Estate of Brown, 2007 NWTSC 67 Date: 2007 08 30
Docket: S-0001-2002000014

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the Estate of Melville Leonard Brown, late of the City of Yellowknife in the Northwest Territories, deceased.

MEMORANDUM OF JUDGMENT ON COSTS

[1] This matter came before me in regular Chambers on August 24, 2007. The executrix of the estate of Melville Leonard Brown ("the deceased") seeks (i) an order dismissing an application commenced by Bruce Melville Brown ("Mr. Brown"), (ii) an order awarding the estate costs against Mr. Brown, to be payable from his share of the estate and (iii) an order directing an interim distribution of the estate as proposed by the executrix. There is also a request by Mr. Brown that his costs in relation to his application be paid by the estate.

[2] I made an order for interim distribution of the estate in Chambers on August 24. Mr. Brown did not oppose the making of an order dismissing his application filed October 3, 2002, which is now moot and so I make that order. The sole issue for determination is therefore costs.

[3] The circumstances are somewhat unusual. In May 2002 the executrix of the deceased's estate applied for and obtained probate of the will and two codicils. The will and the first codicil are in standard form and appear to have been prepared with the assistance of counsel; the deceased's signature is witnessed. The second codicil is a handwritten note which is not witnessed. The application for probate did not raise or address any issues that might arise from that note, including whether it was in the handwriting of the deceased. The second codicil says that the deceased agrees to sell his house in Yellowknife to one of his children, Ms. Burns, for the sum of $175,000.00, payable after his death. Under the will and the first codicil, the house would have fallen into the residue of the estate to be shared by all five of his children, so the second codicil was a significant change.

[4] In October 2002, after probate was granted, the deceased's son Bruce Brown filed an application for a declaration that the second codicil is not a testamentary instrument and is invalid. That application was eventually scheduled to be argued on January 19, 2004. From the briefs filed by Mr. Brown and the executrix, it appears that no evidence was to be called and the issue was the interpretation to be given to the note and whether it was meant as a codicil to the will. That it was the writing of the deceased does not appear to have been in dispute.

[5] The application did not go ahead, however, as the Court ordered that other beneficiaries of the estate be served with notice. It was adjourned *sine die* for that purpose.

[6] No further steps were taken to pursue the application after January 19, 2004. The executrix says in her affidavit that Ms. Burns grew tired of the dispute relating to her right to purchase the house and as a result she instructed the executrix to sell it and include the proceeds in the residue of the estate. Mr. Brown says in his affidavit that in January 2006 Ms. Burns decided to relocate outside the Northwest Territories and no longer wanted to purchase the house. The house was sold in the fall of 2006 for $350,000.00 with the proceeds, save as noted below, falling into the residue of the estate.

[7] Mr. Brown claims legal costs of over $16,000.00 in relation to his application. That amount has been held back from the sale proceeds pending a decision as to whether the costs should be paid out of the estate, as Mr. Brown says they should. He takes the position that the executrix should have brought forward the issue whether the second codicil was a valid testamentary instrument for determination when applying for probate. He concedes delay in pursuing his application but says the executrix could also have brought the matter forward earlier so as to distribute the estate. He also points out that the estate ended up with $350,000.00 for distribution as residue, whereas it would have realized only half that had the house been sold to Ms. Burns.

[8] The executrix's position is that the estate is entitled to costs against Mr. Brown on dismissal of his application for want of prosecution and that Mr. Brown is not entitled to any costs because there has been no determination of the merits of his application. However, if Mr. Brown is entitled to any costs, the executrix says they should be on a party party basis or in a fixed amount much less than the amount claimed.

[9] Costs are in the discretion of the Court: Rule 643(1). When an action or application is dismissed for want of prosecution under Rule 327(1), costs are often, if not usually, ordered payable by the plaintiff to the defendant.

[10] This case does not fit neatly under Rule 327(1), which gives the Court discretion to dismiss for delay where the plaintiff has not proceeded on a timely basis. The court file indicates that Mr. Brown's application was initially returnable on October 24, 2002. It was adjourned *sine die* on that date so that the parties could obtain a special Chambers date. There is no evidence as to why the date obtained was not until January 19, 2004. Presumably either party could have sought an earlier date; it would have been in the best interests of the estate that the matter be resolved. However it is clear that there was a two year delay from January 19, 2004 until at least January 2006, when Ms. Burns decided she no longer wanted to purchase the house. Once she communicated that decision to Mr. Brown, his application really became moot. So the delay from that time on is explained because the matter had become moot.

[11] In light of these circumstances, I decline to grant the estate costs against Mr. Brown.

[12] As to the claim for costs by Mr. Brown, the main difficulty is that his application has not been determined on its merits. I do agree that the validity of the handwritten note as a codicil is something that should probably have been raised at the time the application for probate was made, if only because of the wording of the note. On the other hand, having raised the issue, Mr. Brown did not diligently pursue it and, for reasons not explained, did not comply with the Court's direction to serve the other beneficiaries of the estate.

[13] It is not possible to draw any particular inference as to the merits of Mr. Brown's application from the fact that Ms. Burns eventually agreed to the sale of the house to a third party. There is no direct evidence from her as to why she made that decision and conflicting evidence from the executrix and Mr. Brown on that point. In the end, the dispute seems to have hinged solely on a legal interpretation of the handwritten note rather than anything done by Ms. Burns.

[14] I have considered Mr. Brown's argument that ultimately, as a result of his questioning of the handwritten note, the estate ended up getting twice as much in sale proceeds as it would have had the house been sold to Ms. Burns. While that is true, it

is also true that Ms. Burns withdrew her claim to the house, arguably resulting in a significant loss to her and a gain to the remaining beneficiaries. Again, all of this is difficult to assess without a decision on the merits.

[15] Even if I were to find that the estate should bear Mr. Brown's costs, the costs claimed were not itemized or explained in any way and I would be inclined to limit them to party and party costs, which under the tariff are significantly less.

[16] In all of the circumstances, I decline to order that Mr. Brown's costs be paid by the estate.

[17] The end result is that the parties will bear their own costs.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 30th day of August, 2007.

Counsel for the Executrix: Edward W. Gullberg
Counsel for Bruce Melville Brown: Cynthia Levy