

Hull on Estates Podcast #26

Compensation of an Estate Trustee

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Bianca La Neve: Hi and welcome to Hull on Estates. You are listening to Episode #26 of our podcasts on Tuesday, September 19th, 2006.

Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull and Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.

David Smith: Hi, I'm David Smith, a partner at Hull & Hull LLP, and I have with me today my associate, Bianca La Neve. Hi Bianca.

Bianca La Neve: Hi David.

David Smith: Bianca, today as you said at the outset, we're talking about executor's compensation and you and I both know from our practice that this is a frequently litigated area of estate law. And indeed, the courts have dealt on many occasions with disgruntled beneficiaries who are not satisfied with the amount of compensation claimed by an estate trustee. My sense is that this is because the issue of compensation is an easy target for the rather obvious reason that it's the one area, or the one role played by the estate trustee where he or she is exhibiting some self-interest, which is inherently contradictory to the remainder of his or her role, which is to give money, if you will, to the beneficiaries.

Bianca La Neve: For sure. I think it's easier for beneficiaries to attack compensation as a whole than to actually take a good detailed look at the accounts and try to target sort of errors or problems with the accounts that they find, and the preparation of the accounts by the estate trustee.

David Smith: Do you also think quite often, Bianca, that family dynamics plays into this as well in the sense that often times you'll have siblings who are beneficiaries of an estate, whereas one of their other siblings is also the executor and it gives rise to all kinds of emotional issues and not to minimize it, but it does give rise to the issues associated with sibling rivalry and what have you, which can really create quite a high degree of animosity in family relationships.

Bianca La Neve: I think often times siblings do put their other siblings named as estate trustees under the microscope and whether this is because they are disgruntled that they weren't chosen in the role themselves, or whether they are just trying to make sure that sibling does a good job in the administration of the estate. But we've also seen situations where an outsider to the family is chosen as estate trustee, and then often times, the beneficiaries from one family will ban together and still scrutinize the actions of this non-

family member estate trustee because they feel that one of them should have been chosen in that role.

David Smith: That's right, Bianca. Having considered the fact that this is an area that's ripe with acrimony, I'd like to now turn to consider the issue of how do we determine the appropriate amount of compensation that an estate trustee will claim?

Bianca La Neve: Now, unfortunately, executor's compensation is not often fixed by the terms of the Will. You would think with all the litigation out there, probably a good practice to adopt is actually fixing compensation in the Will. But often times, it is left up to the discretion of the judge reviewing the accounts. Now Section 23.2 of the *Trustee Act* is where the court finds its authority to set the amount of compensation in an application to pass accounts. And in Section 61 of the *Trustee Act*, actually sets out the quantum of compensation that can be set by the court. Now Section 61, and I paraphrase, only really gives the court discretion, because it states that a personal representative or executor is entitled to such fair and reasonable allowance as may be allowed by a judge of the Superior Court of Justice for the care, pain, trouble and the time expended in administering the estate. And so again, you've got a provision that gives the court jurisdiction to set executor compensation but again, doesn't give the court much guidance.

David Smith: Now, Bianca, I understand that Section 61 sets out this test, but clearly the courts have played a role in elaborating upon the test, is that correct?

Bianca La Neve: That's right. The courts have developed two general approaches. The first one is the five factor approach, which was set out in the seminal case of *Re Toronto General Trust and Central Ontario Railway Company*. Now, under this approach, the court considered the following five factors in determining what is fair and reasonable compensation. The first factor is the size of the trust. The second factor is the care and responsibility involved in administering the trust. The third factor is the time spent by the estate trustee in performing his or her duties. The fourth factor is the skill and ability demonstrated by the estate trustee when performing his or her duties. And finally, the fifth factor is the success or rather perceived success resulting from the actual administration by the executor.

David Smith: That's right, Bianca. And I understand that we are going to go into those various factors in a little more detail later on. Of course, the five factors is only one aspect as you've pointed out. The second aspect is the formula, for lack of a better term, that has been employed to lend a degree of consistency to the exercise of the court's discretion. And this formula consists of 2.5% of each of capital receipts, capital disbursements, revenue receipts and revenue disbursements being applied as an objective standard, which I understand against which the five factors can be cross-referenced, if you will.

Bianca La Neve: That's right. And we can't forget that there's also a care and management fee that's been built into the percentage formula, which is 2/5ths of 1% on

the gross value of the estate. And this is based on the average yearly value of the assets, which remain to be distributed.

David Smith: Just so I understand that, Bianca, is the care and management fee applicable in every estate?

Bianca La Neve: No, David. A care and management fee would be applicable where there remain assets within the estate to be distributed. So, for example, if you have an estate where there is an outright distribution of say, \$500,000 and 5 beneficiaries each are to receive \$100,000, then once the estate trustee has distributed the gifts to each of these 5 beneficiaries, there is nothing left in the estate to administer. And so the estate trustee would not be entitled to a care and management fee because, in essence, they are not managing the estate anymore.

David Smith: Oh, I think I see, Bianca. So an example of a case in which the care and management fee would be applied would be one in which the estate trustee is managing a trust?

Bianca La Neve: That's right, and we see these in many cases of minor beneficiaries, where a deceased person has left, let's say, the bulk of their estate to minor children, or minor family members, and the trust for the minor children is to be administered by the estate trustee until that minor child reaches the age of majority.

David Smith: Now, Bianca, you spoke earlier about that case where the court implemented five factors. Now, I understand that that case was from 1905, is it still the case that the courts are applying that test, and how have the courts explained how the five factors are to be considered vis-à-vis the formula we just spoke about?

Bianca La Neve: Well in a very important case, *Re Jeffrey*, the court decided that what a judge should do first on a passing of accounts is test the claim for compensation by an estate trustee by using the percentage formula. And then the result should be cross-referenced with the five factor approach. And the Court of Appeal agreed with this approach, and the *Jeffrey* approach has been applied on a consistent basis ever since.

David Smith: But Bianca, that doesn't seem to me to be a very fair approach. What if I'm an estate trustee and I spent hours working on the estate, but all of the other four factors are not very significant. Isn't the five factor approach going to work to my detriment in such a case, and have the courts ever considered that issue?

Bianca La Neve: Actually, David, the court contemplated such a case in *Re Flaska*. Now in this case, the Court of Appeal rejected the contention by the audit judge that the executor's compensation should be calculated only on the basis of the time spent and documented by the estate trustee. Instead, the Court of Appeal confirmed the finding of the Divisional Court which allowed compensation to be charged at a rate of about 60% of the tariff rate. It's worth noting that in this case, the estate trustee did not actually keep any time records.

David Smith: Well, and that's an interesting point. I suppose on reflection, Bianca, the point that I made about the time spent as being the fairest determinant of compensation could lead to abuse. There is a case *Re Andrewchuk Estate* in which the estate trustee actually had the audacity to docket the time that they spent attending the funeral of the deceased. And of course, something such as that is clearly offensive and is an example of abuse that can arise where too much focus is placed by the estate trustee on the documented time.

Bianca La Neve: That's right. And really, what the courts have done is the five factor approach and the percentage approach, it doesn't mean. And it should be noted that the courts don't always have to apply each of the five factors before they cross-check it with the percentage value or vice versa. The Court of Appeal in *Re Gordon* held that an audit judge does have the discretion not to refer to each of the five factors when cross-checking to the percentage approach.

David Smith: So, really, to a large extent, as with any other kind of litigation, the outcome will depend, to a great extent, on the judge that you have at the hearing, and his own sense of the work spent by the estate trustee and the value of that work.

Bianca La Neve: That's right. And a good illustration of how the court has applied the five factors to the specific facts of a case is the 2004 decision in *Chaney vs. Byrne*. And in this case, the court did consider each of the five factors. For example, in noting the size of the estate, the court noted that it was impressive at \$2.5 million dollars. The court noted that the estate trustees had to exercise quite a bit of care and responsibility because the deceased had papers strewn all over his apartment and the executors had to do a lot of work to actually organize and sort out the deceased's various holdings. The time occupied by the estate trustees was quite substantial and this is also because a lot of the deceased's holdings were in various stock holdings and in different countries. And so the court recognized the time, the care, the skill employed by the estate trustees when looking at the five factors and when setting their compensation.

David Smith: You know, Bianca, I remember this case now. And there was also the discussion in *Chaney* as I recall about whether or not you should reduce the percentage if you were dealing with a simple transaction involving a large amount of money. For example, the transfer of \$500,000 out of a bank account would, by the application of the formula, attract compensation of 2.5%. The argument could be that that clearly would be an excessive amount of compensation and as I understand the court in *Chaney*, said that the way to deal with that situation was not to reduce the amount of the formula applied, but rather to deal with whether or not that was excessive compensation by a judicious application of the five factors' approach.

Bianca La Neve: That's interesting. And I think we should also mention that a court can consider a claim for compensation over and above the amount that would be awarded under the five factors' approach and the percentage guideline.

David Smith: Is that a special fee, Bianca?

Bianca La Neve: I think that's what they called it, yes. And some special fees have been awarded in cases where, let's say, the estate trustee has undertaken litigation on behalf of the estate and has been successful, or an estate trustee has had to manage a company, in cases of bankrupt estates or estates of nominal value where there has been a lot of activity by the estate trustee to actually organize the estate and distribute whatever there is in the estate and deal with competing claims against the assets of the estate. While it's not impossible to get a special fee for extra time and work by an estate trustee, I have found, David, that it is a hard argument to make in front of a court.

David Smith: Isn't the other problem, too, that a claim for a special fee is really a red flag to the beneficiaries, and it's hard to imagine that the beneficiaries, however compliant and co-operative they may be, it's hard to believe that they will willingly accept a special fee. And in fact, as I said, I think it's a bit of a red flag in the sense that it's clearly demonstrating to the beneficiaries that the estate trustee is arguably placing his or her own interest in being paid for what he or she did ahead of the duty owed to the beneficiaries.

Bianca La Neve: That's right, David. We'll be returning to the issue of executor compensation in our podcast next week. But for now, we invite you to e-mail us with any comments on today's session, or leave a post on our blog page. Thanks.

David Smith: Thanks Bianca.

This has been Hull on Estates with the lawyers of Hull and Hull. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.

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