COURT OF APPEAL FOR ONTARIO

CITATION: Di Nunzio v. Di Nunzio, 2022 ONCA 889
DATE: 20221221
DOCKET: C69986

Gillese, Tulloch and Roberts JJ.A.

BETWEEN

Lucia Di Nunzio

Applicant (Appellant)

and

Teresa Di Nunzio and Robert Di Nunzio

Respondents (Respondent)

Benjamin D. Arkin, for the appellant

Michael S. Deverett, for the respondent

Heard: December 15, 2022

On appeal from the judgment of Justice Laurence Pattillo of the Superior Court of Justice, dated October 8, 2021, with reasons reported at 2021 ONSC 6689, and from the costs order dated November 8, 2021.

Reasons for Decision

[1] The appellant appeals the dismissal of her application to set aside the March 1, 2017, will of her deceased mother, Rosalba Di Nunzio. She also seeks leave to appeal the partial indemnity costs order made against her in the amount of $111,395.45.

[2] This appeal arises out of highly contentious estate proceedings. The parties are siblings[1]. Mrs. Di Nunzio died from cancer at the age of 80 on July 20, 2018. On March 1, 2017, she made a will naming Teresa Di Nunzio as the sole trustee and beneficiary and expressly disinherited her other children, Robert and Lucia. On October 23, 2018, the court issued to Teresa, as executrix, a certificate of appointment with will attached.

[3] On October 29, 2018, Lucia started the application that was dismissed by the application judge, and which forms the subject of this appeal. The thrust of her application and her appeal is that the will was invalid and of no force and effect based on lack of capacity, suspicious circumstances, and undue influence.

(1) Dismissal of the application re validity of the will

[4] We do not agree that the application judge made any reversible error and are in substantial agreement with his reasons for dismissing the application.

[5] In substance, the application judge correctly applied the applicable legal principles in *Vout v. Hay,* [1995] 2 S.C.R. 876, and thoroughly considered the evidence in relation to each of Lucia's arguments. He gave compelling reasons for accepting the evidence put forward by Teresa, including evidence from independent witnesses, that amply supported the application judge's findings that

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[1] For ease of reference and with no disrespect, we refer to the siblings by their first names and their mother as "Mrs. Di Nunzio".

Mrs. Di Nunzio had the requisite testamentary capacity, notwithstanding her illness and the effects of her treatment and medication, and was not under any influence but only guided by her own alert good judgment when she made her March 1, 2017 will which was not surrounded by suspicious circumstances.

[6] The application judge explained why he found Lucia's evidence insufficient to support her allegations. He described the history of Lucia's relationship with her mother, which included her mother's prior intent to exclude Lucia from her will. These facts provided the context within which Mrs. Di Nunzio decided to exclude Lucia from her 2017 will. The application judge found Lucia's relationship with her family and particularly with her mother "had been tumultuous and difficult for a very long time" and was not close because of Lucia's long history of alcohol and drug abuse which has continued into her adult years. Mrs. Di Nunzio had sought to disinherit Lucia when she made her 2015 will because Lucia had taken, and not replaced, money from her mother's bank account while Mrs. Di Nunzio was undergoing chemotherapy. This was not an isolated incident. However, Teresa, Robert and Mrs. Di Nunzio's lawyer persuaded her at that time to leave her estate to all three of her children although she removed Lucia as trustee and executrix. The application judge concluded that in making her 2017 will, Mrs. Di Nunzio carried out her "firm and clear" testamentary intention to exclude Lucia and Robert because of her rational concerns, supported in the record, that Lucia would run

through the money, and her belief that Teresa “knew what to do and would look after her siblings”.

[7] The application judge’s findings are amply supported on the record. There is no basis for intervention by this court.

(2) Costs appeal

[8] The appellant submits that the trial judge erred in finding that there were no public policy considerations that warranted payment of the appellant’s costs from the estate. She maintains that even if her appeal is dismissed, she raised reasonable grounds relevant to the will’s validity.

[9] In *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.), at paras. 78-80, this court explained that the traditional approach in estate litigation that the costs of all parties are ordered payable out of the estate has been displaced by the modern approach of fixing costs in accordance with civil costs rules, unless the court finds that there are public policy considerations. Public policy considerations include where the dispute arises from an ambiguity or omission in the testator’s will or other conduct of the testator, or there are reasonable grounds upon which to question the will’s validity. The modern approach balances the need of the court’s oversight to ensure that only valid wills executed by competent testators are propounded with the need to restrict

unwarranted litigation and protect estates from being depleted by litigation: at para. 85.

[10] The application judge gave the following reasons for rejecting Lucia's request that her costs be paid by the estate:

> Lucia submits in the event the application is unsuccessful, the problems giving rise to the litigation were caused by [Mrs. Di Nunzio] resulting in her costs being paid by the Estate. In my view, as established by [*McDougald Estate*], costs in estate litigation follow the event in the absence of one or more policy considerations applying. None apply here, in my view.

[11] Because the application judge gave no reasons for concluding that no public policy considerations were engaged, no deference is owed to that conclusion. As a result, leave to appeal the costs order is granted and this court stands in the place of the application judge to consider the question of costs of the application afresh.

[12] Based on the application judge's findings on the issues of Mrs. Di Nunzio's testamentary capacity and validity of the will, we are not persuaded that the public policy considerations outlined in *McDougald* are engaged here. Accordingly, there is no basis to order that Lucia's costs be paid from the estate.

[13] However, while we are not persuaded that the grounds raised by Lucia rise to the level of public policy considerations that warrant payment of her costs from the estate, the grounds that Lucia raised on the application were not frivolous and

did raise triable issues warranting court scrutiny. As the application judge noted, “at first glance, [Mrs. Di Nunzio’s] decision to leave all of her estate to Teresa, excluding both Lucia and Robert, could be considered as a suspicious circumstance”. In the circumstances of this case, we exercise our discretion and set aside the costs order against Lucia. As a result, Lucia will bear her own costs of the application while Teresa’s costs are payable from the estate.

Disposition

[14] The appeal is dismissed.

[15] We grant leave to appeal the costs order below, allow that appeal, and set aside the costs order. The parties had agreed on $25,000 to the successful party on the appeal. However, in light of the divided success, that agreement does not apply. If the parties cannot agree on the costs of the appeal, they may make brief written submissions, to a maximum of two pages, to be filed with the court no later than ten days from the release of these reasons.

“E.E. Gillese J.A.”
“M. Tulloch J.A.”
“L.B. Roberts J.A.”