

Most Negative Treatment: Reversed

Most Recent Reversed: [DeMichino v. DeMichino](#) | 2012 ONCA 458, 2012 CarswellOnt 8130, 29 C.P.C. (7th) 19, 292 O.A.C. 385, 217 A.C.W.S. (3d) 709 | (Ont. C.A., Jun 28, 2012)

2011 ONSC 142
Ontario Superior Court of Justice

DeMichino v. DeMichino

2011 CarswellOnt 742, 2011 ONSC 142

**Carmela DeMichino and Maria Vokrri, Applicants and Michele DeMichino,
Vassiliki Banushefski, Eleni Makedonas, The Bank of Nova Scotia
Trust Company and The Public Guardian and Trustee, Respondents**

L.B. Roberts J.

Judgment: January 7, 2011

Docket: 03-50-08, 03-30-07, 03-CV-258167CM3

Counsel: Jan Goddard, for Applicants

Marshall Swardon, for Respondent, Michele DeMichino

Archie J. Rabinowitz, Angela Casey, for Respondent, The Nova Scotia Trust Company

Richard Coutinho, for Respondent, The Public Guardian and Trustee

Louis Leibowitz, for Children's Lawyer

Karon Bales, for Respondent, Eleni Makedonas

Felice Kirsh, for Respondent, Vassiliki Banushefski

Richard Stephenson, for Gary Neinstein, Neinstein & Associates LLP

Subject: Public; Torts; Civil Practice and Procedure; Estates and Trusts

Related Abridgment Classifications

Civil practice and procedure

[IV](#) Actions involving parties under disability

[IV.2](#) Mental incompetents

[IV.2.a](#) General principles

Estates and trusts

[VII](#) Mental incompetency

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Professions and occupations

[IX](#) Barristers and solicitors

[IX.5](#) Fees

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[IX.5.f.i](#) General principles

Headnote

Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — General principles

Client was catastrophically injured in motor vehicle accident — Solicitor represented client in tort action, in proceedings before Consent and Capacity Board, and in guardianship application — Judge approved tort action settlement consisting of structured annuity plus \$1,153,617.08, of which \$100,000 was for client's spouse — Prior to court approval, solicitor

used \$35,617.08 to pay disbursements — Solicitor claimed total of \$855,432.81 for fees and disbursements — Judge allowed solicitor to recover \$368,000 for tort action pending further consideration plus \$10,000 for guardianship application — Judge ordered remainder of amount claimed to be held in trust — Solicitor withdrew \$342,382.92 as part of \$378,000 permitted by judge — Solicitor then withdrew \$562,426.41 to cover various invoices — Solicitor's pre-taking of fees was subject of complaint before law society — Solicitor eventually returned disputed amounts to trust account — Solicitor's total fees and disbursements were limited to \$368,000 and he was required to return remainder to client with interest — Fact that solicitor's conduct was being considered by law society did not preclude court from considering his conduct in assessing fees and disbursements — Pre-taking of fees and disbursements and failure to account properly for those amounts were relevant factors in assessing solicitor's claim — Jurisprudence was clear that there was no discretion to pre-take compensation — Solicitor clearly breached fiduciary duty to client and also wilfully breached court order — Solicitor's actions deserved strongest condemnation — Even without breaches, solicitor would not have been awarded anything further — Solicitor had already received more than reasonable and fair compensation — Guardianship application had been waste of time due to solicitor's failure to serve proper parties.

Civil practice and procedure --- Actions involving parties under disability — Mental incompetents — General principles Client was catastrophically injured in motor vehicle accident — Client's spouse and her nephew's wife EM became client's attorney for property and personal care — Spouse herself came under disability so EM became her attorney for property and personal care — Solicitor commenced guardianship application on behalf of client — Solicitor believed client was estranged from his family and so did not give notice to any family members — Client's family members became involved and trust company was ultimately appointed as client's guardian of property — Solicitor agreed to pay client and his family members \$145,000 to settle claims for legal fees — Dispute arose regarding EM's handling of client's and spouse's funds — EM agreed to settle by paying \$95,000 to client and \$50,000 to spouse — Parties brought application for approval of settlements — Application granted — Proposed settlements were in best interests of all concerned — Amount offered by solicitor for legal fees was fair and reasonable even though it did not fully indemnify client and his family members — Expense of continuing with proceedings against solicitor outweighed any further benefit to be obtained — Amounts offered by EM were in best interests of client and spouse — There was risk in establishing EM was liable to repay all impugned amounts notwithstanding spouse's possible incapacity at relevant times — Legal costs in pursuing litigation against EM and others would have been enormous — There was also significant importance in preserving family harmony.

Estates and trusts --- Mental incompetency — Miscellaneous issues

Client was catastrophically injured in motor vehicle accident — Client's spouse and her nephew's wife EM became client's attorney for property and personal care — Spouse herself came under disability so EM became her attorney for property and personal care — Solicitor commenced guardianship application on behalf of client — Solicitor believed client was estranged from his family and so did not give notice to any of client's family members — Client's family members became involved and trust company was ultimately appointed as client's guardian of property — Client retained second solicitor — First solicitor agreed to pay client's family members \$145,000 to settle claim for legal fees — Dispute arose regarding EM's handling of client's and spouse's funds — EM agreed to settle claims by paying \$95,000 to client and \$50,000 to spouse — Parties brought application for approval of settlements and solicitors' fees and disbursements — Application granted — Settlements were in best interests of all involved — Solicitors for client's family members were awarded total of \$80,145.46 on full indemnity basis payable from client's estate — Amount awarded was in addition to \$65,000 to be received from settlement with client's first solicitor — Solicitors for client's family members had worked for benefit of client — These solicitors had played important role in exposing various irregularities and reaching settlements — Amounts claimed were fair and proportionate — Client's second solicitor was awarded \$57,724.92, which was to include \$14,018.88 from settlement with client's first solicitor — Second solicitor provided exemplary service and his time was fair and reasonable.

Table of Authorities

Cases considered by *L.B. Roberts J.*:

Chudy v. Merchant Law Group (2008), 2008 BCCA 484, 2008 CarswellBC 2514, 441 W.A.C. 210, 262 B.C.A.C. 210, 300 D.L.R. (4th) 56, 85 B.C.L.R. (4th) 237, [2009] 2 W.W.R. 224 (B.C. C.A.) — referred to

Chudy v. Merchant Law Group (2009), 283 B.C.A.C. 320 (note), 480 W.A.C. 320 (note), 2009 CarswellBC 1058, 2009 CarswellBC 1059, 396 N.R. 399 (note), 303 D.L.R. (4th) vi (note) (S.C.C.) — referred to
Cohen v. Kealey & Blaney (1985), 10 O.A.C. 344, 26 C.P.C. (2d) 211, 1985 CarswellOnt 1906 (Ont. C.A.) — referred to
to
Desmoulin v. Blair (1994), (sub nom. *Desmoulin (Committee of) v. Blair*) 21 O.R. (3d) 217, 76 O.A.C. 1, (sub nom. *Desmoulin (Committee of) v. Blair*) 120 D.L.R. (4th) 700, 1994 CarswellOnt 1208 (Ont. C.A.) — referred to
Freeman Estate, Re (2007), 34 E.T.R. (3d) 157, 2007 CarswellOnt 5654 (Ont. S.C.J.) — referred to
Solicitors, Re (1972), [1972] 3 O.R. 433, 8 R.F.L. 265, 1972 CarswellOnt 976 (Ont. Assess. O.) — referred to
Solicitors v. Kern (1980), 1980 CarswellOnt 379, 16 C.P.C. 253 (Ont. Assess. O.) — referred to
380876 British Columbia Ltd. v. Ron Perrick Law Corp. (2009), 2009 BCSC 601, 2009 CarswellBC 1178 (B.C. S.C.) — referred to
936464 Ontario Ltd. v. Mungo Bear Ltd. (2003), 74 O.R. (3d) 45, 258 D.L.R. (4th) 754, 2003 CarswellOnt 8091 (Ont. Div. Ct.) — referred to

Statutes considered:

Substitute Decisions Act, 1992, S.O. 1992, c. 30

Generally — referred to

s. 3 — referred to

Rules considered:

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

R. 7.08 — referred to

APPLICATION by parties for approval of settlements and solicitors' fees and disbursements.

L.B. Roberts J.:**Overview:**

1 Michele DeMichino was catastrophically injured in a motor vehicle accident on April 28, 2003. While he has made remarkable progress from his original condition following the accident, Mr. DeMichino remains under a substantial disability and requires around the clock care. Pursuant to various assessments, he has been found to be incapable of managing property and, other than with respect to clothing and hygiene, incapable of his personal care.

2 Since its appointment by court order on September 23, 2008, The Bank of Nova Scotia Trust Company has acted as Mr. DeMichino's guardian of property. Ms. Eleni Makedonas, who is married to the nephew of Vassiliki Banushefski, Mr. DeMichino's common law spouse, has overseen Mr. DeMichino's personal and medical care.

3 Ms. Banushefski, initially named with Ms. Makedonas as Mr. DeMichino's litigation guardian, guardian of property, and attorney for personal care, is now also under a disability. Ms. Makedonas acts as Ms. Banushefski's attorney for property and personal care.

4 Mr. DeMichino's injuries from the motor vehicle accident have given rise to a tort action (under court file number 03-CV-258167CM3) and various other proceedings involving the guardianship of his property and person, the passing of accounts by his previous guardian of property, Ms. Makedonas, and the costs of his previous solicitors, Gary Neinstein and Neinstein & Associates LLP, related to the tort action, the guardianship proceedings, and an application before the Consent and Capacity Board. In the course of these proceedings, the appointment of a guardian of property for Ms. Banushefski has also become an issue.

5 The settlement of the tort action was approved by the order of the Honourable Mr. Justice Moore, dated May 29, 2007, for the total amount of \$1,153,617.08. Court approval of the additional fees and disbursements sought by Mr. Neinstein and his firm was deferred by Justice Moore.

6 Mr. DeMichino (through his section 3 counsel and the Public Guardian and Trustee) and his family members who were involved in the various proceedings ("the estate parties"), as well as Mr. Neinstein and his firm, the Public Guardian and Trustee, and the Children's Lawyer have arrived at a global settlement of all matters, subject to court approval.

7 I have case managed the estate proceedings for over a year into which were folded the settlement of the other issues. I pause here to reiterate my appreciation and thanks to counsel for their unrelenting courtesy, professionalism and hard work that produced the settlement that is before the Court for approval.

8 The estate parties, the Public Guardian and Trustee, the Children's Lawyer, and Mr. Neinstein have agreed in writing that I approve the settlement of all matters, including the claim by Mr. Neinstein and his firm for additional fees.

Claim for additional fees by Neinstein & Associates LLP:

9 I turn first to the matters involving Mr. Neinstein and his firm.

10 Neinstein & Associates LLP is seeking approval of the payment of the following fees and disbursements:

- i) \$487,432.81 related to the tort action;
- ii) \$47,700.00 in respect of the Consent and Capacity Board application; and
- iii) \$10,000.00 for the guardianship application.

11 Mr. Stephenson confirmed that Neinstein & Associates is not seeking payment of fees for work done in relation to the statutory accident benefits claimed for Mr. DeMichino.

12 Although the claim for additional fees and disbursements is not opposed, the conduct of Mr. Neinstein and his firm in pre-taking compensation before obtaining court approval is very much in issue.

13 In his May 29, 2007 Judgment, Justice Moore approved the settlement of the tort action. In addition to the amounts specified in the structured annuity for Mr. DeMichino, Justice Moore approved payment by the defendants of the amount of \$1,153,617.08.

14 By separate order dated May 29, 2007, made in the guardianship application, Justice Moore also approved Neinstein & Associates' fees and disbursements for that application in the amount of \$10,000.00.

15 As part of the settlement in the tort action, Justice Moore allowed the payment from the amount of \$1,153,617.08 to Neinstein & Associates for fees and disbursements related to the tort action in the amount of \$318,000.00 inclusive of GST for fees and in a further \$50,000.00 for assessable disbursements.

16 Neinstein & Associates claimed additional fees and disbursements in the tort action in the amount of \$624,512.81. Justice Moore had requested that the Public Guardian and Trustee provide a report concerning Neinstein & Associates' claim for additional fees and disbursements and expressly ordered that the amount claimed be held in the law firm's trust account pending further order of the Court.

17 Laurie Redden for the Public Guardian and Trustee subsequently delivered a report dated July 10, 2007 in which were set out as part of her analysis the relevant principles to be applied by a court in its determination of counsel's costs on a settlement for a person under a disability. In particular, as noted by Mr. Stephenson in his submissions for Mr. Neinstein, a court should consider the well established factors from the relevant case law which are listed at page 5 of Ms. Redden's report.¹

18 The Public Guardian and Trustee recommended that Neinstein & Associates receive a further \$432,000.00 for legal fees, \$25,720.00 for GST and \$25,512.81 for disbursements, for a total of \$487,432.81. Ms. Redden concluded that the balance of the funds held in trust of \$137,080.00 should be returned to Mr. DeMichino's guardians of property.

19 The manner in which Mr. Neinstein and his firm dealt with the settlement monies requires detailed analysis because the accounts rendered to Mr. DeMichino's guardians of property produced in these proceedings do not completely accord with the firm's trust ledger and trust account statement.

20 The firm ledger and September 17, 2008 trust account statement of Neinstein & Associates show that the firm received the amount of \$1,153,617.08 in settlement funds for Mr. DeMichino and Ms. Banushefski in two payments: \$35,617.08 was received from Baxter Structures/Markel Insurance Company of Canada on April 16, 2007; and \$1,118,000.00 was received from Markel Insurance Company of Canada on June 11, 2007

21 Prior to court approval having been obtained, on April 16, 2007, Neinstein & Associates disbursed \$35,617.08 from its trust account to pay disbursements related to the tort action. It is uncertain from the record whether this disbursement was disclosed to Justice Moore or the Public Guardian and Trustee. There is no reference to this disbursement in Justice Moore's Judgments or in Ms. Redden's report.

22 On June 11, 2007, after court approval of the settlement and on the same day that the second tranche of the settlement funds had been received, Neinstein & Associates transferred the amount of \$342,382.92 from trust in payment of a further invoice.

23 The April 16 and June 11 transfers equal \$378,000.00, namely, the total of the \$368,000.00 approved in the tort action and the \$10,000.00 approved in the guardianship application for the fees and disbursements of Neinstein & Associates.

24 From the balance of \$775,617.08 in the firm's trust account, can be deducted the amount of \$100,000.00, belonging to Ms. Banushefski, which was paid to her and the firm for fees and disbursements, leaving \$675,617.08 which was to be held in trust for Mr. DeMichino, subject to the approval of any further fees and disbursements for Neinstein & Associates.

25 On July 16, 2007, Neinstein & Associates paid the amount of \$137,080.00 to the guardians of property for Mr. DeMichino.

26 Allowing for the possible payment of the fees and disbursements recommended by the Public Guardian and Trustee in the amount of \$487,432.81 and the above noted payment of \$137,080.00, the surplus amount of \$51,104.27 should have been paid to Mr. DeMichino's guardians of property following Justice Moore's May 29, 2007 Judgment. This was not done.

27 Following receipt of Ms. Redden's report, on July 12, 2007, Mr. Neinstein and his firm transferred from the firm's trust account to the firm's general account the amount of \$562,426.41 as payment of a further invoice, including payment of additional amounts claimed in the tort action, exceeding the amount of \$487,432.81 recommended by the Public Guardian and Trustee², and payment of the firm's fees in the amount of \$47,700.00 with respect to the Consent and Capacity Board proceedings, but without court approval as required by the order of Justice Moore and Rule 7.08 of the *Rules of Civil Procedure*.

28 On July 13, 2007, Neinstein & Associates made further disbursements totalling \$5,051.75, in payment of McCague Peacock Borlack McInnis' legal fees and the medical reports of Dr. Alina Kaminska and Dr. Andrew Korda.

29 The balance of \$476.28 remaining in Neinstein & Associates' trust account was paid to the Bank of Nova Scotia Trust Company on July 5, 2010.

30 The balance that should have been in Neinstein & Associates' trust account after the payment of \$137,080.00 is \$538,537.08 (\$487,432.81 plus \$51,104.27).

31 As acknowledged by Mr. Neinstein in paragraph 57 of his July 23, 2010 affidavit filed in these proceedings, the Consent and Capacity Board fees of \$47,700.00 were not for services contemplated by the retainer agreement, which related only to the tort action and statutory accident benefits claim, nor were they taken into account in the Minutes of Settlement in respect of the tort action, or recommended for payment in the Public Guardian and Trustee's report.

32 Mr. Neinstein's conduct with respect to the pre-taking of his firm's fees is the subject of a complaint that is at present before the Law Society of Upper Canada.

33 While not condoning it, Mr. Stephenson argued that the pre-taking of fees and disbursements by Mr. Neinstein and his firm should not be a factor in the Court's assessment of the additional fees and disbursements claimed by Mr. Neinstein and his firm and that whatever consequences flow from that pre-taking shall and should be determined in other proceedings.

34 I disagree. The pre-taking of fees and disbursements by Mr. Neinstein and his firm and his failure to account properly for those amounts are relevant factors in my assessment of the solicitors' claim for fees. An award of costs is discretionary. As part of the Court's exercise of its discretion, the Court may take into account a myriad of different criteria, including the conduct of the person requesting the payment of costs.

35 Mr. Neinstein and his firm were holding the settlement monies in trust for Mr. DeMichino. The jurisprudence is clear that there is no discretion for a trustee to pre-take compensation.³

36 Further, in seeking costs, Mr. Neinstein and his firm are requesting an equitable remedy. A lawyer's bill for services is to be assessed on the basis of *quantum meruit*. Since *quantum meruit* is an equitable remedy, a lawyer who does not come to court with clean hands may not be entitled to a fee. A lawyer who breaches his fiduciary duty to his client and thereby causes harm to his client does not come to court with clean hands.⁴ In the present case, there is no question that Mr. Neinstein has breached his fiduciary duty to Mr. DeMichino by pre-taking his fees to his client's detriment.

37 Mr. Neinstein is a senior practitioner. He has great expertise and experience in the area of personal injury litigation for plaintiffs. This includes all claims related to motor vehicle accidents such as tort and statutory accident benefit claims. In particular, Mr. Neinstein has considerable experience representing parties under a disability like Mr. DeMichino and is fully aware of the necessity for court approval of any settlement.

38 As Mr. Stephenson candidly conceded, there is no excuse for Mr. Neinstein's pre-taking of fees without court approval. According to Mr. Neinstein's affidavits, his pre-taking was not the result of an inadvertent administrative or accounting error, or caused by the ignorance of an inexperienced lawyer.

39 With respect to the tort action fees, Mr. Neinstein deposed in paragraph 44 of his July 23, 2010 affidavit that, "the fees in question were withdrawn as a result of my failing to pay appropriate attention to the matter, combined with my frustration as to the length of time i[t] was taking to conclude the matter".

40 In paragraph 59 of the same affidavit, although admitting that court approval was required, Mr. Neinstein stated that he "lumped the Consent and Capacity Board fees together with the outstanding balance of fees from the tort settlement, and did not differentiate between them" and acknowledged that his withdrawal of those fees was an "error" caused by his "failure to give the matter sufficient attention".

41 Mr. Neinstein admits that his staff brought to his attention that the withdrawals had been made without obtaining the necessary court approval; however, it was not until March 2009 that the amount of \$47,700.00 was returned to the firm's trust account and the amount of \$545,132.81 was not transferred to the firm's trust account until after the July 15, 2010 attendance when I raised the issue with Mr. Neinstein's counsel.

42 Mr. Neinstein's actions deserve the strongest condemnation.

43 They go to the root of his fiduciary relationship with his client and are all the more deplorable in the circumstances of this matter where his client was catastrophically injured and under a severe disability, and is in need of the monies taken by Mr. Neinstein and his firm. It is precisely because of the vulnerability of clients under a disability that the rules require court approval of a lawyer's fees. The present circumstances underscore the importance of the Court as gatekeeper especially in the case of particularly fragile clients.

44 Further, Mr. Neinstein is an officer of the Court. He is fully aware of his obligations to comply with court orders. Mr. Neinstein clearly and wilfully breached Justice Moore's order by pre-taking compensation which had not received court approval because, by his own admission, he was too impatient to wait.

45 On the basis of Mr. Neinstein's pre-taking alone, Mr. Neinstein and his firm have forfeited any claim to additional fees. They are also required to disgorge the interest that would have accrued on the funds in the law firm's trust account had Mr. Neinstein and his firm not misappropriated them.⁵

46 It is not solely on the basis of Mr. Neinstein's pre-taking and breach of his fiduciary duties to Mr. DeMichino and his obligations to this Court that I base my decision not to award any additional fees to his firm with respect to the tort action and Consent and Capacity Board application. Indeed, I have determined that, even without the breaches, Mr. Neinstein and his firm are not entitled to any further fees or disbursements because they have already received more than reasonable and fair compensation.

47 I turn first to the additional claim for fees and disbursements in respect of the tort action in the amount of \$487,432.81.

48 Mr. Stevenson submitted that, while not binding on this Court, the recommendation of the Public Guardian and Trustee with respect to the payment to Neinstein & Associates of the additional amount of \$487,432.81 should be highly persuasive.

49 As submitted by Mr. Coutinho, the July 10, 2007 recommendation of the Public Guardian and Trustee respecting the amount of fees and disbursements that are fair and reasonable is unfortunately of limited application because of subsequent relevant events, including the additional information concerning the hours expended by Mr. Neinstein and members of his firm, which has now been put before this Court.

50 Neinstein & Associates kept no dockets relating to the time spent by its members on any of the matters for which the firm was retained. According to Mr. Neinstein's evidence, the best estimate of their time is set out in Exhibits "B", "D" and "E" to his July 23, 2010 affidavit, which was created by Mr. Neinstein's assistant reviewing and reconstructing a summary of the firm's activities on the file and the time expended by its members.

51 At the time of settlement, the tort action had proceeded through the pleadings and discovery stages and mediation had taken place. Mr. Neinstein was lead counsel at a rate of \$650.00 per hour. He was assisted by "junior counsel", whose hourly rates were \$200.00 and, remarkably for "junior counsel", \$300.00, \$400.00 and even \$500.00 per hour, and a law clerk at the hourly rate of \$125.00 per hour.

52 I agree with Ms. Redden's observation in her report that, while this matter was of the utmost importance to Mr. DeMichino, the outcome was virtually assured and there was essentially no risk that damages would not be paid or that Neinstein & Associates would not be compensated for their services.

53 I appreciate that Mr. Neinstein brought his expertise to bear on this matter; however, as also noted by Ms. Redden, the result achieved, although good, was not extraordinary and should have been the expected outcome in the circumstances of this case involving a catastrophic injury where the defendants' complete liability for Mr. DeMichino's damages was not in doubt. The fact that there were multiple defendants and that expert reports had to be obtained did

not render this matter complex or unusual but are exactly the steps that are usually taken in any tort action involving serious injuries.

54 Indeed, the circumstances of this case did not require the expertise of Mr. Neinstein but could have been obtained by someone more junior and at a much lower hourly rate. It is frankly astounding that Mr. Neinstein expended over 400 hours on this file where there were no motions, examinations for discovery were limited, and the matter settled before trial.

55 In particular, Mr. Neinstein spent almost half of his time, an estimated 195 hours, and his law clerk spent 585 hours on "other activities" that were described to include "telephone attendances, inquiries, numerous daily attendances to various issues".

56 In his July 23, 2010 affidavit, Mr. Neinstein further explained this nebulous category as including "fact finding", "obtaining instructions", "ongoing and extensive interactions with Toronto Rehabilitation Institute in order to keep up to date with Mike's status and to ensure that he continued to receive proper care", and "significant time and resources mediating between Bessy and TRI to ensure that the relationship between Bessy and TRI did not prevent Mike from receiving appropriate care".

57 Mr. Neinstein concluded that "This case required much more time and effort than a typical case simply by virtue of the complexity involved in providing reports to the client and obtaining instructions."

58 Although I understand that Mr. Neinstein and his firm should receive compensation for expending time in communications with Mr. DeMichino's family members in order to obtain instructions, the amount claimed is extravagant.

59 From the description provided by Mr. Neinstein, most of this time could not have been related to legal work but rather to social or administrative work, which should have been performed by someone at a much lower hourly rate. In that respect, I note the reference in Mr. Neinstein's July 23, 2010 affidavit to his firm's arrangement for "management services", which, presumably, should have covered some of the tasks undertaken by Mr. Neinstein and the members of his firm who worked on this file.

60 I note that if this amount of time were truly required in order to obtain instructions, it should have been undertaken by a lawyer at a much lower hourly rate than Mr. Neinstein's hourly rate of \$650.00.

61 I also note that there appears to be substantial duplication between the time claimed for the "other activities" in the tort action and the 300 hours spent by Mr. Neinstein and 585 hours (exactly the same number) spent by his law clerk on "weekly telephone attendances, review of progress reports" in the statutory accident benefits application for which Mr. Neinstein and his firm are not claiming any fees.

62 I am also mindful of the fact that, according to the trust ledger and trust account statement, Mr. Neinstein and Neinstein & Associates appear to have received almost \$30,000.00 in fees and disbursements from Ms. Banushefski's share of the settlement funds for work and disbursements that clearly overlapped with those performed and incurred for Mr. DeMichino.

63 In his July 6, 2010 affidavit in these proceedings, Mr. Neinstein acknowledged that the amount of \$3,404.27, which should have been billed to Ms. Banushefski, was erroneously taken from the trust funds for Mr. DeMichino. There is no explanation as to the nature of this disbursement — the closest disbursements listed in the trust ledger and on the trust account statement are those for legal fees and one of the medical reports.

64 The estimated fee in the tort action in the amount of \$397,836.25 represents over 400 hours of Mr. Neinstein's time at an hourly rate of \$650.00, over 40 hours expended by other counsel, and over 800 hours of his law clerk's time. This

well exceeds the amount that should have been incurred and which would have been within the reasonable expectation of Mr. DeMichino and his family members.

65 With respect to the reasonableness of the fees in the amount of \$47,700.00 claimed for the Consent and Capacity Board application, in his July 23, 2010 affidavit, Mr. Neinstein deposes that he spent 63.46 hours, another lawyer spent 25 hours at \$500.00 per hour, and the law clerk spent 30 hours on this matter, amounting to \$57,500.00.

66 Again, from the description of the activities carried out, it appears that there is substantial duplication of effort under the heading of the Consent and Capacity Board application on matters for which time was apparently also expended in the tort action for communications with Ms. Makedonas, Ms. Banushefski, and TRI and the mediation of TRI's relationship with Ms. Banushefski.

67 Further, there is no explanation of why Mr. Neinstein at his \$650.00 hourly rate, and not a more junior counsel, undertook the legally related activities, or why a social worker or some other appropriate person did not conduct the communications with TRI and manage any difficulties involving Ms. Banushefski.

68 Mr. Neinstein and his firm are seeking court approval again of the amount of \$10,000.00 previously approved for fees and disbursements expended in the guardianship application for Mr. DeMichino because of the issues raised by the other parties concerning the propriety of those proceedings.

69 In particular, Mr. Neinstein and his firm had failed to give notice of the application to Mr. DeMichino's family, as required under the *Substitute Decisions Act, 1992*, and had alleged that Mr. DeMichino was estranged from his family, which his family denies.

70 As those issues were not brought to Justice Moore's attention at the time that the order was made, it is appropriate for me to revisit the approval of the fees and disbursements and to amend Justice Moore's order, if appropriate, having regard to the information that was not before him, but could have made a material difference to the outcome.

71 Mr. Neinstein's failure to give proper notice of the guardianship proceedings spawned all sorts of proceedings by Mr. DeMichino's sisters and the other parties. Ultimately, the parties reached a settlement, subject to court approval, whereby Mr. Neinstein has agreed to contribute to their legal costs by paying the amount of \$145,000.00. The parties have asked that I approve that settlement.

72 I pause here to note that, on the first attendance before me with respect to settlement approval, Mr. Stephenson initially took the position on behalf of Mr. Neinstein and his firm that the payment of the \$145,000.00 was dependent on court approval being given to all of the additional fees and disbursements claimed by Mr. Neinstein and his firm. On the second attendance, Mr. Stephenson advised the Court that he had spoken in error and confirmed that the \$145,000.00 was not tied to court approval of his clients' fees and disbursements.

73 While I am prepared to accept that Mr. Stephenson's original submissions arose out of a misunderstanding, I take this opportunity to state that it is completely inappropriate and bordering on contempt for counsel or parties to try to bind or put pressure on the Court to approve a settlement in a certain form on the threat of withdrawing all or part of its terms.⁶

74 Having reviewed the bills of costs and dockets of the parties' solicitors, I agree that the amount of \$145,000.00 is a fair and reasonable settlement, which is in the best interests of Mr. DeMichino. In particular, I concur with the opinion expressed by counsel for the Bank of Nova Scotia Trust Company that, even though Mr. Neinstein's contribution does not fully indemnify the parties for their costs, the expense of continuing with proceedings against Mr. Neinstein and his firm would outweigh any further benefit to be obtained. I agree with the distribution of the funds to the parties as set out in paragraphs 35 to 38 of Angela Casey's July 9, 2010 affidavit.

75 With respect to the \$10,000.00 claimed by Mr. Neinstein and his firm for the guardianship application, there are no dockets for the time expended. The reconstructed estimate is that Mr. Neinstein spent 20 hours and his law clerk spent 10 hours on meetings with Ms. Makedonas and Ms. Banushefski regarding a management plan, drafting the application record and attendance in court.

76 Given Mr. Neinstein's failure to give proper notice to all interested parties and the litigation that ensued because of his failure to give notice, it is my view that any time expended by Mr. Neinstein and his firm was completely wasted and that Mr. DeMichino received no value from those services. On this basis alone, the entire account can be disallowed.⁷

77 Further, the fees claimed by Mr. Neinstein and his firm are excessive in the circumstances of the application and not justified given the paucity of the materials generated by his office. Again, the time spent by Mr. Neinstein should have been carried out by a more junior lawyer of his firm. Finally, there appears to be overlap between the amount claimed under this heading and the time spent for the Capacity and Consent Board application.

78 The last in the litany of the above noted factors that I have considered is the ability of Mr. DeMichino to pay for the additional fees claimed by Neinstein & Associates and the potential for shortfall in the sums allocated to the structured settlement of future care costs for Mr. DeMichino. As acknowledged by Mr. Stephenson, although not definitive, those factors are also important.⁸

79 In the present case, the settlement achieved will not satisfy all of Mr. DeMichino's care needs. According to the management plan provided by the Bank of Nova Scotia Trust Company, there is a current shortfall in the funds available for Mr. DeMichino's care of over \$6,500.00 per month, with the result that the Bank of Nova Scotia Trust Company is drawing down on Mr. DeMichino's other assets.

80 The Bank of Nova Scotia Trust Company should be in receipt of the \$6,000.00 monthly maximum payment for attendant care benefits directly from the statutory accident benefit provider; however, this has not yet happened. The Bank of Nova Scotia Trust Company has engaged counsel to pursue payment of those benefits as noted in the management plan.

81 There can be no issue that Mr. DeMichino is at present in need of the funds that Neinstein & Associates are claiming as a premium for services rendered.

82 For the above reasons, I am of the view that Mr. Neinstein and Neinstein & Associates have already been well compensated for all of their services and disbursements and that they are not entitled to any further monies.

83 It is agreed that any excess amounts not allowed as additional fees and disbursements to Neinstein & Associates should be returned to the Bank of Nova Scotia Trust Company for Mr. DeMichino. I therefore order that the amount of \$548,060.80⁹, plus accumulated interest, be paid to the Bank of Nova Scotia Trust Company to be invested on behalf of Mr. DeMichino in accordance with a new management plan to be filed with the Court.

84 If there is any issue respecting the amount that should be returned, the parties may make written submissions to me by January 14, 2011.

Guardianship of the person of Michele DeMichino:

85 On July 16, 2010, I had previously made an order on consent appointing Ms. DeMichino and Ms. Vokri as the guardians of the person for Mr. DeMichino. As Ms. Makedonas had resigned on July 15, 2010, the order was necessary so that Mr. DeMichino was not left without a guardian for personal care pending the release of these Reasons.

Passing of Accounts:

86 Over the course of the many attendances and negotiations before me, the estate parties, the Public Guardian and Trustee and the Children's Lawyer reached a proposed settlement of the accounting issues related to Ms. Makedonas' handling of Mr. DeMichino's and Ms. Banushefski's funds.

87 On May 20, 2009, I had appointed the Children's Lawyer to represent Ms. Banushefski at the settlement conferences. On consent, I order that the Children's Lawyer is appointed as litigation guardian for Ms. Banushefski in this proceeding only.

88 There were five amounts in dispute: \$47,700.00 representing monies belonging to Mr. DeMichino that Ms. Makedonas erroneously gave to Ms. Banushefski; \$57,572.00, representing compensation improperly pre-taken by Ms. Makedonas; \$29,000.00 of alleged gifts made by Ms. Banushefski to her relatives, including Ms. Makedonas and her husband; \$98,000.00 of bank machine withdrawals; and the amount of \$60,000.00 from Ms. Banushefski's portion of the settlement funds from the tort action, which was given by Ms. Banushefski to Ms. Makedonas and her husband.

89 The particulars of the proposed settlement are set out in detail in paragraph 10 of the affidavit of Bruce Arnott, sworn on July 9, 2010, and in paragraphs 23 and 24 of the affidavit of Richard Ashok Coutinho, sworn on July 9, 2010, and filed by the Public Guardian and Trustee, and in paragraph 27 of the affidavit of Debra L. Stephens, the Children's Lawyer, sworn on July 19, 2010, and in the Minutes of Settlement signed by the parties.

90 The payment details of the settlement can be summarized as follows:

i. Within thirty days of a judgment approving the settlement, Ms. Makedonas will pay to Mr. DeMichino's guardian of property the amount of \$70,000.00 and provide a promissory note in the amount of \$25,000.00, secured by a collateral mortgage, payable to Mr. DeMichino within seven years.

ii. Within thirty days of a judgment approving the settlement, Ms. Makedonas will pay to Ms. Banushefski's guardian of property the amount of \$25,000.00 and provide a promissory note in the amount of \$25,000.00, secured by a collateral mortgage, payable to Ms. Banushefski within seven years.

91 Notwithstanding that the Public Guardian and Trustee and the Children's Lawyer have incurred substantial costs in these proceedings, in the interest of settlement, they have generously foregone any claim for costs.

92 Also as part of the settlement proposal, the Public Guardian and Trustee has agreed to act as Ms. Banushefski's statutory guardian of property, subject to Ms. Makedonas resigning as Ms. Banushefski's attorney for property and other conditions as outlined in paragraph 13 of the Minutes of Settlement.

93 I agree that the proposed settlement is in the best interests of Mr. DeMichino and Ms. Banushefski for the reasons expressed by Mr. Coutinho in paragraphs 26 to 40 of his affidavit and by Ms. Stephens in paragraphs 30 to 32 of her affidavit.

94 In particular, notwithstanding Ms. Banushefski's possible incapacity at the time that amounts were given to or by her, there was still risk in establishing that Ms. Makedonas was liable to repay all of the impugned amounts, and the legal costs in pursuing litigation against her and others would be enormous. There was also significant importance in preserving family harmony.

95 For all of those reasons, the proposed settlement is approved.

Approval of lawyers' fees and disbursements:

96 Ms. Vokri and Ms. DeMichino are seeking payment on a full indemnity basis of their counsel's fees and disbursements with respect to their application regarding the guardianship of property and person for Mr. DeMichino (\$48,010.25) and the passing of accounts of Ms. Makedonas and Ms. Banushefski (\$32,135.21). Those amounts are in

addition to the \$65,000.00 that the parties agreed Ms. Goddard's firm would receive from the settlement funds offered by Mr. Neinstein.

97 No one is objecting to their claim for payment of additional fees and disbursements.

98 A review of Ms. Goddard's firm dockets and accounts demonstrates that the time claimed was spent in pursuit of her clients' applications and efforts to regularize and settle the management of their brother's property and personal care, from which they derived no personal benefit.

99 Ms. Goddard played an important role in investigating, questioning and exposing the various irregularities in the management of Mr. DeMichino's affairs, including the impugned application brought by Mr. Neinstein and the mishandling of Mr. DeMichino's funds by Ms. Banushefski and Ms. Makedonas, and in the drafting of settlement and other documentation that was useful to all parties during the settlement discussions.

100 Ultimately, it made practical sense for Ms. Makedonas to withdraw as Mr. DeMichino's attorney for personal care. She is Ms. Banushefski's attorney for personal care and the personal care decisions for Mr. DeMichino and Ms. Banushefski could possibly conflict because of their disparate care needs.

101 Ms. Goddard's work greatly benefitted Mr. DeMichino. As a result, I agree that the applicants' costs should be paid on a full indemnity basis. Given the enormous amount of time that was required in order to resolve all of the issues that were vital to Mr. DeMichino's welfare, the applicants' claimed fees and disbursements of \$80,145.46 are fair and proportionate and are allowed in full from Mr. DeMichino's funds.

102 Mr. Swadron has acted as counsel for Mr. DeMichino, pursuant to section 3 of the *Substitute Decisions Act*, since September 3, 2008. His retainer ended upon the granting of the Judgment in respect of the personal care guardianship on July 16, 2010.

103 Up to the July 15, 2010 attendance, Mr. Swadron had rendered accounts as counsel for Mr. DeMichino in the total amount of \$53,109.76, including disbursements of \$1,418.08. Of that amount, it is agreed that the amount of \$14,018.88 shall be paid from the settlement funds contributed by Mr. Neinstein. On July 23, 2010, Mr. Swadron rendered his last account to the Bank of Nova Scotia Trust Company in the amount of \$4,615.16. No one is objecting to his accounts.

104 Mr. Swadron's time is fair and reasonable and is allowed in full. He provided exemplary service to Mr. DeMichino and was of invaluable assistance to this Court and the other parties during the settlement process. I order that his fees and disbursements be paid on a full indemnity basis: the amount of \$14,018.88 shall be paid from the settlement funds payable by Mr. Neinstein; and the balance shall be paid from Mr. DeMichino's funds.

Conclusion:

105 The draft form of Judgment previously submitted should be revised in accordance with these Reasons.

106 In the course of these proceedings, suggestions were made that certain materials should not be made part of the court record because of their privileged nature. Now that the settlement has been approved, it is not clear to me whether any party is asking for such an order. If so, any party seeking such an order should make that request to me in writing, on notice to all interested parties, by January 14, 2011.

Application granted.

Footnotes

- 1 The time expended by the solicitor; the legal complexity of the matters dealt with; the degree of responsibility assumed by the solicitor; the monetary value of the matters in issue; the importance of the matters to the client; the degree of skill and competence demonstrated by the solicitor; the results achieved; the ability of the client to pay; the client's expectations as to

the amount of the fee; and the solicitor's risk of non payment: *Solicitors, Re*, [1972] 3 O.R. 433 (Ont. Assess. O.); *Cohen v. Kealey & Blaney*, [1985] O.J. No. 160 (C.A.); *Desmoulin v. Blair* (1994), 21 O.R. (3d) 217 (Ont. C.A.)

2 In addition to the \$47,700.00 Consent and Capacity Board fees and the Public Guardian and Trustee's recommended fee amount of \$432,000.00, the amount of \$562,426.41 includes the additional fees of \$21,200.00 related to Ms. Banushefski's FLA claim and \$4,100.61 described as a "general cheque fee reduction", which were monies ultimately paid on August 13, 2007 to Ms. Banushefski, disbursements of \$30,306.41 for Mr. DeMichino and \$1,199.39 for Ms. Banushefski, and GST of \$25,920.00, rather than the correct amount of \$25,720.00 on the Public Guardian and Trustee's recommended fee amount of \$432,000.00.

3 *Freeman Estate, Re* (2007), 160 A.C.W.S. (3d) 388, [2007] O.J. No. 3402 (Ont. S.C.J.)

4 Mark M. Orkin, *The Law of Costs*, 2d ed (Aurora: Canada Law Book, 2010), at para. 310.6; *Chudy v. Merchant Law Group* (2008), 300 D.L.R. (4th) 56 (B.C. C.A.), leave to appeal to S.C.C. refused, (2009), 303 D.L.R. (4th) vi (note) (S.C.C.); 380876 *British Columbia Ltd. v. Ron Perrick Law Corp.* (2009), 177 A.C.W.S. (3d) 1102 (B.C. S.C.) [2009 CarswellBC 1178 (B.C. S.C.)]

5 *936464 Ontario Ltd. v. Mungo Bear Ltd.* (2003), 74 O.R. (3d) 45 (Ont. Div. Ct.); *Chudy v. Merchant Law Group, supra*; *Freeman Estate, Re, supra*

6 *Bignall v Juda*, 2010 ONSC 5014, at para. 2

7 *Solicitors v. Kern* (1980), 16 C.P.C. 253 (Ont. Assess. O.); *The Law of Costs, supra*, at para. 310.2

8 *The Law of Costs, supra*, at para. 311.8

9 $\$548,060.80 = (\$487,432.81 + \$51,104.27 + \$10,000.00) - \$476.28$