

Date: 20020912  
Docket: P50758 and P50311

**IN THE SUPREME COURT OF NOVA SCOTIA  
IN THE COURT OF PROBATE  
[Cite as: Rustig Estate (Re), 2002 NSSC 210]**

**IN THE MATTER OF THE ESTATE OF  
JOACHIM WOLFGANG RUSTIG and  
THE ESTATE OF EVELINE LISELOTTE RUSTIG**

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**D E C I S I O N**

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**HEARD:** April 2<sup>nd</sup>, 2002 before the Honourable Justice Walter R. E. Goodfellow. (Numerous further written submissions, last dated August 12<sup>th</sup>, 2002.)

**DECISION:** September 12<sup>th</sup>, 2002

**COUNSEL:** David A. Grant - Self-represented

**GOODFELLOW, J.:**

**BACKGROUND**

**(A) ESTATE OF JOACHIM WOLFGANG RUSTIG**

[1] David A. Grant was the solicitor for Mr. and Mrs. Rustig. He prepared the will of Joachim Wolfgang Rustig and it was executed the 12<sup>th</sup> of February, 1991. The will appointed his wife Eveline Liselotte Rustig as the sole executrix, trustee and beneficiary on the usual basis that she survive her husband for a period of thirty days.

[2] Mr. Rustig died the 10<sup>th</sup> of July, 1999 and his will was admitted to probate the 30<sup>th</sup> of July, 1999. A warrant of appraisal and inventory was filed showing real property of \$107,000.00 and personal property of \$19,000.00, a total of \$126,000.00. The warrant of appraisal and inventory was filed the 1<sup>st</sup> of December, 2000.

[3] Mr. Grant reviewed with Mrs. Rustig her position, resulting in a will executed by Mrs. Rustig the 9<sup>th</sup> of March, 2000.

**(B) ESTATE OF EVELINE LISELOTTE RUSTIG**

- [4] Mrs. Rustig died the 27<sup>th</sup> of March, 2000. David A Grant, in accordance with her will, was appointed the executor on the 3<sup>rd</sup> of April, 2000. (Inventory \$796,490.89, value estimated in petition under \$632,779.11). Mr. Grant was granted executor, successor, de bonis non-administratis of the estate of Joachim Wolfgang Rustig.
- [5] Mr. Grant submitted to Mrs. Rustig's estate 57 statements of account between April the 4<sup>th</sup>, 2000 and November the 23<sup>rd</sup>, 2001 and it appears that he issued fifty-seven cheques to himself totalling \$43,669.17.

#### **POWERS CONTAINED IN WILLS**

- [6] The will, admitted to probate, of the late Mr. Rustig contained the usual general powers plus had Mrs. Rustig failed to survive for a period of thirty days, David A. Grant would have become the sole executor. He was given the usual powers necessary to deal with the estate and directed to divide the residue into two shares divided equally between their two children.
- [7] Both wills entered into probate contained the appointment of David A. Grant as the sole executor and trustee. The wills contained the following additional direction and authority:

**Power of Trustee**

- (l) to employ solicitors, accountants, or such agents as he may see fit and to pay reasonable remuneration therefore.
  
- (m) to set aside for his own use reasonable estimates of his compensation, notwithstanding that it may not at that time be ordered by a court or agreed upon by the beneficiaries of my Will.

**DESIGNATION OF ESTATE SOLICITOR**

It is my direction, that DAVID A. GRANT, be retained by my Trustees as proctor of the estate.

Any Executor or Trustee of this my Will being a solicitor, accountant or stockbroker, or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional fees or other charges for business transacted, time expended and acts done by him or his firm in connection with the administration of my estate and the trusts of this my Will, including acts which an executor or trustee not being in any profession or business could have done personally.

**PROBATE ACT - R.S., c.359**

**Jurisdiction of judge**

**Jurisdiction of judge and registrar**

**153 (2)** Any citation for the adjudication of the claims of creditors and others, the allowance of the accounts of the executor or administrator, the distribution of the estate among the persons entitled and the partitioning and sale of the real property, shall be heard and disposed of by the judge, or by the registrar, at the option of the person applying for such citation at the time of making such application, and such citation shall be made returnable accordingly, but such judge or registrar may transfer to the other of them for hearing and disposal such citation, or any of the matters involved therein or connected therewith.

### **Taxation of bill of costs**

**157** All bills of costs may be taxed by the registrar, and every such taxation may be reviewed by the judge, upon notice given by the party aggrieved to the opposite party, or given to the registrar in a case in which his fees are objected to.

### **Adjournment of hearing**

**159** In any of the following cases ...

(c) if the registrar transfers, or the parties agree to transfer, any matter to the judge for hearing or disposing of the same, the registrar may, from time to time, adjourn the hearing of such matter to enable it to be heard and disposed of by the judge or person appointed to act in the place of the judge.

### **Commission for representative**

**76** In the settlement of any estate the executors or administrators may be allowed over and above all such actual and necessary expenses, as appear just and reasonable, a commission not exceeding five per cent on the amount received by them, and the court further may apportion such commission among the executors or administrators as appears just and proper, according to the labour bestowed or responsibility incurred by them respectively.

### **Powers of probate court**

**78** In the settlement of the accounts of executors or administrators, or in any matter pertaining thereto, the court shall have the same power which is enjoyed by the Supreme Court.

## ***CIVIL PROCEDURE RULES***

### **Costs of a solicitor acting as a trustee, etc.**

#### **CPR 63.23.**

Unless an enactment otherwise provides, a solicitor who is a guardian, committee, mortgagee, trustee or personal representative is entitled as against the estate, fund, or mortgaged property, to make the same charges for services performed by him as a solicitor for or in connection with the estate, fund or mortgaged property as might have been payable out of the estate or fund, or be chargeable against the mortgaged property, as if the solicitor had been employed by some other person acting in that capacity.

### **Costs payable out of trust funds**

#### **CPR 63.24.**

Costs payable out of or chargeable against any trust estate, trust fund or mortgaged property, shall not be so paid as against any person interested therein, unless

- (a) the costs have been taxed;
- (b) any interested person is sui juris and has consented to the payment; or
- (c) the court has fixed the amount of, and directed the payment or charge.

### **Payment in advance or security taken**

**CPR 63.25.**

A solicitor may obtain payment in advance or take security for his future fees, charges or disbursements, subject to the right of taxation.

**ISSUES**

- 1. What is the appropriate remuneration for David A. Grant with respect to legal fees as relates to the estate of Joachim Wolfgang Rustig?**
  
- 2. What is the appropriate remuneration for David A. Grant with respect to legal fees for the estate of Eveline Liselotte Rustig?**
  
- 3. What is the appropriate commission as executor for David A. Grant as relates to the estate of Joachim Wolfgang Rustig?**
  
- 4. What is the appropriate commission as executor for David A. Grant as relates to the estate of Eveline Liselotte Rustig?**
  
- 5. Was David A. Grant entitled to an advance from the estate payment of his legal services or executor's commission?**

**FEES AND COMMISSIONS SOUGHT**

[8] Mr. Grant in the first of his written submissions dated April the 2<sup>nd</sup> states:

**Wolfgang**

Commission	106,000.00	\$ 5,300.00
Proctor fees (23 x 175)=4025)		<u>\$ 4,025.00</u>
<b>TOTAL</b>		<b><u>\$ 9,325.00</u></b>

### **Eveline**

Commission	747,151.96	\$37,357.60
Fees relating to sale of real estate		\$ 9,387.50
Fees relating to the administration of the estate		\$24,591.21

- [9] Mr. Grant seeks legal fees as proctor and solicitor for Mrs. Rustig's estate, a total of \$43,669.17 broken down as follows: (The 57 statements of account total \$43,679.75.)

### **Legal Fees David A. Grant**

Real Estate Sales	-	\$9,387.50
Administration of Tenants	-	\$4,000.00
Estate of Wolfgang Rustig	-	\$4,000.00
Estate of Eveline Rustig	-	\$20,591.21
HST	-	\$5,690.46



[10] In a telephone conference with Mr. Grant on September the 10<sup>th</sup>, 2002 he confirmed that he has received payment of all 57 statements of account submitted and paid in the amount of \$43,669.17. This represents payment in full for all services he performed as a proctor or solicitor and services as an executor which he billed, as entitled to, under the will on a professional legal fee services basis and he is essentially seeking approval of these total fees.

## **ISSUE NUMBER ONE**

**1. What is the appropriate remuneration for David A. Grant with respect to legal fees as relates to the estate of Joachim Wolfgang Rustig?**

[11] My general remarks with respect to legal fees as solicitor and also as proctor as relates to the estate of Mr. Rustig also apply to the determination with respect to Mrs. Rustig's estate.

## **LEGAL FEES - ESTATE OF YOACHIM WOLFGANG RUSTIG**

[12] Mr. Grant provided the court with copies of the accounts he submitted as proctor for this estate while Eveline Liselotte Rustig was the Executrix. Including HST, the four accounts totalled \$995.75 and reflect services that

included the filing of the petition for probate, arranging the advertisement in the Royal Gazette, review of the inventory, advice on a clearance certificate, etc.

[13] Mr. Grant's advise included that there was no requirement of filing the form 19 for the clearance certificate. The necessity of doing so would arise when she died or the properties were disposed of.

[14] The fees charged by Mr. Grant as proctor while Mrs. Rustig was Executrix were very reasonable and there appears to be no duplication, however, I have difficulty in the statement of final accounts submitted for Mr. Rustig's estate where amongst the disbursements is listed "David A. Grant, advance on probate fee, including dealing with income tax problem - \$4,000". I am not certain what this advance is for, whether it represents an early advance towards legal fees, proctor's fees or executor's commission. My assumption is that it is a payment towards his legal fees and has been accounted for. I would ask Mr. Grant to confirm to the Registrar and if I am in error, the appropriate adjustment should be made. For example, if it is an advance on his executor's commission, then an appropriate credit in my final calculations must be made. The only two other disbursements, other than solicitor's disbursements, were funeral expenses paid by Mrs. Rustig before

her death and income tax. There is no indication of the date of the advance taken by Mr. Grant and no statement of details as to what it covers.

[15] Mr. Grant expresses the view that it was necessary to take steps to obtain the tax clearance and close the estate of Mr. Rustig when Mrs. Rustig died and I do not disagree with that position. It would have been a legitimate objection to title by the purchasers of the properties Mrs. Rustig obtained from her husband's estate by direct devise. The sole question is the justification for legal fees and reasonable remuneration as an executor to be paid to Mr. Grant, bearing in mind that some of the work done as proctor of the estate had already been billed and paid before Mrs. Rustig's death and she had performed some of the early basic responsibilities and duties as executrix which would not be required to be duplicated by Mr. Grant when he took over as executor of the estate.

[16] Mr. Grant seeks legal fees for services as a proctor that were not previously billed and paid by Mrs. Rustig of \$4,025. It is calculated at 23 x \$175. per hour and in his representations he suggests that primarily his fees were for the services I have already indicated and he maintains that the normal handling of an estate of this size would be \$3,500. to \$4,000. range, representing about 20 hours at the rate of \$175. plus HST. He had the

additional feature of reporting to the heirs in Germany which required some translation of documents and undoubtedly some additional time. His claim is therefore for 23 hours and there are two difficulties with the proctor's fees as claimed. Accepting for the purposes of this estate only that there is a general range of \$3,500. to \$4,000., it must be remembered that some services were already completed and paid for. In addition, Mr. Grant bases this fee range on the "estate of this size" and as will be noted, subsequently in my decision I have concluded that the real estate did not form part of the estate of Mr. Rustig and therefore the size of the estate was rather minimal comprising in the warrant of appraisal a boat, two old motor vehicles and a small amount of cash, the total initially valued at \$19,000.

[17] Nevertheless, while it is clear that there were some aspects of Mr. Rustig's estate that did require some extra time, I am far from satisfied that the total time and services claimed can be related to the hours claimed. The provision in the will permits Mr. Grant to act as proctor and charge his professional services rate for all duties and in the circumstances, he is entitled to his hourly rate even for services such as collecting rent, etc. which services are not within the normal sphere of professional legal services. The size of an estate is only one of the criteria in determining what is reasonable and

appropriate as to proctor's fee and an executor's commission. I recall many times in practice handling small estates where the law firm I was associated with ended up taking a "bath" in legal fees because the time and effort required to deal with the surviving family members, their needs, etc. and other problems did not professionally warrant a charge for ones full time and only a minor portion thereof. I conclude that in the circumstances of Mr. Rustig's estate, which were relatively straightforward, a reasonable and perhaps somewhat generous allowance for Mr. Grant's proctor's fees would be 15 hours at \$175. for a total of \$2,625. plus HST of 15 per cent, \$393.75, for a total of \$3,018.75. In the end this means that Mr. Grant who attributed \$4,000. of legal fees billed and paid by Mrs. Rustig's estate to Mr. Rustig's estate has been overpaid by \$981.25.

## **ISSUE NUMBER TWO**

### **2. What is the appropriate remuneration for David A. Grant with respect to legal fees for the estate of Eveline Liselotte Rustig**

[18] Normally, an executor who is also the proctor of the estate is only entitled to charge professional solicitor's fees for services that are clearly the duty of the proctor (and not the duty of an executor). Services that clearly require

the intervention of a solicitor beyond the proctor's servicing and processing of the estate, such as the services of a solicitor required dealing with the sale or purchase of real property, permit the retainer of a solicitor on a professional fees basis. In most cases, it is practical and probably beneficial to the estate for the retainer of the proctor or a member of the proctor's firm, bearing in mind that all solicitor's fees are subject to taxation and the proctor has the onus of establishing that such services were not encompassed in the proctor's duties as an executor.

- [19] Where there is more than one executor, one of whom is a solicitor, such solicitor is precluded from charging professional solicitor's fees for services that the executor ought to render without the intervention of a solicitor unless the solicitor has the consent of the co-executors. S.63 of the *Trustee Act*, R.S. c.479.
- [20] In *Bruhm v. Feindel*, [1999] N.S.J. No. 57 (S.C.) one of the co-executors was also named in the will as solicitor for the estate. Without informing the other co-executor, he asked his law partner to act as proctor. The second co-executor was unaware of this until she received a bill for the proctor's services. Both the proctor's account and the executor's commissions were allowed by the Registrar, over the protests of the co-executor. On appeal,

the proctor's account was disallowed, except for disbursements that would have been incidental to the executor's commission. Wright, J. concluded that the facts clearly demonstrated that no solicitor-client relationship was formed between the proctor and the executors as personal representatives of the estate.

[21] The proctor is entitled to reasonable fees. In *Re Yuill Estate*, [1994] N.S.J. No. 575, Scanlan, J. reduced the proctor's fees from \$22,328.91 to \$10,307.46 concluding that the work was straightforward, though the estate was large, and that the proctor billed for inordinate amounts of time for correspondence and attendances. Justice Scanlan ordered reimbursement to the estate of any fees taken by the proctor in excess of \$10,307.46.

[22] In *Re MacDonald*, [2001] N.S.J. No. 378 Registrar Atton assessed solicitor's fees where the solicitor had to be replaced after problems arose in the administration of the two estates involved. The Registrar assessed his proctor's work at 8.5 hours (at two different hourly rates) totalling \$1,485 (he had billed for 56.5 hours, totalling \$16,273.35). She concluded that the lawyer had made the estates unnecessarily complex by failing to communicate with the executor and administrator. She also distinguished, at para. 30, between the role of the solicitor and that of the executor or

administrator, particularly where there has been no clear delegation of the executor's duties to the lawyer.

- [23] The Saskatchewan Court of Appeal confirmed the proposition that a solicitor acting as an executor cannot charge full professional fees for non-professional executor's duties. In *Re McIntosh* (1964), 46 D.L.R. (2d) 416, Maguire, J. wrote at p. 418:

The executor Hart, a solicitor, assumed responsibility for the detailed administration of the estate. His counsel on appeal submitted that this executor should be compensated on the basis of legal professional services rendered and by cross-appeal asked that the compensation be increased to \$16,000. It has long been established that a professional man, be he solicitor, accountant or otherwise, will not be granted compensation on the basis of professional charges for services rendered in respect of those services not actually professional in nature, which an executor not being a solicitor, could perform without legal advice.

- [24] Where an executor also acts as proctor under the authority of the will or with the full consent of co-executors, separate recording of the duties exercised and preferably in separate and distinct logs, one covering the time and services as executor and the other, the normal docket recording professional legal services. Here, Mr. Grant kept time records but lumped all his services as proctor and solicitor together and they are not distinguishable in most of the statements of account he rendered, all of which he rendered solely to the estate of Mrs. Rustig.



[25] Here, Mr. Grant has the express authority set out in the respective wills of the testator and testatrix entitling him to charge and be paid professional fees for all the time he expends, including duties which the executor not being in any profession or business could have done personally. Solicitor's fees at all times must be reasonable but given the authority and direction contained in their respective wills Mr. Grant's accounts charging his hourly rate for all services he performed, including dealing with tenants, etc., services beyond those of a proctor and clearly within the realm of duties expected to be performed by an executor were authorized by the testator/testatrix. This results, for example, in substantial legal fees and I express some concern with respect to the extent of legal fees for the property transactions. It is common knowledge and I do not hesitate to take judicial notice that a solicitor's fees acting for the vendor of real property have, if anything, been reduced due to market pressures over the past decades and that there are going rates for the basic handling of a property transaction for a residential property for the vendor of from \$300. to \$600. I stress that that is for the basics and that in most circumstances there is additional work and very clearly here, on behalf of the estate, there were many additional concerns. Mr. Grant had to deal with the personal representations and promises that

apparently were made by the testatrix to various tenants, draft agreements, deal with taxation problems, etc. The evidence of a letter filed by Mr. Edward Clements, a beneficiary under her will, who was familiar with the deceased for a few years prior to their deaths and a tenant in one of the duplexes, plus he acted as an employee and driver for Mrs. Rustig. He dealt with Mr. Grant after Mrs. Rustig's death and praises the fairness and accessibility he provided. Mr. Clements helped Mrs. Rustig until her death with respect to collecting rents, etc. and indicates that Mr. Grant looked after the complete management of the properties after she died. He also indicates the extent of the faith and trust that Mrs. Rustig had that Mr. Grant would handle her affairs. After careful reflection, I consider his account to the estate of Eveline Liselotte Rustig for legal services should be approved. The extent of the real estate fees and disbursements, \$9,387.50; administration of tenants, \$4,000.; and estate of Eveline Liselotte Rustig, \$20,591.21. These items would carry HST of \$5,096.80. The final statement relating to Mrs. Rustig's estate contains an item, "estate of Wolfgang Rustig - \$4,000." and I have already allowed legal fees as proctor in the amount of \$2,625. plus 15 per cent HST of \$393.75, for a total of \$3,018.75. Mrs. Rustig would have dealt with the tenants and her duties as executrix of her late

husband's estate to the time of her death. Mr. Grant, in order to dispose of the real property devised directly to Mrs. Rustig under her late husband's will, was required as proctor to deal with problems, particularly taxation problems, and such services were clearly within the duty as proctor of Mr. Rustig's estate.

[26] In the result, the total fees payable to David A. Grant as proctor and for the solicitor's work he did as authorized by the respective wills is as follows:

#### **SUMMARY**

Total legal fees for the estate of Mrs. Rustig is therefore \$9,387.50 plus \$4,000. plus \$20,591.21 plus HST of \$5,096.80 plus the amount allowed as proctor for Mr. Rustig estate \$3,018.75, a total of \$42,094.26.

[27] There is therefore a credit due to the estate for the overpayment of fees in the amount of \$1,585.49.

#### **WHAT ARE THE CONSIDERATIONS IN THE DETERMINATION OF THE COMMISSION TO BE ALLOWED TO AN EXECUTOR OR ADMINISTRATOR?**

[28] In MacDonnell, Sheard & Hull, Probate Practice, 4<sup>th</sup> Edition, 1996:

**8.9** By common law an executor is not entitled to remuneration unless provision therefore was made in the will, and the common law whereby an executor was entitled to the undisposed personalty has long been changed by legislation. However, by statute the court, on passing accounts, will allow for fair and reasonable compensation. The judge of the probate court has a wide discretion in the matter and the Court of Appeal ought not to interfere with the award merely because it believes that the judge has been too generous.

[29] One of the earliest pronouncements on entitlement to commission and the circumstances to be taken into consideration comes from *Re Toronto*

*General Trusts Corporation and Central Ontario R. W. Co.* (1905), 6 O.W.

R. 350. Teetzel, J. at p. 354:

In England, nothing is better established than that the trustee can have no allowance or compensation whatever for his time and trouble in the execution of a trust, the principle upon which that rule is founded being that a trustee may make no profit out of his office.

From the American and Canadian precedents, based upon statutory provision for compensation to trustees, the following circumstances appear proper to be taken into consideration in fixing the amount of compensation:

- (1) the magnitude of the trust;
- (2) the care and responsibility springing therefrom;
- (3) the time occupied in performing its duties;
- (4) the skill and ability displayed;
- (5) the success which has attended its administration.

[30] Teetzel, J. was dealing with an appeal where the compensation had been set at \$14,000. payable to the Trust Corporation. Teetzel, J. reviewed the degree of involvement by the Trustee and concluded at p. 356:

As a result of full consideration of all the facts and circumstances in this case, and having regard to the extent of the trust, the care, trouble, and responsibility imposed upon the trustees, the time as well as I can estimate occupied in performing its duties, the skill and ability displayed, and the success which has attended the execution of the trust, I am of opinion that a fair and reasonable compensation to the trustees for the care and pains, trouble and time, expended in and about the execution of the trust in question, would be the sum of \$1,500, and I direct that the report of the Referee be varied accordingly.

- [31] The entitlement and determination of the executor's commission is statutory and in Nova Scotia is contained in Section 76 of the *Probate Act*.

### **Commission for representative**

**76** In the settlement of any estate the executors or administrators may be allowed over and above all such actual and necessary expenses, as appear just and reasonable, a commission not exceeding five per cent on the amount received by them, and the court further may apportion such commission among the executors or administrators as appears just and proper, according to the labour bestowed or responsibility incurred by them respectively.

- [32] The language of Section 76 is clear. It establishes the following:

1. In a settlement of the estate the executor's or administrator's commission is discretionary? "May be allowed over and above all such actual and necessary expenses."
2. Commission is to be "as appear just and reasonable". This terminology is different than that used in other jurisdictions in the past where the terminology was "fair and reasonable compensation".

Nevertheless, the case law is of assistance in determining "as appear just and reasonable".

3. Commission is not to exceed 5 per cent. It is noted that this is an authorized **maximum**.

4. A just and reasonable commission is to be applied “on the amount received by them”. This clearly means that the executor or administrator must have “received” the asset before any question of entitlement to commission on its value arises. If, for example, there is a life insurance policy with a named beneficiary other than the estate, then such funds do not become “received” by the executor or administrator. Another frequent example is where real property is devised directly to a beneficiary and therefore, not “received” by the executor or administrator.

5. The statutory direction giving discretionary authority to apportion a just and reasonable commission based upon “labour bestowed or responsibility incurred by them respectively”, adds further general guidance that the commission determined by judicial discretion has a direct relationship to the effort and responsibility of an executor or administrator.

[33] If a court determines that the executor or administrator did not “amount received”, then no commission is authorized relative to that particular asset. If the preliminary threshold has been established in that the “amount received” came into the estate, then in deciding the quantum of the

commission pursuant to s. 76 of the *Probate Act* a court in the exercise of its discretion may consider all relevant factors, including the following:

1. The size of the estate;
2. The care and responsibility involved in administering the estate;
3. The time the personal representative is occupied in performing his/her duties;
4. The skill and abilities shown by the personal representative;
5. Success resulting from the personal representative's administration of the estate; and
6. Any direction given by the testator in the will.

[34] The duties of a personal representative are generally administrative in nature. Where the executor is a solicitor, there is no prohibition of acting in the separate capacities as executor and proctor. Generally, an appropriate course of action is to have someone else act as proctor which may be a member of the solicitor's firm or associate. The testator and testatrix such as in these two estates, have had a degree of sophistication through property transactions and chose to place full faith and trust in Mr. Grant and provided additional direction and powers in their respective wills. Nevertheless, the court in determining entitlement and the quantum of the commission should

examine the extent to which the executor has, under the authority of the will, sought payment for services that were not necessarily legal but administrative on a professional legal fee basis.

[35] The size of the estate and the manner in which its handled are factors.

[36] With respect to size, two examples make it clear that size alone is not the determining factor:

**Example 'A'** - In an estate consisting solely of \$200,000. of Guaranteed Investment Certificates with no named beneficiary or the estate named would require very little administration by an executor. Essentially determining their maturity, distribution, re-investment, etc. in a timely manner. Also, exploring the protection available through Canada Deposit Insurance, some straight forward tax considerations and the usual procedural steps, concluding with remittances, to heirs. etc.

**Example 'B'** - In contrast, the estate which has a value of \$50,000. comprised of a home, title to which was in the deceased's name alone, occupied by the estranged wife of the testator raising *Matrimonial Property Act* issues, a mortgage in arrears, a volume of debts that must be paid and several heirs and creditors requiring a volume of notices and who are determined to make life miserable for everyone, including the executor.



[37] It would likely follow that in example 'B', the executor would have earned the maximum commission allowable and in example 'A', a just and reasonable commission might well be in the range of 2 to perhaps a maximum of 3 per cent.

[38] The manner in which an executor conducts himself/herself can result in a very limited commission. See *Sampson v. Sampson Estate*, [1999] N.S.J. No. 89. In this case, the Registrar allowed a commission of one-half of one per cent and Simon J. MacDonald, J. noted that there were only a few bank accounts, no bills to pay, nothing of any consequence, the estate funds lost money on investments, the closing of the estate was adjourned at least five times, it was only eventually closed because of the intervention of a solicitor on behalf of the heirs. Noting the delay and failure of the executor to establish the alleged hours of involvement in the executor's duties and responsibilities, the Registrar's award of a commission at one-half of one per cent was confirmed.

[39] In *Re Atkinson*, [1952] O.R. 685, the Ontario Court of Appeal made it clear that applying an arbitrary percentage or customary percentage that the court must never lose sight of and that any practice of method by which compensation is to be determined must always be applied with the statutory

provision strictly in mind. In Ontario, it is s.60.3 of their *Trustee Act* and in Nova Scotia, s. 76 of our *Probate Act*.

### **ISSUE NUMBER THREE**

#### **3. What is the appropriate commission as executor for David A. Grant as relates to the estate of Joachim Wolfgang Rustig?**

[40] Before proceeding to a determination of this issue, it is necessary to recite in some detail the background with respect to the estate Joachim Wolfgang Rustig.

[41] Mr. Rustig engaged David A. Grant for the preparation of his will and it was executed the 12<sup>th</sup> of February, 1991. I have already cited the powers granted by the testator in his will and the will provided:

THIS IS THE LAST WILL AND TESTAMENT of me, JOACHIM WOLFGANG RUSTIG, of Dartmouth, in the County of Halifax, Province of Nova Scotia.

#### REVOCATION

I HEREBY REVOKE all former Wills and Codicils to Wills by me at any time heretofore made and declare this only to be and contain my Last Will and Testament.

#### EXECUTRIX

I NOMINATE, CONSTITUTE AND APPOINT my wife, EVELINE LISELOTTE RUSTIG, of Dartmouth, in the County of Halifax, Province of Nova Scotia, to be the sole Executrix and Trustee of this my Last Will and Testament. I hereinafter refer to my Executrix and Trustee as my "Trustee".

BEQUEST TO WIFE

If my wife, EVELINE LISELOTTE RUSTIG, shall survive me for a period of thirty (30) days then but not otherwise, I give, devise and bequeath all my property, real and personal of whatsoever nature and kind and wheresoever situate including property over which I have a general power of appointment to her absolutely.

[42] Mr. Rustig died the 10<sup>th</sup> of July; his will was admitted to probate the 30<sup>th</sup> of July, 1999. A warrant of appraisal and inventory was filed on December the 1st, 2000 showing real property of \$107,000. and personal property of \$19,000., a total of \$126,000. I requested of Mr. Grant and received specifics of the bills that he had submitted to Mrs. Rustig when she was Executrix of her deceased husband's estate. He billed her for a conference with respect to the estate, July the 14<sup>th</sup>, 1999, the preparation and filing of petition for probate by a bill of July the 19<sup>th</sup> and a final Statement of Account August the 5<sup>th</sup>, 1999 which recited "acting on your behalf with respect to arranging for a further petition for probate". The last Statement of Account submitted to her as executrix is dated the 16<sup>th</sup> of February, 2000

and recites “to review of inventory and advice respecting the preparation of Form 19 and the assessment of property owned by Mr. Rustig.

- [43] Mr. Grant reviewed with Mrs. Rustig her position, resulting in a will executed by Mrs. Rustig the 9<sup>th</sup> of March, 2000.
- [44] The will of Mr. Rustig provided for the direct devise of all his real property to his wife and the warrant of appraisement and inventory listed two of his several properties; namely, 45 Fader Street, appraised value of \$50,000. and 45A Fader Street, appraised value \$57,000. The remainder of this estate was comprised of a boat, \$15,000.; a 1972 motor vehicle, \$2,000.; a 1990 motor vehicle, \$1,000.; and cash of \$1,000. for a grand total of \$126,000. It is noted that the estate was not closed while Mrs. Rustig was the sole executrix. To the time of Mrs. Rustig’s death, Mr. Grant had been paid in full for legal services he performed as proctor for Mr. Rustig’s estate.
- [45] Mr. Grant seeks a commission on the total amount of the estate which he says is \$126,000. and the further background is that when Mrs. Rustig subsequently died the 27<sup>th</sup> of March, 2000, he became the executor of her will and proceeded to reopen the Rustig estate file and move forward to its closing and passing of accounts, etc. Mr. Grant in his memorandum to the Court indicated that he took the position that the Fader Street properties

were to be included in the amount for determining his entitlement to the commission as executor because, in his view, it was necessary for the estate of Mrs. Rustig to advance funds from the sale of the Fader properties by Mrs. Rustig's estate to satisfy tax obligations of Mr. Rustig's estate.

[46] The fundamental question of fact is whether or not the Fader Street properties did in fact come within the control, management or disposition of Mr. Grant in his capacity as executor/successor of the estate of Mr. Rustig or more specifically, were "amount received" by him as executor within the direction of s. 76 of the *Probate Act*. Clearly, the answer is no. It was quite appropriate to advance funds from Mrs. Rustig's estate to attend to any tax liability but very clearly the Fader Street properties devised directly to Mrs. Rustig by operation of his will, and I note further in the statement of account of Mr. Grant's legal fees to the estate of Mrs. Rustig the following charges:

TO: Estate Eveline Liselotte Rustig

**ACCOUNT FOR PROFESSIONAL SERVICES:**

	<u>Estate</u>	<u>Real Estate</u>
Inv L79	To detailed review of bequest respecting sail boat	

	To negotiations on behalf of the estate with respect to the sale of 45 Fader Street	\$ 350.00	\$ 300.00
Inv L91	To acting on behalf of the Estate respecting the sale of 45 Fader Street, Dartmouth, to Robert and Iris Gallagher		\$ 700.00
Inv L92	To preparation (sic) of Agreement of Purchase and Sale respecting 45a Fader Street to Boutilier		\$ 225.00
Inv L103	To acting on behalf of the Estate with respects to the sale of property located at 45A Fader Street		\$ 475.00

[47] Mr. Grant in his submissions acknowledges that the real property listed in the inventory of Mr. Rustig's estate devised directly to his widow and it is clear that these properties were handled in her estate after her death.

[48] I have concluded the properties 45 and 45A Fader Street never did come within the management "received" of David A. Grant as executor/successor for the estate of Mr. Rustig. The first threshold, the establishment of an entitlement to a discretionary award of a commission has not been established.

[49] I note further that Mrs. Rustig performed duties as executrix and as I previously stated, the maximum commission is payable as relates to all of the labour bestowed or responsibility incurred by an executor. In some

cases, a subsequent executor may have additional work by virtue of the manner or delay, etc. of a previous executor but such is not the case here.

[50] I therefore fix the amount to which commission applies as being \$19,000. In determining the rate of commission, I take into account that some of the services for the estate were preformed by Mrs. Rustig during the time she operated as sole executrix and further, in allowing full solicitor's fees for all services performed by Mr. Grant, including some services that fell within the ambit of his duty as executor, a fair and reasonable commission would be 2.5 per cent which amounts to \$475.

#### **ISSUE NUMBER FOUR**

**4. What is the appropriate commission as executor for David A. Grant as relates to the estate of Eveline Liselotte Rustig?**

[51] The size of the estate of Mrs. Rustig for the purposes of determining the executor's commission is advanced at \$741,151.96. Mrs. Rustig's will contains the following specific bequest:

#### **SPECIFIC BEQUEST**

**Property**

I give devise and bequeath the properties located at 40 Sinclair Street, Dartmouth, and Lot A West Jeddore to Edward Logue and Marion Logue or the survivor of them.

[52] This is a direct devise by her will, the properties never become “amount received” in the hands of Mr. Grant as executor. The amount for the purposes of executor’s commission must be reduced by the value of the direct devise which is 40 Sinclair, \$128,000., 1171 West Jeddore Road, \$65,000.

[53] Mr. Grant seeks the maximum of 5 per cent commission. I have already indicated in paragraph 26 that in deciding the quantum of the commission pursuant to s. 76 of the *Probate Act*, the court in the exercise of its discretion may consider all the relevant factors, including those previously listed. S. 76 of the *Probate Act* provides guidance and direction as follows:

1. In a settlement of the estate the executor’s or administrator’s commission is discretionary? “May be allowed over and above all such actual and necessary expenses.”
2. Commission is to be “as appear just and reasonable”. This terminology is different than that used in other jurisdictions in the past



where the terminology was “fair and reasonable compensation”.

Nevertheless, the case law is of assistance in determining “as appear just and reasonable”.

3. Commission is not to exceed 5 per cent. It is noted that this is an authorized **maximum**.

4. A just and reasonable commission is to be applied “on the amount received by them”. This clearly means that the executor or administrator must have “received” the asset before any question of entitlement to commission on its value arises. If, for example, there is a life insurance policy with a named beneficiary other than the estate, then such funds do not become “received” by the executor or administrator. Another frequent example is where real property is devised directly to a beneficiary and therefore, not “received” by the executor or administrator.

5. The statutory direction giving discretionary authority to apportion a just and reasonable commission based upon “labour bestowed or responsibility incurred by them respectively”, adds further general guidance that the commission determined by judicial discretion has a direct relationship to the effort and responsibility of an executor or administrator.

[54] This estate is of some magnitude and the major area for which Mr. Grant deserves to be compensated by an executor's commission is the responsibility he took in overlooking and administering the estate. There were no special features such a litigation, etc. and Mr. Grant was totally and fully reimbursed at his professional rate for all the time occupied in performing his duties. There was some appreciation of the estate from rental income, etc. but no success that did not naturally flow from income producing properties and nothing resulting from any service performed by Mr. Grant. He was, as I have repeatedly said, entitled to charge full professional fees for all the services he performed and that is, however, a consideration in the determination of what is a just and reasonable commission. After careful reflection on all relevant factors, I conclude that a just and reasonable compensation for Mr. Grant as executor would be 3 per cent of \$548,151.96, the executor's commission therefore being \$16,444.56.

## **ISSUE NUMBER FIVE**

**5. Was David A. Grant entitled to an advance from the estate payment of his legal services or executor's commission?**

[55] As I previously indicated, the material indicates an advance of \$4,000.

without any details and I have placed the onus upon Mr. Grant to satisfy the Registrar in that regard.

[56] Entitlement to executor's commission must be found within the will or in the legislation governing estates. In *Feeney's Canadian Law of Wills*, 4<sup>th</sup>

Edition:

By common law an executor is not entitled to remuneration unless provision therefore was made in the will, and the common law rule whereby an executor was entitled to the undisposed personalty has long been changed by legislation. However, by statute the court, on passing accounts, will allow for fair and reasonable compensation.

[57] It is clear from s. 76 of the *Probate Act* which commences with the

terminology "in the settlement of any estate, the executors or administrators may be allowed over and above all such actual expenses" ..... that the entitlement is statutory and is to be determined in the settlement of the estate by the Court of Probate.

[58] S. 76 of the *Probate Act* deals with the remuneration as an

executor/administrator and also s. 157 makes it clear that all bills of costs are subject to taxation by the Registrar of Probate. There is no limitation in the *Probate Act* to a proctor authorized to act as solicitor for an estate submitting and having such solicitor's account for services performed for the estate for

services that are not within the responsibilities and processing duties of the proctor of the estate. It is therefore quite appropriate for Mr. Grant to submit accounts when specific solicitor work was done, for example, on the sale of an individual property and for him to receive payment of such account. Such accounts are final accounts for specific services completed but are nevertheless subject at the end of the day to taxation and also to be taken into consideration in the overall assessment in determining the services done by the solicitor as proctor and the degree of remuneration to be received by the solicitor where the solicitor acts both as proctor and executor.

[59] In *Re Estate of Blanche Meagher, Estate No. 50018*, 2001 NSSC 39, I indicated that,

With respect to interim billing of proctor's fees, this should not take place without the concurrence of all interested parties or approval of the court. Ms. Atton did indicate that in the Halifax area interim billing by proctors did take place and she would have conveyed that to Mr. Block.

[60] There appears to be no prohibition to a proctor submitting an interim statement of account to the estate. I was therefore in error in treating interim billing of proctor's fees in the same manner as advances to an executor's commission. I do note that difficulties have arisen from the practice of interim billing of proctor's fees, in part because often the statement of

account itself is global and does not detail the time and services performed as proctor and it is resulting in a number of files when the estate is settled there has been an overpayment of proctor's fees. The court appreciates that estates take a measure of time and involve legal services as proctor of the estate and in the appropriate circumstances some measure of interim billing for services that have been performed may be appropriate. It is not appropriate to take unsubstantiated advances. It remains a preferred practice to await the settlement of the estate before the proctor submits an account for services of the estate rendered as proctor, however, I repeat there is nothing prohibiting a partial payment of proctor's fees before closing. The proctor's fees are clearly subject to approval and taxation by the court.

[61] With respect to executor's commission, there should not be any advance or partial payment on an executor's commission without the approval of the court as entitlement under s.76 is entirely within the jurisdiction of the court in its judicial application of s.76 of the *Probate Act*. See *Re Estate of Blanche Meagher, Estate No. 50018* above. In the *Meagher Estate* the executors wrongfully advanced themselves without court approval \$70,000. plus HST and were required to reimburse the estate \$31,129.64. Conducting themselves in this inappropriate and unauthorized manner resulted in cost

consequences to the executors and in the future an executor that pays any part of the commission without approval of the court or a very clear authority to do so expressed by the testator in the will, runs similar risks and other consequences such as a possible interest payment on the advance having deprived the estate of such capital.

## CONCLUSION

	<b>Sought</b>	<b>Allowed</b>
1. Mr. Grant sought legal fees for the estate of Mr. Rustig in the amount of \$4,000.	\$4,000.00	\$3,018.75
2. Legal fees relating to Mrs. Rustig's estate - Real Estate -	\$9,387.50	\$9,387.50
Administration of tenants -	\$4,000.00	\$4,000.00
Estate -	\$20,591.21	\$20,591.21
HST -		\$5,096.80

3. Commission as executor on Mr. Rustig's estate	\$5,300.00	\$475.00
4. Commission re Mrs. Rustig's estate	\$37,357.60	\$16,444.56
<b>TOTAL LEGAL FEES AND COMMISSION</b>		<b>\$59,013.82</b>

[62] There was an overpayment of legal fees and the total amount for legal fees received by Mr. Grant must be deducted.

<b>TOTAL LEGAL FEES AND COMMISSION</b>	-	<b>\$59,013.82</b>
<b>PAID IN 57 INVOICES</b>	-	<b>\$43,669.17</b>
<b>BALANCE DUE TO MR. GRANT</b>	-	<b>\$15,344.65</b>

J.