SUPREME COURT OF NOVA SCOTIA
Citation: *Chisholm v. Chisholm*, 2022 NSSC 271

Date: 20220519
Docket: *Syd.* No. 504312
Registry: Sydney

Between:

Daren Chisholm

Applicant

v.

Nancy (Chisholm) Donovan, Estate of Thomas Chisholm, Sr.

Respondent

Cost Decision

LIBRARY HEADING

Judge: The Honourable Justice Patrick J. Murray

Written Decision: May 19, 2022

Subject: Costs

Facts:

[1] In a decision rendered on January 28, 2022, this Court found Daren Chisholm's Application to be premature and without merit.

The Respondent, Nancy Chisholm, seeks costs against the Applicant for the four (4) day hearing.

[2] Mr. Chisholm argued that no costs should be awarded. In his brief he submitted, "there is mixed success in the case and each party should bare (sic) their own costs".

The Applicant primarily argued that the Application was necessary to ensure the proper administration of his father's Estate. In particular, that the Respondent failed to account for the rents received by the Estate, and failed to ensure the bills paid were those of the late Mr. Chisholm.

[3] The Executrix, Ms. Chisholm Donovan, argued that she acted reasonably in her capacity as the personal representative of the Estate, and is entitled to costs from the Estate on a solicitor-client basis.

Issue: [4] Should costs be awarded?

Result: [5] The Court found that it was the Applicant, Mr. Chisholm, who is primarily responsible for the litigation in this matter. Further, the Court was satisfied that the amount of $20,000 representing substantially, the amount of solicitor client costs sought by the Respondent would be an appropriate award.

[6] The Court found that the Applicant, Mr. Chisholm, shall be personally responsible to pay $12,000 of the amount awarded with the balance of $8,000 being paid by the Estate. This will include reasonable and necessary disbursements, in that same percentage, the Applicant being responsible for 60% and the Estate 40%.

Caselaw: ***Sweeney v. Sweeney***, 2020 NSSC 340; ***Casavechia v. Noseworthy***, 2015 NSCA 56; ***Fort Sackville Foundations v. Darby Estate***, 2010 NSSC 45; ***Peach Estate (Re)***, 2011 NSSC 230; and ***MacDonald v. MacCallum***, 2022 NSSC 37.

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Judge:	The Honourable Justice Patrick J. Murray
W**ritten Decision:**	May 19, 2022
Counsel:	Daren Chisholm, Self represented Duncan MacEachern for Nancy (Chisholm) Donovan

By the Court:

Introduction

[1] This is a decision on costs involving the Estate of Thomas Chisholm Sr., of Florence, Cape Breton. Mr. Chisholm passed away in November, 2020.

[2] In his Will, Mr. Chisholm, appointed his daughter, Nancy Chisholm Donovan, to be the Executrix and Trustee of his Will dated December 11, 2009. The Will was probated and a Grant of Probate was issued to Nancy Chisholm Donovan on February 11, 2021.

[3] Following her appointment, the Applicant, Mr. Daren Chisholm, filed an Application to have Ms. Chisholm removed as the personal representative of her father, and seeking that he be named as his father's Executor.

[4] In the Application the Mr. Chisholm argued among other things, that his sister could not be trusted to properly manage their father's Estate, and had failed to account for the assets and liabilities of the Estate.

[5] In a decision rendered on January 28, 2022, I found Daren Chisholm's Application to be premature and without merit.

[6] The Respondent, Nancy Chisholm, seeks costs against the Applicant for the hearing, which ran for (4) four days.

Position of the Applicant

[7] It is Mr. Chisholm's position that no costs should be awarded. In his brief he submitted, "there is mixed success in the case and each party should bare (sic) their own costs". He states that he "was left with no other alternative but to file an Application to the Court to try and deal with the issues of the estate".

[8] The Applicant primarily argues that the Application was necessary to ensure the proper administration of his father's Estate. In particular, he submits, that the Respondent failed to account for the rents received by the Estate, and failed to ensure the bills paid were those of the late Mr. Chisholm.

[9] In addition, Daren Chisholm points to the Executrix's animosity toward him, submitting she refused to cooperate regarding his concerns, and failed to respond to letters he sent to her.

[10] In terms of costs, Mr. Chisholm relies on the decision of Justice Pierre Muise, in ***Sweeney v. Sweeney***, 2020 NSSC 340.

[11] Mr. Chisholm refers to paragraph 16(9)(d) of ***Sweeney***, in submitting Ms. Chisholm Donovan was not protecting the Estate assets, and submits this Court made findings that

supported the necessity of his Application. He argued the rent monies would be considerable and "could amount to … $10,000 - $18,000".

[12] The Applicant states that Nancy Chisholm Donovan failed to come to Court with "clean hands", in that it was her own actions that caused the Application to be made.

[13] Accordingly, Mr. Chisholm submits that each party "should bear their own costs", as permitted by Rule 77.03(1) entitled, "Liability of Costs".

[14] In the alternative, Mr. Chisholm submits, this Court should postpone its decision on costs until the Estate is closed before the Registrar of Probate.

Position of the Respondent

[15] The Executrix, Ms. Chisholm Donovan, submits that she acted reasonably in her capacity as the personal representative of the Estate, and is entitled to costs from the Estate on a solicitor-client basis.

[16] The Respondent relies on jurisprudence from the Nova Scotia Court of Appeal in ***Casavechia v. Noseworthy***, 2015 NSCA 56. In that decision the Court referred to a number of cases including ***Fort Sackville Foundations v. Darby Estate***, 2010 NSSC 45 and ***Peach Estate (Re)***, 2011 NSSC 230.

[17] From these cases, I refer to the following passages in ***Casavechia*** at paragraphs 84 and 87:

> [84] In my view, entitlement to solicitor and client costs from an estate is not limited to executors and personal representatives and to reprehensible conduct warranting court sanction. As I will explain, there remains a residual discretion to award costs.
>
> …
>
> [87] I would add that in *Fort Sackville Foundation*, Moir J. commented:
>
> > [4] Disputes over a fund or an estate may give rise to exceptional circumstances as referred to in Rule 77.03(2). The discretion may be moved because the dispute, and the need for a determination, is created less by the parties than by the instrument that governs the fund or estate.
>
> My identification of this case as one where a judge relied on his discretion to award solicitor and client costs in circumstances other than reprehensible conduct, is not to be taken as acceptance of the first sentence in this passage**. Simply because the litigation may involve an estate does not automatically result in solicitor and client costs. As *Veinot Estate* and *Prevost* make clear, the normal rule is party and party costs, unless there are exceptional circumstances.** (Emphasis added)

[18] The Applicant submits the law "clearly envisions personal representatives are entitled to receive solicitor client costs when they act reasonably and it is not a precondition to such an award that reprehensible conduct warrant this Court's sanction."

[19] In this case, the Respondent submits that if the Court is inclined to award solicitor client costs, such costs should be set off directly from any share in the Estate to which the Applicant, Daren Chisholm, is entitled.

[20] The Executrix submits, in the alternative, that a significant portion (over fifty (50%)) should be deducted from the Applicant's entitlement.

[21] The reason for this position taken by the Respondent is that it would be unfair that all of the beneficiaries of the Estate should bear the costs associated with what she says, is the "unreasonable action advanced by Daren Chisholm".

[22] The Respondent submits should the Court not exercise its discretion to award solicitor client costs, then Nancy Chisholm Donovan, as the successful litigant is entitled to party and party costs pursuant to Rule 77.02.

[23] In that event, Ms. Chisholm Donovan submits a reasonable approach would be the general rule that costs in an application be assessed in accordance with Tariff A, as if the hearing were a trial. (Rule 77.06(2)).

[24] Using the rule of thumb of $20,000 per day, submitted by Respondent's counsel, Ms. Chisholm submits the amount involved would be $80,000 (for 4 days of hearing). (***MacDonald v. MacCallum***, 2022 NSSC 37)

[25] This would result in fees of $9,750 plus an additional $2,000 per day, for four days (4) or $8,000 for a total of seventeen thousand seven hundred and fifty dollars ($17,750).

[26] The Executrix says there was no choice but to defend the Application, submitting no offer of settlement was ever made by the Applicant. Instead, she argues, Mr. Chisholm was at all times seeking the removal of the Respondent.

Analysis

[27] The Applicant is correct to point out that there can be a need for these types of Applications. In ***Sweeney***, Muise, J., set out the following principles with respect to costs in Estate matters:

> [16] At paragraph 20 of **Zwicker**, I summarized additional principles for determining costs in estate matters, extracted from legislation and jurisprudence, including the jurisprudence cited by Geraldine, as follows:
>
> 1. Section 92 of the *Probate Act*, S.N.S. 2000, c. 31, provides that the court may order costs of a contested application to be paid "out of the estate" or by "the party against whom the decision is

given", including the personal representative personally, "where the application is made as a result of the personal representative failing to carry out any duty imposed on the personal representative" or the personal representative made the application and it is frivolous or vexatious.

2. Section 102 of the *Probate Act* incorporates the costs provisions in the *Civil Procedure Rules* where they extend beyond those in the *Probate Act* or *Probate Rules*. As stated at paragraph 10 of **Baird Estate (Re)**, 2014 NSSC 444, "Section 92(1) of the *Probate Act* does not limit the Court's discretion to deal with costs pursuant to *Civil Procedure Rule* 77".

3. Costs are in the discretion of the presiding judge, which is to be exercised in a principled manner.

4. The ultimate objective is to order costs that "will do justice between the parties": *CPR* 77.02(1).

5. A judge may increase or decrease Tariff amounts or award lump sum costs: *CPR*'s 77.07 and 77.08.

6. Solicitor and client costs may be ordered "in exceptional circumstances recognized by law": *CPR* 77.03 (2).

7. The old general rule was that all costs were paid out of the estate, with that of the personal representatives being on a solicitor and client basis, and that of other parties being on a party and party basis. That has been replaced by a more modern approach which aims to discourage unnecessary proceedings and preserve estates for the beneficiaries.

8. A central focus of the modern approach is whether "the need for resort to the court was caused by the testator". If so, the costs will be paid out of the estate: **Prevost Estate v. Prevost Estate**, 2013 NSCA 20, para 17.

9. The regular civil litigation costs rules, including that the unsuccessful party pays the costs of the successful party, are to be applied unless:

(a) "the litigation arose as a result of the actions of the testator" such as where there is ambiguity as to the testator's intentions;

(b) there are reasonable grounds to "question the execution of the will or the testator's capacity in making the will" or whether the testator was a victim of undue influence or fraud, and information disclosed in the litigation process does not dispel those grounds;

(c) "the litigation arose as a result of those with an interest in the residue of the estate" or the costs amount is "a proper burden for them to bear" ; or,

(d) "**the litigation was reasonably necessary to ensure the proper administration of the estate": Wittenberg v. Wittenberg Estate**, 2015 NSCA 79, paras 93 to 104. (Emphasis added)

[28] The Court in ***Sweeney*** ruled that the personal representative had a duty to present a full and balanced picture of the circumstances and not to present the evidence in a way to best support her wishes as the primary beneficiary.

[29] Justice Muise also held:

> [44] It was in the public interest, and "necessary to ensure the proper administration of the estate", that the Court have this contradictory evidence, to scrutinize the circumstances, and to make a proper determination on the validity of the will. The Court ruled there were a number of factors that supported a finding that the Executrix's costs of the Application ought to be paid from the Estate, of which she was the sole residuary beneficiary.

[30] In terms of costs, the Court must consider the circumstances of each case in assessing the reasonableness of the actions of the Executor, Executrix or personal representative. Often this involves a determination of whether the Executrix is entitled to payment of costs from the Estate on a solicitor and client basis.

[31] Turning to the facts in the present case, in my decision I found that the dispute was mainly about "rents not being collected and bills not being paid by the Executrix". (Paragraph 41)

[32] In addition, I found with respect to the main issue of rents at paragraph 52:

> [52] Mr. Chisholm has established that there were no receipts issued by the Estate for rents received and that no bank deposit for rent was made by Nancy Chisholm Donovan. She testified that rents were paid and the monies received were used to pay the bills of the Estate through the Scotiabank, in Sydney Mines, N.S.

[33] That said, the evidence showed that Ms. Chisholm Donovan made arrangements with the Bank of Nova Scotia in Sydney Mines to pay the Estate bills pending the hearing of the Application. (See Exhibit 17, Tabs 5, 6, and 7)

[34] Ultimately, the finding of the Court in relation to the Application by Mr. Chisholm was:

> [54] Having reviewed these Exhibits together with all of the evidence, the Court is not satisfied that Nancy Chisholm Donovan cannot be trusted or is incapable of carrying out her duties as Executrix. That is a "far reach" to be taken from them.

[35] Further, I found that the Respondent had presented a plan to administer the Estate.

[36] Notwithstanding some shortcomings, I found Ms. Chisholm Donovan to be credible in giving her evidence and in explaining her reasons. In addition, I found:

> [59] Nancy Chisholm Donovan spent the past year (2021) responding to the Application before the Court, numerous affidavits, briefs and hearings have been filed.

[37] In keeping with my ruling that Mr. Chisholm's Application was premature, the timing of the Application in relation to the Grant of Probate is among other things especially relevant to an award of costs in this matter.

Determination

[38] There are a number of findings in my decision that support the difficulty presented to the Executrix by the filing of the Applicant's Application.

[39] I held, for example, that she was "unable to get out of the gate" properly, which supports her position that she had difficulty functioning as an Executrix and did not have a full opportunity to perform her duties. (See paragraphs 9, 44, 74)

[40] Ms. Chisholm was also subject to personal attacks and allegations made by the Applicant about her past that were not relevant. In paragraph 44, I stated:

> [44] What is relevant to the issue at hand, is Nancy Chisholm Donovan not being able to open an Estate bank account, which is often the starting point for any representative charged with the serious task of administering an estate, and using it to properly account to the beneficiaries how that was done. An Estate bank account is a necessity to completing the Executor's account, as is required by the *Probate Act* in sections 69 and 70 included in Appendix "A".

[41] A review of the pertinent dates confirms that Ms. Chisholm Donovan received a Grant of Probate on February 11, 2021 and that less than two (2) weeks later, Daren Chisholm filed his Application to have her removed.

[42] In her affidavit filed March 18, 2021, Ms. Chisholm Donovan included the authorizations signed by her permitting Scotiabank to pay bills (to be accompanied with an invoice) on behalf of her father's Estate (Tab 5) and to seek approval from her brother, Daren, in regard to paying Estate bills. (Exhibit 17, Tab 5)

[43] Further, in that same Exhibit at Tab 5 is a letter from the Proctor for the Estate dated February 26, 2021, seeking to have a bank account opened for the Estate of Thomas Chisholm, insisting this was necessary for the Executrix to perform her duties. Mr. MacLeod enclosed the Grant of Probate appointing Nancy Pauline Donovan to "faithfully administer the estate".

[44] In accordance with the certificate, the Executrix filed an Inventory of the assets of the Estate on June 15, 2021. This was after the (3) month requirement that ended May 11, 2021.

[45] In terms of accounting for the Estate assets, the requirements of the Executrix under the *Probate Act* were included in my decision.

> [45] There are several sections of the *Act* that are relevant and instructive in the case before me. For example, s. 69(1) requires that the representative present "an accounting of the administration of the estate **within 18 months** form the date of the grant or such longer period as the Court … may allow". (Emphasis added)

[46] I am going to stop there in terms of outlining some of the circumstances that, in my view, made these exceptional circumstances within which Ms. Chisholm Donovan was expected to perform her duties.

[47] Before concluding, I will mention the concluding paragraph of the email from Scotiabank to Mr. MacLeod in response to his February 26, 2021 letter: (Exhibit 17, Tab 7)

> We note that Darren Chisholm has filed a Notice of Application with the Court of Probate for Nova Scotia under S. 21 of the Probate Act. Therefore, before permitting Nancy Donovan to distribute the assets of the estate, we will wait until this matter is resolved by the Courts.

Conclusion

[48] Based on all of the above, I am satisfied this would not be an appropriate case for each party to bear their own costs, as requested by Mr. Daren Chisholm.

[49] As party and party costs are the norm, I have considered the alternative position advanced by the Respondent. That Tariff A costs in the amount of $17,500 could be fixed with the Applicant bearing a portion of those costs. That would not be an unreasonable cost award.

[50] However, in terms of an award that would "do justice as between the parties", I am satisfied, for all of the above reasons, that an award of solicitor-client costs or something close to that amount should be made.

[51] In terms of quantum, while I found overall the Application was without merit, I also found there were some shortcomings, particularly in regard to there being no receipts issued by the Estate for rents received and no bank deposit for rents made. (See paragraph 52)

[52] That said, I am satisfied that it is the Applicant, Mr. Chisholm, who is primarily responsible for the litigation in this matter.

[53] On the whole, I am satisfied that the amount of $20,000 representing substantially, the amount of solicitor client costs sought by the Respondent would be an appropriate award.

[54] Accordingly, the Applicant, Mr. Chisholm, shall be personally responsible to pay $12,000 of the amount awarded with the balance of $8,000 being paid by the Estate. This will include reasonable and necessary disbursements, in that same percentage, the Applicant being responsible for 60% and the Estate 40%.

[55] This concludes my cost decision.

Murray, J.