

SUPREME COURT OF NOVA SCOTIA
Citation: *Irving v. Irving Estate*, 2016 NSSC 349

Date: 2016-12-22

Docket: *Pictou*, No. 436534

Registry: Pictou

Between:

WILLIAM CHARLES IRVING

Applicant

v.

ESTATE OF EILEEN ROSE IRVING, (as represented by
Debra Mae Sharpe, Executrix of the Estate)

Respondent

DECISION

Judge: The Honourable Justice N. M. (Nick) Scaravelli

Heard: June 22nd and June 23rd, 2016, in Pictou, Nova Scotia

Final Written On behalf of the Applicant – November 23, 2016

Submissions: On behalf of Respondent – November 1st, 2016

Counsel: E. Anne MacDonald, for the Applicant
Jay Matheson, for the Respondent

[1] This is a decision on costs as a result of the applicant's unsuccessful application for relief under the *Testator's Family Maintenance Act*, R.S.N.S., 1989, c. 465.

[2] The deceased, Eileen Rose Irving had five children surviving at the time of her death. The value of her estate was \$135,872. Pursuant to her Last Will and Testament she made specific bequests of \$500 to her ten grandchildren and \$1,000 to her estranged son, the applicant. The rest and residue was left to her four remaining children to be divided equally.

Position of the Parties

[3] The Estate seeks an award of costs on a solicitor/client basis. Alternatively, the estate requests a lump sum award or an amount added to the tariff amount and seeks a total award in the amount of \$23,300, disbursements of \$432 for a total award of \$23,732.

[4] The applicant submits that tariff, scale I for an amount under \$25,000 is appropriate. This amount could be increased by a 25% multiplier in relation to the respondent's prior offer to settle which was not acceptable. The applicant submits costs in the amount of \$7,500 plus disbursements is appropriate.

Analysis

[5] *Civil Procedure Rule 77.02* gives a judge discretion to make any order regarding costs that a judge is satisfied it will do justice between the parties. As per *Rule 77.03(3)* costs in a proceeding generally follow a result. *Rule 77.03(2)* provides that a judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law. Misconduct of a party has been recognized as an exceptional circumstance meriting an award of solicitor and client costs. *MacKay v. Bucher* 2001 NSCA 171.

[6] In my decision I determined there were no circumstances arising out of the application that justified payment of the applicant's costs out of the estate. As a result the applicant has the burden of paying his own costs as well as contribution to the costs of the estate as the successful party. This is not to be interpreted as a finding of any misconduct on behalf of the applicant.

[7] In my view, this is not a case for an award of solicitor and client costs.

[8] Legal counsel for the Estate invoiced their client for legal fees in the amount of \$27,043.99 and seeks sustentative indemnity towards these costs. The Estate was represented by two counsel throughout the proceedings. This was not a complex application hearing.

[9] The motion to strike portions of the applicant's affidavit and the hearing on the merits were conducted as part of a continuous hearing over a period of two days.

[10] As set out in the respondent's submission on costs, it is not unreasonable to set the amount involved at \$25,000 to \$40,000. With the estate valued at \$135,872 and accounting for \$5,000 worth of specific bequests to grand children, the balance would be \$130,872. Granting the applicant a 1/5 interest, at most, would amount to \$26,174. With that amount involved, scaled to Tariff A sets an initial figure of \$6,250. Tariff A also allows \$2,000 per diem in costs. The court resumed the hearing for submissions on the second day at 1:30 pm. I would allow costs for one and one half trial days for a total per diem of \$3,000.

[11] The Estate made a formal offer to settle in the amount of \$10,000 which was not accepted. Pursuant to *Civil Procedure Rule* 10.09(2)(d) I would apply a multiplier of 25% increasing the Tariff A amount to \$11,562.50. To this amount I add \$500 regarding the estate's successful motion to strike portions of the applicant's affidavit.

[12] Accordingly, I award costs in the amount of \$12,062.50 plus disbursements of \$432 for a total award of \$12,494.

Scaravelli, J.