

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Parker v. Cox, 2008 NSSM 29

BETWEEN:

MELITA PARKER

Claimant

- and -

REID COX

Defendant

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**REASONS FOR DECISION**

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**BEFORE**

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on May 13, 2008

Decision rendered on May 16, 2008

**APPEARANCES**

For the Claimant            self-represented

For the Defendants        self-represented

**BY THE COURT:**

- [1] The Claimant is the daughter of the late John Stuart Scott who died on February 16, 2006. Mr. Scott named his friend, the Defendant Reid Cox, as executor of his estate.
  
- [2] The Claimant took steps in mid-2007 to have the Defendant removed as executor by the Probate Court when it appeared that the Defendant was not attending diligently to his duties. The Probate Court removed the Defendant, appointed the Claimant as substitute executor and ordered the Defendant to provide an accounting of his activities as executor. When the Defendant did not appear to be providing the accounting immediately, the Claimant obtained a further order of the Probate Court reiterating the requirement that the Defendant provide an accounting.
  
- [3] Upon eventually taking over and receiving the estate files, the Claimant learned several things that inclined her to take legal action against the Defendant. Specifically, she learned:
  - A. The Defendant had written cheques to himself totalling \$4,000.00, without any apparent authority;
  
  - B. The Defendant had neglected to pay a credit card bill for more than a year, with the result that interest at 18.5% had accrued on that debt;

C. The Defendant had failed to file a 2006 income tax return for the deceased, with the further result that there were anticipated tax penalties to be incurred.

[4] The Claimant has sued in this Court to recover these amounts, plus several smaller items, from the Defendant. Although she has not styled it as such, she sues in her capacity as executor and not in any personal capacity.

[5] When the matter was before me on a previous occasion before being adjourned, notwithstanding the lack of any objection, I wondered out loud whether this court had jurisdiction to hear a claim by an executor arising from the activities of a former executor of an estate. This is not an obvious question, at least to me. I invited comments from the parties on the return date.

### **The Statutory Framework**

[6] The jurisdiction of this court is set out in the *Small Claims Court Act*, and insofar as it might apply to this case, under s.9(a):

9 A person may make a claim under this Act

(a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest;

[7] The things that the Small Claims Court clearly may not do are set out in section 10:

10 Notwithstanding Section 9, no claim may be made under this Act

(a) for the recovery of land or an estate or interest therein;

(b) in respect of a dispute concerning the entitlement of a person under a will, or settlement, or on an intestacy;

(c) for defamation or malicious prosecution;

(d) which involves a dispute between a landlord and a tenant to which the Residential Tenancies Act applies, other than an appeal of an order of the Director of Residential Tenancies made pursuant to Section 17C of that Act; or

(e) for general damages in excess of one hundred dollars.

[8] The statute that deals with most probate issues is the *Probate Act*, and indeed it was the *Probate Act* that permitted the Claimant to remove the Defendant and assume the office of executor.

[9] Looking through the *Probate Act*, several provisions would appear to have relevance to the issue.

[10] S.8 of the *Probate Act* sets out the general jurisdiction of the Probate Court:

8 (1) Each court may

(a) issue grants;

(b) revoke or cancel grants;

(c) effect and carry out the judicial administration of the estates of deceased persons through their personal representatives, and hear and determine all questions, matters and things in relation thereto necessary for such administration;

- (d) order any person who has been named as an executor of a will to appear and probate or renounce executorship of the will;
- (e) order any person who witnessed a will to prove the will;
- (f) order a person to comply with this Act;
- (g) appoint guardians and take the accounts of guardians under the Guardianship Act.

(2) Nothing in this Act deprives the Supreme Court of jurisdiction in the matters referred to in subsection (1). (emphasis added)

[8] Further on, the *Probate Act* specifically deals with what the court may do on a passing of accounts, which is a formal proceeding where the executor seeks approval of his or her activities as executor - a procedure that was not invoked in this case:

#### **Powers of court**

71 On passing the accounts of the personal representative, the court may

(a) enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and the administration and disbursement thereof, including the calling in of creditors and adjudicating on their claims, and for that purpose take evidence and decide all disputed matters arising in the accounting; and

(b) inquire into and adjudicate on a complaint or claim by a person interested in the taking of the accounts of misconduct, neglect or default on the part of the personal representative and, on proof of the claim, make any order the court considers necessary, including an order that the personal representative pay such sum as it considers proper and just to the estate, but any order made under this subsection is subject to appeal.

#### **Further powers of court**

72 (1) On passing of accounts the court may

(a) order that

- (i) the accounts of the personal representative are passed and bills of costs are taxed pursuant to Section 91,
- (ii) the personal representative is discharged,
- (iii) any security be released,

(iv) the estate remaining undistributed after the passing of accounts be distributed among the persons entitled; and

(b) make any other order it thinks necessary to settle the estate.

(2) Where there is a contest as to how the remaining assets are to be distributed, the court shall hear evidence and determine who are the persons entitled to participate in the surplus of assets and the shares that they are respectively entitled to receive.

**Same powers as Supreme Court**

73 On passing the accounts of the personal representative and the distribution of the estate or in any matter relating thereto, a court has the same powers as the Supreme Court. (Emphasis added)

**Discussion and ruling**

- [11] I do not see anything in the two statutes, expressly or by necessary implication, that would prohibit this court from hearing a claim by an executor of an estate, that could properly be described as arising from a contract or tort. The *Small Claims Court Act* is explicit in prohibiting certain types of cases, including claims “in respect of a dispute concerning the entitlement of a person under a will, or settlement, or on an intestacy,” which are some but not all of the cases that may arise concerning an estate. The legislature could have specified that no claims involving estates or executors shall be heard in Small Claims Court, but it did not.
- [12] Looking at the *Probate Act*, I note that the language is permissive (“the court may”) and there is a specific saving for the jurisdiction of the Supreme Court. This persuades me that the Probate Court is given the jurisdiction but it is not necessarily exclusive.

[13] From a policy perspective, it makes sense for certain types of cases to be heard in Small Claims Court, which is much less formal than either Probate Court or the Supreme Court of Nova Scotia of which the Probate Court is essentially a branch. However, I can equally envision cases where the particular expertise of the Probate Court and its unlimited jurisdiction might make it the better or only choice.

[14] Nevertheless, in the case before me the Defendant did not object to my jurisdiction, and I am satisfied that there is nothing in the law that stands in my way. Specifically, I do not regard this as a case which concerns the entitlement of a person under a will.

### **The taking of money without authority**

[15] The claims against the Defendant consist of a mixture of positive acts and acts of omission. The positive acts were the writing of four cheques to himself in the total amount of \$4,000.00. This was done relatively early in his administration of the estate. His rationale was that he believed the Probate Act would eventually allow him a commission of 5% of the value of the estate. He was not entirely wrong. Had he consulted the *Probate Act*, he would have seen the following section:

#### **Commission**

76 On the settlement of an estate, the personal representative may be allowed, over and above all actual and necessary expenses as appear just and reasonable, a commission not exceeding five percent of the amount received by the personal representative and the court may further apportion the commission among the personal representatives as appears just and proper according to the labour bestowed or the responsibility incurred by them respectively.

- [16] What is most noteworthy is that the 5% is not automatic, and it is generally awarded on the settlement of the estate, i.e. at the end, not the beginning. He did not explain why he jumped the gun. I am reluctant to find any dishonest intent, because the Defendant impressed me as a well-meaning individual. Nevertheless, taking money to which one is not entitled may be regarded as a tort, or an unjust enrichment, and is actionable in the Small Claims Court.
- [17] The Probate Court order provides that the Defendant is to receive \$2,500.00 upon the closing of the estate in full satisfaction of any claim. It is acknowledged by all that the Probate Court did not know that the Defendant had taken the \$4,000.00. The Defendant here admits that he has no valid claim for this \$4,000.00, as his entitlement has already been determined by the Probate Court to be limited to the \$2,500.00.
- [18] The parties have agreed that the Defendant receive a credit for the \$2,500.00 that he would ultimately receive, and is only liable to the estate for the balance, namely \$1,500.00.

#### **The credit card interest**

- [19] The credit card claim arises from an outstanding balance that the deceased had with Bank of Montreal. On February 15, 2006, the Defendant received notice from the bank that there was an amount owing that exceeded \$4,000.00, to which he did not respond. Many months later, in November of 2006, a formal Notice of Claim was lodged in the Probate Court seeking \$4,832.71 plus interest at 18.5% from October 31, 2006. Still the Defendant did nothing.



- [20] The Defendant testified that he did not attend to this for several reasons. He thought he had a year to settle claims. He also stated that the estate was short of funds. He also admitted that he was not diligent in his duties because of illness.
- [21] In the end the Claimant paid the Bank of Montreal \$5,577.34 in September 2007, shortly after she received an accounting from the Defendant.
- [22] The explanations for why this debt was not paid fall short. There was money in the account, at some point, as evidenced by the Defendant's taking \$4,000.00 for himself. He also admitted that there would have been plenty of money had he more diligently pursued the proceeds of a life insurance policy. As for having time to pay claims, I believe that an executor like anyone else must be alert to the consequences of allowing interest to accrue at a high rate. The only reason to delay paying would have been if the claim were disputed (which it was not) or there was a prospect that the estate might be insolvent (which it was not).
- [23] I believe it was negligent for the Defendant to ignore this bill and it cost the Claimant \$744.63 in additional interest charges.

#### **The failure to file 2006 income tax return**

- [24] The failure to file 2006 income tax has cost the estate an amount that the Claimant estimates at \$999.42. She cannot be more precise, because she has not yet received the Notice of Assessment from Canada Revenue

Agency. However this is what she paid as a penalty based upon the information available to her.

[25] The deceased died early in 2006, but would have had some taxable income based on (I believe) a pension payout, as he had just retired weeks before his death. The tax return for 2006 would have been due no later than April 30, 2007, but all of the necessary information to file ought to have been available many months earlier than that. In failing to file by April 30, 2007, the Defendant was clearly neglectful in his duties. I appreciate that he was suffering with a serious illness at the time, but had he been unable to continue as executor he had the option of seeking help from the deceased's family, or asking the court to be relieved. Here he actively resisted the Claimant's attempt to have him removed. She only took that step when she learned that the Defendant had failed to file an inventory of the estate, despite two notices from the court to do so. The Defendant cannot have it both ways. If he wished to continue as executor he ought to have attended to his responsibilities. His neglect of the tax filing cost the Claimant \$999.42, which is properly recoverable in damages.

### **Additional claims**

[26] The Claimant has also asked for the sums of \$53.00 for filing the application to have the Defendant removed in Probate Court, and the \$114.28 cost for obtaining an additional grant of Administration. In my view, these were costs that could have been raised with the Probate Court, and I do not propose to second guess what that court might have considered respecting the costs associated with that application.

[27] The Claimant's cost of filing this claim - \$170.88 - and the cost of a process server - \$67.80 - are properly recoverable.

### **General damages**

[28] The Claimant has also made a claim for general damages to compensate her for the time and trouble of having to deal with the defaults of the Defendant. While I have no doubt that she has devoted this time, and suffered inconvenience, I believe that this is normally considered in setting her compensation as executor. I do not know if she intends to claim compensation, given that the sole beneficiaries are herself and her two siblings, but in my view such compensation is better sought in that forum, if at all. I do not allow any general damages.

### **Conclusion**

[29] In conclusion, I find that the Claimant (in her capacity as executor) is entitled to the following from the Defendant:

Cheques written	\$4,000.00
Credit for compensation from Probate Court	(\$2,500.00)
Additional interest costs	\$744.63
Additional tax penalties	\$999.42
Costs of filing and service	\$238.68
Total:	\$3,482.73

[30] The Claimant will have a judgment for \$3,482.73.

**Eric K. Slone, Adjudicator**