

CANADA / JUDGMENT

## Piamonte v. Piamonte

2015 BCSC 1137

COURT

Supreme Court of British Columbia

DECIDED

2 July 2015

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2015 BCSC 1137 Piamonte v. Piamonte

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Piamonte v. Piamonte,

2015 BCSC 1137

Date: 20150702

Docket: S148897

Registry: New Westminster

Between:

John S. Piamonte

Petitioner

And

Mario Piamonte, Victor Piamonte, Dennis Piamonte, Edward Piamonte,

Eileen Thatcher, Sylvia Sokoluk, Kiara Piamonte, Kandi Piamonte,

Krystal Piamonte, Kory Piamonte (an infant),

and the Public Guardian and Trustee

Respondents

- and -

Docket: S156026

Registry: New Westminster

Between:

Re The Estate of Herta Piamonte, Deceased,

and Mario Piamonte

Petitioner

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment re: Costs

Counsel for the Petitioner:

K.B. Friesen

Counsel for the Respondents:

L.I. Barron

Place and Date of Hearing:

New Westminster, B.C.

April 7, 2015

Place and Date of Judgment:

New Westminster, B.C.

July 2, 2015

## Introduction

- [1] On November 6, 2014 I ruled that Herta Piamonte had created a secret trust over her principal asset, a bank account, when she told her son Mario in or about March 2011 he was to divide the bank account equally between her children and the children of her deceased son Bob. These reasons for judgment address the costs issues arising from that dispute.
- [2] The decision resolved an acrimonious argument that had arisen on Herta's death on April 13, 2012. John, a lawyer and son of Herta's, had drafted a will for Herta in 2002, but in disregard of his instructions to her to consult an independent lawyer, a year later she took the draft will to her bank and signed it.
- [3] All Herta's children were alive at the time. The will did not provide for issue of the siblings if one of them should die.
- [4] John wanted to honour the terms of the will he had drawn. Mario wanted to carry out the wishes he claimed his mother had told him in 2011.

- [5] Unfortunately the argument which in monetary terms was the difference between a one-seventh or one-eighth share in an estate of some \$250,000, soon turned sour, when John (who I accept had great pressures building on him due to his wife and daughter's ill-health), wrote to Mario (and I summarized the assertions rather than repeat them all):
- (1) Stating Mario's banker was a "moron" for putting the house money into a joint account with right of survivorship and advising on Herta's death that would mean that the funds in the bank account would not require probate process;
  - (2) Stating the creation of the joint account was improper;
  - (3) Asserting that such process was tax evasion and fraudulent which seemed to ignore the comments in the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17, which stated that such passing of assets by way of survivorship was a lawful process;
  - (4) By threatening Mario with a lawsuit if he did not agree to probate or probate was not sought.
- [6] Unfortunately, when Mario retained counsel in August 2012, John continued in a similar vein telling counsel he was assisting in a fraud and making reference to the Professional Conduct Handbook, Chapter 4 Section 6. As well, John said he would seek special costs.
- [7] Mario and his then counsel proposed a distribution of the bank funds, reserving an amount for the ongoing argument. This offer was not accepted in August 2012 nor when repeated in 2013. As well, John's letters were evidently copied to his siblings who, doubtless, given their brother was a lawyer, were relying on his opinion.
- [8] It also appears from some of the materials filed that Mario was allegedly not truly caring for his mother in her final years and had charged her rent and nursing fees. That issue was not argued before me but it indicates some of the background causing the divide among the siblings.
- [9] Further, I note that the first of Mr. Barron's letters to John on August 28, 2012 pointed out John had placed himself in a potential conflict of interest as per the Professional Conduct Handbook Chapter 7, Rule 1, by drafting a will when he was a beneficiary.
- [10] Mr. Barron's letter recited Mario's recollection of his mother's wish to benefit Bob's children, that a court could possibly invalidate the will which would then give rise to an intestacy, (which would give the same result) and that Mario was holding the joint account in trust for his siblings, a commonly used estate planning device to reduce probate fees.
- [11] John's response on August 31, 2012 was intemperate and an attack on counsel, reiterating the Professional Conduct Handbook charge of encouraging fraud.
- [12] Counsel in reply proffered the eight-way distribution.

- [13] Not until September 2013 did John retain independent counsel. On September 27, 2013 John in his affidavit stated he apologized to Mario's counsel "unreservedly for my incautious unbecoming language": para. 62.
- [14] However, earlier in the affidavit he reiterated he did not want to "fraudulently avoid the probate fee payable".
- [15] When the matter came before me (after several adjournments over 2013 and 2014) on May 20, 2014, after hearing argument, I asked if the parties would concede the estate could not withstand further litigation and agree that I conclude the matter. They agreed. I found that Herta Piamonte created a secret trust that benefits "Bob's children".
- [16] However, I did suggest in spite of John's intemperate language, the parties bear their own costs.
- [17] After a pause, Mario brought an application seeking special costs. The special costs had been sought in response in the petition proceeding and repeated in the separate petition seeking a ruling on the secret trust commenced April 3, 2013.

#### Mario's Argument

- [18] Mario's argument was two pronged, namely (1) that John pay special costs throughout or (2) that the trust funds bear Mario's costs.
- [19] I do note however that John initially petitioned the Court for a declaration that the will was valid and that a probate order be issued. Those orders eventually went by consent.
- [20] Mario argued reprehensible conduct of John was founded in his intemperate language, charges of tax evasion and fraud, and other intemperate criticisms.
- [21] As well, Mario argued there was no need for probate as the remainder of the estate was less than \$25,000, that the bank account being the principal asset did not need to pass through probate and that from the outset Mario was saying the estate should be one-eighth shares.

#### John's Argument

- [22] First, reference was made to the apology that had been given by way of affidavit. Secondly, it was submitted that family disputes are often heated and hurtful things are said, and this had been commented in the case law. Thirdly, the timeline showing the evolving argument about a trust was noted, as well as the offer of John to process the probate without fee and the declined opportunity of co-executors dealing with the matter.
- [23] As well, it was submitted that other siblings were a causative factor and that John's correspondence did not necessarily start the issues as the affidavit materials indicated that other siblings were against Mario for various reasons. As well, John had sought Herta Piamonte's historical bank statements and clinical records in August 2012 and those had not been provided, though no application was made to the Court on that. At the hearing the

validity of the will was not contested and probate was granted, and that if there was any issue about onset of dementia it was between the time of the will and the time of the alleged secret trust.

- [24] As well, Mr. Friesen noted the somewhat changing course of Mario's arguments as to invalidity of the will and then the secret trust being put forward, although I was satisfied the one-eighth division argument was raised early on. However, I agree the correspondence did not positively put the position of secret trust plainly until October 2013, reflected in the petition dated October 29, 2013 filed on Mario's behalf.

#### Discussion

- [25] I had excellent arguments put forward together with extensive case law which I do not propose to repeat.
- [26] Mario's bills as presented total \$46,620.44 including disbursements and taxes of which he has paid \$5,422.28. There are five bills presented, the principal one being April 2, 2013 (\$13,825), with respect to consideration of the petition of John to declare the will valid and seek probate and the preparation and filing of a response and Mario's affidavits. Another bill in April 2013 was a special costs application Mario brought inside the wills petition, while a third account is dated December 3, 2014 for \$17,951 but covers the period of time from March 2013.
- [27] A significant event is the advent of Mr. Barron in September 2013 who quickly realized the seriousness of John's conduct of the matter to date. He doubtless had a hand in the affidavit filed September 27, 2013, including the unreserved apology of John to Mr. Barron for his comments. However, that apology does not appear to include Mario. As well however, I note from that time on the matter was conducted properly and strongly by Mr. Friesen on behalf of John and by Mr. Barron on behalf of Mario. The case law is replete with examples of reprehensible conduct deserving rebuke. It also appears the Law Society has been involved although I have no particulars of that, and I assume that has been dealt with appropriately.
- [28] I note the apology did formally apologize for "regrettable and poor choice of wording, and incautious and unbecoming language" which John rightly described as inappropriate. He said it was not reflective of his professional status. He attributed "the offending choice of words" in part to his desire to honour what he understood were his mother's wishes and the stress of ill-health besetting his wife and daughter.
- [29] I note that thanks to the concession of all sides, the matter was largely resolved after a one day court hearing.
- [30] As to special costs, the courts generally are very slow to award special costs which substantially indemnify a successful party's costs. They are only awarded for reprehensible conduct: *Stiles v. Workers Compensation Board (British Columbia)* (1989), 38 B.C.L.R. (2d) 307 (C.A.).

- [31] Ordinarily costs are awarded according to the Supreme Court Tariffs which are to be paid by the losing party but generally only reflect 20% - 40% of a successful party's actual legal costs to their own solicitor.
- [32] Sometimes in estate cases it may be appropriate for the estate to bear the cost of litigation unless it can be said that the litigation is solely attributable to the losing party: *Vielbig v. Waterland Estate*, [1995] 3 W.W.R. 515 (B.C.C.A.).
- [33] The actions of John reflect the old adage that one should not act as one's own lawyer. People seek legal counsel to get unbiased and objective advice. When, as here, John Piamonte took part in drafting his mother's will, later took umbrage at advice given by a banker (and not a "moron" as John conceded) and then accused Mario and Mr. Barron of fraud, the loss of objectivity is apparent. It speaks to the wisdom of the old adage.
- [34] I do not doubt that John's siblings as well were reliant on their lawyer brother and that may have coloured some of their stance; yet on the other hand, there were opinions held by some of the other siblings that were not reliant on John's opinion.
- [35] In my view Mario is entitled to special costs but only to September 27, 2013. John's correspondence to that time was scandalous and unbecoming of an experienced solicitor, and deserving of rebuke. Thereafter the matter was litigated in a proper, fair and adversarial manner. Much of the time that has expired is in part due to the parties' difficulty to find agreement as I see a number of adjournments prior to the hearing of May 2014.
- [36] In the circumstances, the order will be:
- (1) Mario Piamonte is entitled to special costs from John Piamonte to be assessed by the registrar up to September 27, 2013;
  - (2) From that time, Mario is entitled to his costs at Scale B which shall be paid out of the estate prior to distribution;
  - (3) As well, Mario is entitled to his party and party costs of this application.

"The Honourable Mr. Justice Crawford"

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