

SUPREME COURT OF NOVA SCOTIA

Citation: *Kinley Estate v. MacKeen*, 2023 NSSC 83

Date: 20230306

Docket: *Halifax* No. 511947

Registry: Halifax

In the matter of:

The Estate of Grace Elizabeth Kinley

Between:

Paula Howatt and Edward Kinley, Personal Representatives of the Estate of Grace
Elizabeth Kinley

Applicants

v.

Shona Kinley MacKeen and Peter Kinley

Respondents

Judge: The Honourable Justice Gail L. Gatchalian

Heard: December 19, 20 and 21, 2022, in Halifax, Nova Scotia

Counsel: Trinda Ernst, K.C. for the Personal Representatives
J. Walter Thompson, K.C. for the Respondents

By the Court:

Introduction

[1] This is an Application by Paula Howatt and Edward (“Eddie”) Kinley, Personal Representatives of the Estate of their late mother, Grace Kinley, for a “passing of accounts” under s.71 of the *Probate Act*, S.N.S. 2000, c.3. Mrs. Kinley passed away on October 25, 2017. The Personal Representatives were granted probate of the Estate on January 19, 2018. They filed their final accounting on October 28, 2021. The hearing took place over three days in late December, 2022. The Personal Representatives seek the court’s approval of their administration of the Estate, as well as: (a) a commission of four percent of the value of the Estate, (b) reimbursement of their out-of-pocket expenses, (c) approval of the Proctor’s bill of costs, and (d) an order that the their siblings, Shona Kinley MacKeen and Peter Kinley, pay \$20,000 of the Proctor’s bill. The Personal Representatives say that Shona and Peter pursued unnecessary legal proceedings that increased the costs to the Estate and delayed the closing of the Estate.

[2] Shona and Peter accuse the Personal Representatives of misconduct that resulted in additional unnecessary cost and delay in closing the Estate. Shona and Peter say that the Personal Representatives should receive no commission and

should be ordered to pay all but \$10,000 of the Estate's legal fees, which they say is a reasonable amount of fees for an estate of this size (just over \$1,000,000, with assets and debts that are easily determined and administered). Shona and Peter also challenge some of the out-of-pocket expenses claimed by the Personal Representatives.

[3] The dispute between the parties has its origin in Mrs. Kinley's decision in the fall of 2015 to remove Paula as her Power of Attorney. Mrs. Kinley retained Andrew Kimball, a lawyer, to assist her. On September 21, 2015, Mrs. Kinley executed a new Power of Attorney, appointing Paula and Shona jointly. Then, on October 23, 2015, Mrs. Kinley executed a new Power of Attorney, appointing Shona only.

[4] Since the fall of 2015, Paula and Eddie have alleged that Mrs. Kinley lacked the capacity to instruct counsel and to execute the new Powers of Attorney, that Mr. Kimball breached his ethical duties to Mrs. Kinley, and that Shona and Peter unduly influenced Mrs. Kinley. After they were granted probate, Paula and Eddie, as Personal Representatives, maintained their allegations against Mr. Kimball, Shona and Peter, and on that basis, took the position that Shona and Peter should pay Paula and Eddie certain amounts by way of set-off from Shona and Peter's share of the Estate. The Personal Representatives told Peter and Shona that they

had obtained a copy of Mr. Kimball's file, and that the contents supported the Personal Representatives' allegations.

[5] Shona and Peter disputed the allegations, and when almost 18 months had elapsed from the grant of probate, they repeatedly asked the Personal Representatives to file an accounting of their administration of the Estate. On June 28, 2019, Shona and Peter filed an application under s.69(2) of the *Probate Act*, asking the Registrar of Probate for an order requiring the Personal Representatives to file an accounting of their administration of the Estate. The Personal Representatives responded by seeking a twelve-month extension of the requirement for them to file an accounting. The Personal Representatives justified their delay in filing an accounting, in part, on: (1) an outstanding Nova Scotia Barristers' Society complaint that they had filed against Mr. Kimball and (2) an "RBC Review" of Shona's withdrawal of funds from a joint bank account she held with Mrs. Kinley, which the Personal Representatives said had been elevated to the bank's Ombudsman. In a decision dated February 28, 2020, but not communicated to the parties until July, 2020, the Registrar adjourned the application without day, having accepted the argument of the Personal Representatives that there were several "outstanding legal issues" that had to be resolved, including the Bar Society complaint and the RBC Review.

[6] On August 14, 2020, Shona and Peter filed an appeal of the Registrar's decision to a Judge of the Probate Court. On October 6, 2020, the Personal Representatives sought an adjournment of the appeal because of an outstanding Bar Society complaint that they had filed against Walter Thompson, K.C., counsel for Shona and Peter. In February of 2021, the Personal Representatives told the Court that the only outstanding legal issue was the Bar Society complaint against Mr. Kimball.

[7] The hearing of the appeal took place on March 3, 2021, before the Honourable Justice Ann E. Smith, sitting as a Judge of the Probate Court. In a decision dated April 9, 2021, Smith J. allowed the appeal, and ordered the Personal Representatives to "forthwith obtain a date certain from the Registrar to provide an accounting of their administration of the Estate": *Kinley Estate v. Howatt*, 2021 NSSC 119.

[8] Smith J. also ordered the Personal Representatives to "forthwith" provide Shona and Peter with certain documents, including a copy of Mr. Kimball's file and documents related to the "RBC Review," and to "forthwith fully cooperate with any process initiated by the Appellants to obtain any of these documents held by third parties."

[9] In an unreported costs decision dated October 12, 2021, Smith J. ordered Paula and Eddie to pay \$6,000 in costs personally to Shona and Peter.

[10] The notes to file and memos to file of Mr. Kimball and his colleagues were provided to Shona and Peter in May of 2022. Shona and Peter say that Mr. Kimball's file does not support the allegations made by the Personal Representatives against Mr. Kimball, Shona and Peter. Shona and Peter say that the Personal Representatives have failed to disclose any documents to establish the existence of an RBC Review.

[11] In determining whether the Personal Representatives are entitled to a commission, and if so, how much, and whether the Personal Representatives, on the one hand, or Shona and Peter, on the other hand, should be ordered to pay a portion of the Estate's legal fees, I will consider:

- The legal principles relating to the approval of a commission and payment of an Estate's legal fees.
- The size and complexity of the Estate.
- The Personal Representatives' accusations against Mr. Kimball, Shona and Peter, and their requests for payments from Shona and Peter.

- The allegations of misconduct levelled by Shona and Peter against the Personal Representatives, which include the following:
 - the Personal Representatives misrepresented the contents of Mr. Kimball’s file to Shona and Peter,
 - the Bar Society complaint against Mr. Kimball could not reasonably have benefitted the Estate financially,
 - the Personal Representatives failed to disclose to the court that the Bar Society complaint against Mr. Thompson had been summarily dismissed without investigation,
 - the Personal Representatives failed to disclose to Smith J. that the Bar Society complaint against Mr. Kimball had been summarily dismissed without investigation,
 - the Personal Representatives failed to comply with the order of Smith J. to produce a copy of Mr. Kimball’s forthwith,
 - The Personal Representatives failed to establish the existence of an “RBC Review,” and
 - the Personal representatives failed to comply with the order of Smith J. to forthwith obtain a date from the Registrar to file an accounting.

[12] The Personal Representatives relied on the following affidavits in the hearing before me:

- Affidavit of Paula Howatt, sworn July 31, 2019
- Affidavit of Paula Howatt, sworn June 16, 2020
- Supplemental Affidavit of Paula Howatt, sworn October 28, 2022
- Affidavit of Eddie Kinley, sworn July 31, 2019
- Affidavit of Eddie Kinley, sworn October 28, 2022
- Supplemental Affidavit of Eddie Kinley, sworn December 14, 2022

[13] Shona and Peter relied on the Affidavit of Shona MacKeen sworn October 24, 2022.

[14] Paula, Eddie, Shona and Peter were cross-examined at the hearing.

[15] Shona and Peter called the following witnesses:

- Mr. Kimball and his colleagues, lawyers Blair McIllwain and Benjamin Carver
- Peter Jenkins, Senior Portfolio Manager and Wealth Advisor, RBC Dominion
- Joseph Kinley, son of Peter Kinley

[16] Although neither party moved to strike any portions of the affidavits, I will not be relying on information in the affidavits that offends the principles governing the drafting of affidavits, for example, argument, opinion and inadmissible hearsay: see *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71 at pp.11-12.

Legal Principles

Duties of Personal Representative Generally

[17] Decisions considering the removal of a personal representative are useful for the statements about the duties of personal representatives generally. A personal representative has a fiduciary duty of a trustee in relation to their conduct and

management of the estate, and owes a high degree of fidelity. Courts ask the following questions in determining whether the conduct of a personal representative warrants their removal:

- Does the conduct endanger the trust property?
- Does the conduct show a want of honesty?
- Does the conduct show incapacity to execute the duties?
- Does the conduct show a want of reasonable fidelity?
- Is there evidence of a conflict of interest between the personal interests of the personal representative and those of the beneficiaries, or has the personal representative placed their personal interests over those of the estate and the beneficiaries?
- What is in the best interests of the beneficiaries?
- Has the personal representative exhibited bad faith in relation to decisions made in the course of their administration?

See *Wilkinson v. Wilkinson*, 2019 NSSC 52 at paras.16, 17, 43 and 44

Commission

[18] Under s.76 of the *Probate Act*, the court, on settlement of an estate, may allow the personal representative a commission not exceeding five percent of the amount received by the personal representative, and the court may apportion the commission among the personal representatives as appears just and proper according to the labour bestowed or the responsibility incurred by them respectively.

[19] Under s.62(3) of the *Regulations*, the court may consider the following non-exhaustive list of factors in deciding the amount of the commission to allow a personal representative:

- (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; and
- (e) the success resulting from the personal representative's administration of the estate.

[20] In exchange for fulfilling these duties, a personal representative should be compensated well for their services. This is because they have a heavy responsibility and a fiduciary obligation to make decisions in the best interests of the estate, decisions that the deceased could have and would have made herself if she were living: *Winters Estate (Re)*, 1999 N.J.S. 456 at para.13.

[21] The personal representative must not unreasonably delay in settling the Estate. There is no hard and fast rule as to what constitutes undue or unreasonable delay. However, it is the practice to speak of the executor's year. Therefore, all investments that are not proper to retain should be realized and other residuary property should be liquidated and distributed within the year. Normally, other residuary property should be liquidated and distribution made within the year as well: *Gillis Estate (Re)*, 2017 NSSC 6 at para.19, citing *Halsbury's Laws of Canada* at HWE-266.

[22] Section 69 of the *Probate Act* requires the personal representative to provide an accounting of their administration within 18 months of the grant of probate, unless they apply for and are granted an extension.

[23] While delay in closing an estate cannot be ignored when commission is being determined, delay in and of itself is not necessarily a basis to completely deny commission to a personal representative. Any delay needs to be weighed against the results that have been achieved and the degree of success: *Winter Estate (Re)*, 2017 N.S.J. 474 at para.9-10.

Legal Fees of the Personal Representative

[24] Under s.71(b) of the *Probate Act*, S.N.S. 2000, c.31, on passing the accounts of the personal representative, the court may inquire into and adjudicate on a complaint 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.

[25] Legal and other professional fees incurred by the personal representatives in dealing with an estate are normally paid out of the estate, unless they have acted imprudently, improperly, unreasonably, they have failed to act in the best interests of the estate, or they have been intransigent due to extra-legal considerations such as bad feelings between the parties: *Atlantic Jewish Foundation v. Leventhal Estate*, 2019 NSSC 30 at paras.5 and 11; *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79 at para.99; *Winters Estate, supra* at paras.20-21; *Deagle v. Deagle Estate*, [2019] N.S.J. No.84 at paras.21-22 and 32.

[26] There may be cases where the actions of the 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: *Atlantic Jewish Foundation, supra* at para.11.

Proctor's Bill of Costs

[27] Under s.91 of the *Probate Act*, all bills of costs may be taxed by the Registrar, and every such taxation may be reviewed by a judge. Subsection 61(1) of the Regulations provides that the taxation of a solicitor's bill of costs in relation to an estate of a deceased may be conducted before or upon an application for passing the accounts of an estate. Subsection 61(3) provides that, on taxation of a solicitor's bill of costs, the Registrar may receive evidence by affidavit or orally; direct the production of books, papers and documents; or make any order that the Registrar considers appropriate.

Size and Complexity of the Estate

[28] The Estate was not complicated. At the time of her death, Mrs. Kinley had no debts, except for her monthly living expenses. She had already transferred all of her real property. The inventory value of the Estate was \$1,066,127.15, consisting of some bank savings and some "blue chip common stocks." The Personal Representatives liquidated the stocks into cash in October of 2019, and invested the cash in one account. The beneficiaries of the Estate are Mrs. Kinley's four children: Paula, Eddie, Shona and Peter. Their entitlement under the will is as follows: Paula 40%, Eddie 20%, Shona 30% and Peter 10%. The Personal

Representatives received the final tax clearance certificate to date of death in January of 2019. The Personal Representatives made the first distribution almost three years later, in December of 2021, leaving a balance of \$162,278.92.

Personal Representatives' Accusations Against Mr. Kimball, Shona and Peter

[29] In a letter dated March 28, 2018 to Shona and Peter, the Personal Representatives stated that they had reviewed Mrs. Kinley's accounts, "particularly since September 2015 when our mother was in declining health and *declared that she did not have testamentary capacity or financial capacity*" [emphasis added]. The Personal Representatives stated that they had found four large legal invoices from Mr. Kimball's law firm totalling almost \$20,000. The Personal Representatives asserted that Shona and Peter were responsible for those invoices. The Personal Representatives took the position that \$20,000 should be subtracted from Shona and Peter's entitlements under the will, and that those funds be paid to Paula and Eddie in equal shares at the final distribution of the Estate.

[30] In a letter dated May 8, 2019, the Personal Representatives wrote a nine-and-a-half page letter to Shona and Peter, stating that they intended to make adjustments, in their administration of the Estate, to the detriment of Shona and Peter, for all the "irregularities" they discovered. The Personal Representatives

stated that they had obtained Mr. Kimball's file materials, from which they concluded the following:

- “The two Kimball [Power of Attorneys] and supposed representation by Andrew Kimball were not for Grace's necessities, never benefitted Grace or the Estate whatsoever.”
- “We find the contents disturbing and appear to border on efforts to defraud.”
- “There was no need for new [Powers of Attorney], bank accounts and the resulting large Kimball account.”
- “From the review, particularly of the Kimball file, the Co-Executors were repulsed by the documented actions of undue influence inflicted on a fragile, sick and aged woman.”
- “From the file disclosure, it appears to us, that Shona was directing Mr. Kimball rather than Grace.”
- “It appears that Peter and Shona had their own agenda and used our mother's failing health to their own advantage.”
- “Please be advised that based on the Kimball file review, we intend to include and make adjustments for all the irregularities we have discovered and outlined in detail herein, and for the time involved in extra administrative work.”

[31] The Personal Representatives also took issue with the fact that, as they discovered in Mr. Kimball's file materials, Mrs. Kinley had transferred a number of shares to Shona and Peter before her death, characterizing this as “misappropriation” and stating that they, the Personal Representatives, felt that

they had been “short changed.” The Personal Representatives blamed Shona for not including the share transfer in Mrs. Kinley’s 2015 tax return, resulting in the Personal Representatives having to file an amended 2015 return.

[32] In a letter dated December 17, 2019, the Personal Representatives took the position that Peter and Shona should pay for a total of \$53,071 in “irregularities” before making any distribution from the Estate. Those “irregularities” included almost \$20,000 for Mr. Kimball’s invoices to Mrs. Kinley, over \$20,000 for the shares that Paula and Eddie felt they were “short changed,” plus taxes and penalties incurred for the share transfer and accounting fees, and approximately \$2000 in “cash taken by Shona” from the joint account she held with Mrs. Kinley.

[33] The Personal Representatives reiterated their accusations in the hearing before me, stating that they found “large legal costs for which the deceased received no benefit” and that, “[b]ased on the Kimball file disclosure, the Personal Representatives have provided detailed documented evidence to Kinley/MacKeen’s and their Counsel of undue influence”: see the Affidavit of Eddie Kinley sworn on October 28, 2022 at paras.12 and 28.

[34] The Personal Representatives are no longer seeking reductions to Shona and Peter’s share of the Estate. However, as noted above, they seek an order that Shona

and Peter pay \$20,000 towards the Proctor's fees, for the time and cost of responding to the appeal and the motion for production.

Misrepresentation of Mr. Kimball's File

[35] Shona and Peter placed the notes and memos to file of Mr. Kimball and his colleagues in evidence at this hearing.

[36] Contrary to the assertion of the Personal Representatives in their May, 2019 letter to Shona and Peter, there never was a "declaration" that Mrs. Kinley lacked testamentary capacity or financial capacity in 2015.

[37] It is readily apparent from Mr. Kimball's file that he and his colleagues, Ben Carver and Blair McIlwain, were meticulous in their efforts to ensure that Mrs. Kinley had the capacity to instruct them and to execute new Powers of Attorney and to ensure that Mrs. Kinley was not being influenced by anyone else. It is also clear from the notes and memos to file that Mr. Kimball and his colleagues were meticulous in documenting those efforts.

[38] Based on the material before me from Mr. Kimball's file, there was no reasonable basis for the Personal Representatives' assertion that Mrs. Kinley lacked decision-making capacity in the fall of 2015, or their allegations of

professional misconduct against Mr. Kimball and undue influence against Shona and Peter.

[39] In fact, I find that the Personal Representatives grossly misrepresented the contents of Mr. Kimball's file.

[40] Furthermore, the contents of Mr. Kimball's file satisfy me that the actions taken by the Personal Representatives in their administration of the Estate have been contrary to the wishes of Mrs. Kinley. Mrs. Kinley is presumed to have been competent to instruct legal counsel in the fall of 2015. Mr. Kimball was acting on her instructions when he wrote as follows in a letter dated October 28, 2015 to a lawyer hired by Paula:

...

In the future, I would request that any correspondence from your office challenging my client's capacity to manage her own affairs be copied to me. Mrs. Kinley has the right to respond to any such allegations and most certainly deserves the courtesy, if not from you, then from her own daughter.

...

... I have spent numerous hours with Mrs. Kinley over the past months. In the course of our many discussions, Mrs. Kinley has made it clear to me and other members of my firm that she fully understands both what a Power of Attorney is and whom she has appointed as her delegate. She has also explained to me her reasons for varying her prior delegate appointments, *ad nasuam*.

It was plain and obvious to me that Mrs. Kinley fully understood her decision to revoke her previous Power of Attorney and execute a new one. as such, it would have been entirely inappropriate to subject her to a protracted and potentially biased “assessment” when her capacity was so manifest. Mrs. Kinley is a dignified lady, and the notion of such an assessment is offensive to her.

...

In closing, Mrs. Kinley has firmly asserted control of her own personal and financial affairs. She has also put into place safeguards against any future incapacity which she may suffer. Mrs. Kinley has taken these steps of her own volition, in response to actions by your client which have affronted her dignity.

Mrs. Kinley would prefer to focus now on reconciliation within her family. She remains prepared, however, to assert her independence and defend her own interests to the full extent necessary.

Bar Society Complaint Against Mr. Kimball Did Not Benefit Estate

[41] Even apart from its apparent lack of merit, the Personal Representatives did not adequately explain how their Bar Society complaint against Mr. Kimball could have benefitted the Estate financially, and therefore how it was in the best interests of the Estate to pursue that complaint and to delay the administration of the Estate because of it.

Bar Society Complaint Against Walter Thompson, K.C. Dismissed

[42] The Personal Representatives represented themselves in the appeal. In correspondence to the Honourable Justice Darlene Jamieson dated October 6,

2020, the Personal Representatives requested an adjournment of the motion for directions, stating that it would be premature to set a date for the appeal, in part because they had filed a Bar Society complaint against Mr. Thompson, and the outcome of the complaint was outstanding. The Personal Representatives wrote as follows:

Before the decision of Cora Jacquemin was received by the Parties, the Personal Representatives filed a professional complaint to the Nova Scotia Barristers' Society against J. Walter Thompson, QC as it relates to these proceedings before the court and the Estate of Grace Elizabeth Kinley.

The Nova Scotia Barristers' Society has assigned the complaint against Walter Thompson Complaint No.C-6600. By letter dated September 25, 2020 I have been advised Complaint No. C-6600 has been forwarded to the Complaints Review Committee and a decision is normally rendered by this Committee within 60 days.

[43] In fact, the Bar Society had summarily dismissed the complaint against Mr. Thompson without an investigation over one month earlier, on August 25, 2020. The Personal Representatives omitted this fact from their communication with the Court. The Personal Representatives had requested a review of the summary dismissal. The Complaints Review Committee later upheld the decision to dismiss.

Bar Society Complaint Against Andrew Kimball Dismissed

[44] On February 8, 2021 the Personal Representatives wrote to Smith J., advising in part that the Bar Society complaint against Mr. Kimball was outstanding. They wrote in part as follows:

The only outstanding review matter referred to in the Decision relates to the Nova Scotia Barristers' Society ("NSBS") Complaint C-6480. Recent communication received by the Personal Representatives from the NSBS indicates that a decision should be rendered within sixty (60) days. This time frame would be within a reasonable time period regarding an accounting in Probate Court.

[45] In fact, the Bar Society had summarily dismissed the Personal Representatives' complaint against Mr. Kimball, without investigation, on January 21, 2021. The Personal Representatives omitted this fact from their communication with Smith J. The Personal Representatives requested a review. The Complaints Review Committee upheld the decision to dismiss on March 11, 2021.

Failure to Disclose Mr. Kimball's File Forthwith

[46] In her April 9, 2021 decision, Smith J. ordered that the Personal Representatives forthwith disclose certain documents to Shona and Peter, including the contents of Mr. Kimball's file and documents relating to the "RBC Review."

[47] In April of 2021, the Personal Representative signed authorizations permitting Mr. Kimball and RBC to release their file material to Shona and Peter.

However, the Personal Representatives drafted the authorizations to state that costs of production were to be paid by Shona and Peter.

[48] Shona and Peter objected to this course of action, and appeared before Smith J. to settle the form of order. In the September 15, 2021 order, Smith J. ordered, in part, that the Personal Representatives forthwith provide the documents to counsel for Shona and Peter, and that Shona and Peter could independently solicit the documents from third parties, but that the Personal Representatives were required to forthwith personally reimburse Shona and Peter for the associated costs.

[49] When they received the issued order for production from Smith J., the Personal Representatives wrote to counsel for Shona and Peter, stating, in part, “*we are not prepared to provide the Disclosure, as directed by Justice Smith*, which in part will be the subject of the Appeal” [emphasis added]. The Personal Representatives also wrote that the authorizations that they had signed previously “are withdrawn and are no longer valid.”

[50] The Personal Representatives filed a Notice of Appeal of the decision of Smith J., which did not challenge the order for production. The Personal Representatives also filed a motion for a stay of the decision, but only in relation to the costs decision. The stay motion was heard and dismissed on November 24,

2021. The Court of Appeal ordered Paula and Eddie to personally pay costs in the amount of \$500 to Peter and Shona.

[51] Mr. Kimball hired legal counsel, Richard Niedermayer, to respond to the request for disclosure of Mr. Kimball's file from Shona and Peter. Mr.

Niedermayer asked the Personal Representatives to confirm that he could rely on the authorization previously signed by them to release Mr. Kimball's file to Shona and Peter. On November 23, 2021, the Personal Representatives wrote to Mr.

Niedermayer, stating that they had revoked their consent to disclose the documents and would not pay the costs of the disclosure. The Personal Representatives took the position that since they would be taking no further action against Mr. Kimball, his file was no longer relevant or required for the accounting, and therefore "this portion of the Smith Order should be eliminated."

[52] Shona and Peter continued to insist that the Personal Representatives comply with the order for production. Instead of authorizing Mr. Kimball to release his files to Shona and Peter, the Personal Representatives reviewed and disclosed the files themselves. Their delay in producing the documents resulting in an adjournment of the April, 2022 hearing dates scheduled for this matter.

No Evidence to Substantiate Existence of RBC Review

[53] The Personal Representatives told Shona and Peter, the Registrar and then Smith J. that they had initiated a “review” with RBC, and they told Smith J. they were prevented from disclosing documents about the “review” because of a “non-disclosure agreement” that the Personal Representatives had signed. The Personal Representatives relied, in part, on this “review” for their delay in settling the Estate.

[54] Despite the production order, the Personal Representatives have never disclosed any documents to Shona and Peter that substantiate the existence of any such review. The only document disclosed by the Personal Representatives related to an “RBC Review” is a standard form non-disclosure agreement that the RBC Office of the Ombudsman requires as part of its complaint process, signed by Eddie on January 13, 2020.

Failure to Obtain a Date for Accounting “Forthwith”

[55] Despite the April 9, 2021 decision of Smith J., in which she ordered that the Personal Representatives forthwith obtain a date for a hearing before the Registrar, the following occurred:

- As of July, 2021, the Personal Representatives had taken no steps to obtain a date from the Registrar to provide an accounting.

- On July 14, 2021, Shona and Peter contacted the Registrar themselves to request a conference call.
- On July 20, 2021, the Probate Court provided Shona and Peter nine potential dates in August of 2021.
- In an email dated July 23, 2021, Paula provided reasons for why the Personal Representatives had not responded to the request of Shona and Peter that a date be set for the final accounting, and stated that each of the Personal Representatives was scheduled to be away many times throughout the summer and fall. Paula did not select one of the dates offered, or suggest another date. Paula also justified the failure to obtain a date from the Registrar as follows:

“At the present time, it is our understanding, this file is still with the Supreme Court, therefore it would appear that the Probate Court would not have jurisdiction.” [emphasis added]

- On July 28, 2019, Shona and Peter requested that the Registrar schedule a date for the conference call.
- On August 12, 2021, the Personal Representatives wrote to Smith J. in support of their position on costs, stating in part that “it appears questionable action is now occurring in the Appellants’ request that a date be set by Probate Court when they know the file and *therefore jurisdiction still remains with the Supreme Court, because of their Appeal*” [emphasis added].
- Smith J. noted in her costs decision that, as of August 17, 2021, the Personal Representatives “had not taken steps to secure a date for the final accounting.”
- The Registrar scheduled the conference call for September 27, 2021. Paula and Eddie did not attend.

- The Registrar scheduled January 19 and 20, 2022 for the hearing of the passing of accounts, which dates were adjourned when the Registrar transferred the application to a Judge of the Probate Court.

[56] There was no reasonable basis for the assertion of the Personal Representatives that the Registrar “lacked jurisdiction” to set a date for the Personal Representatives to file an accounting, in the face of an order from Smith J. that the Personal Representatives forthwith obtain such a date from the Registrar.

Conclusion re: Allegations of Misconduct

[57] I have no hesitation in concluding that, throughout the administration of the Estate, the Personal Representatives acted unreasonably, their dealings with the beneficiaries and the court were lacking in candour, they placed their personal interests above the interests of the Estate, they failed to act in the best interests of the Estate, they acted contrary to the known wishes of Mrs. Kinley, their failure to disclose documents forthwith and to obtain a date for their accounting forthwith in the face of Smith J.’s decision and order was deliberate and contemptuous, and they caused an unreasonable delay in the administration of the Estate by the foregoing misconduct. It is especially egregious that the Personal Representatives used their mischaracterization of Mr. Kimball’s file materials to try to extract payments from Shona and Peter, while refusing to provide the file to Shona and Peter, even in the face of a court order. The Personal Representatives’ misconduct

has been protracted, extending over approximately four years. The lack of candour and contemptuous attitude displayed on numerous occasions by the Personal Representatives is compounded by the fact that Paula was a practicing lawyer, and an officer of the court, for approximately three decades until her retirement in 2021.

Commission

[58] The Estate was not complex or very large. I find that, in the circumstances of this case, the Estate should have been distributed and the accounts finalized by the end of 2019 or shortly thereafter. In fact, when Shona and Peter indicated that they intended to file an application with the Registrar to request an order that the Personal Representatives file an accounting, the Personal Representatives assured Shona and Peter that they were working on the accounting (letter dated May 28, 2019), that the detailed accounting was being prepared, and that the Personal Representatives expected to have completed the accounting before the application would be heard (letter dated June 7, 2019). There were no significant steps left in the administration of the Estate, except for the filing of the 2019 tax return.

[59] The delay in finalizing the administration of the Estate was lengthy and unreasonable and caused by the misconduct of the Personal Representatives, and their failure to act in the best interests of the Estate.

[60] I find that the Personal Representatives have, by their misconduct, disentitled themselves to any compensation for their administration of the Estate. They shall receive no commission.

Estate Accounts

[61] The Personal Representatives filed their final accounting on October 18, 2021, a supplemental accounting on September 7, 2022, and a further supplemental accounting dated January 13, 2023 and filed on January 19, 2023. Shona and Peter do not take issue with the accounting itself. It does appear to be technically competent.

[62] Shona and Peter take the position that the Estate should not bear the cost of any accounting fees for filing the Estate's taxes for the years 2020 or later, because they say that those expenses would not have been incurred had it not been for the unreasonable delay caused by the Personal Representatives. In my view, these are properly costs of the Estate, as it was a benefit to the beneficiaries that tax returns were prepared and taxes properly paid.

[63] Along with the accounts, the Personal Representatives submitted a claim for reimbursement for expenses incurred by them personally, for example, travel expenses. I allow their claim for reimbursement for expenses incurred before July of 2019. I do not approve their claim for reimbursement for expenses incurred by them after June of 2019. In my view, most if not all of the expenses incurred after June of 2019 were incurred in relation to the litigation, which I find was made necessary because of the misconduct of the Representatives.

[64] The Supplemental Accounting dated January 13, 2023 is approved, with the exception of reimbursement claimed for expenses incurred by the Personal Representatives after June of 2019.

Approval of Proctor's Bill of Costs

[65] Neither party took issue with the Proctor's Bill of Costs. They are approved. The issue is whether the Proctor's fees and disbursements should be paid out of the Estate, or partially or fully by Paula and Eddie.

Proctor's Disbursements

[66] The Proctor's disbursements will be paid out of the Estate. I find that, apart perhaps from some portion of the photocopying costs, they were incurred in relation to the administration of the Estate as opposed to the litigation.

Proctor's Fees from 2017 – June of 2019

[67] The Proctor's fees for work that took place in the years 2017 and 2018, and from January to June of 2019 inclusive, will be paid out of the Estate.

Proctor's Fees from July of 2019 to January 13, 2023

[68] The vast majority of the Proctor's fees for work done from July of 2019 to January 13, 2023 relates to the Personal Representatives' refusal to file an accounting, the hearing before the Registrar, the appeal to a Judge of the Probate Court, Shona and Peter's efforts to obtain disclosure from the Personal Representatives, the appeal to the Court of Appeal and the stay motion, the production of documents, and the three-day hearing to pass accounts. I find that the foregoing fees were incurred as a direct result of the misconduct of the Personal Representatives.

[69] I order that the Personal Representatives must personally pay the Proctor's fees, plus HST, on a solicitor-client basis, for work performed from July 1, 2019,

to January 13, 2023, with the exception of the following time entries, which I find are related to the proper administration of the Estate:

2019

- July 31
- August 23
- October 7
- October 26
- November 1

2021

- February 9, 17
- August 23
- October 13, 25, 26, 28, 29
- November 1, 3, 4, 24, 25, 26,
- December 6, 7

2022

- February 14
- September 6, 7, 9
- November 16

2023

- January 4, 5, 6, 8, 9, 10, 11, 12, 13, 16, 17

[70] The Proctor's fees that the Personal Representatives are required to pay personally shall be paid directly from Paula and Eddie's share of the remaining Estate funds. Should this not be sufficient to pay the Proctor's fees, Paula and

Eddie shall pay the remaining balance within one month of being so notified by the Proctor.

Costs of this Hearing

[71] Shona and Peter are the successful parties in this application.

[72] Shona and Peter requested that their costs on a solicitor-client basis be paid by the Personal Representatives personally. Despite my findings, the conduct of the Personal Representatives in this hearing cannot be characterized as exceptional, extraordinary or reprehensible, or as calling out for denunciation in the form of an award of solicitor-client costs against them: see *Maskell Estate (Re)*, 2017 NSSC 325 at para.17. I decline to award Shona and Peter costs on a solicitor-client basis.

[73] Shona and Peter are entitled to party and party costs: *Wittenberg Estate*, para.99. The question is whether those costs should be paid by the Estate or by the Personal Representatives personally.

[74] Subsection 92(1) of the *Probate Act* provides that, 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.

[75] I find that the formal, contested, three-day hearing to pass accounts was made necessary by the conduct of the Personal Representatives. The Personal Representatives will personally pay Shona and Peter's costs of this application, on a party and party basis. If the parties cannot agree on the amount of costs, I will receive written submissions from them within two weeks of this decision.

Conclusion

[76] In conclusion, I order as follows:

- The Personal Representatives shall receive no commission.
- The Supplemental Accounting dated January 13, 2023 is approved, with the following exception: the Personal Representatives' claim for reimbursement for expenses incurred by them before July of 2019 is allowed; their claim for reimbursement for expenses incurred by them after June of 2019 is not allowed.
- The Proctor's Bill of Costs dated January 17, 2023 is approved.
- The Proctor's disbursements plus HST will be paid out of the Estate.

- The Proctor's fees plus HST for work performed in the years 2017 and 2018 and from January to June of 2019, inclusive, will be paid out of the Estate
- The Proctor's fees plus HST from July 1 of 2019 to January 13, 2023, with the exceptions noted herein, will be paid by the Paula and Eddie personally, to be paid out of their share of the remaining Estate funds, and if there is a shortfall, to be paid by Paula and Eddie within one month of being so notified by the Proctor.
- Paula and Eddie shall pay Shona and Peter's costs of this Application, on a party and party basis.

[77] Counsel for Shona and Peter shall prepare the order.

Gatchalian, J.