

COURT OF APPEAL FOR ONTARIO

CITATION: Shannon v. Hrabovsky, 2024 ONCA 188

DATE: 20240313

DOCKET: C66527

Roberts, Sossin and Dawe JJ.A.

BETWEEN

Gayle Shannon

Applicant (Respondent)

and

Michael Hrabovsky and Glenn Hrabovsky, both in their capacities as Estate Trustees with a Will of the Estate of Andrew Hrabovsky, deceased, and in their personal capacities

Respondents (Appellants)

Norman Ronski, for the appellants

Vusumzi Msi, for the respondent

Heard: in writing

On appeal from the order of Justice Herman J. Wilton-Siegel of the Superior Court of Justice, dated November 2, 2018, with reasons reported at 2018 ONSC 6593.

COSTS ENDORSEMENT

[1] By judgment dated February 20, 2024, we dismissed the appeal against the application judge's order setting aside the testator's 2007 will and restoring his 2006 will as his last will and testament: 2024 ONCA 120. The appeal was heard in writing, and counsel have now provided their written submissions on costs.

[2] As the successful party, the respondent is entitled to her costs of the appeal, including the costs of an unsuccessful mediation pending the hearing of the appeal. She seeks costs in the amount of \$83,620 for fees and \$5,205.88 for disbursements, including HST. Although not clearly stated in her materials, she appears to have calculated this figure on a substantial indemnity basis.

[3] While this is a very large amount, the appellants' own bill of costs is even higher: they sought over \$150,000 in fees and disbursements for themselves, on a partial indemnity basis. Accordingly, they cannot object that the amount sought by the respondent is contrary to their own expectations of what would be fair and reasonable in the circumstances: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 38.

[4] We are satisfied that this is an appropriate case to award enhanced costs. The appellants made serious allegations of misconduct against the respondent. They accused her of giving "false and deceitful evidence" at the application by failing to put into evidence a letter that her lawyer sent in December 2014 to the lawyer who prepared the testator's wills. We did not accept this characterization and concluded that this letter was equally accessible to the appellants and their counsel at the time of the application, and that, in any event, it would not have affected the application judge's finding that the respondent's application was not limitations-barred. Litigants who make unsubstantiated allegations of misconduct or dishonesty can expect to pay enhanced costs: see *Unisys Canada Inc. v. York*

Three Associates Inc. (2001), 150 O.A.C. 49 (C.A.), at para. 15; *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 47.

[5] We are also satisfied that this is an appropriate case to order that the appellants pay costs personally, rather than awarding costs payable by the estate. The appellants both stood to benefit financially if the 2007 will disinheriting the respondent was upheld, whereas the respondent is the largest beneficiary under the 2006 will. In our view, the appellants' appeal was entirely devoid of merit and was brought primarily for their own benefit rather than for the benefit of the estate. If costs were ordered payable by the estate, this would effectively shift a substantial part of the costs of this appeal to the respondent. In these circumstances, we find it appropriate to order that the appellants pay costs personally: see *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 390-91; *Sawdon Estate v. Sawdon*, 2014 ONCA 101, 119 O.R. (3d) 81, at para. 82; *Westover Estate v. Jolicouer*, 2024 ONCA 81, at para. 14.

[6] However, we are not satisfied that the amount the respondent seeks in costs is justified, even on an enhanced basis. The respondent appears to have calculated the figure she seeks by using a substantial indemnity rate that is the same as or higher than her counsels' actual billing rates. As this court noted in *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 771, 128 O.R. (3d) 64, at para. 57:

[C]osts awarded on a substantial indemnity scale are to be determined on the basis of applying a factor of 1.5 to the amount of the partial indemnity costs as fixed (or that would otherwise have been fixed) in accordance with the Rules and Tariff A.

See also r. 1.03 of the *Rules of Civil Procedure*, O. Reg. 575/07, s. 6(1). Since partial indemnity costs are ordinarily calculated using an hourly billing rate that is around 60 percent of counsel's actual rate, and since the amounts awarded must generally be adjusted further to take into account the factors in r. 57.01(1) of the *Rules*, costs awards that are made on a substantial indemnity basis typically fall short of full indemnity recovery.

[7] In our view, it is appropriate in this case to estimate substantial indemnity costs as 80% of full indemnity costs: see *Yan v. Hutchinson*, 2024 ONCA 158, at para. 4. Therefore, we fix the respondent's costs at \$80,000 all inclusive, to be paid by the appellants.

"L.B. Roberts J.A."

"L. Sossin J.A."

"J. Dawe J.A."