

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: T.K. Barnard Funeral Home Ltd. v. Gray, 2004 NSSM 8
Claim No.: SCCH 224992

BETWEEN:

Name: **T.K. Barnard Funeral Home Limited** Claimant

- and -

Name: **Rita Gray** Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on October 3, 2006. This decision replaces the previously distributed decision.

Counsel:

Claimant: Self Represented

Defendant: Michael Cooke, C.D., Q.C.

D E C I S I O N

[1] This matter was heard on August 19, 2004. Following that, I received written submissions, first from Mr. Cooke on behalf of the Defendant under date of August 27th and then from Mr. Barnard on behalf of the Claimant under date of September 6, 2004. Mr. Cooke provided a further brief submission under date of September 10, 2004.

[2] The claim is for an outstanding funeral services bill issued by the Claimant to the Defendant in respect of the late Ecland Godfrey McClement.

[3] There would appear to be no dispute with the services that were provided, or that they were indeed provided. The defence is really only to the issue of whether or not Ms. Rita Gray is personally liable for the funeral bill or whether the claim should have been brought against

the Estate of the Late Ecland Godfrey McClement, of which Ms. Gray is apparently the Executrix.

[4] At the hearing both Kenneth and Janet Barnard gave evidence. They are the owner/operators of the Claimant company.

[5] Ms. Gray did not testify although was present in Court.

[6] The evidence on behalf of the Claimant company makes it clear that a contract was entered into for the provision of funeral services. Exhibit C1 was a booklet of documents which contained the signed contract dated March 3, 2004. Mr. Barnard testified that he had this contract signed by Ms. Gray on March 3rd at her apartment. He further testified that all of the arrangements were made by Ms. Gray in respect of the deceased. Ms. Gray did pay a deposit of \$1,000.00.

[7] Mr. Barnard also testified as to his knowledge Ms. Gray had received the \$2,500.00 CPP Death Benefit.

[8] For the defence, Mr. Cooke argues that the Estate and only the Estate is liable in a case such as this. Mr. Cooke refers to English case law and submits that the only time that the Executor would be personally liable is in a case of *devastavit*. “*Devastavit*” is defined in *Widdifield on Executors and Trustees*, 6th Edition, (Thompson Carswell 2003):

“A mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors and administrators must answer out of their own pockets, as far as they had, or might have had, assets of the deceased.”

[9] Mr. Cooke further refers to the following statement:

“Only if a creditor alleges and proves that the executor committed a devastavit will the executor be held personally liable for the judgment and debts and costs that cannot be levied on the assets of the deceased.” (citations omitted)

- [10] While the strength of this authority cannot be doubted, I am not convinced that it applies to a situation where, as here, there is a signed contract between the funeral home on the one hand and the individual, Rita Gray, on the other. It seems to me that the authority advanced on behalf of the Defendant would apply where the contract for the funeral service (or whatever the contract is for) is clearly between the Estate representative *qua* representative of the estate on the one hand and the service provider on the other. If there is extravagance or waste committed by the personal representative, then personal liability attaches. Further, as I understand it, the claim may be made by not only a creditor of the Estate but the heirs as well. Black’s Law Dictionary defines “*devastavit*” as:

“He has wasted. The act of an executor or administrator in wasting the goods of the deceased; mismanagement of the estate by which a loss occurs. A breach of trust or misappropriation of assets held in a fiduciary character; any violation or neglect of duty by an executor or administrator, involving loss to the decedent’s estate, which makes him personally responsible to heirs, creditors, or legatees.”

- [11] As noted above, I do not think the principle related to *devastavit* is applicable here in any event. In my view, this is basically a case of a contract. The written document signed by Ms. Gray on March 3, 2004, included the following:

“The undersigned hereby authorizes T.K. Barnard Funeral Homes to furnish the following property, materials, supplies and services in connection with the funeral or burial of..

‘TERMS’ - The undersigned agrees to pay to T.K. Barnard Funeral Homes the above sum or sums herein stated. Amount paid after 15 days is subject to interest at the rate of 2% per month.

The undersigned or the said Company does not by this agreement/contract waive any rights which either might otherwise

have to charge or to collect from the said deceased's estate or legal representative, the whole or any part of the said sum...

I hereby represent that I have sufficient assets legally available to the said company for the payment of the above named sum and covenant and to pay same."

[12] Ms. Gray signed this document and, by signing it, she is taken in law to have agreed to all of its terms. It is a fundamental principle of contract law that a person is deemed to have read and to have agreed to a document that they sign.

[13] Ms. Gray also filled in the term "Executrix" in the line which is for identification. By thus indicating that she was the Executrix, is the Claimant Funeral Home to be taken as understanding that she was contracting on behalf of the Estate only and not in her personal capacity? I think not.

[14] It seems to me very clear that this contract fully contemplates that the funeral home company would otherwise have rights directly against the deceased's estate or legal representative as the quoted clause makes clear. Indeed, I would conceive that the right of an undertaker/funeral provider to collect from the estate of the deceased is an age-old right arising from common law and not from contract law per se. Further, that right has been codified in the modern probate legislation.

[15] I am supported in my overall conclusion in the case by the following paragraph from Widdifield on Executors and Trustees (page 1 - 7):

*"Primarily the estate of the deceased, and not his widow, is responsible for his funeral expenses. The mere fact that the widow requests the burial cannot change the rule. **If the undertaker desires to hold the widow responsible, he must protect himself by her valid promise to pay.** In **Park Memorial Ltd. v. Yurko** (1992), 128 A.R. 172 (Alta. Master), a widow contended that she had signed a contract for the funeral expenses of her husband as his personal representative and so should not be personally liable when the estate*

was insufficient to pay the full amount. She was neither the executrix nor the administratrix at the time of the contract, which purported to bind the authorizing party in addition to any liability of the estate or others. The widow was held to be personally liable under the contract.” (Emphasis Supplied)

[16] It seems to me as well that this conclusion is sound as a matter of policy. Obviously there is a very significant social utility in the service being provided by the funeral home and a ruling that would ignore an otherwise binding contract, and require the funeral home to establish, at that pressing point, that the estate would have assets sufficient to pay the funeral expenses, would run very much counter to this policy consideration.

[17] In any event, it seems to me that the basic contractual rule applies and that the signatory to the contract is bound directly thereby.

[18] Therefore I find in favour of the Claimant.

[19] The contract included an interest charge of 2% per month and the Claimant is entitled to that. I understand that the original invoice was issued in mid-March 2004 and net of the \$1,000.00 deposit was in the amount of \$2,576.50. One month's interest would therefore be \$51.53. Applying the principle that unless there is clear language that says the interest is compounded, i.e. interest on interest, the rule is that it is always simple interest. I would allow for six months of interest April - September inclusive. This would total \$309.18 and together with the balance the outstanding amount would be \$2,885.68 plus costs of the filing fee of \$80.00.

Disposition

IT IS ORDERED that the Defendant pay to the Claimant the following:

| | |
|--------|--------------|
| Debt: | \$2,885.68 |
| Costs: | <u>80.00</u> |
| Total: | \$2,965.68 |

DATED at Halifax, Halifax Regional Municipality, Nova Scotia on October , 2004.

Michael J. O'Hara
Adjudicator

| | |
|----------|--------------|
| Original | Court File |
| Copy | Claimant(s) |
| Copy | Defendant(s) |