IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Koch* v. *Koch,* 2005 YKSC 47 Date: 20050901
Docket No.: S.C. No. 01-A0158
Registry: Whitehorse

Between:

GEORGE KOCH and NORINE KOCH
By their Guardian ad Litem KAREN MacDERMOTT

Petitioners

And

ESTATE OF HELMUT KOCH, DECEASED

Respondent

Before: Mr. Justice R.S. Veale

Appearances:
Mr. James Tucker For the Petitioners
Mr. André Roothman For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The litigation guardian has applied for an order for interim special costs on behalf of two adult children, George Koch and Norine Koch, to be paid from the estate of their father, Helmut Koch, who died on February 14, 2001. The litigation guardian filed a petition on October 5, 2001, claiming dependant status under the *Dependant's Relief Act,* R.S.Y. 2002, c. 56, and seeks an order for the financial support of the adult children from the deceased's estate. The application for interim special costs (payment in full of fees and disbursements) is opposed by the executrix and widow of Helmut Koch,

Ms. Bateson-Koch, who is the beneficiary under his will. The issue is whether this application comes within the narrow class of cases in which the granting of interim costs is appropriate. The executrix also applies for an order for security for costs against the litigation guardian.

THE FACTS

[2] George Koch and Norine Koch are the children of the deceased Helmut Koch. They both reside in Alberta. George was born on September 11, 1954. There is no dispute that George suffers from schizophrenia and as a result is unable to earn a living. He receives limited income assistance from an Alberta government program called the Assured Income for the Severely Handicapped (AISH). It is my understanding that George was not receiving any financial support from his father at the time of his father's death.

[3] It should be noted that the will of Helmut Koch dated May 18, 1989 left the residue of the estate, in the event Ms. Bateson-Koch did not survive Helmut Koch for 30 days, to his seven children equally. However, the share of George Koch was to be held in trust by Karen MacDermott and Kevin Koch, a sister and brother. It would appear that Helmut Koch recognized the disability of George Koch.

[4] Norine Koch was born on August 10, 1965. She suffered a brain injury as a result of a stroke at approximately seven years of age. The litigation guardian states that Norine is severely disabled and unable to earn an income. She also receives limited income support from AISH but is capable of performing some work despite a language disability. Ms. Bateson-Koch does not dispute the claim that Norine suffers some form of disability from her stroke at age seven. However, she disputes the extent of Norine's disability and whether she is unable to support herself completely or partially. Counsel

for the estate concedes that Norine has a case of sufficient merit to qualify as a dependant but the quantum of that dependence is contested. Under the *Dependant's Relief Act*, a "dependant" includes "a child of the deceased who is sixteen years of age or over at the time of the deceased's death and unable because of mental or physical disability to earn a livelihood." A medical examination of Norine, applied for by counsel for the estate, has been ordered to determine her mental and physical capacity.

[5] The litigation guardian is Karen MacDermott who is also a child of Helmut Koch and the sister of the petitioners. She states that there is no other person in the Yukon who will act as litigation guardian. She has been advised by the Alberta Public Guardian and Trustee that they would only represent George and Norine if there were no friends or family capable of doing so. The litigation guardian also lives in Alberta and no evidence has been presented about her assets or ability to pay court costs that might be awarded against her.

[6] The litigation, unfortunately for all, has been contentious and prolonged. The litigation guardian has incurred approximately $42,000 in legal fees and disbursements to date. This includes $10,325.37 paid to a business evaluator to evaluate a commercial building owned by the estate in Edmonton. She has paid $9,798.86 to counsel for George and Norine and owes an additional $21,676.92.

[7] The executrix, Ms. Bateson-Koch, indicated that the legal costs for the estate were approximately $40,000 despite the fact that Ms. Bateson-Koch has conducted part of the litigation in person to minimize costs to the estate. However, she has concluded, quite appropriately, that she cannot continue the litigation without counsel and has applied for a line of credit to fund the ongoing litigation.

[8] In addition to the legal costs incurred by the estate, Ms. Bateson-Koch states that there are $27,330 in taxes and accounting fees of $15,800. Of these amounts, $31,330 is still unpaid. The total amount of estate expenses, which I assume includes the above expenses, is approximately $124,000. The precise net value of the estate remains in dispute but it has a gross value of approximately $340,000.

[9] If the matter proceeds to trial, it is not unreasonable to query whether there will be any money left for George and Norine Koch or Ms. Bateson-Koch. It would be helpful if each party formally filed their best settlement offer pursuant to Rules 37 or 37A, so as to encourage settlement before trial.

THE LAW

Costs after the Event

[10] The traditional principle of awarding costs, set out in Rule 57(9) of the *Rules of Court*, states that costs follow the event unless the court otherwise orders. In the usual case, this means that the successful party is awarded costs against the unsuccessful party, after trial, on a party and party basis according to a schedule attached to the *Rules*. The recovery of court costs on a party and party basis is not a full indemnification of the winner's legal fees and disbursements. It would usually result in recovery of 100% of reasonable disbursements such as expert fees and transportation but a considerably lesser percentage of legal fees.

[11] The court also has the discretion to assess costs as special costs. Special costs are usually understood as meaning a percentage of the fees and disbursements that a client paid to his or her lawyer that would be greater than party and party costs. Special costs are often, but not necessarily, awarded to punish the conduct of a party. However, Rule 57(3) of the *Rules of Court* indicates that where special costs are ordered:

> "the registrar shall consider all of the circumstances, including:
>
> (a) the complexity of the proceeding and the difficulty or the novelty of the issues involved,
> (b) the skill, specialized knowledge and responsibility required of the solicitor,
> (c) the amount involved in the proceeding,
> (d) the time reasonably expended in conducting the proceeding,
> (e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding,
> (f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained, and
> (g) the benefit to the party whose bill is being assessed of the services rendered by the solicitor."

The above discussion and principles are premised upon an assessment of costs after the trial. Although the Rule refers to the Registrar, in this jurisdiction, the trial or Chambers judge may also determine the amount of special costs.

Interim Costs

[12] In the case of *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, 2003 SCC 71, the judgment of LeBel J. explored a court's discretionary power to award interim costs, i.e. costs before the trial. In that case, four Indian Bands began logging on British Columbia Crown land without authorization under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159. The Minister of Forests served stop-work orders and commenced a court action to enforce the orders. The Bands claimed aboriginal title and challenged the jurisdiction of *The Forest Practices Code* to regulate their constitutionally protected aboriginal right to log their land. The court decided that the matter should proceed to full trial rather than a summary proceeding and the Bands applied to have their legal fees and disbursements paid in advance.

[13] The Supreme Court of Canada upheld the Court of Appeal's decision to grant interim costs to the Bands based on the great public importance of the issue at stake and the Bands' inability to proceed to trial without funding. The circumstances of the case were described as special, even extreme.

[14] LeBel J., at paragraphs 31 – 37, discussed the conditions to be met in the "rare" cases where interim costs are awarded. He stated at paragraph 31:

> "Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. That costs orders can be used in this way in a narrow class of exceptional cases was recognized early on by the English courts."

[15] The discretionary power to award interim court costs is well established in Canada.

[16] The case of *McDonald* v. *McDonald*, 1998 ABCA 241, discussed the basis for paying interim costs in matrimonial cases. In that case, the proceedings between spouses were acrimonious. The Chambers judge ordered the father to pay $850 each month as child support for the two children. The father appealed and the mother applied for interim costs of $5,000 in the Court of Appeal. Russell J.A., ultimately ordered the father to post a sum of $2,000 for security for costs. While the case deals with a specific provision in the Alberta Divorce Rules for an award for costs, the judge concluded at paragraph 18:

> As a matter of common law, therefore, a wife in divorce proceedings was allowed anticipatory costs to permit her to present the Court with her position in divorce litigation. The Alberta Court of Appeal decision in Brown v. Brown (1920), 16 Alta. L.R. 88 makes it clear that the Court's ability to make such an order is based on its inherent jurisdiction. It

> rested upon the principle that a wife was a privileged suitor as to costs and alimony on the supposition that the whole of the matrimonial property belonged to the husband.

[17] In *Organ* v. *Barnett* (1992), 11 O.R. (3d) 210 (Gen. Div.), Macdonald J. found the court had a general jurisdiction to award interim costs not limited exclusively to matrimonial cases. She stated that the exercise of such discretion should be limited to exceptional cases and narrowly applied. In that case, the plaintiffs were the children of Robert Organ and beneficiaries of the Organ trusts. The defendants were the sister of Robert Organ, her husband and certain corporations involved in certain family businesses. Macdonald J. found that the plaintiffs as a whole had the “collective financial ability” to fund the litigation and declined to make an order for interim costs.

[18] LeBel J., in *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, cited above, discussed the foregoing cases with approval and expanded the applicability of an award for interim costs to certain trust, bankruptcy and corporate cases “to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed.” (para 34).

[19] LeBel J. placed several conditions on the exercise of this power at paragraph 36:

1. the party seeking the interim costs must be impecunious to the extent they would not be able to proceed with the case without such an order;
2. the party seeking the interim costs must establish at the outset a case of sufficient merit to warrant pursuit; and
3. there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of power is appropriate.

[20] LeBel J. went on to say that an application for interim costs will not be refused because “key issues remain live and contested between the parties” (para 37). He acknowledged that because a decision on interim costs would be made before a determination of the merits of the case, the discretion must be exercised with “particular caution”.

[21] It is of interest to note that the court awarded interim costs as the term “costs” is used in the *Rules of Court*. The court stated that unless the Chambers judge concludes that special costs are warranted, party and party costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation (paragraph 39(2)).

[22] It should also be noted that in dependant relief applications in Alberta, the general rule is to award costs after the event on a solicitor and client basis (special costs) from the estate. See *Kowalski* v. *Kowalski*, 2005 ABQB 378; *Boje* v. *Boje Estate*, 2002 ABQB 272 and 2005 ABCA 73. In other jurisdictions, party and party costs are awarded.

Security for costs

[23] The *Rules of Court* in the Supreme Court of British Columbia have been adopted for use in this court. Prior to 1976, the *Rules* contained a provision permitting a judge to exercise the discretion to order security for costs against a non-resident plaintiff. That rule was deleted in 1976. In *Shiell* v. *Coach House Hotel Ltd* (1982), 37 B.C.L.R. 254, the British Columbia Court of Appeal ruled that as there is no longer such a rule, the court is left with its inherent jurisdiction to order security for costs in some circumstances, but there is no right to demand it just because a party resides out of the jurisdiction and has no assets within it.

[24] There remains in British Columbia and Yukon a statutory provision allowing corporations to apply for security for costs. The rationale is to provide protection to defendants from abuse by natural persons funding litigation for impecunious companies thereby avoiding personal liability for costs. See *Fat Mel's Restaurant* v. *Canadian Northern Shield Insurance Company et al* (1993), 25 BCAC 95, at paragraph 15.

[25] While the inherent jurisdiction to order security for costs against natural persons remains, it must be balanced with the long standing principle that it must not be used to bar even the poorest person from the courts: See *Kropp* v. *Swaneset Bay Golf Course Ltd.*, [1997] B.C.J. No. 593. It is a "power … to be exercised cautiously, sparingly and indeed under very special circumstances": See *Tordoff* v. *Canada Life Insurance Co*. (1985), 64 BCLR 46 (BCSC).

[26] Because the executrix applies for security for costs against the litigation guardian personally and not George and Norine Koch, it is useful to consider the case of *White* v. *Rutter*, [1988] 28 B.C.L.R. (2d) 385 (BCCA). The public trustee was by law the committee (and litigation guardian) for Victor White and brought an action for personal injuries on his behalf. The action was dismissed and the trial judge ordered the public trustee personally liable to pay the defendants' costs. The Court of Appeal set aside the order against the public trustee and held that the defendants were entitled to their costs against the estate of Victor White, not the public trustee. The Court of Appeal clearly distinguished the case of a statutory committee for a person under disability and the case of a next friend acting on behalf of infants. In the case of infants, the court stated that costs have historically been awarded against next friends acting on behalf of infants.

[27] The Court of Appeal in *White* v. *Rutter* also referred to the case of *Lopaschuk* v. *Henderson and Houston* (1951), 3 W.W.R. 327 (BCSC). In that case, a damages action was brought against two infant defendants who were defended by guardians. The plaintiff applied for costs against the guardians personally. In refusing to award costs against the guardians personally, Coady J. stated at page 328:

> "There may be cases where the guardian, by unreasonable conduct in the proceedings, may act so as to incur costs improperly and thus render himself personally liable, but that certainly is not this case."

The policy articulated by Coady J. was that infants cannot appear by themselves, but must appear by guardians. He pointed out that guardians who are appointed by the court or come forward in good faith should not do so at the risk of a costs award against them personally. However, he distinguished between the guardian entering a defence for an infant and a guardian commencing an action for an infant. The guardian entering a defence for an infant has no alternative but to defend the interests of the child, and it would be an exceptional case of misconduct to order costs against such a guardian. Where the guardian commences the action on behalf of an infant, Coady J. implied that an order for costs payable by the guardian would not be limited to the exceptional case of misconduct.

ANALYSIS

Interim Costs

[28] I will now apply the three conditions enumerated by LeBel J. in *British Columbia* v. *Okanagan Indian Band*, cited above, to the facts before me to determine whether this is an appropriate case for awarding interim costs.

[29] **Are George and Norine Koch impecunious to the extent that they would not be able to proceed with the case without such an order?**

[30] In my view, the answer to that question is yes. There is no evidence that George and Norine have any assets. They are living on modest state assistance. But for the intervention of their sister as litigation guardian, they would not have the financial capacity to commence an action in the Yukon against their father's estate.

[31] There is an additional factor at play in this case. On the evidence before me, George and Norine appear to be intellectually incapable of bringing a court action and instructing counsel. In saying that, I am aware that Ms. Bateson-Koch will be seeking an opinion from a medical examination on that very issue with respect to Norine. Thus, it is a live issue which may be heard at trial depending upon the opinion of the expert. However, whether Norine is intellectually capable is unproven at this stage, given the evidence before me, and should not be a basis on which to deny an interim costs award.

[32] Counsel for the estate also submits that the requirement of impecuniosity should be applied to the litigation guardian, who has demonstrated her ability to pay some fees and disbursements. The obvious result from this submission would be to deny interim costs to George and Norine Koch because their sister is prepared to fund their case. Counsel for the estate submits that George and Norine Koch could continue their court case in the absence of an order for interim costs.

[33] The difficulty with making the analysis based on the guardian's financial ability is that the focus shifts from considering the assets of the persons under disability to an analysis of whether family members, legal aid or other sources will rise to the occasion and ensure that the interests of the children of the estate are protected. This could certainly deter potential litigation guardians, with less courage or financial comfort than

Ms. MacDermott, from stepping forward to bring actions against estates where dependant children are not adequately provided for by an estate. In my view, this is a serious policy issue. Surely it would be preferable to err on the side of encouraging guardians to represent persons under disability rather than discouraging them. There are substantial commitments of time and effort, not to mention stress, for guardians to act without reward for persons under disability. As discussed earlier, there is always the spectre of an award of costs against a guardian personally. In short, persons under disability who may have a legitimate claim against an estate should be assessed on their own financial situation, not that of their guardian or potential guardian.

[34] I do not say that there could never be a situation where the existence of a financially well-off litigation guardian would be a consideration in applying this condition to persons under disability seeking an award of interim costs. It may be an appropriate consideration where the litigation guardian has a legal obligation to support the person under disability and has the financial means to do so. In that circumstance, the usual cost determination at the end of the case might be appropriate. However, in the circumstances of this case, I am of the view that the fact that a relative voluntarily stepped forward should not deprive the persons under disability from being assessed on their own financial merits.

[35] I conclude that George and Norine Koch have met this condition.

[36] **Do George and Norine Koch have, at the outset, a case of sufficient merit to warrant pursuit?**

[37] I hesitate to use the words “*prima facie”*, which were used in the Supreme Court decision, as it leaves everyone but lawyers and Latin scholars in the dark about their

meaning. It is really a question whether George and Norine have a case that appears to have sufficient merit at the outset. In the circumstances of this case, it is a question of whether or not George and Norine appear to qualify at the outset as dependants.

[38] The answer is yes. George and Norine appear to be dependants as defined in the *Dependants Relief Act*. Indeed, there is no dispute about the fact of disability of both George and Norine Koch. Ms. Bateson-Koch concedes this point, although, as previously mentioned, she contests the extent of the disability for Norine and indeed whether she is unable to instruct counsel without a litigation guardian.

[39] **Are there special circumstances sufficient to satisfy the court that this case is within the narrow class of cases where this extraordinary exercise of power is appropriate?**

[40] Counsel for the estate submits that this is not a case of special circumstances and the issues do not transcend the individual interests of George and Norine Koch. It is submitted that this is a case of competing interests between the children and a surviving spouse. The value of the estate must be determined and the appropriate division made according to the principles set out in *Tataryn* v. *Tataryn Estate*, [1994] 2 S.C.R. 807.

[41] I do not agree. This condition is not designed to limit awards of interim costs only to those public interest cases on a magnitude of *British Columbia* v. *Okanagan Indian Band.* LeBel J. clearly included the class of cases involving matrimonial or family cases which have traditionally been recognized in Canada as appropriate for an award of interim costs. I view the situation of dependant children without adequate provision from an estate to be in greater need than a spouse without assets. I say this not to diminish the peril or difficulty encountered by dependant adult spouses, but simply to say that the

dependency of children creates an even stronger case for intervention with an order for interim costs. The assets are all held by the estate and without an award for interim costs, these meritorious claims will not proceed. It is perhaps an even more pressing circumstance in this case where the surviving spouse is the executrix of the estate and has a competing claim. Finally, it must be remembered that the litigation guardian commenced this action because the deceased made no provision for his dependant children.

[42] I find the case of these dependant children claiming against the estate of their father to be within the narrow class of cases where an award of interim costs is appropriate. I do not find any fault or failure on the part of the litigation guardian to conduct the litigation in a diligent and bona fide manner.

[43] The remaining issue, that I consider as Chambers judge, is whether the award of interim costs should be special costs or party and party costs. There is no doubt that reasonable disbursements should be recovered in their entirety. However, the issue of whether legal fees should be recovered fully, partially or according to the usual party and party costs in the *Rules of Court* is not, in my view, a matter that calls for a hard and fast rule. It is not unusual after the trial, for the legal costs of dependant relief claimants to be recovered in full as special costs. The policy behind that is based on the fact that the party protecting the estate has full access to the estate funds. The policy of permitting recovery of the claimant’s legal fees and disbursements in full as special costs encourages early settlements and avoids precisely what is occurring in this case: the dissipation of estate assets for legal fees and disbursements, rather than dividing the assets between competing claims.

[44] On the other hand, granting full recovery of legal fees and disbursements on an interim basis before a dependant's relief claim is adjudicated or settled, could result in the claimants being less desirous of settling their claim on a reasonable compromise, particularly if the estate is large.

[45] From the perspective of keeping both sides reasonable in pursuing or defending dependant relief claims against an estate, there is considerable merit in adopting the approach set out by the British Columbia Court of Appeal and concurred in by the Supreme Court of Canada in *British Columbia* v. *Okanagan Indian Band*; that is leaving the discretion to the Chambers judge to order special costs or party and party costs calculated on the appropriate scale. As I read the British Columbia Court of Appeal's decision, the interim costs order should be for party and party costs as set out in the *Rules of Court* unless the Chambers judge concludes that special costs are warranted.

[46] In this case, there is no conduct on the part of the dependants or their litigation guardian that I consider inappropriate. I view the claims of dependant children to be of the highest order, requiring timely resolution. I find that interim special costs, meaning payment of the litigation guardian's full legal fees and disbursements are appropriate in the circumstances of this case. I make this order because of the unequal circumstances of these dependants and the inherently unequal power relationship that dependant children have in claiming against a parental estate. I do not make this order of interim costs on a special costs basis to punish the executrix. It is the inherently unequal power relationship that drives my decision.

Security for Costs

[47] The application by the executrix for security for costs against the litigation guardian personally is founded on the principle that the estate should be protected from the likelihood that if it succeeds, it will be unable to recover its costs from the litigation guardian who resides in Alberta and has not disclosed assets sufficient to satisfy a potential costs award against her personally.

[48] Firstly, I question the merit of ordering security for costs for an estate that failed to address the issue of these dependant children. That failure is the reason that the dependant children have commenced this action. It would be quite inappropriate to order that the dependant children pay security for the costs of the estate in defending an action that the estate precipitated.

[49] Secondly, there is an inherent contradiction in the submission of the estate. In opposing the application for interim costs, counsel for the estate submitted that the litigation guardian provided no evidence of inability to fund the litigation thereby making interim costs unnecessary. Now, in seeking security for costs against the litigation guardian, counsel for the estate submits that the litigation guardian cannot satisfy a potential cost award against her.

[50] Thirdly, the executrix did not seek a specific amount as security for costs but indicated fees and disbursements to date were in the $40,000 range. This would increase significantly if the matter goes to trial. While the order for interim special costs to George and Norine Koch is to ensure their claim will be heard, the impact of a security for costs order would be the opposite. It would require the litigation guardian to pay money into court or provide a letter of credit, resulting in an even greater financial

burden being placed upon the litigation guardian. It would be completely unfair for this volunteer litigation guardian and has the potential of defeating the claim of the dependant children without a trial. To that extent, it runs completely against the purpose of the interim special costs order and adds a considerable burden to the litigation guardian. On this basis alone, the claim for security for costs application should be dismissed.

[51] Fourthly, as discussed above, an order for security for costs should not deny access to justice to a poor person. In the context of the high cost of litigation, even a person of modest means could be prevented from litigating meritorious claims by an order for security for costs.

[52] Counsel for the estate submits that this order would not affect the impecunious litigants here as it is an order against their litigation guardian.

[53] I do not accept this submission. A security for costs order, even for a financially able litigant, is an additional burden that would make it more difficult for the litigation guardian to bring this matter to a resolution. I am also of the view that, the rationale of the order in *British Columbia* v. *Okanagan Indian Band*, cited above, was based upon concerns about access to justice and the desire to mitigate severe inequality between litigants as the policy basis for an interim award of costs. It would be totally inappropriate to award security for costs against this litigation guardian, as that might result in a denial of access to justice or add to the inequality between the litigants.

[54] Finally, the case put forward by the estate is that the dependency of both George and Norine Koch is admitted. Counsel for the estate submits that the real issues are the question of amount based on the potential that Norine can contribute to her own support and balancing of the interests of Ms. Bateson-Koch, as a spouse, with the claim of the dependant children. In short, the issue is how much money should the children and the spouse receive from the estate. The conclusion I draw from this is that the dependant children have a reasonable likelihood of success, making a security for costs award inappropriate. A dispute that has been reduced to an issue of quantum or amount can be dealt with by employing formal settlement offers under Rule 37 and the cost consequences that may follow.

CONCLUSION

[55] To summarize, I have dismissed the application of the estate for security for costs against the litigation guardian. I have granted the application for interim costs on a special costs basis of full recovery of legal fees and disbursements to date.

[56] Counsel may speak to costs, if necessary.

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Veale J.