

SUPREME COURT OF NOVA SCOTIA

Citation: *Brooks Estate v. Brooks Estate*, 2015 NSSC 167

Date: 20150703

Docket: Halifax. No. 411047

Registry: Halifax

Between:

Frederick Brooks, Co-Executor and Co-Trustee of the Estate
Of Marcel Brooks and Co-Trustee of Life Insurance Trust

Applicant

v.

Brandon Ewing and Brenda Brooks, Co-Executors and Co-Trustees
of the Estate of Marcel Brooks and Co-Trustees of Life Insurance Trust;

First Respondents

v.

Kahlyn McIntyre, child beneficiary, by her Litigation Guardian, Devonna
McIntyre, and Justin Huntington, beneficiary;

Second Respondents

Judge: The Honourable Justice C. Richard Coughlan

Heard: February 9, 2015, in Halifax, Nova Scotia

Counsel: Bruce W. Evans, for the Applicant
Matthew J.D. Moir, Counsel for Brendon Ewing

[1] In a decision issued October 21, 2013, I found the proceeds of certain life insurance policies were subject to a trust for the benefit of the children of the late Marcel Brooks namely, Justin Frederick Huntington and Kahlyn Victoria McIntyre. I found a payment of \$50,000.00 by Brenda Brooks to Brandon Ewing from the trust funds was improper as it was a loan from a trust to a trustee. The investment of the money in a business controlled by Mr. Ewing was a breach of his duty as trustee not to use trust property for his own private advantage. I removed Brandon Ewing and Brenda Brooks as trustees of the trust of the proceeds of the insurance policies. I ordered an accounting of the \$50,000.00 used by Mr. Ewing.

[2] Bruce Evans the solicitor for Mr. Frederick Brooks, the remaining Trustee of the above mentioned trust, has filed a motion for the taxation of his legal fees and disbursements in this proceeding and a motion for the reimbursement of the legal fees and disbursements by Brandon Ewing.

[3] Mr. Evans account for legal fees and disbursements is \$213,845.64 plus interest. The initial principal amount of the trust was \$170,447.76. In addition to the principal amount would be any income earned by the trust. The amount wrongfully transferred to Mr. Ewing's company was \$50,000.00. The trust had a balance of \$93,824.47 as of October 8, 2014.

[4] Mr. Evans filed an affidavit in connection with the taxation. Mr. Evans was initially consulted by Frederick Brooks on July 30, 2012 about the transfer of the \$50,000.00. On August 21, 2012 Mr. Brooks signed a retainer agreement in which Mr. Evans, among other things, set out his hourly charge of \$250.00. The retainer agreement does not have an estimate of total fees. Mr. Brooks signed the agreement "Fred Brooks" – there is no indication whether Mr. Brooks signed personally or in his capacity of Trustee.

[5] On August 29, 2012 Mr. Evans sent an account addressed to Mr. Fred Brooks totalling \$2,985.17. The retainer of \$500.00 Mr. Brooks had given Mr. Evans was credited toward the account.

[6] Between August 29, 2012 and September 4, 2012 there was a series of e-mails between Mr. Evans and Mr. Brooks.

[7] Mr. Evans e-mailed Mr. Brooks on August 30, 2012:

Fred,

I will make the claim for costs against Brendon Ewing and alternatively against the trust fund, if Mr. Ewing cannot pay.

It is to the advantage of the children to recover the monies from Mr. Ewing or alternatively to have the legal costs paid from the fund, if Mr. Ewing does not have the money to pay costs.

It is your responsibility to provide funds paying the legal fees in the meantime and to be reimbursed from Mr. Ewing or alternatively by the fund, if Mr. Ewing can not pay.

Please authorize me to proceed as indicated above and provide funds in the meantime to pay for the application until they are reimbursed by Mr. Ewing or the fund.

You will likely get paid back but I need funds to cover legal accounts as they are incurred.

[8] The same day Mr. Brooks e-mailed Mr. Evans asking:

hi how muck (sic) money is need for the application.

[9] Mr. Evans replied on September 4, 2014, stating:

The Application would be on a time basis of \$250 per hour plus tax and disbursements. I would guesstimate that there would be another \$2000 in time to file the application and prepare the supporting affidavits.

Is Brenda prepared to co-operate and consent to being removed? Is she prepared to sign an affidavit stating what happened to the money that was withdrawn in cash and how the money was withdrawn?

Without knowing what kind of response we will get from Brendon Ewing, it is difficult to know how much time would be involved in preparing for and presenting the application. If Brendon does not contest the application, the application hearing may not involve much more time after filing the application.

Collecting the money could be time consuming after a court order is obtained, if Brendon does not have the money to be able to pay it back. I have no idea how much time would be involved in that.

The money for my bills would be repaid to you out of the trust fund once a court order is obtained approving this, so you would get your money back likely. Of course we would try to recover the legal costs from Brendon and he would likely be held liable to pay the costs. Collecting the money from him could be a problem. The fact that he took trust funds, indicates that we should suspect that he may have money problems.

I would like you to pay the existing bill and make arrangements to bring in more money to be applied to the fees for the application. Let me know what you can do. If you can bring in \$2,000.00 plus pay the current bill, that would be satisfactory. Let me know what you can do.

[10] On September 13, 2012 Mr. Brooks paid the balance outstanding on the account of August 29, 2012, being \$2,485.17.

[11] During the fall of 2012 Mr. Evans reviewed the complete file of Manufacturers Life Insurance Company, the complete file of Mr. George Ash concerning the last will and testament of Marcel Brooks and the estate of Marcel Brooks. Mr. Evans spent considerable time searching the records of the Registrar of Joint Stock Companies. Mr. Evans also spent considerable time searching Property-on-Line to determine real property owned by Mr. Ewing or companies with which Mr. Ewing was associated.

[12] Mr. Evans filed a Notice of Application in Chambers on January 15, 2013.

[13] Mr. Evans submitted an account to Mr. Fred Brooks on January 28, 2013 with legal fees of \$48,354.95 plus harmonized sales tax (HST) and disbursements for a total of \$56,210.61. In reviewing the account I note the fees charged for memorandum of law or brief alone amount to more than \$13,000.00.

[14] The application was heard on May 1, 2013. Posthearing submissions were requested and Mr. Evans filed submissions on June 24, 2013 and July 11, 2013. The Court's judgment was issued October 21, 2013.

[15] On September 19, 2013 Mr. Brooks paid \$6,000.00 from the life insurance trust funds to Mr. Evans.

[16] In January 2014 Mr. Brooks filed a motion to amend the application in court to add three companies as respondents.

[17] The key issue when dealing with a bill for legal services is the fee charged by a lawyer to a client is that the fee amount must be reasonable in all the circumstances of the matter. Civil Procedure Rule 77.13 provides:

(1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.

(2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:

- (a) counsel's efforts to secure speed and avoid expense for the client;
- (b) the nature, importance, and urgency of the case;
- (c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;
- (d) the general conduct and expense of the proceeding;
- (e) the skill, labour, and responsibility involved;
- (f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

[18] The Code of Professional Conduct deals with fees and disbursements, as follows:

Reasonable Fees and Disbursements:

3.6-1 A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary

[1] What is a fair and reasonable fee depends on such factors as:

- (a) the time and effort required and spent;
- (b) the difficulty of the matter and the importance of the matter to the client;
- (c) whether special skill or service has been required and provided;
- (d) the results obtained;
- (e) fees authorized by statute or regulation;
- (f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
- (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;
- (h) any relevant agreement between the lawyer and the client;
- (i) the experience and ability of the lawyer;
- (j) any estimate or range of fees given by the lawyer; and
- (k) the client's prior consent to the fee.

...

- 4. A lawyer should be ready to explain the basis of the fees and disbursements charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

[19] The fees charged are not reasonable. This was an application in Chambers to recover \$50,000.00 wrongfully taken from a trust for children. The application

was filed January 15, 2013. By January 28, 2013 legal fees, disbursements and HST totalling \$58,695.78 had been rendered. The accounts show excessive unnecessary time spent on the file. For example, in excess of 60 hours were spent working on the brief of law. The amount charged as of January 28, 2013 is out of proportion to the work required for the application and the value of the matter in issue. The subsequent accounts rendered demonstrate work performed by counsel which was not reasonable in the circumstances of the proceeding. There is no value to Mr. Brooks or the trust in incurring over \$200,000.00 in legal fees, disbursements and tax to recover \$50,000.00 plus interest. Such a legal bill is absurd. It would be ridiculous for the trust which is said to have a balance of \$93,824.47 as October 8, 2014 to incur such fees. Much of the work performed subsequent to the decision was of no value to the trust or Mr. Brooks. For example, a motion was made after the decision was issued, to add certain bodies corporate to the application in chambers which had already been heard. The motion was dismissed.

[20] Considering all of the circumstances of this matter I find that much of the services rendered were not reasonable. Smith Evans account with Frederick Brooks in this proceeding is taxed and allowed in the amount of \$25,000.00 plus HST of \$3,750.00.

[21] A trustee is to be reimbursed or paid from a trust for expenses incurred in the exercise of his or her trusts or powers. Section 29 of the Trustee Act R.S.N.S. 1989 c. 479 provides:

29. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any bank, bankers, broker or other person with whom any trust moneys or securities are deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default, and **may reimburse himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts or powers.** (My Emphasis)

[22] In Waters' Law of Trusts in Canada (fourth edition) the test for allowing expenses claimed by trustees is described at page 1209:

In allowing or refusing claims made by trustees, the test is whether the expense incurred arose out of an act within the scope of the trusteeship duties and powers, whether in the circumstances it was reasonable, and whether it was something that his duty as the trustee required him to do.

[23] In this case there is no doubt it was reasonable for Mr. Brooks to take action to recover the \$50,000.00 wrongfully taken by Mr. Ewing in breach of his duty as trustee. The account of Smith Evans which was taxed in the amount of \$28,750.00 incurred by Mr. Brooks is to be paid by the Trust from the proceeds of the life insurance policies of the late Marcel Brooks.

[24] This whole proceeding was made necessary by Brandon Ewing's breach of trust in wrongfully taking \$50,000.00 from the trust for his own private advantage. The trust should not lose money as a result of Mr. Ewing's actions. Brandon Ewing will indemnify the Trust on a solicitor/client basis. Mr. Ewing will pay the Trust the sum taxed and allowed at \$28,750.99

Coughlan, J.