

TAB 8



## **THE SIX-MINUTE Estates Lawyer 2018**

# **Evolution of Orders Appointing Estate Trustee During Litigation (ETDL) – What Should be Covered?**

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## **The Six-Minute Estates Lawyer 2018**

# **Evolution of Orders Appointing Estate Trustee During Litigation (ETDL) – What Should be Covered?**

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## The Appointment of Estate Trustees During Litigation

An Estate Trustee During Litigation (formerly and elsewhere known as an "administrator *pendente lite*") is appointed to manage and preserve the assets of an estate for its beneficiaries. Such an appointment is most common in circumstances in which the validity of a testamentary document is in issue, such that no other person possesses the authority to act as estate trustee.

Where a will or codicil has been alleged to be invalid by the filing of a Notice of Objection or commencement of a court application, or where a Certificate of Appointment of Estate Trustee has been ordered to be returned, the authority of an estate trustee named in a will or codicil becomes unclear and an Estate Trustee During Litigation may be appointed to act in the interim, pending resolution of the dispute by settlement or trial.

## What is the Purpose of an Estate Trustee During Litigation?

The appointment of an Estate Trustee During Litigation may facilitate early steps in the administration of an estate, such as ascertaining its assets, attending to payment of liabilities, making interim distributions, and/or liquidating assets to be later made available for distribution. The goal in appointing an Estate Trustee During Litigation has been summarized as being "to bring independent, transparent, and accountable stewardship to [an] estate while the questions raised between the parties are being resolved ... to protect the estate and its beneficiaries."<sup>1</sup>

Section 28 of the *Estates Act* provides the statutory authority for the appointment of an Estate Trustee Litigation within the context of a will challenge. This section provides as follows:

Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Superior Court of Justice has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a

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<sup>1</sup> *Mayer v Rubin*, 2007 ONSC 3498 (CanLII) at para 2.

general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.<sup>2</sup>

This section of the *Estates Act* is considered to have the following implications:

- The jurisdiction to appoint an Estate Trustee During Litigation under the *Estates Act* only extends to those situations in which the validity of a will is being challenged;
- The appointment of an Estate Trustee During Litigation by the court is a discretionary matter;
- An Estate Trustee During Litigation can administer an estate in the same fashion as a normal estate trustee, except that:
  - An Estate Trustee During Litigation typically lacks the authority to distribute the estate; and
  - The court has discretion whether or not to award compensation to an Estate Trustee During Litigation.<sup>3</sup>

An Estate Trustee During Litigation may be appointed by the court on an application or motion for directions, pursuant to Rule 75.06 of the *Rules of Civil Procedure*.<sup>4</sup> Historically, the appointment of an Estate Trustee During Litigation outside of the context of a will challenge was rare. More recently, however, courts have recognized the utility of appointing a neutral third party to administer an estate while litigation is ongoing in different circumstances. The recent trend toward the appointment of Estate Trustees During Litigation in cases where the validity of a testamentary document is not in issue is discussed below.

The appointment of an Estate Trustee During Litigation is a discretionary matter for the court's determination. The proposed appointment of an Estate Trustee During Litigation should only be

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<sup>2</sup> RSO 1990, c E.21.

<sup>3</sup> David M. Smith, "The Estate Trustee During Litigation", *Estate Administration For Law Clerks* (Toronto: Law Society of Upper Canada, 2002) at 3-2-3-3 [Smith].

<sup>4</sup> RRO 1990, Reg 194, r 75.06(3)(f) [*Rules*].

refused "in the clearest of cases."<sup>5</sup> Courts will typically favour the appointment of an Estate Trustee During Litigation unless the administration of the estate in question is so highly straightforward that it does not warrant the appointment of an individual or institution to manage the assets of the estate while litigation is ongoing.<sup>6</sup>

It may not be necessary to seek the appointment of an Estate Trustee During Litigation where the authority of the personal representative is not at issue.<sup>7</sup> For example, even where certain terms of a Last Will and Testament may be unclear and/or subject to scrutiny, the parties may nevertheless agree that the named estate trustee possesses authority to administer the estate. This may be the case where, for instance, the issue of the interpretation of other terms of the will (unrelated to the appointment of the trustee and/or the validity of the will as a whole) has been raised.

### In What Circumstances Should an Estate Trustee During Litigation be Appointed?

The court will generally exercise its discretion to appoint an Estate Trustee During Litigation when there are assets to be managed and liabilities to be paid, as is generally the case when litigation arises and may otherwise put these basic steps in the administration of the estate on hold.<sup>8</sup> In some estates where assets are all in liquid form (for example, cash or cash equivalents) and few, infrequent, steps are required to administer the estate, a court may find it altogether unnecessary to appoint an Estate Trustee During Litigation.<sup>9</sup> Courts are often concerned about the cost of appointing an Estate Trustee During Litigation, such that, where the

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<sup>5</sup> Jordan M. Atin, "The Estate Trustee During Litigation" in Brian A. Schnurr, ed. *Estate Litigation*, 2<sup>nd</sup> Ed (Toronto: Carswell, 1994) at 24.2 [Atin], as adopted by Greer J. in *McColl v McColl et al.*, 2013 ONSC 5816 (CanLII).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at 24.2.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

size of an estate is limited, they may refuse to appoint an Estate Trustee During Litigation in recognition that “every effort should be made to minimize the cost of the litigation.”<sup>10</sup>

In *Re Lloyd*,<sup>11</sup> the court held that, even in the case of will challenge proceedings, if a court is satisfied that the appointment of an Estate Trustee During Litigation is not necessary for the preservation of the assets of the estate, an Estate Trustee During Litigation need not be appointed. In that case, the majority of the estate assets were shares in closely-held private businesses, which were being well-managed and appreciating in value. The court found that there was no need to appoint an Estate Trustee During Litigation in the circumstances. In contrast, in *Re: Groner Estate*,<sup>12</sup> an Estate Trustee During Litigation was appointed, notwithstanding that one of the parties’ lawyers was acting as *de facto* administrator for an uncomplicated estate. Greer J. held that:

Assets cannot be administered in a vacuum. Someone or some company must administer them on a daily basis to protect them for the beneficiaries who inherit when the litigation is over. Tax returns must be filed each year and proper accounts kept and investments made. These tasks can only be performed by a knowledgeable Administrator.<sup>13</sup>

While the authority of courts to appoint Estate Trustees During Litigation within the context of a will challenge pursuant to Section 28 of the *Estates Act* has long been recognized, recent years have seen an increase in frequency of such appointments in other contexts, which are not explicitly contemplated by the *Estates Act*. In *Mayer v Rubin*,<sup>14</sup> Myers J. referred to the broad and inherent powers of the court to supervise the management of estates and the ability to appoint an Estate Trustee During Litigation to protect parties to other types of estate litigation. It follows from the court's clear authority to add trustees and to remove both trustees and estate trustees under the *Trustee Act*, that the court may assist parties in a less intrusive manner by

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<sup>10</sup> *Ibid.*

<sup>11</sup> (1980), 6 ETR 10 (Ont Surr Ct).

<sup>12</sup> [1994] OJ No 140 (SC (Gen Div)).

<sup>13</sup> *Ibid* at para 11.

<sup>14</sup> *Supra* note 2.

appointing an Estate Trustee During Litigation by way of "an exercise of the court's inherent jurisdiction to do justice among the parties before the court."<sup>15</sup> Although no issue regarding the validity of the will had been raised, Justice Myers appointed an Estate Trustee During Litigation to protect the assets of an estate while litigation amongst the named estate trustees was ongoing.

### Who Should Act as Estate Trustee During Litigation?

Generally, a party unconnected to the litigation is the most appropriate candidate for appointment as Estate Trustee During Litigation. This principle was confirmed by the Ontario Court of Appeal in *Re Bazos*.<sup>16</sup> Accordingly, the following individuals would not be suitable candidates for the role of Estate Trustee During Litigation:

- beneficiaries with a direct financial interest in the outcome of the litigation;
- named executors; and
- potential witnesses to the litigation.<sup>17</sup>

The party opposing the appointment of a neutral Estate Trustee During litigation must meet a substantial burden in order to successfully do so.<sup>18</sup> Factors that support the appointment of a neutral party and, in particular, a corporate trustee, as Estate Trustee During Litigation, may include the following:

- the ability to secure a bond (or have such a requirement waived);
- income tax issues;
- the extent and complexity of the assets of the estate;
- assets that warrant experienced management;

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<sup>15</sup> *Ibid* at para 31.

<sup>16</sup> [1964] 2 OR 236 (CA).

<sup>17</sup> *Atin*, *supra* note 5 at 24.2.

<sup>18</sup> *Ibid*.



- the capacity to properly insure estate assets; and
- the proportionality of compensation claimed.<sup>19</sup>

In *Re Taylor Estate*,<sup>20</sup> the importance of appointing a neutral third party was emphasized. In that case, the deceased appointed her two children as estate trustees. Litigation ensued, with the daughter seeking the sale of the deceased's house (in which the son was still living), certain repayments by the son to the estate, and her own appointment as sole estate trustee. The son applied to the court for directions. The court held that appointing both siblings as Estate Trustees During Litigation would be a "recipe for disaster" and had the potential to paralyze the administration of the estate, while appointing only one of the two siblings was considered likely to increase mistrust between the parties. The court elected to appoint a neutral third party as Estate Trustee During Litigation, and provided the parties time to agree on the selection and appointment of a mutually-agreeable neutral third party.

Although, generally, an Estate Trustee During Litigation should not have an interest in the litigation, exceptions may apply. For instance, in *Salisbury v Dell*,<sup>21</sup> one of two co-executors named under a will was nevertheless appointed as Estate Trustee During Litigation due to the limited nature of his inheritance, the absence of any allegations of impropriety against him, and the court's expectation that he would continue on as estate trustee following the conclusion of litigation in any event. Moreover, in *Re Wood Estate*, the following factors were considered by the court in appointing a party with an interest in the outcome of the litigation as Estate Trustee During Litigation:

- All other interested parties, aside from the objecting co-executor, had either provided their consent to, or indicated that they did not oppose, the appointment;

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<sup>19</sup> *Ibid.*

<sup>20</sup> 2007 CanLII 23178 (Ont SC).

<sup>21</sup> (1993), 50 ETR 19 (Ont SC (Gen Div)).

- The named estate trustee had been administering the estate since the deceased's death (approximately nine months earlier), and there had not been any allegations of impropriety or criticism raised as to the manner in which the estate had been administered to date;
- Regardless of the outcome of the litigation, the Estate Trustee During Litigation was named as trustee in both the disputed will and a codicil to the previous will of the deceased. Accordingly, the appointee was not considered to have a vested interest in the outcome of the litigation; and
- The estate was relatively modest and it was argued that, if an independent Estate Trustee During Litigation were to be appointed, the appointee would have been required to pass accounts for the administration of the estate to date, which would have resulted in what was considered to be an unnecessary expense to the estate.<sup>22</sup>

In *Buswa v Canzoneri*,<sup>23</sup> Stinson J. heard a motion with respect to the appointment of an Estate Trustee During Litigation. The deceased had died intestate and was survived by seven siblings and two children. The deceased's sisters and his daughter all sought appointment as Estate Trustee During Litigation so that they could make funeral arrangements and/or dispose of the deceased's remains. Stinson J. considered Section 29(1)(b) of the *Estates Act* in appointing the daughter, the deceased's next-of-kin, as Estate Trustee During Litigation under Section 28 of the Act. This decision suggests that blood ties may be relevant to the selection of an Estate Trustee During Litigation.

### What is the Procedure for Appointing an Estate Trustee During Litigation?

If the appointment of an Estate Trustee During Litigation is sought, the related motion should, ideally, take place as soon as possible after the date of death and prior to any significant steps in the administration by the named estate trustee(s).<sup>24</sup>

The appointment of an Estate Trustee During Litigation typically results from a motion or application for directions under Rule 75.06(3)(f) of the *Rules of Civil Procedure*. The material

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<sup>22</sup> Atin, *supra* note 5 at 24.2.

<sup>23</sup> 2010 ONSC 7137 (CanLII).

<sup>24</sup> Atin, *supra* note 5 at 24.2.

filed should include the consent of the proposed Estate Trustee During Litigation, an affidavit, and a binding compensation agreement. Ideally, the affidavit will:

- outline the relationship of the parties;
- explain why it is necessary to appoint an Estate Trustee During Litigation (and highlight the need for a neutral trustee, if appropriate);
- list the known assets and liabilities of the estate;
- describe outstanding administrative duties;
- identify why the appointment of a party as Estate Trustee During Litigation is inappropriate (if that is the case) and/or would result in a conflict;
- detail the anticipated duties of the Estate Trustee During Litigation;
- explain any criticism of the current trustee's administration; and
- propose the security required (or that such a requirement be waived in respect of the appointment of a trust company) by the Estate Trustee During Litigation.<sup>25</sup>

The draft Order appointing an Estate Trustee During Litigation should clearly set out the authority of the Estate Trustee During Litigation, including any relevant limitations. Sometimes the Order appointing an Estate Trustee During Litigation will contain a number of provisions regarding his or her powers and duties, such as clauses addressing the disclosure of medical, financial, or solicitor's records. In addition to outlining the compensation to which the Estate Trustee During Litigation will be entitled, the party seeking the appointment may wish to consider seeking his or her related costs should the appointment of an independent Estate Trustee During Litigation be opposed. A precedent Order Giving Directions with respect to the appointment of an Estate Trustee During Litigation is attached as an Appendix to this paper.

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<sup>25</sup> *Ibid.*

Once the Order is issued and entered, a Certificate of Appointment of Estate Trustee During Litigation may be obtained.<sup>26</sup> Generally, third parties will rely upon the authority of the Order, without the necessity of the Certificate of Appointment. However, this is not the case with respect to real estate transactions and the Certificate of Appointment of Estate Trustee During Litigation is typically required in order to sell an estate property.<sup>27</sup>

### What are the Duties of an Estate Trustee During Litigation?

Rather than a mere nominee or agent of the parties, an Estate Trustee During Litigation is an officer of the court.<sup>28</sup> The Estate Trustee During Litigation has all of the ordinary rights and powers of a general administrator, other than the right to distribute the residue of the estate. The Estate Trustee During Litigation is also subject to the immediate control and direction of the court. The duties of the Estate Trustee During litigation generally include the management of assets, gathering of evidence, payment of liabilities (and other payments directed by the court Order appointing an Estate Trustee During Litigation) and, sometimes, assisting the parties in negotiating a resolution of the litigation.<sup>29</sup>

An Estate Trustee During Litigation has authority to deal with all the assets of the estate. Specifically, he/she/it has authority to value, sell, hold, maintain, and lease the assets. However, an Estate Trustee During Litigation should remain mindful of his/her/its role as the custodian of the assets of the estate and administer those assets only in a manner that is consistent with the potential outcomes of the litigation, without taking any steps that may disregard the succession rights of the parties.<sup>30</sup> The Estate Trustee During Litigation should avoid taking any action that

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<sup>26</sup> *Rules*, *supra* note 4, r 74.10.

<sup>27</sup> Smith, *supra* note 3 at 3-11.

<sup>28</sup> Ian M. Hull and Suzana Popovic-Montag, *MacDonell, Sheard, and Hull on Probate Practice*, 5<sup>th</sup> Ed. (Toronto: Carswell, 2016) at 396.

<sup>29</sup> Smith, *supra* note 3 at 3-11.

<sup>30</sup> *Ibid* at 3-12.

may interfere with the rights of potential beneficiaries, as the eventual distribution of property typically will not be determined until the conclusion of the litigation.<sup>31</sup>

An Estate Trustee During Litigation should not dispose of any property except where there is no other alternative and, only then, with court approval.<sup>32</sup> The Estate Trustee During Litigation may otherwise be removed and/or replaced. In *Re Knoch*, the court held that:

Insofar as was reasonable, the duty of the trust company was to maintain the status quo, and that did include balancing the need to sell to pay succession duty and income tax against the need to maintain all of the assets until settlement of the probate action.<sup>33</sup>

Another crucial function of the Estate Trustee During Litigation is to assist the parties in obtaining evidence relevant to the litigation. Generally, the Order appointing an Estate Trustee During Litigation will authorize it to compel production of medical notes and records, solicitor's notes and financial records from third parties.<sup>34</sup>

The Estate Trustee During Litigation should behave in an even-handed manner towards all parties. This obligation extends to court-ordered productions. Any material that an Estate Trustee During Litigation receives should be circulated to all parties, and all parties should be apprised of the status of the administration on a regular basis.<sup>35</sup>

An Estate Trustee During Litigation should ensure that all legitimate estate liabilities and debts are promptly paid during the litigation. The Estate Trustee During Litigation should calculate and pay income tax and other usual debts, such as funeral expenses. Section 28 of the *Estates Act*,

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> (1982), 12 ETR 162 (Ont Surr Ct) at para 8.

<sup>34</sup> Smith, *supra* note 3 at 3-13.

<sup>35</sup> *Ibid.*

together with Section 48 of the *Trustee Act*, provide an Estate Trustee During Litigation with the authority to settle claims against the estate in good faith.<sup>36</sup>

When the settlement of a claim affects the parties directly (for example, by reducing the size of the residue of the estate), a motion incorporating the term of settlement into a judgment should be considered.<sup>37</sup> Even with the consent of the parties, an Estate Trustee During Litigation should be cautious when attending to distributions of the residue of the estate to its beneficiaries, as this is not authorized by Section 28 of the *Estates Act*. It is nevertheless not uncommon for the parties to sign Minutes of Settlement authorizing the Estate Trustee During Litigation to distribute the estate assets and act in compliance with the Minutes of Settlement.<sup>38</sup> In such circumstances, it may be advisable for an Estate Trustee During Litigation to request that the parties obtain a court Order directing the Estate Trustee During Litigation to do so before assisting in the implementation of such terms of settlement.

An Estate Trustee During Litigation may also play a role in the negotiation of a settlement. Often, an Estate Trustee During Litigation will attend at mediation to provide relevant information regarding the assets of the estate and the status of its administration. Further, the Estate Trustee During Litigation may be able to provide an unbiased view regarding the evidence that has been presented if he or she has been involved in the gathering of evidence and/or examinations for discovery.<sup>39</sup>

The duties of the Estate Trustee During Litigation persist until the completion of the litigation. At that time, the responsibilities of the Estate Trustee During Litigation cease, and it must transfer the assets of the estate to another estate trustee. Generally, the Estate Trustee During Litigation should also pass accounts. This is especially advisable if there is any dispute as to the

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<sup>36</sup> *Ibid* at 3-14.

<sup>37</sup> *Ibid* at 3-14, 3-15.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

compensation and/or legal fees claimed by the Estate Trustee During Litigation or its conduct in administering the estate. The Estate Trustee During Litigation will typically hold back some estate assets until the accounts are passed to cover any expenses relating to the passing of accounts and/or contingent tax liabilities.

### Compensation of Estate Trustees During Litigation

Compensation is a matter of the court's discretion. An Estate Trustee During Litigation's entitlement to compensation is not absolute.<sup>40</sup> Any compensation paid is generally calculated on the same basis as under the *Trustee Act*, or pursuant to a fee schedule agreed upon by the parties and incorporated into the court Order appointing the Estate Trustee During Litigation. Generally, the formula used for compensation of an Estate Trustee During Litigation is a percentage of the receipts and disbursements, as well as a care and management fee.<sup>41</sup> Pre-taking of compensation is generally not permitted.

### Liability of Estate Trustees During Litigation

As an Estate Trustee During Litigation is a fiduciary, he or she may be liable for any failure to carry out his or her duties properly. An Estate Trustee During Litigation is not normally subject to personal liability for third-party claims, as he or she has indemnity rights from the estate for expenses incurred during the appointment. However, a passing of accounts may further protect the Estate Trustee During Litigation from claims by beneficiaries concerning the manner in which the estate was administered.

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<sup>40</sup> *Ibid* at 3-16.

<sup>41</sup> *Ibid* at 3-17.

## Lawyer as Estate Trustee During Litigation

Before a lawyer accepts the role of Estate Trustee During Litigation, due diligence should be undertaken. Before agreeing to act, a lawyer should consider requesting the following documents for review:

- a copy of the death certificate;
- details of the estate dispute;
- copies of the contested will(s);
- a description of the estate assets (including their location);
- a draft Consent to act as Estate Trustee During Litigation; and
- a draft Order Giving Directions.<sup>42</sup>

Furthermore, it is advisable to avoid the following risks related to assuming the role of Estate Trustee During Litigation:

- consenting to act without full disclosure of the scope of work to be undertaken, the nature of the litigation and assets be administered (including where they are located);
- agreeing to act before considering any potential conflicts of interest;
- overextending oneself or one's law practice; and
- wading into the administration slowly. It is best to take control of the file, gain knowledge and insure that all necessary steps safeguard the estate are considered.<sup>43</sup>

A lawyer should request that all of his or her duties are outlined within the Order appointing him or her as Estate Trustee During Litigation. Terms should be included to cover issuing fees,

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<sup>42</sup> John O. Krawchenko, "Solicitor as Estate Trustee During Litigation: Practical Considerations", *Solicitors as Attorneys, Trustees, and Estate Trustees: What You Need to Know* (Toronto: Law Society of Upper Canada, 2010) at 4.

<sup>43</sup> *Ibid* at 5.



compensation, expenses, and the timing of any payments to the lawyer and/or any beneficiaries.<sup>44</sup>

Should the estate assets comprise of real property and chattels, it is a good idea to attend at the estate property (or properties) with an independent witness.<sup>45</sup> Before and after photos are helpful both for insurance purposes and to demonstrate the amount of work performed by the Estate Trustee During Litigation.<sup>46</sup> All mail should be directed to the office of the Estate Trustee During Litigation. Arrangements should also be made for ongoing property maintenance, and the locks on the property should be changed.<sup>47</sup> It is essential to take steps to ensure that the property is properly insured. If a property is being sold, it is advisable to seek input from all interested parties in distributing chattels.<sup>48</sup> If parties disagree regarding the administration or disposal of the contents of the property, the Estate Trustee During Litigation may need to make arrangements to store them until the issue has been settled or is otherwise adjudicated.

Liquid assets may be consolidated in a firm trust account so that arrangements for the payment of bills can easily be made.<sup>49</sup> Any motor vehicles should have their license plates removed and insurance status reviewed.<sup>50</sup>

An Estate Trustee During Litigation can ask for further directions from the court, if necessary. However, it may not always be practical to do so. It may be most efficient to instead consult with the parties and build a consensus on uncontentious issues. If required to bring an application or motion for directions, the requested direction should be specific, and a full evidentiary record should be made available for judicial consideration.<sup>51</sup>

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<sup>44</sup> *Ibid* at 7.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid* at 8.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid*.

## Conclusion

An Estate Trustee During Litigation can play an important role in making litigation run more smoothly, assisting in the gathering of evidence and encouraging settlement. Most importantly, an Estate Trustee During Litigation can protect the assets of the estate for the benefit of the parties while litigation is ongoing. When approached to assist parties as an Estate Trustee During Litigation, it is important to agree to do so only with an understanding of what the role will entail and the inherent risk of personal liability associated with the role. An effective Estate Trustee During Litigation should maintain neutrality and attempt to foster areas of common ground between the parties whenever possible and appropriate.

**APPENDIX**

Court File No. 12345/67

**ONTARIO  
SUPERIOR COURT OF JUSTICE****IN THE ESTATE OF JOHN SMITH, deceased.**

THE HONOURABLE	)	MONDAY, THE 1 <sup>st</sup> DAY OF
JUSTICE	)	
	)	APRIL, 2018

**B E T W E E N:****JANE SMITH**

Applicant

- and -

**EMILY SMITH**

Respondent

**ORDER GIVING DIRECTIONS**

**THIS APPLICATION**, made by the Applicant for, *inter alia*, directions, was heard this day at 330 University Avenue, Toronto, Ontario, in the presence of counsel for the Applicant and counsel for the Respondent.

**ON READING** the Notice of Application, the Affidavit of Jane Smith sworn March 2, 2018, and upon hearing the submissions of counsel for the Applicant and counsel for the Respondent,

1. **THIS COURT ORDERS** that the issues to be tried are as follows:

(a) With respect to the Last Will and Testament of John Smith, deceased (the "**Deceased**"), dated August 1, 2015 (the "**Will**"):

- (i) The Applicant, Jane Smith ("**Jane**"), denies and the Respondent, Emily Smith ("**Emily**"), affirms that the Deceased had testamentary capacity on the date of execution of the Will;
- (ii) Jane denies and Emily affirms that the Deceased had knowledge and approved of the contents of the Will;
- (iii) Jane affirms and Emily denies that the Will was procured by undue influence; and
- (iv) Jane affirms and Emily denies that the Will was made under suspicious circumstances.

#### **Estate Trustee During Litigation**

2. **THIS COURT ORDERS** that A. Lawyer, with the law firm of Hull & Hull LLP, shall be and is hereby appointed Estate Trustee During Litigation, without security, of all singular property of the Estate of the Deceased, pending final resolution of the litigation herein and that a Certificate of Appointment of Estate Trustee During Litigation shall be issued to A. Lawyer, subject to the filing of the necessary supporting Application.

3. **THIS COURT ORDERS** that, subject to further review by the Court, if necessary, A. Lawyer, in her capacity as Estate Trustee During Litigation (the "**Estate Trustee During Litigation**") shall receive out of the assets of the Estate of the Deceased reasonable

remuneration, which shall be calculated on the basis of A. Lawyer's hourly rate in the amount of \$500.00 per hour.

4. **THIS COURT ORDERS** that all property and assets forming part of the Estate of the Deceased shall be and are hereby vested in the Estate Trustee During Litigation from the date of this Order Giving Directions.

5. **THIS COURT ORDERS** that the Estate Trustee During Litigation shall forthwith make all necessary inquiries to ascertain what assets and debts properly form part of the Estate with all powers granted by the within Order to compel information from third parties who are authorized to give such information to the Estate Trustee During Litigation as if the Deceased had requested provision of same.

6. **THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby authorized to exercise those powers given by law to an administrator including such powers under the *Estates Act*, R.S.O. 1990, c. E.21, as amended, and without limiting the generality of the foregoing, the Estate Trustee During Litigation is hereby specifically authorized to do the following:

- (a) to gather and take full account of the assets and liabilities of the Deceased and of the Estate;
- (b) subject to any list or memorandum of the Deceased, to sell any articles of personal, domestic or household use or ornament comprising the assets of the Estate;
- (c) to pay all just debts, funeral and testamentary expenses and all income taxes of the Deceased and of the Estate, including any costs associated with the unveiling of the Deceased's gravestone, and excluding any

income taxes or taxes of any nature or kind in respect of whose ownership or beneficial entitlement may be in dispute;

- (d) to obtain information, records and files relating to the assets and liabilities of the Deceased in the same manner and to the same extent the Deceased would have been able if he were alive;
- (e) to invest any assets of the Estate in guaranteed investment certificates, money market investments, treasury bills or other equivalent types of investments at her discretion;
- (f) to obtain two (2) real estate appraisals of any real property comprising the assets of the Estate and to possibly sell any such real property, including the house at 20 Toronto Street, Toronto, Ontario; and
- (g) to appoint an agent or agents (including legal counsel) and to seek such assistance from time to time as the Estate Trustee During Litigation may consider necessary for the purpose of performing her duties hereunder and to pay those agents and representatives, including legal counsel, from the capital of the Estate.

7. **THIS COURT ORDERS** that the Estate Trustee During Litigation shall not distribute any assets from the Estate without the agreement of all parties or Court Order, with the exception of monthly payments of \$1,000.00 to each of Emily and Jane, to be paid on the last day of each month out of the assets of the Estate, in the manner which the parties agree is most tax efficient.

8. **THIS COURT ORDERS** that the Estate Trustee During Litigation may sell any Estate holdings held as an asset without having to seek prior approval of the Court.

9. **THIS COURT ORDERS** that the Estate Trustee During Litigation shall, within sixty (60) days of this Order, deliver to the parties and file with the Court a Statement of Assets of the Estate of the Deceased, setting out the nature and value of the Estate as at the day before the date of death of John Smith.

10. **THIS COURT ORDERS** that Emily and Jane shall make available for inspection by the Estate Trustee During Litigation all documents and records relating to the assets and administration of the Estate that are in their possession or control and shall provide copies of any such documents and records to the Estate Trustee During Litigation as are requested by her within ten (10) days of such request. The charges for the costs of such copies shall be paid out of the assets of the Estate, subject to further Court Order and reserved to the Trial Judge.

11. **THIS COURT ORDERS** that Emily shall forthwith forward to the Estate Trustee During Litigation all correspondence that she has or may in the future receive that was meant for or directed to the Deceased or his Estate.

#### **Prior Will**

12. **THIS COURT ORDERS** that any party with knowledge of any prior or subsequent Will, codicil or other testamentary documents of the Deceased shall advise the Estate Trustee During Litigation of the details of same and shall provide the original copy to the Estate Trustee During Litigation and the Estate Trustee During Litigation shall circulate a copy to the parties.

#### **Production of Medical Records**

13. **THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all medical records, notes and files relating to the Deceased at any time commencing January 1, 2015 to the date of death, from any person or physician, institution, hospital, health care facility or health care provider in possession of such medical

records, in the same manner and to the same extent as the Deceased would have been able if he were alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid out of the assets of the Estate, at first instance, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge.

#### **Production of Solicitor Records**

14. **THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all solicitors' records, notes and files relating to the Deceased from any solicitor or law firm in possession, power or control of such records, in the same manner and to the same extent the Deceased would have been able if he were alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid out of the assets of the Estate, at first instance, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge.

15. **THIS COURT ORDERS** that any party is hereby granted leave pursuant to Rule 31.10 of the *Rules of Civil Procedure* to examine for discovery John Johnson, the solicitor who prepared the Will, including and relating to conversations had with the Deceased, instructions for and preparation of drafting and execution of any Wills, Powers of Attorney or any other testamentary documents of the Deceased, the costs of the examination to be reserved to the Trial Judge. John Johnson shall be paid at his hourly rate for his attendance and work performed in this regard, out of the assets of the Estate, at first instance, subject to further Order and reserved to the Trial Judge.

#### **Production of Financial Records**



16. **THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all financial records and files relating to the assets held by the Deceased at any time commencing January 1, 2015 to the date of death or under attorneyship, either solely or jointly by the Deceased with another, from any financial or banking institution or agency, whether in Canada or elsewhere, in the same manner and to the same extent as the Deceased would have been able, if he was alive. The charges for the production of the financial records and files shall be paid out of the assets of the Estate, at first instance, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge.

#### **Waiver of Privilege**

17. **THIS COURT ORDERS** that any claim of privilege and duty of confidentiality respecting solicitor, medical, financial or banking records enjoyed by the Deceased in respect of the Deceased be and is hereby waived.

#### **Mediation**

18. **THIS COURT ORDERS** that the Applicant, the Respondent, and the Estate Trustee During Litigation (the “**Mediating Parties**”) shall attend Mediation pursuant to Rule 75.1 of the *Rules of Civil Procedure* within ninety (90) days of the date of this Order, and makes the following directions:

- (a) the Mediating Parties shall mediate their dispute before a mediator mutually agreed upon amongst counsel for the Mediating Parties;
- (b) the issues to be mediated are those set out in the Order Giving Directions herein;

- (c) the Notice of Mediation giving the date, place and time of the Mediation shall be served upon the Mediating Parties by an alternative to personal service pursuant to Rule 16.03 of the *Rules of Civil Procedure*;
- (d) the fees of the Mediator shall be paid out of the Estate at first instance;  
and
- (e) any matters arising out of the mediation requiring further direction of the Court shall be referred to a Judge of this Honourable Court.

19. **THIS COURT ORDERS** that the parties shall adhere to the following schedule, unless otherwise agreed upon by the parties in writing:

- (a) affidavits of documents to be exchanged within sixty (60) days of the date of mediation; and
- (b) examinations for discovery and/or cross-examinations on all affidavits to be conducted within ninety (90) days of the date of mediation.

20. **THIS COURT ORDERS** that the parties and the Estate Trustee During Litigation are hereby granted leave to move for further directions as may appear advisable or necessary.

21. **THIS COURT ORDERS** that the deadlines set out in this Order Giving Directions shall be subject to the contrary written agreement of the parties through their solicitors.

22. **THIS COURT ORDERS** that the issues be tried by a Judge without a jury at Toronto on a date to be fixed by the Registrar, and that the Record shall consist of this Order Giving Directions and any other Order for Directions made by this Court.

23. **THIS COURT ORDERS** that the costs of and incidental to the Applicant in the bringing of this Application shall be reserved to the Trial Judge.

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