SO YOU WANT TO BE AN EXECUTOR (ESTATE TRUSTEE)? – Lessons for the Drafting Solicitor and the Solicitor during the Estate Administration

What many lawyers may not fully appreciate about practising in estate planning is the unique nature of the solicitor-client relationship. What may begin as a young lawyer preparing a will and powers of attorney for a single adult often develops into a life-long relationship which experiences the phases of personal and professional growth of clients coupled with the challenges of aging, including unexpected loss and hardship. In such a relationship, the legal advice provided over the years also changes, not simply because of the evolution of the law, but because the advice given is more comprehensive and evolved. As a result, planning embraces a "holistic" model as it is based on an understanding of the client's family situation, career path, life choices, and core values.

In these unique relationships the estate solicitor may become the trusted family advisor, and is often the point person who brings in other professionals to lend their expertise for anything from a commercial transaction to a family medical crisis. Notwithstanding the time spent, solicitors may not be able to invoice all of their time in these circumstances. Reasons may vary but often it is because of the difficulty in characterizing the service provided. Accordingly, at first blush, a reader of a will or other estate planning document may not understand that behind these documents lie countless hours of conversation about those "soft" issues which are of importance to the client. Consequently, this cultivated relationship and the estate solicitor's unique knowledge and understanding of the client's goals, values, family dynamics and overall estate plan, may result in being asked to be the client's executor.

During a time when solicitors continue to face the challenge of obtaining fees commensurate with their expertise when preparing an estate plan, an executor appointment can assist in bridging the fee gap/disparity. When the estate solicitor, acting as an executor, properly administers the estate, an executor appointment is the opportunity for such solicitor to receive fees commensurate with time expended, skills, and commitment.

However, hand in hand with this opportunity is the challenge of getting paid at the end of the day. Even in situations where the lawyer as the estate solicitor has provided good advice, and, as executor has administered a deceased client's estate expertly and expeditiously, payment terms which were agreed upon with the then living client during the estate planning meeting may still be challenged. Beneficiaries may be hurt that a third party is involved. Initial perceptions may breed a mutual sense of mistrust and erode the executor / beneficiary relationship which will invariably thwart efforts to get paid *even if the Will explicitly permits payment*. The deceased client cannot be examined to evidence his or her intention. What can an estate solicitor do?

This article summarizes i) the statutory authority for a solicitor to act as both solicitor and executor, ii) select aspects of cases dealing with solicitor's compensation and legal fees[1], and iii) lessons for practice for the estate solicitor. [2]

The Trustee Act [3]

The Trustee Act permits a solicitor to receive an allowance for professional services above the compensation that the solicitor would be awarded in his or her role as an executor.

Sections 61 (4) and (5) of the Trustee Act read as follows,

> *(4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.*
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> *(5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.*

A beneficiary may certainly challenge the quantum of a solicitor's claim for executor's compensation, and, notwithstanding this provision, any fees charged for solicitor's work.

Executor Compensation and solicitor fees - Cases

The Estate of Curtis T. Conrade (Deceased) Ontario Superior Court of Justice 2005 CarswellOnt 7058 21 ETR (3d) 140

Abel Calvin Conrade, Carol Ann Mailing and Richard Wayne Rosenman were originally appointed Estate Trustees. Mr. Rosenman was also an estate solicitor. Abel Calvin Conrade was removed by order of the court and then later filed a notice of objection to the accounts of the remaining estate trustees. One of the grounds for the objections was that Clause 21 of the Will, which permitted payment of Mr. Rosenman in his capacity as a solicitor, was ambiguous.

Clause 21 read as follows*, "I declare that any trustee of this my Will who is a barrister at law or a solicitor shall be entitled to charge and to be paid all professional fees or other charges for any business or act done by him or his firm in relation to my estate or to the trust declared by this my will as compensation for acting as one of my trustees…"*[4]

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[1] The case summaries are not reflective of the entire case, and speak to only those relevant facts and related issues discussed in this article.

[2] This article is not a comprehensive analysis of executor's compensation and for purposes of space does not speak to the five factor analysis as set out in Toronto General Trusts Corp. v. Central Ontario Railway (1905) 6 O.W.R. 350 (Ont. H.C.)

[3] R.S.O. 1990 c.T.23

[4] Re Conrade Estate 2005 21 E.T.R. (3d) 140 , CarswellOnt 7058 at para 28

Mr. Justice Kruzick agreed that Mr. Rosenman's inclusion of this paragraph in the Will was permitted by legislation, notably s. 61 (4) of the Trustee Act. The judge went further to say that given the wording of Clause 21 he agreed that when a lawyer is a trustee of any estate, and he/she or a member of his firm does work as a trustee, the lawyer will be entitled to bill at his regular rate.

Mr. Justice Kruzick characterized the nature of the estate as "*not only a large estate but given the evidence, an estate where the deceased was not the most organized person, and the estate was of some complexity given the nature of the holdings*"[5]. Mr. Justice Kruzick awarded compensation in accordance with the usual percentage guidelines, however, although he stated that that he could not but conclude that the deceased's intention was for the lawyer to wear two hats, he could not conclude that it was the testator's intention that the wording in the Will itself contemplated double dipping.

The end result was that the compensation was reduced by both the fees and **disbursements** [6].

In the writer's view, the latter portion of Clause 21 appears to meld compensation and fees, with one offsetting the other in determining the calculation. It appears that the intention may have been that compensation would be charged at an hourly rate instead of the usual percentage guideline. With the exception of Clause 21 in the will, the case does not reference any additional documentation evidencing the late Mr. Conrade's intention. What is not clear however, and of interest to the writer, is the rationale for not permitting payment of disbursements, which would have been a direct out-of-pocket expense for the firm.

Arrand v. MacKenzie, 2010 Carswell Ont 9553, 2010 ONSC 6815, 195 A.C.W.S. (3d) 989, 69 ETR (3d) 154

One of the estate trustees was Gordon Chalmers Adams ["Adams"], who was a solicitor. The issues with respect to Adams were: 1) What is a reasonable amount of compensation to be paid to him? and 2) Is he entitled to be paid his professional hourly rate for all services rendered in the administration of the estate?

Mr. Adams had drafted the will and had included a clause permitting a solicitor, accountant or other professional to charge and be paid all usual professional fees or other charges. Mr. Justice Roy J. Albert had difficulty with the accounts submitted by Adams as they were confusing with respect to various hourly rates, and Adams was making revisions of these rates during trial. Mr. Justice Albert felt that the hours submitted for driving were excessive.

Mr. Justice Albert was also critical of the fact that Mr. Adams would not discuss his compensation with the beneficiaries which seemed to foster a number of the problems between Mr. Adams and the beneficiaries.

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[5] Re Conrade Estate 2005 21 E.T.R. (3d) 140 Carswell Ont 7058 at para 23
[6] Emphasized for effect by writer

Mr. Justice Albert also turned to the Will itself which contained the following clause:

> *"where at any time any of my trustee or my literary executor is a solicitor, an accountant, other than engaged in any profession or business, he or she shall be entitled to charge and be paid all usual professional fees or other charges or business transacted, time expended and asked down by him or her or his or her firm in connection with the administration of my estate and he [sic] trusts all this my Will, including act when she trustee [sic] not being any profession or business could have been done personally."* [7]

With respect to the clause itself, Mr. Justice Albert stated the following,

"Adams relies on this clause as his authority from the testator to charge his legal hourly rate for all services rendered at [sic] the trustee. Obviously this paragraph is a standard clause found in many wills. We have no evidence that the testator understood the full implications of that paragraph" [8]

The end result was that Adams' hourly rate was reduced, and his hours for work were reduced by twenty-five percent (25%).

It seems clear in reading this case that the conduct of Adams during the trial, coupled with his method of record keeping was less than satisfactory. However, even if Mr. Adams administered the estate properly, it is questionable as to whether Mr. Justice Albert would have ruled differently given the fact that the clause was the only written evidence of the testator's intention.

Krentz Estate v. Krentz, 2011 CarswellOnt 1651, 2011 ONSC 1653, 66 E.T.R. (3d) 132, 199 A.C.W.S. (3d) 1025

In this case the late Mr. Krentz died leaving a will appointing an accountant, bookkeeper, and his lawyer, Robert Sidney Fuller, as his executors.

Mr. Fuller had prepared the Will. The Will contained the following two provisions:

> *I authorize my Trustees from time to time to pay to themselves from the capital and income of my estate such reasonable amount or amounts for compensation at such reasonable intervals during any accounting period of my estate, subject to the subsequent approval of such amount or amounts so made by a Judge or authorized officer of the Court on any passing of accounts or audit of the assets of my estate.* [9]

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[7] Arrand v. MacKenzie, 2010 ONSC 6815, 195 A.C.W.S. (3d) 898, 69 E.T.R. (3d) 154, 2010 CarswellOnt 9553, at para 10

[8] Ibid

[9] Krentz Estate v. Krentz, 2011 ONSC 1653, 66 E.T.R. (3d) 132, 199 A.C.W.S. (3d) 1025, 2011 CarswellOnt 1651 at para. 42

> *Any trustee who is an accountant or solicitor or engaged in any profession or business may make and be paid, in addition to disbursements, all usual professional and other charges for work done by them or their firm or any member or employee thereof in relation to the probate of this will or any Codicil hereto or the trusts thereof in the same manner in all respects as if they were not a Trustee hereof including matters which might or could have been attended to in person by a trustee not being an accountant or a solicitor or other professional persona but which such Trustee might reasonably require to be done by an accountant or solicitor other professional person.* [10]

With respect to these two roles, Justice Turnbull stated as follows: "*I have no doubt that most lay people do not understand that there is a distinction between "compensation" and "professional fees" and their effects on their estate, absent specific examples being given to them so they can understand the amount involved and the effect on the residue of their estate.*"[11]

Mr. Justice Turnbull went further to state that although the Trustee Act permits double dipping, that where there is an objection the onus rests on the Trustees to satisfy the court that that was the intention of the testator.

In his analysis, Mr. Justice Turnbull referred to lawyers charging contingency fees. He stated that there are strict requirements to validate such contingency agreements and that recent regulations had been enacted under the Solicitors' Act [12] including examples to calculate such fees.

In this case, Justice Turnbull stated that Mr. Fuller did not present evidence of what he explained relative to double dipping. Mr. Fuller did not have his client sign or initial any sample calculation of the effects as required in a contingency retainer agreement.

Mr. Justice Turnbull stated that he was not implying any wrongdoing, but that when a claim for compensation and fees is being made there is an obligation to satisfy the beneficiaries that the full effect of these clauses were explained to the testator.

Mr. Justice Turnbull held that he was <u>not</u> satisfied that the wording of the Will made the testator's intention clear that the trustees be paid both their professional fees and full compensation.

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[10] Ibid
[11] Supra note 9 at para. 43
[12] R.S.O. 1990, c. S.15

Thoughts

Respectfully, the writer is concerned about the use of the term “double dipping” in the judgments and the negative inference which does not necessarily characterize all estates where the solicitor charges both executor’s compensation and his or her fees. There is a distinction between the solicitor/executor administering an estate and the solicitor acting as lawyer for the estate. The former is a fiduciary obligation and carries a heightened personal liability and risk associated with this obligation. The latter supports the estate administration with the requisite legal work and advice. These are two different and separate functions. Perhaps however the notion of double dipping is not just a reflection of cases where there is poor file management and improper accounting, but, as stated in the introduction, it is a preconceived impression of the Bar due to the solicitor’s general lack of attention to evidencing all of the non-billable hours, all of the agreements, all of the discussions and goal setting, and all of the education provided to our clients.

Lessons for Practice - The Planning Meeting and Drafting

One of the reasons for selecting the cases as presented is noting the similar judgments as they relate to ascertaining testator intention notwithstanding the different fact scenarios – notably conduct of the solicitor and content of the clauses. The case law seems clear that regardless of the nature and content of the clauses in a Will, these clauses cannot be solely relied upon to evidence testator intention when there is an objection to compensation and fees. Based on the decisions described above, the following are suggestions from the writer to ensure the estate solicitor can satisfy his or her onus when there is an objection to compensation and fees:

- Learn from the Trust Companies – Prepare a letter of intention, or a memorandum incorporated into the will, indicating that the client (testator) is aware that the firm will be charging fees for solicitor’s work. Ensure that the testator/client has signed or initialled any schedule or memo evidencing his or her understanding;

- Incorporate calculations with examples in your correspondence and/or memorandum. With respect to legal fees, you may want to include current hourly rates including those of the estate clerks, with a fee approximation. Include a sample equation - *$_____ (Executor’s Compensation) + $ _____ (Legal Fees exclusive of disbursements) = $_____.*

- Will drafting – It seems clear that incorporating a provision into a basket of administrative clauses toward the end of the will is unlikely to be a compelling argument to evidence the client’s knowledge and understanding. Include the relevant compensation clauses at the beginning of the will so that they are readily identifiable and have the client initial them. “Personalize” this paragraph to reflect the actual circumstances, such as referring directly to the solicitors (eg. Mr. John Lawyer) named as executors.

- Reference the client's specific instructions regarding fees and compensation in both your interim correspondence and final reporting letter;

Lessons for Practice – The Lawyer (Law Firm) as Executor and Estate Solicitor

When beginning the estate administration, it is best to practise defensively, not only for the purpose of being prepared to respond to any potential objections but to facilitate better file management overall. The following are recommendations:

- If your firm has an estates practice group, ensure that a different lawyer is assigned to the solicitor's work. It is easier to assign and differentiate roles at the beginning of the estate administration.

- Prepare estate accounts in court accepted format from the beginning of the administration;

- Open separate executor files and solicitor files so as to differentiate dockets and their descriptions;

- Communicate with the beneficiaries and respond to questions. This does not mean that you are to provide legal advice to beneficiaries. This means that you are to provide periodic status reports as to the progress of the administration as in the normal course. In providing such progress reports, ensure that you clearly communicate that neither you nor your firm are the lawyer for the beneficiaries, as the dual role may cause confusion.

Conclusion

These cases are a wake-up call for solicitors to not only improve our file and practice management, but to become greater educators and advocates of our skills as both executors and as estate solicitors to clients and to the Bar in general. As we continue to educate and improve our practice management, it is the writer's hope that collecting proper fees will be an attainable goal.