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# RECENT CASELAW DEVELOPMENTS – June 2008


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# Recent Caselaw Developments
## by Ian M. Hull and Suzana Popovic-Montag

## A. The Role of the Executor and Solicitor – Delineated

***Rooney Estate v. Stewart Estate*, (2007) Carswell Ont. 6560**

The recent decision of Justice Pierce of the Ontario Superior Court of Justice in *Rooney Estate* v. *Stewart Estate* addressed several important issues relating to the administration of an estate, the passing of accounts and the role of the solicitor.

In *Rooney Estate* v. *Stewart Estate*, the Applicant sought an Order requiring the estate solicitor to pass his accounts. The deceased had died in December of 2000 and she had named her niece as her estate trustee. A Certificate of Appointment was obtained in March 2001 and the estate trustee retained a solicitor in relation to the administration of the assets, which exceeded $600,000.00.

The central issue related to the question of legal fees and disbursements charged by the estate solicitor. The Court held that the estate was a simple one to administer as there were no complexities such as real estate holdings or minor children's interests.

The question of compensation was not contentious and was payable in the amount of $30,000.00. However, the fees charged by the solicitor, in excess of $30,000.00, were in dispute. Furthermore, estate accounting fees to be paid in the amount of $4,600.00 were in also in issue.

The Court set out a helpful and clear delineation as between the role of the estate trustee and the role of the solicitor.

The Court held (at paragraph 17) that the estate trustee is responsible for:

1. arranging for the funeral and disposition of the deceased's remains;
2. locating the Will and instructing the solicitor to apply for the appropriate grant of appointment;
3. locating all of the assets of the estate, including making arrangements to secure, preserve, and dispose of such assets in accordance with the terms of the Will;
4. advertising for creditors and paying all debts of the estate, including the filing of appropriate tax returns;
5. preparing a set of accounts for the approval of the beneficiaries or the Court, as is required; and
6. distributing the assets of the estate.

The Court went on (at paragraph 20) to set out the duties of a trustee, or an estate trustee in keeping accounts. These duties were said to be as follows:

1. to keep clear and accurate accounts of the estate, rendered at appropriate intervals to the beneficiaries;
2. to keep the accounts distinct from other accounts;
3. to retain supporting documents for all accounts;
4. to produce to any beneficiary the accounts when requested. Income or revenue beneficiaries are entitled to have accounts at reasonable intervals; accounts must be presented to residuary beneficiaries when entitled to possession;
5. to make all beneficiaries fully aware of their rights;
6. to disclose any and all breaches of trust;
7. to allow all beneficiaries adequate time to investigate the accounts;

8. to ensure that all beneficiaries have competent, independent advice in reviewing the accounts; and

9. to notify all interested beneficiaries of any Court audit.

In assessing the role of the estate trustee and her solicitor, the Court attempted to clarify the difference between awarding executor's compensation and the payment of solicitor's fees. The Court (at paragraph 21) made it clear that the estate trustee may retain a solicitor to help with the estate; however, the role of the solicitor is to apply for a Certificate of Appointment for the trustee and to attend upon a passing of accounts. The Court emphasized the distinction between solicitor's work and the work of an estate trustee and referred to the decision of *Smith Re:*[1]

> *The executor is entitled to employ a solicitor and charge for his services but not for work which he might have properly done himself. The solicitor is solicitor for the executor and not of the estate; and costs recoverable by him against the executor can be charged against the estate by the executor only if he shows they are necessary and proper charges against the estate. An executor is not entitled to employ a solicitor to do work which he could do, such as writing ordinary letters, attendances, and paying premiums on policies, attending to the bank to make transfers and other ordinary attendances; services which an ordinary layman ought to do without the intervention of a solicitor.*

The Court held (at paragraph 25) that in this case the solicitor erred in charging to the estate fees that were incurred in performing trustee's work.

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[1] [1972] 2 O.R. 256 (Ont. Sur. Ct.) at 261.

The Court made it clear that, while it is proper to render an account for trustee's work done by the solicitor, the account must be rendered to the trustee, to be paid out of her compensation.

An additional issue that was considered in this decision was the conduct on the part of the solicitor who insisted on what is often seen as "the usual practice" in respect of obtaining a release. In this case, a blended account was sent to the beneficiary for services that the estate trustee and the solicitor undertook and the solicitor insisted on the release to be signed first and then the cheque (i.e. the distribution of the portion of the estate assets entitled to the beneficiaries) would be sent later.

In criticizing this "usual practice", the Court made it clear that an estate trustee and his or her solicitor must distribute as much of the estate as quickly as possible. Further, it was held that an appropriate holdback is allowed; however, it must be calculated on a reasonable basis.

The Court relied on the decision of *Brighter* v. *Brighter Estate*[2]:

> *An executor's duty is to carry out the instructions contained in the Will ... The executor has no right to hold any portion of the distributable assets hostage in order to extort from a beneficiary an approval or release of the executor's performance of duty as trustee, or the executor's compensation or fee. It is quite proper for an executor (or trustee) to use the current expression (to accompany) payment with a release which the beneficiaries are requested to execute. But it is quite another matter for the trustee to require execution of the release before making payment; this is manifestly improper.*

The Court went on to indicate that, in order for a release to be enforceable, the beneficiary must be "fully informed"; have received competent legal advice in the review of the accounts; should

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[2] (1998) Carswell Ont. 3113 (Ont. Gen. Div.) at paragraph 9.

understand how compensation has been charged; and should know what legal services have been provided and what the fees were.

In summary, it appears that the delineation of the role of executor and estate trustee has been further emphasized, and the Court in *Rooney Estate v. Stewart Estate* has re-affirmed important guidelines in respect of the administration of an estate.

## B. The Unique Role of Insurance Policies in Estate Administration

***Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate* (2008), 88 O.R. (3rd) 481 (Ont. C.A.)**

The Ontario Court of Appeal rendered a recent judgment in the context of Part V of the provisions of the *Succession Law Reform Act* and jointly-owned insurance policies.

The Court was asked to consider in this decision whether or not a jointly-owned policy fell within Section 72(1)(f) of the *Succession Law Reform Act* and therefore did not form part of the deceased's estate for the purpose of dependants' relief or, alternatively, whether the insurance proceeds could be clawed back into the estate to satisfy the dependants' relief claim.

Judgment was delivered by Gillese J. A and she noted that the insurance policy in question provided that, on the death of one of the spouses, the surviving spouse was entitled to a lump sum payment of $109,000.00.

In *Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate,* the deceased died on March 24, 2005 and was survived by six children, three of whom were minors. The Court noted at the outset that the three minors and the deceased's widow, Mary, qualified as the deceased's dependants pursuant to the *Succession Law Reform Act.* The Court also noted, at the outset, that the deceased made inadequate provision for the support of his dependants.

The deceased, Lloyd Ogilvie, left his estate to his wife Mary and, if she predeceased him or survived him for thirty days, the residue went to one of his minor children, Novlette. Novlette was thirteen at the time of the Application and she lived with her mother Mary in the matrimonial home. When the deceased died, one of his minor children, Malachi, brought an Application pursuant to the *Succession Law Reform Act* claiming dependant's relief.

The deceased essentially left no estate; however, proceeds from two life insurance policies were potentially available to provide support for his dependants. The first policy, of which the deceased was the sole owner, had a value of $60,711.00 and Mary was the main beneficiary of that policy. There was no dispute that this policy could be deemed part of the deceased's estate for the purpose of dependants' relief under the *Succession Law Reform Act*.

The deceased's wife Mary argued that the other minor children were also receiving a death benefit and therefore were not in financial need. Furthermore, she argued that the jointly-owned policy could not be deemed to be part of the deceased's estate for the purposes of a dependants' relief claim.

At first instance, the Judge hearing the Application held that the second policy was indeed clawed back into the estate pursuant to Section 72 of the *Succession Law Reform Act*. The Court held that this policy of insurance was caught by the Section on the basis that the dependants relief provisions are remedial in nature and enable the Court to establish support for persons who are dependant. The Court held (at paragraph 14) that the deceased was a joint owner of the second policy and, as a result, had all of the incidence of ownership. The Court held that the only basis for finding that the second policy did not come within Section 72 would be to read in the requirement that the policy be "solely" owned by the deceased. Accordingly, the Application Judge deemed the second policy to be part of the estate for the purpose for funding a dependants' support order.

The surviving spouse Mary appealed to the Divisional Court and it allowed the Appeal, in part, and excluded the second policy from the deceased's estate. In doing so, the Divisional Court considered Section 199 (1) of the *Insurance Act*, R.S.O. 1990 C.I.8. Associate Chief Justice Cunningham held that the Application Judge was correct in including the insurance policy as being owned by the deceased.

At the Court of Appeal, Justice Gillese J.A. reviewed Section 72(1)(f) of the *Succession Law Reform Act* and considered the wording of this provision and, in particular, the meaning to be given to the word "owned".

Section 72(1)(f) of the *Succession Law Reform Act* provides as follows:

> *72(1) Subject to Section 71 for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or her dependant or any other person, shall be included as testamentary dispositions as of the date of death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate and being available to be charged for payment by an Order under Clause 63(2)(f)...*
>
> *Any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;*

The Court of Appeal considered (at paragraph 27) the meaning of the word "owned" and it noted that it was not a defined term pursuant to the *Succession Law Reform Act*.

In coming to its conclusion that the second policy was not owned exclusively by the deceased, the Court noted that, on a plain reading of Section 72, the second policy was not owned by the deceased as it was jointly-owned by himself and Mary.

Furthermore, the Court held (at paragraph 29) that Mary did not become entitled to the proceeds of the second policy because she was named beneficiary of that policy; rather, her entitlement flowed from her status as an owner of the second policy. The Court noted that "at the instant of the deceased's death, Mary's joint ownership interest swelled to become an absolute entitlement to the proceeds of the second policy".

The Court (at paragraph 29) went on to note that it could not claw back the proceeds of the second policy as it would be essentially taking property belonging to Mary. The Court relied on *Modopoulos* v. *Breen Estate,* [1969] O.J. No. 2738, 15 E.T.R. (2nd) 128 (Gen. Div.) at paragraph 25 and noted that the Court "cannot reach into the hands of a third party" in order to make provision for someone else's dependants. The Court of Appeal went on to note that, to take the proceeds of the second policy from Mary, was tantamount to expropriation.

In summary, the Court was simply not prepared to "stomp" on fundamental property rights of an individual and to step in and "claw back" the second insurance policy.

Another interesting aspect of this decision was the *obiter* comments at the end (paragraph 57) by the Court where it noted that, as a result of *Cummings* v. *Cummings* (2004), 64 O.R. 39, [2009] O.J. No. 90 (C.A.), the moral considerations as well as the needs of the dependants were relevant in the exercise of discretion under the Part V provisions of the *Succession Law Reform Act*. Again, the Court seems to go out of its way to remind the bar that, in making Orders for support, the quantum of support will also be, in part, based on the testator's moral duties.

## C. The Right to Elect Under the F.L.A. – Revisited

***Iasenza v. Iasenza (Estate)* (2007), 39 R.F.L. (6th) 452**

In the *Iasenza v. Iasenza (Estate)*, decision, Justice Hackland tackled the difficult problem of how to deal with Section 6(1) of the *Family Law Act*, R.S.O. 1990, c. F.3. (the "FLA"). This provision of the legislation allows for an equalization of net family properties, here, between the surviving spouse and her late husband.

The Court considered conflicting authorities on the specific issue of whether or not an election under Section 6(1) of the FLA is irrevocable, or whether the Court has a residual discretion to set aside the election to avoid an injustice.

Section 6(1) of the FLA states as follows:

> "6.(1) When a spouse dies leaving a Will, the surviving spouse shall elect to take under the Will or to receive the entitlement under Section 5."

In *Iasenza v. Iasenza (Estate)*, Melinda Iasenza ("Mrs. Iasenza") sought an Order setting aside or declaring of no force and effect an election which she made under Section 1 of the FLA requiring an equalization of the net family properties between herself and her late husband, Joseph, who died on November 12th, 2003.

It is important to note that Mrs. Iasenza also sought a support order pursuant to Part V of the *Succession Law Reform Act*.

The Court acknowledged the conflicting authorities in respect to this narrow issue of the revocability of the election and considered the decisions of *Varga Estate v. Varga,* [1987] O.J.

No.437 (H.C.J.), Owen J., *Re Van der Wyngaard* (1987), 59 O.R. (2nd) 195 (Surr.Ct.), McDermid J. and *Re Bolfan Estate* (1992), 87 D.L.R. (4th) 119 (Ont.Gen.Div.), Hawkins J. The Court also acknowledged the helpful article on this topic written by Tim Youdan entitled "Revocation of an Election under Part I of the Ontario *Family Law Act*".[3]

In this case the Applicant, Mrs. Iasenza, married Joseph Iasenza in May 2000. Joseph Iasenza had two adult children from a prior marriage.

During the course of the marriage, Mrs. Iasenza gave evidence that she had little or no knowledge of the family finances, although Joseph Iasenza did assure her that she could stay in the home and that he would make provision for her in his Will. Mr. Iasenza told Mrs. Iasenza, during his lifetime, that his investments were worth $500,000.00 to $600,000.00.

Shortly after the death of Mr. Iasenza, Mrs. Iasenza sought advice in respect of her legal and financial position and her counsel attended to diligently investigating the issue of what assets were in the estate. There was some confusion, however, with regard to what assets where to be included in the estate and what assets fell outside of the estate in the course of these investigations.

Eventually, Mrs. Iasenza's counsel gave advice to her to file an election under Section 6(1) of the FLA for an equalization of the net family property, in lieu of receiving her entitlement under the Will. The election was filed on August 21st, 2004. Shortly thereafter, Mrs. Iasenza commenced an Application for support pursuant to the provisions of the *Succession Law Reform Act*.

Mrs. Iasenza's counsel testified that the reason why he advised her to file the election was that the six month limitation period was approaching and that, based on the disclosed assets, it

[3] (1992) 45 E.T.R. 229.

made financial sense. Furthermore, her solicitor indicated that he was expecting that Mrs. Iasenza would be pursuing a claim for support pursuant to the *Succession Law Reform Act,* in any event.

It is important to note that, notwithstanding the new estate solicitor's offer to consent to an Order extending the time for the filing of the election, Mrs. Iasenza's counsel did not do so.

At trial, the Court determined that the estate ultimately consisted of significantly more assets than Mrs. Iasenza and her counsel had understood, and having elected for an equalization of net family property under Section 5 of the FLA, Mrs. Iasenza was financially prejudiced.

The Court then considered whether or not it had jurisdiction to relieve against a result such as this, which it saw was clear injustice. The question became whether or not the Court could set aside the surviving spouse's election under Section 6(1) of the FLA and whether or not the election itself is irrevocable.

In considering this issue, the Court addressed all of the authorities referred to above.

The Court ultimately held (at paragraph 25) that it had residual jurisdiction to authorize a revocation of an election under Section 6(1) of the FLA. It went on to note that, in exercising this discretion, the Court should have particular regard to the following:

(a) Was the election filed as a result of a material mistake of fact or law made in good faith?

(b) Was there any responsibility or culpability on the part of effected parties in relation to the election?

(c) Was the notice of intent to seek revocation of the election given in a timely way and, in particular, how long after the six-month filing period was such notice given?

(d) Has the estate been distributed or would interested parties otherwise be adversely effected by a revocation of the election? and

(e) Does the election result in an injustice to the surviving spouse in all of the circumstances?

In summary, it seems that the Court has now addressed what has to date been an almost unresolveable problem for the estate's bar, and has given some guidance to counsel as to when the Court may in fact set aside an election pursuant to Section 6(1) of the FLA. However, there are still competing authorities, at the same level and, as such, we should continue to act with great caution when making an election.