

2009 CarswellOnt 1982
Ontario Superior Court of Justice

Futerman v. Futerman

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**Sonja Lynn Futerman v. Harold Hyman
Futerman and The Public Guardian and Trustee**

L.B. Roberts J.

Heard: March 12, 2009

Judgment: March 25, 2009

Docket: 03-78/08

Counsel: Paul Trudelle, for Applicant
Richard Coutinho, for Respondent, Public Guardian and Trustee
David R. Richmon, for Jack M. Futerman

Subject: Estates and Trusts; Civil Practice and Procedure

Headnote

Estates and trusts --- Estates — Actions involving personal representatives — Rights and liabilities of personal representative — Actions by personal representative — Personal liability for costs

Table of Authorities

Cases considered by L.B. Roberts J.:

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, (sub nom. *Boucher v. Public Accountants Council for the Province of Ontario*) 71 O.R. (3d) 291 (Ont. C.A.) — referred to

McDougald Estate v. Gooderham (2005), 17 E.T.R. (3d) 36, 2005 CarswellOnt 2407, (sub nom. *McDougald Estate, Re*) 199 O.A.C. 203, 255 D.L.R. (4th) 435 (Ont. C.A.) — followed

Ziskos v. Miksche (2007), 2007 CarswellOnt 7162 (Ont. S.C.J.) — considered

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 57.01 — referred to

L.B. Roberts J.:

1 The applicant and Jack Futerman seek payment of their legal costs incurred to date in these proceedings and ask that payment be made from the Estate of Harold Futerman.

2 The Public Guardian and Trustee seeks \$250.00 plus GST in costs for the March 12th attendance in response to the costs motions. No party objects to the costs sought and I order that they be paid to the Public Guardian and Trustee from the estate of Harold Futerman.

3 As I have been case managing this matter, the parties requested that I hear the costs motions. I agree that it is appropriate for me and that I have jurisdiction to hear the costs motions even though the application was not decided on the merits: *Ziskos v. Miksche*, [2007] O.J. No. 4276 (Ont. S.C.J.), at paras. 42 to 43.

4 The applicant is the spouse and Jack Futerman is the brother of Harold Futerman.

5 Harold Futerman is 74 years old and a person under a disability. He has had a long history of mental illness stemming back to 1985. He is now suffering from severe dementia and aphasia. He is unable to speak or communicate in any reasonable way. He is confined to a wheelchair.

6 The applicant asserts that she is the guardian for personal care of Harold Futerman. Together with his now deceased brother, Edward Futerman, Jack Futerman was a former guardian of property for Harold Futerman until he and his brother requested that the Public Guardian and Trustee assume that role. The Public Guardian and Trustee has been the guardian of property for Harold Futerman since in or about June 2007.

7 The present application was instigated by Mrs. Futerman primarily to seek an order removing the Public Guardian and Trustee as Harold Futerman's guardian of property and having herself appointed as Harold Futerman's guardian of property. As part of her application, Mrs. Futerman proposed that Harold Futerman live with her and that she receive financial support from Harold Futerman's estate.

8 The application was vigorously opposed by Jack Futerman, who filed a detailed affidavit, sworn November 14, 2008, establishing that Harold Futerman's medical condition required him to receive the kind of institutional care offered by the Baycrest Apotex Centre where he currently resides.

9 The parties first appeared before me on December 2, 2008. With the parties' agreement, I conducted two settlement case conferences on January 9 and February 25, 2009, to attempt to resolve all of the issues in these proceedings. The parties were able to resolve the issues that the Public Guardian and Trustee remain as guardian of property for Harold Futerman, that Harold Futerman continue to reside at the Baycrest Apotex Centre, and that further financial information concerning Harold Futerman's assets be shared. The issue of support for Mrs. Futerman was not resolved and is proceeding to a hearing on the issues and in accordance with the schedule, which are set out at the end of this Endorsement.

10 Mrs. Futerman claims costs on a substantial indemnity basis from Harold Futerman's estate in the amount of \$14,939.76, including disbursements of \$570.76 and GST. Through her counsel, Mr. Trudelle, Mrs. Futerman submits that it was necessary for her to bring this application in order to ensure that her husband was receiving proper care and to obtain an accounting of her husband's financial affairs from the Public Guardian and Trustee. Mr. Trudelle also argues that the application achieved the desired result of requiring the Public Guardian and Trustee and Jack Futerman to provide financial information and documentation relating to Harold Futerman's estate.

11 Jack Futerman claims costs on a substantial indemnity basis of \$14,789.30, including disbursements of \$195.05, plus GST. He maintains that his participation was necessary in order to respond to the application, protect his brother's assets and to ensure that his brother received appropriate care.

12 The Public Guardian and Trustee agrees that Mr. Futerman's evidence and participation were necessary in these proceedings and does not take issue with Mr. Futerman's claim for costs.

13 The Public Guardian and Trustee objects to the costs claimed by Mrs. Futerman, contending that the main thrust of the application was to have Mrs. Futerman appointed as guardian of property for Harold Futerman and have him live with her as she had proposed, and that the application was unsuccessful. Mr. Coutinho for the Public Guardian and Trustee also submits that the application for an accounting was premature in that the Public Guardian and Trustee could only provide the information and documentation that the Public Guardian and Trustee was collecting from the former

guardians of property for Harold Futerman, that the Public Guardian and Trustee was in the process of doing so, and that, if there were urgency, the application for an accounting could have been brought against the former guardians of property. Mr. Coutinho makes the submission that, if any costs are to be awarded to Mrs. Futerman, a costs award in the range of \$3,000 to \$5,000 would be appropriate.

14 The appropriate approach with respect to the assessment of costs in estates proceedings was set out by the Ontario Court of Appeal in *McDougald Estate v. Gooderham* [2005 CarswellOnt 2407 (Ont. C.A.)], 2005 CanLII 21091, in the following excerpt from para. 85 of that decision:

The modern approach to awarding costs, at first instance, in estate litigation ... recognizes the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

15 This approach was applied by Justice Spies in *Ziskos v. Miksche*, *supra*, at para. 56, a case similar to the present case, in which Justice Spies was acting as case management judge in disposing of the parties' respective claims for costs arising out of an application for guardianship of property. At paras. 58 to 61 of that decision, Justice Spies further noted that, in assessing costs in estates proceedings, the Court should take into account the usual factors and principles applied to other civil proceedings, including those factors set out in Rule 57-01 of the *Rules of Civil Procedure*, as well as the principles of fairness, reasonableness and proportionality enunciated by the Ontario Court of Appeal in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.).

16 Pursuant to Rule 57.01, it is also relevant to consider whether any step in the proceeding was unnecessary and caused costs to be incurred unnecessarily. As well, I have taken into account the more commonly applied factors of the complexity of the proceedings, the importance of the issues and the principle of indemnity: *Ziskos v. Miksche*, *supra*.

17 Applying the above principles to the present case, I am of the view that Mrs. Futerman should not receive full indemnity for her costs.

18 I agree that the principal focus of her application was to be appointed as the guardian of property for Harold Futerman and to have him live with her in accordance with her proposal. Based on the evidence filed from Harold Futerman's physicians (including Dr. Lipson's July 14, 2008 note attached as Exhibit "C" to the applicant's affidavit), the applicant's proposal appears contrary to Harold Futerman's best interests and did not have a reasonable chance of success. Further, there was no sworn evidence filed by Mrs. Futerman to raise any basis to remove the Public Guardian and Trustee as guardian of property for Harold Futerman. Moreover, the evidence filed establishes, in my view, that Mrs. Futerman does not have the requisite abilities to manage Harold Futerman's property and that some of her actions created enormous and unnecessary expense to the estate. For example, Mrs. Futerman unilaterally moved Harold Futerman from Lincoln Place, a nursing home where he had resided for almost a year, to Terrace Gardens Retirement Residence, an extremely expensive facility which his estate could not afford. There is no sworn evidence that Lincoln Place was unsuitable for Harold Futerman's needs. Based on the evidence filed, it is highly unlikely that Mrs. Futerman would have been appointed as guardian of property for Harold Futerman had the application proceeded.

19 With respect to her request for an accounting, it is my view that the purpose of Mrs. Futerman's requests for financial information was for her stated objective of seeking increased support from the estate. I note that Mrs. Futerman had been receiving monthly support from the former guardians of property for Harold Futerman, which was continued by the Public Guardian and Trustee. While, as a claimant of the estate, Mrs. Futerman may be entitled to ask for certain financial information concerning the estate's assets, there was no evidence to demonstrate that her request was urgent or that it was not being responded to in a reasonable and satisfactory way. As noted above, there was no evidence to suggest that the estate's assets were not being properly administered by the former guardians of property or the Public Guardian and Trustee. The Public Guardian and Trustee was continuing to provide generous financial support to Mrs. Futerman and was responding to her requests for information as best it could in the circumstances of this case, which included the

death of Edward Futerman, who was the principal source for the estate's financial information. Given the information provided by the Public Guardian and Trustee in the letter of Wanda Gennings of September 16, 2008, in my view, it was not urgent for Mrs. Futerman to bring this application to obtain additional details of the financial information provided by Ms. Gennings on behalf of the Public Guardian and Trustee.

20 As a result, while I do not believe that Mrs. Futerman should pay the costs of this application, as urged by counsel for Mr. Futerman, I decline to award Mrs. Futerman costs of this application as it relates to her request to be appointed as guardian of property for Harold Futerman and his residence. I am of the view that the application ought not to have been brought in this manner. If Mrs. Futerman wanted to seek increased support and obtain financial information for her support claim, she should have brought an application for that relief instead of an application for guardianship of property and respecting the residence of Harold Futerman, which was without merit. Had she done so, the participation of Jack Futerman and his attendant costs would likely have been unnecessary.

21 Although I do not believe it was urgent for Mrs. Futerman to have sought an accounting in this application, she was entitled to receive financial information about the estate of Harold Futerman and financial information was produced as a result of the settlement conferences. At the conferences, from her visits to Harold Futerman, Mrs. Futerman also provided information concerning Harold Futerman's present condition at Baycrest Apotex Centre. Having regard to Mrs. Futerman's present circumstances as a possible dependant of the estate and her participation in the settlement conferences, I award Mrs. Futerman costs on a partial indemnity basis in the amount of \$3,300.00 with respect to the attendances for the settlement conferences.

22 With respect to Jack Futerman's requests for costs, I am in agreement with the submissions by his counsel and Mr. Coutinho that Jack Futerman's evidence and participation in these proceedings were absolutely necessary in order that a full evidentiary record was before this Court and to ensure that Harold Futerman's interests were fully protected. Jack Futerman's participation was also important in order to provide financial information concerning Harold Futerman's estate. None of the former guardians of Harold Futerman's property, including Jack Futerman, has taken fees. It is my view for those reasons that Jack Futerman is entitled to full indemnity for his costs from the estate of Harold Futerman.

23 With respect to the trial of the remaining question of support for Mrs. Futerman, the applicant and the Public Guardian and Trustee have agreed that a trial be held in respect of the following issues:

- i. Is the applicant a dependant of Harold Futerman as defined by the *Family Law Act*?
- ii. Is the applicant entitled to support from Harold Futerman pursuant to the *Family Law Act*?
- iii. If the applicant is entitled to support, what is the amount and duration of support to which the applicant is entitled?

24 Further to my Endorsement of February 26, 2009 and the parties' previous agreement, the applicant and the Public Guardian and Trustee have also agreed on the following revised timetable for the hearing of the trial of the issues defined above:

April 24, 2009 — Mrs. Futerman shall deliver her affidavit materials;

May 8, 2009 — the Public Guardian and Trustee shall deliver responding materials;

May 12, 2009 — a settlement case conference shall be held before me starting at 8:30 a.m. for 90 minutes;

May 15, 2009 — Mrs. Futerman shall delivery any reply materials:

June 17 and 18, 2009 — a two-day hearing of the trial of the issues as defined above shall take place. The dates have been cleared with the Estates Office.

25 The parties shall exchange and file facta for the trial of the issues in accordance with the *Rules of Civil Procedure*.

26 The parties have also agreed that the Public Guardian and Trustee shall pay support to the applicant from the estate of Harold Futerman, on a without prejudice basis and subject to further court order, in the amount of \$2,500.00 on April 13, May 11 and June 15, 2009.

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