



THE ROLE OF THE LAWYER AS ESTATE TRUSTEE AND ESTATE SOLICITOR by Natalia Angelini

Lawyers at times act as both solicitor for the estate and as the estate trustee. While the duties overlap, the manner of being compensated ought to be kept separate. Below I touch upon these issues, as well as the risk of personal liability that attaches to each role.

Duties of Solicitors as Estate Trustees

The obligations owed by an estate trustee to the beneficiaries and third parties, such as creditors of the deceased, are listed below¹, and apply equally to the solicitor who is acting as the estate trustee:

- (i) to avoid situations which place the estate trustee in a conflict, coupled with the duty to derive no profit from the position (this duty poses added consideration for the solicitor who acts as executor - where the estate trustee is also the estate solicitor, an inherent conflict can exist, which necessitates vigilance as it relates to the prohibition on deriving a profit from the position of executor.²);
- (ii) to act impartially among all the beneficiaries;
- (iii) to inform and account; and
- (iv) to act personally in the performance of duties imposed³.

The Will itself and statute law, such as the *Trustee Act* (including sections 67 and 68), can expand the scope of the duties. The solicitor acting in dual capacities also has to consider professional obligations imposed by the *Rules of Professional Conduct* and the Law Society of Upper Canada, and to the management of the solicitor's practice.⁴

Compensation and Legal Costs

An estate trustee's right to compensation is based on the terms of the Will, sections 23(2), 23.1 and 61 of the *Trustee Act*, and the applicable case-law. Section 61(4) of the *Trustee Act* further provides:

"Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services."

Some things to note are:

- the rendering and paying of separate legal accounts in the course of the administration of an estate has been at least implicitly accepted as established practice by the court;⁵
- even if the Will contains a clause allowing the lawyer to charge for his or her services, the amount charged is open to challenge by the beneficiaries to determine if the charge is appropriate;⁶
- solicitors must clearly distinguish between their services as solicitors and their services as estate trustee;⁷ the onus rests with the solicitor to show that he or she is not charging a lawyer's rates for executor work;⁸
- if the solicitor/executor fails to provide an acceptable breakdown of fees, the legal account may be disallowed;⁹ it is therefore crucial that the lawyer keep separate dockets for legal work and estate trustee's work, and account separately as well;¹⁰
- when conducting executor work, a solicitor cannot charge his/her hourly rates; otherwise that amount is deducted from executor's compensation;¹¹ thus, care must be taken to differentiate between expenses proper to an estate trustee and legal fees;
- a solicitor is not expected to be well-versed in all areas of estate administration, such that expenses to obtain assistance are not automatically improper;¹² however, where the draftsman and estate solicitor are the same it is unfair for the estate solicitor, in attempting to solve problems arising from the Will,

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to benefit from his own oversight – legal fees have been reduced in this circumstance;¹³ and

- it is the executor's obligation to pay a solicitor/executor, such that a legal account rendered in respect of executor's work should be rendered to the executor personally, with payment made from his or her compensation.¹⁴

Personal Risk and Liability

The estate trustee's conduct may be protected, limited or exonerated by the terms of the Will, statute (*Trustee Act*, section 35), an order relieving the estate trustee of liability, the existence or provision of releases or indemnities, a passing of accounts, the conduct of the beneficiaries, and/or the assistance of the court

(*Trustee Act*, section 60). The solicitor owes a duty of care to his or her client, being the estate trustee in this circumstance. As such, these protections are not directly afforded to the estate solicitor.

The solicitor acting in a dual role of solicitor and estate trustee appears to be insured by LAWPRO.¹⁵ However, the lawyer who takes on the role of estate trustee and provides no legal services may be exposed to claims in the same manner as any other estate trustee, as LAWPRO insurance coverage does not appear to extend to him or her (the lawyer may want to contact LAWPRO beforehand to address any coverage issues). A new insurance product, ERAssure, that insures executors, may be a worthwhile option to explore before a solicitor takes on the role as estate trustee.¹⁶

¹ See Corina S. Weigl, "Duties of Solicitors as Estate Trustees", Ontario Bar Association: Solicitors as Attorneys, Trustees, and Estate Trustees – What You Need To Know (Toronto: Ontario Bar Association, Continuing Legal Education Program, May 20, 2010) at 1-2.

² *Supra* note 1.

³ Section 20(1) of the *Trustee Act*, R.S.O. 1990, c. T.23, states "a trustee may appoint a solicitor as agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust." The trustee remains liable, however, to those he or she has a duty to in respect of the money retained by the solicitor.

⁴ See Rosemarie Albrecht (Investigator with the LSUC), "The Lawyer as Estate Trustee: Record-Keeping Requirements" (Toronto: LSUC 2009 Annual Estates and Trusts Summit) and Louise Christofolagos, "Practice Management Issues for Estates and Trusts Practitioners" (Toronto: LSUC 2009 Annual Estates and Trusts Summit).

⁵ Jennifer J. Jenkins and H. Mark Scott, *Compensation and Duties of Estate Trustees, Guardians, and Attorneys* (Aurora: Canada Law Book, 2010) at 7-1.

⁶ Carmen S. Theriault, Ed., *Widdifield on Executors and Trustees*, 6th Ed. (Toronto: Thomson Carswell, 2002) at 4-19.

⁷ *Supra* note 6 at 4-19.

⁸ *Supra* note 5 at 7-2.

⁹ *Ibid.* at 7-2.

¹⁰ See Mary Louise Dickson, Q.C. "Wearing Both Hats: Solicitor as Trustee and Lawyer for the Estate", Ontario Bar Association: Solicitors as Attorneys, Trustees, and Estate Trustees – What You Need To Know (Toronto: Ontario Bar Association, Continuing Legal Education Program, May 20, 2010) at 1. Also see *Fareed v. Wood* 2005 CanLII 22134 (ON S.C.) at para 48.

¹¹ *Fareed v. Wood*, *Supra* note 10 at 19.

¹² *Supra* note 1 at 9.

¹³ *Re Briand Estate* [1995] O.J. No. 3551 (Gen. Div.), cited in *Supra* note 1 at 9-10.

¹⁴ *Ibid.*, at 11.

¹⁵ See Deborah Petch (of LawPRO), "Wills and Estates Law: Claims slowly on the increase".

¹⁶ For more information you can search www.erasure.com



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