



Estates and Trusts News

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AVOIDING CONFLICTS OF INTEREST IN ESTATE ADMINISTRATION

In the midst of your first meeting with the executor, she tells you that the deceased, her father, added her name to the house. She claims that her father wanted her to have the house when he died because she helped him in his final days more than her siblings did. She also states that he wanted to avoid paying probate fees. What is your next step? How do you respond to these statements?

The administration of even the simplest estate can lead to conflicts of interest. Avoiding these ethical landmines may be as easy as asking yourself questions that get to the root of the solicitor-client relationship and help to identify when the estate trustee's interests diverge from that of the beneficiaries.

Who is the estate trustee?

Ethical issues can arise because of the individual who has been named as executor. This is less likely to be the case if the executor named in the Will is either the sole beneficiary, or is not a beneficiary. In those cases, there is less risk for a conflict of interest to arise.

The conflict can occur because an estate trustee, who is also a beneficiary, cannot necessarily carry out his or her duties to the other beneficiaries and promote his or her interests in the estate at the same time. Take our example above: the estate trustee owned property jointly with the deceased. If she is claiming that the asset is hers, and not trust property (i.e., belonging to the estate), then she is promoting her own interests ahead of the beneficiaries' interests.

Lawyers have a duty of honesty and candour. They must inform a client

of information that may affect the client's interests and they must clearly disclose what the lawyer honestly thinks about the merits and probable results of the client's claim.

Assisting the estate trustee in promoting his or her personal interests puts the solicitor in a conflict. This includes giving advice on the strength of a claim against the estate. It could also include negotiating with a beneficiary about an estate asset that is being claimed by the trustee in his or her role as beneficiary.

If a trustee has a personal claim against the estate, then he or she must be referred to another lawyer to provide them with independent legal advice. That other lawyer should be the one advising them on the strength of their claim and whether to continue as trustee, or to bring an application or action against the estate. The estate solicitor should not give his or her opinion on the merits of such a claim.

What if the estate trustee is the surviving spouse?

When the testator names his or her spouse as the executor, and that spouse is not the only beneficiary of the estate, then there is potential for a conflict of interest.

If the spouse chooses not to take under the Will, and elects to receive his or her entitlement under the *Family Law Act*, or makes a dependant's support claim under the *Succession Law Reform Act*, then she or he is making a claim against the estate. In that case, the spouse is acting in his or her individual capacity, and is not acting as a representative of the estate.

The estate solicitor cannot act on behalf of the trustee's personal interests. A solicitor in this situation must make it clear to the estate trustee that he or



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she is to carry out the terms of the Will and to act in the interests of the beneficiaries. The spouse must be referred to other counsel to obtain independent legal advice concerning the election or dependant's support claim. It may also be necessary to have an estate trustee during litigation appointed to administer the estate while the claims are before the court.

How many estate trustees are there?

If you are retained to assist with the administration of an estate, and there is more than one estate trustee, you should be conscious of the fact that disputes may arise amongst them.

Perhaps the trustees cannot agree on questions related to the assets. It could be a dispute over what assets actually make up the estate, or it could even be a dispute involving how the assets should be distributed. Regardless of the exact disagreement, these estate trustees have placed the estate lawyer in a precarious ethical situation.

The dilemma arises because a lawyer who has been jointly retained cannot represent two or more clients in conflict with one another. Doing so necessarily means that you would be acting adversely to one of them. This could irreparably damage the lawyer-client relationship. When a lawyer is jointly retained by two or more clients, there must be an understanding that all decisions made by the clients will be agreed upon. If this is not the case, the lawyer must take prompt action.

If a conflict develops, the lawyer cannot continue to act for all of them. The lawyer must either obtain the consent of the clients to continue to act for only one of them, or cease to act for all clients if there is no consent. If the estate solicitor anticipates a contentious issue arising at any point, the clients must be referred to other law-

yers in order to seek independent legal advice.

What are the estate assets?

Determining what constitutes the estate's assets can be a complicated exercise. As we have discussed, there may be assets that the deceased owned jointly with an adult child. There may be a debate over whether the estate, or another named beneficiary, is to be the recipient of a registered investment or the proceeds of a life insurance policy.

Despite the instructions in the application for a certificate of appointment of estate trustee, there are circumstances in which jointly-owned property and insurance proceeds should be included in the calculation of the value of the assets of the estate.

An estate solicitor will need to gather as much information as possible about the circumstances behind the joint ownership or the signing of beneficiary designation forms.

When a testator chooses to hold assets jointly with his or her adult independent child in order to minimize estate administration taxes, the presumption of resulting trust applies and the joint asset is to be held in trust by the recipient. When the property is held jointly with a spouse, or by a parent and a dependant, non-adult child, the presumption of advancement applies and the property is transferred to the surviving joint owner.

The solicitor's job in these circumstances is to determine whether the asset in question was gifted to the surviving joint owner, or is trust property. It is not, as discussed earlier, to advise the estate trustee on the merits of his or her claim that the transfer was a gift from the deceased. To do so would be a clear conflict of interest as the lawyer would be representing opposing sides in the dispute.

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While the solicitor administering the estate will work closely with the estate trustee, the solicitor should be alert to circumstances in which the estate trustee may have personal interests that differ from his or her duties as the executor of the estate. A solicitor who provides advice to, negotiates on behalf of or prefers the personal interests of the estate trustee in this situation runs the risk of acting in a conflict of interest. Best practice is to refer the client to another lawyer for independent legal advice. ■

This article has been adapted from a paper presented by Andrea M. Hill at the LSUC's Practice Gems: Probate Essentials 2017 program on September 29, 2017.

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