

CANADA / JUDGMENT

Young v. Veselic

2023 BCSC 721

COURT

Supreme Court of British Columbia

DECIDED

2 May 2023

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2023 BCSC 721 Young v. Veselic IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Young v. Veselic, 2023 BCSC 721 Date: 20230502 Docket: S6077 Registry: Golden Re: The Estate of Kristina Veselic Between: Ivana Young Plaintiff And Stanislav Veselic Defendant Docket: S130115 Registry: Kelowna Between: Stanislav Veselic, as Executor of the Estate of Kristina Veselic Petitioner And Ivana Young Respondent Before: The Honourable Justice Branch Supplementary Reasons for Judgment on Costs Counsel for the Plaintiff/Respondent: B. Fairley M. Blakley The Defendant/Petitioner appearing in person and by counsel: S. Veselic P. Henry Written Submissions Received: May 10, 2022, June 9, 2022, January 10, 2023, February 8 and 15, 2023 Place and Date of Judgment: Golden, B.C. May 2, 2023 Table of Contents I. INTRODUCTION. 4 II. FACTUAL BACKGROUND. 4 III. PARTIES' POSITIONS. 6 IV. BASIC COSTS ASSESSMENT. 6 V. SPECIAL COSTS. 9 VI. EFFECT OF OFFER. 10 VII. JUSTICE CRERAR'S ORDER. 12 VIII. DEFENDANT'S CLAIM TO COSTS FROM ESTATE. 12 IX. CONCLUSION. 13 I. INTRODUCTION

- [1] I issued two sets of reasons in this wills validity and variation matter, which are reported at Young v. Veselic, 2022 BCSC 697 (the "Validity Reasons") and 2022 BCSC 2172 (the "Variation Reasons") (collectively, the "Reasons"). These are my supplementary reasons on costs. I advised the parties that the costs of both matters should be considered together, given that much of the evidence presented went to both issues. Indeed, after the seven-day first trial leading to the Validity Reasons, no additional evidence was called at the second half-day trial leading to the Variation Reasons. II. FACTUAL BACKGROUND
- [2] I adopt the facts set out in the Reasons. I will not repeat the facts set out therein, and will use the same defined terms.
- [3] In terms of additional facts relevant to the issue of costs:
- a) The Testatrix's home was sold in about December 2019, with the remaining proceeds of some \$316,000 presently being held in trust.

- b) The plaintiff delivered her list of documents to the defendant on May 29, 2020. However, the defendant did not initially deliver a list of documents or copies of any documents, even after the plaintiff issued a formal demand for production. The plaintiff brought an application on July 29, 2020, to compel the defendant to produce and deliver a list. The order was granted on September 8, 2020.
 - c) The plaintiff sought production of the Testatrix's medical records from the Golden and Kelowna General hospitals. However, the hospitals would not release the records without the consent of the defendant, and the defendant refused to provide his consent. This resulted in the plaintiff having to file an application to produce on July 29, 2020 (within the same application as above). This order was also granted on September 8, 2020.
 - d) The defendant would not initially consent to the release of the files of the solicitors who drafted the Testatrix's First and Second Will. The plaintiff filed an application to compel production on July 29, 2020. The defendant eventually consented to production on October 26, 2020.
 - e) The defendant did not deliver a list of documents to the plaintiff until October 7, 2020.
 - f) On December 10, 2020, the defendant's then counsel sent a without prejudice letter to plaintiff's counsel (the "Offer"). The letter proposed a global settlement as follows: The parties would agree to an order proving the Second Will, \$70,000 from the proceeds from sale of the Home would be paid to the plaintiff, the parties would each bear their own costs, and the Testatrix's estate would be distributed 25% to the plaintiff.
 - g) The plaintiff sought further production from the defendant in 2021. Justice Crerar's March 23, 2021 order required that the defendant produce the following within 30 days of the order:
 - i. the bill of sale for the sale of the Testatrix's motor vehicle and any other related documents to the transaction; ii. personal bank records of the defendant from May 2018 to September 2019; and iii. a complete list of documents by June 15, 2021.
 - h) The defendant did not comply with Justice Crerar's order. In his submissions he says that he is "unable to comment why the records were not produced until after the deadline, or whether they were incomplete as alleged". The defendant suggests that he provided the documents to his then-counsel, and later did his best to produce all relevant documents after he began representing himself.
 - i) The defendant concedes that he missed court ordered deadlines, although he asserts that this was due to a break down in communication with his former counsel.
- III. PARTIES' POSITIONS
- [4] The plaintiff proposes the following orders as to costs:
- a) special costs payable to the plaintiff;

- b) alternatively, special costs for the defence of the counterclaim, and for two-thirds of the remaining aspects of the proceeding;
 - c) alternatively, costs at Scale B, but with special costs for the defence of the counterclaim; and
 - d) alternatively, costs on Scale B for two-thirds of the entire proceeding, but with special costs for the defence of the counterclaim.
- [5] The defendant proposes the following costs order:
- a) Subject to (c) and (d), the plaintiff pay to the defendant party and party costs, in an amount to be agreed upon or assessed;
 - b) the scale be fixed at Scale B;
 - c) the plaintiff pay the defendant double costs for all steps taken in the proceedings after the Offer on December 10, 2020; and
 - d) the defendant be awarded special costs payable from the Testatrix's Estate, less any costs paid to the defendant by the plaintiff.
- IV. BASIC COSTS ASSESSMENT
- [6] Rule 14-1(9) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] provides: "Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders" (emphasis added). Rule 14-1(14) provides that the court may order that a party pay an apportionment of costs for improper acts, omissions, or behaviour that unnecessarily increases costs notwithstanding the outcome of the case: *Cook v. Neufeld*, 2022 BCSC 757 at paras. 5-7. Rule 14-1(15) allows apportionment of costs in relation to some particular application, step, or matter.
- [7] A party seeking apportionment must establish the following:
- (1) that there were separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
 - (2) there is some basis upon which the trial judge can identify the time attributable to the trial of those separate issues; and
 - (3) apportionment of costs would effect a just result. *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27 at para. 31.
- [8] The discretion to award costs other than in accordance with the standard approach must be exercised judicially and for reasons connected with the case: *Brauer v. ICBC*, 1989 CanLII 2779, (1989), 38 B.C.L.R. (2d) 232 (S.C.) at 238.
- [9] In relation to any interlocutory applications, costs are generally not recoverable until the conclusion of the action. Rule 14-1(12) applies:
- (12) Unless the court hearing an application otherwise orders,

- (a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and
 - (b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.
- [10] In terms of the plaintiff's request for special costs, these are awarded to rebuke "reprehensible conduct" in the course of litigation. Reprehensible conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court's view deserves reproof or rebuke: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at paras. 8-11.
- [11] In terms of the effect of this being an estate matter, the general rule that costs follow the event applies in estate disputes, particularly where the proceeding was in substance an adversarial dispute between beneficiaries: *Bull Estate v. Bull*, 2015 BCSC 136 at para. 136. In *Sato v. Sato*, 2018 BCCA 287, the court stated:
- [56] It is true that the modern approach to estate litigation is that the normal costs rules generally apply: *Hollander v. Mooney*, 2017 BCCA 238 at paras. 39--40. However, in *McDougald Estate v. Gooderham* (2005), 2005 CanLII 21091 (ON CA), 255 D.L.R. (4th) 435 at para. 78 (Ont. C.A.), in a passage cited in *Hollander*, the Court of Appeal acknowledged that costs may be awarded against the estate "[w]here the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator" The court explained at para. 58:
- [58] Cases where costs are awarded out of the estate generally involve questions of the construction of an ambiguous provision of a will or the testator's capacity at the time the will was created, and I would similarly here conclude that the conduct of the deceased raised the dispute as to the validity of the will. The deceased drafted his will in 2011, while living abroad, and took no action after he was married to draw up a new one by the time he died in 2015. He was also diagnosed with cancer approximately a year before he died, yet took no steps to update his will. The evidence in this case shows that there was a good faith dispute as to whether the deceased had an intention to reside in Luxembourg permanently at the time he was married such that his 2011 Will might still have been valid. Therefore I would set aside the order with respect to costs, and award the parties special costs of both the trial and appeal against the estate.
- [12] Beginning with the question of substantial success, I find that there were mixed results. Looked at from the perspective of the plaintiff, she:

- a) failed in her wills validity/undue influence/unjust enrichment challenge to the Second Will, Second Transfer, and defendant's withdrawals, save for an order that \$17,000 was transferred improperly by the defendant;
 - b) succeeded in her wills variation action, but did not establish a right to succeed to the joint accounts held with the Testatrix, and did not succeed in obtaining an order for the return of \$10,000 transferred to the defendant immediately after the Testatrix's death; and
 - c) in relation to the petition by the defendant for proof of the mother's last will in solemn form, the Reasons have the legal effect of granting the defendant's requested relief, but subject to the adjustments noted above.
- [13] The plaintiff argues that she was successful on two of three issues, being the wills variation and the misappropriation allegation. However, substantial success is not determined based on a mechanical counting of the number of issues on which each party was successful, but rather on the weight of such issues: *Webber v. Sullivan*, 2019 BCSC 1784 at paras. 15-16. In particular, the question as to whether the transfer of the Testatrix's home to the defendant should be set aside was the dominant issue from a both a financial and trial time perspective, and the plaintiff lost on that issue.
- [14] As such, subject to the additional specific arguments addressed below, the default award will be that each party bear their own costs. V. SPECIAL COSTS
- [15] In terms of the request for special costs based on the other party's conduct, I find that neither party acted "reprehensibly". I disagree that either party's conduct unnecessarily prolonged the trial(s). Both advanced their respective positions forcefully, but appropriately. The defendant did struggle to defend his position at trial and struggled to follow proper procedural steps generally, but no more so than any other lay litigant. Subject to the problems with document production, which I discuss further below, I find that he was acting in good faith.
- [16] I cannot fault the plaintiff for not conducting an examination for discovery of the defendant. Given that the parties were siblings, I expect that both parties believed they already knew what the other would say. I do not find that the plaintiff's decision not to examine the defendant lengthened the trial in any way.
- [17] In terms of the effect of the parties' cross allegations of wrongful appropriations from the Testatrix's accounts:
- a) I cannot fault the plaintiff for raising the undue influence argument. There were sufficient "red flags" surrounding the execution of the Second Will for the plaintiff to believe in good faith that there was a problem that needed to be considered by the Court. Further, the plaintiff was able to establish that there were wrongful withdrawals, just not at the level she argued for.

- b) Similarly, I cannot fault the defendant for raising a concern about the plaintiff's management of the Testatrix's funds in the joint accounts. The accounting was complex, and based on the evidence before me, was only properly explained in appropriate detail at trial. I note as well that the plaintiff had to rely on repayments to make her accounting work - at a minimum raising a spectre that there were original withdrawals that were improper. Again, there were sufficient "red flags" to avoid applying any punitive costs order
- [18] An unsuccessful claim of fraud "does not inexorably lead to the conclusion that the unsuccessful party should be held liable" for special costs: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 42. There must be something more, such as where the fraud allegations were "unwarranted and completely unfounded", *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 18. That was not the case here, in either direction.
- VI. EFFECT OF OFFER
- [19] Does the Offer require a different outcome than that both parties bear their own costs?
- [20] Rule 9-1(4) allows the Court to consider an Offer to Settle when exercising its discretion in relation to costs. Rule 9-1(5) set out options available to the Court which include the award of double costs for some or all of the steps in the litigation. Rule 9-1(6) specifically instructs the Court to consider:
- a) whether the offer ought reasonably to have been accepted;
 - b) the relationship between the terms of settlement offered and the final judgment of the courts;
 - c) the relative financial circumstances of the parties; and
 - d) any other factor the court considers appropriate.
- [21] I accept that the Offer would have put the plaintiff in a more favourable financial position than the result achieved at trial. Although the parties failed to provide calculations, it would appear from the evidence that the trial award to the plaintiff of one half of the present value of the Estate, together with one-half of the \$17,000 wrongful withdrawal, should yield the plaintiff approximately \$36,500 (subject to the discussion about the defendant's entitlement to costs from the estate below).[1] On the other hand, the offer would have yielded the plaintiff the \$70,000, as well as 25% of the Testatrix's residual estate, or approximately \$84,000.
- [22] However, notwithstanding that the Offer was more favourable than the result the plaintiff achieved at trial, I find that it was not unreasonable for the plaintiff to have refused to accept the Offer, given the following:

- a) The Court must consider the first factor under Rule 9-1(6)(a) without the benefit of hindsight. In other words, only the circumstances in existence at the time of the offer are relevant, not the award made at trial: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 29-32.
 - b) The Reasons turned in large measure on the reliability and credibility of non-party witnesses, whose testimony and courtroom performance would not have been knowable with any certainty at the time of the Offer.
 - c) Throughout the proceeding, the defendant delayed his document production, at some points specifically failing to comply with production orders. These delays and failure to produce documents would understandably have made it more difficult for the plaintiff to properly assess the claim: *Lam v. Chiu re costs*, 2008 BCSC 1367 at para. 38.
- [23] The parties are on relatively similar economic footing, so this factor does not favour any particular result.
- [24] Given my finding that it cannot be said that the refusal to accept the Offer was unreasonable, it is not necessary to address the plaintiff's alternative argument that the Offer was not properly served. VII. JUSTICE CRERAR'S ORDER
- [25] Justice Crerar ordered that the costs of the March 23, 2021 application should be in the cause. Given that my order is that both parties should bear their own costs, that would also be the appropriate treatment of the costs of this application as well. VIII. DEFENDANT'S CLAIM TO COSTS FROM ESTATE
- [26] The defendant seeks his net special costs payable from the Estate. I find that the defendant is not entitled to such an order.
- [27] Absent the discovery problems discussed above, I would have been inclined to make an order that the defendant receive from the Estate at least his costs associated with:
- a) the Petition to prove the Second Will in solemn form, and
 - b) the plaintiff's challenge to the validity of the Second Will, as he was effectively wearing his hat as executor in relation to these issues. As stated in *Bull Estate v. Bull*, 2015 BCSC 136 at para. 139: it is a long-standing principle that executors are entitled to be indemnified for the costs they properly and reasonably incur while acting within the scope of their office; they will therefore receive a special costs award out of the estate: *Royal Trust Corp. of Canada v. Clarke* (1989), 60 D.L.R. (4th) 257 (B.C.C.A.) at para. 17. This general rule does not preclude the court from ordering that an unsuccessful litigant pay some or all of the executor's costs associated with proving the will in solemn form
- [28] However, I find that the defendant executor's conduct in failing to properly provide discovery to the plaintiff beneficiary while wearing his hat as executor must have implications. Although not enough to support an award of special costs, I find that it is appropriate for this litigation misconduct to deprive him of his right to costs from the Estate.

In failing to produce documents in a timely fashion, the defendant was wearing both hats, and should not be immunized from the practical effect of my costs award because one of those hats was as executor: Anderson Estate, 2012 ABQB 517 at paras. 13, 26-28, and 36. The defendant clearly stepped beyond his role as a disinterested administrator of the estate. Given the fact that he is a beneficiary of 50% of the estate, this order only effectively penalizes the defendant to the tune of 50% of his costs, as he would have borne 50% of the costs as beneficiary in any event. IX. CONCLUSION

[29] I find that each party should bear their own costs. "The Honourable Mr. Justice Branch"

[1] $(\$17,000/2)$ [wrongful withdrawal] + $(\$56,000/2)$ [remainder of the Estate other than the sale of the home] = \$36,500

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Prepared on 26 October 2026 · Esheria