

Compensation issues for the Solicitor/Accountant/Executor

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When a solicitor is named executor to an estate, compensation issues may arise. The Trustee Act (Ontario) provides that a trustee is entitled to “such fair and reasonable allowance for the care, pains and trouble and time expended in and about the estate” and expressly provides that in the case of a solicitor-trustee, the allowance may be increased by a “fair and reasonable” amount in respect of professional services to the estate. Notwithstanding such express legislative acknowledgement, “double dipping” has often been subject to adjustment.

Estate of Roman Krentz 2011 ONSC 1653 involved a contested application about the fees. The late Mr. Krentz named his lawyer, his accountant and his bookkeeper as trustees under his Will. The estate trustees sought compensation payable out of the Estate. Two of the late Mr. Krentz’s children, as beneficiaries, objected to the accounts on a number of grounds, including that the trustees’ compensation should be reduced because they were paid full professional fees for most of the work in respect of which compensation was claimed as estate trustees. The solicitor acting as estate trustee had drawn the late Mr. Krentz’ Will and codicil.

The Will contained what the solicitor explained was “standard wording” permitting trustees who are professionals to bill for their professional time in addition to the work as trustee. On cross-examination, the solicitor stated that the deceased had not expressly requested this clause. However, the Objectors did not claim that the particular clause was inserted deceitfully, but rather urged the Court to recognize the “implicit unfairness” of such a clause and to reduce the compensation.

The Court reviewed the late Mr. Krentz’ Will and noted that there was a particular paragraph authorizing the trustees to pay themselves reasonable compensation and a separate paragraph stating that any trustee who is a professional may be paid all usual professional and other charges for work done. However, in the Court’s view, without specific examples, a layperson would not understand that there is a difference between the compensation referred to in the one paragraph and the professional fees referred to in the other paragraph. The Court further found that the two boilerplate clauses did not clearly spell out that a lawyer would be paid for his/her professional work and also be paid compensation as a trustee.

The Court drew an interesting analogy between compensation for a lawyer who is both trustee and counsel and contingency fee arrangements which are now permitted under the Solicitors Act (Ontario). The suggestion was that the lawyer – trustee has a form of contingent interest, presumably because of the generally accepted percentage basis of calculation for trustee compensation. The Court noted that in both situations, the payments may not be easily quantified and may increase relative to the size of the recovery (in the case of a contingency fee arrangement) or estate (because of percentage compensation). The Court made reference to the strict requirements for contingency fee agreements in the Solicitors’ Act (Ontario) including sample calculations but noted that “unfortunately” there were no similar provisions in the Trustee Act (Ontario). The Court held that a lawyer – trustee who seeks both professional fees

and trustee's compensation has an obligation to satisfy the beneficiaries and the Court that the full ramifications of the arrangement were explained to the testator. The Court was not satisfied that this had occurred, and held that this was relevant to determining the proper amount of Trustees' compensation.

Evidence was adduced that both the accounting firm of the accountant-trustee and the law firm of the lawyer-trustee billed the Estate subsequent to Mr. Krentz' death. There was no evidence that the professional accounting fees included any time that was more properly attributable to trustee's work. The particular accountant – trustee testified that when he needed staff from his accounting firm to do trustee work, he would write off the time. The lawyer–trustee kept detailed dockets of work done for the Estate, and separated his professional work as a lawyer from the work he did as a trustee. He testified that the bills from his firm only included legal work.

The Court noted the above favourably and in the end, accepted the trustees' claim for compensation based on the percentages method without reduction on account of professional fees already billed. In addition to compensation based on the percentages approach and a care and management fee, the trustees also claimed a special fee for their administration of the Estate. The assets of the Estate included a corporation, all of the shares of which were held by the Estate. The position of trustees was that if such corporation had instead been a sole proprietorship, as opposed to a separate legal entity, its revenues and receipts would have been revenues and receipts of the Estate such that compensation based on the percentages approach would have been higher.

While the Court found some attraction in this argument, the claim for a special fee was rejected. The fact that the trustees were fully paid for their professional fees and that the deceased likely did not understand the calculation of compensation with payment both for trustee duties and professional duties was a stated factor for the rejection of such claim.

Estate of Roman Krentz underscores the need to fully explain to clients the manner in which trustees may claim compensation, and the potential for “double dipping” if the client names a lawyer as trustee.

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