TAB 6

Potential Pitfalls – Understanding What to Watch out For

Distribution of Estate Assets: Some Final Issues to Address

"Dead"Lines In Estate Administration: A Refresher

A. Sean Graham
Eisen Graham

Practice Gems: Probate Essentials 2010
September 16, 2010

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Legal Education

DISTRIBUTION OF ESTATE ASSETS: SOME FINAL ISSUES TO ADDRESS

A. Sean Graham[1]

Plans for the eventual distribution of an estate generally begin at the outset of an administration. Issues that may interfere with what the beneficiaries may expect to receive, or the estate trustees hope to distribute, are often discernible early on.

The sooner these issues are identified, considered and accounted for in the estate trustee's deliberations the better: If they are not identified or somehow go awry, they can drag the entire estate into litigation and the usual risks, costs and delays that it entails.

Also, once issues are identified, beneficiaries can be warned about potential interferences or delays with distributions. The common beneficiary misconception that estate administration is simple, quick and inexpensive is best dispelled early.

1. Invalidating Bequests

Between the date of execution of the Will and the date of death, or even between death and distribution, various events and fact scenarios can lead to the invalidation of bequests.[2] Very often these events or scenarios can affect one beneficiary more than others, which could lead to significant frustration if the problem is not identified early in the administration. Even if the problem is identified early, there may still be frustration

---

[1] Partner, Eisen Graham.

[2] This Section draws heavily from James Kennedy, Q.C.'s Chapter 5 of *Widdifield on Excecutors and Trustees,* 6th ed. (Carswell, Toronto) entitled "Bequests and Beneficiaries".

and litigation, but at least the estate trustees will be as prepared as possible for those possibilities.

Abatement and Ademption

Where a contemplated gift under a Will cannot be performed because a testator has disposed of the intended gift between the date of the Will and the date of death, the gift is said to have adeemed.

> 16. In general terms, the law has long held that where a testator bequeaths specific property under his will, but that property is not among his assets at death, then the gift fails. It must also be said that where the legacy is of a general nature, i.e., it does not specifically identify the thing bequeathed (for example, a pecuniary legacy) it does not adeem. Examples of cases where the legacy consisted of real property clearly described so as to fall within the category of a specific bequest can be found in *Re Church*, [1923] S.C.R. 642, *(*sub nom. *Church v. Hill)* [1923] 3 W.W.R. 405, [1923] 3 D.L.R. 1045
>
> [...]
>
> 25. The rule of ademption is narrowly construed where the devise is described in specific terms. The rule has been stretched in those cases where the description of the legacy is more general in an attempt to give effect to the intent of the testator whenever that can be done without violating the rule that a will speaks from death and property specifically devised no longer exists. So in cases such as *Hicks v. McClure*, the court avoided the very often unfair finality of the ademption rule by holding that if the legacy has been converted to another form, the beneficiary will not lose his bequest if it can still be clearly identified among the assets of the testator's estate. The same result would have been reached in *Re Stevens*, except that there the sale proceeds of the devise became so commingled with the rest of the testator's funds it was not any longer identifiable.[3]

---

[3] *Nakoniecczny v. Kaminski*, 1989 CarswellSask 238 (Saskatchewan Court of Queen's Bench)

If the property intended to be gifted is still owned by the testator at death but the assets of the Estate are nonetheless insufficient to pay its debts and the specific bequests, general legacies will be reduced, or abate, in equal proportions.

Gifts will abate or be entirely extinguished in an Order of priority, with some gifts preserved to the detriment of others according to long-established common law concepts of which property is valued higher than others. Real property is still imbued with greater importance than personal property, notwithstanding the anachronistic feudal-era underpinnings of that primacy. Gifts on the same level of priority which is not entirely extinguished will be reduced *pro rata* according to available assets. The levels of priority are as follows:

1. Residuary personal property will be reduced or exhausted first.

2. Residuary real property will be next.

3. General legacies, including monetary bequests from the residue.

4. Demonstrative legacies, meaning proceeds of sale of a specific asset or fund not forming part of the residue.

5. Specific bequests of personal property.

6. Specific bequests of real property.[4]

---

[4] Kennedy, *Supra note 2, at 5.2.1*

Some practical steps may decrease the chances of problems with beneficiaries, or at least provide the estate trustee with a solid defence to beneficiary complaints in situations involving ademption and abatement:

1. Obtain proof of the transfer of property during life along with an explanation, if possible, of why property granted in a Will would be disposed of by the testator. If no solid proof is possible, it may be best to avoid repeating hearsay explanations from a beneficiary unaffected by the loss, since that may encourage already latent or burgeoning animosity between beneficiaries into the open.

2. Where there are significant bequests of valuable personal property, an estate trustee would be well advised to document, immediately, what the deceased still owned at death. Pictures of the deceased's residence taken as soon as possible after death may prove helpful, especially if family members or others have entered the deceased's property before the estate trustee.

3. Beneficiaries ought to be told as soon as possible that there is a chance of abatement. Early notice may not erase the sting of finding out that an intended gift cannot be performed, but it will avoid a beneficiary making plans in reliance on a contemplated improved asset level which does not come to pass.

In Terrorem Provisions

> I declare that if any beneficiary of this my Will shall, within years after my death and without the consent of my Trustees, which my Trustees in their discretion may give or withhold, institute any action or proceeding in which the validity of this my Will or any Codicil thereto is sought to be

> impeached, then, in every such case, such beneficiary shall absolutely forfeit and lose all interest in and right to any gift to him hereunder or under any Codicil hereto and every gift so forfeited shall fall into my residuary estate unless it is a gift of a share of my residuary estate, in which case it shall devolve as though such beneficiary had died at the time such action or proceeding was instituted.[5]

The doctrine of *in terrorem* dictates that a condition in a Will effectively intended to deprive the Court of its jurisdiction to determine any manner under the Will. Such a clause may be found invalid if:

1. The legacy is of personal property or blended personal and real property;

2. The condition is a restraint on marriage or one which forbids the beneficiary to dispute the validity of the will; and

3. There must be a gift over in the will so that an alternate beneficiary is provided for – bare forfeiture of the gift by the beneficiary is insufficient.[6]

Beneficiaries should be informed of the presence of such a clause as soon as possible. If not, and if a Notice of Objection to the validity of a Will is filed without knowing of the provision, a beneficiary might blame the estate trustee for failing to provide a warning.

A practice has developed of sending the beneficiary only that portion of the Will which relates to him or her, instead of the entire Will. Where direct family are concerned, I tend to disagree with that practice as a matter of principle: in my experience it leads to much more animosity, distrust and litigation than it avoids.

---

[5] Sheard Hull Fitzpatrick. *Canadian Form of Wills,* , 4th ed. (1982) at 119.
[6] Kennedy, *supra note 2* at 5.1.8.2

In particular, with an enforceable forfeiture clause is not disclosed, an upset beneficiary may file a Notice of Objection without knowing the consequences.

A beneficiary who has taken steps which may or may not invoke the forfeiture clause may decide that discretion plays the better part of valour and try to revoke the decision. This puts the estate trustee in a difficult position, since the gift over beneficiaries may insist on the forfeiture clause being implemented. Unless all those with a financial interest are *sui juris* and consent, which in many situations is anything but a given, it may be difficult to put the challenge back in the box and distribute to a formerly complaining but not placated beneficiary as the testator intended.

Tax issues

The different tax treatment of different assets can lead to tremendous acrimony, even where an issue is identified quickly. Where the Will dictates that the benefit of an asset is to be held by one person or class but the tax burden is to be borne out of residue, anger and blame of the lawyer may quickly ensue.

Bad news does not improve with age. The sooner problems like this are disclosed to those affected, the better. Beneficiaries who have discovered they can expect a certain amount of inheritance to work with are remarkably adept and quick at restructuring their lives accordingly. A nasty surprise one year after death, with the closing of their new home purchase in the offing for example, might be much worse for them than receiving unhappy information as part of the probate or early communication process.

Generally, taxes will have been paid prior to final distributions and the estate trustee will have confidence that there is no significant tax exposure before making. However, one risk is often forgotten when making distributions to non-residents of Canada. Section 116 of the *Income Tax Act* (the "ITA") mandates that a non-resident beneficiary of a Canadian estate is deemed to be disposing of a capital interest when receiving a distribution of "taxable Canadian property"[7] and liable for capital gains taxes in the result. Since non-resident beneficiaries, having received a payment, are not necessarily the surest source of tax remittances to the Canada Revenue Agency ("CRA"), the ITA directs executors and trustees to withhold and remit 25% of a distribution to CRA within 30 days of the end of the month of the distribution. The withholding can be reduced to 25% of the net gain from the distribution, but only if the beneficiary first obtains a tax certificate of compliance.

Even where there is no capital gain, the remittance must be made.[8] If not, the executor faces a personal penalty of 10% of the unremitted tax, not to mention the possibility of the ongoing attention of CRA once non-remittance is discovered. If the executor is not a lawyer, the estate solicitor can expect to be questioned in short order once the consequences of non-remittance make themselves known.

Claims against the estate

Family Law Act Part V of the *Succession Law Reform Act*, dependant's relief claims

---

[7] Defined in s.115(1) of the ITA to include real property situate in Canada, capital property used in carrying on business in Canada, shares of a private corporation resident in Canada and capital interests in personal trusts resident in Canada.

[8] For a more fulsome summary of this issue, see "A Pot-Pourri of Six-Minute Issues", Hoffstein and Weigl, 9th Annual Estates and Trusts Summit.

against the estate can lead to all manner of remedies, including occupation of home or direct transfer of specified properties to an applicant. These claims can therefore affect specific bequests under the Will and lead to ademption and abatement after the fact. Any settlement which leads to this result should certainly have the consent or non-opposition of the beneficiaries affected.[9]

Enclosure 1 to this paper is a list of deadlines applicable to estate administration which may be of assistance in identifying risks, pitfalls and timing issues, both at the outset of an estate, and prior to making distributions.[10]

Beneficiary deaths or releases

A beneficiary may die, or a charity cease to exist, before the testator's death, leading to the extinguishment of gifts. It is necessary in every estate to identify whether named beneficiaries are still alive at the earliest stage. Of course, the Will may speak to that possibility and provide for a gift over, in which case the gift survives even if the recipient has not.

Even if a beneficiary has predeceased the testator, there are exceptions to the general rule that the gift is extinguished along with the beneficiary. Section 31 of the *Succession Law Reform Act* R.S.O. 1990, CHAPTER S.26 (the "SLRA") is one such exception, and reads as follows:

> **31.**Except when a contrary intention appears by the will, where a devise or bequest is made to a child, grandchild, brother or sister of the testator who dies before the testator, either before or after the testator makes his or her will, and leaves a spouse or issue surviving the testator, the devise or bequest does not lapse but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible,

---

[9] For a discussion of whether distribution ought to be delayed in case of litigation risk, see "Distribution Delayed: Reasons to Wait", Graham, Hull & Hull Estates, Trusts and Capacity Breakfast Series, July 2007.

[10] Reproduced with the permission of Hull & Hull LLP, originally published for the June 2, 2005 Hull & Hull Estate, Trust and Capacity Law Breakfast Series

(a) if that person had died immediately after the death of the testator;

(b) if that person had died intestate;

(c) if that person had died without debts; and

(d) if section 45 had not been passed.[11]

Where the terms of the Will show that the legacy was intended to be in discharge of an obligation, the gift will not lapse and the deceased beneficiary's estate can recover the gift after death of the testator.[12]

If Section 31 of the SLRA is not in force, Section 23 of the *Succession Law Reform Act* operates to avoid an intestacy:

> **23.**Except when a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of,
>
> (a) the death of the devisee or donee in the lifetime of the testator; or
>
> (b) the devise or bequest being disclaimed or being contrary to law or otherwise incapable of taking effect,
>
> is included in the residuary devise or bequest, if any, contained in the will.

Where the terms of the Will show that the legacy was intended to be in discharge of an obligation, the gift will not lapse and the deceased beneficiary's estate can recover the gift after death of the testator.

Other Reasons for Gifts to be Invalidated

Some other, more remote, reasons gifts can be invalidated are as follows:

1. The Beneficiary has agreed, before the death of the testator, to release an interest in an estate – note the estate trustee should be sure to ascertain

---

[11] For detailed discussion of caselaw surrounding the section see Kennedy, *supra* note 2 at 5.1.8(a)
[12] *Ibid,* 5.1.8(c).

whether the beneficiary was given consideration in return, lest the release be rendered void due to lack of consideration.[13]

2. The beneficiary has lied to or deceived the testator to a fundamental extent which renders the gift fraudulent. The standard which must be reached for the Court to intervene in this manner is very high and not readily attained.[14]

3. The beneficiary has murdered the testator – the policy reasons for which are easy to discern. The same principle applies to anyone claiming through the criminal.[15]

2. *Per capita*, *per stirpes* and variations thereof

Just as particular care needs to be taken in the drafting process with respect to use of the phrases *per capita* and *per stirpes*, so do those terms need to be properly understood at the outset of administration. Failure to do so will lead to incorrectly identifying and serving beneficiaries, and in the worst case scenario, distributions to the wrong persons.

Therefore, some early clarification of terms is appropriate:[16]

- Issue: Means descendants to the remotest degree, but context can restrict the meaning to descendants to the first degree.[17]

- *Per Capita*: By head, meaning that one share is to be paid to each member of a class alive at the date of distribution. Therefore, a gift "to my issue per capita" could mean that equal shares would go to each child, grandchild, great-grandchild.

---

[13] *Ibid,* 5.1.10.2
[14] *Ibid,* 5.1.10.1
[15] *Dreger, Re* (1976) 1 O.R. (2d) 371 (Ont. H.C.)
[16] Hollaman, "'Gifts Per Stirpes' – Drafting it the Safe Way", *Hull & Hull Estates Trusts and Capacity Law Breakfast Series, September 29, 2004.*
[17] *Re Sinclair* 91802), 7 Ves. Jun.522, 32 E.R. 211 (as cited in Hollaman).

- *Per stirpes:* Signifies that the estate is to be distributed by "roots" or "by representation - one share is to be paid to the first surviving representative (or representatives) of each family or line of descendants. Therefore, the share of a child who predeceased the testator would pass to his/her children in equal shares, and if grandchildren predeceased as well, it would go to great grandchildren, until the family line has received its share. The grandchildren receive nothing if the child survives to take.

Cullity J. provides helpful summary of the two terms and instruction in how to apply imprecise or incorrect language in *Lau v. Mak Estate* 2004 CarswellOnt 3328:

> 8 It is hardly necessary to say that the words are not part of everyday linguistic usage. They are essentially words selected by lawyers engaged in drafting wills and they have a long-established, elaborate and precise meaning that is unlikely - to say the least - to be familiar, or apparent, to clients with no legal background. They refer essentially to the manner in which property is to be distributed between, or among, beneficiaries described in a will. They are not themselves descriptive of the beneficiaries. As contrasted with a *per capita* distribution, a distribution *per stirpes* effects a division of property in accordance with stirpes or stocks of descent. In ordinary language, a division in equal shares *per stirpes* will allocate one share to each family of beneficiaries while, under a *per capita* distribution, all beneficiaries will share equally.
>
> 9 While the most familiar examples of a stirpital distribution are probably to be found in gifts to a class that could comprise individuals of different generations - such as gifts to the testator's issue - this is not invariably the case. A bequest to grandchildren in equal shares *per stirpes* would, *prima facie*, not include great-grandchildren: *Gettas v. Karavos*, [1962] S.C.R. 390 (S.C.C.). In such a case the stirpes, stocks or families which would affect the division of property would be found in ancestors - the parents - of the beneficiaries. Thus, a grandchild who was the only offspring of one of the testator's two children would obtain half of the gift while several offspring of the other child would share the other half. There would be no representation by, or implied gifts over to, their issue.
>
> [...]
> 11 References to gifts *per stirpes* are, as I have indicated, essentially lawyers' expressions and, unless constrained by authority, I would be inclined to interpret them in the light of their traditional meaning and ignore them if, so construed, the will is not intelligible without attributing an unusual meaning to the other words of the Will. I would do this not simply on the basis of the principle that technical terms are generally to be given their technical meaning but, also, because the term "*per stirpes*" is an essential and peculiarly valuable part of a drafter's

> arsenal. Until such time as the proponents of plain-language drafting can find a simple substitute that will embrace all of the features of a stirpital decision that have been painstakingly elucidated in the past, the court should, I believe, be reluctant to accept, and impliedly approve, distortion of the concept.

Of course, an estate trustee faced with unclear language will likely wish to have the will interpreted, unless early agreement of all those with a financial interest is reached. Where the amounts in issue are considerable, that agreement is best arrived at after those affected have received independent legal advice.

Again, these interpretive problems are best identified and disclosed to beneficiaries at the outset, with any needed clarification obtained as soon as possible lest the administration be unduly complicated.

3. Memoranda

Unless existing at the time of the Will and specifically referred to and incorporated into the Will, a memorandum created by a testator is merely precatory, meaning that while it may express the wishes of the testator, it is not binding on the Estate Trustee.[18]

Extrinsic documentary evidence of the testator's intention is not binding on the estate trustee, even when that evidence may have been created in written form by or at the instigation of the testator, even if it was created on the same day of the Will.[19]

This settled law will not necessarily preclude the beneficiaries from expecting memoranda or wishes of the testator expressed outside the context of the Will to be implemented. It is suggested that the earlier beneficiaries obtain a copy of the Will, the better, because the sooner they read it the sooner their information and belief derived from other sources about the testator's intention can be put to the test. Keeping the entire Will back from non-residuary beneficiaries or disappointed family members not in the Will is a very effective way to increase suspicion and acrimony while the pain of loss

---

[18] *Feeney's Canadian Law of Wills,* 4th ed. James MacKenzie, Butterworth's, paragraph 6.17.
[19] *Re Rudaczyk* [1989] 69 OR (2d) (Ont. H.C.J.), ***Blow, Re,*** 82 D.L.R. (3d) 721, 2 E.T.R. 209, 1977 CarswellOnt 397, 18 O.R. (2d) 516 (Ont. H.C. Dec 29, 1977)

is still fresh and emotions raw. If the estate trustees need to apply for probate, the contents of the Will are to become public relatively quickly in any case.

4. Receipts, Releases, Indemnities and Judgments

Once the work of gathering in assets, paying debts, resolving liabilities and identifying and locating beneficiaries, an estate trustee is entitled to focus on ensuring self-preservation before distributions can be made.

The 'levels of protection', starting from highest level of protection and working down to lowest level, might be ranked as follows:

a. A Judgment Passing Accounts alongside a Final Clearance Certificate from Canada Revenue Agency[20];

b. A Release and indemnity from a well-informed beneficiary who has had the benefit of independent legal advice;

c. A Release and indemnity from a beneficiary with no lawyer and who has received little information and documentation about the administration;

d. A Receipt, indemnity and acknowledgment of satisfaction with the state and amount of the gift where the state of the gift could be in issue, for instance where a painting torn or china is chipped.

There are variations on the above themes, of course, with each estate trustee protected to varying degrees depending on the existence of independent legal advice and the extent of disclosure. While releases are generally drafted to cover off whether information has been received and independent legal advice received, it is suggested that such documents are nonetheless vulnerable to attack where undisclosed breach of trust, negligence or even subpar administration has taken place.

---

[20] Note that a Final Clearance Certificate is something of a given if an estate trustee wants genuine and lasting protection from CRA.

Certainly, there is no better protection for an estate trustee than a Judgment Passing Accounts combined with a Final Clearance Certificate from the Canada Revenue Agency. An estate trustee can be apply to pass accounts in accordance with Rules 74.17 and Rule 74.18 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, and section 48 and 49 of the *Estates Act* R.S.O. 1990, c.E.21, as amended.

There is a fairly tenuous view in the legal profession that an executor is entitled to a release as a condition precedent before distributing the Estate to beneficiaries. Without specifically disagreeing in principle, in practice my view is that such an entitlement ought to be relied on with great reservation in any given case.

In my view, the better practice, if a beneficiary refuses to give a release, is to apply to pass accounts. Since that passing comes with significant risks, costs and delays to not only beneficiaries but also estate trustees, it often is best to avoid. The avoidance of those costs can be specified as the consideration going to the beneficiaries in return for signing a release.

For practical purposes, obtaining a release may be best looked at as more of an option than an entitlement. In taking that view take some comfort from Sheard J.'s strong remarks in *Brighter v. Brighter Estate* 1998 CarswellOnt 3113 (Ont. Gen. Div):

> 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 duties 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 beneficiary is requested to execute. But it is quite another matter for the trustee to require execution of the release before making payment; that is manifestly improper.
>
> [...]
>
> A beneficiary should not be required to obtain the assistance of the court to obtain payment of the gifts contained in the will. Alan Brighter must be indemnified for the costs he has necessarily incurred to obtain the order for payment to him of his distributive share of his mother's estate. The respondent executrix must personally pay those costs, since it is due to her failure to perform her duty as executrix that those costs have been incurred. By the same token, legal fees that have been paid out of the estate funds in respect of the

proceedings which have resulted in my order for payment of the residue must be restored to the estate.

Since estate trustees cannot 'extort' a release by holding back on distribution, it naturally follows that any release obtained in this fashion may be deemed unenforceable.

Even where there was no 'extortion' in play, and a Release is provided by a beneficiary without being threatened, I still view it as suspect: a Release is a contractual document, and contracts generally require consideration to be enforceable. The obvious consideration flowing to the beneficiary from the Estate Trustee who accepts a release instead of insisting on a judgment passing accounts is a reduction in estate expenses and delay. In my view, that consideration ought to be stated specifically in the release.

Lack of independent legal advice and lack of the provision of full information and material facts to a beneficiary may be grounds for invalidating a release.[21]

Incorporated in the Release ought to be a broad indemnity, by the beneficiary of the estate trustee, of any and all risks to the extent of the property received by the beneficiary. Given the recent Supreme Court of Canada decisions in the area of joint assets it may be prudent to insert language in the release specifically addressing that issue, and stating that the beneficiary acknowledges that the estate held no beneficial interest in any joint assets which have not been gathered in. Obviously, this language can be more or less precise depending on the facts of each estate.

---

[21] *Widdifield on Excecutors and Trustees,* 6th Ed. (Carswell, Toronto) Chapter 10, "Breach of Trust and its Consequences" by Margaret O'Sullivan, at 10.5.1.

In cases where the gift is a specific bequest, and there is no ademption or abatement, a receipt and acknowledgment of acceptable condition may be sufficient, but ideally it ought to incorporate an indemnity in case new facts come to light. Note that there is a two year limitation for most claims against estates by third parties (see Enclosure 1), so any specific bequest made before that time ought, to be prudent, include an indemnity.

Plan for the end, at the beginning

The foundation for an uncontentious distribution process and protection of the estate trustee can be laid early on in the administration. Informing beneficiaries early and often about the administration and providing them with copies of key documents will make it difficult for them to argue that they did not know enough about the administration to sign a release and be bound to its terms.

For that reason, it is wise to consider, at the outset, what level of protection an estate trustee should be working towards requesting at the end of the day, and what information the beneficiaries can have at each stage which will make them more amenable to provide that protection.

"DEAD"LINES IN ESTATE ADMINISTRATION: A REFRESHER[22]

A. Sean Graham, Hull & Hull

Estate administration practice is very much deadline-driven, with most deadlines commencing from the date of death. The purpose of the following is to provide a refresher as to some key non-tax deadlines as well as some brief thoughts concerning each.

1. Issue: Filing Notice of Objection

Timing: Immediately, once death has taken place and notice is received of a client's or potential client's desire to challenge the validity of a will.

Source: Rule 75.03, *Rules of Civil Procedure*

- Whenever a potential client retains a solicitor to challenge the validity of a Last Will and Testament, a Notice of Objection should be filed immediately.

- If the client does not retain you but is proceeding nonetheless, you should have unambiguous documentation that you gave advice, in writing, concerning whether to file a Notice of Objection.

2. Issue: Giving notice to beneficiaries of charitable bequests under a Will.

Timing: Must be completed within one month of the date of the testator.

Source: *Charities Accounting Act* (Ontario), section 1.

- Since Charities do not have the notice of the death in the way family members can be expected to, this narrows the information gap and allows them to become involved early if they see fit.

---

[22] Reprinted with permission of Hull & Hull.

- This will have greater importance the larger the bequest relative to the overall assets of the estate, but charities tend to be forgotten early on in the administration. This deadline can be easy to miss, especially if there is a delay in retaining an estate solicitor.

- Charitable beneficiaries (and their solicitors) sometimes chafe at being treated as an afterthought in estate administration. Complying with this deadline can limit such perceptions and foster a more productive relationship at the outset.

3. **Issue:** Canvassing guardians of orphans before expiry of testamentary guardianship appointment

Timing: Testamentary appointment expires 90 days after testator's death, or upon disposition of appointee's application for a permanent appointment

Authority: *Children's Law Reform Act* (Ontario), section 61.

- Guardians appointed through the will should be advised early that their appointment expires 90 days after death, and canvassed for their views as to whether they want to apply for a permanent appointment.

- If the testamentary guardians do not want to be appointed, other options should be canvassed, and if there are no acceptable candidates, the Office of the Children's Lawyer should be notified.

4. Issue: Duty to retain records and information required to pass accounts in the form for passing.

Timing: Immediate upon assuming exectorship.

Source: Rule 74.17, *Rules of Civil Procedure*

- The duty to account and its ramifications is usually a surprise for most executors. Often they have no idea of the records to be kept and the information to be retained. Certainly very few realize that their duty is essentially indefinite unless they pass their accounts. Many ignore the duty despite advice, then deny receiving the advice when criticized.

- Problems with accounting tend to be most severe when there is no estate solicitor or the estate solicitor is not deeply involved. It is rare for an executor to admit that they were advised by the solicitor about the accounting duty but ignored the advice, less rare for an executor to blame the lawyer.

5. **Issue:** Application for Order allowing a claim against an Estate in the face of a notice contesting the claim

Timing: Within 30 days of receipt of Notice of Contestation, or within 3 months thereafter with leave of the Court.

Source: *Estates Act* (Ontario), section 44

- The Notice of Contestation is an excellent tool to knock claims out at the outset of an estate administration.

- One concern is that, when dealing with sophisticated recipients of the notice, you are inviting them to move forward with their claims.

- This could be a very dangerous deadline for the solicitor of the claimant from a liability standpoint. It is likely less dangerous for the estate solicitor, but still potentially problematic.

6. **Issue:** Payment of immediately distributable bequests
Timing: 1 year after date of death

Source: Common Law

- Following the expiry of the Executor's Year, an executor will be expected to earn interest on any undistributed assets. If interest is

not earned, liability may attach, or more commonly a claim for reduced compensation when it comes time to pass accounts.

7. **Issue:** Registering a caution to avoid direct vesting of real property to beneficiaries after 3 years if not disposed of by personal representatives.

Timing: 3 years after death

Source: *Estates Administration Act* (Ontario), section 9.

- In cases where debts and liabilities are not yet known, executors should register a caution lest undistributed real property vest in the beneficiaries at the 3-year point. Cautions can be registered after 3 years, but only with the consent to the registration of a caution from the beneficiaries with an interest (or the Children's Lawyer in case of minor beneficiaries), or an Order of the Court. See E*states Administration Act* (Ontario) section 11.

8. **Issue:** Restriction on distribution on an intestacy

Timing: No distribution of the assets of the estate of an intestate can be made until 1 year after the date of death

Source: *Estates Administration Act* (Ontario), section 26

- This can cause practical problems with, for example, valueless personal property. Significant criticism by the court over distributing invaluable personal property of little value in the face of an intestacy is, in my view, unlikely, but the section is unambiguous.

- Note that this is subject to section 53 of the *Trustee Act* (Ontario), which allows for distribution provided prior notice to creditors.

9. **Issue:** *Family Law Act* (Ontario) equalization application

Timing: Must be brought within 6 months of spouse's death, unless extended by the Court

Source: *Family Law Act* (Ontario), subsections 6(10) and 6(16)

- This leads to the practical problem of having to decide whether to elect before full financial information is available. Often this problem is the basis of an Application to extend the deadline and limit any distributions in the interim

10. **Issue:** Right to rent-free possession of matrimonial home by surviving spouse

Timing: Expires 60 days after death

Source: *Family Law Act*, (Ontario), section 26(2)

- Executors who fail to evict the spouse after the deadline could be criticized for allowing wasting asset, and if damage is done to the property by the spouse, the executor could be found liable.

11. Issue: Payment of insurance proceeds

Timing: Insurers must pay proceeds within 30 days of receiving the following: (a) sufficient evidence of the insurable event; (b) the age of the insured; (c) the right of the claimant to the payment; and, (d) the name and age of the beneficiary.

Source: *Insurance Act* (Ontario), section 203(1)

- Helpful only where insurers are not prompt, they are generally prompt.

12. Issue: Application for Dependant's Relief under Part V of the *Succession Law Reform Act (*Ontario)

Timing: Application must be brought within 6 months of grant of Certificate of Appointment of Estate Trustee.

Source: Succession Law Reform Act (Ontario), subsections 60(1) and 60(2)

- The Application should be brought as soon as possible, and consideration must be given to naming the designated beneficiaries of section 72 assets, and even in some cases notifying the institution holding the section 72 assets at death.
- Note that an Application can still be brought after the 6-month deadline, with leave of the court, but only with respect to assets undistributed as at the date of the Application

13. Issue: Actions by and against executors for torts

Timing: Must be brought within 2 years of the date of death

Source: *Trustee Act* (Ontario), section 38

- The *Limitatons Act* (Ontario) appears to resolve the different limitation periods for torts and contracts, with both now being two years.

- This deadline is largely ignored by executors and sometimes even solicitors, often apparently on the basis that if the deceased chose not to bring a claim during her lifetime, the executors should not do so after death. In my view this is extremely risky, since on a passing of accounts it will not be the views of the testator as to a claim that are relevant, but rather whether the claim should have been brought on an objective, prudent business decision.

- Executors and estate solicitors should be very careful before agreeing to be as forgiving as a testator may have been, because while the testator could not be sued during his lifetime for not moving forward, the executor can be.