

CANADA / JUDGMENT

Boyar (Re)

2014 BCSC 1571

COURT

Supreme Court of British Columbia

DECIDED

19 August 2014

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2014 BCSC 1571 Boyar (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boyar (Re),

2014 BCSC 1571

Date: 20140819

Docket: 1139524

Registry: Prince George

Between:

Joanne Wendy Boyar, Executor of the Estate of William Michael Boyar,

also known as William Boyar also known as William M. Boyar also known as Bill Boyar, Deceased

Plaintiff

And

Joyce Muriel Boyar, Jill Patricia Kemmerling,

Richard Allan Foulston, Kathleen Chandler

Defendants

Before: The Honourable Madam Justice Baker

Reasons for Judgment

(Re: Costs)

Counsel for the Plaintiff:

Robin J. Craig

Counsel for the Defendant, Foulston:

C. Keith Aartsen

Counsel for the Defendant, Chandler:

Greta Airhart

Place and Date of Trial:

Prince George, B.C.

February 4-8, 12-15

and March 20-21, 2013

Written Submissions filed by the Plaintiff:

April 29, 2014

Written Submissions filed by the Defendants,

Foulston and Chandler:

April 30, 2014

Place and Date of Judgment:

Prince George, B.C.

August 19, 2014

- [1] On February 27, 2014 I delivered Reasons for Judgment in this estate litigation. I gave the parties leave to file written submissions about costs. These are my Reasons in relation to costs.
- [2] The parties advised the Court that the trial had originally been scheduled to commence on August 20, 2012, but was adjourned by consent. The issue of costs thrown away was left to the discretion of the trial judge. These Reasons also dispose of the issue of costs of the adjournment.

THE ISSUES AT TRIAL

- [3] At trial, both Ms. Chandler and Mr. Foulston maintained that William Boyar lacked testamentary capacity when he signed his will on August 7, 2010. In that will, he left his entire estate - estimated to have a value of \$400,000 after payment of debts - to his sister, the plaintiff Joanne Boyar. At trial, Ms. Chandler and Mr. Foulston also sought to establish that at the time Mr. Boyar made his will, he was subject to undue influence and duress by Ms. Boyar.

- [4] Ms. Chandler also pursued a Counterclaim in which she maintained that she was Mr. Boyar's spouse. She sought an order that Letters of Administration be issued to her and an accounting for any property or funds disposed of by Ms. Boyar. Ms. Chandler sought to have the will varied pursuant to the Wills Variation Act and an order that most of the estate go to her. In the alternative, she put forward a claim based on the doctrines of unjust enrichment and quantum meruit for compensation for services provided to Mr. Boyar following a motorcycle accident in which he was injured; and while he was receiving treatment for the cancer that caused his death.
- [5] Mr. Foulston, who was Mr. Boyar's friend but is also a lawyer, pursued a claim that he had provided legal services to Mr. Boyar in relation to litigation commenced by the deceased to recover damages for the injuries he suffered in the motorcycle accident.
- [6] Mr. Foulston also claimed to be entitled to legal fees for his involvement in the purchase of a residence by the deceased.
- [7] Mr. Foulston also advanced specific claims to a boat, boat motor, boat trailer and a motorcycle that Mr. Boyar had purchased in the year prior to his death. Mr. Foulston had the motorcycle in his possession at time of trial, having refused to deliver it up to Ms. Boyar.

THE OUTCOME AT TRIAL

- [8] In the decision and Reasons issued on February 27, 2014, I found that Mr. Boyar had testamentary capacity when he signed the will on August 7, 2010 (the will is dated July 27, 2010) and that there had been no undue influence exerted by Ms. Boyar, and that Mr. Boyar was not under duress. I made an order for probate of the will.
- [9] I found that Ms. Chandler was not Mr. Boyar's spouse and dismissed her claims for Letters of Administration, and for variation of the will.
- [10] I found that Ms. Chandler was entitled to compensation for services provided to Mr. Boyar on the basis of the doctrine of unjust enrichment and I awarded her \$40,000.
- [11] I found that Mr. Foulston was not entitled to compensation for legal services.
- [12] I found that Mr. Foulston had no valid claim to the boat, boat motor, boat trailer or motorcycle. I ordered him to surrender the motorcycle to Ms. Boyar forthwith, and to compensate the estate for any damage to or loss in value of that chattel that occurred after he refused to surrender the motorcycle to Ms. Boyar.
- [13] I found that Mr. Foulston was entitled to compensation for support and assistance he had provided to Mr. Boyar on the basis of the doctrine of unjust enrichment and I awarded him \$8,000.

SETTLEMENT OFFERS

- [14] Counsel for Ms. Boyar has provided the Court with a copy of an offer of settlement dated January 23, 2013. Ms. Boyar offered to settle Ms. Chandler's claims for a payment to her of \$25,000 plus delivery of some specific chattels – a swing set and gazebo; and a painting of a moose. Ms. Boyar offered to settle Mr. Foulston's claims for a payment to him of \$5,200 or a transfer to him of title to the deceased's motorcycle. Neither offer was accepted.
- [15] By letter dated January 23, 2013, Mr. Foulston offered to settle his claim for a payment to him of one-third of the estate. Mr. Foulston's proposal to settle, if accepted, would have resulted in a payment to him of approximately \$133,000. In submissions at the end of trial, Mr. Foulston's counsel argued that Mr. Foulston should be awarded \$200,000.
- [16] By letter dated January 31, 2013, Ms. Chandler offered to settle her claim for a payment to her of 70% of the estate. She also specified, however, that Mr. Foulston be paid 25% of the estate, leaving Ms. Boyar with only 5% of the estate.
- [17] Given that the estate is estimated to have a value of \$400,000 after payment of debt, Ms. Chandler's offer to settle, if accepted, would have resulted in a payment to her of approximately \$280,000. Mr. Foulston would have received \$100,000 and Ms. Boyar would have been left with only \$20,000.
- [18] Ms. Chandler maintained at trial that as Mr. Boyar's "spouse" she was entitled to receive his entire estate; or if his will was valid, it should be varied to give her at least one-half of the estate. No award was made in relation to these claims.
- [19] In relation to her claim for unjust enrichment, her counsel made submissions that an award should be made to her in the amount of \$70,000.

RULE 14-1(10) OF THE SUPREME COURT CIVIL RULES

- [20] Rule 14-1(10) provides that a plaintiff who is awarded a sum within the jurisdiction of the Provincial Court may recover only disbursements unless this Court finds that there was sufficient reason for the plaintiff to bring his action in the Supreme Court.
- [21] Counsel for Ms. Boyar submits that this Rule should be applied here and that Mr. Foulston should be limited – if awarded any costs – to his disbursements only. She points out that Mr. Foulston had to be joined as a defendant only because he had filed a caveat which prevented the grant of probate, and submits that he should have advanced his claims for compensation in the Provincial Court.
- [22] While I do not agree with Mr. Foulston that the Provincial Court lacked jurisdiction to hear the matters raised by his Counterclaim, I am of the view that there was sufficient reason for Mr. Foulston to pursue his claims by way of counterclaim in this Court.

[23] As events transpired, it is clear that Mr. Foulston should not have filed a caveat, but once he was a defendant in a proceeding commenced in this Court, it made sense to have his counterclaim adjudicated by this Court. Proceeding with a separate action in Provincial Court would have required duplication of much of the testimony and likely inconvenience to all of the parties.

COSTS IN GENERAL AND IN ESTATE LITIGATION

[24] Rule 14-1(9) of the Supreme Court Civil Rules sets out the general rule that a successful litigant will be entitled to recover his or her costs from the unsuccessful party or parties, unless the Court orders otherwise. Numerous authorities have emphasized that the exercise of the Court's discretion to depart from the general rule must be judicial and based only on a consideration of relevant factors.

[25] In *Gold v. Gold*, 1993 CanLII 286 (BC CA), the Court referred to a four-step inquiry: focusing on the "matters in dispute" at the trial, which may include matters not expressly pleaded; assessing the weight or importance of the matters to the parties; doing a global assessment to determine which party "substantially succeeded" overall; and where one party substantially succeeded, consider whether there are reasons to "otherwise" order that the winning party be deprived of costs.

[26] In *Vielbig v. Waterland Estate*, 1995 BCCA 2544, the Court of Appeal heard and dismissed an appeal from the summary dismissal of a Wills Variation action brought by the daughter of the testator. At the conclusion of the summary trial, the trial judge had awarded costs against the daughter. On appeal, she argued that costs should be paid out of the estate or that the parties should bear their own costs. The Court of Appeal dismissed her appeal and upheld the award of costs against the appellant. The Court referred with approval to passages from the decision of Master Horn in *Lee v. Lee Estate* (1993), 50 E.T.R. 297, in which the Master pointed out that in actions where the validity or meaning of a will is in issue; or the capacity of the testator to make the will is not entirely clear, the court will sometimes order that the costs of all parties be paid out of the estate. As Master Horn stated it:

This is upon the principle that where such an issue must be litigated to remove all doubts, then all interested parties must be joined and are entitled to be heard and should not be out of pocket if in the result the litigation does not conclude in their favour. The estate must bear the cost of settling disputes as a cost of administration. The question to be asked in such case is whether the parties were forced into litigation by the conduct of the testator or the conduct of the main beneficiaries.

But the case is different where the litigation does not relate to the validity of the will or the capacity of the testator or the construction of the will

(at paras. 301-302)

- [27] Master Horn and the Court of Appeal both noted that claims for the variation of a will or other claims against an estate that are not necessitated by any error or fault on the part of the testator are more likely to fall under the general rule that the unsuccessful litigant will pay costs, including the costs of the estate.
- [28] In *Woodward v. Grant*, 2007 BCSC 1549, Justice Gray noted that there are compelling arguments for the general costs rule to be applied in estate litigation. She noted that a general practise of awarding costs from the estate could encourage probate litigation and discourage settlement; and the result would be to defeat the testator's intentions to the extent that the costs awarded "reduced the size of the estate available for distribution" (at para. 16).
- [29] In *Bates v. Finley*, 2002 BCSC 159, Justice Drost ordered that the plaintiffs – nieces and nephews of the deceased who challenged the validity of the will and alleged lack of testamentary capacity; and undue influence on the part of the primary beneficiary - were ordered to pay the costs of the primary beneficiary (who was also the executor) as special costs. Justice Drost found that the plaintiffs' persistent attack upon the character and credibility of the defendant, and their allegation that the defendant had conspired to manufacture evidence as the trial progressed, were reprehensible and deserving of an award of special costs.
- [30] In *Todd v. Walker*, 2009 BCSC 537, Justice Myers found in favor of the plaintiff in a Wills Variation action and awarded 40% of the estate to the plaintiff (who had been left only \$1 in the will). The plaintiff and the defendant were half-siblings and were both children of the testator. The case involved only the two beneficiaries. The plaintiff had delivered an offer prior to trial but the award at trial was better than her offer. Although the defendant was also the executor, Justice Myers noted that he was not required to defend the action and the decision to do so was for his benefit only. Justice Myers ordered costs to be paid to the plaintiff by the defendant and ordered that the defendant not be entitled to have his legal costs in relation to the action paid out of the estate.

POSITIONS OF THE PARTIES

- [31] Ms. Boyar is seeking an order that the defendants, jointly and severally, pay the costs of the plaintiff and that those costs be assessed as special costs; or as double costs after January 23, 2013, the date on which Ms. Boyar's offer of settlement was communicated to the defendants.
- [32] Counsel for Ms. Boyar points out that there was no ambiguity in relation to the will that necessitated the bringing of a probate action and that it was necessary for Ms. Boyar to bring the action only because Mr. Foulston and Ms. Chandler filed caveats. Ms. Boyar was entirely successful in obtaining the relief sought by her in the Amended Notice of Civil Claim.

- [33] Ms. Boyar also succeeded in relation to all of the claims brought by Ms. Chandler based on her allegation that she and Mr. Boyar were or had been "spouses".
- [34] Counsel for Ms. Boyar points out that Mr. Foulston failed to establish that Mr. Boyar was under "duress" at the time he made his will. He failed in relation to all of his claims based on the assertion that he had provided legal services to Mr. Boyar; and in relation to his specific claims to the chattels.
- [35] Counsel for Ms. Boyar submits that although the Court did make awards in favour of the two defendants, those awards were small in relation to the claims the defendants had advanced against the estate and in relation to the totality of matters placed in issue at trial. She submits that Ms. Boyar was "substantially successful" and should therefore recover her costs against both defendants.
- [36] She submits that costs should be awarded as special costs because the conduct of the defendants – in particular, the conduct of Mr. Foulston – was reprehensible.
- [37] Counsel for Ms. Chandler submits that Ms. Chandler should be entitled to recover her reasonable costs at Scale B from the estate. She points out that the award to Ms. Chandler exceeded the amount offered to her prior to trial. She submits that it would be unfair to award costs to Ms. Boyar " since the litigation is not costing her personally as the estate will pay her legal fees in any event "
- [38] Counsel for Ms. Chandler submits that if Ms. Chandler has to pay Ms. Boyar's costs as well as her own legal fees and disbursements, the costs award will deprive her of any benefit from the award made to her.
- [39] Counsel submits that it was fair for Ms. Chandler to challenge the validity of the will because she understood that Ms. Boyar had been unkind to Mr. Boyar during his lifetime; and because the will was signed only days after Mr. Boyar was discharged from hospital following surgery.
- [40] Counsel for Ms. Chandler submits it was reasonable for Ms. Chandler to bring to the Court the issue of her status as spouse.
- [41] Counsel for Mr. Foulston filed a very brief written submission in which he states that Mr. Foulston should be awarded his costs assessed under Appendix B, but does not elaborate. Mr. Foulston is also seeking costs for preparation for the trial scheduled to commence on August 17, 2012.

ANALYSIS AND DECISION

- [42] Ms. Boyar was "substantially successful" in relation to the matters raised in this litigation – both by the claim and the Counterclaims – and at trial. She succeeded on all issues she was obliged to prove in order to obtain a grant of probate. She was obliged to bring the action only because of the caveats filed by the defendants. There was, in my view, no fault on the

part of the deceased – no ambiguity or uncertainty – that necessitated the bringing of the probate action. Ms. Boyar did not make the litigation necessary by any step taken by her in relation to the administration of the estate.

- [43] As I pointed out in my Reasons for Judgment, Ms. Chandler was one of the persons who witnessed the signing of Mr. Boyar's will. She took no issue at the time with Mr. Boyar's testamentary capacity. The other person who witnessed the will – Ms. Chandler's former common law spouse, friend and house-mate – testified as a witness in Ms. Chandler's case but said nothing that cast doubt on Mr. Boyar's testamentary capacity.
- [44] Mr. Foulston was not present when the will was executed and as stated in my earlier Reasons, I am satisfied he had no evidentiary basis to question Mr. Boyar's testamentary capacity or to allege, as he did, undue influence or duress. Neither Ms. Chandler nor Mr. Foulston presented any medical evidence relating to Mr. Boyar's mental state, health conditions, or medications of the sort we would expect to see if testamentary capacity is questioned.
- [45] Ms. Boyar was successful in defending against Ms. Chandler's assertion that she had been Mr. Boyar's spouse, and was therefore substantially successful in relation to Ms. Chandler's Counterclaim. All of Ms. Chandler's claims were dismissed, save only her claim for compensation for "unjust enrichment". In relation to that part of her claim, her counsel submitted that an award should be made of \$70,000. I awarded \$40,000.
- [46] Ms. Boyar was successful in defending against Mr. Foulston's assertion that he had provided legal services to Mr. Boyar for which he was claiming to be entitled to one-half of the estate. During trial, I pointed out to Mr. Foulston and his counsel the provisions of the Legal Professions Act requiring delivery of an account for legal services. Although the trial adjourned for more than one month before the final two trial days, no account was ever rendered and the issue was never clearly addressed.
- [47] Ultimately, I awarded Mr. Foulston only \$8,000 for support and assistance provided to Mr. Boyar.
- [48] Mr. Foulston retained counsel to lead him during his direct testimony, and to make closing submissions on his behalf. Mr. Foulston conducted the rest of the trial himself. Mr. Foulston sometimes behaved during trial as if he was counsel for Ms. Chandler. Although he testified that he is an experienced litigation counsel, his rambling pleadings failed to conform to the Supreme Court Civil Rules and both his questioning of other witnesses and his own testimony often dealt with matters that had already been canvassed by counsel for Ms. Chandler, or matters that were irrelevant or inconsequential. His approach meant the trial took longer than it needed to.

- [49] The offer made to Mr. Foulston of \$5,200 cash, or title to the motorcycle, was less than the amount awarded to him at trial (assuming that the motorcycle was worth less than \$8,000 at the time the offer was made). However, it was a reasonable offer and definitely "in the ballpark". Mr. Foulston's counter-proposal was not a reasonable offer.
- [50] Although Mr. Foulston succeeded in obtaining a small monetary judgment, I am not persuaded that an award of costs should be made in his favour as he was substantially unsuccessful when the claim and Counterclaim are considered globally. I shall return to the question of whether Mr. Foulston should be ordered to pay some or all of Ms. Boyar's costs.
- [51] I am also not persuaded that Ms. Boyar (or the estate) should be required to pay Ms. Chandler's costs. Although Ms. Chandler did recover an award, she was substantially unsuccessful in relation to almost all of the issues raised by her Counterclaim. I have already stated that she was entirely unsuccessful in challenging the probate of the will. The core of her Counterclaim was her assertion that she was Mr. Boyar's spouse and that she was therefore entitled to the bulk of his estate.
- [52] The real issue, in my view, is whether Ms. Boyar should recover some or all of her costs from the defendants, or either of them.
- [53] Although I have said that Ms. Boyar was substantially successful at trial, her primary position at trial was that neither Ms. Chandler nor Mr. Foulston should receive an award of any kind. Her counsel did make submissions "in the alternative"; but essentially the position of the estate was that neither defendant was entitled to compensation in any amount.
- [54] The offer to settle made by the plaintiff to Ms. Chandler was reasonable, but I cannot say that it was unreasonable for Ms. Chandler to reject the offer, taking into account the "in trust" claims that Mr. Boyar had advanced on behalf of Ms. Chandler in the personal injury litigation he pursued following his motorcycle accident, and the care and support she had subsequently provided while Mr. Boyar was undergoing treatment for cancer. The law about the factors establishing when parties are "spouses" has been evolving and that would, I infer, have made it more difficult for Ms. Chandler's counsel to assess the likelihood of success of that claim.
- [55] The ultimate award to Ms. Chandler did exceed the amount offered to her, although it is likely the case that she would have had a better net recovery if she had accepted the offer and had not incurred the legal expenses and other costs associated with the trial.
- [56] In the end, both defendants achieved a result at trial better than that offered by Ms. Boyar in her settlement proposal.
- [57] The parties' relative financial circumstances are a factor to be considered. Ms. Boyar has inherited a significant sum of money - \$400,000. That Mr. Boyar had an estate of any kind was the result of the funds he received in settlement of his claims for damages for the significant injuries he suffered as a result of his motorcycle accident. During most of his life, Mr. Boyar would have had no expectation of accumulating an estate of any magnitude and

Ms. Boyar no expectation of inheriting an estate of any magnitude from her brother. Until a few years before his death, Ms. Boyar and Mr. Boyar had limited contact. Ms. Boyar was not relying on the expectation of the inheritance. In that sense, the inheritance could be seen as a sort of "windfall".

- [58] No evidence was provided in the costs submissions about Ms. Boyar's financial situation but during trial she testified about the kind of work she had done throughout her career to date - I think it could fairly be described as "white collar"; the fact that she owns her own home; and has been able to afford to take at least one long vacation. From those facts I infer that she is in a stable, perhaps "comfortable" financial position.
- [59] Ms. Chandler's financial situation, although she has had full or part-time employment with the BC Ferry Corporation for some years, appears to be unstable. She described times when she had difficulty paying the rent on the home she has occupied for some years and her financial situation appears to have been precarious at times. She testified she will have an employment pension if she continues to work. Her health does not appear to be good - she had health problems during trial. Her counsel has submitted that an award of costs made against her will substantially negate the award made to her following trial.
- [60] Mr. Foulston is a practising lawyer and he testified about a successful career in the forestry industry prior to attending law school. He described himself as a successful and experienced litigator. He suffered a heart attack a couple of years ago and as a result had, at least temporarily, downsized his legal practise. He owns at least one home in Prince George and a vacation property near Fort St. James. From this evidence I infer that he is in a stable, perhaps "comfortable" financial position.
- [61] Having considered all of the factors, I have determined that Ms. Boyar shall have her costs of the action from the defendants up to and including January 23, 2013. The costs shall be payable "jointly and severally". Neither defendant shall have costs of the earlier adjournment of the trial. The adjournment was necessitated by a serious health problem in plaintiff's counsel's family and the defendants' counsel were notified as soon as reasonably possible.
- [62] I have noted that Mr. Foulston's approach to the trial unnecessarily complicated and prolonged the trial. I order that Mr. Foulston pay the plaintiff's costs and disbursements for two days of the trial, to be assessed on Scale B. The disbursements payable by Mr. Foulston shall not include the plaintiff's airfare.
- [63] Otherwise the parties shall each bear his or her own costs of the trial and the proceedings from and after January 24, 2013. To avoid any confusion, each party shall bear his or her own costs of the submissions about costs.
- [64] If I had awarded Ms. Boyar the costs of the entire proceeding I would not, in any event, have directed that the costs be assessed as special costs, or as double costs.

- [65] I did make negative credibility findings about some aspects of the testimony of Ms. Chandler and Mr. Foulston and I rejected some of their testimony. In my view, however, their conduct in this regard should not be characterized as "reprehensible". The fact that a party is disbelieved, or even found to have been untruthful, is not uncommon in litigation and it requires something more to deserve that label. The allegations of undue influence and duress and the testimony of both defendants portrayed Ms. Boyar in negative ways, but neither defendant made allegations equivalent to "fraud".
- [66] Given the factors referred to, and in particular the relative financial positions of Ms. Boyar and Ms. Chandler and the fact that both defendants recovered awards that exceeded the amounts offered by the plaintiff in her offers of settlement, I would not have awarded double costs.

"BAKER J."

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Prepared on 28 October 2026 · Esheria