SUPREME COURT OF NOVA SCOTIA
COURT OF PROBATE FOR NOVA SCOTIA

Citation: *Stevens Estate v Stevens and Stevens*, 2021 NSSC 7

In the Estate of Vivian Kathleen Stevens, Deceased

Date: 20210112
Docket: BWT No. 448287
Probate No.: BW 14200
Registry: Halifax

Between:

Graham Stevens and Shelley Veinotte, as Personal Representatives of the Estate of Vivian Kathleen Stevens

Applicants

v.

Royal Stevens, as Guardian of Stewart Stevens and Cynthia Stevens, in her capacity as Litigation Guardian of Stewart Stevens

Respondents

Judge:	The Honourable Justice Diane Rowe
Heard:	July 30, 2020, in Bridgewater, Nova Scotia
Counsel:	G.F. Philip Romney, for the Applicants Rubin Dexter and Benjamin Carver, for the Respondents

By the Court:

[1] The late Vivian Stevens' estate was not especially large or overly complicated, however the legal process associated with its administration has been complex and lengthy. This decision regards an application seeking the passing of Final Accounts in the estate, pursuant to the *Probate Act*, S.N. 2000, c.31 (the "Probate Act" or "the Act"). The objecting parties dispute the final account filed by the administrators, specifically in relation to legal costs paid out of the estate, incurred in relation to the removal of a prior executor.

[2] The application was initially scheduled for hearing on April 23, 2020. The Covid-19 pandemic intervened, and was then heard by the Court on July 30, 2020.

[3] The hearing was punctuated by new procedures concerning infection control measures, as all the parties and counsel appeared in person. The Court appreciates that all parties demonstrated their commitment to the continued administration of justice in their community during this uncertain time.

Background:

[4] Mrs. Vivian Stevens passed away on March 6, 2009. The administration of her estate began on March 23, 2009. In her will, she left her property to her three sons Royal, Donald and Stewart Stevens.

[5] Mr. Royal Stevens acted as the sole executor of the estate, as his brother and co-executor Donald Stevens was then deceased.

[6] Royal Stevens is also the legal guardian of his brother Stewart, and is appointed Stewart's guardian under the former *Incompetent Persons Act*, now the *Adult Capacity and Decision-making Act,* SNS 2017, c.4. Mr. Stewart Stevens has significant capacity difficulties, both physically and mentally.

[7] Donald Stevens' two children, Ms. Shelley Veinotte and Mr. Graham Stevens, are two residual beneficiaries. As several years passed without the estate being distributed, and as they were seeking to have their residual interest in lands referenced in this matter as the "Clearland Property" conveyed to them, they retained counsel.

[8] On February 17, 2016, almost seven years after the estate had been opened, Shelley Veinotte and Graham Stevens filed an application seeking the removal of Royal Stevens as executor. They were successful in the application, and by Order of the Honourable Justice Margaret Stewart dated August 26, 2016, (the "Removal Order") Mr. Royal Stevens was removed as executor, and Ms. Veinotte and Mr. Graham Stevens were appointed personal representatives of the estate. During the course of that hearing before Justice Stewart, Royal Stevens admitted that he had misappropriated over $75,000 from the estate.

[9] The Removal Order also provided:

> "4. That the Applicants shall have costs in the amount of $1,000.00 plus disbursements of $502.95 which costs shall be paid by Royal Barrie Stevens in his personal capacity."

[10] After the Removal Order was issued, Shelley Veinotte and Graham Stevens filed an application in November of 2016, seeking a grant of administration, with related undertakings concerning their duties as administrators. A surety was provided at that time. They were appointed administrators of the Stevens Estate on December 16, 2016 ("Administrators").

[11] The Administrators' counsel continued to provide legal services as proctor and counsel for the estate.

[12] The estate proceeded to file an action against Mr. Royal Stevens and his wife seeking recovery of the estate assets that were converted to their own use during his executorship.

[13] Mr. Royal Stevens, in his capacity as Stewart Steven's guardian, then filed an action against the estate, seeking recovery of funds payable to Stewart, as received on Stewart's behalf by their late mother Vivian Stevens, that was deposited in her personal bank accounts.

[14] Cynthia Stevens was appointed Stewart's litigation guardian in regard to the action to recover Stewart's funds on January 29, 2019.

[15] These two actions were consolidated by the Court, and a Settlement Conference convened before the Honourable Justice Heather Robertson. The Settlement Conference took place on January 29 and February 8, 2019, with the parties reaching an agreement.

[16] Subsequently, a motion was filed by Royal Stevens and Cynthia Stevens seeking an Order to enforce the terms of the settlement achieved. Justice Robertson heard that motion, and then issued the terms of the settlement in her Order dated July 25, 2019 (the "Settlement Order").

[17] The Settlement Order dismissed the consolidated actions, and provided that Royal Stevens was to repay $44,000.00 in certain amounts, on a schedule, in restitution to the estate. In addition, he was to renounce his share in the estate.

[18] Further, Ms. Veinotte and Mr. Graham Stevens were to pay $3500.00 to the estate for the Clearland property, to effect the conveyance of the lands to them both.

[19] Clause 4 of the Settlement Order provided that the legal costs incurred by Cynthia Stevens, acting as litigation guardian to Stewart in this proceeding, were to be payable by the estate. The clause further provided that in the event of a dispute, the fees were to be taxed in Small Claims Court.

[20] In addition, the Settlement Order provided that costs of the motion to enforce the settlement were payable by Shelley Veinotte and Graham Stevens to Royal Stevens and Cynthia Stevens, in the total amount of $1500.00, plus disbursements.

[21] This element of the Settlement Order mirrors the costs award in the Removal Order, where costs in a similar amount were payable by Royal Stevens to Graham Stevens and Shelley Veinotte, personally.

Passing of a Final Account pursuant to s. 55 of the Probate Court Regulations

[22] On December 16, 2019, the Administrators' counsel filed an application under section 64(3)(a) of the *Probate Court Practice, Procedure and Forms Regulations*, made pursuant to s. 106 of the *Probate Act*, ("Probate Court Regulations" or "Regulations"). This section of the Probate Court Regulations provides for the hearing of an application concerning "a contentious matter" in the administration of an estate. The contentious matters referenced within were the legal fees incurred by the Administrators in relation to costs incurred in the Removal Order proceeding, and seeking taxation of Cynthia Stevens' counsel's fees.

[23] Then on February 5, 2020, the Administrators also filed an application for the passing of an account by the Court pursuant to sections 53 and 55 of the Probate Court Regulations. If this application is successful, and the accounts accepted, then

s. 61 of the *Probate Act* empowers the Court to proceed to discharge the administrators.

[24] The February 5, 2020 application requests that the Court undertake the taxation of legal fees incurred by a beneficiary to the estate in relation to the removal of the prior executor, give direction on the distribution of the estate, the release of any surety, and give direction on payments to the guardian for a beneficiary under a disability. Enclosed with the application was a Final Statement of Account, with counsel's fees included within an Affidavit filed with the Court.

[25] The Order, if granted on this application, would effectively conclude further administration of the estate, with distribution to follow. The issues raised by the Administrators in the December 16, 2019 application requesting the hearing of a contentious matter were blended.

Objections to the Application to Pass the Final Account

[26] Royal Stevens and Cynthia Stevens, in their respective roles as Stewart Stevens' guardian and Stewart's litigation guardian in the action filed against the estate, objected to the content of the final account filed by the Administrators in support of this application for discharge and distribution.

[27] Royal Stevens filed a notice of objection to the application to pass the final account on June 22, 2020. Mr. Stevens' objection, on behalf of Stewart, specifically sought exclusion of payment for all the legal fees associated with Ms. Veinotte and Mr. Graham Stevens' application to remove Royal Stevens as executor. In addition, it requested that the Court exclude legal fees incurred in regard to advancing the Administrators' personal interests in the estate. The objection also requested the inclusion in the accounts of the $1502.95 referenced in the Removal Order, which was payable to Ms. Veinotte and Mr. Graham Stevens from Mr. Royal Stevens. Finally, it also requested that the accounts not be passed as the estate's counsel had received payment for legal fees directly from the estate prior to a taxation being held before a Court under ss. 91 and 61 of the Probate Court Regulations.

[28] Mr. Royal Stevens also filed a supplementary notice of objection to the application under s. 55(3)(c) on July 13, 2020, citing the failure of Ms. Veinotte and Mr. Graham Stevens to pay $3,500.00 for the Clearland Property into the estate, and requesting credit to the Estate for the payment to them by Royal Stevens of the $1,502.95 awarded in the Removal Order.

[29] Mr. Royal Stevens' submission to the Court was that the hearing was more in keeping with the initial application filed in December, 2019 by the Administrators, specifically for a hearing on a contentious matter of the legal fees, rather than one pursuant to sections 53 and 55 of the Regulations, which could result in the discharge of the Administrators, and distribution of the Estate.

[30] Cynthia Stevens, on behalf of Stewart as litigation guardian, joined in these objections. Her objection was filed pursuant to s. 66(1) of the Regulations, on July 9, 2020, as a response to the initial application filed in December, 2019 by the Administrators for the hearing of a contentious matter concerning legal fees.

[31] Cynthia Stevens also raised the issue of the then outstanding payment of the $3,500.00 into the estate for the Clearland property, and the passing of accounts and payment for her solicitor, as was required under the Settlement Order.

[32] In addition, Cynthia Stevens requested that the court consider the failure of the Administrator to request an award of solicitor-client costs payable from Mr. Royal Stevens, in light of his conduct as the estate executor and the misappropriation of assets, in the earlier removal proceedings. It was submitted that this failure to request solicitor-client costs from Mr. Stevens was an omission by the Administrators that was not remedied, and could not be addressed at this stage of the estate administration, and should be seen as a failure of their fiduciary duty to the estate. In the alternative, it was submitted that the Administrators' counsel had failed to pursue the potential remedy of a costs award for solicitor-client costs directly from Mr. Stevens, in error, to the detriment of the Estate.

[33] As the hearing date approached, the Administrators filed an "Updated Summary" of the Final Account of the estate on July 16th, 2020.

[34] The Updated Summary indicated that payment of $3,500.00 for the Clearland property had been made into the estate account.

[35] It also added a Schedule "E", which included within the total amount of Cynthia Stevens' legal fees referenced in the Settlement Order, in the amount of $5,048.16.

[36] It appears upon the filing of the Updated Summary that the Administrators abandoned seeking the Court's direction on these two items, as initially referenced in the application of December, 2019. I will note that payment was outstanding to Ms. Stevens' counsel at the time of the hearing.

[37] The Updated Summary narrowed the hearing to the objectors' request that the Court determine whether the legal costs contained in the final account filed by the Administrators should include the costs of the applicants' legal fees associated with the former executor's removal, in the absence of an express direction or authorization by the Court. The objectors argue the fees for these legal services should not be payable out of the estate, and as the invoices have already been paid by the estate, should either be paid back into the estate by the Administrators personally, or should be paid back into the estate by the estate's counsel Mr. Romney personally, as a reimbursement to the estate.

Issue:

[38] Should the legal fees incurred by an administrator upon the removal of a prior executor for cause be included in the accounts and paid out of the estate, or should such legal fees be disallowed in the absence of a Court order addressing an award of solicitor-client costs.

Analysis:

[39] Royal Stevens refers the Court to the Settlement Order, which provided for an amount of costs to be payable from Royal Stevens directly to Ms. Veinotte and Mr. Graham Stevens. It is submitted that this aspect of the Settlement Order is intended to address fully an award of costs, pursuant to the Court's jurisdiction under Rule 77 of the *Civil Procedure Rules*. It is silent concerning an award of costs on a solicitor-client basis from Royal Stevens into the estate.

[40] Mr. Royal Stevens, on behalf of Stewart, argues that the silence of the Settlement Order on solicitor-client costs incurred by the Administrators in his removal as executor, is determinative on the issue of whether the estate should bear the full measure of these fees as an expense.

[41] Mr. Stevens submits that the estate should not be diminished by the total amount of the legal fees associated with his removal, as this is effectively making a decision that should more properly have been the subject of an Order awarding solicitor-client costs.

[42] It is submitted that the effect of accepting the full measure of the subsequent Administrators' legal fees incurred upon the removal of the prior executor reduces the share available to Stewart on distribution, to his detriment.

[43] Further, it is argued that the silence in the Settlement Order on this aspect was either a mistake or an omission of the Administrators' counsel and, as such, the fees should be paid back into the estate by the Administrators, as they did not instruct their counsel to address this in the Orders issued by the Court. In the alternative, the fees should be payable by the estate's counsel personally back into the estate on the basis of mistake or omission concerning this item in the draft Order.

[44] Royal Stevens and Cynthia Stevens request that the Court infer that the Removal and Settlement Order's silence on the solicitor-client costs supports the view that the inclusion of the full measure of the subsequent Administrator's legal costs within the final accounts is an implicit, and therefore improper, award to the Administrators of solicitor-client costs. Mr. Royal Stevens' counsel notes that the scale of legal costs that may be awarded in a proceeding is not addressed in either the *Probate Court Act* or the Regulations, and that the Court should then refer to Rule 77 of the *Civil Procedure Rules* for guidance in setting an appropriate award of costs.

[45] In response, both at the hearing, and afterward via correspondence directly to the Court, the Administrators sought to provide portions of the transcript of the judicial settlement conference. The purpose of this was to support the argument that all the legal expenses incurred by the Administrators during the course of the administration of the estate were implicitly intended by the Court to be payable out of the estate. It was their understanding of the Court's intentions that was the basis for not requesting an explicit reference to legal fees as an estate expense within the Settlement Order issued by the Court. I do not find it necessary to rely upon these, and have not relied up on the unsolicited submissions filed with the Court, after the hearing.

[46] Counsel for the Administrators indicated that, in his experience, solicitor fees were payable out of the estate as a matter of course as part of the administration of the estate. He submitted that had been the case in this estate prior to his own involvement, as two prior counsel who were retained to assist with its administration were paid out of the estate directly, and objection to their accounts was not raised.

[47] In this matter, both parties offer differing interpretations concerning the silence of the Orders on the issue of legal fees incurred by Ms. Veinotte and Mr.

Graham Stevens on the application seeking the executor's removal. The Administrators' view is that legal fees are expenses generally understood to be appropriately accounted for and payable out of the estate, and not requiring explicit direction from a Court, in keeping with the law concerning the indemnification of a trustee. In the alternative, the objectors' view is that the legal fees are costs which may have been awarded by a Court to a successful party under the *Probate Court Act* and *Civil Procedure Rules* upon the removal of an executor for cause, and the absence of explicit direction in these prior Orders precludes a Court from making an implicit award of discretionary solicitor-client costs at this later proceeding in the estate.

[48] It would be preferable for parties to ensure that when an Order is being drafted in a proceeding during the course of a contested administration of an estate, that counsel work together to ensure that the terms of the Order be explicit concerning legal fees, and particularly whether, and to what extent, legal fees incurred in the proceeding are being addressed, whether as expenses of the estate, or as the subject of a costs award made pursuant to the Act and the *Rules*. This would likely assist in effective estate administration.

[49] A disposition on this application in the estate requires that the Court consider whether the legal fees incurred by the Administrators in this matter are an estate expense that should be included in the final account, or should such legal fees be disallowed from inclusion as there is no Court order addressing an award of solicitor-client costs for the successful applicants.

[50] Sections 71 and 72 (1) of the *Probate Act* provides the following:

> **Powers of court**
>
> 71 On passing the accounts of the personal representative, the court may
>
> (a) enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and the administration and disbursement thereof, including the calling in of creditors and adjudicating on their claims, and for that purpose take evidence and decide all disputed matters arising in the accounting; and
>
> (b) inquire into and adjudicate on a complaint or claim by a person interested in the taking of the accounts of misconduct, neglect or default on the part of the personal representative and, on proof of the claim, make any order the court considers necessary, including an order that the personal representative pay such sum as it considers proper and just to the

estate, but any order made under this subsection is subject to appeal. 2000, c. 31, s. 71.

[51] **Further powers of court**

72 (1) On passing of accounts the court may

(a) order that

(i) the accounts of the personal representative are passed and bills of costs are taxed pursuant to Section 91,

(ii) the personal representative is discharged,

(iii) any security be released,

(iv) the estate remaining undistributed after the passing of accounts be distributed among the persons entitled; and

(b) make any other order it thinks necessary to settle the estate.

[52] In addition, the *Probate Act* provides at section 92:

Costs in contested matters

92 (1) In any contested matter, the court may order the costs of and incidental thereto to be paid by the party against whom the decision is given or out of the estate and if such party is a personal representative order that the costs be paid by the personal representative personally or out of the estate of the deceased.

[53] And then at section 102 of the Act:

Application of Civil Procedure Rules

102 Where no provision is made in this Act or in the Probate Rules with respect to practice or evidence and in so far as this Act or the Probate Rules do not extend, the *Civil Procedure Rules* apply.

[54] Accordingly then, the Court will look to Rules 77.01 and 77.02 of the *Civil Procedure Rules*, which provides more detailed guidance concerning an award of costs.

[55] Rule 77.01 (1) addresses the scope of the Rule concerning costs as follows:

77.01 (1) The court deals with each of the following kinds of costs:

(a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;

> (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
>
> (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule. (emphasis mine)

[56] Rule 77.02 of the *Civil Procedure Rules* addresses the Court's general discretion to award party and party costs:

> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10-Settlement. (emphasis mine)

[57] The *Probate Act*, in tandem with the *Civil Procedure Rules*, work together to inform a Probate Court judge exercising their discretion when making an award of costs, and to empower the court to make an award upon the scale of solicitor-client costs in "exceptional circumstances" where an executor is removed for cause.

[58] McDougall, J., in *Hopgood v. Hopgood*, 2020 NSSC 18, refers to the leading Nova Scotia Court of Appeal decisions setting out the applicable principles concerning an award of costs in an estate, at paragraphs 36 to 39, as follows:

> [36] In *Casavechia v. Noseworthy*, 2015 NSCA 56, Oland, J.A., at paragraph [71], quoted from an earlier decision of the Nova Scotia Court of Appeal in *Prevost Estate v. Prevost Estate*, 2013 NSCA (2), as follows:
>
> > [71] This Court's most recent statement on costs in estates litigation is found in *Prevost Estate*. There, Bryson J.A. for the Court stated:
> >
> > > [17] It is often the case that parties in an estate dispute are awarded costs out of the estate. An adverse party may receive party-and-party costs; an executor or trustee will usually receive solicitor-client costs by way of indemnity. One cannot assume judicial generosity in all of these cases. Much will turn on whether or not the contested issue arises from conduct of the deceased. Generally, if the need for resort to the court was caused by the testator, costs will be borne by her estate, (*MacDonell, Sheard and Hull Probate Practice*, 4th ed. (Scarborough, Ont: Carswell, 1996) pp. 372-381). …

> [37] In *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79, Bryson, J.A., beginning at paragraph [91] *et sequentes* provides a clear and concise review of the evolution of costs in Estate matters.
>
> [38] I do not think it necessary to reproduce what Justice Bryson wrote in its entire ty. I do note, however, that he referred to what he had been previously stated in *Prevost Estate*.
>
> [39] At paragraphs [99] and [100], Justice Bryson also said:
>
> > [99] To the extent that there was a traditional practice of paying costs of all parties out of the estate, those days are over. Provided that a personal representative is discharging her duties and is acting reasonably, she can be expected to be indemnified from the estate. Not so with an adverse party, who may obtain party-party costs if successful, but may have to bear her own costs or even have to pay them, if unsuccessful. If the court proceeding can be ascribed to conduct of the deceased or residuary beneficiaries, a losing party may still recover costs from the estate, although usually on a party-party basis (*Casavechia, supra; Townsend v. Doherty*, 1993 O.J. No. 713, per Borins J. as he then was; *Gamble v. McCormick*, 2002 O.J. No. 2694 (S.C.J.); *Holzel v. Mjeda*, 2000 ABQB 549; *Oldfield v. Oldfield Estate*, 1994 O.J. No. 2529).
> >
> > [100] Awarding costs against or out of an estate means that the expense usually is borne by the residuary beneficiaries. It is appropriate to ask whether that is a proper burden for them to bear. Where the personal representative is discharging her duties and there is no other unsuccessful party to share at least some of the burden, there is nothing that can be done to mitigate this indirect charge on the generosity of the testatrix, at the expense of the residuary beneficiaries. But where, as here, there is an unsuccessful party who is the cause of the litigation, it is proper that the unsuccessful party bear much of the burden. …

[59] Understandably then, cases in which solicitor-client costs are awarded are very fact specific and reflect consideration and balancing of this legal principle with the facts, as they reflect the discretion of the presiding judge. It was possible that the Administrators could have pursued a path to request that the judge make an award of solicitor-client costs. They did not do so.

[60] I am not able to reopen this aspect of the prior order now, as Rule 77.02(2) precludes a judge from making an order concerning costs awarded after acceptance of a formal offer to settle. As noted before, the Settlement Order did make an award of costs, though not of solicitor-client costs payable into the estate by Mr. Royal Stevens.

[61] On my review of each of the Orders, and considering the circumstances that gave rise to them, it appears that the costs award, as against either Mr. Royal Stevens or Ms. Veinotte and Mr. Graham Stevens, are party and party costs upon each application, and were not costs awards intended to address the fees that were being incurred in the broader context to advance the estate's general administration, in keeping with Mrs. Vivian Stevens' Will.

[62] The Administrators did not request that either of the presiding judges consider an award of solicitor-client costs payable into the estate by the former executor Mr. Royal Stevens. The result of their successful application was that they then assumed the role of administrators, with associated trust conditions and responsibilities.

[63] While it may have been preferable for the Administrators to have made a request to the court for Mr. Royal Stevens' to pay solicitor-client costs to the estate, it is not a certainty that any such costs award would have been made. The *Probate Act* provisions and *Civil Procedure Rules* cited all refer to the discretion of a presiding judge in making any award concerning costs. As such an award is uncertain, it would not be appropriate to infer that the administrators would have been successful in receiving an order that would have realized the full amount of the fees associated with the executor's removal.

[64] I do not find that it is necessary, pursuant to sections 72(1) and 92(1) of the *Probate Act*, to order that the Administrators personally pay the legal fees they incurred in the application to remove the initial executor, back into the estate. The fees were incurred reasonably, resulting in a benefit to the estate and in furtherance of the broader goal of effective administration of the estate, which they undertook upon their appointment.

[65] In considering whether the administrators, after their appointment, are or may be liable for a breach of trust in failing to obtain solicitor-client costs incurred upon the removal of an executor, I have considered the application of section 64 of the *Trustee Act*, RSNS 1898, c. 479 which provides:

> **Court may relieve trustee from liability**
>
> 64 If it appears to the Court that a trustee is or may be personally liable for any breach of trust whether the transaction alleged to be a breach of trust occurred before, on or after the twenty-seventh day of March, 1902, but has **acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he**

> **committed such breach**, then the Court may relieve the trustee either wholly or partly from personal liability for the same. R.S., c. 479, s. 64.

[66] I am also mindful of the distinction drawn by Roscoe, J.A., writing for the court in *Comeau v. Gregoire*, 2005 NSCA 135, at paragraph 19 and 20 (in reference to s. 64 of the Trustees Act):

> [19] This section applies to trusts imposed upon personal representatives of estates as a consequence of the definition part of the **Act**:
>
> > s. 2 ....(r) "trust" does not include the duties incident to an estate conveyed by way of mortgage, but with this exception "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person. (emphasis mine)
>
> [20] The effect of s. 64 of the **Trustee Act** is that personal representatives of estates are only liable to do their best, and if they honestly do their best in the circumstances, they are not liable for errors in judgment. See: **Davies v. Nelson**, 1927 CanLII 452 (ON CA), [1928] 1 D.L.R. 254 (Ont. C.A.); **Re Shields Estate**, [1994] P.E.I.J. No. 116 (Q.L.) (S.C.T.D.) 61; **Slemko v**. **Dye,** [1989] B.C.J. No. 342 (Q.L. (B.C.S.C.). …

[67] In *Comeau*, the Court of Appeal upheld an order of relief from liability for a personal representative for alleged breaches of trust that predated her appointment. While this case's facts are similar in that respect to the facts in this matter, it should be noted that the personal representative was not one appointed subsequent to a removal proceeding.

[68] Also, in *Zwicker v. Richardson (Estate)*, 2018 NSSC 327, Muise, J., thoroughly canvassed the law concerning situations in which a Court may relieve a trustee of liability, as he considered a matter in which unsophisticated trustees were charged with the administration of a complex estate. He notes at paragraph 151 to 153 inclusive the following:

> [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."

[69] Ms. Veinotte and Mr. Graham Stevens demonstrated in the evidence presented that they were unfamiliar with estate matters, and placed their trust in their counsel on this issue, in reliance upon his professional advice. It was reasonable for them to do so, as the Administrators' counsel had represented them in their successful application to remove the executor, and succeeded in discovering the extent of diminishment of the estate and obtained an order for restitution.

[70] It is apparent that upon their appointment the administration of the estate progressed more quickly, after a lengthy period of time had already passed. Their efforts resulted in the estate recovering in excess of $100,000.00, which was a significant portion of the assets available for distribution The estate has been enriched by their stewardship, which will also enrich Stewart Stevens' share.

[71] They both demonstrated to me, on their cross examination on the contents of the affidavit of costs filed, their belief that the contents of the legal accounts presented were appropriate. While they seemed slightly unfamiliar with the contents of the accounts, this did not appear to stem from either negligence or an intent to be wilfully misinformed, but due to the passage of time and in reasonable reliance that the contents were accurate in regard to necessary legal work for the estate, as was presented to them by their trusted counsel. They should not have to pay into the Estate an amount representative of the possibility of an award of solicitor-client costs, that may or may not have been awarded.

[72] I also note that the Administrators are not seeking an executor's fee from the estate, thereby increasing the amount available to be apportioned to Stewart Stevens.

[73] I am satisfied that the Administrators did act honestly and reasonably, and should be excused for any alleged breach of their duty as personal representatives,

if such occurred in omitting to seek solicitor-client costs for the removal of the prior executor, pursuant to s. 64 of the *Trustees Act*.

[74] I can not order Royal Stevens to pay costs on the earlier removal application back into the Estate, as the Court in making the Order removing him as executor was then best placed to consider the issue of whether he should be subject to an order for solicitor-client costs.

[75] Finally, in relation to the objection that the accounts should not be passed as Mr. Romney had received payment for legal fees directly from the estate, prior to a taxation being held before a Court under sections 91 and 61 of the Probate Court Regulations, I note these two sections indicate a taxation of legal costs prior to payment out of an estate is discretionary. A judge may order such a taxation upon passing the final account, but it is not a mandatory step prior to payment out of the estate.

[76] The Administrators were cross examined on the contents of the accounts in issue during the hearing, and I am satisfied on their evidence that they understood the contents and authorized their payment accordingly.

[77] On my own review of Mr. Romney's accounts in the course of the hearing, there are two items which were entered as "Small Claims Court attendance". I also note that these entries coincide with a notation concerning a person named "B. Stevens", who Ms. Shelley Veinotte confirmed on her oral evidence is another family member, Barry Stevens, who was providing accounting services for the estate.

[78] I accept that the amounts for legal fees submitted by counsel for the administrator are appropriate, though significant, and were reasonably incurred as the administration of the estate has become complicated by related legal proceedings.

[79] Cynthia Stevens' counsel submits that Stewart Stevens' share should not be diminished by the costs of Royal Stevens' removal, as against the entirety of the estate. However, but for the steps taken by Ms. Veinotte and Mr. Graham Stevens, the estate may never have had restitution of the funds from Mr. Royal Stevens, with little available for any distribution.

[80] As the objectors each appeared in an ongoing fiduciary role in relation to Stewart Stevens, they are both under a duty to preserve Stewart's property and legal

interests in the estate. The actions of the Administrators in seeking the removal of the prior executor, and ensuring restitution to the estate, does not conflict.

Conclusion:

[81] The legal fees incurred by Ms. Veinotte and Mr. Graham Stevens furthered the administration of the estate. The steps were necessary. These fees are payable from the estate, as are the legal costs incurred by the estate for administration costs from the date of the court's appointment of Ms. Veinotte and Mr. Graham Stevens.

[82] The admitted misappropriation of the funds led the residual beneficiaries to take on the task of rectifying the administration. This required seeking the removal of the prior executor.

[83] As noted previously, the "Updated Summary" of the Final Account of Graham Stevens and Shelley Veinotte in the Estate, submitted to the Court on July 16th, 2020, included a Schedule "E" with Cynthia's counsel's fees in the amount of $5,048.16. That amount was unpaid, as of the day of hearing and are payable upon this order, if not already paid. I note that payment for the Clearland property is also captured as received into the estate in that "Updated Summary".

[84] As some time has passed since the hearing of the matter, counsel for the Administrators is to prepare and file a current final account with the amount for distribution available, prior to an order being issued by the Court passing the accounts, setting out the distribution and discharging the administrators.

[85] The total amount for distribution available is to be divided, with Stewart Stevens receiving half of the total amount, and the other half of the estate to Ms. Shelley Veinotte and Mr. Graham Stevens, with that half to be further divided between each of them.

[86] $1,502.95 is to be deducted from the half share of the estate to be distributed to Ms. Shelley Veinotte and Mr. Graham Stevens. While the Removal Order held that this amount was to be payable directly from Mr. Royal Stevens to Ms. Shelley Veinotte and Mr. Graham Stevens, and not from the Estate, it was awarded solely in relation to the Removal Order litigation. Ms. Shelley Veinotte and Mr. Graham Stevens have not demonstrated that the amount they were to receive from Mr. Royal Stevens in relation to the Removal Order was put toward the legal fees they incurred

in relation to the Removal. I do not see any payment to counsel in this amount toward the legal fees incurred by the Administrators in that initial application.

[87] Further, the Settlement Order provided that $1,502.95 was to be paid personally by Ms. Shelley Veinotte and Mr. Graham Stevens to Ms. Cynthia Stevens and Mr. Royal Stevens, with each to then determine apportionment of that amount in relation to legal fees in relation to the enforcement motion, as was cited by Justice Robertson in the Settlement Order.

[88] As canvassed before, costs are discretionary elements of an order by the presiding judge, in keeping with the direction of *Civil Procedure Rule* 77.02(2) that the Court "… may, at any time, make an order about costs as the judge is satisfied will do justice between the parties…" An award of party and party costs to the estate, payable by Stewart Stevens' representatives, will not result in an appreciable benefit for the estate and not to the advantage of Stewart Stevens. I am therefore declining to award costs in the application heard. The legal fees incurred by the estate administrators in this proceeding are to be paid out of the estate, after taxation by the Registrar of Probate.

[89] The grant of Probate in Mrs. Vivian Stevens' estate was made eleven years ago. It is not an elaborate or complex estate. The assets are plainly determined and not at issue. There was no conflict in the lengthy history of the estate on the number of beneficiaries or their identity. There are no evidentiary or legal questions on the testamentary capacity of the testator, or of the legality of the Will.

Diane Rowe, J.