SUPREME COURT OF NOVA SCOTIA
Citation: *Farrell v. Farrell*, 2017 NSSC 47

Date: 2017-02-23
Docket: Tru No. 451764
Tru No. 455536
Registry: Truro

Between:

The Incompetent Persons Act, RSNS 1989 C. 218

-and-

An application by David Farrell to be appointed as
Guardian of the person and Estate of
Milton Thomas Farrell and Jean Madeline Farrell

AND

The Incompetent Persons Act, RSNS 1989 C. 218

-and-

An application by Mary Elizabeth MacDougall to be appointed as
Guardian of the person and Estate of
Milton Thomas Farrell and Jean Madeline Farrell

Judge:	The Honourable Justice Gregory M. Warner
Heard and oral decision:	January 5, 2017, in Truro, Nova Scotia
Final Written Submissions on Costs:	February 15, 2017
Counsel:	M. Ann Levangie, counsel for David Farrell Gary A. Richard, counsel for Mary Elizabeth MacDougall

By the Court:

[1] This **costs decision** involves competing applications in chambers for guardianship of the applicants' parents.

The Applications

[2] On May 26, 2016, David Farrell applied for a declaration that his parents, who had been residing with him since November 2014, were incompetent and his appointment as guardian of them and their estates. His application was supported by two of his three siblings.

[3] On September 16, 2016, his other sibling, Mary MacDougall, filed a Notice of Contest of his application and her own application for guardianship.

[4] Neither party contested that their parents were not capable of managing their own affairs.

[5] Mr. Farrell's care plan was for their parents to remain living in the granny suite attached to his home near Stewiacke for as long as possible. Ms. MacDougall's plan was for their parents to be immediately placed in a senior's residence near her home in Antigonish.

[6] Both Mr. Farrell and Ms. MacDougall held powers of attorney for their parents and had used those powers to deal separately with their parents' finances. A significant issue in these applications related to their respective handling of their parents' substantial finances.

[7] At the end of the hearing on January 5, 2017, the court concluded, in an oral decision, that Mr. Farrell's past care and proposed care plan was by far the better plan as between that of himself and Ms. MacDougall, and that granting his application was in the best interests of the parents.

[8] Furthermore, the court found that the conduct of Mr. Farrell in his handling of their parents' affairs, both their personal care and those monies over which he exercised his power of attorney, were beyond reproach. He accounted to his siblings in a transparent manner, including, for example, giving them the ability to view directly the accounts of their parents with the passwords to their bank accounts.

[9] This contrasted sharply with the sometimes inappropriate and always secretive handling by Ms. MacDougall of the bulk of their parents' money that she used her power of attorney to get control of. She consistently avoided providing an accounting to her co-power of attorney or siblings.

Costs Submission

[10] David Farrell submits that he was substantially successful. He submits that costs are for the purpose of doing justice between the parties and starts with the proposition that the award of costs follows the result. He seeks costs in accordance with Tariff A, Scale 2 (basic scale) following a decision or order in a proceeding.

[11] Because this contest involved a substantial non-monetary issue (guardianship), he asked the court to apply the "rule of thumb" developed by Nova Scotia courts over several years for calculating the "amount involved" for non-monetary issues on the basis of the notional "amount involved" of $20,000 for each day of trial.

[12] Imputing this amount would result in an award, pursuant to Tariff A, Scale 2 of $4,000 (the hearing consumed a full day) together with $2,000 for trial day, for total costs of $6,000.

[13] Counsel for Mr. Farrell did not disclose Mr. Farrell's actual legal fees and expenses in respect of his application and contest of Ms. MacDougall's application. His counsel states that $6,000 would be a substantial contribution towards his reasonable fees and expenses.

[14] Counsel for Ms. MacDougall submits that Mr. Farrell would have been required to make the guardianship application, even if she had not opposed it, including obtaining affidavits and participating in a hearing.

[15] Because of the legitimate concerns of Ms. MacDougall respecting Mr. Farrell's handling of the finances pursuant to his power of attorney, a schism had developed between them, and the applications heard by the court were necessary to provide a clear picture to the court of their respective handling of monies on behalf of their parents.

[16] Finally, Ms. MacDougall submits that success was divided because the court imposed reporting and other conditions on Mr. Farrell.

[17] Ms. MacDougall says the parties should bear their own costs.

Analysis

[18] *Civil Procedure Rule 77* applies to costs decisions following litigation, including these competing guardianship applications in chambers.

[19] While *CPR 77.02* gives courts a general discretion to award costs that will do justice between the parties, the starting point for costs award is *CPR 77.03(3)*: "Costs of a proceeding follow the result, unless a judge orders or a *Rule* provides otherwise." The successful party is usually awarded costs.

[20] I do not agree with Ms. MacDougall's submission that success in these applications was divided. David Farrell was completely successful. The fact that I included in the Order reporting conditions and added a sister as a co-guardian respecting finances was not an indication of divided success. I imposed on Mr. Farrell reporting conditions that he had already voluntarily initiated long before this litigation and I added his sister as a co-guardian for the purpose of protecting Mr. Farrell from potential future challenges from Ms. MacDougall. I further directed that the monies Ms. MacDougall controlled pursuant to her use of the powers of attorney be turned over to the guardians appointed by this court.

[21] Throughout Mr. Farrell service to his parents he acted responsibly, transparently, and at some sacrifice/cost to his personal life and finances.

[22] The submission that Mr. Farrell's application and a hearing was necessary in any event is misleading. Normal guardianship applications are uncontested and dealt with in general or regular chambers in a few minutes at a nominal cost. This proceeding was contested and involved lengthy, competing affidavits as well as cross-examination.

[23] The court notes that each of the two applications were filed as Applications in Chambers. They were not Applications in Courts nor actions under *CPR 4.* The hearing of these applications was set down for two days, even though the hearing was completed in one full day.

[24] The successful applicant seeks that the court award costs pursuant to Tariff A, Schedule 2, and for that purpose, to determine the "amount involved" as if the substantial issue was the non-monetary issue of appointment of guardians.

[25] *CPR 77* states in part:

> In these Tariffs unless otherwise prescribed, the "amount involved" shall be
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> …
>
> (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;

[26] As noted, counsel for Mr. Farrell asks the court to apply the "rule of thumb" for calculating a notional or fictitious "amount involved" $20,000 per day to the calculation of costs pursuant to Tariff A, Scale 2, thereby generating a costs award of $6,000.

[27] While I agree that the use of the "rule of thumb" is appropriate when applying Tariff A to a proceeding resulting in a decision or order that has a significant non-monetary issue, it is not the appropriate approach to apply in this case for two principal reasons.

[28] First, as noted by Fichaud J.A. in *Armoyan v Armoyan*, 2013 NSCA 136, at paragraphs 15 to 30, and applied in *Armoyan*, Freeman J. A. in *Williamson v Williams*, 1998 NSCA 195, set out that the basic principle is that costs award should afford a substantial contribution to the parties' reasonable fees and expenses. He added that the artificiality of a notional or fictitious "amount involved" supports instead the use of the "lump sum" analysis authorized by *CPR 77.08* to achieve the goal of a 'substantial contribution' to reasonable costs.

[29] The second reason is that the both applications in this case were Applications in Chambers, for which Tariff C is specifically designed. Tariff C provides a range of costs, based on the length of hearing, plus other discretionary factors. The starting point is the length of hearing, and for a hearing of one full day, the costs are $2,000. The relevant discretionary provisions read as follows:

> For applications heard in Chambers the following guidelines shall apply:
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> …
>
> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
>
> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>
> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.

[30] Conceptually, Applications in Chambers, pursuant to *CPR 5*, are either heard in regular or general chambers, when they will take less than a half-hour and do not include cross-examination of any affidavits filed *(CPR 5.05(1))*, or, alternatively, are heard at appointed times, when they are intended to take less than half a day (*CPR 5.05(2)*).

[31] The fact that these two chambers applications were scheduled for two days and actually consumed one full day can be considered in the costs award by reason of paragraphs 3 and 4 of Tariff C.

[32] It would not be just to award costs in this case on the simple Tariff C rate for a full day. The affidavits and evidence were substantial. The issues were very important to the parties; they involved not just the care of two vulnerable parents but the management of their substantial estate. The amount of effort involved in preparing for and conducting the applications was more than for a normal Application in Chambers. Finally, the decision and Order that followed the Application in Chambers was determinative of the entire matter at issue in the proceedings.

[33] This court may multiply the maximum amounts in these circumstances by 2, 3 or 4 times, depending on the complexity, importance and effort involved. Because these Applications in

Chambers were determinative of a very important matter to the Farrell family, I conclude that David Farrell is entitled to a multiplier of three times the full day chambers rate of $2,000, or $6,000 in total.

[34] The court awards costs to David Farrell against Mary MacDougall in the amount of $6,000. To the extent that David Farrell may have received an advance from the funds of his parents with respect to this legal proceeding, he shall reimburse those funds upon receipt of this costs award.

Warner, J.