

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Swift v. Nazaroff*,  
2023 BCSC 1937

Date: 20231106  
Docket: S47225  
Registry: Penticton

Between:

**Nataline Swift**

Petitioner

And

**Wallace Nazaroff, by his Litigation Guardian, the Public Guardian and Trustee,  
Holly Tina Burrows and Terry Burrows**

Respondents

Before: The Honourable Justice Hardwick

## Reasons for Judgment re: Costs

Counsel for the Petitioner:

N.R. Zaseybida

Counsel for the Respondent,  
Public Guardian and Trustee:

D.L. Polley

Counsel for the Respondents,  
Holly Burrows and Terry Burrows:

E. MacKinnon

Written Submissions Received:

September 18 and October 3, 2023

Place and Date of Judgment:

Penticton, B.C.  
November 6, 2023

[1] These reasons address the issue of costs arising from my hearing of a petition (the “Petition”) this summer, involving a dispute about ownership and use of a certain parcel of improved real property between siblings after the passing of their mother.

[2] The substantive reasons from the hearing of the Petition are indexed at 2023 BCSC 1602 (the “Reasons”).

[3] As set out in the Reasons, I concluded, *inter alia*, that the respondent, Wallace Nazaroff (“Wallace”), was entitled to occupy the subject property on the basis of the terms set forth in the Will, which I concluded entitled him to a life estate.

[4] I deferred the issue of costs, in the Reasons, in favour of Wallace in light of the fact that he was by his litigation guardian, the Public Guardian and Trustee (“PGT”).

[5] Specifically, I ordered as follows at paras. 81–91 of the Reasons:

[81] Costs are awardable at the discretion of the hearing judge.

[82] The general principle is that costs are awarded to the successful party but those costs are at the discretion of the presiding justice: *Supreme Court Civil Rules*, R. 14-1(9). This is the same at trial, summary trial or in the case of a petition.

[83] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:

[71] Rule 14-1(9) . . . grants unqualified discretion to depart from the *prima facie* rule that the successful litigant should be awarded its costs.

[72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by this court: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

[84] In this case, the respondents have been the successful party.

[85] I see no reason in the circumstances to deny the respondents, Holly and Terry, the benefit of a costs order.

[86] Accordingly, I order that Holly and Terry are entitled to their costs of this petition on the basis of it being of ordinary difficulty pursuant to Appendix B of the *Supreme Court Civil Rules*.

[87] As it relates to Wallace, his interests since on or about April 8, 2023, have been represented by the PGT. I did not receive specific submissions on how this would factor into an award of costs as he was previously represented by counsel and then self-represented for a period of time.

[88] I am thus going to order that if costs are sought on Wallace's behalf that the PGT file written submissions within two weeks of the release of these reasons. Counsel for petitioner shall file written submissions two weeks thereafter. No reply submissions are required.

[89] The written submissions shall be provided to me through Supreme Court Scheduling.

[90] In the event circumstances arise and counsel are able to reach agreement on a somewhat modified schedule for the exchange of submissions, they have leave to do so. However, they must notify Supreme Court Scheduling before the date upon which any submissions are due based on these reasons for judgment. Failing notification of a consent extension, I shall proceed on the basis that no further written submissions on costs are forthcoming after the expiry of the above timetable.

[91] Finally, upon receipt of any written submissions with respect to costs, I do still retain my jurisdiction to require the parties to make oral submissions. Those submissions, should they be required, can be done through MS Teams at a date to be arranged with Supreme Court Scheduling.

[6] The parties complied with my orders as set forth above and provided written submissions on costs. Upon receipt and consideration of the written submissions, I have concluded that oral submissions are not required.

[7] Specifically, I have concluded that Wallace was substantially successful in his defence of the Petition. I am further satisfied there is no reason to depart from the usual rule such that he should be awarded his costs on the same terms as the other respondents, Holly and Terry, according to Appendix B of the *Supreme Court Civil Rules*, based upon the matter being of ordinary difficulty.

[8] In this regard, I further accept the submission that the fact that Wallace was represented by his litigation guardian, the PGT, should not have any bearing upon Wallace's entitlement to costs and his position on the issue of costs is indistinguishable from that of his co-respondents.

[9] The PGT is not obligated to and does not fund the legal services for vulnerable adults (the "Clients") for whom the PGT agrees to act as litigation guardian.

[10] Importantly, and as highlighted in the submissions foiled by the PGT, Wallace was represented by counsel throughout the proceeding with the exception of that period during which cross-examination of the parties on their respective affidavits occurred. Wallace did not conduct a cross-examination of the petitioner and did not have counsel present for his cross-examination.

[11] The PGT initially became involved in February 2023 to seek an adjournment by consent and to investigate Wallace's circumstances. No other steps were taken in the proceeding until the PGT filed the application to be appointed as litigation guardian on March 8, 2023.

[12] I accept the PGT, as any litigation guardian, acts to protect the Client's interest and does not have any other interests in the proceeding. The PGT, acting on behalf of Wallace as a Client, must retain and pay for independent counsel to represent the Client and is then indemnified by the Client.

[13] In this case, the PGT incurred legal costs on behalf of Wallace and has the right to see recovery of those costs from Wallace.

[14] In this regard, there is no requirement or obligation on the part of the PGT to assume conclude of existing or ongoing litigation on behalf of an adult person under disability. Consent to act as litigation guardian is only provided by the PGT if:

- a) the case has merit;
- b) it is in the best interests of the adult;
- c) there is a reasonable prospect of recovering costs; and
- d) outside counsel is prepared to act in the case.

[15] The PGT takes on the role of litigation guardian only when there are no other suitable persons, such as a family member, who is willing to assume that capacity. In this case, Wallace had granted power of attorney to the respondent, Holly, but she

could not act as his litigation guardian due to the potential for their interests to be in conflict.

[16] The PGT thus appropriately stepped in as litigation guardian for Wallace as:

- a) the case had merit;
- b) defending the Petition was in Wallace's best interests;
- c) there is at least some prospect of recovering costs from Wallace as he has pension income and some modest ongoing employment income; and
- d) very capable outside counsel was prepared to act on his behalf.

[17] In reaching this conclusion, I reject the submission from the petitioner that the costs of this action should be borne from the estate of Doris Nazaroff.

[18] There was some ambiguity as to whether the Will (as defined in the Reasons) granted a licence to occupy or a life estate. Had the petitioner sought clarification solely on this single issue, her argument as to having the costs paid from the remaining funds in Doris' estate would have been more persuasive.

[19] However, the petitioner's primary position was that the subject property should be transferred to her by right of survivorship pursuant to an unregistered Form A transfer. This was ultimately rejected (see para. 58 of the Reasons in this regard). Had this position been successful, Wallace would have neither a license to occupy or a life estate. His occupancy on the property would have been solely at the whim of the petitioner.

[20] In these circumstances, it is not appropriate to have the estate indemnify the costs which are owing to Wallace.

[21] Wallace is, as set forth above, entitled to his costs pursuant to Appendix B of the *Supreme Court Civil Rules*, based upon the matter being of ordinary difficulty.

Those costs shall not, however, include Wallace's attendance for cross-examination on his affidavits, or any preparation therefor, where he did not have counsel.

"Hardwick J."