

CANADA / JUDGMENT

Harrington v. Margerison

2015 BCSC 603

COURT

Supreme Court of British Columbia

DECIDED

20 April 2015

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2015 BCSC 603 Harrington v. Margerison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harrington v. Margerison,

2015 BCSC 603

Date: 20150420

Docket: 14-2914

Registry: Victoria

In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349

and amendments thereto and the appointment of a Committee

for the person and affairs of ELIZABETH MARY GOWER MARGERISON

Between:

Bevan Clifford Harrington

Petitioner

And:

Elizabeth Mary Gower Margerison

Respondent

Before: Master Bouck

(as Registrar)

Reasons for Decision

Counsel for Bevan Clifford Harrington:

G. Loster

Counsel for Roslynne Harrington:

J. Horton

Place and Date of Hearing:

Victoria, B.C.

March 23 and April 1, 2015

Place and Date of Decision:

Victoria, B.C.

April 20, 2015

The Appointment

- [1] This is an assessment of the petitioner's special costs in the context of a contested committee application. The bill of costs claims the sum of \$31,662.97 and reflects the charges incurred by the petitioner for Mr. Loster's services.
- [2] Roslynne Harrington contests the amount of the fees and some of the disbursements.
- [3] For ease of reference, I will refer to Bevan Harrington and Roslynne Harrington by their first names for the balance of these reasons. No disrespect is intended.

The Bill

- [4] The petitioner claims fees of \$26,748 and disbursements of \$1,666.71. The bill particularizes the services provided to the petitioner over an approximate one year period. The fee portion of the bill is based on Mr. Loster's recorded time spent of 74.3 hours and charged at the rate of \$360 per hour. Charges for taxes on the fees and disbursements make up the remainder of the bill.

The Law

- [5] The assessment of special costs is governed by Rule 14-1(3) of the Supreme Court Civil Rules. The assessment is an objective exercise and differs from the subjective approach to be taken by the registrar on a review of a lawyer's bill under the Legal Profession Act, S.B.C. 1998, c. 9. Rule 14-1(3) provides as follows:

14-1(3) On an assessment of special costs, a registrar must

- (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and

- (b) consider all of the circumstances, including the following:
 - (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;
 - (ii) the skill, specialized knowledge and responsibility required of the lawyer;
 - (iii) the amount involved in the proceeding;
 - (iv) the time reasonably spent in conducting the proceeding;
 - (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;
 - (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;
 - (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;
 - (viii) Rule 1-3 and any case plan order.

[6] In *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107, the Court of Appeal reviewed the evolution of the law regarding this kind of assessment, finding that:

the legislative intention is clear that special costs are in their nature to resemble closely the reasonable fees that would be charged by a lawyer to his or her own client. It may be that, in some cases, they will be equal in amount. However, special costs and lawyers' reasonable fees are not identical.

[at para. 49.]

[7] The Court in *Lee* endorsed the "rule of thumb" first enunciated in *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.), *aff'd* 73 B.C.L.R. (2d) 212 (C.A.) that a special costs bill can be assessed "in most instances" at about 80% or 90% of a similar bill reviewed under the Legal Profession Act.

[8] However, the Court also ruled that there are "no fixed limits" on the amount of the special costs to be allowed as the registrar has broad discretion: paras. 26-27. Furthermore, the exercise of that discretion involves a consideration of not only the factors set out in Rule 14-1(3) but also the additional "Yule factors" such as risk and ability to pay. Indeed, it has long been held that "all factors essential to justice and fair play" must be considered by the registrar on a special costs assessment: *Sarkodee-Adoo v. Sarkodee-Adoo*, [2003] B.C.J. No. 1458 (S.C.) at para. 35.

[9] The Court of Appeal recently reiterated the principles set out in *Lee* in *Gichuru v. Smith (c.o.b. Howard Smith & Co.)*, 2014 BCCA 414 at para. 125:

the rule of thumb approach of a deduction from legal fees is merely an aid to a proper assessment and each case will turn on what is proper or reasonably necessary in the particular circumstances with the meaning of the words in R. 57(3) [the predecessor to SCCR 14-1(3).]

The Evidence

- [10] Bevan and Roslynnne are the two children of the respondent/patient. Each sought to be appointed the committee of their mother's person and estate. Each brought a petition seeking this relief. The petitions were heard by Smith J. over two days with judgment reserved. Subsequently, Smith J. appointed Roslynnne as the committee but with certain conditions and restrictions. The court awarded special costs to both the Bevan and Roslynnne, with those costs to be paid from the patient's estate. Roslynnne's costs have yet to be assessed.
- [11] At the assessment, oral evidence was given by Bevan, Roslynnne and Mr. Loster. In addition, Bevan relies on the affidavits of Eugene Raponi, Q.C. and James Legh, two senior members of the Victoria Bar. Messrs. Raponi and Legh opine in support of the hourly rate charged by Mr. Loster for his services.
- [12] The evidence of both Bevan and Roslynnne sometimes strayed into the factual disputes which were before the court on the committee's application. Not all of that evidence was relevant to this assessment.
- [13] Mrs. Margerison is now 97 years of age and twice widowed. Roslynnne and Bevan are the patient's only children. The Harrington siblings are named as co-executors in their mother's last will and testament and will inherit the residue of their mother's estate in equal shares.
- [14] Both Roslynnne and Bevan are retired and reside in the Victoria area. Both Roslynnne and Bevan have been involved in their mother's financial affairs and physical care for many years. The flavour of the evidence is that Bevan was mostly in charge of his mother's financial affairs while Roslynnne was primarily concerned with her mother's physical care. Eventually, the siblings found that they were unable to work cooperatively with each other and had different ideas about their mother's financial and physical needs. Contributing to these difficulties was the fact that Mrs. Margerison had authorized each of her children to act independently under a power of attorney. Bevan and Roslynnne did not always consult with each other before acting as that attorney.
- [15] Despite advancing years and some health problems, Mrs. Margerison lived for many years independently in the home she owns on Aldeane Avenue in the City of Colwood. Roslynnne moved in with her mother in 2011. Roslynnne, Bevan and third party caregivers provided care and assistance to Mrs. Margerison in the home but there were also stays at hospitals from time to time.
- [16] Beginning in 2012, various disagreements arose between the Harrington siblings concerning their mother's wellbeing. Bevan and Roslynnne each retained counsel. One area of conflict concerned Roslynnne's proposal to become a joint tenant on the title to the Aldeane property and, later, to purchase the property outright. A second area of disagreement was over the appropriate level of medical and personal care required by the patient. Bevan did not trust Roslynnne's abilities to manage Mrs. Margerison's ongoing physical or financial needs.

On two occasions, Bevan had moved Mrs. Margerison out of the Aldeane home without any notice to Roslynne. By this time, Mrs. Margerison was showing signs of advanced mental and physical impairment. Roslynne wished to care for her mother at home with some professional assistance as and when needed. Bevan believed that Mrs. Margerison's needs would be better met in an extended care facility.

- [17] The siblings attempted to resolve their differences in a four-way meeting with counsel. When those efforts failed, Roslynne and Bevan commenced their respective petitions pursuant to the Patients Property Act, R.S.B.C. 1996, c. 349. Roslynne's petition was filed first in time. Mr. Loster was uncertain as to whether Bevan ought to file his own petition and sought advice from the office of the Public Guardian and Trustee (the "PGT"). The PGT recommended that Bevan bring his own petition. In support of Bevan's petition, an affidavit of kindred and fortune was prepared and sworn. In addition, Mr. Loster met with the two physicians who were able to opine on Mrs. Margerison's mental and physical capacities. The physicians' respective affidavits were prepared and sworn. The physicians have not charged Bevan for their participation in the proceeding. Roslynne and Bevan exchanged additional affidavit material, as will be further described below.
- [18] As a matter of habit or practice, Bevan maintained notes describing his interactions with the patient. The notes include observations of Mrs. Margerison's physical and mental health as well as details of medical appointments and advice provided. Bevan also kept records of his mother's financial transactions, including monies paid to Roslynne from time to time. Booklets of these records were provided to Mr. Loster for review. Mr. Loster acknowledges that not all of the information contained in the booklets was pertinent to the committee application.
- [19] Mr. Loster's evidence addressed the terms of his retainer with Bevan, such as the agreed upon hourly rate, the steps taken in the retainer and payments received on account. In giving his evidence, Bevan was uncertain about the hourly rate that he agreed to pay for Mr. Loster's services. A range of \$325 to \$365 was suggested. There is no written retainer agreement.
- [20] Bevan is somewhat hearing impaired so brought his wife along to each of the thirteen office meetings with Mr. Loster. The meetings were generally followed up by an email from Bevan detailing the points of discussion and future steps to be taken in the retainer. During the course of the retainer, more than two hundred emails were exchanged between Mr. Loster and Bevan. Mr. Loster exchanged somewhere between forty and fifty letters with potential witnesses. The witnesses, several of whom became affiants, included Bevan's wife, a staff member of the proposed extended care facility and one of Mrs. Margerison's neighbours. Bevan himself deposed to three affidavits.
- [21] Despite the many contested facts disclosed in the affidavit material, the parties agreed that the petitions could be resolved without a trial or even cross-examination on the affidavits. The petitions were heard on September 3 and 4, 2014. Some twenty affidavits were before

the court. Oral reasons for judgment were given on September 12, 2014 (unreported, Victoria Registry 14-2517 and 14-2914). I note that the style of cause of the court's transcribed reasons effectively joins the petitions. The registry required that an order be entered in each of the petition proceedings. The last steps described in the bill of costs are the receipt of these two orders and the reporting to the client.

- [22] Roslynne testified that her legal fees relating to the committee application amount to \$16,000. The bills charging those fees are not in evidence.

Discussion

- [23] One of the objections raised by Roslynne is that Bevan's petition itself was unnecessary. Roslynne submits that the committee issue could have been adjudicated upon within her petition proceeding. I am unable to accept that submission. As the entered order reflects, the court specifically awarded the petitioner his costs in this proceeding. No such costs award could or should have been made if the court had found Bevan's petition to be unnecessary. The registrar is in no position to effectively overrule the petition judge on this point.
- [24] A petition proceeding under the Patients Property Act is not particularly complicated or difficult. The statute sets out the evidentiary requirements. There are readily available precedents for the prescribed affidavit material. The legal principles relevant to this type of proceeding, even where there is a contest over who should be the committee, are well established. Given this lack of complexity, counsel would not be required to offer any particular skill or specialized knowledge. The amount involved is not a consideration on this assessment.
- [25] The time reasonably spent in conducting the proceeding, together with the conduct of another that tended to shorten or unnecessarily lengthen the duration of the proceeding, warrants more detailed discussion.
- [26] In his reasons for judgment, Smith J. summarizes the themes articulated in the evidence and observes that the affidavits:

contain conflicting evidence on the reasons for [the breakdown of the Harrington siblings' relationship], the substance of their disputes, and the assistance each of them has or has not provided to their mother over the years.

And that:

None of that evidence is particularly relevant to the issue now before the court, except that it demonstrates the inability of Roslynne and Bevan to work together cooperatively in their mother's interest.

- [27] Mr. Loster compared this proceeding to a high conflict family law case in which each party felt the need to answer allegations raised in the opposing affidavits, regardless of the relevancy of the allegations to the relief being sought.
- [28] Both Bevan and Roslynnne engaged in this "affidavit war". Thus, it would be unfair to blame either of these individuals for prolonging the petition hearing due to the volume of affidavit material to be canvassed. The court did not sanction the volume of affidavits produced by the parties. However, neither did the court deny either party the costs associated with this work product. With a few exceptions, it is impossible to parse out which of the twenty affidavits was objectively unnecessary. An affidavit exhibited to another person's affidavit is not admissible evidence: *Carter v. Canada (Attorney General)*, 2011 BCSC 1371 at paras. 25-28. Bevan submitted one such affidavit. The preparation of that affidavit material is not proper work in the conduct of the proceeding and thus the time spent preparing the material is not objectively reasonable.
- [29] Further, in terms of the time reasonably spent in the retainer, the nature of the client might be a relevant consideration: *Starko Estate (Re)*, 2009 BCSC 1473 at para. 81. However, a demanding or difficult client is not an objectively reasonable client. Mr. Loster did not suggest that Bevan was difficult, but did admit that the volume of notes and email communications made the retainer itself more challenging and time consuming. Mr. Loster spent a significant amount of time in the review and culling of Bevan's records. Objectively, the number of emails exchanged between Bevan and Mr. Loster seems excessive for this type of proceeding. It is no doubt Mr. Loster's responsibility as counsel to review information provided by a client and respond to all communications. However, as acknowledged by Mr. Loster, much of the information was not necessary for the proper conduct of the committeeship application. As such, some of that time spent in the retainer was not objectively reasonable.
- [30] The proceeding was of great importance to Bevan given the mistrust that has developed between the Harrington siblings over the care of their mother. A committeeship application is a serious and very important matter as the order effectively deprives an individual of his or her autonomy.
- [31] The petitioner was not successful in his proceeding except with respect to the recovery of special costs and, arguably, the conditions imposed in the committeeship order. That does not necessarily mean that Mr. Loster's services were of no benefit to the petitioner. Given the discord between the Harrington siblings, the petition required adjudication by the court.
- [32] Roslynnne submits that an amount equivalent to her own legal fees ought to be allowed on this assessment. There is some appeal to this submission. As noted, the assessment of Roslynnne's special costs has yet to be performed. Without deciding the issue, the figure of \$16,000 is within the range of a fee that a reasonable client would pay a competent solicitor for the proper and necessary work in these proceedings. It is not necessarily the ceiling for such fees. Bevan and Roslynnne had the same starting point and would be presenting the

same type of evidence in their respective petition proceedings. Other than the subjective nature of the client or perhaps the hourly rate charged by the particular solicitor, the amount of legal fees reasonably incurred by each of the Harrington siblings ought to be at least within a proximate range. It follows that the special costs to be allowed to each of the Harrington siblings should be close in range, although those costs may not be exactly the same. A consideration of justice and fair play supports this result. After all, the siblings are equal residual beneficiaries to their mother's estate. It would be unfair for Bevan to significantly erode the value of Roslynne's share in the estate by receiving a disproportionately greater award of special costs.

[33] In conclusion, and upon consideration of all of the circumstances of these proceedings, I assess Bevan's special costs in the all-inclusive sum of \$21,000. Roslynne did take issue with some of the disbursements claimed in the bill, but I find that all of these charges were properly and necessarily incurred in the conduct of the proceeding and the amounts charged reasonable. If necessary, a certificate of costs may be submitted for my endorsement.

"C.P. Bouck"

Master C.P. Bouck

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