

**SUPREME COURT OF NOVA SCOTIA**  
**IN THE COURT OF PROBATE**

**Citation:** *Estate of Sigrun Zibara v. St. Pierre*, 2022 NSSC 357

**Date:** 20221207

**Docket:** *Halifax*, No. 508550

**Probate No.** H-66548

**Registry:** Halifax

**Between:**

Estate of Sigrun Zibara

*Applicant*

v.

Michael St. Pierre

*Respondent*

**DECISION**

**Judge:** The Honourable Justice Ann E. Smith

**Heard:** March 14, 2022 and June 20, 2022, in Halifax, Nova Scotia

**Counsel:** Gavin Giles, K.C. for the Applicant  
Luke Godin, for the Respondent

**By the Court:**

**Introduction**

[1] This matter comes before the Court of Probate for Nova Scotia as a result of a Notice of Objection to Accounts filed by Michael St. Pierre, one of the beneficiaries of the Estate of the late Sigrun Zibara (the “Estate”).

[2] Ms. Zibara passed away on March 18, 2020. A Grant of Probate was issued on May 14, 2020 appointing Alan Stern, K. C. as personal representative of the Estate. Ms. Zibara’s two sons, Michael St. Pierre and Marc St. Pierre are the sole residual beneficiaries of the Estate.

[3] Mr. Stern filed an initial Inventory of the Estate on July 16, 2020.

[4] The Inventory lists real property located at 2769 Joseph Howe Drive (free of mortgage) (the “Property”) at a value of \$360,900.00. In terms of personal property a chequing account with the Royal Bank of Canada (“RBC”) in the amount of \$42,497.93 is listed along with personal effects in the amount of \$8,000.00. RBC investments in the amount of \$546,632.77 and an RBC GIC in the amount of \$230,000.00 are also listed. The total value of the Estate is noted at \$1,188,030.70.

[5] Mr. Stern filed an Application to Pass Accounts Without a Hearing (s. 55(1)(a) of the *Probate Act* 2000, c. 31, s. 1) on March 26, 2021.

[6] A Notice of Objection to Accounts was filed by Michael St. Pierre on August 24, 2021. In it, Michael St. Pierre states that he objects to the legal invoices of McInnes Cooper charged as a disbursement to the Estate and seeks taxation of same.

[7] Michael St. Pierre also objects to the amount of executor's commission claimed by Mr. Stern (5%) as follows:

1. The care and responsibility involved in administering the estate was limited. The estate assets were not complex. The assets were not difficult to ascertain or to gather. They consisted of:
  - a. A mortgage free home located at 2769 Joseph Howe Drive, Nova Scotia;
  - b. Investment accounts with RBC;
  - c. CPP;
  - d. Rental income;
  - e. and minimal household goods and personal effects.
2. The house sold less than four months after the passing of the deceased. The house was appraised contemporaneously with its sale at \$404,000.00 but was sold for \$260,000.00 to the tenants of the house who were not arm's length buyers. The property was never listed on the open market, and so no other offers were received, and the market was not tested. The sale of the home under the appraised value was completed without the consent of Michael St. Pierre.
3. The personal representatives' care and responsibility in administering the estate was limited in that they retained the following third parties to manage the affairs of the estate:
  - a. McInnes Cooper to complete estate work;
  - b. Grant Thornton to complete the accounting and tax returns

4. The time the personal representatives were occupied in performing their duties was limited. The personal representatives have not provided substantive records outlining the time and nature of their duties involved in administering the estate. From the information supplied with the accounts, minimal time was spent by the personal representatives as much of the duties of the personal representatives were delegated to the professionals retained by the personal representatives.
5. The personal representative wasted an estate asset by not listing the house for sale on the open market, and instead choosing to sell the home to non-arm's length tenants for a substantially lower amount (\$144,000.00) than the appraised value of the house, which was a waste of an estate asset to the direct determinant of Michael St. Pierre.

[8] The Registrar of Probate determined to transfer the Application to Pass Accounts to a Judge of the Probate Court of Nova Scotia pursuant to s. 99 of the *Probate Act*.

### **Background Facts**

[9] Mr. Stern, K.C. is a long time friend of the Zibara family. Michael St. Pierre has described Mr. Stern as having been a close and trusted friend of his mother.

[10] Mr. Stern drew Ms. Zibara's Last Will and Testament and Ms. Zibara chose Mr. Stern as her Executor. Ms. Zibara executed her Last Will and Testament on April 29, 2003.

[11] On July 7, 2021 an Agreement of Purchase and Sale for the late Ms. Zibara's house was entered into between Mr. Stern and Bailey Scaplen, an existing tenant of the late Ms. Zibara, who before her death, had been living in a long-term care home.

The sale price was \$260,000.00. This was a private sale, the house not being listed on the open market.

[12] The Statement of Disbursements filed by Mr. Stern lists expenses of \$80,579.80. These expenses include legal fees to McInnis Cooper in the amount of \$18,448.13. Fees paid to Grant Thornton for accounting services are noted at \$3,565.00. Michael St. Pierre does not object to the Grant Thornton fees.

[13] Mr. Stern seeks an executor's commission of 5%. Michael St. Pierre submits that the executor's commission should not exceed 2.5%.

### **Issues**

[14] The issues for determination of the Court are as follows:

- (1) What Executor's commission should Mr. Stern, K.C. receive?
- (2) The Taxation of Legal Fees – the Amount and Who pays

### **The Evidence Before The Court**

[15] The Applicant filed the Affidavit of Michael St. Pierre, sworn to on December 22, 2021. The Applicant also filed the Affidavit of Michael St. Pierre sworn to on April 4, 2022. The Estate filed the Affidavit of Alan Stern, K.C. and the Affidavit of Jeffrey R. Blucher. Each Affiant was cross-examined on his Affidavit.

Michael St. Pierre

[16] In his Affidavit, Michael St. Pierre says that as a result of his family's relationship with Mr. Stern, and his knowledge of Mr. Stern's expertise, he trusted that Mr. Stern was using his expertise as a former lawyer practicing in the area of estates law to do what was best for the Estate. Michael St. Pierre says that he did not feel there was any reason to be concerned and he trusted that Mr. Stern would obtain the best value for his late mother's house in the circumstances.

[17] Michael St. Pierre states in his Affidavit that he met with Mr. Stern at least three times in person before the fall of 2020 with respect to Estate business. With respect to the sale of the Property, Michael St. Pierre states in his Affidavit, as follows:

At one of these meetings, Mr. Stern did mention to me that he was considering selling the Property to the existing tenants. I recall Mr. Stern saying something to the effect of that "this was what my mother would have wanted". I also recall Mr. Stern saying, as part of this same conversation, that sometimes when an estate sells property the value obtained is below market value.

[18] Michael St. Pierre goes on his Affidavit to recount his "shock" when learning that the Property had been sold to the existing tenants for \$260,000.00:

The first time I learned of the sale price of the Property was when I was provided with the accounts attached hereto as Exhibit "B". I was provided with these accounts on or about January 29, 2021. At this time, I requested the assessment/appraisal values of the house as they were not included in the proposal. I then sent an email to Mr. Stern asking for the assessment/appraisal values.

On or about February 2, 2021 I received an email from Mr. Stern with the assessed value amount of \$360,900.00 and appraised value of \$404,000.00. I was shocked when I learned that the Property was sold to the existing tenants of the Property for \$260,000.00 (net of \$257,091.69). Based on the accounts attached hereto as Exhibit "B" the net was \$103,808.31 less than the tax assessed value of the Property at the time of the sale.

On or about February 18<sup>th</sup>, 2021 Mr. Stern provided me with a copy of an Appraisal for the Property, dated July 21 of 2020, a copy of which is attached hereto as Exhibit "C". The Appraisal values the Property, as of July 21, 2020 at \$404,000.00.

[19] Further in his Affidavit, Michael St. Pierre recounts, from his perspective, the conversations he had with Mr. Stern about the sale of the house to the tenants and the McInnes Cooper accounts for legal services:

On or about February 16, and 22, 2021 I asked Mr. Stern to explain why the Property was sold for so little to the existing tenants, and why the McInnes Cooper invoices were so high. I never received an answer from Mr. Stern regarding why the sale price of the Property was so low. I received an incomplete answer about the legal fees of McInnes Cooper. As a result of not receiving answers to my questions, and because of an illness I was suffering from at the time, I hired Luke Godin of BOYNECLARKE LLP to assist me in getting answers and to provide me with advice.

[20] Michael St. Pierre also says in his Affidavit that prior to the sale of his late mother's house to the tenants, he was not advised of the prospective sale price. He states that he did not agree to the sale price and takes issue with the sale price to the tenants/purchasers "below the market price". Michael St. Pierre acknowledges that selling the house privately saved realtor fees, which he says he understands are generally 5% plus HST.

[21] In terms of the McInnes Cooper legal fees, Michael St. Pierre expresses his concerns as follows:

At the time I received the accounts attached hereto as Exhibit "B" the total amount invoiced to the Estate by McInnis Cooper was \$9,716.64. Pursuant to those accounts I understood McInnes Cooper projected an additional \$7,000 in legal fees, for a total of \$16,716.64. A further \$5,000 was projected for accountants' fees. This totals a projected \$21,716.64 in professional fees to administer the Estate.

I contest the extent of the professional fees being charged because the Estate consisted of investment accounts and the Property, together with some miscellaneous personal effects. I do not believe that the fees charged by McInnes Cooper are reasonable in the circumstances of Estate (*sic*) and seek to have them taxed.

[22] In cross-examination, the Estate's counsel put to Michael St. Pierre that it was Mr. Stern's recollection and position that it was his late mother's wish that the house be sold to her tenants. Michael St. Pierre agreed that he was not in a position to argue with that.

[23] In cross-examination Michael St. Pierre agreed that apart from the appraisal of the Property, he would not, personally, have any real idea of the house's value. Michael St. Pierre also agreed that there was nothing he did to look at other comparable properties or hire an appraiser.

[24] In terms of the quantum of McInnes Cooper accounts, Michael St. Pierre agreed that he did not obtain an independent opinion as to an alternative quantum for the professional fees.



[25] In his Affidavit sworn on April 4, 2022 Michael St. Pierre states that he has reviewed the McInnes Cooper accounts. He then states that he is advised by Luke Godin, his lawyer in this matter, and believes, that Mr. Godin's standard hourly rate in 2021 was \$220. He notes that based on Mr. Blucher's Affidavit that that hourly rate was similar to, or less than the rates of the para-professionals whose time he says makes up a large portion of the fees charged by the Proctor.

The Evidence of Alan Stern, K.C.

[26] In his Affidavit, Mr. Stern provides details of his long-time friendships with each of the late Ms. Zibara and the late Abraham Leventhal, and the close relationship between Ms. Zibara and Mr. Leventhal as follows:

The late Sigrun Zibara was the long-time love affair of the late Abraham ("Abe") Leventhal.

Though the late Ms. Zibara and the late Mr. Leventhal were never married and never "lived together", they maintained an exceptionally close relationship almost from the time of the death of the late Mr. Leventhal's spouse, Elaine Devara (Zive) Leventhal in 2001.

When he died in 2016, the late Mr. Leventhal favoured the late Ms. Zibara with a very substantial bequest from his substantial estate.

This large bequest was managed for the most part whilst the late Ms. Zibara was alive by her long-time friend and later Power of Attorney, Ms. Marilyn Pellerin.

The late Mr. Leventhal was a long-time friend of mine and sometimes client, whom I had known for most of my life.

The Last Will and Testament of the late Mr. Leventhal which favoured the late Ms. Zibara with a bequest was drawn by me, and I was appointed by the late Mr. Leventhal as his Executor.

The late Sigrun Zibara was also the long-time and very close friend of mine, and especially of my spouse, Ms. Janet Stern- who was specifically mentioned in the late Ms. Zibara's obituary, along with Ms. Pellerin and another friend.

As a result of my relationship with the late Mr. Leventhal, his relationship with the late Ms. Zibara, and her relationship with me and my spouse, she came to consult with me regularly over the years on a variety of legal, family, and estate planning matters; and I prepared the Last Will and Testament, current at the time of her death, for her execution of April 29<sup>th</sup>, 2003.

Throughout the years, the late Ms. Zibara and I had no end of long conversations, some of which related to her wishes with respect to the disposition of her property following her death.

Many of my consultations with the late Ms. Zibara during the last several years of her life related specifically to the disposition of her estate at the appropriate time, her decision to favour her son, Marc St. Pierre, over her son, Michael St. Pierre, with a larger portion of the residue of her estate, and her decision to ensure that to the extent reasonably possible, her house, which from 2015 onwards she was no longer capable of occupying, was sold to her long-time tenants in the house at the time of her death.

It was on the basis of those consultations that I regarded myself to have acquired an intimate knowledge of the late Ms. Zibara's testamentary wishes.

I regard myself as having carried out those testamentary wishes to the very extent possible.

[27] It is not disputed that because of age-related infirmities, the late Ms. Zibara moved into long-term care in 2015. Accordingly, she did not need to live in her home, and a decision was made to rent it. Mr. Stern, K.C., had no involvement in the dealings involving the rental of the late Ms. Zibara's house. In his Affidavit, Mr. Stern, K.C., deposes as follows with respect to the house and the late Ms. Zibara's tenants:

At the time of the late Ms. Zibara's death, the house had been tenanted for approximately four (4) years; the first tenant, Mr. Chad Everett, having gone into occupation of the house in approximately 2016; and his partner, Ms. Bailey Scaplen having moved in approximately two years later.

I knew very little of Mr. Everett and Ms. Scaplen, and I was not the one responsible for their tenancies in the house.

To the best of my knowledge, one of the late Ms. Zibara's and the late Mr. Leventhal's long-time friends, Mr. Calvin Blades, was the one who recommended Mr. Everett as a tenant for the house at the time the late Ms. Zibara was required to go into long-term nursing care.

I was never privy to the precise dealings between the late Ms. Zibara and Mr. Everett and Ms. Scaplen; or between the late Ms. Zibara and Mr. Blades with respect to Mr. Everett and Ms. Scaplen.

I for example never saw any Lease for the house.

I was also not aware during the late Ms. Zibara's lifetime how much rent was being paid for her house.

I also did not know what, if anything, was included in that rent.

All I knew from my numerous discussions with the late Ms. Zibara between her going into long-term nursing care and her death, was that she liked her tenants, and that it was her wish that they be permitted to purchase the house from her estate when the time came.

It was that factor which most influenced my sale of the house to the late Ms. Zibara's tenants for the \$260,000 of which Michael St. Pierre now complains.

[Emphasis added]

[28] In his Affidavit, Mr. Stern sets forth the considerations that he gave, prior to Ms. Zibara's death, to having Ms. Zibara execute a new Last Will and Testament, or at least a codicil, reflective of her wishes to sell her house to her tenants. Mr. Stern discarded such an approach and in his Affidavit, recounts the reasons why he did so.

[29] In his Affidavit, Mr. Stern, K.C. provides his response to Michael's St. Pierre's contentions regarding the appraisal of the House at \$404,000.00. This appraisal was performed by appraiser Greg Lockyer:

That is an appraisal which I commissioned as Executor on the instructions of Grant Thornton for final income tax reporting purposes.

As the late Ms. Zibara at the time of her death had not been a resident in the house for many years, its sale, as a part of the liquidation of her Estate, would result in the attraction of Capital Gains Tax.

It was thus my intention that the appraisal of the house be used for Capital Gains Tax purposes, to reduce the amount deemed due and owing to the extent legally possible.

As such, I never regarded the appraisal as in any manner governing my disposition of the house to the late Ms. Zibara's tenants, as was in keeping with her wishes.

Accordingly, I was skeptical of the conclusions set out in the appraisal in that they were largely – if not solely – dependent upon so-called “comparables” which I did not regard on review as comparable to the house at all.

I had become very well familiar over my years in legal practice with property appraisals, what they were based on, how they were used and how accurate or inaccurate they could be.

Without limitation, I regarded so-called “comparables”...as not being fully comparable with the house.

[30] Mr. Stern also recounts in his Affidavit his concerns about selling the house in its then condition, including selling it as a vacant estate sale house with the added cost of real estate commission:

Given its condition the house would have had to have been thoroughly cleaned and redecorated prior to any attempt as (*sic*) its sale, and it would have had to have been “staged”; all so as to avoid the depressed offers which in my experience as a lawyer are ordinarily extended on estate sale houses which are clearly vacant.

I did make some efforts to cost these requirements, but I certainly expected them to cost into the thousands of dollars; just as I certainly expected that the real estate commission on a listing and later sale of the house would have run into the tens of thousands of dollars.

[31] Mr. Stern's Affidavit also sets out his concerns about the cost of other possible requirements related to the selling the house on the open market, as opposed to selling the house “as is”:

I was also concerned that any attempt by me to sell the house on behalf of the late Ms. Zibara's Estate in the open market could have resulted in requirements for such things as a new furnace, or a new hot water heater, the removal of urea formaldehyde foam insulation, asbestos, lead pain (*sic*) and piping, or other things of that nature.

By accepting the house as an "as is" basis, the late Ms. Zibara's Estate avoided those risks – and their related possible expenses.

[32] Mr. Stern was also concerned with the legal status of the late Ms. Zibara's tenants should they choose not to leave the house:

Deposed to above is that I knew of no Lease, and so far as I also knew, there was no documentation respecting the tenancy.

Though I knew generally from my experience that there were forms of remedy available to the late Ms. Zibara's Estate as against the tenants' continuing occupancy, I knew that they were uncertain, time consuming, could entail the Director of Residential Tenancies, the Small Claims Court of Nova Scotia, the Supreme Court of Nova Scotia, and ultimately, the Nova Scotia Court of Appeal.

I was also concerned that any such proceedings would entail even more in the manner of legal expenditure, and that they would most likely negatively affect the market interest in the house were it to be listed for public sale.

[33] Mr. Stern also says in his Affidavit that he was further concerned about any resulting delay, which he says could have amounted to years given "the backlog in the Courts generally, as "I was constantly being pressed by Mr. Michael St. Pierre, in particular, to close the late Ms. Zibara's Estate".

[34] Mr. Stern says that "all of those circumstances combined to influence me to sell the house to the tenants, as had been the oft-stated wish which the late Ms. Zibara had communicated to me".

[35] In cross-examination, Mr. Stern agreed that the Lockyer Appraisal was the only professional appraisal of the Property he obtained.

[36] Mr. Stern also agreed in cross-examination that he does not now, nor did he at the time the Property was sold, hold any professional designations which allowed him to offer opinions as to the value of real property.

[37] In cross-examination on his Affidavit, Mr. Stern was asked if he ever asked the tenants whether or not they would leave in the event that the house was sold. He said that he did not do so.

[38] Mr. Stern also stated in his Affidavit with respect to Ms. Zibara's existing tenants, "they were both compromised in their ability to raise financing". Mr. Stern was asked in cross-examination if he ever obtained any sworn disclosure from the tenants which would confirm their actual ability to pay for a house, including with respect to a down payment. Mr. Stern's evidence was that the disclosure that was made to him was made by Mr. Chad Everet, who had been in bankruptcy and did not have the ability from his own resources to obtain a mortgage. Mr. Stern said that Mr. Everet was truthful and direct with him, and he had no reason to question his statement that he was in bankruptcy.

### **The Evidence of Jeffrey R. Blucher**

[39] Counsel for Mr. Stern filed the Affidavit of Jeffrey R. Blucher, a partner with McInnes Cooper in support of the taxation of the accounts for legal service rendered to the Estate by McInnes Cooper for Proctor services. Mr. Blucher was appointed by Mr. Stern, K.C. to act as Proctor of the Estate. The Proctor services were provided largely by Mr. Blucher and at his direction.

[40] Mr. Blucher is a senior lawyer, having practiced for approximately twenty-six years. He holds a designation as a Trusts and Estates Practitioner (T.E.P), which he received as a member of the Society of Trust and Estate Practitioners. Mr. Blucher is a past member of the Board of Governors for the Canadian Tax Foundation and a past chair of the Canadian Bar Association's National Wills, Estates and Trusts Section.

[41] Mr. Blucher states in his Affidavit that individual accounts were rendered to the Estate by McInnes Cooper for Proctor services on each of May 29, 2020; July 30, 2020; October 30, 2020; December 29, 2020; January 29, 2021; May 31, 2021; July 30, 2021 and September 30, 2021.

[42] The Court notes, and Mr. Blucher so states in his Affidavit, that by September 30, 2021, a Notice of Objection had been filed by Michael St. Pierre. Mr. Blucher states that at that time he considered that matters involving the Estate had become

litigious in nature, and he therefore passed the matter along to his law partner, Gavin Giles, K.C., who has had carriage of it since then.

[43] Mr. Blucher states in his Affidavit that in preparation for the drafting of his affidavit, he reviewed all of the related accounts and their back-up dockets and did not detect anything which he considered out of the way, profligate or wasteful.

[44] Mr. Blucher states that the majority of McInnes Cooper's services to the Estate were provided by him and by Ms. Ann Lisney, a senior estates para-professional. Several other para-legal professionals worked on the file as well. Mr. Blucher explained that as a result of the Covid pandemic, McInnes Cooper's office closed in mid-March 2020, with only a small "critical team" of staff and lawyers in the office. Ms. Zibara passed away on March 18, 2020. This scenario meant that some functions normally carried out by estate paralegals, were also performed by corporate, or other paralegals. However, the only individuals with material time on the file were Mr. Blucher and Ms. Lisney. The pandemic caused other difficulties, such as the virtual swearing of affidavits, the complexity of dealing with financial institutions and other related matters.

[45] An associate at McInnes Cooper performed work, under Mr. Blucher's supervision, concerning that portion of the residue of the Estate which was to go into



a trust for five years for Marc St. Pierre, Michael St. Pierre's brother. A question arose as to whether the trust could be terminated under the *Saunders v. Vautier* principle or by way of a variation of trust application. Due to his age and other circumstances, Mr. Stern had concerns about being a trustee for five years; the alternate Executor was not interested in being a trustee. Mr. Blucher asked a McInnes Cooper associate to carry out research and prepare a draft agreement under *Saunders v. Vautier*, which would have the effect of terminating the trust, and converting Marc St. Pierre's portion of his entitlement to an out-right gift. Mr. Blucher's evidence was that these trust issues added time and complexity to the matter.

[46] Further, Mr. Blucher said that Marc St. Pierre was living in Germany at this time and there was significant difficulty locating him for the purpose of serving him with the final Estate accounts. There was also a question of whether Marc St. Pierre had capacity to receive service.

[47] Mr. Blucher said that the issue concerning the trust and the difficulties associated with locating and serving Marc St. Pierre added to the time spent on the matter.

[48] In cross-examination, Mr. Blucher testified that his time-keeping practice was to record all the work that he performed and make a contemporaneous docket entry reflecting what was done. He states in his Affidavit that the hourly rate which he charged for his work on the Estate matters was \$400. This was a discounted hourly rate, his posted hourly rate for 2020 being \$531 and for 2021 being \$540. His reasons for his discounted hourly rate related to his longstanding professional relationship with Mr. Stern, K.C. as well as for the purpose of assisting in managing costs for the Estate. Mr. Blucher said that he used a discounted hourly rate in this instance on his own initiative.

**Issue 1: What Executor’s Commission Should Mr. Stern, K.C. Receive?**

[49] A key component of Michael St. Pierre’s argument before this Court was that Mr. Stern “wasted” the largest asset of the Estate – his late mother’s Property, by selling it for the price he did without exposing the sale to the open market. That alone, he says, should decrease the amount of commission Mr. Stern is entitled to receive.

The Sale of the Property

[50] Michael St. Pierre is very concerned about the sale price achieved on the sale of his later mother’s home. In that regard he focuses on the fact that the Lockyer

Appraisal had appraised the home “contemporaneously” at \$404,000.00, using a “comparable” approach to value. Mr. Stern explained in his Affidavit why he was concerned with that approach being used.

[51] Michael St. Pierre submits that the evidence before the Court is that the private sale to the tenants of the Property reduced the amount available to the residual beneficiaries. Mr. St. Pierre calculates that the private sale of the Property reduced the amount of money to the residual beneficiaries by \$120,770.00 calculated as follows:

The appraised value less the sale price	\$144,000.00
Less realtor’s commission (5%) and HST	\$23,230.00
<u>Total loss</u>	\$120,770.00

[52] Michael St. Pierre’s position is that absent consent of beneficiaries, a disposition so significantly below the market value is waste of an estate asset. Mr. St. Pierre submits that the Court should further and significantly reduce the commission sought by Mr. Stern as a result of “the failure to obtain the market value (or close to the market value) of a significant Estate asset”.

[53] Mr. Stern explains in his Affidavit why he commissioned the appraisal. He did so in the context of a likely capital gain arising on the sale, since the late Ms.

Zibara had not lived in the home for several years. A lower appraised value, obtained in a lawful manner, could reduce the Estate's capital gains.

[54] The Estate's counsel notes that in the appraisal Mr. Lockyer states, under the heading, "Analyses and Comments" , "the comparables listed above offer the best indication of values for the subject property. Adjustments have been applied to reflect the differences from the subject property for site and building size, location, condition and extras. Most weight has been afforded sales one and two, being on the subject street, being corner sites and most similar in style". Counsel says that apart from these statements, there is nothing in the evidence which shows how Mr. Lockyer determined the matters he refers to in these comments, apart from perhaps driving by and visually seeing the properties he says are comparables or looking them up on the internet.

[55] Further in his appraisal report, under the heading, "Exposure Time– Analyses of Reasonable Exposure Time", Mr. Lockyer states, "A reasonable exposure time is 20 to 690 days". Mr. Lockyer does not state how he determined the figure of 690 days, which appears to amount to 23 months, or a month short of two years. Counsel for the Estate points out that if the Property was worth \$404,000 and sat on the market before being purchased almost two years later, this would cause a significant

delay in the Executor's duty to close the Estate within a reasonable time and also a significant burden on the Executor to wait all that time.

[56] Under the heading, "Reconciliation and Final Estimate of Value", Mr. Lockyer states, "In the final analysis, the direct comparison approach has been utilized to value the subject property". Although Mr. Lockyer takes the reader of the appraisal through the various approaches, he does not say why he has chosen the direct comparison approach over the other appraisal approaches.

[57] Further in the appraisal report, under the heading, "Scope" and "Other" Mr. Lockyer states, "the subject property was inspected on July 21, 2020. The direct comparison and costs approaches have been used. Information on sales were obtained from the Halifax- Dartmouth Real Estate Board and is assumed to be accurate. Physical and economic factors that could affect the property were also considered". Mr. Lockyer does not advise what those factors are or how they were considered.

[58] Mr. Stern considered the Lockyer Appraisal, but determined to reject its accuracy.

[59] Mr. Stern also explained his concerns about the expense of getting the house ready for a sale on the open market. He was further concerned about the legal status

of the tenants and whether, if the house was sold, what rights they might seek to assert – something which would add expense and delay to the process of dealing with the house.

[60] This Court finds that Mr. Stern at all times acted honestly and reasonably in connection with his decisions around the sale of the house to the tenants and at the price he did. Further, it is clear from Mr. Stern's Affidavit that he ascertained Ms. Zibara's wishes with respect to her house over a lengthy period of time. Mr. Stern did not personally benefit in any way from any aspect of the house transaction.

[61] This Court finds that there was nothing wasteful about Mr. Stern's approach to the sale of the late Ms. Zibara's home. It was not disputed that Mr. Stern had been clearly advised by Ms. Zibara that it was her wish that the home be sold to her tenants. This Court finds that Mr. Stern approached his task as Executor in carrying out that wish with the degree of prudence and care that he would have brought to bear had he been selling his own home. In his Affidavit, as set out above, he clearly provides his reasons for his decision, in the end, to sell the home to one of the tenants.

[62] Counsel for Michael St. Pierre referred to the decision in *Ord. v. Neal*, 1820 56 E.R. 962, but that decision does not really advance Mr. St. Pierre's own arguments. *Ord* related to a equitable challenge to the sale of a property to a

purchaser by a trustee. It was argued that the Court should not give effect to the subject sale because it was not fair to the trust. In this case, Mr. St. Pierre did not challenge the sale of the Property on equitable bases but rather, challenges Mr. Stern in his role as Executor. The concern in *Ord* seems to have been that the sale by a Trustee might be to advance one beneficiary as opposed to another. Here, Mr. Stern, was strictly neutral in his decision to proceed as he did.

#### The Amount of Executor's Commission

[63] Returning to the amount of Executor's commission which Mr. Stern, K.C. should receive, the Court notes that pursuant to the *Trustee Act*, RSNS 1989, c. 479 executors are entitled to such "fair and reasonable remuneration for their care, pains and trouble, and their time expended in and about the estate" as determined by the court.

[64] The *Probate Act* also applies to executors and provides some direction regarding remuneration. Section 76 says that an executor may be allowed, over and above actual and necessary expenses "as appear just and reasonable", a commission not exceeding 5% of the value of the estate. The court may apportion the commission among personal representatives "as appears just and proper according to the labour bestowed or the responsibility incurred by them respectively."

[65] The regulations under the *Probate Act* at s. 62(3) set out the factors that may be considered when determining the amount of an executor's commission:

- 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.

[66] Section 76 of the *Probate Act* sets a maximum percentage for the commission at 5% of "the amount received by the personal representative".

[67] It is not disputed that the "amount received by the personal representative" in this case is in the range of \$1,188,030.70.

[68] Michael St. Pierre submits that Mr. Stern's executor's commission should be limited to well below 5%, and before this Court his counsel suggested not more than 2%.

[69] In *Atlantic Jewish Foundation v. Leventhal Estate*, 2018 NSSC 297, Campbell J., referred to Justice Goodfellow's decision in *Rustig Estate (Re)* 2002 NSSC 210 noting that Justice Goodfellow analyzed the factors to be considered in setting the executor's commission:



He (Justice Goodfellow) noted that the settlement of the executor's commission is discretionary. Commission "may" be allowed over and above actual and necessary expenses. The commission must be just and reasonable up to a maximum of 5%. The direction to apportion a just and reasonable commission based up[on "labour bestowed or responsibility incurred" by the respective executors adds further guidance that the commission as determined by judicial discretion has a direct relationship to the effort and responsibility of the executor.

[70] Both counsel for Michael St. Pierre and counsel for Mr. Stern refer to the decision of the Ontario Divisional Court (per: Corbett and Adams, JJ. (Steele, J. dissenting) in *Laing v Laing Estate (Sub. Nom. Laing Estate, Re)*, [1996] O.J. No.738 in terms of the fixing of an executor's commission:

The fixing of a compensation under s. 61(1) of the *Trustee Act* is far from an exact science. As Adams J. observed, at p. 284, it 'it is an issue over which reasonable minds may differ'. Appellate review of that assessment must be restrained so that it does not become merely the substitution of one reasonable assessment for another reasonable assessment. In *Smith, Re*, [1953] O.R. 185 (Ont. C.A.) at 189, Pickup C.J.O. observed:

...but the Court of Appeal should interfere if there is any error in principle, or if, in its opinion, the amount allowed is grossly insufficient or excessive.

[71] Counsel for the Estate points out that it was held in *Laing* that the time spent by an Executor could not be "the dominant consideration" in the establishment of her or his, or their, entitlement to a commission.

[72] Michael St. Pierre argues that Mr. Stern's time and effort in the management of the Estate was "limited".

[73] In terms of the factors under the *Probate Act*, the Court notes:

*Size of the Estate*

[74] The Estate was certainly not small. Rather, it can be said to have been moderately large.

*Complexity of the Estate*

[75] Michael St. Pierre submits that the Estate was not complex, that the Will was straightforward and the Estate was not subject to litigation or legal challenges by family members. As noted previously, the Estate consisted of three accounts located at RBC, jewellery (specifically bequeathed) and the Property.

[76] Michael St. Pierre notes that the Property was sold privately to one of the tenants. Some work was required to deal with the tenants and some rent was collected, but otherwise Mr. Stern's dealings with the Property were limited.

[77] Mr. Blucher testified, as a very experienced trusts and estate lawyer, that the trust issue which arose was relatively unique. Mr. Blucher was clear in his evidence that dealing with the *Saunders v. Vautier* issues was not so unique, but such issues rarely arose in the circumstances of an estate such as that of the late Ms. Zibara. Further, the Court notes that there were circumstances involving a beneficiary of the Estate, Marc St. Pierre, which required inquiries and some level of investigation as

to whether he lived independently or in a type of institutional care and whether he was legally competent.

*Time Involved*

[78] According to the detailed time records attached to Mr. Blucher's Affidavit, Mr. Blucher recorded less than ten (10) hours' time at \$400/hr. Paraprofessional Ann Lisney recorded approximated 61 hours at \$210/hr. Mr. Stern's time in and of itself was not significant. However, that is but one factor which must be considered.

*Skill, Ability and Success of the Executor*

[79] Mr. Stern, K.C. brought significant skill and ability to his role as Executor. No one has questioned that that is the case. I have found that he acted entirely reasonably, and in accordance with the Testatrix's wishes in selling the Property to the late Ms. Zibara's former tenant. He recognized legal issues surrounding the matter of the trust for Marc St. Pierre and retained McInnes Cooper to provide him with advise in that regard.

*Amount of Commission*

[80] There is every reason in this case for Mr. Stern to be rewarded for his efforts and his skill. At issue is the amount of that compensation.

[81] The Court notes that Mr. St. Pierre adduced no evidence before this Court as to what an appropriate executor's commission should be. When counsel for Mr. St. Pierre was asked by this Court what he thought was an appropriate executor's fee for Mr. Stern, he responded, "2%". However, counsel for the Estate notes that that percentage is not backed up by any case law submitted or by way of a principled analysis.

[82] For example, as counsel for the Estate points out, in *Atlantic Jewish Foundation v. Leventhal Estate*, 2018 NSSC 147 Mr. Graham Q.C., was retained by the Atlantic Jewish Foundation to opine on certain general matters including how executor's commissions are dealt with.

[83] The Applicant's February 15, 2022 submissions to the Registrar of Probate attach a diary authored by Mr. Stern, K.C. titled, "Statement of Commission Sought". At the time of Ms. Zibara's death, Mr. Stern and his wife were travelling in Florida. When Mr. Stern returned from Florida, a full array of estate duties awaited him. He dealt with funeral home, the funeral arrangements, a virtual memorial service and several meetings with Michael St. Pierre. Mr. Stern opened and maintained an estate account, coordinated the distribution of gifts, provided an interim distribution, dealt with all of the issues surrounding the sale of the property, and the moderately complex tax issues.

[84] In *Leventhal*, Justice Campbell underscored both the open-ended and pragmatic approaches to the assessment of what any executor's commission should be. His analysis, that while 5% is neither a tariff rate nor a presumptive rate, notes that the general approach is such that the larger the estate, the lesser the commission. His ruling ultimately was that an in an estate valued at close to 18 million accorded with an executor's commission of approximately 2.5%.

[85] The Respondent's counsel presented documents to this Court titled, "Package of Orders Relating to Executors' Commission".

[86] Included in this package were orders from the Registrar of Probate setting a 5% executor's commission for estates valued in the range of \$1.1 to 1.5 million. I put little weight on this information, provided as it was, without context and details surrounding the Registrar's process of decision-making.

[87] The Estate at issue is in the 1.1 to 1.2 Million dollar range.

[88] When the Court considers all relevant factors and circumstances in this matter, I find that an executor's commission of 5% is just and reasonable for Mr. Stern's care, time and work on Estate matters.

**Issue 3: The Taxation of Legal Fees – The Amount and Who Pays**

[89] Michael St. Pierre argues that some of what is owed to McInnes Cooper for legal fees should be paid by Mr. Stern, because what he approved as Executor was not objectively warranted.

[90] Section 91 of the *Probate Act* addresses the taxation of bills of costs in probate matters:

All bills of cost may be taxed by the registrar, and every such taxation may be reviewed by a judge, upon notice given by the party aggrieved to the opposite party, if any.

[91] Section 61 of the *Probate Act* Regulations provides that:

61(1) The taxation of a solicitor's bill of costs in relation to an estate of a deceased person pursuant to Section 91 of the Act may be conducted prior to or upon an application for passing the accounts of an estate.

...

- (3) On taxation of a solicitor's bill of costs the registrar may
- (a) receive evidence by affidavit or orally;
  - (b) direct the production of books, papers and documents; or
  - (c) make any order that the registrar considers appropriate.

[92] The McInnes Cooper fees and disbursements are summarized as follows:

Date	Hours	Fees	Disbursements	HST	Total
May 29/20	18.10	\$3,819.00	\$68.76	\$583.16	\$4,470.91
July 20/20	17.10	\$3,972.50		\$595.88	\$4,538.68
Oct 20/20	2.90	\$589.00		\$88.35	\$677.35
Dec 20/20	7.70	\$1,769.00	\$7.60	\$266.49	\$2,043.09
Jan 29/21	8.70	\$2,110.00		\$316.50	\$2,436.50
May 31/21	15.70	\$3,706.00		\$555.90	\$4,261.90
Jul 29/21	7.70	\$2,049.50		\$307.43	\$2,356.93
Sep 20/21	3.70	\$1,801.00	\$62.37	\$279.51	\$2,142.88

[93] Total legal fees (exclusive of HST) amount to \$19,816.00.

[94] Michael St. Pierre says that he recognizes that McInnes Cooper is entitled to compensation for their work. However, he takes the position that the accounts of McInnes Cooper are “higher than is reasonable in all the circumstances” of the Estate, and in particular:

- The Estate was not complex or novel in any way and so would not be a difficult file to manage;
- The time and effort should be have been relatively standard – certainly the executor’s accounts prepared by McInnes Cooper reflect this; and
- There was no special skill needed to manage the Estate as there were no novel issues at play.

[95] Exhibited to Mr. Blucher’s Affidavit are all of the Proctor’s accounts to the Estate and all of the back-up and time-keeping records relative to each of those accounts.

[96] In his Affidavit, Mr. Blucher states:

In preparation for the drafting of this Affidavit, I have reviewed all of the related accounts and their back-up dockets, and I have not detected anything which I would consider out of the way, profligate, or wasteful.

Though I do not recall any such instance specifically, it would have been (and is) my practice to have reviewed all of the back-up dockets to the various accounts to ensure that none of the related services were out of the way, or profligate, or wasteful.

[97] The proctor of an estate is entitled to reasonable fees: *Rustig Estate (Re)*, 2002

NSSC 210 at para. 21.

[98] Counsel for Michael St. Pierre says that McInnes Cooper fees for the day-to-day administration of the Estate should not exceed \$500.00. Counsel suggests that those day-to-day matters include such work as providing notarized copies of the Will or other documents and taking the will in and out of the vault for so doing. Counsel suggests that this work may have been necessary, but that it did not add value.

[99] Counsel for Michael St. Pierre says that it is the Estate's burden to prove that the McInnes Cooper accounts were reasonable, and it has not proven that the amount that they seek to certify is reasonable in all of the circumstances.

[100] Counsel submits that an amount in the range of \$5000.00 to \$7000.00 plus HST and disbursements is reasonable in a case such as this.

[101] In the normal solicitor and client taxation context, Grant J described the issue for determination as follows, beginning at para. 31:

No lawyer undertakes perfection, no client is entitled to that expectation.

The [lawyers] were presented with a factual situation not of their making. Their role was to use their training, expertise, and skill to protect and promote their client's best interests. In doing so, they adhered to a standard of reasonableness. They were to do so at a reasonable charge.

Three years later with the benefit of hindsight we are examining and diagnosing each step taken as the file progressed. That is not the proper standard because we are then looking at perfection. The test is whether the acts were reasonable in the circumstances at the time they were done.

[Emphasis added]



[102] In *Tannous v. Halifax (City)* (1995) CanLII 4402 (NSSC). Goodfellow, J. held that the reasonability of an account for legal services is dependent on an overall view, as opposed to any concentration on individual time entries.

[103] As noted by counsel for the Estate, the ethical duty on a Proctor with respect to its fee accounts to its estate client is clear. “Legal Ethics and Professional Conduct”, a publication of the Nova Scotia Barristers’ Society (Chapter 12) sets out the following:

A lawyer has a duty to

(a) Stipulate, charge or accept only fees that are fully disclosed,

...

For the purposes of this Rule, in determining whether a fee is fair and reasonable, the following factors should be considered:

- (a) The time and effort required and spent;
- (b) The difficulty and importance of the matter;
- (c) Whether special skill or service has been required and provided;
- (d) The customary charges of other lawyers of equal standing in the locality in like matters and circumstances;
- (e) In civil cases, the amount involved or the value of the subject matter;
- (f) The result obtained
- ...
- (i) Reasonable office overhead;
- (j) Such special circumstances of loss, or adverse effect on other work, urgency and uncertainty of reward;
- (k) Any reasonable agreement between the lawyer and the client.

[104] In addition to these factors, *Civil Procedure Rule 77.13* also informs the assessment of the reasonableness of the law firm's fee charged to the client. *Rule 77.13* provides:

- (1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.
- (2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:
  - (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.

[105] Mr. Blucher provided evidence about what was done to advance the matter of the late Ms. Zibara's Estate, who did what work and when, what fees were charged for what work, and importantly how they were discounted.

[106] I have carefully reviewed the McInnes Cooper time entries for the work carried out by Mr. Blucher, Ms. Lisney, an experienced estates para-professional and by other para-professionals. Mr. Blucher either directly provided, or directly supervised others on the provision of legal services to the late Ms. Zibara's Estate. Mr. Blucher deposed in his Affidavit to the general manner in which the matter was

serviced by him and his senior para-legal Ms. Ann Lisney. Such services provided by others were generally few, and were affected by the pandemic.

[107] At the end of each comprehensive time docket deposited to by Mr. Blucher is a personal breakdown of services provided such that the total time docketed by others beyond Mr. Blucher and Ms. Lisney was less than \$2000.00 (\$1,917.50).

[108] Approximately one-third of that was docketed by an associate lawyer for research and preparation of a draft agreement on the replacement trustee issue. Mr. Blucher testified, as a very experienced trusts and estate lawyer, that the trust issue which arose was relatively unique. Mr. Blucher was clear in his evidence that dealing with the *Saunders v. Vautier* issues was not so unique, but such issues rarely arose in the circumstances of an estate such as that of the late Ms. Zibara. Further, the Court notes that there were circumstances involving a beneficiary of the Estate, Marc St. Pierre, which required inquiries and some level of investigation as to whether he lived independently or in a type of institutional care and whether he was legally competent.

[109] I have considered from a global perspective whether the amount of the legal fees incurred were reasonable in all of the circumstances. I conclude that they were.

[110] In terms of who pays, Michael St. Pierre suggests that part of the legal fees incurred should be paid by Mr. Stern personally.

[111] In *Atlantic Jewish Foundation v. Leventhal Estate*, 2019 NSSC 30, Justice Campbell's costs decision in the matter referred to early in this decision, he ruled on whether Mr. Stern, K.C., as the proctor of that estate, should be able to have the legal fees for the estate's appeal paid out of the estate. At para. 5, Campbell J stated:

Legal and other professional fees incurred in dealing with an estate are paid out of the estate. That is the case even if the executor is one of, or even the only person, who may derive a benefit from that expenditure. The fees must be incurred reasonably to determine and respect the wishes of the testator who made the will. An executor should not be required to put personal money at risk to engage in litigation with that purpose and should not lose personal money if the position he has taken turns out to have been wrong or at least to have been not accepted by a court provided it is not entirely unreasonable.

[112] Further, at para. 11 Campbell J states:

But the executor is different. Executors are indemnified from the estate when discharging their duties and acting reasonably. Personal representatives should have the ability to act reasonably within their discretion to take and respond to legal actions on behalf of the estate without the concern they will be ordered to bear responsibility for the legal fees involved. There may of course be cases where the actions taken by a personal representative are so improvident, and so "unnecessary and ill-advised" that they should be required to bear their own costs or some portion of those costs.

[113] Justice Campbell goes on to note, that even in litigation involving a challenge to the commission sought by the executor, where the executor stands to benefit personally from a favourable outcome, the executor is still acting as the personal representative of the testator, who is entitled to advance a claim for commission.

[114] There is nothing before this Court which shows that Mr. Stern, K.C.'s actions in responding to a challenge to his commission was ill-advised or unreasonable. There is absolutely no reason for this Court to so order.

[115] Further, under like the facts before the Court of Appeal in *Wittenberg v. Wittenburg Estate*, 2015 NSCA 79, there is no evidence before this Court to even suggest that Mr. Stern mismanaged the Estate, including by incurring excessive legal fees.

[116] I find that Mr. Stern, K.C. acted, at all times, reasonably, and there is no reason why the residuary beneficiaries should not, as is the normal default position, indemnify the Estate for costs and fees incurred. I find that there is nothing which Mr. Stern or the Estate did to promote the proceedings before the Court; rather they were called upon to defend them. The Proctor's fees and disbursements are reasonable; they are clearly not abusive. They must be paid from the Estate.

### **Conclusions**

[117] The legal and other accounts submitted to the Registrar of Probate are approved.

[118] Mr. Stern, K.C. is entitled to an Executor's Commission at the rate of 5% of the Estate's gross value. If this amount is in dispute and the parties cannot resolve the matter, submissions may be made to this Court in that regard.

[119] Michael St. Pierre shall bear his own costs. The Estate's costs shall be payable out of the Estate. If the parties cannot agree on the quantum of such costs, the Court will accept written submissions within 30 calendar days of this decision.

Smith, J.