

**In the Court of Appeal of Alberta**

**Citation: Nazarewycz v. Dool, 2009 ABCA 70**

**Date:** 20090303

**Docket:** 0701-0117-AC

0701-0190-AC

0701-0191-AC

**Registry:** Calgary

**Between:**

**Jerezy Nazarewycz**

Appellant (Respondent)

- and -

**Lawrence William Dool and Cyril Fred Dool**

Respondents (Applicants)

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**The Court:**

**The Honourable Mr. Justice Clifton O'Brien  
The Honourable Madam Justice Patricia Rowbotham  
The Honourable Madam Justice Colleen Kenny**

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**Memorandum of Judgment**

Appeal from the Orders by  
The Honourable Mr. Justice P. M. Clark  
Dated January 10, 2007, June 15, 2007 and June 27, 2007  
Filed on June 15 and 27, 2007  
(2007 ABQB 12, Docket: ES01-099495)

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## Memorandum of Judgment

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### The Court:

#### Introduction

[1] The tangled proceedings before this Court arise from an application to discontinue an action without costs. The respondents, Lawrence William Dool and Cyril Fred Dool (the Dools), commenced proceedings challenging the last will of Katherine Dool, their late aunt by marriage. Prior to discoveries and trial, and by reason of their deteriorating health and financial circumstances, the Dools determined to no longer participate in the proceedings and withdrew their objection to formal proof of the will. The subsequent application of the Dools to discontinue their action prompted the three orders, consecutively made by the surrogate judge, which are the subject of this appeal.

#### Background Facts

[2] Katherine Dool (sometimes, the deceased) died at 79 years of age in November 2001. The appellant, Jerezy Nazarewycz (Nazarewycz), was her nephew by blood and was named as executor of the deceased's last will, made on July 17, 1998 (the 1998 will). At the same time, the deceased also executed a "springing" Power of Attorney, appointing Nazarewycz as her attorney, as well as a Personal Directive.

[3] The 1998 will gave the homestead lands to Nazarewycz. An earlier will, executed by the deceased in 1992, at a time when her husband was still living, bequeathed the homestead to the Dools. Katherine Dool's husband died in 1993. The Dools swore that prior to their uncle's death, they had witnessed him eliciting a promise from his wife that the homestead would remain with his blood relatives. The Dools at the time were leasing the homestead from their uncle.

[4] The Dools in their challenge to the 1998 will provided affidavit evidence that the deceased, commencing in 1996, had begun to withdraw from socializing with her late husband's family and seemingly had become dependent on Nazarewycz and his wife, who appeared to be managing her affairs and preventing her contact with other family members.

[5] The Dools further deposed that in March 1998, Katherine Dool had been admitted to hospital and that her physician had expressed doubts as to whether she could care for herself, and suggested that she enter a nursing home.

[6] Their affidavit evidence showed that in August 1998, after the execution of her last will, her physician had made a handwritten note stating that Katherine Dool was unable to handle "her personal duties in the house". Home care notes dating from this time, approximately a month after execution of her last will, suggested some signs of dementia. Hospital discharge notes from January 1999 referenced her health condition as including "early senile dementia".

[7] The evidence of the Dools further indicated that hospital records and physician notes subsequently noted “progressive dementia”. The medical certificate following her death on November 22, 2001, recorded dementia as a “significant” condition contributing to her death.

[8] As a result of their suspicions, contributed to by the unwillingness of Nazarewycz to provide information in response to their inquiries, the Dools filed caveats in relation to Katherine Dool’s estate shortly after her death. On May 31, 2002, the Dools filed a Notice of Objection to Informal Grant.

[9] On September 18, 2002, the Dools filed a Notice of Motion seeking a direction that the will be proved in solemn form, that a personal representative be appointed to administer the estate and propound the will, and further that an accounting be directed.

[10] In response, Nazarewycz filed an affidavit in opposition to the application. His affidavit explains and disputes some of the matters deposed to by the Dools. Generally speaking, his affidavit addressed issues concerning Katherine Dool’s health before her death and her testamentary capacity, as well as relating her independence and problems with her late husband’s relatives. He further deposed that he had agreed to a meeting that had taken place between the solicitors for the Dools and Ihor Broda, the solicitor who prepared the 1998 will. He stated that the purpose of the meeting was to allay any concerns that the Dools had in respect of the 1998 will. The affidavit of Ihor Broda was also filed, setting out the circumstances relative to the preparation and execution of the 1998 will and Katherine Dool’s capacity to instruct same. The position of Nazarewycz, as expressed in his affidavit, was that the objections of the Dools to the 1998 will were made “with malice or frivolously or vexatiously”, and further that their objections were “not supported by any reliable evidence”.

#### **Mason Order**

[11] On October 18, 2002, Mason J. heard the application of the Dools and granted an order (the Mason order) providing, amongst other things:

- (a) Denying the request of Nazarewycz to informally probate the 1998 will;
- (b) Granting the request of the Dools for formal proof of the 1998 will;
- (c) Appointing The Canada Trust Company (Canada Trust) as Administrator with Will Annexed of the Estate of Katherine Dool;
- (d) Directing Canada Trust to propound the 1998 will in formal proof of will proceedings and further stipulating that both the Dools and Nazarewycz would be respondents in such proceedings, which was to be conducted by Canada Trust;

- (e) Directing Canada Trust to manage and preserve the estate assets during the formal proof of will proceedings;
- (f) Directing Nazarewycz to transfer estate documents and property in his possession or control to Canada Trust;
- (g) Directing Nazarewycz to fully and completely account and file with the court, no later than December 16, 2002, Statements of Account for two time periods:
  - (i) from the time Nazarewycz “intermeddled in, or commenced acting pursuant to” the power of attorney until Katherine Dool’s death; and
  - (ii) from the time Nazarewycz commenced acting as Executor pursuant to the 1998 will until the date of the order.

And further directing that both Canada Trust and the *Dools shall* review the accounting to ensure the accuracy of the two sets of accounts; [emphasis added]

- (h) Directing that the issues to be tried in the formal proof of will proceedings were “the deceased’s due execution, knowledge and approval, testimony capacity and any allegation of undue influence, suspicious circumstances and any other relevant matters”; and
- (i) Awarding costs payable out of the Estate in the fixed amount of \$26,000 to the solicitors for the Dools and of \$22,000 to the solicitor for Nazarewycz.

[12] No appeal was taken from the Mason order.

[13] Nazarewycz’s purported accounting in response to the Mason order did not satisfy either the Dools or Canada Trust. They considered the accounting to be incomplete and inadequate, and further, that responses made to their inquiries by his solicitor were dismissed without proper reason. Further, the health and financial circumstances of the Dools deteriorated in the time frame following the Mason order.

[14] The Dools decided to withdraw from the proceedings and to discontinue the action which they had commenced on November 29, 2001 by their filing of caveats against the estate. On September 20, 2005, they filed an application seeking to discontinue without costs.

[15] The application was supported by affidavits from each of the Dool brothers. Lawrence Dool deposed to the difficulties in obtaining the accounting and other disclosures sought following the Mason order. He then outlined his serious medical conditions in the relevant time frame. In October

2002, he had knee replacement surgery. In November 2002, he had ischemic colitis, which caused him to be placed in intensive care for a period, and in December 2002, he had his colon removed. He then developed a homosystene disorder which caused blood clotting, endangering his life. In the spring of 2003, he was further hospitalized by reason of excessive haemorrhaging and blood loss. His medical problems continued and were compounded as, in the summer of 2004, his wife had emergency surgery for cancer. Following a meeting with his lawyers in July 2004 to discuss the issues in litigation, Lawrence Dool experienced chest discomfort and shortness of breath. He was hospitalized for emergency treatment. At the time of swearing of his affidavit, he continued to have severe health problems such as to cause him concerns with respect to his ability to provide clear evidence or to properly and timely instruct his own solicitor. He deposed that his physician had instructed him “to remove himself from the Court proceedings”.

[16] In addition to his medical problems, Lawrence Dool deposed that he was a cattle farmer and that the BSE crisis in 2003 had caused severe financial loss and consequent stress and depression.

[17] Cyril Dool in his affidavit confirmed his brother’s significant medical problems and also deposed as to his own unsatisfactory medical condition. Since both brothers were required to be witnesses in the proceedings, they had determined to discontinue the proceedings rather than to further jeopardize their health by continuing the litigation.

[18] Nazarewycz responded to the Dools’s application by filing a notice of motion, dated January 3, 2006, seeking an award against the Dools both for the costs incurred by Canada Trust in administering the estate since the Mason order in 2002, and for his own solicitor and client costs.

[19] Nazarewycz supported his cross-application with an affidavit swearing that the challenge to the 1998 will was “spurious” and that there was no reason to doubt the testamentary capacity of Katherine Dool. He deposed that he had provided “a full and complete accounting” to the best of his ability to do so.

[20] The Nazarewycz affidavit did not challenge the deterioration in the health and financial conditions of the Dools.

### **Bensler Order**

[21] It is evident that the parties were then able to resolve their issues, apart from the potential liability of the Dools for costs. Bensler J. granted an order by consent on March 1, 2006 (the Bensler order), providing amongst other things:

- (a) The Mason order was varied by consent of the parties;
- (b) As the Dools had withdrawn their objection to formal proof of the 1998 will and had withdrawn their caveat, a trial of the issues was no longer necessary and the matter became non-contentious pursuant to the Surrogate Rules;

- (c) Canada Trust had accounted for its administration of the Estate and passing of formal accounting was dispensed with;
- (d) Canada Trust was entitled to receive compensation for its services from the Estate in the amount of \$32,343.06 and was also entitled to reimbursement for its legal expenses in the amount of \$10,728.16.
- (e) Canada Trust was directed to pay the balance of funds held by it, after deducting payment of its fees and legal expenses, to the solicitor for Nazarewycz to be paid to him upon probate issuing to Nazarewycz;
- (f) Nazarewycz was entitled to apply for probate of the 1998 will “on an informal, uncontentious basis”; and
- (g) The issues of costs of the proceedings to date, except as otherwise already ordered, between the Dools and Nazarewycz, including any allocation of liability for the costs incurred by Canada Trust, were expressly reserved.

[22] The application of the Dools and the cross-application of Nazarewycz, earlier set down to deal solely with costs, then proceeded to a hearing before a chambers judge on March 8, 2006.

### **Chambers Hearings and Orders**

(a) *March 8, 2006*

[23] Prior to the hearing, counsel had filed written submissions supported by case and other authorities. In light of subsequent developments, it is perhaps unfortunate that counsel in this instance were not content to rely upon their written submissions and to forego oral argument. In any event, it should be noted that the Dools’ written submission, under the heading Nature of Relief Sought, spelled out that not only were they seeking to discontinue without costs, but that they were further requesting “costs from October 9, 2002 to date, or in the alternative, costs of the within application on a solicitor and his own client basis, to be paid by the estate”. Accordingly, the appellant was made aware in timely fashion that the Dools were also seeking costs.

[24] The transcript of the oral argument discloses some sharp exchanges between the chambers judge and counsel for Nazarewycz. It is clear that the court was offended at what it perceived to be the harsh position taken by Nazarewycz, as well generally as his lack of cooperation in making timely accounting and disclosures to information reasonably sought by the Dools and Canada Trust pursuant to the Mason order. The chambers judge reviewed letters between counsel, which were exhibited to the affidavits before him, which correspondence set out the requests and responses thereto, and expressed the view that Nazarewycz was “stonewalling” rather than complying with the directions of Mason J. The chambers judge was further aggravated by counsel for Nazarewycz insisting on more than one occasion that there was not a “scrap of evidence” to support the challenge

of the Dools when it was evident that Mason J., on the evidence before him, had concluded there were genuine issues for trial.

[25] The chambers judge at the conclusion of the oral argument stated that he wanted to read the cases cited by counsel and to review the file, following which he would provide a written decision. However, nothing was said that could have prepared counsel for the developments that followed.

(b) *November 17, 2006*

[26] The chambers judge advised that he had decided to give an oral decision to be followed by a written judgment. He explained that he had requested the attendance of counsel “because there are some interesting aspects of this case that counsel probably did not really anticipate”. He continued by stating that there were aspects that he had decided to deal with at that time “which may come as a bit of a surprise to counsel and to the parties involved”. He further stated that his written judgment when it was delivered would “prevail” over his oral decision, with the exception of certain directions that were to take effect at once.

[27] The chambers judge stated that the Dools would be entitled to discontinue their action without costs, and would be entitled to recover their own solicitor and client costs against the estate. He then stated that these costs would also be borne by each of Nazarewycz and his solicitor on a joint and several basis.

[28] The chambers judge observed that the Mason order remained outstanding and was unaffected by the Dools’ discontinuance, so that the will remained to be proved in solemn form and the accounting directed by Mason J. was to be completed. (In so saying, it appears that the chambers judge had overlooked the Bensler order which had expressly varied the earlier Mason order, but more will be said in this regard later herein.)

[29] The chambers judge commented that counsel for Nazarewycz had been “ill-prepared for the application”, and then turned his attention to his lack of civility. He stated that he had found that counsel to be “over aggressive, impolite to counsel opposite and to the court” and that it was not pleasant having that counsel appear before him. He continued by stating that counsel for Nazarewycz was “disdainful of the Court process and his behaviour borders on contempt”. He later added that almost every time that counsel appeared before him, he had the impression that that counsel had disdain for the court. The chambers judge then advised that the counsel’s conduct generally, and in this case specifically, should be the subject of review. He added that he had been in contact with the Law Society and would be providing it with a transcript of the proceedings. He stated that he was directing that copies of the correspondence between counsel with respect to the application for proof in solemn form also be provided to the Law Society, together with other related materials “to permit the Law Society conduct committee to properly assess the handling and carriage of the file”.

[30] The chambers judge continued by finding that Nazarewycz was in contempt of court for having failed to provide the accounting directed by the Mason order. He directed Nazarewycz to provide the accounting.

[31] The next direction made by the chambers judge was that the will was to be propounded and proven in solemn form. He directed that Canada Trust seek legal advice for the purpose of proceeding with the application to prove the will, and further, that Nazarewycz fully cooperate, and admonished that if he did not do so, he would be subject to imprisonment or fines.

[32] The chambers judge then directed that all money and assets of the estate be frozen, as well as repayment of any assets that had been distributed.

[33] Counsel for Nazarewycz stated that he was surprised that the chambers judge had found him disdainful because he held the court in the highest regard and surmised that it was his personality that must offend the court. The chambers judge stated that that was “exactly the point” and shortly thereafter advised counsel that that was the end and that he would not put up with any further “ruminations” of counsel before the court.

[34] Finally, the chambers judge advised counsel for Nazarewycz that he had the option to return with counsel to argue the award of costs against him personally. The chambers judge also said that Nazarewycz would have opportunity “to come back and defend himself with counsel with respect to the contempt citations, and to purge his contempt”.

[35] Counsel for Nazarewycz then requested a stay pending appeal. The chambers judge advised that he never stayed his own orders and invited counsel to go to the Court of Appeal if he so chose.

(c) *December 6, 2006*

[36] Mr. Halt appeared on behalf of counsel for Nazarewycz and also as agent for Nazarewycz. Mr. Halt indicated that in the circumstances he would be requesting that the Associate Chief Justice assign another judge “to take conduct of the rehearing” of the award of costs against counsel personally. Mr. Halt made it clear that he was attending to address only the process of further proceedings and not the merits of the matter.

(d) *January 10, 2007*

[37] Written reasons for judgment were delivered on this date: *Re Dool (Estate of)*, 2007 ABQB 12. This judgment provides detailed reasons for permitting the Dools to discontinue without costs and for the award to them of solicitor and client costs from the date of the Mason order. He further directed payment of costs of the application to Canada Trust, as Administrator *ad litem*, to be paid out of the estate on a solicitor and client basis.

[38] The chambers judge reviewed the law respecting costs on discontinuance, noting that the ordinary rule is that costs are paid by a plaintiff, but this does not always apply to estate matters.

Further, the rationale in awarding costs is that the plaintiff has concluded it cannot win the case, whereas this case involved extenuating circumstances and a reasonable claim.

[39] He found that the circumstances in this case were compelling for discontinuing without costs. He cited case authority in support of health issues being a special circumstance.

[40] He also reviewed the law of costs in estate litigation, noting that frequently solicitor client costs are awarded regardless of the outcome, particularly when there are claims of fraud or undue influence making it reasonable to investigate the circumstances of the will being admitted to probate. As well, cases raising lack of capacity or undue influence can properly require formal proof of the will without costs, as long as concerns were in good faith and justified in the circumstances. He also cited case authority where costs were awarded to plaintiffs discontinuing an action when the stress of the litigation had “torn the family apart”.

[41] The chambers judge found that the conduct of the respondents was reasonable and that they had reasonable grounds for their suspicions. He further found that the aggressive, uncooperative and demeaning position of the appellant prevented assessing the respondents’ claim. On that basis, he held the appellant should be penalized in costs. Because of health and financial problems, he held a discontinuance without costs was justified.

[42] The written reasons confirm that they supersede the oral reasons. They vary the oral decision in that the chambers judge withdrew the award of costs against each of Nazarewycz and his counsel. In other words, the estate only was to bear the costs.

[43] In the concluding paragraph of the written reasons, the chambers judge queries why counsel for Nazarewycz would not be anxious to prove the will in solemn form and thereby refute the allegations of the Dools, and allay suspicions. He concluded:

Instead, counsel’s obstreperous conduct has left the Respondent in a position where, after all this time and expense, he must begin again to do what ought to have been done in the first place. Despite my questioning him about it in Court, I have been unable to determine whether counsel for the Respondent was acting on instructions from his client or simply chose to take an obstructionist position of his own initiative. In either event, I am of the view that the Respondent should consult with new counsel as to whether his interests have been properly served in this case.

(e) *June 15, 2007*

[44] This hearing appears to have been held in response to an application by Canada Trust for advice and direction. An affidavit sworn in support thereof deposed that Nazarewycz had not complied with the directions made by the chambers judge in the course of his oral decision on November 17, 2006, and in particular that the estate assets had not yet been transferred.

[45] Mr. Halt once again appeared. He advised that counsel for Nazarewycz was not available by reason of short notice of the application. Mr. Halt suggested that the chambers judge should recuse himself because there was a reasonable apprehension of bias against counsel for Nazarewycz. Mr. Halt advised that no formal application for recusal had yet been filed, but that he was prepared to take that step if necessary.

[46] The chambers judge at that time, and in the absence of counsel for Nazarewycz, also proceeded to approve and sign the formal order arising from his written reasons earlier delivered, notwithstanding that the terms thereof had not been approved as to form by counsel for Nazarewycz. In doing so, the chambers judge “waived taxation” and fixed the quantum of costs to be paid by the estate to the Dools for the period from October 9, 2002 to June 15, 2007, in the amount of \$36,835.73. He also fixed the quantum of costs payable to Canada Trust, in the amount of \$5,629.43.

[47] The chambers judge then granted a further order, likewise in the absence of counsel for Nazarewycz, providing as follows:

- (a) Nazarewycz was directed to comply with the directions set forth in the January 10, 2007 order;
- (b) Nazarewycz was to transfer to Canada Trust the estate assets not later than June 22, 2007;
- (c) Canada Trust was to undertake administration and “do all things to administer the estate under” the Mason order;
- (d) Costs of the application, in the amount of \$5,197.53, were to be paid by the estate to Canada Trust;
- (e) If Nazarewycz did not comply with the direction to transfer the estate assets to Canada Trust, then he was directed to appear before the court on June 27, 2007, to show cause why he should not be held in contempt; and
- (f) Directing further that if Nazarewycz did not comply with other provisions of the order, then a warrant would be issued for his arrest.

(f) *June 27, 2007*

[48] On June 22, 2007, an application was filed by Nazarewycz seeking the recusal of the chambers judge and a stay of enforcement of his orders granted on January 10 and June 15, 2007.

[49] The chambers judge refused to recuse himself and suggested that the matter be appealed.

[50] He further directed that the costs earlier awarded be paid forthwith and refused a stay of his order on the basis that “the Court of Appeal has full ability to deal with that application”. However, he did stay that term of his order on January 10, 2007, which directed Canada Trust to proceed with the application for proof in solemn form of the 1998 will.

[51] It must be noted that at the outset of this hearing the chambers judge requested “clarification” with respect to the Bensler consent order. He stated that the Bensler order was provided in materials relating to the application before him, and that that “was the first time” that he had seen that order. Counsel then directed his attention to a transcript of the hearing conducted on March 8, 2006, wherein the chambers judge had commented that he had “seen Justice Bensler’s order”. However, it seems apparent that the chambers judge in making his directions over the period from March 8, 2006 to June 27, 2007, had overlooked the provisions of the Bensler order which had expressly varied the terms of the Mason order by directing, amongst other things, that Canada Trust was no longer required to formally prove the will, and that Nazarewycz would be entitled to apply for its probate on an informal, uncontentious, basis.

### **Grounds of Appeal**

[52] The appellant raised a number of grounds of appeal:

- (a) Varying the Bensler order made by consent on the court’s own motion and without proper grounds;
- (b) Making fact findings on affidavit evidence that was contradictory or inadmissible;
- (c) Improperly awarding solicitor and client costs against the estate without an application, without taxation and without appropriate grounds for the exercise of the court’s discretion;
- (d) Granting injunctive relief (freezing estate assets) without a motion and without grounds;
- (e) Failure of the chambers judge to recuse himself when he formed a personal opinion of the conduct of counsel for the appellant, which influenced, or gave the appearance of influencing, the judgment;
- (f) Engaging the contempt of court jurisdiction without notice and without evidence to support contempt proceedings;
- (g) Issuing a warrant for arrest of the appellant, contrary to law; and
- (h) Failing to stay the order of January 10, 2007, and instead directing payment out of estate funds held in court.

### **Standard of review**

[53] Costs awards are discretionary and will not be interfered with, unless it is shown the judge misdirected himself on the law or made an overriding and palpable error: *Conway v Zinkhofer*, 2008 ABCA 392, [2008] A.J. No. 1262, citing *Deans v. Thachuk*, 2005 ABCA 368, 376 A.R. 326.

[54] Questions of jurisdiction are questions of law and reviewed on a standard of correctness, while finding of fact and inferences of fact require a palpable and overriding error before this Court will intervene: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[55] Issues such as recusal and contempt of court are highly fact specific and require the exercise of the judge's discretion. Like a determination of abuse of process, appellate review calls for deference, absent error of legal principle or palpable and overriding error of fact findings: *Enron Canada Corp. v. Husky Oil Operations Limited*, 2007 ABCA 27, 401 A.R. 291 at para. 13.

### **Positions of the Parties to the Appeal**

[56] Prior to commencing our analysis, it is useful to set out the positions of the parties on the hearing of the appeal as they explain the issues that this Court is required to address and dictate the order in which we address them.

[57] The appellant seeks, of course, to set aside all three orders. He submits that the record demonstrates a reasonable apprehension of bias prior to the first order having been made on January 10, 2007. On that basis, he argues that all three orders are tainted and void. Accordingly, his further grounds of appeal are of an alternative nature. In the event that the orders are set aside, he urges that in the circumstances of this case, this Court substitute its opinion and provide such directions as seem fit.

[58] The respondent Dools are concerned only with the issue of costs. They did not seek to uphold the remainder of the terms of the subject orders. They submit that the chambers judge exercised his discretion as to costs in accordance with judicial principles. However, like the appellant, in the event that the chambers orders are set aside, they too request that this Court rule on the matters of costs.

[59] Canada Trust, having been reinstated as Administrator *Ad Litem* on the court's initiative, joined in the appeal as an affected party. It asserted that the chambers judge erred by making the re-appointment, and that his orders should be reversed, with the exception of his directions as to costs, including its administrative and legal costs. Again, in the event that the orders are wholly set aside, Canada Trust seeks that this Court direct payment of costs to it.

[60] In short, no parties attempted to uphold the orders except as to the terms relating to costs. Thus, we will first deal with the issue of whether any portions of the orders may be sustained and secondly, with the costs issues.

**A. Reasonable Apprehension of Bias**

[61] This issue is of immediate and fundamental importance, as if the chambers judge should have recused himself prior to the making and entry of his orders, then they must be set aside in their entirety. The majority judgment in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193, stated at para. 100:

If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See [*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*], [1992] 1 S.C.R. 623 at 645]; see [*R. v. Curragh Inc.*], [1997] 1 S.C.R. 537 at para. 6]. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge.

[62] The majority judgment in *Newfoundland Telephone Co.*, referenced above, concluded at 645:

As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. *If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision.* A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. *The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void.*

[emphasis in original]

[63] The appellant bears the onus of demonstrating that the conduct of the chambers judge gave rise to a reasonable apprehension of bias. Bias describes “a leaning, inclination, bent or predisposition towards one side or another or a particular result” per Watt J. in *R. v. Bertram*, [1989] O.J. No. 2123 at 51-52. Watt J. further stated: “Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.” (These passages are quoted with approval in *R. v. S.(R.D.)* at para. 106.)

[64] The apprehension of bias must be reasonable and held by reasonable and informed persons. The accepted test was set out by Grandpré J. in dissent in *Committee for Justice and Liberty v. Canada (Natural Energy Board)*, [1978] 1 S.C.R. 369 at 394: “[W]hat would an informed person, viewing the matter realistically and practically – and having thought of the matter through – conclude?” An informed person is one with knowledge of all of the relevant circumstances, including an appreciation of the court’s traditions of integrity and impartiality, which duties are undertaken by the judges of the courts. Accordingly, the threshold for a finding of real or perceived bias is high.

[65] This Court in *Point on the Bow Developments Ltd. v. William Kelly & Sons Plumbing Contractors Ltd.*, 2005 ABCA 310, 371 A.R. 395 at para. 5, concluded that recusal should occur if a reasonable person, properly informed, viewing the matter realistically and practically, and having thought the matter through, would think it more likely than not that the decision maker, whether consciously or unconsciously, would not decide fairly. In other words, if there is a reasonable apprehension of bias, the decision maker should recuse him or herself.

[66] In *Point on the Bow*, the chambers judge had found a party in contempt for failing to comply with terms of an order and made remarks regarding the conduct of the party and its counsel. He recused himself, rather than hear the matter when it was returned after an appeal, on the basis he could be perceived to be predisposed to decide the contempt application in a certain way: 2005 ABQB 368, [2005] A.J. No. 641. His recusal was affirmed by this Court, *supra*.

[67] Not every case of less than courteous interactions between a judge and counsel or criticism of counsel by a judge constitutes a reasonable apprehension of bias.

[68] In *R. v. McCullough*, [1998] O.J. No. 2914 (C.A.), 39 W.C.B. (2d) 168; leave to appeal dismissed (1999), 125 O.A.C. 399n (S.C.C.), the alleged bias arose from criticisms made by the trial judge about the conduct of the counsel and witnesses. The Ontario Court of Appeal found no reasonable apprehension of bias stating at para. 17:

A trial judge is entitled to make reasonable criticism respecting the conduct of counsel and witnesses who appear in court. The trial judge's inquiries of the conduct of a witness and the appellant's counsel were neither unreasonable nor otherwise improper. He was concerned that certain events had caused considerable inconvenience, expense and loss of court time. He expressed his concerns in a reasonable manner. The criticism voiced by the trial judge was not misplaced and it cannot be said to support an apprehension of bias. In its proper context, it did not demonstrate "a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction." See *R. v. Bertram*, [1989] O.J. No. 2123 as cited in *R.D.S. v. The Queen* (1997), 118 C.C.C. (3d) 353 (S.C.C.).

[69] Southin J.A. for the British Columbia Court of Appeal in *Middlekamp v. Fraser Valley Real Estate Board* (1993), 83 B.C.L.R. (2d) 257, [1993] B.C.J. No. 1846, noted at para.10: "Every experienced counsel has from time to time felt herself unfairly treated by receiving a lashing from the sharp edge of the tongue of a judge." But such treatment does not constitute bias. She continued at para. 11 that bias does not mean a judge is "less than unfailingly polite or less than unfailingly considerate" or has "an opinion as to the case founded on the evidence nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism." She stated at para. 14:

[I]t is never enough to disqualify a judge that someone not knowing all the facts or understanding the court process might have an apprehension of bias. There must be an evidentiary foundation for a conclusion that the judge was indeed biased.

[70] Similarly, criticisms of counsel's behaviour do not create a reasonable apprehension of bias if they do not indicate a predisposition to decide a case or issue in a certain way. In *R. v. Arnold*, [2000] O.J. No. 1580, 46 W.C.B. (2d) 295 (S.C.J.), an accused sought an order prohibiting a judge from continuing to preside at the trial on the basis there was a reasonable apprehension of bias based on comments and conduct of the judge including comments which counsel described as criticisms and insults, and threats to cite counsel in contempt. The court held there was no reasonable apprehension of bias stating at para. 43:

Chastising or admonishing counsel with respect to the attitude, conduct or tone of voice used towards the court cannot be said, in the entire circumstances of this case, to support a finding, of an apprehension of bias. The Court is entitled to remind counsel of the limits of acceptable conduct and attitude demonstrated where it is of the opinion that counsel may well be at risk of broaching those limits. I say this without finding that the trial judge was indeed intending this result.

The Ontario Court of Appeal agreed there was no reasonable apprehension of bias: [2000] O.J. No. 3749.

[71] However, reasonable apprehension of bias has been found where it seems a judge has prematurely made up his mind, foreclosed argument and given judgment without providing opportunity for a party to be heard.

[72] This Court examined the interventions of a chambers judge in foreclosure proceedings of a commercial property, concluded that the parties were denied a fair hearing, and remitted the matter back for a fresh hearing: *Calvert Home Mortgage Investment Corp. v. Ro/Lin Holdings Ltd.*, 2007 ABCA 259, 79 Alta L.R. (4th) 278. The exchanges in that case, which gave rise to the apprehension of bias, were set forth at paras. 5-6:

5 The appeal from the Master's order confirming sale came before the chambers judge on July 5, 2005. When told that the Appellants would seek an adjournment, he made the following observations:

- “Talk about abuse of process.”
- “It better be good, Mr. Elgert.” (counsel for the Appellants)
- “Okay. Keep going, Mr. Elgert, because it doesn't look good.”

6 After hearing argument from the Appellants' counsel about the proposed adjournment, the following exchange occurred:

The Court: This is such an egregious, egregious abuse of process. You are not going to get away with it. I'm sorry. Counsel is perfectly right. This is dreadful, absolutely dreadful, ...

Mr. Elgert: Thank you, My Lord. I have nothing else I can say.

The Court: -- I am somewhat embarrassed with the application that is made in this fashion when they -- the offer was granted when?,

Mr. Elgert: March 11th, sir.

The Court: March 11th, and you come in July. Oh, come on, people. The application for an adjournment is dismissed. The appeal is dismissed.

[73] The analysis of this Court in *Calvert* arising from this record is set out at para 13:

Did the judge exhibit an open mind amenable to persuasion by counsel for the Appellants during the July hearing? In our view, he did not. He refused to grant the adjournment sought by the Appellants -- a matter within his discretion. In more or less the same breath, however, and without hearing any argument on the merits of the appeal from the Master's order, he dismissed it. The Appellants' counsel could perhaps have pressed his arguments on the merits of the appeal. He might, for example, have mentioned that the Respondent had not yet tendered payment (a fact that was apparently not brought to the chambers judge's attention until the December 5, 2005 hearing). However, the chambers judge's earlier interventions suggest that he was disinterested in further argument on the merits.

[74] We have concluded, with a measure of reluctance, that in the case before us, the orders of the chambers judge must be set aside on the ground that the appellant was denied a fair hearing and has demonstrated a reasonable apprehension of bias. Our reluctance stems from the latitude that judges must have to deal with what they consider to be the unsatisfactory conduct of counsel before them. However, upon our examination of the entirety of the record, the chambers judge, prior to the grant of his first order on January 10, 2007, had made remarks such as to give rise to the appearance both of a loss of impartiality between the parties and prejudgment of issues.

[75] The chambers judge's criticism that counsel was ill prepared and uncivil, and reporting his conduct to the Law Society, did not of itself give rise to a reasonable apprehension of bias. As stated in *McCullough*, a judge is entitled to make reasonable criticism of counsel's conduct. Judges are also entitled to make a complaint to the governing professional body if they perceive a lawyer's conduct

is deserving of review: *G.(M.G.) v. T.(C.E.)* (1994), 98 B.C.L.R. (2d) 102, [1994] B.C.J. No. 2119 (C.A.).

[76] However, in the oral judgment of November 17,2006, and repeated in the written judgment of January 2007, the chambers judge's criticisms of counsel's behaviour and comment that it was not pleasant having counsel appear before him were not limited to the present proceedings, but included counsel's previous appearances before the chambers judge. His suggestion to the appellant that he consult with new counsel undermined confidence that any further representations made by that counsel in the further course of the proceedings would be fairly heard and dealt with. Further, the court's determination to cite the appellant for contempt and to award costs jointly against him and his counsel, all without notice or argument and initiated by the chambers judge, added to the perception of prejudgment and unfairness. This is especially so as during the November proceedings when counsel for the appellant attempted to challenge and to question the appellant's alleged non-compliance with a court order, the chambers judge cut short any explanation and advised he would respond on behalf of respondent's counsel [AB 409]. These remarks and directions, without notice or opportunity for argument, gave rise to an appearance that he was predisposed against the appellant and his counsel, and had prejudged certain issues.

[77] It should be added that the comments, criticisms and directions made on November 17,2006, were all made at an interim stage when the judge was preparing his written reasons. The remarks were said to be "expressly subject to the decision that will be in written form" [AB 395]. It seems evident that the chambers judge had made up his mind and had determined to move forward with his judgment, including dealing with the matters that had never been raised and with respect to which counsel had no opportunity to make submissions.

[78] An unfortunate aspect of this matter is that some of the criticisms made by the chambers judge of the appellant and his counsel, as well as many of the directions given by the court at that time, apparently were made because he overlooked the Bensler order, which had varied the earlier Mason order. As a result, some of the comments were unfair, and directions were made that were inappropriate. As earlier noted, no party in the appeal proceedings has sought to uphold the re-appointment of Canada Trust and related directions given by the court. No doubt, the overlooking of the order contributed to the criticisms of the appellant and his counsel and compounded the apprehension of bias and unfair treatment.

## **B. Costs of Proceedings**

[79] Having set aside the order of the chambers judge, we would ordinarily return the parties to the Court of Queen's Bench for a fresh hearing before a different judge. However, there has already been undue delay in determination of the costs applications, and disproportionate legal expenses have been incurred. The parties have requested this Court to make the decision regarding costs and it seems practicable that we do so.

[80] The appellant recognizes that any award of costs is discretionary, but submits that the discretion must be exercised judicially and with regard to proper principles. The gist of his argument is that the Dools made allegations of wrongful conduct on his part. More specifically, that the allegations against him were of undue influence and “possibly fraud”. The appellant submits that these were serious allegations and that since they were never established by the Dools, their failure to do so should attract costs: *Stevens v. Crawford*, [2000] A.J. No. 515, 264 A.R. 219, Supplementary Reasons at paras. 53-81.

[81] However, we have concluded, not unlike the chambers judge, that there are special circumstances in this estate litigation, which provide a proper basis both for permitting the Dools to discontinue the action without costs and which also entitle them to recover the legal costs incurred by them in participating in the litigation. We will explain.

[82] We start with an examination of the Mason order made on October 9, 2002 upon the request of the Dools that formal proof of the 1998 will be required. The allegations that are now complained of by the appellant predate that order. Mason J. had before him the affidavit evidence, not only of the Dools, but also of the appellant and Ihor Broda, who prepared the 1998 will and attended to its execution.

[83] The Mason order not only required the will be proved in solemn form, it appointed Canada Trust as administrator, and directed it to propound the 1998 will. Moreover, the direction was that Canada Trust would conduct the proceedings with both Nazarewycz and the Dools to be respondents in the formal proof of the will proceedings. The order directed Nazarewycz to account, and placed responsibility both on Canada Trust and the Dools to ensure the accuracy of the accounts. No appeal was taken from the order.

[84] It is correct to point out, as did the appellant, that the Mason order does not determine the merits of the issues directed by the court, namely, those of testamentary capacity, undue influence and suspicious circumstances. However, the Mason order demonstrates that the Dools had met the threshold test and satisfied the court that there was a reasonable evidentiary basis for directing that those issues be tried.

[85] No further pleadings issued following the Mason order. Rather, the parties pursued issues of accounting and disclosure, all as directed by that order. Canada Trust took the prudent position that it would not proceed with the trial of the issues until it received the accounting and disclosures directed by the court. This invites no criticism as it was necessary to have those materials in order to prepare for further proceedings and to further assess these issues.

[86] The desire to discontinue, which in these circumstances involved the withdrawal by the Dools of their objection to the 1998 will, did not arise from unfavourable rulings in the litigation, which cast doubt either upon the credibility or the reasonableness of their earlier allegations. There was no determination that the allegations were without merit, nor does the discontinuance imply that

challenge to the 1998 will was doomed to failure or otherwise illegitimate. In such circumstances, the court may properly relieve a plaintiff from payment of costs upon discontinuance: *Canadian Mortgage Investment Co. v. Teel (No. 2)*, [1923] 1 D.L.R. 576, [1922] A.J. No. 78 (Alta. S.C.A.D.) at para. 7.

[87] Health and other personal issues can also constitute special circumstances such as to relieve a plaintiff from costs upon a discontinuance. Dickson J. of the Saskatchewan Queen's Bench did so on the basis of health in *Donlevy v. Donlevy*, 1999 SKQB 154, 191 Sask.R. 152 at paras. 10-12:

The respondent cannot be regarded as being a successful litigant in this action. The issue was not adjudicated in his favour. The litigation process was stopped short of adjudication by the petitioner's illness.

Counsel then asserts that the petitioner raised ill-conceived and high-handed allegations of character and conduct against the respondent. His desire to answer these allegations have placed upon him an emotional and financial burden. Because discontinuance has deprived him of the opportunity to answer, counsel suggests the Court should infer that the petitioner discontinued her claim because it lacked merit. He then presents case authorities supporting the principle that losing litigants must bear the costs of unmeritorious litigation.

I cannot get beyond counsel's invitation to infer that the petitioner discontinued her claim because she thought it lacked merit. She swears she discontinued because of her mental health. She presented medical evidence of her fragile state. I am asked to ignore that evidence and speculate that she discontinued her claim for the reason suggested by counsel, raised by his inference alone and unsupported by evidence. Her claim has not been adjudged unmeritorious. It has only been denounced as such by counsel. That is not sufficient for me to exercise my discretion in favour of his client. There will be no order for costs.

[88] Here the evidence of the Dools as to their deteriorating health has not been disputed. This special circumstance explaining their desire to discontinue, coupled with the Mason order justifying both the reasonableness in bringing the action and their subsequent participation therein, serves as a basis not only to relieve them from costs but additionally to make an award of costs in their favour.

[89] We take into account that costs in estate litigation have traditionally been approached somewhat differently than those in general litigation. This difference was noted and explained by Johnstone J. in *Popke v. Bolt*, 2005 ABQB 861, 342 A.R. 220 at para. 22:

Historically, estate litigation has been treated somewhat differently. Courts have often ordered that the costs of both parties be paid from the estate. The reasoning is twofold. First, where the conduct of the deceased whose will is in dispute (the “testator”) necessitates the litigation, it is reasonable to require the testator, through his estate, to pay. However, a substantial link must exist between the testator’s actions and the actual need for litigation: *Holzel v. Mjeda* (2000), 269 A.R. 30, 2000 ABQB 549 (Alta. Q.B.) at para. 31. Second, society has an interest in ensuring that only valid wills are probated, and that property is distributed in accordance with their terms. Parties who seek the court’s assistance in these matters should not be deterred by the cost of litigation: Brian A. Schnurr, *Estate Litigation*, 2d ed. vol. 2 (Scarborough, Ont.: Thomson Carswell, 1994) at 19-2.

[90] Ian M. Hull in his article “Costs in Estate Litigation” (1998) 18 E.T.R. (2d) 218, discusses principles governing the allocation of costs when a will is challenged, and attempts to identify those circumstances in which costs will be paid out of the assets of the estate. He indicates that in circumstances which warrant an investigation, the estate may be expected to bear the costs at least down to the stage where sufficient information is gathered to assess the merits of the case. He comments at 223-224:

Now that the will challenger has had the opportunity to review the productions, to examine those parties propounding the will, to interview witnesses and to examine the solicitor who drew the will, the investigation stage of the proceedings is probably complete.

It is at this stage in the proceedings that the party challenging the will must carefully assess the strengths and weaknesses of the case before proceeding further.

...

The question of when the will challenger may start to be exposed to an adverse order as to costs is a nice one indeed. However, up to this point in the proceedings, provided they have been carefully conducted with some dignity, a strong argument could be put forward to the court that costs up to this stage should be paid out of the assets of the estate on a solicitor and client basis, even if the proceedings are abandoned.

[91] In the case before us, Mason J. had determined that the circumstances required an investigation, and the Dools were in the process of carrying out the directions of the court when their personal circumstances overtook their abilities to carry on with the litigation.

[92] There is an additional factor to be considered, namely, the manner in which Nazarewycz responded to the proceedings. While he made Ihor Broda, the solicitor who prepared the will,

available to be interviewed at a relatively early stage, for the most part, the accounting and other disclosures had to be pried out of the appellant. His position was uncompromising and forced Canada Trust and the Dools to labour in their efforts to gather relevant information. It may be that the appellant was under no obligation to be forthcoming and cooperative; however, it should not be surprising in such circumstances that the proceedings became protracted and expensive.

[93] In *Weiner v. Elman* (2001), 43 E.T.R. (2d) 163, [2001] O.J. No. 4940 (Ont. S.C.J.), the testator's daughters applied to remove their Notice of Objection to Probate in relation to their late mother's will. The respondent, their father, cross-applied for solicitor and client costs. The court held that the respondent had forced the daughters to file a Notice of Objection because the respondent had refused to provide them with any information about their late mother's estate, and made every effort to stonewall their inquiries. The litigation that resulted was contentious and had caused great stress that, in the words of the court, had "torn the family apart". As such, the daughters sought to discontinue. Citing the respondent's uncooperative conduct, the court dismissed his cross-motion for solicitor and client costs. Further, even though the daughters had not requested any costs, the court awarded them. Similar considerations are applicable in this appeal.

[94] For the reasons expressed above, we have concluded that the Dools are entitled to discontinue and otherwise withdraw from their further participation in the litigation, without payment of costs. We further find that they are entitled to be indemnified by the estate for their solicitor and client costs from October 9, 2002 (the date of the Mason order) to and including June 27, 2007 (the date of the last chambers order).

[95] The chambers judge fixed the solicitor and client costs of the Dools in the amount of \$36,835.73 for the period from October 9, 2002 to June 15, 2007. The court, of course, has a discretion to make a lump sum award pursuant to r. 601 of the *Alberta Rules of Court*.

[96] However, we have set aside the order of the chambers judge awarding the lump sum costs. Further, we observe that the lump sum appears to have been fixed without explanation as to its quantum and without affording the party to be charged the right to tax the costs or otherwise to make representations as to the quantum.

[97] In these circumstances, we are not prepared to grant a lump sum. Failing agreement by the parties as to quantum, the Dools will be entitled to recover their solicitor and client costs on a full indemnification basis in an amount as taxed by the taxing officer.

[98] The situation of Canada Trust is the same. It was acting at all times pursuant to court orders and is entitled to its costs of administration, including legal expenses, on a solicitor and client basis. As the order of the chambers judge directing and fixing the costs incurred by Canada Trust following the Bensler order (March 1, 2006) have been set aside, we direct that it shall be entitled to recover these costs in an amount either as agreed or taxed.

**C. Costs of the Appeal**

[99] We are mindful that the appellant has succeeded in setting aside the three orders of the chambers judge. However, we have reached the same conclusion on the issue of the costs of the appeal. At root, the court found that it was reasonable for the Dools to challenge the 1998 will, and their subsequent participation as respondents in the proceedings was reasonably conducted. Personal considerations beyond their control led them to withdraw before there was any determination on the merits. In these circumstances, it is appropriate that the estate should bear the costs. One of the incidents of the litigation was the re-appointment of Canada Trust. Its participation was initiated by the court out of its concern to protect the estate. The estate must likewise bear its costs.

[100] The Dools and Canada Trust are therefore entitled to recover their solicitor and client costs of the appeal, on a full indemnity basis, from the estate in amounts as agreed or taxed.

**D. Conclusion**

[101] The appeal is allowed in that the orders of the chambers judge dated January 10, June 15, and June 27, 2007 are each set aside. However, the respondent Dools and Canada Trust are each entitled to costs from the estate, as directed above. The matter is referred back to a new surrogate judge for continuation of estate administration, including any further directions arising out of this judgment.

Appeal heard on February 11, 2009

Memorandum filed at Calgary, Alberta  
this 3rd day of March, 2009

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O'Brien J.A.

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Rowbotham J.A.

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Kenny J.

**Appearances:**

E. W. Halt, Q.C. as agent for C. M. Smith  
for the Appellant

B. J. Kickham, Q.C.  
M.P. Nicholson  
for the Respondents

A. Moulton  
for Canada Trust Company