

Date: October 4th, 2002
Docket: SY 6553

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Faye Estate (Re), 2002 NSSC 242

IN THE MATTER OF: The Estate of James Michael Faye

- and -

IN THE MATTER OF: The Taxation of the Proctor's Account

DECISION

HEARD: At Shelburne, Nova Scotia before the Honourable
Justice David W. Gruchy

DATE: July 9th, 2002

**WRITTEN RELEASE
OF DECISION:** October 4th, 2002

COUNSEL: Johanne Tournier, for self
Donald G. Harding, for the residual heirs

GRUCHY, J.:

- [1] Pursuant to the provisions of the Probate Act, (c. 359 R.S.N.S. 1989) I have reviewed the Bill of Costs of the estate's proctor, Johanne Tournier, as taxed by the Registrar of Probate of Yarmouth County on December 7th, 2001. A question was raised whether this function is a "review" pursuant to the Probate Act or whether it is an appeal from a decision of the Registrar. In my view, the result is the same.
- [2] The result of that taxation was the apparent reduction of fees in the amount of \$14,205.39 to \$1,049.43.
- [3] I attach to this decision a copy of the Registrar's decision to which I will refer during the course of these reasons.
- [4] I consider the standard of review of this matter to be that of a *de novo* hearing. Accordingly, I have reviewed the entire court file and the file of the Registrar.
- [5] It is unfortunate, but understandable and acceptable, that the residual beneficiaries of the estate, one of whom is an infant, did not actively participate in this review, but I did hear a general statement from their counsel, Donald G. Harding, at the opening of the hearing and I reviewed his various written submissions made during the administration of the estate. Mr. Harding submitted to me that further activity on his part would merely have resulted in additional and unnecessary expense to the residual heirs.
- [6] I will first review briefly some of the facts concerning the estate and its administration.
- [7] The deceased intestate, James Michael Faye, was killed on February 26th, 1995, at the age of 33 years. The circumstances of his death gave rise to an action undertaken on behalf of his estate, his children and his family. His "family" consisted of his parents, the daughter of Lori Dawn Acker, Paula Acker, now age 22 years, the daughter of Denise Perry, Lacey Jade Faye, age 10 years and (arguably) Denise Perry with whom the deceased had lived in a common law relationship until about one and one half months prior to his death.
- [8] Ms. Tournier was consulted by the deceased's mother the day after his death. Legal and practical questions arose with respect to the administration of the estate almost immediately - ranging from the identification of the legal heirs, an administrator, life insurance questions and the guardianship of the infant

child or children - all questions an experienced solicitor might have anticipated in such circumstances.

- [9] In her initial retainer, Ms. Tournier says she made it clear that her fees would be based on the rate of \$85.00 per hour plus disbursements and GST.
- [10] It is perhaps unnecessary for the purposes of this review to outline in detail all the questions raised by the apparently strained relationship between Denise Perry and the parents of the deceased, some of which were apparently petty but time consuming and others were more substantive.
- [11] Denise Perry retained Mr. Harding on March 2nd, 1995 to represent her and her daughter's interests. It is apparent from the correspondence between the solicitors that although Mr. Harding and Ms. Tournier seemed to attempt a cooperative approach to settling matters, that objective was not achieved.
- [12] During the period from late March to early May, 1995, the parties were under the impression that the Public Trustee would apply for administration of the estate, but on May 3rd, the Public Trustee indicated that she renounced the right to administration in favour of the parents of the deceased who could apply for that status as creditors of the deceased.
- [13] After the renunciation by the Public Trustee, administration of the estate was granted to the parents of the deceased, John G. Faye and Lottie P. Faye on June 27th, 1995. A warrant of appraisal was issued by the Registrar of Probate on the same date.
- [14] On October 26th, 1995, Ms. Perry, with the cooperation of Pamela Acker, the mother of Lori Dawn Acker, applied for an order requiring the filing of an inventory, their appointments as guardians of Lacey Jade and Lori Dawn and a license to sell the real property of the deceased to obtain funds to respond to claims and for distribution.
- [15] On November 23rd, 1995, Ms. Tournier applied for a license to sell the real property. Following this application and judicial conference on December 7th, 1995, Justice Hall granted to the administrators of the estate, a licence to sell the property for not less than \$50,000.00, a figure suggested by an appraisal. After a renewal of the license the property was eventually sold in February 1999 for \$33,000.00.
- [16] A citation to close the estate was issued by the Registrar on October 17th, 2000. The estate was to be closed on December 8th, 2000. On December 7th, Ms. Tournier requested that the closing be adjourned and undertook to supply closing documents to the Registrar and to Mr. Harding by December 11th, 2000. It was subsequently agreed that the closing would be held on September 13th, 2001 upon the condition that documentation would be

supplied “well in advance” of that date. On September 10th, Ms. Tournier requested a further adjournment. The closing was then scheduled for October 1st, 2001. Denise Perry by affidavit filed on September 27th, gave notice to the court and to the administrators that she complained of the manner in which the estate had been administered, resulting in losses to the heirs. In particular, they objected to the “large proposed proctor’s fees”. The closing of the estate was again delayed, during which period of delay the administrators filed an affidavit in an attempt to explain or excuse delays.

- [17] The closing of the estate was scheduled for October 12th. On that date, however, although the administrators were present, Ms. Tournier was not. The Registrar then wrote to Ms. Tournier requesting further documentation and protesting her absence. He allowed administrators fees of 3% of the total inventory of \$54,723.14 and indicated the proctor’s account would be taxed only when documentation requested was received. In particular, the Registrar requested information about the results of a civil action netting the estate the sum of \$4,035.80. Ms. Tournier replied on the same date as follows:

I wish to advise that the gross amount of the civil claim appears in schedule “A” of the receipts as income of \$5,194.18 to the estate and the disbursements to myself as amount of \$1,056.62 in the estate disbursements.

- [18] By the same reply Ms. Tournier requested that nothing further be done with respect to the estate for at least three weeks as she would be absent from the province and referred the Registrar to Albert Bremner, Q.C. with respect to any concerns arising in the interim period. The Registrar replied in a sharply worded request for certain further particulars to be filed with him by November 9th, 2001. Ms. Tournier replied on November 28th and submitted a revised account by which she claimed fees of \$10,917.17 and disbursements of \$3,288.22. She had already received fees from the estate in the amount of \$1,156.62, that amount being the prorated share of fees and disbursements for the recovery by the estate on the civil action taken by Ms. Tournier on a contingency fee basis. In her letter of explanation Ms. Tournier said:

The amounts which I am claiming are as follows:

Fees -
\$1132.22

Disbursements -
\$ 98.86

\$3974.60	\$ 805.75
\$ 912.18	\$ 357.57
\$2001.20	\$1546.88
\$1930.01	\$ 289.50
<u>\$ 966.96</u>	<u>\$ 189.66</u>
\$10,917.17 - total	\$3288.22 - total

The only amounts for which I have been paid are the share of the estate's legal fees and disbursements payable pursuant to the Contingent Fee Agreement on the civil claim. I received a total of \$1156.62 from the estate's share of the settlement of \$5194.18. The calculations for these figures were previously provided to you. A total settlement of \$25,000.00 was received, of which \$17359.98 was payable to John Faye and Lottie Faye for loss of care, guidance, and companionship. The total fees payable pursuant to the Contingent Fee Agreement, which provided for a percentage of twenty-five per cent, were \$6250.00. The disbursements totalled \$1225.90. Based on the percentages, the estate's share of the total disbursements were \$189.66. The total legal fees payable by the estate for the civil claim would thus have been \$966.96.

This paragraph probably misled the Registrar. The accounts show an estate receipt of \$5,194.18 arising from the civil suit. That figure appears to have been the gross amount recovered by the estate with no deduction for Ms. Tournier's legal fees and disbursements. The estate account also shows the amount of \$1,156.62 paid to Ms. Tournier pursuant to the contingency fee agreement. It was clear from Ms. Tournier's submissions to me that she had in fact deducted her prorated fees and disbursements prior to paying the net amount to the estate.

[19] Ms. Tournier's account shows that she paid \$1,575.07 for various advices from other lawyers concerning the estate. Her detailed accounts shows large numbers of conferences with various counsel related to advices and for which Ms. Tournier has apparently charged for her time plus some of the fees charged to her by counsel. In addition, there are large charges for photocopying, related probably as well to the obtaining of advices.

[20] Three of Ms. Tournier's accounts submitted for approval by the Registrar contained a notation, "for itemized bills see handwritten draft previously submitted"

[21] I have examined those handwritten notes and have not found them particularly helpful or explanatory. After the Registrar received the accounts from Ms. Tournier he indicated by letter of November 29th that he would, in effect, make his decision and the estate would be closed upon receipt from

her of the necessary closing documents. She replied on December 16th and pointed out that she had not charged interest on her accounts and not claimed approximately \$1,000.00 in disbursements paid to counsel, although she did say approximately 1/3 of that amount should be approved. In her submission to me and to the Registrar she indicated that she had received some faulty advice from one of her counsel.

- [22] On December 17th, 2001 the Registrar passed accounts and showed a balance for distribution to the heirs of \$21, 351.68. He allowed administrators' fees of \$1,641.96 and proctor's fees and disbursements of \$1,049.43. He had reduced the proctor's total fees and disbursements from \$14,205.39. The estate had a gross value of \$54,732.14.
- [23] A great deal of confusion followed the filing of the Registrar's decision as to the proper method of review. I need not detail that confusion, but Ms. Tournier has filed a number of affidavits supporting and attempting to explain her position.
- [24] I will attempt as best I can to relate the Registrar's decision to Ms. Tournier's affidavits and submissions. I have also referred to the running notes placed in the Probate file which I found helpful and revealing.
- [25] I will refer to various enumerated paragraphs of the Registrar's decision.
- [26] In paragraph 1 the Registrar referred to five adjournments of the closing of the estate, inferring that this was excessive and for which, he said, Ms. Tournier took responsibility. Ms. Tournier said that it was correct that there had been five adjournments, but said that only one was from an actual hearing. I have reviewed the various proceedings and the correspondence and running notes with respect to same, and I can find no acceptable reason for such delays. While Ms. Tournier said that it was not exactly correct that she had taken responsibility for these adjournments, and while some fault may possibly be attributed to the administrators, I find that it was ultimately Ms. Tournier's responsibility to prepare the estate for closing and to present the information in an organized fashion.
- [27] In paragraph 2 the Registrar complained of lack of accounting particulars. I take it that the Registrar was referring to Ms. Tournier's account. In her submission to the Registrar, with respect to her account for fees she indicated that she "... would like to have \$15,000", but would settle for \$10,000. I find this an unacceptable and surprising position. It is not for the Registrar to enter into a bargaining session with a proctor with respect to an account. In fact, I found that the accounting, as presented to the Registrar, was extremely difficult to follow and the resulting fees appeared to be well

in excess of “usual”. I will have something further to say about this matter below. It is clear, however, that Ms. Tournier was charging \$85.00 per hour, which is certainly a reasonable rate but which rate does not include clerical and stenographic expenses. The difficulty appears to have been the excessive time employed.

- [28] As well, in paragraph 2 the Registrar mentions that Ms. Tournier took an advance of \$1,263.72 from the estate with respect to the contingency fee arrangement. I agree with the Registrar that proctors should not ordinarily take advances for their fees from the estate. Nonetheless, in this particular case Ms. Tournier says, and I accept, that she had submitted to the Registrar and to other counsel the disposition of the recovery on the contingency fee action at the time of settlement. In addition, Ms. Tournier obtained court approval of the infant settlement and had duly filed a contingency fee agreement. Elsewhere Ms. Tournier’s accounting appears to show the gross recovery as an estate asset with the contingency fee shown as an expenditure. This latter method has the effect of artificially increasing the gross value of the estate upon which administrators’ commissions and proctors’ fees would be based. (I remark as an aside that the gross estate had already been inflated by the artificially high real estate appraisal, for which I attach no criticism to Ms. Tournier.)
- [29] By paragraph 3 of the Registrar’s decision, he was critical of Ms. Tournier’s failure to attend the eventual closing date of the estate on October 12th, 2001. The Registrar was justified in this criticism. In addition, he complained once again about the difficulty in following the accounts as prepared by Ms. Tournier, and with which I agree. The accounts were partly typed and partly handwritten and were received by the Registrar one half hour after the scheduled closing. In my view, that practice was inexcusable, as the Registrar and other parties ought to have been given full notice of the accounting and an opportunity to review the accounts. The Registrar proceeded as best he could with the closing of the estate and allowed the administrators’ commission at 3% of the gross value of the estate. I remark that this allowance was, perhaps, an error, as it appears that much of the work performed by Ms. Tournier would best have been described as falling within the administrators’ functions, and therefore the administrators’ commission should have been reduced and Ms. Tournier should have looked to the administrators for fees for performing their duties.
- [30] In paragraph 4 of the Registrar’s decision, he remarked that Ms. Tournier had explained that much of the delay had been caused by the settling of the

civil claim which, he said, had “little to do with the estate”. I agree with the Registrar. The amount recoverable by the estate from the civil action was always severely limited, and in my view the estate could have been closed, or a partial distribution made, without waiting for the settlement of the civil action. The Registrar also remarked that certain legal fees and disbursements relating to the civil claim had been included on the proctor’s account. I agree with the Registrar in that such fees should not have been charged to the estate, but rather, attributed to the civil action. In this paragraph, as well, the Registrar said that Ms. Tournier was “ ... effectively receiving compensation for the same services on three different occasions for the same action - the contingency agreement, the billings to the estate for the civil action, and a billing in proportion to what the estate received from the civil claim.” I cannot agree that Ms. Tournier was receiving triple fees. I do agree, however, that if Ms. Tournier was charging for services rendered in the civil action on her proctor’s account, then that would amount to double billing. Ms. Tournier says that this was a misunderstanding on the part of the Registrar and that she was in fact only paid once.

[31] In paragraph 5 of the decision, the Registrar again remarked on the payment by Ms. Tournier to herself for the amount of \$1,263.72. Ms. Tournier responded and acknowledged that she had paid herself this amount from the settlement pursuant to the contingency fee agreement. As I have remarked above, if the civil action was properly settled (and I have no reason to doubt that), then Ms. Tournier should simply have shown the net amount paid to the estate, thereby avoiding an artificial inflation of the total value of the estate. In paragraph 39 of Ms. Tournier’s affidavit of June 28, 2002 she indicated that she had provided all calculations to the Registrar with respect to the settlement in July, 2000. These were the only fees Ms. Tournier took by means of an advance, and such an advance, in these particular circumstances, appears to be justified.

[32] In paragraph 19 of the Registrar’s decision, he referred to *Re MacNeil* 43 N.B.R. (2d) 1 for the various factors to be considered with respect to a solicitor’s account. I will now refer to each of those factors.

1. The time and effort required and spent

[33] I have no doubt that the time as recorded by Ms. Tournier is accurate. I have some difficulty in agreeing that the amount of time expended by Ms. Tournier was in fact required. It seems clear that Ms. Tournier spent a great

deal of time briefing counsel and obtaining advice on matters which did not warrant the time and effort expended.

2. The difficulty and importance of the matter

[34] There were unquestionably difficult practical matters involved in this estate, but which were essentially matters which ought to have been attended to by the administrators. I have difficulty in ascribing much value to the “importance” of the various matters when one considers that the gross value of the estate was only somewhat in excess of \$50,000.00 and the amount for distribution to the heirs was in the range of \$24,000.00.

3. Whether special skill was required

[35] Ms. Tournier was retained as a solicitor presumably versed in probate matters. Other than the civil action involved, no special skill beyond that of the ordinary proctor was required. The civil action for which Ms. Tournier obtained counsel might arguably have required special skill, but ultimately those consultant’s fees were not charged to the estate. I do find, however, considerable evidence within the file that Ms. Tournier’s time and effort in briefing counsel were charged to the estate.

4. Whether the charge compared favourably with other lawyers of similar standing

[36] In this regard I have inquired about the various guidelines used by registrars of probate in certain areas of the province. While I recognize that tariffs or adjusted scales of fees are not binding in any legal sense, they are instructive as to the range of fees which the various county Bar Associations find acceptable. I have looked at the guidelines as used by the counties of Lunenburg, Halifax, Colchester, Cumberland, Cape Breton, Digby and Yarmouth, Annapolis Royal and Pictou. Generally speaking the accounts for a proctor in the handling of a “usual” estate include the following:
Preparation of application for administration, including instructions, preparing a petition, affidavit or verification, oath of office, bond and necessary attendances;

Advertising for creditors;

Completion of inventory and attendance to file and return warrant of appraisement;

Drafting petition to close including instruction and necessary attendances;

Taking a citation and service, affidavit for publication of debt notice and service of citations;

Drafting a bill of costs and attendance to tax, attendance on closing, decrees on final settlement.

[37] Additional fees are attracted by such services as:
Income tax returns;

Renunciations of administration;

Extraordinary correspondence;

Preparation of executors or administrator's accounts;

All extraordinary attendances.

[38] The only extraordinary fees attracted in this particular estate of which I am aware were those with respect to the licence to sell. I consider that an amount of \$300.00 for such a licence would be reasonable.

[39] The average of the various fees for the basic services relative to an estate of \$54,000.00 is approximately \$2,000.00. In addition to this amount should be added costs relative to the licence to sell. An allowance should also be made for representing the estate on the sale of the property in the approximate amount of \$300.00.

[40] I would consider charges of approximately \$2,600.00 justifiable in relation to fees which might be expected from "lawyers of similar standing".

5. The value of the claim

[41] This consideration is not applicable herein.

6. The results obtained

[42] The results herein consisted merely of the ultimate settlement of the estate.

7. The tariff

[43] I have referred to the various tariffs with respect to paragraph 4 above.

8. Any other special circumstances

[44] I will address this subject below.

[45] In paragraph 9 of the Registrar's decision, he refers to the channelling of money through the proctor's own trust account. In the circumstances described herein, I find no difficulty with the manner in which Ms. Tournier handled the funds. In my view a proctor is justified in using a solicitor's general trust account for such purposes as existed herein; a solicitor/executor should always operate a separate account.

[46] In paragraph 10 the Registrar refers to an "overabundance of telephone conferences and lengthy interviews re the civil action". Ms. Tournier explained her services in her various affidavits. I have concluded, however, that relative to the overall value of this estate, the number and length of the conferences and the various charges submitted by Ms. Tournier are excessive.

[47] In paragraph 11 the Registrar takes exception to photocopying in the amount of \$222.60. I agree with the Registrar. I can only conclude that much of this amount of copying must have been related to the obtaining of advices from various counsel, a subject which I have addressed above.

[48] In paragraph 12 the Registrar takes exception to the number of lawyers and law firms retained and consulted by Ms. Tournier. Ms. Tournier has indicated in her affidavits and in her time records that she did in fact spend a large amount of time briefing lawyers. She has said that she consulted five different lawyers, all experts within their fields. She also indicated that she did not claim all of the fees charged to her by the consultants. I conclude that Ms. Tournier spent excessive amounts of time in briefing outside counsel, as I have indicated above, and for obtaining advice on subjects which ought to have been within her own capabilities.

[49] In paragraph 13 of the Registrar's decision, he takes exception to her charges for Prothonotary's fees relative to the civil action. He did not allow those amounts. Ms. Tournier agrees that the account should be reduced for the amounts of the various Prothonotary's fees.

[50] In paragraph 14 the Registrar criticizes Ms. Tournier for having failed to explain to the administrators their various duties. Ms. Tournier denied this particular allegation and said that she had in fact given the administrators certain Continuing Legal Education papers or Mr. Vincent Allen's book with respect to administration of estates. On the other hand, it is apparent from reading the file the administrators complained to the Registrar that Ms.

Tournier had not instructed them properly on their duties and methods of bookkeeping. I conclude that the administrators did not understand fully their role, resulting ultimately in extra expenses to the estate. That expense ought to have been borne by the administrators, not the heirs.

- [51] In paragraph 15 of the Registrar's decision, he quotes with approval the decision of Scanlan J. in *Re Yuill Estate*, [1994] N.S.J. No. 575. I agree with the Registrar that Justice Scanlan's remarks are applicable herein.
- [52] In paragraph 16 the Registrar points out that fees and disbursements in the amount of \$14,205.00 is 26% of the gross value of the estate, which appears unquestionably to be unreasonably high. He goes on to point out that in the period in which the estate was opened, it suffered a net loss of \$14,633.00 and attributes some of that loss apparently to the delays incurred in the administration of the estate. I do not conclude that the loss can be attributable to the proctor. It is clear that the initial appraisal of the value of the house was unrealistically high. That not only caused a delay but also resulted in a fictional loss to the estate. The delay in recognizing that the appraisal was unrealistically high and the delayed sale of the house remains unexplained, but I cannot attribute those facts solely to the proctor.
- [53] In paragraph 18 the Registrar complains that six years for the administration of this particular estate was excessive. Ms. Tournier claims that the delays were caused in part by having to obtain a licence to sell the real estate and the settlement of the civil claim. I find that neither of these reasons for delaying the closing of the estate is fully acceptable. I do not understand why obtaining the licence to sell the property took the time it did. I do not accept that it should have required "years of efforts" to obtain a settlement of the parent's civil claim; nor do I accept that the settlement of that particular aspect of the claim ought to have impacted negatively upon the estate.
- [54] In all the circumstances apparent within this file, and having reviewed the Registrar's decision, I conclude that Ms. Tournier is entitled to an amount somewhat in excess of the various guidelines to which I have referred. I approve her solicitor's costs in the total amount for all services rendered in the amount of \$4,000.00 plus the disbursements as approved by the Registrar.
- [55] On October 1st, 2001 the Probate Court appointed Denise E. Perry guardian of Lacey Jade Perry-Faye. (I do note, however, that the letter of guardianship issued by the Registrar is addressed to John and Lottie Faye and this document appears to require some amendments.)

- [56] At the request of Ms. Tournier, I approve the bond of guardianship as submitted by Denise Perry and as guaranteed by Jane I. Perry and Gordon Murray Perry.
- [57] The Registrar has forwarded to Ms. Tournier his account in the amount of \$200.00 being the closing fees payable at the time of closing. I direct that Ms. Tournier shall pay that account but shall be entitled to recovery of same from the estate.

J.