

Hull on Estates Podcast #34

Security for Costs Motion in the Context of Estate Litigation

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Craig Vander Zee: Hello, welcome to Hull on Estates. You are listening to Episode #34 of our podcasts on Tuesday, November 14th, 2006.

Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull and Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.

Justin de Vries: I'm Justin de Vries.

Craig Vander Zee: And I'm Craig Vander Zee, and today we are going to talk a little bit about security for costs motions in the context of estate litigation. When Justin and I last spoke on security for costs motion, it was in a general context with the knowledge that we were going to discuss the specific estate context later on. And in our last day, we chatted about the rules that govern security for costs motions including Rule 56 and 61.06 of the Rules of Civil Procedure. We talked about the general availability of such motions in a civil litigation context. We also discussed about factors you'd want to consider as to when you bring a motion for security for costs and the materials that you might consider when you bring that motion. We also chatted about the amount and form of security that you should expect to discuss in front of a court or to seek from another party and the likely security that you might receive in that regard. So with that mindset and with that background, Justin, why don't we talk today about the security for costs motion, specifically in the context of estate litigation, or contentious estate proceedings.

Justin de Vries: As you said, Craig, this is really Part 2 of our presentation or podcast on security for costs motion. And the first case that I want to look at today is *Re Bisk* which was a 1979 decision of Holland, J. and it was an appeal of a Master's decision. There were issues of due execution, testamentary capacity and undue influence. So we were talking about a Will challenge that had come up in front of a judge from the Master. There the court held that there was sufficient probable grounds to question the capacity of the testator by the heirs-at-law. That really means the family was involved in challenging the Will. And the court held that because the family or next-of-kin would likely be not ordered to pay costs at trial, even if they were unsuccessful in challenging the Will, there should be no security for costs.

Craig Vander Zee: And just as a reminder, the *Bisk* decision was a decision in 1979 and specifically what you are referring to Justin, I believe, is the decision that is the appeal that the court considered, Justice Holland considered, in respect of a Master's decision where costs had been awarded, that is, sorry, security for costs had been awarded.

Justin de Vries: Yes, and it was overturned. And really again, the point to keep in mind is the court said that certainly in 1979, and we'll talk about how the landscape has changed somewhat, but in 1979 it was regarded as a well-established right that a family or heirs-at-law could really put a beneficiary of an estate trustee to proof to show in solemn form that is in open court, that a Will was in fact valid. And because of that, the courts were reluctant to award costs against a family or an heir-at-law even if they were unsuccessful. So that's still true to some extent, but the courts have looked at it from a different perspective when it comes to costs. And the next case that we're going to look at is the *Moses Estate* case. The *Moses Estate* was a decision of the Manitoba Court, it was a decision by a Master who really looks at procedural aspects of litigation. It was a 2001 decision and again, you can see here how the landscape is beginning to change a little bit in the estate context of security for costs. There, a sister in California brought a Will challenge and the estate trustee responded by bringing a security for costs motion against that sister in California. The Master relied on the *Bisk* decision and also noted that there was a modest estate of \$200,000 involved. And what the court ultimately held was that security for costs were not appropriate in the situation and the court focused on the year-long delay that the estate trustee took in bringing that motion for security for costs. And last time we talked about how delay can be fatal. If you know that their situation, that security for costs would be appropriate, you have to move with some expediency to bring that motion on. In this case, the court held that the sister who was in California for the last 40 years was well-known to the estate trustee and the fact that she was out of country and could have moved a lot quicker. However, the court did recognize that heirs-at-law or family may be required to post security for costs at the end of the day. So that's where we see at least a recognition by the court that there are instances that even heirs-at-law who are challenging, really making a frivolous Will challenge, can still be required to pay costs at the end of the day, therefore opening up the possibility of security for costs at an earlier instance if that motion is brought.

Craig Vander Zee: As well, in *Moses*, the court addressed the issue, to some degree in any event, the issue of costs that might be awarded at the end of the matter as well, depending on the success of the matter and it appears that the court considered the fact as you've mentioned, that the estate was modest, about \$200,000 in size. And that court further noted that the costs might not automatically be awarded to the challenger at the end of the trial. In other words, it seems that the court seemed to take some recognition of the fact in considering the motion for security for costs, wrongly or rightly, that costs at the end of the day could be awarded against the challenger, or perhaps the challenger may not receive any costs as part of the ultimate disposition, even if traditionally and historically cost awards seem to go that way, that is where everybody in a Will challenge seems to have part or all of their costs paid for by the estate.

Justin de Vries: I think that what the court was signaling in the end was that security for costs could be posted in the right circumstances, but in *Moses* there wasn't the right set of facts in order to do that. The next case that we can look at is the *Boustios* case and it was a decision of Madam Justice Greer in 2004. And that case really did depart from *Bisk*. It signaled that there was really a new world in estate litigation and the court recognized

and commented on the fact that costs are not automatically paid out of the estate where a family or heirs-at-law have brought a Will challenge.

Craig Vander Zee: It's probably important in this case, as well, Justin, to note the facts because obviously decisions, and in this case of Justice Greer, in the province of Ontario, it's always important to consider what was before the judge in terms of the factual underpinnings.

Justin de Vries: In this case, Dimitrios or Jimmy, had died without children or a spouse. He had a brother in Greece who challenged the Will and the brother challenged the Will on lack of knowledge and approval, capacity and undue influence. So really, all aspects were thrown at the Will to say it was not valid. The estate trustee and beneficiary was the deceased's nephew, so again, here we have a situation where you do have family challenging but it's a family member who is really benefiting under the Will.

Craig Vander Zee: And in this case, the deceased was not married and had no children.

Justin de Vries: That's right. And what the brother in Greece claimed is that there was a Will in 1982 which left most of the estate, if not all of the estate in both Canada and Greece, to him. So, of course, he wanted to see that Will upheld and the later Will that benefited the nephew of the deceased set aside. Now Examinations for Discovery had been completed though undertakings remained outstanding. The court held in looking at the evidence before it that there was no real proof of undue influence, and the medical evidence was also weak. The medical evidence that the brother in Greece was relying on was the fact that his son, who was a doctor, claimed that his uncle did not have capacity, but it was unclear to the court whether the son or nephew in Greece had even examined his uncle, and then secondly, whether or not the son in Greece was prepared to come and testify in court in Ontario. As well, the brother in Greece had not provided the names of witnesses that would be called at trial. So in the end, Madam Justice Greer pointed out that the estate trustee and sole beneficiary had a good relationship with his uncle and was family and that the brother in Greece was one of only four surviving siblings who actually challenged the Will. Again, no evidence of undue influence and the medical evidence was also weak because people were unsure as to whether or not the challenger's son or nephew was prepared to come to Canada or if he had examined his uncle directly. The signature of the deceased was also confirmed by the lawyer who witnessed the Will here in Canada. So according to Madam Justice Greer, the brother in Greece should really assess his position based on the evidence that had been put forward and a security for costs motion would do that. And as such, Madam Justice Greer ordered that security be posted, and it was a significant sum. And as we've discussed in the past, Craig, as you know, the court will not award a token amount, and that really had the effect of making the brother in Greece decide whether or not he was prepared to post this and go ahead.

Craig Vander Zee: In this decision, there are some interesting observations and conclusions, and frankly, distinctions that are made by Justice Greer and the prior cases. She specifically recognizes and considered the *Bisk* case acknowledging that it is pretty much 25 years old by the time that this case comes before her. And that the difference, or

one of the significant differences that the issue of whether the case is frivolous or not did not seem to be prior consideration of the judge in *Bisk* although it was a consideration, but it wasn't primarily dealt with. And then further, that in the *Bisk* case, it was the next-of-kin making the claim and her distinction that in this case, it was only one of the deceased's four surviving siblings that was challenging the Will. In other words, there wasn't a consensus in the family towards the challenge of the Will itself.

Justin de Vries: And the one other factor I would add is the costs. The court recognized that the landscape, as I said before, has changed in the respect of an automatic award of costs when family are involved. There is no guarantee that the estate is going to pay the costs of a Will challenge and in fact, a challenger, next-of-kin or heir-at-law or family may be required to post security for costs because they will not be successful at trial. So there are a couple of conclusions I think we can draw now, Craig, from the consideration and discussion that we've had over the last two occasions. The first one I would mention is delay. Delay is always fatal, we saw that in the *Moses* case. If you have the right facts for security for costs motion, you have to move quickly so that the other side doesn't suffer any prejudice, or secondly, is lulled into a false sense of security that they won't face such a motion in the future.

Craig Vander Zee: Thought might also be given as the courts seem to now be willing to take this into consideration as a significant factor, is who is actually bringing the Will challenge. Whether it is a next-of-kin, or whether it is a friend of the family, or frankly, a stranger of the family, it may very well be a significant difference as to the outcome of the security for costs motion. Especially when the court considers all of the factors, such as where that person is located and whether it's frivolous or vexatious in terms of the claim being made.

Justin de Vries: And on that note, as well, the court will also look to see if there is consensus among the family. So if it's a single family member challenging the Will as opposed to the entire family, then a court is more likely to say that that single family member has a greater burden to answer when it comes to posting security for costs. So that's something else to keep in mind when dealing with family. In general, I think it's fair to say on the frivolous and vexatious aspect of a motion for security for costs, that there has to be pretty clear evidence that a Will challenge lacks merit and where you do have that evidence, then the court is more likely, obviously, to grant security for costs against the challenger. And we saw that in the *Boustios* case where, in the end, the court felt that there wasn't really a lot of evidence to support a claim against the Will that the uncle swore at the end of the day.

Craig Vander Zee: Again, as with motions for security for costs in the civil context, we should also be mindful of the fact that even in the estate context, you would still have to have the proper materials before the court by way of a motion, a supporting Affidavit and a Bill of Costs, and that type of presentation would be expected before the court. In the end, they'd still have to assess the nature and the amount of the costs.

Justin de Vries: And then finally, just a word on impecuniosity, which is something that needs to be considered as well. Even where the court is prepared to say that a challenger should post security in the right circumstances, where the challenger can demonstrate to the court that in fact they don't have a lot of assets, but that their claim is nevertheless meritorious, the court can order that no security for costs be posted because the courts are always interested, of course, in allowing a meritorious claim to go forward and not willing to put the stop or the brakes on that just because an individual doesn't have money. So impecuniosities as in the civil context is something that can be considered as well in a security for costs motion.

Craig Vander Zee: Lastly, one factor in bringing a motion for security for costs is the cost of the motion itself, quite apart from the costs that are being sought to be protected. In considering whether to bring it along with all the other factors and considerations we've discussed in our podcast, there is also the question as to how much it's going to cost. And if it's going to be a bitter fight with respect to the motion for security for costs in and of itself, that may be a factor for or against bringing the motion itself. And with that, Justin, I think that ends today's podcast. It's been enjoyable speaking with you once again.

Justin de Vries: Thanks, Craig.

This has been Hull on Estates with the lawyers of Hull and Hull. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.

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