

NOVA SCOTIA COURT OF APPEAL

Citation: Miller v. Legge, 2008 NSCA 8

Date: 20080124

Docket: CA 282504

Registry: Halifax

Between:

Carl Miller and Walter O. Newton

Appellants

v.

Lawrence Legge, Robert Legge, Sharon Legge and David Legge

Respondents

Judges:

MacDonald, C.J. N. S., Roscoe and Saunders, J.J.A.

Appeal Heard:

January 22, 2008, in Halifax, Nova Scotia

Held:

Clause 11 of the order of Justice Warner dated May 22, 2007 respecting the agency fees is set aside and in all other respects the appeal is dismissed per reasons for judgment of the Court.

Counsel:

Michael Ryan, Q.C. and Harry Thurlow, for the appellant
Walter O. Newton

Peter Bryson, Q.C., for the appellant Carl Miller

Robert Legge, respondent, self-represented

Lawrence Legge, respondent, self-represented

no one appearing for respondents Sharon Legge and
David Legge

Reasons for judgment

By the Court:

[1] This is an appeal from a decision of Justice Gregory M. Warner, (2007 NSSC 53, [2007] N.S.J. No. 75 (Q.L.)) by which he passed the accounts, fixed the Trustees' fees and terminated the widow's income trust in the Estate of Harold B. Legge.

[2] The Trustees appeal alleging that the judge erred in determining the magnitude of the trust as a basis to quantify their fees, in finding that they exercised poor judgment which led to a decline in the value of the estate, in ordering the repayment of agency fees collected by them from the beneficiaries with respect to non-estate assets, in the calculation of the widow's income, in disallowing claims of two creditors of the estate, and in disallowing the payment of solicitor client costs for one of the Trustees.

[3] We are of the unanimous view that, with the exception of the ground related to the agency fees, the appeal should be dismissed.

[4] The appellants have convinced us that the issue of the agency fees charged by them to the heirs of the Estate in relation to the collection of non-estate accounts, was not properly before the judge on the application relating to the closing of the Estate. The order that those fees be returned is therefore set aside.

[5] All of the other points raised by the appellants either involve questions of fact or mixed fact and law, or, as in the case of the costs issue, is a matter of discretion. The standard of review we must apply is as set out in **Housen v. Nikolaisen**, [2002] S.C.J. No. 31 (Q.L.), [2002] 2 S.C.R. 235. Findings of fact and inferences drawn by the judge are reviewed on appeal for palpable and overriding error and we may intervene only if the judge made a clear and obvious error that affected the result. (see: **McPhee v. Gwynne-Timothy** (2005), 232 N.S.R. (2d) 175; 737 A.P.R. 175; 2005 NSCA 80, at ¶31 - 33). It is not our role to re-try the issues or to substitute our opinion for that of Justice Warner.

[6] With respect to the review of the discretionary order disallowing solicitor client costs, the decision will not be interfered with by this Court unless wrong principles of law have been applied or the decision is so clearly wrong as to

amount to an injustice: **D.C. v. Children's Aid Society of Cape Breton Victoria**, 2004 NSCA 146; [2004] N.S.J. 470 (Q.L.).

[7] In this case the complex record of the Estate's 13-year administration placed before the judge, although voluminous, was to use his words, conflicting, convoluted and inadequate. (¶ 56) In our view Justice Warner diligently deciphered the accounts and carefully weighed all the relevant factors in fixing the Trustees' fees as set out in the **Trustees Act**, R.S.N.S. 1989, c. 479, Practice Memorandum 11 and **Toronto General Trusts Corp. v. Central Ontario Railway**, [1905] O.J. No. 536.

[8] We have studied the record and carefully considered the oral and written arguments of the parties. In our opinion the burden on the appellants to show reversible error on the part of the judge has not been discharged. Palpable and overriding error or error in principle leading to an injustice has not been demonstrated. The evidence supports the findings of fact and the inferences drawn by the judge.

[9] With the exception of the agency fees issue, noted above, the appeal is dismissed. Since none of the respondents appeared with counsel, there will be no order for costs.

MacDonald, C.J.N.S.

Roscoe, J.A.

Saunders, J.A.