

STANDING IN THE SHOES OF AN ESTATE TRUSTEE AND GETTING PAID

Introduction

While lawyers have always provided legal advice to estate trustees during the administration of an estate, more and more lawyers are being retained to perform many of the duties normally reserved to estate trustees. How lawyers are paid for performing such services is the primary focus of this article. The recent decision of Cullity J. in *Bott Estate (Trustee of) v. Macaulay*, 76 O.R. (3d) 422, 18 E.T.R. (3d) 15 will be considered.

Bott Estate (Trustee of) v. Macaulay

The issue of the fee charged by a lawyer for performing services normally reserved to the estate trustee was recently considered in *Bott Estate (Trustee of) v. Macaulay*. The decision was not appealed and has yet to be widely considered by the courts in Ontario.

The dispute concerned the fees charged by the solicitor who was retained by the estate trustee (the “Solicitor”). The estate trustee brought an application for the review of the Solicitor’s accounts as well as an order for an assessment of the Solicitor’s accounts pursuant to the *Solicitors Act*, R.S.O 1990, c. S.15, as amended. The application was commenced within 12 months of the delivery of the accounts.

By way of background, Alma Bott died in June 2003. Her son, Gerald Bott (“Bott”), was appointed estate trustee with a will in August 2003 pursuant to his mother’s last Will and Testament. The Will left the entire estate to Bott and his sister in equal shares. The value of the estate was approximately \$650,000.

Bott decided to retain the Solicitor to help him with the administration of the estate as he had little or no experience in such matters. The Solicitor’s name was provided to Bott by the funeral home.

The Solicitor ultimately rendered two accounts: the first was an October 21, 2003 account in the amount of \$7,204.49 for services as a solicitor on behalf of the estate. A second account dated October 28, 2003 was addressed to Bott for services on Bott’s behalf as estate trustee. The second account in the amount of \$34,828.50 represented five per cent

of the value of the estate plus GST. The Solicitor paid (“pre-took”) the accounts out of the proceeds of the estate at the same time as he delivered them to Bott.

In responding to the estate trustee’s application, the Solicitor took the position that the court had no jurisdiction to order an assessment under the *Solicitors Act* and that his fees could only be challenged on a passing of accounts.

Cullity J. ordered an assessment of the October 28, 2002 account, the account rendered by the Solicitor for services on behalf of the estate trustee. The first account was not in issue. Cullity J. also expressed his surprise and his apparent displeasure that the Solicitor pre-took his 5% compensation and that the Solicitor characterized conveyancing work as executor’s work and not solicitor’s work.

Cullity J. was quick to point out that an estate is not a juridical person and cannot retain anyone or incur liabilities. As such, an “estate solicitor” is one who performs services for an estate trustee and not an estate. The estate trustee is therefore personally liable to the estate solicitor not the estate. In the normal course, an estate trustee is entitled to be reimbursed/indemnified from the assets of the estate for the estate solicitor’s fee. However, whether or not an indemnity exists does not affect the liability of the estate trustee to the estate solicitor. In this context, Cullity J. stated:

If the estate trustee wishes to challenge the fees or disbursements charged by the estate solicitor, the appropriate procedure is by an assessment pursuant to the *Solicitors Act* unless, on a passing of accounts, the beneficiaries have challenged the reasonableness of the fees as an expense incurred by the estate trustee in administering the estate, or unless the estate trustee wishes to have an order approving the right to an indemnity or reimbursement.

The fact that beneficiaries have not yet insisted on a passing of accounts does not affect the right of the estate trustee to have his or her legal bills assessed pursuant to the *Solicitors Act*. It is a matter properly between a solicitor and his client.

In his decision, Cullity J. noted that nothing prevents a solicitor from performing services that are ordinarily part of the estate trustee’s work and for which the estate trustee is

personally liable. However, the estate trustee cannot claim compensation for such work and his or her compensation would be otherwise reduced. According to Cullity J., absent any special agreement between the estate trustee and a solicitor, a solicitor will generally be entitled to charge only on the normal *quantum meruit* basis and the reasonableness of the fees can be questioned on an assessment.

While remuneration paid to the solicitor for services reserved to the estate trustee may be calculated at a special rate or as a percentage of the value of the estate, the beneficiaries are entitled to challenge the reasonableness of the amount paid on a passing of accounts. Moreover, even in the face of any such arrangement or agreement, the estate trustee is not prevented from assessing his/her solicitor's account, though such an arrangement would factor into the assessment officer's consideration.

In considering the October 28, 2003 account, Cullity J. held that there was no agreement between Bott and the Solicitor that entitled the Solicitor to a percentage of the value of the estate. The Solicitor's fees were to be determined on a *quantum meruit* basis and without reference to any amount that might be awarded to Bott as estate trustee. As a final rebuke, the Solicitor was ordered to deposit the \$34,828.50, plus interest, he pre-took into an interest bearing account pending the completion of the assessment. .