SUPREME COURT OF NOVA SCOTIA
COURT OF PROBATE FOR NOVA SCOTIA
Citation: *Hopgood v. Hopgood (Estate)*, 2018 NSSC 100

IN THE ESTATE OF Corinne Mabel Hopgood, Deceased

Date: 2018-04-26
Docket: Hfx No.: 451532
Probate No.: 58689
Registry: Halifax

Between:

Christopher Hopgood

Appellant

v.

The Estate of Corinne Mabel Hopgood

Respondent

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	October 23, 24 and 25, 2017, in Halifax, Nova Scotia
Written Decision:	April 26, 2018
Counsel:	Diana Musgrave and Daniel Wood, on behalf of the Appellant Jessica Lyle, Estate Proctor Lawrence Graham, Q.C., Andrew Nicol and Natalie Woodbury, on behalf of the Salvation Army William Mahody, Q.C., on behalf of the Intervenor, Cox & Palmer Allen Fownes, watching brief for Nancy Unser

By the Court:

BACKGROUND:

[1] Corinne Mabel Hopgood died on December 5, 2010, leaving behind an estate worth over $5.2 million. Four months before her death, she executed her Last Will and Testament. In her will, Corinne Hopgood made 19 specific bequests to various members of her family, amounting to $1,895,000. The residue of the estate was to be divided between five charities. The fifth charity, Symphony Nova Scotia, was written in by hand after the will had been executed. This addition was accepted and a release of interest was signed by the four other charities named in the will.

[2] While the will itself is straightforward, administration of the estate has been anything but. The will appointed two executors – Christopher Hopgood, Corinne Hopgood's nephew by marriage, and Nancy Unser, her niece in Orlando, Florida. Ms. Unser renounced her right to act as co-executor on December 16, 2010. Probate of Corinne Hopgood's will was granted to Christopher Hopgood on January 14, 2011.

[3] Nancy Unser was very close to her aunt. Corinne Hopgood left her $400,000 – the single largest bequest in the will – and the contents of her home. Ms. Unser's husband, Charlie Unser, received his own bequest of $100,000. Their sons, Ken and Donald Unser, each received bequests of $150,000. Nancy Unser received further payments from Christopher Hopgood, as executor, in the amounts of $387,400 ($190,000 for her own use, $140,000 for her husband, and $57,400 for her son Ken) and $30,000 for the care of her cousins, Clyde and Andrew Parks. Mr. Hopgood considered these amounts to be "pre-death financial obligations of the estate". Nancy Unser also received reimbursement from the estate for substantial amounts she claimed as expenses and fees.

[4] Despite she and her family receiving more than $1 million from Corinne Hopgood's estate, Nancy Unser remained dissatisfied with the will. She believed it did not properly represent her aunt's wishes, and that the Unser family should have received a much larger portion of the estate. On October 31, 2011, Ms. Unser wrote to Christopher Hopgood and claimed a further $500,000 for "love, service and loyalty" to her late aunt and uncle. Mr. Hopgood declined to pay the invoice

and suggested that Ms. Unser hire a lawyer if she wished to further pursue the matter.

[5] In October 2014, almost four years after his aunt's death, Christopher Hopgood forwarded his final accounts to Paul Goldberg, proctor to the estate. Mr. Goldberg circulated copies of the accounts to the residual beneficiaries and asked them to consent to a closing without a hearing. The Salvation Army raised questions about certain payments made from the estate bank account, including four cheques totalling $697,400, described in the accounts as "pre-death financial obligations". The Salvation Army was told by Mr. Goldberg that Corinne Hopgood had instructed her nephew to pay these amounts to the named individuals several days before her death. In addition to the $417,400 worth of cheques to Nancy Unser discussed earlier, Christopher Hopgood wrote cheques to himself and to his brother, David Hopgood, each in the amount of $140,000.

[6] Unsatisfied with the proctor's explanation for the distributions, the Salvation Army filed a notice of objection with the Probate Court on August 28, 2015. In addition to the "pre-death financial obligation" cheques, the Salvation Army challenged several other payments, including further amounts that Christopher Hopgood paid to himself and to Nancy Unser, and an amount paid to Mr. Hopgood's daughter, Jane Hopgood. Two of the residual legatees who had initially consented to the accounts revoked their consent and joined the Salvation Army in its objections.

[7] Before a hearing to pass accounts took place, Nancy Unser brought a motion before the Honourable Justice Allan Boudreau to extend the time for contesting the validity of Corinne Hopgood's will: 2015 NSSC 351. The Salvation Army opposed the motion. In denying the relief sought, Justice Boudreau held at paras. 21 to 23:

> By all the evidence, which is uncontradicted, Mrs. Hopgood read and understood her Will and signed it. She initialled every page in the presence of two lawyers.
>
> As pointed out this morning, a very telling fact that Mrs. Hopgood knew what she was doing and that she wanted to leave the residue of her Estate to various charities is that she apparently, in her handwriting, added a fifth charity to the list, namely Symphony Nova Scotia, sometime after the Will was signed.
>
> Based on the facts as known, I find that Ms. Unser has clearly failed to meet even a basic threshold for an Application to challenge the validity of the August 22, 2010 Will. The known facts, as I said, are basically uncontradicted.

[8] On February 2 and 3, 2016, a hearing to pass the accounts was held before the Registrar of Probate. In her decision issued May 10, 2016 (2016 NSPB 1), the Registrar found that the "pre-death financial obligation" payments were not proper distributions of the estate and that Christopher Hopgood was personally liable for them. The Registrar further disallowed various expenses paid by Christopher Hopgood in his role as executor totaling $154,075. These included the following payments to Nancy Unser: (1) $51,084 for expenses allegedly related to clearing out Corinne Hopgood's home; (2) $32,400 for a real estate consulting fee (reduced to $10,250), and (3) $50,000 described as an "equalization payment" for the depreciation in value of the contents of the home.

[9] The Registrar disallowed a consulting fee and travel fees paid to Christopher Hopgood's daughter in the amount of $20,481. According to Mr. Hopgood, the fee was for work with the residual beneficiaries to ensure that they had plans to use the inheritance funds in a manner consistent with his aunt's wishes.

[10] The Registrar disallowed a commission of $10,000 paid to Christopher Hopgood for acting as attorney for his aunt. She further found that certain amounts paid by Mr. Hopgood under the power of attorney prior to Mrs. Hopgood's death were advance bequests under the will. Since the bequests had been paid out in full, Mr. Hopgood was ordered to reimburse the estate for those amounts.

[11] As a result of the Registrar's findings, Christopher Hopgood, as executor, was ordered to pay the estate $851,655. Mr. Hopgood appeals from the Registrar's decision. Although he disputes most of her findings, there are some that he accepts. He acknowledges that the $20,841 payment to his daughter, the $140,000 "pre-death financial obligation" payment to himself, the $10,000 payment to himself as compensation for acting as his aunt's attorney, and a $190 payment to himself for expenses related to a relative's funeral in 1981, were not proper distributions of the estate. The Court received a letter from Jessica Lyle, the current proctor to the estate, on November 3, 2017, advising that Mr. Hopgood has repaid most of these amounts. Mr. Hopgood also conceded in closing submissions that the $1,500 cheques he wrote to himself and to Nancy Unser as his aunt's attorney did not clear prior to Corinne Hopgood's death and must be repaid. As of the date of this decision, the Court has no evidence that the estate has been reimbursed for these amounts.

[12] With respect to the Registrar's other findings, Christopher Hopgood's position is that:

> (1) if he made errors as executor of his aunt's estate, they were based on his good faith reliance on the advice and counsel of the proctor, Paul Goldberg;
>
> (2) the amounts paid to Nancy Unser for services rendered were proper distributions of estate assets; and
>
> (3) the payment of $6,842 to Ken Unser that Mr. Hopgood made in his capacity as attorney under the power of attorney is not an estate distribution and therefore not within the Registrar's jurisdiction.

Mr. Hopgood seeks relief under s. 64 of the *Trustee Act* from personal liability for any distribution of estate assets made by him.

[13] The Salvation Army's position is that the Court should deny Christopher Hopgood relief under s. 64 of the *Trustee Act* and uphold the Registrar's decision. It says that Mr. Hopgood is not entitled to relief from liability because he cannot establish that he acted honestly and reasonably, or that he ought fairly to be excused for his breaches of trust. The Salvation Army further says that Mr. Hopgood provided erroneous or misleading information when soliciting the legal opinion of the estate's proctor, Paul Goldberg, and, even if that were not the case, incorrect legal advice is not a basis for relief from liability under s. 64.

[14] Unfortunately, Paul Goldberg passed away shortly after he retired from the practise of law in late June 2015. On March 17, 2017, Cox & Palmer, the firm where Mr. Goldberg practised until his retirement, was added as an intervenor in this proceeding. Its involvement is limited to matters concerning the legal advice provided to the estate of Corinne Hopgood. Cox & Palmer says the evidence does not support Christopher Hopgood's contention that he relied on the advice of Paul Goldberg throughout the administration of the estate, and he should not be excused from personal liability on this basis.

THE EVIDENCE:

[15] Christopher Hopgood filed his own affidavit. Cox & Palmer filed affidavits from Tanya Butler and Harry Thompson, Q.C. Both Ms. Butler and Mr. Thompson served as legal advisors to Corinne Hopgood's estate between June and September 2015. After reviewing the Butler and Thompson affidavits, Mr. Hopgood filed a response affidavit. Each affiant was cross-examined. The parties entered a total of 26 exhibits (including the affidavits).

The Four Cheques

[16] Christopher Hopgood is a retired investment advisor who worked for Scotia McLeod for over forty years. He is the nephew by marriage of Corinne Hopgood, and, at the time of her death, had known her for more than sixty years.

[17] Corinne Hopgood's Last Will and Testament was prepared by her lawyer, Paul Goldberg. She executed the will on August 22, 2010, at her Halifax home in the presence of Mr. Goldberg and Paul Thompson, another lawyer at Cox & Palmer. According to Christopher Hopgood, his aunt often talked about being unhappy with her "business", which is what he says she called her will.

[18] Christopher Hopgood said that before his aunt's death, he regularly visited her on Sunday afternoons to help her prepare meals, review her investment accounts, and pay her household bills. He often provided her with general advice in relation to her investments. As a result of helping his aunt manage her affairs, Mr. Hopgood was familiar with Corinne Hopgood's personal savings account held with RBC. According to Mr. Hopgood, his aunt kept this account for personal use, separate from her investment accounts at RBC Dominion Securities. He said his aunt used to refer to her savings account as "her money" and the funds in her investment accounts as "the estate money". Other than these dealings, he had limited involvement in managing Corinne Hopgood's personal affairs. Mr. Hopgood described his aunt as a "very private, independent, and strong-willed individual who tended to be somewhat untrusting of others".

[19] Christopher Hopgood said it was during these Sunday afternoon visits that Corinne Hopgood expressed her desire to take care of certain individuals after her death. He said she mentioned that Ken Unser, Nancy Unser's son, was having financial difficulties after recently losing his job. He said she told him that she wanted to help Ken Unser pay off his mortgage and pay for his education retraining costs. Mr. Hopgood said his aunt often mentioned that she was regularly helping Clyde Parks, a relative who was on social assistance and unable to look after himself, and that she wanted to continue helping him after her death. Mr. Hopgood said he suggested that his aunt purchase an annuity on Mr. Parks' behalf, but she was afraid that it might affect his entitlement to government assistance. According to Mr. Hopgood, his aunt mentioned Clyde Parks' and Ken Unser's situations several times during the summer and fall of 2010. He said Corinne Hopgood also indicated on one occasion that she wanted to help out Andrew Parks, another relative of limited means.

[20] On November 18, 2010, Corinne Hopgood was admitted to the hospital after falling in her home. Christopher Hopgood stated that every time he would visit his aunt in the hospital, she would complain and beg him to get her discharged so she could return home. Mr. Hopgood did not know if his aunt had a power of attorney in place and was concerned that the hospital administration would not accept direction from him. To clarify the situation, he contacted Maurice McGillivray, a lawyer and personal friend, to ask him to speak to his aunt about a possible power of attorney. After meeting with Corinne Hopgood at the hospital on November 22, 2010, Mr. McGillivray advised Mr. Hopgood that his aunt had already executed a power of attorney naming him as her attorney. Mr. Hopgood said he did not see the power of attorney until after his aunt's death, at which time he learned that, in fact, his aunt had appointed both himself and Barry K. Parks as attorneys, "acting together or separately".

[21] Mr. Hopgood arranged for his aunt to be discharged from the hospital and, on November 26, 2010, she was taken by ambulance to her residence. That evening, Mr. Hopgood went up to his aunt's bedroom to speak with her. He said she greeted him with a smile and told him how happy she was to be back home. The conversation then turned to the money in her savings account. According to Christopher Hopgood, Corinne Hopgood told him that she wanted him to distribute the funds in the account to himself, his brother, David Hopgood, and to Nancy Unser, Charlie Unser, and their family. Mr. Hopgood said his aunt did not specify the amounts that should be given to each recipient. He said he told his aunt not to worry about that, and to concentrate on getting better. According to Mr. Hopgood, although his aunt was in her mid-nineties, he always believed she would live to be 100 years old, like her own mother. He did not expect that she was close to death.

[22] Corinne Hopgood's condition deteriorated and she fell into a coma on December 3, 2010. Having been told by the doctor that his aunt was dying, Mr. Hopgood contacted close family, including Nancy Unser, to notify them of the situation. When he contacted Ms. Unser, she informed him that they were both named as co-executors in Corinne Hopgood's will. Mr. Hopgood said he did not see a copy of his aunt's will until after her death.

[23] According to Mr. Hopgood, with his aunt in a coma, he felt he had an obligation to honour her wishes in relation to her personal savings account. To that end, he says that on December 3, 2010, he wrote and signed four cheques as his aunt's attorney. He wrote two cheques, each in the amount of $140,000, payable to himself and to his brother. He wrote one cheque payable to Nancy Unser in the

amount of $387,600, which included $190,000 for her own use, $140,000 for her husband, and $57,600 to pay off Ken Unser's mortgage. He also wrote a second cheque payable to Nancy Unser in the amount of $30,000, to be used for the benefit of Clyde and Andrew Parks.

[24] Also on December 3, 2010, Christopher Hopgood used Corinne Hopgood's personal savings account to purchase a bank draft in the amount of $6,564.48, which he said he sent to Ken Unser to honour his aunt's wish to pay for his retraining. Mr. Hopgood did not seek legal advice before making this payment.

[25] Corinne Hopgood passed away on December 5, 2010. Unsure of what to do with the December 3 cheques, Mr. Hopgood contacted Mr. Goldberg, his aunt's lawyer and potential proctor to the estate. According to Mr. Hopgood, he met with Mr. Goldberg at the Quinpool Road branch of the Royal Bank in Halifax on December 6 or 7. When he showed Paul Goldberg the cheques in the hallway of the bank, Mr. Goldberg told him that they could not be cashed. Mr. Hopgood said Mr. Goldberg told him that the cheques should be treated as liabilities of the estate.

[26] Paul Goldberg's accounts do not reference a meeting with Christopher Hopgood at the bank on December 6 or 7. The accounts do reference a "Meeting with Executors to review terms of the Will" on December 9, 2010. Mr. Hopgood said he and Nancy Unser attended the meeting that day. Notes of the meeting taken by Mr. Goldberg do not mention any discussion of pre-death financial obligations of the estate.

[27] Also on December 9, Mr. Hopgood sent Mr. Goldberg the following letter by mail:

> Dear Paul:
>
> As appointed power of attorney for Corinne M. Hopgood, I was instructed by her, during her last days that she wished to make a number of distributions from the large amount of cash in her bank account at the Royal Bank of Canada, Oxford Street and Quinpool Road …
>
> These are large distributions and I look to you, our solicitor for direction. The cheques were written up on Dec. 3rd, 2010, but by the nature of their size, we waited to today's meeting with you for guidance as to how to proceed.
>
> Her wishes as discussed with me were as follows:
>
> To pay to her niece Nancy Unser, for her son Ken Unser $57,400
> To pay to her niece Nancy Unser, for care of Clyde Parks and Andrew Parks $30,000

> To make distributions to Nancy Unser, Charlie Unser, David Hopgood, and Christopher Hopgood the remaining bulk of the cash in the above noted account, leaving funds for the day opt day operation of the estate. Principally the residence at 1956 Woodlawn Terrace.
>
> | | |
> |---|---|
> | Nancy Unser | $190,000 |
> | Charles Unser | $140,000 |
> | David Hopgood | $140,000 |
> | Christopher Hopgood | $140,000 |
>
> The above are considered by myself, power of attorney for Corinne Hopgood during her last period of time on earth, and as executor of the Estate of Corinne Hopgood as obligations and liabilities owed by the estate.
>
> Yours truly,
>
> Christopher Hopgood

[28] The four original cheques were enclosed with the letter. Although Mr. Goldberg confirmed receipt of the letter, there is no evidence that he replied to it in writing or ever prepared a legal opinion letter in relation to the cheques.

[29] Christopher Hopgood said he and Nancy Unser met with Paul Goldberg again on December 15, 2010. On that date, Mr. Hopgood signed a letter addressed to Ms. Unser confirming his understanding that she was renouncing her right to act as co-executor of the estate "on the condition that in my capacity as Executor, I will keep you informed of all significant financial matters relating to the management of the Estate". The letter also confirmed Mr. Hopgood's "undertaking" to "manage the Estate with the best interests of the Hopgood/Unser families as the priority". Ms. Unser renounced her right to act as co-executor the following day. Mr. Hopgood's evidence is that Nancy Unser renounced her right to act as co-executor because she was a US citizen and her involvement would create tax implications for the estate. He denied making "a deal" with Ms. Unser to give the family beneficiaries preference over the residual charity beneficiaries in exchange for her renunciation.

[30] Probate of Corinne Hopgood's will was granted to Christopher Hopgood on January 14, 2011. Mr. Hopgood instructed Mr. Goldberg that he would personally handle paying out the funds to the close family members, which he identified as himself, his brother, and the Unsers, while all other beneficiary payments would be handled by Cox & Palmer.

[31] When the estate's bank account was opened in February 2011, Mr. Hopgood wrote four cheques to the same individuals and in the same amounts as the cheques written on December 3, 2010. He said he made the payments in reliance on the advice Mr. Goldberg gave him on December 6 or 7 that the original cheques could be treated as liabilities of the estate. According to Mr. Hopgood, Mr. Goldberg did not, at any time, indicate to him in person or in writing that it would be improper to pay out those amounts from the estate's assets. He agreed, however, that he did not obtain a legal opinion letter from Mr. Goldberg confirming that he should go ahead and pay the amounts out of the estate.

Disputed Payments to Nancy Unser

[32] Clause 4(c) of the will provided:

> c. *Personal and Household Articles*. Give all my articles of personal and household use or ornament to my niece, Nancy Unser, of Orlando, Florida. I express the wish, without imposing any obligation, that Nancy distribute these articles in accordance with any lists that I may leave. To enable her to carry out this task, she and her husband Charles may occupy my home at no charge for up to three months after my death.

[33] For several months after Corinne Hopgood's death, Nancy Unser remained in Halifax to deal with the contents of her aunt's home. Ms. Unser submitted a series of three invoices for expenses she allegedly incurred during that period. The first invoice, for $20,606, indicated that it was "For Services Rendered during 2010 for travel expenses, personal care, Housekeeping, trash gathering, supplies and expenses". Mr. Hopgood paid the invoice on February 15, 2011, without any additional support for the amount claimed. Ms. Unser was not asked to provide receipts or other support for the invoice until some time after August 2015. The additional support shows that almost half of the $8,287 in "travel expenses" Ms. Unser claimed from the estate had actually been incurred in January, June, and August – long before Corinne Hopgood's hospitalization and death. For the month of November 2010, Ms. Unser charged the estate $500 for "house sitting", $528 for "night care", $600 for "care and comfort", and $442 for "supplies and expenses". She also charged the estate for groceries, lunches, limousines, and wine. For December 2010, Ms. Unser again charged the estate for groceries, lunches, limousines, wine, and drinks. She charged $999 for "misc expenses", $1,600 for house sitting at $100 per night, and $7,650 for "cleaning out house" at $75 per hour.

[34] Ms. Unser next submitted an invoice in the amount of $12,764 for the period of January and February 2011. The invoice indicated that the amount claimed was for "Travel expenses, house expense, meals, supplies, Clearing out and sorting personal belongings". Again, Mr. Hopgood paid the invoice without any additional support. The documentation provided in 2015 shows that Ms. Unser again charged the estate for groceries, numerous lunches, drinks, limousines, and, oddly, expenses she incurred while antiquing in Mount Dora after returning to Florida. She further charged the estate $8,550 for 114 "working hours" that she and her husband spent clearing out the house, and $1,900 for house sitting at $100 per night.

[35] The third invoice, in the amount of $17,714, was for March 2011. Ms. Unser wrote that the invoice was for "Travel expense, food/meals, supplies, house checking and Watching, clearing out contents, costs related to gifting, Distributing and trash removal, and cleaning services". Like the other two, Mr. Hopgood paid this invoice without additional support. The support provided in 2015 shows that Ms. Unser continued charging the estate for groceries, lunches, drinks, and limousines. She further charged $7,800 for 104 hours that she and her husband spent clearing out the house, and $2,500 for house sitting.

[36] Christopher Hopgood's evidence is that he was not provided with written advice or guidance by Mr. Goldberg when he assumed the role of executor for his aunt's estate. He said he was not provided information regarding the content of an executor's responsibilities, or told what an executor could and could not pay for out of the estate. According to Mr. Hopgood, Nancy Unser's first invoice was submitted directly to Paul Goldberg. He said that he and Ms. Unser reviewed and discussed it with Mr. Goldberg on January 14, 2011, and Mr. Goldberg told them it would be fine to pay it. In relation to the other two invoices, Mr. Hopgood said that he felt they were reasonable based on the considerable work done by Ms. Unser and her husband to clear out the house and prepare it for sale on the market. He emphasized that every drawer in the home was full of papers, mementos, and other items accumulated by his aunt over her lifetime, and clearing it out would have been a "huge task". He said Corinne Hopgood had been a school teacher for many years and had made it clear to himself and Ms. Unser that she wanted items that came from her former students treated appropriately. According to Mr. Hopgood, Ms. Unser "sorted through over 40 years' worth of teaching mementos and paperwork to ensure that nothing of consequence was disposed of and when approached by former students, Nancy found what they requested and returned it to them".

[37] Two other payments to Nancy Unser from the estate are at issue in this proceeding. On February 25, 2011, Ms. Unser invoiced the estate in the amount of $32,400 for "Consultation Fees re Sale of Home". According to the invoice, the fee represented 6% of the $540,000 sale price for 1956 Woodlawn Terrace. Christopher Hopgood said that Nancy Unser was a licensed real estate agent in the United States and she advertised and staged the home for sale, provided information to potential buyers over the telephone, and conducted several showings of the home. Ms. Unser was not licensed to practice real estate in Nova Scotia and, as a result, did not have access to the Multiple Listing Service ("MLS"). She advertised the home in the newspaper and found a buyer within one week.

[38] According to Mr. Hopgood, Paul Goldberg was aware in January 2011 that Nancy Unser was handling the sale of the house. Mr. Goldberg's accounts reflect a telephone conference with Ms. Unser on January 6, 2011, "re house sale and personal accounting for expenses". He also recorded a "meeting with clients to review offer to purchase 1956 Woodlawn Terrance and related matters" on January 14, 2011. Christopher Hopgood had no specific recollection, however, of ever telling Paul Goldberg that Ms. Unser intended to charge $32,400 for her services. In Mr. Hopgood's view, however, the amount was reasonable because the estate would have had to pay a substantial commission if he had hired a local real estate agent.

[39] The last disputed payment to Ms. Unser is the $50,000 "equalization payment". When Christopher Hopgood prepared the inventory for the estate, he valued his aunt's household goods and personal effects at $10,000. Upon Corinne Hopgood's death, those household contents became Nancy Unser's property. According to Mr. Hopgood, Ms. Unser sold a number of items, making about $50,000. For some reason, she then assessed the initial value of the contents at $100,000, and invoiced the estate for the difference. On the invoice, Ms. Unser described the $50,000 as "Reimbursement to Nancy M. Unser For loss [*sic*] value of contents contained in home". Mr. Hopgood said he voiced his concerns about whether this was a valid estate distribution, but Mr. Goldberg told him that he should pay the invoice. Mr. Hopgood could not explain how Ms. Unser had arrived at the $100,000 valuation. He did not amend the estate inventory to reflect the change in value.

[40] On March 22, 2011, Christopher Hopgood wrote to Paul Goldberg indicating that he had mailed out the Unser family bequests that day. In addition to

the amounts set out in the will, Mr. Hopgood included a $50,000 payment to Nancy Unser, which he agreed was the equalization payment. The next day, Mr. Goldberg sent an e-mail to Mr. Hopgood thanking him for confirmation of payment and asking, "How will you be categorizing the additional payment to Nancy?" When asked why Mr. Goldberg would ask that question if he had reviewed and approved the payment, Mr. Hopgood simply repeated, "We had discussed it".

Questions from the Salvation Army

[41] On November 5, 2014, Paul Goldberg wrote to the residual beneficiaries enclosing the executor's final accounts and asking them to consent to a closing without a hearing. On November 15, 2014, Patricia Ward, Estates Program Administrator for the Salvation Army, wrote to Paul Goldberg requesting further clarification on a number of items, including the pre-death financial obligation cheques. On December 9, 2014, Mr. Goldberg sent a letter in response. In relation to the four cheques, he wrote:

> The Pre-Death Financial Obligations were the result of specific, unequivocal directions given to Mr. Hopgood before Mrs. Hopgood's death. Mr. Hopgood, under the terms of his Power of Attorney, had the authority to fulfill the deceased's direction but it was simply a matter of timing. He was unable to attend to Mrs. Hopgood's instructions prior to her demise;

[42] The Salvation Army proceeded to retain counsel. On January 21, 2015, Natalie Woodbury from Boyne Clarke wrote to Mr. Goldberg requesting further details concerning the alleged directions given to Mr. Hopgood by Corinne Hopgood. Mr. Goldberg responded on May 14, 2015, enclosing, among other things, a copy of Christopher Hopgood's letter to him of December 9, 2010, and copies of the December 3 cheques. Lawrence Graham, Q.C., another lawyer at Boyne Clarke assisting on the file, wrote to Mr. Goldberg on May 26, 2015, to set dates for a hearing to pass accounts and to request a copy of Mr. Goldberg's "opinion as proctor to the executor as requested in the letter of December 9".

[43] By June 2015, Paul Goldberg was retiring from practice and Harry Thompson, Q.C., and Tanya Butler became involved with the Hopgood estate. Mr. Thompson was admitted to the Nova Scotia bar in 1969 and has practised primarily in the area of wills, trusts, and estates law since 2005. He and Mr. Goldberg had practised together since 1989. Mr. Thompson stated that he first became aware of the Hopgood estate in December 2010 when Paul Goldberg consulted him on the legality of Corinne Hopgood's handwritten addition of Symphony Nova Scotia to the residual beneficiaries listed in the will. He had no further involvement in the file until December 2014, when Mr. Goldberg told him about the letter from the Salvation Army raising questions about the estate distributions. Mr. Thompson said that he reviewed a draft of the letter Mr. Goldberg planned to send in reply, and suggested some cosmetic changes.

[44] Tanya Butler was admitted to the Nova Scotia bar in 2009, and has practised primarily in the area of wills and estates law since 2012. She joined Cox & Palmer as an associate in June 2015, and immediately became involved in the Hopgood estate. With Mr. Goldberg retiring, Ms. Butler was to assume the role of proctor to the estate. Ms. Butler said that at the time she was brought on to the file, the Salvation Army was pressing for court dates so that various issues could be determined. One of those issues was the legality of the pre-death financial obligation payments made by Christopher Hopgood in February 2011.

[45] On June 16, 2015, a meeting was held at Cox & Palmer's Halifax offices. According to Tanya Butler and Harry Thompson, they were both in attendance, along with Paul Goldberg and Christopher Hopgood. The purpose of the meeting was to provide Mr. Hopgood with Cox & Palmer's opinion regarding whether the pre-death financial obligation payments were an allowable expense of the Estate. Ms. Butler took notes during the meeting.

[46] According to Mr. Thompson and Ms. Butler, Mr. Thompson explained to Mr. Hopgood that the law did not permit cheques written before death but not cashed before death to be treated as a liability of the estate. Ms. Butler said that, upon hearing this news, Mr. Hopgood either looked down or hung his head, and his face was quite flushed. She said Paul Goldberg was seated next to Mr. Hopgood and Mr. Hopgood did not look at him, or confront him in any manner. According to Ms. Butler, Mr. Hopgood said he believed he had done the morally correct thing and honoured his aunt's wishes. She said he was very critical of the Salvation Army for not being grateful for what they had received under the will.

[47] Harry Thompson gave similar evidence concerning Mr. Hopgood's reaction to the news that the pre-death financial obligation cheques were not valid distributions of the estate. He stated that Mr. Hopgood lowered his head, turned a bit red, and said something like, "I was only carrying out Corinne's wishes and I thought I was doing the right thing". Mr. Thompson added, however, that he recalled Mr. Hopgood saying words to the effect that "I should have called Paul for advice before writing the cheques". Mr. Thompson said that he had a handful of further interactions with Mr. Hopgood after the meeting but that Mr. Hopgood never suggested, at any time during those interactions, that the disputed payments were made on the advice of Paul Goldberg.

[48] Tanya Butler said that, upon assuming carriage of the Hopgood file, she focused primarily on putting the final accounts into a form that could be filed with

the Probate Court, and on reconciling the receipts and statements to the accounts. As she undertook this work, she discovered several other payments from the estate that she considered problematic, including the real estate consultation fee, the equalization payment and the expense payments made to Nancy Unser. Ms. Butler said she raised the problematic payments with Christopher Hopgood as she discovered them.

[49] According to Ms. Butler, in August 2015, at Mr. Hopgood's request, she summarized the accounts and provided a liability analysis. She met with Mr. Hopgood on August 19, 2015, four days after Paul Goldberg's death, and reviewed the letter with him in detail. Ms. Butler made notes immediately following the meeting. Ms. Butler said that after reviewing the letter with Mr. Hopgood, she "asked Mr. Hopgood point blank if he had discussions regarding any of the payments with Paul Goldberg" and he responded to her question with "only number one, the cheques". Ms. Butler understood Mr. Hopgood to mean the December 3 cheques. She said she "very clearly" recalled that Mr. Hopgood told her that all of the other expenses were decisions he made on his own. Her notes from the meeting indicate that Mr. Hopgood "thought the others were all reasonable expenses, reasonable amounts". It was also Ms. Butler's clear recollection that between June and September 2015, Christopher Hopgood steadfastly maintained that he had not told Paul Goldberg when he made the February disbursements and "never pointed a finger at Paul Goldberg until after consulting other counsel in September 2015". Ms. Butler's notes state that Mr. Hopgood made "no accusation of negligence; just kept saying wish you + Harry had been with me from beginning".

[50] Ms. Butler was asked on cross-examination about a telephone conference she had with Nancy Unser on August 25, 2015. Her notes of the call indicate that Ms. Unser told her that Paul Goldberg was the one who proposed that she act as a real estate consultant, told her she could charge the estate a fee of 6%, and told her she could charge $70 per hour for her expenses and those of her husband. Ms. Butler described Ms. Unser's manner during the call as "abusive". Although there are entries in Paul Goldberg's accounts of meetings and telephone calls with Nancy Unser, Ms. Butler did not recall seeing any notes of their conversations in Mr. Goldberg's file.

[51] According to Harry Thompson's affidavit, in the week preceding September 24, 2015, he learned from Ms. Butler that Christopher Hopgood sought the advice of other counsel. He said that he and Ms. Butler met with Mr. Hopgood for the

final time on September 24, 2015, to tell him that Cox & Palmer could no longer act for him as executor.

[52] Christopher Hopgood filed an affidavit in response to the evidence of Mr. Thompson and Ms. Butler. In it, he said that he did not recall Paul Goldberg being in attendance at the meeting on June 16, 2015. He agreed that he was flushed and upset to learn that the law did not permit the December 3 cheques to be treated as a liability of the estate. He said he was "completely overwhelmed by the information, as it was the first time I had ever been told this in over four years of dealing with Paul Goldberg". According to Mr. Hopgood, it was Ms. Butler who recommended that he seek a second opinion in September 2015. He reiterated that he did discuss the larger estate expenses with Mr. Goldberg, including Nancy Unser's expenses. Mr. Hopgood conceded that he may have said that he should have called Mr. Goldberg for advice before writing the cheques, but he did not recall having said that during a meeting. Finally, he said that he was never asked by either Tanya Butler or Harry Thompson what advice Paul Goldberg had given to him in relation to how to treat the December 3 cheques.

LAW AND ARGUMENT:

[53] This is an appeal from a decision of the Registrar of Probate pursuant to s. 93(1) of the *Probate Act*, S.N.S. 2000, c. 31. An appeal under s. 93(1) is a trial *de novo*. Subsection 93(2) provides, in part:

> (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;

[54] As Moir J. noted in *Cooper v. Moncel Estate*, 2012 NSSC 195, on a *de novo* appeal, "the issue under appeal is decided afresh. The hearing of the appeal is more like first instance determination than appellate review": para. 6.

[55] Section 64 of the *Trustee Act*, R.S.N.S. 1989, c. 479 grants the Court the discretion to relieve a trustee from liability for a breach of trust:

> If it appears to the Court that a trustee is or may be personally liable for any breach of trust whether the transaction alleged to be a breach of trust occurred before, on or after the twenty-seventh day of March, 1902, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

[56] In short, the trustee may be excused from personal liability if she can establish that she:

(1) acted honestly;
(2) acted reasonably; and that
(3) it would be fair to excuse her in the circumstances of the case.

[57] In *Scott Estate (Re)*, 2005 NSCA 135, [2015] N.S.J. No. 427, Roscoe J.A. said at para. 20:

> The effect of s. 64 of the *Trustee Act* is that personal representatives of estates are only liable to do their best, and if they honestly do their best in the circumstances, they are not liable for errors in judgment.

[58] The burden is on the trustee to prove that his actions are worthy of the exercise of the court's discretion to excuse the trustee for the breach: *Cahill v. Cahill*, 2016 ONCA 962, [2016] O.J. No. 6569, at para. 50; *Langley v. Brownjohn*, 2007 BCSC 156, [2007] B.C.J. No. 2776, at para. 63.

[59] As the British Columbia Supreme Court noted in *Langley*, determining whether a trustee should be excused is a highly fact-driven exercise, dependent upon the circumstances of each particular case:

> 62 Whether or not a trustee should be excused for his or her breach is highly dependent upon the circumstances peculiar to each case; there are no hard and fast definitions of the types of behaviour that will be excused or those that will not.

[60] The Court also set out, at para. 66, a non-exhaustive list of factors that courts have considered when determining whether a trustee should be excused:

(1) Whether the trustee sought out and/or relied upon the advice of a professional in relation to the impugned conduct;

(2) Whether the opinion relied upon was correct;

(3) The relationship and communication, or lack of it, between the trustee and the beneficiaries leading up to the commission of the breach;

(4) Whether the breach was merely technical or a minor error in judgment;

(5) Whether the trustee is a lay person or a professional;

(6) Whether the trustee has received remuneration.

[61] In *Day v. Day*, 2009 NSSC 98, [2009] N.S.J. No. 265, Justice Moir referred to the factors listed in *Langley*, but noted at para. 82:

> While it is helpful to have the standard in mind, and to consider factors that have influenced judges in the past, one must not put greater limits on the discretion than those the Legislature itself has chosen: reasonableness and honesty. And so, Mr. Di Costanzo also referred me to the simple point made by Justice Hogg in *Lamport v. Thompson*, [1940] O.J. No. 374 (Ont. S.C.) at para. 42:
>
> > One must approach this question, however, upon the basis that it is impossible to lay down general rules which will be absolute, and each case must depend on its own circumstances.

[62] With respect to the requirements that the trustee acted honestly and reasonably, the Ontario Court of Appeal in *Cahill* stated:

> 51 Whether a trustee has acted honestly and reasonably will depend on the facts of the particular case. In *The Law of Trusts*, Gillese J.A. notes, at p. 190, "Generally, the courts have interpreted 'honestly' as an active involvement in the affairs and decisions of the trust administration". Whether a trustee's conduct is "reasonable" is generally determined on the basis of what an ordinary prudent business person would have done in the circumstances.

[63] The standard of care required of a trustee in administering an estate is "that of a man of ordinary prudence in managing his own affairs": *Fales v. Wohllenben Estate*, [1977] 2 S.C.R. 302, 1976 CarswellBC 240, at para. 32. Said differently, "[t]he court puts itself in the position of the trustees at the time of the disputed conduct, and considers what the prudent business person would have done in light of the facts as they were then known and the prevailing opinion among business

people at that time": *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at p. 1328.

[64] Proof that the trustee acted honestly and reasonably does not end the matter. The trustee must also establish that, in the particular circumstances of the case, the trustee "ought fairly to be excused". In other words, the court must be satisfied that this is a case where it is more equitable for the beneficiaries, rather than the trustee, to bear any loss which has occurred.

The Pre-Death Financial Obligation Payments

[65] Christopher Hopgood relies primarily on the decisions in *Day* and *McDougall Estate*, 2011 ONSC 4189, [2011] O.J. No. 3327. In *Day*, the testator was obligated under a 1998 corollary relief judgment to maintain life insurance for the younger two of his three children, Courtney and Joshua Day. The testator died in 2001. His eldest child, Troy Day, became his administrator. However, his sister, Marilyn Conrad, had control of the life insurance proceeds because she was the named beneficiary.

[66] When her brother died, Ms. Conrad received $261,658.88 from the insurers – $60,000 more than expected. Having received additional proceeds, Ms. Conrad felt justified in giving some benefit to herself and Troy Day. Although most of the proceeds were distributed to the testator's two younger children, Ms. Conrad took slightly over $30,000 for herself, and paid $30,000 to Troy Day. She made these payments with the consent of Courtney and Joshua Day's mother, Laverne Day. Courtney and Joshua Day claimed an accounting from their aunt, who sought relief under s. 64 of the *Trustee Act* for any breaches of trust.

[67] Justice Moir was satisfied that Ms. Conrad acted honestly in paying herself $30,000, but held that she could not be permitted to benefit from her own breach:

> 84 In my assessment, Ms. Conrad's paying $30,000 of the insurance proceeds to herself may have had some basis in reason, but it does not justify an exercise of the discretion under Section 64 of the *Trustee Act*. At best, it was a mistake that saw the trustee gain at the expense of those entitled to the money. In the circumstances, preventing Ms. Conrad from gaining from her own default overshadows, even eclipses, all of the considerations that are in her favour.

[68] He further concluded that in making the payment of $30,000 to Troy Day, Ms. Conrad acted honestly and reasonably:

> 85 The payment of $30,000 to Troy Day was, like the payment to herself, made honestly. Although it was an error in judgment for Ms. Conrad to make the payment, the breach was reasonable. She believed that, with the insurance proceeds turning out to be over a quarter million dollars, her brother, whom she knew well, would want to benefit his first child as well as the younger two. Wrongly but reasonably, Ms. Conrad believed there were good reasons to question the existence or extent of the trust.

[69] The Court found that, in addition to Ms. Conrad's beliefs about her brother's wishes and the extent of the trust, several other factors supported the exercise of discretion under s. 64:

> 87 First, and most importantly, all parties and their counsel took Ms. Laverne Day to speak for the two younger children. She agreed to the payment. Through her lawyer, she took part in the negotiations towards a proposed $25,000 payment. She actually consented to the $30,000 payment. Through her lawyer, she reached agreement on treatment of the balance but she withheld her signature. Ms. Conrad had good reason to believe that the younger children were bound by their mother's consent.
>
> 88 It would be unfair to require Ms. Conrad to pay Courtney and Joshua Day for money given to their half-brother with the consent of their mother, who appeared to Ms. Conrad to have authority.
>
> 89 Secondly, Troy Day signed a release in exchange for the payment. This ended whatever claim he may have had for a share of the insurance proceeds and effectively put an end to whatever claim he may have had under the *Testator's Family Maintenance Act* to a disproportionate share of the estate in view of the other two children of Mr. Day receiving all the insurance proceeds.
>
> 90 Thirdly, I do not believe Ms. Conrad can recover the payment from Troy Day and I would have dismissed the third party claim against him even if the discretion was not exercised. I agree with Mr. MacInness' submission. There were juristic reasons for the payment, such that it is not recoverable under the law of unjust enrichment. Further, this payment is not, in my view, of a kind to be recovered as a mistake … [*citations omitted*]
>
> 91 Finally, the factors identified in *Langley v. Brownjohn* tend to favour Ms. Conrad's position. She was under professional advice, in fact she acted through her lawyer, when the payment was first proposed in February, 2001. Through Laverne Day, she was in communication with the beneficiaries on the subject of the payment to Troy Day. She is not a professional. She did not receive remuneration. The loss to the children is significant but it only represents a fraction of the funds to be paid to them or that were paid for their benefit.

[70] In *McDougall Estate*, Nugent McDougall died in 2008, leaving behind a handwritten will and codicil that did not name an estate trustee. His only surviving

relative was his sister, Pearl McDougall. Mr. McDougall's friend, Delgado Chambers, was appointed estate trustee with Ms. McDougall's consent. Ms. Chambers had been a friend of the deceased for many years and served as his contact person at the nursing home where he lived shortly before his death.

[71] Mr. Nugent's handwritten will was difficult to comprehend. In addition to a clause leaving his belongings to his sister, the will contained reference to glaucoma and cataract research. According to Ms. Chambers, Mr. McDougall had made many donations to various charitable organizations during his lifetime, and had undergone cataract surgery. She understood that the will required her to make a donation to a charity involved in eye care research in glaucoma and cataracts. To that end, Ms. Chambers made a donation of $10,000 to an eye clinic in Jamaica. Pearl McDougall filed an objection to the accounts, challenging the charitable donation.

[72] The Court found that although the testator clearly intended to make a charitable gift for eye and glaucoma research, the gift failed because he did not specify the amount or portion of his estate to be directed to this charitable purpose. The Court concluded, however, that the estate trustee should be excused from liability for the breach:

> 36 In the present case I find that the estate trustee has met the onus of establishing that she acted honestly and reasonably in carrying out what she understood were the intentions of the testator. She derived no personal benefit from the charitable gift and it was not suggested that she had an ulterior purpose in travelling to Jamaica. She had good reason to select the particular charity in Jamaica, based on the testator's own eye surgery, his prior charitable donations and his connection with Jamaica, and for choosing to make a donation in the range of $10,000, which is approximately 3% of the value of the estate. I accept her evidence that she informed Ms. Chambers [*sic*] of her intention to make the donation. Ms. Chambers proceeded on the mistaken assumption that she had discretion to determine the amount of the charitable gift.

[73] Christopher Hopgood says that he acted honestly and reasonably in administering his aunt's estate. Like the trustee in *McDougall Estate*, he acted on the reasonable belief that he was required to honour his aunt's wishes. He says he knew from conversations with his aunt that she did not intend for the money in her RBC savings account to form part of her estate, and he considered it his role as executor to follow her instructions to distribute the money to various family members. According to Mr. Hopgood, the *McDougall Estate* decision establishes that his aunt's failure to specify the amounts that she wanted to give to each person

does not disentitle him to relief from liability. Mr. Hopgood says that, as in *Day*, his reliance on legal advice is proof that he acted reasonably.

[74] Unlike the trustees in *Day* and *McDougall Estate*, however, Christopher Hopgood's plea for relief from liability, insofar as the pre-death financial obligation payments is concerned, is complicated by s. 45 of the *Evidence Act*, R.S.N.S. 1989, c. 154. That section provides, in part:

> [I]n any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or both of them, with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgment or admission of the deceased, unless such testimony is corroborated by other material evidence.

[75] The requirement for corroboration in s. 45 is intended "to discourage dishonest or ill-founded claims against estates": *Johnson v. Nova Scotia Trust Co.*, (1973), 6 N.S.R. (2d) 88, 1973 CarswellNS 90 (N.S.S.C.(A.D.)). In *Murphy Estate (Re)*, (1998) 169 N.S.R. (2d) 284, [1998] N.S.J. No. 324, Justice Davison thoroughly reviewed the law concerning the corroboration required by s. 45. In so doing, he adopted the following list of principles compiled by O'Hearn Prob. Cr. J. in *Re McCarthy* (1970), 16 D.L.R. (3d) 72:

> (a) Corroboration is of no avail if the claimant's story is not believed;
>
> (b) A mere scintilla of corroborating evidence is not sufficient;
>
> (c) Evidence that is consistent with two views or two opposing views is not corroboration of either.
>
> (d) The corroborating evidence need not be sufficient in itself to establish the case.
>
> (e) The direct testimony of the second witness is unnecessary for sufficient corroboration.
>
> (f) The corroboration may be afforded by circumstances alone.

[76] Accordingly, even if I believed Mr. Hopgood's account of his conversations with Corinne Hopgood, I cannot excuse him from liability for these payments under s. 64 of the *Trustee Act* without evidence corroborating his assertion that his aunt gave him the instructions he claims in relation to her savings account. There is no such evidence. The only evidence before the Court on this issue is the testimony of Christopher Hopgood himself. For this reason, I affirm the

Registrar's finding that Mr. Hopgood is personally liable for the $697,400 ($140,000 of which he has already repaid to the estate).

[77] If I am in error that the Court is prohibited by s. 45 of the *Evidence Act* from relieving Mr. Hopgood from liability for these payments, I would still decline to exercise the Court's discretion to excuse him for these breaches of trust. I find that he has not met the burden on any trustee seeking relief from liability to show that he acted honestly and reasonably, and ought fairly to be excused.

[78] Mr. Hopgood seeks relief from this Court on the basis that he relied on advice from Mr. Goldberg. The evidence suggests, however, that he was not forthright with Mr. Goldberg about the nature of his aunt's alleged instructions. Mr. Hopgood's December 9, 2010, letter conveys the impression that Corinne Hopgood had specified the amounts that she wanted each individual to receive from her savings account. That Mr. Goldberg interpreted it this way is clear from his December 9, 2014, letter to the Salvation Army, wherein he described the pre-death financial obligations as being the result of "specific, unequivocal directions given to Mr. Hopgood before Mrs. Hopgood's death". Mr. Hopgood admitted that he never told Mr. Goldberg that he had decided on the amounts himself.

[79] Mr. Hopgood also misrepresented what he now says were his aunt's instructions in relation to Ken Unser, and Clyde and Andrew Parks. He opened his letter of December 9, 2010, as follows:

> As appointed power of attorney for Corinne M. Hopgood, **I was instructed by her, during her last days** that she wished to make a number of distributions from the large amount of cash in her bank account …
>
> [*Emphasis added*]

After stating that he was looking to Mr. Goldberg for direction, he wrote:

> Her wishes as discussed with me were as follows:
>
> To pay to her niece Nancy Unser, for her son Ken Unser $57,400
>
> To pay to her niece Nancy Unser, for care of Clyde Parks and Andrew Parks $30,000

[80] The only reasonable inference from the letter – and, in my view, the one Mr. Hopgood wanted Mr. Goldberg to draw – is that Corinne Hopgood disclosed to him her wishes in relation to Ken Unser and Clyde and Andrew Parks "during her last days". Mr. Hopgood admits, however, that she told him that she wanted to

help pay Ken Unser's mortgage, and to continue to help Clyde and Andrew Parks, at various times during his regular Sunday afternoon visits. Contrary to the suggestion in the letter, she did not instruct him to distribute specific amounts to these individuals from her savings account.

[81] These facts, whether or not they would be relevant to the legal status of the cheques, are pertinent to Mr. Hopgood's assertion that he acted honestly. Furthermore, unlike the trustee in *Day*, Mr. Hopgood did not advise the beneficiaries of his aunt's instructions to him, or his intention to pay these amounts out of the estate. This is not surprising. Mr. Hopgood said he felt that the charities only received as much as they did under the will because of his investment advice to his aunt, and that they should have been grateful for those gifts.

[82] The crux of Christopher Hopgood's position that he acted reasonably is that he sought Mr. Goldberg's counsel on what to do with the cheques, and followed his advice to treat them as liabilities of the estate. The parties agree that it is not the Court's role on this appeal to determine whether this alleged advice was negligent. In assessing the reasonableness of Mr. Hopgood's actions, however, it is necessary to decide whether he has proven that Mr. Goldberg did, in fact, give him such advice. I find that he has not.

[83] Christopher Hopgood was adamant that he met with Paul Goldberg at the Quinpool Road branch of the Royal Bank on December 6 or 7, and that Mr. Goldberg told him that he should treat the cheques as pre-death liabilities of the estate. It is difficult to believe that Mr. Goldberg would have left his downtown offices to attend at the Royal Bank without billing the estate for his time. Mr. Hopgood's claim that this meeting took place is further undermined by the letter he sent to Mr. Goldberg on December 9, after meeting with him earlier that day. In it, Mr. Hopgood wrote:

> These are large distributions and I look to you, our solicitor for direction. The cheques were written up on Dec. 3rd, 2010, but by the nature of their size, **we waited to today's meeting with you for guidance as to how to proceed.**
>
> [*Emphasis added*]

[84] Mr. Hopgood concluded the letter by writing:

> The above are considered by myself, power of attorney for Corinne Hopgood during her last period of time on earth, and as executor of the Estate of Corinne Hopgood as obligations and liabilities owed by the estate.

[85] Nowhere in this letter does Mr. Hopgood mention an earlier meeting with Mr. Goldberg at the Royal Bank. In fact, he says in the letter that he waited until December 9 to raise the issue of these cheques. Nor does he say in the letter that his characterization of the cheques as obligations and liabilities of the estate was based on previous advice from Mr. Goldberg.

[86] The evidence does not support Mr. Hopgood's claim that Mr. Goldberg gave him any advice on December 6 or 7 at the Royal Bank. Mr. Hopgood has proven, however, that he asked Mr. Goldberg for guidance on the cheques in his letter of December 9, 2010. He has also proven that Mr. Goldberg received that letter. But that is where the support for Mr. Hopgood's allegation ends. I do not accept his position that Mr. Goldberg's response to the Salvation Army on December 9, 2014, proves that the pre-death financial obligation payments were made pursuant to his advice. It is equally likely that Mr. Goldberg was attempting to defend his client's actions after the fact, in the hope that the Salvation Army would not pursue the matter any further.

[87] The allegation that Christopher Hopgood relied on Mr. Goldberg's advice is also difficult to reconcile with Tanya Butler's evidence that Mr. Hopgood did not look at Paul Goldberg or confront him upon being told that the cheques were not a valid distribution of the estate during the meeting on June 16, 2015. Although Mr. Hopgood does not recall Mr. Goldberg's presence at the meeting, his attendance is supported by Ms. Butler's contemporaneous notes and an e-mail from Ms. Butler to Lawrence Graham on June 15, 2015, indicating that Ms. Butler, Mr. Thompson, and Mr. Goldberg intended to meet with Mr. Hopgood the next day. Where Mr. Hopgood's recollection of the meeting differs from Ms. Butler's, I accept her evidence.

[88] I find that Christopher Hopgood has not proven that he made the pre-death financial obligation payments on the advice of Paul Goldberg. While I do not suggest that Mr. Hopgood's version of events is impossible, possibility is not probability. I am sympathetic to Mr. Hopgood's argument that it is unfair to penalize him for Mr. Goldberg's decisions about what to bill or to otherwise record in writing, but the Court must base its decision on the evidence. That evidence does not establish that Mr. Goldberg told Mr. Hopgood to treat the cheques as liabilities of the estate.

[89] Although it is likely cold comfort to Mr. Hopgood, even if he had proven that Mr. Goldberg advised him to make the payments, it would not have absolved

him of liability in the circumstances of this case. Reliance by a trustee on incorrect professional advice, while an important factor, does not necessarily lead to an exercise of the Court's discretion to excuse the trustee for a breach of trust. In *National Trustee Co. of Australasia v. General Finance Co. of Australasia*, [1905] A.C. 373 (J.C.P.C.), the executor had erroneously made payments from the deceased's estate to her children rather than to her husband, the rightful beneficiary. When the assignee of the husband's share of the estate brought an action to recover the funds, the executor argued that there was no breach of trust because it had paid the moneys on the advice of competent legal advisers. The executor argued in the alternative that if there was a breach of trust, it should be relieved from liability under s. 3 of the *Victorian Trusts Act, 1901*, which, like s. 64 of the *Trustee Act*, permitted a trustee to be relieved from liability if he had acted honestly and reasonably, and ought fairly to be excused. In dismissing the executor's argument that there had been no breach of trust, the Judicial Committee of the Privy Council wrote at p. 379:

> With respect to the first point, it is clear beyond all question that John Fraser was entitled to the whole of his wife's share in the trust estate, and not to one-third only; and that the payment of two-thirds to Mrs. Fraser's children instead of to the respondents was a breach of trust. The fact that such payment was made through the bad advice of the solicitors of the trust company is no defence.
>
> In *Doyle v. Blake* Lord Redesdale said: "I have no doubt that they" (the executors) "meant to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer". And there are many similar decisions in the books.

[90] The trust company's argument that it should be relieved from liability was equally unsuccessful. Like the courts below, the Judicial Committee was satisfied that the trust company had acted honestly and reasonably. It disagreed, however, with counsel's contention that, these two things having been established, the right to relief followed as a matter of course. The Judicial Committee wrote at p. 381:

> Unless both are proved the Court cannot help the trustees; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances.

[91] It was a very material circumstance in this case that the executor was a trust company and not a gratuitous trustee. While not willing to say that relief from

liability should never be applied to a trust company, the Judicial Committee held that it would have been unfair to place the burden of the loss on the respondent assignees who had committed no fault and were entitled to their share of the estate. The Judicial Committee continued at pgs. 381-382:

> If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof as is practicable, for their cestui que trusts. … It may be that the solicitors would be willing or might be compelled to make good the loss, if the trust company should find they cannot obtain relief elsewhere. …

[92] In *Smullen Estate, Re*, [1995] O.J. No. 675, 1995 CarswellOnt 180 (Ont. Sup. Ct. J.), Dr. Smullen was the trustee of a trust fund for his two children. After investing the funds in Guaranteed Income Certificates, Dr. Smullen sought the advice of his accountant on how to report the interest produced by the GICs for income tax purposes. His accountant incorrectly advised him to claim the interest as his own income. Dr. Smullen followed this advice for the years 1990-1992. He then paid $16,000 out of the trust to cover the resulting income tax liability. Upon learning that he should not have claimed the trust income as his own, Dr. Smullen brought an action in negligence against the accountant. That action had not come to trial before the hearing of an application by the beneficiaries to recover the funds.

[93] Dr. Smullen sought relief under s. 35 of the Ontario *Trustee Act*, arguing that he should not be penalized for having relied on the advice of a qualified chartered accountant, even if the advice was bad. The Court held that Dr. Smullen had not acted reasonably, and that if he had received the advice he claimed, any remedy was against the accountant:

> 38 The income tax issue has two parts to it, one of which is squarely before me in the submitted accounts and can be answered simply. That is, the three payments out of the trust to the Receiver-General totalling $16,000. It was obviously factually wrong for Dr. Smullen to have described as his own income the income of the trust. Thus, it was a breach of trust for him to have recouped himself out of the trust funds for the resulting additional tax (not to mention the apparently generous calculation that exceeded the additional tax). **That an accountant could have recommended that Dr. Smullen report the trust's income as his own seems extraordinary, but that is a subject that may be left to the lawsuit that Dr. Smullen has brought.**

> 39 **I am unable to conclude that Dr. Smullen acted reasonably when he reported and paid income tax on the income of the trust as his own income. Section 35, therefore, cannot be invoked to relieve him from personal liability for this breach.** He must repay the $16,000 to the trust and make good the loss to the trust of the interest that the money could have produced had those three payments to the Receiver-General not been made.
>
> [*Emphasis added*]

[94] In *Nelson v. Little Estate*, 2005 SKCA 120, 2005 CarswellSask 682, Mildred Little executed a will in 1982 naming her only son, James Little, as executor. In the will, she left her home to her son and divided the residue of her estate between her two daughters. In the 1990s, Ms. Little transferred title to the house to the names of herself and her son, jointly. She also transferred some bank deposits totaling $57,056 into a joint account with her son, and designated him as the person to receive payments under a Registered Retirement Income Fund with a value of $29,508.

[95] When Ms. Little died on August 12, 1999, James Little took the position that the bank deposits and the proceeds of the RRIF did not pass under the will, but were given to him for the benefit of Ms. Little's grandchildren, great-grandchildren, and himself. He paid $45,000 to the grandchildren and great-grandchildren, and nothing to his sisters. The sisters brought an action against their brother, claiming that the funds were part of the residue of their mother's estate.

[96] At trial, James Little testified that his mother's wishes were that the money be used to look after her grandchildren and great-grandchildren. Other witnesses gave conflicting evidence as to Ms. Little's intentions. The trial judge found that Ms. Little had not intended to make a gift of the funds in the joint bank account and the RRIF. The judge also found as a fact that the monies were not intended to benefit the grandchildren and great-grandchildren. Since there was no gift to Mr. Little, and no trust in favour of the grandchildren and great-grandchildren, the funds reverted back to the estate. James Little appealed the trial decision and raised, for the first time, the argument that he should be relieved of liability under s. 57 of the Saskatchewan *Trustee Act*. Notwithstanding Mr. Little's reliance on legal advice that he was entitled to distribute the funds, the Court dismissed his appeal:

> 23 The appellant says he paid the monies to the grandchildren and great-grandchildren in the honest belief that he was carrying out Ms. Little's wishes. He

> gained no personal benefit from doing so, and did not act dishonestly. He also points out that the bulk of the funds went to children or grandchildren of the respondents, his sisters. The other side of the coin is that the trial judge did not accept his evidence that Ms. Little intended that the funds in question benefit the grandchildren and great-grandchildren. Furthermore, the appellant knew from the outset that the respondents disagreed with the position taken by him and intended to take proceedings against him. The disagreements were such that they could not even agree upon the funeral of Ms. Little. **In the circumstances, the appellant's actions in distributing the funds without at least getting directions from the court were imprudent for a trustee, notwithstanding that he made the distribution upon legal advice that he was entitled to do so. The circumstances simply do not justify, on any equitable basis, compelling the innocent respondents to bear the loss to them occasioned by the trustee's imprudence.**
>
> [*Emphasis added*]

[97] Indeed, even in *Day*, upon which Christopher Hopgood relies, the fact that the trustee acted through her lawyer was only one factor considered by Justice Moir when determining whether it was equitable in the circumstances to relieve her from liability. If acting on incorrect legal advice was a sufficient basis, without more, to exonerate a trustee for a breach of trust, that would have ended the analysis. It was also relevant to the Court that: (1) counsel for the beneficiaries, like Ms. Conrad's lawyer, incorrectly believed that the children's mother could consent on their behalf; (2) Troy Day, the eldest child, had signed a release in exchange for the payment that ended any potential claim he may have had under the *Testator's Family Maintenance Act*; (3) Ms. Conrad was likely unable to recover the payment from Troy Day because there were juristic reasons for the payment; and (4) the factors identified in *Langley v. Brownjohn* tended to favour Ms. Conrad's position: she acted under professional advice, she communicated with the beneficiaries about the payments, she was not a professional, and she did not receive remuneration.

[98] In Christopher Hopgood's case, even if I had found that he acted on legal advice from Mr. Goldberg, I would not relieve him from liability for the pre-death financial obligation payments. Unlike the trustee in *Day*, Mr. Hopgood would have the option to sue Cox & Palmer, or the recipients of the cheques to recover his losses (an option that still remains open to him). Furthermore, while Mr. Hopgood was not a professional trustee, he was hardly unsophisticated. He worked as an investment advisor for forty years, and acted as executor of another estate during the same period that he was executor of his aunt's estate. Unlike the trustee in *Day*, he did not communicate with the beneficiaries before making the

payments, and he received $100,000 in remuneration for acting as executor. Finally, Mr. Hopgood gave Paul Goldberg misleading information about his aunt's instructions that may (or may not) have influenced the opinion he says Mr. Goldberg gave him. It would be inequitable to excuse him from liability for having relied on an opinion that he obtained by providing counsel with misleading information. In all of the circumstances of this case, fairness dictates that Mr. Hopgood should bear the loss caused by his own breaches of trust rather than the innocent beneficiaries who were entitled to the funds under Corinne Hopgood's will.

Payments to Nancy Unser

[99] I will now consider the payments to Nancy Unser for expenses, a real estate consultation fee, and a $50,000 "equalization payment". Christopher Hopgood submits that these amounts were proper distributions of estate assets. In the alternative, he says he should be relieved from liability because, like the pre-death financial obligation payments, he made these distributions on the advice of Paul Goldberg.

[100] Nancy Unser submitted three invoices, totaling $51,084, for "expenses" she said she incurred while staying in Halifax and clearing out Corinne Hopgood's home. Each invoice consisted of an amount and a brief general description. For example, the third invoice, for $17,714, indicated that it was for "Travel expense, food/meals, supplies, house checking and Watching, clearing out contents, costs related to gifting, Distributing and trash removal, and cleaning services". Mr. Hopgood paid all three invoices without requesting or receiving a breakdown of the individual expenses, or any receipts or other support for the amounts claimed. When additional support was provided in 2015, it became clear that, in addition to travel expenses incurred after her aunt's hospitalization, Ms. Unser charged the estate for trips she took long before her aunt was hospitalized. She also charged for groceries, lunches, wine, drinks, limousines, shipping costs, and so on. Ms. Unser further charged the estate for sixty nights of house sitting at $100 per night ($6,000), and for 320 hours that she and her husband spent cleaning out the house at $75 per hour ($24,000).

[101] The Registrar of Probate concluded that these invoices should not have been paid by the estate. I agree. When Corinne Hopgood died, the contents of her home became Nancy Unser's property. In her will, Corinne Hopgood expressed the wish, but not the obligation, that her niece would distribute them in accordance

with any lists that she might leave. There is no evidence before the Court of any such lists. To give Ms. Unser sufficient time to deal with her belongings, the will provided that she and her husband Charles could occupy the home "at no charge for up to three months". Christopher Hopgood argues that "at no charge" means "at no cost to her". In other words, he says that Ms. Unser was entitled under the will to payment of any and all expenses she incurred while staying in the home to deal with the contents. He further argues that the will gave him the power to sell the property, and the discretion to conduct the sale in the manner and on the terms he deemed appropriate. In his view, that discretion gave him the authority to "retain" Nancy Unser to clear out the home and prepare it for sale.

[102] Even if I accepted Mr. Hopgood's interpretation, it does not explain why Ms. Unser was paid $6,000 for house sitting. In any event, the language of the will does not support the highly generous interpretation Mr. Hopgood attributes to it. In my view, the will means exactly what it says. Ms. Unser was permitted *to occupy the home* at no charge. The will did not entitle her to reimbursement for travel expenses incurred before and after Corinne Hopgood's death, limousine rides, lunches and drinks, or bottles of wine. It did not entitle her to payment of the costs involved in gifting her own property or shipping it to herself in Florida. It certainly did not entitle her to payment of expenses related to an antiquing trip to Mount Dora.

[103] As to Mr. Hopgood's claim that the will gave him the discretion to pay Ms. Unser to clear out the house so that it could be sold, I disagree. Upon Corinne Hopgood's death, the contents of the home became Ms. Unser's property. Under the terms of the will, she was given three months to reside in the home free of charge while she dealt with her newly-acquired property. This direction in the will meant that Mr. Hopgood was not empowered to sell the home, or to exercise any discretion in relation to sale of the property, until those three months had expired. By that time, the contents should have been removed from the home. Even if this were not the case, however, I do not accept that using estate assets to pay a beneficiary to dispose of her own property is a proper exercise of the discretion Mr. Hopgood was given under the will.

[104] I will now consider the real estate consultation fee payment. On February 25, 2011, Nancy Unser invoiced the estate in the amount of $32,400, or 6% of the $540,000 sale price for Corinne Hopgood's home, for what she called "Consultation Fees re Sale of Home". In reducing this payment to $10,250, the Registrar wrote at page 5 of her decision:

> The amount paid to Nancy Unser for commission in the amount of $32,400 is not allowed. While she may have been familiar with the property, there is no correlating requirement that the estate pay her a professional commission on the sale of the home. However, I don't believe it unreasonable that she receive remuneration for her assistance to the estate. …

[105] Nancy Unser was not licensed to practice real estate in Nova Scotia, and, as such, could not submit an MLS listing for the property. Instead, she placed an ad in the newspaper. She quickly received a few offers, and the property was sold within one week. During the hearing before the Registrar, Christopher Hopgood was asked how he settled on the sale price of $540,000. He testified:

> There … there was two … that was the price that was still reasonable. The price … the property was advertised. There were two interested parties. That was the highest price that came from all that, the advertising, the showing of the properties [*sic*]. There were two people interested, and that was the highest price, yeah.

[106] Corinne Hopgood's home was located in a highly desirable area of the city. Despite very limited marketing, it quickly generated two serious offers. In my view, an ordinary prudent business person would have recognized that an MLS listing of the property by a local agent would likely have produced significantly more interest than a newspaper ad. Higher interest may have resulted in a higher purchase price. That being said, but for his payment to her of 6% of the sale price, Mr. Hopgood's decision to have Ms. Unser handle the sale might have been a valid exercise of his discretion. Selling a property without a local agent might not bring in the best purchase price, but it would save the estate from having to pay a standard real estate commission on the sale. In paying Nancy Unser a consulting fee of $32,400 when she did not bring the same skills and resources to the table as a local real estate agent, Mr. Hopgood failed to exercise his discretion reasonably. He prioritized Ms. Unser's interests over those of the residual beneficiaries.

[107] Little needs to be said about the $50,000 "equalization payment" to Nancy Unser. No experience as an executor is necessary to recognize the patently unreasonable nature of this distribution. There is nothing in the will to suggest that Ms. Unser was entitled to $100,000 worth of household contents. I agree entirely with the following comments of the Registrar at page 4 of her decision:

> The value of an asset cannot be arbitrarily increased and an equalization payment demanded by the recipient. The $50,000 paid to Nancy Unser as "equalization

> payments" for the contents of the home is not allowed and is to be paid back into the estate forthwith.

[108] Having concluded that none of these payments were valid estate distributions, I must consider Mr. Hopgood's submission that he should be relieved from liability because he made the payments on Paul Goldberg's advice.

[109] In addition to his own testimony, Mr. Hopgood relies on Mr. Goldberg's accounts for the first half of 2011 as evidence that he acted on Mr. Goldberg's advice. In his billings, Mr. Goldberg references several telephone conferences, meetings, and e-mails between himself and Mr. Hopgood. There is also an entry dated January 6, 2011, that references a telephone conference between himself and Nancy Unser "re house sale and personal accounting for expenses". From this evidence, Mr. Hopgood says the Court can infer that Nancy Unser's invoices were prepared in accordance with Mr. Goldberg's advice, and that Mr. Hopgood obtained approval for each of the disputed payments.

[110] Mr. Hopgood's evidence that Paul Goldberg told him to make these payments is at odds with Tanya Butler's "very clear" recollection that Mr. Hopgood told her he had made those decisions on his own. Her notes prepared immediately after her meeting with Mr. Hopgood on August 19, 2015, indicate that he "thought the others were all reasonable expenses, reasonable amounts". Mr. Hopgood's evidence also seems to conflict with statements by Mr. Goldberg. In his letter to the Salvation Army dated December 9, 2014, Mr. Goldberg addressed the sale of the property:

> A copy of the appraisal, Agreement of Purchase and Sale and the Statement of Adjustments are attached. Nancy Unser travelled to Nova Scotia on several occasions and attended to the disposition of household effects and all related matters with respect to the sale of the family property. **Please note that no real estate commission was paid;**
>
> [*Emphasis added*]

[111] In relation to the equalization payment, Mr. Hopgood e-mailed Mr. Goldberg on March 22, 2011, to inform him that he had paid out the Unser family bequests and an additional $50,000 to Nancy Unser. When Mr. Goldberg replied the next day, he asked Mr. Hopgood, "How will you be characterizing the additional payment to Nancy?" This is an odd question for Mr. Goldberg to ask if, as Mr. Hopgood claims, the two men had discussed the invoice and Mr. Goldberg

advised him to make the payment. Furthermore, while Mr. Hopgood made the payment on March 22, Ms. Unser's invoice is dated March 31, 2011.

[112] On the evidence before the Court, I am unable to conclude that Christopher Hopgood made the disputed payments to Nancy Unser on the advice of Mr. Goldberg. In any event, even if I were satisfied that Mr. Goldberg advised him to make the payments, as extraordinary as it may seem, I would not excuse Mr. Hopgood from liability under s. 64 of the *Trustee Act.* Mr. Hopgood knew that Ms. Unser was dissatisfied with her family's share of the estate, and any prudent businessperson in his position would have recognized these invoices for what they were: a blatant attempt by Ms. Unser to extract as much money from the estate as possible. If Mr. Goldberg actually gave Mr. Hopgood the advice he alleges, it would nevertheless have been unreasonable for him to blindly follow it in the unique circumstances of this case. Moreover, he has not proven that he ought fairly to be excused, for many of the same reasons discussed earlier.

The Payment to Ken Unser under the Power of Attorney

[113] On December 3, 2010, Christopher Hopgood used funds from Corinne Hopgood's savings account to purchase a bank draft in the amount of $6,564.48. Mr. Hopgood said he sent the money to Ken Unser to honour his aunt's wish to pay for his retraining. Since Mr. Hopgood paid Mr. Unser with a bank draft rather than by cheque, the funds cleared the bank account prior to Corinne Hopgood's death. Although the Registrar questioned, during the hearing, whether she had jurisdiction to deal with these payments, she held that the payment constituted an advance bequest and ordered Mr. Hopgood to repay the funds to the estate.

[114] I agree with Mr. Hopgood that payments he made as Corinne Hopgood's attorney, provided they cleared her account before her death, do not fall within the jurisdiction of the Registrar of Probate. Where a beneficiary under a will believes that an attorney has committed an illegitimate transaction while the testator was incapacitated, that beneficiary may bring an application to the Supreme Court under s. 5(1) of the *Powers of Attorney Act*, R.S.N.S. 1989, c. 352:

> 5(1) Where a donor of an enduring power of attorney becomes legally incapacitated, a judge of the Trial Division of the Supreme Court may for cause, on application,
>
> (a) require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor;
>
> (b) require the attorney to attend to show cause for the attorneys failure to do anything that the attorney is required to do as attorney or any order made pursuant to this Act;
>
> (c) substitute another person for the attorney;
>
> (d) allow or disallow all or any part of the remuneration claimed by the attorney;
>
> (e) grant such relief as the judge considers appropriate;
>
> (f) make such provision respecting costs as the judge considers appropriate.

[115] As Justice Leblanc noted in *B.F.H. v. D.D.H.*, 2010 NSSC 340, [2010] N.S.J. No. 562, at para. 24, the Act imposes no restrictions on who has standing to bring an application pursuant to s. 5(1). Where the donor has died after becoming incapacitated, an accounting may be ordered to resolve a concern among beneficiaries: *Burns v. Burns*, 2002 NSSC 145, [2002] N.S.J. No. 280, at para. 21.

[116] The fact that Mr. Hopgood acted as both attorney and executor did not widen the scope of the Registrar's jurisdiction. I allow the appeal in relation to the payment of $6,564.48 to Ken Unser.

CONCLUSION:

While Christopher Hopgood may have felt morally obliged to carry out what he believed were Corinne Hopgood's wishes in relation to the funds in her savings account, he had no legal authority for effectively rewriting her will. With respect to Nancy Unser's invoices for expenses, the real estate consultation fee, and the equalization payment, he acted unreasonably and must repay these amounts to the estate. He is not required to reimburse the estate for the $6,564.48 he paid to Ken Unser as his aunt's attorney.

[117] I will hear from the parties on costs if they are unable to reach agreement.

McDougall, J.