CITATION: Mayer v. Rubin, 2018 ONSC 1826
COURT FILE NO.: 05-162/16
DATE: 20180316

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

ANNIE MAYER in her capacity as an estate trustee
of the Estate of JOHANN RUBIN and in her personal capacity, Applicant

- and -

MORRIS ERIC RUBIN in his capacity as an estate trustee of the Estate of Johann Rubin and in his personal capacity, IDA RUBIN in her capacity as an estate trustee of the Estate of Johann Rubin and in her personal capacity, SARAH WERNER in her capacity as an estate trustee of the Estate of Johann Rubin and in her personal capacity, ARSANDCO INVESTMENTS LIMITED in its capacity as trustee for the Estate of Johann Rubin and in its personal capacity, FAIGY ESTHER HAMMER AND THE OFFICE OF THE CHILDREN'S LAWYER and The Bank of Nova Scotia Trust Company, in its capacity as Estate Trustee During Litigation of the Estate of Johann Rubin, also known as the Jay Rubin Estate, Respondents

BEFORE: F.L. Myers J.

COUNSEL: *Arieh Bloom,* counsel for the applicant
David M. Lobl, counsel for The Bank of Nova Scotia Trust Company, in its capacity as estate trustee for the estate of Johann Rubin
Jacob Kaufman, counsel for Morris Rubin
Henry Juroviesky, counsel for Faigy Hammer and Sarah Werner
Jessica Firestone, counsel for Joseph Pernica, litigation guardian for Ida Rubin

HEARD: March 16, 2018

ENDORSEMENT

[1] A case conference was held this morning by telephone. The purpose of the case conference was to settle the terms of the court's order dated November 24, 2017 and to schedule competing motions for costs.

[2] All counsel who wished to do so have previously made written submissions on the form of the order in issue. They were content that the form of the order be settled during the call today. In accepting the form of order proposed by the estate trustee, I was accepting the form of schedule "A" to which the parties had consented in open court.

[3] Settling an order is an administrative act that counsel is required to conduct in good faith. The order is to be drafted simply. It records, in the appropriate format, the operative terms of the tribunal's endorsement. Settling an order is not an opportunity for clients to negotiate or for counsel to regret a consent given. Rather, settling an order is a professional matter that counsel is required to perform regardless of the positions or preferences of the client. *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.* (1991), 5 OR (3d) 65 (MC).

[4] The applicant seeks costs against Ms. Hammer, Ms. Werner, and their lawyer Henry Juroviesky personally for time and cost she says was wasted in the order settlement process. Ms. Hammer and Ms. Werner wish to bring a motion for costs as well although I am unsure of the subject matter of that proposed motion. I have already received written costs submissions concerning the November 24, 2017 hearing. No further costs motion for that hearing is required.

[5] I have advised the parties previously that I am no longer case managing this matter generally. I do not recall reserving costs other than with respect to the November 24, 2017 order. Costs of the order settlement process remain an open topic. If any party believes that there is another proceeding that I heard for which costs remain a live issue, then he, she, or they may serve a motion record on the other parties and have it delivered to my attention before the end of March. A case conference will then be held to schedule submissions and to consider whether the costs sought on any motion that I heard remain available. Otherwise, if the parties have motions to bring, they may do so on the Estates List in the ordinary course.

[6] The applicant's motion record under rule 57.07 was delivered to the court on February 21, 2018. Mr. Juroviesky advised this morning that he has yet to put LawPro on notice of the motion for costs against him personally. He undertook to do so forthwith.

[7] The costs of the order settlement process are very modest. Although costs are sought personally against a lawyer and therefore it is necessary and appropriate that a full opportunity to respond be provided, the process must still be proportionate. Ms. Hammer and Ms. Warner may need independent counsel to respond as Mr. Juroviesky and they are potentially adverse in interest. It may be that they will resolve matters among themselves to remove the potential for adversity.

[8] Although some time has passed already, some further time is required due to Mr. Juroviesky not taking steps to see to his own and his clients' representation. Accordingly, Ms. Hammer, Ms. Warner, and Mr. Juroviesky shall respond to the outstanding motion by serving the other parties and delivering to my attention any evidence upon which they rely by April 6, 2018. Counsel are to schedule a case conference by telephone for the following week at which further procedural steps, if any, will be discussed under Rule 50.13 (6).

[9] The parties are on notice that during that case conference, in accordance with rule 57.01 (7) the court will devise and adopt the simplest, least expensive, and most expeditious process that appears fitting at that time.

[10] It is perfectly obvious that the current motions are uneconomical and are designed to make tactical points among counsel. This litigation has been extremely hard fought and expensive already. There is a very substantial amount of money at stake. The principal parties are siblings. The allegations among them have been exceptionally nasty and betray an underlying personal bitterness that perhaps only family members can hold toward one another. The siblings are now engulfed in a sea of professionals poised to engage on a very extensive and expensive voyage through years and years of legal and accounting documentation to re-package history to best suit their own current positions. The costs and distress of the process seem to be more attractive to the parties than sitting down, splitting a difference, and salvaging whatever is left of their family ties while their mother remains alive. There is enough money available that none of them will notice the difference in the long run. Instead, they choose to play out their damaged family dynamics in a public forum at great expense and with immense personal emotional cost.

[11] I decided to stop case managing this case because it became a tool to help the parties bludgeon each other rather than to resolve their issues. This has become one of a small number of unfortunate cases in which case management seems to encourage the parties to disagree.

[12] Normally, parties recognize that case management should encourage reasonable compromise and cooperation. Most parties do not want to show themselves to be taking unreasonable positions in front of a judge whom they know will be seeing them over and over again. Moreover, most reasonable parties recognize that with some cooperation on procedural matters such as scheduling, there are great advantages available in case management like streamlining the issues and reducing delay in the proceedings. Parties usually realize a case management premium by cooperating.

[13] But sometimes, the low cost of case management leads parties to an erroneous conclusion that they should harden their positions and decline even the slightest cooperation because the process of seeking resolution is so quick and cheap. The judge is just a phone call away. In these cases, the judge becomes the parties' private referee. The parties get repeated, privileged access to a judge. They are prepared to abuse the judge's commitment of non-sitting time to their case in hopes of achieving minor tactical gains and showing a resoluteness to oppose even the most trivial concession. In those circumstances, case management does not move the case forward or lessen expense.

[14] Case management only works where counsel are able to cooperate and to obtain instructions to do so from their clients. Case management can fail as well where counsel focus on their obligation to be zealous and fearless advocates while ignoring the concomitant obligation to do so "in a way that promotes the parties' right to a fair hearing in which justice can be done." The quoted words are found right after the obligation to be fearless in Commentary [1] to Rule 5.1-1 of the *Rules of Professional Conduc*t. The overriding commitment to fairness and justice is part and parcel of the obligation to be zealous and fearless advocates. Otherwise, we revert to trial by battle in which parties pay champions to assault each other. That is not justice as we know it.

[15] In *Hryniak v Mauldin*, 2014 SCC 7, at para. 28, the Supreme Court of Canada reminded us that the principal goal of the civil justice system is a "fair process that results in a just adjudication of disputes."

[16] Now counsel are swinging at each other personally because they cannot even get orders settled without judicial intervention. Whether issues are born of bilateral, proper, hard fought negotiating, or unilateral, improper conduct remains to be determined if necessary. Another front is opened in the unrelenting distress of this family's war. How much preferable might it be for the parties to take a step back and choose to resolve their difficulties another way? Perhaps, for example, a judge with background in their issues might agree to help them discuss a negotiated outcome.

F.L. Myers J.

Date: March 16, 2018