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ESTATE, TRUST AND CAPACITY LAW BREAKFAST SERIES

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RECENT DEVELOPMENTS IN JOINT ACCOUNTS

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A. INTRODUCTION

A gift is not a kiss in the dark. Unlike the memory of a kiss which fades in time, the giving of a gift has lasting consequences.[1]

There are two fundamental ways in which a person may make a gift. The first is, of course, by testamentary disposition and the second is by *inter-vivos* gift.

The question of validity is, of course, paramount in the context of estate litigation matters and consequently, once the intended gift has been classified, unless there has been compliance with the appropriate legal requirements to perfect that type of gift, the transaction will be invalidated, no matter how clear the intention of the donor might be otherwise.[2]

The classification process, between an *inter-vivos* gift and a testamentary disposition, has been described as follows: [3]

> "First, and needing particular emphasis, is the proposition that an intended transfer should be sustained if the facts show substantial performance of the ritual and evidentiary functions (This assumes the propriety of neglecting the protective function in a case permitting classification...If the case is clearly within the Statute of Wills, the operation of its protective provisions cannot be avoided) whatever

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[1] Feeney's Canadian Law of Wills, 4th Edition (Lexis Nexis) p. 1.1, per Justice Greer in *Schilthuis v. Ainold*, [1991] O.J. No. 2212 (Gen. Div.), at p. 2 of 25.
[2] Supra Note 1 at 1.2
[3] (1931), 51 Yale L.J. 1 at 17

> may be the particular method of securing that performance. As shown by the foregoing analysis, it will be secured by compliance with the Statute of Wills, but it will also be secured by compliance with the formalities for *inter-vivos* transfer. It may be secured in cases which technically do not satisfy the requirements of either testamentary or *inter-vivos* gratuitous transfers but which do comply with contract doctrines, by the existence of circumstances customarily surrounding the type of transaction involved. If these two functions are performed, the major purpose justifying the existence of transfer are satisfied. If so, there is no important reason of general policy for frustrating intent: on the contrary, following the thesis stated at the beginning of this article, the Court should strive to effectuate an intent placed on the case, if possible, in a legal category imposing no doctrinal barriers. If, on the other hand, these functions are not performed, our current philosophy requires dismissal of the claim. Such functional test of the validity of the alleged transfer is surely more fundamental than purely technical criteria."

An *inter-vivos* gift is said to be a "present passing of interest", and is to be irrevocable.[4]

As such, for an *inter-vivos* gift, there must be evidence of a donative intent of the donor to be unconditionally bound by the transfer coupled with the validity of either the subject matter of the gift or some appropriate indictor of title.[5]

B. OWNERSHIP OF JOINT ACCOUNTS AND JOINT ASSETS

Generally, the governing statement of law with respect to the ownership of money deposited in a joint account, when the money is deposited

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[4] Feeney at 1.3
[5] Feeney at 1.4

by one of the account holders only, is as set out by the Supreme Court of Canada in Niles v. Lake[6].

> The law is well settled, I think, that when a person transfers his own money into his own name jointly with that of another person, except in cases with which we are not concerned, then there is, prima facie, a resulting trust for the transferor. This presumption, of course, is a presumption of law which is rebuttable by oral or written evidence or under circumstances tending to show there was, in fact, an intention of giving beneficially to the transferee.

At page 258, Taschereau J. went on to state:

> The words "shall be joint property of the undersigned" or "right of survivorship" and "all monies in the account to be joint property of the undersigned" are indeed apt words to convey a legal title to the fund, but not to convey the whole fund beneficially. Something more than mere transfer is required to destroy the presumption of a resulting trust and intimation of such an intent must appear on the document itself, or as a result of evidence which reveals the intention to benefit the transferee.

At page 260, Taschereau J. also stated:

> The presumption arising upon such a voluntary transfer of property into another title or legal power, without more, is that of a resulting trust to the donor, and the burden is on those asserting a beneficial transfer to establish that fact.

As such, the onus is on the recipient of the inter vivos gift to rebut the presumption of a resulting trust and, where the person is deceased, the

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[6] [1947] 2 D.L.R. 248 p.254, Taschereau J. (S.C.C.).

presumption can only be met by providing the same convincing and unimpeachable corroborative evidence.

The decision of Justice Cullity in Cho Ki Yau Trust v. Yau Estate[7] is an excellent illustration of how the courts have dealt with whole question of ownership of inter vivos gifts and joint accounts.

In the Cho Ki Yau Trust v. Yau Estate, the first wife of the deceased and their adopted son held a term deposit jointly (without express right of survivorship). Upon the death of the first wife, the husband directed the bank to transfer the funds into his personal account. The adopted son claimed that the mother had intended the funds to go to him upon her death and the adopted son brought an action against the father's administrator and sought summary judgment.

The court considered issues such as the ownership of the joint account in light of the lack of an express right of survivorship in the language of the bank's joint account agreement. Furthermore, the court looked at the question of the presumption of advancement as between parent and child and given the relationships of the parties, the whole question of rebutting the presumption of resulting trusts was considered by the court.

Finally, the court also made some comments with respect to the whole issue of conversion of assets[8].

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[7] (1999) 29 E.T.R. (2d) 204 (Ont.Sup.Ct.J.) 204.

As to the question of the ownership and right of survivorship of the assets in the joint account, the court considered a reasonably unique circumstance in this case as the language of the bank's joint account agreement was not determinative as the agreement determined the rights and obligations vis-à-vis the bank only.[9]

Justice Cullity made it clear that in circumstances such as this, the question of whether the adopted son obtains a beneficial right to the funds on deposit depends upon the intention of his mother and that, for this purpose, the terms of the document provided by the bank for their signatures are of secondary importance. The court made it clear that those documents really just determine the rights and obligations in respect of the bank.[10]

Cullity J. went on to emphasize that depending upon the evidence of the depositor's intention and on the operation of the equitable presumptions of a resulting trust and advancement where such evidence is lacking, the beneficial ownership of joint accounts to which only one of the account holders has contributed may vary significantly irrespective of the terms of the documents provided by the bank.[11]

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[8] In this decision, there is also an interesting discussion of the appropriate circumstances whereby summary judgment may be granted in an estate proceeding. In this case, summary judgment was granted and Justice Cullity reviews the law in respect of summary judgment in some detail. This issue is not the subject of this paper and as such if one is interested in reviewing this aspect of the decision one should refer to pages 207-212.

[9] Cho Ki Yau Trust v. Yau Estate at p. 213.

[10] IBID at p. 213. See also Niles v. Lake [1947] S.C.R. 291 (S.C.C.) at pp. 307-309 per Rand J.; Mailman, Re, [1941] S.C.R. 368 (S.C.C.) at pp. 377-378 per Crocket J.; Taylor Estate v. Taylor (1995), 9 E.T.R. (2d) 15 (B.C.S.C.).

[11] IBID, at p. 213.

In essence, where the evidence is that the original deposit of the funds is made by one of the individual joint account holders, in the absence to the contrary, it must be presumed that the sole depositor was the beneficial owner of the funds. This circumstance where the one individual deposits most, if not all of the funds into the account and the other joint holder is there solely for the convenience and benefit of the depositor, is of course common in many family situations.

Justice Cullity goes on to note that cases in which beneficial joint ownership has been found to exist from the inception from the account have most commonly involved accounts in the names of spouses to which each has contributed or, at least, from which each has made withdrawals for his or her own purposes.[12]

As noted above, the intention of the depositor and the documentation is of secondary importance.

In considering the question of ownership, looking at the intentions of the depositor and, on a secondary basis looking at the banking documentation, one must then turn to the question of whether or not a presumption of advancement exists and whether or not there is evidence that is capable of rebutting it.

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[12] IBID, at pp. 213-214.

Typically in circumstances of joint accounts the account is either set up jointly in the name of the depositor and his or her spouse or jointly in the name of the depositor and his or her child.

As between spouses, the presumption of advancement has been preserved by virtue of s. 14 of the *Family Law Act*[13] which provides as follows:

(i) Presumptions

The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between husband and wife, as if they were not married except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

As between parent and child, the whole question of the presumption of advancement is more complex. Historically, the presumption of advancement was not regarded as applicable to transfers between a mother and her child while the father was alive and supporting the child.[14]

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[13] R.S.O. 1990, c.F.3.
[14] Cho Ki Yau Trust v. Yau Estate at p. 214.

In Cho Ki Yau Trust v. Yau Estate[15] Justice Cullity carefully reviews the authorities in support of the concept that the presumption of advancement does not apply between mother and child while their father is alive. In so doing, Cullity J. provides a comprehensive comparison as between the authorities which support the concept of the presumption of advancement in these circumstances and the authorities which reject the presumption of advancement. He goes on to repeat the fact that there is a present statutory endorsement of the presumption of advancement in s. 14 of the *Family Law Act* and clearly states that in the context of other situations including those involving the acquisition, or transfer, of property between strangers and between parents and their children, the presumption of advancement continues to be endorsed by the courts.[16]

While Justice Cullity struggled with the authorities that denied the existence of a presumption of advancement when a mother transfers property gratuitously to her child,[17] he eventually finds that in the circumstances, the deposit of the funds by the depositor mother gave rise to a presumption of advancement in favour of the son.[18]

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[15] At pp. 214-219.

[16] Cho Ki Yau Trust v. Yau Estate at p. 216. See also Albert v. Albert (1982), 13 E.T.R. 149 (Alta.Q.B.); Cohen v. Cohen (1985), 60 A.R. 234 (Alta.Q.B.); Tucker Estate v. Gillis (1986), 22 E.T.R. 73 (N.B.Q.B.); Boulos v. Boulos (1986), 24 E.T.R. 56 (Nfld.T.D.); Dreger (Litigation Guardian of) v. Dreger (1994), 5 E.T.R. (2d) 250 (Man.C.A.); Wilson, Re, (1999), 27 E.T.R. (2d) 97 (Ont.Gen.Div.).

[17] See Cartwright J. in Edwards v. Bradley, [1957] S.C.R. 599 (S.C.C.) and Lattimer v. Lattimer (1978), 1 E.T.R. 274 (Ont.H.C.).

[18] It should be noted that Cullity J. made it clear that while no authority was cited to him that applied to the presumption of advancement in favour of an adopted child, even independently of the provisions of ss. 1(2) of the *Children's Law Reform Act*, R.S.O. 1990 c.C.12, which provides:
(1)(2) exception for adopted children – where an adoption order has been made, s.158 or 159 of the *Child and Family Services Act* applies and the child is the child of the adopting parents as if they were the natural parents

Cullity J. determined that the more recent authorities in respect of the application of a presumption of resulting trust should prevail and relied on the decision of *Re: Wilson*[19] and accepted the court's analysis and conclusion which stated:

> Taking into consideration the natural affection between a mother and child, legislative changes requiring mothers to support their children, the economic independence of women and the equality provision of the Charter, I conclude that the presumption of advancement, rather than the presumption of resulting trust, should apply to the transfer of assets from [the mother] to her [son].

Accordingly, the court in Cho Ki Yau Trust v. Yau Estate found that the deposits for a mother intended to retain the sole use and benefit of the funds in the account during her lifetime and notwithstanding, her adopted son became a co-owner of the account at its inception and as a consequence, the plaintiff father had no right to appropriate any of the funds for his own benefit without the adopted son's authority.

(ii) Recent Developments

The British Columbia Court of Appeal in *Cooke* v. *Cooke Estate*[20] considered the issue of an account held jointly by the deceased and one of his daughters. The deceased had left his Estate to be divided equally among his six

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and ss. 158(2) of the *Child and Family Services Act*, R.S.O. 1990, c.C.11, a distinction cannot properly be drawn in Ontario, at the present time, between voluntary transfers to adopted and other, children.

[19] (1999), 27 E.T.R. (2d) 97 (Ont.Gen.Div.)

[20] (2005), 16 E.T.R. (3d) 108 (B.C.C.A.).

children. The joint account was significantly larger than the Estate at the date of death.

At trial the Court held that the deceased intended to provide an *inter-vivos* gift to his daughter. The deceased had converted his bank account into a joint account approximately eight years prior to his death and at that time there was no questions as to his capacity. On a day to day basis, the daughter did not make any transactions on the account. However, cheques were issued to her from the account and she received all of the monthly statements. The Court also considered the fact that approximately six years before his death, the deceased had transferred real property in a joint tenancy with his daughter and attended to subsequently sell that property. The proceeds of the sale of that property were deposited into a joint account and the deceased also prepared a Will in or around this time period. Further, at the time the instructions were given to the solicitor, the Court felt they were consistent with the special gifting to the daughter and the equal distribution of the residue to his children.

At the Court of Appeal, the panel again reviewed the evidence clearly indicating the deceased's intention to make a gift to the daughter and held that the presumption of advancement was really an evidentiary tool that was, of course, rebuttable in the right circumstances.

The Court of Appeal upheld the trial judge and the special gift to the daughter.

In Pecore v. Pecore[21], the Ontario Court of Appeal considered these same issues and delivered its decision on September 8, 2005.

In Pecore v. Pecore, the deceased transferred assets under his name jointly with his daughter. The jointly held assets amounted to approximately 80% of the value of the Estate.

The deceased was concerned that the transfer of the assets to his daughter's name could trigger a deemed disposition and result in tax consequences. As a result, he wrote the financial institutions and told them not to adjust the cost base for the investments as he retained 100% ownership and that the transfer to joint names was for probate purposes only.

Subsequent to the transfer of the investment account, the deceased also amended his Will to name his daughter and his daughter's husband as residual beneficiaries.

The daughter was married to a man who was a quadriplegic, as a result of a motor vehicle accident and the daughter was her husband's primary caregiver.

Approximately two years after the date of death of the deceased, the daughter and her husband's marriage ended and the daughter's husband, in

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[21] (2005), 19 E.T.R. (3d) 162 (Ont. C.A.)., leave to Appeal granted to S.C.C. May 2006.

the course of the divorce proceedings, learned that she had received substantial inheritance by way of a joint ownership account following her father's death.

The husband brought a claim against the daughter claiming an interest in the jointly held assets and claiming that he was entitled to 50% of those assets.

Of interest, in this case the transfer of the joint account was not challenged by the siblings of the transferee, it was challenged by the deceased's son-in-law.

At trial, the Judge reviewed the evidence and concluded that the deceased intended the gift of the assets held on joint account with the daughter. The Court again, as is customary in these matters, reviewed the specific factual circumstances relating to this matter.

At trial, the deceased's intention was supported by the other daughter of the deceased. A review of the documents signed by the deceased was also undertaken and the Court was satisfied that all the documents signed by the deceased with the various financial institutions clearly indicated that the daughter was to have a right of survivorship. The timing of the gifting was also considered and was further supported by the deceased's Will, an RRSP and an insurance policy designation.

At the Court of Appeal, in dismissing the son-in-law's appeal, Lang, J.A. considered and reviewed the presumptions of resulting trust and advancement. Her Honour, of course, acknowledged that if the presumption of resulting trust applied, the burden was on the daughter to establish the gift and conversely if the presumption of advancement applied, the burden would lie on the son-in-law to establish that the deceased did not intend his daughter to receive both the legal and beneficial ownership of the investments.

Lang, J.A. stated that:[22]

> "Since both presumptions can be rebutted by evidence of actual intention, in my view, the presumptions become relevant only if, after considering all the evidence and the circumstances surrounding the transfer, a court is unable to draw a conclusion about the transferor's actual intention. Only in such a case, would a court resort to the presumptions to determine the issue. In a case such as this, which involves joint ownership of assets, resorting to the presumptions will rarely, if ever, be necessary."

The Court of Appeal went on to conclude that in this case there was ample evidence of actual intent and it was unnecessary for the trial judge to resort to the presumptions.[23]

On November 1, 2005, the Court of Appeal again considered these questions in Saylor v. Madsen Estate.[24]

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[22] Ibid, at 165.
[23] Ibid, at 172.
[24] [2005] A.J. #1 No.4662, (2005) 143 A.C.W.S. (3d) 570 (Ont. C.A.), see also the trial decision Saylor v. Brooks (2004) 13E.T.R. (3d) 44 (Ont. S.C.). Leave to Appeal granted to S.C.C. May 2006.

In this case the Court of Appeal held that while the deceased's intention was clear from the evidence, the presumption of resulting trust did not need to be considered. The Court confirmed the approach set out in Pecore v. Pecore and held that:[25]

> Reliance on the presumptions has diminished because the Courts are now first examining all of the evidence to determine the transferor's intent. That is to say, Courts are tending to examine the evidence in its entirely and base findings regarding intention on all the facts. It will only be where the evidence itself is unclear that reliance on the presumptions becomes necessary.
>
> This approach will reflect what I believe to be a sensible and modern approach to an analysis of the presumptions. ...there is no reason to resort to the presumptions where evidence of intention is clear. This approach is both contemporary and reasonable since the overall purpose is, after all, to ascertain the transferor's intention."

Conclusion

Given the recent interest in this issue by the Supreme Court of Canada, this issue will no doubt be considered by estate lawyers for many years to come.

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[25] Ibid. at paragraphs 24 and 25.

REMOVAL OF ESTATE TRUSTEES REVISITED

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REMOVAL OF ESTATE TRUSTEES REVISITED[1]

Introduction

As a general proposition, the representation of beneficiaries presents any litigator with a wealth of law in support of his or her position. The onerous standard of care imposed upon any trustee is such that the lawyer representing beneficiaries has an immediate advantage in any contested proceeding. Simply put, the Court will seek to ensure that the beneficiaries are protected. Accordingly, the actions of the trustee in administering any trust will be carefully scrutinized.

Where removal of estate trustees is sought, the Court will consider the removal of a trustee anytime the welfare of the beneficiaries is at stake. The acts or omissions justifying the removal must be "such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."[2]

Statute

The statutory basis for the removal of an executor is found at section 37 of the *Trustee Act*[3] which provides as follows:

> 37. The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some

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[1] David M. Smith of Hull & Hull LLP. Grateful acknowledgement is made to Jordan Atin whose previous paper on this subject was of great assistance.
[2] *Letterstedt v. Broers* (1884), (1883-84) L.R. 9 App. Cas. 371 (*South Africa* P.C.) @ 385-9.
[3] R.S.O. 1990, c. T.23, as am.

> other proper person or persons to act in the place of the executor or administrator so removed.

Section 3(1) of the Act provides that a trustee shall be removed when he or she "refuses [to act] or is unfit to act, or is incapable of acting."

The Court's statutory jurisdiction to remove fiduciaries is therefore very broad. However, the Act does not provide any clear guidance as to when it is appropriate to exercise its discretion to remove an executor or trustee.

Accordingly, it has been left to the evolution of caselaw to provide such guidance.

Judicial Tests for Removal

The leading case of *Letterstedt v. Broers*[4] sets out the jurisdiction of the Court on removal applications as referenced in the second paragraph of this paper. As noted, the primary concern is the welfare of the beneficiaries.

Despite the number of cases concerning the removal of executors, no one case is seen as creating a universally accepted test for determining when removal will be ordered.

Instead, several tests have emerged, and while there are subtle differences, they are all objective tests.

The following are the general circumstances under which an estate trustee will be removed:

- Bankruptcy;
- Conviction of a felony;
- Permanent removal from the jurisdiction;
- Incapacity through illness, age, or inclination;

- Substantial breach of trust;
- Lack of appreciation of duties;
- Inability of trustees to agree; dissension with the beneficiaries;
- Undue delays;
- Conflict of interest;
- Improper Behaviour

Burden of Proof

The burden of proof rests on those seeking the removal of the executor. The Court will look for evidence proving "a *likelihood* that the trust cannot be carried out in accordance with the wishes of the deceased as expressed in the will"[5] (emphasis added).

Procedural Issues

In seeking the removal of an executor, the matter is brought by application pursuant to Rule 14.05(3) of the *Rules of Civil Procedure*. In Toronto, the matter is brought on the estates list.

In other removal applications, for example, those based on maladministration or breach of trust and, even, hostility between the executor and beneficiaries, the Courts are concerned with the actual actions of the executor relating to the administration of the estate.[6]

Thus, in those cases, the application to remove the executor, naturally, is commenced during, or sometimes close to the completion of, the administration.

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[4] (1884), 9 App. Cas. 371 (P.C.)
[5] *Crawford v. Jardine* (1997), 20 E.T.R. (2d) 182 (O.C.G.D.)
[6] *Re Thorpe* (1929), 35 O.W.N. 325; See also Martin, Re [1978] 4 W.W.R. 515 (Sask. Surr. Ct.)

Several older cases held that an application to remove an executor could not be commenced prior to the issuance of probate.[7] The basis of those decisions appear to turn on the division of jurisdiction between the former Supreme and Surrogate Courts. In that regard, the authority of those cases is now dubious.

Because of the proliferation of estates which are administered without probate as a result of *Re Granovsky Estate*,[8] the Superior Court of Justice in *Carmichael v. Carmichael*[9] considered whether a removal application could be made where the executors had not sought or received a Certificate of Appointment of Estate Trustee. The Court distinguished between situations where the executors had "not assumed the administration of the estate" and those where the executor has, in fact, done so. In the former case, the Court suggested that a removal application would be premature, in the latter, the applicant was free to bring such an application.

The focus of the remainder of this paper is on the issue of removal for conflict of interest.

Determining if a Conflict of Interest Justifies Removal

The mere existence of a conflict of interest will often be a sufficient basis to justify the removal of a trustee, even if the trustees did not take actions which caused any detriment to the beneficiaries: "The question is whether it would be difficult for the trustee to act with impartiality, not whether, in fact, it would or would not do so."[10]

One such test, enunciated in *Re Shaw Co.*[11], was put this way:

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[7] *Re Weil*, [1961] O.R. 751, 29 D.L.R. (2d) 308 (Ont. H.C.); [1961] O.R. 888, 30 D.L.R. (2d) 91 (Ont. C.A.); *Re Deutsch* (1976), 18 O.R. (2d) 357, 82 D.L.R. (3d) 567 (Ont. H.C.)

[8] (1998), 156 D.L.R. (4th) 557, 21 E.T.R. (2d) 25 (O.C.G.D.)

[9] (2000), 46 O.R. (3d) 630, 184 D.L.R. (4th) 175, 31 E.T.R. (2d) 33 (S.C.J.)

[10] *Re Walter W. Shaw Co.* [1922] 3WWR 119 (*Sask.* K.B.).

[11] [1922] 3 W.W.R. 119 (Sask. K.B.). This matter was a bankruptcy case.

> "The question is whether it would be difficult for the trustee to act with impartiality, not whether, in fact, it would or would not do so."

In *Orenstein v. Feldman*[12], the court found that the trustee's personal interests "place[d] him in a position where he must inevitably weight his interests against the interests of the other beneficiaries and no trustee should ever be in that position".

In that case, the court did not require evidence that the executor took actual steps to prefer his own personal interest. The *position* of conflict alone was sufficient. Thus, counsel's arguments that the executor "as a man of principle would undoubtedly act impartially in the best interests of all beneficiaries" was rejected by the Court who approved the objective test set out in *Re Shaw Co.*

The Ontario Court of Appeal put it in slightly different terms, but applied the same basic concept, where it stated:

> "It is our view that misconduct on the part of a trustee is not a necessary requirement for the Court to act and that the Court is justified in interfering, and indeed required to interfere, when the continued administration of the trust with due regard for the interests of the *cestui que trust* has by virtue of a situation arising between the trustees becomes impossible or improbable."[13]

The court is not necessarily focused on blame or responsibility, but merely on whether the trust can be expected, or seen to be expected, to be administered properly.

In many conflict removal cases, the conflict exists, or is created, at the death of the testator, before any assumption of administration by the executor takes place. Because of the authority concerning premature applications, Courts have fashioned another remedy, or at least another name, in such cases. "Passing over" rather than removing an executor, is the frequently cited term:

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[12] supra

> "There is no doubt at all that the passing over of an executor and granting administration to other parties is an unusual and extreme course, though it is within the discretion of the Probate Court; but to do so without citing the executor is indeed a most extreme course. I assume, and I think I rightly assume, that it is within the discretion of the Probate judge to take this course if he is asked to do so and the circumstances are very unusual circumstances which make it desirable that this course should be taken."[14]

For example, in *Stadelmier v. Hoffman*[15], one of four named executors, appeared to be subject to a claim by the estate for recovery of property. The other three executors sought to remove the fourth. The Court agreed to "pass over" the fourth because of an *actual* conflict of interest. The Court acknowledged the requirement of probate before removal, but found that in cases of actual conflict of interest, a named executor could be effectively removed even prior to probate.[16]

This view is consistent with the objective test referred to previously. It is the very existence of a position of conflict of interest which acts to disqualify a named executor. Thus, the absence of misconduct, or in fact any actions whatsoever, in the administration of the estate is not a bar to removal.

Before passing over an executor prior to probate, an *actual* rather than a *potential* conflict of interest must be present.[17] For example, the possibility that a remainderman could potentially have a conflict of interest was found to be insufficient to remove the executor.[18] The Court found that the conflict had not arisen and might never arise. The Court did, however, point out that if the trustee had a discretion to reduce the payments to the income beneficiary, thereby increasing the amount remaining for the executor as remainderman, the removal application might have been successful.

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[13] *Re Consiglio Trusts (no. 1)*, [1973] 3 O.R. 326, 36 D.L.R. (3d) 659 (C.A.)
[14] *Re Leguia* (1936), 105 L.J.P. 72 (C.A.) per Lord Wright
[15] (1986), 25 E.T.R. 174, (sub nom. Becker, Re) 57 O.R. (2d) 495 (Surr. Ct.)
[16] See also *Bowerman, Re* (1978), 20 O.R. (2d) 374, 87 D.L.R. (3d) 597 (Ont. Surr. Ct.),
[17] *Falk v. Dick*, (April 21, 1994), Doc. Winnipeg Centre PR 93-01-31835 (Man. Q.B.) ; *Stadelmier v. Hoffman*, supra
[18] *Re Christie Estate*, [1943] 3 W.W.R. 272, 52 Man. R. 11, aff'd [1944] 1 W.W.R. 528 (C.A.).

> "If the situation at the present time were such that the trustee could exercise her discretionary powers of reducing payments, then undoubtedly the removal of the trustee might well be ordered."[19]

Importance of Testator's wishes

The court's discretion to remove an executor, whether before or after a Certificate of Appointment of Estate Trustee has been issued, is not to be taken lightly. It is not merely a choice between potential applicants for estate trustee, each with an equal right to the position. The burden rests on those attempting to replace the named executor and displace the stated intentions of the testator.

Since there is normally no dispute as to the validity of the Will appointing the executor, it should not be approached by the courts in the same fashion as an appointment of an estate trustee during litigation[20] in a will challenge. The discretion in those cases is much broader. In those cases, the testator's wishes and intentions have not been and cannot be conclusively determined until the Court pronounces on the validity of the will in question. Thus, the court is free to select its choice for estate trustee, unencumbered by the wishes of the testator. Removal applications, however, are different, because the testator has expressly selected his executor.

The Court is being asked to declare that the named executor should not be permitted to administer the estate, notwithstanding he was the choice of the testator.

In *Crawford v. Jardine*[21], the court stated:

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[19] *Re Christie Estate, supra.*

[20] *Estates Act*, s. 28 provides that the Court may appoint an Estate Trustee During Litigation "[P]ending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration..."

[21] supra

> "Central to the question of the removal of estate trustees is the proposition that in those cases, as, for example, here, where the deceased has expressly appointed the trustees, the court should be loath to interfere with the testator's expressed intention, except on the clearest of evidence that *there is no other course to follow*." (emphasis added).[22]

This deference to the testator's wishes is, at times, less than complete. In *Falk v. Dick*[23], the court referred to *Letterstedt v. Broers* in finding that the welfare of beneficiaries was of greater importance than the testator's "solemn decision" in selecting his executor. Thus, deference was only shown to the point where the appointment "does affect and impair the due and faithful administration of the estate".

Nevertheless, in most removal applications, deference to the testator's selection of executor is expressed as an important consideration.

Testator's Approval of Executor's Conflict of Interest

It can be argued that even greater deference to the testator's appointment of executors ought to be paid in two other particular cases:

(a) where evidence is tendered to show that the testator was aware of the conflict and appointed the executor notwithstanding, or
(b) where the will expressly permits an executor to act notwithstanding a conflict.

If evidence can be shown that testator was aware of a potential conflict of interest and yet appointed the executor anyway, the court should be even less willing to interfere. The court acknowledges that the testator is implicitly permitting the executor to act in a conflict of interest.

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[22] *Tempest, Re* (1866), 1 Ch. App. 485 (Eng. C.A.); *Owen Family Trust, Re* (1989), 33 E.T.R. 213 (B.C. S.C.), at 215.

For example, in *Crawford v. Jardine*[24], the Court acknowledged that the testator foresaw a potential conflict between his appointed executors. The court was comforted by the fact that the testator had made provision for the resolution of such conflict among the executors. Though not solely a conflict of interest case, the court seemed re-assured by the fact that the testator foresaw the potential for conflict in deciding not to displace the testator's wish and remove an executor.

Perhaps the most common conflict of interest is the appointment of beneficiaries, for example, a life tenant or a remainderman or both, to be executors.

Where the executors have broad discretion to encroach on capital, for example, the conflict of interest may be acute. In such a case, each has a clear conflict of interest in that the life tenant will wish, for her own personal benefit, to encroach on capital, while conversely, the capital beneficiary would prefer not to encroach at all. Each has a vested personal interest in exercising discretion in one way or another. However, in this situation, the *position* of conflict of interest does not, of itself, usually appear sufficient to remove the executor.

This is, at least partially, due to the implicit acknowledgement that the testator was aware that his chosen executor was in the *position* of conflict of interest. Where a beneficiary is appointed as an executor, the conflict of interest is apparent when the will is prepared and does not arise out of some other facts which are not known of by the testator when she signs the will. The conflict arises *because* the testator appointed a beneficiary as executor and it is the testator who set up the conflict of interest. Thus, the Court will infer that the testator, being aware of, and perhaps creating, the conflict, has implicitly permitted it. Thus, it is only where the executor/beneficiary takes actions motivated by the conflict of interest that a court seems prepared to remove the named executor/beneficiary.

A common example of authorization of a conflict of interest is the authority giving permission to an executor to purchase assets from the estate.

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[23] Supra
[24] Supra

In *Re Ballard Estate*[25], the court confirmed that at common law, a trustee may not purchase any part of the trust property unless the Will, in clear terms, permits him to do so. The will specifically stated that "the decision of a majority of my Trustees shall govern and be final and binding upon all persons concerned, *notwithstanding that any one or more of my Trustees may be personally interested in the matter in dispute or question.*" (emphasis added) The Court stated the law as follows:

> "[O]nce the court has found a conflict of interest and duty, the question is asked as to whether consent to that activity was given?"[26]

In that case, the Court found that consent had been given by the provision of the will to the purchase of trust property, notwithstanding the conflict of interest. The court, however, was clear to point out that, notwithstanding the provision in the will, "the trustees, however, are in no way relieved of their fiduciary duties to the estate by this Court's interpretation of the Will." Thus, in such cases, the Courts appear to require evidence that, in fact, the trustee acted in his own personal interest to the detriment of the competing interests of the beneficiaries and not merely that a competing interest existed.

Types of Conflicts which will lead to Removal

A conflict of interest can fall into at least two categories. The most common situation is created where the executor's *personal interests* conflict with the fulfillment of his duties as executor. The second, which is much less common, occurs where executors have a conflict of *duty* not involving their own personal interest.

J.C. Shepherd in *The Law of Fiduciaries*[27] argues that the Court must, in considering whether to remove a fiduciary:

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[25] (1991), 41 E.T.R. 113, 79 D.L.R. (4th) 142, 3 O.R. (2d) 65, (sub nom. Ballard Estate, Re) 44 O.A.C. 225, 3 O.R. (3d) 65 (C.A.)

[26] (D.W.M. Waters Law of Trusts in Canada 2d ed. (Toronto: Carswell, 1984), at p. 715).

[27] Supra, at p.342-343

1. Evaluate the objective potential for misuse of the power;
2. Evaluate the risk of potential misuse in the particular case, if possible, where there has been a history of past misconduct in the administration; and
3. Find that not removing the executor would cause irreparable harm. In so doing, the court should consider how easily the executor could hide his breach or the extent to which the beneficiary could protect herself from the possible breach of trust.

While it is a very useful analytical framework, it does not appear that any court has explicitly applied that test. Instead, in deciding whether to remove an executor for a conflict of interest, courts appear to apply a functional test. The court considers what duties the executor will be required to fulfill in the particular estate and determines whether his personal interests conflict with those duties. For example,

> "In considering the fitness of the respondent to act as an executor I have considered also the duties of an executor in a general way. One duty of an executor is to bring in the estate for distribution among the beneficiaries."[28]

Thus, if the executor has a personal interest in not collecting the assets, for example because he claims to retain them as his own, he cannot act[29].

The classic case occurs where the estate has a claim against an executor to recover assets which may form part of the estate. One such case was *Re Berner Estate*[30] where a promissory note signed by the executor in favour of the deceased was in issue. The court found that the executor was "in a position of conflict because of the note, as on the one hand, as executor, he would be in a position of responsibility for investigating and pursuing the estate's entitlement in respect of the note and yet, on the other hand, personally he would be in the position of opposing the estate's interest in a note which would be detrimental to his personal position."

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[28] *Stadelmier v. Hoffman, supra*
[29] See *Re Nitsche Estate* (1998) CarswellOnt 1250; *Re Wildeman* (1982), 24 Sask. R. 257 (Surr. Ct.)
[30] [2000] O.J. No. 662 (S.C.J.)

Failure to pay a debt owing to the estate, either personally or through a company controlled by the executor, may also be grounds for removal. Thus, where an executor's company failed to pay a sizable debt for a period of a year and a half, the court removed the executor in part, because "there is a conflict between the duty of the respondent as trustee and his company's position as debtor to the Trust."[31]

Another difficulty which may arise if the respondent is an executor is that there may be lack of unanimity between the executors on the issue of whether a suit should be instituted in the first place.[32] Where there are multiple trustees, and one of them may be subject to litigation, the Court must be aware that the executor/defendant could effectively block attempts to commence the litigation.[33]

Conversely, where an executor has a claim against the estate, he too may be in a conflict of interest.[34] For example, in *Re Lithwick Estate*[35], the court removed an executor because of a claim he had against the estate.

> "It is, of course, not the law that an executor can never have a claim against an estate for past services or loans, but he should not place himself in a position where his duty to investigate the validity of such claim against the estate conflicts with his interest in promoting an undocumented and dubious claim."

The Court was particularly concerned that the claim against the estate, in that case, would not be easily proven by the executor/creditor.

In *Scott v. Scott*[36], a co-trustee was claiming a debt from the trust and refused to co-sign cheques as co-trustee until his claim was paid. The Court removed him.

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[31] *Re Owen Family Trust* (1989), 33 E.T.R 213 (B.C.S.C.)
[32] See *Chubey v. Chorney Estate*, [1995] M.J. No. 60 (Q.B.)
[33] See *Stadelmier v. Hoffman*, supra
[34] See *Isley v. Isley Estate*, (1996) 140 Sask R. 191 (Q.B.) aff'd (1996) 144 Sask. R. 218 (C.A.); *Gubbe v. Sardella*, [2001] O.J. No. 2114 (S.C.J.)
[35] (1976), 9 O.R. (2d) 643 (H.C.J.)
[36] (1991), 41 E.T.R. 150 (Sask.Q.B.)

> "There is no question that Kenneth Scott is using his position as a trustee (with a veto power on disbursements from the trust fund) to attempt to gain a personal benefit for himself, namely, payment of his claim respecting the maintenance of Clayton Scott. Whether or not he is entitled to that benefit is beside the point. He has let his personal interests override and interfere with his obligations to act in the best interests of the trust.
>
> ...
>
> He has failed to perform his basic duties as trustee in the administration of the trust and is in fact deliberately frustrating its administration. Such act, or failure to act, has placed him in direct breach of his fiduciary duties to the beneficiaries of the trust."

In *Cooper v. Fenwick*[37], the Court found that an executor had a "clear conflict of interest position in that, through corporations controlled by him, he is seeking to enforce debt securities against corporations of which the Estate is a fifty percent shareholder."

In *Orenstein v. Feldman*, money was advanced by Orenstein to Feldman in trust to finance certain real property transactions. Orenstein's indebtedness was to be paid off in priority to Feldman's indebtedness upon the sale of the property. It was found that Feldman was determined to hold and develop the lands with a view to achieving sufficient recovery to pay off "his" indebtedness to the bank and that his personal interest in paying off the bank might conflict with his duty to realize on the lands and mortgage as security, and to pay off in priority the principal sum still owing to Orenstein. The Court found that Feldman's personal interests placed him in a position where he would inevitably weigh his interests against the interests of other beneficiaries, particularly Orenstein.

An executor's personal partial ownership of estate assets can also lead to a conflict of interest. In *Re Anderson*[38], the estate was the majority shareholder, and a co-executor was a minority shareholder, in the incorporated company through which they carried on business. The minority owner/co-executor refused to allow his co-executor to vote testator's shares so as to elect a board of directors to the

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[37] Unreported (September 27, 1994), Doc. 1658/84 (Ont. Gen. Div.)
[38] (1928), 35 O.W.N. 7

liking of testator's family, who were the beneficial owners of the shares. The Court removed the minority owner/co-executor.

It is now accepted that a spouse who makes a *Family Law Act* election must be removed as an executor.[39] Similarly, a dependant who makes a dependant support application pursuant to Part V of the *Succession Law Reform Act*, cannot act as both an applicant and respondent. In such case, the dependant should likely be removed as executor, at least pending the determination of the dependant support claim. Depending on its resolution of the application, the dependant may have to be removed permanently if the disposition of the claim gives rise to a further conflict of interest as trustee.

An example of a conflict of *duty*, as opposed to a conflict of interest, is the case of *Weinstein v. Weinstein*[40]. An Executor of two separate estates who are engaged in litigation against each other, was removed. Such a position was described by Greer J. as a "conflict of interest of major proportions". The court indicated that the executors ought to have immediately renounced their appointment in light of the clear conflict. The court, in the circumstances, refused to permit the removed executors to have any input into the appointment of the successor executors.

The conflict of duty can also arise where an executor is involved with the assets of the deceased in a different capacity. For example, a named executor who was also a member of the accounting firm who was the auditor of the testator's company was recognized to have a conflict of interest.[41] The Court wrote:

> "I am satisfied that the objectivity required for a proper audit of the estate or company accounts would not be possible as long as a partner in the auditing firm was an executor and trustee."

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[39] *Reid v. Reid Martin* (1999), 35 E.T.R. (2d) 267, 11 R.F.L. (5th) 374 (Ont. Div. Ct.)
[40] (1997), 18 E.T.R. (2d) 178 (O.C.G.D.)
[41] *Re Martin* (1985), 47 C.P.C. 229 (Ont. H.C.J.)

In *Re Winter Estate*[42], it was argued that the executor had a conflict of interest as executor of a contested will because of his professional role in drafting it. It was claimed that he, from a potential negligence point of view, also has a corresponding interest as a lawyer in having it upheld. This was rejected.

A duty of an estate trustee which coincides with his personal interest, does not conflict with it, is not a conflict of interest.[43] For example, a personal interest in upholding a will, while benefiting him personally, does not conflict with his duty as executor to propound the will.

[42] (2001), 197 N.S.R. (2d) 385 (S.C.), aff'd (2002) 202 N.S.R. (2d) 5 (C.A.)
[43] *Re Winter Estate*, supra

STANDING IN THE SHOES OF AN ESTATE TRUSTEE AND GETTING PAID

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STANDING IN THE SHOES OF AN ESTATE TRUSTEE AND GETTING PAID

Introduction

Estate planning and administration have become more complex as the personal wealth of Canadians increases. We have all read about the coming wealth transfer from the generation born between the two great wars and baby boomers are now within striking distance of retirement.

Lawyers are regularly called upon to act as estate trustees for clients or family. Moreover, while lawyers have always provided legal advice to estate trustees during the administration of an estate, more and more lawyers are being retained to perform many of the duties normally reserved to estate trustees. How lawyers are paid for performing such services is the primary focus of this paper. The recent decision of Cullity J. in *Bott Estate (Trustee of) v. Macaulay*, 76 O.R. (3d) 422, 18 E.T.R. (3d) 15 will be considered.

Estate Trustees

It is trite law that estate trustees have fiduciary duties to both the deceased and to the beneficiaries. An estate trustee is to act reasonably and prudently throughout the administration of the estate. The duties of an estate trustee include: determining and collecting assets, finding and notifying beneficiaries, applying for probate, paying debts, preparing and filing a final income tax return, maintaining the estate, investing, and final distribution of the estate. Litigation is the unwanted companion to estate administration and is becoming more prevalent in today's culture of self-entitlement. The estate trustee is generally charged with managing such litigation and the distribution of the estate may be held up pending the resolution of any claims. Finally, an estate trustee may be required to pass his/her accounts.

It is important to note that, in general, an estate trustee must act personally and cannot delegate the exercise of discretion, that is the responsibility for decisions, to third parties. However, the law does allow an estate trustee to delegate

administrative work to third parties, although the court may reduce the compensation claimed by the estate trustee as a result.

Bott Estate (*Trustee of*) *v.* Macaulay

The issue of the fee charged by a lawyer for performing services normally reserved to the estate trustee was recently considered in *Bott Estate (Trustee of) v. Macaulay*. The decision was not appealed and has yet to be widely considered by the courts in Ontario.

The dispute concerned the fees charged by the solicitor who was retained by the estate trustee (the "Solicitor"). The estate trustee brought an application for the review of the Solicitor's accounts as well as an order for an assessment of the Solicitor's accounts pursuant to the *Solicitors Act*, R.S.O 1990, c. S.15, as amended. The application was commenced within 12 months of the delivery of the accounts.

By way of background, Alma Bott died in June 2003. Her son, Gerald Bott ("Bott"), was appointed estate trustee with a will in August 2003 pursuant to his mother's last Will and Testament. The Will left the entire estate to Bott and his sister in equal shares. The value of the estate was approximately $650,000.

Bott decided to retain the Solicitor to help him with the administration of the estate as he had little or no experience in such matters. The Solicitor's name was provided to Bott by the funeral home.

The Solicitor ultimately rendered two accounts. The first was an October 21, 2003 account in the amount of $7,204.49 for services as a solicitor on behalf of the estate. A second account dated October 28, 2003 was addressed to Bott for services on Bott's behalf as estate trustee. The second account in the amount of $34,828.50 represented five per cent of the value of the estate plus GST. The Solicitor paid ("pre-took") the accounts out of the proceeds of the estate at the same time as he delivered them to Bott.

In responding to the estate trustee's application, the Solicitor took the position that the court had no jurisdiction to order an assessment under the *Solicitors Act* and that his fees could only be challenged on a passing of accounts.

Cullity J. ordered an assessment of the October 28, 2003 account, the account rendered by the Solicitor for services on behalf of the estate trustee. The first account was not in issue. Cullity J. also expressed his surprise and his apparent displeasure that the Solicitor pre-took his 5% compensation and that the Solicitor characterized conveyancing work as executor's work and not solicitor's work.

In his supporting affidavit, Bott indicated that he did not realize that he had, in fact, signed two retainers: one relating to the Solicitor acting on behalf of the estate (i.e. the customary legal services) and one relating to the Solicitor acting on behalf of the estate trustee (i.e. assuming the duties of the estate trustee). The need for clarity in such a situation is therefore obvious. In the same affidavit, Bott also described in some detail the work he had performed as estate trustee and his view that he had performed all the duties required of an estate trustee.

Cullity J. was quick to point out that an estate is not a juridical person and cannot retain anyone or incur liabilities. As such, an "estate solicitor" is one who performs services for an estate trustee and not an estate. The estate trustee is therefore personally liable to the estate solicitor for his/her fees, not the estate. In the normal course, an estate trustee is entitled to be reimbursed/indemnified from the assets of the estate for the estate solicitor's fee. However, whether or not an indemnity exists does not affect the liability of the estate trustee to the estate solicitor. In this context, Cullity J. stated:

> If the estate trustee wishes to challenge the fees or disbursements charged by the estate solicitor, the appropriate procedure is by an assessment pursuant to the *Solicitors Act* unless, on a passing of accounts, the beneficiaries have challenged the reasonableness of the fees as an expense incurred by the estate trustee in administering the estate, or unless the estate trustee wishes to have an order approving the right to an indemnity or reimbursement. In either event, the court may order an assessment or, in some cases, may review the reasonableness of the accounts at the passing.

The fact that beneficiaries have not yet insisted on a passing of accounts does not affect the right of the estate trustee to have his or her legal bills assessed pursuant to the *Solicitors Act*. It is a matter properly between a solicitor and his client. As noted by Cullity J.: "[t]he possibility that the reasonableness of a solicitor's fees may be in issue on a passing of accounts, does not affect the rights of the estate trustee as the solicitor's client".

In his decision, Cullity J. noted that nothing prevents a solicitor from performing services that are ordinarily part of the estate trustee's work and for which the estate trustee is personally liable. However, the estate trustee cannot claim compensation for such work and his or her compensation would be otherwise reduced. According to Cullity J., absent any special agreement between the estate trustee and a solicitor, a solicitor will generally be entitled to charge only on the usual *quantum meruit* basis. Furthermore, the reasonableness of the fees can be questioned on an assessment based on the usual factors set out Rule 58.06 of the Rules of Civil Procedure as well as the amount of time, labour, and trouble involved, the degree of skill and responsibility applied, the result obtained, etc.

While remuneration paid to the solicitor for services reserved to the estate trustee may be calculated at a special rate or as a percentage of the value of the estate, the beneficiaries are entitled to challenge the reasonableness of the amount paid on a passing of accounts. Moreover, even in the face of any such arrangement or agreement, the estate trustee is not prevented from assessing his/her solicitor's account, though such an arrangement would factor into the assessment officer's consideration.

In considering the October 28, 2003 account for services performed by the Solicitor on behalf of the estate trustee, Cullity J. held that there was no agreement between Bott and the Solicitor that entitled the Solicitor to a percentage of the value of the estate. The Solicitor's fees were to be determined on a *quantum meruit* basis and without reference to any amount that might be awarded to Bott as estate trustee. As a final rebuke, the Solicitor was ordered to deposit the $34,828.50 he pre-took into an interest bearing account pending the

completion of the assessment. The Solicitor was also required to pay interest on the $34,828.50 at the prejudgment interest rate from October 28, 2003 to the date of the deposit.