SUPREME COURT OF YUKON

Citation: *Mitchell Estate (Re)*, 2017 YKSC 25 Date: 20170403
S.C. No. 1175-93
Registry: Whitehorse

IN THE MATTER OF THE ESTATE

OF

PAUL ANTHONY DOUGLAS MITCHELL

LATE OF WHITEHORSE, YUKON TERRITORY

DECEASED

Before Mr. Justice L.F. Gower

Appearances:

Kathleen M. Kinchen	Counsel for the Executor
Desire Mitchell	Self-Represented
Traci Dekuysscher-Mitchell	Self-Represented
Jay Mitchell	Self-Represented
Reuben Mitchell	Self-Represented

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for an order passing the accounts of the applicant executor, Vivian Lee Kitchen, respecting her administration and management of the estate of Paul Anthony Douglas Mitchell, for the period from January 14, 1994, when probate was granted, to January 24, 2017, being the second and last day of the hearing for the application to pass the accounts. The notice of application refers to Rule 64(58) of the *Rules of Court* as one source of authority for the application. However, this must be a typographical error, as it is sub-rules 64(61) to (63) which authorize and specify the requirements for an application for passing of accounts. The applicant also referred to

the *Estate Administration Act*, R.S.Y. 2002, c. 77, as the additional source of authority for the application.

[2] There are four adult beneficiaries to the estate: Desire Mitchell; Traci Dekuysscher-Mitchell; Jay Mitchell; and Reuben Mitchell. They are each to receive an equal share of the residue of estate. As I did in the hearing, for the sake of convenience and simplicity, I will refer to the parties by their first names. Only Reuben has consented to the passing of accounts. The other three beneficiaries object for various reasons, which I will get into shortly. In general, the objectors all allege that Vivian was not duly diligent in the exercise of her fiduciary duty as a trustee of the estate, which has resulted in it taking 23 years to be finalized.

[3] The statement of account sought to be passed is based principally upon a trust reconciliation, dated as at March 8, 2010, which was prepared by a chartered accountant on Vivian's instructions. At that time there was $12,250.54 left in the estate for distribution.

[4] Vivian's lawyer on this application, Kathleen Kinchen, reported that there was $4,830.13 left in the estate as of January 6, 2017. There was no particular explanation for the decrease in the residue of the estate since the trust reconciliation of March 8, 2010. As there is no evidence of any further accounting for additional payments to the beneficiaries since that time, I am assuming that the reduction is the result of further legal fees incurred by the estate after the last trust reconciliation.

[5] The diligence required of a trustee/executor in administering a trust/estate is that of a person of ordinary prudence in managing their own affairs. A trustee's primary duty is the preservation of the trust assets using ordinary skill and prudence, as well as

common sense: see *Fales v. Wohlleben Estate,*[1977] 2 S.C.R. 302, at p. 750; and *Reinisch Estate, (Re)*, 2011 MBQB 200, at para. 56. Trustees are expected to act honestly, conscientiously and reasonably and in what they feel is in the best interests of the beneficiaries: *Kinakh v. Kurta* (1995), 103 Man. R. (2d) 22 (Q.B.). Trustees are responsible throughout the administration of an estate for maintaining reasonable and appropriate costs and accounting to the beneficiaries for expenditures made out of the estate's resources: *Sklar Estate,* 2010 ABQB 544.

[6] The global issue in this application is whether Vivian has met her fiduciary duty to manage the assets of the estate reasonably and appropriately. The more specific issues are complaints by the objecting beneficiaries about how Vivian has handled the following matters:

1) Lawyers' and accountants' fees;
2) Mega Mart (a corporation formerly owned by Paul);
3) Maintenance and sales of vehicles;
4) Preferential treatment to Reuben;
5) Failure to provide information over 23 years; and
6) Executor's remuneration.

CHRONOLOGY OF EVENTS

[7] According to the documentary record before me, the chronology of events is as follows.

[8] Paul Mitchell died on October 28, 1993. He had been in a common-law relationship with Vivian for a number of years, until the couple separated in 1981.

Reuben is the child of Paul and Vivian's common-law relationship, and the youngest beneficiary. Desire, Traci and Jay are Paul's children from a previous relationship.

[9] Vivian only realized that Paul had named her as executor to his estate shortly before his death. She reluctantly agreed to act in that capacity. Indeed, about four months after Paul's death, Vivian stated that she considered removing herself as executor, but received legal advice that this was not possible.

[10] In any event, Vivian obtained a grant of probate on January 14, 1994. In obtaining that order, Vivian swore an affidavit deposing that the approximate net value of the estate at that time was just over $25,500. She further deposed that this was subject to the possibility of Paul having some equity in the family home described as 125 Ponderosa Drive, which was then legally registered in the name of Robert Walters, a lawyer who I understand previously did legal work for Paul. Vivian was represented by estate lawyer Norma Farkvam when she obtained the grant of probate.

[11] There is also evidence that, beginning in January 1994, Vivian had each of Desire, Traci and Jay identify on separate lists the items of physical property that they wished to retain from Paul, pending the final completion of the estate administration. Vivian testified that Reuben was not interested in such items at that time.

[12] Also in January 1994, Vivian was advised by Norma Farkham that she would have to hire a separate lawyer to deal with the dispute over the ownership of the family home at 125 Ponderosa Drive.

[13] On May 18, 1994, Vivian sent a fax to Desire, Traci and Jay stating as follows:

> Hi guys. Here are some papers you are asking for lately. Let me know what other ones you want as I have collected most legal documents now. Love Vivian.

[14] On February 15, 1995, Vivian wrote to the Canada Revenue Agency ("CRA") to seek tax clearance certificates for both Paul and Mega Mart, a company formerly operated by Paul. She explained in that letter that she had been unable to locate all the records for Paul or Mega Mart and was unable to file tax returns for either. Vivian further indicated that Mega Mart filed its last corporate tax return in 1989, at which time it reported a taxable loss of $711,551. She further stated that she understood the company continued to suffer massive losses until its final collapse and that Paul had little if any income after the collapse of the business.

[15] Vivian testified that her experience with the initial management of the estate was "horrendous". She had never administered an estate before. Vivian testified that she put many hours and days of labour into the task during her time off. She held meetings with the beneficiaries, rented out and managed 125 Ponderosa Drive and another rental property (referred to as Lots 78 & 79), dealt with six other pieces of real property associated with the estate, dealt with tax issues, and arranged for appraisals and sales of various pieces of property. Vivian found the task mentally challenging. She also testified that Norma Farkvam, who was an experienced estate lawyer, told her that it was one of the most complicated estates she had ever seen, but that she felt Vivian was doing an "exemplary job". While these last two points of testimony could be accused of being self-serving, they are corroborated by statements made in a later letter from Norma Farkvam, dated April 1,1999, which I refer to below.

[16] On May 22, 1998, Desire sent an email to Norma Farkvam, which included the following statements:

> … I am requesting information as to the status of my late father's estate… I have had basically no contact with Vivian

> Kitchen since my father passed away. I have requested a copy of the will and a list of the few items that I requested from the estate, but that was many years ago. I have not been told or updated on the status of the estate for over 4 years now…

[17] On June 28, 1998, Vivian responded with a fax to Desire stating:

> Regarding your formal request for information of the estate I believe that at this point I have been following your wishes of not communicating to you directly. Not being allowed to have your address or phone number left me with communicating through Traci regarding the estate. It is my understanding that you have been fully informed in this manner to date.
>
> As to the current status of the estate I am confident it will be completed by the end of July at which time you will be given a complete accounting. Barring unforeseen circumstances, this should allow the last outstanding items to be cleared up and hopefully all monies owed to the estate to be collected.
>
> I hope this meets with your approval. Thank you for your inquiry.

[18] On August 4, 1998, Desire's lawyer, Gerald Nori, wrote to Norma Farkvam requesting a copy of Paul's will and a report on the status of the estate administration. Desire incurred legal fees of $741.17 for that work.[1]

[19] On August 10, 1998, Vivian wrote a letter to the beneficiaries enclosing a "Cash Flow Statement" regarding the income and expenditures of the estate to that point in time. Vivian testified that she prepared this Cash Flow Statement on her own, without the assistance of an accountant, in order to save costs for the estate. She also enclosed a copy of the probate order and a copy of the will. The net value of the estate at that time was believed to be $116,382.56. This was to be divided equally by the four

[1] After the hearing, Vivian tendered a document purporting to be a fax cover sheet, which suggests she faxed a copy of Paul's Will to Desire. However, Desire, Traci and Jay all objected to this being admitted as an exhibit, and noted that were was no proof it was actually faxed to Desire. Accordingly, I have declined to admit this document as an exhibit.

beneficiaries and Vivian included a separate statement indicating that each was expected to receive $29,095.64 as their equal share. The statement also indicated what amounts of cash and assets taken in kind had already been received by the beneficiaries to that point:

TOTAL VALUE OF ESTATE			$116,382.56
Each child is to receive 25% of the total value of the estate $29,095.64			
Jay Mitchell	Total		$29,095.64
		Cash Paid Out	<$ 1,056.00>
		Assets	<$19,020.00>
		Cash Value	$ 9,019.64
Traci Dekuysscher	Total		$29,095.64
		Cash Paid Out	<$ 4,667.16>
		Assets	<$ 4,330.00>
		Rent	<$ 7,200.00>
		Cash Value	$12,898.48
Desire Mitchell		Total	$29,095.64
		Cash Paid Out	<$ 2,187.07>
		Assets	<$ 2,620.00>
		Cash Value	$24,288.57
Reuben Mitchell	Total		$29,095.64
		Cash Paid Out	<$ 200.00>
		Assets	<$ 2,095.00>
		Cash Value	$26,800.64
Balance Cash Value			$73,007.33

[20] On September 7, 1998, Desire sent a fax to Vivian stating:

> I have looked over Tracey [as written], Jay & Reuben's lists and agree with their revisions. I have also revised in accordance with their lists. Some things I never asked for or received so I crossed them out. I hope the fax prints clearly, if not fax me back and I will type up a new list. I do not know if there is anything else I was supposed to sign or do, so I will wait for word as to the next step.

[21] On February 22, 1999, the three objecting beneficiaries sent a letter to Vivian, referring to her earlier letter of August 10, 1998, listing 16 points about which they were seeking further information. So far as I can tell, other than Desire's fax of September 7, 1998, this was the first response to Vivian's initial accounting of the estate management to August 10, 1998.

[22] On March 5, 1999, Norma Farkvam wrote to the beneficiaries providing information on five of the 16 points queried by the objecting beneficiaries.

[23] On April 1, 1999, Norma Farkvam again wrote to the beneficiaries with information responding to the final 11 queries. The only matter which could not be answered at that time was to do with the estate's final tax clearance certificate, since it had not yet been obtained. There are three points of note from this letter.

[24] First, it enclosed a second "Cash Flow Statement", again prepared by Vivian herself for the purpose of saving costs, detailing the estate's income and expenditures to February 8, 1999.

[25] Second, Norma Farkvam explained that she had advised Vivian to pay herself a fee for her administration of the estate:

> The Executor is entitled to remuneration for time, care and efforts expended in administering the estate, under the Trustee Act of the Yukon Territory. By law, such remuneration tends to be in the range of 1% to 5% of the gross value of the estate, the disbursements made by the estate, and income earned by the estate. In addition, Trustees are entitled to a sliding-scale per centage for estate funds administered each year while the estate is being settled.
>
> As Vivian Kitchen's lawyer, I have encouraged her to take remuneration for her efforts. She may choose to do so.

[26] The third notable point from Norma Farkvam's letter is her summary of the complexity of the estate, presumably offered as an explanation as to why the matter was taking as long as it was:

> This was a very unusual and difficult estate to settle. There were questions as to ownership of many of the assets. There were complicated tax questions to be answered. There was a threatened tax audit. There were several different litigation matters to be investigated or settled. In all of this there were crates and pallets and boxes of old information to be sorted and disposed of. Your father was a businessman involved with various ventures which had to be determined. It is not uncommon in such cases to take years to complete such an administrative job.

[27] The Cash Flow Statement prepared by Vivian and enclosed with this letter corroborates what Norma Farkvam said about the legal complexity of the estate. The various legal fees identified in that Statement are described as follows:

> Legal Fees:
> re Mitchell vs. Koziuk [Paul's former romantic partner]
> re Mitchell & MegaMart vs. Koziuk
> …
> re Estate vs. Walters
> re Will & Affidavit
> re General Estate Fees
> re MegaMart
> re Sale of Lot 78 &79
> re Sale of 125 Ponderosa

[28] There are no entries to that date (February 8, 1999) for accounting fees, corroborating that Vivian had done all of the accounting work to that point in time by herself.

[29] As for the payments made to the beneficiaries, the Cash Flow Statement records that the beneficiaries to that date had received the following cash payments (Note: Traci

was credited with having received $7,200 by way of unpaid rent, for the period she resided in one of the estate's properties):

Traci	$14,592.81
Desire	$ 5,187.07
Jay	$ 956.00
Reuben	$ 200.00

[30] I take judicial notice of the fact that Norma Farkvam left Whitehorse to practice in Kelowna, British Columbia in 1999.

[31] On October 23, 2000, a year-and-a-half after Norma Farkvam's letter of April 1, 1999, Traci instructed lawyer John Laluk to file a petition against Vivian seeking, among other things, an order that Vivian pass the accounts of the estate by providing audited financial statements, as opposed to the "Cash Flow Statements" which she had provided previously. According to the documentary record before me, there was no response by any of the objecting beneficiaries to Vivian's Cash Flow Statement to February 8, 1999, prior to the filing of this petition. In any event, Vivian retained counsel to respond to the petition. She was advised by her counsel to bring a separate action requiring John Laluk to withdraw as counsel for the petitioner due to a conflict of interest. Ultimately, Mr. Laluk did so and the petition did not proceed.

[32] Traci recalls that there was a hearing before a judge in December 2000, in which the judge ordered Vivian to present the beneficiaries with an accounting. However, there is no evidence in the relevant court file that any such order was ever made.

[33] On March 9, 2001, Vivian wrote to Traci, care of Traci's then law firm, enclosing 12 items of financial information about the estate, principally a trust reconciliation prepared by a chartered accountant as at September 8, 2000. This was presumably in response to the earlier demand from John Laluk that she provide audited financial

statements to obtain an order passing the accounts of the estate. There are a few interesting points arising from the financial statements enclosed in this letter.

[34] First, the net value of the estate available for distribution to the beneficiaries had, by that time, been reduced to $78,973.63, which, divided by four, resulted in a proposed distribution to each of the beneficiaries of $19,743.41. As at November 24, 2000, the beneficiaries were noted to have already received the following distributions:

Proposed Distribution

	Cash Previously Distributed	In-kind Previously Distributed	Expenses Related to Cash on Hand	Total Previously Distributed
Desire Mitchell	$ 3,033.00	$ 2,620.00	$ 0.00	$ 5,653.00
Reuben MItchell	$ 200.00	$ 2,095.00	$ 0.00	$ 2,295.00
Traci Mitchell	$14,592.81	$ 4,330.00	$ 0.00	$18,922.81
Jay Mitchell	$ 956.00	$18,670.00	$ 96.30	$19,722.30

[35] Secondly, we see for the first time that there were accounting fees paid out by the estate. Ordish and Associates had been paid $481.50, which I understand was for chartered accountancy relating to tax issues for Mega Mart; and MacKay and Partners had been paid $2,000, which I understand was for the preparation of the trust reconciliation.

[36] The third point of interest in this financial information is that it included, also for the first time, the basis upon which Vivian sought to compensate herself for her executor's fees. Her calculations appear to have also been prepared by the chartered accountant. They are based on a percentage of the value of the capital assets, a percentage of the amount of revenue received, and a percentage based on the care and management of assets over the entire period from the date of Paul's death. What is

noteworthy about the calculations is that Vivian claimed 4.5% of the net value of the capital assets, when she had been previously advised by Norma Farkvam that she could claim up to 5% of the gross value of the estate. She also only claimed 4.5% of the amount of revenue received, when she could have claimed up to 5% of those amounts.

[37] On April 1, 2001, on the basis of the information in Vivian's letter of March 9th, just referred to, Reuben signed a release and consent to the passing of accounts.

[38] However, on the documentary record before me, there was no written response by any of the objecting beneficiaries to this accounting from Vivian of March 9, 2001, until Desire wrote a short letter to Vivian on March 7, 2010, which included the following statements:

> I am writing to ask about the status of my dad's estate. I have spoken to Tracey [as written] and Jay, and they have both agreed to sign off on the estate. We are all wondering about whether there has been any interest accrued, as it has been 17 years…

[39] As Vivian conceded in her testimony, it is possible that there were other occasional telephone calls or emails between her and the objecting beneficiaries over that nine year period, which have not been brought into evidence. However, I infer that there was nothing of substance raised or discussed, because if there had been, then I would have expected one of the parties to have referred to same in their evidence.

[40] Vivian testified that during this nine year period, there were several matters which likely caused the objecting beneficiaries to become distracted from estate matters. Principally, Traci and Desire suffered through numerous health and personal issues. Vivian was also under the impression that she was not to contact Desire directly, at her request. Vivian testified that to prepare an audited financial statement would have cost

the estate an additional $10,000, so she held off on doing so. She said she did not know whether to pursue the passing of the accounts aggressively or simply wait for the consents of the beneficiaries. Obviously, she opted for the latter.

[41] In any event, after receiving Desire's letter of March 7, 2010, Vivian again instructed her chartered accountant to prepare an updated trust reconciliation to March 8, 2010. As I noted at the outset, it is this trust reconciliation which is the basis for the current application for the passing of accounts.

[42] On December 13, 2012, Vivian forwarded the updated trust reconciliation to each of the beneficiaries by email.

[43] On January 24, 2013, Vivian emailed Traci indicating that Desire and Reuben were both interested in concluding the estate, but that she had not yet heard from Traci or Jay. Traci responded on the same date that she had a question regarding the apparent absence of accumulated interest earned on banked monies.

[44] On May 16, 2013, Desire sent an email to Vivian apparently indicating that she was prepared to consent to the finalization of the estate, but complaining about a number of problems in her life at that time, including health issues, student debt, an abusive relationship and a divorce. The email indicates the extensive difficulties that Desire had recently gone through, and the level of anger that she felt as a result of the delay in the completion of the administration of the estate.

[45] Vivian next retained Kathleen Kinchen, who wrote to the beneficiaries on January 28, 2014, seeking their consents to the passing of accounts, or alternatively their specific objections to doing so.

[46] On March 30, 2014, the three objecting beneficiaries wrote to Ms. Kinchen describing a number of general complaints that they had regarding their relationship with Vivian. They also raised 185 specific objections, which were cross-referenced to line items on the 2010 trust reconciliation.

[47] On April 24, 2015, Ms. Kinchen wrote to the objecting beneficiaries, providing answers to 102 (by my count) of their objections.

[48] On May 3, 2015, Desire emailed Ms. Kinchen complaining that her response of April 24, 2015 was "incomplete" and that she required further "documentation".

[49] On August 30, 2015, Ms. Kinchen wrote again to the objecting beneficiaries, providing additional responses (120, by my count) to the remaining objections, as well as additional information.

[50] On October 10, 2015, Ms. Kinchen sent a further letter to the three objecting beneficiaries with additional documents attached, however a copy of that letter is not in evidence before me.

[51] On October 15, 2015, Traci sent an email to Ms. Kinchen, presumably in response to her letter of October 10, 2015. The email included the following statements:

> These attachments are a waste of time.
> You both go back to our original request for information
> STILL not responded to!
> …
> I am for one tired of this bullshit.
> …
> Plain abuse of your position [referring to Vivian]
> …
> Really…unprofessional and childish
> Have a nice damn day

[52] I have cross-referenced all of the responses provided by Ms. Kinchen which are in evidence to the corresponding line items in the trust reconciliation of March 8, 2010.

So far as I can tell, all of the questions from the objecting beneficiaries have been satisfactorily answered.

[53] On April 21, 2016, I presided over a case management conference attended by all the parties, either personally or by telephone. Ms. Kinchen indicated that she did not have the consents of the objecting beneficiaries and was seeking direction on how to bring the matter to a close. She further indicated that, at that time, there was only about $8,000 left in the estate for distribution. I reminded the parties about Rule 1(6), which states:

> (6) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,
>
> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
>
> (c) the complexity of the proceeding. (my emphasis)

At the close of the case management conference, we scheduled July 21, 2016, as the date for the hearing of the application for passing of accounts.

[54] On July 21, 2016, I am informed that the hearing could not go ahead because Vivian and Reuben were both recovering from significant medical procedures. Unfortunately, Traci had already flown to Whitehorse for the hearing, with her children. Accordingly, she seeks reimbursement of $570.41, being the cost of the ticket for herself. The application was adjourned.

[55] On October 25, 2016, a case management conference was held with Justice Maisonville to determine whether the matter would go ahead later that week. Desire and Traci both appeared by telephone, and indicated that they had purchased tickets to fly up for the hearing. Ms. Kinchen applied for a further adjournment, because she was about to fly to Vancouver for emergency surgery. The adjournment was granted to January 23 and 24, 2017, peremptory on Vivian. Ms. Kinchen was directed to file her client's materials by no later than November 1, 2016. The beneficiaries were directed to file their materials, if any, by December 1, 2016.

[56] On November 1, 2016, Vivian filed her statement of account for the estate, as well as her affidavit in support to pass the accounts.

[57] On December 1, 2016, Reuben filed his affidavit, followed by each of Desire and Traci on December 2nd, and finally Jay on December 5, 2016.

ANALYSIS

[58] According to the *British Columbia Probate and Estate Administration Practice Manual, 2016 Update*, Volume 1, at p.15-17, the court has considerable discretion to tailor the procedure used to resolve the issues in dispute on an application to pass the accounts. The court may resolve any such disputes on a summary basis. The respective onuses on the executor and the objecting beneficiaries are described as follows:

> The personal representative [executor] should make an effort to define the issues in dispute and to address and satisfy any questions raised by the persons to whom the duty to account is owed. Likewise, if a beneficiary does not approve the accounts, he or she should identify the objections to the accounting and provide that list of objections to the court and the personal representative in advance of the hearing… Objections to the accounts should

> not be vague and general. A beneficiary should specify with precision each item in the accounts with which he or she takes issue, the reason for the objection, and the adjustment he or she asks the court to make to the accounts… [citations omitted; my emphasis]

[59] As I noted above, the specific questions which the objecting beneficiaries raised in their letter of March 30, 2014 have, by and large, been answered by Ms. Kinchen's letters of April 24 and August 30, 2015. At any rate, there have been no specific continuing objections or disputes with any of the answers that have been provided.

[60] The remaining areas of dispute are more general, and can be grouped into the following topics:

1) Lawyers' and accountants' fees;

2) Mega Mart;

3) Maintenance and sales of vehicles;

4) Preferential treatment of Reuben;

5) Vivian's failure to provide information over 23 years; and

6) Vivian's remuneration.

1) Lawyers' and accountants' fees

[61] Desire deposed in her affidavit that Vivian had hired six different lawyers (not including Ms. Kinchen) and eight different accounting firms, for over $69,615.37 in fees. She later deposed that Vivian had "thrown away $80,000 plus on lawyers and accountants".

[62] It is true that the estate had many various legal issues to deal with, including:

- the administration of the estate generally;
- Mega Mart's financial and tax status;

- a threatened tax audit;
- the separation between Paul Mitchell and Betty Koziuk;
- the legal dispute between Paul Mitchell and Bob Walters;
- a wrongful dismissal dispute with a former employee of Paul Mitchell;
- the maintenance and sale of 125 Ponderosa Drive;
- the maintenance and sale of Lots 78 & 79; and
- defending the petition filed by John Laluk in October 2000.

[63] This necessitated retaining eight different lawyers over the years, including:

- Norma Farkvam;
- Lorne Austring;
- Robert Pitzel;
- Ron Veale;
- Mark Radke;
- Laura Cabott;
- Stephen Phillips; and
- Gary Whittle.

[64] I have added up all of the line items for legal fees in the trust reconciliation to March 8, 2010, and by my calculations these fees total $44,615.37. Many of these fees ($37,872.79) were incurred and listed in Vivian's first Cash Flow Statement to August 10, 1998.

[65] Further, as I understand it, the beneficiaries have now been provided with copies of the actual statements of account detailing the work done for the estate in each case.

Again, there has been no quarrel by any of the objecting beneficiaries to any of the particulars referred to in those statements of account.

[66] It must also be remembered that it was Norma Farkvam's opinion, as an experienced estate lawyer, that this was "a very unusual and difficult estate to settle". Accordingly, in my view, although the total legal fees are indeed substantial, it appears that all of the legal work performed was necessary for the proper administration of the estate.

[67] As for Desire's complaint that eight different accounting firms were retained by Vivian, this is simply incorrect. The only three accountants involved with the estate were Walter Wilhelm, Ordish and Associates, and MacKay and Partners. Again, I have added up the line items referring to accounting expenses in the trust reconciliation to March 8, 2010 and, by my calculations, the total spent on accountants to that point in time was $4,581.74. There would have been some additional accounting fees for the preparation of the trust reconciliation itself, but I do not expect they would have been substantial, since it was largely an update of the previous trust reconciliation. In my view, these fees also appear to be proper and reasonable.

[68] I conclude that the objections to the legal and accounting fees by the three objecting beneficiaries are vague, general, inaccurate and exaggerated.

2) Mega Mart

[69] As I understand it, the principal complaint of the three objecting beneficiaries here is that Vivian allowed Mega Mart to lapse as a corporate entity, when it had accumulated tax liabilities of approximately $800,000, which might have had some value to a prospective purchaser. The argument is that a purchaser could have set-off

future profits from the company against this accumulated tax liability, and therefore could avoid paying income taxes for several years.

[70] At one point, Jay expressed an interest in purchasing Mega Mart, but he apparently changed his mind and ultimately did not pursue it.

[71] There is no evidence that any other person or entity ever expressed an interest in purchasing Mega Mart.

[72] It must be remembered here that the diligence required of an executor in this situation is that of a person of ordinary prudence in managing their own affairs. The executor is expected to use ordinary skill and common sense.

[73] In this case, Vivian only decided to allow Mega Mart to lapse as a corporate entity after receiving accounting advice from Walter Wilhelm and Ordish and Associates, as well as legal advice from Norma Farkvam and Lorne Austring. Vivian was not acting on a lark in making this decision, but rather prudently followed the advice of her lawyers and accountants. Further, it is only common sense that if there are no purchasers for a particular trust asset, then that trust asset can properly be considered to have little or no value. Accordingly, I am satisfied that Vivian's actions in this regard were necessary, proper and reasonable.

3) Maintenance and sales of vehicles

[74] The complaint of the three objecting beneficiaries here is that there were three particular vehicles which were initially appraised and valued by Vivian, but which were subsequently sold for much less than the initial estimated value, causing a loss to the estate. The vehicles were:

	Initial estimated value	**Final sale value**
5-ton truck	$10,000.00	$ 3,075.81
1980 Marquis Motorhome	$ 8,000.00	$ 3,500.00
1976 Mercedes	$ 5,000.00	$ 300.00
Totals:	$23,000.00	$ 6,875.81

The argument is that Vivian allowed the estate to incur a loss of $16,124.19, being the difference between the two above totals.

[75] Vivian testified that she consulted with dealerships and automobile repair shops in coming up with her original estimates. However, it also appears that the estimates varied significantly. For example, with the 1976 Mercedes, Vivian testified that she received estimates ranging from $1,500 to $5,000, and all the way up to $10,000, if the vehicle was in mint condition. The fact that she used the estimate of $5,000 indicates to me that she was tending towards using the higher end of the average values for all three vehicles. However, I agree with Vivian's testimony that the ultimate test of what a vehicle is worth is what it will sell for on the open market, not what it was originally estimated to be worth.

[76] There are further complicating factors relating to this issue.

[77] First, with respect to the 5-ton truck and the motorhome, Vivian testified that Jay initially expressed an interest in taking these vehicles as part of his share of the estate. Vivian said that she advised Jay against this, because the vehicles would soon depreciate below their original estimated values. In any event, it further appears that Jay actually took physical possession of the motorhome for a period of time. Ultimately, both the motorhome and the 5-ton truck were sold for the values stated above. Again, the

fact that they were sold for less than their original estimated value does not mean that there was a real loss to the estate for the difference. Rather, it indicates to me that those were the respective values of the vehicles at the time of their sales.

[78] As for the 1976 Mercedes, Traci initially expressed an interest in taking this vehicle as part of her share of the estate. While there was a dispute in the evidence about whether Traci actually had physical possession of the vehicle at any time, it does not appear to be disputed that the only offer to purchase that vehicle was for the price of $2,000. Further, that offer was not accepted by Vivian. I infer that the reason the offer was not accepted is because Traci did not want the vehicle sold because she still had an interest in it. Otherwise, there would have been no reason for Vivian not to sell the vehicle for $2,000. In the result, I understand that the vehicle was allowed to sit outside for some time and that its value was diminished by squirrels chewing on some electrical wires. Ultimately, when the time came to get rid of it, Vivian could only obtain a price of $300 from an auto wrecker.

[79] While the evidence surrounding the 1976 Mercedes is unclear, I understand that the beneficiary most upset about the issue is Traci. However, as I have concluded above, Traci prevented the sale of the vehicle when it still had some substantial value. Therefore, Traci's argument that Vivian allowed the vehicle to deteriorate while in her care is substantially undermined.

4) Preferential treatment of Reuben

[80] Beginning in approximately June 2001, Vivian began making advances to Reuben as part of his share of the estate. As far as I can tell from the trust reconciliation to March 8, 2010, Reuben received 14 advances over the period from June 2001 to

February 2004, totalling $16,126.58. Vivian testified that this was during a period of time when Reuben was attending university and had additional expenses related to that attendance. The complaint of the objecting beneficiaries is that these monies were paid to Reuben without their knowledge or consent. On the other hand, Traci has complained that when any of the objecting beneficiaries wanted to receive advances on their inheritances, they had to receive the consent of all three of the others. In particular, she deposed in her joint affidavit sworn with Desire and filed October 24, 2016:

> … While us three beneficiaries, named in this document, had to receive authorization of all the named beneficiaries to acquire any and all advances received from the estate…(my emphasis)

[81] The problem with this sweeping allegation is that it is not corroborated by either Desire or Jay. Desire complained in her affidavit that when she called Vivian to request an advance on one occasion when she was living in a woman's shelter with her children, "I was told twice, she was too busy." Desire did not depose that Vivian refused because she did not yet have the consents of the other three beneficiaries. Nor does Jay corroborate what Traci has deposed to here. Rather, he complained that he expected that some sort of communication should have been provided regarding the payments out to Reuben, but he did not complain that any advances he received were contingent on the consent of the other three beneficiaries. In addition, Traci herself was inconsistent about this issue when she swore her affidavit in support of her petition filed in late 2000. In that affidavit she deposed that she had been refused requests for advances by Vivian, but she said nothing whatsoever about the fact that Vivian was requiring the consents of all of the other beneficiaries before making advances.

[82] Finally, Reuben himself has deposed that he has no knowledge of Vivian ever requiring that advances be approved by the beneficiaries and that he had never given authorization nor been required to authorize any of the advances received by the other beneficiaries. This information remains uncontested by the objecting beneficiaries, as they did not seek to cross-examine Reuben on the point at the hearing.

[83] Therefore, I do not accept Traci's allegation in this regard.

[84] Furthermore, it is apparent from Vivian's initial Cash Flow Statement of August 10, 1998 that the three objecting beneficiaries were actually the first to be paid out in significant sums either by way of assets or cash, as I have noted above at para.19 of these reasons. In addition, in the trust reconciliation to September 8, 2000, it is still apparent that Reuben had received the least of the four beneficiaries, in total distributions from the estate, to that time: see para. 29 above.

[85] Therefore, I find there is no evidence that Vivian treated Reuben preferentially.

5) Vivian's failure to provide information over 23 years

[86] I am not so much concerned here that Vivian failed to produce information during her management of the estate for the last 23 years, but rather that there are two significant periods of largely unexplained inactivity. The first is the period of nine years between Vivian's letter of March 9, 2001, which enclosed the trust reconciliation as at September 8, 2000, and Desire's response letter to Vivian of March 7, 2010. The second is the period of approximately two-and-a-half years between Desire's response letter and Vivian's reply on December 13, 2012, which enclosed the updated trust reconciliation to March 8, 2010.

[87] The law in the Yukon at the time of probate did not provide a statutory requirement that the executor pass the accounts. Similarly, case law indicates that, depending on the jurisdiction, the executor may be under no requirement to initiate the passing of accounts. Nevertheless, the lack of a requirement does not mean that, at times, and especially in litigious circumstances (i.e. the petition filed by Traci in late 2000), it would not be prudent for an executor to have accounts approved by the court. Indeed, the passing of accounts is typically employed by competent trustees to achieve closure and discharge fiduciary duties for the time period under examination: See *Widdifield on Executors and Trustees,* 6th Ed., Appendix A, para. 4, p.1.

[88] At the time of probate there was also no statutory time frame set for the distribution of an estate, although since then, the *Trustee Act*, R.S.Y. 2002, c. 223, s. 55(1) has been amended to provide that an executor must, unless the court otherwise orders, pass the accounts within two years from the date of probate or within two years from the date of their appointment.

[89] Furthermore, an executor is not required to wait until they obtain the consents of the beneficiaries in order to apply to have the estate accounts passed. Rather, the executor has a positive obligation to administer the estate in a timely fashion. If the executor is in doubt as to how to proceed, s. 48(1) of the *Trustee Act*, authorizes them to apply to a judge, without the commencement of an action, to seek direction on any questions respecting the administration of the estate.

[90] When an executor fails to show that delays have been justified, courts may find them to be in breach of their fiduciary duties and, depending on how wilful or negligent the delay, may even find them personally liable.

[91] In *Re Stolarchuk*, 2011 BCSC 1681, Bouck J. found that five years was an excessively lengthy period for the sale and distribution of real property within the estate. In particular, Bouck J. held that the executor's inexperience did not excuse the delay (para. 61). That said, the case is distinguishable from the present matter in that: (1) the estate was less complicated and did not involve business holdings; and (2) the executor's delay in selling the real property could be attributed to her personal interest in acquiring the property.

[92] Bouck J. also briefly discussed the common law principle of the "executor's year" as one means of assessing the timeliness of an executor's management and completion of an estate:

> 59 The term "executor's year" reflects the common law principle that an executor is not compelled to distribute legacies to beneficiaries until the expiry of one year from the date of the testator's death. Absent justification for delaying distribution of the legacies, the beneficiaries should be entitled to interest on those legacies commencing from the end of the executor's year: *Widdifield on Executors' Accounts*.

[93] Finally, Bouck J. confirmed that the executor did not have to wait until obtaining the agreement of the beneficiaries before selling the real property. Rather, she should have sought the direction of the Court (para. 63).

[94] In *Pilo Estate (Re)* [1998] O.J. No. 4521 (Gen. Div.), Greer J. found a co-executor at fault for an inordinately lengthy 10 year period of estate distribution. The estate was modest in size, but it did contain multiple properties and a partnership interest. The co-executor found to be breaching his fiduciary duty was a lawyer and, at several points in his decision, Greer J. makes reference to the executor's professional status and the corresponding competency expectations that arose from it. This might be

a distinguishing feature from the present case, but throughout the decision Greer J. emphasized that anything other than timely realization and distribution must be accounted for, and that beneficiaries are entitled to expect prompt administration of the estate.

[95] In *Cormack v. Indergaard*, 2016 ABQB 544, Poelman J. found an executor to be negligent in the eight-year administration of a relatively simple estate, consisting principally of residential property, personal property and a limited amount of cash. He noted that the standard of care expected of a reasonable executor is the same degree of diligence as would be expected from a person of ordinary prudence in the management of their own affairs (para. 34). Poelman J. then briefly commented that the concept of the executor's year is often unrealistic, but where there is unreasonable delay, an executor may be personally responsible for any loss caused by it:

> 35 Of particular interest here is the length of time required to complete administration. Some cases have referred to a presumption that assets should be brought in, realized and distributed within a year of the grant of probate: *Laboucane Estate*, 2011 ABQB 253, para. 58. However, as fairly conceded by the applicant here, one year is often unrealistic, and regard must be had to the nature of the assets and overall circumstances.
>
> 36 As noted in *Laboucane Estate*, where there is unreasonable delay a personal representative will be personally responsible for any loss caused by it. (my emphasis)

This last point of liability for losses was emphasized by him again as follows:

> 42 Thus, the usual principle of a trustee's compensation will apply: she is liable only for the losses caused by her breaches of duty: *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at 1270 and 1279-81. In addition, she is liable to account for all receipts and disbursements of property under her trust: *Waters*, 1273. (my emphasis)

[96] Poelman J. found that the executor had acted in good faith and with proper motives throughout (para. 40). However, one of the losses incurred was due to the fact that she failed to invest the estate's cash in an interest-bearing account; had she done so, there was evidence that interest of approximately $3,300 might have been generated for the estate (paras. 63 and 64). In the result, Poelman J. found that the losses occasioned by the delay were relatively minor (para. 80) and that the executor's willingness to forgo any fee for her administration of the estate (estimated to be approximately a value of $5,000) was adequate recompense for the loss of interest income.

[97] This was a very unusual and difficult estate to settle. Vivian was an inexperienced (indeed reluctant) executor. Norma Farkvam warned the beneficiaries early on that it is not uncommon in such cases to take years to complete such an administrative job. There is also evidence that much of the paperwork for Paul Mitchell and Mega Mart was missing or was unaccounted for. We also know that there were numerous legal issues to be resolved, not the least of which was the legal ownership of the principal asset of the estate, i.e. the family home at 125 Ponderosa Drive.

[98] Notwithstanding these difficulties, there is evidence that shortly after Vivian obtained the grant of probate in January 1994, she began dealing with the three objecting beneficiaries to determine lists of various items of personal property that they wished to gain from their father's estate. She also wrote to them on May 18, 1994, providing some initial paperwork. In February 1995, Vivian sought CRA tax clearance certificates for Paul Mitchell and Mega Mart. Those certificates were not provided until June 1 and October 26, 1995, respectively.

[99] Further, after Norma Farkvam received an email from Desire in May 1998 requesting information, Vivian responded in a relatively timely fashion with a reply on June 28, 1998. Then, on August 10, 1998, Vivian provided her first reporting letter and Cash Flow Statement.

[100] Next, after Vivian received a letter from the three objecting beneficiaries in February 1999 with 16 questions about the administration of the estate, Ms. Farkvam responded in a relatively timely fashion in March and again in April 1999 answering virtually all of the inquiries, and enclosing a second Cash Flow Statement.

[101] Then, following the unsuccessful legal proceedings to force Vivian to pass the accounts, in October through December 2000, Vivian wrote to Traci on March 9, 2001, with a proper trust reconciliation prepared by a chartered accountant as at September 8, 2000.

[102] After that, there was the curious hiatus of about nine years in communications between Vivian and the three objecting beneficiaries, which only came to an end when Desire wrote a short letter to Vivian on March 7, 2010.

[103] Further, although Vivian instructed her chartered accountant to prepare an updated trust reconciliation to March 8, 2010, after receiving Desire's letter of March 7, 2010, this was not forwarded to the beneficiaries until December 13, 2012, about two-and-a-half years later.

[104] There was then no significant response from any of the objecting beneficiaries until their joint letter of March 30, 2014, almost a year and a half later, with 185 specific requests for additional information relating to the trust reconciliation of March 8, 2010. The delay from that letter to the dates of the hearing of the present application is also

due, in part, to the continuing dissatisfaction that the objecting beneficiaries had with the answers provided by Vivian through her new counsel, Kathleen Kinchen.

[105] When Ms. Kinchen wrote to the objecting beneficiaries on April 24, 2015, providing answers to some 102 of their inquiries, Desire responded in May 2015 that Ms. Kinchen's letter was "incomplete" and that she required further "documentation". Then, when Ms. Kinchen responded yet again to the objecting beneficiaries in her letters of August 30 and October 10, 2015, there was simply no response from Desire or Jay until they filed their affidavit material in relation to this application in December 2016. Finally, Traci's response on October 15, 2015 was indicative of the overall attitude of the three objecting beneficiaries, claiming that Ms. Kinchen's attachments were "a waste of time" and that she was "tired of this bullshit".

[106] This is also an area where I found that the tenor of the evidence and submissions from the three objecting beneficiaries tended to be absolute, exaggerated and occasionally simply unfair. I am referring here to statements such as "None of our concerns or questions were ever answered" [as written], or "she never answered any of my calls after that" (the joint submission of the three objecting beneficiaries of March 30, 2014).

[107] I conclude that Vivian managed the estate in a reasonably diligent fashion from the time she obtained probate in January 1994 until she wrote to the beneficiaries on March 9, 2001, enclosing the first trust reconciliation to September 8, 2000. Accordingly, my conclusion on the next issue is that Vivian's executor's fees were reasonable to that point. However, by then, she was clearly put on notice by Traci's petition in late 2000 that the objecting beneficiaries were anxious that she should proceed with the passing

of the estate's accounts. Indeed, I expect that if she had made her application to do so at that time, with or without the agreement of the objecting beneficiaries, the matter may well have been resolved and the parties would likely not be where they are today.

[108] There is no question that Vivian had a positive obligation to wrap up the administration of the estate in a timely manner. It was no excuse for her to simply wait until she obtained the consents of the beneficiaries. That said, it must also be borne in mind that Traci and Desire were experiencing significant health and other personal problems for a period of time after the end of 2000. This makes it more understandable why Vivian held off on aggressively attempting to pass the accounts.

[109] By contrast, there is no explanation of which I am aware why Vivian took a further two-and-a-half years to respond to Desire's letter of March 7, 2010 with the updated trust reconciliation enclosed in Vivian's letter of December 13, 2012.

[110] The question then becomes, was this merely an unwillingness to perform an unpleasant duty, or was it negligence? See *McCargar v. McKinnon*, 1868 CarswellOnt 170 (U.C. Ct. Ch.), at para. 4. Taking these two periods of delay together, I am satisfied that they constitute negligence on Vivian's part. However, I am nevertheless satisfied that Vivian acted honestly and in good faith throughout her administration of the estate. Further, there is no evidence that Vivian obtained any personal benefit from her administration (other than her reasonable executor's fees, which I will discuss in more detail shortly). Finally, it likely did not help matters much that Vivian lost the assistance of her primary estate counsel, Norma Farkvam, sometime in 1999, when she moved away from Whitehorse.

[111] There is also the question of whether there is a clear loss to the estate caused by this negligence. I have already rejected the arguments of the objecting beneficiaries that the estate suffered losses through excessive legal and accounting fees, as well as in the sales of three particular motor vehicles. The other form of loss asserted by the objecting beneficiaries is that the cash on hand in the estate was never invested in a suitable interest-bearing account, and that only "pennies" were earned on interest. I reject this argument because I have gone through all of the interest entries in the trust reconciliation to March 8, 2010, and by my reckoning, a total of $4,238.03 was generated in interest over the entire period.

[112] Thus, I am not satisfied that the estate suffered any loss directly attributable to the delays for which Vivian is responsible.

[113] As for the period of time between Vivian retaining Ms. Kinchen, apparently in January 2014 or just before, and the hearing of this application, I am satisfied that Vivian has acted prudently and in a timely fashion. The length of time that it has taken to get this hearing scheduled has been due to a combination of numerous requests for specific information from the objecting beneficiaries and various unforeseen medical issues arising for Vivian, Reuben and Ms. Kinchen.

[114] It is indeed unfortunate that the estate has taken over 23 years to get to this point. As the executor, Vivian must bear the lion's share of the responsibility for this overall delay. However, I am not satisfied that the estate has suffered any particular loss directly attributable to this delay. Further, as I have alluded to above, I believe that the objecting beneficiaries must also share some of the blame for the delay.

[115] I return to the principle that the diligence of an executor administrating an estate is that of a person of ordinary prudence in managing their own affairs. While they are bound by a fiduciary duty, executors are not expected to perform up to the level of professional trustee. Rather, they are expected to act honestly, conscientiously and reasonably and in what they feel is in the best interests of the beneficiaries. While I have found that Vivian was negligent for not doing more during the nine year and two-and-a-half year gaps in communications between her and the objecting beneficiaries, there are a number of mitigating factors:

1) This was a very complicated estate;
2) This was the first time Vivian had acted as an executor;
3) The evidence is clear that her relationship with all three objecting beneficiaries had been strained over the years, even to the point of Desire indicating that she did not want Vivian to have direct contact with her for a significant period of time;
4) Notwithstanding these difficulties, I am satisfied that Vivian acted honestly and with the best interests of the beneficiaries in mind throughout;
5) Vivian lost her principal estate lawyer in 1999;
6) There were health and other personal issues with Traci and Desire for a period of time after the end of 2000;
7) Vivian did not personally profit from her administration of any aspect of the estate;
8) The cash on hand in the estate was maintained in interest-bearing accounts, and generated $4,238.03 in income for the estate; and

9) There is no evidence that the estate suffered any loss as a result of the overall delay.

[116] For all these reasons, I am not prepared to impose any compensatory remedy against Vivian for her negligence. In other words, I am not going to require her to repay any money to the estate.

6) Vivian's remuneration

[117] As I understand it, the argument of the three objecting beneficiaries here is that because the estate was so ineptly administered by Vivian over such a long time, she should not have paid herself any fees for her efforts.

[118] I prefer to frame this issue in terms of what Vivian had accomplished up to the time she claimed her executor's fees. I have already concluded that Vivian was reasonably diligent in her management of the estate between the time she obtained probate and the point of which she sent her letter to the beneficiaries dated March 9, 2001, enclosing the first trust reconciliation. Accordingly, I am satisfied that it was reasonable for her to pay herself the fees which her estate lawyer, Norma Farkvam, had expressly encouraged her to take.

[119] Further, Vivian received legal advice from Ms. Farkvam on how to calculate such fees. And, when Vivian did so, she charged the estate less than the maximum of the range (4.5% versus 5%) multiplied against net estate values, and not the gross values, as suggested by Ms. Farkvam. In addition, this was a very unusual and difficult estate to settle. As well, in the beginning, Vivian tried to do all of the bookkeeping and accounting work herself, in order to save the estate money. She testified that she put hours and

days of effort in her spare time into her management of the estate. That evidence was not contradicted by the objecting beneficiaries.

[120] Accordingly, I am satisfied that her remuneration was reasonable and proper.

CONCLUSION

[121] Desire will be compensated from the estate for the legal fees she expended in retaining Gerald Nori to obtain a copy of Paul's will in August 1998. Those fees were $741.17. Although Vivian attempted to submit a document after the hearing suggesting that she had faxed Desire a copy of the will in 1994, there was no proof that the fax was actually transmitted. In any event, the objecting beneficiaries did not consent to the admission of the document and I declined to admit it.

[122] Traci will be compensated from the estate for the cost of her airfare to attend the hearing of this application which was set for July 21, 2016. That cost was $570.41. At that time, the matter had to be adjourned because Vivian and Reuben were both recovering from significant medical procedures. However, Traci had already flown to Whitehorse for the hearing by the time she was given notice of the adjournment.

[123] Both of these sums will be paid out before the balance of the estate is distributed. At the end of the day, it is Vivian's responsibility to ensure that each of the beneficiaries receives an equal share of the estate.

[124] There will be no compensatory remedy imposed against Vivian.

[125] However, because there was mixed success on this application, I order that each party, including Vivian, shall bear their own costs. That means that Vivian shall not pay her legal fees for this application from the residue left in the estate. Rather, she shall

pay those fees out of her own pocket.

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GOWER J.