SUPREME COURT OF NOVA SCOTIA
Citation: *Atlantic Jewish Foundation v. Leventhal Estate*, 2018 NSSC 147

Date: 20180627
Docket: Hfx No. 470775 (H-63083)
Registry: Halifax

Between:

Atlantic Jewish Foundation

Appellant

v.

The Estate of the late Abraham (Abe) Leventhal through its Executor and Trustee, Alan J. Stern

Respondent

DECISION ON MOTION
Hearing *De Novo* or Appeal and Admissibility of Graham Affidavit

Judge: The Honourable Justice Jamie Campbell

Heard: May 31, 2018, in Halifax, Nova Scotia

Counsel: Timothy Matthews Q.C., for the Appellant
Gavin Giles Q.C., for the Respondent

By the Court:

[1] This matter arises in the context of a dispute between the Atlantic Jewish Foundation ("AJF") and Alan J. Stern Q.C. Mr. Stern is the Executor and Trustee of the Estate of Abraham Leventhal. The AJF is a beneficiary under the will. The organization objects to the amount of the commission charged by Mr. Stern. Mr. Leventhal's estate was substantial. It has assets that are now valued at almost $18 million. Mr. Stern's commission as approved by the Registrar of Probate was $896,692.43. The AJF says that a reasonable commission would be substantially lower and it has appealed the decision of the Registrar.

[2] At this stage, the issues to be resolved are procedural. The AJF argues that an appeal from the Registrar's decision should be heard and considered *de novo.* That means that the case is treated as if it were being heard for the first time. Mr. Stern's counsel says that it is an appeal. Because it is an appeal a deferential standard of review should be applied. That is especially true when reviewing the decision of a specialized decision maker, like the Registrar of Probate. The AJF wants to file additional evidence and wants to file the affidavit of Lawrence Graham Q.C. which contains Mr. Graham's review of his experience in Probate Court matters as it relates to commissions approved for executors in large estates. Mr. Stern's counsel objects to the admission of that evidence.

Hearing *De Novo* or Appeal

[3] The statutory basis for the appeal is found in s. 93 of the *Probate Act* SNS 2000, c. 31. A party who is "aggrieved" by an order or decision of the Registrar of Probate may appeal from that decision to a judge. On the appeal, "where the judge thinks fit", the parties may adduce the same evidence that was before the registrar and any "further or other evidence". The judge may confirm, vary or set aside the order or decision appealed from and "make any decree, order or decision which the registrar should have made". The judge may rescind, set aside, vary or affirm the order or decision appealed from, or make any decision that the registrar "could have made."

[4] If the appeal were in the form of an appeal from the decision of an administrative decision maker to whose findings deference is accorded, that appeal would be based on the record before the decision maker. Instead, the legislation specifically provides that the judge may rehear the evidence that was before the registrar, and may hear more evidence. The section allows the judge to make any

decision that the registrar "should" or "could" have made. That is not the typical language of deferential judicial review.

[5] It has been argued on behalf of Mr. Stern that the court should not interpret the authorities that have reached the conclusion that a hearing *de novo* is contemplated by the statute as requiring a hearing *de novo* in every case. Justice Moir's decision in *McInnes Cooper v. Moncel Estate*[1] is argued to have simply adopted the determination made by Justice Gruchy in *Faye Estate*[2] "without any critical analysis". In *Moncel Estate* Justice Moir dealt with an appeal from the registrar's decision setting the amount of the executor's commission. He followed *Faye Estate* in concluding that the appeal was by way of a *de novo* hearing. He noted that subsection 93(2) provides that where the judge think fit, the parties may adduce the same evidence that was before the registrar and further or other evidence. The appeal is not a review. The matter is "decided afresh" and the hearing is more like a "first instance determination than appellate review."[3]

[6] The wording of the section is as Justice Moir interpreted it. The judge may decide the case without hearing any further evidence. The judge may hear the same evidence that was before the registrar. And the judge may hear more evidence. That is a matter for the exercise of judicial discretion. The judge can then make any decision that the registrar could or should have made. Justice Moir's statement that it is "more like a first instance determination than an appellate review" acknowledges the nuances. A judge may decide that no further or other evidence should be heard. It makes sense that there should be some deference accorded to the findings of fact and assessments of the credibility of witnesses made by the Registrar of Probate when the judge has not heard evidence on the appeal.[4] The process is still more like a first instance determination than a search for error.

[7] This is a case in which discretion should be exercised to hear further evidence. The procedural history is particularly relevant. The Executor filed an Application to Pass Accounts Without a Hearing on September 14, 2017. The Executor's Accounts and Statement of Commission Sought were to be reviewed by the Registrar of Probate on November 14, 2017. The AJF filed a Notice of Objection to Accounts on November 1, 2017. A written argument was filed. When

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[1] 2012 NSSC 195
[2] 2002 NSSC 242 appeal dismissed, 2003 NSCA 97
[3] *Moncel Estate* at para. 6
[4] *Power Estate* 2007 NSSC 126

counsel for the AJF attended for the hearing he was anticipating a hearing at which he would have an opportunity to cross-examine the executor and make oral submissions. He was told that there was no hearing scheduled because the matter in dispute related only to the executor's commission. The Registrar then issued the Order Passing Accounts.

[8] The Probate Court Practice, Procedure and Forms Regulations, NS Reg 119/2001 set out three procedures for passing of Executor's Accounts. With consent of the beneficiaries they may be passed without an accounting. The passing of accounts may be done without a hearing. Or it may be done with a hearing. Regulation 58 provides that when a Notice of Objection is filed, as it was in this case, the application to pass the accounts shall proceed by a hearing. There was no hearing. There is no provision that would permit a "hearing" to be interpreted as "paper hearing" involving the exchange of written materials with no actual appearance before the Registrar. Because there was an objection and no hearing before the Registrar that strongly favours the hearing of evidence on the appeal.

Admissibility of Graham Affidavit

[9] The AJF seeks to have admitted the affidavit of A. Lawrence Graham Q.C. The affidavit is said to have two purposes. The first is to provide the standard executor commission fee agreements used by five trust companies. The second is to indicate current Probate Court practice based on Mr. Graham's experience before registrars of the court. The AJF says that the information contained in the affidavit is not opinion evidence but objective facts and evidence of usual practice provided by a person who is an expert in the field.

[10] Counsel on behalf of Mr. Stern has argued that the affidavit is not admissible. The argument is that Mr. Graham has not displayed the objectivity required of an expert whose role is to provide an objective and unbiased opinion. Questions surrounding an expert's impartiality address admissibility and not only the weight to be given the evidence.[5] A court is required to assess the expert's display of analytical comprehension, fairness, objectivity, and non-partisanship with a view to deciding whether the threshold for admissibility has been met. It has been argued on behalf of Mr. Stern that the Graham affidavit has missed the threshold test for admissibility "by a wide margin indeed". The affidavit is

[5] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182

described as advocacy which should be rejected because it lacks balance and is incomplete.

[11] The affidavit is described as a "quintessentially one sided analysis" that has "completely ignored any possibility of there being legitimate legal and factual underpinnings" for the registrar's decision. The objectivity displayed by Mr. Graham is questioned. Whether his "fundamental approach to his analysis was consonant with his obligation to provide independent assistance to the Court by way of objective and unbiased opinion" was questioned. Mr. Graham's observation that registrars employ lower percentages on larger estates which then result in generous commissions that will adequately compensate executors, is argued to be an opinion that is "totally and completely without any foundation whatsoever." Counsel says that while Mr. Graham claims that this represents "common sense and arithmetic" it is the opinion that "lacks common sense". They say that Mr. Graham's "narrow opinion" demonstrates "acutely that his mind was closed" as to the possibility that the executor's commission was justified. The brief filed on behalf of Mr. Stern (dated May 17, 2018) states at para. 174:

> Mr. Graham, Q.C. also openly, some might suggest brazenly, invites This Honourable Probate Court in these proceedings to follow suit with his opinion. Such an approach, however, is improper in that it purports to opine on the very same issue that This Honourable Probate Court may be called upon to decide: the magnitude of Mr. Stern Q.C.'s Executor's Commission in these proceedings.

[12] Given that it has been argued that "some", whoever they may be, might characterize Mr. Graham's affidavit as offering a "brazen" invitation to the court, the document, which was signed by an officer of the court, should be examined in search of some substantiation for that assertion.

[13] The affidavit is 2 pages long and was sworn on March 27, 2018. It consists of 17 paragraphs and attaches 5 exhibits. It is hardly a model of tendentiousness. Those who would claim to see anything at all brazen about it would, with respect, have a lot of explaining to do.

[14] The first 6 paragraphs identify Mr. Graham, his source of information and refer to his being recognized in one matter, as an expert witness in estate practice. Paragraph 6 states that it is not unusual for an executor of a modest estate to be awarded the maximum commission of 5%. None of those things are controversial. Or at least one might expect that to be the case.

[15] Paragraphs 10, 11, 12, 13, and 14 attach fee agreements used by trust companies and in those paragraphs Mr. Graham calculates the amount of commission that would be due for an $18 million estate applying the percentages in each of those agreements. That is the kind of information that could be attached to the affidavit of a non-expert witness who contacted the companies to get copies of their forms. It involves the application of basic arithmetic.

[16] In para. 15 Mr. Graham says that in his experience trust companies offer further discounts if assets are held at the institution or at a parent company of that institution. For very large estates, trust companies would be open to negotiating even lower fees. In para. 16 Mr. Graham says that in the absence of a fee agreement it is very common for an executor to approach residuary beneficiaries to discuss what would be an appropriate commission. In the final paragraph, Mr. Graham says that a professional executor and trustee would advise the residuary beneficiaries of the usual Probate Court practice and would seek a commission consistent with that practice. Once again, those statements are based on Mr. Graham's experience but do not offer opinions on the ultimate issue in this matter. They are observations that may be contested.

[17] The only parts of the affidavit that approach offering an opinion are paras. 7, 8 and 9. In para. 7 Mr. Graham says that for very large estates, "typically" with values over $1 million, registrars have "usually" awarded a lesser percentage as a commission. That recognizes that compensation must be fair and reasonable. "Usually" does not mean always. And Mr. Graham makes no statement as to whether this case is "usual". Mr. Graham does not provide a review of large estates and the amounts of commissions awarded in each case. The size of the estate is not the only factor used in assessing commission. Some smaller estates may be very complicated and some larger estates may be straightforward despite their size. Whether that observation is born out on a review of probate files, may be a real question.

[18] In para. 8 Mr. Graham says that the correlation of higher values to lower percentage commissions, in his "opinion" simply reflects common sense and arithmetic. It may do, but whether Mr. Graham believes that the practice that he has observed reflects common sense and arithmetic is not really an issue.

[19] At para. 9, Mr. Graham says that professional executors and trustees are aware of the Probate Court practice regarding executors' commissions. Trust companies enter into compensation agreements with individuals who wish to

appoint the company as executor. Mr. Graham says that in his "experience" these compensation agreements reflect Probate Court practice and "are indicative of the fair market value of executor services." That statement does represent an opinion as to "fair market value" for services provided by trust companies. The fair market value of services addresses the concerns of trust companies in a competitive environment. There may well be a challenge to whether that assessment is within Mr. Graham's expertise and whether it is even relevant in the context of a private executor.

[20] The issue at this stage is not the weight to be given the affidavit of Mr. Graham. It is whether it can be admitted at all. To the extent that it is an expert opinion it must meet the standard of threshold reliability. To the extent that it contains "fact evidence" as distinguished from opinion evidence it can be admitted and given the proper weight in the final analysis. A person who is an expert practitioner may offer fact evidence that relates to that practice. It will not be treated as expert opinion evidence.[6] This affidavit contains a bit of both.

[21] The issue then is whether the portions of the affidavit that express opinions are so unreliable that the affidavit should not be admitted as evidence. There is no evidence whatsoever that Lawrence Graham Q.C. was partial, was not independent, or was biased. There was no allegation of, or evidence of, impropriety in the way the affidavit was prepared. There was no question at all as to Mr. Graham's expertise which was acknowledged to be very substantial. The affidavit does not offer an opinion on the ultimate issue. Mr. Graham does not purport to assess the complexity of the Leventhal Estate. He does not comment in any way upon the efforts made by Mr. Stern as the executor. He does not say what he would propose as a reasonable commission on the facts of this case. Mr. Graham offers an opinion with which counsel for Mr. Stern vehemently disagrees. That does not make Mr. Graham an advocate for the other side. Counsel may challenge the accuracy of the observations and opinions. It may be that the information contained in the affidavit can be shown to be wrong. That does not make the affidavit inadmissible.

[22] The AJF has been successful in this preliminary motion. The *de novo* hearing will proceed on November 15 and 16, 2018 and the Graham affidavit is

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[6] *Silver Sands Realty Ltd. v. Nova Scotia (Attorney General)* 2007 NSSC 292

admissible. Costs of $1,000 are awarded, payable at the conclusion of the proceedings in any event of the cause.

Campbell, J.