NOVA SCOTIA COURT OF APPEAL
Citation: *Faye Estate v. Perry*, 2003 NSCA 97

Date: 20030925
Docket: CA 189011
Registry: Halifax

Between:

Johanne L. Tournier

Appellant

v.

Denise Perry, Lacey Jade Faye, and
Lori Dawn Acker

Respondents

Judges:	Saunders, Oland and Hamilton, JJ.A.
Appeal Heard:	September 17, 2003, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Oland, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Johanne L. Tournier, for the appellant Donald C. Harding, not appearing for the respondents

Reasons for judgment:

[1] The appellant, a lawyer, acted as proctor of the estate of the late James Michael Faye. She appeals the decision of Justice David Gruchy of the Supreme Court of Nova Scotia, sitting as a judge of probate, who approved $4,000 plus disbursements for her services as proctor.

[2] The late Mr. Faye passed away intestate on February 26, 1995. He was survived by two minor children by different mothers. Denise Perry, the mother of one of those children, had been his common law wife until shortly before his death. His parents, John and Lottie Faye, were appointed administrators of the estate after the Public Trustee renounced its right to appointment.

[3] The appellant, whom the parents had consulted soon after their son died, acted as proctor of the estate. Six years passed before the estate was closed. In the intervening period, among other things, the appellant brought two applications for a license to sell the same real property for estate debts, and negotiated a civil claim on behalf of the parents. From the settlement of that claim, she paid herself $1,263.72 pursuant to a contingency fee agreement. On several occasions, the appellant consulted various Halifax lawyers for advice pertaining to the administration of the estate.

[4] The closing was scheduled following a citation to close issued by the Registrar. It was adjourned several times before it was finally held.

[5] The estate was valued at $54,732.14. The appellant submitted an account for her work as proctor of $14,205.39. The Registrar of Probate was of the view that the civil claim had little to do with the estate and was covered by the contingency fee agreement. He found the proctor's account excessive and allowed the amount she had already taken from the estate account for the civil claim, and fees and disbursements totalling $1,049.43 for the sale of the real property.

[6] The appellant appealed the taxation by the Registrar to a judge of probate. Justice Gruchy reviewed the proctor's account in a *de novo* hearing. He also found that the time spent was excessive. In the result, he approved $4,000 plus

disbursements as allowed by the Registrar. His decision is reported as *Faye Estate (Re)*, 2002 NSSC 242, 209 N.S.R. (2d) 56.

[7] In her appeal of that decision to this court, the appellant claims the $7,471.62 to the credit of the estate remaining in her trust account in addition to the amount approved by the judge of probate. The respondents, Denise Perry and the two minor children of the late Mr. Faye, did not file any submissions and their counsel did not appear or make submissions at the hearing of this appeal.

[8] The appellant set out eighteen grounds of appeal in her notice of appeal. Most attack the factual findings and inferences made by the judge of probate. The appellant's argument in regard to all of the grounds of appeal is that the administration of the estate was complex, that it required much time, effort, expense and consultation with expert lawyers, and that she had not been adequately compensated.

[9] The standard of review is as stated by the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. With respect, I am of the view that the appellant has not disclosed any error by the judge of probate which would amount to an error of law. She herself acknowledged that his reference to *Re MacNeil* 43 NBR (2d) 1 and his listing of the factors to be considered with respect to her account was correct. Furthermore, the appellant has not identified any error or errors pertaining to questions of fact or inferences of fact which, individually or cumulatively, would amount to a palpable and overriding error such that I would interfere with the decision of the judge of probate. On the contrary Justice Gruchy's reasons reflect a balanced assessment of the facts together with a careful and comprehensive application of the law to the evidence.

[10] During her submissions, the appellant argued that she had not had a hearing before the judge of probate. She stated that he did not have all the particulars of the work she did, that she did not testify, and that she did not have an opportunity to make further submissions before he released his decision. With respect, I cannot accept this argument.

[11] The judge of probate had before him, in addition to other material, two lengthy affidavits sworn by the appellant. In them, she detailed matters pertaining to the estate administration which, in her view, made her proctor's account as submitted a reasonable one. These matters included identification of the persons

entitled to administration and of the heirs-at-law, the initial involvement of the Public Trustee, the issues on which legal advice was obtained, the civil claim, the license to sell real property, the time spent with the administrators and to prepare for closing, and the adjourned closings. While the appellant expressed some regret at not having included even more information, the extent of the evidence she provided by way of her affidavits was considerable. It is apparent from his decision that the judge of probate also reviewed additional materials in making his determination. Moreover, the appellant presented submissions of her choosing to him and there was no indication that any request to file post-hearing submissions was made. In short, the appellant has not persuaded me that the record before the judge of probate was in any way incomplete or that her position was not fully understood by Justice Gruchy.

[12] I would observe that the penultimate paragraph of the appellant's factum reads in part:

> The reasoning by the Learned Judge of Probate in some ways was most impressive. He did give careful consideration to my submissions and make a well-reasoned decision. Yet, it seems to me in the end to have been arbitrary. To assess the proper amount of fees in a case like this on the value of the estate is to immediately discount the value of the effort expended, despite the fact that some of the issues could not effectively be reduced to a question of the bottom line. I would not have changed my handling of the case in light of all the circumstances in operation at the time. The question at the end is what is fair compensation for the work done. It is my respectful submission that the learned Probate judge's final conclusion of $4000.00 plus the disbursements approved by the Registrar was arbitrary, despite the preliminary reasoning leading up to his conclusion. (Emphasis added).

As the appellant herself acknowledges, the judge of probate thoroughly reviewed and responded to her submissions in his decision. It is apparent from his decision, particularly ¶ 32 *et seq.* where he set out factors to be considered in reviewing a proctor's account and examined the work done for this estate, that he did not limit his considerations to the size of the estate in determining fair compensation.

[13] I would dismiss the appeal. Considering that none of the other parties appeared or filed any submissions, I would direct that there be no order as to costs.

Oland, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.