

CANADA / JUDGMENT

Chute Estate (Re)

2014 BCSC 344

COURT

Supreme Court of British Columbia

DECIDED

3 March 2014

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2014 BCSC 344 Chute Estate (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Chute Estate (Re), 2014 BCSC 344 Date: 20140303 Docket: P14087 Registry: Duncan Re the Estate of Ann Nora Chute aka Annie Nora Chute aka Anne Norah Chute aka Anna Chute, Deceased Before: Master Bouck (Sitting as Registrar) Reasons for Decision Counsel for the Executor, Wayne Chute: M. Mark Counsel for the opposing beneficiary, Patricia Nnyamah: K. Ducey Counsel for the opposing beneficiary, Sandra Chute: C. Wilson Place and Date of Hearing: Victoria, B.C. October 28, 2013 and January 15, 2014 Place and Date of Decision: Victoria, B.C. March 3, 2014

Introduction

- [1] These reasons address the passing of executor's accounts, fixing the executor's remuneration and reviewing the accounts of the solicitor initially retained by the executor to assist in the estate administration.
- [2] On January 4, 2013, the court (coincidentally me, sitting as a Master) made the following order:
1. The Accounts of the Applicant filed with this Application in respect of his administration and management of the Estate of Ann Nora Chute also known as Annie Nora Chute also known as Anne Norah Chute also known as Anna Chute, Deceased. ("Ann Chute") for the period from December 24, 2011 to June 20, 2013, be audited, taken and passed before the Registrar of this Court in Victoria, British Columbia.
 2. That the Registrar recommend a fair and reasonable allowance for the Applicant's care, pain, trouble and time expended in and about the Estate in administering, disposing of, arranging and settling the affairs of the Estate from. December 24, 2011 to present.
 3. The solicitor's bill be assessed under Rule 14-1 of the Supreme Court (Civil) Rules and reviewed under s. 70 of the Legal Profession Act. 4.
 5. The registrar will certify [his/her] findings and, when filed, the registrar's certificate will be binding on the beneficiaries without further order of this court; and
 6. The applicant shall have special costs for this application.

- [3] Leaving aside the solicitor, the individuals involved in this hearing are the testator's three surviving children.
- [4] The executor and his siblings are all in their sixties. Wayne Chute and his wife Karen are long time Duncan residents. Ms. Nnyamah lives in the Lower Mainland while Sandra Chute lives in Hamilton, Ontario. For reasons not disclosed, Sandra Chute has been long estranged from some members of her family.
- [5] Patricia Nnyamah attended on both days of this hearing but did not give evidence. Sandra Chute's counsel attended the hearing on a watching and then listening brief basis.
- [6] Oral testimony was given by Michael Coleman, Q.C. (whom I will also refer to as Mr. Coleman) and the executor.
- [7] For convenience only, these reasons may refer to various Chute family members by their first names only. No disrespect is intended. The Evidence
- [8] Given the terms of this reference and the legal issues that flow from those terms, I will first provide an overview of the evidence presented with respect to the estate administration and the legal fees in dispute. Further particulars of the evidence may be provided when determining the executor's remuneration and conducting a review of the solicitor's bills. A. The Administration of the Estate
- [9] Ann Chute died a widow on December 24, 2011. At the time of her death, Mrs. Chute was residing in a senior's home located in Duncan, B.C.
- [10] Mrs. Chute was a person of means, having inherited significant financial assets from her late husband's estate.
- [11] The historical management of the financial affairs of Woodrow and Ann Chute is relevant to this reference.
- [12] Following a stroke suffered in 2007, Woodrow Chute spent the remainder of his life in hospital. In February 2008, the executor and Ms. Nnyamah were appointed co-committees of their father's person and estate.
- [13] The duties as co-committees included managing bank accounts at various financial institutions in the Duncan/Chemainus area.
- [14] Wayne Chute and Ms. Nnyamah also took charge of selling their parents' home and disposing of the home's contents. In January 2008, Ann Chute moved into the senior's residence bringing with her only some clothing and some other odds and ends.
- [15] In or about 2009, Wayne Chute assumed control of his mother's financial affairs, pursuant to a power of attorney
- [16] The Chute family home was sold to a third party in November 2009. The proceeds from the sale of the property were invested in GICs.

- [17] Woodrow Chute died in January 2010. Both Patricia Nnyamah and Wayne Chute received a fee for their respective efforts as committees.
- [18] Ann Chute's Last Will and Testament is dated January 25, 2004. The terms of the Will mirror those found in the Last Will and Testament of Woodrow Chute. Karen Chute, a legal secretary by training, prepared both documents. In both Wills, Wayne Chute is nominated to be the executor of the estate with Karen as the alternate executor.
- [19] Ann Chute intended to leave all of her estate to Woodrow and vice versa. However, in the event that one spouse predeceased the other, the residue of the estate was left to Wayne Chute and Patricia Nnyamah. Sandra Chute is not provided for in either of her parents' Wills.
- [20] Wayne Chute is now retired but was formerly employed in the logging industry as a weigh master. Mr. Chute has no specific training or expertise in financial management. Other than involvement in his parents' estates, Wayne Chute has never acted as an executor.
- [21] In early January 2012, Wayne sought the assistance of Michael Coleman, Q.C., with respect to obtaining the grant of probate and advice generally on the administration of the estate. Karen Chute was a former employee of Mr. Coleman's law firm Coleman Fraser Whittome Lehan ("Coleman Fraser").
- [22] On January 9, 2012, Mr. Chute, in his capacity as named executor, entered into a retainer agreement with Coleman Fraser. The retainer letter is comprehensive and sets out the services to be performed, the terms of payment for those services and the opportunity for the executor to conduct a review of accounts under s. 71 the Legal Profession Act, S.B.C. 1998, c. 9 (the "LPA").
- [23] The circumstances of the retainer will be further described below. However, it is clear from the evidence that Mr. Coleman was primarily retained for the purposes of obtaining a grant of probate and advising or assisting the executor in other typical estate administrative duties.
- [24] A grant of probate was issued to Wayne Chute on April 4, 2012.
- [25] To no one's surprise, Sandra Chute commenced proceedings under the Wills Variation Act (the "WVA" action) in or about May 2012.
- [26] In that same month, Wayne Chute and Patricia Nnyamah jointly retained Coleman Fraser to defend their interests in the WVA action. Wayne and Patricia entered into a retainer agreement with Coleman Fraser on June 25, 2012. Pursuant to that retainer, James Coleman acted on behalf of Wayne Chute and Patricia Nnyamah although Michael Coleman had some peripheral involvement in the litigation file. The terms of this retainer will also be further discussed below.

- [27] In early October 2012, Ms. Nnyamah and Mr. Chute had a falling out over the executor's proposed remuneration. Thereafter, Ms. Nnyamah retained Ms. Ducey to act on her behalf in the WVA action.
- [28] In December 2012, the WVA action was settled. It was agreed between the parties that Sandra Chute will receive \$200,000 from the estate once this passing of accounts is completed.
- [29] During this period, Wayne Chute continued to manage the financial affairs of the estate and perform some of the more typical executor's duties.
- [30] In general terms, Mr. Chute has carried out the following tasks: · obtained a death certificate; · paid the ambulance bill and cancelled the deceased's medical services plan; · removed Ann Chute's personal belongings from the senior's residence and disposed of the same -- mostly to a local Thrift Shop; · arranged for a grave marker (no funeral or memorial service was held); · provided a copy of the Will to Patricia Nnyamah; · engaged in telephone communications with both Patricia Nnyamah and Sandra Chute; · attended ("21 trips in 22 months") at the financial institutions holding the various estate accounts for the purpose of "rolling over" matured GICs and closing one account upon the GIC maturing and then consolidating the holdings in one institution; · delivered information to Michael Coleman for the solicitor's preparation of the grant of probate application, swore affidavit in support of the grant and paid probate fees; · communicated with the executor of the estate of Ann Chute's brother (William Sivak) and received monies from that estate; · sold a coin collection (\$735 proceeds received into the estate); · instructed H & R Block to prepare the deceased's post-death tax return; · sold shares received from Manulife Financial ("15 different steps required"); · considered settlement proposals of the WVA action.
- [31] Wayne kept meticulous notes of the time spent by him in both estate administration and the defence of WVA action. The notes record events occurring between December 2011 and October 5, 2013. According to those notes, Mr. Chute has spent about 187 hours of his time attending to the administration of the estate and about 29 hours dealing with the defence of the WVA action. Some of the time recorded includes calculating the time recorded.
- [32] The administration of the estate was largely complete by June 2012. The two remaining tasks are the passing of accounts and the filing of the estate's final tax return. As I understood the evidence, this last task may not be accomplished until 2015 when one of the GICs reaches maturity.
- B. The Legal Services/Accounts
- [33] The Appointment setting down this reference attaches the following bills issued by Coleman Fraser: Date: Fees (with tax): Taxable Disbursements (with tax): Non-taxable Disbursements: Total: Issued to: April 16, 2012 \$35,026.61 \$365.42 \$200.00 \$35,592.03 Estate of Ann Nora Chute August 28, 2012 \$20,492.64 \$76.41 \$25.00 \$20,594.05 Wayne Chute and Patricia Nnyamah December 10, 2012 \$5,872.72 \$10.26 \$0.00 \$5,882.98 Wayne Chute and Patricia Nnyamah January 28, 2013 \$4,043.20 \$15.59 \$0.00 \$4,058.79 Wayne Chute May 3, 2013 \$1,943.20 \$66.78 \$0.00 \$2,009.98 Wayne Chute

- [34] However, the objections raised by both Patricia Nnyamah and Sandra Chute are with respect to the first account and the charges of Michael Coleman, Q.C. in the second account dated August 28, 2012.
- [35] Both of these accounts have been paid by the executor with estate funds.
- [36] The account of May 3, 2013 is shown as a liability of the estate. However, it is my understanding that the parties have reached agreement on how the last three Coleman Fraser bills will be paid. This decision, therefore, does not address those bills in any way.
- [37] The evidence focussed on Michael Coleman's charges only.
- [38] Mr. Coleman was called to the Bar of British Columbia in 1969 and has been practicing law in Duncan since that time. Mr. Coleman describes his practice as a "very general practice in a small community".
- [39] The executor approached Coleman Fraser because of Karen's past relationship with the law firm. Mr. Coleman already knew something of the unhappy dynamics in the Chute family. During their first meeting with Mr. Coleman, Wayne or Karen Chute disclosed that Karen had prepared Ann's Will. It was also revealed that Sandra had been excluded as a beneficiary under that Will. Both of these circumstances raised "red flags" in Mr. Coleman's mind. Mr. Coleman advised the Chutes that not only might Sandra bring a WVA proceeding, but there might also be a challenge to the validity of the Will itself given Karen Chute's involvement in its preparation. Mr. Coleman spent two hours following this meeting researching the law with respect to proving a Will in solemn form.
- [40] According to Mr. Coleman, these potential challenges were factored into the fee proposed in the retainer letter dated January 9, 2012. In that letter, the Coleman Fraser agrees to provide the following services: · advising generally with respect to the law governing the administration of the estate; · assisting the executor in verifying the ownership of the assets, including searching titles; · preparing all documents required to obtain grant of probate; · applying for the grant of probate; · attending to the transmission of assets into the name of the executor; · assisting in the transfer of assets to the beneficiaries; · assisting in the first passing of accounts; · if requested, assisting in the preparation and filing of necessary income tax return for the deceased and the estate.
- [41] The law firm's charges for these services are broken down into essentially two parts or periods. The charges for services provided up to the grant of probate being issued would be 2% of the gross value of the estate based on the Disclosure Statement. Thereafter, if legal services were still required, Coleman Fraser would charge for its services on an hourly rate basis. The letter sets out the hourly rates and the names of the individual lawyers and legal assistant who might be involved in the file.

- [42] Mr. Chute was not concerned about the validity of his mother's Will and says that there were no discussions with Mr. Coleman about this potential issue being a factor in the law firm's proposed fee.
- [43] Any services relating to a WVA action would be (and were) the subject matter of a separate retainer letter. Thus, the only litigation aspect to this first retainer would be with respect to a proceeding to prove the Will in solemn form.
- [44] The retainer letter is in the standard form issued by the Mr. Coleman for these types of services. The retainer terms were never questioned by the executor.
- [45] As it turns out, Coleman Fraser's services were limited to obtaining the grant of probate. The task of preparing the probate application documents were largely delegated to Mr. Coleman's legal assistant. The application proceeded uneventfully.
- [46] As the nature of the estate assets would have disclosed, neither real nor personal property searches were strictly necessary, nor was Coleman Fraser involved in the transfer of any assets to beneficiaries.
- [47] Mr. Chute paid the April 16, 2012 bill promptly and expressed no concern about the fees charged.
- [48] The August 28, 2012 account includes charges for Michael Coleman's services. The bill states that Mr. Coleman devoted 38 hours of his time to the matter and charged \$11,400 for those services. James Coleman's time on this account is charged as \$6,270.00. Mr. Chute was "shocked a little bit" by the charges attributed to Michael Coleman in this bill. The Executor's Accounts
- [49] The executor's original accounts disclose the following: As of the date of death
- a. Assets valued at \$1,559,617.89 consisting almost entirely of monies held in various financial institutions;
 - b. No liabilities. As of June 17, 2013
 - a. Assets valued at \$1,532,814.61 held at two separate financial institutions;
 - b. Liabilities consisting of: Executor's Fees and Care Management Fee: \$44,748.15; Legal Fees and Disbursements payable to Coleman Fraser Whittome Lehan - accounts rendered October 22, 2012, January 28, 2013 and May 3, 2013: \$11,951.75; Payment of settlement funds to Sandra Chute (pursuant to WVA claim): \$200,000; Executor's out of pocket Expenses: \$1,697.11; Accountants' Fees: To be determined; Estate Taxes - CRA: To be determined; Legal Fees: To be determined.
- [50] In a supplemental affidavit, Mr. Chute deposes that certain gold coins owned were sold for less than the value reported in the initial accounting and that an account receivable from the estate of William Sivak was less than originally anticipated.

- [51] A Revised Statement of Account is exhibited to the affidavit and relied on at this hearing.
- [52] If the accounts are passed as presented, Wayne Chute and Patricia Nnyamah will each receive \$631,414.
- [53] In addition, Mr. Chute claims remuneration of \$47,052.20. Reimbursement for out of pocket expenses in the sum of \$1,697 has already been taken from the estate. The out of pocket expenses include indemnification for vehicle travel expenses (377 m x \$.53 = \$199.81) to attend to estate business. Most of the travel claims relate to attendances at either Coleman Fraser or the financial institutions holding the estate GICs. Discussion
- [54] Ms. Nnyamah identifies a few errors in the Revised accounts. However, the objections raised at this hearing primarily focused on the fees claimed in those accounts. For that reason, I will first address the determination of both the legal fees and executor's remuneration. Assessment and Review of the Legal Charges
- [55] My attempt to marry up the terms of the reference order with the evidence and submissions of the parties presents something of a conundrum.
- [56] Although I pronounced the reference order, this conundrum did not entirely reveal itself until after the hearing had commenced.
- [57] The order requires the registrar to both assess the solicitor's bill under Rule 14-1 and conduct a review under s. 71 of the LPA.
- [58] Rule 14-1 provides for the assessment of costs generally. The provisions that might apply with respect to an estate matter are Rules 14-1(6) and (3) which provide as follows: 14-1 (6) Unless the court on application otherwise orders, if costs are payable for any non-contentious business under Rule 21-5, those costs
- (a) must be assessed as special costs, and
 - (b) may be assessed without an order of the court, and subrules (3) and (5) of this rule apply.
- (3) On an assessment of special costs, a registrar must
- (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
 - (b) consider all of the circumstances, including the following:
 - (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved; (ii) the skill, specialized knowledge and responsibility required of the lawyer; (iii) the amount involved in the proceeding; (iv) the time reasonably spent in conducting the proceeding;
 - (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding; (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained; (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer; (viii) Rule 1-3 and any case plan order.

- [59] Thus, pursuant to Rule 21-5 (2) (a), the first bill issued by Coleman Fraser perhaps ought to have been the subject matter of a special costs assessment. While I have no specific recollection of the submissions made by counsel before pronouncing the reference order, I suspect that the order was made on the expectation that the probate-related bill would be assessed rather than reviewed.
- [60] However, that was not the understanding of either the executor or the opposing beneficiaries at this hearing. Rather, the parties conducted a review of the bill under the LPA.
- [61] This distinction matters because the assessment of special costs is an objective exercise, while the review of legal bills is subjective and different considerations apply when determining reasonableness. The remedies available following a review and an assessment also differ.
- [62] The other complicating issue is that the executor, representing the estate which paid the bill, does not take issue with the first bill. The beneficiaries say that they are entitled to pursue a review of the bill pursuant to ss. 64 and 70(1) of the LPA as "persons charged". No authorities were provided which specifically address that issue. In all but one of the authorities relied on by the parties, the executor did indeed pursue a review of a solicitor's account.
- [63] In *Johnston, Johnson & Co. Solicitors v. Morrison Estate*, 2009 BCSC 217, Master Young dealt with similar circumstances to the case at bar. In that case, the beneficiaries challenged the accounts of the solicitors retained by the executor to assist in the administration of the estate. The solicitors in that case sent a bill to all beneficiaries although the estate paid the bill. Master Young rejected the executor's attempt to prevent the review of the solicitors' accounts (a strategy not employed in this case). However, as revealed in the style of cause, the matter before Master Young was both an appointment under the LPA and a passing of accounts in the estate proceeding. In this case, the proper procedure might have been to take out a separate Appointment and attach the bills subject to review. Nevertheless, the order does provide the authority to proceed with a review of the Coleman Fraser legal bills and none of the parties involved raised any issues with respect to the procedure followed.
- [64] The review of the second bill is less controversial. While the estate has paid the bill, Ms. Nnyamah is a "person charged" pursuant to ss. 64 and 70(1) of the LPA. Thus, Ms. Nnyamah is entitled to review the bill regardless of Mr. Chute's position. Coleman Fraser willingly participated in the review and did not raise any limitation period defence.
- [65] Although the settlement terms were only cursorily alluded to in the evidence, the resolution of the WVA action might include the opportunity for the beneficiaries to review these two bills.
- [66] Section 71 of the LPA provides as follows: 71 (1) This section applies to a review or examination under section 68 (7), 70, 77 (3), 78 (2) or 79 (3).

- (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:
 - (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
 - (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
 - (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
 - (a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;
 - (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
 - (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including
 - (a) the complexity, difficulty or novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the lawyer,
 - (c) the lawyer's character and standing in the profession,
 - (d) the amount involved,
 - (e) the time reasonably spent,
 - (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
 - (g) the importance of the matter to the client whose bill is being reviewed, and
 - (h) the result obtained.
 - (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client. The First Account
- [67] At first blush, the contract entered into between the executor and Coleman Fraser appears to be a contingency fee agreement and thus might be more properly examined under s. 68 of the LPA. However, the payment of fees is not dependant on a certain event which may or may not occur; obtaining a grant of probate was going to happen sooner or later. Rather, the timing of the issuance of the grant dictated when an account would be issued. A similar circumstance was addressed by Master Baker in *Sabatino and Co. v. Sutherland*, 2010 BCSC 1254 ("Sabatino"). Master Baker concluded that the charges issued by solicitor ought to be reviewed under s. 71 even if the fee is percentage-based and rendered pursuant to a written

agreement.

- [68] My findings with respect to this first account are identical to those expressed by Master Baker in Sabatino at paras. 40-44. Taking into account the s. 71(4) factors, a fee of \$31, 273.76 is excessive for the work necessarily performed to obtain a grant of probate. However, the agreement freely entered by the executor with Coleman Fraser is a "very significant circumstance" which supports the charges being allowed to stand.
- [69] In the result, I decline to reduce the first account. The consequences of entering into this fee arrangement will be taken into account in setting the executor's remuneration. The Second Account
- [70] As noted, only the fees charged in the bill by Michael Coleman, Q.C. are challenged by the beneficiaries.
- [71] Given that position, a less fulsome review of the s. 71(4) factors might be in order.
- [72] Mr. Coleman acknowledges that his role in this particular retainer was supervisory and consultative. James Coleman had conduct of the WVA litigation and appears to have taken the necessary steps to bring that matter to its ultimate conclusion.
- [73] Some of Michael Coleman's time-based charges pre-date the retainer letter of June 25, 2012. The inclusion of charges for these earlier services are said to be justified in part by the terms of the original retainer letter. That is, there was an agreement that if the executor required legal services after the grant of probate was issued, those services would be charged on an hourly rate basis.
- [74] The difficulty with this position is that the retainer agreement with the executor deals with services for assisting in the administration of the estate, not for any WVA related services.
- [75] Furthermore, while I have no doubt that Mr. Coleman has accurately recorded the time spent in consultation or supervision of the WVA proceeding, I am not persuaded that all of that time ought to have been charged to these beneficiaries. I am not satisfied that the steps taken by Michael Coleman were necessary for the conduct of the WVA action, and would not exercise my discretion in favour of allowing many of these charges under s. 71(3)(a) of the LPA. Other than the fact of being a junior lawyer, there is no evidence to suggest that James Coleman required supervision or that consultation with senior counsel was necessary to advance the interests of these clients. The time charged by Michael Coleman on the second account is reduced to \$4,500. The second bill is allowed at \$12,361.32.
- [76] The usual result of a reduction on a paid bill requires the law firm to re-pay the estate the overcharge plus interest: s. 74 of the LPA. However, no submissions were made with respect to this result. Executors Remuneration
- [77] Section 88 of the Trustee Act, R.S.B.C. 1996, c. 464 provides as follows: 88 (1) A trustee under a deed, settlement or will, an executor or administrator, a guardian appointed by any court, a testamentary guardian, or any other trustee, however the trust is created, is entitled to,

and it is lawful for the Supreme Court, or a registrar of that court if so directed by the court, to allow him or her a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble and his or her time spent in and about the trusteeship, executorship, guardianship or administration of the estate and effects vested in him or her under any will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper.

- (2) The court or a registrar of the court if so directed by the court, may make an order under subsection (1) from time to time, and the amount of remuneration must be allowed to an executor, trustee, guardian or administrator, in passing his or her accounts, in addition to any other allowances for expenses actually incurred to which the trustee, executor, guardian or administrator may by law be entitled.
- (3) A person entitled to an allowance under subsection (1) may apply annually to the Supreme Court for a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets.

[78] The criteria to be considered in determining the executor's remuneration is as follows:

- 1. the magnitude of the Trust (or estate);
- 2. the care and responsibility involved;
- 3. the time occupied in the administration;
- 4. the skill and ability demonstrated;
- 5. the success achieved in the final result. (See: *Re Toronto General Trusts Corporation* (1905), 6 O.W.R. 350 at 354; *Re Morrison Estate*, 2009 BCSC 217.)

[79] The remuneration allowed an executor need not be a specific percentage of the gross aggregate value of the estate, but must not exceed the maximum 5% of that value: *Trustee Act*, s. 88(1); *Re Turley Estate* (1955), 16 W.W.R. 72 (B.C.S.C.).

[80] Similar, but not the same, considerations as set out above govern the award of the care and management fee under s. 88(3): *Re Pedlar* (1982), 34 B.C.L.R. 185 at 189 (S.C.).

[81] Mr. Chute is claiming remuneration of 2.9% of the gross aggregate value of the estate with respect to his administration. That administration is largely, but not altogether, completed. Thus, there will be a final (and potentially contested) passing of accounts. The 2.9% fee includes remuneration under both s. 88(1) and 88(3) of the *Trustee Act*.

- [82] Patricia Nnyamah suggests that Mr. Chute be awarded a total fee in the range of \$5,000 to \$8,000. While I have concluded that such an award would not be fair to the executor, there are several reasons why the sought-after remuneration ought not to be awarded.
- [83] The size of the estate is significant in comparison to many that come before the court for the passing of accounts. However, the executor's work in administering the estate was made relatively simple by the nature of the assets and Mr. Chute's familiarity with those assets. The only complications in the administration were brought about by the WVA action, but Mr. Chute would be a neutral party in his role as executor. In that neutral role, Mr. Chute might be expected to receive up-dates from counsel on the progress of that litigation but really very little executor's work was involved.
- [84] Mr. Chute did manage the assets, to the extent of rolling over the GICs and closing out bank accounts. Time was justifiably spent by the executor in gathering information for the probate application, attending the solicitor's office and various financial institutions. As well, Mr. Chute kept in communication with the beneficiaries about the estate's administration, at least until counsel become involved. Nonetheless, the actual time recorded by Mr. Chute does not mean that the estate administration ought to have required all of the time spent. As noted, some of the time recorded includes calculating the time spent recording. Nor were all of Mr. Chute's visits to the financial institutions strictly necessary. Some of that time could have been reduced by using instant tellers or combining transactions on a single day.
- [85] There was little skill or ability required in the administration of this estate -- even appreciating Mr. Chute's unfamiliarity with the role.
- [86] Similarly, there was not much required of Mr. Chute to achieve success in this estate's administration. The financial assets were to be preserved, but that was easily done. The account receivable from William Sivak's estate was called in, but that process was initiated before Ann Chute's death. Mr. Chute achieved success in selling the coins and the Manulife shares.
- [87] The real problem with the sought-after remuneration lies with Mr. Chute's decision to accept the terms contained in the first retainer agreement with Coleman Fraser. The result of this agreement is that the estate had paid more than \$31,000 for legal costs that would probably be assessed at a fraction of that amount under Rule 14-1.
- [88] Looked at another way, the 2% paid in fees for obtaining a grant of probate together with the claimed remuneration of 2.9% of the gross value of the estate means that the estate (and thus the beneficiaries) will be paying close to the 5% maximum remuneration allowed under the Trustee Act for the work involved in administering this very simple estate.
- [89] It is appreciated the Mr. Chute is not sophisticated in terms of either estate administration or dealing with lawyers. However, the bargain struck with Coleman Fraser is a poor reflection on the executor's ability to administer the estate to the best advantage of the

beneficiaries. There was no effort made by the executor to negotiate the proposed fee or indeed consider other solicitor's quotes for the same services. The responsibility for this bad bargain lies with the executor and his remuneration ought to reflect a consequence for making that bargain.

- [90] Taking all of these factors into account, I find that Mr. Chute is entitled to the total sum of \$15,000 as executor's remuneration. That sum includes the out of pocket expenses for which Mr. Chute has already been reimbursed. Passing of the Accounts
- [91] Patricia Nnyamah correctly identified the following errors in the Revised accounts: · A4 ought to be \$735 (the amount received from the sale of the coins, not the appraised value); · A5 ought to be \$11,929.83 (the amount actually received from the William Sivak estate); · A7 ought to be \$6,526 (the amount received from the sale of the Manulife shares).
- [92] The Coleman Fraser bill of August 28, 2012 has been reduced to \$12,361.30 and should be reflected as such in the accounts.
- [93] The executor's remuneration (F2 and F5) is determined at \$15,000.
- [94] The account of Coleman Fraser issued May 3, 2013 (F4) is not a liability of the estate.
- [95] With these corrections, the monies to be paid to Patricia Nnyamah and Wayne Chute from the residue (Proposed Distribution) will be adjusted upwards. I am unable to determine the precise amount of this adjustment without knowing how the executor intends to address the Coleman Fraser second account. Neither the parties nor Coleman Fraser made any submissions on this particular issue. Written submissions will be required unless the parties can reach agreement on the appropriate remedy to address the now determined overcharge on this bill. Summary
- [96] In accordance with the order of July 25, 2013, I hereby certify that the accounts of the executor for the period of December 24, 2011 to June 20, 2013 are passed subject to the corrections and adjustments as determined in these reasons.
- [97] The executor is awarded total remuneration for this period of \$15,000 inclusive of out of pocket expenses and the care and management fee.
- [98] The bill of Coleman Fraser issued April 16, 2012 is allowed as presented.
- [99] The bill of Coleman Fraser issued August 28, 2102 is allowed at \$12,361.32.
- [100] As the parties are aware, there is no prescribed form of certificate to be filed. The parties are at liberty to present their own form of certificate if necessary.

- [101] The reference order provides that the executor receive special costs "for the application." That is a usual term and intended to provide the executor with indemnification (in part or in whole) for the costs associated with the passing of accounts since the exercise is a necessary step in the administration of the estate. Those special costs were not addressed at this hearing and may be the subject of a future assessment.
- [102] The reference order does not specifically address costs relating to this passing of accounts hearing (or if that is included in the "application"). Typically, special costs of all of those involved in the passing of accounts are paid from the estate. However, the parties are at liberty to provide written submissions with respect to those costs, including any argument on the registrar's jurisdiction to consider this issue given the absence of any precise term in the reference order.
- [103] The parties are to provide their written submissions, together with any submissions addressing the remedy for the LPA review outcome, to the Manager of Court Scheduling at the Victoria Registry on or before April 11, 2014. The parties are further directed to advise the Manager of Court Scheduling of any resolution of these issues. "C.P. Bouck" Master C.P. Bouck

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