

CITATION: Hitchen, et al. and Morissette, et al., 2022 ONSC 4634
COURT FILE NO.: CV-21-00000098-0000 and CV-21-00000439-0000
DATE: 20220809

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Teresa Hitchen, Applicant

AND

Carl Denis Morissette, Janis Marie Moore, and Robert David Moore, Respondents

AND RE: Janis Moore, in her capacity as Power of Attorney of Personal Care for Mary Patricia Morissette and Robert Moore, in his capacity as Power of Attorney for Property of Mary Patricia Morissette, Applicants

AND

Teresa Hitchen, Mary Patricia Morissette and The Office of the Public Guardian and Trustee, Respondents

BEFORE: Justice Spencer Nicholson

COUNSEL: J. Schrieder and B. Sheehan, for Teresa Hitchen

A. Yiu and L. Wianecki, for Janis and Robert Moore, personally and in their capacities as Power of Attorneys

Carl Morissette, self-represented

I. Wright, for Mary Patricia Morissette

HEARD: February 4, April 4 and April 14, 2022

REASONS

NICHOLSON J.:

[1] This application was before me in regular civil motions court on February 4, 2022. Although I did not remain seized of the matter, I did suggest that thereafter, if I was available, it should be brought back before me given my familiarity with the issues. That occurred and I dealt with the matter on April 4 and 14, 2022.

[2] Simply put, it became too expensive for the Moores to contest the proceedings and they signalled a willingness to consent to the relief sought. Teresa Hitchen, however, takes the position that she is entitled to costs of the proceedings. Thus, the sole issue before me is with respect to costs of the applications.

- [3] I mean no disrespect by using first names.
- [4] I should also indicate at the outset of these reasons that a short time after I heard arguments regarding costs, I was notified that the subject of the proceedings, Mary Patricia Morissette (“Patricia”) had passed away. I offer my condolences to her family and friends.

Background:

- [5] In reciting this background, I expressly am making no findings of fact. Much of the information is taken from an affidavit sworn by Patricia, who, importantly, has not been found to be incapable under the *Substitute Decisions Act, 1992*, S.O. 1992, c.30.
- [6] This is a dispute between family members. Carl and Patricia had been married since October of 1959, some 60 years. Teresa Hitchen and Angela Morissette are the adult children of Carl and Patricia. The sisters do not get along at all. Janis and Robert David (“David”) Moore were lifelong friends of Carl and Patricia.
- [7] Patricia was born July 27, 1929.
- [8] On December 11, 2013, Patricia executed a general power of attorney in respect of personal care and for property. Carl was to be her attorney for both if Patricia was determined to be incapable. Janis was to act as alternate attorney in respect of personal care and Janis and David were to be the alternate attorneys in respect of property.
- [9] Carl and Patricia lived in their family home until July 1, 2019. They then moved to an apartment in Scarborough.
- [10] In her affidavit sworn February 5, 2021, Patricia describes that her relationship with Carl was worsening. She thought he was bullying and berating her and was being controlling. He and Angela did not want her to speak with Teresa, whom they believed was after money. Patricia describes wanting to leave Carl but having no place to go.
- [11] Entries from Patricia’s diary were appended to her affidavit in which she describes how she felt. There are comments contained therein where Patricia describes ongoing difficulties between her and Carl.
- [12] Patricia was admitted to Scarborough General Hospital in May of 2020 as a result of pain in her knee and bladder. While in hospital, Carl apparently invoked his authority under the power of attorney to prevent her from speaking with Teresa.
- [13] In her affidavit, Patricia describes that she disagreed with Carl doing so and wanted Teresa to be updated with respect to her condition. There are nurses’ notes confirming this appended to Patricia’s affidavit.

- [14] Patricia advised the hospital staff that she wished to reside with Teresa, not Carl. She also told the staff that she no longer wished to have Carl as her power of attorney and wanted Teresa to be the power of attorney. There are doctors' notes that refer to a family fall out between Teresa and Carl/Angela. The same notes indicate that Patricia wished to live with Teresa.
- [15] The "Final Note Discharge Summary" from Providence Healthcare, dated June 9, 2020, reads as follows:
- "Unfortunately, this patient's stay at Providence was complicated with a very complex social situation. The patient has very consistently maintained the disposition that she wants to be discharged to her daughter Theresa (*sic*) and does not want to return to her husband. She does understand that this would be an end to a 60-year marriage. Although the patient does have a diagnosis of dementia and does have some mild cognitive impairment, she is capable of making this decision. She understands her diagnosis as well as the social situation involved. The patient has also stated that she trusts her daughter Theresa and is quite confident that Theresa is looking out for her best interest. She is concerned of the impact her staying with her daughter would have on her son-in-law. Our social worker has been heavily involved with this case."
- [16] On June 9, 2020, Patricia purportedly executed a revocation of power of attorney with respect to the December 11, 2013 general power of attorney in favour of Carl and the Moores. On June 10, 2020, she executed a new power of attorney, appointing Teresa as power of attorney for personal care and property.
- [17] Following her discharge from hospital in June, Patricia lived with Teresa and Teresa's husband for a period of time. However, she subsequently moved to a long-term care facility in London on September 15, 2020.
- [18] Carl advised Patricia's bank that there was a dispute about Patricia's capacity and the bank would not release money to Patricia. A compromise was ultimately reached where payments to the long-term care facility would be made from Patricia's accounts.
- [19] Teresa brought this application dated January 19, 2021. At that time, Patricia was 91 years of age. The application sought an order recognizing as valid the revocation of Patricia's power of attorney dated December 11, 2013 and recognizing the validity of the powers of attorney dated June 10, 2020.
- [20] Carl did not file any responding material.
- [21] However, the application was defended by Janis and David. During the costs argument it became apparent that their legal expenses, however, have been reimbursed by Carl, at least in large measure.

- [22] The responding affidavit material of Janis casts Teresa in a poor light. Janis describes that she had a volatile temper. Janis accuses Teresa of fabricating Patricia's diary by instructing her mother what to write as Janis had never been aware of Patricia keeping a diary. Janis, in short, believes that Teresa orchestrated her mother's apparent desire to be apart from Carl and convinced Patricia that she was the victim of abuse by Carl.
- [23] Janis did acknowledge that Patricia and Carl would have arguments that frequently involved yelling at one another, but she did not believe that their relationship was anything but "normal".
- [24] Janis also indicates that Patricia was showing symptoms of cognitive decline and dementia and had been assessed in August and October of 2019. A doctor's note has been attached confirming that a discussion of dementia occurred. The note does not suggest that Patricia is incapable.
- [25] Janis expresses that they require the court's assistance to ensure that Patricia can at least have contact with those persons that love her and not only the people that Teresa chooses.
- [26] David swore an affidavit as well. In his affidavit he suggests that Teresa is responsible for money disappearing from Patricia's bank accounts. He describes that Carl and Angela had concerns that Teresa was taking Patricia on errands that often involved stopping at the bank and withdrawing money. David suggested to Carl that he should be made a joint holder of Patricia's account so that he could monitor her money.
- [27] David describes that in May or June of 2020, Carl learned that Teresa had sent some financial documentation to CIBC trying to sever the joint accounts. There was concern that Teresa was going to drain the bank accounts, through Patricia. There was money "moving all over the place". This resulted in CIBC freezing the bank accounts. David believes that Teresa is attempting to misappropriate Patricia's money.
- [28] The Moores prepared and issued their own Notice of Application, seeking an order that Patricia was the subject of undue influence by Teresa such that the June 2020 power of attorney was invalid.
- [29] The parties attempted unsuccessfully to resolve the issues at mediation in October of 2021.
- [30] I note that Mr. Ian Wright became involved as Patricia's lawyer in these proceedings.
- [31] As I noted at the outset, the matter came before me in Friday civil motions court on February 4, 2022. At that time, my only concern was with Patricia's well-being. Patricia had suffered a bad fall while in the long-term care facility. Teresa wished to hire extra help to assist Patricia in the home and sought access to Patricia's funds to pay for it. I made the following interim without prejudice order:

- a) the power of attorney for personal care of Mary Patricia Morissette dated June 10, 2020 is valid and may be acted upon, pending further order;
- b) the power of attorney for property of Mary Patricia Morissette dated June 10, 2020 is valid and may be acted upon, pending further order;
- c) Ms. Hitchen was not to sell or encumber any of Ms. Morissette's real property, pending further order;
- d) Ms. Hitchen was to provide an informal explanation of all payments and withdrawals made from any of Ms. Morissette's accounts at the next return date;
- e) Ms. Hitchen was to provide copies of invoices for personal support workers or any other similar assistance to both Carl Morissette and counsel for the Moores, if requested and
- f) the Respondents were not to be prevented from communicating with Ms. Morissette.

[32] I adjourned the matter to March 25, 2022 to be spoken to.

[33] On March 22, 2022, counsel for Teresa wrote to counsel and the court and advised that retaining a personal support worker was not feasible. No funds were withdrawn from Patricia's account. However, Patricia's condition had deteriorated and she was sent for palliative care to Parkwood Hospital on February 22, 2022. Her room at the long-term care facility was released, eventually.

[34] The matter next came to me on April 5, 2022. Both parties agreed that I should address the issue of costs, including entitlement and quantum, of the applications. I confess to having some misgivings about doing so, given that the applications were never determined on their merits. I adjourned the matter to April 14, 2022 to hear arguments.

Parties' Position on Costs:

Teresa's Position:

[35] Teresa argues that she is entitled to her costs. In her submission, the respondents relented and Teresa obtained the order that she wanted. Rule 57 must have consequences for parties that take positions and participate in legal proceedings. It encourages parties to be cautious and evaluate the strengths and weaknesses of their case early on.

[36] In this case, all of the parties opposed Teresa, without due caution. The fact that there is a rift between members of the family does not justify a departure from the costs consequences of engaging unsuccessfully in litigation.

- [37] Teresa argues that there can be no doubt that she was successful. The Moores and Carl simply gave up and were thus, the unsuccessful parties. They unnecessarily prolonged the proceedings. They had no evidence to support their allegations that Teresa was incapable.
- [38] Teresa seeks her costs on a substantial indemnity basis. Her Bill of Costs sets out full indemnity costs of \$49,708.70 plus disbursements of \$1,975.20, for a total of \$51,683.90. Her partial indemnity costs are \$34,796.09, plus disbursements for a total of \$36,771.29.

Position of the Moores:

- [39] The Moores argue that their actions in these proceedings were motivated by being morally obligated to their friend Patricia's well-being and they had nothing to gain personally by being involved in this litigation. They did not give up because they believed that they were wrong, but because the litigation was not getting anywhere. They were "bleeding costs".
- [40] They complain that a lot of the litigation could have been avoided if Teresa had agreed to a capacity assessment,
- [41] In the Moores' view, there have been no winners in this matter.

Position of Carl and Angela:

- [42] Despite not filing any responding material, Carl and Angela participated in the hearing on costs. I find that it was beneficial to the court to hear from them in the circumstances.
- [43] I note that Angela had provided a letter dated March 1, 2022 that was supposed to be for the March 25, 2022 hearing date. I had, in my February 4, 2022 endorsement, expressly indicated that there was no need for the parties to file "formal materials" because I was worried about the parties incurring further legal expenses and anticipated that costs had become a major point of contention. Thus, the letter was appropriate, in my view.
- [44] The letter from Angela, however, provides a further account from her perspective of the dispute between Teresa and Angela/Carl. Again, it is clear that Angela and Carl believe that Teresa's motivation in looking after Patricia is suspect. They find it "hard to believe" that Patricia knew what she was doing when she signed the June 10, 2020 power of attorney. She states "Teresa's motive was, and still is, financial gain."
- [45] Even if I accept what Angela states in this letter, the fact is that she and Carl took no formal position in the proceedings because he did not file a response. The Moores no longer wish to participate. This is not the time or manner in which this court can make the types of determinations that Angela would clearly like the court to make about Teresa's motives.

- [46] I do however, appreciate her viewpoint, and entirely agree with her comment that “this is one of the saddest family disputes I have ever heard of”.
- [47] With respect to costs, Angela believes that Teresa should be responsible for her own legal costs, given that she has learned that Patricia has been gifting Teresa her CPP, OAS and supplemental income since June of 2020. Furthermore, Angela worries about Carl’s ability to support himself if faced with a large costs award.
- [48] Carl also provided a letter dated April 7, 2022. He describes that he has given David over \$60,000 to reimburse the Moores for their legal fees incurred in this proceeding.
- [49] Again, I note that much of Carl’s letter addresses the allegations against Teresa, which would have been appropriate if the applications were being determined on their merits. They are not, however. The sole issue now before me relates to costs.
- [50] On that issue, Carl states the following in his letter:

“I spent the money on legal fees because I do not think Pat really knew what she was doing when she went to London. She would never have done this if she was in her right mind. I really thought I would get her back. Two years later, it is too late. Pat is never coming home again. I will never see her again. Teresa wants me to pay for her legal fees. I do not understand that thinking. Teresa stole from us, took Pat away and wouldn’t let me speak with her for months, served me with court documents and told lies about me to everyone. She tore the family apart. I feel Teresa wanted our money and has been successful so far in getting Pat’s pension money and will most likely get the \$119,000 that is left in Pat’s account. I am too old to fight Teresa in court when Pat dies so Teresa can have that money. I hope it makes her happy. She has lost her sister and her father. I hope the money was worth it for her.”

Analysis:

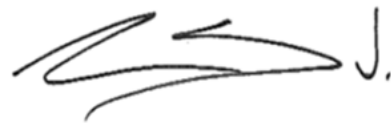
- [51] This case is a terrible example of the damage that can be done when family members quarrel. In this case, the last months of Patricia’s life have been greatly diminished because of this litigation. It is tragic and none of the participants should feel good about it. I agree, litigation aside, there have certainly been no winners here.
- [52] I reiterate that I am not determining any of the factual issues that were in dispute in the applications. I am not weighing in on whether Teresa’s motivations with respect to Patricia were pure or tainted. I am not making any determination in any way of Patricia’s capacity at any time.
- [53] I am entirely sympathetic to all parties about Patricia’s death. I am not particularly sympathetic to *any* of the parties that this matter was addressed by litigation which has ultimately proved to be pointless. The family has expended a ridiculous amount of their

collective financial resources on legal bills. My understanding of their financial situation is that the money to do so was not readily available.

- [54] Worse, this litigation has widened the rift between family members and drawn Patricia's lifelong friends into the fray.
- [55] Costs are governed by s.131 of the *Courts of Justice Act*, R.S.O. c. C. 43, as amended. The section provides that costs of and incidental to a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. This section provides the court authority to deprive a successful party of costs in the appropriate case. However, there is no question that the usual rule is that a successful litigant is presumptively entitled to their costs. Costs are usually ordered on a partial indemnity basis barring conduct that merits the court demonstrating its disapproval. Costs on a substantial indemnity basis should only be awarded "where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties" (see: *Young v. Young*, 1993 CanLII 34 (S.C.C.)).
- [56] It seems to me that the situation here is somewhat analogous to when a party discontinues an action under Rule 23. Rule 23.05 permits a party to seek their costs when an action is discontinued by the opposite party.
- [57] I turn to Rule 57 which governs how the court should exercise its discretion in awarding costs in court proceedings in Ontario. In considering the factors enumerated in Rule 57, I must consider that the over-riding principle in awarding costs is fairness and reasonableness (*Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291, 48 C.P.C. (5th) 56 (Ont.C.A.)).
- [58] This is not an appropriate case for an award of costs on a substantial indemnity basis. None of the parties' actions within the litigation calls for sanction by the court.
- [59] I have also concluded that it would not be just for me to deprive Teresa of her costs of these proceedings. It would be facile to view the Moores as innocent bystanders in these proceedings. I do not question that they had Patricia's best interests at heart. The problem is that Teresa says that she did too. Whether there were any *mal fides* is not something the court can now determine. Furthermore, the Moores did not simply remain neutral in this litigation. To the contrary, they took a side by actively joining Carl and Angela against Teresa and taking the position that Teresa was misappropriating funds from her mother.
- [60] The positions advanced by the Moores in their affidavit were done with minimal evidence that would dispel the presumption of capacity in the *Substitute Decisions Act, 1992*.
- [61] Accordingly, the positions taken by the Moores required Teresa to incur legal expenses that she would have not otherwise incurred. In my view, the Moores' wish to now be rid of the litigation does not provide any comfort to Teresa in respect of those expenses.

They could have, and should have, considered the costs consequences at the outset of the litigation.

- [62] I have considered counsel's hourly rates. The rates here demonstrate that lawyers are expensive, but I have no concerns that the rates are not appropriately representative of the experience level of the lawyers involved and the market place.
- [63] In terms of time spent, the Moores' "counter-application" required Teresa to file responding material. There was no doubt considerable duplication in the material on each application. The court can always find some excess of time spent. Furthermore, the court is not tasked with a line-by-line scrutiny of a lawyer's time but must assess costs that are fair and reasonable.
- [64] Most notably, Teresa's lawyers have included the time spent preparing for and conducting the mediation conducted in October. It is my view that the costs involved in participating in a private mediation are not properly subject to an award of costs (see *Saltsov v. Rolnick*, 2010 ONSC 6645 (Div.Ct)).
- [65] I further consider that this litigation, although unfortunate, involved issues of considerable importance to Patricia. At issue was her ability to meaningfully determine who would be empowered to make decisions on her behalf in the event that she was determined to be incapable.
- [66] I have also considered whether the refusal by Teresa to obtain a capacity assessment after the commencement of the litigation should reduce her entitlement to costs. I conclude that it should not. The relevant time in which it would have to be shown that Patricia was incapable was in June of 2020. Having a capacity assessment a year or more later would be of limited assistance in the litigation.
- [67] I have concluded that a fair and reasonable partial indemnity award for costs of both the applications is \$30,000, inclusive of fees, HST and disbursements. Carl and the Moores shall be jointly and severally liable for these costs, given that despite not filing any responding materials, Carl was clearly involved in the litigation and, in some ways, directing the Moores.



Justice Spencer Nicholson

Date: August 9, 2022