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Trusts, Estates and Third Parties: Compliance Issues in Modern Practice

Friday, April 1, 2011
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Program Chair: **Blair L. Botsford**, Miller Thomson LLP

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**Trusts, Estates and Third Parties: Compliance
Issues in Modern Practice**

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Modern Practice**

R. Craig Ross, Pallett Valo LLP

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TRUSTS, ESTATES & THIRD PARTIES:
COMPLIANCE IN MODERN PRACTICE

By R. Craig Ross, Pallett Valo LLP

PART I. ADVERTISING FOR CREDITORS

General

It is a principal duty of the Estate Trustee to satisfy the proper debts of the deceased. If the Estate Trustee distributes the estate to the prejudice of a creditor, either with knowledge of the creditors claim, or without giving proper notice to creditors under s. 53(1) of the Trustee Act, the Estate Trustee is personally liable.

Section 53(1) of the *Trustee Act* provides that, where an executor has duly advertised for creditors' claims and distributes the estate according to the deadline set out in the notice, an unpaid creditor who subsequently appears has no remedy against the executor if there are insufficient assets to pay the claim. The question is what is "due" advertising? Practices have developed and the court has provided some guidance on this topic, but the answer to this question will ultimately depend on the particular circumstances.

While our advice to our clients must be to advertise, there are many circumstances where Estate Trustees will choose not to advertise and accept the risks. Our duty is to clearly explain the duties and risks to the client and, as always, assist the Estate Trustee(s) to make their own decisions. Where the solicitor fails to advise the Estate Trustee of the risk of distributing the estate without advertising for creditors, and a valid claim arises following distribution, the Estate Trustee will be entitled to a remedy against the solicitor.

Distribution of assets under trust deeds for benefit of creditors, or of the assets of intestate

53. (1) A trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or of a particular class or classes of creditors, where the creditors are not designated by name therein, or a personal representative who has given such or the like notices as, in the opinion of the court in which such trustee, assignee or personal representative is sought to be charged, would have been directed to be given by the Superior Court of Justice in an action for the execution of the trusts of such deed or assignment, or in an administration suit, for creditors and others to send in to such trustee, assignee or personal representative, their claims against the person for the benefit of whose creditors such deed or assignment is made, or against the estate of the testator or intestate, as the case may be, at the expiration of the time named in the notices, or the last of the notices, for sending in such claims, may distribute the proceeds of the trust estate, or the assets of the testator or intestate, as the case may be, or any part thereof

among the persons entitled thereto, having regard to the claims of which the trustee, assignee or representative has then notice, and is not liable for the proceeds of the trust estate, or assets, or any part thereof so distributed to any person of whose claim there was no notice at the time of the distribution.

Reasons for Advertising

In addition to confirming that there are no outstanding creditors and thereby eliminating the trustee's potential liability to them, the following are several other reasons for advertising:

- If the Estate Trustee wants to pass his or her accounts, it can be required on the first passing of accounts.
- On an intestacy, if the trustee wants to distribute the estate prior to the expiration of one year after the death of the intestate.
- If the trustee has had to post an administration bond and wants to have it discharged.

Practical Considerations

(i) Where to Publish

- The decision in *Furik Estate, (Re)* [1993] O.J. No. 1689 (Ont. Gen. Div.) provided the following guidance to Estate Trustees:
 - In small isolated communities there are not many newspapers that have a general circulation and everyone knows everyone else's business;
 - In very large communities the cost of advertising may be prohibitive compared to the size of the estate and the modest lifestyle of the deceased; and
 - In medium sized communities where there are newspapers having a general circulation then advertising for creditors is a preferred mode of inquiry.
- In small communities, it may be appropriate to place notices in a few select places, including community message boards and churches.
- Where there are few beneficiaries and one or more of them are also Estate Trustees, and/or where the deceased spent his or her last years in a nursing home, or with simple finances, the Estate Trustee might decide not to advertise.
- Other steps that ensure creditors are identified include securing and redirecting mail as early as possible and a careful review of bank statements to identify regular or automatic withdrawals.

- With respect to the geographical location of the publication:
 - *Ashman (Re)*, (1907), 15 O.L.R. 42 suggests advertisements should be made in the localities where creditors are thought to be. If the creditors may be located throughout the province, it might be prudent to advertise in the Gazette in addition to the local newspaper.
 - *Daubeny (Re)*, (1902), 1 O.W.R. 773 (Ont. H.C. [In Chambers]) suggests advertisements should be placed where the deceased resided at the time of their death.
- With respect to the type of publication:
 - *Mason v. Cameron* (1893), 15 P.R. 272 proposes it is not the practice to advertise in the Ontario Gazette as few people see or read it.
 - *Egan Estate (Re)* [1994] O.J. No. 84 (Ont. Gen. Div.) held that it was unnecessary to advertise in the Globe and Mail when advertising in the local Brampton newspaper was sufficient. The court ordered the beneficiary to refund the costs of advertising in the Globe and Mail.

(ii) When to Publish

- The Executor should advertise for claims before the debts or legacies are paid, or in cases of intestacy, before any distributions are made.
- The practice has become three insertions, one every week for three weeks in a local paper of wide circulation where the deceased resided and possibly where the deceased carried on business.
- At least one month's notice should be provided from the date of the first publication to the date by which all claims must be filed.

(iii) How to Publish

- Attached as Appendix "A" is an example of the letter we provide to the Toronto Sun regarding notice to creditors together with a draft Notice for publication.
- Besides calling for claims against the estate, the notice should state that the effect of non-compliance with it will be the exclusion of persons failing to comply therewith from participation in the estate to be divided.¹
- Once the time period for filing claims have expired, the newspaper will provide an Affidavit of Proof of Publication. Attached as Appendix "B" is an example Affidavit of Proof of Publication.

¹ See *Stewart v. Snyder* (1893), 30 O.R. 110 (Ont. H.C.); affirmed 27 O.A.R. 423

Points of Interest

Whether Creditors Include Next of Kin - For the purposes of the protection provided to Estate Trustees who have duly advertised, the creditors excluded following due notice do not include creditors who are heirs or next of kin.²

Effective Notice to Trustees of Claims - Notice to one trustee that a creditor exists is notice to both trustees.

Creditor Rights Following Proper Advertisement –

- Section 53(2) of the *Trustee Act* states:

Right of creditor to follow assets not affected

53(2) Nothing in this section prejudices the right of any creditor or claimant to follow the proceeds of the trust estate, or assets, or any part thereof into the hands of persons who have received the same.

- If barred from advancing a claim against the personal representative under section 53(1), section 53(2) allows the unpaid creditor to “follow the proceeds.”
- If the estate was, or would have been insolvent if the executor had known of the creditor’s claim, the creditor can compel the other creditors to refund ratably the amount that they received, in excess of the pro rata amount, that would have been payable to them had all the claims been known to the executor.
- If a creditor does not make a claim until some individual beneficiaries have received their legacies in full, the creditor is entitled to receive, out of the funds of the unpaid beneficiaries, not the whole of his debt, but only part of it, bearing the same proportion to the whole as the legacies given to those beneficiaries bore to the whole amount given by the will. The creditor must seek payment of the balance of his debt, in proper proportions, from those legatees who have been actually paid.

Notices of Contestation

Delivering a Notice of Contestation under sections 44 and 45 of the *Estates Act* can be an extremely useful tool when attempting to dispose of questionable claims against the estate. A Notice of Contestation can be used in both liquidated and unliquidated claims against the estate for money.

The purpose behind ss. 44 and 45 was stated in the lower court decision of *Ethier v. Raspberry*³: “sections 44 and 45 of the *Estates Act* were enacted to expedite the winding

² *Trustee Act*, s. 53(3).

³ (1997), 16 E.T.R. (2d) 197 (*sub nom. Ethier v. Larone Estate*) 28 O.T.C. 57 (Ct. J. (Gen. Div.)) (*Ethier*).

up of the estates of deceased persons by affording to the personal representatives a means of determining within a reasonable time, the legal validity of claims which they think should be contested". Therefore, by requiring claimants to respond to the Notice of Contestation within 30 days after receiving the Notice, or within three months thereafter if the judge on application so allows, the sections provide personal representatives with a summary procedure by which they can quickly deal with claims against the estate. The provisions state:

44. (1) Where a claim or demand is made against the estate of a deceased person or where the personal representative has notice of such claim or demand, they may serve the claimant with a notice in writing that they contest the same in whole or in part, and, if in part, stating what part, and also referring to this section.

45. (1) Where any claim or demand not within the meaning of subsection 44(1) is made against the estate of a deceased person or where the personal representative has notice or knowledge of the claim or demand, they may serve the claimant with the notice prescribed in the said subsection.

44. (2) Within thirty days after the receipt of such notice of contestation or within three months thereafter if the judge of the Superior Court of Justice on application so allows, the claimant may, upon filing with the registrar a statement of their claim verified by affidavit and a copy of the notice of contestation, apply to the judge of the Superior Court of Justice for an order allowing the claim and determining the amount of it, and the judge shall hear the parties and their witnesses and shall make such order upon the application as the judge considers just, and if the claimant does not make such application, the claimant shall be deemed to have abandoned the claim and it is forever barred.

Sections 44 and 45 of the Estates Act are treated in much the same way, since the sections are very similar, except that s. 44 deals with liquidated claims and s. 45 deals with unliquidated claims. The timelines and process provided to a creditor to preserve his claim is the same under both sections, as is the consequence. The forms and process to be applied to the Notice of Contestation process are set out in Rule 75.08. The decision in *Fisher Estate v. Mandic*⁴ provides that, pursuant to Rule 75.08(3), the creditor's claim will be preserved upon filing and delivery of the claim in the prescribed form together with the affidavit verifying the facts set out in the claim even if the creditor does not initiate an application by Notice of Application as provided in section 44(2).

Proper service of a Notice of Contestation will be an effective bar to claims for money against an estate if the claimant/creditor fails to comply with the provisions of the *Estates Act* and Rule 75.08.⁵ It cannot prevent a mortgagor from pursuing its rights under a

⁴ (2001), 37 E.T.R. (2d) 200 (Ont. Sup. Ct.) [*Fisher*].

⁵ *Ethier*, supra.

power of sale, which is, by its nature, not a claim for money.⁶ It also cannot bar the rights of a potential dependent, or the claims of beneficiaries against an estate trustee to enforce their rights.⁷ There is some question whether a claim in the nature of quantum meruit or other claims under the general principle of unjust enrichment qualify as a claim for money to which the Notice of Contestation will apply.

In spite of some uncertainty with respect to the scope of the Notice of Contestation process, we have used it successfully in several cases to rid estates of claims by family members and others of purported debts owing by the deceased. A copy of the standard form Notice of Contestation is attached as Appendix “C”. Personal service on the claimant is recommended, together with service on the claimant’s solicitor if there is one.

PART II. CLEARANCE CERTIFICATES

Why Estate Trustees need a Clearance Certificate

- Section 159(2) of the Income Tax Act: a legal representative shall obtain a clearance certificate before distributing property that he or she controls in their representative capacity.
- If the Estate Trustee distributes property without a clearance certificate, he or she is personally liable for any unpaid income taxes that exceed the undistributed portion of the estate whether such taxes are assessed before or after the actual distribution of property. Income Tax Information Circular IC82-6R8 specifically acknowledges that the legal representative does not need a clearance certificate before each distribution, as long as he or she keeps enough property to pay any liability to the Canada Revenue Agency (“CRA”).⁸

What does the Clearance Certificate Cover?

- A clearance certificate certifies that all the amounts for which the taxpayer is, or can reasonably be expected to become, liable under the *Income Tax Act* at or before the time of distribution have been paid, or certifies that the Minister of National Revenue has accepted security for payment.
- In estates, the certificate also applies to amounts for which the Estate Trustee may become personally liable for payment as the legal representative.
- The clearance certificate also covers the payment of any outstanding Canada Pension Plan contributions and Employment Insurance premiums, including interest and penalties.

⁶ *London & Western Trusts Co. v. Sale*,

⁷ See *Omicciuolo Estate v. Pasco*, 2008 ONCA 241.

⁸ Income Tax Information Circular IC82-6R8, December 10, 2010, <http://www.cra-arc.gc.ca/E/pub/tp/ic82-6r8/ic82-6r8-10e.html>

- A clearance certificate covers only the property the Estate Trustee controlled from the date he or she received control to the date for which clearance is requested. If property is discovered after the certificate is received and the property does or might affect the amount of income or capital gains reported in the returns, the Estate Trustee will need to get another certificate before distributing the new property.

How to Ask for a Clearance Certificate

STEP 1: Complete Form TX19, “Asking for a Clearance Certificate” (Attached as Appendix “D”)

- Generally, the CRA requires that taxpayers not file Form TX19 until they have received assessment notices for the period that the clearance certificate is intended to cover. For instance, if the clearance certificate is to the date of death, Form TX19 should not be filed until the assessment notice is received for the final T1 return.
- CRA acknowledges that Estates and Trusts are an exception as the legal representative may be awaiting the clearance certificate before a final distribution. The practice of filing Form TX19 with the final T3 return together with the supplemental information described below is acceptable. Withholding a modest amount in a non-interest bearing account until the certificate arrives prevents the need to file any additional T3s or request a further clearance certificate after final distribution of the holdback.
- Make sure the Form TX19 is as complete as possible and include the necessary attachments.
- Identify the person asking for the certificate by providing their name, address, telephone number and title.
- If the person asking for the certificate is acting on behalf of:
 - **DECEASED PERSON:** The form must include the name, last address, social insurance number and the date of death;
 - **TRUST:** The form must include the name of the trust, the name and address of the trustee, the trust account number and the wind-up date; and
 - **CORPORATION:** The form must provide the full corporate name, the business number and the wind-up date.

STEP 2: Provide documentation to the Canadian Revenue Agency if it has not already been submitted. Examples include:

- A copy of the will;
- if the individual died intestate, a copy of the document appointing an administrator. Also attach proposed details of the distribution of assets including

the names, address and social insurance numbers of the beneficiaries and their relation to the deceased;

- a copy of the trust document;
- a statement showing the properties and the distribution plan. The statement should describe each property, its adjusted cost-base and the fair market value at the date of death or distribution;
- any other documents to prove who the legal representative is; and
- a letter of authorization if the Estate Trustee wants the Canadian Revenue Agency to communicate with someone else.

Where the taxes payable by a trust can only be determined after the Fair Market Value of certain property is determined on the date of distribution⁹, the following must also be provided before a clearance certificate will be issued:

- A scheme of distribution by a chosen date which is prior to the date for which clearance is sought;
- A calculation of the taxes payable as if the distribution had occurred on the chosen date;
- file a final tax return for the year ending on the chosen date; and
- submit the request for a certificate in writing stating that the transfer will take place as soon as possible after issuing the certificate.

Attached as Appendix "E" is a form prepared by CRA outlining the information required for a clearance certificate to issue. It is our practice to defer to the tax accountant retained for the returns in determining what information to provide and the format of that information. Often a clearance certificate will issue based on a less formal account of the details of the estate.

STEP 3: Send it to the Assistant Director

Section 116 of the Income Tax Act

Under section 116 of the *Income Tax Act*, non-resident vendors who dispose of certain taxable Canadian property have to notify the CRA about the disposition either before they dispose of the property or within ten days after the disposition. When the CRA has received either an amount to cover the tax on any gain the vendor may realize upon the disposition of property, or appropriate security for the tax, the CRA will issue a certificate of compliance to the vendor. A copy of the certificate is also sent to the

⁹ This includes: distributions of property by a trust in satisfaction of an income interest (s.106(3)) and distributions of property by a trust in satisfaction of a capital interest where the distribution is deemed to be made at fair market value instead of the adjusted cost base of the trust (s.107, i.e. distributions from an alter ego trust on the death of the settlor).

purchaser. If the purchaser does not receive such certificate, the purchaser is required to remit a specified amount to the Receiver General for Canada and is entitled to deduct the amount from the purchase price.

As those who practice in the area of estate administration will know, this section applied to dispositions of capital interests in a Canadian resident trust, and therefore was interpreted to include distributions from an estate to a non-resident beneficiary. Specifically, a non-resident beneficiary of an estate receiving a distribution of his interest was included as a “vendor” disposing of his or her beneficial interest. The estate, therefore, became the purchaser to which this section applied, and the Estate Trustee was exposed to personal liability if he or she did not obtain a certificate of compliance with s. 116 prior to distribution, or disclose the distribution to the CRA within 10 days and withhold 25% of the value of the distribution.

This always seemed like an inappropriate application of the rule because distributions of capital interests in estates are not taxable to the beneficiary under the *Income Tax Act*. It seemed especially burdensome when attempting to distribute legacies or modest estates. In our experience, though, it did serve its intended purpose, namely, giving the CRA the opportunity to identify any tax liability of the beneficiary prior to the assets leaving the country.¹⁰

In order to comply with section 116 prior to 2008, the Estate Trustee and non-resident beneficiary were required to cooperate to obtain an Individual Tax Number for the non-resident beneficiary and a certificate of compliance by completing and filing Form T2062. The beneficiary and the Estate Trustee were both then forced to wait an extended period, sometimes as much as a year, before making the distribution following the receipt of the certificate.

In 2008, the CRA instituted a summary process for dispositions by non-residents of taxable Canadian property if the purchaser (read “beneficiary”) is resident in a country under a tax treaty with Canada and the property is exempt under the treaty. For the vast majority of our estates, the new subsection 116(5.02) will apply. The Estate Trustee must be satisfied that (1) the non-resident vendor is a resident of a country with which Canada has a tax treaty; and (2) the property is treaty-protected. If the Estate Trustee is satisfied, he or she may simply send a notice to the CRA within 30 days of the disposition setting out:

- (a) the date of the distribution;
- (b) the name and address of the non-resident person;
- (c) a description of the property sufficient to identify it;
- (d) the amount paid or payable, as the case may be, by the purchaser for the property;
and

¹⁰ In one circumstance a certificate would not issue because the non-resident beneficiary had outstanding OSAP loans.

(e) the name of the country with which Canada has concluded a tax treaty under which the property is a treaty-protected property.

An example of the notice we were providing to the CRA to comply with this rule is attached as Appendix “F”.

The federal 2010 budget initiative amending the definition of “taxable Canadian property” in s.248(1) of the *Income Tax Act* to exclude “a capital interest in a trust (other than a unit trust) resident in Canada” is now in force. **As a result there is no longer a section 116 reporting requirement for Canadian estates making capital distributions to non-resident beneficiaries.**

PART III. DUTY TO ACCOUNT

Nature of the Duty

In general, an Estate Trustee’s duty to account includes the duty:

- To keep clear and accurate accounts of the estate, rendered at appropriate intervals to the beneficiaries;
- To keep estate accounts distinct from other accounts (segregate estate assets from the Estate Trustee’s personal assets);
- To retain supporting documents for all accounts;
- 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 possessions;
- To make all beneficiaries fully aware of their rights;
- To disclose any and all breaches of trust;
- To allow all beneficiaries adequate time to investigate the accounts;
- To ensure that all beneficiaries have competent, independent advice in reviewing the accounts; and
- To notify all interested beneficiaries of any court audit¹¹

This helpful summary of the duty to account reminds us of the distinction between the duties to keep accurate accounts and report regularly to the beneficiaries on the one hand, and the option to prepare accounts in court passing form apply for court approval on the other. The duty to account is not a duty to pass accounts before the court; it is simply the duty to fully inform the beneficiaries of the matters of the estate at appropriate intervals. While the process of the court passing satisfies the duty to account to beneficiaries, the decision to apply for court approval of the Estate Trustee’s accounts is usually based on:

¹¹ *Rooney Estate v. Stewart Estate*, 2007 CarswellOnt 6560 (OSCI)

- The Estate Trustee's desire to have his or her actions approved by the court and therefore be free of any claims by interested parties; and
- The Estate Trustee seeking compensation under section 61(1) of the *Trustee Act*.

Rule 74.17 of the *Rules of Civil Procedure* re-states the duty of Estate Trustees "to keep accurate records of the assets and transactions in the estate" and requires they include:

- (a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;
- (b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;
- (c) an account of all money received, but excluding investment transactions recorded under clause (e);
- (d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);
- (e) where the estate trustee has made investments, an account setting out,
 - (i) all money paid out to purchase investments,
 - (ii) all money received by way of repayments or realization on the investments in whole or in part, and
 - (iii) the balance of all the investments in the estate at the closing date of the accounts;
- (f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;
- (g) a statement of all money and investments in the estate at the closing date of the accounts;
- (h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;
- (i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and
- (j) such other statements and information as the court requires.

It is important to note here that the practice of dividing capital and income accounts is just that, a practice. It is not required by the Rule, and unless the accounts are being prepared by sophisticated computer software, it is recommended there only be a Receipts Account and a Disbursements Account.

Issues in Accounts

(i) Making it Balance

- The accounts should always balance by the following formula:
 - Receipts (Rule 74.17(c)) – Disbursements (Rule 74.17(d)) + Unrealized Original Assets (Rule 74.17(f)) = Statement of Assets and Investments at Closing (Rule 74.17(g)).
- Original Assets are not part of the calculation. Instead, there is a requirement to reference the disposition of the Original Asset in the Receipts Account. The disposition of the asset may or may not be for the same value as expressed in the Original Assets, but this is not relevant for the balancing of the accounts. Instead, if properly cross-referenced, the beneficiary has the opportunity to see if the realized value is more or less than the value of the original asset and ask for details/explanation.
- Notwithstanding the design in the Rule, which works if followed, there is a common experience that the Rule is not properly applied by the account preparer, leading to difficulty in balancing the account. For example, a piece of real property might be valued in the Original Assets at the sale price, and then entered in the Receipts Account at the outset as an “entry”. While this is not technically correct because it should not be included as a “receipt” until it’s disposed of, the accounts will balance so long as the costs of disposing of the property and amounts paid out pursuant to the sale agreement (commissions, legals, property taxes, etc.) are all included as separate entries in the Disbursement Account. The correct way for this to appear in the accounts is to only include the net proceeds of sale in the Receipt Account. This way the beneficiary is given the opportunity to see the difference in value between the Original Asset listing and the Receipt Account entry and ask for background information explaining the difference, such as the lawyer’s report on the sale of the property.
- It is appropriate to include all cash accounts as both part of the Original Assets and as entries in the Receipt Account because there is no “disposition” or conversion of the asset to money.
- If there is difficulty making accounts balance, it is usually because:
 - i. one of the statements (Original Assets, Investment Account) is being included in the calculation in error; or
 - ii. the entry of an original asset as a Receipt prior to disposition as opposed to only the net proceeds of disposition appearing as a Receipt together with a missing cost of disposition in the Disbursement Account.

(ii) The Investment Account

- Pursuant to Rule 74.17(e), an Investment Account is only required if the Estate Trustee makes investments. The rule therefore does not apply to existing investments that are owned at death and retained for some period.
- The design of the Rule is to exclude the purchase of an investment as an entry in the Disbursement Account and exclude the sale of the investment as an entry in the Receipts Account. Instead, the Investment Account is there to document the purchase and sale of investments.
- Income on investments (interest and dividends) together with gains realized on the sale of investments should appear in the Receipts Account with adequate description. Similarly, losses on disposition of investments together with transactions costs of investments should appear in the Disbursement Account.
- Notwithstanding the design of the Rule, there is a practice, especially among the Trust Companies, to show purchases of investments as disbursements and sales or dispositions of investments as receipts. While this will properly account for the administration of the estate, it also significantly increases the total number of entries.

Compensation Issues

(i) Deductions in Calculating Compensation

- Where there is a claim for compensation, the Estate Trustee must create a Statement of Compensation setting out the amount being charged on the Receipts Account and the Disbursements Account. Care must be taken to deduct from the total sum of Receipts and Disbursements items for which compensation cannot be claimed.
- Items that may appear in the Disbursements Account that cannot be charged compensation include:
 - Payments to Estate Trustees to reimburse for personal expenses (gas, mileage, work absence);
 - Losses on investments;
 - Payments on account of Estate Trustee compensation;
 - Purchases of investments appearing in the Disbursement Account and Investment Account; and
 - Transfers to testamentary trusts (disbursements to beneficiaries are made during the trust or on its termination).
- Items that may appear in the Receipts Account that cannot be charged compensation include:

- Entries to document assets received from the Attorney for Property or Guardian where Estate Trustee and Attorney/Guardian are the same person and compensation is paid to Attorney/Guardian;
- Income Tax refunds; and
- Other entries that are for accounting purposes only and do not reflect a new realization of estate assets.

(ii) Professional and Agent Fees

There are three general principles that reflect the modern approach to Estate Trustees using agents and professionals and paying their fees from the Estate:

- The Estate Trustee is entitled to be indemnified for all proper expenses incurred in the administration of the estate;
- The Estate Trustee may delegate administrative duties to an agent provided the Estate Trustee retains decision making authority; and
- The fee of the professional/agent is a proper expense if the duties being delegated require expertise that the Estate Trustee does not have.¹²

If the Estate Trustee delegates administrative functions that do not require expertise to an agent, the expense may be charged against the estate, but if so, it should be deducted from the Estate Trustee's compensation. In short, a "proper expense" is one that can be charged against the estate and not deducted from the Estate Trustee's compensation.

Investment Management Fees and Real Estate Commissions

These are generally considered proper estate expenses not deducted from Estate Trustee compensation because they require expertise that the Estate Trustee is not expected to have. An exception might include the appointment of an investment advisor as Estate Trustee where the Estate Trustee was appointed with this expertise in mind.¹³

Accountants

It has always been the case that fees for income tax advice were proper expenses of the estate not deducted from Estate Trustee compensation. Until recently, Estate Trustees were expected to prepare tax returns, but it is now accepted that Estate Trustees are not expected to have the expertise required to understand the tax consequences of death and the necessary filings.

Accounting fees for the preparation of the estate accounts, on the other hand, are not generally considered proper expenses of the Estate Trustee. This is because accounting to the beneficiaries is a fundamental role of the Estate Trustee. Susannah Roth has provided an excellent outline of the jurisprudence on this issue in her paper *Indemnify*

¹² See Susannah B. Roth, *Indemnify Me!*, LSUC Estates and Trust Summit 2010

¹³ *Ibid.*

Me!, presented that the LSUC Estates and Trusts Summit 2010 which is not reproduced here. She also makes an excellent and intuitive argument, with some supporting case law, that the complexity of the court passing format and the increasing complexity of estates themselves suggest accounting fees for preparation of estate accounts should be a proper expense provided they are proportional.

Legal Fees

It is important to remember, as a first principle, that the solicitor acts for the Estate Trustee, not the estate. So, the work done by the solicitor is for the Estate Trustee – the question with respect to the accounts and the Estate Trustee’s compensation is – is the legal fee for advice and work the Estate Trustee requires to properly perform his or her function, or, is the legal fee for the work of the Estate Trustee?

As a general rule, all solicitor’s work necessary for the proper administration of the estate is a proper expense of the estate. This includes preparation of the application for a Certificate of Appointment, providing advice regarding the meaning of the Will, legal fees for conveyancing and the sale of real property; advice on the Estate Trustee’s duties in light of the Will and general estate law, seeking the court’s direction if necessary, and preparing the court application for a passing of accounts. It may also include collecting of debts, settlement of claims against the estate and dealing with the Public Guardian and Trustee and the Children’s Lawyer where rights of incapable persons or minors are part of the administration.

When the solicitor performs Estate Trustee functions, the cost of the solicitor’s time is not chargeable against the estate.¹⁴ Examples of Estate Trustee functions that, if performed by the solicitor, are not properly charged to the estate might include:

- Informing third parties of the death;
- Taking inventories of estate assets;
- Writing ordinary letters;
- Attendances at financial and other institutions to administer accounts; and
- Filing applications for insurance proceeds and other benefits.

Where the solicitor has performed Estate Trustee functions, the solicitor is prima facie not entitled to his or her regular rate and will be only entitled to be paid on a quantum meruit basis for the Estate Trustee work done if his or her accounts are assessed. The reason for this is that Estate Trustee work is, by its nature, not legal advice or the performance of legal services.¹⁵ The solicitor will be entitled to charge his or her regular rates for Estate Trustee work if:

1. Prior to doing any Estate Trustee work, the solicitor explains to the Estate Trustee that he or she will be charged personally for this type of work;

¹⁴ Rooney Estate, supra.

¹⁵ Rooney Estate, supra.

2. The solicitor obtains specific instructions to undertake Estate Trustee work and establishes a retainer with the Estate Trustee specifically for this purpose; and
3. The solicitor opens a separate file for the Estate Trustee work and docketts his or her time to this file.

It is important here to make the practical observation that there is not always, or even often, going to be a perfect delineation of Estate Trustee work and solicitor's work. Often the solicitor will assist the Estate Trustee with part of the Estate Trustee's work and charge the Estate without consequence. Usually this will be the case where the Estate Trustee is also one of only a few residual beneficiaries and there is no intention to claim compensation. The lesson that should therefore be taken from the forgoing analysis is to identify those estates that will possibly include a claim for compensation, in these cases discuss compensation early and often with the Estate Trustee, and if the Estate Trustee gives instructions to perform Estate Trustee work, establish the separate retainer.

The Lawyer as Estate Trustee

The following are a number of principles/rules that apply to the duty to account when the lawyer acts as Estate Trustee and as lawyer for the "estate":

- Lawyers are not held to any higher standard of care for acting as Estate Trustee, but a lawyer can be negligent in his or her capacity as lawyer for the estate while satisfying the standard of care expected of an Estate Trustee in respect of the same set of facts.¹⁶
- LSUC By-Law No. 9, regarding lawyer's trust accounts applies to moneys held in trust for an estate where the lawyer is also the trustee.
- LPIC will cover liability arising from a lawyer acting in the office of Estate Trustee provided the appointment came in the ordinary course and as part of the lawyer's practice.
- Lawyers are entitled to be compensated separately for legal services provided and as estate trustee in the same manner as any estate trustee, on the condition that:
 - He or she has kept records scrupulously separate as between the two roles;
 - He or she has adequately demonstrated there has been no duplication¹⁷; and
 - He or she has recorded his or her time in both roles with sufficient detail to reflect the nature of the work done and differentiate the services provided as solicitor versus as Estate Trustee.¹⁸

¹⁶ Justin De Vries, *Representing the Estate Trustee*, OBA Annual Institute 2010

¹⁷ *Indemnify Me!*, Roth, *Supra*.

¹⁸ *Fareed v. Wood* (2005), CarswellOnt 2572 (Ont. S.C.J.)

- Reductions will be forced when the solicitor attempts to charge executor's work at the rates reserved to solicitors for solicitor's work.

PART IV – SOLICITOR'S DUE DILIGENCE

General

The solicitor for the Estate Trustee should make it very clear to their client what the Estate Trustee's duties include, and what the client should expect from the solicitor. The solicitor should also advise on specific administrative decisions such as the need to advertise for creditors or obtain valuations and the risks associated with the options. Finally, the solicitor should carefully document the advice given and the instructions of the Estate Trustee.

The solicitor should also clearly explain to the client/Estate Trustee what administrative duties can be properly delegated to agents, what the requirements are of the Estate Trustee with respect to duties delegated to agents, and the potential for liability or a reduction in Estate Trustee compensation as a result of delegation.

The solicitor should provide their Estate Trustee/client with a checklist of their responsibilities and associated liabilities. This outline is often best provided in the letter confirming the retainer. An example letter is attached as Appendix "G".

Role of the Estate Trustee

In *Rooney Estate v. Stewart Estate* [2007] O.J. No. 3944 (O.S.C.J.), Mr. Justice Pierce described the Estate Trustee's role as follows:

- Arranging for the funeral and disposition of the remains;
- Locating the will and instructing the solicitor to apply for the appropriate grant of appointment;
- Locating all the assets of the estate, including making arrangements to secure, preserve, convert and dispose of such assets in accordance with the terms of the will;
- Advertising for creditors and paying all debts of the estate including the filing of appropriate tax returns;
- Preparing a set of accounts for the approval of the beneficiaries or the court, as is required; and
- Distributing the estate.

Additional roles include identifying and locating beneficiaries and obtaining valuations if necessary.

Role of the Estate Solicitor

The role of the lawyer for the Estate Trustee includes:

- To apply for a certificate of appointment for the trustee and to attend upon passing of accounts;
- To advise the Estate Trustee on:
 - The meaning of the Will and the application of the terms of the Will to the circumstances (i.e. the death of a legatee or residual beneficiary, either before death, or after);
 - General duties of Estate Trustees, such as: duties to creditors and priorities in estate administration¹⁹, duty to convert the estate in a timely fashion²⁰, duty to file tax returns and related deadlines²¹
 - Other issues that might require advice are:
 - Whether valuations of certain assets are necessary or desirable;
 - Deceased's directions regarding long-term trusts – distributions of capital and income; and
 - Duty of care regarding investments.
- Some but not all of the above can be dealt with in a retainer letter.
- If the issue is dealt with in the retainer letter, the key is to stick to the roles and focus on the Estate Trustee ultimately having to make the decision.
- Assist the Estate Trustee to make decisions if they ask, but document information and advice given in the form of a memo to file.

Duty of Care and Standard of Care

A lawyer advising an estate trustee owes a duty of care to his or her client. If an Estate Trustee is held liable for losses experienced by the estate for breaching his or her standard of care, the Estate Trustee will be able to look to the solicitor for indemnification if the solicitor knew of the relevant circumstances and failed to advise the Estate Trustee of the duty and risks.²²

¹⁹ *MacCulloch v. McInnes Cooper & Robertson*, 2001 CarswellNS 286, leave to appeal refused, 2001 CarswellNS 8.

²⁰ *Linsley v Kirstiuk*, (1986), 28 D.L.R. (4th) 495 (B.C.S.C.).

²¹ *Learoyd v. Whiteley*, (1887), 12 App. Cas. 727 (U.K. H.L.). The author is grateful to Justin De Vries for these authorities and the analysis in *Representing the Estate Trustee*, *supra*.

²² *MacCulloch v. McInnes Cooper & Robertson*, *supra*, for example.

Generally speaking, the solicitor does not owe a duty of care to the beneficiaries and should not be liable to the beneficiaries for the actions of the Estate Trustee. This will not be the case where the solicitor has become *trustee de son tort* in that there has been a breach of trust or losses to the trust property which has been entrusted to the estate solicitor. In other words, where, as in *Rooney Estate v. Stewart Estate* and many others, the solicitor became de facto trustee by undertaking the duties of the Estate Trustee and administering the assets of the estate, the lawyer's duty of care will extend to the beneficiaries.

As mentioned above, the standard of care is a separate issue, and will be applied differently to the solicitor advising the Estate Trustee and to the solicitor as Estate Trustee. The solicitor as Estate Trustee owes a duty of care to the beneficiaries, but only at the standard of care applied to Estate Trustees, namely that of a man of ordinary prudence in managing his own affairs²³. The solicitor for the Estate Trustee owes no duty of care to the beneficiaries, but must meet the standard of a solicitor advising his or her client, namely:

A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. The requisite standard of care has been variously referred to as that of a reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.²⁴

LSUC Standards in Estate Administration Matters

At a minimum, the estate administration file should include:

- a notarial copy of the Will and each codicil;
- the Certificate of Appointment of Estate Trustee or a notarial copy;
- an inventory and valuation of original assets;
- a list of the current assets and their value;
- a list of beneficiaries and any co-estate trustees, their addresses and telephone numbers;
- the original or a court certified copy of any Orders or Judgments affecting the estate, for example, a Judgment on a passing of accounts;
- original beneficiary receipts, releases and/or approvals of executor compensation;
- invoices for solicitor's fees;
- separate dockets for estate trustee work performed by the lawyer and legal services provided by the lawyer;

²³ *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302 (S.C.C.) at 315.

²⁴ *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 (S.C.C.), at 523.

- where appropriate or required by the *Trustee Act*, an investment plan and/or documentation of investment advice sought and received;
- copies of all T1 Returns for years prior to the date of death filed with Canada Revenue Agency (“CRA”) by the estate trustee; the T1 terminal return; all T3 Returns for the estate; all CRA Notices of Assessment or Reassessment; and CRA clearance certificates;
- an affidavit of publication of a Notice to Creditors; and
- correspondence sent and received by the lawyer’s office regarding the estate.²⁵

Common issues identified by auditors in Estate Administration matters include:

- Delay in administration of the estate. Sometimes, other service issues are identified, for example, failure to file tax returns or late filing resulting in penalties to the estate.
- Incomplete accounting records or missing source documents.
- Not keeping separate dockets for solicitor’s work and estate trustee work.¹¹
- Not rendering detailed legal accounts, i.e. – sufficient to confirm the charges are for solicitor’s work and not estate trustee work.
- Charging for estate trustee work at the solicitor’s hourly rate.
- Including in invoices for legal services estate trustee work while the solicitor-estate trustee or the client-estate trustee(s) take compensation without adjustment.
- Pre-taking estate trustee compensation.
- Improper or inappropriate calculation of compensation, for example:
 - using 5% of the gross value of the original assets to calculate compensation instead of 2½% of receipts and 2½% of disbursements;
 - taking a care and management fee where the will contemplates no ongoing testamentary trusts;
 - not excluding the value of specific transactions before applying the percentages to the receipts and/or disbursements, for example:
 - internal transfers or book entries;
 - disbursements in payment of executor compensation;
 - disbursements in payment of legal fees where the solicitor is the estate trustee;
 - in specie distributions of estate assets to beneficiaries; and
 - not adjusting the amount of compensation for accounting fees paid for preparation of income tax returns.

²⁵ Louise Chrisofolakos, *Practice Management Issues for Estates and Trusts Practitioners*, LSUC 12th Annual Estates and Trusts Summit, 2009.

- High risk investments. An example would be a private mortgage or unsecured loan. Additional regulatory concern arises in respect of these investments where the lawyer is in a conflict of interest, for example, where he or she is related to the borrower or acted for lender and borrower in the transaction.²⁶

²⁶ Ibid.