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2005 CarswellOnt 1372

Brown Estate (Trustee of) v. Chin

Brenda Nichols v. The Bank of Nova Scotia, Estate Trustee for the Estate of Robert Guy Brown; Nichol Brown, c/o The Office of the Children's Lawyer; Glen Brown; Susanne Vidito

And The Bank fo Nova Scotia Trust Company in their capacity as the Estate Trustee Without a Will of the Estate of Robert Guy Brown, deceased v. Peter Chin, Patricia Brown, Brenda Nichols, Glen Brown, Suzanne Divito for and on behalf of a minor, The Children's Lawyer and Bonnie Brown

Ontario Superior Court of Justice

DiTomaso J.

Judgment: April 1, 2005
Docket: 03-2466, FLA 741-04

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Proceedings: additional reasons to *Brown Estate (Trustee of) v. Chin* [\(2005\), 2005 CarswellOnt 972](#) (Ont. S.C.J.)

Counsel: Martin J. Prost for Applicant

Kimberley A. **Whaley** for Respondent

Subject: Estates and Trusts; Civil Practice and Procedure

Estates and trusts --- Estates -- Actions involving personal representatives -- Practice and procedure -- Costs -- Liability of estate

In estates action, woman sought leave to appeal main order of judge on interlocutory issue together with his order as to costs -- Woman did not decide to appeal main order until after she received notice of order compelling her to pay \$5,500 in costs payable within sixty days -- As woman could not afford to pay costs, she then brought leave to appeal motion in respect of both orders -- Motion was dismissed and issue arose as to costs on leave to appeal motion -- Woman ordered to pay \$10,500 in costs on substantial indemnity basis -- Motion for leave to appeal orders of judge was ill conceived and ultimately unsuccessful -- Driving motive for leave to appeal motion was woman's inability to pay sum of \$5,500 rather than grounds which would satisfy requisite tests for leave pursuant to R. 62.02(4) of Rules of Civil Procedure -- Leave to appeal motion was seen by woman as opportunity to re-litigate issues that had already been argued before judge -- Costs incurred by estate trustee in contesting leave to appeal

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motion had effect of depleting estate's assets which was detrimental to minor child of deceased who was beneficiary of estate -- Woman ought to have considered her ability to pay costs before she mounted her ill-fated leave to appeal -- Estate trustee ought not to be saddled with such unnecessary costs and they ought to be borne entirely by woman.

Cases considered by *DiTomaso J.*:

Josephs Estate, Re (1993), 17 C.P.C. (3d) 36, 14 O.R. (3d) 628, 50 E.T.R. 216, 1993 CarswellOnt 403 (Ont. Gen. Div.) -- referred to

Marshall Estate, Re (1998), 1998 CarswellOnt 337, 17 C.P.C. (4th) 46, 22 E.T.R. (2d) 255 (Ont. Gen. Div.) -- referred to

Merry Estate v. Merry Estate (2002), 2002 CarswellOnt 3993, 48 E.T.R. (2d) 72, (sub nom. *Meredith v. Plaxton*) 62 O.R. (3d) 427 (Ont. S.C.J.) -- referred to

Schweitzer v. Piasecki (1998), 1998 CarswellOnt 135, 20 E.T.R. (2d) 233 (Ont. Gen. Div.) -- referred to

Turner v. Hancock (1882), 20 Ch. D. 303 (Eng. C.A.) -- referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131 -- considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 57.01 -- considered

R. 57.03 -- considered

R. 62.02(4) -- considered

ADDITIONAL REASONS to judgment reported at *Brown Estate (Trustee of) v. Chin* (2005), 2005 CarswellOnt 972, 15 E.T.R. (3d) 69 (Ont. S.C.J.), concerning costs.

***DiTomaso J.*:**

Introduction

1 Nichols sought leave to appeal the main order of Howden J. dated November 25, 2004 together with his order as to costs dated January 10, 2005.

2 Nichols did not decide to appeal the main order until after she received notice of Howden J.'s order compelling her to pay \$5,500 in costs payable within sixty days.

3 As Nichols could not afford to pay the costs, she then brought her leave to appeal motion in respect of both orders. Her leave to appeal was refused and her motion was dismissed. The parties agreed that the costs of the motion would be determined by way of written submissions. I have received and reviewed those submissions.

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Position of the Parties

4 It is submitted on behalf of the Estate Trustee that on numerous occasions, counsel for the Estate Trustee advised counsel for Nichols that the Nichols motion for leave to appeal was out of time and did not meet the test for leave pursuant to Rule 62.02 (4) of the *Rules of Civil Procedure* and that costs would be sought against Nichols.

5 Without hope of success, the Nichols motion resulted in interim delay and further costs pending ultimate disposition of the issues between the parties. Every dollar paid by the Estate for legal costs defending such motions comes from a fifteen-year-old beneficiary. Some 43.4 hours of time was spent by counsel for the Estate Trustee in responding to the Nichols motion. Consequently, costs are sought against Nichols on a substantial indemnity basis to be paid by Nichols personally and forthwith. The Bill of Costs prepared on a substantial indemnity basis is in the amount of \$18,145.52. Counsel's hourly rate is \$350 per hour.

6 The position taken on behalf of Nichols was that costs on procedural issues such as presented in our case are best left to the trial judge. Further, this would appear to be required in a case such as ours where Nichols has limited financial resources. The ability to pay is a vital consideration. Nichols' principal asset is her claim in this case.

7 If costs are to be fixed at this time, it was submitted that the claim for costs advanced by the Estate Trustee was grossly excessive.

8 I have reviewed Rule 57.01, 57.03 of the *Rules of Civil Procedure* and section 131 of the *Courts of Justice Act* in coming to my decision in respect of costs.

9 I have also considered the authorities cited by both counsel. I find that costs are to be fixed at this time rather than leaving costs to be determined by the trial judge.

10 The motion for leave to appeal the orders of Howden J. by Nichols was ill conceived and ultimately unsuccessful. The driving motive for the leave to appeal motion was Nichols' inability to pay the sum of \$5,500 rather than grounds which would satisfy the requisite tests for leave pursuant to Rule 62.02 (4). In addition, Nichols faced a number of procedural errors and difficulties in respect of her leave motion. It was clear to me that the leave to appeal motion was seen as an opportunity to re-litigate the issues that had already been argued before Howden J. on November 1, 2004 as evidenced by his three endorsements.

11 By Nichols pursuing this course of action, the inevitable result was the escalating legal expense incurred by the Estate Trustee. Those costs incurred by the Estate Trustee have the effect of depleting the Estate's assets, which is detrimental to the minor child of the deceased who is a beneficiary of the Estate.

12 The Nichols motion for leave to appeal has caused interim delay in addition to increasing legal fees and has further delayed the ultimate disposition of the issues between the parties. The amount of the Estate is small and cannot withstand the cost generated by unnecessary and unmeritorious litigation. Whereas, the costs order of Howden J. was in the amount of \$5,500, now the costs incurred by the Estate Trustee associated with this unsuccessful leave to appeal motion is approximately three times that of the amount ordered by Howden J. Certainly, Nichols ought to have considered her ability to pay any such costs before she mounted her ill-fated leave to appeal. The Estate Trustee ought not to be saddled with these unnecessary costs. Rather, I find that these costs ought to be borne entirely by Nichols.

13 Accordingly, I find that the costs of Nichols' dismissed leave to appeal motion are to be fixed on a substantial indemnity basis payable by Nichols. See *Marshall Estate, Re.* [\[1998\] O.J. No. 258](#) (Ont. Gen. Div.), *Schweitzer v. Piasecki*, [\[1998\] O.J. No. 177](#) (Ont. Gen. Div.), *Merry Estate v. Merry Estate*, [\[2002\] O.J. No. 4472](#) (Ont. S.C.J.), *Josephs Estate, Re.* [\[1993\] O.J. No. 1672](#) (Ont. Gen. Div.), *Turner v. Hancock* (1882), 1879 T. 249, [(1882), 20 Ch. D. 303].

14 Returning to the Estate Trustee's Bill of Costs, on a substantial indemnity basis, the amount of \$15,190 is claimed for fees based on 43.40 docketed hours. Each side filed a Factum and Brief of Authorities. While I do not doubt that those hours were docketed, I find the number of hours and hourly rate high. I would fix the fees in the

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amount of \$10,500 plus GST. I would also fix disbursements inclusive of GST in the amount of \$1,892.22.

Disposition

15 Costs are hereby fixed in the amount of \$10,500 plus GST for fees together with disbursements in the amount of \$1,892.22. Said costs are payable by Brenda Nichols to the Estate Trustee within thirty days from the date of this order.

Order accordingly.

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