

SUPREME COURT OF NOVA SCOTIA
Citation: Smith v. Smith Estate, 2013 NSSC 239

Date: 20130723
Docket: Hfx. No. 387586
Registry: Halifax

Between:

Joy Smith

Applicant

v.

Royal Trust Corporation of Canada, Executor and Trustee of the Last Will and
Testament of Gladys Mae Smith, deceased

Respondent

- and -

IN THE COURT OF PROBATE FOR NOVA SCOTIA

Date: 20130623
Docket: K(H) No. 7535 (411420)
Registry: Kentville

Between:

Probate Court of Kentville

Plaintiff

v.

The Estate of Gladys Mae Smith

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: March 6, 2013, in Kentville, Nova Scotia

Counsel: Timothy C. Matthews, Q.C., for the Respondent
Roland Pensrinukun, on his own behalf

By the Court:

[1] This matter came before me in Supreme Court, at Windsor, Nova Scotia, on Wednesday, March 6, 2013. Counsel for the corporate Executor and Trustee, Royal Trust Corporation of Canada, and Mr. Roland Pensrinukun, the principal beneficiary named in the Last Will and Testament of the Late Gladys Mae Smith, agreed that all accounts for legal fees and disbursements associated with the probating of the Estate of the Late Gladys Mae Smith and the additional legal expenses incurred in responding to an application brought by the late Mrs. Smith's daughter - Joy Smith - under the *Testator's Family Maintenance Act*, R.S.N.S., c. 465, would be taxed.

[2] The claim made by Joy Smith under the *Testator's Family Maintenance Act* was eventually settled thereby avoiding a Court hearing. A Consent Dismissal Order was issued out of this Court on October 5, 2012. The applicant agreed to abandon her claim without costs to either party. To reach this settlement, the Executor/Trustee, which had a duty to defend the claim, incurred legal expenses totalling \$37,456.53 inclusive of disbursements and HST. The four accounts that make up this total remain unpaid.

[3] The legal fees associated with the probating of the Estate consisting of three separate accounts totalling \$11,067.98, inclusive of disbursements and HST, have been submitted to the Estate's Executor/Trustee. All these accounts have been paid, in full.

[4] The Estate lawyers have requested that all accounts tendered to date, paid or unpaid, be taxed.

[5] Royal Trust Corporation of Canada does not object to the accounts as presented. Roland Pensrinukun, acting on his own behalf, takes a contrary position. He is very much opposed to the legal fees being claimed which, if allowed, would likely lead to the sale of the Estate's principal asset, the home in which his grandmother resided prior to her death - a home which apparently he has great deal of emotional attachment to.

[6] Much of the criticism directed towards the Estate's lawyers relate to the fees incurred in responding to the claim made by the Testatrix's daughter - Joy Smith - under the *Testator's Family Maintenance Act*. Mr. Pensrinukun suggests that too

much time was directed to the discovery hearing and to telephone conversations between lawyers for Ms. Smith and lawyers for the Estate. He also suggested that the claim could have been dispensed with simply by bringing a Motion for Summary Judgment prior to discoveries.

[7] Mr. Pensrinukun's concerns are understandable given the high costs incurred. Litigation costs can sometimes be onerous and even successful parties who would normally expect to be paid costs end up having to cover a significant share of their own legal expenses.

[8] In this particular instance the claim was settled without costs leaving it to the Estate to bear all its own legal costs without contribution from the unsuccessful applicant. Holding out for costs was felt to be a risk that might have resulted in even more money being spent than could reasonably be expected to be awarded by way of a cost contribution from the opposing side. This is a decision that the Executor/Trustee has full authority to make. I am satisfied that it was made in good faith with the intention of benefiting the Estate, its' creditors and the beneficiaries. I am not prepared to second guess the decision.

[9] I will now turn to the bills that have sent to the Executor and Trustee, Royal Trust Corporation of Canada, for payment.

NORMAL PROBATE ADMINISTRATION LEGAL WORK:

[10] A series of three separate accounts have been submitted to the Executor/Trustee totalling, to date, \$11,067.98. These three accounts have all been paid and are not being challenged by the Executor/Trustee.

[11] They include amounts for time obtaining and providing documentation pertaining to the deceased testatrix's medical condition prior to her demise. This was provided to lawyers for Joy Smith to discourage a challenge to the Will based on the testatrix's mental competence and an allegation of undue influence. These allegations were floated prior to the decision to advance a claim on behalf of the testatrix's daughter under the *Testator's Family Maintenance Act*.

[12] The particulars of these three accounts are as follows:

<u>Date</u>	<u>Particulars</u>	
(i) October 26, 2011	Fees -	\$3,250.00
	Disbursements -	\$ 182.33
	HST -	<u>\$ 514.85</u>
	Total =	\$3,947.18
(ii) December 19, 2011	Fees -	\$3,150.00
	Disbursements -	\$ 313.78
	HST -	<u>\$ 509.22</u>
	Total =	\$3,973.00
(iii) January 25, 2012	Fees -	\$2,625.00
	Other Charges -	\$ 90.05
	Disbursements -	\$ 22.17
	HST -	<u>\$ 410.58</u>
	Total =	\$3,147.80

[13] According to counsel for the Estate of the fees charged on this latter bill “is based on 0.8 hours of my time and 34.9 hours of the articulated clerk’s time at \$130 per hour. In fact, the clerk’s time and charges were reduced from \$4,537 to \$2,268, as I concluded that some of the time spent did not provide good value for the client. Much of this work involved organization of the files received from the various hospitals and the many doctors who treated Mrs. Smith, so that disclosure could be made. These documents were organized and bound in index volumes, in case the matter proceeded to court.” [Extracted from correspondence to the Registrar of Probate dated January 15, 2013].

[14] As indicated earlier, this preparatory work was done when there was talk of a challenge to the Will’s validity.

[15] I am satisfied that this additional work was necessary and given the subsequent application made by Joy Smith under the *Testator’s Family Maintenance Act* combined with the reduction in potential fees from \$4,537 to \$2,268 (a \$2,269 reduction) the amounts charged on these three invoices which includes amounts for

legal fees, other charges, disbursement and applicable taxes totalling \$11,067.98 should be allowed. I, therefore, tax and approve these bills as presented and paid.

ADDITIONAL LEGAL WORK ARISING FROM THE APPLICATION BROUGHT BY JOY SMITH PURSUANT TO THE *TESTATOR'S FAMILY MAINTENANCE ACT*:

[16] A series of four invoices were presented to the Executor/Trustee, all of which pertain to the Application brought on behalf of Joy Smith under the *Testator's Family Maintenance Act*.

[17] The particulars of these bills are as follows:

<u>Date</u>	<u>Particulars</u>	
March 28, 2012	Fees -	\$ 5,500.00
	Disbursements -	\$ 166.42
	HST -	<u>\$ 849.97</u>
	Total =	\$ 6,516.39
June 7, 2012	Fees -	\$ 4,850.00
	Other charges -	\$ 34.95
	Disbursements -	\$ 18.02
	HST -	<u>\$ 735.45</u>
	Total =	\$ 5,638.42
August 8, 2012	Fees -	\$16,900.00
	Disbursements -	\$ 1,545.59
	HST -	<u>\$ 2,766.84</u>
	Total =	\$21,212.43
October 4, 2012	Fees -	\$ 3,550.00
	Disbursements; -	\$ 5.90
	HST -	<u>\$ 533.39</u>
	Total =	\$ 4,089.29

[18] These four invoices amount to \$37,456.53. When combined with the three other invoices submitted for what has been described as “normal probate administration work” the total comes to \$48,524.51.

[19] On top of this the corporate Executor/Trustee has calculated its fees to be \$11,316.28 based on a formula whereby it charges varying percentages of the value of the assets being administered.

[20] Together the charges to administer the Estate and to defend it from the claims of the Testatrix’s daughter add up to \$59,845.79.

[21] The estimated value of the Estate assets is only \$222,706.36 according to a draft document prepared by Royal Trust Corporation of Canada dated July 29, 2011. This includes an estimated value of \$175,000 for real estate.

[22] Additional probate work must still be done in order to pass the Executor’s accounts and to close the Estate. No doubt this will result in additional legal and Estate closing fees in the thousands of dollars.

[23] I realize the Executor/Trustee had little choice but to retain counsel to open the Estate and to administer the Estate’s assets and also to defend the Estate from what turned out to be a meritless claim by the Testatrix’s daughter.

[24] Indeed, the major component of legal fees and disbursements is attributable to the litigation that resulted in complete success for the Estate save for the lack of contribution by the unsuccessful applicant to the legal fees incurred by the Estate in defending against her claim.

[25] The Estate’s principal beneficiary, Mr. Pensrinunkun, feels that the matter could have been disposed of by way of a summary judgment motion which could have avoided a significant amount of the legal expenses incurred. He also alleges that legal counsel needlessly ran up the bill by engaging in settlement discussions with opposing counsel and by participating in discovery hearings.

[26] I do not accept either of these contentions. I have no hesitation in accepting that the legal work performed in defending against the claim advanced by Mr. Pensrinukun’s aunt was necessary.

[27] Having said this, the overall amount charged, given the overall value of the Estate, seems out of proportion. I realize that litigation can be expensive but the fees charged cannot always be based on the time expended. While there was success in this particular case, I am of the view that legal fees totalling \$30,800.00 is high.

[28] I will, therefore, tax the four yet to be paid, accounts at \$22,500.00 (a reduction of 26.95%). All disbursements and other charges are taxed and approved as presented. HST will have to be adjusted accordingly.

[29] I ask counsel for the Estate to prepare an Order reflecting this decision.

McDougall, J.