SUPREME COURT OF NOVA SCOTIA
Citation: *Zwicker v. Richardson (Estate)*, 2018 NSSC 327

IN THE ESTATE OF SHIRLEY ELIZABETH RICHARDSON

Date: 20181220
Docket: Probate 13412
Registry: Bridgewater

Between:

Judith Zwicker, in her Personal Capacity, and in her Capacity as Personal Representative of the Estate of Judith Stevens

Applicants

v.

Linda Louise Herman, John David Herman and Tommy Dale Herman, in their Personal Capacities, and John David Herman and Tommy Dale Herman, as Personal Representatives of the Estate of Shirley Elizabeth Richardson

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Pierre L. Muise
Heard:	March 19 to 21, 2018, in Bridgewater, Nova Scotia
Final Written Submissions:	Received June 8, 2018
Written Decision:	December 20, 2018
Subject:	Estates – *Probate Act* - Passing of Interim Accounts – Management of Estates – Relief from Liability for Mismanagement – Personal Representative's Commission – Proctor's Account
Summary:	Judith Stevens was the executrix of the Richardson Estate from February 2005 until she passed away in 2011. Judith

Zwicker was appointed executrix in September 2011. The last real property of the Estate sold in October 2011. Ms. Zwicker liquidated all assets and sought to have the Estate finalized. Following the directions of the Proctor and accountants, she: organized the receipts and bank statements; placed all undistributed funds in non-interest bearing accounts; and, in 2012, applied for a clearance certificate. The Canada Revenue Agency provided it in 2013. She then urged the Proctor, on multiple occasions, to finalize the accounts. The Proctor was unable to get the accounts to balance, even after receiving assistance from a retired registrar of probate. In May 2016 Ms. Zwicker complained to the Barristers Society that the Proctor was not responding to her requests to finalize the Estate. The Proctor withdrew. Ms. Zwicker was removed as personal representative on September 12, 2016. The within application was to pass the interim accounts up to that point.

Issues:

(1) Are the interim accounts in balance and sufficiently supported by evidence?

(2) Did the Executrixes properly manage the Estate in the circumstances?

(3) What, if any, commission should the Stevens Estate and Ms. Zwicker receive?

(4) Which portion, if any, of the Proctor's account for legal services should be allowed?

Result:

(1) The interim accounts are in balance and sufficiently supported by the evidence, except for: unsupported and unexplained expenditures during Ms. Stevens' management of the Estate totalling $9,789.14; and, the $25.60 Ms. Zwicker owes the Estate to correct an error she made while depositing cash from sale of furnishings. Those amounts are to be paid to the Estate to complete the balancing.

(2) The sale of the real properties was rendered unusually difficult by their: condition; nature; occupants; being

grossly overvalued by the deceased, Ms. Richardson, creating unrealistic expectations for the beneficiaries; and, being burdened by debts and judgments of Ms. Richardson's husband, who predeceased her. In addition, the Proctor directed that all receipts and bank statements be sent to his office; but, some went missing, causing delay and inability to provide sufficient evidence supporting some expenses. In the circumstances, the Executrixes generally managed the Estate properly, and in connection with any mismanagement, acted honestly and reasonably and ought fairly to be excused.

(3) The Stevens Estate is entitled to 2% of the $1,388,927.73 total value of the Estate, less any amounts to be paid to the Richardson Estate to account for unsupported and explained expenditures. Ms. Zwicker is entitled to 1.5% less the $25.60 owing to the Richardson Estate.

(4) Proctor's fees totalling $7,677.15, inclusive of HST, plus disbursements of $18.87 would have been allowed. That amount was reduced by $4,789.14 due to expenses caused to the Stevens Estate by the lost receipts. That reduction is to be credited to the Stevens Estate. That results in it only owing the Richardson Estate $5,000, with the remaining amount being accounted for by the reduction in fees which would otherwise have been owed by the Estate.

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Final Written Submissions:	Received June 8, 2018
Counsel:	Kathryn M. Dumke, Q.C., Counsel for the Estate of Judith Shirley Stevens and Judith Zwicker G.F. Philip Romney, Counsel for the Estate of Shirley Elizabeth Richardson, Linda Louise Herman, John David Herman and Tommy Dale Herman Richard Niedermayer, Counsel for David Hirtle

INTRODUCTION

[1] Shirley Richardson passed away on February 5, 2005. Her daughter, Judith Stevens administered the estate from February 22, 2005 to when she passed away in 2011.

[2] Judith Zwicker was appointed to replace Ms. Stevens in September 2011. Other than the sale of one last real property, which happened about 2 weeks later, all that remained to be done was the final accounting and distribution of the balance of the Estate. There were unsuccessful attempts at passing the final accounts.

[3] Ms. Zwicker was removed as personal representative for the Estate of Shirley Richardson. The reason for removal was that potential claims against the Estate of Judith Stevens for alleged mishandling of the Richardson Estate put her in conflict of interest. That was because Ms. Zwicker is also the personal representative, as well as the sole beneficiary, of Ms. Stevens' Estate.

[4] Ms. Zwicker was ordered to provide an accounting of the administration of the Richardson Estate up to the date of removal, September 12, 2016.

[5] The within application is for the passing of those interim accounts.

[6] It is contested by the Richardson Estate, its current personal representatives, John David Herman and Tommy Dale Herman, as well as by Linda Louise Herman, who is another daughter of the late Shirley Richardson and one of the main beneficiaries of her estate.

[7] The contesting parties noted, prior to the proceeding, that Ms. Zwicker had not succeeded in providing an interim accounting in which the figures presented balance. They now do not contest that point. However, in support of their position that the interim accounts presented should not be approved, they point to missing receipts, and allege discrepancies and missteps in the accounting.

[8] They are of the view that it is futile to require a further accounting; and, suggest Ms. Zwicker should be discharged pursuant to section 72 of the ***Probate Act*** of Nova Scotia without approval of the accounts and without receiving any executrix's commission for herself or the Stevens Estate, because of the failure to provide a proper accounting and other alleged mishandling of the Estate.

[9] They further request that the Richardson Estate be reimbursed all amounts in relation to which there are no or questionable receipts.

[10] The Stevens Estate and Ms. Zwicker acknowledge they are responsible for paying, to the Richardson Estate, those amounts shown as expenses incurred after

the grant of probate for which they have been unable to produce receipts or provide an explanation.

[11] They allege that negligence by the former proctor of the Richardson Estate, David Hirtle, resulted in loss of receipts and extreme delay in closing the Estate. They, and the contesting parties, are of the view that he should, therefore, not receive any legal fees for his services.

[12] Mr. Hirtle asks that his full legal services account be allowed, arguing that it is reasonable compensation for services rendered.

[13] There is no dispute that the duties and responsibilities of the personal representative of an estate may be altered by provisions in a deceased person's will. The Stevens Estate and Ms. Zwicker point to provisions in the Will of Shirley Richardson as purportedly relieving them of responsibility for some of the alleged mishandling of the Richardson Estate.

[14] It was agreed that, in determining this Application, I could examine the materials in the Probate File, except for the envelope with David Hirtle written on it. I have ignored that portion of the file.

ISSUES

[15] The issues raised in this application may be framed as follows.

(i) How should Shirley Richardson's Will be interpreted and considered in the circumstances?

(ii) Are the interim accounts in balance and sufficiently supported by evidence?

(iii) Did the Executrixes properly manage the Estate in the circumstances?

(iv) What, if any, commission should the Stevens Estate and Ms. Zwicker receive?

(v) Which portion, if any, of Mr. Hirtle's account for his legal services as Proctor of the Estate should be allowed?

LAW AND ANALYSIS

ISSUE 1: HOW SHOULD SHIRLEY RICHARDSON'S WILL BE INTERPRETED AND CONSIDERED IN THE CIRCUMSTANCES?

[16] Our Court of Appeal, in ***Re Murray Estate***, 2001 NSCA 25, at paragraphs 18 to 23, quoted with approval the following comments from the Saskatchewan Court of appeal:

> "Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to these circumstances in so far as they bear on the intention of the testator. He should *then* study the whole contents of the will and after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so."

[17] Our Court of Appeal in that case made an *obiter* comment that the preferred approach was that the Judge should look at the surrounding circumstances from the beginning, and not only in situations where there was lack of clarity or ambiguity. I agree with that comment, as the surrounding circumstances inform the interpretation of the intention expressed in the language used. Words that would be clear and unambiguous in certain circumstances, may not be in others.

[18] Our Court of Appeal in ***Smithers v. Mitchell Estate***, 2004 NSCA 149, at paragraph 19, emphasized the need to have regard to the whole of the clause in question, as well as to the will as a whole, and, if possible, to give effect to all of the will. It added:

> "A fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates."

[19] Clauses 5, 6, 7, 9 and 12 of the Will of the late Shirley Elizabeth Richardson contain declarations, authorizations and directions relating to the management of her Estate by her personal representative. These provisions are to be considered in

assessing the reasonableness of the steps taken by Ms. Stevens and Ms. Zwicker as personal representatives.

[20] These clauses state the following:

> "5. I DECLARE that from the date of my death all income from my estate whether accrued or accruing due at my death, but actually paid or received after my death, shall be treated and applied as income of the residue of my estate even if the property from which the income is derived is sold for payment of debts, succession duties, estate taxes, income or capital gains taxes or legacies, or for any other purpose and that property not producing income shall not be treated as producing income.
>
> 6. I AUTHORIZE my Trustee to sell any real and personal property forming part of my estate at any price in any manner as she in her discretion deems advisable and to execute and deliver to the purchasers any deeds and other documents that in her opinion may be necessary.
>
> 7. I DIRECT that my Trustee in making investments shall not be restricted to investments in which trustees are authorized by law to invest trust funds, and I relieve and exonerate my Trustee from all liability and responsibility and for any loss which may be occasioned to my estate by reason of her so doing.
>
> ….
>
> 9. I DIRECT that my Trustee have all the powers to deal with the assets of my estate which I would have if alive and competent and without restricting the generality of the foregoing and in addition to all other powers vested in Executors and Trustees by law or statute, my Trustee shall have and may from time to time exercise the following powers:
>
> a) To grant options for not exceeding six months in respect of any real or personal property forming part of my estate;
>
> b) To compromise, settle and adjust all claims or demands in favour of or against my estate upon such terms as she deems proper;
>
> c) To postpone for a minimum period of time as she may consider advisable the conversion of all or any part of my estate held by her under the terms of this my Will;
>
> d) To employ and pay for such professional and other assistance as in her discretion may be necessary or required in the discharge of her duties and to act on the opinion or advice of or information obtained from any lawyer, accountant, broker or other expert, but without obligation to act upon such opinion or advice, and to pay proper compensation for all such legal advice or assistance obtained.

….

12. NOTWITHSTANDING any requirements in the Probate Act of Nova Scotia or any successor legislation to obtain approval of the Supreme Court of Nova Scotia to mortgage real property forming part of my estate, my personal representative may mortgage the real property for the purpose of paying debts or to erect, repair, improve and complete buildings or improve lands for any other purpose that my personal representative in her absolute discretion deems beneficial to the estate."

[21] These clauses follow Clause 4 which provides for the distribution of the residue remaining after the debts, expenses, taxes, and duties related to the estate have been paid. Clause 4 directs that the residue be divided into 18 shares to be distributed as follows:

(i) 5 shares to each of Ms. Richardson's two daughters, Ms. Herman and Ms. Stevens;

(ii) 3 shares to her granddaughter, Shelly Ann Barry; and,

(iii) 1 share to each of her other five grandchildren, Tommy Herman, John Herman, Todd Herman, Sherry Ann Rhodenizer and Angela Buckmaster.

[22] Ms. Barry is the daughter of Ms. Stevens and the one who, after Ms. Richardson passed, agreed to stay at the Spectacle Lake Property, also known as the Rhodes Corner Property, to provide security, reduce insurance premiums and deter vandalism which had been occurring in the area.

[23] Ms. Richardson made her will March 4, 2004. At that time, Ms. Barry was staying with her at the Rhodes Corner Property so that she would not be alone.

[24] Her will named Ms. Stevens as its sole executrix and trustee, without any alternate. Therefore, the provisions relating to management of the Estate were included expecting she would be the executrix. Ms. Richardson named her knowing, more likely than not, that she had no experience acting as an executrix and trustee.

[25] In these circumstances, the provisions were, more likely than not, included, as they commonly are in such situations, to provide Ms. Stevens additional flexibility in the management of the estate, and to provide some protection from liability for action or inaction in such management, even if the steps taken by her differ from those that might be taken by a more experienced executrix and trustee. This is consistent with the principle and policy of not making the standard expected executrixes and trustees too onerous so that they will not be discouraged from accepting the position.

[26] These provisions may be considered in determining whether the executrixes fulfilled their duties or should fairly be excused for any breach because they acted honestly and reasonably.

[27] For that purpose, the following portions of the clauses in question are of significance.

[28] Clause 5 includes a declaration that "property not producing income shall not be treated as producing income".

[29] In the context of Clause 5 standing alone, this portion of Clause 5 could be read as part of delineating which income is attributable to the residue. However, in the context of the will as a whole, it is more reasonably read as a declaration in its own right. I say that because there are no bequests or devises under the will other than as part of the division of the residue remaining after estate debts, expenses, duties and taxes have been paid.

[30] This declaration does not go so far as to relieve the testatrix of all responsibility to take reasonable measures to manage the estate assets so as to produce income. However, it does indicate that the testator recognized that some of the estate assets, such as the real property not being rented, could not readily be converted to income-producing assets, and that it may be reasonable to keep those assets in a form and way which did not produce income. In that way, it provides greater flexibility to continue holding those assets in the same manner as they were being held prior to Ms. Richardson's passing.

[31] It is noteworthy that Ms. Richardson saw the Rhodes Corner Property as having a value at least approaching $940,000. Considering that perspective, it is not unreasonable to conclude that she might not expect the property to be rented to produce income pending sale as that would create a risk of damage and deterioration, as occurred in one of the properties she inherited from her husband. I say that because of Ms. Richardson's perspective. There is evidence from Ms. Zwicker that the house was not rentable because of rot damage discovered after Ms. Richardson's passing.

[32] Clause 6 authorizes the executrix to sell the real and personal property at the price and in the way she deems advisable. It does not require her to obtain any appraisal or advice, nor to be guided by or follow any such appraisal or advice.

[33] Clause 7 allows the executrix to make investments in ways other than those imposed by law in relation to trust funds, and relieves and exonerates her "from all liability and responsibility and for any loss which may be occasioned to [the] estate by reason of her so doing". It does not require her to seek investment advice. The provision for relief and exoneration recognizes that Ms. Stevens was not an experienced executrix, nor a sophisticated investor.

[34] Clause 9(c) recognizes that it may be advisable to postpone conversion of some or all of the Estate and gives the executrix the power to do so. However, it

highlights that such postponement must only be for the minimum period of time the executrix deems advisable.

[35] Clause 9(d) empowers the executrix to hire and pay professionals such as lawyers and accountants, and to act on, or decide not to act on, their opinion or advice.

[36] The main purpose of Clause 12 is to permit the executrix to mortgage real property without obtaining court approval. That is not directly relevant to the circumstances of the case at hand. However, the listed approved purposes for such a mortgage do inform the assessment of the actions of the executrixes in the case at hand. They include repair and improvement of buildings or improvement of lands. There is evidence that the Rhodes Corner Property had significant leakage and rot issues and that significant funds were expended to repair and improve the house on it, as well as the surrounding land. Clause 12 is indicative of the testatrix's recognition that such repairs and improvements may reasonably be required. Its inclusion could reasonably have been considered by the executrixes in determining whether to effect such repairs and improvements.

ISSUE 2: ARE THE INTERIM ACCOUNTS IN BALANCE AND SUFFICIENTLY SUPPORTED BY EVIDENCE?

[37] Ms. Zwicker had, on November 21, 2011, from her personal account, paid three estate bills totaling $104.70. She did so because she could not readily access the Estate Account at the time. To compensate for that, she deposited only a portion of the money she received from the sale of estate furnishings into the Estate Account. She erroneously deposited only $209.70, instead of the $235.30 she should have deposited. That error occurred because she mistakenly paid the power bill in the amount of $25.60 twice. At the hearing, she recognized that she ought to have deposited an additional $25.60 into the Estate Account, and agreed to do so.

[38] With those additional funds added to the figures in the Account Summary, it brings the Estate Account balance to $234,603.01. That is the exact amount remaining for distribution after deducting the partial distributions totalling $450,000, and estate expenses, from the total value of the estate.

[39] Therefore, a balanced accounting is obtained by Ms. Zwicker paying to the Estate the $25.60 she owes it.

[40] To calculate the balance remaining for payment of the new executors' commissions and for distribution, I must first determine the appropriate executrixes' commissions and which, if any, portion of the proctor's account will be allowed.

[41] However, before doing so, I will assess, under this section of my decision, whether the figures in the accounting are sufficiently supported by evidence; and, under the following section, whether the estate was managed in a reasonable manner such that the expenditures ought to be approved.

[42] Under this section I will address the missing receipts, as well as the alleged discrepancies and missteps in the accounting.

Missing Receipts

Expense / Payment Receipts

[43] The accounting contains entries, both on the income side and on the expenses side, with no supporting receipts or other transaction documentation apart from banking statements.

[44] The Executrixes properly acknowledge that they are required to replace monies indicated as expenditures if unable to provide a sufficient explanation. They further acknowledge that they have been unable to explain expenses totaling $1999.40 because of the lack of supporting documentation and, in relation to one expenditure at Canadian Tire, an illegible receipt.

[45] Two of those expenditures, which total $1290.67, appear as items paid February 15, 2005 from the account used by Ms. Richardson while living.

[Supporting Documentation of Account of Personal Representative, Volume I, page 127.] That was after Ms. Richardson's passing, but before probate was granted on February 22, 2005. The evidence does not establish who caused those amounts to be paid from the account, nor what they were for. Therefore, I agree with the Executrixes that they are not responsible for replacing those unknown expenditures made prior to their appointment as personal representatives.

[46] The same banking statement shows two cheques written on the same account, on February 23 and 24, 2005 respectively, totalling $354.21. The Executrixes argue that, since that was immediately following the granting of probate, they should also be excused from having to reimburse those amounts. The argument implies that those cheques would not have been written by Ms. Stevens post-grant of probate because there would not be sufficient time to process them.

[47] I reject this argument for the following reasons.

[48] The same banking statement shows another cheque processed on February 24, 2005 in the amount of $161.70. The supporting documentation shows that expenditure is comprised of sewer and water bills from the Town of Lunenburg. They are stamped "PAID" with an accompanying date. The quality of the stamp or photocopying makes it difficult to read the second number representing the day. However, it appears to have been stamped paid February 22, 2005. Since the due

dates for the bills were January 31 and February 28, 2005, they are bills which one could reasonably expect Ms. Stevens, as the then executrix, to have paid immediately upon receiving the grant of probate.

[49] Since that cheque appeared on the bank statement on February 24, the other cheque appearing on February 24 could just as easily have been written by Ms. Stevens in her capacity as executrix. Similarly, a cheque written on February 22, could show up in the bank statement as having been processed on February 23.

[50] In addition, the same banking statement shows a debit adjustment of $15,880 on February 22, 2005, with the same amount showing as a credit adjustment on February 24, 2005. Ms. Zwicker did not have an explanation for those transactions. She speculated that the amount may have been taken to pay probate taxes and then reversed when it was discovered that there were not sufficient funds in the account. In the circumstances, the most reasonable inference to be drawn from those transactions is that Ms. Stevens commenced dealing with the account immediately upon receiving a grant of probate, on February 22, 2005.

[51] Consequently, the Estate of Ms. Stevens is responsible for reimbursing that $354.21 to the Estate of Ms. Richardson.

[52] The Executrixes concede responsibility to reimburse the other unknown and unexplained purchases, payments and cheques totaling $354.52. They are comprised of:

- an unknown purchase at Canadian tire on June 24, 2005 in the amount of $121.80 (receipt not legible)
- an unknown purchase on July 22, 2005 in the amount of $67.00
- an unknown payment on October 11, 2005 in the amount of $124.68
- an unknown cheque dated July 3, 2007 in the amount of $41.04 (image not available)

[53] All of these expenditures were made before Ms. Zwicker received the Grant of Probate of Unadministered Property issued September 14, 2011. As such, the Estate of Ms. Stevens is responsible to reimburse them.

[54] Consequently, the Estate of Ms. Stevens is required to reimburse the Estate of Ms. Richardson a total of $708.73 in relation to these unexplained expenses. (That may be deducted from any executrix's commission the Stevens Estate may be entitled to.)

[55] The Bank Account Statements, at page 20, show that a cheque in the amount of $4080.41 was processed on May 9, 2006. There is no accompanying copy of the

processed cheque. Schedule E to the Summary of the Accounting notes that as being a payment to the Receiver General for income tax.

[56] Ms. Zwicker was asked about that cheque and stated that it was to pay income tax for the Estate. The only reason she gave for knowing that was that it was to the Receiver General. However, the banking statement does not indicate that, and there is no copy of the cheque, nor any receipt confirming who it was paid to.

[57] The Notice of Assessment for Shirley Richardson for the 2005 tax year, issued June 30, 2006, states that Revenue Canada has transferred $385,490.20 from the taxpayer's 2006 instalment account, bringing the account balance to zero.

[58] The Bank Account Statements, at page 20, also show that a cheque in the amount of $385,490.20 was processed on May 1, 2006. A copy of the processed cheque is located at page 352 of Volume II of the Supporting Documentation. It shows that cheque as having been written April 28, 2006, and paid to the order of the Receiver General.

[59] This demonstrates that, more likely than not, no amounts were paid to the Receiver General, in 2006, prior to June 30, other than the $385,490.20. Therefore,

the Applicants have failed to establish that the $4080.41 cheque processed May 9, 2006 was paid to the Receiver General for income tax.

[60] Therefore, the Estate of Ms. Stevens must also reimburse the Estate of Ms. Richardson for that unsupported $4080.41 expense. (That may also be deducted from any commission the Estate of Ms. Stevens may be entitled to.)

[61] This conclusion is not based on any negative assessment in relation to Ms. Zwicker's credibility. I found her to be a very credible witness who did her absolute best to relate the facts as clearly, completely and accurately as she could. I also accept that Ms. Zwicker and Ms. Stevens fulfilled their role as executrixes with integrity and honesty. They did what they saw as fair, just and reasonable at the time. Therefore, it is likely that the $4080.41 was spent on what was considered to be an appropriate estate expense.

[62] However, likely due to the passage of time, and the fact that many receipts have gone missing, Ms. Zwicker has been placed in the unenviable position of trying to recall and piece together the many estate expenses incurred from 2005 to 2011. This particular cheque was processed almost 12 years before Ms. Zwicker testified. Understandably, in the circumstances, Ms. Zwicker does not have a clear recollection of what the cheque was for.

[63] I will deal later with the $5,000 cash withdrawal initially attributed to having been used to pay a deposit to Melvin Verge for roofing work. That will be dealt with under the heading “Payments to Melvin Verge for Roofing”.

[64] There are also other expenditures with no receipts.

[65] S. 59(2) of the ***Probate Court Practice, Procedure and Forms Regulations***, N.S. Reg. 119/2001, gives the Court, on passing of accounts, discretion to “allow any item of expenditure or distribution without the production of a voucher, receipt or release, upon the filing of an affidavit in support of the expenditure or distribution”.

[66] Ms. Zwicker provided affidavit and oral evidence explaining the other expenditures with no receipts.

[67] The Banking Statements indicate that a cheque in the amount of $140 was processed on July 25, 2011, and another, in the same amount, was processed on August 25, 2011. Ms. Zwicker attributed those to being payments to George Fisher for mowing the Rhodes Corner Property.

[68] An earlier bank entry shows a cheque in the amount of $210 having been processed on July 4, 2011, also being attributed to a payment to George Fisher for mowing.

[69] There is a receipt at page 682 of Volume II of the Supporting Documentation, from Fisher's Chores and More, acknowledging receipt of: $210 for mowing June 4, June 17 and July 11; and, $140 for mowing July 13 and 23. There is a handwritten note on the page on which that receipt is photocopied circling the $140 and including the notation "paid in August month".

[70] I also note that there is an image of a cheque dated July 1, 2011 to George Fisher in the amount of $210. The cheque indicates that it is for "mowing lawn". There is also an image of a cheque dated August 21, 2011, to George Fisher in the amount of $140. It does not note the reason for the cheque.

[71] It would not make sense that Mr. Fisher would be paid, on July 1, for mowing completed that day and in June, and wait until August 21 for a cheque to pay him for mowing on July 13 and July 23.

[72] More likely than not, the July 25, 2011 processing of a $140 cheque was in relation to the cheque given to Mr. Fisher for mowing on July 13 and July 23. I reach that conclusion even though there is no image of that cheque.

[73] The receipt at page 682 reveals that Mr. Fisher was paid $70 per mow. There were 2 mows in July. It is reasonable to anticipate that there would also be two mows in August. The image of the August cheque reflects payment for two mows.

[74] Therefore, I find that the after-the-fact handwritten note is inaccurate. That $140 was paid in July, not August.

[75] Despite the lack of receipt for the August payment, the image of the cashed cheque has been presented. That documentation is sufficient.

[76] The banking statements show cheque #233 in the amount of $25 having been processed on September 2, 2011. That cheque was noted as being a cheque to Ricky Weagle for cleaning up in preparation for a showing, and as being without a receipt. However, an image of the processed cheque shows that it was written on July 4, 2011, to Ricky Weagle, with a notation that it was for "cleanup for showing". That evidence would have been sufficient. However, I note that there is also a receipt at page 682 of Volume II, dated September 2011, which shows that Mr. Weagle acknowledged receipt of cheque # 233, in the amount of $25, for "cleanup for showing".

[77] The Banking Statements show a cheque in the amount of $138 debited from the Estate Account on August 16, 2011. Ms. Zwicker, in the Summary, attributed that to paying the Waterman for maintenance of the water softener which was installed May 20, 2005. She indicated that the receipt for that was one that went missing after being given to Mr. Hirtle. In addition, there is no image of the

processed cheque. However, she knows that it was for maintenance of the water conditioning system, and Ms. Stevens did not have a water softener.

[78] That expenditure was much more recent than the 2005 cash withdrawals. Therefore, the passage of time creates less of a reliability concern. The service and the payment for it occurred shortly before Ms. Zwicker was appointed personal representative of the Estate in September 2011. To her, that was a significant occurrence in the administration of the Estate. It would provide reason for the events surrounding or leading up to it to become fixed in her mind. As indicated, I have found her to be a credible witness.

[79] Therefore, I accept her evidence that the $138 cheque processed August 16, 2011, was a payment to the Waterman for maintenance of the water softener at the Rhodes Corner Property. I allow the expense despite the receipt having been lost at some point after being delivered to Mr. Hirtle.

[80] The Bank Account Statements show a cheque in the amount of $53.03 having been processed on August 15, 2011. There is no corresponding image of the cheque or receipt. Ms. Zwicker has attributed that cheque to being a Nova Scotia Power payment.

[81] Looking at the history of Nova Scotia Power payments supports that. The bimonthly payments to Nova Scotia Power preceding it that year, which are supported by receipts, include the following: $110.69 on February 11, 2011; $102.94 on April 13, 2011; and, $69.36 on June 9, 2011. So, the August 15, 2011 payment is roughly consistent with the timing of Nova Scotia Power bills coming due. The amounts from February 11 to June 9 are steadily decreasing, indicating a lower power consumption as the weather warms. Given that the payment would be for the two months preceding the payment due date, it makes sense that the August 15 payment would be still lower than the June 9 payment. Therefore, the $53.03 payment is consistent with what one would expect. It was shortly before Ms. Zwicker took over as personal representative, creating more of a reason for her to recollect what it was for.

[82] Therefore, I accept Ms. Zwicker's evidence regarding that amount being a Nova Scotia Power payment for the Estate, and allow the expense even though the receipt has been lost.

[83] There are also payments for heating fuel without receipts. There is one dated March 13, 2007 to South Shore Fuels, and one dated March 17, 2009 to Wilson's Fuels (which Ms. Zwicker explained was the same business as South Shore Fuels). Both are supported by images of cheques processed through the Estate Account.

Since I have accepted that Ms. Stevens and Ms. Zwicker administered the estate honestly and with integrity, I find that those amounts were legitimate estate expenses and approve them accordingly, despite the absence of receipts.

[84] Counsel for the contesting parties, in cross-examination of Ms. Zwicker, pointed to the $1544.31 cash withdrawal on March 3, 2005 shown in the Bank Account Statements, at page 2, and asked her where that money went. She was unable to explain it on cross-examination, stating she was looking to see where it went. However, on redirect examination her attention was brought to page 4 of the Bank Account Statements, which shows a deposit in the amount of $1544.31 to open the Estate Account. It was clear that the cash withdrawal was to close the account referred to at page 2. It was in the personal names of Thomas Richardson and Judith Stevens (who had Shirley Richardson's power of attorney at the time the account was opened). The withdrawal brought the account balance to zero and the full amount was transferred to the newly opened Estate Account.

Reliance on Sharron Atton's Accounting and Banking Statements

[85] Since various documents delivered to Mr. Hirtle's office have gone missing, Ms. Zwicker has had to rely on other sources of information to compile the accounting. Part of that information came from the accounting prepared by Sharon Atton. She indicated she decided to use it because she trusted Ms. Atton's work.

[86] Given that Ms. Atton was a retired registrar of probate, it was reasonable for Ms. Zwicker to trust her work. In the circumstances, I accept figures derived from the accounting of Ms. Atton. They include the following.

[87] The estate auction inventory went missing. Ms. Zwicker testified that Mr. Hirtle lost it. Therefore, she used the amount of auction proceeds referenced in the Atton Accounting. That amount was $8500 and is reflected in the account filed with the Probate Court May 11, 2015. To that $8500, she has added $1518.74, which is the total of the receipts for items sold outside the main estate auction. That resulted in a total receipt for household furnishings of $10,018.74. Thus, there was an adjustment in the amount of $2018.74 to the original inventory value of $8000. (I will discuss later the impact of some of the items having been purchased from estate funds following Ms. Richardson's death.)

[88] The statements regarding income on RBC GIC's went missing. Therefore, she used the following GIC income figures from Ms. Atton's accounting: January 16, 2007, $218.22; March 15, 2007, $136.92; and, April 30, 2007, $254.36. A portion of the accounting was entered as Exhibit 10. The full accounting had been sent to Mr. Hirtle. However, The Applicants have only been able to obtain part of it.

[89] The GIC redemption amounts for those dates are shown in the bank statements. The Atton Accounting was only used to determine the income portion.

[90] Page 63 of the Bank Account Statements shows a branch to branch deposit of $5179.54 on November 27, 2007. Though the supporting documentation has gone missing, it was indicated that the Atton Accounting identified it as being an income tax refund from Revenue Canada.

[91] Since the amount coming into the estate is reflected in the banking statements, identifying its source is not essential. It merely adds clarity.

[92] However, I will also make some comment in relation to other incoming amounts as provided and characterized by the Applicants.

[93] The interest earned on RBC Investment Account 681-2262118 was calculated by taking the net value of the account when it was liquidated on December 13, 2005 and subtracting the total value of the account on October 31, 2005 (ie. the value used for the addition of that account to the inventory). That was $86,889.49 less $85,036.30, resulting in an income amount of $1,853.19. However, Schedule B to the Summary shows income of $1,853.42 (ie. $0.23 too high).

[94] Exhibit 6 shows that, on October 31, 2005, there was also a cash balance of $4520.44. Adding that amount produces a total of $91,409.93. That is $70.30 less than the $91,480.23 shown at Page 14 of the Bank Account Statements as having been deposited into the Estate Account.

[95] The Applicants erroneously used $91,480 as the deposit amount to calculate the difference, arriving at a difference of $70.07. It treated that amount as income on the cash portion of the account. More likely than not, that is what it was. However, that calculated income is $0.23 less than what it should have been. That counterbalances the error in the calculation of the income on the sale of shares. Thus, the accounting still balances.

[96] Ms. Zwicker's testimony, with the explanatory comments of counsel, explained how income amounts were calculated from documents forming part of the exhibits. Those calculations were accurate.

[97] Other amounts were shown as income from unknown sources because they were deposited into the Estate Account, despite the absence of documentation confirming their source. In the circumstances, that was the only practical and reasonable approach to take.

Discrepancies

Real Property Disposition Related Expenses

[98] The Executrixes sold the following three real properties: 958 Blue Rocks Road (Garden Lots); 1380 Blue Rocks Road (Blue Rocks); and, 12072 Hwy 3, Rhodes Corner (Rhodes Corner). In relation to all three of these properties they showed the legal fees and real estate commission balance as having been paid out of the estate bank account at RBC. In relation to Garden Lots, they also showed a payment made on closing to the Municipality of Lunenburg. In relation to Rhodes Corner, they also showed amounts paid to Sharron Atton for preparation of the estate accounting.

[99] The Contesting Parties correctly point out that these amounts are shown on the trust account statements of the lawyer who handled the property transactions, David Hirtle, as having been paid out of his trust account.

[100] That may cause some confusion in deciphering the accounting. However, it does not result in double claiming of the same expenses for the following reason.

[101] The inventory, and the adjustments to it, related to the real property, show the value received by the Estate as the full amounts received by Mr. Hirtle from the lawyers representing the purchasers. They do not use the net amounts received by

the Estate from Mr. Hirtle after deduction of disposition costs and other expenditures. Therefore, they needed to show those expenditures somewhere. They chose to do so within the Estate Account even though the monies were actually paid through Mr. Hirtle's trust account.

[102] They used the Trust Account Statements to obtain the exact figures for those expenses. That became a convenient and, to some extent, necessary approach because, as will be discussed further later, much documentation has gone missing and the Executrixes, despite having requested Mr. Hirtle's complete file from him and from the current personal representatives, have not been able to obtain it.

[103] The net amounts from Garden Lots and Blue Rocks were deposited in the Estate Account on the day of closing. The Contesting Parties raise a concern that the banking statements did not show a similar deposit of the net amount from the Rhodes Corner sale on the day of closing.

[104] That net amount was $225,385.86. Ms. Zwicker purchased two RBC GIC's directly with the trust cheque received from Mr. Hirtle. One was in the amount of $100,000 and the other in the amount of $125,385.86. They were cashed in on May 31, 2012, and deposited, together with accrued interest, into the Estate Account which resulted in a total deposit of $226,565.83. She put that money into the account so that there would be funds available to pay any amounts that may be

owing to Revenue Canada. At that point, she was anticipating a rapid closing. The two GIC redemptions totaling that amount are shown in the Bank Account Statements at page 186.

[105] Therefore, the net proceeds of the Rhodes Corner sale are properly accounted for and explained.

Real Property Purchase Deposits

[106] A related objection raised by the Contesting Parties is that the inventory and the adjustments to it do not include the deposits for the purchases of the real properties.

[107] The Executrixes explained the exclusion of those deposits as follows.

[108] They were only able to obtain information in relation to the deposit for Rhodes Corner, which was $5000. Their attempts to obtain, from Mr. Hirtle and Counsel for the current executors, the statements of adjustments for the real property sales have been unsuccessful. To remain consistent in the accounting approach they excluded the deposits for all properties. Their exclusion does not affect the final accounting for the purposes of distribution. At worst it might decrease the total value of the inventory, which could only result in reducing the commission amount payable to them.

[109] I agree that, in the circumstances, given that the deposit information was withheld from them, this was the most reasonable and practical approach.

[110] Since there were real estate commission amounts remaining payable in relation to all three properties, more likely than not, any deposits went towards real estate commission. The Executrixes have only claimed as expenses the amounts paid for the balances owing in real estate commission. Therefore, the exclusion of the deposit amounts does not result in any net asset to the estate being omitted; and, does not affect the accounting for the purposes of final distribution in any way that is a prejudicial to the beneficiaries.

[111] However, I note that the statements of adjustments for the Blue Rocks Property and the Garden Lots Property were included in the documents filed in the Probate Court on May 11, 2015, in support of the accounting filed that day. They showed deposits of $500 and $1000 respectively.

[112] Those amounts could, in addition to the $5000 deposit for the Rhodes Corner Property, be added to the value of estate assets managed (after deducting the portion of the $2018.74 extra received from sale of household items that arose from after-purchased items) to determine an appropriate commission. However, the Applicants have not asked that any commission be based on an estate value higher than that advanced in their accounting. So, the estate value shown in the existing

accounting will serve as the base for any executrix's commission that may be payable.

Payments to Melvin Verge for Roofing

[113] There was a cash withdrawal from Ms. Richardson's bank account on March 3, 2005 in the amount of $5000. Ms. Zwicker deposed that it was used to pay Melvin Verge for roof work on the Spectacle Lake Property (also known as Rhodes Corner). The Contesting Parties argue that, considering the other evidence relating to the roofing work, it has not been established that the $5000 withdrawn in March was used to pay Mr. Verge.

[114] At the hearing, Ms. Zwicker testified that she then recalled that the $5000 withdrawn on that day was used to pay for the removal of the pine trees. She said that Ms. Stevens had initially planned to use it for the roof. However, she decided it would make more sense to have the trees removed first to eliminate the danger of them falling and the damage caused by shedding needles. The contesting parties did not address that revised evidence. Therefore, prior to dealing with it, I will deal with their argument regarding it not making sense that the $5000 would have been used to pay Mr. Verge.

[115] Mr. Verge signed an acknowledgement of receipt of funds in relation to having worked on the roof of the property of the Richardson Estate. That acknowledgement was attached as exhibit A to Ms. Zwicker's affidavit filed August 30, 2017. It notes that, on September 25, 2005, he received the sum of $3500 to start the job of shingling the roof. He provided receipts for work done. In addition to the shingling, it included removal of the old shingles from the property and building a new dome on one end. He indicated he also purchased some materials. He said it took over a month to finish the job as he only worked part days. To his recollection, it seemed right that he had received $7000.

[116] The transaction record, bank draft purchaser's receipt, and Nauss Brothers Limited invoices at pages 262 to 264, and 273, of the Schedule E Supporting Documents, Volume I, show the Estate paid a total of $5045.37 for roofing and roof repair related materials with a delivery date of August 20, 2005. That included 150 bundles of shingles.

[117] It does not appear likely that the Estate would have paid Mr. Verge $5000 in March when the materials were only to be delivered in late August.

[118] The same volume of supporting materials, at pages 274, 278, 281 and 288, show a total of $7000 as having been withdrawn and paid for roofing labour. The withdrawals were as follows: $3500 on August 25, 2005; $800 on September 26,

2005; two withdrawals of $800 each on September 28, 2005; and a withdrawal of $1100 in October 21, 2005. It was explained that the three rapid withdrawals of $800 each were because the account only permitted bankcard withdrawals of up to that amount.

[119] That total and the timing of the withdrawals is consistent with: Mr. Verge's acknowledgement of having received $3500 on September 25; having received $7000 in all; and, the explanation of Ms. Zwicker that the funds were withdrawn to have cash on hand to pay for labour over a period of time.

[120] The March withdrawal in the amount of $5000 is not consistent with those points, nor with the delivery date for the roofing materials.

[121] Cancelled cheques at pages 337 and 414 show payments to Mr. Verge of $265 and $285 on April 17, 2006 and November 20, 2006 respectively, for other services rendered to the estate long after the roofing job was completed. They are separate and apart from the main roofing job. They do not assist in determining purpose of the $5000 withdrawal in March.

[122] Considering these points, that $5000 withdrawal was, more likely than not, for something other than to pay Mr. Verge for the roofing.

[123] As previously indicated, this conclusion is not based on any negative assessment in relation to Ms. Zwicker's credibility.

[124] This particular withdrawal was some 13 years ago. Understandably, in the circumstances, Ms. Zwicker does not have a clear recollection of what the money was used for, since it was so close to the roofing job, she initially concluded that it had been taken out for that job.

[125] By the time of hearing, she realized that did not make sense. At that point, she said she recalled the $5000 was used to take down the trees.

[126] The passage of time made her affidavit evidence that it was used to pay in advance to Mr. Verge unreliable. The same passage of time similarly affects the reliability of her evidence regarding it being used to remove the trees.

[127] Schedule E to the Account Summary, and corresponding supporting documentation at pages 194 and 195, of Volume 1, shows a cash withdrawal on June 21, 2005, in the amount of $2200, and a receipt from Raymond Zwicker stating that he was paid $2109 for cutting and removing trees from the property. There is a handwritten note on the bottom of that receipt indicating that the remaining $91 was given to Ms. Zwicker for travel expenses (ie. money to reimburse her for her motor vehicle fuel expense related to travel for the Estate).

The receipt shows a total of 152 hours was spent on the project and $130 was charged for moving the tractor used, and fuel for the tractor and four-wheeler.

[128] That appears to be a more reasonable amount for cutting and removing the trees, and the time spent appears reasonable. There is no evidence suggesting that it would make sense that the $5000 withdrawn in March was also used for tree cutting and removal.

[129] Therefore, I cannot accept her evidence that the $5000 was used for that purpose.

[130] Unfortunately, despite the honesty and integrity with which they managed the Estate, she is now left unable to explain what was done with that $5000. Consequently, the Stevens Estate will be required to reimburse that $5000 to the Richardson Estate.

Missteps

Loan to Ms. Stevens

[131] It was alleged that, on April 25, 2005, Ms. Stevens used funds from the Richardson Estate to pay off her personal loan in the amount of $24,837.55; then repaid it on June 5, 2009, with interest of $4747.54. If it had occurred in that fashion it would have constituted a breach of trust.

[132] The evidence of Ms. Zwicker explained the loan situation as follows. The loan paid out was a loan taken out by Ms. Richardson during her lifetime, for the benefit of Ms. Stevens. $24,837.55 was paid to TD Canada Trust on April 25, 2005, using an estate cheque, to pay out the loan in Ms. Richardson's name.

[133] Since the loan in Ms. Richardson's name was taken out to provide funds to Ms. Stevens, it left Ms. Stevens owing Ms. Richardson's estate the amount of funds advanced to her. Though she did not repay it immediately. She added interest to account for that delay.

[134] In earlier attempts at closing the Estate, Ms. Zwicker provided the Registrar of Probate with a chart showing how the loan interest was calculated from September 1, 2005 to April 25, 2009. The interest rate was based upon TD Canada Trust's prime lending rate, even though the loan taken out by Ms. Richardson had been based upon its prime rate less 0.5%. In other words, Ms. Stevens paid more interest than what Ms. Richardson would have had to pay to TD Canada Trust.

[135] The rates used fluctuate from a high of 6.25% in 2007 to a low of 2.25% in 2009.

[136] In my view, that was a fair and reasonable approach to take in the circumstances. It did not prejudice the Estate. It also did not involve a breach of

trust as the monies had already been advanced to Ms. Stevens while she was not the trustee of Ms. Richardson's Estate.

Payout of Debt of Thomas Richardson

[137] An objection was raised to the Estate having, on April 11, 2005, paid out a loan in the name of Thomas Richardson in the amount of $25,132.21, without a satisfactory explanation.

[138] Thomas Richardson was Ms. Richardson's husband. He predeceased her. Ms. Richardson was the executrix and, because she survived him, sole beneficiary of his estate. That included a devise of real property in Blue Rocks. That property was in Shirley Richardson's estate after her passing. She was the personal representative and sole beneficiary of his estate. Since she, and ultimately her estate, benefitted from receiving the assets of Thomas Richardson's Estate, she and her estate were responsible for ensuring his debts were paid.

[139] Mr. Hirtle also deposed that there was a judgment registered against Thomas Richardson which had to be released to permit the sale of the property that had come into the Shirley Richardson Estate. He further testified that Thomas Richardson had been co-owner of the Rhodes Corner Property, and full owner of the Blue Rocks Property. The judgment against him attached to the properties

while he was still alive. Mr. Hirtle was not sure whether Mr. Richardson was an owner of the Garden Lots Property.

[140] He agreed the judgment had only been released in 2009, well after the sale of Blue Rocks. However, he explained that when the Blue Rocks Lot sold, no objection was raised.

[141] He testified that it was a judgment dated January 31, 2006 for work done for Thomas Richardson by a garage operated by Carolyn Hull. It was not a large amount. Thus, that was a different debt than the loan in question.

[142] That had to be released to sell the Rhodes Corner Property.

[143] At page 484 of Volume II of the Supporting Documentation there is an image of cheque # 161 written July 30, 2008 to Carolyn Hull, in the amount of $212. There is a corresponding entry at page 87 of the Bank Account Statements showing that cheque was processed on August 11, 2008. More likely than not, that is for payment of that debt, to release the judgment.

[144] A third matter related to Thomas Richardson is the $1400 to $1500 remaining in the Bank of Nova Scotia account, which was given to Sherri Stevens. That was explained as resulting from Thomas Richardson having promised her the $3000 in his President's Choice account before he died, which amount had not

been paid from his estate. That payment was not challenged, and there was nothing to suggest it was not an enforceable promise. Therefore, I have treated it as a legitimate debt owed by the Thomas Richardson Estate, and thus properly paid from the Shirley Richardson Estate which acquired all its assets.

ISSUE 3: DID THE EXECUTRIXES PROPERLY MANAGE THE ESTATE IN THE CIRCUMSTANCES?

[145] The contesting parties submit the Applicants did not properly manage the Estate because they: expended excessive funds on the Rhodes Corner Property, including renovations, as well as unnecessary expenses and purchases; failed to produce sufficient income from the Estate assets; and, delayed realizing the assets of the estate and providing an accounting.

[146] Even if the Applicants are found to have improperly managed some portion of the Estate, s. 64 of the ***Trustee Act***, R.S.N.S. 1898, c. 479, gives the Court discretion to relieve them of liability for such mismanagement if they "acted honestly and reasonably, and ought fairly to be excused for the breach".

[147] As stated in ***Comeau v. Gregoire [Also referred to as Scott Estate (Re)]***, 2005 NSCA 135, at paragraph 20, the Court stated:

> "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."

[148] The Court noted that the personal representative "acted honestly and reasonably".

[149] "[T]he standard expected of them is purposely not made too onerous by the law, so as to encourage persons to accept a position as executor": James MacKenzie, *Feeney's Canadian Law of Wills*, *Fourth Edition* (loose-leaf) (Toronto: LexisNexis Canada Inc., 2000), at §8.56.

[150] Therefore, if the Applicants improperly managed the Estate, I will have to consider whether they "acted honestly and reasonably, and ought fairly to be excused".

[151] The standard against which to measure reasonableness is that which "an ordinary prudent business person would have done in the circumstances": ***Hopgood v. Hopgood (Estate)***, 2018 NSSC 100, paras 62 and 63.

[152] The Applicant "ought fairly to be excused" if it will be "more equitable for the beneficiaries, rather than the [Applicants], to bear any loss": ***Hopgood***, para 64.

[153] Some of the factors to be considered are listed at paragraph 60 of ***Hopgood*** as follows:

> "(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."

[154] I have already stated my finding that they acted honestly.

[155] Whether they acted reasonably needs to be assessed based on the circumstances existing at the relevant time.

[156] Their level of experience and sophistication as it relates to skills required to act as personal representative is also a relevant consideration.

[157] Ms. Zwicker has a grade 10 education. She has worked as a home caregiver or personal care worker, as well as a delivery person for two drugstores. This is the only estate she has ever managed; and, the only estate Ms. Stevens has ever managed. She and Ms. Stevens worked together in the Barrington area as home care providers from the 1990s until just before Shirley Richardson passed away.

Excessive Expenditures for the Rhodes Corner Property

[158] The contesting parties note approximately $125,000 was spent on the Rhodes Corner Property, and it sold for roughly $26,000 less than the value assigned to it in the inventory, which was $276,300.

[159] Looking at those figures, and with the benefit of hindsight, the expenditures turned out to be a misjudgment. However, I must examine the circumstances existing when the expenditures were made.

[160] Ms. Richardson, before she died, listed the property for $940,000. After her death, the listing was reduced to $475,000, with Remax. From 2005 to 2011 they listed with different real estate agencies, starting with Remax and ending with Exit. The only offer made on the property was the $250,000 offer accepted in 2011.

[161] Needles from pine trees growing in close proximity to the Rhodes Corner House had fallen on the roof and caused damage, resulting in the roof leaking into the living room, den and back bedroom. Therefore, the trees were cut down, requiring landscaping into lawn where the trees were removed.

[162] There was also some gardening work done, including planting perennials and applying mulch.

[163] The roof needed to be re-shingled. It was also discovered that a dormer needed to be reconstructed because of rot where a flat section of the roof had leaked. That same leak also caused rot in the attic of the house.

[164] Electrical wiring problems were discovered which caused a hazard. They had to be repaired.

[165] One of the flower boxes fell off the side of the house. That resulted in an inspection of all of the flower boxes. Since they were all in danger of falling off they were removed and repairs were made to the house where they had been located. It is noteworthy that that was done in early 2011, over six years after Ms. Richardson passed away, and at a time when no offer had yet been received on the Property.

[166] There were also other problems with the property which had to be repaired to facilitate the sale of the property.

[167] A water softener was installed in May 2005.

[168] The basement had flooded, requiring cleanup. However, Tom Herman and Ms. Zwicker did that at no charge.

[169] There had been a problem in the area with vandalism. Neighbours had called the police several times. Ms. Zwicker had seen boys kicking at the gate and trying to tear down a nearby stop sign. Leaving the house vacant would make it more vulnerable to vandalism. In addition, insurance premiums would have been substantially higher for a vacant home.

[170] Also, Ms. Zwicker deposed that the house was not rentable at the time.

[171] Therefore, they had Shelly Barry stay there most nights. She agreed to do so even though she had her own home, where she lived with her boyfriend, and the property was uncomfortable to live in at the time. She paid no rent or utilities, only the salts for the water conditioning system.

[172] Ms. Barry had lived with Shirley Richardson for about a year before she died. Ms. Richardson had asked her to stay in the house until it sold. Ms. Barry only stopped staying there when the property was sold.

[173] They had to pay utilities, propane, other heating fuel, taxes, water heater rental, snow removal, and other yardwork, such as lawnmowing, for the home.

[174] The Rhodes Corner Property was the only one that used propane, explaining why all propane expenditures had to be for that property. I note that, after having paid for repairs to the propane furnace, it became too costly and Ms. Stevens

replaced the propane furnace with an oil furnace. That explains the furnace replacement expenditure and the furnace fuel oil expenditures after the Blue Rocks Property and the Garden Lots Property were sold, even when there was little furniture left. Both of those properties were heated by oil. However, the property continued to have a propane hot water heater. Therefore, propane was still required after that.

[175] Ms. Barry was diabetic and needed refrigeration for her medication. The refrigerator at the Rhodes Corner Property was not working properly. So, Ms. Stevens purchased a refrigerator, using her own money, which was left with the property when it was sold. The purchaser had requested it as a condition of closing. The Estate did not reimburse her for the cost of the refrigerator.

[176] They also had to pay to clean the property for showings.

[177] Clause 12 of the Will indicates Shirley Richardson recognized that repairs and improvements may reasonably be required. Its inclusion could reasonably have been considered by the executrixes in determining whether to effect the repairs and improvements they did.

[178] Shirley Richardson, having listed the property for $940,000, reasonably created an expectation that the property would sell for much more than $250,000.

Ms. Stevens, assisted by Ms. Zwicker, would have cause to be concerned that if they sold the property for too low a price, the beneficiaries may accuse them of selling at an unreasonably low price.

[179] That risk was in Mr. Hirtle's mind as he testified about the multiple complications regarding the listing price and things done to the property. He stated that he consistently told Ms. Stevens to lower the price and sell the property. He noted she had been provided an assessment of what it was worth but risked criticism for selling it at too low a price, highlighting that it had been listed for about $1 million at the time of the Ms. Richardson's death, and ultimately sold for $250,000.

[180] That was revealed to be a real risk in affidavit evidence filed with the Probate Court in January of 2009, by two of the contesting parties, John Herman and Louise Herman. They both deposed that, at that time, the Rhodes Corner Property had an assessed value of $355,600 and $399,000 was more in line with what the list price should be. The evidence was presented in support of an argument that the prior listing with Canterbury Real Estate Sales Inc., for $595,000, was too high, and that the listing with Re/Max South Shore Realty, starting in October 2008, for $399,000 was more appropriate. However, when compared with the $250,000 ultimately received, the suggestion of a listing price

approaching $400,000, indicates that, more likely than not, had the property been sold early on for $250,000, even without effecting improvements and repairs, those beneficiaries would have had an issue with the selling price.

[181] Mr. Hirtle testified that he had discussions regarding sale of the properties. He did not provide the details of those discussions. However, given his concerns regarding the risk of a challenge for selling it at too low a price, I infer, that, more likely than not, formed part of the discussion.

[182] Ms. Zwicker's evidence was that the listing price was dropped to $475,000 prior to 2006. That shows a significant and rapid drop in the price that is not totally inconsistent with the suggested listing approaching $400,000.

[183] The serious issues with the house and property made it such that it clearly would not attract a price anywhere near what it had been listed for. Then, even when they cut the price almost in half, listing it for $475,000, they still were receiving no offers.

[184] Even with extensive repairs, including a new roof, fixing the rot in the dormer, fixing the yard, landscaping, and removing problematic trees, they only received the one offer for $250,000, which they accepted in 2011.

[185] In retrospect, it would have been more beneficial to sell the house for $150,000 or $175,000, without incurring the cost of repairing and maintaining the home. However, the high price at which it had been listed before Ms. Richardson's passing, made that low a sale price seem completely unreasonable at the time. Consequently, it made the amounts spent on and for the house appear reasonable at the time.

[186] Ms. Stevens and Ms. Zwicker had no experience acting as executrixes, and were not sophisticated in such matters. Ms. Stevens made a judgement call at the time to spend the money to preserve and improve the property. The decision was made after consulting with realtors and Mr. Hirtle, after Mr. Hirtle had also discussed the matter with a realtor.

[187] Although reliance on the advice of the proctor of an estate will not necessarily relieve a personal representative of liability, in the circumstances of the case at hand, it was not unreasonable for them to rely on his advice and proceed with the expenditures.

[188] They also purchased, for the Rhodes Corner Property, a ride-on lawnmower, a second mower, a whipper-snipper, and a shed for the ride-on mower. Those were ultimately sold as part of the estate auction which, with the addition of other items sold, including the china cabinet, rug and curtains sold afterwards by Ms. Zwicker,

brought in $10,018.74. That is an amount higher than the $8000 initially indicated in the inventory as the value of the household goods and personal effects.

[189] That extra amount is Shown as $2,018.74 adjustment to inventory, but some of the additional amount likely related to the sale of the mowers and whipper-snipper that were purchased with estate monies already accounted for in value of Estate. Since those expenses were also accounted for, it does not affect the global accounting. It artificially increases the value of estate assets handled. However, it does so by a lesser amount than the exclusion of the $6,500 in deposits from the sale of the real properties artificially reduces the value of assets handled. Therefore, no adjustment is required to determine total value of assets handled for the purpose of calculating the executrix's commission.

[190] Ms. Zwicker acknowledges that, in retrospect, it was a bad judgment call to purchase the ride-on lawnmower. The reasoning behind the purchase, at the time, was that it was expected that Ms. Barry would be mowing the lawn and it was a large lawn. It turned out that they had to hire someone to mow. She indicated the mower was purchased for around $1600 and sold in the auction for around $1000. However, at the time, Ms. Stevens acted honestly and reasonably in purchasing the lawn care equipment. Had Ms. Barry taken care of the yard as expected, over the 6 summers, it would have saved the Estate money.

[191] Ms. Zwicker explained that the shed was installed on the property, at the suggestion of the realtor, to help promote the sale of the home. The realtor had informed them that people viewing the home had stated that it should have an outbuilding. Given that they had not received any offers. It was not unreasonable to act on that suggestion.

[192] The Applicants honestly did their best and ought to be excused from any error in judgment relating to expenditures on the Rhodes Corner Property.

Incurring Unnecessary Penalties

[193] Ms. Zwicker acknowledged that the Estate incurred a penalty due to late filing of an income tax return. She explained that it was Mr. Hirtle who had instructed the accounting firm of Belliveau and Veinotte to prepare the return. Given that Mr. Hirtle was asking that all receipts be delivered to him, and having all bank statements sent directly to him, it was reasonable for the Applicants to let him take care of having the tax return filed. Even though filing income tax returns is the responsibility of the personal representative, given their inexperience, it is fair to excuse their failure to recognize the risk of delay resulting in a penalty, and to spread the loss resulting from the delay by the proctor and/or accountants amongst the beneficiaries.

Failing to Produce Sufficient Income

[194] At the time of Ms. Richardson's death she had one property which was rented. It was the Garden Lots Property. It remained rented up until the time it was sold. However, the tenant was excused from paying rent, or the rent was refunded, for May to August, and November 2005, plus April 2006, in exchange for him effecting improvements to the house, including installation of a sump pump, as well as replacement of the floor, water pump and water tank.

[195] The Blue Rocks Property was not rentable. It had belonged to Shirley Richardson's husband. He had let his brother and nephew live there. He eventually had to ask his nephew to leave because he had caused the property to be in terrible condition. Even after he left, a dog remained there and the house was covered with feces. The porch roof had leaked and rotted out the porch floor. A realtor visiting the premises fell through the rotted floor into the basement. It almost resulted in a lawsuit against the Estate. That property was sold "as is".

[196] "The net amounts from Garden Lots and Blue Rocks were deposited in the Estate Account on the day of closing. The Garden Lots Property sold in May 2006; and, the Blue Rocks Property sold in June 2007.

[197] The Contesting Parties raise a concern that the banking statements did not show a similar deposit of the net amount from the Rhodes Corner sale on the day of closing. That net amount was $225,385.86.

[198] Ms. Zwicker purchased two RBC GIC's directly with the trust cheque received from Mr. Hirtle. One was in the amount of $100,000 and the other in the amount of $125,385.86. They were cashed in on May 31, 2012, and deposited, together with accrued interest, into the Estate Account which resulted in a total deposit of $226,565.83. She put that money into the account so that there would be funds available to pay any amounts that may be owing to Revenue Canada. At that point, she was anticipating a rapid closing. The two GIC redemptions totaling that amount are shown in the Bank Account Statements at page 186.

[199] The funds from the sale of the Garden Lots Property was shown as released from Mr. Hirtle's trust account on June 9, 2006, and transferred to the Estate Account on June 12, 2006. Page 22 of the Bank Account Statements shows that, on that same date, June 12, two GIC redemptions totaling $424,159.31 occurred. Also, on the same day, using those redeemed GIC amounts, and the bulk of the $60,496.29 from the Garden Lots sale, a GIC in the amount of $480,000 was purchased. In my view, that is a prompt and reasonable investment.

[200] The $27,315.21 from the sale of the Blue Rocks Property was shown as released from Mr. Hirtle's trust account on July 25, 2007. Page 53 of the Bank Account Statements shows that amount as having been deposited into the Estate Account on July 27, 2007. It remained in that account, which maintained a balance of between $20,000 and $30,000, until November 26, 2007, when partial distributions totaling $90,000 were made. That was made possible by transferring, to the Estate Account, an additional $70,000 from a CIBC investment vehicle. It was not unreasonable to hold the sale proceeds in the Estate Account for that relatively short interim period of time before the partial distributions.

[201] Earlier partial distributions totaling $360,000 had already been effected on October 24, 2006 (i.e. 4.5 months after receiving the net proceeds from the sale of the Garden Lots Property). Those partial distributions were made possible by a GIC redemption on October 24 in the amount of $364,956.16, which still left a little over $6000 in the account to cover estate expenses.

[202] That is a grand total of $450,000 in partial disbursements.

[203] Ms. Zwicker was informed by the accounting firm of Belliveau and Veinotte that she had to close the investment accounts to obtain, from Revenue Canada, the clearance certificate for the Estate. Mr. Hirtle had informed her that the clearance certificate was required in order to close the estate. Page 186 of the Bank Account

Statements shows that, on May 31, 2012, she redeemed three GICs totaling $233,583.73 which was deposited into the Estate Account.

[204] It was in 2012 that she applied for the clearance certificate. She did not receive it until early in 2013. Though she expected the Estate to be closed soon thereafter, it still has not been closed. However, having been told she needed to close interest-bearing accounts to get the clearance certificate, it was reasonable for her to do so, and it would not be fair to hold her responsible for any lost income thereafter, even if it had been proven.

[205] At paragraphs 20 to 33 of her affidavit filed August 30, 2017, Ms. Zwicker provided evidence of income that was lost as a result of the Royal Bank of Canada's error in relation to the investment which it was supposed to transfer to Judith Stevens and Linda Herman. The personal representatives are not to be held liable for bank errors.

[206] As already noted, Clause 5 of the Will indicates that Ms. Richardson recognized that some of the estate assets, such as the real property not being rented, could not readily be converted to income-producing assets, and that it may be reasonable to keep those assets in a form and way which did not produce income. That provides greater flexibility to continue holding those assets in the same way as they were being held prior to her passing.

[207] Despite being burdened with difficult real properties, and disbursing a total of $450,000 relatively promptly, the Estate has still produced $49,189.65 in income. In the circumstances, that is not an unreasonably low amount.

[208] There was no evidence of the market conditions at the relevant times. I cannot find that investment in GIC's was unwise.

[209] The Applicants did not fail to produce income that was reasonably sufficient in the circumstances.

Delay in Realizing the Assets of the Estate

[210] Ms. Stevens' ability to handle the Estate's affairs were negatively impacted by the effects of rheumatoid arthritis which rendered her unable to walk, affected her hands and caused severe pain. That disability occurred one month before Shirley Richardson passed away.

[211] At first, Ms. Zwicker assisted Ms. Stevens in transporting her for appointments, funeral arrangements and matters relating to the probating of her mother's estate. Eventually, she quit her job and became Ms. Stevens' full-time personal care worker.

[212] Though Ms. Zwicker needed to assist Ms. Stevens physically, she was fully competent and made all the estate administration decisions.

[213] Ms. Zwicker carried out the physical tasks, such as labour work, picking up materials, taking Ms. Stevens to appointments, supervising workers, and transporting workers. The labour work she performed included cleaning up, yardwork, scraping and painting the house, and installing new insulation in the basement. She received no compensation from the Estate for those tasks.

[214] A factor which complicated and delayed the sale of the Blue Rocks Property is that Thomas Richardson's brother, Ivan Richardson, had had been promised he could stay there while he was alive. He died at some point after Ms. Richardson.

[215] Then, it took some time to get Ivan's son, Ivan Junior, to leave. Further, he had rendered the property in terrible condition, and left a dog there which defecated all over the house. As noted, that is the property at which the realtor fell through the rotted floor into the basement.

[216] Ms. Zwicker deposed that, in addition to the amount of work needed, the size of the Rhodes Corner Property made it difficult to sell.

[217] The Rhodes Corner Property ultimately sold on October 17, 2011.

[218] In the circumstances, I cannot find that it has been shown that the Rhodes Corner Property could reasonably have been expected to sell earlier, nor that the personal representatives acted unreasonably in first attempting to obtain a higher price, and improving the property to assist in that effort.

[219] In the circumstances, there was no unreasonable delay in liquidating the other real properties and assets either.

Delay in Providing an Accounting and Engaging Sharon Atton to Assist

[220] Section 69 of the ***Probate Act***, S.N.S. 2000, c. 31, requires personal representatives to provide an accounting of their administration of an estate within 18 months of the grant of probate, unless they apply for and are granted an extension.

[221] The first 12 months has been referred to as the "executor's year". Section 70 of the ***Act*** provides that the personal representatives are to pay claims and make distributions within that year, unless they apply for and are granted an extension. That means that, as noted in ***Willisko v. Murphy***, 2014 NSSC 389, at paragraph 44, that estate property is to be liquidated within that year.

[222] Mr. Hirtle testified that he did not discuss, with the personal representatives, the timeframe in which they needed to complete the management of the estate. He

acknowledged that the normal time is 18 months; and, no application to extend was made. However, he added that it was not possible in this case because they needed to sell real property.

[223] Since the Rhodes Corner Property did not sell until October 17, 2011, no final accounting could be provided before then.

[224] Ms. Zwicker instructed David Hirtle, as Proctor of the Estate, to proceed with the closing in October 2011.

[225] He handed her a box of bank statements and receipts and asked her to go through them and attach the receipts to the corresponding bank statements. The documents were in disarray and voluminous. However, Ms. Zwicker completed that task by January 2012 and returned the documents to Mr. Hirtle. At that point, she informed Mr. Hirtle that they needed to close the Estate. He told her that a clearance certificate from Revenue Canada was required. So, she applied for it in 2012. In 2013, she received one dated January 16, 2013, for the period ending February 5, 2012. She provided it to Mr. Hirtle, once again, asking him to proceed with the accounting and closing of the estate.

[226] Mr. Hirtle was unable to balance the accounts. He engaged retired Registrar of Probate, Sharon Atton, to provide an accounting. She was also unable to balance the accounts.

[227] After numerous calls to Mr. Hirtle's office in an attempt to finalize the Estate, she threatened to call the Barristers Society if he did not call back. By 2016 she was so dissatisfied with his services that she did call the Barristers Society. At that point, Mr. Hirtle withdrew his services.

[228] Ms. Zwicker was removed as personal representative on September 12, 2016.

[229] To fulfil her obligation to account up to the date of removal she initially filed an accounting prepared by Ms. Atton, then, filed an amended accounting on August 30, 2017. At that point, the accounts were short by $78.12.

[230] By the time of the hearing of her application to pass interim accounts, the accounting had been balanced.

[231] A significant factor which caused delay and difficulties in accountings throughout is that of missing receipts.

[232] At the request of Mr. Hirtle, Ms. Stevens and Ms. Zwicker, delivered all receipts to Mr. Hirtle. They asked that he advise them if there are any missing receipts when he had a chance to compare them with the bank statements, which were being sent directly to him, as per his request. He did not advise them of any missing receipts.

[233] Mr. Hirtle confirmed that he asked them to provide him with that information so that he would have it to ultimately prepare the final accounting. He added that it was always his practice to do that.

[234] He also deposed that he was in possession of bank statements and receipts "that were reconciled for each month". During his testimony he explained that he meant reconciled for each month when finally assembled, not reconciled monthly. However, it would have been reasonable for Ms. Stevens and Ms. Zwicker to interpret it as a monthly reconciliation.

[235] He added that he engaged in that reconciliation process between 2011 and 2014.

[236] He further testified that he chose to receive the bank statement directly, as a matter of convenience, to decrease the chances of them going missing.

[237] He also testified that he did not ask for any missing receipts along the way because he did not compare the receipts with the banking statements until he started reviewing the documents for the final accounting. That also supports the evidence of Ms. Zwicker to that effect.

[238] Ms. Zwicker deposes, and I accept, that they even had receipts from each worker they paid in cash, and that all receipts were delivered to Mr. Hirtle.

[239] Unfortunately, after Mr. Hirtle was unable to balance the accounts and ultimately withdrew, not all receipts remained with the box of documents Ms. Zwicker received from his office to complete the accounting.

[240] She specifically recalled having twice given Mr. Hirtle the receipts from Mr. Verge who did the roof work on the Rhodes Corner Property. The first time she gave him the originals. Then he called asking for receipts for the roofing job. She had kept copies, and gave those to him.

[241] In preparation for this interim accounting, the Applicants requested, from Mr. Hirtle, and from counsel for the current personal representatives, all file materials from Mr. Hirtle's work as Proctor. They both refused the request. That compounded the difficulties posed by the missing receipts.

[242] The Applicants could have obtained some of the information they were seeking from the Probate File, such as the statements of adjustments for the Blue Rocks and Garden Lots properties. However, that possibility does not alleviate the remaining prejudice to the Applicants, and, does not excuse the failure to produce the requested information.

[243] Ms. Zwicker was asked why they hired Jamie Ernst, not the accounting firm of Belliveau and Veinotte, who had prepared tax returns for the Estate, to help prepare the accounting for the Estate. She explained that Mr. Hirtle had hired Mr. Ernst, who is a chartered accountant, for that purpose. She thought he had prepared an accounting summary for Mr. Hirtle. However, they never received it.

[244] Ms. Zwicker stated that Belliveau and Veinotte did do work needed for her to obtain the clearance certificate she received in 2013.

[245] In addition, Mr. Mayo from Belliveau and Veinotte helped her prepare an interim accounting after she was removed as personal representative, by helping her obtain the documents she required. That was at some point between August and October 2016.

[246] Mr. Hirtle testified that he had hired Jamie Ernst to prepare an accounting in response to an application to remove Ms. Stevens as personal representative.

However, the accounting was provided to Mr. Romney, who represented the applicants, and the application did not proceed. That may explain why Ms. Stevens and Ms. Zwicker did not receive it.

[247] Mr. Hirtle explained that he hired Jamie Ernst, not Belliveau and Veinotte, because Mr. Ernst is his accountant and the one he usually hires. In addition, he said the executrix did not object.

[248] Mr. Hirtle was asked about what work was done on the final accounting between October 2011 and October 2014. He responded that it was being worked on as chunks of concentrated time became available. He had filed accounts in February 2014. The Registrar of Probate adjourned the matter because of health issues. The day before the adjourned hearing he advised her that the accounts did not balance. So, the matter was once again adjourned.

[249] Ms. Atton was engaged by Mr. Hirtle to attempt to balance the accounting because of her expertise as a retired registrar of probate. I disagree with the suggestion of the contesting parties that she was not an appropriate person to take on the task. She did have the necessary skills. Plus, Mr. Hirtle did not ask Jamie Ernst to do it because he was of the impression that Mr. Ernst did not want to.

[250] Ms. Zwicker agreed with retaining Ms. Atton. However, part way through, she asked what Ms. Atton's bill was and found out it was $3,000. She was concerned about that cost, so she told Christa, Mr. Hirtle's wife and legal assistant, to stop that service. However, it did not stop.

[251] She did not know why Ms. Atton was paid by 3 different cheques from $9,800 held back by Mr. Hirtle from the sale of the Rhodes Corner Property, other than that he had it and it was estate money. She said she did not authorize the holdback.

[252] However, she did testify that she trusted Ms. Atton's accounting, so she used it and added her own accounting to it. Therefore, Ms. Atton's work had a value to her and to the Estate.

[253] Mr. Hirtle's trust account statement shows that the last of 3 payments made to Sharon Atton, from the funds held back following sale of the Rhodes Corner Property, was made on May 3, 2016. On that same day he paid the balance of the holdback, $1034.31 to the Estate.

[254] One may wonder why Ms. Zwicker did not secure another Proctor when Mr. Hirtle was not getting back to her and being slow in advancing the closing of the Estate. She testified that she did contact a couple lawyers and asked one of them to

take over. That lawyer advised her it was better to let Mr. Hirtle continue. Given her lack of experience and sophistication related to managing estates, it was reasonable for her to heed that lawyer's advice.

[255] It is noteworthy that she paid that lawyer out of her personal monies, even though she could easily have justified paying it out of the estate.

[256] In the circumstances, Ms. Zwicker acted honestly and reasonably in allowing Mr. Hirtle to continue attempting to complete the accounting, with the assistance of Ms. Atton, and prodding him to move the accounting along. Even though the overall delay turned out to be excessive, one could not say she acted unreasonably in not ending the relationship with Mr. Hirtle earlier, considering the circumstances existing at the time and the advice she received.

[257] Therefore, she ought fairly to be excused for the delay in providing an accounting.

ISSUE 4: WHAT, IF ANY, COMMISSION SHOULD THE STEVENS ESTATE AND MS. ZWICKER RECEIVE?

[258] Section 76 of the ***Probate Act*** provides that the commission allowed to the personal representatives of an estate must not exceed 5% of the "amount received" by them, and may be apportioned amongst them "as appears just and proper

according to the labour bestowed or the responsibility incurred by them respectively".

[259] The commission, in addition to being 5% or less, must be "just and reasonable": ***Re Rustig Estate***, 2002 NSSC 210, para 53.

[260] Section 62 of the ***Probate Court Practice, Procedure and Forms Regulations***, N.S. Reg. 119/2001, lists, as factors which may be considered in determining the commission to be allowed, the following:

> a) the size of the estate;
> b) the care and responsibility involved in administering the estate;
> c) the time the personal representative was occupied in performing their duties;
> d) the skill and abilities shown by the personal representative;
> e) the success resulting from the personal representative's administration of the estate."

[261] It is appropriate to reduce a commission for unjustified delay in administering the estate: ***Reeves Estate (Re)***, 2007 NSPB 1; ***Re Jones Estate***, 2011 NSPB 3.

[262] However, even where there is unjustified delay arising from some negligence, mitigating factors may make it such that the commission will not be reduced (and the personal representative will not be liable to compensate the estate for resulting losses): ***Mitchell Estate (Re)***, 2017 YKSC 25.

[263] In ***Mitchell Estate***, the personal representative took 23 years to complete the estate and was found to have been "negligent for not doing" during "gaps in communication between her and the objecting beneficiaries". However, she was not required to pay any amounts to the estate, and her commission was not reduced. At paragraph 115, the Court described the mitigating factors as follows:

> "1) This was a very complicated estate;
>
> 2) This was the first time Vivian had acted as an executor;
>
> 3) The evidence is clear that her relationship with all three objecting beneficiaries had been strained over the years, even to the point of Desire indicating that she did not want Vivian to have direct contact with her for a significant period of time;
>
> 4) Notwithstanding these difficulties, I am satisfied that Vivian acted honestly and with the best interests of the beneficiaries in mind throughout;
>
> 5) Vivian lost her principal estate lawyer in 1999;
>
> 6) There were health and other personal issues with Traci and Desire for a period of time after the end of 2000;
>
> 7) Vivian did not personally profit from her administration of any aspect of the estate;
>
> 8) The cash on hand in the estate was maintained in interest-bearing accounts, and generated $4,238.03 in income for the estate; and
>
> 9) There is no evidence that the estate suffered any loss as a result of the overall delay."

[264] At paragraph 118, the Court noted that the executrix had been "reasonably diligent in her management of the estate" from the grant of probate until a little over 7 years later, when she sent her trust reconciliation letter to the beneficiaries (which some of the beneficiaries objected to).

[265] In the case at hand, it took about 7 ½ years to sell the Rhodes Corner House. I have already gone through the circumstances and difficulties justifying that length of delay. Those circumstances and difficulties had the effect of significantly complicating the management of the estate.

[266] Monies from the sale of the other two real properties were quickly invested and/or distributed within a reasonable time. A significant distribution, i.e. one of $360,000, occurred within the first 19 months of the administration of the estate. The second significant distribution, in the amount of $90,000, occurred roughly one year later, and only a few months after receipt of the funds from the second sale of real property.

[267] Some of the contesting beneficiaries took an adversarial approach. Instead of cooperating with the Applicants and being of assistance in providing documentation required to complete the accounting, they withheld that information. That made the task of compiling the accounting much more challenging and time-consuming.

[268] In addition, some of the contesting parties commenced an application to remove Ms. Stevens as personal representative, then discontinued it. That resulted in additional delay and expense.

[269] Neither Applicant had acted as personal representative of an estate before. Neither was a professional or had any experience or training that may be of assistance to them in administering the estate. Their level of sophistication was that of an ordinary person who had never acted in that capacity before.

[270] Ms. Stevens was significantly disabled by rheumatoid arthritis, requiring her to use a wheelchair. She had to rely on Ms. Zwicker for her mobility and to carry out physical tasks. That further complicated the administration of the estate.

[271] Neither of the Applicants benefited from any delay. Instead, it resulted in them performing extra duties and incurring more out-of-pocket expenses that have not been reimbursed. I have already outlined some of the labour expended by Ms. Zwicker for which she has never been compensated. I have noted the refrigerator that Ms. Stevens bought from her own money and was sold with the estate property. Thus, the Estate benefited from that purchase. Ms. Zwicker, frustrated with the delay from Mr. Hirtle's office, in an effort to move things along, paid for legal advice from her own pocket. She has not been compensated for that.

[272] Ms. Zwicker proceeded almost immediately after the sale of the Rhodes Corner Property to push the Estate along to bring it to a close. She contacted the Proctor to do it as he had advised her it was part of what he would do in acting as Proctor for the Estate. He asked her to sort out the receipts and attach them to the

banking statements. Though she indicated they were in complete disarray and voluminous, she completed that by early 2012. She asked the Proctor again to complete the matter. He told her she needed a clearance certificate. The accounting firm told her she needed to close all interest-bearing accounts and investments to get the clearance certificate. She did that. She obtained the clearance certificate in early 2013. She again pushed the Proctor to close the Estate. He ultimately set a date for closing. However, the accounts did not balance and were objected to. At the suggestion of the then registrar of probate, he hired a retired registrar of probate to assist with the accounting. It still did not balance.

[273] The real delay in the case at hand, like that in ***Mitchell Estate***, occurred after the estate assets had been liquidated and the process of rendering an accounting and preparing the estate for closing had been commenced. In the circumstances, Ms. Zwicker did all that she could reasonably have been expected to do to move things along.

[274] Considering these points, there is no reason to reduce the commission below the amount requested by the Applicants.

[275] They have requested 2% for the Estate of Judith Stevens and 1.5% for Ms. Zwicker.

[276] They ask that the percentage be based on the total value of the estate as outlined in the accounting summary. That amount is $1,388,927.73. As already noted, the amounts that should not form part of the total value for commission purposes, is exceeded by the real property deposit amounts that could have been added. Therefore, it is appropriate to use the suggested estate value amount.

[277] 2% of that amount is $27,778.56.

[278] 1.5% of that amount is $20,833.92.

[279] By the time Ms. Zwicker took over as executrix, two of the real properties had already been sold, there had already been two partial distributions, and the Rhodes Corner Property sold in the next month. She arranged for quick auctioning and sale of personal property assets. However, she was left with assembling and organizing the accounting documents from the beginning of the management of the estate, and proceeding to close the estate, which particularly in light of the challenges posed by documents having gone missing after being delivered to the Proctor, became a time-consuming and stressful task. In addition, she provided significant assistance before officially becoming personal representative, for which she has not been compensated. Therefore, the proposed apportionment of the commission, as between the Applicants, appears “just and proper” considering “the labour bestowed and the responsibility incurred by them respectively”.

[280] Plus, there is very little left for the current personal representatives to do. All the assets have been liquidated. The accounting between this interim accounting and the final accounting ought to be straightforward and simple. Therefore, there is substantial room before reaching the 5% maximum to provide a just and proper proportion of the commission to them.

[281] The remaining question is whether those amounts are fair and reasonable.

[282] The fact that we are dealing with a relatively large estate cuts both ways when it comes to determining the proper commission percentage. On the one hand, a lower percentage provides a larger monetary amount than with a smaller estate. On the other hand, a personal representative managing a larger estate takes on greater liability. This is not one of those large estates where most of the assets are easily liquidated. Therefore, the size of the estate required significantly more effort.

[283] Its administration was complicated by the responsibilities which Ms. Richardson had undertaken as personal representative and sole beneficiary of the estate of her husband. Some of those responsibilities remained unfulfilled and had to be fulfilled by the Applicants. That included paying debts formerly of Thomas Richardson.

[284] It was also complicated by the condition of the Blue Rocks Property and the fact that property was occupied by a person who had been promised the right to stay there for his entire life.

[285] It was particularly complicated by the circumstances surrounding the Rhodes Corner Property. It was a large property. Ms. Richardson had overvalued it, creating elevated expectations in the beneficiaries regarding the price that it would bring. It was in very poor condition, necessitating significant repair and improvement to put it in a condition where it would have a better chance of attracting a price that would be within the expectations of the beneficiaries. Still, it was a difficult property to sell, as evidenced by the fact that only one offer was received. The result was that the Applicants had to deal with multiple realtors, labourers, tradespeople, contractors, property maintenance people, suppliers, fuel companies, and utility companies, over 7 ½ years. They also had to consult the Proctor in relation to the difficulties regarding the property and its sale. In addition, because of the problems with vandalism in the area, and to keep insurance premiums down, they had to arrange to have Ms. Barry stay there at night.

[286] The multiple receipts for work done and supplies obtained, and the evidence of Ms. Zwicker regarding the labour, supervisory, transportation, procurement and organizational services she provided, plus her prolonged efforts in relation to the

accounting, demonstrate that the Applicants spent an enormous amount of time performing their duties.

[287] The accounting is ultimately the responsibility of the personal representative. If other people are paid to carry it out, that may justify reduction of the commission. However, in some cases, a complex accounting may require professional assistance. In the case at hand, other than the complexities arising from missing documentation, there were no complexities requiring professional assistance. Some of the accounting work was done by Mr. Hirtle. Extensive accounting work was done by Sharon Atton. That came about as a result of Mr. Hirtle informing the personal representatives that was part of what he did.

[288] Being inexperienced in administering the estates, they simply followed his direction. Then, because Mr. Hirtle was unable to balance the accounting, he hired Ms. Atton.

[289] Mr. Hirtle submitted a bill which included $2359.05 for Preparation of Final Account. That was based on section B of the Lunenburg County Guidelines for Proctor's Fees, adjusted for inflation from 1989. His only time entry expressed as being for work on the final account is an entry for eight hours on February 10, 2014. He testified the accounting was done over a period of time when they had blocks of time to work on it. He said his assistant spent days on it; but, did not

specify her total hours. He stated his eight hours was the time he spent discussing why the accounting was not reconciling. He explained that he would review the accounting by having it read to, and discussed with, him. His hourly rate at the time billing was $180. For eight hours, that would be $1440.

[290] Ms. Atton, according to the record of disbursements from Mr. Hirtle's trust account, was paid $4975.00.

[291] Ms. Zwicker, due to lost documentation, relied on some of the Atton Accounting. However, eventually, she completed the accounting herself, with assistance from her current counsel, Ms. Dumke. That was done as part of the within application. With her assistance, the accounting has been successfully completed, despite it having become more challenging and time-consuming due to the lost information.

[292] The Applicants have been left unable to identify the nature of certain expenditures, because of the loss of information after delivery to Mr. Hirtle's office. As such, Mr. Hirtle's accounting directions and efforts have caused them significant prejudice.

[293] Some of the benefit they gained, during this interim accounting, from the Atton Accounting would have been unnecessary were it not for the lost

information. However, Ms. Zwicker did testify that, almost immediately after being removed as personal representative, and directed to prepare interim accounts, she used the figures taken from the Atton Accounting and built on to them to produce her first attempt at balancing the accounting. She then produced the current accounts. Therefore, the Atton Accounting did serve as a starting point.

[294] The 1.5% remaining available for commissions leaves $20,833.92. Subtracting $7300 (approximately representing the amount paid to Ms. Atton, plus the amount requested by Mr. Hirtle), would still leave approximately $13,500 for the current personal representatives.

[295] That is still 1% of the full value of the Estate. There is very little left for them to do. That which is left is a very straightforward. They have taken on much less liability than the Applicants. Consequently, there is still more than enough room to properly compensate them, even if the expense of professional help with the accounting is deducted from the commission initially available.

[296] As such, the requested commission already allows for that extra accounting expenditure.

[297] The Applicants did not display a high level of skill and ability. However, they clearly put a lot of effort into the administration of the Estate, engaged in

significant consultation, and made judgment calls that were rendered difficult by the circumstances which I have outlined.

[298] Although they were not successful in obtaining the type of price for the Rhodes Corner Property that had initially been expected by the beneficiaries, and they incurred significant expense in repairing, improving and holding the property, they ultimately did succeed in selling it, despite it being a difficult property to sell.

[299] Although they did not succeed in bringing a high percentage of income into the Estate, they were dealing with significant assets that were not conducive to earning income, and, it was reasonable for them to invest conservatively in GIC's as they did.

[300] Considering these points, the commission amounts requested are fair and reasonable.

ISSUE 5: WHICH PORTION, IF ANY, OF MR. HIRTLE'S ACCOUNT FOR HIS LEGAL SERVICES AS PROCTOR OF THE ESTATE SHOULD BE ALLOWED?

[301] ***Civil Procedure Rule*** 77.13 provides that Mr. Hirtle is entitled to "reasonable compensation" for the services he performed, "assessed in light of all the relevant circumstances", such as:

> "(a) counsel's efforts to secure speed and avoid expense for the client;
>
> (b) the nature, importance, and urgency of the case;
>
> (c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;
>
> (d) the general conduct and expense of the proceeding;
>
> (e) the skill, labour, and responsibility involved;
>
> (f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing."

[302] The Court in ***Faye Estate (Re)***, 2002 NSSC 242, at paragraphs 33 to 44, referred to the following factors in determining the reasonableness of a proctor's fees:

> "1. The time and effort required and spent;
>
> 2. The difficulty and importance of the matter;
>
> 3. Whether special skill was required;
>
> 4. Whether the charge compared favourably with other lawyers of similar standing;
>
> 5. The value of the claim;
>
> 6. The results obtained;
>
> 7. The tariff;
>
> 8. Any other special circumstances."

[303] "If a lawyer is going to charge on the basis of time then he must be prepared to substantiate his charges by accurate records … ": ***Lindsay v. Stewart, MacKeen & Covert***, 1988 CarswellNS 231 (C.A.), at para 45.

[304] Where a question is raised regarding the reasonableness of actions taken by counsel, the court must assess "whether the acts were reasonable in the

circumstances at the time they were done": ***MacLean v. Van Duinen***, 1994 CarswellNS 91 (S.C.), para 33.

[305] ***Civil Procedure Rule*** 77.12(2)(a) states: "A judge who determines that expenses are caused by the improper or negligent conduct of counsel may order … [that] counsel not recover fees from the client".

[306] The following points are relevant factors in determining what, if any, portion of Mr. Hirtle's legal account should be allowed.

[307] His evidence was that he likely would have told Ms. Stevens and Ms. Zwicker that he would bill in accordance with the scale in the Lunenburg County Guidelines for Proctor's Fees. He did not, in his words, "particularly" discuss what the scale entailed. He did not think he had discussed billing extra work on an hourly basis. Therefore, more likely than not, the main fee agreement was that he would be paid in accordance with the Guideline scale.

[308] His record of time spent on the file emanates partly from information extracted from his accounting program (PC Law) and partly from his own after-the-fact reconstruction (though he indicated it was a conservative reconstruction). It is not an accurate record and could not be used to substantiate an hourly billing for all services. In relation to the portion of his statement of account that is based

on the Lunenburg County Scale, the estimated time spent is presented only as a factor in supporting the reasonableness of the scale amount.

[309] The time-sheet he created indicates he worked almost 75 hours on the Estate from September 11, 2005 to May 23, 2016, thus for over a decade. At the beginning his hourly rate was $150. That would total $11,250. At the end, his rate was $180 per hour. That is the rate he used to separate bill for services provided in connection with the services noted in Schedule A to his statement of account. If that rate was used for all of the time indicated, the total would be $13,500. His total fee claimed is $12,629.17. Thus, the service hours re-created is a factor which supports the reasonableness of his bill.

[310] The services outlined in Schedule A to his statement of account, as being extra services, included: work related to responding to a 2009 application to remove Ms. Stevens as personal representative (which ultimately did not proceed); and, drafting documents to have Ms. Zwicker named personal representative, following Ms. Stevens' passing, including recording of probate documents.

[311] His total fee is broken down as follows:

> "Estate Fees as per [s. A of] scale ($7,983.12)
> Preparation of Interim Receipts ($320)
> Preparation of Notices of Entitlement ($680)

Legal Fees as per Schedule "A" ($1,287.00)
Preparation of Final Account [as per s. B of scale] ($2,359.05)"

[312] He adjusted the fees based on the Guidelines scales for inflation from 1989 when the Guidelines were created. As noted in Exhibit 9, without inflation, the section A fees would have been $5,646.17, and the section B fees would have been $1,668.47.

[313] In this case, the value of the Estate greatly exceeds the maximum base values listed in the Guidelines. The same estate, in 1989, would have had a much lower value than in 2005 when this estate was opened. That increase in value acts as an automatic inflationary adjustment. In addition, the cases cited in which the scale fees were used did not adjust for inflation. They included: ***Faye Estate***; ***Bruhm v. Feindel***, [1999] N.S.J. No. 57 (S.C.); and, ***Boliver Estate (Re)***, 2013 NSPB 1.

[314] Therefore, I agree with the Applicants and the contesting parties that increasing the scale amounts for inflation is not an appropriate or reasonable approach in the case at hand.

[315] In some cases, such as where the value of the Estate is at or below the low end of the base scale amounts, it may be reasonable and appropriate to adjust for inflation. However, in those cases, where the proctors state they will bill in

accordance with the Guidelines scales, they may have an obligation to inform the personal representatives in advance that they will adjust them for inflation.

[316] Mr. Hirtle agreed that he did not open or close the estate, which are tasks included in section A of the Guidelines.

[317] He also testified he understood the preparation of final accounts as being provided for under the Guidelines, and agreed he was not successful in getting them to balance. However, as he specified, the scale for preparation of the accounts is in section B of the Guidelines.

[318] Having agreed to billing in accordance with the scale, he cannot use the full scale amount for partial services, even if it is reflective of the hours actually spent. If he did, it would effectively be converting the billing arrangement for that portion of his account to an hourly rate billing arrangement. That was not the agreement in the case at hand.

[319] The section A scale includes services normally provided by the proctor and at least two attendances at the Probate Office. Mr. Hirtle did not attend at the Probate Office. However, he engaged in preparation to do so.

[320] Included in the section A portion of his bill, is some additional work, which was not a normal part of a proctor' duties. He dealt with the threat of a lawsuit

against the Estate, by the realtor that fell through the floor of the Blue Rocks Property. Mr. Hirtle testified that he dealt with Mark Dempsey in relation to that.

[321] He also dealt with the release of the judgment against Thomas Richardson, including preparing and recording the Certificate or Satisfaction. Mr. Hirtle's evidence was not clear on the point. His affidavit evidence indicated it was work conducted separate and apart from the real estate transactions. In his testimony at the hearing, it appeared to be considered to be part of handling the real estate transactions, for which he has already been paid separately, despite him having included, in his Estate Timesheet, a total of one hour for tasks relating to releasing that judgment, between June 26, 2006 and February 2, 2009. Even if he did not consider it to be part of the real estate transactions, it is related to them.

[322] He billed the full section B scale amount for preparation of the final account. However, he did not complete it, and handed over the bulk of the work to Ms. Atton, after having had Ms. Zwicker complete the onerous task of organizing the voluminous receipts he had handed over to her in disarray. He did spend 8 hours working on the accounting, and some time corresponding with accountants and Ms. Atton. However, the scale amount is for preparing the accounts, not making efforts at preparing, them.

[323] Mr. Hirtle testified he advised Ms. Zwicker not to use cash. Ms. Zwicker did not dispute that.

[324] Both Mr. Hirtle and Ms. Zwicker provided evidence to the effect that, and I accept that: he directed them to deliver all receipts to his office; he had the Estate's bank statements sent directly to himself so that he could reconcile them with the receipts; he informed them he would prepare the final accounting (as was his usual practice); he did not advise them the personal representative normally prepares the final accounting; and, he did not advise them that it could be expected that the personal representative's commission would be reduced if he did the final accounting.

[325] The Guidelines themselves remind proctors of the importance of advising personal representatives of what is normally done by them, and of the expectation that their commission will be reduced if work normally done by them is done by the proctor.

[326] He indicated he was communicating he would do the reconciliation for the final accounting. Ms. Zwicker and Ms. Stevens understood he would do the reconciliation on a monthly basis. It appears that it was done intermittently when there were blocks of time available.

[327] Mr. Hirtle thought, at the time, that it was standard practice for the proctor to prepare the final accounting. He realizes now, that is not the case.

[328] I accept that the personal representatives obtained receipts for all transactions, including cash transactions, and delivered them to Mr. Hirtle's office, some of them twice (the original, then the carbon copy). However, some of them have gone missing. It is unclear whether they went missing within Mr. Hirtle's office, or when provided to other professionals, such as accountants or Ms. Atton. I accept that Ms. Zwicker returned all receipts to Mr. Hirtle after organizing them. However, the result is that the Applicants have been prejudiced in their ability to provide a full accounting.

[329] There is noting improper or unreasonable with Mr. Hirtle having provided the supporting documentation to accountants or Ms. Atton. However, if he had not directed the Applicants to provide him that information, and had advised them that preparation of accounts was normally the duty of the personal representatives, then, there is a significant probability they would at least have retained copies of the supporting documentation. They could have made and retained copies of everything, either way; but, Ms. Zwicker was even asked to provide a retained copy of some documents, which copy also went missing.

[330] The fact that Ms. Atton was unable to balance the accounts was advanced as highlighting the complexity of the matter. The length of time the Estate was open, the number of transactions involved in its administration, and the difficulties with liquidating the real properties did make the Estate a more difficult and complex one. However, the lost documents at least equally impeded balancing of the accounts.

[331] In addition, some of the difficulties surrounding the sale of real property, such as the right of way issue, were dealt with as part of the real estate transaction for which Mr. Hirtle has already been paid. Mr. Hirtle also confirmed that the multiple discussions regarding the properties were billed as part of the real estate transactions.

[332] The Estate was of a fairly significant size, having a total value of almost $1.4 Million. That results in increased liability for the proctor, and often in increased work, both of which are reflected in the Guideline scale amounts.

[333] Since this was the first time the personal representatives administered an estate, and it was of some size, complexity and difficulty, the work of the proctor was important to them and the Estate.

[334] The nature and size of the Estate, in the case at hand, called for some special skill. However, Mr. Hirtle did not bring the full measure of special skill required as he was unable to balance the accounts.

[335] He also did not move the matter along as quickly as would have been desirable, resulting in the accounting taking from late 2011 to February 2014, before the application to pass accounts was made, and the application not being completed when he withdrew in May 2016.

[336] Proctors' fees are, in practice, almost always paid from estate assets. As such, the value their work brings to an estate is important. However, proctors also assist the personal representatives "in advancing the Estate's affairs to move toward a settlement of the accounts and distribution of the Estate's assets": ***Medjuck v. Arron (Estate)***, 2012 NSSC 292, para 41. It has been noted that the personal representatives are "primarily responsible" for the proctor's fees, which, to the extent reasonable, they can recover from the estate: ***Weldon v. Canadian Surety Co.*** (1966), 64 D.L.R.(2d) 736 (Co. Ct.), page 738. Therefore, the value their work brings to the personal representatives is also important.

[337] Having advised the Applicants he would prepare the accounting, it was reasonable for Mr. Hirtle, at the time, to attempt do so. The fact he was unsuccessful, does not make that work completely useless to the Estate. It still

serves as a base from which to complete the accounting. That base was also of some benefit to Ms. Zwicker. However, the lost receipts removed some of that benefit, in that it made it impossible to substantiate some of the transactions and resulted in the Stevens Estate owing $9,789.14 to the Richardson Estate.

[338] Having asked for the receipts to be delivered to his office, Mr. Hirtle had an obligation to ensure their safekeeping. Instead, they went missing, resulting in that unnecessary expense to the Stevens Estate, but not, in itself, causing prejudice to the Richardson Estate.

[339] Ms. Zwicker had to close all income-earning accounts to obtain the clearance certificate needed to close the Estate. She did so with the expectation that the Estate would be finalized relatively quickly. That did not occur. Mr. Hirtle's delay in advancing the accounting may have caused the Estate to lose income it would otherwise have earned. However, there has been no evidence presented regarding what the Estate likely would have earned.

[340] Therefore, though Mr. Hirtle ought to be able to recover all reasonable fees agreed upon from the Richardson Estate, as between Mr. Hirtle and the Stevens Estate, the unnecessary expenses caused justify some reduction. To accomplish those two objectives, the ultimate fee approved can be reduced, but with the saving

to the Richardson Estate being deducted from the amount the Stevens Estate owes it.

[341] The Applicants present ***MacCulloch v. McInnes Cooper & Robertson***, 2001 NSCA 8, in support of their argument that Mr. Hirtle should not recover any fees because he: failed to advise them of the potential exposure to litigation if the closing of the Estate was delayed; caused loss of information and delay; and, the Applicants have been served with an action seeking, among other things, damages for delay and mismanagement of the Estate.

[342] In ***MacCulloch***, the lawyer hired by an executrix to act for her in a transaction to purchase estate assets was found to be negligent for failing to advise her of the potential problems associated with such a purchase and to seek court approval. The estate was petitioned into bankruptcy. The trustee successfully sued the executrix. She did not pay the judgment. However, the lawyer was required to pay her legal fees in defending the action, and the amount by which the value of the estate was diminished by the trustee spending estate resources on the litigation.

[343] There was no indication that the lawyer who represented her in the transaction did not receive his fees at the time of the transaction, nor that those fees were ordered returned. Therefore, the reasoning in MacCulloch does not directly support the result suggested by the Applicants.

[344] However, as indicated, it is proper to reduce Mr. Hirtle's fees to account for the expenses his conduct caused for the Stevens Estate, and ***MacCulloch*** highlights that failure to advise of potential dangers can cause such expenses.

[345] Considering the points I have discussed, reasonable reimbursement for Mr. Hirtle's legal services, before adding HST, would be $6,675.78. The breakdown is as follows.

[346] I accept the $2,287 as a reasonable amount overall for: preparation of interim receipts and notices of entitlement; the 2009 Application to Remove Ms. Stevens as personal representative; and, having Ms. Zwicker appointed personal representative following Ms. Stevens' passing.

[347] I first reduce the section A scale amount to $5,646.17, and the section B scale amount to $1,668.47, to remove the inflation adjustment. That results in scale amounts totalling $7,314.64. However, I only allow 60% of that amount to account for the expected tasks that were not undertaken or, if undertaken, were not completed, while also considering that some tasks that are not usually part of a proctor's work were completed. That leaves net scale fees of $4,388.78.

[348] Adding that amount to the $2,287 gives the $6,675.78 total noted above. With HST, the grand total is $7,677.15.

[349] However, for reasons noted, Mr. Hirtle's actions have made it such that the Stevens Estate owes the Richardson Estate $9,789.14. On the other hand, the Stevens Estate could have taken steps to ensure it kept a copy of all receipts for a final accounting, even if Ms. Stevens understood they would be prepared by Mr. Hirtle. Therefore, it should bear some of the loss.

[350] Consequently, I will reduce Mr. Hirtle's grand total bill for legal services by $4,789.14. That will be his contribution to the expense created for to the Stevens Estate. The Stevens Estate will bear responsibility to pay the remaining $5,000 to the Richardson Estate by deducting it from the commission to which it would otherwise be entitled.

[351] So, that leaves the Estate owing Mr. Hirtle $2,888.01, inclusive of HST, for his services.

[352] In addition, they owe him $18.87 in reasonable disbursements for courier and photographs.

[353] So, the complete legal account owing to Mr. Hirtle is $2,906.88.

CONCLUSION

[354] For the reasons discussed, I conclude and order the following:

1. I pass the accounts of the Estate of Shirley Richardson for the period from February 22, 2005 to September 12, 2016, upon:

(a) The Estate of Judith Stevens paying the Estate of Shirley Richardson $5,000 for unexplained and unsupported expenses (by deducting that amount from the executrix's commission to which the Estate of Judith Stevens is entitled); and,

(b) Judith Zwicker paying the Estate of Shirley Richardson $25.60 to correct the error she made in depositing funds from sale of furnishings (by deducting that amount from the executrix's commission to which Judith Zwicker is entitled).

2. The Estate of Judith Stevens is to be paid an executrix's commission of $27,778.56, which, after deduction of the $5,000 owing to the Estate, leaves $22,778.56 to be paid to the Estate of Judith Stevens.

3. Judith Zwicker is to be paid an executrix's commission of $20,833.92, which, after deduction of the $25.60 owing to the Estate, leaves $20,808.32 to be paid to Judith Zwicker.

4. Mr. Hirtle's bill of costs is taxed and allowed in the amount of $2,906.88, inclusive of fees, HST and disbursements, which amount is to be paid directly to Mr. Hirtle by the Estate of Shirley Richardson.

5. The Estate of Judith Stevens and Judith Zwicker are discharged as personal representatives of the Estate of Shirley Richardson.

6. The balance remaining for distribution, as of September 12, 2016, subject to any additional executor's commission that may be payable to the current personal representatives, is $183,083.65.

ORDER

[355] I ask Counsel for the Applicants to prepare the Order.

COSTS

[356] If the issue of costs cannot be resolved, I will receive submissions in writing within 45 days of delivery of this decision to all counsel involved.

Pierre Muise, J.