
CANADA / JUDGMENT

Le Gallais Estate (Re)

2018 BCSC 388

COURT

Supreme Court of British Columbia

DECIDED

13 March 2018

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2018 BCSC 388 Le Gallais Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Le Gallais Estate (Re),

2018 BCSC 388

Date: 20180313

Docket: P160039

Registry: Victoria

In the Matter of the Estate of Lorna Le Gallais, Deceased

Before: Master Bouck

(as Registrar)

Reasons for Decision

Counsel for the Executrix,

Constance Dora Isherwood, Q.C.:

F.K. Walton, Q.C.

P. Bowering

Counsel for Victoria Hospice Society, Salvation Army and Alzheimer Society of B.C.:

P.B. Newman

No appearances for Christ Church Cathedral, Heart and Stroke Foundation of B.C. and Yukon and The Arthritis Society, B.C. and Yukon Division

Place and Date of Hearing:

Victoria, B.C.

February 5, 2018

Place and Date of Decision:

Victoria, B.C.

March 13, 2018

The Reference

- [1] This estate accounting matter comes before the registrar pursuant to the order of Adair J. made August 31, 2017 (the "Order"). That Order provides that:
1. the applicant in her capacity as solicitor for the executrix (the "Executrix") of the will of Lorna Le Gallais (the "Will") is entitled to charge the usual and proper fees, disbursements and taxes for the legal work she performs, despite being a witness to the Will;
 2. the applicant's claim for special costs from the estate of Lorna Le Gallais (the "Estate") in relation to this application is dismissed;
 3. the registrar will conduct an assessment of the applicant's legal accounts;
 4. a master or registrar will conduct an inquiry, assessment or accounting as appropriate determining, approving or making recommendations with respect to the Executor's remuneration;
 5. all matters with respect to the costs related to the assessment of the applicant's legal fees and the passing of the Executrix's accounts are adjourned generally; and
 6. upon the master and/or the registrar's approval of the applicant's accounts, and the Executrix making all payments due and owing with respect to all property that devolved to the Executrix under the Will, including but not limited to the Canada Revenue Agency and the beneficiaries under the Will, the Executrix is discharged from the office as personal representative of the Estate.
- [2] To state the perhaps obvious, the applicant and the Executrix referred to in the Order are the same person. As the style of cause discloses, the beneficiaries of the deceased's estate are all charities. Christ Church Cathedral consents to the executrix's[1] remuneration and legal fees as claimed, while the other beneficiaries take issue with the amounts claimed in both categories of charges.
- [3] Only Mrs. Isherwood gave evidence at the hearing. Not including the pre-hearing conferences, this reference occupied one day.
- [4] The parties agree that despite the somewhat ambiguous language of term 4 of the Order, the results of the reference are to be certified pursuant to Supreme Court Civil Rules 25-13 (3) to (5).

- [5] The Order does not stipulate whether this process is to result in a final award to the executrix.

The Evidence

- [6] The testator died on September 3, 2015, at the age of 94. Ms. Le Gallais was an only child, had never married or had children but is survived by several cousins.
- [7] At the time of her death, Ms. Le Gallais was a resident at Oak Bay Lodge, a care facility in Victoria, B.C. Both a long-time friend and solicitor of Ms. Le Gallais, the executrix had drawn the Will that is the subject matter of this proceeding. Since 2008, Mrs. Isherwood had been managing the testator's financial and personal affairs under a power of attorney. While acting under the power of attorney, Mrs. Isherwood's law firm received and reviewed all of Ms. Le Gallais' personal mail including banking records.
- [8] Mrs. Isherwood was aware that Ms. Le Gallais had pre-paid for end of life arrangements with a local funeral service provider. Specifically, Mrs. Isherwood knew that Ms. Le Gallais wished to be cremated and did not wish to be honoured in a funeral or memorial service.
- [9] Ms. Le Gallais held no real property at the time of her death. The estate consisted of financial assets, such as GICs, Canada Savings bonds and shares in various companies. Although the actual share certificates were held in a safety deposit box, Mrs. Isherwood had been managing the dividends and interest paid on these passive investments for many years prior to Ms. Le Gallais' death. Later in the estate administration, the executrix brought into the estate the CPP death benefit and the proceeds of a life insurance policy that had named the testator's late mother as the beneficiary. Mrs. Isherwood has also been the solicitor of Ms. Le Gallais' late mother and was thus already in possession of some of the documents that facilitated the payment of the insurance proceeds to the estate.
- [10] The Will left the residue of the estate to the six above-named charities in equal shares. The Will allows Mrs. Isherwood to charge the estate for legal services in addition to receiving remuneration as an executrix. That clause states that:

If the said Constance Dora Isherwood should act as Executrix of this my will and should also attend to the legal work of my estate, she shall be entitled to the usual and proper charge for such legal work.

- [11] In her oral evidence, Mrs. Isherwood detailed the steps taken in her role as executrix. That evidence mirrored the executrix's Memorandum of Work Done as exhibited to her 7th affidavit filed in this proceeding. To summarize, Mrs. Isherwood is claiming remuneration for making funeral arrangements, preparing comments and attending a memorial for the deceased at Oak Bay Lodge, receiving various documents related to the estate, attending the testator's banking institutions and taking inventory of a safety deposit box, clearing out the deceased's room at Oak Bay Lodge, communicating with the deceased's cousins and the beneficiaries, setting up a brokerage account to redeem shares found in the safety deposit

box, conducting various banking steps including the opening of an estate account, organizing documents for the preparation of income tax returns, and preparing a draft statement of account for the executrix's remuneration.

- [12] The grant of probate was obtained by Mrs. Isherwood on April 8, 2016. But for the contest over the claimed executrix's remuneration and legal fees, the estate administration neared completion some ten or eleven months later. The beneficiaries each received an interim distribution of \$200,000 in June 2017.
- [13] Mrs. Isherwood did not contemporaneously record her time for performing executor's tasks; she now estimates the total time involved to be about 77 hours.
- [14] After calling in all assets, the estate's value was determined to be \$1,611,308.91. The estate's value increased during the administration by \$32,588.63 but that increase was largely a result of dividends and interest paid on the passive investments. Mrs. Isherwood is claiming executor's remuneration of \$38,950, or 2.5 % of the capital assets. Both income and care and management fees are waived. There has been no pre-taking of the sought-after remuneration.
- [15] The legal work performed by Mrs. Isherwood is set out in an undated "bill of costs" issued by Holmes and Isherwood in the context of this proceeding. Initially, the charges for Holmes and Isherwood's legal services were included as part of the executrix's remuneration in the statement of accounts sent to the beneficiaries.
- [16] Holmes and Isherwood seeks payment of \$17,550 for legal fees, disbursements and taxes. The bill in question charges for services rendered between September 8, 2015 and July 16, 2016. The bill states that 50.5 hours were spent by Mrs. Isherwood in performing legal services for the estate. Mrs. Isherwood charged for her services at the rate of \$400 per hour. However, the bill was reduced as a matter of courtesy from \$20,200 to \$15,580.
- [17] Thus, if both the remuneration claim and the legal bill are allowed as presented, the total amount to be disbursed to Mrs. Isherwood and her law firm from the estate will be \$56,500.
- [18] The only steps left in the actual administration of the estate are to obtain a clearance certificate from the Canada Revenue Agency and provide a final accounting and disbursement to the beneficiaries. Presumably, those steps will be taken once the issues of the legal account, executrix's remuneration and costs of this proceeding are resolved.

Discussion

A. Executor's Remuneration

- [19] As stated in *Chau Estate (Re)*, 2016 BCSC 2541:
- [14] The personal representative, or administrator, is entitled to remuneration to a maximum of five percent of the gross aggregate value, including capital and income, of all the assets of the estate at the date of the passing. Section 88 of the *Trustee Act* RSBC 1996 c. 464 provides:

Setting remuneration of trustees and guardians

88 (1) A trustee under a deed, settlement or will, an executor or administrator, a guardian appointed by any court, a testamentary guardian, or any other trustee, however the trust is created, is entitled to, and it is lawful for the Supreme Court, or a registrar of that court if so directed by the court, to allow him or her a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble and his or her time spent in and about the trusteeship, executorship, guardianship or administration of the estate and effects vested in him or her under any will or grant of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper.

(2) The court or a registrar of the court if so directed by the court, may make an order under subsection (1) from time to time, and the amount of remuneration must be allowed to an executor, trustee, guardian or administrator, in passing his or her accounts, in addition to any other allowances for expenses actually incurred to which the trustee, executor, guardian or administrator may by law be entitled.

(3) A person entitled to an allowance under subsection (1) may apply annually to the Supreme Court for a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets.

[15] The criteria to be considered in determining the appropriate amount of remuneration are set out in a number of cases, the leading of which is *Re Toronto General Trust Corp. v. Central Ontario Railway Company*, (1905) 6 OWR 350, at 354, (Ont HC). The criteria are: the magnitude of the trust; the care and responsibility involved; the time occupied in administering the trust; the skill and ability displayed; and finally, the success achieved in the final result.

[16] Remuneration does not need to be fixed as a percentage of the gross aggregate value of the estate, it may be calculated as a lump sum, provided it does not exceed five percent of the total value of the estate; see *Re Turley Estate*, (1955) 16 WWR 72 (BCSC).

[20] In determining the appropriate remuneration, the registrar may take into account the legal fees charged to the estate by the executrix where such fees relate to work that ought to have been undertaken by an executor: *Bernhard v. Wist*, 2011 BCSC 101 at paras. 106-107.

[21] Considering all of the evidence presented, I find that the executrix is entitled to remuneration of \$25,000, with that sum reflecting reasonable compensation for the care, pain, trouble and time that Mrs. Isherwood expended in the administration of this estate.

- [22] The magnitude of the estate speaks for itself. However, the size or value of the estate is not necessarily reflective of the risks and requirements of its administration. In my view, the executrix was not tasked with a great deal of care and responsibility in this administration given the secure or passive nature of the estate assets.
- [23] As well, as Ms. Le Gallais' attorney, friend and solicitor, the executrix was already familiar with the estate assets and the testator's intentions. That circumstance made the ordinary tasks of gathering in assets and communicating with beneficiaries much simpler than what might otherwise be the case for an executor.
- [24] The executrix claims remuneration for tasks that were not necessary to the estate's administration. For example, Ms. Le Gallais stipulated in her end of life instructions that there should be no funeral or memorial service. Thus, there was no obligation for the executrix to prepare and have published an obituary or to prepare comments for or attend the deceased's celebration of life at Oak Bay Lodge. Mrs. Isherwood may have chosen to do any of those things as the deceased's friend but these steps did not advance the estate's administration or the beneficiaries' interests. Nor was there any need for the executrix to communicate with Ms. Le Gallais' cousins, except perhaps with respect to the modest amount of family memorabilia left by the deceased. Similarly, the time spent on such matters as receiving sympathy cards resulted in no benefit to the administration of the estate.
- [25] Overall, the time that the executrix estimates to have spent in estate administration is excessive. On that issue, I agree entirely with the submissions made by Ms. Newman.
- [26] This estate could be considered one of the very simplest to administer but for the opening of a brokerage account, dealing with the life insurance policy, and addressing a few banking errors.
- [27] The remuneration awarded recognizes the work involved in preparing the estate accounts. No allowance in the remuneration is made with respect to the executrix's attendance at any court proceedings as the issue of costs related to the passing of the executrix's accounts was adjourned generally by the court.

B. Review of Legal Bill

- [28] The review[2] of the Holmes and Isherwood legal bill is governed by s. 71 of the Legal Profession Act, S.B.C. 1998, c. 9, which provides that:

Matters to be considered by the registrar on a review

71 (1) This section applies to a review or examination under section 68 (7), 70, 77 (3), 78 (2) or 79 (3).

- (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:

- (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
 - (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
- (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
- (a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;
 - (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
- (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including
- (a) the complexity, difficulty or novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the lawyer,
 - (c) the lawyer's character and standing in the profession,
 - (d) the amount involved,
 - (e) the time reasonably spent,
 - (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
 - (g) the importance of the matter to the client whose bill is being reviewed, and
 - (h) the result obtained.
- (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

[29] I find that many of the services described in the bill were neither reasonable nor proper for conducting a solicitor's estate-related work. Some of the services charged for in the bill are more properly characterized as the executor's work and, indeed, even duplicate such work. Other steps described in the bill were simply unnecessary for the estate solicitor to undertake. Examples of this unnecessary and/or duplication or assumption of executor's work include Mrs. Isherwood "taking instructions" from herself as executrix; preparing letters to the deceased's friends and cousins (except for the limited purpose of the probate application); assisting a cousin in gifting to Christ Church Cathedral; preparing the CPP death benefit application; time spent photocopying documents; and communications with financial institutions, the Medical Services Plan of B.C., periodical providers, charitable

institutions (other than the beneficiaries), and the life insurance provider.

- [30] In terms of the s. 71 (3) factors, the solicitor's work on the estate was neither complex nor difficult. Some skill was required on the part of the solicitor to navigate the probate process but the probate documents themselves were straightforward in content. The beneficiaries take no issue with the solicitor's character and reputation as a long-standing member of the Bar. Given her experience and standing, it is reasonable for Mrs. Isherwood to charge the estate for her legal services at the rate of \$400 per hour. However, it is not reasonable to charge the estate at that rate, if at all, for administrative tasks such as photocopying, typing, mailing documents and preparing the bill in question: *Kowarsky and Co. v. Williams*, [1998] B.C.J. No. 543 (Registrar).
- [31] The necessary and proper work required by the solicitor with respect to this estate amounted to commencing and concluding the probate process, preparing the estate accounts, and communicating with the named beneficiaries (and perhaps, at the first instance only, with the intestate heirs) regarding these processes. I find that \$5,500 is a fair fee for this necessary and proper work.
- [32] Lest there be any confusion, I have already taken into account the solicitor's assumption and duplication of executor's work in setting the executrix's remuneration.

C. Costs

- [33] Both parties raise the issue of costs in the written submissions. I do not interpret the Order as requiring the registrar to make any determination on costs including with respect to s. 72 of the LPA.

Summary

- [34] In summary, pursuant to the terms of the Order:
- a. The legal account of Holmes and Isherwood is allowed at \$6,261.00, inclusive of taxes and disbursements; and
 - b. The executrix's remuneration is determined at \$25,000.

- [35] The issue of costs is outside the scope of this reference.

"C.P. Bouck"

Master C.P. Bouck

- [1] Both the Supreme Court Civil Rules and the Wills, Estates and Succession Act use the gender neutral term "executor". However, the Order, evidence and submissions refer to Mrs. Isherwood as the "executrix" so that term is adopted in these reasons.

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- [2] The Order uses the word assessment, perhaps because the bill has not been formally issued to a client. However, the parties agree that the bill is to be reviewed pursuant to the Legal Profession Act.
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