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TRUSTEE COMPENSATION, SPECIAL FEES, AND THE ROLE OF THE LAWYER FOR THE ESTATE TRUSTEE

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The role of an estate trustee[1] is often thrust upon a family member or friend and can bring with it a range of unfamiliar responsibilities and obligations. Sometimes the tasks required of the estate trustee may be straightforward and accomplished with minimum effort, however, often the estate trustee is required to expend considerable time and effort in problem resolution. Once the estate is fully administered the estate trustee is entitled to reasonable compensation that can, in most cases, be agreed upon. Where unusual effort has been required of the estate trustee a higher level of compensation may be sought. How is that compensation to be quantified - and how are differences in expectations between the trustees and the beneficiaries to be resolved?

This paper examines estate trustee compensation in general, requests for special fees and the role of the lawyer for the estate trustee in the determination of same. Particular attention is directed to issues resulting from expectations of compensation in excess of that normally awarded for cases of similar complexity and estate size.

Trustee Compensation

In acting for the estate a trustee is entitled to compensation for the services rendered in administering the estate, in addition to the costs/expenses incurred in the role of trustee on the basis of reimbursement.[2] Under the *Trustee Act* (Ontario) [the "**Act**"][3] trustees are entitled to be compensated for their services on the passing of accounts.[4] As the Act does not specify how the trustee's compensation should be quantified, the Court looks to the common law to determine what it should be.

The Ontario Court of Appeal commented in *Re Atkinson Estate* ["***Atkinson***"][5] that compensation must be determined in light of the language of the statutory provision that provides for it.[6] At the time of the *Atkinson* decision, subsection 60(3) of the 1950 *Trustees Act* (Ontario)[7] employed substantively the

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[1] For the purposes of this paper, the terms trustee and estate trustee will be used interchangeably and shall include an "Estate Trustee" as defined in Rule 74.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as well as a trustee of an *inter vivos* trust as applicable.

[2] *Worrall v. Harford* (1802), 32 E.R. 250 (Ex. Ch.); See also Donovan W.M. Waters, Mark R. Gillen & Lionel Smith, *Waters' Law of Trusts In Canada*, 4th ed. (Toronto: Carswell, 2012) at 1208 [Waters].

[3] *Trustee Act*, R.S.O. 1990, c. T.23.

[4] *Trustee Act*, *ibid*. ss. 23, 61; See also *Rules of Civil Procedure*, *supra* note 1, R. 74.17(1)(i):

> … accounts filed with the court shall include,
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> (i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the asset of the estate, a statement setting out the method of determining the value of the assets

[5] *Atkinson Estate, Re* (1951), [1952] O.R. 685, 1951 CarswellOnt 404 at paras. 17-18 (C.A.) [*Atkinson*].

[6] *Atkinson*, *ibid*. at para. 15.

[7] *Trustee Act*, R.S.O. 1950, c. 400.

same language that exists today in subsection 61(1) of the Act.[8] These provisions provide that an individual acting in the capacity as a trustee will be entitled to compensation for the "care, pains and trouble, and the time expended in and about the estate"; the compensation to be determined by a judge of the Superior Court of Justice.

The Court of Appeal further explained that the convention of applying established percentages in devising estate trustee compensation, while a useful guide, should not be adhered to slavishly. The Court commented the following:

> …[D]epending upon the idiosyncrasies of the particular estate, the care, pains and trouble and time expended may be disproportionate to the actual size of the estate. A small, complex estate may make more demands upon the trustee's care and time and skill than a much larger estate of a simpler nature; conversely, even in a large estate with many complex problems, assessment of the compensation by the adoption of what might be said to be "the usual" percentages would result in a grossly excessive allowance. …[9]

In the later decision of *Re Laing Estate* ["***Liang Estate***"], the Ontario Court of Appeal revisited the issue of what constitutes reasonable compensation for estate trustees and determined that the two approaches developed in the common law should be applied together.[10] First, the "tariff guidelines" approach is applied based on a percentage of the estate.

The tariff guidelines are:

(i) 2.5% charged on capital receipts, capital disbursements, revenue receipts, and revenue disbursements; and

(ii) if the estate is not immediately distributable, an annual care and management fee of 2/5 of 1% of the average value of the gross assets under administration per annum.[11]

Once an amount has been determined under the tariff, the court will then determine whether that amount is "fair and reasonable" by considering five different factors.

The five factors are:

(i) the size of the trust;

(ii) the care and responsibility involved;

(iii) the time occupied in performing the duties;

(iv) the skill and ability shown; and

(v) the success resulting from the administration.[12]

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[8] *Trustee Act*, *supra* note 3, s. 61(1):

> 61. (1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.

[9] *Atkinson*, *supra* note 5 at para. 18.

[10] *Laing Estate, Re* (1998), 113 O.A.C. 335, 1998 CarswellOnt 4037 (C.A.).

[11] *Jeffery Estate, Re* (1990), 39 E.T.R. 173, 1990 CarswellOnt 503 at para. 13; See also *Farmers' Loan and Savings Company* (1904), 3 O.W.R. 837 #2, 1904 CarswellOnt 462 (Chambers).

[12] *Toronto General Trust Corp. v. Central Ontario Railway Co*. (1905), 6 O.W.R. 350, 1905 CarswellOnt 449 at para. 20 (Weekly Court).

Special Fee

Except where the instrument creating the trust or statute fixes the compensation of the trustee, the Court has the discretion to reduce or increase the compensation awarded. Fees above what would ordinarily be permitted may be justified in certain circumstances and are often referred to as "special fees." In *Bluestein Estate v. Bluestein* ["***Bluestein***"], the Ontario Superior Court explained as follows:

> Claims for special fees are justified where extra or specialized work by the estate trustee is necessary as a result, for example, of the complexities in the administration arising from the nature of the assets, taxation problems, numerous categories of beneficiaries or litigation by or against the estate. The estate trustee must establish that the special work performed was outside the "average" estate such that the estate trustee would not be compensated adequately for all the work required to be done.[13]

Therefore, a trustee wishing to claim fees in addition to what would normally be awarded must establish that they engaged in tasks related to the administration of the trust that were not contemplated by the headings of core compensation under the tariff. To do so, the claimant must demonstrate that without an award for special fees, he or she would be under-compensated for the work properly performed while administering the estate.[14]

In *Bluestein*, part of the special fee awarded was in recognition of additional work incurred by the estate trustee in addressing various issues including resolving an oil spill, pursuing an insurance claim and processing the sale of the house belonging to the estate.[15] Other cases have seen awards of special fees for time-consuming tasks, such as efforts required for the management and disposal of properties belonging to the estate,[16] or excessive travel time required for the trustee to administer the estate;[17] difficult tasks, such as valuing and liquidating an estate's art collection and collectables;[18] and for extraordinary tasks, such as determining how payments from the Canadian Blood Agency in compensation for tainted blood should be distributed.[19]

Professional Services

In *Re Jones* ["***Jones***"], the Ontario Surrogate Court established that extra work required of the estate trustees to calculate the value of the estate assets would, in certain circumstances, justify the award of a special fee above and beyond the typical compensation warranted for an estate of that size. The Court found that the work required by the trustees to calculate the value of the estate's assets in light of recent changes to capital gains treatment in the *Income Tax Act* was such an instance.[20]

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[13] *Bluestein Estate v. Bluestein* (2000), 33 E.T.R. (2d) 18, 2000 CarswellOnt 1054 at para. 20 (S.C.J.) [*Bluestein*].
[14] *Boje Estate, Re*, 2006 ABQB 599, 25 E.T.R. (3d) 214, 2006 CarswellAlta 1032 at para. 75, *A.T.A. v. Calgary Board of Education*, 2006 ABQB 817, 69 Alta. L.R. (4th) 261, 2006 CarswellAlta 1724 at para. 32.
[15] *Bluestein*, *supra* note 13 at para. 21.
[16] *Bellomo Estate, Re* (1989), 36 E.T.R. 123, 1989 CarswellOnt 541 at para. 10 (Dist. Ct.).
[17] *Frye Estate*, *Re*, 1992 CarswellOnt 1888 at para. 59 (Gen. Div.) [*Frye*].
[18] *O'Brien Estate v. O'Brien* (1996), 21 O.T.C. 264, 1996 CarswellOnt 4885 at para. 25 (Gen. Div.) [*O'Brien*].
[19] *Ibid*.
[20] *Jones, Re* (1973), 1 E.T.R. 88, 1973 CarswellOnt 218 (Surr. Ct.); contra *Campin Estate, Re* (1992), 49 E.T.R. 197, 1992 CarswellOnt 549 at para. 3 (Gen. Div.).

Similarly, in *Bluestein* the trustee was allowed a claim for a special fee based, in part, on accounting services rendered. The Court commented that whether "income tax advice and the preparation of terminal and estate tax returns is allowed as a charge against the estate depends upon a number of factors including the complexity and size of the estate."[21] In making that comment, the Court was mindful of the holding in *Re Goldlust Estate* ["***Goldlust***"][22] where the trustee was permitted a claim for special fees for accounting advice based on the complexity of the testator's personal and corporate financial affairs.

The *Goldlust* decision was, in turn, based on *Re Miller Estate* ["***Miller***"],[23] wherein the Court held that accounting services were specialized services that were not within the scope of the expertise ordinarily expected of an estate trustee. Accordingly, the Court held that the estate should compensate the trustee for engaging these services in the form of a special fee and not take them out of the regular compensation. However, it is significant to note that the special fee awarded in *Bluestein* was reduced on the basis that the estate trustee was a chartered accountant and the estate was of average size and complexity. The remainder of the fee claimed by the trustee was considered part of the estate trustee's compensation.[24]

These examples show that while compensation for services and reimbursement are technically separate concepts, the Courts sometimes address them together. It is not permitted for the trustee to be paid twice for the same service, and if the task could have been done by the trustee personally normal compensation should be sufficient.[25] However, in the context of professional skills, the Act permits estate trustees to engage experts and be reimbursed for their professional fees where a higher degree of skill or expertise is required.[26]

The Supreme Court of Canada has confirmed that the trustee will generally be entitled to the costs associated with bringing or defending judicial proceedings if these proceedings are for the benefit of the estate.[27]

The Supreme Court decision in *Goodman Estate v. Geffen* ["***Goodman***"] demonstrates that a trustee will be permitted to recover costs if it is appropriate to bring an application before the court.[28] However, the court will be justified in denying the trustee costs where they were incurred unreasonably or

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[21] *Bluestein*, *supra* note 13 at para. 25.
[22] *Goldlust Estate, Re* (1991), 44 E.T.R. 97, 1991 CarswellOnt 546 (Gen. Div.).
[23] *Miller Estate, Re* (1987), 26 E.T.R. 188, 1987 CarswellOnt 644 (Surr. Ct.).
[24] *Bluestein*, *supra* note 13 at para. 25.
[25] Discussed further in *Quantification of Special Fees* below.
[26] *Trustee Act*, *supra* note 3, s. 61(4).
[27] *Goodman Estate v. Geffen,* [1991] 2 S.C.R. 353, 1991 CarswellAlta 91 at para. 75 [*Goodman*].
[28] *Goodman*, *ibid*. at para. 79.

in substance for the trustee's own benefit.[29] To this end, legal costs are subjected to closer scrutiny to guard against spurious litigation instigated for reasons other than the benefit of the estate.[30]

This principal was recently reiterated by Brown J. in *Salter v. Salter Estate* ["***Salter***"] where he commented that,

> A view persists that estates litigation stands separate and apart from the general civil litigation regime. It does not; estates litigation is a sub-set of civil litigation. Consequently, the general costs rules for civil litigation apply equally to estates litigation - the loser pays, subject to a court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described in *McDougald Estate*. Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation. Quite the contrary. Given the charged emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle of "loser pays" in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes.[31]

Apart for the appropriateness of reimbursement for costs incurred in litigation, the Courts have found that where the trustee is required to contribute extensive time facilitating the litigation he or she should be compensated for that effort. In *Re Stanley Estate* ["***Stanley***"], the Ontario Court of Justice found that a special fee for the estate trustee was warranted because dealing with a lawsuit is not a task normally expected of a trustee.[32] Furthermore, the special fee may be accessible even in the situation of a complicated passing of accounts.[33]

Duty to Keep Records

The onus is on the estate trustee to ensure the accuracy of the accounts submitted at the passing of accounts.[34] In doing so, the estate trustee must keep proper records relating to both the property and expenses within the estate, and the time and effort exerted by the estate trustee during his/her administration of the estate to justify compensation. This requirement was discussed at length in *Re Frye Estate* ["***Frye***"], where the court emphasized that, estate trustees have a duty to "give to the trust property and the record keeping the same care and attention as a prudent man would give to his own personal affairs, and this includes his claim for compensation."[35]

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[29] Waters, *supra* note 2 at 1209-1210.
[30] See *McDougald Estate v. Gooderham* (2005), 255 D.L.R (4th) 435, 2005 CarswellOnt 2407 (C.A.), *Salter v. Salter Estate*, [2009] W.D.F.L. 3762, 2009 CarswellOnt 3175 (S.C.J.) [*Salter*], *Proudfoot Estate, Re*, 1993 CarswellOnt 4185 at para. 24 (Gen. Div.).
[31] *Salter*, *ibid*. at para 6.
[32] *Stanley Estate, Re* (1996), 13 E.T.R. (2d) 102, 1996 CarswellOnt 1180 at para. 7 (Gen. Div.) [*Stanley*]; See also *Thoburn Estate, Re*, [1945] O.W.N. 895, 1945 CarswellOnt 353 at para. 13 (High Ct. J.).
[33] See e.g. *Krentz Estate v. Krentz*, 2011 ONSC 4375, 66 E.T.R. (3d) 193, 2011 CarswellOnt 5886 at para. 35 (S.C.J.).
[34] *Rules of Civil Procedure*, *supra* note 4, R. 74.17:
> 74.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include [various requirements listed from (a) to (j)].

[35] *Frye*, *supra* note 17 at para. 27.

Moreover, the Court commented that there is an obligation on those claiming compensation to identify and prove the activities carried out by them, as they relate to the time expended, in sufficient detail as to satisfy the audit judge that the time is reflective of the work claimed.[36] Notably, this principle applies not only to appropriate record keeping of the estate, but also in justifying a special fee.

In assessing the validity of the special fee claimed by the trustees, the Court in *Frye* held that it was unable to determine whether certain work claimed in the special fee was in fact outside of the compensation provided in the tariff. Similarly, in *Stanley*, the Court found that there was no evidence of the specific time spent defending a lawsuit by the trustees. Although it was held that the trustees were entitled to a special fee for their time, the Court reduced their compensation because of inadequate record keeping.[37]

Quantifying the Special Fee

To quantify the amount that should be awarded for a special fee, Greer J. of the Ontario Court of Justice commented, in *Re O'Brien Estate* ["***O'Brien***"], that "[t]he setting of Special Fees is an art and not a science. It is extraordinary compensation awarded in special circumstances, the amount of which is in the discretion of the Judge."[38]

In determining what is reasonable, the general premise is that a trustee may not recover expenses that were incurred as a result of his or her own misconduct.[39] This was seen in the context of *Frye*, discussed above, where the court reduced the special fee awarded to about half of what was claimed because it was unable to clearly assess the time spent by the trustee in administering the estate.[40]

Furthermore, as discussed above under *Professional Services*, the trustee must carry out the routine tasks of the estate that a layperson is capable of performing him or herself.[41] This principle extends to situations where the estate trustee is a lawyer. Although a lawyer is statutorily entitled to a "fair and reasonable" allowance in respect of the "necessary professional services" which she or he has rendered, this does not extend to services undertaken in the capacity as a trustee.[42] In this respect, the principles apply in the same way as they would if the lawyer was a different person from the trustee. In *Bott Estate (Trustee of) v. Macaulay* ["***Bott***"], the Court reiterated that a lawyer-trustee cannot charge fees at his or her legal rates for the routine work of the estate that a trustee is expected to perform unless there was an agreement or a provision in the trust document that explicitly provided for it.[43]

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[36] *Frye*, *ibid*. at paras. 24, 29, 36-37.
[37] *Stanley*, *supra* note 32 at para. 7.
[38] *O'Brien*, *supra* note 18 at para. 27 (Gen. Div.).
[39] It follows also that expenses voluntarily assumed by the trustee may generally not be recovered.
[40] *Frye*, *supra* note 17 at par.a 56.
[41] Waters, *supra* note 2 at 1214.
[42] *Trustee Act*, *supra* note 3, s. 61(4).
[43] *Bott Estate (Trustee of) v. Macaulay* (2005), 76 O.R. (3d) 422, 2005 CarswellOnt 3743 at paras. 26-28 (S.C.J.) [*Bott*], *Solicitors, Re* (1973), 2 O.R. (2d) 104, 1973 CarswellOnt 1011 at para. 6 (Assessment Officer) (however, even

A final consideration in the exercise of discretion by the Court is the estate trustee's conduct. Where the court determines that the trustee has contributed to the complexity of the administration of the estate, it may determine that a special fee should be reduced, or is not warranted. A clear example of this would be unscrupulous behavior. In *Re Assaf Estate* ["***Assaf***"] the Ontario Superior Court commented that allegations of egregious conduct on the part of the estate trustee would impact the determination of a special fee if proved.[44]

However, it is possible that the special fee may be reduced due to the trustee's conduct even where he or she is acting in good faith. In *Re Philp Estate* ["***Philp***"],[45] the Court disallowed a special fee claimed on the basis that a residual beneficiary complicated matters unnecessarily. The Court held the estate trustees accountable for contributing to the delay, which had been caused, in part, by the beneficiary seeking legal advice after communications between him and the estate trustees broke down.

Role of Counsel

When discussing the role of a lawyer in estate matters, it bears repeating that it is not possible for a lawyer to be retained by an estate directly. An estate, which is a form of trust, is not a legal entity.

Lawyers sometimes refer to themselves as acting for the estate. This is not correct. The lawyer is in fact acting for the estate trustee, the legal owner of the assets. This principle was articulated by the Superior Court in *Bott*, where Cullity J. stated that,

> Although references to an estate solicitor are deeply ingrained in estate practice in this jurisdiction, they are descriptive only of the work a solicitor is retained to perform for his client. An estate is not a juridical person and cannot retain anyone, or incur liabilities. An estate solicitor is one performing services to a personal representative acting as such.[46]

It follows then that the duty of care owed by the lawyer in respect of the duties being performed by the estate trustee is to the estate trustee directly.

It is a duty of the trustee's lawyer to advise the trustee on how to perform his or her fiduciary obligations and accordingly it is recommended that the lawyer explain to his/her client (the trustee) the legal duties and responsibilities imposed on the trustee at the outset of the retainer.[47] Throughout the retainer, the lawyer must continue to advise the trustee on his or her fiduciary responsibilities including

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if such an agreement existed, the beneficiaries would still have the right to challenge it on the basis of its fairness and reasonableness pursuant to the *Solicitors Act*, s. 16(1)).

[44] *Assaf Estate, Re* (2006), 23 E.T.R. (3d) 61, 2006 CarswellOnt 467 at para. 75 (S.C.J.).

[45] *Philp Estate, Re* (1989), 35 E.T.R. 210, 1989 CarswellOnt 537 at paras. 17 (Surr. Ct.).

[46] *Bott*, *supra* note 43 at para 19. Note that in the context of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), by operation of sub-sections 104 (1) and (2) an estate is deemed to be an individual and therefore may incur liability for taxes. Furthermore, in the context of the *Bankruptcy Insolvency Act*, R.S.C. 1985, c. B-3, the deceased remains the insolvent person, but the estate trustee takes on responsibility for the implications of the bankruptcy as follows: (i) in the context of a Section 49 assignment in bankruptcy, the estate trustee acts on behalf of the deceased; and (ii) in the context of a contested bankruptcy in Sections 43 and 44, the estate trustee accepts service on behalf of the deceased and becomes personally liable for distributions of estate property until the dispute is resolved.

[47] Brian A. Schnurr, *Estate Litigation*, 2d ed., loose-leaf (Toronto: Thompson Carswell, 2012) at 21.12-12.13.

the fees that may be requested for on the passing of accounts. It is at this stage that the question will be raised regarding the entitlement of the estate trustee to the special fee, if any.

Returning to the description in *Bluestein*, the question to be considered is whether the trustee has been required to perform extra or specialized work due to complexities in the administration of the estate. If, after explaining the law, the lawyer is instructed by the trustee to do so, the lawyer should assist the trustee in preparing a claim for a special fee consistent with the requirement for the claim to be at a reasonable rate and supported by documentation of the time spent and the work performed.

Lawyer's Relationship to Beneficiaries - Does One Exist?

Although the relationship between the lawyer and trustee dictates that the lawyer owes a duty to the trustee directly as the client, there is a body of law that has established that, in certain circumstances, a theoretical duty of care may be imposed on the lawyer in respect of the beneficiaries. These two duties are fundamentally different in nature; where the first is based in the fiduciary relationship between the solicitor and client, the later stems from the principal articulated in *Hedley Byrne & Co. v. Heller and Partners* ["***Hedley Byrne***"] that "if someone possessed of special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise."[48]

In *Whittingham v. Crease & Co* ["***Whittingham***"], the lawyer for the deceased was found liable to the intended beneficiaries of a will.[49] In that case, the Court found that despite there being no contractual relationship between the lawyer and the plaintiff beneficiaries, by undertaking to oversee the execution of the will the lawyer became liable to them for its proper execution. Similarly, in *Tracy v. Atkins* ["***Tracy***"], the British Columbia Court of Appeal found a real-estate lawyer, acting for the purchaser, liable for losses incurred by estate beneficiaries because he had undertaken work that would ordinarily be done by the vendor's solicitor in conveying an estate property.[50] The Court noted that a lawyer would not ordinarily be in a relationship of such proximity with an opposing party, but in this context the lawyer placed himself in the position of dealing with the beneficiaries' interests when he ought to have known that they were relying on him to protect those interests.[51]

In *White v. Jones* ["***White***"], the House of Lords discussed liability as arising from the duty of care owed to the client, the breach of which resulted in damages to the disappointed beneficiary. In his reasons, Lord Geoff concluded as follows:

> In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to

[48] *Hedley Byrne & Co. v. Heller and Partners*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).
[49] *Whittingham v. Crease & Co* (1978), 88 D.L.R. (3d) 353, 1978 CarswellBC 456 at paras. 60-61 (S.C.); See also *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605, 1999 CarswellOnt 4561 at paras. 8-9 (Gen. Div.).
[50] *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632, 1979 CarswellBC 357 at paras. 8-19 (C.A.) [*Tracy*]; See also *Pelky v. Hudson Bay Insurance Co.* (1981), 35 O.R. (2d) 97, 1981 CarswellOnt 706 at para. 100 (High Ct. J.).
[51] *Tracy*, *ibid*. at para. 10.

> extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit.[52]

It is also arguable that the scope of liability that a lawyer for the estate trustee may face has been widened. In *White*, the House of Lords also commented that since the *Hedley Byrne* principle is founded upon an assumption of responsibility, the lawyer may be liable for negligent omissions as well as negligent acts of commission.[53] Furthermore, in *Earl v. Wilhelm* ["***Earl***"], the Saskatchewan Court of Appeal followed the reasoning of *White* and found a solicitor liable to intended beneficiaries for failing to make proper inquiries when instructions were being taken for the creation of the will.[54]

Advising the Estate Trustee

In the context of expanding risks, a lawyer must be careful when advising an estate trustee. Considering whether a trustee can make a claim for a special fee when it is not certain that there is sufficient reason or documentation to support that claim, the question arises what rights the beneficiaries might have, and whether a conflict of interest may result.

When advising the estate trustee in the administration of the estate, commenters warn the lawyer of the estate trustee to be mindful of the potential to be sued by the beneficiaries (or potential beneficiaries). The lawyer may be held liable in negligence for a beneficiary's losses if found to be performing the duties of the estate trustee or for incorrectly interpreting the will. Schnurr explains that the lawyer should not discuss such a potential claim with the beneficiary stating that:

> …[I]t is the solicitor's job in representing the estate trustee to maximize the estate for distribution pursuant to the will and not to assist those who would make claims against the estate. … The solicitor should not initiate or engage in discussions with beneficiaries (or non-beneficiaries) about claims they might have against the estate, such as dependent support or *quantum meruit*. If the subject is raised by the individual, the solicitor should simply state that she cannot discuss such matters with the individual and recommend in writing that the individual seek legal counsel.[55]

The forgoing finds support in the Law Society of Upper Canada's, *Rules of Professional Responsibility* [the "**Rules**"]. In particular, Rule 2.03 imposes a duty of confidentiality requiring the lawyer to hold all information concerning his or her client in strict confidence.[56] Accordingly, information may only be divulged where required by law or if the lawyer believed that an identifiable person or group was

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[52] *White v. Jones*, [1995] 2 A.C. 207 at 260 (H.L.) [*White*].
[53] *White*, *ibid.* at 268.
[54] *Earl v. Wilhelm*, [1998] 5 W.W.R. 509, 1997 CarswellSask 619 at paras 23-30 (Q.B.), aff'd 2000 SKCA 1, 2000 CarswellSask 49 (C.A.).
[55] Schnurr, *supra* note 47. at 12-13.
[56] Law Society of Upper Canada, *Rules of Professional Conduct* (effective November 1, 2001, amendments current to January 24, 2013) Rule 2.03 [*Rules*].

in imminent danger of serious bodily or psychological harm. The commentary following sub-rule 2.03(1) states that:

> … A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.[57]

The lawyer is also bound by the Rules to prevent dishonest behavior. Pursuant to Rule 2.02, the lawyer must not assist in or encourage any dishonest conduct, or advise a client on how to violate the law.[58] So, if the trustee is engaging in untoward behavior by requesting the special fee unwarranted, the lawyer may be placed in an ethical conflict and may be required to withdraw.

However, if the context is such that the trustee, after being advised of the law by his or her lawyer, remains of the view that he or she is entitled to compensation in addition to the tariff, the requirement to withdraw would likely not arise. The solicitor's duty would be to administer advice based on the state of the law and accept instructions accordingly. If his or her conclusion was that the trustee would not be entitled to a special fee but the trustee insisted on it regardless, the lawyer may continue to act for the client as instructed. However, to address the potential liability that would arise from the trustee acting against the advice given, the lawyer would be prudent to make a record of the contrary opinion in the file.

Privilege and Access to Estate Communications

In the context of communications between the lawyer and the trustee, the beneficiaries' rights again become a significant concern. Even though the lawyer-client relationship makes communications between the lawyer and the estate trustee privileged, some of those communications are not protected from being disclosed to the beneficiaries. In *Ontario (Attorney General) v. Ballard Estate* ["***Ballard***"], [59] Lederman J. for the Superior Court of Justice, Commercial List, made it clear that beneficiaries (including residuary legatees with contingent, unvested interests) are entitled to disclosure of all "trust documents." The Court held that the "joint interest" rule applied to the lawyer-client communications, and that the estate trustee and beneficiaries share an equal interest in the lawyer's advice contained within.

The joint interest rule is described in *Ballard* as being consistent with the principle behind parties in a joint retainer under sub-rule 2.04(6)(b) of the Rules, which describes the duty of a lawyer who accepts employment from more than one client to advise the clients that "no information received in connection with the matter from one can be treated as confidential so far as any of the others are

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[57] *Rules*, *ibid*.
[58] *Rules*, *ibid*. Rule 2.02(5)(a).
[59] *Ontario (Attorney General) v. Ballard Estate* (1994), 20 O.R. (3d) 350, 1994 CarswellOnt 579 (S.C.J. [Commercial List]) [*Ballard*].

concerned."[60] Lederman J. explained that because the trustee is duty bound to act in the best interests of the beneficiaries, the legal advice sought and obtained from the lawyer for the estate trustee is also seen as furthering the beneficiaries' interests and therefore does not fall under the rubric of lawyer-client privilege.[61] The trustee must then reveal information to a beneficiary on demand concerning the way in which trust property has been invested or otherwise dealt with, whether the beneficiary's interest is present or contingent.[62]

Thus, while there would be no obligation on the lawyer to disclose to the beneficiaries the fact that the estate trustee intends to make a claim for a special fee, where estate funds have been used to pay for the advice given, it may not be possible to prevent the beneficiaries from discovering this fact if the lawyer had advised against it in writing. The same letter that the solicitor would have prudently included in the client file, documenting his or her contrary opinion, may end up becoming a powerful piece of evidence for the beneficiaries to impugn the estate trustee.

The apparent solution to this risk is that legal advice concerning the estate trustee's intent to obtain a special fee, deserved or not, should be paid for by the trustee personally and not through the use of estate funds. By opening a separate file for the passing of accounts, it would be possible to separate the administrative matters, which are producible, from the compensation issue, which would retain privilege. Then, at the conclusion of the passing of accounts, it would be possible to ask for increased costs pursuant to Rule 74 of the *Rules of Civil Procedure* to recover the costs of the passing where the file includes the lawyer's written advice.

Conclusion

Considering the challenges that often accompany the administration of an estate, it is not uncommon that an estate trustee will feel that they are entitled to a greater degree of compensation than the tariff permits. The case law demonstrates that the Courts are willing to award fees above the tariff in the form of a special fee where the estate trustee would be under-compensated for his or her contribution to the estate's administration. When determining what the special fee should be the Courts will consider factors such as the estate trustees conduct in relation to the fees requested, whether the additional effort is properly documented in relation to the request, and whether the services rendered were reasonable and for the purposes of the estate. The lawyer of the estate should be aware of these considerations and the complexities that may arise when advising the estate trustee in the administration of the estate and making claims for compensation.

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[60] *Rules*, *supra* note 56, R. 2.04(6)(b) (an exception to this, discussed in paragraph 11, would be where it is more important to preserve the confidentiality of deliberations with respect to the trustee's exercise of discretion).
[61] *Ballard*, *supra* note 59 at para. 9.
[62] *Ballard*, *ibid*. at para. 12.