SUPREME COURT OF NOVA SCOTIA

Citation: *Withenshaw v. Withenshaw*, 2022 NSSC 158

Date: 20220609
Docket: Kentville No. SK 475379
Registry: Halifax

Between:

Gary Paul Withenshaw and George David Withenshaw

Applicants

v.

Gail Eileen Withenshaw

Respondent

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions
Written Submissions:	April 29; May 5 and May 19, 2022
Counsel:	Richard W. Norman, for the Applicants Gail Withenshaw, on her own behalf

Revised Decision: The text of the original decision has been corrected according to the attached erratum, dated June 16, 2022

By the Court:

[1] This is the third (and final) decision of this Court in relation to this matter. It follows *Withenshaw v. Withenshaw*, 2020 NSSC 208 and *Withenshaw v. Withenshaw*, 2022 NSSC 21. They will be referred to as the "first decision" and "second decision" respectively.

[2] The first decision involved a determination of whether the Respondent, Gail Withenshaw, would be required to account for her stewardship of her deceased mother's assets, pursuant to section 5(1)a of the *Powers of Attorney Act*, R.S., c. 352, s. 1 (as amended), "the *POAA*". Integral to that determination was whether the (now deceased) Doris Withenshaw was in a state of "incapacity" within the meaning of that legislation and if so, during what period of time.

[3] This was important because, for reasons set out in the first and second decisions, I had concluded that the Court only had the ability to order an accounting with respect to those transactions under the auspices of the Power of Attorney that occurred during that period of incapacity. Any accounting with respect to transactions preceding that interval could only be sought by Doris Withenshaw, if she was still alive. Since she is not, it could only be sought by her Estate. I will return to this point later in these reasons.

[4] The second decision dealt with the accounting itself. It was rendered after a hearing held on September 21, 2021. Following the hearing, I requested submissions from the parties and, absent agreement, further evidence (in affidavit form) with respect to the residual value of the vehicle (a 2008 Dodge Caliber), in relation to which Doris Withenshaw's money had funded (all but $930.99 of) the purchase price. The vehicle had been placed in Gail Withenshaw's name.

[5] I found this to have been a legitimate expense because the late Ms. Withenshaw had suffered from a number of health concerns, including degenerative disc disease, which made it difficult for her to get in and out of the vehicle her daughter had been previously driving. The only times (practically speaking) Doris Withenshaw was ever able to get out of the nursing home in which she resided was when she went on outings with the Respondent. So the car was a necessary purchase, but it ought not to have been placed in Gail Withenshaw’s name.

[6] As noted in the second decision:

> 73. So, $20,930.99 is the cost to be attributed to the purchase of this vehicle. On the balance of probabilities, I conclude that the sum of $20,000.00 (cheques 009 and 016) was paid back to Gail Withenshaw out of Doris Withenshaw's funds. Of that amount, therefore, the Respondent must repay all but $930.99 of whatever the book or resale value of the vehicle was on November 1, 2014 [*sic*, actual date of death was March 1, 2014].
>
> 74. There is no evidence before me as to the book or resale value of that vehicle on November 1, 2014 [*sic*, actual date of death was March 1, 2014]. The parties will either agree as to that value within fourteen (14) days of the receipt of this decision, or contact the Court to arrange to be heard with respect to that value. This is the first component of the amount which the Respondent will be obligated to repay.
>
> 75. Any purported gift allegedly made by the late Mrs. Withenshaw of the residual value of the vehicle to her daughter, even if I were to set aside the hearsay difficulties created by the aforementioned portion of the Respondent's affidavit, occurred well after the date upon which I was satisfied that Doris Withenshaw lacked capacity.

[7] The second issue upon which I invited submissions involved the present day amount remaining in the Estate's account, less the life insurance that had been paid upon Doris Withenshaw's death. I did not deal specifically with the issue of the life insurance premiums. They would have had to have been paid out of the deceased's assets during the period of her incapacity preceding her death, because all agree that the proceeds were paid to her Estate upon her death. Therefore, I invited submissions from the parties as to whether these premiums should also be deducted from the amount which the Respondent is required to repay.

[8] Finally, I invited submissions on prejudgment interest (a topic with which neither side had dealt up to that point) and costs.

[9] After originally scheduling this matter to be heard on May 4, 2022, the parties agreed that I could decide these final matters on the basis of the affidavits that have been filed, and their written submissions. I will proceed to consider each issue sequentially.

[10] In addition, by way of a further issue, I will return to a topic addressed in the second decision. It involves cheque 001, in the amount of $50,000.00. This was dated March 23, 2007, and had predated the finding of Doris Withenshaw's incapacity.

A. Value of the vehicle as of March 1, 2014.

[11] I have been satisfied upon a balance of probabilities that the value of the 2008 Dodge Caliber automobile (on March 1, 2014) was $5,000.00. Of that amount, the Respondent is required to repay the Estate all but $930.99, which is the amount of the purchase price for which I had found that she did not receive reimbursement when the car was purchased. I have also been satisfied that the current value of the vehicle is $1,907.00. Gail Withenshaw shall transfer ownership of the vehicle to the Estate. She shall also pay to the Estate the sum of $2,162.01 ($5,000.00-$930.99 = $4,069.01; $4,069.01 - $1,907.20 = $2,162.01). This amount will be incorporated into the revised formula shown in para. 26 of this decision ("the revised formula").

B. Present day amount in Estate account/life insurance proceeds.

[12] The parties are in agreement that life insurance proceeds comprise $56,104.75 of the current balance. Absent these proceeds, therefore, the amount of $23,770.09 is retained in the Estate account. Accordingly, the Respondent is to be given credit for this latter figure as against the monies that she is required to repay, in accordance with the revised formula.

C. Life insurance premiums.

[13] The Applicants have provided their position with respect to whether Ms. Withenshaw ought to receive credit against what she owes to the Estate, for the life insurance premiums which were paid during the (approximately) seven year period during which her stewardship of her mother's assets overlapped with the latter's incapacity. This was addressed in their counsel's correspondence of April 26, 2022:

> They [the Applicants] object to this amount of money being deducted from the Estate. It is something that a proper accounting might have explained at the hearing last year. Ms. Withenshaw has not proven why she should be permitted to reopen her case now and have this evidence admitted and considered.

[14] With respect, these amounts were included in the materials filed in advance of that hearing. They are referenced in Gail Withenshaw's affidavit which was filed on June 18, 2021, in support of her accounting - Exhibit "A", p. 1 - cheques 005 and 018 – "Manufacturers" each in the annual amount of $1,305.00). They are also referenced in the Applicant, Gary Withenshaw's, affidavit filed on June 3, 2021. At page 14 of Exhibit "C" (of the latter affidavit) we see the reverse side of cheque 018

– clearly stamped as deposited by Manufacturers Life Insurance Co. in the amount of $1,305.00.

[15] Moreover, I have concluded that the annual premium, $1,305.00, was clearly paid over the course of eight years. This is because the premiums would also have been paid out of Doris Withenshaw's monies for the (approximate) year which coincided with the Respondent's receipt of the POA (on June 20, 2006) up to the date upon which she was found to lack capacity (May 2, 2007). Cumulatively, these amounts total $10,440.00. It would be patently unfair for the Estate to receive the benefit of life insurance proceeds, without the Respondent being given a corresponding credit against the amount which she is required to repay to the Estate with respect to these premiums.

[16] This is particularly so where the Applicants, at the second hearing, and after having taken the position that the Respondent's accounting was very inadequate, instructed their counsel not to ask a single question on cross-examination, whereby she may have been able to explain some of these things. Ms. Withenshaw is not reopening her case (at least in this respect) at all. She shall receive credit for this amount against what she is required to repay, again in accordance with the revised formula.

D. Gasoline

[17] The parties are in agreement with respect to the credit to be provided to the Respondent for the 81 months (6.78 years) following the purchase of the new vehicle with respect to gasoline expended during her outings with their mother. That global amount is $6,227.08.

[18] They disagree, however, as to whether Gail Withenshaw should receive anything for gas expended by her in her previous vehicle. This encompasses the period from May 2, 2007, the date of the finding of incapacity, to May 27, 2008, the date of purchase of 2008 Dodge Caliber.

[19] In paras. 88 – 90 of the second decision it was noted:

> 88. The only other valid cost incurred in relation to the car is the cost of the gasoline for the two to three average weekly visits to the nursing home from the date of acquisition of the vehicle (May 2008) to the date of Doris Withenshaw's death (November 1, 2014) [sic, actual date of death was March 1, 2014], a 56 kilometre commute, round trip. <u>There was also gas expended for trips using Gail Withenshaw's vehicle before this new car was purchased. No evidence was called</u>

> as to the fluctuating cost of gasoline over this interval. The parties will agree to the amount for which the Respondent is to be given credit for the gas consumed from May 1, 2007, to date of death as against the Estate assets for which she must account (as is the case with respect to the residual value of the vehicle on November 1, 2014 [*sic*, actual date of death was March 1, 2014]) within two weeks of the date of this decision, failing which another hearing will be convened at which the relevant evidence may be called.
>
> 89. I repeat that in the overwhelming majority of cases, the failure to provide receipts, or some documentation, to enable the Court to conclude what expenditures were made, how much expense was incurred, and that it was for the benefit of the donor of the Power of Attorney in question, will prove fatal to a Trustee's assertion of an expense paid on behalf of the donor.
>
> 90. In this case, we have medical evidence that would have justified the need for the purchase of a car suitable for Doris Withenshaw's needs, as well as the records of the nursing home that document many of the visits that the Respondent made to her mother to take her on outings Grand View Manor. We know that it was a 56-kilometre round trip from the Respondent's home to the Manor, each visit. The only unknowns (to repeat) are the cost of the gasoline which would have been incurred, and the residual value of the vehicle (which was beneficially owned by Doris Withenshaw's Estate) on the date of her death, November 1, 2014 [*sic*, actual date of death was March 1, 2014].
>
> [Emphasis added]

[20] As can be clearly seen, this issue has already been decided. In addition to the agreed-upon credit for the gasoline expenditure noted above, Gail Withenshaw shall receive a gasoline credit with respect to the period of time from May 2, 2007 to May 27, 2008 in the amount of $918.49 ($6,227.08 / 6.78 = $918.49). The total gasoline credit is therefore $7,145.57.

E. Prejudgment interest

[21] The parties have (eventually) agreed to prejudgment interest at the rate of 2.5%. This was not their original position. I will deal with this in more detail when the issue of costs is addressed below.

F. Credit for $50,000.00 (cheque 001) which predated the later finding of capacity.

[22] The Respondent is entitled to another deduction. It is one with which I dealt in the body of the second decision, but neglected to incorporate into the formula noted in paras. 94 and 95 thereof.

[23] This is highlighted by selected excerpts from the second decision:

> 25. Next, the Applicants have indicated that they seek to recover some funds paid to the Respondent by their mother prior to the date upon which she has been shown to have been legally incapacitated. Most prominent of these funds was a cheque signed by the deceased payable to the Respondent in the amount of $50,000, dated March 23, 2007. They argue that, although this predates May 1, 2007, by approximately five weeks, Doris Withenshaw's incapacity did not just "suddenly emerge" on the latter date. Rather, her disease was rapid and ongoing, and (they continue) her overall health situation could not have been meaningfully different on March 23, 2007, than it was on May 1, 2007.

[24] And later:

> 100. Justice LeBlanc (as he was then), observed in *B.F.H. v. D.D.H.*, 2010 NSSC 340:
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> > 10. Where a donor has become legally incapacitated, as Mrs. H. is on account of the Order under the *Incompetent Persons Act*, subsection 5(1)(a) of the *Powers of Attorney Act* permits the Court to "require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor." … the period for which an accounting is required is from the date the Court determines that Mrs. H. had become incompetent or incapable of managing her affairs. Prior to that date, the Applicant is not entitled to seek any accounting or to otherwise make any claim. Any accounting prior to the date of incapacity is owed only to the Applicant.
> >
> > [Emphasis in original]
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> 101. Although there is not an overabundance of decided cases in this Province which address this particular point, with respect, I am in agreement with the conclusion in *B.F.H. (supra).* I have already said this in the earlier decision:
>
> > 30. The implications of this are obvious. If "any accounting prior to the date of incapacity is owed only to [Doris Withenshaw]" and she is deceased, only her Estate, under different legislation, could hold the Respondent to pass accounts for transactions incurred prior to the period of incapacity – and the Respondent is the Executrix of the Estate in any event.

[25] I had earlier concluded (in para. 50) that the value of the pool of assets for which Ms. Withenshaw must account was $412,769.15. I had arrived at this figure by reference to the total of Doris Withenshaw's investments as of January 1, 2006, then deducting the expenses that the evidence had established had impacted that pool from January 1, 2006 to May 2, 2007 to calculate the amount for which Ms. Withenshaw must account to the Court. I neglected, however, to subtract the

$50,000.00, represented by cheque 001, which was dated March 23, 2007. I had concluded that only the Estate could pursue an accounting with respect to these monies, because the date of the alleged gift predated that of the finding of incapacity.

[26] The revised formula therefore begins with a corrected figure for the pool: $412,769.15 - $50,000.00 (cheque 001) = $362,769.15.

Assets for which to account	Credit (expenditures satisfactorily explained)
$362,769.15	(i) $4,852.95, cost of living Doris Withenshaw, May 1, 2007 – August 15, 2007 (ii) $20,000.00 cheques 009 and 016, minus all but $930.99 of the resale value of the vehicle = $5,000.00 - $930.99 = $4,069.01; $4,069.01 - $1,907.20 (current resale value of vehicle) = $2,162.01 $20,000.00 - $2,162.01 = $17,837.99 (net vehicle credit) (iii) gasoline expenditure = $7,145.57 (iv) vehicle insurance and registration = $4,500.00 (v) prescription drugs = $15,183.23 (vi) present balance in account = $23,770.09 (vii) life insurance premiums = $10,440.00 TOTAL CREDITS APPLIED $83,729.83

[27] The total unaccounted for ($362,769.15 - $83,729.83) is therefore $279,039.32. This is the amount which the Respondent shall pay to the Prothonotary of this Court in accordance with the direction given in the second decision (para. 103). Prejudgment interest on this figure at the rate of 2.5% shall be applicable as earlier indicated.

G. Costs and disbursements

(i) Costs

[28] There is no consensus on costs. I propose to deal with the issue and determine the amount of costs to be paid in this entire proceeding, exclusive of those costs which were already awarded to the Applicants on June 21, 2021 (see paras. 4 - 8 of the second decision) in relation to the adjournment of the second proceeding.

[29] I begin with the Tariffs of Costs and Fees which follow Civil Procedure Rule 77 ("CPR 77"). The relevant portions thereof read as follows:

> In these Tariffs unless otherwise prescribed, the "amount involved" shall be
>
> (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
>
> (i) the amount allowed,
>
> (ii) the complexity of the proceeding, and
>
> (iii) the importance of the issues;
>
> (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
>
> (i) the amount of damages provisionally assessed by the court, if any,
>
> (ii) the amount claimed, if any,
>
> (iii) the complexity of the proceeding, and
>
> (iv) the importance of the issues;
>
> (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
>
> (i) the complexity of the proceeding, and
>
> (ii) the importance of the issues;
>
> (d) an amount agreed upon by the parties.
>
> **TARIFF "A"**
>
> **Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding**
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> In applying this Schedule the "length of trial" is to be fixed by a Trial Judge.
>
> The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2,000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge.

Amount Involved	Scale 1 (-25%)	Scale 2 (Basic)	Scale 3 (+25%)
Less than $25,000	$3,000	$4,000	$5,000
$25,000-$40,000	4,688	6,250	7,813
$40,001-$65,000	5,138	7,250	9,063
$65,001-$90,000	7,313	9,750	12,188
$90,001-$125,000	9,188	12,250	15,313
$125,001-$200,000	12,563	16,750	20,938
$200,001-$300,000	17,063	22,750	28,438
$300,001-$500,000	26,063	34,750	43,438
$500,001-$750,000	37,313	49,750	63,188
$750,001-$1,000,000	48,563	64,750	80,938
more than $1,000,000	The Basic Scale is derived by multiplying the "amount involved by 6.5%.		

[30] The "amount involved" for the purposes of Tariff "A" obviously falls within the $200,001 – $300,000 continuum. The Applicants claim entitlement to Scale 3. They contend as follows:

> Your Lordship made a number of adverse comments about Ms. Withenshaw's conduct throughout the course of the litigation and for that reason we say that Scale 3 should apply when determining the amount of costs pursuant to Tariff "A". This dispute was far more time-consuming and expensive than it needed to be.
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> Using Tariff "A", Scale 3 would yield costs of $43,438.00 to which the Applicants propose to add $4,000.00 representing the $2,000/day allowed for each day of a hearing as determined by a hearing judge. The incapacity hearing in March 2020 was one and a half days long. The accounting hearing this past September was half a day long. The total amount of costs would therefore be $47,438.
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> (*Applicants' brief, April 14, 2022, p. 3*)

[31] I am not going to repeat what I set out in the second decision with respect to Gail Withenshaw's conduct. It is certainly true that many of her actions (and I have only cited some of them) did contribute to the length of this proceeding. I have earlier noted that she has already paid $5,000.00 in costs with respect to those cumulative actions of hers which necessitated the adjournment of the second hearing, which would have otherwise been held on June 21, 2021.

[32] But I was not without criticism of the Applicants, as well. I mentioned several times (both in the second decision and this one) that they had instructed their counsel not to ask the Respondent anything in the second hearing. Nonetheless, they took the position, and argued strenuously, that her accounting was significantly lacking.

[33] In the end result, the Court has agreed that the accounting was lacking. But an absolute failure to cross-examine the Respondent must be taken to have had the effect of vitiating, in a fairly significant way, the preparation time expended by Applicants' counsel to prepare for the second (half-day) hearing. I take note of this as costs are assessed.

[34] In addition, the failure to cross-examine had one other important result. It prevented the Respondent from offering additional explanations (if indeed, there were any additional explanations that could have been offered) about some of the very defects in her affidavit evidence in respect of which the Applicants were complaining. While I cannot state that this was the Applicants' objective in providing such instructions to their counsel, such was certainly the effect of their decision to proceed in this manner.

[35] And there other concerns which are related to a costs assessment. As noted earlier in the decision, the Applicants, while acknowledging that the Estate had received the benefit of the life insurance proceeds, refused to agree that their sister should receive credit (as against what she must repay) for the premiums which would have had to have been paid during their mother's lifetime. This was despite the fact that the information upon which such calculations were to be based had previously been made available to the Court by the Respondent (and also the Applicants themselves). Such a position was unreasonable.

[36] Finally, I found it necessary to write the parties again on May 9, 2022, after I had received their submissions with respect to the matters discussed in this decision. In that letter I noted, with respect to their position on prejudgment interest:

> I have begun to review the parties' written submissions with respect to the remaining matters outstanding from Withenshaw v. Withenshaw, 2022 NSSC 21. In his correspondence dated April 14, 2022, Mr. Norman argues at page 2 thereof:
>
> > ...there should be prejudgment interest. <u>The applicants propose that it should run from 2014 at the rate of 5 per cent</u>. That would result in $17,379.00 per year of interest for eight years, or $139,032.00.
>
> Notwithstanding the fact that Ms. Withenshaw has subsequently indicated, in her correspondence of April 29, 2022, that she is in agreement with an interest rate of

> 5% per year starting from 2014, I require that this rate, if sought by the Applicants, be proven in an appropriate manner. Ms. Withenshaw is an unrepresented party. This rate (5%) appears to be (considerably) in excess of the amounts of prejudgment interest which this Court awarded over the time period which this award purports to cover.
>
> The parties may agree to a more representative prejudgment interest rate, or Mr. Norman may prove the proper rate by way of affidavit evidence, such as that from an appropriate bank representative who may advise as to average 30-day deposit rates during each year of the period in question.
>
> [Emphasis added]

[37] As noted above, Ms. Withenshaw was, by the time she and Mr. Norman provided their positions with respect to prejudgment interest, an unrepresented party. The Applicants' position with respect to this point, as well as with respect to the life insurance proceeds, was patently unfair to the Respondent, particularly given her unrepresented status.

[38] This is not to downplay the undeniable fact that the Respondent herself was unfair and did cause delay to the Applicants at various times throughout the course of this proceeding. But I mention again that the Applicants have already received an award of $5,000.00 in costs as a result of her actions which led to the adjournment of the June 21, 2021 date.

[39] It is also true that the Applicants were vocal about the other instances of unfairness and/or conduct of the Respondent (some of which the Court has pointed out in the earlier decisions). However, given the Applicants' own conduct at times, I cannot agree that they should be awarded Scale 3 costs in these circumstances.

[40] I am not going to attempt to measure the degree to which each side has deviated from the standards of fairness which both the Court and all parties are entitled to expect. Moreover, I have not been advised as to the amount of the Applicants' actual legal costs and disbursements.

[41] When all is said and done, the Applicants have been successful and, in my view, are entitled to their costs on that basis. They shall receive a costs award based upon Scale 2 (basic) ($22,750). To this figure, I add $2,000.00/day for the total of two hearing days, which amounts to a further $4,000.00. I conclude, in all the circumstances of this case, that this will do justice between the parties and provide the Applicants with a substantial contribution to their costs.

[42] Total costs are therefore determined to be $26,750.00.

(ii) Disbursements

[43] The Applicants shall also receive their reasonable disbursements. These are said to be in the amount of $4,476.85, and the breakdown provided follows:

> The Applicants are also seeking their disbursements. The largest disbursement incurred by my clients was the expert report with respect to capacity. I enclose copies of Dr. Bosma's invoices. Reasonable disbursements are $4,476.85 in total. The breakdown is as follows:
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> - $218.05 filing fee
> - $25 law stamp
> - $40 – witness fee for Dr. Mulhall
> - $120 – process server fee for service of application
> - $112.81 – fees paid to external counsel for signing of Dr. Mulhall affidavit
> - $676.24 – courier and delivery fees
> - $484.75 – printing/photocopying
> - $2,800 ($1,200 + $1600) for Dr. Bosma's fee (for expert report and testimony)
>
> (*Applicants' submissions, April 14, 2022*)

[44] I am prepared to allow all of these claims with the exception of the amount submitted for "printing/photocopying" ($484.75) as no breakdown of the number of copies and/or the amount being charged per page was provided.

[45] Total costs and disbursements, therefore, amount to $30,742.10, which sum shall be paid by the Respondent to "Cox & Palmer" in trust for the Applicants, Gary Paul Withenshaw and George David Withenshaw.

[46] Counsel for the Applicants shall prepare the order accordingly.

Gabriel, J.

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Gail Eileen Withenshaw

Respondent

ERRATUM

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions
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Counsel:	Richard W. Norman, for the Applicants Gail Withenshaw, on her own behalf
Erratum Date:	June 16, 2022

Para. 27 – $289,479.32 replaced with $279,039.32