

CANADA / JUDGMENT

Scurek v. Scurek

2020 BCSC 821

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 821 Scurek v. Scurek IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Scurek v. Scurek, 2020 BCSC 821 Date: 20200603 Docket: S175062 Registry: Vancouver Between: Lydia Adrienne Scurek Plaintiff And Peter Alexander Josef Scurek as Executor of the Will of Joseph Scurek aka Józef Scurek, Deceased, and in his personal capacity, James Joseph Donald and John William Donald Defendants Before: The Honourable Mr. Justice Verhoeven Reasons for Judgment re Costs Counsel for the Plaintiff: J.W. Bilawich Counsel for the Defendant Peter Alexander Joseph Scurek in his personal capacity: K.E. Ducey Counsel for the Defendant Peter Alexander Josef Scurek, as Executor of the Will of Joseph Scurek: S. Li-Seller The Defendant, John William Donald, appearing in person: J.W. Donald The Defendant, James Joseph Donald, appearing in person: J.J. Donald Date of Written Submissions: May 11, 15, 2020 May 25, 2020 Place and Date of Judgment: Vancouver, B.C. June 3, 2020 Table of Contents I. Introduction.. 3 II. The positions of the parties.. 4 III. Legal Principles.. 5 IV. Analysis and Conclusions.. 6 I. Introduction

- [1] I issued reasons for judgment in this matter March 27, 2020. The Reasons for Judgment are indexed and published at 2020 BCSC 450 (the "RFJ").
- [2] In the RFJ I indicated that the parties could make arrangements through Supreme Court Scheduling to address costs, if they could not agree as to costs. They have not agreed, and have chosen to address costs by way of written submissions.
- [3] In these reasons, I will refer to the parties by the same names as set out in the RFJ, at paras. 2-6.
- [4] As set out in the RFJ, the plaintiff, Lydia, brought these proceedings for variation of the will of her father, Joseph. The other personal defendants are her brother, Peter, and her sons, John Jr. and James.
- [5] Under the terms of the will Joseph divided the estate as follows: Lydia 1/6, Peter 3/6, John Jr. 1/6 and James 1/6, each. The net value of the estate as of the date of trial was \$1,626,125.36.
- [6] I set out the positions of the parties at trial at paras. 11 -18 of the RFJ.

- [7] In summary, Lydia's position was that the will should be varied so that the proportions would be as follows: Peter 1/6, Lydia 3/6, John Jr. 1/6, and James 1/6.
- [8] In other words, Lydia's position was that Peter should give up two-sixths of the estate in her favour, and the shares left to her two sons should remain undisturbed.
- [9] Peter's position was that the will made adequate provision for Lydia and therefore should not be varied; but alternatively, he submitted that if there were to be a variation, it should come at the expense of the shares of Lydia's sons, John Jr. and James, and therefore his 3/6 share should not be reduced.
- [10] I accepted that the will did not make adequate provision for Lydia. I varied the will as follows: (para. 156 of the RFJ): Lydia 3/6, Peter 2/6, and John Jr. and James, 1/12 each.
- [11] In summary, then, Lydia succeeded in establishing that the will ought to be varied in her favour. She increased her share of the estate from 1/6 to 3/6, with 1/6 coming from Peter, and the other 1/6 coming, equally, from her two sons. II. The positions of the parties
- [12] Lydia's position is that she and Peter were the primary combatants in this litigation, and that her claim to vary the will was successful. She submits that she should receive party and party costs of the action against Peter, personally. She does not seek costs against John Jr. and James.
- [13] Peter submits that Lydia was only partly successful as against him. He argues that one-half of the increase in her share came at the expense of Peter's share, and the other one-half came at the expense of the shares that were allocated to her sons.
- [14] Peter's position is as follows:
1. each party should bear their own costs;
 2. alternatively:
 - a. the costs of all parties should be paid by the estate; or
 - b. the costs of Lydia and Peter should be borne by John Jr. and James, to be paid out of their shares of the estate; or
 - c. Peter should be required to pay no more than 50% of Lydia's costs, given that only 50% of the amount awarded to Lydia came from Peter's share of the estate.
- [15] Both Peter and Lydia agree that the executor's costs should be paid by the estate as special costs. This is also the submission of counsel for the executor.
- [16] John Jr. and James provided no submissions as to costs.

- [17] At trial, Lydia and Peter (in his personal capacity) were represented by legal counsel. Peter was also represented in his capacity as executor by legal counsel, who, appropriately, took only a minor role in the proceedings. John Jr. and James represented themselves. They took the same positions as each other. In effect, John Jr. and James acted as one party throughout the litigation. III. Legal Principles
- [18] Generally speaking, unless the court otherwise orders, costs of a proceeding are awarded to the successful party: Supreme Court Civil Rules, Rule 14-1(9).
- [19] The word "success" has been equated to "substantial success", and as a general rule of thumb, substantial success occurs when the prevailing party succeeds on 75% of the matters in dispute, considered globally. However this does not mean that a court is to: "descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all disputed matters globally": *Lamperstorfer v. Plett*, 2018 BCSC 607, citing *Fotheringham v. Fotheringham*, 2001, BCSC 1321, at para. 45; *Wilson v. Loughheed*, 2012 BCSC 1166 [Wilson], at para. 16.
- [20] Although not rigidly applied, the tendency of this Court has been to invoke the usual role that costs follow the event in relation to wills variation actions: *Wilson*, para. 19.
- [21] However, there have been cases where the court has ordered that the costs of the litigants be payable from the estate rateably pursuant to s. 65(1) of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, where there has been a successful claim under the statute, and it can be said that the proceedings "arose from" the provisions of the will. So in *Hall v. Korejwo*, 2011 BCCA 355, the litigants agreed that the will did not make adequate provision for the plaintiff. What was really at issue was how the will should be varied. There were other beneficiaries who did not participate in the appeal. The Court of Appeal ordered that the costs of both parties in the Supreme Court and on the appeal were to be payable rateably by the estate.
- [22] On the other hand, in the companion action and appeal, *Hall v. Hall*, 2011 BCCA 354, the plaintiff was unsuccessful in establishing that the will did not make adequate provision for him. As to costs, the Court of Appeal stated: "there are no special circumstances that suggest costs should be payable from the estate." The plaintiff/appellant was liable to pay the costs of the other parties, therefore. IV. Analysis and Conclusions
- [23] In this case, the plaintiff Lydia was substantially successful. She succeeded in establishing that the will did not make adequate provision for her, and she obtained an order increasing her share of the estate from 1/6 to 3/6.
- [24] On the other hand, Peter was substantially unsuccessful. I did not agree with his primary position, which was that the will should not be varied because it made adequate provision for Lydia. He achieved partial success on his alternative argument that any increase in Lydia's share should come at the expense of the shares of John Jr. and James. John Jr. and James were also unsuccessful. Although they participated only minimally in the litigation,

and took no position on the issues as between Lydia and Peter, which were the primary focus of the trial, they submitted that their shares of the estate should not be disturbed.

- [25] I do not agree that this is a case where the costs of all parties should be paid by the estate, in accordance with one of the alternative submissions of Peter. As I indicated in para. 1 of the RFJ, while it can be said that in this case the testator sought to discharge his moral obligations to his adult daughter Lydia by benefiting her sons at her expense, and it could be said that the litigation arose from the will in that sense, Peter supported that position at trial, and was unsuccessful in doing so. Unlike *Hall v. Korejwo*, Peter did not agree that the will failed to make adequate provision for Lydia.
- [26] Lydia chose not to claim for a reduction in the shares provided for her sons John Jr. and James; however, that result was open to me as a consequence of the nature of proceedings, and therefore flows from her decision to seek variation of the will. Following the general rule, Lydia would ordinarily be entitled to costs against the other personal defendants, having been substantially successful against them. But for the fact that she chooses to make no claim against her sons for costs, an appropriate disposition as to costs would be to order that Lydia would be entitled to one set of costs, payable severally by Peter as to 50% and by John Jr. and James, as to the other 50%.
- [27] In the circumstances, where Lydia claims costs against Peter only, in my view it is appropriate that she receive 50% of her costs against Peter, personally, and I so order. I am not satisfied that he alone should bear the entirety of Lydia's costs. Peter's liability for costs should not be increased as a result of Lydia's generous or benevolent position in relation to her sons.
- [28] Generally speaking, an executor is required to play a neutral role in the litigation, and as a result of having to play a neutral role, will generally receive special costs from the estate: *Wilcox v. Wilcox*, 2002 BCCA 574, at para. 25. The executor was a necessary party, pursuant to Rule 21-6(2)(a)(iii) of the Supreme Court Civil Rules. Lydia and Peter agree that in his capacity as executor, Peter should receive special costs payable by the estate. The executor's counsel participated in the trial in a limited matter by providing estate information for the assistance of the court, and played a neutral role.
- [29] In the circumstances, the executor is awarded special costs, payable by the estate.
- [30] Lydia's costs payable by Peter should be paid from Peter's share of the estate, pursuant to Rule 14-1(16).
- [31] Lydia's costs will be assessed at Scale B, pursuant to s. 2 of Appendix B to the Supreme Court Civil Rules. "Verhoeven J."

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