

SUPREME COURT OF YUKON

Citation: *E.S.N. (Re)*, 2010 YKSC 74

Date: 20101125
S.C. No. 09-B0057
Registry: Whitehorse

IN THE MATTER OF THE APPLICATION FOR GUARDIANSHIP OF E.S.N.

Before: Mr. Justice R.S. Veale

Appearances:

Judith M. Hartling
Debra L. Fendrick

Counsel for the Public Guardian and Trustee
Counsel for S.N.

REASONS FOR JUDGMENT (Public Guardian and Trustee Fees)

INTRODUCTION

[1] The Court appointed the Public Guardian and Trustee (the “PGT”) as guardian of E.S.N., commonly known as S.N., pursuant to s. 32(1) of the *Adult Protection and Decision Making Act*.

[2] This application is to determine whether the PGT has the authority to charge fees to remunerate the work of the PGT on behalf of S.N. as provided in the *Public Guardian and Trustee Regulation*, O.I.C. 2005/83 (the “PGT Regulation”).

THE FACTS

[3] As a result of a motor vehicle accident caused by the negligence of a Yukon Government employee, S.N. entered into a settlement agreement and received certain

funds in compensation for her injury. In that litigation, S.N. was represented by the PGT as litigation guardian.

[4] At an earlier date, completely separate and distinct from the motor vehicle accident, S.N. was diagnosed with Fetal Alcohol Spectrum Disorder.

[5] Upon receipt of the settlement funds, the PGT made an application to be appointed as guardian pursuant to s. 32(1) of the *Adult Protection and Decision Making Act*.

[6] Based upon an Incapability Assessment, which was opposed by S.N., this Court appointed the PGT as guardian for S.N.'s adult estate amongst other matters but reserved to this date the issue of whether the PGT could charge fees for the work of the PGT according to the PGT Regulation.

THE STATUTORY FRAMEWORK

[7] There are two pieces of legislation that must be interpreted: the *Public Guardian and Trustee Act* and the PGT Regulation, and the *Adult Protection and Decision Making Act* and its *Adult Protection and Decision Making Regulation*, O.I.C. 2005/78.

The *Adult Protection and Decision Making Act*

[8] I will begin with the *Adult Protection and Decision Making Act* as it is the statute that sets out the requirements for the appointment of a guardian.

[9] Section 29 of the *Adult Protection and Decision Making Act* states:

The following are eligible to be appointed as the adult's guardian

...

(b) subject to the Public Guardian and Trustee Act, the Public Guardian and Trustee; and (my underlining)

...

[10] Section 32(1) reads as follows:

The Supreme Court may make an order appointing a guardian for the adult if the court is satisfied that

- (a) the adult is incapable of managing all or part of their affairs;
- (b) the adult needs the care, assistance, and protection of a guardian; and
- (c) forms of available support and assistance less intrusive than guardianship have been tried or carefully considered.

[11] Under the title Payment and Expenses, s. 47 of the *Adult Protection and Decision Making Act* states:

The Supreme Court may order

- (a) that a guardian be remunerated, in accordance with the guidelines prescribed by the regulations, from the adult's assets for acting in that capacity; and
- (b) that a guardian be reimbursed from the adult's assets for reasonable expenses properly incurred in performing the duties or exercising the authority given under this Act.

[12] Pursuant to s. 84, the Commissioner in Executive Council may make regulations including:

- (m) prescribing guidelines for the remuneration of guardians from the adult's assets;

[13] Section 17 of the *Adult Protection and Decision Making Regulation, O.I.C. 2005/78* (the "Adult Protection regulations"), s. 17 states:

The remuneration for a guardian shall not exceed the following amounts

(a) for funds received or disbursed, 2.5% of the amount disbursed;

(b) for the management of the adult's assets, 0.5% per annum of the fair market value of those assets for the time that they are managed by the guardian.

The *Public Guardian and Trustee Act*

[14] Section 4(2) of the *Public Guardian and Trustee Act* states that:

(2) Subject to subsections (3) and (4), the Public Guardian and Trustee may

(a) act as a guardian under the Adult Protection and Decision-Making Act;

...

(3) The Public Guardian and Trustee may not be appointed by a court to act in any capacity mentioned in subsection (2) without being heard.

(4) An appointment of the Public Guardian and trustee to act in any capacity mentioned in paragraph (2)(c) to (f) is not effective without the consent of the Public Guardian and Trustee.

[15] It appears that, while it must be heard, the consent of the PGT is not required for its appointment as a guardian under the *Adult Protection and Decision Making Act*.

[16] The authority for the deduction of costs, fees or expenses incurred is set out as follows under s. 21 of the *Public Guardian and Trustee Act*:

The Public Guardian and Trustee is entitled to deduct any costs, fees, or expenses incurred for acting as a guardian of a person's estate out of the estate. (my underlining)

[17] Section 25 of the *Public Guardian and Trustee Act* permits the Commissioner in Executive Council to make regulations prescribing fees.

[18] The fees are contained in the PGT Regulation as follows:

Fees

1.(1) The fees to be charged by the Public Guardian and Trustee are set out in the Schedule of Fees.

...

SCHEDULE OF FEES

...

Purpose of this schedule

2. The purpose of this schedule is to establish the following fees for the Public Guardian and Trustee

(a) a transaction fee to cover the costs of receiving, disbursing or transferring funds and property;

(b) a management fee to cover the costs of managing funds and property from the time it is received until it is disbursed or transferred;

(c) other fees for other services.

TRANSACTION FEES

Receipt of funds

3. For funds received, whether by way of income or capital, the fee is 2.5% of the amount received.

Funds disbursed

4 . For funds disbursed, whether from income or capital, the fee is 2.5% of the amount disbursed.

...

MANAGEMENT FEES

Management of funds held in trust

7. (1) For the management of funds held in trust, the fee is 0.5% of the funds per annum for the time the funds are held in trust.

(2) For the purposes of subsection (1), “management of funds” includes

- (a) maintaining records and accounts;
- (b) making and maintaining investments;
- (c) communications with financial institutions;
- (d) other similar activities.

...

Hardship policy

15. The Public Guardian and Trustee may waive the payment of all or part of any fee in this schedule where the Public Guardian and Trustee considers it appropriate to do so.

ISSUES

[19] There are two issues to be determined:

Issue 1: Does the PGT have the statutory authority under the *Public Guardian and Trustee Act* to charge transaction and management fees in the guardianship of S.N.?

Issue 2: Should the court exercise its *parens patriae* jurisdiction to override the statutory authority of the PGT to charge transaction and management fees?

THE STATUTORY AUTHORITY TO CHARGE TRANSACTION AND MANAGEMENT FEES

Issue 1: Does the Public Guardian and Trustee have the statutory authority under the *Public Guardian and Trustee Act* to charge transaction and management fees in the guardianship of S.N.?

[20] Counsel for S.N. submits that the authority of the PGT to charge transaction and management fees is governed by s. 47 of the *Adult Protection and Decision Making Act*

which gives the court discretion to order remuneration to a guardian appointed under that *Act*. Counsel submits that the PGT does not have authority under s. 21 of the *Public Guardian and Trustee Act* because the *Act* uses the word “deduct” rather than the word “charge” which is used in the Regulation. Since the wording of a regulation cannot enhance the meaning of the word used in the *Act*, it follows that if the word “deduct” is not precise enough to empower the PGT to charge transaction and management fees, then no such fees could be charged for the guardianship of S.N., except as ordered by this court in the exercise of its discretion under s. 47 of the *Adult Protection and Decision Making Act*.

[21] However, in my view, s. 29 of the *Adult Protection and Decision Making Act* clearly permits the appointment of the PGT as a guardian “subject to the *Guardian and Trustee Act*”. I interpret this to mean that the remuneration of the PGT is under the *Public Guardian and Trustee Act* not the *Adult Protection and Decision Making Act*, which authorizes the appointment. Thus, I find that the court does not have the discretion to award fees to the PGT under s. 47 of the *Adult Protection and Decision Making Act*, as that section relates only to guardians other than the PGT.

[22] While the word “deduct” may not be as precise as the word “remunerate” or “charge”, I am satisfied that the PGT has the authority to charge transaction and management fees under s. 21 of the *Public Guardian and Trustee Act* and the PGT Regulation.

***Parens Patriae* Jurisdiction**

Issue 2: Should the court exercise its *parens patriae* jurisdiction to override the statutory authority of the Public Guardian and Trustee to charge transaction and management fees?

[23] On the authority of *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, and *Yassin v. Loubani*, 2006 BCCA 509, this Court has decided that in appropriate and exceptional cases, the court can resort to *parens patriae* jurisdiction: see *T.T.M. v. E.E.Q.*, 2008 YKSC 37, at para. 31. In *Eve*, the Supreme Court of Canada considered whether the jurisdiction would permit the Court to consent to the sterilization of a mentally incompetent woman. In *Yassin v. Loubani*, the B.C. Court of Appeal exercised the jurisdiction to award interim custody to the mother of two children that were habitually resident in Saudi Arabia, despite a lack of statutory jurisdiction.

[24] I do not find this guardianship case to be one of the exceptional or unusual cases calling for the exercise of the *parens patriae* jurisdiction. S.N. requires a guardian for reasons that have no relationship to the motor vehicle accident for which the Yukon Government is vicariously liable. I would have no hesitation denying fees if the guardianship was required because of the injury caused in the motor vehicle accident. However, that is not the case.

[25] Section 15 of the PGT Regulation permits the PGT to waive fees “where the Public Guardian and Trustee considers it appropriate to do so”, and this may be a case for the PGT to consider applying this hardship policy, as the fees it proposes to charge will reduce the funds that flow to S.N. from the accident for which the Yukon Government is vicariously liable. For example, it might be appropriate for PGT to waive

the 'Receipt of Funds' fee in s. 3 of the Regulation, as the government is the source of those funds. Fairness or hardship would suggest that a fee in these circumstances would amount to the government recovering fees from funds it was obligated to pay.

[26] However, the discretion for such a waiver is a matter for the PGT to exercise not this Court (see, e.g. *Rootman Estate v. British Columbia (Public Trustee of)*, (1998), 115 B.C.A.C. 281).

[27] There will be no order for costs.

VEALE J.