

## **EXECUTOR CONFLICT OF INTEREST AND THE ADMINISTRATOR PENDENTE LITE- CONSIDERATIONS IN CHALLENGING THE VALIDITY OF A WILL IN BRITISH COLUMBIA**

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The key functions of executors are to call in the estate assets, to manage them competently and to distribute them in accordance with the deceased's wishes as set out in the will. In a perfect world, these functions would be performed by a person without any personal interest in the estate, ensuring that all matters are managed with an even hand.

For a number of reasons, this is often not the case. Perhaps the most common of these are:

- **Cost.** Independent trustees and executors can be expensive, particularly if a trust company is involved.
- **Privacy.** While appointing a key family friend or a trust company can avoid conflicts, it also opens up the family's finances to outside scrutiny.
- **Myopia.** Testators are usually optimistic that no disputes will arise.
- **Balance.** Potential problems can sometimes be avoided by appointing multiple persons. Of course, in the absence of unanimity disagreements may still arise.

In the administration of most estates, the appointed persons discharge their duties without incident. In many other cases, the executor will take steps to diligently resolve conflicts among beneficiaries which usually relate to distributions but can also involve management of trust assets and liabilities including the pursuit or defence of claims for or against the estate.

### **Questions as to Validity of Will**

There are a number of circumstances in which it may not be clear who the executor is. These include a challenge to the will for want of compliance with required formalities, lack of testamentary capacity, undue influence or evidence of suspicious circumstances. In cases of multiple successive wills or potentially overlapping wills from different jurisdictions, if there are different executors it will not be known who should be administering the estate until it is established which, if any, wills are valid; if none are valid, the court may be called upon to appoint an administrator under provisions of the *Estates Administration Act*, R.S.B.C. 1996, c. 122 applicable to intestacies.

In the meantime, someone has to make decisions affecting all matters from paying debts, to interim distributions to dependent beneficiaries, to calling in estate assets, to instructing counsel in litigation by or against the estate.

Section 8 of British Columbia's *Estates Administration Act* provides the option to apply for what is often called an administrator *pendente lite*:

- 8 (1) Pending an action touching the validity of a will, or for obtaining, recalling or revoking a probate or a grant of administration, the court may appoint an administrator of the estate of the deceased person.
- (2) An administrator appointed under subsection (1)
  - (a) has all the rights and powers of a general administrator, other than the right of distributing the estate, and

(b) is subject to the control of the court, and must act under its direction.

The term “may appoint” makes it clear that the section is discretionary. The application may be made by any person having standing in the estate, though there is nothing requiring the proposed administrator to have such standing.

### **The Exercise of Discretion**

In contrast to section 7 of the Act which gives the court discretion to appoint an administrator for the estate of a person who has died intestate, leaving a will with no executor, or under other ‘special circumstances’, section 8 generally applies to scenarios where there is at least one will appointing one or more executors. Of course, if the validity of the wills is in question it may be unclear whether or not there is an intestacy.

There is however little B.C. case law providing guidance on the purpose of section 8 or on the circumstances under which an administrator *pendente lite* will be appointed.

A narrow view would confine the appointment to cases where there is a serious outstanding question in the “pending action” as to who will ultimately manage the estate. Under this interpretation, if the same executor, or group of executors, is appointed under successive wills one or more of which is impugned, a section 7 order should be unnecessary.

A much broader view would permit a section 8 order whenever the validity of the will(s) is uncertain. However, such an interpretation might encourage challenges to validity where the plaintiff’s true objective relates to the identity of the executors.

### **Conflict of Interest**

In the author’s view, the ultimate question on applications for an administrator *pendente lite* should be whether there is a true conflict of interest which necessitates impartial management of the estate.

The issue of potential conflict was considered in *Salisbury v. Dell* (1993) CarswellOnt 565; 50 E.T.R. 19; Ontario Court of Justice (General Division), decided under a similar s. 28 of the Estates Act, R.S.O. 1990, c.E.21. In this case there were two executors, one of whom was also the main beneficiary under a second, challenged, will. A beneficiary under the first will contended that the named executors should not act as administrators *pendente lite* since they had an interest in the outcome of the litigation. The executors contended that even if the second will were declared invalid, they would still be executors under the first will and should therefore be administrators *pendente lite*.

The court applied the law to the circumstances then at bar:

The contentious nature of litigation and the need for impartiality on the part of the administrator requires that a person unconnected with the litigation ought to be appointed to the office. In *Re Bazos*, [1964] 2 O.R. 236 (C.A.) the Court said [p.238]:

It is well to remember that justice must not only be done but must also appear to be done, and we think it would be a very unusual situation where one of the parties to an issue such as was here ordered would be appointed administrator *pendente lite*. ...

In the matter of *Re McArthur Estate* (1990), 1 O.R. (3d) 592 (Gen. Div.), Flinn J. departed from the general rule. He appointed the executors under a disputed will as administrators pendente lite as they would remain as executors of the estate even if the will was declared invalid. There were, however, no complaints of any impropriety on the part of the executors in that case.

In the circumstances of this case it is clear to me that the respondent Elwin Dell should not be appointed an administrator pendente lite. The major asset of the deceased's estate is the farm and it is said to have a value of approximately \$200,000. Since Elwin Dell will inherit the farm if the will in question is upheld, he should not be involved in the administration of the estate during the course of the litigation.

On the other hand, his co-executor Norman Workman does not stand to inherit anything of significance under either will and there are no allegations of impropriety on his part. In addition even if the will in question is declared invalid he will still be an executor under the deceased's first will. This is not a large estate and an effort should be made to minimize the cost of this litigation. As a result I find that it is not appropriate to appoint a trust company to act as administrator pendente lite. In the circumstances it is entirely appropriate for Norman Workman to continue with the administration of the estate and I order that he be appointed administrator pendente lite.

It appears to be the law in Ontario, based on *Re Bazos, supra*, that in the face of a challenge to validity the normal rule is to disallow an executor with a conflict while litigation is pending. In that case the court relied at para. 4 on *Macdonell and Sheard on Probate Practice* for the following proposition:

Under normal circumstances the Court will not, except on consent, appoint one of the litigant parties as administrator pendente lite. The rule is not an absolute one, but will be departed from only in a very strong case.

However, in the absence of a challenge to validity this rule may be supplanted by the testator's expression of wishes in appointing an executor to manage the estate's affairs: *Forbes v Gauthier Estate*, 2008 CarswellOnt 4912, 43 E.T.R. (3d) 143 (Ont. S.C.J)

In *Calvin v. Melanson* (1997) CarswellBC 2876 (BCCA) Southin J.A. considered the practicality of making an order under section 8 having regard to the interests of the estate generally. She exercised the court's discretion to appoint a solicitor without personal interest:

What is now before me is an application by the appellant for a stay of proceedings. As I see it, a stay simpliciter would result in the appellant and his sister continuing to be the administrators and Mr. Schofield having no status at all.

This does not seem to me to be in the interests of the next-of-kin of the deceased, of whom the contesting administrators are only two, as they are at serious odds.

My tentative view is that the solution to the present problem, which is how to preserve the rights of the appellant without stopping the administration in its tracks, is for me to make an order staying the order below but appointing

Mr. Schofield administrator pendente lite of the estate. The powers of such an administrator are limited. He should put up a bond in the amount ordered by the learned judge below.

The order was confirmed at 1998 CarswellBC 276. It is not clear from the series of decisions in this case whether the underlying disputes involved allegations of invalidity.

The following are some factors relevant to determining if there is a conflict of interest which necessitates impartial management of the estate:

1. What is the nature of the alleged conflict?
2. Has the alleged conflict jeopardized unbiased conduct of the underlying dispute to date?
3. Who stands to gain and who stands to lose if the order is made? The outcome should be geared to preserving all parties' rights and the estate assets pending resolution of the underlying dispute.
4. Has there been delay in coming to court? If so, the court would consider what has precipitated the application at this time.
5. What are the applicant's bona fides? This consideration may be central to the outcome but left unstated due to the court's disinclination to prejudge the ultimate issue.

### **Materials to Present on the Application**

The affidavit material should address, at a minimum:

- The testamentary documents in issue. These should be attached so the court can view who are the named executors/trustees/beneficiaries under various scenarios
- Evidence to show who will inherit in the event of an intestacy
- The nature of any actual or potential conflicts of interest which may arise for the various possible executors/administrators in the course of litigation
- The current stage of the estate's administration, ie what matters are pending and what remains to be done
- The extent, if any, to which any party has abused or threatened to abuse their power and/or made objectively poor decisions regarding the estate

An applicant who is challenging a testamentary document will have to consider carefully whether to adduce evidence relating to the substance of the underlying validity issue. While such evidence may add "meat" to the argument supporting the order sought and its absence could lead the court to infer that the plea is tactical in nature, it can also subject the affiant to cross-examination on an affidavit. It would be difficult for the party having adduced evidence supporting the substantive validity issue to resist cross-examination based on the narrow issue before the court.

The Ontario Superior Court of Justice in *Sherbourne v Shanks* (2005) CarswellOnt 2604 expressed its preference for evidence of the underlying invalidity in the context of a request for administrator pendente lite (or what is now in Ontario called an "estate trustee during litigation"). In that case the plaintiffs had alleged lack of testamentary capacity, undue influence and suspicious circumstances, and failure to know and appreciate the contents of the impugned will.

After reviewing the scant documentary evidence before it, the court expressed its views thus:

No medical opinion evidence was tendered. It is unknown whether such has been requested or received by any of the parties. In my view, such should have been obtained and produced. There has been more than sufficient time to attend to this aspect of the litigation. Such evidence may have assisted the parties in addressing the ultimate issue or, at least, in identifying the actual issues.

The objectors have made general allegations but have not presented any facts or evidence in support. While it may be suggested such is premature, I am of the view disclosure is required immediately and throughout the litigation as information or evidence becomes available to save time and expense.

Since the son seeking to be appointed administrator was also a principal beneficiary under the will and the object of the undue influence allegations, the court held that “(a)lthough the interim administration of this estate will require minimal services and is straightforward, the potential conflict necessitates the appointment of a neutral trustee.” It would appear based on this analysis that the lack of evidence was, however undesirable, not a significant factor in the son’s disqualification. The court also rejected a trust company as its proposed fee was considered too high given the nature of the estate.

### **Executor as Applicant**

Finally, even if there are no objectors and in the absence of any apparent conflict, it may be advisable for an executor named under a will to seek an order under section 8. This can be a form of protection in the event that the challenge is ultimately successful and transactions involving estate assets are later impugned. Since the administrator pendente lite is, under section 8, “subject to the control of the court, and must act under its direction”, the named executor who acts within its scope could not be said to have conducted itself without authority.

### **Conclusion**

Conflicts arise frequently in the context of executors’ management of an estate in which they are beneficiaries, being inherent in the expressed wishes of many testators.

Conflicts will rise to being intolerable where the executor’s status is uncertain due to an impugned will. In this regard, the court will examine the relationship among the parties, the testamentary documents and the parties’ conduct to date in determining whether a conflict or potential conflict is serious enough to disqualify a named executor.

In the context of such an application, it is not yet clear how important it is to adduce evidence supporting or refuting the underlying case of invalidity.