



Civil Resolution Tribunal

Date Issued: July 12, 2019

File: SC-2018-007700

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nelson v. Nelson*, 2019 BCCRT 846

B E T W E E N :

Marian Nelson

APPLICANT

A N D :

Carey Nelson

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. The respondent, Carey Nelson, is the sole beneficiary of a discretionary trust. The applicant, Marian Nelson, who is the respondent's aunt, acted as his trustee from April 20, 2011 until 2017. This dispute is about whether the applicant and the respondent agreed that he would pay the applicant for being a trustee. The applicant says that they had a verbal agreement that she would be paid \$1,000 per

year and she claims \$5,000. The respondent denies that they agreed to any payment.

2. The applicant is self-represented. The respondent has a non-legal representative.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to a "he said, she said" scenario with both sides calling into question the credibility of the other. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

6. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:
 - a. order a party to do or stop doing something;
 - b. order a party to pay money;
 - c. order any other terms or conditions the tribunal considers appropriate.

ISSUE

7. The issue in this dispute is whether the parties agreed that the applicant would be paid for acting as the respondent's trustee.

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant must prove her case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.
9. As mentioned above, the applicant is the respondent's aunt. Under a Trust Deed dated April 20, 2011, the applicant became a trustee of a discretionary trust for the respondent's sole benefit. The applicant acted as trustee until around the spring 2017, when she resigned. The exact date is not in evidence, but the respondent now has a new trustee.
10. Clause 5 of Schedule "C" of the Trust Deed says that the trustee may be paid if there is an agreement for payment between the applicant and the respondent. If there is no agreement, Clause 5 says that the "applicable law regarding trustee remuneration shall govern", which I find refers to the *Trustee Act*. Clause 5 does not require an agreement about payment to be in writing.
11. As mentioned above, the applicant alleges a verbal agreement. Verbal agreements are enforceable just like written agreements, but they are often harder to prove. In

this dispute, the applicant does not have any direct evidence that the agreement existed other than her own statement. Rather, she points to all the services she provided to the respondent, which did not just involve administering the trust but also trying to help him in other areas of his life. She says spent her own money and missed work to help the respondent. I infer that the applicant's argument is that she would not have done this without the promise of payment.

12. The respondent says that he never agreed to pay her any amount. His primary argument is that the applicant had full control of the trust's bank accounts for 6 years and never paid herself any money. The respondent says that if the trust owed her \$1,000 per year, she would have taken it when she was entitled to it.
13. This dispute requires me to determine whose evidence is more credible or truthful. Both parties are clear in their evidence and there are no inconsistencies in either of their statements. That said, one aspect of assessing credibility is assessing which version of events is more probable in the circumstances based on common human experience. This is essentially what the respondent argues. He says that it is improbable that the applicant would fail to take money that she was entitled to during the time she was trustee.
14. In reply, the applicant says that she was unable to pay herself because every time she took the respondent to the bank, he was too intoxicated to make a transaction. She does not provide any specific evidence about when, or how often, she says she took the respondent to the bank over the years of being trustee.
15. Based on the evidence before me, I agree with the respondent. Given the applicant's description of the services she provided, I find that she would likely have paid herself annually if she believed she was entitled to payment or, if the respondent was preventing her from being paid, she would have resigned much sooner. I note that even though the parties are relatives, the applicant says that she had no relationship with the respondent before becoming his trustee. In addition, I find that it is implausible that over her 6 years as being trustee she could not make any transactions with the bank because the respondent was "always drunk",

especially since the respondent's new trustee has been able to make several transactions since taking over, as shown in the trust's bank statements in evidence.

16. In other words, if the parties had come to an agreement as the applicant alleges, I would expect there to be some objective evidence over the 6 years that she was trustee to support the existence of the agreement. In the absence of any such evidence, I find that the applicant and respondent did not have an agreement that the applicant would be paid for acting as trustee. I therefore dismiss her claim.
17. I note that when a trustee does not have an agreement about whether they will be paid for acting as a trustee, sections 88 to 90 of the *Trustee Act* allow them to apply to the BC Supreme Court to determine whether they are entitled to compensation, and if they are, how much. Because this process is within the jurisdiction of the BC Supreme Court, I make no comment on whether the applicant may be entitled to compensation under the *Trustee Act*. This decision is limited to whether the parties had an agreement for payment under the Trust Deed.
18. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. The applicant has not been successful so I dismiss her claim for reimbursement of tribunal fees and dispute-related expenses. The respondent did not claim any dispute-related expenses.

ORDER

19. I dismiss the applicant's claims, and this dispute.

Eric Regehr, Tribunal Member