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“The Estate Trustee During Litigation”

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THE ESTATE TRUSTEE DURING LITIGATION¹

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INTRODUCTION

Will challenge litigation is a common occurrence. The validity of a will can be questioned on a number of grounds. In the event that a will is found to be invalid, prior will may be found to be valid. Alternatively, the estate may pass on an intestacy. Until the conclusion of the ongoing litigation, the identity of the beneficiaries and the portion passing to these beneficiaries is unknown.

Not only are the beneficiaries unknown. Until a will is determined to be valid, or an intestacy is found, there is no person with authority to preserve the estate. While the will may name an estate trustee, as the will is being challenged, that person does not have the authority to act, and will not be able to obtain a Certificate of Appointment.

In most cases, the estate of the deceased needs to be administered in some fashion until the validity of the will or wills in question in the litigation is determined. Therefore, there is a need for someone who can be granted the authority to act as Estate Trustee while the litigation is proceeding, and until it is concluded.

This is where the Estate Trustee During Litigation (“ETDL”) steps in.

Formerly known as “Administrator Pendente Lite”, the ETDL’s role is straightforward: he or she is to act as estate trustee while the will challenge litigation proceeds.

¹ Thank you the invaluable assistance of Jordan Atin, and his chapter in Schnurr, *Estate Litigation*,

AUTHORITY

The authority for appointing an ETDL can be found in section 28 of the *Estates Act*, R.S.O. 1990, Chap E.21, as amended. Section 28 provides:

Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Superior Court of Justice has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.

As can be seen, the section gives the Court the jurisdiction to appoint an administrator of the deceased's property, known as "ETDL".

The section goes on to provide that the ETDL so appointed has all the rights and powers of a general administrator, other than the right to distribute the residue of the property. The authority granted to the ETDL is as broad as the authority granted to an Estate Trustee, with the exception that the ETDL cannot distribute the estate.

The main duties of the ETDL will be to safeguard the assets of the estate, and pay the debts.

In dealing with the assets of the estate, the ETDL will be constrained by possible distributions that may be made in the event that a certain will is found to be valid. For example, if a will being challenged contains a specific bequest of a certain item, the ETDL should, to the extent possible, maintain that item, so that it can be distributed in

the event that the will is found to be valid. As stated in *Lloyd v. Lloyd*², “the Court has jurisdiction to ensure that, not only are the assets preserved and debts paid, but those whose rights exist either through intestacy or through proof of a testamentary disposition are maintained.” In *Lloyd*, an ETDL was removed where it was shown that he was offering certain property for sale contrary to the provisions of the will being challenged.

The ETDL must therefore familiarize herself with the terms of the will being challenged, and any potentially valid and operable prior wills, and ensure that the interim administration of the estate does not offend any of the potential bequests. In the event that such a disposition is necessary, perhaps to pay debts, then it would be advisable to obtain the consent of all of the parties with a potential interest, or obtain the approval of the court to the proposed transaction.

In dealing with the debts of the estate, the ETDL must, like any Estate Trustee, ensure that the debts of the estate are properly ascertained, and paid.

With respect to claims made against the estate, the ETDL has the duty to defend these claims, and the authority to settle claims. However, where the settlement of the claim significantly impacts on the assets of the estate, a motion to incorporate the settlement into a judgment should be brought, on notice to the affected parties.

Section 28 provides that the administrator is subject to the immediate control and direction of the court. In fact, an ETDL is an officer of the court, and not the mere nominee or agent of the parties³. However, having said that, the ETDL also owes duties to the parties, and is bound to account to them.

Being subject to the immediate control and direction of the Court also allows the ETDL to apply for the opinion, advice and direction of the Court, if an issue or question arises that might expose the ETDL to liability.

² (1980), 6 E.T.R. 10 (Ont. Surr. Ct.)

³ MacDonell, Sheard, Hull, *Probate Practice*, 4th ed. (Carswell: Toronto, 1996), p.263

An ETDL may incur potential liability in the event that it does not carry out its duties properly. Therefore, if there is any question or doubt as to a course of action, an application to the Court for directions should be brought. Finally, as discussed below, a passing of accounts at the end of the administration should also be undertaken, in order to obtain Court approval of the actions of the ETDL.

In addition to protecting the assets of the estate and paying the debts, the ETDL can play an important role in gathering and disseminating information. Often, the distrust among the parties to the litigation can lead to suspicions regarding the size of the estate, as well. Having an independent third party ascertain and report on the size of the estate can often remove that issue as an issue of contention.

Further, Orders Giving Directions in will challenge proceedings often charge the ETDL with the authority and obligation to obtain solicitor, financial and medical records. In the event that the Order Giving Directions is insufficient, and issues of privilege owing to the deceased arise, the ETDL would have the authority to waive the privilege and obtain the information.

The ETDL's authority ends once the litigation is completed (including any appeal, if one is launched). At that point, the ETDL is obligated to turn over the property to the rightful estate trustee.

The ETDL should pass accounts at this point, and is entitled to hold back sufficient funds to cover the expenses of the passing of accounts⁴.

The issue of compensation may be addressed on the passing of accounts. Unless provided for in the Order appointing the ETDL, or with the consent of all of the parties, pretaking of compensation is not permitted.⁵

⁴ *Warsh v. Warsh Estate*, [1996] O.R. No. 3196 (O.C.G.D.)

⁵ *Re Knoch*, 1982 CarswellOnt 622

As seen, s. 28 of the *Estates Act* allows the court to award the ETDL “such reasonable remuneration as the court considers proper”. The section is permissive, in contrast to the provisions of the *Trustee Act*, which provides that an Estate Trustee is “entitled” to fair and reasonable compensation as the court may allow. However, very little turns on this distinction.

Compensation to an ETDL is usually calculated in the same manner as Estate Trustee compensation. The recent Divisional Court decision of *Church v. Gerlach*⁶ considered the calculation of ETDL compensation. There, the court considered the holding in *Laing Estate v. Hines*⁷, where the Ontario Court of Appeal affirmed that an executor's compensation must be calculated with s. 61 of the *Trustee Act* in mind. To determine what is “fair and reasonable” compensation, the Court of Appeal adopted a two-step approach that applied the usual percentages as a guideline and then cross-checked the amount of compensation produced against the following five factors:

- a. The magnitude of the estate;
- b. The care and responsibility required;
- c. The time spent performing the duties;
- d. The skill and ability applied; and
- e. The success of the administration.

The Divisional Court in *Church v. Gerlach* held that these principles are applicable to an estate trustee during litigation, relying on *Re McLennan Estate*⁸.

It is often the case that an ETDL will not seek the appointment unless compensation can be agreed upon at the time of appointment. Often, the Order Giving Directions that appoints the ETDL will include a specific compensation agreement. The court will

⁶ [2009] O.J. No. 54 (Ont. Div. Ct.)

⁷ (1998), 41 O.R. (3d) 571

⁸ [2002] O.J. No. 4716 at para.22 (S.C.J.)

normally allow these, if it can be shown that the compensation payable pursuant to the agreement is reasonable.

APPOINTMENT

A preliminary question is whether an ETDL needs to be appointed at all. For example, in *Lloyd*, supra, the bulk of the estate consisted of shares in closely held private businesses. The businesses were being managed, and there was no allegation of mismanagement. The Court held that there was no need to appoint an ETDL.

However, in the case of *Re Groner*⁹, Justice Greer appointed an ETDL, and in fact refused an adjournment of the motion to appoint, as “Legally, there was no one who could properly act in the administration”. There, the assets of the estate were being “administered” by a respondent and his counsel’s law firm. Justice Greer distinguished *Lloyd*, and concluded that:

Assets cannot be administered in a vacuum. Some one or some company must administer them on a daily basis to protect them for the beneficiaries who inherit when the litigation is over. Tax Returns must be filed each year and proper accounts kept and investments made. These tasks can only be performed by a knowledgeable Administrator.

I suggest that in most cases, an ETDL will be appointed. It is a rare case where an ETDL will not be required to take some steps to preserve the assets of the estate, and ascertain and pay liabilities, such as taxes.

Assuming that an ETDL is required, who should be appointed? There is a surprising amount of litigation on the issue: surprising because the law appears to be clear that a neutral third party will be appointed in all but the most exceptional cases.

The basic rule, set out in *Re Bazos*¹⁰ and cited in numerous subsequent decisions, is that a party unconnected with the litigation is the most appropriate person to be appointed. “Such an appointment puts the neutral party in the legal position of being able to receive

⁹ [1994] O.J. No. 140 (O.C.G.D.)

¹⁰ [1964] 2 O.R. 236 (Ont.C.A.)

and hold assets, pay debts, preserve assets and make all proper inquiries into assets as well as trace assets if required to do so.”¹¹

The rationale for the rule is based on the optics of having one interested party in control of the estate assets. As stated in *Re Bazos*¹²,

It is well to remember that justice must not only be done but must also appear to be done, and we think it would be a very unusual situation where one of the parties to an issue such as was here ordered would be appointed administrator pendente lite. That it should not be done in this case is crystal clear... .

As noted in *Re Gicas*¹³, a recent decision of Strathy J., “All parties are entitled to the perception of neutrality as well as neutrality in fact. The appointment of an ETDL accomplishes this objective and levels the playing field.” The Court has a responsibility to ensure the integrity and independence of the administration of the estate pending the resolution of a will challenge.

There are exceptions to the rule that a neutral third party will be appointed as ETDL. However, as stated in *Re Gicas*, supra, “The rule is not absolute and inflexible, but the Court’s discretion to refuse the appointment of an ETDL should only be exercised in the clearest of cases.”

One of the exceptions to the rule that a neutral third party will be appointed as ETDL which can be summarized as being circumstances where the proposed ETDL is Estate Trustee under both the challenged will and the prior, unchallenged will, AND the party does not have a personal stake in the litigation.

¹¹ *Re Groner*, supra.

¹² Supra, p. 238.

¹³ Unreported, March 5, 2009, Court File No. 01-042/08

This was the case in *Salisbury v. Dell*¹⁴. There, a party named as Estate Trustee in the disputed will and also in a prior will was allowed to act as ETDL. That party did not have a personal stake in the litigation, and there were no allegations of impropriety against him. Another Estate Trustee who was given a substantial bequest under the disputed will was not allowed to act.

*Hanson v. Hurley*¹⁵ involved similar facts: parties seeking to be appointed ETDL were the Estate Trustees under both the challenged will and the prior will. There, however, the Estate Trustees were also beneficiaries under the prior will, and were challengers of the later will. A number of factors led the judge to conclude that the named Estate Trustees should be allowed to act as ETDL. These included:

- Other beneficiaries did not oppose the appointment;
- There were no allegations of impropriety against the proposed ETDL;
- The estate was modest in size; and
- No other proposed Estate Trustee had consented to act.

In *Re Gicas*, supra, the deceased named his lawyer and niece as Estate Trustee. The will was challenged, and the issue to be determined on the motion for directions was whether the lawyer should be appointed as ETDL, or whether a trust company should be appointed. Strathy J. considered the issue, and concluded that appointing the “family lawyer” as ETDL “would not satisfy the need for impartiality”. In coming to this conclusion, Strathy J. considered the fact that the lawyer may be a witness at trial; may be in a conflict of interest due to his relationship as solicitor for the deceased and for other family members; the perception that the solicitor had sided with certain family members and against another beneficiary; and the alleged lack of fully open communication with all of the parties to the litigation.

¹⁴ (1993), 50 E.T.R. 19 (Ont. Gen. Div.)

¹⁵ (1994), 3 E.T.R. (2d) 293 (O.C.G.D.)

The strength of the general rule that an interested party ought not act as ETDL is illustrated in *Re Baker Estate*¹⁶. There, the parties to a will challenge proceeding initially consented to an order appointing an Estate Trustee that was named in both the challenged Will and the prior Will as ETDL. However, on the consent motion, the motions judge questioned the propriety of appointing an ETDL who stood to benefit under both of the Wills. The Estate Trustee was bequeathed a piano and bedroom suite under one will, and \$5,000 and a dish set under the other. After the issue was raised by the motions judge, one of the parties withdrew its consent. The motions judge went on to refuse to appoint the individual as ETDL. Notwithstanding the relatively minor nature of the named Estate Trustee's interest in the estate under either Will (the estate was valued at \$3.6m), the fact that there were no allegations of impropriety against him, or the fact that he had already administered the estate of the deceased's spouse, the named Estate Trustee was not permitted to act as ETDL. The Court observed that the estate was large and complex, and would benefit from a professional administrator. Further, the named Estate Trustee would likely have to appear as a witness, and had expressed an opinion as to the validity of the last Will. This later point raised a "perception of bias at worst or lack of impartiality and neutrality at best." The Court concluded that "the circumstances are not so unusual as to justify departing from the general rule referred to in *Re Bazos* that in the absence of consent from all interested parties a person unconnected with the suit is the most proper person to be appointed as estate trustee during litigation."

PROCEDURE

The appointment of an ETDL is normally dealt with as part of the motion or application for directions under Rule 75.06. One of the matters that the Rule specifically provides for is that the Court may direct the appointment of an ETDL.

Normally, the motion will be brought by one of the parties to the will challenge. However, persons other than the potential beneficiaries and estate trustees may apply to have an ETDL appointed. For example, a creditor, who is not a party to the will

¹⁶ 2005 CanLII 42480 (Ont. S.C.) per McDermid J.

challenge, may apply to have an ETDL appointed. In such a circumstance, the applicant may be allowed its costs out of the estate.¹⁷

In the motion or application, the moving party should propose an ETDL and provide the proposed ETDL's consent. In addition, as suggested by Jordan Atin in his chapter, the materials should include an affidavit setting out:

- a. The relationship of the parties;
- b. The need for the appointment;
- c. The potential conflict of appointing a party as ETDL;
- d. The anticipated duties of the ETDL;
- e. Any issue surrounding the *de facto* administration of the estate prior to the appointment of ETDL;
- f. Proposed security; and
- g. Any compensation agreement.

Security will normally be required, unless the ETDL is a trust company, or is able to satisfy the Court that security is not required. In light of the nature of the appointment, and in light of the recent decision in *Re Henderson*¹⁸, which dealt with the evidence required to dispense with a security bond by an Estate Trustee, it is suggested that it will be difficult to avoid the necessity of posting security.

A sample term of an Order appointing the ETDL is as follows:

¹⁷ *Tichborne v. Tichborne* (1869), L.R. 1 P.&D. 730, cited in MacDonnell, Sheard, Hull, Probate Practice, 4th ed. (Carswell: Toronto, 1996), p.262

¹⁸2008 CanLII 69136 (Ont. S.C.)

THIS COURT ORDERS THAT [name of ETDL] be and is hereby appointed as Estate Trustee During Litigation without security, of all singular property of the Estate of [name of deceased], pending the final determination or settlement of the litigation herein and that a Certificate of Appointment of Estate Trustee During Litigation be issued to [name of ETDL] subject to the filing of the necessary supporting Application.

The Order may also provide for the compensation to be paid, and often attaches the Compensation Agreement as a schedule. The Order Giving Directions may read:

THIS COURT ORDERS that subject to further review by the Court, if necessary, the Estate Trustee During Litigation shall receive out of the assets of the Estate reasonable remuneration and shall be calculated on the basis of the fee schedule set out and attached hereto as Schedule "A".

The Order Giving Directions in the will challenge often provides for the disclosure of solicitors' notes and records regarding the preparation of the will, as well as financial and medical records. The Order Giving Directions may clothe the parties with the authority to obtain this information, or may give the ETDL the power to obtain and distribute this information to the parties.

After the appointment is made in the Order Giving Directions, the ETDL must apply for a Certificate of Appointment. Rule 74.10 sets out the required documents for the application. Essentially, the Court requires an Application in the prescribed form, a copy of the Order appointing the ETDL, the security required by the Estates Act, or as set out in the Order, the prescribed fee (\$75.00), and the Certificate of Appointment, for signing.