Claim no. 298115

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Burchell MacDougall v. Mansfield, 2008 NSSM 67

BETWEEN:

BURCHELL MacDOUGALL

Claimant

- and -

WINNIFRED HELEN MANSFIELD

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on August 18, 2008

Decision rendered on September 5, 2008

APPEARANCES

For the Claimant Stephanie Atkinson, solicitor

For the Defendant David Mansfield (power of attorney)

BY THE COURT:

[1] The Claimant law firm seeks payment of a balance owing on its legal accounts in the amount of $5,901.65, for services rendered from November 13, 2007 through mid-January 2008.

[2] The quantum of the bills is not contested, and I did not engage in a taxation *per se*. The sole issue is whether the Defendant should be liable to pay for these legal services which were performed at a time when she was suffering from the early stages of dementia.

[3] The Defendant herself did not attend the trial, quite appropriately, given her advancing condition and the medical evidence to the effect that direct involvement in this proceeding would likely only cause her anxiety.

[4] The legal position of the Defendant as now conveyed by her son and ostensible current power of attorney, David Mansfield ("David"), is that the expense should be borne by another of her sons, Grant Mansfield ("Grant"). The allegation is that the Defendant lacked legal capacity at the time she was brought to the Claimant's office and changed her power of attorney to empower Grant.

[5] Stephanie Atkinson ("Atkinson") is a lawyer at the Claimant firm. She was contacted on November 13, 2007 by Grant, who informed her that the Defendant wished to change her power of attorney. Atkinson came quickly to learn that there was significant bad blood within the Mansfield family. There were multiple allegations of financial irregularities circulating within the family. As of that date the current powers of attorney were ostensibly

the Defendant's sons David and Neil, and Atkinson was told that the Defendant did not wish to have them as her attorneys.

[6] I refer to the power of attorney in favour of David and Neil as "ostensible" because it was of fairly recent origin, having been created in August of 2007 by lawyer Robert Hines. All of the questions that have been raised about the Defendant's capacity in November 2007 could equally be raised about her capacity in August 2007.

[7] Upon her entry into the situation in November 2007, Atkinson became immediately aware that there were real issues surrounding the Defendant's competence. She understood that she required medical information before proceeding with any changes to the Defendant's legal arrangements. She also made certain to spend a significant amount of time with the Defendant outside the presence of Grant.

[8] Before too long Atkinson began fielding calls and correspondence from other members of the family and/or their lawyers, cautioning her about making changes given the Defendant's dementia.

[9] Atkinson described the Defendant as someone who, despite her early dementia, was still very lucid and oriented. She was still living alone and looking after herself. Atkinson had done some legal research to fully inform herself about the legal test for competence. In the end, she was satisfied that the Defendant was competent and sincerely wanted to remove David and Neil as her attorneys and appoint Grant in their place.

[10] I received in evidence letters and records from physicians and others speaking to the Defendant's medical status at or around the time the power of attorney was changed. It is sufficient for my purposes to say that there is clearly evidence that the Defendant was suffering from a degree of cognitive impairment at the time, but what impresses me significantly is that this woman was living on her own and looking after almost all of her own needs, and that she continues to do so up to this time. She was still driving a car to perform errands until sometime in late October 2007 when her licence was suspended because of medical concerns. Her relatively new physician, Dr. Deliu, had assessed her condition in August 2007 and found her to be confused, but attributed this in part to probable medication errors. Those medications had been to an extent, at least, straightened out by November, and it appears that there was not the same level of confusion that had existed in August.

[11] It is both trite law and common sense that a person does not become legally incompetent to manage his or her affairs, or to give a valid power of attorney or execute a will, upon the earliest onset of dementia or Alzheimer disease. The mere application of a diagnostic label does not put a freeze on a person's ability to make decisions and act on his or her own behalf. I also take notice of the fact that someone can be confused and disoriented one day and lucid the next day. The progression of a dementia illness seems to be that the periods of confusion and disorientation become longer while the windows of lucidity become shorter.

[12] Lawyers are entrusted with an obligation to be satisfied that the person wishing to perform a legal act is competent at the time they are seeking to perform that legal act. There are bound to be clear cases of competence

and incompetence on either side of the line. And there are bound to be close cases where it is more a matter of judgment. In a close case, it is expected that the lawyer will take the necessary time to be as sure as she can be that the right call is being made. Atkinson certainly put in that time. It is more than a little ironic, looking at Atkinson's account, that the bulk of her time spent was satisfying herself as to the Defendant's competence and fending off accusations and attacks from the very family members who now refuse to allow her to be paid out of the Defendant's assets.

[13] Eventually, it appears, in order to avoid an all-out family war, Grant decided to renounce his authority under the power of attorney, with the result that this power reverted to David. This marked the end of any involvement of Ms. Atkinson or her firm, other than to fend off a complaint of professional misconduct to the Bar Society launched in the name of David's fiancé, Sherry Dennis.

[14] There is no doubt that Atkinson walked into a Mansfield family minefield, and she became a lightning rod for the hostility that David's side of the family felt for Grant. It appears to me that Atkinson did precisely what she had to do. She could not shirk the responsibility to take instructions from a woman who, despite her cognitive difficulties, appeared to want to do what she wanted to do and who did not appear to be under the undue influence of the person who brought her. There appeared to be some urgency to make these changes, in light of financial irregularities said to have been perpetrated by the Defendant's son Neil. To have refused to take the instructions and to have essentially buckled under the pressure and accusations of other family members, the actions of some of whom were

said to be the source of the Defendant's desire to make these changes, would have been arguably unprofessional.

[15] At the risk of repeating myself, I am not discounting the fact that the Defendant had cognitive difficulties. She apparently was confused when asked by a friend and did not remember changing her power of attorney the day after it was done. However, the most important issue is whether she was competent and acting with a free will when she made such a change and when she retained Atkinson to work on her behalf.

[16] I am satisfied on the evidence that the Defendant was legally competent and that Atkinson had a reasonable basis to believe that the Defendant herself had retained her as a lawyer and was capable of instructing her. As such, the Defendant ought to bear the cost.

[17] I also note that David is acting under the authority of a power of attorney drafted by Mr. Hines and executed in August 2007, during a time when the Defendant was arguably in worse shape cognitively. It is difficult to see how the August power of attorney would be valid and the November one invalid, given the evidence before me. However, I do not need to make any finding concerning the August power of attorney as I accept that David has valid legal authority to represent his mother's interests at this time.

[18] As indicated, David's position is that the Claimant should be looking to Grant personally to pay the legal bill, as it was solely Grant (they say) who engaged Atkinson. I do not accept that proposition. Certainly Grant brought the Defendant to Atkinson, but it was the Defendant's affairs that were the subject of the retainer. The defence appears to me to be little

more than an effort to continue a brotherly dispute, at the expense of Ms. Atkinson and her firm. That is not a result that I wish to endorse. Nor is a result that would see the Claimant forced to write off all of her time and effort trying to assist the Defendant and protect her from the harm that she believed was occurring.

[19] As such, the Claimant shall have judgment for the amount claimed, namely $5,901.65, which is based upon the total bills of $6,141.65 minus a $240 payment.

[20] The Claimant has asked for interest and costs. Interest is asked at 4% for six months, totalling $122.83. This amount is reasonable. The filing fee of $174.13 is clearly recoverable. There is a claim of $308.37 for service of documents. There was no explanation offered for why it was necessary for the process server to make multiple efforts to serve both the Defendant and David, and to travel so many kilometres to do so. In my discretion, I am reducing the service fee to a more reasonable amount of $100.00.

[21] In summary, the Claimant shall have judgment for

Debt	$5,901.65
Interest	$122.83
Costs	$273.13
Total	$6,297.61

Eric K. Slone, Adjudicator