

SUPREME COURT OF NOVA SCOTIA

Citation: *Curry v. Curry*, 2023 NSSC 401

Date: 20231211
Docket: 506553
Registry: Halifax

Between:

Paula Curry

Applicant

v.

Anne Curry, Stephen Andrew Curry, Philip Leo Curry, William Gregory Curry,
Daniel Curry, and Mary Avita Curry

Respondents

Decision

Judge: The Honourable Justice John A. Keith
Heard: October 5 2023, in Halifax, Nova Scotia
Final Written Submissions: October 31 2023
Written Release: December 11, 2023
Counsel: Jason Woycheshyn and Sarah Nicholson, for the applicant
Tanya Butler, for the respondents

By the Court:

INTRODUCTION AND BRIEF CONCLUSION

[1] Anne Curry and her husband Leo Curry had seven children: William Gregory Curry, Paula Anne Curry (the Applicant within), Philip Leo Curry, Daniel Thomas Curry, Stephen Andrew Curry, Mary Avita Curry, and Patricia Irene Curry Bauer.

[2] Leo Curry died on March 23, 2021 at the age of 90. He was survived by Anne Curry but only by less than 10 months. Anne died on January 20, 2022, also at the age of 90. This proceeding relates to Anne Curry although it is very much a family dispute.

[3] Throughout her life, the relationship between Anne and all her children was loving, caring and devoted. The same cannot be said of the interrelationships between her children. The full nature of, and underlying reasons for, the problems which divide Anne's children have roots in some mystery of family dynamics that were not (and need not be) fully explored in this proceeding. Regardless, in the wake of Anne's passing, certain unresolved issues triggered the following two Court related proceedings:

1. Court File No. 521507 regarding the disposition of Anne's cremated remains, the details of which are contained in my decision cited as 2023 NSSC 402; and
2. This application to approve her accounts and discharge the Applicant (Anne's daughter) Paula Anne Curry as Anne Curry's representative appointed under the provisions of the *Adult Capacity and Decision-making Act*, SNS 2017, c 4 (the "*Act*"). By way of background, Paula Curry was appointed Anne Curry's representative under a consent order issued by the Honourable Justice Gail L. Gatchalian on October 25, 2021 (the "**Consent Representation Order**"). The Consent Representation Order remained in place for a little less than 3 months: from October 25, 2021 until January 20, 2022 when Anne Curry died. (the "**Representation Period**") Three of Anne's other children and the Respondents herein (William Gregory Curry, Philip Leo Curry, and Mary Avita Curry) opposed Anne Curry's certain monetary claims being made by Paula Curry as part of this request to approve her accounts.

[4] The Respondents do not oppose Paula Curry's request to be discharged. They do oppose Paula Curry's request to be paid for \$91,763.04 for expenses paid and

salary earned during the Representation Period. The Respondents state that she should only receive \$51,012.64 representing a deduction of \$40,750.40.

[5] For the reasons provide below, I conclude that:

1. Paula Curry shall be discharged as Anne Curry's representative under the Consent Representation Order;
2. Paula Curry is not entitled to be paid the full \$91,763.04 being claimed but shall be paid \$71,565.12.

[6] Finally, the parties and witnesses in this proceeding are all Anne Curry's children. I have introduced various member of the Curry family by their full names but will refer to each by their first names only. I do so in the interest of brevity and clarity. No disrespect or misplaced familiarity is intended.

ANALYSIS

[7] As indicated, the Respondents argue that Paula's claim for reimbursement be reduced from \$91,763.04 to \$54,045.33.¹ This amounts to a deduction of \$37,717.71 which may be broken down as follows:

¹ At paragraph 67 of the Respondents' Written Submissions filed September 22, 2023, the Respondents say that Paula should be reimbursed \$51,012.64 – not \$54,045.33. They include a table confirming how the \$51,012.64 is calculated. Respectfully, their math is incorrect. The total of the amounts which the Respondents propose be paid to Paula is \$54,045.33 – not \$51,012.64. The difference between the two figures is \$3,043.69 which is the exact amount of certain "Incidentals (not including food)" which the Respondents agree and confirm in the table is properly paid to Paula.

1. \$3,814.32 in respect of expenses associated with the family home at 9 Oxford Street, Sydney, Nova Scotia where Anne lived for most of her life (“**9 Oxford Street Costs Claim**”);
2. \$20,197.92 in respect of legal fees that the Respondents say were already determined by Court Order (“**Post-Order Legal Costs Claim**”);
3. \$13,705.48 as a reduction in Paula Curry’s salary during the Representation Period for alleged breaches of the *Act* and Consent Representation Order (“**Salary Claim**”)

[8] I address each issue separately below.

(a) 9 Oxford Street Costs Claim

[9] Paula Curry claims \$7,628.63 related to certain household expenses (or “carrying costs”) incurred during the Representation Period and related to the Curry family home at 9 Oxford Street in Sydney where Paula Curry lived full-time while caring for Anne Curry in the last few months of Anne’s life.

[10] The uncontested evidence is that Leo Curry and Anne Curry originally owned the family home but eventually added Paula Curry as a joint tenant in what the Respondents characterize as a “zombie deed”. A “zombie deed” is sometimes used

to refer to a deed which transfers an interest in real property and is signed the owner, but not actually registered until after an owner dies. Thus, the term “zombie deed”: the deed remains a “live” transaction that is not formally recognized until after the transferee’s death. In this case, it is agreed that in 2013, Leo and Anne signed a deed adding Paula as a joint tenant owner of 9 Oxford Street. However, the evidence indicates that Paula was not aware of the deed until after Leo died and, in any event, it was not registered until many years later.² It is agreed that Paula and Anne were the two joint tenant owners of 9 Oxford Street during the entire Representation Period ending with Anne’s death on January 20, 2022.

[11] The Respondents say that Paula Curry, as one of two joint owners, should be responsible for ½ of the costs associated with 9 Oxford Street and cannot claim full reimbursement. Therefore, the conclude, Paula is only entitled to reimbursement of 50% of the claimed cost or \$3,814.32 ($\$7,628.63 \div 2$). They argue that Paula, as joint owner, became entitled to half of the value (including equity/profit) associated with the property and must therefore be responsible for half the operating or “carrying” costs.

² The timing is not entirely clear in the evidence. Philip testified that the deed was registered in 2020 although he did not provide registration details. (Affidavit of Phillip Curry sworn March 28, 2023 at paragraph 105) This would mean that the deed recognizing Paula’s joint tenancy interest in 9 Oxford Street was registered **before** Leo died in March, 2021. However, during cross-examination, Paula stated that she only first learned of the deed **after** Leo died, through the Proctor of his estate (Murray Hannam). Paula then took steps to register the deed. In written submissions dated September 29, 2023, Paula’s counsel further confirms that the deed recognizing Paula’s joint tenancy interest was not registered until after Leo’s death. For the purposes of this decision, it is unnecessary to resolve this discrepancy around timing. The uncontested fact is that, at all material times, Paula and Anne were the two joint tenant owners of 9 Oxford Street.

[12] In my view, Paula is entitled to be compensated for the full costs associated with 9 Oxford Street. My reasons include:

1. It is not axiomatic that joint tenant owners are legally obliged to pay their equal share of the costs associated with maintaining and carrying real property. Other joint tenant owners may assert a claim for reimbursement. However, from the time Leo and Anne signed a deed granting Paula a joint tenancy interest (2013) forward, there was never any suggestion or indication that they required Anne to pay an equal share of the costs associated with 9 Oxford Street. Leo always arranged to pay those costs. It is notable that this was around the time Paula began assuming increasing responsibility for Anne's ongoing care. It is also notable that this issue only arose for the first time **after** Leo's died and Paula's joint tenancy interest was first discovered. In other words, this issue was more of a concern for certain Curry children than it ever was for Leo or Anne;
2. Anne was the primary resident of 9 Oxford Street. It is true that Paula lived at 9 Oxford Street but only as Anne's caregiver. No party challenges the fact that Anne required full time care;
3. Although Paula was a joint tenant owner, she did not enjoy all of corresponding rights of an owner. For example:

- a. Paula did not attempt to sell, rent or profit from 9 Oxford Street until after Anne's death and her duties as Anne's caregiver were completed. On this, I also note that Paula did not rent (or profit from) her own home in Sydney, Nova Scotia while caring for Anne; and
 - b. Under the terms of the Consent Representation Order, Paula was not permitted to be in 9 Oxford Street between the hours of 12:00 p.m. and 7:00 p.m. on Tuesdays, Thursday, or Sundays. During this time, a personal care worker tended to Anne's health and personal care needs and, as well, the three Respondents (William, Philip and Mary) and/or their families could privately visit with Anne.
4. Paula continued to personally pay for (and does not claim reimbursement of) the costs of maintaining her own home which, as indicated, she neither rented nor sold prior to Anne's death. In the circumstances, in my view, it is both reasonable and understandable Paula should not be required to pay the ongoing costs of her own home while caring full-time for her mother at 9 Oxford Street and, on top of that, pay for half the costs associated with 9 Oxford Street.

(b) Post-Order Legal Costs Claim

[13] Paula Curry claims reimbursement of \$22,834.87 representing legal fees invoiced by McInnes Cooper in relation to legal services associated with the Consent Representation Order. The Respondents state that \$20,197.92 of this amount relates to legal costs incurred before Gatchalian, J. issued a cost award in the amount of \$85,394.49 in relation to Consent Representation Order. In other words, the Respondents say, Gatchalian, J issued a final order on December 17, 2021 determining the amount of legal fees owing as at that date (\$85,394.49). That final order has not been appealed. In the circumstances, Paula Curry is estopped from re-opening this issue and trying to add on to a cost award already determined by Gatchalian, J.

[14] I agree with the Respondents. Paula sought and obtained a significant cost award from the Court with respect to legal fees incurred up to that point in time. If there were additional legal fees accrued to that point in time, it was incumbent upon Paula and her legal counsel to assert the claim at that time – not presume the right to make further claims in the future, after a formal Court Order was issued.

[15] I fully agree with the Respondents that the legal doctrine of issue estoppel prevents parties in these types of circumstances from re-opening and re-litigating issues that should properly have been advanced prior to the Order being issued.

[16] Paula's claim for reimbursement of legal fees incurred prior to the date of the issued Order (December 17, 2021) is denied. Paula is entitled to reimbursement of legal costs in the amount of \$2,636.96 – not \$22,934.87.

(c) Salary Claim

[17] It is agreed that the compensation to which Paula was entitled in caring for her mother was set at \$50,000 per year net (i.e. grossed up to account for any applicable income tax).

[18] The Respondents do not challenge Paula's entitlement to compensation prior to the issuance of the Consent Representation Order. However, they ask the Court to exercise its discretion to deny Paula any compensation during the Representation Period (i.e. the 87 days from the date the Consent Representation Order was issued on October 21, 2021 until Anne's death on January 20, 2022). The amount otherwise payable for these 87 days would be \$13,705.48 calculated at \$136.99/day plus a 15% gross-up for (see the Respondents' Written Submissions dated September 22, 2023 at paragraphs 27 – 28).

[19] The Respondents argue that cumulative breaches of the Act and the terms of the Consent Representation Order were sufficiently serious as to disentitle Paula to compensation. The specific concerns raised by the Respondents are:

1. Paula failed to provide a quarterly accounting;
2. Paula failed to properly manage Anne's finances;
3. Paula made poor personal and health care decisions on her mother's behalf;
4. Paula failed to notify Philip of Anne's sudden illness on December 20, 2021 in a timely manner;
5. Paula failed to include Philip in the house visit that Anne's family physician made the day before Anne died; and
6. Paula restricted end-of-life visits between Anne and the Respondents.

[20] I accept the Respondent's argument that, under sections 59(3) and 62 of the *Act*, the Court retains the discretion to vary Paula's compensation on the basis that she failed to comply with the *Act* or the Representation Order, or if her "effort, care, and responsibility" are not commensurate with the amounts sought. (section 56(3) of the *Act*)

[21] However, I am not prepared to deny Paula \$13,705.48 for the care she provided in the last 87 days of Anne's life under the *Act* and under the Consent Representation Order. My reasons include:

1. I accept Paula's evidence that she was doing her best, having regard to Anne's declining health in the last months of her life. While it is very clear that all of Anne's children clearly loved their mother deeply, Paula shouldered the most significant burden in terms of day-to-day care and, indeed, Paula ultimately agreed to move in with Anne full-time and better ensure that Anne would not be alone should a problem arise. I do not at all fault any of the Respondents for not assuming the role of primary caregiver. At the same time, I have not seen any evidence that would cause me to diminish Paula's sacrifice or doubt her commitment to Anne;
2. As to the allegation that Paula failed to provide a quarterly accounting, the fact is that Anne did not survive the first quarter of the Representation Period. Moreover, the statements provided by Paula on April 20, 2022 confirm that she had not accessed any of Anne's accounts (para. 42 of the Affidavit of Paula Curry sworn April 12, 2023). Put differently, any technical breach did not amount to any demonstrable prejudice sufficient to engage my discretion and dock Paula's entitlement to compensation;
3. As to the allegations of financial mismanagement:

- a. I accept Paula's evidence that she did contact Anne's financial advisors at MD Private Management; and
 - b. Philip acknowledged during cross-examination that he did not realize Paula's obligations as representative under the *Act* ended with Anne's death. At that point, any obligation to file tax returns fell to her executors which included Paula but also included the Applicant, Mary.
4. The Respondents and Philip, in particular, were very critical of:
 - a. Paula's health care decisions during the last months of her life;
 - b. An alleged failure by Paula to either include Philip in health care decision and/or keep the Respondents informed as to changes in Anne's health; and
 - c. Restrictions which they perceived Paula placed on the Respondent's access to Anne at the end resulting in her own children being denied the opportunity to comfort or simply sit beside Anne in her last hours on earth.

I have carefully considered the evidence and understand the Respondents' concerns around Anne's care. I am also sympathetic to

their upset at not being able to be with Anne as much as they wanted in the days and moments before Anne was irretrievably lost to them. Paula's decisions in the last months of Anne's life were not always perfect. But Paula should not be held to a standard of perfection. I am satisfied Paula did what could reasonably be expected in the circumstances. My reasons include:

- a. Anne's declining health and Paula's understandable, immediate desire to prioritize Anne's care and comfort as she was dying;
- b. Paula's evidence that she was complying with the medical advice provided by Anne's family physician Dr. MacKillop - even though Philip (who is also a physician) may have disagreed;
- c. The evidence contains numerous texts and other exchanges between Paula and the Respondents regarding Anne and her care. Regrettably and for reasons that go well beyond the bounds of this decision, the communications between siblings were not as effective as they might be in an ideal world. However, respectfully, Paula cannot be fairly held wholly responsible for this situation; and

d. The Respondents did visit with Anne on the night of Wednesday, January 19, 2022 after being told by Paula that Anne “was approaching the end of life” and that Dr. MacKillop was arranging for palliative care. Philip and the other Respondents immediately asked to see their mother. Paula immediately agreed even though the visit would occur on a night not otherwise contemplated under the Consent Representation Order.³ The next morning, Anne succumbed to old age.

[22] I am not prepared to exercise my discretion to reduce Paula’s requested compensation by \$13,705.48, as proposed by the Respondents.

CONCLUSION

[23] Based on the foregoing reasons, Paula is not entitled to the full amount being claimed. I determine and order that:

1. Paula shall be paid \$7,628.63 representing her 9 Oxford Street Claim;
2. Paula shall be paid \$2,636.96 of the \$22,834.87 Post-Order Legal Costs Claim. Paula shall not be paid the additional \$20,197.92 which comprise this claim;

³ Under the Consent Representation Order, the Respondents were entitled to visit with Anne at 9 Oxford Street between noon and 7 p.m. on Tuesdays, Thursdays, and Sundays.

3. Paula shall be paid \$13,705.48 in relation to the Salary Claim.

[24] In sum, of the \$91,763.04 being claimed, Paula shall be paid a total of \$71,565.12.

[25] I am not prepared to award costs to any party. Success was mixed with the Applicants and Respondents almost equally divided in terms of the financial amounts at stake.

Keith, J.