

Marguerite Kirk and Paul Kirk

APPELLANTS/RESPONDENTS
BY CROSS-APPEAL

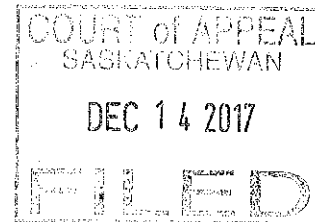
- and -

Gerald Kirk, Celeste Barnes and Dale Linn, Q.C. in his capacity as Interim Administrator of the
Estate of Anastasia Kirk

RESPONDENTS/APPELLANTS
BY CROSS-APPEAL

Jordan Hardy for Marguerite Kirk
Paul Kirk
Gerald Kirk
Celeste Barnes

**Taxation before Melanie A. Baldwin, Q.C.
Registrar, Court of Appeal for Saskatchewan
December 12, 2017**



Background

[1] The Court described this appeal in the following way:

[1] This appeal is rooted in a complex dispute among the four children of Anastasia Kirk. They are unable to agree how the assets in her estate should be handled and distributed.

[2] After a number of proceedings had been commenced, the Kirk siblings reached an agreement about how to deal with various matters in contention amongst them. The appellants, Marguerite and Paul Kirk, subsequently brought an application in the Court of Queen's Bench seeking an order giving effect to the agreement. The Chambers judge found the agreement to be legally binding but then went on to determine several "implementational" issues associated with it. Marguerite and Paul appeal from that decision and argue the Chambers judge improperly addressed and dealt with three specific implementation-type matters without giving them a chance to present evidence or make submissions with respect to those matters. The respondents, Gerald Kirk and Celeste Barnes, cross-appeal. They argue that the agreement in question is not legally valid and request that this Court order the probate of a testamentary document they favour.

[2] On November 8, 2017, the Court allowed the appeal and quashed the cross-appeal. Mr. Gerald Kirk and Ms. Barnes were ordered to pay Ms. Kirk and Mr. Paul Kirk party and party costs with respect to the appeal and complex applications to quash the cross-appeal. The costs are to be deducted from the amounts otherwise payable to Mr. Gerald Kirk and Ms. Barnes from the estate and added to the amounts payable from the estate to Ms. Kirk and Mr. Paul Kirk.

[3] An appointment for taxation was taken out, made returnable before me on December 12, 2017. Proposed bills of costs and vouchers for disbursements were filed by Ms. Kirk and Mr. Paul Kirk. On December 12, 2017, Mr. Hardy appeared before me on behalf of Ms. Kirk and Mr. Gerald Kirk attended in person. Mr. Paul Kirk attended the taxation hearing by telephone as did Ms. Barnes.

Proposed Bills of Costs

[4] Ms. Kirk's proposed bill of costs lists the following fees under column 4 of the Court of Appeal Tariff of Costs:

2	Notice of Appeal	\$ 600
4	Simple motion – perfect appeal	\$ 625
5	Complex motion (a) opposed – lift stay	\$2500
5	Complex motion (a) opposed – quash cross appeal	\$2500
7	Preparation of Appeal Book	\$1250
8	Preparation of Factum	\$5000
9	All other preparation for hearing	\$1250
10	Appearance to present argument on appeal before Court of Appeal	\$ 600
11	Preparing formal judgment	\$ 400
12	Correspondence	\$ 400
13	Preparation of Bill of Costs	\$ 250

The fees claimed total \$15,375. The proposed bill of costs also claims disbursements of \$2132.21 which includes court fees and photocopying/printing, postage, mileage and online research charges.

[5] Mr. Paul Kirk's proposed bill of costs lists the following fees under column 4 of the Court of Appeal Tariff of Costs:

4	Simple motion – perfect appeal	\$ 625
5	Complex motion (a) opposed – lift stay	\$2500
5	Complex motion (a) opposed – quash cross appeal	\$2500
7	Preparation of Appeal Book	\$1250
8	Preparation of Factum	\$5000
9	All other preparation for hearing	\$1250
10	Appearance to present argument on appeal before Court of Appeal	\$ 600
12	Correspondence	\$ 400
13	Preparation of Bill of Costs	\$ 250

The fees claimed total \$14,375. The proposed bill of costs also claims disbursements of \$1112.91 which includes court fees and notary public, electronic conversion/copying, courier and travel charges.

Issues

[6] The parties disagree as to which column of the Court of Appeal Tariff of Costs applies. Mr. Gerald Kirk and Ms. Celeste Barnes also take issue with various fee items and disbursements claimed by Ms. Kirk and Mr. Paul Kirk in the proposed bills of costs.

[7] The issues that I must address in this decision are:

Which column of the Court of Appeal Tariff of Costs applies?

Are the appellants entitled to costs for the application to perfect?

Are the appellants entitled to costs for the application to lift the stay? Is it a simple or complex application?

Is Ms. Kirk entitled to costs for preparing the formal judgment?

What disbursements are the appellants entitled to claim?

Arguments

Which column of the Court of Appeal Tariff of Costs applies?

[8] Ms. Kirk (through Mr. Hardy) argues that column 4 applies based upon the amount at stake in the appeal. She notes that the issues raised by the notice of appeal, in particular issues relating to the sale of a home in North Vancouver, have monetary value in excess of \$300,000. Further, Ms. Kirk maintains that the cross-appeal brought by Mr. Gerald Kirk and Ms. Barnes made the monetary amount at issue in the appeal much larger. The cross-appeal sought to return to an earlier will which directed the entirety of the estate (valued at approximately 2.5 million dollars) to Mr. Gerald Kirk and Ms. Barnes.

[9] Mr. Paul Kirk relies on the Court's decision in *Farmers of North America Incorporated v Bushell*, 2013 SKCA 65 which provides that the amount in issue determines the appropriate tariff column. He takes the position that column 4 applies, noting that the cross-appeal brought the entire value of the estate (approximately 2.5 million dollars) into issue and that the North Vancouver house which is a subject of the appeal has a value between 1.4 and 1.7 million dollars.

[10] Mr. Gerald Kirk takes the position that the amount at stake in the appeal should be limited to the amount claimed in the notice of appeal and that the cross-appeal should not impact on the selection of the appropriate column. He adds that the listing price of the North Vancouver house was not really at issue between the parties – it was the realtor that they could not agree upon. He argues that column 1 applies. He acknowledges that the entire estate is worth approximately 2.5 million dollars.

[11] Ms. Barnes takes the position that column 4 does not apply. She agrees with Mr. Gerald Kirk that the issue relating to the North Vancouver house was not listing price but was which realtor would be retained to sell the property.

[12] In reply, Mr. Paul Kirk points out that the appellants won the appeal and that the Court's decision specifically gives the appellant costs relating to the quashing of the cross-appeal as well as for their success on the appeal proper.

Are the appellants entitled to costs for the application to perfect?

[13] Ms. Kirk and Mr. Paul Kirk claim costs for the application to perfect which they characterize as a simple application. Ms. Kirk notes that the appellants volunteered to file the appeal book and their factums by the deadline ultimately ordered by the Chambers judge on the application to perfect. Mr. Paul Kirk adds that the parties could have reached an agreement on a schedule for filing material without the application to perfect and that the application was essentially resolved by consent before the Chambers judge.

[14] Ms. Kirk and Mr. Paul Kirk argue that the Chambers judge left the matter of costs for the application to perfect to the panel of the Court hearing the appeal. The appellants were successful before the panel and are therefore entitled to costs for the application to perfect.

[15] Ms. Barnes and Mr. Gerald Kirk take the position that the appellants should not be given costs for the application to perfect which was both brought and won by Ms. Barnes and Mr. Gerald Kirk. Mr. Gerald Kirk points out that the Chambers judge left the matter of costs for the application to perfect to the panel of the Court hearing the appeal and that panel of the Court made no direction as to costs for the application to perfect. Under the circumstances, the appellants are not entitled to claim costs for this application.

Are the appellants entitled to costs for the application to lift the stay? If so, is it a simple or complex application?

[16] Ms. Kirk and Mr. Paul Kirk argue that they were the successful parties on this contested application – the stay was not lifted by the Chambers judge. The application was contested and complex. All parties filed briefs in relation to the application. The Chambers judge left the matter of costs for the application to lift the stay to the panel of the Court hearing the appeal. The appellants were successful both before the Chambers judge and on the appeal and are therefore entitled to costs for the application to lift the stay.

[17] Ms. Barnes and Mr. Gerald Kirk indicate that the application to lift the stay was brought simply to move the appeal along. They wanted to lift the stay so that the North Vancouver house could be sold when the market was strong. Mr. Gerald Kirk notes that the Chambers judge did not lift the stay because it would have made the appeal moot. The Chambers judge left the matter of costs for the application to lift the stay to the panel of the Court hearing the appeal and that panel of the Court made no direction as to costs for the application to lift the stay. Under these circumstances, the appellants are not entitled to claim costs for this application.

Is Ms. Kirk entitled to costs for preparing the formal judgment?

[18] Ms. Kirk claims the fee item for preparing the formal judgment. She notes that, although the Court ultimately issued a formal judgment submitted by the respondents, the responsibility for taking out a formal judgment is that of the successful party. Ms. Kirk's counsel drafted a formal judgment and sent it to the respondents. Rather than communicating their objections to the draft judgment as contemplated by *The Court of Appeal Rules*, the respondents simply filed their own draft. Ms. Kirk argues that she is entitled to claim this fee item under the circumstances.

[19] Ms. Barnes and Mr. Gerald Kirk take the position that Ms. Kirk cannot claim this item as the formal judgment which she prepared was not accepted by the Court.

What disbursements are the appellants entitled to claim?

[20] Mr. Gerald Kirk and Ms. Barnes object to the photocopying (\$1470.50 plus \$73.50 tax) and mileage disbursements (\$246.67 plus \$12.33 tax) claimed by Ms. Kirk and Ms. Barnes objects to all of the disbursements (\$112 for swearing affidavit, \$20.06 electronic conversion/copy, \$39.34 courier, \$47.00 airport shuttle, \$58.48 car rental, \$464.36 air travel, \$102 for meals and \$244.67 hotel) claimed by Mr. Paul Kirk.

[21] Mr. Hardy, on behalf of Ms. Kirk, takes the position that there was a large amount of material served and filed on the applications and on the appeal and that the number of photocopies made is therefore reasonable. He also argues that the per copy cost (25 cents) is reasonable. The mileage disbursement is for Mr. Hardy's travel to Saskatoon to argue the appeal and is warranted.

[22] Mr. Paul Kirk argues that the disbursements he claims are the actual out-of-pocket expenses he incurred on the applications and appeal. As such, he is entitled to reimbursement for these amounts. In relation to his rental car cost, he prorated the amount claimed to only cover the use of the rental car directly related to the appeal.

[23] Mr. Gerald Kirk and Ms. Barnes argue that the photocopying disbursement claimed by Ms. Kirk is excessive not necessarily on a cost per copy basis but on the number of copies made. Ms. Barnes argues that the appeal could have been heard in Regina so Mr. Hardy's mileage was not a necessary expense and that Mr. Paul Kirk could have appeared by telephone (as she did) so his travel expenses are not proper disbursements. Ms. Barnes also says that Mr. Paul Kirk used the rental car, at least in part, for personal use. Finally, Ms. Barnes takes the position that the amount Mr. Paul Kirk claims for swearing his affidavit is excessive.

Analysis and Decision

Which column of the Court of Appeal Tariff of Costs applies?

[24] There is no dispute about how the appropriate column is to be selected. All parties agree that the column which applies depends on the monetary amount at issue in the appeal. The disagreement comes over what monetary amount was at issue.

[25] *The Court of Appeal Rules* are silent about the process for determining what amount is at issue on an appeal. My practice is to determine the amount at issue by reviewing what is claimed in the notice of appeal. In the notice of appeal, Ms. Kirk and Mr. Paul Kirk ask the Court to direct the enforcement of the settlement agreement between the parties. A key feature of the settlement agreement is the equal division of the estate between the parties. The estate is worth approximately 2.5 million dollars.

[26] Where there is a cross-appeal advanced by a respondent to an appeal, the relief claimed in the cross-appeal may also be relevant to a determination of the amount at issue in the appeal. In its decision, the Court summarizes the relief claimed on the cross-appeal as a "request that this Court order the probate of a testamentary document they [Mr. Gerald Kirk and Ms. Barnes] favour" rather than enforcement of the settlement agreement which "they argue . . . is not legally valid." I agree with the appellants that the cross-appeal also brings the entire value of the estate into issue.

[27] Based on the foregoing analysis, I conclude that column 4 of the Court of Appeal Tariff of Costs applies to the appeal. The value of even one quarter of the estate exceeds \$300,000. I will therefore tax the costs to which the appellants are entitled on column 4.

Are the appellants entitled to costs for the application to perfect?

[28] The Chambers judge indicated that costs of this application would be reserved to the panel hearing the appeal. The panel hearing the appeal made no specific order as to costs for this application. The appellants maintain that this means that, as the successful parties on the appeal, they are entitled to costs for this application. The respondents maintain that this means that the appellants are not entitled to costs for this application.

[29] I believe that a distinction must be made between an order for costs in the cause and an order that costs be left to the panel hearing the appeal and I have made this distinction in previous taxation decisions.

[30] Where costs of an application are in the cause, the successful party on the appeal is entitled to costs for the application, regardless of whether the panel of the Court that hears the appeal specifically orders this. In my December 5, 2014 taxation decision in *Fehr v Turta*, CACV2578 (unreported), I made the following point about costs in the cause:

Justice Whitmore ordered that costs of the application to lift the stay should be “in the cause.” According to Mark Orkin, *The Law of Costs*, loose-leaf (Rel 48, November 2014) 2d ed, vol 1 (Toronto: Canada Law Book, 2014) at paragraph 105, “costs in the cause” is “a convenient manner of referring to the costs of proceedings before the successful party has been ascertained.”

In *Fehr v Turta*, I went on to allow the successful party on the appeal to claim costs for the application for which the costs in the cause order was made.

[31] The order made by the Chambers judge in this case was not for costs in the cause. Rather, he reserved the matter of costs to the panel hearing the appeal. The panel hearing the appeal specifically ordered costs for the appeal proper and for the appellants’ applications to quash the cross-appeal. No specific order for costs was made in relation to the application to perfect. In my February 25, 2013 taxation decision in *Hogan v. Hogan*, CACV2251 (unreported), I dealt with a similar situation as follows:

Ms. Hogan also claims tariff fee items for complex opposed applications (Item 5(a)) for the application to lift the stay and for the application to strike or quash the appeal. As noted above, Gerwing J.A. specifically referred the matter of the costs of the application to lift the stay to the panel of the Court which heard the application to strike or quash the appeal. The matter of the costs of the application to lift the stay was apparently not addressed by either party before the Court. The Court specifically awarded costs for 1 motion only.

I can only conclude that either the panel was alive to the matter of costs for the application to lift the stay and determined that it was not appropriate to award costs for that application in addition to costs for the application to strike or quash the appeal or that the panel was not alive to the matter of costs for the application to lift the stay because it was not raised. In either event, it is not appropriate for me to assess costs for the application to lift the stay.

[32] I therefore conclude that the appellants are not entitled to costs for the application to perfect.

Are the appellants entitled to costs for the application to lift the stay? Is it a simple or complex application?

[33] The Chambers judge also indicated that costs of this application would be reserved to the panel hearing the appeal. The panel hearing the appeal made no specific order as to costs for this application. On the basis of my analysis relating to the application to perfect, I conclude that the appellants are not entitled to costs for the application to lift the stay.

[34] In the event that I am wrong about the appellants’ entitlement to costs for this application, I will go on to address the issue of whether it should be characterized as a simple or complex application.

[35] In past taxation decisions, I have determined that an application to lift the stay is a simple application. For example, in my December 19, 2012 taxation decision in *Resch v Dufour*, CACV2324 (unreported), I held as follows:

With respect to tariff item 5(a), I am not persuaded that an application to lift the stay should be characterized as a complex application. It has not been singled out for special treatment under the tariff like an application for leave to appeal (item 1). It is specifically contemplated by *The Court of Appeal Rules* in Rule 15. Forms are provided (Forms 5a and 5b) which are referenced right in the *Rules*. There is an established body of case law as to the tests to be satisfied on an application of this kind. It seems to me that this is the kind of application that must be characterized as a simple application. As a result, I will tax off the complex opposed motion tariff amount and tax on the simple motion tariff amount.

I also concluded that an application to lift the stay was a simple application in *Fehr v Turta*, cited above.

[36] I find that the application to lift the stay should be characterized as a simple application.

Is Ms. Kirk entitled to costs for preparing the formal judgment?

[37] Ms. Kirk served a draft judgment on the respondents in accordance with Rule 57.1 of *The Court of Appeal Rules*. The respondents were not happy with the content of Ms. Kirk's draft judgment and served and filed their own draft judgment. The panel of the Court that heard the appeal was consulted and they preferred the content of the respondents' draft judgment. The respondents were then invited to take out a formal judgment based on their draft judgment.

[38] Ms. Kirk takes the position that she followed the process mandated by Rule 57.1 of *The Court of Appeal Rules* to have a formal judgment issued and that she is therefore entitled to claim the applicable tariff item for this. The respondents maintain that, as the Court preferred the content of their draft judgment and as they took out the formal judgment, Ms. Kirk is not entitled to these costs.

[39] The process followed by the respondents and by the registry office in relation to the formal judgment was not the process envisioned by Rule 57.1 of *The Court of Appeal Rules*. The respondents should have communicated their objections to Ms. Kirk's draft judgment rather than submitting their own draft judgment. After the Court approved the content for the judgment, Ms. Kirk (as the successful party on the appeal) should have been invited to amend her draft judgment and take out a formal judgment in the terms preferred by the Court. This did not happen. I am inclined to permit Ms. Kirk to claim this tariff item under the circumstances.

What disbursements are the appellants entitled to claim?

[40] Ms. Kirk claims a \$1470.50 (plus tax) disbursement for photocopying. The per copy cost claimed is 25 cents. This per copy cost is acceptable. At 25 cents per copy, \$1470.50 amounts to 5882 copies. This is a significant number of copies but I am of the opinion that it is supported by the Court's file. I have reviewed the material filed by Ms. Kirk on the appeal proper and the application to quash and it amounts to approximately 900 pages. Counsel would have had to make multiple copies of the material for the Court and the other parties. Ms. Kirk is entitled to claim this disbursement.

[41] Ms. Kirk also claims reimbursement for mileage for her counsel's attendance at the appeal hearing in Saskatoon. The historical practice in Saskatchewan is to treat counsel's travel expenses as part of the general cost of overhead and therefore as covered by the applicable tariff fee items. In *Delta-T Canada Corp v. Ellisdon Design Build Inc.*, 2013 SKQB 281, Laing J. said the following about counsel's travel disbursement at paragraph 12:

Travel costs are disbursements, and counsel's disbursements for travel in attending court proceedings are not taxable.

[42] In my June 30, 2015 taxation decision in *Borowski v Ukrainetz*, CACV2690 (unreported), I made the following statement:

As for disbursements, respondent counsel claims travel costs of \$168.30 for his travel to and from the chambers hearing for the application for leave to appeal. I am not inclined to allow this. Travel expenses have not traditionally been permitted as disbursements at least by registrars in this Court.

[43] After the taxation hearing, I consulted with the Local Registrars of the Court of Queen's Bench in Regina and Saskatoon and confirmed that they continue to follow the historical practice described above. I am not persuaded that I should abandon the historical approach in this case. Ms. Kirk is not entitled to claim this disbursement.

[44] Finally, Ms. Kirk claims a \$25 disbursement for online legal research. I did not raise this item with the parties at the taxation hearing and I apologize for my failure to do so. The approach taken to online research charges was described by Registrar Schwann, as she then was, in her November 12, 2008 taxation decision in *Knudson v Knudson*, CA1461 (unreported):

... the cases are divided on whether computer assisted research is a proper disbursement cost. [Orkin, 219.6(9); *Denzler v. Aull*, (1994) O.R. (3d) 507] In one case, the costs were limited to those cases ultimately presented in court. [*Sandu v. ICBC* (1999), 45 C.P.C. (4th) 266] The other line of thought – for which there appears ample authority – is to disallow this cost on the footing that legal research is effectively part of the fees taxed by legal counsel or as part of the general cost of overhead. [*Sidorsky v. CFCN Communications Ltd.* (1995), 35 C.P.C. (3rd) 239; see also *Harach v. Schubert*, [1999] 12 W.W.R. 273 (Sask. Q.B.) where Quicklaw costs were denied in Saskatchewan]

[45] In my March 16, 2012 taxation decision in *Jensen v Agricultural Credit Corporation of Saskatchewan*, CACV2080 (unreported), I referred to Registrar Schwann's decision in *Knudson* and added the following:

In her fiat in *Knudson*, Registrar Schwann also referred to the decision of Ryan-Froslic J. in *Reid v. Babchouk* (2004), 246 Sask. R. 155 as authority for the proposition that allowing disbursements for items such as legal research has the effect of awarding solicitor/client costs rather than party-and-party costs. Registrar Schwann ultimately taxed off the item claimed for legal research in that case.

While the case law may not yet be settled on this issue, I prefer the approach taken by the court in *Sidorsky* and by Registrar Schwann in *Knudson*. For this reason, I will tax off the amount claimed for online legal research.

[46] I continue to prefer this approach to online legal research charges. I will tax off the amount claimed by Ms. Kirk for online legal research.

[47] Ms. Barnes objected to all of Mr. Paul Kirk's claimed disbursements. Mr. Paul Kirk has provided proper vouchers for all of the disbursements claimed and I have no concern with many of them, including the disbursements for swearing his affidavit, electronic conversion and copying, courier and, of course, the filing fee for his application to quash the cross-appeal.

[48] While I am satisfied that Mr. Paul Kirk actually incurred all of the travel expenses identified on his list of disbursements and that those expenses are all attributable to his trip to Saskatoon for the appeal hearing, I do not believe that he is entitled to claim these disbursements in light of the nature of the Court's award of costs to him.

[49] The Court awarded Mr. Paul Kirk costs on the same basis as "if he had hired counsel" to make submissions for him. This results in Mr. Paul Kirk being entitled to claim the tariff fee items that he has claimed relating to the appeal hearing – the same tariff fee items that counsel for Ms. Kirk is entitled to claim. Since Mr. Paul Kirk is entitled to claim the same tariff fee items as counsel is entitled to claim, it necessarily follows that Mr. Paul Kirk is not entitled to claim disbursements for travel costs for the reasons given above in relation to the travel charge claimed by Ms. Kirk for counsel's mileage.

Taxation

[50] Ms. Kirk's fees are therefore taxed as follows:

2	Notice of Appeal	\$ 600
5	Complex motion (a) opposed – quash cross appeal	\$2500
7	Preparation of Appeal Book	\$1250
8	Preparation of Factum	\$5000
9	All other preparation for hearing	\$1250
10	Appearance to present argument on appeal before Court of Appeal	\$ 600
11	Preparing formal judgment	\$ 400
12	Correspondence	\$ 400
13	Preparation of Bill of Costs	\$ 250

The total fees allowed are \$12,250.

[51] As for disbursements, once the \$26.25 (\$25 plus \$1.25 tax) for online legal research and the \$259 (\$246.67 plus \$12.33 tax) are taxed off, the amount remaining is \$1,837.96 which is allowed. Ms. Kirk's total fees and disbursements allowed are \$14,087.96.

[52] Mr. Paul Kirk's fees are therefore taxed as follows:

5	Complex motion (a) opposed – quash cross appeal	\$2500
7	Preparation of Appeal Book	\$1250
8	Preparation of Factum	\$5000
9	All other preparation for hearing	\$1250
10	Appearance to present argument on appeal before Court of Appeal	\$ 600
12	Correspondence	\$ 400
13	Preparation of Bill of Costs	\$ 250

The total fees allowed are \$11,250.

[53] As for disbursements, once the \$916.51 for travel disbursements is taxed off, the amount remaining is \$196.40 which is allowed. Mr. Paul Kirk's total fees and disbursements allowed are \$11,446.40.

[54] There is one final matter that I agreed to address in my written decision – the process for “appealing” my decision. While there is no appeal, there is potentially a review by a judge of the Court. Rule 54.1 of *The Court of Appeal Rules* says:

54.1 (1) A person with a pecuniary interest in the result of a taxation of costs who is dissatisfied with the taxation may apply to a judge for a review of the taxation of costs.

(2) An application pursuant to Subrule (1) must be made within 14 days after the date of the certificate as to taxation of costs.

(3) A review of the taxation of costs must be limited to items that have been objected to before the registrar and may include items with respect to which the registrar exercised discretion.

DATED at Regina, Saskatchewan, this 14th day of December, 2017



REGISTRAR – COURT OF APPEAL