

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: In the Estate of Margareta (Margaret) Van Spengen, deceased

BEFORE: The Honourable Mr. Justice P.J. Flynn

COUNSEL: K.A. Scherl, for the Applicant

N. De Koning, for the Beneficiary M. Schmitt

2005 CanLII 47782 (ON SC)

ENDORSEMENT

[1] This was an application to pass accounts in the estate of Margareta (Margaret) Van Spengen who died on March 23, 2002.

[2] It is only left for me to determine what is fair and reasonable compensation for Peter Miller, who served both as Executor and Trustee of and solicitor to the estate.

[3] He seeks total compensation for his Estate Trustee's work in the amount of \$12,751.58. He claims that on the basis of 3 percent of the total receipts of \$213,139.00 and 3 percent of the total disbursements of \$211,913.83.

[4] Mr. Miller also seeks compensation for his solicitor's work in the total amount of \$1,827.86. In this regard he claims \$200.00 per hour for eight hours of work plus disbursements of \$108.28 and GST of \$119.58.

[5] So, in total, Mr. Miller seeks compensation of \$14,579.44 in respect of work done on an estate with assets valued at \$201,273.93 at the date of death.

[6] Mr. De Koning for the only Objecting Party, Margaret Schmitt, one of the four children of the deceased, all of whom are equal residual beneficiaries, says that while Mr. Miller did perform some service to the estate, his total compensation as Trustee and solicitor should only be in the nominal amount of \$2,500.00, all inclusive.

[7] In respect of his efforts as solicitor, Mr. Miller has produced a breakdown showing the expenditure of 8.55 hours. He seeks solicitor's fees of \$1,600.00 based on an hourly rate of \$200.00 (for eight hours). He has been a sole general practitioner for 26 years, mainly in the areas of real estate and wills. While he has acted countless times as estate solicitor, only once before was he also Estate Trustee. He testified that his usual hourly rate ranged from the Legal Aid rate to \$200.00, which he would charge to those clients who could afford it, if the market would bear it. Mr. De Koning did not raise serious objection to the hourly rate. However, in determining what is fair and reasonable solicitor compensation, just as in fixing costs on the same basis, I must do more than the mere mechanical exercise of multiplying hours by a certain hourly rate.

[8] Mr. De Koning was right to complain about Mr. Miller's charging the estate for his meeting with Paula Van Spengen. Mr. Miller also appeared to charge at his full hourly rate for clerical activities, such as picking up documents from the courthouse. These cannot have the same value as those hours expended in exercising his professional skills. Moreover, while Mr. Miller's first time docket for solicitor's services is made on April 9, 2002, the same docket

record shows that he did not prepare the Notice of Application for Certificate of Appointment, until June 6, 2003, a full year and a quarter after the death of his client (Mr. Miller acted for the deceased during her lifetime and prepared the will and the codicil in question).

[9] Mr. Miller told the court that he was extremely busy with real estate transactions and that he had had some staffing issues. But this was a simple, modest estate, with 13 beneficiaries (nine grandchildren received bequests of \$3,000.00 each and the deceased's four children were to divide the rest equally). The assets of the estate consisted of one bank account, one term deposit, four guaranteed investment certificates and one mutual fund account *all at the same branch* of the T-D Canada Trust Bank. This was not an estate that required any special legal expertise or advice. And Mr. Miller exercised or proffered none. In fact, in many law firms dealing with estates on a regular basis, an estate's clerk would have done most of the work and in a fraction of the time.

[10] Accordingly, I determine that a fair and reasonable compensation for solicitor's fees in this matter should not exceed \$1,200.00. I would allow Mr. Miller's claim for disbursements and so I fix his total solicitor's compensation at \$1,400.00, inclusive of GST.

[11] Mr. Miller claims Estate Trustee compensation at the rate of 3 percent of receipts and 3 percent of disbursements because of the tariff set out in the regulations to the Substitute Decisions Act, 1992, SO 1992, c. S. 30 for the continuing work of guardians or attorneys under that Act and on the basis of the statutory fee schedule increase for the administration of estates and trusts (from 2.5 percent to 3.0 percent) in the Office of the Public Guardian and Trustee. He argues that it would be inconsistent, unjust and unreasonable to deny Estate Trustees in the

private sector the same percentages for the same type of work in administering estates as is received by the Public Trustee and Guardian.

[12] In my view, this argument cannot prevail. I have no evidence before me that the work Mr. Miller did as estate trustee is similar to that done by the Public Trustee and Guardian or by a guardian or attorney under a continuing Power of Attorney. There were no trusts created by the will and no care or management of any consequence.

[13] Mr. De Koning concedes that the cases generally show a yardstick comparator for trustee compensation based on 2.5 percent of receipts and disbursements. This court then must start there and consider that yardstick based on five factors repeatedly set out by the cases:

1. The Size of the Estate

Compared to the cases I was shown, this cannot be said to be an average or usual estate. It is a very modest estate, smaller than many.

2. The Care and Responsibility Involved

Mr. Miller did not have much to do – he instructed the bank to keep and roll over the better interest rate investments and to cash in others as they came due. He then paid the nine grandchildren their \$3,000.00 bequests and paid out \$30,000.00 as an interim disbursement to each of the four children. As at June 30, 2005, there remained assets in the estate of \$40,557.00 and contingent liabilities of \$22,079.00 *at most*. Very little yet needs to be done.

3. The Time Occupied in Performing the Duties

Mr. Miller's spreadsheet claims a total of 34.3 Executor hours, but he concedes a clerical error which reduces that amount to 29.55 hours. And Mr. De Koning properly complains of Mr. Miller claiming 3.5 hours in August 2005 for preparing his time dockets and he correctly argues that entries after June 30, 2005 are more properly presented as part of the costs claim on the passing of accounts application itself. Accordingly, Mr. Miller's claim for Trustee's time is reduced to 19.75 hours. If one were only to consider this factor, Mr. Miller's claim for Trustee compensation would amount to some \$645.65 for each hour – more than three times the rate he claimed as solicitor. That solidly bolsters my ultimate conclusion that the application of the so called yardstick percentages (2.5 percent) would result in serious overcompensation to the Trustee.

4. The Skill and Ability Shown

Mr. Miller conceded in cross-examination that he did not require or exercise any unusual skill or ability to administer the estate. The estate contained no real estate, no RRSP's, no trusts, no loans, no business interests and no beneficiary challenged the will. This should result in a deduction from the yardstick. Moreover, the estate was not administered in a timely fashion and this too must mean that the trustee's compensation fails to reach the yardstick.

5. The Success Resulting from the Administration

Mr. Miller argued that there was a measurable success and that the estate assets earned more than \$9,000.00 and did not represent any loss to the beneficiaries. This misses the point entirely. Surely success in a modest straight-forward estate such as this must be measured against the question of how quickly those simple assets could have been converted and completely distributed to all of the beneficiaries, for each of them to use or invest as they saw fit. Using this prism, there might even be said to be a failure in the administration of the estate or at the very brightest no success at all. Just as unusual success in the administration of an estate might justify an increase in trustee's compensation, so too should a failure – as here – result in a deduction.

[14] On the basis of each and every one of the five factors, I repeat myself by saying that the application of the yardstick percentages would result in a serious overcompensation to the estate trustee.

[15] In my view, it is more appropriate to set the bar at roughly one percent of the estate receipts and disbursements. Accordingly, I fix the fair and reasonable Estate Trustee compensation at \$4,250.00. Together with the \$1,400.00 I have fixed for solicitor's compensation, this means that the total amount of Mr. Miller's compensation for the complete administration of this estate shall be \$5,650.00.

Costs

[16] Without anything more, it seems that the objecting beneficiary is the successful party on this application. Unless I am persuaded otherwise by submissions or offers, it would be my view that costs should follow the event. Accordingly I will fix those costs upon receiving and reviewing written submissions of the parties in accordance with these directions:

1. Counsel for Ms. Schmitt shall serve and deliver to me at my chambers in Kitchener on or before December 16, 2005 his written costs submissions not exceeding three double-spaced typed pages, together with his form 57B and bill of costs and any relevant offers to settle.
2. Counsel for the estate shall serve and file on or before January 6, 2006 her written costs submissions not to exceed three double-spaced typed pages, together with her form 57B and any bill of costs and offers to settle.
3. If he chooses, Mr. De Koenig may serve and file on or before January 13, 2006 a reply submission not exceeding one double-spaced typed page.

P.J. FLYNN J.

DATE: November 28, 2005