

CANADA / JUDGMENT

Todd v. Walker

2009 BCSC 537

COURT

Supreme Court of British Columbia

DECIDED

21 April 2009

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2009 BCSC 537 Todd v. Walker IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Todd v. Walker, 2009 BCSC 537 Date: 20090421 Docket: 17873 Registry: Cranbrook Between: Sandra Alice Todd Plaintiff And: Raymond William Walker, Executor of the estate of Maxine Gwendolynne MacDonald Defendant Before: The Honourable Mr. Justice Myers Reasons for Judgment Counsel for the Plaintiff: W.G. Sheard Counsel for the Defendant: D.F. Collins Written Submissions: March 18 and 26, 2009

- [1] This is a ruling with respect to costs of an action brought pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490. I gave oral reasons on March 13, 2009, varying the will in favour of the plaintiff and allowed the parties the opportunity to make written submissions with respect to whether the plaintiff's costs should be paid by the estate or whether they should be paid by the defendant personally.
- [2] The plaintiff delivered an offer pursuant to R. 37B and achieved a result which was better than the offer. There is no dispute that the plaintiff is entitled to double the costs of the trial. The only issue is who should pay the costs.
- [3] The plaintiff and defendant are half-siblings and the testator was their mother. The will gave the plaintiff \$1.00 and the balance of the estate to the defendant. My decision was to vary the will to provide the plaintiff 40% of the estate.
- [4] A helpful statement of the principles governing the issue of costs in estate litigation was set out by Martinson J. in *Steernberg v. Steernberg*, 2007 BCSC 953, in which she noted:
- [21] In *Vielbig v. Waterland Estate* (1995), 121 D.L.R. (4th) 485, 1 B.C.L.R. (3d) 76 (C.A.), the British Columbia Court of Appeal approved the following summary of the law made by Master Horn in *Lee v. Lee Estate* (1993), 84 B.C.L.R. (2d) 341 (S.C.), with respect to costs in estate actions and actions under the Wills Variation Act: An order for costs in favour of a completely unsuccessful party against a completely successful party is a most exceptional order. The general rule is that costs follow the event and, while a court may depart from this rule, any departure is usually in the way of depriving a successful party of costs and not of awarding costs to an unsuccessful party. In either case, the usual rule should not be departed from simply because an unsuccessful party did not expect to lose In probate or administration

actions or in proceedings for the construction of wills, the rule may be more frequently departed from. In such cases where the validity of a will or the capacity of the testator to make a will or the meaning of a will is in issue, it is sometimes the case that the costs of all parties are ordered to be paid out of the estate. 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 [sic] 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. Actions brought under dependants' relief legislation presume the validity of the will and the capacity of the testator and that his intentions are clear. There are not doubts to be settled. The remedies provided by such legislation are directed to the maintenance and support of the dependants of the testator and are based on public policy. The legislation does not invalidate the will, it merely permits the court to vary the provisions made by the testator. So an unsuccessful action under such legislation cannot be said to have been caused by a testator, or to have been necessary to enable the estate to be distributed. The action does not benefit the estate.

- [5] Thus, in actions brought under the Wills Variations Act, the general rule is that the unsuccessful party is to personally pay the successful party's costs.
- [6] The Court does have the discretion not to follow the general rule, and in several cases has not done so. However, in the case at bar I think following the general approach achieves a fair result. This case only involved two beneficiaries, one of them the executor, Mr. Walker. He was not required to defend the action in order to look after the interests of other beneficiaries. The decision to defend the litigation was his alone and for his own perceived benefit, as was the decision not to accept the plaintiff's offer.
- [7] The plaintiff is entitled have the costs of this litigation paid personally by the defendant at Scale B, with double trial costs pursuant to R. 37B.
- [8] To be clear, Mr. Walker is to bear all the costs of this litigation and no distinction is to be made between his defence of the litigation in his personal capacity and as executor. Similarly, Mr. Walker is not entitled to have his own legal costs paid out of the estate. That is not to say that the costs of administering the estate, such as probate costs, are to be paid personally; Mr. Walker is entitled to have those paid by the estate in the ordinary course. "E.M. MYERS, J."

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