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TAB 1

Practice Gems:

Administration of Estates 2020

An Estate Administration Checklist For Solicitors Advising
Estate Trustees During The Estate Administration Process -
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**AN ESTATE
ADMINISTRATION CHECKLIST
FOR SOLICITORS ADVISING ESTATE TRUSTEES
DURING THE ESTATE ADMINISTRATION PROCESS**

By: Clare E. Burns and M. Jasmine Sweatman, as updated by Jag C. Gandhi¹, and
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This checklist for the administration of an estate is meant to be an *aide memoire* to solicitors advising estate trustees. Estate administrations are as varied as the lives of the persons whose estates are being administered. They range from the mundane to the stuff of Giller prize winning novels. This checklist cannot, for that reason, be exhaustive³ nor is the order in which the topics have been set out necessarily chronological.

We encourage you to take this document, input it into your word processing system, and personalize and expand it according to your experience and needs.

¹ This paper is an update to the paper prepared by Clare Burns of WeirFoulds LLP and Jasmine Sweatman of Sweatman Law Firm for the LSUC's Practice Gems: The Administration of Estates 2013, which was further updated by Jag C. Gandhi of Miller Thomson LLP in 2017. The authors gratefully acknowledge the assistance of Lori M. Duffy, Kimberly Whaley, and Bethany Anderson in the development of this checklist.

² Both partners at Fogler, Rubinoff LLP in the Tax and Estates Group.

³ Sources used in developing this checklist include: Armstrong and Tyrrell, *Estate Administration a Solicitor's Manual*, Toronto: Thomson Carswell (2007); MacGregor, *Preparation of Wills and Powers of Attorney: First Interview to Final Report*, 3rd ed. Toronto: Canada Law Book Inc., (2004); Whaley, *Advanced Roundtable in Estate Law 2010*, precedent retainer and reporting letters.

Although not specifically addressed in this paper, many estate administrations include the administration of one or more testamentary trusts. Many of the duties set out below are equally relevant to the administration of testamentary trusts. This is a separate substantive topic that merits its own checklist considering the specific terms of a testamentary trust, as well as the interests of the beneficiaries thereunder and the duties and obligations of the trustees.

1. First Interview with Client

- (a) Confirm who the client is:
 - (i) Although it may seem obvious, it is not always;
 - (ii) The solicitor represents the personal representative, not the estate itself or the beneficiaries, and the solicitor should explain this to the estate trustee in the first meeting;⁴
 - (iii) This is particularly important should any conflict arise between the personal representative and any other party;
 - (iv) If there is more than one personal representative, the clients must be told that the lawyer takes instructions from all of them, and if one instructs the lawyer, the others must consent before the lawyer can act on the instructions;
- (b) Explain the extent of the solicitor's duties:
 - (i) The role of the solicitor is determined at the time of the retainer. The solicitor must ensure that the client recognizes the distinction between the estate trustee's⁵ role and that of the solicitor;
 - (ii) Solicitor must clearly articulate that the role of decision-making belongs to the estate trustee and not the solicitor;
 - (iii) Communicate the estate trustee's duty to personally perform all duties requiring the exercise of discretion;⁶
- (c) Obtain information regarding the deceased:
 - (i) Where was the deceased domiciled at the time of death?
 - (ii) Was the deceased a US citizen or a green card holder? If yes, are US tax filings up to date?

⁴ *Bott v. Macaulay* (2005), 18 E.R.R. (3d) 15 (Ont. S.C.J.); *De Los Reyes v. Timol*, (2000) 31 E.T.R. (2d) 44 (Ont. S.C.J.)

⁵ For the purpose of consistency in this paper, unless referring to a specific role, such as an Estate Trustee With a Will or an Estate Trustee Without a Will, we will refer to all executors as "estate trustees".

⁶ *McLellan Properties Ltd. v. Roberge*, [1947] 4 D.L.R. 641 (S.C.C.)

- (d) Identify all the family members of the deceased:
 - (i) Draw the family tree so as to determine relationships by marriage and by blood/adoption;
 - (ii) Determine whether the deceased or any deceased beneficiaries of the estate have genetic material stored that could give rise to posthumously conceived children or issue; alternatively, diarize 6 months from the date of death of the deceased and the date of death of any relevant beneficiaries to conduct a search of the registrar for any notices filed with respect to posthumously conceived issue;⁷
 - (iii) Determine the deceased's marital status at time of death, remembering that a person may die with a legally married spouse and multiple common law spouses;
 - (iv) Determine all unrelated persons in respect of whom the deceased may have been paying support or owe an obligation of support [stepchildren for example];
 - (v) Are any of the beneficiaries US citizens or green card holders?
 - (vi) Are any of the beneficiaries non-residents?
- (e) Obtain from the client:
 - (i) The original Will(s) and Codicil(s);
 - (ii) The affidavit(s) of execution or, failing same, appropriate evidence regarding the due execution of the original Will(s) and Codicil(s);
 - (iii) Any letters of wishes or other precatory documents;
 - (iv) Original death certificate or statement of death;
 - (v) Copies of death certificate or statement of death for any executor predeceasing the deceased;
 - (vi) All contracts/orders affecting the estate (e.g. separation agreements, orders for support);
 - (vii) Names and addresses of beneficiaries;

⁷ Following the implementation of the *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016, S.O. 2016, c. 23 - Bill 28 on January 1, 2017, depending on the terms of a Will or the rules of intestacy, an estate trustee may need to consider the distribution of an estate among those beneficiaries alive on the deceased's date of death and those conceived and born within three (3) years of the deceased's death (or the death of the relevant beneficiary who predeceased the deceased).

- (viii) Preliminary list of assets and liabilities;
 - (ix) Copies of income tax returns, bank statements, broker statements, insurance policies, RRSP and RRIF certificates or statements, TFSA statements, GIC certificates or statements, stock and bond certificates and pension information;
- (f) Confirm that funeral arrangements have been made:
- (i) There can be disputes with respect to funeral and burial, for instance, as to whether the deceased should be buried or cremated;
 - (ii) Instructions in a will are usually worded as "wishes" and, even if worded as directions, are not enforceable by law, but can be carried out if the estate trustee "so chooses";⁸⁹
 - (iii) The estate trustee has the duty to dispose of the body, and the right to possess the body for that purpose;
 - (iv) The solicitor should advise the estate trustee of any special instructions regarding donation of organs (if it is not too late to do so);

⁸ *Saleh v. Reichert* (1993), 50 E.T.R. 143 (Gen. Div.) – case summary as follows:

- ◆ Deceased was brought up Muslim, and died intestate (so this doesn't directly address the Will clause issue). Husband was appointed administrator. Husband intended to have her body cremated in accordance with her expressed wishes.
- ◆ Deceased's father brought action seeking to prevent cremation and to have body buried in accordance with Muslim faith.
- ◆ Court: action was dismissed. Administrator of estate had the duty of disposing of the body and the right to possess it for this purpose.
- ◆ Fundamental obligation is that the body be disposed of in a "decent and dignified fashion". Either burial or cremation would have met these criteria.
- ◆ The expressed wishes of a person as to the disposition of his or her body cannot be enforced in law. Nevertheless, there is nothing to prevent an executor or administrator, on whom the duty falls to dispose of the remains, from carrying out the deceased's lawful wishes concerning the disposal of his or her body.
- ◆ Husband could dispose of the body by burial or cremation and could properly carry out the wishes expressed by the deceased "if he so chose".

⁹ *Abeziz v. Harris* [1992] O.J. No. 1271 – case summary as follows:

- ◆ The deceased was born Jewish, but was not practicing. He made a Will in which he expressed a wish to be cremated, and appointing his friend as his executor. His mother sought to prevent the executor from cremating his body.
- ◆ The mother argued that the Will was made under suspicious circumstances (the Court found no undue influence)
- ◆ The Court said: "Quite clearly Ben chose his executrix in March and reconfirmed his choice in April: he also reaffirmed his decision to be cremated. While it is true that a testator cannot force his executor to comply with his wishes there is nothing to prevent a valid executor from carrying out a testator's lawful wishes concerning the disposal of the testator's body."
- ◆ Religious law had no bearing in this hearing. Executrix had right to decide as to burial/cremation.

- (v) The estate has an obligation to dispose of the body in a "decent and dignified fashion";
- (vi) Religious law has no bearing – an estate trustee has the right to decide;
- (vii) Proper funeral expenses are payable out of the estate in priority to any other charges. The amount must be reasonable under the circumstances;¹⁰
- (viii) If someone other than the estate trustee has contracted with the funeral home for the arrangements, the estate is to reimburse only for so much of the cost as the estate trustee might reasonably have paid in the circumstances. Note that if there is an issue about the solvency of the estate regard must be had to the bankruptcy legislation on this point;
- (g) Confirm that family members and others with a proper interest in the estate have been told about the death [**i.e. in the case of multiple marriages confirm that previous spouses/children have been informed as appropriate**];
- (h) Identify those people familiar with the deceased's business and private affairs and in possession of other pertinent information [**e.g. solicitor, accountant, insurance broker**];
- (i) Determine if there are any circumstances that *prima facie* may give rise to constructive trust, unjust enrichment or *quantum meruit* claims;
- (j) Determine if there is any concern that the deceased and/or the estate were insolvent. If so, consider applicability of bankruptcy legislation and, in particular, whether putative estate trustees wish to renounce their appointments;
- (k) Diarize the expiry of the executor's year as the date of the first anniversary of the death of the deceased;
- (l) Solicitor should explain, as early as possible, what the estate trustee is "getting into" and the potential issues and pitfalls. Ideally, the estate trustee should be aware of their tasks, duties, and responsibilities before accepting the position of estate trustee;

¹⁰ *Shelly's Case* (1693) 1 Salk. 296 (Eng. K.B.) – case summary as follows:

- ◆ Funeral expenses, said Sir Edward Coke, according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatever.
- ◆ But an executor or administrator is not justified in incurring such as are extravagant, even as it respects the legatees or next-of-kin entitled in distribution: 3 Inst. 202. Nor, as against creditors, is he warranted in spending more than that which is absolutely necessary.
- ◆ In 1693, Lord Holt said that no funeral expenses are allowed against a creditor, except for the coffin, ringing the bell and the fees of the parson, clerk and bearers; but not for the pall or ornaments.

- (m) Before the client decides to act, they must consider if they disagree with any of the terms of a will or want to challenge the will in some way. If so, they should not be acting as personal representative;
- (n) Explain potential for conflicts – Does an estate trustee intend to challenge the Will? If the spouse is appointed as (an) estate trustee, might he/she elect under the FLA?
- (o) If the client has not already acted as estate trustee (acceptance), explain that renunciation is possible:
 - (i) An Estate Trustee with a Will derives his or her authority from the Will;
 - (ii) The responsibility of the Estate Trustee with a Will commences when the person acknowledges, by action in the role as estate trustee, that they will act as estate trustee;
 - (iii) An estate trustee may be able to renounce his or her office before a Certificate of Appointment of Estate Trustee with a Will is issued without formal process;
 - (iv) After a Certificate of Appointment is issued to an Estate Trustee With a Will or an Estate Trustee Without a Will, the estate trustee may only resign in accordance with the terms of the Will, in the case of an Estate Trustee With a Will, or by Court Order, in either case;
- (p) Discuss the importance of consistent reporting of information for assets, debts and tax purposes¹¹;
- (q) Discuss the need to keep accurate accounting of all dealings with the deceased's accounts and keeping a record of all transactions being made. In many cases recommend to the estate trustee to keep an excel spreadsheet of all ins and outs when dealing with the estate funds;
- (r) Discuss immediate financial needs of surviving spouse, children, etc.;
- (s) Discuss CPP death benefit and any pension survivor benefits;
- (t) Discuss opening of and listing of safety deposit box;
- (u) If there are multiple Wills discuss the difference between the Will to be probated and the Will that would not be probated and the assets governed by each Will;

¹¹E.g. ensure that property valuations used for the purpose of reporting to the Canada Revenue Agency and the Minister of Finance are reflective of the same fair market value as of date of death.

- (v) Discuss that if the Will needs to be probated that Estate Administration Tax ("**EAT**") would be payable at the time the application for a Certificate of Appointment is made;¹²
- (w) Discuss the requirement to file an Estate Information Return ("**EIR**") in the event that the estate trustee needs to obtain a Certificate of Appointment (also known as probate) with respect to the Will (or if there are multiple Wills, one of the Wills). Discuss the requirement that such EIR needs to be filed within 180 days of the issuance of the Certificate of Appointment;¹³
- (x) Discuss the loss of graduated rates for testamentary trusts and the new "Graduated Rate Estate ("**GRE**") regime;
- (y) Discuss the loss of the principal residence exemption in trusts, except for in narrow circumstances;
- (z) Where there are multiple estate trustees acting, solicitor should advise that, before applying for probate, the different roles, tasks, and the sharing of compensation should be decided, and an agreement between estate trustees should be signed up front;
- (aa) Review basis of solicitor's fees. Confirm retainer with estate trustee(s) and obtain required ID.

2. **Review of Will(s), Codicil(s) and Affidavit(s) of Execution**

- (a) Consider whether Will(s) and Codicil(s) contain any ambiguities or drafting errors. If there are multiple Wills consider if the terms work together. If estate trustees are different for each estate clarify retainer;
 - (i) If errors or ambiguities discovered:
 - Consider advisability of a rectification application prior to probate being applied for;
 - Consider viability of claim against drafting solicitor. Note applicable limitation period and advise estate trustees of same;
 - (ii) If ambiguity discovered, consider whether an application for advice and direction will be required;

¹² Although the rates of EAT in Ontario have not changed since 2017, there is now an exemption for EAT with respect to estates valued at \$50,000 or less. Applications for Certificates of Appointments may still be required; however, no EAT will be payable with respect to these small estates after January 1, 2020: *Protecting What Matters Most Act (Budget Measures)*, 2019, S.O. 2019, c. 7 - Bill 100, Schedule 21.

¹³ The previous requirement to file EIRs within 90 days of the issuance of a Certificate of Appointment was amended as of January 1, 2020.

- (b) Consider whether a *Succession Law Reform Act*¹⁴ dependant's relief claim is likely to ensue: advise estate trustees re same and limitation periods re same. Diarize limitation periods. Where named estate trustee may have a claim consider referring out for independent legal advice;
- (c) Consider whether spouse will choose to elect under section 6 of the *Family Law Act*¹⁵: advise estate trustees re law and limitation period. Where one estate trustee is spouse consider referring out for independent legal advice;
- (d) Consider whether any assets were held in joint tenancy by the deceased at death but are properly the subject of a resulting trust pursuant to the Supreme Court of Canada decisions in *Pecore v. Pecore*, [2007] 1 S.C.R. 795 [*Pecore*] and *Madsen Estate v. Saylor*, [2007] 1 S.C.R. 838 [*Madsen*].¹⁶ Assert claims as necessary;
- (e) Consider whether any class gifts in the Will and/or facts known about the deceased and his/her family may require inquiries as to possible existence of children or other issue of the deceased beyond those identified in first meeting with client;
- (f) If there are multiple Wills, review if the executors of the both Wills are similar or different and determine if there are any specific dispositive provisions or powers of trustees that differ between the multiple Wills.

3. Prepare and Deliver Letter to Estate Trustee

- (a) Outline estate trustees' duties and the fact that they do not necessarily have to accept the role of estate trustee (see notes above):
 - (i) Explain duty to account and necessary record keeping. Highlight that they should retain all receipts and vouchers and be able to substantiate, with details, all receipt and disbursements. Also, highlight the need to keep accurate and detailed records of any expenses;
 - (ii) Explain that the inventory of assets should be as comprehensive and accurate as possible for an efficient administration of the estate. Highlight that date of death valuations need to be obtained in order to complete the application for a Certificate of Appointment;
 - (iii) Explain that estate trustees are required to determine all liabilities of the estate and arrange for payment; however, especially in potentially

¹⁴ R.S.O. 1990, c.S.26, as am.

¹⁵ R.S.O. 1990, c.F.3, as am.

¹⁶ In light of the recent case of *Calmusky v Calmusky*, 2020 ONSC 1506 (CanLII), the Ontario Superior Court of Justice applied the reasoning in *Pecore* and *Madsen* to a beneficiary designation on a Registered Retirement Income Fund (RRIF), in addition to a joint account. With this decision looming in Ontario, it may be advisable to consider whether any assets designated outside of an estate in a manner inconsistent with the estate plan (including RRIFs, RRSPs, TFSAs, pension plans and life insurance policies) are also the subject of a resulting trust.

insolvent estates, all liabilities should be determined before payment is made;

- (iv) Advise re potential liability under the *Environmental Protection Act*¹⁷ in respect of land that may come into their control as estate trustee;
 - (v) Remind them that it is necessary for the estate trustee to secure and take control of the assets once they are identified;
 - (vi) Remind them to notify the appropriate government bodies of the deceased's death (CRA, Ministry of Health, MTO, Canada Service);
 - (vii) Consider including a separate document attached to the letter highlighting the estate trustees duties during the administration of the estate;
- (b) Outline your respective roles as estate trustee and solicitor:
- (i) Be sure to expressly state any limitation on your retainer—for example that you will not be providing any tax or investment advice;
 - (ii) The role of the solicitor is determined at the time of the retainer, it frequently includes the following responsibilities:
 - Read and interpret the Will, advising the estate trustee of the rights and obligations under the Will, and at law, and offer assistance where needed;
 - Prepare the application for a Certificate of Appointment of Estate Trustee with or without a Will, if necessary;
 - Prepare documents for registration of securities;
 - Arrange for real estate conveyances;
 - Advertise for creditors and advise on the settlement of claims;
 - Assist in preparation of accounts and appear on the passing of accounts if necessary;
 - Prepare releases by beneficiaries to release estate trustees from liability;
 - Report to the estate trustee;

¹⁷ R.S.O. 1990, C.E. 19, as am.

(c) Explain estate trustee compensation:

- Subject to the Will itself, section 61(5) of the *Trustee Act* allows estate trustees "fair and reasonable compensation";
- What is fair and reasonable? Traditional approaches – the 5-factor approach and the tariff approach:
 - The 5-factor approach was set out in *Toronto General Trusts Corp. v. Central Ontario Railway* [1905], 6 O.W.R. 350 (Ont. H.C.), in which the court held that 5 factors are to be considered:
 - (1) The magnitude of the trust;
 - (2) Care and responsibility springing therefrom;
 - (3) The time occupied in performing duties;
 - (4) Skill and ability displayed;
 - (5) Success which has attended its administration;
 - The tariff approach refers to guidelines adopted by Ontario Courts:
 - (1) 2.5% of capital amounts received and disbursed;
 - (2) 2.5% of the revenue amounts received and paid out;
 - (3) 2/5 of 1% of the total value of the estate for a care and management fee where appropriate, after the first year of administration;
- Courts have said that the "fair and reasonable" criteria cannot be ignored in favour of the simpler tariff.
- In *Re Jeffery Estate* (1990), 39 E.T.R. 173 (Ont Surr. Ct), at 179, the Court set out the leading approach:

...the audit judge should first test the compensation claims using the "percentages" approach and then, as it were, cross-check or confirm the mathematical result against the "five factors" approach... Usually, counsel will, in argument, set out a factual background against which the five factors can be brought to bear on the case at hand. Additionally, the judge will consider whether an extra allowance should be made for management, based on special circumstances. The result of this testing process should enable the judge to determine whether the claims are excessive or not and, in the result, will enable the judge to make adjustments as required.

See also: *Laing Estate v. Hines* 1998 CanLii 6867 (On. C.A.) [*Laing*] for the proposition that estate trustees are not to be compensated for work performed on their behalf by a paid solicitor;

- An estate trustee cannot expect to receive compensation for services or tasks that he or she does not perform. A solicitor, if asked by the estate trustee, may perform work that falls within the trustee's role, and where this happens, the solicitor should advise the trustee that he or she will render an account for those services to the trustee personally. If the solicitor does estate trustee work, separate dockets should be kept for that work.

Rooney Estate v. Stewart Estate, 2007 CarswellOnt 6560 (Ont. S.C.J.) [*Rooney*],¹⁸

- Where the estate pays for work that the solicitor has performed on behalf of the estate trustee, the estate trustee's compensation is to be correspondingly reduced;

¹⁸ *Rooney Estate v. Stewart Estate* – case summary as follows:

- ◆ Applicant sought an order requiring the estate solicitor to pass his accounts for work performed for the estate trustee and to account for the estate assets that are/have been within his possession.
- ◆ Deceased's niece was appointed estate trustee. She retained a solicitor.
- ◆ Estate was valued at \$600K. After bequests of \$120,000 were paid, the residue was left to the deceased's sister.
- ◆ The sister died while the estate was being administered. Her daughter, Jane, is the trustee for that estate, and brought this application.
- ◆ Principal issue = legal fees and disbursements charged by solicitor.
- ◆ The Rooney Estate objected to the fees charged to the Stewart Estate, and refused to execute a release which it was asked to sign before receiving its cheque.
- ◆ Simple estate. Estate Trustee delegated almost all tasks to the solicitor.
- ◆ Solicitor charged the estate a total of \$31,061.35 for legal fees, including a small disbursement account and GST on the legal fees.

Court:

- ◆ Trustee may claim compensation for carrying out these duties, and that compensation may include reimbursement for charges for professional help. The Trustee cannot expect to receive compensation for services performed by others whose services are charged to the estate. Must pay the accounts for services of others out of her compensation.
- ◆ Outlined solicitor's roles. Solicitor is entitled to be paid for these legal services from the estate (apply for certificate of appointment and to attend upon a passing of accounts). Solicitor's client is the trustee, not the estate.
- ◆ Not unusual for the solicitor to be asked to perform work which falls within the trustee's role. The solicitor should not perform trustee's work unless instructed to do so by the trustee. If such a request is made, the solicitor should advise the trustee that he will render an account to the trustee personally for doing her work.
- ◆ A solicitor is not entitled to charge a solicitor's rate for doing work that could have been done by the estate trustee.
- ◆ Here, the solicitor erred in charging the estate fees that were incurred in performing the trustee's work. Solicitor should have charged fees for estate trustee's tasks to the estate trustee rather than to the estate. The manner of sending the release first and the cheque later, suggests the "beneficiary was held hostage for the release."
- ◆ Trustee was ordered to repay the estate the sum of \$4,654.50 paid to the accountants, for which the solicitor was entitled to bill the estate trustee personally.

- Recommend that they keep dockets recording the dates and times they spend dealing with estate matters and administration from the outset. These records may not be needed but, if necessary, they will have evidence of the work they have completed and the time spent.

See *Arvantis v Levers*, 2017 ONSC 3758 (CanLII) for the proposition that where time spent by the estate trustee cannot be evidenced with dockets, compensation will not be awarded;

- Remind them that any compensation awarded is regarded for income tax purposes as taxable income and must be declared in the income tax return of the recipient for the year in which it is received;

- (d) First, it is necessary to explain to an estate trustee client that they are personally responsible for preparing estate accounts. Consequently, if they retain you or another professional to prepare the estate accounts your fees for doing so are their personal responsibility. Often these fees become a deduction from estate trustee compensation and so the estate trustee is effectively reimbursed. However, in the event compensation is not awarded then the estate trustee must pay these costs personally.

See: *Re Knight Estate*, [1999] O.J. No. 4825 (Sup. Ct.) It is wise to maintain separate dockets of the time spent on the preparation of estate accounts;

- (e) Explain the executor's year and the importance of paying legacies within the first year, if possible¹⁹;

¹⁹ Following the 2018 Ontario Court of Appeal decision in *Rivard v Morris*, 2018 ONCA 181 (CanLII), it is more important than ever to remind executors of the cost of failing to pay legacies within the first year of the estate administration — case summary as follows:

- ◆ The deceased was survived by two daughters and a son
- ◆ Although all of the deceased's children were treated equally in an earlier Will, the deceased's last Will gave legacies of \$530,000 to each of his daughters and the residue of his estate to his son
- ◆ All three children were named as executors under both Wills
- ◆ The daughters challenged the validity of the later Will but the Will was upheld pursuant to the determination of Justice Carey in *Rivard v Rivard*, 2016 ONSC 4436 (CanLII)
- ◆ Following the judgment of Justice Carey, the daughters claimed interest at a rate of 5% per year, payable out of the residue of the estate (i.e. their brother's share) due to the delay in paying them their legacies while the will challenge was proceeding
- ◆ The application judge ruled that no interest should be payable because rule 65.02(2) of the Rules of Civil Procedure did not apply and, despite the common law rule of convenience (which required that such interest be paid if legacies are not paid within the first year of the deceased's death), the judge exercised discretion to deny such interest because the daughters were estate trustees for much of the administration period and it was their will challenge that delayed the administration of the estate
- ◆ The daughters appealed the decision with respect to interest and the Court of Appeal overturned the decision of the application judge

- (f) If the Will requires a Certificate of Appointment, explain the requirement to pay EAT and how it is calculated. Remind them that such amount needs to be paid when the application is being made;
- (g) Explain the concept under the *Income Tax Act*²⁰ of the deemed disposition at death and the obligation on the estate trustees to file tax returns. Be sure to identify the risk of personal liability for the estate trustees if they do not pay the appropriate taxes and fail to obtain clearance certificates. An explanation should be provided of when the returns are due and to retain the appropriate accountant to help with the returns depending on the complexity of the estate. Specialized accountants may need to be retained (i.e. Canadian-US tax accountants);
- (h) Explain the GRE regime. Specifically the designation of an estate as a GRE, the 36-month graduated rate period, and what happens after the first 36 months. Advise the estate trustees that due to the complexities of the GRE regime, it is more important than ever that the estate trustees consider the wide array of applicable tax issues and more importantly, obtain appropriate, accurate tax advice;
- (i) A section in the letter should include a discussion of the taxation of testamentary trusts post-2015 (i.e. the graduated tax rate will no longer apply to subsequent trusts created under the Will);
- (j) Explain that an estate trustee is required to file an EIR within 180 days of the issuance of the Certificate of Appointment if the Will requires a Certificate of Appointment. If the EIR is not filed within the 180 days of the issuance of the Certificate of Appointment, there is no limit on the time the Ministry has to assess or reassess the estate:
 - (i) Explain that the estate trustee is now obligated to provide an inventory of assets to the Ministry of Finance and to substantiate the value of the assets. Therefore, it is recommended that they obtain and retain valuations and appraisals of the assets of the estate;

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- ◆ Although the Court of Appeal agreed that rule 65.02(2) did not apply to the proceedings in question, it did not agree that the common law rule of convenience was applied correctly because the application judge chose not to apply it after considering it a penalty or compensation for delayed payment
 - ◆ The Court of Appeal determined that the rule applied even where payment within the executor's year is impractical or impossible and whether or not the legacy has vested
 - ◆ The Court did not ultimately determine whether it has the discretion to apply the rule of convenience in any given circumstance, as it was not necessary to do so in order to overturn the application judge's decision on the basis of improperly applied principles and consideration of irrelevant factors and factors to which inappropriate weight was given.
 - ◆ Relying on section 3 of the *Interest Act*, the Court of Appeal confirmed that the appropriate rate of interest to pay on outstanding legacies after the executor's year is 5%

²⁰ R.S.C. 1985, c.1, as am.

- (ii) Explain that a substantial amount of detail is to be disclosed in the form, including the assessment roll number and PIN of any and all real estate located in Ontario, the name and address of financial institutions where the deceased held accounts, the name and address of the deceased's stock broker, and the VIN and HIN, make and model of all automobiles and boats;
- (iii) Highlight that the Guide²¹ points out that "all property in which the deceased had a beneficial interest, even if the deceased did not hold legal title and legal title was held in another person's name" must be included. This could include assets that are held jointly with another where the intention is for the asset to form part of the estate, even though joint assets with right of survivorship are specifically excluded from being reported according to the Guide. Estate trustees will need to obtain information with respect to joint accounts and property. If the deceased left one Will, no Will or the assets falling outside of the probatable Will of the deceased do not include jointly held assets that are held on a resulting trust for the deceased's estate, the value of such assets may be includable in the EAT calculations and reportable on the EIR;
- (iv) Explain that the Minister has four years from the date the EAT become payable to assess or re-assess the EAT. The period remains open if the Minister subsequently establishes that the estate trustee has failed to comply with the requirements to file or has misrepresented the information regarding the estate. Explain there is no process for a clearance certificate to be issued, however, the Minister has indicated that the Ministry may issue a "comfort letter" to the estate trustee once the CRA has issued its tax clearance certificate;
- (v) Explain that the penalties for failure to comply with the new EIR requirements can be significant – fines of up to twice the amount of tax payable or imprisonment of up to two years (or both) may be imposed;
- (vi) Clearly indicate in the letter who will be responsible for preparing and filing the EIR (the estate trustee or the solicitor). If you decide to assist with the filing of the EIR, clearly indicate that you will be relying on the inventory, values and information provided by the estate trustee in preparing the EIR;
- (vii) They should be reminded of their obligation to file an amended EIR (and pay the additional EAT) within 60 days of the estate trustee discovering additional assets or errors in the EIR;

²¹ [http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955F1-2/\\$File/9955Guide.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955F1-2/$File/9955Guide.pdf)

- (k) Explain the prudent investor rule pursuant to s. 27.1 of the *Trustee Act*²²;
- (l) Consider whether to explain the even hand rule as it relates to capital and income beneficiaries;
- (m) Explain the estate trustee's fiduciary duty:
 - (i) The estate trustee is a fiduciary holding title to and control of estate property for the exclusive benefit of the beneficiaries;
 - (ii) Obligation of a trustee is to perform his or her tasks personally, with care, and with the sole interests of the beneficiaries in mind;
 - (iii) A trustee must carry out his tasks with due care and attention, as well as with honesty;
 - (iv) A trustee must not permit his own interest to conflict in any way with his duty to the beneficiary whom he serves;²³
 - (v) General rule: delegation of administrative duties is permissible; delegation of decision-making duties is not;²⁴

²² R.S.O. 1990, c.T.23, as am. [*Trustee Act*].

²³ *Ontario Law Reform Commission Report on the Law of Trusts*, Vol. 1 (Toronto: Ministry of the Attorney General, 1984), p. 23

²⁴ *Haughton v. Haughton Estate* (1995), 6 E.T.R. (2d) 221 (Ont. C.A.) – case summary as follows:

- ◆ Brother and sister – dispute over appraisal of deceased mother's cottage
- ◆ Mother died in 1986, and her will divided estate equally between son and daughter, and appointed an executor (neither of the children – 73 year old man with Parkinson's).
- ◆ The daughter was to have first right to purchase the cottage, and if she refused, it was to be offered to her son. Price to be fixed by an independent valuator chosen by my Trustee. Daughter had 3 months to signify intent to purchase.
- ◆ Executor wanted to appraise cottage asap. Plaintiff called around for him and found 2 qualified appraisers. One was available to do work.
- ◆ On executor's request, daughter wrote to appraiser and appraised the cottage at \$73,000. Appraiser sent the executor a copy of the appraisal and the plaintiff met with the executor to discuss. They agreed that she should be allowed to purchase the cottage for \$66,000, and the agreement was later formalized. When the brother became aware of the sale price, he objected and requested a further appraisal.
- ◆ Executor refused to proceed with the conveyance and later resigned as executor.
- ◆ Plaintiff brought an action for specific performance of the agreement for the sale of the cottage. At trial, no other appraisal was tendered in evidence, but the brother claimed it was valued at \$188,000. The action was allowed, and the brother appealed.
- ◆ Court of Appeal: 2/3 – appeal was allowed.
- ◆ Majority: Although executors can delegate administrative duties to others, they must personally carry out specific decision-making duties imposed upon them under a will. The rule should be adhered to as strictly as possible where a prospective delegate, as a result of being a beneficiary, has an interest in the outcome of the decision.
- ◆ Plaintiff intermeddled in the estate and became an "informal administratrix". Gave instructions to the real estate appraiser and to the British Columbia counsel for the estate, and then requested ratification from the executor. Her brother stood to suffer an adverse result.

- Will may provide for exceptions;
 - *Trustee Act* contains provisions permitting limited delegation (s.20);
 - Common law exceptions to the rule against delegation, such as where delegation is prudent for business reasons;²⁵
- (vi) The general rule is that if a trustee breaches his or her fiduciary duty, he or she will be liable to the beneficiaries for any losses that occur as a result;²⁶
- (vii) BUT: Section 35 of the *Trustee Act* provides that the court has the discretion to relieve trustees of liability where the court finds he or she acted "honestly and reasonably and ought fairly to be excused";

-
- ◆ There was never any doubt cast on the independence or the competence of the original appraiser, the method of his selection was contrary to the provisions of the will, and the valuation could not stand.
 - ◆ No liability resulting to the executor, who was elderly and very ill.
 - ◆ Dissent: plaintiff did not choose the appraiser – he was the only one available. Plaintiff never met or spoke to the appraiser. Wrote on behalf of the executor; letter was entirely factual and accurate; trial judge's conclusions were entirely justified and should not be reversed.

²⁵ *Wagner v. Van Cleeff* (1991) 5 O.R. (3d) 477 (Div. Ct.) – case summary as follows:

- ◆ Appellant was an Austrian resident who spoke no English, but came to Canada in 1985 to settle her sister's estate.
- ◆ She met the respondent through the Austrian embassy, and he introduced her to (and acted as translator with) the solicitor, M. M signed a Power of Attorney allowing M to take steps on her behalf with respect to the estate (the appellant was not appointed estate trustee).
- ◆ No will – M wrote to the appellant suggesting the appointment of the respondent as administrator.
- ◆ Once appointed, respondent executed powers of attorney to M giving M powers in excess of those authorized by s. 20 of the *Trustee Act*.
- ◆ M then absconded after misappropriating \$215,000 – the bulk of the appellant's sister's estate.
- ◆ Appellant brought proceedings against respondent alleging that he had improperly discharged his duties as administrator by selecting M as solicitor, by delegating all his duties as administrator to M and by failing to supervise M.
- ◆ Action dismissed at first instance – held that the respondent never assumed the duties of administrator, and if he had, he should be relieved from all liability by s. 35 of the *Trustee Act* because he had acted honestly and reasonably. Appellant appealed.
- ◆ Appeal allowed.
- ◆ Respondent had assumed the duty to administer the estate. Letters of administration were issued to him.
- ◆ The general rule is that an administrator must personally perform all the duties of the office requiring the exercise of his discretion. However, as an exception to this rule, an administrator is permitted to select agents to perform certain tasks where it would be regarded as prudent for a person in the ordinary course of business to delegate the performance of these duties. [*McLellan Properties Ltd. v. Roberge* [1947] S.C.R. 561]
- ◆ Standard = that of a person of ordinary prudence in the management of his own affairs.
- ◆ The trustee was in breach of his duty in delegating all his duties to M and then failing to supervise any aspect of M's activities.
- ◆ Could not be excused by s. 35 on the grounds that he acted honestly and reasonably and ought fairly to be excused. Although he acted honestly, his actions were not reasonable. Ignorance of an administrator's duties does not make a defaulting trustee's actions reasonable, nor does complete reliance on others, including a solicitor. By failing to assume any direct responsibility for the administration of the estate, the respondent had not met even the minimal standard of care for a gratuitous trustee.

²⁶ *Trusts & Guarantee Co. v. Brenner* [1933] S.C.R. 656.

- (viii) The estate trustee is personally liable for debts of the deceased or the estate up to the value of the estate assets that are distributed, so ensure that all debts are paid before distribution;
- (n) Discuss the concept of obtaining a Clearance Certificate from CRA with respect to income tax liability before making the final distribution of property. Explain that the certificate certifies that all taxes, interest, penalties and other amounts payable by the deceased and the deceased's estate have been paid or security for the payment thereof has been accepted by the CRA;
- (o) Explain the concept of passing of estate accounts and the difference between a formal passing of accounts vs informal passing of accounts, therefore, highlighting the importance of keeping accurate bookkeeping records and accounting;
- (p) Consider including with the letter an action plan which outlines who between the estate trustee and you will be responsible for what tasks related to the administration of the estate.

4. Determine Estate Assets and Liabilities

- (a) An estate trustee must "as soon as possible acquaint him/herself with the nature and circumstances of the trust property and look into documents and papers to ascertain the condition of the estate";²⁷
- (b) Estate trustees are obligated to undertake an inventory of the estate as part of their fiduciary duties, and must be careful about the extent to which they delegate this function;²⁸
- (c) The estate trustee should keep an itemized list of the assets to assist in completing the application for a certificate of appointment of estate trustee as well. The inventory also forms the basis of future preparation of the accounts and for the completion of the income tax returns;

²⁷ *Underhill's Law Relating to Trusts & Trustees*, 14th ed. (1987), p. 408

²⁸ *Clemmens v. Lamothe*, 2007 CarswellOnt 3328 (S.C.J.) – case summary as follows:

- ◆ Deceased was intestate, had two ex-wives and left behind a common law spouse (Clemmens).
- ◆ Deceased had children from both marriages, who were to take equally under the intestacy.
- ◆ Clemmens alleged she had a right to a life interest in the deceased's house, under a domestic contract. While this issue was being settled, the deceased was permitted to remain in the house.
- ◆ estate trustees: the second wife, and a daughter from his first marriage (Lamothe). The daughter and Clemmens did not get along, and the police had to attend at the house the day after the deceased's death because of a confrontation between them.
- ◆ The estate trustees wished to conduct an inventory of the estate, and to do so, wished to attend at the house where Clemmens was living. Clemmens objected.
- ◆ Court: The estate trustees are obliged to undertake a full inventory of the estate. It is a clear obligation that they take such an inventory as part of their fiduciary duties in administering the estate. The two estate trustees are bound to do this together and unless they agree, one cannot perform this function by herself. Ms. Lamothe does not agree that she be excluded from this procedure.

- (d) Consider providing a questionnaire to the estate trustee to help them collect the necessary information;
- (e) All assets should be listed in order to ensure they have all been dealt with, including those assets that are jointly owned, and those which pass by way of contract or beneficiary designation. Use separate columns or categories to distinguish the value for probate purposes from the value of those passing by right of survivorship;
- (f) If you were not the solicitor who prepared the Will, consider contacting the drafting solicitor, who may have asset information for the deceased;
- (g) Identify the deceased's private and business interests;
 - (i) Ascertain that all assets are insured as appropriate:
 - Includes cars, boats, jewellery, real estate, recreational vehicles, household contents [**Consider whether vacancy riders are required for real estate**];
 - (ii) Consider what other steps are necessary to protect estate assets and take those steps:
 - Arrange for vacant real estate to be supervised:
 - (1) ensure that any potential traps on property [**such as pools**] are appropriately secured;
 - (2) Have regard to the potential for use of the property for illegal purposes [**i.e. grow ops**];
- (h) Obtain from the deceased's residence or place of business and move to a place of safekeeping in the control of the estate trustee:
 - (i) Cash and securities;
 - (ii) Credit cards [**these should be cancelled**];
 - (iii) Mortgages and deeds;
 - (iv) Insurance policies;
 - (v) Jewellery and other valuables;
 - (vi) Passport and other identity papers and/or proof of citizenship;
 - (vii) Any other business or personal records of a sensitive nature;

- (i) Contact all financial institutions where the deceased held cash or securities and notify them of the death:
 - (i) Make inquiries about other assets owned at death;
 - (ii) Determine location of safety deposit boxes;
- (j) Identify and compile a list of all the deceased's digital assets:
 - (i) Include digital assets which cannot be given away but do need accounts shut down;
 - (ii) Ensure collection of the physical digital assets (computers, USB drives, external hard drives etc.) to secure the information;
- (k) Where deceased owned or had an interest in a private business take steps immediately to ensure business continuity and appropriate management:
 - (i) Determine the ownership structure of the business **[inspect minute books; obtain copies of relevant shareholders' agreements; obtain copies of key man insurance policies, if any];**
 - (ii) In the case of the sudden death of a professional **[lawyer, accountant, doctor, dentist, chiropractor etc.]** consider consulting with licensing body to ensure that appropriate steps are taken with respect to the deceased's clients and their affairs. In the case of a lawyer pay particular attention to the trust accounts controlled by the lawyer;
- (l) Prepare or obtain valuations and inventory of assets:
 - (i) List contents of safety deposit boxes and arrange for safeguarding of valuables;
 - (ii) Determine cash and securities on deposit and list all stock certificates in the hands of the deceased at date of death **[Contact stock transfer agents in respect of missing stock certificates thought to be in possession of deceased at death to determine process for replacement];**
 - (iii) Determine pension benefits due under Federal, Provincial and private plans. If the deceased resided in another country during their lifetime determine whether they have any pension entitlements in those jurisdictions;
 - (iv) Determine particulars of insurance policies including face value, terms, and beneficiaries. **[Be sure to compare particulars to all contractual requirements for the maintenance of insurance policies in any separation or shareholder agreements];**

- Obtain details of all group and personal life insurance held through employment and/or credit cards;
- (v) Determine all employment entitlements:
- Outstanding salary, WIP, or commission entitlements;
 - Stock option and profit sharing plans;
 - Retirement plans;
 - Medical and other health insurance plans;
- (vi) Real estate:
- Inspect and obtain valuations of real estate:
 - (1) Consider and obtain instructions as to whether to obtain letters of opinion from real estate agents or appraisals from certified appraisers;
 - (2) Include recreational properties, farm properties, apartments and commercial buildings owned by the deceased;
 - (3) Check currency of mortgages, taxes;
 - (4) Arrange for continuing supervision and collection of all rents;
 - Itemize all mortgage investments and arrange for future collection of payments;
- (vii) Obtain valuations of all private company shares held by the deceased:
- Consider if Chartered Business Valuator should be retained;
 - Determine if shareholders agreements dictate value at death or the process for valuation;
- (viii) Consider what other property deceased may own or have an interest in: trusts, estates, choses in action, intellectual property **[blogs, music, literary assets]**;
- (m) Preparation of list and settlement of liabilities:
- (i) Debts and Liabilities:

- Notice to Creditors – Precedent Language from the LSO and *Trustee Act*

Notice to Creditors and Others

All claims against the estate of ►, late of the City of ►, in the County of ►, who died on or about the ► day of ►, ►, must be filed with the undersigned not later than ►. Thereafter, the undersigned will distribute the assets of the estate having regard only to the claims then filed.

DATED this ► day of ►, .

FRANK DOE, 111 Main Street, ►, Ontario, by his lawyers, 89 Back Street, ►, Ontario, POSTAL CODE

- S. 53 of the *Trustee Act* provides that where an estate trustee has given notice, he or she may distribute the assets in the estate at the expiration of the time specified in the notice or the last of such notices for sending in claims against the estate. The estate trustee is not liable for any person's claim that has not been received at the time of distribution;
- Advise estate trustee that they should publish a proper advertisement for creditor's claims before paying any debts or legacies or distributing any portions of residue;
- Advertise for creditors as soon as possible after death. If a claim is received, the estate trustee ought not to proceed to pay the legatees without making due provision for all legitimate claims of which notice has been received;
- Advertising for creditors does not extinguish the debt, and creditors may "follow the proceeds of the trust estate, or assets, or any part thereof into the hands of persons who have received same",²⁹
- Also, no controlling authority as to what trumps: s.53 of the *Trustee Act* or the *Limitations Act*, two year period;
- Should publish the ad in the locality in which the deceased lived or carried on a business at the date of death, and where the deceased is a business person, place notice in the Ontario Gazette as well. 3 inserts and a month's notice should be given from the first

²⁹ *Trustee Act*, s. 53(2)

publication and the time fixed for distribution. Custom is once a week for three successive weeks;

- If deceased was intestate, no distribution can be made within the year following death unless the estate trustee has advertised for creditors;³⁰
- Judgment rendered on July 7, 2017, in the *Estate of Carrol Allen Dale*³¹, Justice Conway held that a Notice to Creditors posted on www.noticeconnect.com was sufficient to grant an estate trustee protection from personal liability under section 53(1) of the *Trustee Act*. The fee for posting a Notice to Creditors online with Notice Connect is \$130, providing estate trustees with an additional, and in many cases less expensive, means of protecting themselves against personal liability with respect to creditors of an estate.
- In any event, if an estate trustee decides not to advertise for creditors, it is prudent for the solicitor to obtain a written direction from the estate trustee confirming instructions not to advertise for creditors;
- Consider all claims or possible claims arising from circumstances **[dependant's relief, spousal election, separation agreement terms, existing litigation]**;
- Consider whether the circumstances of the deceased make it advisable to search for executions;
- Determine all outstanding liabilities in respect of credit cards and lines of credit or other personal loans **[car loans etc.]**;
- As funds become available discharge liabilities. Be sure to have regard to the principles of the relevant fraudulent conveyances legislation and, as noted above, where the estate may be insolvent have regard to the bankruptcy legislation before making any payments;
- Taxes:
 - (1) Determine any outstanding income tax liabilities: diarize deadline for the terminal tax return;

³⁰ *Estates Administration Act*, s.26

³¹ https://www.noticeconnect.com/static/files/NoticeConnect_court_ruling.a9b3a04ad00a.pdf

- (2) Calculate tax payable pursuant to the *Estate Administration Tax Act*, 1998³² and compare to numbers used in terminal return to insure any difference is explicable;
- (3) Where the deceased held shares of a private Canadian corporation, obtain post-mortem tax planning advice to reduce potential double tax exposure³³ (e.g. subsection 164(6) loss carry back and/or “pipeline” transaction). Consider timing of such tax planning (e.g. the loss carry back usually must be completed within the first taxation year from the date of the death of the deceased);
- (4) Consider whether the capital loss carry back rules have any application in respect of capital losses sustained by the estate;
- (5) Consider whether charitable bequests can be honoured by way of transfer of a qualifying security;
- (6) Consider whether a gift to charity meets the rules in the *Income Tax Act* so as to be considered a gift made in the year of death;
- (7) Consider whether a Rights and Things Return pursuant to the *Income Tax Act* should be filed: diarize date for same;
- (8) Consider whether any tax filings are required in relation to non-resident beneficiaries;
- (9) Consider the advisability of getting expert advice related to tax treaties and the calculation of tax;
- (10) Determine if the deceased's citizenship, residency during any period of their adulthood, or ownership of foreign assets obligates the estate to make any foreign tax filings. Obtain local advice as necessary;
- (11) Determine whether tax planning is required to utilize a beneficiary's principal residence exemption where unavailable for testamentary trust;

³² S.O. 1998, c.34, Sched., as am.

³³ When an individual dies owning shares of a company, there will often be a deemed capital gain on the shares of the company resulting from the deemed disposition of the shares at fair market value. This capital gain must be reported in the deceased's terminal return. There follows a potential for “double tax” because another tax event will occur when the company's investments are sold and when the after-tax proceeds are distributed to the estate.

- (12) Advise client re seeking and obtaining clearance certificates under the *Income Tax Act* to date of death and for the estate;
- (13) Prepare and file the necessary terminal, Rights and Things and ongoing tax returns for the estate until wound up;
- (n) If dealing with multiple Wills consider how to organize the assets and liabilities under both Wills.

5. Application for Certificate of Appointment of Estate Trustee

This is ordinarily not completed until the detailed inventory of the estate assets and liabilities is prepared and valuations obtained. If there is a risk of a will challenge, the putative estate trustees should not pay any money out of the estate until the Certificate of Appointment is obtained.

- (a) Prepare necessary application pursuant to the *Rules of Civil Procedure*:
 - (i) Ensure that the Children's Lawyer and/or Public Guardian and Trustee are served as necessary;
 - (ii) Determine the tax owing under the *Estate Administration Tax Act*, 1998 and remit same or provide required undertaking;
 - (iii) Ensure that service is effected on beneficiaries as required by the *Rules of Civil Procedure*;
- (b) If necessary, locate witnesses to execution of testamentary documents and obtain necessary affidavit of execution;
- (c) If dealing with multiple Wills, be clear as to what assets are being included in the Will for which the Certificate of Appointment is being obtained (in the Application) and which assets are being excluded (in your file and in correspondence to your client).

6. Realization and Distribution

- (a) Cash/Stocks/Bonds/etc:
 - (i) Close out bank and investment firm accounts and open estate accounts as necessary;
 - (ii) Register securities in the names of the estate trustees;
 - (iii) Confirm advice to estate trustees about the requirements of the prudent investor rule pursuant to section 27.1 of the *Trustee Act*. Have the estate trustees seek expert investment and tax advice as necessary and have them record that advice;
- (b) Private Company Shares:

- (i) Transmit shares to estate trustees;
 - (ii) Elect estate trustees as directors of corporation, where appropriate;³⁴
 - (iii) Appoint officers, including bank signing officers, if necessary;
 - (iv) Consider tax consequences and arrange expert advice as necessary;
 - (v) Review any agreements relating to transfer of shares;
 - (vi) Sell or transfer shares to third parties or beneficiaries or dissolve corporation, as necessary;
- (c) Real Estate and Mortgages:
 - (i) As required, convey or sell residence and other real estate;
 - (ii) Consider tax consequences of all sales and arrange expert advice as necessary;
- (d) Insurance and Annuities:
 - (i) Complete necessary claim forms and provide to the relevant insurer with all required supporting documentation;
- (e) Personal household goods and possessions:
 - (i) Arrange for safeguarding of all items to be transferred in specie;
 - (ii) Arrange for sale at auction or disposal as appropriate of all other personal belongings;

³⁴ In order to properly supervise an estate's interest in a privately controlled corporation, an estate trustee will usually have a duty to appoint himself as a director of such corporation (*Re Lucking's Will Trusts*, [1968] 1 W.L.R. 866). The estate trustee may determine that another person can be properly supervised in this role, however, and the estate's ownership of the shares of the corporation should allow the estate trustee to remove the appointed director at any time. If the estate's interest in the private corporation is a minority interest, representation on the board of directors may be impossible.

If an estate trustee has been appointed to the board of directors, the solicitor for such estate trustee should advise the estate trustee of his or her potential conflict of interest in acting as a director of the corporation (with fiduciary duties owed to the shareholders and creditors of the corporation) and the estate trustee (with fiduciary duties owed to the beneficiaries of the estate). Although these interests will often be in line with one another, where they are not, the director's fiduciary obligations take priority (See David Hughes, "Trust Principles and the Operation of a Trust-Controlled Corporation" (1980), 30 *University of Toronto Law Journal* 151-98, at 160-165 and *Butt v. Kelson and Others* [1952] 1 Ch. 197 (C.A.)). Advice should also be given to the estate trustee regarding compensation in his or her role as director and estate trustee (e.g. "double-dipping").

- (iii) If the deceased had firearms consult with local police authorities before moving them about proper method of transport and/or transfer or disposal. DO NOT transport before discussion;
 - (iv) Consider obtaining expert advice with respect to special collections or very valuable items (e.g. artwork, wine collections, etc.)
- (f) Obtain expert advice on disposition of all other assets:
 - (i) Intellectual property;
 - (ii) Mining claims/royalties;
 - (iii) Sale contracts;
 - (iv) Stock options;
- (g) Prepare an interim distribution schedule for the estate assets:
 - (i) Consider whether all limitation periods have passed and, if they have not, whether an interim distribution is possible in light of the amounts in issue relative to the total value of the estate;
 - (ii) Consider whether a holdback fund is required to deal with tax or other contingencies;
 - (iii) Prepare an interim accounting and provide it and the proposed interim distribution schedule to the beneficiaries for comment. **[Note: consider which beneficiaries should receive this in light of their respective interests. For example, legatees who are to receive their legacies may not need to receive the complete accounts];**
 - (iv) Prepare releases for beneficiaries who are *sui juris*, arrange for their execution and make interim distributions.(See the notes below concerning common pitfalls with receipts.) Consider whether a formal passing of accounts should be pursued if there are minor, unborn, or mentally incompetent beneficiaries;
- (h) Some common pitfalls when making distributions:
 - (i) Ademption:
 - Ademption occurs when the property specifically bequeathed no longer exists at the date of death. When the gift has adeemed, the beneficiary receives nothing;
 - The terms of the Will may avoid this result where, for example, the testator stipulates the gift or property in substitution;

- *McDougald Estate v. Gooderham* [2005] O.J. No. 2432 (Ont. CA):
Justice Gillese says "Wills often contain bequests, which are directions that specific items of property are to be given to named recipients upon the testator's death. Sometimes the specified item cannot be found among the testator's assets at the time of death. This can happen because the item is lost, destroyed, sold or given away before the testator dies. At common law, in such a situation, the bequest is held to have adeemed and the gift fails. If there are proceeds from the disposition of the item of property, the proceeds fall into residue and are distributed accordingly. The proceeds are not given to the named beneficiary;
- Section 36(1) of the *Substitute Decisions Act, 1992*³⁵ alters the common law relating to ademption;
- Applies where property that is the subject of a specific bequest in the Will of an incapable person has been disposed of by that person's attorney for property or guardian of property;
- Where this rule applies, the intended beneficiary will be entitled (absent a contrary intention in the Will) to receive the equivalent of a corresponding right in the proceeds of the disposition of the property, without interest, from the residue of the estate;

(ii) Abatement:

- When the estate is solvent but insufficient to pay all the bequests, the estate trustee is obligated to determine contesting claims between the beneficiaries. Thus some or all of the gifts may have to abate;
- Absent a contrary intention in the Will, the order of abatement depends on the nature of the legacy or abatement. If the residue is insufficient to satisfy legacies, general legacies abate pro rata, followed by specific and demonstrative legacies, then devises;
- The general rule is that all general legacies abate rateably. In order to establish a different priority there must be an indication that the testator considered the possibility that the assets may be deficient and provided for the order of payment in that event;

³⁵ S.O. 1992, c. 30, as am.

- (i) Receipts/Releases:
 - (i) It is common practice to require a release from the intended legatee prior to payment;
 - (ii) If not, a receipt in the form of a cancelled cheque or otherwise that evidences proof of full payment ought to be sufficient protection for the estate trustee;
 - (iii) However, if (for example, as a result of abatement) the amount of the cash legacy to be paid is less than the amount set out in the will, a release is preferable, as it is conceivable that the legatee will allege either that:
 - (1) The particular legacy ought not to have been subject to abatement according to application of proper legal principles; or
 - (2) But for the estate trustee's unreasonable acts or omissions, there would have been no abatement or the amount of the abatement would have been smaller;
 - (iv) Where a beneficiary is to receive specific assets, it is advisable to ask the beneficiary for an acknowledgement that the asset in the Will is the asset the estate trustee intends to convey;
 - (v) Advise the estate trustee that he or she is not discharged by paying the legacy to a minor, unless the will provides that the minor's receipt shall be a sufficient discharge;
 - (vi) The estate trustee has a duty to distribute;
 - (vii) The Courts have held it is improper to hold up payment to a beneficiary until the beneficiary signs a release. Ontario cases (*Brighter v Brighter*; *Rooney Estate v. Stewart Estate* (See previous notes));
 - (viii) Courts are highly critical of requiring receipts, as it is akin to holding a beneficiary 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";
- (j) Applications to Pass Accounts
 - (i) Where beneficiaries are unwilling or unable to provide releases to the estate trustee, advise estate trustee about the process of bringing an application to pass accounts before the Court;
 - (ii) In light of the Ontario Court of Appeal's decision in *Wall v. Shaw*, 2018 ONCA 929, which held that limitation periods do not apply to objections to accounts because they do not commence proceedings, estate trustees

should be advised to periodically pass their accounts for long estate administrations where releases are not forthcoming.

7. Prepare Final Report to Estate Trustee

- (a) Include estate accounts, original releases [**retain notarial copies**], and all income tax returns and notices of assessment if not already delivered to the estate trustees;
- (b) Summarize what legal services were covered by the retainer and what legal services were not included (i.e. specific tax advice, filing EIR, obtaining clearance certificate);
- (c) Confirm the termination of your retainer.

8. An Additional Cautionary Note on Solicitors' Fees

Many estate trustees assume that all legal fees incurred by them are properly chargeable to the estate. This is not the case and it is important for any solicitor acting for an estate trustee to make this clear in the initial retainer letter sent to the client.

It is important to explain to an estate trustee that amounts incurred to address beneficiaries' concerns about the conduct of the estate trustee in the administration of the estate are ordinarily payable personally by the estate trustee unless payment is consented to by the beneficiaries or there is an order made for reimbursement of the fees after the conduct has been examined on a passing of accounts or other court application.³⁶

If the retained solicitor is not prepared to wait for payment where such a dispute arises it is necessary to make clear to the estate trustee client that they must pay the fees in the first instance and await reimbursement. Moreover, the wise solicitor will make it clear that where the estate trustee is, in fact, defending their own interest in the estate the full reimbursement of the legal costs may not be approved by the court.³⁷

4840-0266-8995, v. 4

³⁶ *DeLorenzo v. Beresh*, 2010 ONSC 5655, [2010] O.J. No. 4637 (Sup. Ct.); *Re McDougall Estate*, 2011 CarswellOnt 6849, 2011 ONSC 4189 (Sup. Ct.); and *Gelcer v. Tamari*, 2011 CarswellOnt 6079, 2011 ONSC 3498 (Sup. Ct.)

³⁷ *Hosein v. Hosein* [2010] O.J. No. 2261 (Sup. Ct.). See also: *Salter v. Salter Estate* 2009 CarswellOnt 3175 (Sup. Ct.).



Practice Gems: Administration of Estates 2020

**Update to the Estate
Administration Checklist for
Solicitors Advising Estate Trustees**

Mary Wahbi & Kathryn Balter

September 21, 2020

AGENDA

1. Importance of a Checklist

2. General Reminders

- a) Who's your client?
- b) Role and duties of estate trustees
- c) Role and duties of solicitors advising estate trustees
- d) Solicitor's fees
- e) Estate trustee compensation

3. Specific Updates to the 2017 Checklist

- a) New timelines - Estate Information Return (EIR)
- b) Changes to Estate Administration Tax (EAT)
- c) New filing requirements - application for certificate of appointment of estate trustee (CAET)
- d) New duties relating to posthumously conceived children/issue

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Importance of a Checklist

- Tool to get yourself organized for the long process of administering an estate
- Working tool to organize and delegate to the various employees who may be working on the file (lawyers, clerks, administrative staff)
- Adopt into your own system and use as a living document
- Will assist to avoid missing important steps
- Remind yourself of steps taken after dormant periods of estate administration work

GENERAL REMINDERS

Who's Your Client?

- Your client is the estate trustee – NOT the estate
 - Consider conflicts in representing the estate trustee if he or she is also a beneficiary or creditor of the estate
- If there is more than one estate trustee, the joint retainer rules apply to the engagement and this should be explained to your clients
 - Consider conflicts that may arise between the estate trustees throughout the course of the administration (not just at the outset)
 - Obtain a written agreement from clients detailing the joint retainer rules (Section 3.4-5 of the *Rules of Professional Conduct*)
 - Consider majority rule provisions of Will vs. joint retainer

Role and Duties of Estate Trustees

- An estate trustee should consider whether he or she wishes to act as such prior to taking any steps in the administration of an estate
- Once the estate trustee has committed to acting, and has taken steps or held himself out to be the estate trustee, he or she may only be removed by court order (or in accordance with a mechanism set out in the Will)
- Advise the estate trustee that they are not required to use the drafting lawyer's services as solicitor for the estate trustee (even if the Will indicates that such lawyer is to be used) (Section 3.4-38 of the *Rules of Professional Conduct*)

Role and Duties of Estate Trustees (cont.)

- **Fiduciary Obligations** - an estate trustee owes obligations to the creditors and beneficiaries of the estate, which must be put ahead of his or her own interests
- **Delegation** - although the Will may permit certain powers of delegation, an estate trustee may never delegate discretionary decisions and all delegated tasks must be appropriately supervised by the estate trustee
- **Transparency** – advise the estate trustee regarding his or her duties to keep accounts and to keep beneficiaries informed
- **Personal Liability** – where an estate trustee fails to take certain steps (i.e. notice to creditors; clearance certificates) he or she will be personally liable to the creditors and/or beneficiaries of the estate

Role and Duties of Solicitors

- Explain the distinction between the estate trustee (decision-maker) and the estate solicitor (advisor)
- Advise the estate trustee in writing if there are any aspects of advice that the solicitor is not providing (e.g. tax advice)
- Where a solicitor or staff being supervised by the solicitor take on administrative duties that would otherwise be the role of the estate trustee, compensation payable to an estate trustee should be reduced accordingly (separate file for this work is advisable)

Solicitor's Fees

- The ordinary rules arising from the operation of the *Solicitors Act* apply to the preparation and rendering of accounts in the course of an estate administration retainer and to the review of those accounts
- Although the estate trustee is entitled to be indemnified for estate expenses, some advice given to estate trustees may not be payable from the estate (e.g. advice regarding breaches of fiduciary obligations or other concerns raised by beneficiaries)
- Advise estate trustees to pay legal fees relating to these concerns personally and then seek reimbursement on approval of accounts (formally or informally)

Estate Trustee Compensation

- **Backup Documentation** - Although estate trustees may not always seek compensation for their role, it is essential that they be advised at the outset that in order to support any claim for compensation that they choose to make they will need to provide evidence of the work performed
 - detailed dockets of time spent in the administration of the estate
 - evidence of payments made on behalf of the estate for which reimbursement will be sought
- Compensation claims can always be withdrawn but detailed dockets cannot be recreated years after the fact if the estate trustee decides that he or she wishes to claim compensation
- Advise estate trustees that compensation will be taxed as income

UPDATES TO 2017 CHECKLIST

New Timelines - EIR

Action Item	Jan 1, 2015 to Dec 31, 2019 Deadlines	Jan 1, 2020 forward Deadlines
Filing of EIR	90 days from receipt of Certificate of Appointment	180 days from receipt of Certificate of Appointment
Amendments to EIR (new information)	30 days from estate trustee becoming aware of additional assets or change in date of death values	60 days from estate trustee becoming aware of additional assets or change in date of death values
Amendments to EIR (refund or additional amount paid)	30 days from estate trustee receiving refund or paying additional amount	60 days from estate trustee receiving refund or paying additional amount

Changes to EAT

- As of January 1, 2020, Estate Administration Tax payable on the first \$50,000 of an estate's value is waived
- If an estate is worth less than \$50,000, no EAT will be due
- If an estate is worth more than \$50,000, the \$250 that was payable in applications filed prior to January 1, 2020 is waived and EAT of 1.5% of the value of the estate in excess of \$50,000 (rounded up to the nearest \$1000) is due on filing

New Filing Requirements - CAET

- As of December 21, 2018, new forms for applications for a CAET were required by the Registrar (although old forms were accepted until March 1, 2019)

Note: Schedule 8 of the *Smarter and Stronger Justice Act, 2020*, S.O. 2020, c. 11 will come into force on a future date to be determined by the proclamation of the Lieutenant Governor and will amend the *Estates Act* to create a new procedure for “small estates”. It is expected that similar amendments will be made to the Rules of Civil Procedure, although none have currently been proposed, and the Attorney General is currently seeking input regarding the appropriate definition of “small estates”

Posthumously Conceived Issue

- On January 1, 2017, the *All Families Are Equal Act* amended various pieces of legislation in Ontario, including the *Children's Law Reform Act* and the *Succession Law Reform Act*
- The rules of parentage were amended to accommodate various changes in reproductive rights in Ontario, including the ability to posthumously conceive a child
- It is now essential to advise estate trustees of the possibility of a posthumously conceived child to benefit from an estate (depending on the circumstances of a testator and/or beneficiary)
- Estate trustees should perform searches of the Registrar after the expiration of the six (6) month period for a spouse to file such notice expires (subject to an extension of same) where relevant

COVID-19 Protocols cont'd

- On April 7, 2020, the Lieutenant Governor of Ontario made an Order in Council under the *Emergency Management and Civil Protection Act* permitting the virtual witnessing of wills and powers of attorney during the Covid-19 emergency
- The Order was further amended to permit execution in counterparts on April 22, 2020
- On July 24, 2020 the *Reopening Ontario Act* came into force, which further extended the Order until August 23, 2020
- a further extension was made on August 20, 2020, extending the Order to September 22, 2020

COVID-19 Protocols

- further extensions may be made with an ultimate expiry date of July 24, 2021
- In the future, if presented with Wills executed in the virtual presence of the testator or one or more witnesses, it will be essential to confirm that such Wills: (1) meet the requirements of the Order; and (2) were executed between April 7, 2020 (provided that such execution was not done in counterparts prior to April 22, 2020) and the final date the Order expires

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Thank you!

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