

IN THE COURT OF PROBATE FOR NOVA SCOTIA

Citation: *Vickery Morris Estate (Re), 2019 NSPB 2*

Date: 20190429

Docket: Amh. No. 485933

Registry: Amherst

Between:

**IN THE ESTATE OF AUGUSTA (GUSSIE) REBECCA VICKERY
MORRIS, Deceased**

LIBRARY HEADING

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: April 29, 2019 in Amherst, Nova Scotia

Oral Decision: April 29, 2019

Written Decision: July 10, 2019

Subject: **Probate Act and Regulations – Interpretation of provisions respecting the determination of fair market value of real property**

Issues: (1) Where an Estate has used the assessed value of real estate when making Application for Grant of Probate can it subsequently lower this figure when filing the Estate Inventory?

Result: In some circumstances a downward variation of the stated fair market value is permissible under the operation of the *Act* and *Regulations*. On the facts of this case, a downward variation was permitted where an arms length sale on the open market at a time proximate to the date of death had taken place.

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DECISION

Judge: The Honourable Justice Jeffrey R. Hunt
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Oral Decision: April 29, 2019
Written Release: July 10, 2019
Counsel: William Fairbanks, Proctor for the Appellant

By the Court:

[1] Before the Court is a de novo appeal advanced under s. 93(1) of the *Probate Act*. The Estate of Augusta Vickery Morris submits that it ought to be permitted to amend the valuation it supplied for a piece of estate real property where the initial valuation (assessed value) later proves to have been inaccurate as an indicator of true fair market value. They further submit the amended fair market value can be derived from an arm's length property sale on the open market in a time frame proximate to the date of death.

[2] The Registrar questions whether amendment is permissible and seeks guidance on the application of the relevant statute and regulations.

Background

[3] Applications for Grant of Probate must include a best estimate for the fair market value of estate assets. Almost invariably the practice with respect to real property has been to employ the assessed value. This is logical and reflective of the fact that Applications for Grant of Probate are designed to be advanced shortly after death. The representative of the estate is expected to

make best efforts to quickly determine valuations across a wide range of asset types.

[4] Use of the assessed value for real estate makes sense as a default method of quickly establishing a benchmark value. Appraisals will be the exception not the rule. Many estates are of such a size that it would be impractical or inappropriate to expend resources on outside valuations.

[5] The fact situation before the Court poses the question of what ought to occur when an Application for Grant of Probate relies on assessed value, but a subsequent arm's length sale reveals a different real-world valuation at the time of death.

[6] In such a scenario, can the Executrix properly swear her Form 29 Affidavit attesting to the assessed value as being reflective of fair market value? When the Estate comes to file its formal Inventory ought it be permitted to employ as true fair market value the price as revealed by the open market third-party sale?

[7] Do the *Probate Act, Regulations* and *Form 29* permit the Estate to utilize the market value as indicated by an arm's length sale, so long as it is proximate to the date of death?

[8] After considering the facts and governing legislation I have concluded that the Estate, in the circumstances of this case, may use the sale price from the arm's length sale as indicative of true market value. Not every sale will have the elements of timeliness and reliability found here. Registrars will have the authority and continuing obligation to assess whether a sale can displace assessed value as the best indicator of value at date of death. Not all sales will be equal as reliable indicators. Sales which are not truly arm's length or lack the element of reasonable exposure to the market will presumably be excluded. Sales not close in time to the date of death will not rise to the standard.

[9] In many cases, perhaps most, these issues will never arise. The assessed value will rightly continue to be the accepted indicator of value. In many estates the issue will never arise because the distribution of assets will unfold in such a way that open market sales are not a consideration.

[10] The amount in issue in this matter was small. The Proctor for the Estate and the Registrar acknowledged as much. The Proctor and Registrar are each highly experienced in probate practice. The Proctor was himself a long-time Registrar of Probate. In a normal situation, where the cost of a litigation dwarfs the amount in issue, the matter would not be expected to proceed. This appeal

was advanced in summary fashion in order to seek guidance on this issue which has been open to question, at least in Cumberland County probate practice.

Facts

[11] A brief timeline may assist with understanding how this matter unfolded:

- April 6, 2016 Ms. Morris passed away.
- April 20, 2016 Application for Grant of Probate.
- April 28, 2016 Grant of Probate issued.
- July 28, 2016 Statutory deadline for Inventory (not met).
- July 29, 2016 Agreement of Purchase and Sale for real estate parcel at \$90,000.00.
- January 18, 2019 Proposed Inventory filed.
- January 24, 2019 E-Mail decision of Registrar.
- January 28, 2019 Proctor request for reconsideration.
- March 1, 2019 Notice of Appeal filed.
- March 12, 2019 Typed version of Registrar's decision.

[12] Following the death of Ms. Morris, the Executrix followed the usual course and filed an Application for Grant of Probate. This happened within 30 days of

the date of death. As is entirely appropriate, the Application for Grant included a valuation for the fair market value of a parcel of real estate in Advocate Harbour, Cumberland County (less encumbrances) which was based on the assessed value of the real estate at the time of death. This value was \$111,000.00. This was the property assessment on April 6, 2016.

[13] The property was relatively quickly listed for sale on the open market. This took the form of an MLS listing with a real estate agent. After having been exposed to the market for some time it sold in an arms length transaction for \$90,000.00.

[14] As can be seen from the timeline, there is then a substantial time gap before the Estate moves to file its Inventory. This did not take place until January 2019. The proposed Inventory listed the real estate parcel as having a value at date of death of \$90,000.00. The Estate sought to pay probate fees based upon the reduced fair market value for the real estate.

[15] The Registrar declined to accept the proposed Inventory for filing. She indicated that the payment of probate fees based upon the initial valuation in the original Application for Grant was required. The Registrar and Proctor

exchanged some respectful arguments without either changing their position.

Ultimately, this Appeal was filed.

Position of Estate

[16] The position of the Estate is that when an estate inventory is sworn and filed the Personal Representative must swear to the actual fair market value. If the assessed value has been proved not to reflect actual fair market value, then it is the true value which must be reported. In the circumstances of this case this means the Executrix can only swear to the \$90,000.00 valuation. Accordingly, they say this is the figure which must be included in the Inventory and on which probate fees ought to be paid.

Position of Registrar

[17] The Registrar submits that it has been standard practice for a very substantial period of time to work with and rely upon the assessed value. The *Assessment Act* is meant to establish fair market value for real estate in the province and it contains a mechanism allowing a property owner to appeal the amount of an assessment.

[18] The Registrar is quite reasonably concerned with the practical complications of departing from the practice of employing assessed values which have the advantage of being easy to ascertain. She is concerned that Registrars will lack the resources to identify sales which are truly arm's length versus those which may be unreflective of fair market value. She does acknowledge that Registrars have statutory authority, derived for instance from Regulation 41(4) of the Probate Act, to challenge purported valuations included in an asset inventory.

Legislation and Regulations

[19] I will set out the relevant portions of the *Probate Act* together with portions of the *Regulations*, and **Forms**.

[20] The *Act* provides in part, as follows:

Duties of Personal Representative

- 57**
- 1) Every personal representative shall within three months after the grant or such extended time as the court allows, file with the Court a full and true inventory in the prescribed form of the assets of the deceased.
 - 2) Where the personal representative does not file an inventory in accordance with subsection (1) the registrar may give the personal representative a notice, in the prescribed manner and form, requiring the personal representative to do so within 30 days after receipt of the Notice.
 - 3) Where a person fails to comply with the Notice given pursuant to subsection (2) the court may order the person to do so.

Duty to file further Inventory

58 Where any real or personal property of the deceased comes into the possession or knowledge of the personal representative after the personal representative has filed the inventory or where any valuation in the inventory appears to have been in error, the personal representative shall, within thirty days after the personal representative has come into possession or knowledge of the real or personal property or the error has come to the attention of the personal representative or additional time as the registrar allows, file with the court a further inventory.

....

87 (3) Where, after a grant is issued any document, including any inventory that is, pursuant to this *Act*, filed with the registrar discloses that the value of the property of the deceased person at the time of death of the deceased person exceeds the value of the estate given in the application for the grant the value of the estate for the purpose of calculating the tax payable to the registrar is increased by an amount equal to the amount of the excess and the additional tax is payable by the personal representative of the deceased person out of the assets of the estate to the registrar when the document is filed.

....

89 (1) The Governor in Council may make regulations

- (a) providing for the refund of overpayment of the taxes imposed by Section 85, 86 or 87 and prescribing the manner in which an application for a refund must be made.

[21] Turning to the *Regulations*:

41 (1) For the purposes of the taxes collected under the *Act* and the security and inventory required under the *Act* the “value of the estate” means the value of the assets of a deceased person calculated on

- (a) the gross value of the personal property of the deceased;
and
- (b) the fair market value of the real property of the deceased less the amount of any mortgages and encumbrances registered against the real property at the Registry of Deeds for the probate district in which the real property is located

that passes by a will or wills, or that transfers or will be transferred to a trust under a will or wills, whether or not the trust described in the will is described as being separate from the estate, or that passes upon intestacy.

- (4) Where a court has reason to believe that the value of the estate

exceeds the sum stated in the inventory, the court may inquire into the matter.

Form 29

[22] Form 29 is prescribed by **Regulation**. It provides, in part, as follows:

I, the personal representative of this estate make oath and say:

1. The inventory of this estate is to the best of my knowledge, information and belief a true statement of all the assets of the deceased at the date of death and shows the fair market value of those assets.
2. I shall file a further inventory with the court within 30 days after any additional real or personal property comes into my possession or knowledge or whether any valuation in this inventory appears to me to have been made in error.
3. The value of the deceased's estate for the purpose of subsection 87(1) of the **Probate Act** and Section 41 of the **Probate Court Practice, Procedure and Forms Regulations**
 - (a) is unchanged from the date of the grant.
 - (b) has changed to \$_____ but no adjustment is required to the probate tax payable on the estate.
 - (c) has changed to \$_____ and a payment of probate tax in the amount of \$_____ shall be made to reflect this change.
 - (d) has changed to \$_____ and a refund of probate tax in the amount of \$_____ is hereby applied for to reflect this change.

[Note: choose the applicable option in paragraph 3 and delete the others.]

[23] It is helpful to remember the sequence in which filings will take place. The Application for Grant of Probate comes first and early in the process. The filing of Form 29 and the Inventory takes place subsequently. In light of this, the drafters of the legislation gave the Executrix a number of options as reflected above in Form 29. The Executrix can attest that the value is unchanged from

the time of the Application for Grant or alternatively that a change has occurred which has increased, decreased or had no impact of the probate tax payable. It is critical to note that in any case the valuation must be for the date of death.

[24] I have reviewed the helpful submissions from both sides. I say this in passing, both the Registrar and the Solicitor in this matter are imminently reasonable people and I think the fact that they each have come to different views is reflective of the fact that the drafting of the operative provisions could perhaps have been clearer. However it is my conclusion that it is sufficiently clear to me that in creating the Regulations and Form 29 the drafters did opt to invoke their discretion under section 89(1) of the Probate Act to create an option to allow a Personal Representative of an Estate to revise the estimated value for an estate asset including real estate. Otherwise the wording of Form 29, which has the force of Regulation, makes no sense whatsoever. This would be contrary to the principles of interpretation which I must employ.

[25] For clarity, I repeat the wording of section 89 and clause 3 of Form 29:

- 89** (1) The Governor in Council may make regulations
- (a) providing for the refund of overpayment of the taxes imposed by Section 85, 86 or 87 and prescribing the manner in which an application for a refund must be made.

Form 29

....

3. The value of the deceased's estate for the purpose of subsection 87(1) of the Probate Act and Section 41 of the Probate Court Practice, Procedure and Forms Regulations
- (a) is unchanged from the date of the grant.
 - (b) has changed to \$_____ but no adjustment is required to the probate tax payable on the estate.
 - (c) has changed to \$_____ and a payment of probate tax in the amount of \$_____ shall be made to reflect this change.
 - (d) has changed to \$_____ and a refund of probate tax in the amount of \$_____ is hereby applied for to reflect this change.

[26] Form 29 gives the Personal Representative of the Estate the option of indicating that they believe a valuation has changed and requires the Representative to swear or attest to the correctness of the valuation. The Executrix here asserts that as she now has clear evidence that the true fair market value was other than the assessed value she can properly swear to the incorrect figure.

[27] A Registrar of Probate retains many tools under the *Act* and *Regulations* which permit them, if necessary, to challenge a purported valuation should the Registrar deem it necessary.

[28] The Registrar confirms that historically she has permitted deviation from the assessed value in very limited circumstances. This includes instances where she has been presented with a certified appraisal from an expert property

valuator (as opposed to a market analysis from a realtor). I find that an arm's length sale on the open market in a time proximate to the death has the same indicators of reliability and ought to be accepted as well. The *Regulations* and *Form 29* permit as much.

[29] After having considered all the material and arguments before the court I have concluded as follows:

- Section 87(3) of the Probate Act authorizes the Governor in Council to create provisions respecting the amendment of estate asset valuation and applicable probate tax owing.
- This option was created by Regulation and the mechanism adopted is described above and evident in the wording of Form 29. One might have thought of clearer ways to provide for this but notwithstanding this fact **Form 29** the *Regulations* does contemplate amendments in valuations and consequent alteration in probate tax payable. Subsection 3(c) and subsection 3(d) permit the alteration of a valuation amount found in an Application for Grant of Probate.
- Any such amendment must be based on the type of clear evidence found in this case. A true arm's length sale on the open market at a time proximate to the date of death.

[30] For these reasons, I have concluded it is permissible on the facts in this matter for the Executrix to file the Estate Inventory reflecting the \$90,000.00 valuation.

[31] I find that the sale in question does provide an accurate and usable indication of true market value.

Concerns of Registrar

[32] I want to make reference to some of the potential practical ramifications of this decision. It seems obvious that going forward the Registrar of Probate may opt to be rather more insistent that estates and proctors be in compliance with the requirement to file timely inventories under s.57(1) of the *Act*. And where estates or proctors fail to file in a timely fashion, I suspect there will be a greater reliance by Registrars on their powers to issue notices to comply under s.57(2) and s. 57(3).

[33] Proctors and executors are highly likely to continue to use a property's assessed value in the Application for Grant of Probate. The assessed value is the logical starting point. In most cases this will be the figure used throughout.

[34] Where late or amended inventories are filed, I anticipate more Registrars, will act on their authority to seek affidavit evidence attesting to the circumstances of sale. Sales at non arm's length, to family members, in non-traditional circumstances or in a time frame removed from the date of death will, in all likelihood, be rejected as a basis for deviating from assessed value.

[35] I note that within the property assessment system itself the assessment authorities do not accept related party transactions as indicative of fair market value.

[36] To return to the particular circumstances of this Estate, the sale in this case does not suffer from any of the concerns expressed above. This sale was truly reflective of fair market and was so close in time as to be so reflective at the time of death.

[37] This is not open invitation for estates to sell properties two years after the fact and attempt to use that valuation as the fair market value at the time of death. That would not be acceptable. Such a sale would not be reflective of fair market value at the time of death. Mr. Fairbanks on behalf of the Estate did not advocate for such an outcome.

Conclusion

[38] For these reasons, I conclude the operation of the *Probate Act* and Regulations make clear that while the assessed value at time of death may be a starting point for fair market value, this is not an immutable figure. A true arms length sale at a time proximate to the death may be used to displace the assessed value.

[39] Those are my reasons. Mr. Fairbanks, can we discuss the Order?

[Note: Further discussion omitted]

J.