

By the Court:

[1] Frances Margaret Stewart died June 20, 2012. Her Last Will and Testament dated September 5, 2002, was admitted to probate in the probate district of Lunenburg County. The Will named Ms. Stewart's son-in-law, Byford Hopkins as executor and trustee. The residue of the Estate was given to Ms. Stewart's daughters Leontine Ann Hopkins and Jane Frances Stewart-Gray in equal shares. Jane Frances Stewart-Gray predeceased Ms. Stewart and Ms. Stewart-Gray's share of the estate goes to her children Angus Alexander Stewart-Gray and Anne Ishbel Stewart-Gray.

[2] The personal representative of the Estate, Byford Hopkins, is the husband of Leontine Ann Hopkins

[3] Ms. Stewart-Gray filed a notice of application requesting Mr. Hopkins provide an accounting and settle the Estate. A hearing was scheduled for February 10, 2014. Mr. Hopkins then filed an application to pass accounts without a hearing and the hearing for February 10, 2014 was cancelled and a date set to pass the accounts. Mr. Stewart-Gray and Ms. Stewart-Gray filed a notice of objection and a hearing took place April 16, 2014. The Registrar of Probate issued a decision June 9, 2014.

[4] Mr. Hopkins appealed the Registrar's decision and in the Notice of Appeal set out the grounds of appeal as follows:

“1. The Registrar breached the rules of natural justice and/or procedural fairness in that she failed to allow the Personal Representative to address incorrect information on several points, taken from the Notice of Objections to Accounts, by not raising said points at the Hearing for confirmation or refutation. This resulted in the Registrar using incorrect and unproven information to arrive at her Decision.

2. The Registrar erred in disallowing those Personal Representative's mileage charges listed in her Decision from June 27, 2012 through May 23, 2013. Said mileage charges were in connection with the affairs of the subject Estate.

3. In disallowing the mileage charges referred to above, the Registrar made mathematical errors in her calculation of the allowable mileage charges. Moreover, in recalculating said mileage charges, the Registrar used Google maps to recalculate distances.

4. The Registrar erred in disallowing, either in whole or in part, funeral expenses associated with the following:

1. Flowers

2. The Cremation box/Gravemarker;

5. The Registrar erred in disallowing the disbursement of \$4200.00 by the Personal Representative in repayment of the loan from Esther Rumley to the deceased, Frances Stewart. In disallowing said disbursement, the Registrar erred in her reliance on the Limitations of Actions Act of Nova Scotia and in her findings of fact, including that the deceased had “dementia” at the time of such loan.”

[5] Appeals from the registrar are governed by section 93 of the Probate Act S.N.S. 2000 c.31, (Act) which provides:

93(1) Any party aggrieved by an order or decision of the registrar, other than a grant, may in the prescribed manner, appeal from the order or decision of the registrar to the judge.

(2) On an appeal taken pursuant to subsection (1),

(a) the judge may hear such appeal and, where the judge thinks fit, any of the parties thereto may adduce the same evidence as that given before the registrar and, so that the judge may hear the same evidence and any further or other evidence, any further or other evidence and the judge may confirm, vary or set aside the order or decision appealed from, and may make any decree, order or decision which the registrar should have made;

(b) the judge may rescind, set aside, vary or affirm the order or decision appealed from or make any decision or order the registrar could have made;

(c) costs of the appeal are in the discretion of the court.

[6] Mr. Hopkins applied to introduce further evidence, which I allowed. In addition to the material which was before the Registrar, Mr. Hopkins filed an affidavit and gave oral evidence at the hearing of the appeal.

[7] The first ground of appeal is that the Registrar breached natural justice and the duty of the procedural fairness owed to Mr. Hopkins as personal representative of the Estate of Frances Margaret Stewart.

[8] A registrar owes a personal representative of an estate a duty of fairness.

[9] In giving the majority judgment in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 L'Heureux-Dubé, J., while discussing factors affecting the content of the duty of fairness stated at paragraphs 21 and 22:

“21. The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

22. Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.”

[10] Justice L'Heureux-Dubé then set out factors to be used in determining the content of the duty of fairness as 1) the nature of the decision being made and the process followed in making it; 2) the nature of the statutory scheme under which the decision maker operates; 3) the importance of the decision to the individual or individuals affected; 4) the legitimate expectations of the party challenging the decision; and 5) the nature of the deference accorded to the body;

[11] The Probate Act provides there shall be a court of probate for each probate district and there shall be a registrar of probate for each probate court. Section 12 of the Act states each registrar shall perform such duties as imposed by the Act and the Regulations. Section 5 of the Regulations sets out the duties of registrars:

“5 (1) Each registrar or a person designated by the Minister of Justice shall have the care and custody of all wills, documents, books, letters, transcripts, exhibits, papers and records of any kind belonging to the court.

- (2) A registrar shall not release any original will on file at the court.
- (3) A registrar shall, upon request, provide a certified copy of any original will on file at the court for which a grant has been issued by the court.
- (4) Each registrar shall perform the following duties:

- (a) keep an index of all documents filed at the office of the registrar that lists the

- (i) name of the deceased,
- (ii) place of residence of the deceased,
- (iii) date of death of the deceased,
- (iv) date of the grant,
- (v) name of the personal representative, and
- (vi) value of the estate,

and provides for convenient reference to any of the documents when required;

- (b) number and date all applications for grants and other documents when filed;

- (c) open a separate file for each estate;

- (d) record all information and documentation

- (i) filed with the court, and
- (ii) issued by the court

in the appropriate court records;

- (e) if an estate includes real property in the Province, forward to the appropriate Registrar of Deeds, in the case of a grant of

- (i) probate or administration with the will annexed, a certified copy of the will and the grant, or

- (ii) administration, a certified copy of the application for administration and the grant;

- (f) record and maintain a summary of every activity and procedure with respect to each estate;

- (g) sign and issue all grants in duplicate under the seal of the court;

- (h) attach the original of any will to the duplicate of the grant retained by the registrar;

- (i) attach a copy of the original of any will, certified as a true copy the Registrar, to the duplicate of the grant delivered to the personal representative;
 - (j) endorse the date on which the grant is issued on the back of an application for a grant and sign the back of the application.
- (5) A requirement in these regulations to record and maintain information and documents shall be deemed to include a reference to the corresponding computer storage and retrieval systems provided for that purpose.
- (6) A registrar may issue a certificate of status of a grant in Form 1 confirming that a grant is in force and effect.
- (7) Upon revocation of a grant, the registrar shall make an entry of the revocation across the face of the grant on file in the following form:”

Revoked by Court Order dated
Registrar

[12] Section 97 of the Act sets out the jurisdiction to hear and determine certain matters pursuant to the Act including matters to be heard and determined by the registrar:

“97 (1) The following matters shall be heard and disposed of by a judge of the Supreme Court:

- (a) an application for the approval, pursuant to Section 50, of a sale;
- (b) an application for the approval, pursuant to Section 52, of the lease or mortgaging of real property;
- (c) an application for an order, pursuant to Section 53, requiring that real property be conveyed or vesting real property;
- (d) an application for an order pursuant to Section 55.

(2) The following matters shall be heard and disposed of by the judge of the court, or, where all interested persons and the registrar agree in writing, by the registrar:

- (a) the hearing of proof of a will in solemn form;
- (b) an application to have a personal representative removed.

(3) All other applications and other matters before the court shall be heard and disposed of by the registrar and, subject to subsection (1), the registrar may make any order that the judge may make. 2000, c. 31, s. 97.”

[13] It is apparent a registrar exercises both administrative and judicial duties. The duty of procedural fairness required of a registrar depends on the particular function the registrar is exercising.

[14] This is an appeal from the Registrar's decision of Mr. Hopkins' application to pass his accounts as personal representative of the late Frances Margaret Stewart. The powers of the court on the passing of accounts of a personal representative are set out in sections 71 to 73 of the Act.

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. 2000, c. 31, s. 71.

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. 2000, c. 31, s.72.

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. 2000, c. 31, s. 73.”

[15] Section 59(1) of the Regulations allows the Court to “adjudicate” a disputed matter in accordance with sections 66 or 71 of the Act, and set the procedure the parties shall follow and the time limits, if appropriate. In addition the court’s powers and procedure on hearing contentious matters as set out in section 67 of the Regulations as follows:

“67 Without limiting the powers of the court, the registrar, on hearing an application under this Part, may

- (a) receive evidence by affidavit or orally;
- (b) dispose of issues arising out of the application;
- (c) direct a hearing of issues arising out of the application and the procedure to be followed at the hearing;
- (d) set the time or times within which matters or proceeding respecting the estate shall be completed;
- (e) grant any relief to which the applicant is entitled because of a breach of trust, willful default or other misconduct of the respondent;
- (f) direct that notice of the court’s decision or order be given to a particular person;
- (g) dispense with service of notice on any persons if, in the opinion of the court, service is impractical;
- (h) order that any money in the hands of a personal representative be paid into any chartered bank to the credit of the estate and not withdrawn without a court order;
- (i) order that security for costs be given by any party;
- (j) order that costs be paid from the estate or by a person who is a party to the application;
- (k) make any order the registrar considers appropriate in the circumstances.”

[16] Section 102 of the Act provides where there is no provision in the Act or Probate Rules with respect to practice or evidence the Civil Procedure Rules apply.

[17] In giving the court's judgment in *Saulnier v Klyn Estate* (1988), 86 N.S.R. (2d) 29 (N.S.S.C.–A.D.), MacKeigan J.A., described the Probate Court at paragraph 2:

“2. The Court of Probate is a special Court under the **Probate Act**. Section 96 of the **British North American Act, 1867**, gave the federal government power to appoint “the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.” The Court of Probate in each district of Nova Scotia consists of the judge of Probate and the registrar; both have extensive judicial powers and both are appointed by the province by or under the **Probate Act**. The Court is thus separate from the County Court though its judge in each district is, by s. 1(b) of the **Probate Act**, the County Court Judge of that district.”

[18] In reviewing the powers of the court, normally the registrar, on passing the accounts of a personal representative, including adjudicating claims of creditors, taking evidence and deciding all disputed matters arising in the accounting, adjudicating any complaints or claims by a person interested in the taking of accounts, hearing evidence and determining the persons entitlement to participate in any surplus of assets, it is clear the registrar is acting in a judicial role. Judicial procedures are to be followed.

[19] The hearing before the Registrar dealing with the accounts of Mr. Hopkins was held April 16, 2014. The Registrar's decision was issued June 9, 2014. By letter dated April 21, 2014 Catherine Byham and Doug Botchett wrote to the Registrar. Catherine Byham identified herself as an inspector in the personal bankruptcy of Leontine Hopkins, the wife of Mr. Hopkins. In the letter Ms. Byham and Mr. Botchett state:

“From the hearing on April 16, 2014 it would appear that a good deal depends on the credibility of both Byford and Leontine Hopkins. From a long association and many dealings with these people it would be charitable to say their credibility is suspect at best.”

[20] Ms. Byham and Mr. Botchett then go in extensive detail to comment on matters upon which the Registrar was to adjudicate. The letter from Ms. Byham and Mr. Botchett was improper. There is nothing before me to indicate it had any impact on the Registrar's decision or was considered by the Registrar.

[21] When exercising a judicial function the principles of natural justice require a party be given an opportunity to hear the case against it and an opportunity to present its case. A party must be afforded the opportunity to correct or contradict evidence prejudicial to its position. Mr. Hopkins should have been provided with a copy of the letter from Ms. Byham and Mr. Botchett in order for him to respond to its contents if he wished.

[22] As a result of my conclusion concerning the letter from Ms. Byham and Mr. Botchett dated April 21, 2014 it is not necessary for me to address the other communications raised by Mr. Hopkins, namely the e-mail from Dot Cooper dated February 12, 2014; letter from Catherine Byham dated February 26, 2014; e-mail from Dot Cooper dated March 14, 2014; e-mail from Dot Cooper dated March 30, 2014; and letter from the Registrar to Ms. Byham dated March 4, 2014.

[23] I note there was nothing put in evidence from the proctor of the estate concerning his knowledge or lack thereof of the above mentioned correspondence or his review of the probate file.

[24] Mr. Hopkins being successful on his first ground of appeal, I will now, pursuant to section 93 of the Act deal with the passing of Mr. Hopkins accounts as personal representative of the Estate of Frances Margaret Stewart.

[25] In the Notice of Appeal Mr. Hopkins said the Registrar erred in disallowing the mileage he claimed from June 27, 2012 through to May 23, 2013 and made errors in her calculation of the mileage for which Mr. Hopkins should be compensated. Mr. Hopkins also appealed the registrar's disallowance of amounts claimed for flowers at the funeral; the amount allowed for the cremation box and gravemarker and the repayment of a loan from Esther Rumley to Ms. Stewart in the amount of \$4,200.00.

Mileage:

[26] Mr. Hopkins claimed he travelled 4496 kilometers on the Estate's business. He says he took the mileage from a daily log book he kept for estate business. The Registrar considered the mileage claimed seemed excessive. She disallowed trips claimed by Mr. Hopkins made prior to Ms. Stewart's death when the Public Trustee of Nova Scotia was Ms. Stewart's guardian. The Registrar allowed reimbursement for 858 Kilometers at \$0.41 per kilometer which resulted in

\$351.78 allowed for mileage charges incurred by Mr. Hopkins for the Estate. In reviewing the material which was before the Registrar as well as the additional material filed by Mr. Hopkins on the appeal and hearing Mr. Hopkins evidence it appears the mileage he claimed was excessive. For example, on both June 29, 2012 and July 5, 2012 Mr. Hopkins picked up items from the funeral at the funeral home and returned items to the funeral home – it could have been done in one trip.

[27] Mr. Hopkins' log book in which he said he kept his mileage records was not in evidence. I am not prepared to accept Mr. Hopkins evidence as to the mileage he travelled on behalf of the estate. I am not prepared to change the mileage allowance as determined by the Registrar.

Flowers

[28] The Registrar disallowed a disbursement for flowers at the funeral in the amount of \$158.70

[29] Mr. Hopkins says there were other family flowers at the funeral and these flowers were requested by Ms. Stewart. I will allow the disbursement for the flowers in the amount of \$158.70.

Cremation Box/Gravemarker

[30] Mr. Hopkins' wife, Leontine Hopkins is an owner of Bay Life Art Limited which company made the cremation box and gravemarker for Ms. Stewart's ashes. Mr. Hopkins says Ms. Stewart commissioned Leontine Hopkins to create a box for her ashes. The cremation box was started sometime after May 16, 2012. Leontine Hopkins and Byford Hopkins provided \$300.00 to Bay Life Art on that date to purchase materials to get started on the cremation box. Payments toward the cost of the cremation box and gravemarker were made from the Estate to Bay Life Art on October 22, 2012 \$300.00; November 19, 2012 \$460.00; December 18, 2012 \$175.00; March 18, 2012 \$250.00; April 22, 2013 \$500.00; July 19, 2013 \$100.00; July 22, 2013 \$200.00; August 12, 2013 \$100.00; August 21, 2013 \$500.00 and September 23, 2013 \$400.00. Normally an estate pays for a cremation box or gravemarker or any item when purchased. The payment method employed by Mr. Hopkins was unusual. I do not accept Mr. Hopkins' evidence concerning the cremation box and gravemarker.

[31] The Bay Life Art invoice for the cremation box and the gravemarker was in the amount of \$2,820.00 plus harmonized sales tax (HST) of \$423.00 for a total of

\$3,243.00. Although HST was not collected or reported, as Bay Life Art was not required to pay HST as its income was less than \$30,000.00, Bay Life Art was paid \$2,985.00. The gravemarker in question is a piece of slate rock on which pictures were painted. The Registrar allowed \$1,000.00 for the cremation box and gravemarker. There is nothing before me to cause me to vary the Registrar's decision concerning the cremation box and gravemarker.

Loan from Esther Rumley

[32] The Registrar disallowed the disbursement of \$4,200.00 to the Estate of Esther Rumley.

[33] In March 2007 Ms. Stewart was a resident of Harbour View Haven Nursing home in Lunenburg, Nova Scotia. Mr. Hopkins stated Esther Rumley, a childhood friend of Ms. Stewart visited Ms. Stewart at the home of Byford Hopkins and Leontine Hopkins in Lunenburg. Mr. Hopkins installed a ramp and a downstairs bathroom in the residence owned by he and Leontine Hopkins. Mr. Hopkins testified he thought it was his and his wife's money used to finance the ramp and bathroom. Mr. Hopkins testified he did not know about the loan from Esther Rumley until he was informed of it at Ms. Stewart's funeral. He was told Ms. Rumley made a loan of \$4,200.00 to finance the bathroom to make it easier when Ms. Stewart visited the Hopkins' residence.

[34] I do not accept Mr. Hopkins evidence. It is unbelievable a person installing a ramp and bathroom in his own residence would not know the source of the funds used to pay for the renovations.

[35] The renovations were a benefit to Mr. and Mrs. Hopkins; a ramp and a bathroom were added to their residence. They and not the Estate of Ms. Stewart should pay any loan made to finance the renovations. The Estate is to be reimbursed the \$4,200.00 paid to the Estate of Esther Rumley.

[36] The Registrar ordered Mr. Hopkins to reimburse the Estate \$7,534.75. The amount Mr. Hopkins is to reimburse the Estate is reduced by \$158.70, being the cost of the flowers resulting in the amount to be reimbursed to the Estate of Frances Margaret Stewart by Byford Hopkins of \$7,376.05.

[37] If the parties are unable to agree I will hear them on the issue of costs.

Coughlan, J.