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Litigation Administrators and Representation Orders

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Litigation Administrators and Representation Orders

by David Morgan Smith

Rules 9 and 10 of the *Rules of Civil Procedure* contemplate various issues that arise when one of the parties to a proceeding dies either before or after the commencement of a proceeding.

The purpose of the paper is to highlight some of the provisions in these rules that may arise in the course of an estates practice.

The circumstances contemplated by these rules is a departure from the standard situation which arises in estate litigation wherein a Will is challenged and all persons with a financial interest consent to the appointment of an Estate Trustee During Litigation.

Claims Against Estates

Rule 9.01 provides guidance in situations in which claims are made against an estate or trust.

The Rule reflects the fact that executors have the authority to settle claims against the estate. It is therefore not necessary to name the beneficiaries as parties. The Rule reads as follows:

9.01 (1) A proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries ***without joining the beneficiaries as parties.*** (emphasis added)

An example would be a claim asserted by a creditor perhaps in response to an Advertisement for Creditors. The executor in such case publishes an advertisement for creditors in the paper which will clearly state that claims are to be submitted to the executor.

While there is no statutory requirement to advertise for creditors, there are several reasons why the personal representative would advertise for creditors:

(i) to confirm that there are no outstanding creditors (especially if the deceased carried on an active business) and thereby eliminate liability with respect to such a claim if it arises after the estate has been distributed;

(ii) if the executor wants to pass his accounts in the court it is usually required on the first passing of accounts;

(iii) on an intestacy, if the executor wants to distribute the estate prior to the expiration of one year after the death of the intestate; or

(iv) if the executor has had to post an Administration Bond and wants to have it discharged .

The usual practice is to insert the advertisement for creditors for three consecutive weeks in a daily newspaper in the area where the deceased lived and worked at the time of death. In the advertisement, the date upon which all claims must be filed is usually one month after the first date that the

advertisement is published whereafter once the time period for filing claims has expired, the newspaper will provide an Affidavit of Proof of Publication.

Proceedings which require Joinder of Beneficiaries

The exceptions to creditors' claims are enumerated in Rule 9.01(2). These listed exceptions require the beneficiaries and arguably all persons with a financial interest in an estate to be served with the originating process:

9.01(2) Subrule (1) does not apply to a proceeding,

(a) to establish or contest the validity of a will;

(b) for the interpretation of a will;

(c) to remove or replace an executor, administrator or trustee;

(d) against an executor, administrator or trustee for fraud or misconduct; or

(e) for the administration of an estate or the execution of a trust by the court.

Appointment of a Litigation Administrator

If an estate does not have an executor or administrator but is nonetheless named as a party in a proceeding, the court may appoint a person to represent the estate for a limited purpose.

Rule 9.02 states:

9.02 (1) Where it is sought to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator, the court on motion may appoint a ***litigation administrator*** *to represent the estate for the purposes of the proceeding.*

(2) An order in a proceeding to which a litigation administrator is a party binds or benefits the estate of the deceased person, but has no effect on the litigation administrator in a personal capacity, unless a judge orders otherwise.

Rule 1.04(1) states that *"These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."* The Courts want to ensure that, if an estate is a necessary party to a proceeding, that it has representation. Presumably to encourage participation, the Rule protects the litigation administrator against personal liability.

Caselaw

Some of the reported cases that consider whether to appoint (or terminate the appointment of) a litigation administrator are personal injury cases arising out of motor vehicle accidents.

In *Raiz v. Vaserbakh (1986), 9 C.P.C. (2d) 141 (Ont. Dist. Ct.)*, the deceased, who died intestate, was involved in a motor vehicle accident prior to his death. His son sought to be appointed litigation administrator of the estate in order to commence a personal injury claim arising out of the motor vehicle accident. The Court declined the request and required that the son obtain letters of administration: "The court is cautious in granting authority to prosecute and action without the burden of administering the estate and being answerable therefore."

In *Kavanagh v. Harmann Estate 2004 O.J. No. 4127,* Master McLeod considered a motion brought by a Litigation Administrator for an Order terminating his appointment. The Litigation Administrator was a claims examiner for the insurance company that had insured the vehicle driven by the Defendant. The Defendant was the Estate of the driver who died when he collided with a vehicle after first hitting the Plaintiff pedestrian.

The Litigation Administrator had been appointed, rather remarkably, without formal notice. There were no estate assets and no estate trustee. Apparently, the claims examiner had agreed to his appointment but only if the Plaintiff agreed to limit its claim to the policy limit of $1,000,000 and agreed that the Defendant could take the position that the policy limit was restricted to $250,000 if it determined that the accident subsequent to the hit and run was a successful suicide attempt.

Because the Litigation Administrator was employed by the Insurance Company that intended to take the position that the policy limit was only $250,000, he was in a conflict of interest.

Master McLeod stated: *"It would not be appropriate to compel him to act as litigation administrator if he does not wish to do so. The question is who should take on that role and on what terms?"*

The Court considered that there was some suggestion that the deceased had a sister and could be approached. Alternatively, a lawyer was prepared to act but not without compensation (a problem since the estate had no assets). Failing the

willingness of any person to act as litigation administrator, it appeared that the Court would permit the proceeding to continue without a litigation administrator, although this was clearly a less than ideal situation.

A recent case that has considered when a Litigation Administrator ought to be appointed is *G.B. v. Fortin [2011] O.J. No. 2576.* In this case, the Plaintiff alleged that the Defendant sexually assaulted him over a number of years while he was a resident in a detention facility. Unbeknownst to the Plaintiff, the Defendant died prior to the commencement of the action. Accordingly, the Plaintiff requested the court to appoint a litigation administrator for the estate of the deceased Defendant.

The Defendant institution opposed the appointment since the administration of the estate was completed almost nine years ago, and in any event, there was no estate. They also submitted that the appointment was statute-barred and, further, that the proposed litigation administrator was an inappropriate person to be appointed.

The Court stated:

> *"The defendant argued that the appointment was unreasonable, given that Etienne Fortin left no estate. However, the plaintiff is not motivated by the existence of an estate to satisfy an award of damages, but rather by the possible existence of records. This is not an unreasonable approach to the litigation. To the extent that these arguments are all live issues, it is not clear that this action is out of time and as such, a litigation administrator should be*

appointed. The defendant argued that the proposal to appoint Mr. Jerome Gardner as litigation administrator was inappropriate. Among other things, the defendant believed him to be a unilingual Anglophone, while les Frères operated in French. Counsel for the parties may wish to propose terms and the name of a mutually acceptable person to be appointed. If they cannot agree on an appropriate litigation administrator by June 30, 2011, they may seek an appointment before me to make submissions."

Proceeding Commenced before Probate or Administration

9.03 (1) Where a proceeding is commenced by or against a person as executor or administrator before a grant of probate or administration has been made and the person subsequently receives a grant of probate or administration, the proceeding shall be deemed to have been properly constituted from its commencement.

Proceeding Brought by or against Estate

9.03 a(2) A proceeding commenced by or against the estate of a deceased person,

(a) by naming "the estate of A.B., deceased", "the personal representative of A.B., deceased" or any similar designation; or

(b) in which the wrong person is named as the personal representative,

shall not be treated as a nullity, but the court may order that the proceeding be continued by or against the proper executor or administrator of the deceased or against a litigation administrator appointed for the purpose of the proceeding, and the title of the proceeding shall be amended accordingly.

Proceeding Commenced in the Name of or Against a Deceased Person

9.03 (3) A proceeding commenced in the name of or against a person who has died before its commencement shall not be treated as a nullity, but the court may order that the proceeding be continued by or against the executor or administrator or a litigation administrator appointed for the purpose of the proceeding and the title of the proceeding shall be amended accordingly.

Where There is an Executor or Administrator and a Litigation Administrator has been Appointed

9.03 (4) Where it appears that a deceased person for whom a litigation administrator has been appointed had an executor or administrator at the time of the appointment, the proceeding shall not be treated as a nullity, but the court may order that the proceeding be continued against the executor or administrator and the title of the proceeding shall be amended accordingly.

Terms May be Imposed

9.03 (7) On making an order under this rule, the court may impose such terms as are just, including a term that an executor or an administrator shall not be personally liable in respect of any part of the estate of a deceased person that the executor or administrator has distributed or otherwise dealt with in good faith while not aware that a proceeding had been commenced against the deceased person or the estate.

Rule 10: Representation Orders

Representation of Interested but Unascertained Persons

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the Variation of Trusts Act;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

Representation Of A Deceased Person

Occasionally, an estate of a deceased person may be unadministered yet it is nonetheless in the interests of justice that such estate has representation in proceedings before the Court. For example, one estate may claim an entitlement in another estate. However, if the estate claiming such an entitlement is otherwise insolvent, it may be that no one is prepared to administer the estate and, as executor, actually advance the claim.

It may then be left to a beneficiary to seek a **Representation Order** from the Court (under Rule 10.02 of the *Rules of Civil Procedure*) authorizing him or her to either: (i) represent the interests of the estate under which he or she takes or (ii) allow his or her application to proceed in the absence of an appointed executor.

Rule 10.02 reads as follows:

10.02 *Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding.*

The court in *Raiz* considered Rule 1.04(1), which provides that the rules *"shall be liberally construed to secure the just, most expeditious and the least expensive determination of every civil proceeding on its merits". It wrote, "It may well be in circumstances other than in this case before the court that there may be an anticipation of a very urgent matter and a motion might be made before commencement of a proceeding on the undertaking to do certain things, such as obtaining letters of administration forthwith*". It noted that the cost of applying for letters of administration was relatively minimal and that in the case before it there were no limitation period issues that warranted approving the request: *"As a general policy consideration a court should be very cautious in granting authority*

to a person to carry out litigation without the burden of administering an entire estate." In the circumstances of the case, and despite Rule 1.04(1), it refused the motion.

Rule 10.02 was recently considered in the decision of Justice Hoy of the Ontario Superior Court of Justice in *Sloan v. Fox Estate [2011] O.J. No. 2802,* released June 15, 2011.

The facts of the case were as follows:

- Arna Sloan was a 30% beneficiary in, and claimed as a creditor against the Estate of Elliot Moldaver (the "Moldaver Estate");
- Elliot Moldaver, in turn, was a beneficiary of the estate of his mother, the late Eve Fox (the "Fox Estate");
- A portion of the residue of the Fox Estate was set aside in a fund to be paid out to Elliot over time.
- The sole executor of the Moldaver Estate renounced her position because, as a beneficiary of the Fox Estate, and not the Moldaver Estate, she was therefore in a conflict.
- But for any entitlement under the will of his late mother, the estate of Elliot Moldaver was insolvent.
- No replacement executor had been appointed for the Moldaver Estate.
- Ms. Sloan was in a relationship with Mr. Moldaver at the time of his death. If the consequences of Mr. Moldaver's death under Ms. Fox's will that Ms. Sloan advances were accepted by the Court, the Moldaver Estate would receive approximately $350,000;

- The executors of the Fox Estate declined to seek a court determination of who was entitled to the bequest made to Mr. Moldaver as a consequence of his death.

- Ms. Sloan accordingly brought such an application in her personal capacity.

- Ms. Sloan has served the other beneficiaries of the Moldaver Estate.

In finding that the application advanced by Ms. Sloan should be allowed to proceed, Her Honour stated, in part, as follows:

> *" I accept...that the court should be cautious in granting authority to carry out litigation without the burden of administering the entire estate. On the very particular facts of this case, however, I am persuaded that an order should issue pursuant to Rule 10.02 permitting Ms. Sloan to do so in the absence of a person representing the Moldaver Estate. In addition to being a beneficiary of the Moldaver Estate, Ms. Sloan is, allegedly, a creditor. If her application prevailed, she would not be an appropriate executor. Additional steps would be required at that time to name a different executor. This is an unnecessary expense. The Moldaver Estate is – absent entitlement from the Fox Estate - insolvent; not surprisingly, no one has volunteered for this task....Moreover...the proceeding at issue is an application for the determination of rights depending on the interpretation of a will, not an action where facts are in dispute.*