SUPREME COURT OF NOVA SCOTIA
Citation: *E.A.B. (Re)*, 2015 NSSC 57

Date: 2015-02-23
Docket: Ken No. 421478
Registry: Kentville

IN THE MATTER OF:	*Incompetent Persons Act*, R.S.N.S. 1989, c. 218 as amended
IN THE MATTER OF:	An application for the appointment of Guardians of the person and estate of E. A. B. (aka E. A. B.), Windsor Forks, County of West Hants, Province of Nova Scotia

Editorial Notice:	**Identifying information has been removed from this electronic version of the judgment.**
Judge:	The Honourable Justice Gregory M. Warner
Heard:	December 10, 11 and 15, 2014, in Kentville, Nova Scotia
Final Written Submissions:	February 2, 2015
Counsel:	Paul B. Miller, for the applicants R. W. B. and M. Y. E. B.
	Patrick Eagan, for the respondents S. L. and B. N.

By the Court:

[1] This is the costs decision.

[2] On November 9, 2013, B. B. (age 81) and her son R. B. filed an Application in Court for a declaration that B.'s husband, E. B. (then age 87), was incompetent and for the appointment of themselves as guardians of his person and estate pursuant to the *Incompetent Persons Act*.

[3] After a three-day hearing, contested by daughters S. L. and B. N., the court, in an oral decision, granted an amended Application to appoint R. B. and M. B. as guardians.

[4] This application arose because, by means not approved by the court, S. L., a daughter of E. and B. B.:

a) removed E. from his home with B., by a deception without B.'s knowledge or consent, and kept E. in her home (except for a short period of time when he was placed in […]);

b) interfered with B. having access to E. while he was in Ms. L.'s home for most of twenty months; and,

c) obtained access to E. and B. B.' joint bank account, removed $30,000, and took control of E.'s pension income, which had been used to support both E. and B. B. in their home.

[5] After the filing of the application on November 9, 2013, several events occurred which delayed the hearing and determination of the application, including:

a) At the scheduled Motion for Directions on December 3, 2013, counsel for the applicant and for Ms. L. (who had not filed a Notice of Contest) appeared. Counsel for Ms. L. requested an adjournment of the Motion for Directions. The Motion was adjourned to February 6, 2014. Timelines were given for the filing of affidavits and a Notice of Contest.

b) On February 4, 2014, Ms. L. filed, purportedly on behalf of B. B., a notice that B. B. would act on her own (without counsel) and a letter directing that the application be discontinued.

c) At the hearing of the adjourned Motion for Directions on February 6, 2014, Jon Cuming, counsel for Ms. L., advised that Ms. L. would now be acting on her own. Ms. L. participated in the Motion for Direction. Paul Miller, counsel for B. B., confirmed that he was still her counsel and that she wished to continue the application. The court scheduled the hearing of the Application for June 2 and 6, 2014; gave the intended respondent (Ms. L.) deadlines to file a Notice of Contest; provided deadlines for the filing of affidavits, Affidavit Disclosing Documents and prehearing brief by the intended respondent; and, granted the applicants an order directing a doctor, a lawyer and two insurers to produce to the applicants all their records respecting E. B..

d) Ms. L. did not file a Notice of Contest and, on March 7, 2014, advised the court by e-mail that neither she nor her sisters intended to do so.

e) On April 30, 2014, Mr. Miller, counsel for the applicants, requested an adjournment of the hearing from June to September. Subpoenas were issued for discovery of the intended respondent and others. The court granted the requested adjournment to September 3, 2014, one day only on the basis that no Notice of Contest was intended to be filed.

f) On September 3, 2014, new counsel appeared for Ms. L. (Mr. Glogier on behalf of David Thomas), who advised that Ms. L. intended to participate in the hearing as a party and sought an adjournment. The sitting judge rescheduled the hearing of the application to November 5, 2014, and provided new deadlines for the respondent to file a Notice of Contest and affidavits, for the applicant to file responding affidavits, and for pre-hearing briefs.

g) On September 17, 2014, Ms. L. discharged Mr. Thomas and filed a Notice of Intention to Act on her Own. She was again without counsel.

h) By October 31, 2014, Ms. L. had retained new counsel (Patrick Eagan). On October 31, 2014, a recorded telephone conference was held between counsel and the court to deal with an adjournment request of Mr. Eagan on the basis he had just been retained and needed time to prepare for the hearing. Mr. Miller objected to yet another adjournment. The court adjourned the hearing of the application to December 10 and 11, 2014, and provided new deadlines for the respondent to file a Notice of Contest, affidavits and a brief, as well as for the applicants to file any response affidavits and a new brief.

i) A Notice of Contest on behalf of S. L. and B. N., with several new affidavits, were filed.

[6] At the hearing of the Application on December 10, 11 and 15, 2014, the affiants for the applicants – B. B., R. B., W. B. (a son of E. and B.), M. B. (sister of B. B.) and Dr. Michele MacLean (the B.' family doctor) were cross-examined on their affidavits, as well, the respondents S. L. and B. N. (daughter of E. and B.) were cross-examined on their affidavits.

[7] The affidavits filed by Dr. Iona Wile and by Brenda White (Credit Union manager) were admitted without cross-examination.

[8] Both sides subpoenaed additional witnesses who were examined and cross-examined. Witnesses presented by the applicants were Dr. Bruce Phillips (who attended upon E. B. during his stay at […]), Lynn Smith (administrator of […]), RCMP Constable Terrance Fogarty and Karen Ramsay (adult protection worker); by the respondents was Cathy Blois (care coordinator for the Department of Community Services).

[9] At the end of the hearing of evidence and oral submissions of counsel, the court gave an oral decision granting the amended application for a declaration that E. B. was incompetent and appointing R. B. and M. B. as guardians of the person and estate of E. B., pursuant to the

Incompetent Persons Act. The court's findings of fact were substantially in accord with the applicant's position.

Submissions

[10] The applicants cite the 12 principles respecting the award for costs pursuant to *CPR 77*, set out at para. 3 in *Lubin v Lubin*, 2012 NSSC 19. They direct the court to 11 specific aspects of S. L.'s conduct that they submit are so outrageous ("exceptional and extraordinary") as to merit an award of solicitor and client costs against her. In addition to the wrongful removal of E. B. from his home and his wife, effectively restricting his wife's access to him for over twenty months (March 2013 to December 2014), the applicants claim that the respondent S. L. wrongfully took more than $61,500 from the B.' joint bank account at the credit union and from Mr. B.' pension income.

[11] Applicants' counsel docketed his time as 102 hours at $325 per hour plus HST and disbursements of $2,577.61 (including $1,299.50 for the attendance of Dr. Phillips at the hearing). This totals approximately $44,624.49. The applicants seek solicitor and client costs in that amount. The applicants have paid their counsel $15,000.00 to date.

[12] Alternatively, if the court is of the view that party and party costs is not the appropriate basis for a costs award, the applicants calculate party and party costs.

[13] They submit that the calculation of the 'amount involved' includes $61,500 taken by the respondent from the B.' joint account at the Victory Credit Union and E. B.' pension cheques. The 'amount involved' also includes a significant non-monetary issue respecting whether Mr. B. was incompetent, whether his removal from his home and his wife was justified, whether the interference and effective denial of access by B. B. to E. B. was justified, and whether the applicants were appropriate guardians.

[14] The applicants submit that party and party costs should be calculated on Tariff A, Scale 3, for the $40,000 to $65,000 'amount involved' range or $9,063. To this they add:

a) $6,000 for a three-day hearing;

b) $3,000 for attendance at two contested Motion for Directions on December 4, 2013 and February 6, 2014, as well as the adjourned hearing of September 4, 2014;

c) $1,000 for two of three telephone motions;

d) $2,577.16 for disbursements; and,

e) $2,859.45 for HST on fees.

This total $24,500.06.

[15] The applicants ask the court to consider, if it is of the view that solicitor and client costs are not merited, to find that party and party costs are not adequate and to award lump sum costs.

They direct the court's attention to the factors enumerated in *CPR 77.07(2)* and the recognition in costs awards of substantial non-monetary issues identified in *CPR 77.18(c)*.

[16] The respondents' brief does not directly respond to the applicants' analysis of *CPR 77*. Counsel submits that S. L.'s actions were all carried out in the best interests of E. B. and that she attempted to resolve the dispute between her and her mother and some siblings before and during the hearing without success. Counsel submits that her conduct did not rise to the level of "extraordinary or exceptional" circumstances that would merit solicitor and client costs.

Analysis

[17] The law respecting costs is not difficult. The principles have been repeated often since *Landymore v Hardy* (1992), 112 NSR (2d) 410, and *Williamson v Williams*, 1998 NSJ. No. 498 (NSCA). They are articulated thoroughly in the *Lubin supra* decision cited by counsel for the applicants.

[18] Application of these principles is case specific.

[19] I agree with the applicants that the reason it took more than one year for the application to be heard was by reason of the many changes in counsel by Ms. L.. During that time, Mr. and Mrs. B., who had already been separated for eight months, were separated for another twelve months.

[20] Ms. L.'s misconduct was reprehensible. She was the primary reason the hearing of the application was much delayed.

[21] While B. N. was identified as a respondent in the Notice of Contest filed on November 26, 2014, and it is apparent that she supported Ms. L., it was Ms. L. who conducted all of the procedural steps, in her name, before November 26, 2014, and whose conduct led to the application being filed in the first place. While neither counsel addressed the fact that Ms. N. became a party on November 26th, it is a factor that I address in apportioning costs against the respondents.

[22] I adopt and incorporate the analysis of the leading cases respecting solicitor and client costs found in *NBFL v Potter*, 2008 NSSC 213, at paras. 16 to 28. In my view, Ms. L.'s misconduct, while reprehensible, did not rise to that of one of those rare and exceptional cases identified in the case law as meriting solicitor and client costs.

[23] With respect to the applicants' party and party costs calculation, Mr. Miller purports to apply Scale 3 of Tariff A to an 'amount involved' of between $40,000 and $65,000. His own calculation of the actual monetary issue involved is $61,500. His calculation of the amount involved, Step 1 in the application of Tariff A, leaves little for the non-monetary issues.

[24] In my view, the non-monetary issues were more significant than the monetary issues. They included whether E. B. was incompetent, an issue because of Ms. L.'s evidence that he was

aware and agreed with her actions, and whether the applicants should be appointed E. B.' guardians.

[25] *CPR 77.18(c)* specifically authorizes the court, where there is a substantial non-monetary issue, to include that fact in the determination of the 'amount involved', to the extent that it affects the complexity of the issues.

[26] The most important goal of a costs award is to do justice between the parties *(CPR 77.02*). The exercise of determining the 'amount involved' does not give the court the license to determine costs arbitrarily but does give discretion to recognize the non-monetary issues in the determination of the 'amount involved'.

[27] In this case, whether this court increases the 'amount involved' by reason of the substantial non-monetary issues or resorts to the factors enumerated in *CPR 77.07*, and, in particular, *CPR 77.07(2)(e)*, to award a lump sum, is irrelevant. I conclude that the amount involved should fall in the range of $65,001 and $90,000 on Tariff A.

[28] The applicants seek application of Scale 3 at Step 2 of the tariff analysis. The starting point for the Step 2 analysis is the 'Basic Scale (Scale 2)'. I am not satisfied that this proceeding was so complex or involved issues of importance beyond those between the parties, so as to merit an award of costs on Scale 3. The biggest issues were factual issues, involving a contest between the reliability and credibility of the applicants' evidence versus that of the respondents. The appropriate scale is Scale 2.

[29] Scale 2 party and party costs for the amount involved in this case is $9,750. To this, the rules provides that the court may add $2,000 per day for each day of a trial or hearing. In this case, the hearing involved three full days, and merits a counsel fee of $6,000. The total fees calculated as party and party costs is $15,750.

[30] The applicants seek, in addition, that the court awards $4,000 for attendance at the various prehearing motions. The intent of Tariff A is that all steps in the proceedings are considered in determining the amount involved and the scale. I therefore do not award as party and party costs the additional claim for attendance at pretrial motions.

[31] I conclude that party and party costs should be fixed in the amount of $15,750 plus HST of $2,362.50, plus the claimed, and, in my view, justified, disbursements of $2,577.61, for the total sum of $20,690.11.

[32] The award of party and party costs of $15,750 appears to be about 43% of the time that Mr. Miller says he docketed (102 hours) at his hourly rate. I have not had a detailed breakdown of those 102 hours; however, the delays caused by Ms. L. from the time of the filing of the application in November 2013 until the hearing in December 2014 leads me to conclude that the 102 hours of time is a reasonable amount of docketed time.

[33] A party and party cost award will not satisfy the *Landymore supra* and *Williamson supra* principle of a substantial contribution to the successful party's costs. I therefore add the lump

sum of $3,000 (for fees and HST) to bring the successful party's fees award to about 50% of their legal costs.

[34] The court awards costs totaling $23,690.11.

[35] The role of the two respondents in the events leading to the application, and in the conduct of the proceedings after the filing of the application, differ. It would not be just to make each equally responsible for this costs award. As to the allocation of this award between the respondents, both shall be responsible (jointly and severally) for the disbursements of $2,577.61 and one-half of the fees and HST on fees of $10,556.25. S. L. shall be solely responsible for the other one-half of the fees and HST on fees of $10,556.25.

Warner, J.