

In the Estate of Van Spengen, deceased

[Indexed as: Van Spengen Estate (Re)]

80 O.R. (3d) 317

Ontario Superior Court of Justice,

Flynn J.

February 1, 2006

2006 CanLII 2780 (ON SC)

Civil procedure -- Costs -- Costs against solicitor personally -- Counsel for Estate Trustee and Solicitor not complying with court order that [page318] costs submissions be limited to three double-spaced typed pages -- Estate Trustee and counsel being ordered to pay part of beneficiary's costs personally on joint and several basis.

Counsel were ordered to deliver written costs submissions not exceeding three double-spaced pages. Counsel for the Estate Trustee and Solicitor submitted a volume containing 13 different tabbed documents.

Held, a costs order should be made against the Estate Trustee and his counsel personally.

There had to be some consequence for ignoring the court's order. Of the costs that were to be paid to the objecting beneficiary, the sum of \$600 was to be paid personally by the Estate Trustee and his counsel on a joint and several basis, without recourse to the estate.

RULING on costs.

K.A. Scherl, for applicant.

N. de Kning, for beneficiary M. Schmitt.

[1] Endorsement of FLYNN J.: -- In my reasons of November 28, 2005, I wrote that unless I were otherwise persuaded by submissions or offers the objecting beneficiary should have her costs. I have not been otherwise persuaded by anything contained in the submissions of the parties. I should like to direct some more remarks to those submissions.

[2] In my endorsement, I ordered both counsel to deliver written costs submissions, not exceeding three double-spaced pages, together with (his/her) form 57B and bill of costs and any relevant offers to settle. I have been shown no relevant offers. Both parties did deliver a costs outline. And both delivered written costs submissions.

[3] Counsel for Margaret Schmitt complied with my order in that his written submissions did not exceed three double-spaced typed pages.

[4] Ms. Scherl, on the other hand, submitted a volume containing 13 different tabbed documents, including the Affidavit of the Estate Solicitor and a document entitled Costs Submissions of the Estate Trustee, Peter M. Miller, on passing of accounts consisting of more than six pages and a bill of costs seeking \$5,280.60 in costs. This amount seems to be based exactly on the actual rates charged by Ms. Scherl as solicitor (\$150 per hour) and for an unspecified student (\$75 per hour).

[5] A court order or direction as to costs must never be taken as a mere suggestion. I did not ask for any affidavit material. And I specified the maximum length of costs submissions. There must be some consequence for ignoring this court's order. In this case, the consequence is that of the costs I herein order to be paid to [page319] the objecting beneficiary, Margaret Schmitt, the sum of \$600 shall be paid personally by the Estate Trustee and Solicitor, Peter Miller and his counsel, Karen Scherl, on a joint and several basis,

without recourse to the estate.

[6] Otherwise Ms. Schmitt's costs shall come out of the estate.

[7] Margaret Schmitt was represented by John L. Gignac until September 14, 2005 and by Miller, Thomson LLP thereafter. Mr. Gignac's actual account of \$936.25 including G.S.T. should be allowed in full.

[8] Miller Thomson's actual fees amount to a "block fee" of \$3,500. This is a reduction of \$934.50 from the amount that would normally be achieved by using the firm's actual billing rates. The author of the bill of costs sets out that this \$3,500 represents, in the main, an effective substantial indemnity hourly rate for Mr. de Kning of \$154.05. Mr. de Kning was called to the bar in 2003. In my view, that would be an acceptable substantial indemnity rate if I accepted that counsel with only two years experience should properly command \$195 per hour on a full indemnity (actual rate) basis. And I do not.

[9] The crux in determining any costs award is to fix what is fair and reasonable, given the reasonable expectation of the losing party. And while it is useful in this regard to compare both sides' costs outlines to see that the Applicant Estate Trustee/Solicitor would claim total fees of \$4,297.50, compared to Ms. Schmitt's almost equivalent claim of \$4,375 for fees, one cannot but help notice the rate differential. Apparently, Ms. Scherl is charging her time out at \$150 per hour. In my view, Mr. de Kning's hourly rate on a substantial (not full) indemnity basis should not exceed \$125. A reduction to achieve that amount would be the only reduction that I would make in the costs to be awarded.

[10] Accordingly, Ms. Schmitt is entitled to her substantial indemnity costs in the amount of \$4,200 of which \$600 shall be paid personally by the Estate Trustee/Solicitor and counsel as set out above. The balance is to be paid out of the estate. These costs are to be paid within 30 days.

Order accordingly.
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