NOVA SCOTIA COURT OF APPEAL

Citation: *Morrissey v. Morrissey Estate*, 2018 NSCA 96

Date: 20181130
Docket: CA 472795
Registry: Halifax

Between:

Glenda Morrissey

Appellant

v.

Tanya Elliott, in her capacity as the Personal Representative of the Estate of Joseph F. Morrissey and Tanya Elliott in her personal capacity

Respondents

Judges:	The Honourable Chief Justice J. Michael MacDonald The Honourable Justice Cindy A. Bourgeois (concurring) The Honourable Justice Linda Lee Oland (dissenting)
Appeal Heard:	September 13, 2018, in Halifax, Nova Scotia
Subject:	Costs; standard of review; discretionary decision
Summary:	A mother and daughter challenged a will executed by the mother's son (daughter's brother). That proceeding (under the same file number) morphed into three claims against the estate; namely (a) the mother and daughter's claim for the return of personal items, (b) the mother's debt claim, and (c) a debt claim advanced by the mother on her husband's behalf (the deceased's father). The trial judge ordered the personal items to be returned to the mother and daughter, while dismissing both debt claims. Costs were ordered against the mother and daughter jointly. The daughter appealed the costs order, asserting that she was successful in the one aspect of the claim she advanced.
Issues:	(1) The standard of appellate review

(2) The merits of the appeal

Result: The majority dismissed the appeal, concluding (a) the judge's discretionary costs order was entitled to deference, (b) his factual findings would stand, short of palpable and overriding error, and (c) his order was a proper exercise of discretion based upon unassailable factual findings; namely that the mother and daughter "were essentially acting with one interest" and that "the matter was conducted jointly".

Bourgeois, J.A. concurring: Without having the benefit of a full record of the evidence and submissions made to the judge, this Court is not in a position to question the factual finding that the mother and daughter "were essentially acting with one interest". The judge was in the best position to make such an assessment.

Oland, J.A. dissenting: The judge erred in principle and his costs award was so clearly wrong as to amount to an injustice. The daughter claimed for the return of her father's walking stick and a painting. The judge described the personal property claim as merely "a side issue" to the mother's two substantial monetary claims. In one paragraph at the end of his 79-page decision, he decided the daughter's claim in her favour. Nevertheless, he determined that she was jointly liable with her mother for costs of some $11,000.

The judge stated that the two were joint applicants and were essentially acting in one interest. He relied on the fact that the mother and daughter had brought an application for proof in solemn form. However, that application did not proceed, and its hearing date was used to hear the monetary and personal property claims. There was never an application before the judge; and the two were not co-applicants to whom a presumption of joint and several costs exposure could apply. The daughter's affidavit evidence in support of her mother's claims did not transform her into someone acting in one interest with her mother. That the mother may be judgment proof is not a legal basis to award costs against the daughter. The parties agreed that the appeal book would not include

material from the hearing that was unnecessary and irrelevant to this costs appeal. In the particular circumstances here, the abbreviated appeal book does not preclude an appeal against joint liability.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 20 pages.

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Respondents

Judges:	MacDonald, C.J.N.S.; Oland and Bourgeois, JJ.A.
Appeal Heard:	September 13, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S. and Bourgeois, J.A. concurring; Oland, J.A. dissenting
Counsel:	Peter C. Rumscheidt, for the appellant Ronald R. Chisholm, for the respondents

Reasons for judgment:

OVERVIEW

[1] The appellant challenges a Supreme Court costs order. For the following reasons, I would dismiss the appeal. Simply put, in my view the impugned order reflects an unassailable exercise of judicial discretion.

BACKGROUND

[2] The parties to this litigation are grieving the death of Truro resident, Joe Morrissey. The appellant, Glenda Morrissey, is his sister and the respondent, Tanya Elliott, is his widow. Glenda, along with her mother, Geraldine Morrissey, jointly challenged Joe's will benefitting Tanya. They alleged that Tanya unduly influenced him. They also filed claims against Joe's Estate. One was a joint claim by Glenda and Geraldine for six items of personal property. A second was a $54,000 debt claim filed by Geraldine. A third was a $7,000 debt claim filed by Geraldine on behalf of her husband, Glen Morrissey (Joe and Glenda's father), who had also recently passed away. Glenda filed affidavits supporting all three claims.

[3] Glenda and Geraldine eventually abandoned their challenge to the will. Instead the parties agreed that the designated court time would be used for the three Estate claims.

[4] Justice Jeffrey R. Hunt of the Supreme Court (sitting in Probate) heard the claims in September of 2017. By all accounts, Geraldine's two debt claims were the major focus. Justice Hunt delivered an oral decision approximately two months later. He ordered the personal property returned to Glenda and Geraldine but dismissed Geraldine's two debt claims. Central to this appeal is the judge's order for costs of approximately $11,000, payable jointly and severally by Glenda and Geraldine.

[5] The parties agree on the amount of costs but Glenda insists that she should not be responsible since she was successful in the one claim (personal property) that she advanced. Instead, she suggests, only her mother should be liable.

[6] Mr. Peter C. Rumscheidt represented both Glenda and Geraldine before Justice Hunt. He continues to represent Glenda on appeal. Since Glenda's submissions before us are (on paper at least) against her mother's interests, we had

Mr. Rumscheidt confirm that Geraldine was aware of and supported Glenda's appeal.

ISSUES

[7] Since this is a costs appeal, the appellant must first obtain leave. That is the first issue to be addressed.

[8] Then, in his factum, Mr. Rumscheidt identifies three issues challenging the decision:

> [31] The Appellant submits that Justice Hunt erred as follows:
>
> a) In holding that Glenda was jointly and severally liable with Geraldine and the Estate of Glenn Augustus Morrissey for costs in the amount of $11,162.50.
>
> b) In concluding that Glenda together with Geraldine Morrissey were co-applicants with respect to the proceedings.
>
> c) In finding that both Glenda and Geraldine Morrissey were acting with one interest in respect to the proceeding.

[9] His first two issues are more appropriately merged as one; namely whether the judge erred by considering Glenda and Geraldine co-applicants for costs purposes. Therefore, my analysis will answer the following questions:

1. Should leave be granted?
2. Was it an error in principle to consider Glenda and Geraldine co-applicants for costs purposes?
3. Was it an error to conclude that Glenda and Geraldine were acting with one interest?

When addressing each of these issues, I will initially identify the deference, if any, owed to the trial judge.

ANALYSIS

Should leave to appeal be granted?

[10] The bar for securing leave to appeal is low. A party must simply raise an arguable issue that could result in an appeal being allowed. See *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶ 18. Glenda was

ordered to pay costs despite being successful on the one claim she advanced. In my view, that alone is enough to grant leave.

Was it an error in principle to consider the appellant and her mother co-applicants for costs purposes?

[11] I start with this basic premise. An order for costs represents an exercise in discretion commanding deference to the trial judge. We will interfere only if the judge made an error in principle or the award is just plainly wrong. See *Casavechia v. Noseworthy*, 2015 NSCA 56 at ¶ 42-43.

[12] This ground suggests that the judge erred in principle by not properly interpreting the pleadings. I disagree for the following reasons.

[13] Ironically, both sides assert that the pleadings support their respective positions on this issue. Glenda insists that three distinct claims were filed and she was a claimant in only one, and a successful one at that. She explains in her factum:

> ***Justice Hunt Erred in finding Glenda and Geraldine jointly and severally liable***
>
> [41] The present case required a departure from the general rule to do justice between the Parties. Glenda Morrissey, a party who sought only the return of property, which she obtained, is now jointly and severally liable for costs in the amount $11,162.50. The majority of these costs stem from the two (2) Notices of Claim filed by Geraldine Morrissey, one in her personal capacity, and one in her capacity as the Personal Representative of the Estate of Glen Morrissey.
>
> [42] In finding Glenda jointly and severally liable for costs, Justice Hunt reviewed a number of authorities which he concluded "create a prima facie expectation of joint and several cost exposure as between co-applicants." In asserting that Glenda and Geraldine were co-applicants, Justice Hunt relied on the fact that Glenda and Geraldine had jointly filed an Application for Proof in Solemn Form (which was discontinued) and that the debt and property claims (filed as separate Notices of Claim) had proceeded. Justice Hunt concluded that while there were three (3) Notices of Claim, the matter proceeded as one Application – rendering Glenda and Geraldine co-applicants and resulting in joint liability. This is an error in principle that amounts to an injustice.
>
> ***Glenda and Geraldine were not co-applicants for costs purposes***
>
> [43] Glenda and Geraldine (personally) were co-applicants to only one (1) of the three (3) claims before the Court – the claim for the return of personal property from the Estate. Glenda and Geraldine were entirely successful in this regard – Justice Hunt ordered Ms. Elliott to return the property forthwith.

> [44] The Appellant contests Justice Hunt's assertion that she was a co-applicant for the purposes of the other two claims against the Estate. Geraldine Morrissey in her personal capacity brought a claim for the return of $54,000 against the Estate. Geraldine Morrissey, in her capacity as the personal representative of the Estate of Glen Morrissey brought a claim against the Estate for $7,000.
>
> [45] Glenda was not a co-applicant for the purposes of either of these claims. This is a relevant consideration for costs purposes. In finding that Glenda was a co-applicant and applying the *prima facie* expectation of joint and several liability Justice Hunt made Glenda responsible for the cost consequences for two claims that she was not a party to.

[14] Tanya insists that the trial judge got it right when he concluded that only one application was ever filed, with Glenda and her mother being co-applicants. Justice Hunt observed:

> I have reviewed Mr. Chisholm's draft form of Order together with correspondence of both counsel on the question of what parties ought to be named in the costs portion of the Order. It is acknowledged that Geraldine Morrissey in her personal capacity and as the personal representative of the Estate of Glen Morrissey ought to be named. There is disagreement with respect to whether Glenda Morrissey ought to be included as jointly and severally liable.
>
> It may be helpful to remember how the matter originally commenced. It was an Application for Proof in Solemn Form jointly by Geraldine Morrissey and Glenda Morrissey. Subsequently, it was agreed to transition the Proof in Solemn Form matter to an adjudication of the debt and property claims. While there were three Notices of Claim, the matter did proceed as one Application.

[15] In my respectful view, the judge got it right. The record reveals that Tanya was responding to a barrage of legal attacks advanced by Glenda and her mother. They jointly attacked the will. There was a threat to challenge the validity of a deed from Joe to Tanya. Then there were the three claims against the Estate. Mr. Rumscheidt acknowledges all this in his factum, beginning with the application challenging the will:

> ***History of Legal Proceedings Leading to the Costs Decision***
>
> [20] The Application was set down for February 21, 2017. Ms. Elliott filed a Notice of Objection to the Application on February 16, 2017. At the request of counsel, the original hearing date for the Application was adjourned without day. A Request for Motion for Directions was filed on March 6, 2017, and the motion date was set for April 18, 2017. At the hearing trial dates were scheduled for September 18, 19 and 20, 2017.
>
> [21] Following the April 18, 2017 Chambers hearing, Ms. Elliott sought to have the Application discontinued. As, even if the Application was successful, the

> *Intestate Succession Act* would apply, and the result would be the same – Ms. Elliott would inherit all of Joe's property. There was no mention of the two outstanding Notices of Claim.
>
> [22] On April 25, 2017 Mr. Rumscheidt advised that he had instructions to discontinue the Application. He indicated that the issues outlined in the Notices of Claim remained outstanding as did a Deed challenge. Mr. Rumscheidt took the position that both the Deed challenge and the Notices of Claim could be heard at the September dates. Mr. Rumscheidt further suggested that "a Consent Order could be filed consolidating the two matters."
>
> [23] On April 27, 2017, Mr. Chisholm advised that Ms. Elliott did "not agree to proceeding with the Notice of Claim and Deed challenge at the same time." Mr. Chisholm further stated that "[t]he Notice of Claim must proceed first." Following correspondence from Mr. Rumscheidt on May 9, 2017, Mr. Chisholm confirmed on May 10, 2017 that only the "s.48(1) claim for the $54,000 and the s.64(3) claim for the return of certain property" remained.
>
> [24] The Court was advised of matters on May 11, 2017. Copies of the two Notices of Claim, one for the return of property (filed by Glenda and Geraldine) and the other for monies (filed by Geraldine alone) were attached for reference. Mr. Rumscheidt advised that "the parties wish to proceed with the Notices of Claim and use the existing hearing dates for same."
>
> [25] Mr. Rumscheidt and Mr. Chisholm had a Telephone Conference with Justice Hunt on June 19, 2017. The Court sent fax correspondence on June 26, 2017 confirming the arrangements reached on June 19, 2017. The parties agreed "to convert the existing hearing dates from a Proof in Solemn Form contest to a hearing on the Notices of Claim filed by Mr. Rumscheidt's clients." Filing dates were set by the Court, and the hearing was reduced from three days to two days.
>
> [26] On August 25, 2017, Geraldine filed a third Notice of Claim against the Estate. In her capacity as the Personal Representative of the Estate of Glen Morrissey she sought the return of $7,000. All three (3) claims were heard concurrently in the Probate Court following agreement by counsel. The hearing of the three (3) claims took place on October 31 and November 1, 2017 before Justice Jeffrey Hunt.

[16] Glenda and her mother at no time discontinued their joint application challenging the will, despite an undertaking to do so (May 11, 2017 letter from Mr. Rumscheidt to the Court). Instead they used it as a foundation to advance their three Estate claims. The same court file number was used throughout. Thus, the only application ever filed was joint. The judge's finding that Geraldine and Glenda were co-applicants does not represent an error in principle in these circumstances. I would dismiss this ground of appeal.

[17] Furthermore, as I will explain under the next heading, the judge also had every right to conclude that, in addition to being co-applicants, Glenda and Geraldine also pursued a common interest in advancing this litigation.

Was it an error to conclude that Glenda and Geraldine were acting with one interest?

[18] The trial judge concluded that Glenda and Geraldine "were essentially acting in one interest" and that the matter was "conducted jointly".

> I have considered the authorities which I conclude create a prima facie expectation of joint and several cost exposure as between co-applicants. The presumptive rule favours joint liability for joint actors in litigation. There must be a reason for departing from the presumptive stance. For instance, this can be overcome where the parties conducted their cases differently, through different counsel or with different theories. That is not the case here. Both parties were represented by the same counsel throughout and were essentially acting in one interest.
>
> …
>
> After considering the matter it is my view that the Order must properly include both Geraldine and Glenda Morrissey. They were joint Applicants. The matter was conducted jointly. There is no compelling reason to depart from the presumptive rule in these circumstances.
>
> [Emphasis added]

[19] This ground of appeal attacks the judge's factual finding. Given the trial judge's obvious advantage of seeing the trial unfold, this understandably commands deference. Short of palpable and overriding error, we will not interfere. See *Housen v. Nikolaisen*, 2002 SCC 33.

[20] In my view, there was ample evidence to support this factual finding. As the judge noted, they had the same counsel. Furthermore, Glenda provided two affidavits supporting Geraldine's debt claims. I am not suggesting that being a supporting witness should have rendered Glenda liable for costs. However, this represents a basis for the judge to conclude that she and Geraldine were "essentially acting in one interest".

[21] As well, the allegations contained in Geraldine and Glenda's joint application to set aside the will are instructive. It was Glenda who signed the supporting affidavit. It depicted a motivation not just to claim their fair share from the Estate. It also included a personal attack on Tanya, alleging that she had

intimidated and threatened Joe and that she unduly influenced him to prepare and sign his will (benefitting Tanya). Glenda attested:

> 3. The facts on which this application is based are:
>
> (a) Joe signed his Last Will and Testament on June 4, 2015.
>
> (b) Joe and Tanya Lynn Elliott (Ms. Elliott) were married on June 12, 2015.
>
> (c) In or about May 2015, the deceased was diagnosed with cancer.
>
> (d) As a result of the illness and associated symptoms, Joe was receiving significant levels of medication which included mood altering substances.
>
> (e) Based on my personal observations and other information received, it is my understanding and belief that the medications being taken by Joe impacted on his mental capacity and his ability to think clearly.
>
> (f) To my understanding and belief, Joe and Ms. Elliott began their relationship in or about 2008.
>
> (g) Up to the time when Joe was diagnosed with cancer, my mother, Geraldine Morrissey ("Geraldine") and I were in regular contact with Joe.
>
> (h) Even before Joe was formally diagnosed with cancer, he was showing significant health problems. Once these problems began to surface, Ms. Elliott actively took steps to isolate Joe from my mother and me.
>
> (i) Ms. Elliott became more and more controlling in her efforts to isolate myself and my mother from Joe.
>
> (j) Based on my personal observations and available information, it was and is my belief that Ms. Elliott was intimidating and threatening towards Joe with the goal of restricting access to my mother and me.
>
> (k) It is my belief and position and that of my mother Geraldine that Joe's execution of his Will was made at a point in time when he lacked the necessary testamentary capacity to do so. In addition, or alternatively, it is our position that Joe's execution of the Will was a result of undue influence and pressure exerted upon him by Ms. Elliott and that the execution of the Will was not a voluntary act by Joe.
>
> [Emphasis added]

[22] A fair reading of this record, therefore, reveals much more than individual bifurcated claims filed against the Estate, as Glenda submits. Instead, as the judge noted, it reveals two people acting in "one interest". Furthermore, it would appear that their joint target was Tanya.

[23] Before closing, I would like to address a point emphasized by Mr. Rumscheidt during oral submissions. He highlights the injustice he says his client would suffer should she, as the successful litigant, be responsible for costs. However, I would highlight this countervailing injustice should we grant the relief he seeks. Everyone acknowledges that Tanya deserves to receive this costs award. It is also acknowledged that Geraldine is judgment proof. Therefore, should we allow this appeal, Tanya will likely never recover the approximately $11,000 that she deserves.

[24] Therefore, in these exceptional circumstances, the judge's decision to order Glenda jointly and severally liable for costs was an unassailable exercise of discretion. I would not disturb it.

Disposition

[25] I would dismiss the appeal and award the respondent, Tanya Elliott, costs on appeal of $1,000.00 (inclusive of disbursements).

MacDonald, C.J.N.S.

Concurring Reasons for Judgment: (Bourgeois, J.A.)

[26] I agree with the analysis and conclusion set out by the Chief Justice. However, there is an additional reason why I defer to the trial judge's finding that the appellant and her mother were joint actors pursuing a common interest.

[27] As a preliminary matter, it is important to review the trial judge's reasons regarding the award of costs. In a memorandum to counsel dated December 12, 2017, the trial judge set out his conclusion:

> I have considered the authorities which I conclude create a prima facie expectation of joint and several cost exposure as between co-applicants. The presumptive rule favours joint liability for joint actors in litigation. There must be

> a reason for departing from the presumptive stance. For instance, this can be overcome where the parties conducted their cases differently, through different counsel or with different theories. That is not the case here. Both parties were represented by the same counsel throughout and were essentially acting in one interest.
>
> I refer to the statements of Justice Wood in **Nova Credit Union v Giamac Inc.**, 2013 NSSC 7 where he commented on this issue as follows [para 26]:
>
> > In the circumstances of this proceeding, I am satisfied that the interests and actions of Mr. Smithers, Giamac Inc. and Mr. Giovannetti are sufficiently interrelated that any costs award in favour of the successful parties should be paid by them jointly and severally. If Messrs. Smithers and Giovannetti feel that there should be some allocation of the costs burden between them, that is a matter they can resolve between themselves.
>
> After considering the matter it is my view that the Order must properly include both Geraldine and Glenda Morrissey. They were joint Applicants. The matter was conducted jointly. There is no compelling reasons to depart from the presumptive rule in these circumstances.

[28] The appellant has not challenged the trial judge's statement of the law, nor the existence of a "prima facie" expectation of joint and several cost exposure where parties are co-applicants or are joint actors in pursuit of a common interest. As my colleague Oland, J.A. ably sets out, the pleadings raise a question as to whether the appellant and her mother should be considered "co-applicants". In my view, however, even if a strict view of the pleadings would preclude them from being considered co-applicants, joint and several exposure for costs can still follow where parties are jointly pursuing a common interest.

[29] Whether or not parties have conducted a matter in a fashion sufficient to demonstrate a common interest is, in my view, a finding of fact. It is a finding that a trial judge is in the best position to make, after considering not only the pleadings, but the evidence, submissions and the manner in which counsel presented the claims.

[30] Both of my colleagues have referenced aspects of "the record" in their respective reasons. In my view, the appellant has not provided this Court with an adequate record to permit a critical review of the trial judge's conclusion regarding the nature of how the claims were presented. Civil Procedure Rule 90.31 sets out the required contents of "the record" in an appeal of a costs award. It directs:

> 90.31 An appeal book in an appeal as to costs only must be in the format required by Rule 90.30(3) and consist of all of the following, unless a judge of the Court of Appeal directs otherwise:
>
> (a) a table of contents describing each document;
>
> (b) a copy of the notice of appeal;
>
> (c) a copy of the order and decision appealed from;
>
> (d) a copy of the pleadings, including any particulars;
>
> (e) any offers to settle, exhibits and **evidence relevant to the appeal**;
>
> (f) a reference sheet containing the heading and file number of the matter appealed, the name of the judge, and the date of the hearing and of the decision in the court below;
>
> (g) **a transcript of submissions made**. (Emphasis added)

[31] The appeal book filed with the Court does not contain a transcript of the *viva voce* evidence provided at the hearing, or the submissions of counsel. It would appear that the appellant, during a Motion for Directions heard via telephone, requested that a hearing transcript not be provided. That request was granted by the chambers judge.

[32] As noted by the Chief Justice at [19] above, deference is due to the trial judge given his advantage of seeing the matter unfold in front of him. He saw the parties in the courtroom, he heard evidence from Geraldine Morrissey, he saw how Mr. Rumscheidt posed questions and made submissions on behalf of his clients. He was able to assess nuances, which are always difficult for an appellate court to appreciate, and impossible to critique without a full record.

[33] I am mindful that the appellant, through her counsel, sought and received permission to file an abbreviated appeal book. However, it was also the appellant who chose to frame the grounds of appeal. This included a challenge as to how the trial judge characterized the conduct of the parties in the course of the proceedings, which, in turn, informed his decision on costs. Surely, a record of the proceedings is directly relevant to that issue. Surely, counsel is well-aware of the deferential standard applied not only to findings of fact, but discretionary orders of costs. It is the appellant who is well-versed with the issues on appeal and the record before the trial judge that is relevant to them, not the chambers judge. It is not the role of the chambers judge, or the respondent, to point out to a represented appellant the perils of such a request.

[34] It is ultimately the appellant who bears the burden of establishing an error by the trial judge that justifies our intervention. This burden includes providing the necessary record for the Court to assess and respond to the issues raised on appeal.

[35] In my view, the appellant cannot ask this Court to set aside the trial judge's finding that the appellant and her mother conducted themselves as joint actors with a common purpose, without the full record. Without it, I am not prepared to find the trial judge made an error in reaching that conclusion in the present circumstances.

Bourgeois, J.A.

Dissenting Reasons: (Oland, J.A.)

[36] I have read my colleagues' reasons dismissing the appeal. With respect, I am unable to agree. While I also conclude that leave should be granted, in my view the judge erred in principle and his costs award against Glenda Morrissey is so clearly wrong as to amount to an injustice.

[37] Geraldine Morrissey and her late husband, Glen Morrissey, had two children: Glenda and Joe. After Joe's passing, Glenda and Geraldine filed an application for proof in solemn form respecting his Will. They also made a claim against Joe's estate for the return of certain personal property, namely:

(a) walking cane/stick which converts into a pool cue;

(b) print of Blarney Stone Castle;

(c) Christmas ornaments made by Joe's grandmother;

(d) brown wooden cane belonging to Glen;

(e) "Fisherman" painting; and

(f) "Ship" painting.

[38] Glenda wanted two items: the walking cane/stick that had belonged to her and Joe's father, and the painting of a ship by her grandmother Rose Aylward. She alleged they were hers, and in Joe's possession on the understanding that they would be returned to her. Her mother wanted the four other items.

[39] Geraldine alone made a claim against Joe's estate for $54,000. She alleged that she had loaned this amount to Joe to purchase a mini-excavator and a truck, as

well as to purchase or renovate real estate. On behalf of the estate of her late husband, Geraldine also made a claim against Joe's estate for $7,000 for loans she alleged Glen had made to Joe.

[40] Justice Jeffrey R. Hunt heard the three claims. The evidence included affidavit evidence by each of Glenda and Geraldine; by Tanya Elliott, Joe's widow; by Jim Aylward, Geraldine's brother; and by Michael MacKay, a friend of Joe. Geraldine and Tanya Elliott were cross-examined. Glenda and the other affiants were not.

[41] At the end of the hearing, the judge gave an oral decision. Transcribed double-spaced, his reasons run 79 pages. After reviewing some of Geraldine's evidence regarding her monetary claims, the judge mentions at p. 14:

> There's a side issue to the main financial dispute. This has been called the personal property issues. There are four specific items in the possession of Joe Morrissey at his death, claimed by his mother and two items claimed by his sister.
>
> Tanya Elliott, in her affidavit appears to say she agreed with Joe Morrissey to return certain items of property to his family at some point. I will deal with those matters separately.

[42] After proceeding to consider and dismiss Geraldine's monetary claims over the next 64 pages of his decision, the judge returned to the personal property claim in the very last paragraph of his decision. It reads:

> With respect to the final issue that I intend to deal with which is personal property, my note on that appears to be missing. Okay, here, there were certain items of personal property identified in the Record and known to the parties. In her affidavit and evidence, this is referenced by Tanya Elliott. These appear to be items which she agreed for the most part. I think her affidavit may refer to two "paintings" but I find that overall if you take her paragraphs – the paragraphs of her affidavit that [inaudible coughing in background] it's referring and I find it applies to all those six items. Those are items which, it appears, based upon the conversation, and instructions or agreement that Ms. Elliott references in her affidavit that Joe Morrissey was under the belief that those were to be returned to his family at some time. Whether he had in mind that he had them on some sort of bailment, I don't think I can find that that survived his death so the time to return them is now. And those – I direct that those be returned forthwith.

[43] In the result, Glenda and Geraldine recovered the personal property they had claimed. On the other hand, the monetary claims for over $60,000 that Geraldine had brought were dismissed.

[44] The general rule with respect to costs is that, unless it is necessary in the particular circumstances to do justice between the parties, the successful party is entitled to costs. Despite Glenda's success in the only claim she had brought, namely, that for the return of her father's walking stick and her grandmother's painting, and he himself having characterized the personal property claim as a mere "side issue" which could be decided in one paragraph in a 79-page decision, the judge found her jointly and severally liable with Geraldine for costs of some $11,000.

[45] On what basis could the judge find joint and several liability? The explanation is contained in his costs decision, where the judge wrote:

> It may be helpful to remember how the matter originally commenced. It was an Application for Proof in Solemn Form jointly by Geraldine Morrissey and Glenda Morrissey. Subsequently, it was agreed to transition the Proof in Solemn Form matter to an adjudication of the debt and property claims. While there were three Notices of Claim, the matter did proceed as one Application.
>
> I have considered the authorities which I conclude create a prima facie expectation of joint and several cost exposure as between co-applicants. The presumptive rule favours joint liability for joint actors in litigation. There must be a reason for departing from the presumptive stance. For instance, this can be overcome where the parties conducted their cases differently, through different counsel or with different theories. That is not the case here. Both parties were represented by the same counsel throughout and were essentially acting in one interest.
>
> . . .
>
> After considering the matter it is my view that the Order must properly include both Geraldine and Glenda Morrissey. They were joint Applicants. The matter was conducted jointly. There is no compelling reasons to depart from the presumptive rule in these circumstances.

[Emphasis added]

[46] The judge relied on the presumptive rule favouring joint liability for joint actors in litigation. My colleagues say that the judge did not err in principle in considering Glenda and Geraldine co-applicants. For the reasons which follow, I am of the view that he did, and that this Court's intervention is justified.

[47] I begin with the standard of review. It is well-established that costs decisions are discretionary, and this Court is not to interfere lightly with the

discretion of a trial judge in setting costs. In *Casavechia v. Noseworthy*, 2015 NSCA 56, this Court outlined the law in respect of appeals from costs decisions:

> [42] An award of costs is discretionary. Hamilton J.A. in *Westminer Canada Ltd. v. Fraser*, 2005 NSCA 27 stated:
>
> > [19] Section 801.5 in Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 2002) states the following with respect to when an appeal court will interfere with the discretion of a trial judge in setting costs:
> >
> > > Even though leave to appeal has been obtained, it does not follow that the Court of Appeal will readily or lightly interfere with the discretion of the trial judge under any circumstances. The exercise of the court's discretion as to costs should be interfered with on appeal only in limited circumstances. The Supreme Court of Canada has enunciated the general rule in these words: **'This discretionary determination should not be taken lightly by reviewing courts ... [U]nless [the trial judge] considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected.'** Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, p. 32 ...
> >
> > > The proper question to ask on a motion for leave is whether the trial judge considered the relevant legal principles in arriving at a decision as to costs. ... **An appellate court may not substitute its discretion for that exercised by the court below, nor is it called upon to rehear the case. It will interfere with the disposition of costs only where the trial judge proceeded erroneously in law and failed to exercise his discretion, or where he exercised his discretion on grounds wholly unconnected with the cause.**
> > >
> > > **As had been said, an appellate court will be justified in interfering with the exercise of a trial judge's discretion only if the trial judge misdirects himself or herself, or if the decision is so clearly wrong as to amount to an injustice.**
> >
> > [20] As recently stated by this Court in **D.C. v. Children's Aid Society of Cape Breton Victoria**, [2004] N.S.J. 470 (Q.L.)(N.S.C.A.), ¶ 5, a decision to award costs is discretionary, and will not be interfered with by this Court unless wrong principles of law have been applied or the decision is so clearly wrong as to amount to an injustice. Both parties agree this is the standard of review.
>
> [Justice Hamilton's emphasis]

. . .

> [43] In *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, Justice Arbour for the Supreme Court of Canada stated at ¶ 27 with respect to the standard of review that "[a] court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong." See also *Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.*, 2010 NSCA 17 at ¶ 17 and *Wadden v. BMO Nesbitt Burns*, 2015 NSCA 48 at ¶ 54.
>
> [Emphasis added]

[48] According to his reasons, the judge relied on the fact that the matter had originally commenced as a joint proof in solemn form application, and that mother and daughter were represented by the same counsel.

[49] Had the application for proof in solemn form succeeded and Joe been found to have died intestate, Ms. Elliott would still have inherited his entire estate, as she did under Joe's Will; that is, the result would have been the same. Not surprisingly, the matter did not proceed. On April 18, 2017, hearing dates were set for September 18, 19 and 20, 2017. By April 25, 2017, counsel for the applicants had advised opposing counsel that he had instructions to discontinue, and later undertook to do so.

[50] Counsel for the parties agreed to use the time already set aside to hear the application for proof in solemn form to hear the personal property and monetary claims. This was confirmed in a Memorandum dated June 19, 2017 by the judge to counsel, which summarized their telephone conference that day:

> Counsel confirmed their intention, if agreeable to the Court, to convert the existing hearing dates from a Proof in Solemn Form contest to a hearing on the Notices of Claim filed by Mr. Rumscheidt's clients.
>
> This was discussed and agreed to.

[51] As a consequence, what the judge heard and decided were the personal property claim and the two monetary claims. The application for proof in solemn form had disappeared; he never had to consider it.

[52] At ¶15 of their reasons, my colleagues point out that Glenda and her mother had jointly attacked Joe's will, and refer to "a threat to challenge the validity of a deed from Joe to Tanya." While the application for proof in solemn form had indeed been joint, it had ended earlier with counsel's advice and undertaking to discontinue. There was not the least intimation from Ms. Elliott's counsel that opposing counsel's failure to file a formal notice of discontinuance might have been a strategic manoeuvre, and it was feared that the application might spring to

life again. The proof in solemn form application had effectively ended. It had become irrelevant.

[53] As to the deed challenge, counsel for Glenda and her mother did refer to it in the narrative set out in his factum, which my colleagues quoted in ¶15 above. However, when questioned at the hearing before this Court, he advised that the documents to challenge the deed had never issued. Since the judge could never have known of it, he could not have included it as a factor in considering whether the two were co-applicants.

[54] My colleagues at ¶16 also rely on the fact that the only application ever filed was joint, and that the same court file number was used for the hearing of the personal property and monetary claims. That may be so, but it does not change the reality that the application for proof in solemn form had ended without any judicial involvement and, for reasons of efficiency and economy of judicial resources, the hearing dates were used to hear the claims against Joe's estate. By agreement of counsel and the judge, the hearing had changed from one to decide an application on proof in solemn form to one to decide the personal property and monetary claims.

[55] In summary, there never was an application before the judge; he only heard and decided three claims. In my view, the judge erred in principle when, in deciding costs, he relied on the earlier application for proof in solemn form and stated that "While there were three Notices of Claim, the matter did proceed as one Application." This led to his unreasonable conclusion that Glenda and her mother were co-applicants. They were not; so there should never have been a presumption of joint and several costs exposure. Rather, the judge should have placed the onus on the respondents to convince him to depart from the usual rule that costs will follow success in the proceeding.

[56] I am also unable to agree that the judge did not err in concluding that Glenda and her mother were "acting in one interest."

[57] In ¶20, my colleagues observe that the two had the same counsel, and that Glenda had provided two affidavits "supporting Geraldine's debt claims." Glenda filed three affidavits. In the first dated July 11, 2017, she confirmed a conversation between her mother, her father and herself that Geraldine had detailed in her own affidavit, and a discussion with her mother about what her father had told them about his loan to Joe and what Geraldine had told her about her own loan to Joe, which again Geraldine had set out in her own affidavit. The remainder of that

affidavit dealt with Glenda's own claim for the walking stick and ship painting. Her second affidavit dated July 25, 2017 was supplementary to the first, and dealt only with her claim for two items and discussions with Joe regarding them.

[58] In her third affidavit dated August 4, 2017, Glenda referred to Tanya Elliott's affidavit of July 19, 2017 and addressed Joe's income, refuted an allegation Ms. Elliott made, and deposed as to the amount that Joe had received after his father's passing. The last item had appeared in Geraldine's own affidavit.

[59] In my view, Glenda's affidavit evidence was simply that – evidence. Her mother's monetary claims against Joe's estate pertained to private family transactions. It is not surprising that, within a small family, one person would have evidence relevant to another's claims. The family dynamic was difficult, as is evident from the affidavits and oral testimony respecting the personal property and monetary claims. However, the fact that Glenda was party to discussions or a distribution of funds after her father's passing, and so had personal knowledge and relevant information to share with the Court, does not mean that her affidavit evidence transformed her from a claimant for return of personal property to someone who was "acting in one interest" with her mother who had brought monetary claims. It is also noteworthy that she was not cross-examined on her affidavit evidence.

[60] As for my colleagues' reference to Glenda's affidavit in support of the joint application for proof in solemn form, I have already explained that that application did not proceed and was not before the judge. It is not apparent to me from his reasons that the judge considered the content of material filed with it in determining costs in respect of the three claims he decided. If he did, he would have considered irrelevant factors and exercised his discretion on grounds unconnected with the matter he was deciding.

[61] My colleagues also suggest that in determining that Glenda and her mother "acted in one interest", the judge made a factual finding and say that this Court will not intervene short of palpable and overriding error. I am conscious of the deference to which the judge is entitled. However, after scouring the record before this Court on appeal, I cannot clearly identify how the judge could make such a factual finding. I have already explained why Glenda's affidavits in support on the non-starter of an application for proof in solemn form, which contained evidence that supported her mother's claims, should be discounted. That leaves only the fact that the two claimants used the same lawyer in presenting their claims and that, by agreement of counsel and the judge, their claims were presented at the same

hearing rather than separate hearings. In my estimation, these minor procedural attributes are not sufficiently substantial or convincing to support any finding of fact that the two had "acted in one interest" and so should be jointly and severally liable for costs.

[62] In his submissions to the judge on costs, counsel for Ms. Elliott wrote that Geraldine does not own real property, is 83 years of age, and effectively immune to any Order to pay costs. In his factum to this Court, Glenda's counsel repeated those submissions on which Ms. Elliott had relied. He then added that, unlike Geraldine, Glenda owns real property, has full-time employment and would not be immune to an order related to costs.

[63] This material was the basis for the indication in ¶23 above that, unless the costs decision finding Glenda and Geraldine jointly and severally liable is upheld, Ms. Elliott will not receive the costs awarded her. My colleagues highlight this in what they characterize as a "countervailing injustice" should this Court allow the appeal.

[64] As is so clearly evident from the judge's decision on the merits of the claims before him, Geraldine's monetary claims were the ones which required detailed consideration. The inventory value of Joe's estate was $35,460. Geraldine claimed $54,000 personally, and over $7,000 on behalf of her husband's estate. The disposition of the monetary claims was of critical importance to Joe's estate and to his widow and sole beneficiary.

[65] Ms. Elliott could have made a motion for security for costs in regard to Geraldine's claims pursuant to Civil Procedure Rule 45 which provides a remedy for a party who defends a claim and, if successful, will experience undue difficulty in realizing on a judgment for costs. The motion might even have ended those claims. She chose not to do so.

[66] I cannot agree that justice calls for the respondent to recover costs from Glenda, who wanted two items of largely sentimental value returned to her and whose claim the judge characterized as "a side issue." Even if Geraldine should be judgment proof, that is not a legal basis to award costs against Glenda. An order of joint and several liability in the particular circumstances would result in great unfairness to Glenda.

[67] In summary, if the judge's determination that Glenda and Geraldine acted "in one interest " was a factual one as suggested, it was one without an evidentiary basis in the record on appeal and so would be a palpable and overriding error.

[68] Having considered the majority opinion, I turn to the separate concurring reasons by my colleague, Justice Bourgeois. She faults the appellant's counsel for not providing this Court with "an adequate record to permit a critical review" of the judge's costs decision. She says that, her lawyer having chosen not to do so, the represented appellant is precluded from asking this Court to set aside the judge's determination as to liability for costs.

[69] I begin with what Rule 90.31 requires on a costs appeal. The relevant portion reads:

> 90.31 An appeal book in an appeal as to costs only must … consist of all of the following, unless a judge of the Court of Appeal directs otherwise:
>
> …
>
> (e) any offers to settle, exhibits and evidence relevant to the appeal;
>
> …
>
> (g) a transcript of submissions made.

[70] Not every costs appeal needs to present the full record of the hearing below. The Rule expressly contemplates and permits a streamlined version in certain instances, including when the material otherwise stipulated would be irrelevant. This makes sense. Litigation is an expensive endeavour, and most parties are not wealthy people. Having irrelevant evidence transcribed and copies of the transcription produced increases the costs of an appeal. This can be an access to justice issue.

[71] The appeal book did not contain a transcript of the *viva voce* evidence at the hearing of the personal property and monetary claims. At the Motion for Directions, counsel for the appellant advised the Chambers judge that he and counsel for the respondent had discussed the contents of the appeal book. The lawyers were inclined to include the transcript of the oral decision on the merits, but not one of the *viva voce* evidence which was limited to cross-examination on some affidavits. Both counsel agreed that nothing in that evidence would be referenced in or relevant to the costs appeal. Counsel for the respondent added that there was no dispute about the amount of costs, and only one concise issue on the appeal.

[72] An appeal book can only be abbreviated if a Chambers judge permits. The Chambers judge who heard this Motion required "a clear assurance" on the record from both counsel that nothing in the cross-examination evidence would bear on the issues that either of them was going to make on the costs appeal. Each counsel gave him that assurance. Only then did the Chambers judge allow that the evidence on cross-examination need not be included in the appeal book.

[73] Counsel know their case best. Here, they agreed that certain evidence was irrelevant and would not be helpful to advance the argument of either side. They satisfied the Chambers judge that a transcript of that evidence need not be presented on the costs appeal. It is my view that, in these circumstances, their judgment should be respected and any criticism of it should be circumspect.

[74] According to my colleague, the failure by appellant's counsel to provide this Court with an adequate record prevents the appellant from asking that the trial judge's finding that she and her mother were joint actors with a common purpose be set aside. With respect, I disagree.

[75] It was both counsel who asked that the appeal book not include what both considered to be irrelevant and unnecessary material. Moreover, the judge read the affidavit evidence and heard the *viva voce* evidence. He could have mentioned evidence from the cross-examination of the affiants in his analysis and reasons on costs, but did not do so. There is no indication whatsoever that any of that evidence played any part in his reasoning.

[76] In this particular situation, it is my view that the fact that the appeal book did not contain the transcript of the cross-examination evidence does not bolster the deference owed to the judge's decision as to joint and several liability for costs.

[77] I would allow the appeal, and amend the costs Order issued December 18, 2017 so that "Geraldine Morrissey and the Estate of Glen Morrissey are jointly and severally liable for costs of $10,850 plus disbursements of $312.50 for a total costs order of $11,162.50." I would award the appellant costs on the appeal of $1,000, inclusive of disbursements.

Oland, J.A.