IN THE COURT OF PROBATE FOR NOVA SCOTIA

Citation: *Lockyer Estate (Re)*, 2018 NSSC 128

Date: 20180529
Docket: Hfx No. 447385
Registry: Halifax

In the Estate of Donna Marie Lockyer, deceased

DECISION

Judge:	The Honourable Justice Suzanne Hood
Heard:	By Written Submissions, in Halifax, Nova Scotia
Final Written Submissions:	December 8, 2017
Counsel:	Sheree L. Conlon, Q.C., for the Estate of Donna Lockyer William Leahey, for Leahey Legal Services Christopher I. Robinson, for Stephen Lockyer, guardian *ad litem* for the Taxation of Accounts

By the Court:

Facts

[1] Over one and a half days in October 2017, the Probate Court dealt with an amended Notice of Taxation dated May 23, 2017, and filed with the court by the Estate as required by s. 91 of the *Probate Act*.

[2] Arising from the decision on the Taxation of Accounts, bills of costs for the taxation have been submitted as follows:

1. Leahey Legal Services $14,964.30
2. Stewart McKelvey $42,036.84, including Weldon McInnis' account for the taxation which totaled $11,064.73
3. Stephen Lockyer, as litigation guardian, $25,503.05 plus tax plus disbursements of $404.87

[3] Leahey Legal Services and Stewart McKelvey say their accounts should be paid personally by Stephen Lockyer as litigation guardian. Stephen Lockyer as litigation guardian says his account should be paid by the Estate.

[4] Some background is necessary in order to assess bills of costs arising from the taxation.

[5] The probate matter was with respect to the Estate of Donna Lockyer, who died on December 23, 2015. At the time of her death, she was separated from her husband Stephen Lockyer and had started divorce proceedings including a *Matrimonial Property Act* application. The divorce proceedings were acrimonious with numerous motions being made.

[6] The couple had two sons, Henry and Spencer, and at the time of their mother's death they were 16 and 15. They were then living with their father in the matrimonial home. Donna Lockyer had gone to the Bahamas seeking medical treatment for Stage 4 breast cancer. She returned to Halifax only days before her death.

[7] Donna Lockyer had executed a will on December 4, 2015. It was prepared by William Leahey and sent to Donna Lockyer in the Bahamas for execution. Her will appointed her twin sister, Della Hirsch, as executor, but she was away at the time of her sister's death. Accordingly, Della Hirsch asked William Leahey to do some of the things she would otherwise have done to carry out Donna Lockyer's wishes. There were disputes with Stephen Lockyer about such things as Donna Lockyer's cremation.

[8] Stephen Lockyer filed a Proof in Solemn Form (PISF) questioning the validity of Donna Lockyer's will. When the PISF application was filed, William Leahey had to retain counsel for the matter since he was to be a witness with respect to the execution of the will. Richard Niedermeyer of Stewart McKelvey was retained and over the ensuing six months there was considerable correspondence with Stephen Lockyer's then lawyer, Jane Lenehan. As well, a litigation guardian for Henry and Spencer had to be appointed. Jean Beeler, Q.C., was appointed and was involved in the litigation. William Leahey continued to act as proctor to the extent possible and in addition provided information to Richard Niedermeyer with respect to the *Matrimonial Property Act* application.

[9] Ultimately the PISF proceeding was resolved on July 27, 2016 with the formal order being dated October 4, 2016.

[10] Before the settlement occurred, Stephen Lockyer advanced a number of pre-hearing steps. These included a request for discovery of all four of the Estate's witnesses before their affidavits were filed. He also requested Donna Lockyer's private records from third party record holders directly, refusing to allow the Estate to vet the records for relevance. He sought records dating back four years prior to the execution of her will. He filed two affidavits which contained evidence which

the Estate viewed as inappropriate in an affidavit, saying the affidavits were scandalous and vexatious.

[11] Arising from these and other matters, a series of motions was scheduled to be heard on August 8 and 10, 2016.

[12] Accounts were taxed for Stewart McKelvey, Weldon McInnis, and Leahey Legal Services. Stewart McKelvey represented the Estate, initially only on the PISF proceeding and later as proctor. Jean Beeler, Q.C., of Weldon McInnis acted as litigation guardian for the minor beneficiaries of Donna Lockyer's will. After the settlement, she continued to act as trustee for the minor beneficiaries arising from the settlement agreement.

[13] Stewart McKelvey's Amended Notice of Taxation included the Leahey Legal Services account for services up to July 28, 2016 and Weldon McInnis' account dated November 16, 2016.

[14] With respect to the taxation of accounts, Stephen Lockyer became the litigation guardian for the minor beneficiaries by order of the court on April 11, 2017. That appointment was uncontested and none of the parties to the taxation appeared on the motion. In my view, it was this uncontested appointment which

led to expense and problems with the taxation of the accounts. Stephen Lockyer, as litigation guardian, became a party to the taxation of accounts.

[15] The Estate wanted to set the Taxation of Accounts down for one half day. I will deal with this hereinafter.

[16] Efforts to resolve the Taxation of Accounts foundered on Stephen Lockyer's insistence upon seeing emails to and from William Leahey with respect to the litigation Stephen Lockyer personally had undertaken. Stewart McKelvey refused to provide the first two emails that were requested on the basis of solicitor-client privilege. Ultimately 27 more were requested. Stephen Lockyer, as litigation guardian on the taxation, made a production motion for those emails. I denied the motion in my oral decision of October 27, 2017. I concluded that entries which were not included in the Leahey Legal Services account (ten) were not relevant. I also concluded that it was not necessary to provide details and emails for the other 19 entries on the account which was billed because there was no evidence to substantiate any allegation that anything improper was done.

[17] In that decision, I also noted the relatively small amount of time that was spent and that Jean Beeler, Q.C., as litigation guardian at the time the entries were

made would have been in a position to determine if the executor or proctor were acting adversely to the interests of the minor beneficiaries.

[18] A related motion, to replace Stephen Lockyer as litigation guardian with his counsel Christopher I. Robinson became unnecessary when the production motion was dismissed. It is noteworthy that the motion proposed replacing Stephen Lockyer as litigation guardian if his motion had been granted, on the basis of Stephen Lockyer then having a conflict of interest. However, it is difficult to see how replacing him with his own counsel could resolve a conflict of interest.

Costs Issues

[19] Stephen Lockyer as litigation guardian raised a number of issues in his written submissions on the costs issue. I will deal with them in the order in which they appear.

1. Role of each firm with respect to the taxation of its account

[20] Stephen Lockyer as litigation guardian says the only role each firm had was to put forward its arguments in support of its own account. I agree with that submission and, in my view, that was what was done by each. The only exception was when Sheree Conlon, Q.C., of Stewart McKelvey, objected to some of the questions put to William Leahey by counsel for the litigation guardian. She was

present at that time for the taxation of the Stewart McKelvey account and, in my view, this did not increase Stewart McKelvey's costs.

[21] On August 15, 2017 Weldon McInnis filed its brief on the taxation. Leahey Legal Services filed its submissions on September 5, 2017.

2. Production Motion

[22] Stephen Lockyer as litigation guardian says he tried to resolve the production issue by requesting a discount to the Leahey Legal Services account in exchange for disclosure. The difficulty with the production request is that it dealt with email exchanges between William Leahey as proctor and Della Hirsch as executor under her late sister's will. These emails were exchanged at a time when Stephen Lockyer personally was taking an adverse position and was involved in the PISF proceeding.

[23] Stephen Lockyer as litigation guardian says the minor beneficiaries of the Estate were not adverse in interest to the Estate; however, Stephen Lockyer personally was.

3. Adjournment Motion

[24] The Estate wanted to set the Taxation of Accounts down for one half day. Stephen Lockyer as litigation guardian for the taxation believed more time would be required: 1.5 to two days. When the Estate did set it down for one half day, Stephen Lockyer as litigation guardian made a motion to adjourn that date. He was successful, the taxation was adjourned and scheduled for 1.5 days.

4. Right to Costs on Taxation

[25] Stephen Lockyer as litigation guardian says there is no right to bill costs for the taxation. He refers to the *Legal Profession Act*, S.N.S. 2004, c. 28, and its provisions about taxing a lawyer's account. He says costs are normally taxed by adjudicators of Small Claims Court and they award no costs for taxing a lawyer's account.

[26] There are two problems with these submissions. First, the taxation of the accounts in an Estate matter is required by, and pursuant to, the *Probate Act*, not the *Legal Profession Act*. Regulation 61 of the *Probate Act* provides for "taxation of a solicitor's bill of costs … pursuant to section 91." Section 91 of the *Act* provides for bills of cost to be taxed.

[27] Secondly, the Small Claims Court does not have jurisdiction to award costs whereas section 92 of the *Probate Act* specifically provides for costs on contested matters.

[28] Normally a taxation of the costs of those acting for an Estate is not a contested matter. However, it is not a matter of deciding whether to have a taxation of costs in a probate matter. It is required either as a stand alone process or as part of the passing of the Estate's accounts.

5. "Contested" Matter

[29] Regulation 64 of the *Probate Act* provides for applications to court "respecting any contentious matter". It sets out a means by which such matters are commenced and provides for notice to anyone "interested in an Estate".

[30] However there was no need for such an application in this case. The Notice of Taxation was filed by Stewart McKelvey and notice given to counsel for the original litigation guardian (Matthew J.D. Moir, for Jean Beeler, Q.C.), William Leahey and Christopher I. Robinson as counsel for Stephen Lockyer personally.

6. The Role of the Probate Court Judge on a Taxation of Costs

[31] Stephen Lockyer, as litigation guardian, says it is the responsibility of the court to satisfy itself and make a determination as to the reasonableness of a lawyer's account. He says no agreement by counsel can "halt the process, thereby short circuiting the very purpose of the Taxation and its principal".

[32] He is correct. The taxation of bills of costs must be decided by the court (or the registrar of probate). An agreement by counsel with respect to the accounts does not eliminate the need for the hearing. However, if the accounts are not contested, the role of the probate court judge becomes less difficult. In fact, this was recognized by Stephen Lockyer as litigation guardian for the taxation in his letter to Sheree Conlon of Stewart McKelvey dated July 14, 2017. In that letter he said that if the parties agreed, it would "render the taxation perfunctory …".

[33] With respect to the Weldon McInnis account, brief submissions were made in writing after Stephen Lockyer as litigation guardian advised on August 9, 2017, that the Weldon McInnis account was reasonable. Therefore Matthew J.D. Moir made only a brief appearance on the taxation. The account was approved with a minor reduction: the administration fee.

[34] Stephen Lockyer as litigation guardian did not advise Stewart McKelvey until the evening before the taxation that he agreed with its account in the amount of $75,000. That was the amount as of December 31, 2016 which account was included in the Notice of Taxation. By that evening, Stewart McKelvey had filed its brief and the affidavit of Sarah Walsh in support of its account.

[35] The court dealt briefly with the account saying it was satisfied the reduced account of $75,000 inclusive of tax and disbursements was reasonable.

[36] Approval of accounts of Stewart McKelvey and Weldon McInnis took only a few minutes of court time. The balance of that day was spent dealing with the production motion brought by Stephen Lockyer as litigation guardian, which motion, as I have said, was dismissed.

[37] On the second afternoon of the hearing, commencing around 1:30 p.m., Christopher I. Robinson cross-examined William Leahey for approximately 80 minutes. Closing submissions were made that afternoon by Christopher I. Robinson and William Leahey, and the court reserved decision. As mentioned above, that decision was given orally on October 27, 2017.

[38] In that decision, I concluded that the Leahey Legal Services account of $20,330 was reasonable. One half day was spent dealing with the Leahey Legal

Services account. As I have said, dealing with the other two accounts took only a brief time. It therefore appears that setting the taxation of the accounts for one half day as proposed by Stewart McKelvey was, in fact, a reasonable estimate.

7. Settlement Offers

[39] Stephen Lockyer as litigation guardian says some of what Stewart McKelvey says were settlement offers were not. He says the figure of $75,000 provided by Stewart McKelvey on December 8, 2016 was actually advising the other counsel what Stewart McKelvey would seek to have taxed. I agree.

[40] An offer of August 17, 2017 expired while Christopher I. Robinson was on vacation and is, in my view, irrelevant because of its timing.

[41] There was an offer made by Stewart McKelvey of $71,000 all inclusive on June 29, 2017. This is, of course, less than the amount of $75,000 agreed to by Stephen Lockyer as litigation guardian and taxed by the court. Stephen Lockyer as litigation guardian in his written submissions to the court raised issues with the amount of the Stewart McKelvey account. However, as I have said, on the evening before the hearing he advised that the account of $75,000 was acceptable.

[42] It is clear that an earlier offer of settlement, June 29, 2017, had it been accepted by Stephen Lockyer as litigation guardian, would have eliminated the necessity for Stewart McKelvey to respond in writing to the issues raised in his brief. As he points out, it is still the responsibility of the court to satisfy itself about the reasonableness of the Stewart McKelvey account. However, as I said above, the exercise was said to be perfunctory by Stephen Lockyer as litigation guardian if there was agreement. It is noteworthy that in the affidavit of Richard Niedermeyer he sets out in Exhibit DD the pre-bill dated October 19, 2016 for the Estate matter totalling $99,733.50 plus disbursements.

[43] No one objected to the Weldon McInnis account and the firm's written submissions were succinct and designed to assist the court in its assessment of the reasonableness of the account. Mention was made of the discount applied when Ms. Beeler as litigation guardian and Mr. Moir met to discuss the matter, the latter to do the work necessary to bring the settlement before the court. Only one of the two lawyers billed for those meetings. As I said above, Mr. Moir appeared only briefly on the taxation and, with everyone's agreement, went first and then departed.

[44] The Leahey Legal Services account dated January 26, 2016 (this was in error; the date should have been January 26, 2017, based on the dates of the

entries) was for $19,087.50 plus HST for a total of $21,950.63 plus disbursements for a total account of $26,373.58. As well, there was additional unbilled time totalling $7,275. In his submissions to the court on the taxation, William Leahey said his fees were $20,330 and he had discounted his account by $6,092.50. He also said $7,275 in unbilled time should be added. I concluded the account of $20,330 as submitted was reasonable.

[45] Prior to the taxation, Stephen Lockyer as litigation guardian proposed that in addition to the discount proposed by William Leahey, Leahey Legal Services should pay $15,000 to the Estate. At the taxation, the position of Stephen Lockyer as litigation guardian was that the account should be reduced by $12,312.50 plus HST, a lesser amount than his position on July 31, 2017, which also included a request for two of the emails to which I have referred above.

[46] The accounts of both Stewart McKelvey and Leahey Legal Services were approved by the court for amounts in excess of earlier settlement proposals. This is a factor in awarding costs of taxation.

8. Personal Liability of Stephen Lockyer for Costs

[47] The usual rule in Nova Scotia is that a litigation guardian will not have costs awarded against him or her unless the guardian abuses the court's processes (Rule

36.07(5)). The situation is different in Ontario and British Columbia and I therefore do not find the authorities from those two provinces cited by Stewart McKelvey to be helpful.

[48] The issue is whether there is conduct by Stephen Lockyer as litigation guardian which could be considered to be an abuse of the court's processes.

[49] In my view, Stephen Lockyer as litigation guardian failed to distinguish between that role and his role as a litigant in the PISF application. Although he was ostensibly acting for the minor beneficiaries, his sons, what is telling is his insistence upon obtaining 29 emails between William Leahey as proctor and his late wife's sister as executor. These emails all were related to Stephen Lockyer's adversarial role with respect to Donna Lockyer's Estate. His actions on Donna Lockyer's death and his subsequent PISF application were the actions of an adverse party. Had Donna Lockyer's will been declared valid, her Estate of approximately $192,000 net of expenses would have passed to her sons. The matrimonial home was in joint tenancy and Donna Lockyer's interest in it passed to Stephen Lockyer on her death. The Estate asset was the balance in Donna Lockyer's account left after she had removed $300,000 from a joint line of credit. This could have been a simple Estate to administer.

[50] However, a complicating factor was Donna Lockyer's claim in the divorce that assets which Stephen Lockyer claimed were business assets should be declared matrimonial assets. Their value, although not stated, appears to be substantial.

[51] In *National Bank Ltd. v. Barthe Estate*, 2015 NSCA 47, Saunders, J.A., held that a misuse of the court's procedures is an abuse of process. Rule 88.01 also provides guidance on the doctrine. It says:

> **88.01**(1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.
>
> (2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.
>
> …

[52] The Estate says Stephen Lockyer's actions as litigation guardian amount to an abuse of process and should be penalized by an award of costs against Stephen Lockyer personally.

[53] One of the factors in assessing whether there has been an abuse of process is to ensure the administration of justice is not brought into disrepute. However, in *National Bank*, the Court of Appeal pointed out that it will be rare that the doctrine will be successfully invoked.

[54] In *National Bank*, Saunders, J.A., referred in paragraph 235 to two ways in which there can be an abuse of process: first, where the violations "have proven to

be manifestly unfair to a party to the litigation …". The second way is where the party "in some other way brought the administration of justice into disrepute …".

[55] In *Ocean v. Economical Mutual Insurance Company*, 2013 NSSC 14, Smith, A.C.J., in para. 37, quoted from *Toronto (City) v. CUPE Local 79*, 2003 SCC 63. In that case, the Supreme Court referred in turn to *R. v. Scott* [1990] 3 S.C.R. 979 at page 1007. There the court said "abuse of process may be established where 1) the proceedings are oppressive or vexatious; and, 2) violate the fundamental principles of justice underlying the community's sense of fair play and decency."

[56] Stewart McKelvey cites several examples of what they say is abuse of Stephen Lockyer's position as litigation guardian. He sought solicitor-client communications (between William Leahey and the executor) as a condition for approval of Stewart McKelvey's account. As I have said, these were communications between William Leahey and the executor in the context of the disputes between Stephen Lockyer personally and the executor.

[57] Stewart McKelvey also says that Stephen Lockyer would not agree to any account unless all were agreed to. That led to all three firms having to continue to prepare for the taxation. Stewart McKelvey says Stephen Lockyer ultimately

agreed not to contest the Stewart McKelvey account and had previously said he would not contest the Weldon McInnis account.

[58] Stephen Lockyer brought an unsuccessful production motion to gain access to 29 email exchanges between William Leahey and the executor. As I said above, these emails were communications between William Leahey and the executor when Stephen Lockyer was adverse in interest.

[59] Stephen Lockyer tried to step away from his role as litigation guardian and be replaced by his own counsel, because he believed he would have a conflict of interest if the production motion was granted. In my view, this speaks to the impropriety of seeking the emails in the first place.

[60] I conclude Stephen Lockyer acted more as a litigant than as a litigation guardian. He did not separate the two roles. For that reason he was ill suited to be a litigation guardian on the taxation. His questioning of William Leahey during the taxation, in my view, reflected his view of William Leahey as his late wife's lawyer on the highly contested divorce, as her lawyer when he prepared her will and as proctor when he acted on the executor's instructions.

[61] His insistence on the taxation that he was trying to preserve Estate assets for his sons is belied by his actions in his personal capacity in the PISF application and his request for his costs of the taxation to be paid from the Estate.

[62] In my view, although the actions of Stephen Lockyer as litigation guardian were carried out for an improper purpose, they fall short of an abuse of process. In my view, these actions would not bring the administration of justice into disrepute. I cannot conclude, therefore, that Stephen Lockyer should personally pay the costs of the other parties to the taxation. However, that is not to say that there should be no costs consequences.

Factors in the Costs Award

[63] I consider the following factors in determining a costs award.

1. Stephen Lockyer as litigation guardian caused the taxation hearing to take one and a half days, only one half day of which was in questioning the account of Leahey Legal Services. As I have said, on the eve of the hearing he advised he had no objection to the largest account that is the Stewart McKelvey account.

2. Stephen Lockyer as litigation guardian had requested a hearing of one and a half to two days of which only one half day, as it turned out,

was needed to address the Leahey Legal Services account. Stewart McKelvey had set it down for one half day. After the successful adjournment request on June 19, 2017, Stephen Lockyer as litigation guardian advised on August 9, 2017 that he did not object to the Weldon McInnis and, as I have said above, eventually stated he had no objection to the Stewart McKelvey account.

3. Stephen Lockyer as litigation guardian made an unsuccessful production motion during the time set for the taxation. As I have said above, in my view, this motion was inappropriate because it was made with the intent to view account entries relating to the time when Stephen Lockyer personally was in an adverse position to the executor.

4. Stephen Lockyer as litigation guardian, on the assumption the production motion would succeed, proposed that his counsel replace him as litigation guardian for purposes of the taxation. This was predicated on the existence of a conflict of interest. It would not eliminate any conflict of interest to have his own counsel replace him as litigation guardian.

5. Stephen Lockyer applied to be an intervenor in the taxation of accounts. In his affidavit, he expressed his concern that

> … the Estate and its proctor have no intention of vigorously contesting the taxation of the lawyers' accounts, and I further believe that the *guardian ad litem* does not intend to vigorously oppose the account of Mr. Niedermeyer [of Stewart McKelvey]. (para. 19 of Stephen Lockyer's affidavit of March 27, 2017)

He also said in para. 18:

> It is my belief that Donna would have wanted Henry and Spencer to have been bequeathed a meaningful sum of money to be held in trust for their benefit, and based on the figures I have been provided, it appears as though in the event the lawyers' bills are paid as rendered, there will be very little – if any – value remaining in the Estate to be left to Henry and Spencer.

There were three things he did not mention. The first was that the Estate of Donna Lockyer could have been far greater than $192,000 had the claim against him personally under the *Matrimonial Property Act* been successful. A Statement of Property filed by Stephen Lockyer in the divorce proceeding refers to "business assets" of Armshore Investments Limited.

The second was that if his PISF application had been successful and the will of Donna Lockyer declared invalid, there would have been an intestacy. In that event, as Donna Lockyer's surviving spouse, Stephen Lockyer would have been entitled to a share of her Estate, reducing his sons' shares.

The third was that the main reason for the extent of most of the legal fees was his own role in contesting the validity of Donna Lockyer's will. When one reviews the accounts submitted for taxation, it is clear that in the Stewart McKelvey account the fees were related to the PISF application brought by Stephen Lockyer personally. Similarly, the account of Weldon McInnis related entirely to the need for a litigation guardian because of the litigation brought by Stephen Lockyer.

The proctor's account was problematic since it included time charges for William Leahey as a witness in the PISF application. However, if there had been no PISF application, the proctor could have continued to act and some of the questionable time entries for non-proctor work could have been resolved on the taxation by the court, which is what occurred. The account was approved for the reduced amount sought.

In my view, it was unnecessary for Stephen Lockyer to have a role in the taxation of accounts. His previous counsel, Jane Lenehan, had written to Richard Niedermayer and Jean Beeler on November 22, 2016 explaining Stephen Lockyer's reason for seeking to be litigation guardian for the taxation. She referred to the "difficult position Mrs.

Beeler finds herself in, defending her own account and at the same time questioning all three accounts on behalf of the minor beneficiaries".

Even if this was the case, the need for a separate litigation guardian for the taxation was eliminated on August 9, 2017 when Stephen Lockyer as litigation guardian said he took no objection to the Weldon McInnis account.

6. Stephen Lockyer's motion to be added as an intervenor on the taxation of accounts was unopposed. The Chambers' judge instead granted an order appointing Stephen Lockyer as guardian *ad litem* for the purposes of the taxation. Sheree Conlon, Q.C., for the Estate, submitted that the reason the Estate did not oppose the motion was to save legal fees. However, in hindsight, it proved to be most unfortunate that no one opposed the motion. This, in my view, is a factor in a costs award.

7. Stephen Lockyer as litigation guardian says with respect to the submissions on costs of the taxation that the Estate of Donna Lockyer should not be charged for the time spent by Stewart McKelvey, Weldon McInnis or Leahey Legal Services in dealing with the

taxation itself. He says these costs should be borne by each party in defending its own accounts. He points out that the Estate, and therefore its beneficiaries, his sons, should not receive less money by the court ordering costs to be paid out of the Estate.

He then says, however, that his costs as litigation guardian should be paid by the Estate because as litigation guardian his role was to represent the interests of the beneficiaries.

8. The accounts of Stewart McKelvey and Weldon McInnis were taxed as submitted with no objection taken by Stephen Lockyer as litigation guardian. The account of Leahey Legal Services was also taxed in the reduced amount submitted after cross-examination by counsel for the litigation guardian.

9. In effect, the taxation itself was concluded in one half day: approximately five minutes on the Weldon McInnis account on October 11, approximately five minutes on the Stewart McKelvey account that same morning, and one half day on October 12 with respect to the Leahey Legal Services account. This is consistent with the time for which Stewart McKelvey originally had set the taxation down.

The Costs Award

[64] If successful, the litigation guardian for a party would be entitled to be compensated in costs by the Estate. In this case, the litigation guardian was wholly unsuccessful. I conclude the litigation guardian's costs of the taxation should be borne by Stephen Lockyer as litigation guardian.

[65] I therefore must consider what an appropriate award of costs should be for the other parties, Stewart McKelvey, Weldon McInnis and Leahey Legal Services.

[66] Stewart McKelvey's account for its costs of the taxation also include the costs of Weldon McInnis. Stewart McKelvey says the total fees it incurred are $47,797 but proposes a 25 percent discount "to account for any duplication in work, the amount in issue and the Estate's limited resources". Stewart McKelvey says its fees are $36,000 plus disbursements of $579.86 for a total of $42,036.84 including HST. Stewart McKelvey says the Weldon McInnis account for the taxation, all inclusive, is $11,164.73. The two accounts therefore total $53,201.57.

[67] Stewart McKelvey had to tax its account for legal services to the Estate which includes the account of Jean Beeler, Q.C., as guardian *ad litem*. It was successful on the taxation as was Weldon McInnis.

[68] I conclude that it is not appropriate in the circumstances of this case that the costs of Stewart McKelvey and Weldon McInnis be paid from the Estate on a solicitor-client basis. For that reason, I treat them as successful parties entitled to party and party costs. I will deal with the account of Leahey Legal Services hereinafter.

[69] I must determine the amount involved. Insofar as Stewart McKelvey is concerned, the amount involved is $75,000, the amount approved on the taxation.

[70] Stewart McKelvey says that Scale 3 should be used because the taxation was complicated and prolonged. Stewart McKelvey says “virtually the entire contested taxation was undertaken abusively and unnecessarily”.

[71] I have dealt with the issue of abuse of process above. I have concluded above that it was unnecessary for Stephen Lockyer to act as litigation guardian on the taxation and for the taxation to have taken one and a half days. Nonetheless, I conclude in my discretion that the basic scale, Scale 2, is the appropriate one. The circumstances, in my view, do not warrant Scale 3 costs. Although the Stewart McKelvey account was contested until the evening before the taxation, settlements or agreements are often reached on the eve of trial or hearing. After its account and that of Weldon McInnis were approved, there was no need for Stewart McKelvey

to be present for the cross-examination of William Leahey on the Leahey Legal Services account. Stewart McKelvey did not object to the Leahey Legal Services account; in fact, Stewart McKelvey submitted it should be taxed as submitted.

[72] In addition to the tariff costs on Scale 2, the length of the hearing is a factor. $2,000 per day is to be added to the costs. For Stewart McKelvey, the length of the hearing was one half day for an additional fee of $1,000. On Scale 2, I award Stewart McKelvey party and party costs of $12,250 plus $1,000 for a half day hearing for a total of $13,250.

[73] For Weldon McInnis, the amount involved is $36,992.50. Because its account was not objected to and Stephen Lockyer as litigation guardian advised of this two months before the hearing, I conclude Scale 1 is appropriate. Matthew Moir's appearance was very brief and I conclude the length of trial is one hour and the fee for that is $250. The costs award is therefore $4,688 plus $250 for a total of $4,938.

[74] Since I have concluded that Stephen Lockyer personally should not be responsible for the costs of Stewart McKelvey and Weldon McInnis, these costs are to be paid from the Estate.

[75] Leahey Legal Services admits it is not entitled to bill the Estate for its legal services after October 2016 when the executor retained Stewart McKelvey as proctor. However, Leahey Legal Services says it incurred costs for the legal work necessary to respond to Stephen Lockyer's motions as litigation guardian. Leahey Legal Services says it lost billable time doing so and should receive a partial or full indemnity for these costs.

[76] Leahey Legal Services says there is authority for the payment of costs to a self-represented party. It cites *Salman v. Al-Sheikh Ali*, 2011 NSSC 30, as authority for such payment.

[77] In that case, the court said doing so was within the discretion of the court and referred to the purpose of awards of costs. In para. 46, the court said:

> [46] … The purposes of such an award are twofold: to ensure that the Salmans are not immunized against costs because the Al-Sheikh Alis represented themselves and, overall, to encourage settlement in cases even where parties are representing themselves.

[78] Leahey Legal Services says the court should consider that a self-represented barrister has been deprived of income he could otherwise have earned if he had not been involved in this court proceeding. Leahey Legal Services cites *Wright and McTaggart* (Re), [1990] O.J. No. 2141, (Assessment Officer). In that case the

Assessment Officer concluded that the lawyer was unable to sell his time to any other client while appearing on the assessment.

[79] That case was cited by Macdonald, J. in *Fellowes, McNeil v. Kansa General International Insurance Co.*, [1997] O.J. No. 5130 (ONSC) where a barrister representing his firm was awarded party and party costs because he and his partners were deprived of income he could have earned if serving other clients.

[80] In Nova Scotia, there have been no cases where a self-represented barrister has been awarded costs. Self-represented parties have been awarded costs; for example, *Salman supra*, *Crewe v. Crewe*, 2008 NSCA 115, and *Leigh v. Milne*, 2010 NSCA 36. The decision in *McBeth v. Dalhousie College and University*, [1986] N.S.J. No. 159 (C.A.) is often cited as one of the earlier cases where a costs award was made in favour of a self-represented party.

[81] In *Fong v. Chan* [1999] O.J. No. 4600 (C.A.) Sharpe, J.A. concluded that both self-represented lawyers and self-represented lay litigants may be awarded costs. He pointed out three fundamental purposes of costs: 1) to indemnify successful litigants; 2) to encourage settlement; and, 3) to discourage and sanction inappropriate conduct (para. 22).

[82] Leahey Legal Services says it lost billable time of approximately $13,000 and was successful at the taxation of its account.

[83] If Leahey Legal Services is to receive its costs on the taxation of its account, I conclude they should not be a full indemnity. As was the case with the costs of Stewart McKelvey and Weldon McInnis, I conclude the costs of Leahey Legal Services should be paid on a party and party basis. I conclude that Scale 2 is the appropriate scale since Stephen Lockyer as litigation guardian took exception to some of the invoiced fees and cross-examined William Leahey for approximately one half day on his account.

[84] The amount in issue is $20,330, the amount awarded. On Scale 2, the party and party costs are $4,000 plus one half day of hearing at $1,000, for a costs award of $5,000 to be paid from the Estate.

Hood, J.