

## **A SMORGASBORD OF ISSUES BETWEEN AN ESTATE TRUSTEE AND HIS/HER SOLICITOR**

The recent case of *Rooney Estate v. Stewart Estate*<sup>1</sup> serves to highlight the “distinct” but complimentary” roles of the estate trustee and the estate solicitor. The case makes for interesting reading and addresses a smorgasbord of issues that are all too common.

### **FACTS**

Mary Stewart died on December 19, 2000. The Stewart Estate was valued in excess of \$600,000. After certain bequests totalling \$120,000 were paid, the residue of the estate was left to the deceased’s sister Joan Rooney. Unfortunately, Ms. Rooney died while her sister’s estate was still being administered. The applicant, Jane Luedtke, was the estate trustee for the Rooney Estate. Ms. Luedtke sought an order requiring the estate solicitor for the Stewart Estate, Carlo Cimetta, to pass his accounts for work he performed on behalf of the estate trustee and to account for the estate assets within his possession. The principal issue was the legal fees and disbursements charged by Mr. Cimetta.

The estate was a simple one to administer. A co-executor had renounced her appointment. There was no real estate to be preserved or sell and no foreign assets. There were no beneficiaries under the age of majority. Bequests were directed to six Canadian charities and thirteen individuals. All assets were in the form of Canadian investments or accounts held at four banks or investments houses.

The estate was substantially administered by October 2003. However, a cheque to the Stewart Estate for \$10,738.17 had not been cashed. It was presented on the condition that the Rooney Estate sign a release for the funds. As Ms. Luedtke objected to the fees charged to the Stewart Estate (including those of the estate accountants), she refused to execute a release.

Mr. Cimetta charged the estate a total of \$31,061.35. The sum included a small disbursement account and GST on legal fees. The Stewart Estate also paid \$4,654.50 in accounting fees. There were no details of the accountant’s billings, but the nature of the estate suggested to the court that only personal income tax filings were required. On the advice of Mr. Cimetta, the estate trustee for the Stewart Estate took compensation in the amount of \$30,110 (5% of the value of the estate). However, compensation was not an issue in the application to pass accounts.

### **BREACHES OF TRUST**

Ms. Luedtke submitted that Mr. Cimetta committed several breaches of trust in the administration of the Stewart Estate for which he had to account:

- He paid himself double compensation for performing solicitor’s work and estate trustee’s work which was not authorized by the will or the beneficiary;
- He recommended compensation for the estate trustee at the standard 5% without reducing his fees for the estate trustee’s work he performed;

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<sup>1</sup> (2007), CarswellOnt 6560

- He charged fees in relation to the size and complexity of the estate that exceeded *quantum meruit*, thereby reducing the beneficiary share of the estate;
- He demanded releases from the beneficiary before delivering his accounts; and
- He did not recommend independent legal advice for the beneficiary before she signed a release.

### **TRUSTEE DE SON TORT**

Ms. Luedtke submitted that by acting contrary to the terms of the will, Mr. Cimetta became the *de facto* estate trustee or a “trustee de son tort”. As noted by the judge, *Black’s Law Dictionary* defines “trustee do son tort” as a “person who is treated as a trustee because of his wrongdoing with respect to property entrusted to him or which he exercised authority which he lacked.” As the court subsequently noted in its decision, “[i]t is a maxim of equity that equity will not suffer a wrong to be without a remedy”.

Mr. Cimetta claimed that Ms. Luedtke’s application was, in effect, a claim for assessment of his accounts, which was statute-barred under the *Solicitor’s Act*<sup>2</sup> for being out of time. He also claimed that it was a procedural anomaly not to include the estate trustee of the Stewart Estate as a party to the application. Mr. Cimetta also relied on the equitable defence of *laches* (i.e. delay) and section 20(1) of the *Trustee Act* to act as agent for the estate trustee. Both these arguments were ultimately rejected by the court.

### **THE ROLE OF THE ESTATE TRUSTEE**

In considering the application to pass accounts, the court noted as follows:

The roles of the estate trustee and the solicitor she [the estate trustee for the Stewart Estate] retains are distinct but complementary. On occasion, these roles overlap. In considering the issue of compensation for these roles, it is important to keep in mind how they differ; it is also important to recall the nature of the solicitor’s retainer.

The court held that the estate trustee is responsible for:

1. Arranging for the funeral and disposition of remains;
2. Locating the will and instructing the solicitor to apply for the appropriate grant of appointment;
3. Locating all the assets of the estate, including making arrangements to secure, preserve, and dispose of such assets in accordance with the terms of the will;
4. Advertising for creditors and paying all debts of the estate, including the filing of appropriate tax returns;

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<sup>2</sup> R.S.O. 1990, c. S.15, as amended

5. Preparing a set of accounts for the approval of the beneficiaries or the court, as is required; and
6. Distributing the estate.

The court noted that the trustee may claim compensation for carrying out the above-noted duties on behalf of the estate. That compensation could include reimbursement for charges for professional help. However, the trustee could not expect to receive compensation for services performed by others whose services were charged to the estate.

### **THE DUTY TO ACCOUNT**

The duty of an estate trustee to keep accounts is also well known and the court thought it worthwhile to set them out:

1. To keep clear and accurate accounts of the estate, rendered at appropriate intervals to the beneficiaries;
2. To keep the accounts distinct from other accounts;
3. To retain supporting documents for all accounts;
4. To produce to any beneficiary the accounts when requested. Income or revenue beneficiaries are entitled to have accounts at reasonable intervals; accounts must be presented to residuary beneficiaries when entitled to possession;
5. To make all beneficiaries fully aware of their rights;
6. To disclose any and all breaches of trust;
7. To allow all beneficiaries adequate time to investigate the accounts;
8. To ensure that all beneficiaries have competent, independent advice in reviewing the accounts; and
9. To notify all interested beneficiaries of any court audit.

### **THE ROLE OF THE ESTATE SOLICITOR**

It is accepted that an estate trustee can retain counsel to help with the estate. As the court succinctly identified:

Generally, the role of the solicitor is to apply for a certificate of appointment for the trustee and to attend upon a passing of accounts... It is not unusual for the solicitor to be asked to perform work which falls within the trustee's role. The solicitor should not perform the 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. Generally, the estate is not liable to pay this account; rather, it falls to the trustee to pay out of her compensation [i.e. compensation is corresponding reduced].

It is important to note that the solicitor's client is the estate trustee not the estate. With respect to the solicitor's account, the solicitor is entitled to be paid for his/her accounts from the estate.

## DECISION

According to the court, Mr. Cimetta erred in charging the estate the fees that he incurred in performing the estate trustee's work. He was entitled to render an account, but it was to be paid by the estate trustee out of her compensation. The result was that the estate effectively paid for Mr. Cimetta's work twice. Once when he rendered his blended account to the estate (his solicitor's fee and his trustee's fee combined) and for a second time when the estate trustee took full compensation (5% of the value of the estate) without a corresponding reduction in compensation for work performed on behalf of the estate trustee by Mr. Cimetta.

The court further held that Mr. Cimetta was wrong to charge for the performance of trustee's work at his hourly rate. According to the court, a solicitor's hourly rate should be reserved for legal advice with respect to performing legal services and not for the performance of trustee's work. In fact, the solicitor should have rendered two accounts – one for legal services and one for trustee's services. The estate trustee in paying the solicitor's account for legal services was entitled to be reimbursed by the estate. However, if the estate paid the solicitor's account for services performed on behalf of the trustee, the compensation claimed by the trustee would be correspondingly reduced.

In an important distinction, the court noted that an estate trustee cannot assess his/her solicitor's account on a passing of accounts. Such an assessment is to take place under the auspices of the *Solicitor's Act*. However, if on a passing of accounts, the beneficiaries wish to challenge the reasonableness of a solicitor's account, as an expense of the estate, the court can review the reasonableness of the solicitor's accounts in that regard. If the accounts are held to be unreasonable, the trustee's compensation can be reduced. Where there is no special agreement between solicitor and estate trustee, the proper measure of the solicitor's account for legal services to the estate and for doing trustee's work is on a *quantum meruit* basis.

The court held that the doctrine of *laches* did not apply, as no proper accounts had been rendered to the estate by the solicitor for his work alone. Instead, a blended account had been tendered for all services such that Ms. Luedtke was not able to distinguish between what charges represented legal fees and what charges were for services rendered on behalf of the estate trustee. Moreover, the estate had not been fully administered and there had been no passing of accounts. As such, the equitable defence of *laches* did not apply.

## THE RELEASE

In 2001, Mr. Cimetta wrote to Ms. Rooney, the residuary beneficiary of the Stewart Estate, indicating that if he received an executed release from her, he would forward payment to her in the amount of \$394,062.17. No estate accounts were included with the letter. The decision is not altogether clear, but Ms. Rooney apparently executed and returned the release to Mr. Cimetta in exchange for payment.

In 2003, after the death of Ms. Rooney, the residuary beneficiary, Mr. Cimetta wrote to Ms. Luedtke and advised her that the estate had held back \$20,000. He proposed to disburse net funds of some \$10,000 to the Rooney Estate upon receiving a signed release. The letter included a brief statement of the estate accounts. However, this time Ms. Luedtke, in her capacity as estate trustee, refused to execute the required release.

The court had this to say in the circumstances:

The matter of sending the release first and the cheque later suggests the “beneficiary was held hostage for the release.” There is every implication that the beneficiary’s entitlement was conditional upon forwarding the release. This practice was criticized by the court in *Brighter v. Brighter Estate* [citation omitted] at par. 9:

An executor’s duty is to carry out the instructions contained in the will... The executor has no right to hold any portion of the distributable assets 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. It is quite proper for an executor (or trustee, to use the current expressions) to accompany payment with a release which the beneficiary is requested to execute. But it is quite another matter for the trustee to require execution of the release before making payment; that is manifestly improper.

In resisting a passing of accounts, Mr. Cimetta attempted to rely on a release signed by Ms. Rooney in 2001. The court held that in order for a release to be enforced, the beneficiary who signs the release:

1. Must be “fully informed”;
2. Must have received competent legal advice in a review of the accounts;
3. Should understand how compensation has been charged; and
4. Should know what legal services have been provided and what the fees were.

According to the court, there was no evidence that Ms. Rooney executed the release knowing that the estate had been double charged for Mr. Cimetta’s work; once for legal fees and again when compensation was paid to the trustee. There was no evidence that Ms. Rooney knew that Mr. Cimetta charged the estate more for legal and trustee services than would arguably be allowed on a *quantum meruit* basis. In fact, the court regarded Ms. Rooney as an unsophisticated beneficiary. The court therefore held that Ms. Rooney was not fully informed and the release could not be enforced against her.

In the end, the court held that the estate should not be put to the expense of a full passing of accounts when the only issue related to the legal fees taken by the solicitor, the compensation paid to him for performing work normally carried out by an estate trustee, and the disbursements to the accountants. As a result, the court ordered that Mr Cimetta:

1. Repay the estate the sum of \$4,654.50 paid to the accountants, which payment was without prejudice to Mr. Cimetta’s right to bill the estate trustee personally for that sum;
2. To submit for passing his account for legal services properly provided to the estate;
3. To repay to the estate the balance of the amount withdrawn from the estate by him for fees and disbursements incurred in administering the estate on behalf of

the estate trustee without prejudice to his right to submit an account to the estate trustee personally for reimbursement for doing her work.

4. Once the matter was back before the court, the court would determine the proper fee to be paid to Mr. Cimetta for his work as estate solicitor on a *quantum meruit* basis.

## CONCLUSION

*Rooney Estate v. Stewart Estate* stands for the following propositions:

1. The roles of the estate trustee and the estate solicitor are distinct but complementary;
2. Generally, the role of the solicitor is to apply for a certificate of appointment for the trustee and to attend upon a passing of accounts;
3. A lawyer who crosses the line from solicitor to estate trustee may be held to be a "trustee do son tort" or a *de facto* trustee and called to account;
4. An estate trustee may claim compensation for carrying out his/her duties. Compensation could include reimbursement for professional help;
5. An estate trustee cannot expect to receive compensation for services performed by others whose services are charged to the estate;
6. An estate trustee has a duty to keep accounts and share such accounts with the beneficiaries;
7. It is not unusual for the solicitor to be asked to perform work which falls with the trustee's role. However, the solicitor should not perform trustee's work unless specifically instructed to do so by the trustee;
8. Where the solicitor performs trustee's work, the solicitor should advise the trustee that he/she will render an account to the trustee personally. It then falls to the trustee to pay this account;
9. Where the estate pays for work performed by the solicitor on behalf of the estate trustee, the estate trustee's compensation must be correspondingly reduced;
10. A solicitor's account, which is an expense to the estate, can be challenged on a passing of accounts as being unreasonable. However, an assessment of the solicitor's account must be made under the *Solicitor's Act* by the estate trustee;
11. An estate trustee cannot hold a beneficiary hostage by demanding a signed release before disbursing funds; and
12. In order for an estate trustee to rely on a release, the beneficiary signing the release must be (a) fully informed, (b) receive competent legal advice, (c) understand how compensation was charged, and (4) know what legal services were performed at what price.