

CANADA / JUDGMENT

Nasely King (Re)

2024 BCSC 2122

COURT

Supreme Court of British Columbia

DECIDED

31 October 2024

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2024 BCSC 2122 Nasely King (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nasely King (Re),

2024 BCSC 2122

Date: 20241031

Docket: S1912071

Registry: Vancouver

NASELY KING

- and -

THE PATIENTS PROPERTY ACT R.S.B.C. 1996, CHAPTER 349 AND AMENDING ACTS

Before Madam Justice Fitzpatrick

Oral Ruling

Counsel for Yu Yim, Petitioner:

K. Richardson

Counsel for George Lau, Wendy McGrath and Victor King, Committees of the Estate of Nasely King:

K. Zhu

A. Winters

Counsel for the Estate of Rita King:

D. Labun

Place and Date of Hearing:

Vancouver, B.C.

October 31, 2024

Place and Date of Judgment:

Vancouver, B.C.

October 31, 2024

- [1] THE COURT: This is a contested estate matter.
- [2] My involvement began in late 2020, when I heard competing applications with respect to the appointment of a committee of Nasely King's person and estate. One application was brought by Yu Yim, also known as Fanny Yim, who was in a relationship with Mr. King at the time; the other application was brought by Mr. King's children, George Lau, Wendy McGrath and Victor King (collectively, the "Children"), supported by their mother, Mr. King's wife, Rita King.
- [3] On December 9, 2020, I issued my reasons for judgment: *Nasely King (Re)*, 2020 BCSC 1940 [Reasons]. I appointed Ms. Yim as the committee of Mr. King's person. Also, I appointed the Children as the committee of Mr. King's estate, subject to a particular carve out whereby the Public Guardian and Trustee ("PGT") was appointed as litigation guardian for certain family law proceedings that Ms. King had commenced in February 2020.
- [4] In the Reasons, I addressed costs, as follows:
- [62] All parties are entitled to recover their special costs from Mr. King's estate, subject to review by the PGT: *Royal Trust Corporation of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 (C.A.); *Atwal (Re)*, 2005 BCSC 660 at para. 25; and, *Bowman* at para. 50.
- [5] Counsel have now advised that, since the last hearing before me, both Mr. King and Ms. King have died.
- [6] There are two applications before me.
- [7] Firstly, on October 29, 2024, the Estate of Rita King applied to correct my entered order with respect to the costs award. The entered order provided that Ms. Yim and the Children were entitled to recover their special costs of the proceeding from Mr. King's estate. The order makes no mention of Ms. King recovering her costs. I understand that this application is contested.
- [8] The parties have agreed that this application should be adjourned and reset once all of the materials have been filed and counsel are able to discuss hearing dates. Accordingly, that application is adjourned generally.

- [9] Secondly, although no formal notice of application has been filed, Ms. Yim seeks the Court's directions as to payment of her costs, as was ordered in the Reasons.
- [10] Ms. Yim has presented her lawyer's accounts, claimed as the special costs, to the PGT. The total amount claimed \$56,222.61. The PGT has reviewed those accounts and approved them.
- [11] Ms. Yim then presented her legal accounts to the Children, in their capacity as committees of Mr. King's estate. The Children indicate that Ms. Yim's documents include a list of various accounts from September 2018 to November 2020. The documents also include the statements of account of Gordon Yu, who represented Ms. Yim at the hearing before me. However, Mr. Yu's statements of accounts have been heavily redacted, particularly as to the services provided.
- [12] Ms. Yim's counsel indicates that Ms. Yim refuses to provide un-redacted copies of the legal invoices on the basis of privilege. In doing so, she points to three other proceedings that are currently underway as between the two estates and the children.
- a) Firstly, in January 2022, the Children filed a claim against Ms. Yim with respect to a family home and allegations of misappropriations of funds;
 - b) Secondly, in June 2022, some or all of the various family owned corporations (see Reasons at paras. 6-10) filed a claim against Ms. Yim raising allegations of impropriety with respect to a salary paid to her; and
 - c) Thirdly, in September 2023, Ms. Yim commenced a wills variation action with respect to Mr. King's will (executed by Mr. King prior to the committee proceedings and even prior to what appears to have been his separation from Ms. King).
- [13] Ms. Yim asserts that I should simply direct that her legal accounts be paid by Mr. King estate. In the alternative, Ms. Yim says that this court should undertake a review of Mr. Yu's un-redacted legal accounts towards determining whether or not they are reasonable in the circumstances.
- [14] In support, in respect of the latter position, Ms. Yim's counsel relies on *Edwards v. Bell*, 2004 BCSC 399. At paras. 48-51, Justice Gray confirms that the court does have jurisdiction to specify a sum for special costs. That proposition is not controversial in this application. However, Gray J. further notes that the power to do so is to be exercised sparingly. At para. 51, the Court found that it was appropriate to assess costs in those circumstances where there were privilege issues, given that the necessary information was before the court.
- [15] The Children, on behalf of Mr. King's estate, opposes that relief. Counsel has provided further and more recent authorities with respect to when and, if so, how a court might assess or consider the reasonableness of a lawyer's accounts towards assessing the reasonableness, where there are issues of privilege.

- [16] Counsel points to *Canadian National Railway Company v. A.B.C. Recycling Ltd.*, 2005 BCSC 1559 [ABC]. In that case, Justice Kirkpatrick, as she then was, was similarly asked to assess a special cost award in the face of privilege issues. At paras. 26-27, she refers to *Edwards* but found that it could be distinguished from the circumstances before her.
- [17] At paras. 28-30, Kirkpatrick J. commented on the various difficulties that would potentially be encountered by a judge simply reviewing un-redacted accounts toward assessing reasonableness. These difficulties arose in part because a consideration of the reasonableness of a lawyer's accounts is often accompanied by a consideration of the entirety of a lawyer's file. She questioned whether the Court could properly assess reasonableness by only a review of the accounts themselves. She also referred to potential difficulties arising due to the judge bringing his or her observations of counsel's conduct in that it would place the judge in the position of a witness.
- [18] Finally, Kirkpatrick J. stated that only two possible approaches were possible - one being waiver and one being a deferment of the assessment:
- [30] I conclude that CN must waive privilege over its lawyers' files to allow for the proper assessment of the reasonableness of the work done by CN's lawyers on behalf of their client. Given the pending appeal, the detriment to CN in the waiver of privilege is obvious. The only mechanism by which that detriment can be avoided is to defer the assessment of legal costs pending the conclusion or waiver of all appeals.
- [19] ABC was commented on favourably by the more recent decision in *Gichuru v. Smith*, 2014 BCCA 414. *Gichuru* extensively reviewed this Court's power to assess special costs. Beginning at para. 101, the court addresses these matters in detail and confirms that a party who is awarded special costs is only entitled to their objectively reasonable legal costs, not necessarily the costs that they incurred from their lawyer.
- [20] At para. 104 of *Gichuru*, the court reinforced the view of Kirkpatrick J. in ABC that it is often necessary to know what a lawyer did to justify the fee in terms of assessing whether it is reasonable. That involves a consideration of the other side's file and an examination of the other side's lawyers in respect of the file and the matters that were addressed, something that goes well beyond a simple review of the statements of account.
- [21] At paras. 106-107 of *Gichuru*, the court also notes, as this Court did in *Edwards*, that if a judge set out to determine the quantum of special costs, it is a matter that should be done only sparingly. The court observed that the Registrar is often best placed to undertake that type of assessment unless the judge is intimately familiar with the litigation. I would parenthetically add that is not the case here.

- [22] At paras. 111-114 of Gichuru, the court addressed any potential assessments in the context of what could potentially be a waiver of privilege, where a litigant considers that disclosure and a waiver of privilege would be detrimental to ongoing litigation issues. Gichuru adopted the same approach as was endorsed in ABC in that a party seeking an assessment has two choices - waiver of privilege or deferment:
- [120] Where a party is claiming its legal accounts are privileged, it can elect to waive privilege, wait until all appeals are exhausted before having its costs assessed or choose to abandon its claim to special costs.
- [23] I agree with the Children that Gichuru provides the most recent and binding authority as to how the assessment of Ms. Yim's legal accounts should be handled.
- [24] I do not consider that it is appropriate for me in this case to simply look at Mr. Yu's un-redacted accounts, for the reasons articulated by Kirkpatrick J. in ABC. In my view, it would not provide the Court with the basis upon which to make that decision, particularly since it would negate the ability of the Children to make submissions on the issue as to whether the amounts claimed were reasonable or not.
- [25] Accordingly, I decline to make any direction as sought by Ms. Yim. As set out in ABC and Gichuru, Ms. Yim has the choice as between the two options - waiver of privilege or deferment - in terms of how she wishes to proceed into the future. Are there any costs consequences arising from today?
- [26] CNSL K. ZHU: Yes, Justice.
- [27] CNSL A. WINTERS: Justice, my apologies. I'm going to step in here. We would like to have the costs for the appearance today. Although it was not provided as a formal application that that's how this has gone about. And given our position has been that the approach was not appropriate, we would like to have our costs for the appearance today.
- [28] THE COURT: Ms. Richardson?
- [29] CNSL K. RICHARDSON: We would ask that costs be paid out of the estate, in respect. Either each party bears their own costs or --
- [30] THE COURT: Which estate?
- [31] CNSL K. RICHARDSON: The estate of Nasely King on the basis that the questions raised around this were not simple. The suggestion put forward by us, that the court review the accounts, was a reasonable one to make in the circumstances given the complexity of litigation and concerns with privilege, though, is a complex question to have the court weigh in on. Thank you.
- [32] THE COURT: I am ordering that Ms. Yim will pay the costs of today's half-day attendance on Scale B to the Estate of Mr. King. Are you looking for costs, Ms. Labun?

[33] CNSL D. LABUN: Not on this application or on the application of direction.

"Fitzpatrick J."

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