

CANADA / JUDGMENT

Conner Estate v. Worthing

2020 BCSC 1012

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Supreme Court of British Columbia

DECIDED

7 July 2020

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2020 BCSC 1012 Conner Estate v. Worthing

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Conner Estate v. Worthing,

2020 BCSC 1012

Date: 20200707

Docket: S109690

Registry: Kelowna

Between:

Keith Woodburn Purvin-Good, as Executor of the Will of Jean Ingrid Conner

Plaintiff

And

Denis Worthing, Faron Lee Alexander Black, Tracey Marcella Black

also known as Tracey Reimer, Krislynn Richelle Reimer, Ronald Conner,

Rhonda Carr-Hagar, Glenn Conner, William Conner, William Croy,

Chelsey Conner, Tiffany Conner, Athina Conner, Adriann Conner,

William Conner Jr., Richard Tyler Worthing, Travis Ryan Worthing, and

Kristen Okimaw as Litigation Guardian of Brett David Timm,

Kolby Robert Alexander Bisson and Shayna Rolene Bisson

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment on Costs

Counsel for the Plaintiff:

G. White

Counsel for the Defendant, Denis Worthing:

M. Hansen

Counsel for the Defendant, Kristen Okimaw as Litigation Guardian of Brett Timm:

K. Darling

Place and Date of Written Submissions

of the Plaintiff:

Kelowna, B.C.

May 15, 2020

Place and Date of Written Submissions

of the Defendant Kristen Okimaw, Litigation Guardian for Brett David Timm:

Kelowna, B.C.

May 22, 2020

Place and Date of Written Submissions

of the Defendant Denis Worthing:

Kelowna, B.C.

June 9, 2020

Place and Date of Judgment:

Kelowna, B.C.

July 7, 2020

- [1] On February 27, 2020, I gave my decision arising from a two day hearing brought to prove the deceased's will in solemn form and to rectify certain errors on the face of the will.
- [2] The deceased, Jean Ingrid Conner, died on May 14, 2013. She left a will dated January 25, 2013. The need to prove the will in solemn form arose because the deceased's widower, Dennis Worthing, filed a citation that precluded the executor from obtaining probate.
- [3] The executor is Mr. Keith Purvin-Good, a solicitor who also drafted the will.

- [4] I concluded that the executor had proven the will in solemn form, and in so doing, I rejected Mr. Worthing's arguments that:
- a) Ms. Conner did not have the requisite capacity to sign a will;
 - b) Ms. Conner was unduly influenced by her sister, Rhonda Hagar; and
 - c) the witnesses to the will did not subscribe the will and thus the will was invalid by operation of s. 4 of the Wills Act.
- [5] I then went on to rectify certain errors on the face of the will that were apparent because the will as drafted gave the testator's house, which is the primary asset of the estate, in fractions and percentages that totalled 150%, and also gave away the residue twice. My decision is reported at 2020 BCSC 150.
- [6] In addition to the executor and Mr. Worthing, the infant beneficiary Brett David Timm, was also represented at the hearing and has made submissions with regard to costs. Mr. Timm is represented by a guardian ad litem, Kristen Okimaw. The positions of Ms. Okimaw and the executor were allied on all issues. Ms. Okimaw's participation in the hearing will be addressed under the heading that deals with her claim for costs.
- [7] The parties were afforded the opportunity to make submissions on the issue of costs. Due to the COVID pandemic, it was agreed those submissions would be made in writing.

Issues

- [8] The issues are:
- a) Is the executor entitled to indemnity from the estate;
 - b) Is the defendant Worthing either obligated to pay costs, or entitled to be paid his costs; and
 - c) Is Ms. Okimaw as guardian ad litem for Brett David Timm entitled to costs.
- a) Is the executor entitled to indemnity from the estate?
- [9] As a general proposition, executors who act within the scope of their duties are entitled to full indemnification for costs properly and reasonably incurred while acting within the scope of their office [Gawdun v. Lord, 2020 BCSC 266 at para. 74; Leung v. Chang, 2014 BCSC 1243 at paras. 82 and 83].
- [10] An exception to the general rule is if the executor is guilty of reprehensible conduct that is deserving of rebuke. In MacLean v. MacLean, 2009 BCSC 292, Registrar Bouck said the following at para. 59:
- [59] There are circumstances where the executor might be denied those costs and even ordered to pay the objecting beneficiary's special costs: Munroe Estate (Re) (1999), 30 E.T.R. (2d) 270 (B.C.S.C.). However, there must be a finding of reprehensible conduct on the part of the executor to justify such an order.

- [11] Similarly, in *Bigras Estate (Re)*, 2011 BCSC 950, the Court stated the following at para. 64:
- [64] The associated costs of the accounting would normally be paid out of the estate, unless there was some demonstrated conduct by the executor that is reprehensible or deserving of rebuke: *Re Kanee Estate* (1992), 69 B.C.L.R. (2d) 89 (C.A.); *MacLean v. MacLean*, 2009 BCSC 292 at paras. 58-64. In such circumstances, the executor might be ordered to bear his own costs.
- [12] Mr. Worthing argues that Mr. Purvin-Good should be denied his costs in this case because as the drafter of the will, the errors that led to the need for the application for rectification was wholly unnecessary and that by drafting a will that contained obvious errors and did not accord with the deceased's instructions, his conduct should be viewed as reprehensible and worthy of rebuke.
- [13] I do not agree.
- [14] In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (B.C.C.A.), our Court of Appeal applied the threshold of reprehensible conduct to awards of special costs and concluded it was a term of "wide meaning" that encompassed all forms of misconduct that was deserving of the court's reproof or rebuke. The conduct must warrant chastisement and be of such a nature that the court feels the need to distance itself from the conduct in issue.
- [15] Mr. Purvin-Good is not a party to the litigation in his personal capacity but rather in his limited role as the executor of Ms. Conner's will. The fact that the drafter of the will and the executor are the same person does not mean that Mr. Purvin-Good is before the Court in this matter in his personal capacity.
- [16] While costs can be awarded against a non-party, the discretion to make such an order applies in only very limited circumstances. In *Hollander v. Mooney*, 2017 BCCA 238, the Court held the following at para. 55 :
- [55] This Court summarized the jurisdiction to award costs against a non-party in *Perez*, where Madam Justice Rowles said:
- [17] The court does have jurisdiction to order costs against a non-party: *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230 (C.A.). However, an award of costs against a non-party is unusual and exceptional, and should only be made in "special circumstances": *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771, 72 B.C.L.R. (3d) 389, at para. 21.
- [18] "Special circumstances" have been held to include situations where the non-party has engaged in fraudulent conduct, an abuse of process, or gross misconduct in the commencement and/or conduct of the litigation, or when the non-party is the "real litigant": *Anchorage*.

- [17] This is not a case that involves fraudulent conduct, abuse of process or gross misconduct in the conduct of the litigation. Based upon the evidence at the hearing, the worst that can be said in this case is that the will as drafted contained errors.
- [18] I agree with Mr. White that Mr. Worthing is endeavoring to make a professional negligence claim under the guise of a costs determination. There is no evidence that Mr. Purvin-Good has ever been put on notice by Mr. Worthing with regard to a professional negligence claim. There are no pleadings on point; no notice to Mr. Purvin-Good regarding a claim; no evidence of the standard of care; no evidence of any postponement or tolling agreement regarding any limitation period.
- [19] If an allegation of professional negligence were going to be advanced in this case, it should have been made in clear terms and on notice with proper evidence. This has not occurred. Upon receipt of notice, Mr. Purvin-Good would then have been obligated to notify his professional liability insurer. He would likely be entitled to be represented by counsel. I can only assume that Mr. Worthing intends that I take judicial notice of the standard of care and make a finding of liability without the benefit of evidence or argument. Neither would be appropriate.
- [20] Further, an executor's conduct must be reprehensible to preclude recovery of costs. Even if Mr. Purvin-Good in his capacity as solicitor were negligent when he drafted the will, and I make no such finding, it does not follow that his conduct would be characterized as reprehensible so as to preclude him from recovering his costs.
- [21] When determining whether Mr. Purvin-Good is not entitled to be indemnified for his costs in his role as the executor of the estate, I must determine whether his conduct in that capacity has been reprehensible.
- [22] Mr. Worthing's authorities that discuss denying an executor his costs were cases where the impugned conduct related to the executor's obligations in the capacity of executor. In both *Bigras* and *MacLean*, the registrar concluded that the executor was entitled to costs, notwithstanding some concerns with the timeliness of accounting. Mr. Worthing suggests that Mr. Purvin-Good was dilatory because it has taken so long to prove the will in solemn form, his Citation having been issued over five years before the summary trial. Litigation may proceed more slowly than expected for a number of reasons, and there is no evidence here that persuades me that the delay lies solely at the feet of the executor.
- [23] There is no evidence that Mr. Purvin-Good has done anything improper or that would hint that he acted outside the scope of his duties as executor.
- [24] I conclude that he is entitled to his costs on a full indemnity basis, payable out of the estate.
- b) Is the defendant Worthing either obligated to pay costs, or entitled to be paid his costs?

- [25] The normal rule in litigation in British Columbia is that the unsuccessful party pays the winner's costs. While this has not always been the case in estate litigation matters, the more recent trend is for the normal rule to apply [Singh Estate (Re), 2019 BCSC 1114 at para. 19].
- [26] An exception to the general rule may be found where the will maker was "the cause" of the litigation. In *Leung v. Chang*, 2014 BCSC 1243, the general principles were summarized at para. 36 as follows:
- [36] In probate actions, if the court finds either the will-maker or the residuary beneficiary was "the cause" of the litigation or the litigation was in some way encouraged by the will-maker's conduct, for example, when there is confusion or uncertainty surrounding his or her testamentary documents, generally the costs of all parties will be paid from the estate. If the court finds the challenge to the will was reasonable, for example because it was precipitated by highly "suspicious circumstances" surrounding the preparation of the will, typically the court will not make an order for costs against the unsuccessful party. With the exception of these prescribed circumstances, an action relating to the validity of a will is properly characterized as an adversarial dispute among the affected parties and the usual rule that costs follow the event will apply. In keeping with this analytical approach, the current judicial trend in this province has been to characterize an action over the validity of a will as an adversarial dispute among the affected parties: *Mawdsley*; *Woodward v. Grant*, 2007 BCSC 1549 at para. 16.
- [27] The executor argues that Mr. Worthing was unsuccessful on all issues. He argues that Mr. Worthing should pay costs at Scale B for the capacity and formal validity arguments, but special costs for the undue influence argument. He says that Mr. Worthing's baseless allegations warrant censure and rebuke and he says they may properly be characterized as reprehensible.
- [28] In *Benekritis v. Benekritis Estate*, [1998] B.C.J. No. 171, the Court discussed the awarding of special costs in the face of unsubstantiated allegations of lack of capacity and undue influence at paras. 54 to 56:
- [54] The Court may order special costs under R. 57(3). In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 14 C.C.E.L. (2d) 84 (B.C.C.A.) at 91, the Court found the "single standard for the awarding of special costs is that the conduct in question properly be categorized as 'reprehensible'". The Court went on, at 91, to describe the wide meaning that is attributed to the word "reprehensible":

... the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

- [55] The conduct to be assessed for special costs is the conduct either in the circumstances giving rise to the cause of action or in the proceedings: Garcia at 90.
- [56] I am satisfied the defendants are entitled to special costs having regard to the plaintiff's unsubstantiated and unfounded allegations of lack of capacity and undue influence. He will not be permitted to diminish or deplete the estate by his conduct.
- [29] The defendant for his part argues that there were sufficient suspicious circumstances to warrant the inquiry regarding capacity, undue influence and the circumstances surrounding the execution of the will and that very little court time was spent on the former two issues.
- [30] The defendant chose to advance arguments with regard to the probate proceeding and was unsuccessful on all of them. I see no reason to deviate from the general litigation rule, which is that the unsuccessful party should pay costs to the successful one. I conclude that the defendant is liable to pay Scale B costs with regard to all three of the arguments in the probate matter.
- [31] Even if I were to accept that the defendant could have had some initial concerns worthy of investigation at the commencement of the case regarding both capacity and undue influence, it was apparent by the time of the summary trial that his arguments were weak. Because Mr. Worthing persisted, the executor was put to the time and trouble of preparing evidence and argument.
- [32] On the execution issue, Mr. Worthing took a position in submissions before the Court that was contrary to his own application response. Although there may have been some uncertainty as to some of the facts surrounding the execution of the will at first instance, the evidence as to whether the witnesses had printed their names on the will was something that had clearly been established well before the hearing.
- [33] However, I do not consider that the defendant's conduct in raising the undue influence argument reaches the level of reprehensible conduct that would warrant an award of special costs. The defendant's argument was that there were sufficient suspicious circumstances that should cause the court concern, which claim failed. As I said earlier, the claim was weak. However, the allegation of undue influence was not with regard to any of the represented parties but rather pertained to Ms. Conner's sister. She was not represented and did not incur costs to defend herself from the allegations.
- [34] It does not automatically follow that an unsuccessful claim for undue influence will attract an award of special costs. While the allegation was unsuccessful, as I concluded in paras. 27 to 30 of my decision, there were no personal attacks or efforts to impugn anyone's character but rather reference to a constellation of circumstances that the defendant argued, when viewed in the whole, were suspicious. I did not agree, but the allegations made by Mr. Worthing did not rise to the level of being scandalous or outrageous, and deserving of rebuke.

- [35] The issue did not occupy a substantial amount of court time. I conclude that the defendant should pay costs as to this argument, but at Scale B.
- [36] As to the rectification claim, I conclude that the defendant is entitled to receive his costs from the estate. I so find because the rectification portion of the application was necessitated by the errors on the face of the will that required the intervention of the court, and falls within the types of costs that are caused by the will-maker as contemplated in *Leung v. Chang*.
- [37] Mr. Worthing's participation in the rectification portion of the hearing was appropriate, and he is entitled to his costs from the estate on the rectification issue.

Apportionment of costs

- [38] Since I have determined that the defendant is liable for costs at Scale B for the probate portion of the hearing but is entitled to costs payable out of the estate for the rectification portion of the hearing, it is necessary to divide the costs between the claims.
- [39] The executor proposes the following: one-sixth for capacity, one-sixth for undue influence, one-third for execution, and one-third for rectification.
- [40] For his part, the defendant breaks the hearing down as follows: fifty percent for unavoidable rectification, thirty percent for opposition to rectification, fourteen percent for formal validity, three percent for undue influence and three percent for capacity.
- [41] Because I have determined that Mr. Worthing will be liable to pay Scale B costs for all of the arguments in the probate action, as opposed to special costs for the undue influence component, I need only allocate as between the application for proof in solemn form and the rectification component application.
- [42] When parties are compensated for costs following litigation, it does not necessarily follow that the time spent at the hearing on each of the issues is indicative of the time spent to prepare. As such, while the arguments regarding undue influence and capacity did not take as much court time as the rectification and validity arguments, the executor was nonetheless required to obtain medical evidence and potentially conduct interviews of potential witnesses.
- [43] The rectification argument occupied more court time than the other arguments. It is neither possible nor necessary to determine the appropriate allocation with any degree of mathematical precision. I consider an appropriate apportionment in this case to be one-half to the probate action and one-half to the rectification application.
- c) Is Kristin Okimaw in her capacity as the guardian ad litem for Brett David Timm entitled to costs?

- [44] The defendant says that the infant beneficiary's guardian ad litem Ms. Okimaw did not need to participate at the hearing because her submissions mirrored those of the executor.
- [45] While I agree that was the manner in which the hearing unfolded, counsel for Ms. Okimaw inquired prior to the hearing as to whether Mr. Worthing would be seeking costs against Ms. Okimaw and was advised that Mr. Worthing's position was that costs should follow the event. As such, it is entirely reasonable that counsel attend the hearing.
- [46] Ms. Okimaw is entitled to full indemnity costs payable out of the estate because her attendance was necessitated in part by the errors on the face of the will, but more significantly because costs were sought against her.

Summary

- [47] The executor is entitled to his costs on a full indemnity basis from the estate.
- [48] The defendant Worthing is liable to pay costs to the estate for the probate proceeding at Scale B, and is entitled to his costs on a full indemnity basis for the rectification proceeding. The parties' costs are allocated equally between the probate and rectification arguments.
- [49] Ms. Okimaw is entitled to her costs on a full indemnity basis from the estate.

"Wilson J."

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Prepared on 26 October 2026 · Esheria