

# **REPRESENTING THE ESTATE TRUSTEE – WHAT TO KNOW AND WHAT TO AVOID** by Justin W. de Vries and Diane Vieira<sup>1</sup>

## **Introduction**

It has been said that the “worst part” about practicing law is dealing with clients. A rather harsh assessment, but it is likely trite to say that advising a client is never straightforward or easy. No doubt, most lawyers can recount the trials and tribulations of successfully representing their clients (the truly difficult client is a whole other matter).

Advising a client can get particularly murky in the world of estates where a lawyer has been appointed the executor under a will, but continues to provide legal services to the estate. Furthermore, during the course of the administration of an estate, a lawyer often assumes the dual role of estate trustee and estate solicitor either by accident or design. It is therefore critical that a lawyer handling or assisting in the administration of an estate be cognizant of the distinct roles of an estate trustee and an estate solicitor. In being mindful of the distinction, a lawyer must strive to avoid any overlap of roles and shy away from outright usurping the role of the estate trustee.

Tellingly, the courts have been consistent in highlighting the different roles a lawyer may play in the administration of an estate and steadfast in holding lawyers to account. Moreover, a lawyer who is involved, directly or indirectly, with the administration of an estate must be aware of: (1) what constitutes a breach of trust by an estate trustee; (2) ensure that he/she does not facilitate a breach of trust; and (3) what to do when faced with such a breach of trust.

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## What Constitutes a Breach of Trust?

“A breach of trust occurs whenever a trustee fails to carry out his obligations under the terms of the trust, the rules of equity, or statute.”<sup>2</sup>

The standard of care for a trustee can be summarized by the following principles:

- The trustee shall obey the directions of the settlement or trust instrument unless the court authorizes changes or the beneficiaries consent to them;
- The trustee shall act impartially between beneficiaries;
- The trustee must exercise ordinary care and prudence;
- The trustee shall not profit from the administration of the trust or permit her or her interest to conflict with the interest of the trust; and
- The trustee shall be ready with his or her account.<sup>3</sup>

If a trustee fails to uphold this standard of care, he or she is liable to the beneficiaries for any loss. In calculating damages, the trustee must place beneficiaries in the same position as they would have been if no breach was committed.

## The Duty of Care of a Solicitor

The obligations of a solicitor to his or her client include:

- The duty to be skillful and careful;
- To advise the client on all matters relevant to his or her retainer, so far as may be reasonably necessary;
- To protect the interests of the client;
- To carry out the client’s instructions by all proper means;

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<sup>2</sup> D.W.M. Waters, M. Gillen, and L. Smith, *Waters’ Law of Trusts in Canada*, 3 ed. (Toronto: Thomson/Carswell, 2005) at 1208.

<sup>3</sup> Carmen S. Theriault, ed. *Widdifield on Executors and Trustees*, 6th ed., looseleaf (Scarborough, Ont.: Carswell, 2002), Margaret O’Sullivan, “Breach of Trust and its Consequences”, 10-1.

- To consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the solicitor; and
- To keep the client informed to such an extent as may be reasonably necessary.<sup>4</sup>

A solicitor is required to bring reasonable care, skill, and knowledge to the performance of the professional service which he or she undertakes. A solicitor's liability can exist in both contract and in tort for negligence. The requisite standard of care has been variously referred to as that of the reasonable competent solicitor, the ordinary competent solicitor, and the ordinary prudent solicitor.

A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.<sup>5</sup>

### **To Whom Does a Lawyer Owe a Duty?**

A solicitor advising an estate trustee owes a duty of care to his or her client. It is important to remember that the estate trustee is the solicitor's client and not the estate *per se*. A solicitor working for an estate trustee is often referred to as the "estate solicitor" (as is the case in this paper), but the distinction must not be lost.

When a solicitor represents a testator, courts have extended a lawyer's duty of care to include non-clients, including beneficiaries and third parties who have suffered a loss due to the negligence of a solicitor (commonly referred to as "disappointed beneficiary"

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<sup>4</sup> *Coughlin v. Comery* (1996), O.J. No. 822 (Gen. Div.) at para. 21 aff'd (1998), O.J. No. 4066 (Ont. C.A.), See also *Tiffin Holdings Ltd. v. Millican et al* (1964), 49 D.L.R. (2d) 216 at para. 219.

<sup>5</sup> *Central Trust Co. v. Rafuse* (1986), 75 N.S.R. (2d) 109 (S.C.C.) at para. 59.

claims).<sup>6</sup> However, applying these principles, in the course of solicitor advising an estate trustee where there are contested matters, a duty of care may be owed to the beneficiaries or potential beneficiaries and the solicitor must govern him/herself accordingly.

### **Solicitor's Duty to Parties Adverse in Interest**

In *De Los Reyes v. Timol*<sup>7</sup>, the defendant was a solicitor, Yunus Timol (“**Timol**”), who had been retained by the estate trustee, (“**Phekoo**”). Phekoo had been named as the executor in the deceased’s 1994 Will. The plaintiff, Georgina De Los Reyes (“**De Los Reyes**”), was a beneficiary named in a holograph will that pre-dated the 1994 Will. Timol moved for summary judgment to dismiss a claim for breach of fiduciary duty brought by De Los Reyes against Timol.

The facts are as follows: After being retained by Phekoo, Timol became aware that the De Los Reyes was in possession of the pre-1994 holograph will. On the instructions of Phekoo, and with notice De Los Reyes, Timol applied for certificate of appointment of an estate trustee with a will. Timol did not specifically advise De Los Reyes that the 1994 Will would be probated.

Upon obtaining the certificate of appointment, Phekoo conveyed real property, an asset of the estate, to his daughter for less than market value. In the meantime, Timol became aware that De Los Reyes had obtained an opinion that the signature on the 1994 Will was a forgery.

Phekoo and De Los Reyes entered into a settlement and a consent judgment was issued providing for the authenticity of the holograph will, the payment of certain funds to the De Los Reyes, and the release from liability to Phekoo. De Los Reyes was represented

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<sup>6</sup> See *Earl v. Wilhelm* (1997), 18 E.T.R. (2d) 191; aff’d (2000), 31 E.T.R. (2d) 193 (Sask. C.A.), *Hall v Bennett Estate* (2001), 40 E.T.R. (2d) 65 (Ont. C.A.). See also B. Croll & M. Yach, eds. *Key Developments in Estates and Trust Law in Ontario* (Aurora, Ont.: Canada Law Book, 2008), Archie Rabinowitz, “Solicitor’s Liability”, 197 to 209.

<sup>7</sup> (2000), 31 E.T.R. (2d) 44 (Ont. S.C.J.). See also L. Sheard, “Solicitor’s Liability and Recent Decisions in Estate Cases”, *15 Minutes Estates & Trust Lawyer*, (Hamilton Law Association: February 6, 2003).

by various solicitors during the proceedings and, at times, represented herself. De Los Reyes ultimately asserted that Timol had breached his fiduciary duty by obtaining a certificate of appointment at a time when the authenticity of 1994 Will was being challenged.

De Los Reyes' action was dismissed. The judge held that Timol, as solicitor for the estate trustee, owed no duty De Los Reyes, a party seeking to challenge the 1994 Will. Timol did not owe a fiduciary duty to De Los Reyes since Timol's loyalty was in representing Phekoo who was adverse in interest to De Los Reyes. Timol did, however, have a duty not to mislead the court. However, the court found that Timol did not mislead the court in the circumstances. The court further noted that if Timol acted improperly to the detriment of the estate, then De Los Reyes' recourse lay with the trustee, Phekoo, and not Timol. However, if Phekoo was sued, Phekoo could then, in turn, claim against Timol.

### **Delegation by a Trustee and Duty of Care**

While the delegation of decision-making duties by a trustee is not permissible, section 20 (1) of the Ontario *Trustee Act*<sup>8</sup>, allows a solicitor, with the estate trustee's instructions, to receive and disburse money under a trust. However, a trustee's liability is not exempt for money retained by a solicitor, as the solicitor is, in the end, an agent of the trustee.

When delegating, the trustee must exercise his or her duty of care when selecting an agent and proper supervision of the trustee is crucial. A trustee who employs a solicitor, even one with an excellent reputation, will be found liable if the solicitor misappropriates trust funds.<sup>9</sup> In the end, reputation alone is not enough to shield a trustee from liability.

When an agent (i.e. solicitor) is negligent, a trustee can sue the agent for negligence. A beneficiary can sue the trustee if the trustee fails to sue the agent. However, an agent is

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<sup>8</sup> R.S.O. 1990, Chapter T. 23 (as amended).

<sup>9</sup> See *Low v. Gemley*, [1890]18 S.C.R. 685 (S.C.C.).

not liable to a beneficiary *per se* and no cause of action arises between a solicitor and a beneficiary during the administration of the estate. However, and as mention above, it is arguable that the courts could extend a solicitor's liability to a beneficiary regarding the administration of an estate; the courts have extended the duties of solicitors before. Nevertheless, extending a solicitor's duty to a beneficiary with respect to the administration of the estate is fraught with difficulties, the most obvious being the difficulty a solicitor would have in serving "two masters".

In *Wagner v. Van Cleeff*<sup>10</sup>, Ms. Wagner ("**Wagner**") was an Austrian resident who came to Canada to settle the estate of her deceased sister. Wagner asked Mr. Van Cleeff ("**Van Cleeff**") for assistance with respect to administrating her sister's estate. Van Cleeff introduced her to a solicitor and Wagner ultimately executed a power of attorney allowing the solicitor to deal with the administration of the estate.

The solicitor suggested that appointment of Van Cleeff as estate trustee. Van Cleeff was duly appointed but then promptly delegated the administration of the estate to the solicitor. The solicitor eventually absconded with the bulk of the estate assets. Wagner alleged than Van Cleeff improperly discharged his duties in administrating the estate by delegating his duties and not properly supervising the solicitor.

Wagner's action was initially dismissed on the grounds that Van Cleeff never assumed the duties of an estate trustee and even if he had, the court held that section 35 of the *Trustee Act* relieved him of all liability. Wagner appealed and the appeal was ultimately allowed.

On appeal, the court found that Van Cleeff did not breach his duty in selecting the lawyer as an agent. However, Van Cleeff was in breach of his duties by completely delegating his responsibility as trustee and failing to supervise the lawyer. As such, Van Cleeff was not relieved of his personal liability.

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<sup>10</sup> (1991), 5. O.R. (3d) 477 (Ont. Div. Ct.).

While the solicitor in *Wagner v. Van Cleeff* was obviously a rogue, lessons for both the estate trustee and the estate solicitor can be drawn from the decision. The lesson for the estate trustee is obvious; an estate trustee cannot blithely delegate his or her authority to an agent, including the estate solicitor. Moreover, even when a solicitor plays an active role in the administration of the estate, he or she must be properly supervised. With respect to the estate solicitor, the estate solicitor must guard against the estate trustee abandoning his/her role as estate trustee and delegating control and decision-making to the estate solicitor. Such an outcome may seem easier on its face, but is usually a recipe for disaster.

## **Lawyer's Liability when a Trustee Commits a Breach of Trust**

### **Constructive Trustee**

A stranger to a trust is anyone not validly appointed as the trustee, including a solicitor. A stranger to a trust is not liable merely for acting as agent of a trustee who is in breach of trust.

The Supreme Court of Canada in *Citadel General Insurance Co. v. Lloyd's Bank of Canada* (“**Citadel v. Lloyd's**”) found there are three ways a stranger to the trust may be held liable as a constructive trustee for breach of trust: (1) as a knowing assister; (2) as a knowing receiver of trust property (what the court called “knowing receipt and dealing” head of liability); and (3) as a trustee *de son tort*.<sup>11</sup>

A *knowing assister* is a stranger to the trust who, with knowledge, assists the trustee in the trustee's dishonest and fraudulent breach of trust. It is axiomatic that a knowing assister will be liable to the beneficiaries for losses sustained and/or profits made. The knowledge requirement of the knowing assister can be satisfied by actual knowledge, recklessness, and willful blindness. Constructive knowledge, that is knowledge of circumstances which would indicate the fact to an honest person, or knowledge of facts

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<sup>11</sup> [1997] 3. S.C.R. 805 at para. 19.

which would put an honest person on inquiry, was specifically excluded by Iacobucci J. writing for the majority.

*A knowing receiver* is a stranger who receives trust property lawfully and not for his own benefit, but then deals with it in a manner inconsistent with the trust. Liability on the basis of “knowing receipt” requires that the stranger to the trust receive or apply trust property for his or her own use and benefit.

The stranger must receive or apply trust property for his own use and benefit rather than as an agent of the trustee. In such circumstances, the stranger is liable for breach of trust. The court explains the distinction between agent and knowing receiver in *Citadel v. Lloyd's*. A bank employee received the property for the use and benefit of the bank. In collecting money for a customer, the banker is the customer’s agent. However, when the bank collects money to reduce the customer’s overdraft which was extended to the customer by the bank, it receives money for its own benefit and becomes a knowing receiver.<sup>12</sup>

The knowing assister and knowing receiver are different strangers to the trust in that a knowing assister will not possess trust property in any form, but will be liable for his conduct in breach of trust.<sup>13</sup>

A trustee *de son tort*, or what is commonly referred to as a defacto trustee, is one who has acquired (or has the means to acquire) ownership of the trust property and gets involved in order to undertake the administration of the trust. This category of “stranger liability” is the one that will most likely apply to a solicitor who does not knowingly engage in a breach of trust by acting dishonestly.

To be liable as trustee *de son tort*, strangers to the trust must commit a breach of trust while acting as trustees. Such persons are not appointed trustees but “take on themselves

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<sup>12</sup>**Ibid.** at para. 26.

<sup>13</sup> *Air Canada v. M. & L Travel Ltd.*, [1993] 3 S.C.R. 787.



to act as such and to possess and administer trust property”. The solicitor must assume the office or function of a trustee and/or administer the trust funds on behalf of a beneficiary.<sup>14</sup>

Those who purport to be trustees *de son tort* are subject to the same liability as a trustee. They are subject to fiduciary obligations and applicable standards of care.<sup>15</sup>

### **Estate Solicitor as Trustee *de Son Tort***

In *Rooney Estate v. Stewart Estate*<sup>16</sup>, the solicitor for the estate trustee, Carlo Cimetta (“**Cimetta**”), was alleged to have committed several breaches of trust in the administration of the estate.

Mary Stewart died on December 19, 2000. The Stewart Estate was valued in excess of \$600,000 with the residue of the estate left to Joan Rooney (“**Rooney**”). Rooney died while the estate was being administered. The applicant, Jane Luedtke (“**Luedtke**”), was the estate trustee for the Rooney Estate. Luedtke sought an order requiring the estate solicitor, Cimetta, to pass his accounts in the Stewart Estate with the principal issue being the legal fees and disbursements made by Cimetta.

Luedtke submitted that Cimetta became the trustee *de son tort* when he exercised authority that he lacked. Luedtke submitted that Cimetta engaged in breaches of trust as defacto estate trustee by: (1) paying himself double compensation for performing solicitor’s work and estate trustee’s work; (2) recommending compensation for his client, the estate trustee, at the standard 5% without reducing compensation for estate trustee work Cimetta performed; (3) charging fees that exceeded *quantum meruit* in relation to the size and complexity of the estate thereby reducing the beneficiary’s share of the estate; (4) demanding releases from the beneficiary before delivering his estate accounts; and (5)

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<sup>14</sup> *Citadel v. Lloyd’s* at para. 20.

<sup>15</sup> *Waters*, 1214.

<sup>16</sup> (2007), CarswellOnt 6560.

failing to recommend independent legal advice for the beneficiary before she signed a release.

Cimetta stated that Luedtke's claim was essentially a claim for an assessment of his accounts and statute barred. He also relied on the equitable defence of laches and section 20(1) of the *Trustee Act* to act as agent for the estate trustee.

The court rejected Cimetta's arguments and found that the estate trustee had delegated nearly all the administration of a simple estate to Cimetta. The court found that Cimetta owed a fiduciary duty to the beneficiary in respect of her beneficiary interest.

The court went on to define the distinct roles of the estate trustee and the estate solicitor together with their respective duties.

The court held that the estate trustee is responsible for:

- Arranging for the funeral and disposition of remains;
- Locating the will and instructing the solicitor to apply for the appropriate grant of appointment;
- 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;
- Advertising for creditors and paying all debts of the estate, including the filing of appropriate tax returns;
- Preparing a set of accounts for the approval of the beneficiaries or the court, as is required; and
- Distributing the estate.

The court accepted that an estate trustee can retain counsel to help with the estate and noted that the trustee could not expect to receive compensation for services performed by others who, in turn, charged the estate for those services.

The court identified the role of the estate solicitor as follows:

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 [the solicitor's client] 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 correspondingly reduced].<sup>17</sup>

It is once again important to note that the solicitor's client is the estate trustee not the estate. With respect to the solicitor's account for legal work carried out on behalf of the estate, as opposed to the trustee personally, the solicitor is entitled to be paid for his/her accounts from the estate. Cimetta erred in rendering a blended account to the estate.

Moreover, the court found that a solicitor for an estate trustee who crosses the line from agent to estate trustee will be held to be a trustee *de son tort* and called to account. Cimetta was ordered to repay certain sums that he had billed the estate.

### **Estate Solicitor Breaching their Duties as a Lawyer**

In some situations, a solicitor will have to wear two hats. When a solicitor is appointed as the estate trustee, the solicitor's duty of care relates to not acting as a solicitor, but as an estate trustee. However, a solicitor may be relieved of liability for his or her actions as estate trustees, but not for his or her actions when wearing his or her solicitor's hat.

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<sup>17</sup> Rooney at paras. 21 to 23.

In *Linsley v Kirstiuk*<sup>18</sup>, the plaintiffs brought a claim for damages for a breach of trust against two co-estate trustees; one trustee was a solicitor and the other one was an accountant. The plaintiffs also sued the solicitor co-estate trustee's firm.

The accountant was excused for a breach of trust under a section of the British Columbia's *Trustee Act* similar to section 35 of the Ontario *Trustee Act*. The court found that he had acted reasonably and honestly in relying on the advice of his co-trustee, who was also the solicitor for the estate.

The solicitor, in his capacity as co-estate trustee, was found to be in breach of trust for failing to sell the assets of the estate in a timely fashion as required under the will.

The law firm was negligent in failing to give proper legal advice; even though the firm was not specifically asked to give an opinion with respect to the conversion of assets it was aware of the trustees' actions.

It is not clear in the decision if the solicitor breached the trust in his capacity as a trustee or as solicitor of the estate but he was held jointly and severally liable with his law firm to the plaintiffs.

In the English trust case, *Learoyd v. Whiteley*<sup>19</sup> a co-trustee who was also a solicitor was not held to a higher standard of care by virtue of being a solicitor, but the court did hold him liable in his role as solicitor. In his dual role, the court noted that he was deemed to know the law regarding the filing of income taxes returns and it was his duty as a solicitor to determine the deadlines. He was held personally responsible in his role as a solicitor for such losses.

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<sup>18</sup> (1986), 28 D.L.R. (4th) 495 (B.C.S.C.).

<sup>19</sup> (1887), 12 App. Cas. 727 (U.K. H.L.). See also *Kulyk Estate, Re* (1997), 17 E.T.R. (2d) 308 (Ont. Gen. Div.).

Both *Linsley v Kirstiuk* and *Learoyd v. Whiteley* stand for the proposition that a lawyer must be cognizant of the role he or she is assuming in administering the estate. Failure to recognize the difference can quickly lead to unexpected liability.

### **Estate Solicitor's Duty to Warn of Risk**

In the Nova Scotia decision, *MacCulloch v. McInnes Cooper & Robertson*<sup>20</sup>, a solicitor, Stewart McInnes (“**McInnes**”), was negligent for failing to advise his client, one of the executors, of her obligations as executor when she purchased trust property from the estate.

Mrs. Patricia MacCulloch (“**MacCulloch**”) was the surviving spouse of the deceased, Charles MacCulloch, and one of four executors named in his will. In addition to other bequests, MacCulloch was to have exclusive use of a farm as her principal residence and the estate was to pay all taxes and upkeep maintenance for the farm.

The estate ran into liquidity problems and MacCulloch proposed to purchase the farm outright from the estate and obtain uncontested title to a Toronto condominium in exchange for \$500,000. The estate accepted her proposal. MacCulloch subsequently sold the farm for \$1,350,000 and the Toronto condominium for \$485,000.

The Bank of Nova Scotia petitioned the estate into bankruptcy and a trustee in bankruptcy reviewed the transaction between MacCulloch and her husband's estate. The trustee in bankruptcy brought an action against MacCulloch seeking an accounting with respect to the property purchases.

The court found that MacCulloch had breached her duty by purchasing the estate property, but owed no duty to the trustee in bankruptcy and dismissed the claim. The trustee in bankruptcy appealed and the Nova Scotia Court of Appeal found the MacCulloch liable to account for the proceeds on the resale of the properties.

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<sup>20</sup> 2001 CarswellNS 286, leave to appeal refused, 2001 CarswellNS 8.

After being successfully sued, MacCulloch decided to sue McInnes. McInnes and his firm were found negligent in preparing the agreements for the sale of the properties without court approval in advance. McInnes, in turn, appealed the trial judge's decision.

In analyzing the grounds for appeal, the Nova Scotia Court of Appeal assessed if McInnes was negligent. In assessing the solicitor's conduct and standard of care, the court noted that McInnes had ignore the opinion of a Toronto lawyer that there was an absolute prohibition which prevented an executor from purchasing assets of the estate and to not purchase the property without first obtaining court approval.

Instead, McInnes believed that a clause in the will permitted the estate trustees to sell assets to family members. McInnes decided to elect to proceed with the sale to MacCulloch without court approval, but with consents obtained by the other beneficiaries.

The court noted that the problem was not that McInnes chose a course of action which did not provide protection to MacCulloch (and presumably the other three other executors), but failed to research the issue or advise MacCulloch of her options once he had been alerted to the problem.<sup>21</sup> The court found that McInnes had failed to research the issue and/or advise MacCulloch of the risks and, as a result, failed to meet the standard of care required by an estate solicitor. McInnes' appeal was therefore dismissed.

## **Relief from Liability for Client's Breach of Trust**

### **1. Statue**

Section 20 (1) of Ontario *Trustee Act*, allows a solicitor, with the estate trustee's direction, to receive and disburse money under the trust as agent for the trustee.

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<sup>21</sup> **Ibid.** para. 36

Despite statute protection, the estate trustee must still abide by common law and equity principles. While the solicitor is entitled to rely on this provision, it does not bar the application of an equitable remedy.<sup>22</sup>

## **2. Advising the Estate Trustee of their Duties**

The solicitor for the estate trustee should make it very clear to their client what their duties and obligations are. The solicitor should provide their client with a checklist of their responsibilities and associated liabilities (see *Rooney Estate* above).

Providing a client with a detailed retainer detailing the estate solicitor's role, and sticking to that role, will discourage an estate trustee from later claiming that the estate solicitor was the defacto trustee or that administering the estate was largely the responsibility of the solicitor. A solicitor would be prudent to confirm instructions from the client in writing before undergoing any estate trustee work.

## **3. Protection from Potential Conflicts of Interest**

Representing multiple estate trustees may lead to a potential for conflict of interest. At the time of the retainer, the estate trustees should be advised that if conflict arises among them, the remedies available to the trustees include applying to the court for directions or the removal of one or more of the estate trustees.

Where a solicitor represents multiple clients, the solicitor should scrupulously avoid meeting with one of the estate trustees one-on-one, as only problems can arise.

As stated throughout this paper, the solicitor's client is the estate trustee. In cases of possible support claims against the estate, the estate solicitor is not under an obligation to advise potential beneficiaries of their right to make a claim from the estate. If requested, the solicitor should advise a potential claimant to seek independent legal advice.

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<sup>22</sup> *Rooney Estate* at para. 42.

#### 4. Order for Directions

In general, an estate solicitor should be aware of the provisions of Rule 14 of the Ontario *Rules of Civil Procedure* and the commencement of proceedings by way of application. Utilizing Rule 14 and Rule 75.06 proactively may help avoid a breach of trust by the estate trustee.

Rule 14.05(3) states that a proceeding may be brought by application where the rules authorize the commencement of a proceeding by application or where the relief claimed is, among other things:

- the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of an estate;
- an order direction executors, administrators or trustees to do or abstain from doing any particular act;
- the removal or replacement of one or more executors; and
- the determination of rights that depend on the interpretation of a deed

For example, an estate solicitor may provide the estate trustee with an incorrect interpretation of the will or trust document. If there is any lack of clarity and the solicitor is uncomfortable interpreting the will or trust document, the solicitor should advise the estate trustee to obtain a formal written legal opinion from a lawyer who is comfortable providing such an opinion. Moreover, Rule 14.05(3) (d) of the Ontario *Rules of Civil Procedure* specifically allows the estate trustee to formally apply to the court for the determination of rights that depend on the interpretation of a deed or will.

For its part, Rule 75.06(1) states that any person who appears to have a financial interest in an estate may apply for directions. Under Rule 75.06(3), the court may direct the issues to be decided, procedures for bringing the matter before the court in a summary fashion, etc



The solicitor may also advise the estate trustee to seek the advice of the court in managing the trust property pursuant to section 60(1) of the *Trustee Act*.

An estate solicitor advising an estate trustee, who is not sure if all heirs are ascertained, should be advised to apply to the court for a determination of the issue to ensure that distribution is made to proper beneficiaries. As stated above, the application can be brought pursuant to Rule 14.05(3) of the *Rules of Civil Procedure*.

## **5. Trustee *de son tort*/Defacto Trustee**

A beneficiary may sue an estate solicitor when the solicitor takes over or assumes responsibility for the administration of the estate from the estate trustee.

When an estate solicitor becomes a defacto estate trustee, their protection from liability as an agent of the trustee ends and they become personally liable to the beneficiaries for any breach of trust. A solicitor should therefore be careful to not act without the written instructions of their client when assisting in the administration of estate so as to avoid the charge that he or she becomes the defacto estate trustee. Authority to make decisions affecting the estate should rest with the trustee and not the solicitor.

## **6. Concurrence by Beneficiaries**

There is a common law defence available to the estate trustee or defacto trustee, if the beneficiary has requested or confirmed the breach. Agreeing to the breach can be inferred from the failure of the beneficiary to object within a reasonable time after knowledge of the breach. However, a beneficiary must have full knowledge and understand as to what he or she is consenting to. Notwithstanding the above, this is a defence that is inherently risky and any breach of trust, whether or not the beneficiaries concur, should be largely avoided or approved in advance by the court. A lawyer should be careful to properly paper his or her file.

## **7. Laches**

Finally, the defence of laches may be used to shield a solicitor from his or her client's breach of trust. Laches is an equitable doctrine, and it expresses the principle that, if the claimant permits too long a delay to ensue before he or she brings his action, the courts may dismiss his action on those ground. This is yet another defence that may be available to the solicitor when confronted by his or her client's breach of trust well after the fact.

However, once again, extreme caution is advised as laches is a defence fraught with risk. A solicitor is much better advised to flag a breach of trust to the estate trustee as soon as the breach becomes apparent and advise the client to correct the breach immediately and/or seek a court order addressing the breach and its corresponding consequences.