

COURT OF APPEAL FOR ONTARIO

CITATION: Ducharme v. Thibodeau, 2023 ONCA 60

DATE: 20230127

DOCKET: C70765

Feldman, Lauwers and Roberts JJ.A.

BETWEEN

Robert Michael Ducharme in his capacity as Estate Trustee
for the Estate of Brian Charles Ducharme, deceased

Applicant
(Respondent)

and

Claudine Thibodeau

Respondent
(Appellant)

Andrew Rogerson and Celine Dookie, for the appellant

Owen D. Thomas, for the respondent

Heard: January 16, 2023

On appeal from the judgment of Justice Kelly A. Gorman of the Superior Court of Justice, dated May 13, 2022.

REASONS FOR DECISION

[1] The appellant appeals from the removal and striking out of her notice of objection and the judgment that the last will and testament of the late Brian Charles

Ducharme dated February 18, 2020 is valid, and seeks leave to appeal the \$47,147.90 substantial indemnity costs award made by the application judge.

[2] On the eve of the hearing of the application, the appellant withdrew her notice of objection to the validity of the late Mr. Ducharme's will. We agree with the respondent that the appellant therefore has no standing to appeal the validity of the late Mr. Ducharme's will. Moreover, she provided no evidence to support the allegations in her notice of objection that the late Mr. Ducharme's will, which was made before she met him, was not duly executed or alternatively, it was executed under undue influence, and the deceased lacked testamentary capacity, knowledge and approval of his will. As a result, there is no basis to set aside the judgment of the application judge.

[3] The appellant also seeks leave to appeal the application judge's costs order against her. The application judge's very brief reasons for the substantial indemnity costs order read:

“Given the protracted nature of the proceedings – all at the feet of the [appellant], there will be costs on a substantial indemnity basis, in the amount of \$47,147.90 (inclusive of HST and disbursements), payable, forthwith.”

[4] We agree with the appellant that the application judge erred in her award of substantial indemnity costs of \$47,147.90. It is clear from the record that not all of the “protracted nature”, namely the delay, of these proceedings is solely attributable to the appellant's actions. Adjournments were legitimately

necessitated by the unavailability of counsel and the court. This is a palpable and overriding error that requires us to set aside the application judge's costs award and consider afresh the appropriate disposition of costs.

[5] While the appellant's notice of objection appears to have little merit, it does not rise to the level of an abuse of process that merits an exceptional costs award on the substantial indemnity scale. Accordingly, we conclude that the fair, proportionate and reasonable costs award in the circumstances of this case is \$25,000, inclusive of all amounts.

[6] The appeal was of questionable merit and appeared to have been the hook onto which the appellant attached her costs appeal without seeking leave to appeal costs, the real issue on this appeal. As a result, the respondent is entitled to costs of the appeal in the amount of \$5,000, inclusive of all amounts.

[7] By order of Paciocco J.A. dated September 21, 2022, the appellant deposited into court the amount of \$20,000 as security for the respondent's costs. The respondent is entitled to be paid out of court the amount of \$20,000, plus any accumulated interest, towards the costs awards made by this panel.

"K. Feldman J.A."
"P. Lauwers J.A."
"L.B. Roberts J.A."