

SUPREME COURT OF NOVA SCOTIA
Citation: *O'Brien Estate (Re:)*, 2016 NSSC 287

Date: 2016-10-25
Docket: Probate K/K 13131
Registry: Kings/Kings

Between:

Estate of Stephen Charles O'Brien

-and-

Casi Langille, personal representative of the
Estate of Stephen Charles O'Brien

-and-

John Hepworth, alternative personal representative
of the Estate of Stephen Charles O'Brien

-and-

Tyrone Thompson, Applicant

Judge:

The Honourable Justice Gregory M. Warner

Heard:

August 25, 2016, in Kentville, Nova Scotia

**Final Written
Submissions:**

September 29, 2016

Counsel:

Trinda Ernst Q.C., for Casi Langille, personal representative of the
Estate of Stephen Charles O'Brien
Emily Racine with Richard Norman, for John Hepworth
Sarah Nicholson with Sarah Walsh, for Tyrone Thompson

By the Court:

[1] This is a cost decisions for three related applications, made in respect of the Estate of Stephen O'Brien, who died unexpectedly on August 1, 2015, at Wolfville, Nova Scotia.

Background

[2] Stephen O'Brien, the testator, a retired Canadian citizen, born in Montreal moved to the Bahamas sometime before 2012. There he met Tyrone Thompson ("Thompson"), who worked at a restaurant where the testator often ate. In 2012, the testator purchased a home in the Bahamas. The home was broken into. The testator had mobility issues. He asked and received assistance from Thompson and a friend Mr. Smith. Eventually he asked Thompson and Mr. Smith to move into his home. Thompson helped around the home for free room. Thompson continued his employment at the restaurant, which was his only source of income.

[3] During this time, the testator was in a relationship with Casi Langille of Hantsport, Nova Scotia. Each maintained their own residences and separate finances, but visited each other and spent extended periods of time with each other.

[4] The court accepted the evidence of Thompson and Langille that on or about March 2014, the testator offered to pay Thompson's way to Acadia University for a four-year degree and to provide him with an apartment in return for Thompson assisting the testator in his daily tasks, as he was doing in the Bahamas. The testator initiated the offer because he liked Thompson, considered him to be intelligent and wanted to do something good.

[5] Thompson accepted the offer. Sponsored by the testator, Thompson obtained a student VISA from the Government of Canada and was accepted into Acadia University for the 2014–15 academic year. The testator and Thompson moved into an apartment that the testator rented in Wolfville. The testator paid all of Thompson's university costs and most of his living expenses during the 2014–15 year. At the end of the April 2015 school term, Thompson returned to the Bahamas for the summer intending to return for his second year, and Ms. Langille arranged for a caregiver to assist her in providing the care to the testator that was being provided by Thompson, until Thompson's return.

[6] On June 24, 2015, in preparation for Thompson's return, the testator directed Ms. Langille to prepare a cheque to Thompson for \$19,747 to cover his 2015–16 university fees and to give the cheque to him upon his return. On August 1, 2015, a few days before Thompson's return to Nova Scotia, the testator died. He was about 53 years old.

[7] The testator's will, dated October 23, 2014, in brief named Casi Langille as his personal representative, and a Montreal childhood friend, John Hepworth, as her alternative. It left his estate in trust for his son, to be paid to him when he attained the age of 25 years.

[1] It appears that the testator, who had family, was not close to his family.

[2] It appears that the testator's family did not have a relationship, or at least a good relationship, with Ms. Langille or Thompson. Neither Ms. Langille nor Thompson were invited to the testator's funeral and the testator's family attended at the Wolfville apartment and cleaned out the apartment, including some of Ms. Langille's property.

[3] Probate was granted to Ms. Langille on October 5, 2015.

[4] Mr. Hepworth, on behalf of the testator's family, complained about her handling of the testator's estate and discussed her resignation as personal representative. Ms. Langille had, among other things, honoured the testator's June 2015 cheque by forwarding it to Thompson after the testator's death and she continued to provide support to Thompson during his second academic year.

[5] Four applications were filed in respect of this estate:

1. Thompson filed a claim to have the estate honour the testator's commitment to pay for his four-year education at Acadia University.
2. Ms. Langille applied to be discharged as personal representative of the estate and to have her accounts approved to date, including her payments to Mr. Thompson.
3. The testator's landlord made a claim for rent and damages.
4. Mr. Hepworth applied to replace Ms. Langille as personal representative of the estate. This was not contested.

[6] Ms. Langille supported Thompson's claim. Mr. Hepworth was given permission by the court, on behalf of the residual beneficiary, to contest both Thompson's claim, and Ms. Langille's request for approval of her accounts and discharge without further liability to the estate.

[7] At the motion for directions held in court on May 3 and continued on May 18, 2016, the landlord's application was set for hearing on August 22 and the remaining three related claims were set for hearing on August 25 and 26, 2016.

[8] The landlord's claim was settled out of court on or about August 19, 2016. The other three applications were heard on August 25, 2016, at the end of which an oral decision was given.

[9] In an oral decision on Thompson's claim, the court determined that the estate was liable for his university costs for the academic year 2015-16 and, so long as he remained a full-time student, for the year 2016-17, but the estate was not liable for his claim respecting a fourth academic year.

[10] As a result of that decision, the application of Mr. Hepworth to have Ms. Langille reimburse the estate for the \$19,747 cheque advanced by her to Thompson after the testator's

death was dismissed. By the time of the hearing, that was the only contest respecting her accounts that was to be determined by this court.

[11] Mr. Hepworth's uncontested application to be appointed as personal representative to replace Ms. Langille was approved.

Submissions

[12] Ms. Langille seeks legal costs, respecting her application to be discharged without personal liability for the Thompson cheque or other payments she had made from the estate while acting as personal representative, to be paid on a solicitor-client basis, to be taxed by the Registrar of Probate in the usual fashion by the Proctor.

[13] Ms. Langille represents that she was successful in defending Mr. Hepworth's application on behalf of the residual beneficiary, that she had waived her entitlement to a commission for acting as personal representative, and that her counsel should be paid reasonable solicitor and client costs out of the estate. That is, Ms. Langille should not be out of pocket for fulfilling her personal representative duties, for which she was found not to have not acted improperly.

[14] Alternatively, Ms. Langille, applying the analysis of this court in *Keddy v Keddy Estate*, 2016 NSSC 194, seeks costs against the estate in the amount of \$6,000. This is based on the court's determination that the amount involved was \$20,000 and that Tariff A should apply. This means \$4,000 Tariff A (basic scale), plus \$2,000 for each day of the hearing.

[15] Mr. Hepworth submits that Ms. Langille should be awarded \$2,000.00 on the basis of Tariff C, and the issue of Thompson's entitlement was primarily carried by him.

Analysis

[16] Counsel for the personal representative was required to attend twice for the motion for directions, file six affidavits and a pre-hearing brief, and attend a hearing in respect of the three applications on August 25th. She was required to review the application, affidavit and brief of Thompson, and the affidavit and brief filed on behalf of Mr. Hepworth. Reasonable party-and-party costs, based on Tariff A, Scale 2 (basic scale) for a claim under \$25,000 is \$4,000, to which is added \$2,000 for each full day of hearing.

[17] The Proctor of the estate, who acted for Ms. Langille, has not provided an estimate of her reasonable solicitor-and-client costs to Ms. Langille in respect of the three applications heard on August 25, 2016.

[18] I conclude that the Proctor should be able to tax her costs for services to the estate as Proctor, on a solicitor-and-client basis, to be taxed by the Registrar of Probate in the usual manner with respect to everything except those services provided directly in respect of the three applications.

[19] Absent an agreement with respect to her costs for those services or any evidence of what her reasonable solicitor-and-client costs were, it is appropriate that her application costs should be determined by the court in this decision. As noted, in respect of the three applications heard August 25th, Ms. Langille's counsel had to file her application to be discharged and have her accounts approved; attend twice for the motion for directions; prepare six affidavits of Ms. Langille; review Thompson's application, affidavit and brief; review and respond to Mr. Hepworth's application, affidavit and brief; and attend a full-day hearing.

[20] Counsel for Mr. Hepworth says Tariff C should apply and costs should be awarded for \$2,000.

[21] Tariff C applies to chambers motions. These applications were not chambers' motions. Tariff A applies to "a decision or order in a proceeding". These applications in Probate Court proceeded in a similar manner to Applications in Court. There were substantial issues of facts. The proceedings resulted in a final determination of the issues in dispute. Tariff A is the proper tariff.

[22] Applying Tariff A, I determined that the "amount involved" was \$20,000. There was nothing unusual about the nature of the proceedings; therefore, Scale 2 is the appropriate scale. The hearing lasted a full day.

[23] Ms. Langille was successful on all of the issues upon which she was challenged by Mr. Hepworth on behalf of the residual beneficiary. She should have her costs of the three applications in accordance with Tariff A, the basic scale (\$4,000) plus \$2,000 for one full day of hearing, plus her reasonable disbursements, in respect of those applications, against the estate.

[24] This is not intended to limit the Proctor from taxing any other services she provided as Proctor of the estate while Ms. Langille was personal representative in the usual manner before the Registrar of Probate.

Warner, J.