

TAB 4

Administration Where There are Claims Against the Estate

Craig Vander Zee, C.S., TEP
Hull & Hull LLP

**Practice Gems: The Administration of Estates
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CONTINUING PROFESSIONAL DEVELOPMENT

Administration where there are Claims Against the Estate

Craig Vander Zee

cvanderzee@hullandhull.com

Hull & Hull LLP
Barristers and Solicitors
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-0316
FAX: (416) 369-1517

Overview

The risk of personal liability is an incident of the office of trustee. The risk is not limited to breaches of fiduciary obligations owed to beneficiaries. As trustees are principals and not agents of the beneficiaries, they will, *prima facie*, be personally liable on obligations owed to third parties and trustees may incur personal liability in tort or under statutes such as the *Environmental Protection Act* (Ont.).^[1]

The estate trustee's conduct may be protected, limited or exonerated by the terms of the Will, statute, an order relieving the estate trustee of liability, the existence or provision of releases or indemnities, a passing of accounts, the conduct of the beneficiaries, whether indirect or direct, and/or the assistance of the court.

[1] Cullity, M.C.C. "Personal Liability of Trustees and Rights of Indemnification", 16 E.T.J. 115 at pp. 115 and 127; see also Craig Vander Zee, "Conflicts involving the Role of a Lawyer as Estate Trustee & Estate Solicitor", *The Six Minute Estates Lawyer* 2011 (Toronto: Law Society of Upper Canada, April 2011).

Role of Estate Trustee

The general responsibilities of estate trustees include the following^[1]:

1. Make proper funeral and burial arrangements.
2. Determine that the Will appointing the estate trustee(s) is the last will and testament.
3. Determine and list the names, addresses and ages of the beneficiaries entitled to the estate and notify them of their interest.
4. Determine and list the full and complete nature and value of the assets of the deceased (arrange valuations where necessary).
5. Arrange for an examination and inventory of the contents of any safety deposit box.
6. Determine whether there are any contested assets of the deceased and/or his or her estate and take the appropriate action in respect of such assets.

^[1] Craig Vander Zee, "Conflicts involving the Role of a Lawyer as Estate Trustee & Estate Solicitor", The Six Minute Estates Lawyer 2011 (Toronto: Law Society of Upper Canada, April 2011); also see Mary Louise Dickson, Q.C. "Wearing Both Hats: Solicitor as Trustee and Lawyer for the Estate", Ontario Bar Association: Solicitors as Attorneys, Trustees, and Estate Trustees – What You Need To Know (Toronto: Ontario Bar Association, Continuing Legal Education Program, May 20, 2010) at 1-2.

Role of Estate Trustee (cont'd)

7. Review insurance coverage and the appropriate coverage of the assets where necessary.
8. Address any perishable assets of the deceased.
9. Secure and protect the assets of the deceased and the estate including business interests and the collection and deposit of income generated by assets, if any.
10. Open and maintain an estate bank/investment account, as appropriate.
11. Determine what debts and liabilities are owed by the deceased at the time of death and the estate and arrange for the payment of them. Determine whether any debts and liabilities should be contested, and contest and/or settle any debts and liabilities if they are not legitimate.
12. Notify various government and private institutions of the death, as appropriate.
13. Retain a lawyer to advise on the administration of the estate. Instructing the solicitor to apply, as necessary, for a Certificate of Appointment of Estate Trustee.

Role of Estate Trustee (cont'd)

14. Invest the assets of the estate pending the distribution of the estate, as required. Decisions relating to the investment of the assets should be documented, as should any decision relating to the holding of the investments in their current form.
15. Arrange for the sale of the estate's assets (as appropriate) to generate funds for the payment of debts, taxes and legacies.
16. Maintain accounts and keep all supporting vouchers. Accounts prepared in accordance with the *Rules of Civil Procedure* may be required. If the beneficiaries consent to a different form of accounts, formal accounts may not need to be prepared.
17. Determine the tax liability of the deceased and the estate in all relevant jurisdictions. File the necessary tax returns, pay the taxes and obtain the appropriate tax Clearance Certificate(s). ^[1]
18. Distribute the estate's assets in accordance with the terms of the Will or laws of intestacy. Establish any testamentary trusts in accordance with the terms of the Will. If the estate trustee is the trustee, he or she will be responsible to carrying out the terms of the trust and administering the trust.

^[1] Craig Vander Zee, "Conflicts involving the Role of a Lawyer as Estate Trustee & Estate Solicitor", *The Six Minute Estates Lawyer 2011* (Toronto: Law Society of Upper Canada, April 2011). The costs of retaining an accountant are sometimes brought into contention by beneficiaries. If the beneficiaries do not challenge the cost, the estate trustee will likely not have a problem charging the cost to the estate in addition to the estate trustees compensation, see *Schnurr v. Dunbar* [2000] O.J. 2836 (S.C.J.) (no amount was deducted for accounting or expert tax advice).

Role of Estate Solicitors

The following are responsibilities of the estate solicitor^[1]:

1. Reviewing the Will or, if there is no Will, the laws of intestate succession. Determine the beneficiaries of the estate. If there is ambiguity in respect of the terms of the Will, advise the estate trustee and consider whether an application to the court is necessary. All members of a class of beneficiaries are to be determined. Determine whether any beneficiaries are minors and/or disabled. If so, advise of the necessary involvement of The Children's Lawyer and/or the Public Guardian and Trustee. It is often helpful to ask the estate trustee to make a family tree.
2. Ascertaining the assets passing by Will or under applicable laws of intestate succession, for probate purposes, amongst others. While it may be the responsibility of the estate trustee to compile a list of the deceased's assets, it is generally advisable for the solicitor to compile the list of all assets owned by the deceased or alleged to be owned by the deceased so as to be able to determine the completeness of the list of assets and whether there are any estate obligations in respect of assets (such as RSPs designated to another person) which are not part of the estate but which the estate may have liabilities in respect of.

^[1] Craig Vander Zee, "Conflicts involving the Role of a Lawyer as Estate Trustee & Estate Solicitor", *The Six Minute Estates Lawyer 2011* (Toronto: Law Society of Upper Canada, April 2011); *Supra* note 3 at 3-4. Also see Mary Louise Dickson, Q.C. "Wearing Both Hats: Solicitor as Trustee and Lawyer for the Estate", Ontario Bar Association: Solicitors as Attorneys, Trustees, and Estate Trustees – What You Need To Know (Toronto: Ontario Bar Association, Continuing Legal Education Program, May 20, 2010) at 1-2.

Role of Estate Solicitors (Cont'd)

3. Advising the estate trustee of legal implications of assets held jointly, or with another person as tenants in common, or that are designated to a beneficiary outside the Will and the assets payable to beneficiaries.
4. Advising the estate trustee of elections and/or claims that may be made by others, as applicable, as against the estate under an applicable statute and/or the common law (i.e. *Family Law Act*, *Succession Law Reform Act*).
5. Preparing documents required to have the estate trustee appointed by the appropriate court including the Application for a Certificate of Appointment of Estate Trustee to the appropriate court, including issues dealing with same such as dispensing with a bond, if applicable.

Role of Estate Solicitors (Cont'd)

6. Preparing the advertisement for creditors etc. if the estate trustee wishes to advertise for creditors and others.
7. Searching title to all real estate owned by the estate as well as the executions on same.
8. Assisting the estate trustees in transferring and/or realizing the assets of the estate.
9. Preparing Releases for completion by the beneficiaries of the estate as required when assets are paid or transferred to them.
10. Advising on all matters in connection with the administration of the estate.

Dealing with Claims Against the Estate

Considerations (this list is not meant to be exhaustive nor are the considerations in a specific order):

- Retaining legal counsel:
 - Legal Costs: estate trustee is liable for legal costs – legal costs are generally permitted to be paid out of the assets of estate but this will also depend on the type of claim being made, whether there are assets in the estate to pay the legal costs, amongst other considerations;
 - What kind of assets are in the estate to pay the legal costs – do assets need to be liquidated, are these assets legacies;
 - Legal costs that are permitted to be paid out of the estate are subject to review and approval of the beneficiaries/Court;
 - What are the anticipated legal costs of defending the claim;
 - Confidentiality of the advice;
- Determine what type of claim is being made (i.e. family law election, will challenge, dependent support claim, trust claims);

Dealing with Claims Against the Estate (Cont'd)

- Who is making the claim / does the estate trustee have a conflict of interest;
- Is the claim in dispute;
- Are there assets in the estate, or assets that are available by way of clawback (if the claim is a dependant support claim - see s.72 of the SLRA) or otherwise, to satisfy the claim? What kind of assets are they;
- What are the options for resolving the claim (family meeting, negotiation, mediation, litigation etc.);
- Who are the necessary parties to the claim and its resolution;
- Are there minors involved (does the Office of the Children's Lawyer need to be involved, Rule 7 of the *Rules of Civil Procedure*);
- Is there any person with an interest who is incapable or unborn or unascertained; does the Office of the Public Guardian and Trustee need to be involved/ is there a Guardian/ is there a Power of Attorney (Rule 7 and 10 of the *Rules of Civil Procedure*, the Substitute Decisions Act);
- Are charities involved;

Dealing with Claims Against the Estate (Cont`d)

- Are all the parties that need to be included on notice? Are they represented;
- Must they have representation;
- What is the limitation period applicable to the claim;
- Is it (or was it) necessary for a party to seek an order extending the time within which the claim can be made, or seek leave to bring the claim;
- Should an Estate Trustee During Litigation be appointed;
- What Orders are necessary for the defence of the claim;

Dealing with Claims Against the Estate (Cont`d)

- What litigation steps are necessary to defend the claim;
- What evidence is necessary to defend the claim;
- If there are multiple claims alleged against the estate, are they being dealt with together or one after the other;
- What will the requirements be of the estate trustee (or the Estate Trustee during the litigation) during the litigation / do the assets need to be dealt with in certain manner while the litigation is pending;
- What will be the requirements of the estate trustee as a result of the resolution of the claim (whether by way of settlement or a decision of the Court);
- Tax issues arising from resolution (whether by way of settlement or a decision of the Court);
- Is Court approval of a settlement necessary / are certain Court Orders/Judgments necessary;

Distributions

Considerations (this list is not meant to be exhaustive

nor are the considerations in a specific order):

- What is the Status of the administration;
 - See matters to be dealt with referred to above under Role of the Estate Trustee and Role of the Estate Solicitor;
 - Have the claims by or against the estate been resolved;
 - Have the net assets of the estate been determined;
- Are there legacies;
- Have the assets been liquidated, as required;
- Is the distribution being considered an interim or final distribution;

Distributions (Cont'd)

- Determine the compensation to be claimed by estate trustee;
- What is the status of the any and all tax issues – is an Application for a Tax Clearance Certificate being made / is one being made / to the date of death and/or for the estate;
- Have accounts been prepared (formal or informal);
- Is an Application to pass accounts necessary;
- Do the beneficiaries approve of the estate trustee's accounts, the compensation of the estate trustee and the proposed distribution (a distribution statement);
- Are the beneficiaries prepared to sign a Release and/or Indemnity;
- If an interim distribution is being contemplated, determine the remaining expenses/debts of the estate; what is an appropriate holdback;

Distributions (Cont'd)

- How is the stub period of accounting to be handled