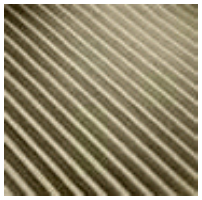

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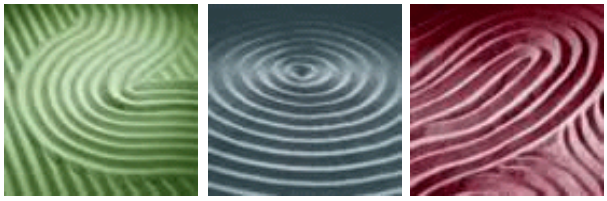

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The Charity as Estate Beneficiary

by M. Jasmine Sweatman
June 2003

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Introduction

I have been asked to speak about what it means to be a charitable beneficiary of an estate. Being a charitable residuary beneficiary is similar and different from being an individual beneficiary. This paper highlights those differences. I will be discussing these points chronologically starting with the point in time that a beneficiary is advised of their interest in an estate. I will also highlight some points in the context of estate litigation.

A. ESTATE ADMINISTRATION

In the Beginning ...

As a beneficiary, a charity will be advised of potential interest in an estate just like any other beneficiary. If the gift to charity is a specific gift or legacy then although technically only the page from the Will that references the gift needs to be provided with the Application there is no harm in giving the charitable legatee a complete copy. Where, however, the gift is of the residue then the complete Will must be provided.

Charities are advised that it is prudent to always get a complete copy of the Will, regardless of their interest. Further, they understand there is no harm in asking. Correspondingly, there is no harm in complying with the request to provide a copy to a legatee interest - once the Application is filed with the court, the Will becomes a public document. In this case, if the estate solicitor or estate trustee refuses to provide the complete Will then, once an application is made, most charities know they can search the court file and obtain a copy of the testamentary documents for a small fee.

At this stage it is helpful to tell the charitable beneficiary an estimate of the value of the estate and to the extent possible the value of their particular interest. The value of the estate is not always the value stated on the Application for a Certificate of Appointment which is simply the value of the estate for probate purposes and does not account for liabilities. Further, this value is as of the date of death which although may give a reasonable idea of value may not reflect current market values. Accordingly, at this stage a charity will consider asking for this information if not forthcoming.

Sometimes the Application for a Certificate of Appointment is by someone other than the named (primary or alternate) estate trustee. In this case, the estate solicitor usually sends a letter setting out the circumstances as to why the Application is being taken out by that person and requesting the charitable beneficiary to consent to the appointment. Upon receipt of such a request the charity will consider the request carefully. Accordingly, sufficient information, such as the person's relationship to the deceased, age, relevant experience, residence and confirmation that the person agrees to act, should be set out in the letter at first instance. Consider also discussing the issue of compensation. Also, consider setting out your (as estate solicitor) confirmation that you recommend the person for the position.

A charity will ensure that it has as much information about this person as possible. Obviously, the person was not chosen by the deceased for the position and a charity does not want to be a position at the end of the administration where it has agreed to the appointment of the person as estate trustee and it turns out that they do not perform satisfactory. A charity will often not know anything about the person except what has been told to them. As a precaution therefore, a charity may agree to the suggested person but indicate that its agreement is based on the information and recommendation of the estate solicitor and that the charity assumes that the person has been advised of and understands his or her duties as estate trustee.

Sometime a charitable beneficiary may be asked itself to take on the appointment. The request should explain why and suggest that the guidance of a solicitor be sought. This request will also be considered carefully. A charity is not in the business of administering estates. The preferred course is to see whether there is a family, friend, lawyer or trust company who could take on the appointment. Although rare, in the right circumstances (i.e. simple assets, known liabilities, the organization is the sole beneficiary, uncomplicated administration) a charity could agree to act as estate trustee.

Alternatively, a charity may be asked to be the named estate trustee at the time that the deceased prepares their Will. This is relatively frequent where the person has no or close family, does not want to burden their friends and distrusts lawyers and/or trust companies. Often, the person is leaving their estate to charity. In this case, if the circumstances are appropriate a charity can be named. Typically, an officer position would be named, such as the secretary of the organization at the time of the person's death rather than a particular person. Flexibility should also be built into the appointment to allow the Board of Directors to designate a person to act as estate trustee if the person in the named position at the time is unable or unwilling to act as estate trustee. At the time of making the Application for the Certificate, a certified resolution of the Board of Directors would also have to be filed.

Internal Response

Upon receipt of the Notice of Application, a charitable beneficiary typically makes a record of the relevant information regarding the particular bequest. For example, the type of bequest, any conditions connected with the bequest, timing issues (such as a life interest) and whether the bequest is acceptable to the charity is recorded. Even colour-coded files (depending on the nature of the interest) are used. The collected information is then usually recorded in a tickler or bring forward system and an estimate made as to when the charity should expect further communication from the estate trustee or estate solicitor.

At this early stage the charity is encouraged to take the time to review the materials and assess the situation (to the extent possible). Simply filing the materials and not responding or simply acknowledging receipt of the materials is not considered enough. Charities understand the expectation of their donors that they will approach the bequest

with professionalism and take all necessary steps to protect the gift.

It should be remembered that a charity is answerable for its activities and disposition or use of its property like a trustee. It is subject to the supervisory equitable jurisdiction of the court and the provisions of certain statutes such as the *Trustee Act*,[1] *the Charitable Gifts Act*,[2] and the *Charitable Accounting Act*.[3] Accordingly, the directors are under a fiduciary obligation. Its fundamental obligation is to deal with the funds it obtains from the public (including deceased persons) for strictly charitable purposes.[4] Accordingly it should come as no surprise that a charity is entitled to make its presence known. There are a variety of responses that a charity considers at this beginning stage. It understands that this first communication is critical and creates first impressions.

At this stage do not be surprised to get some more detailed responses such as requests for information or further detail on the plan of administration. One such request may be for the age of the life tenant. This request should not be taken as an "invasion of privacy" - it is simply giving the residuary beneficiary a better idea on the length of the administration of the estate. Charities recognize that this question is difficult to ask. But, that difficulty in large measure exists because of the often negative feedback it receives from having asked the question. Any beneficiary is entitled to know when to expect to receive their share (whether partial or in full) from the estate.

Division of Labour

Once the Certificate is issued then begins the task of administering the estate. At this stage charities are aware of the division of labour between the solicitor for the estate and the estate trustee, especially when it is the same person.

The estate solicitor should, at the first meeting with the estate trustees, be explaining the expectations of the beneficiaries and the roles of the estate trustee and solicitor for the estate. The roles and corresponding duties are different and distinct.

Generally speaking, the duties of an estate trustee include the responsibility to ascertain the deceased's assets, debts and to administer the estate. Estate trustees are fiduciaries. They are acting not for themselves but for the beneficiaries. Although they are entitled to receive compensation for their efforts, they must act in the best interests of the beneficiaries in accordance with the testamentary documents or as directed by a court.

A charitable beneficiary will expect that an estate trustee will do the following:

* make funeral arrangements;

* retain a solicitor for advice;

* locate, inventory, value and secure the assets. Ensure adequate insurance coverage is in place as required;

* determine and provide addresses for all beneficiaries. Discuss any potential adverse claims against the estate by possible dependants with estate solicitor;

* determine the debts of the deceased and pay them after contestation and settlement as necessary;

* obtain investment advice regarding transfer or sale of assets;

* file tax returns, pay taxes owing and obtain appropriate tax clearance;

* distribute assets as directed by Will or by the rules governing intestate succession;

* invest assets for establishment of any testamentary trusts;

* maintain proper accounting records and prepare periodic estate accounts detailing estate administration for beneficiaries' information and review; and

* report to beneficiaries as required.

The duties of an estate solicitor are principally to advise the estate trustee, prepare legal documents, advertise for creditors, arrange for settlement of creditor's claims, if required, and generally protect the interests of the estate trustee. At times a charitable beneficiary has to be reminded that the estate solicitor does not represent their interests. If a dispute arises, a beneficiary should be told to consult and, if necessary, retain counsel.

In the event that the estate trustee also happens to be a solicitor, the beneficiaries are entitled to insist that the solicitor make a very clear distinction in his or her professional accounts between services rendered as estate solicitor and those rendered as estate trustee. In practice, it is not uncommon for an estate trustee to defer the majority of the work required to administer an estate to a solicitor. Solicitor and client should discuss this and clearly understand the implications of this perhaps improper delegation. At a minimum, the solicitor should segregate the actions undertaken as solicitor and those performed on behalf of the estate trustee.[5] In the latter case charges for services performed by the solicitor on behalf of the estate trustee for estate trustee's duties should be applied to reduce the estate trustee's compensation.

Accordingly, most charities understand that the role of the estate solicitor is to:

* determine the last testamentary document(s). Check for codicils and/or the existence of holograph Wills or Codicils;

* read and, if necessary, interpret the Will. Check for Affidavit of Execution (and arrange for the execution of the Affidavit, if missing);

* meet with the estate trustee(s) to review estate assets and Will to determine if probate

application is necessary;

* obtain all information and particulars regarding assets, beneficiaries, as necessary to complete application for Certificate;

* prepare application for Certificate and other documentation required for execution by the estate trustee(s), serve and file the document with the appropriate court office;

* prepare legal documents for asset re-registration or redemption including powers of attorney, notarial copies of Certificate, declarations of transmission;

* arrange for real estate conveyance and/or registration of documentation required to pass title to beneficiary(ies);

* advertise for creditors and arrange settlement of any creditors' claims, if needed;

* assist the estate trustee with the preparation of estate accounts;

* arrange for the passing of the estate accounts, if necessary;

* assist the estate trustee with the preparation of all income tax return(s);

* advise with respect to income tax returns, holdbacks/non-resident tax liability and necessity for final tax clearance certificate; and

* prepare release for execution by beneficiaries.

At this stage there are anticipatory steps that a charitable beneficiary will consider undertaking. Sometimes a charity is aware before the person's death of the intention to benefit by Will. It may even have a copy of a Will on file. If so, that copy will likely be compared with the Will received as part of the Application for a Certificate. There may be a difference.

In *The University of Manitoba v. Sanderson Estate*[6] the husband and wife entered into a written agreement to execute mirror Wills and not to revoke the Wills during their joint lives or after the death of one of them. Under these mirror Wills each had a respective life interest with the residue going to the University. The University had been given a copy of the written agreement and Wills. The wife died. By the right of succession the husband received all her property and the Will was not probated. The husband made a new Will that included several bequests to relatives. The husband died. The relatives brought claims against the estate that settled on a quantum meruit basis. The University objected.

The British Columbia Court of Appeal held that the joint property and the net residue of the husband's estate were impressed with a constructive trust in favour of the University. Query whether the University would have been as successful if it had not

had a copy of the agreement and Wills?

In the Middle ...

After the payment of funeral, testamentary expenses, costs of administration, debts and legacies the residue remains. Once the residue is ascertained it should be distributed (in large part), or if an on-going trust as provided by the Will, invested.

It is at this intermediate stage that the charitable residuary beneficiary should be given a status report. This is quite often provided by delivery of the first set of estate accounts. If an outright distributable estate what typically remains outstanding before the estate can be wound-up is the approval of the accounts, waiting for the Clearance Certificate from CCRA and the final distribution to the residuary beneficiaries. If an on-going administration situation, such as where a trust is established under the Will, then this intermediate stage will focus on the administration of the trust and ensure that an even-hand is maintained between the different classes of beneficiaries.

At this intermediate stage the charitable beneficiary still has a role to play. As a beneficiary, the charity is entitled to ask for information regarding the administration of the estate including status reports. The timing of these requests will vary depending on the nature of the estate. At a minimum it is suggested that a status report accompany every interim distribution and on a regular basis (i.e. every six months) with respect to ongoing trusts.

In Ontario, any person with a financial interest in the estate, such as a charitable beneficiary, also has the right to request the assistance of the court when requests for information are ignored or not satisfactorily answered. These options are very effective and known to charities. Also effective is the informal liaising among the various charitable beneficiaries who tend to work together.

A charity should also be advised when a request for the tax Clearance Certificates has been made. By advising when the request has been made, a charity will know that effectively the administration is concluded and that the estate trustee will be winding up the estate once the Certificate is received. The charity should also be told the estimated time expected to process the Certificate. Generally speaking the larger charities understand that this process does take time. However, at this time a charity will usually ask whether there is the possibility of making a further interim distribution. At this stage, especially, if there are charitable beneficiaries, there should be no further taxes payable and the holdback maintained for the purposes of winding-up the estate should be an absolute minimal amount.

Residual beneficiaries should also expect to receive during this intermediate stage an estate accounting that details the assets, liabilities and transactions relating to the estate for the preceding period. Generally, the first accounting should be delivered for the period covering the first 12 to 18 months after the date of death.

A charity is required to protect the deceased donor by monitoring the estate administration, asking questions, pursuing instincts, retaining counsel as appropriate, and properly reviewing estate accounts. Depending on the circumstances, it may be necessary to work with the other departments within the charity and review policies to ensure compliance. At this stage the nature of the gift will be examined closely to ensure its acceptability. An area of particular importance during an administration is any real property. Of increasing significance is the issue of environmental liability when the estate has a property that is or may be environmentally compromised. Environmental concerns are a source of increasing concern. For charities the risk is great. The existence of commercial or business property will likely raise a red flag and due diligence questions should follow. The risk is potentially so great that a charity will consider renouncing its interest in the estate.

Sometimes prior to a distribution, a charity is asked whether they would consider receiving their gift in another form, other than may be contemplated by the Will. In could be that the estate has a significant holding in appreciated stocks such that donating them in specie could result in significant tax savings, yet the Will suggests a cash gift. In this case, whether this substitution is permitted is governed by the Will. Quite frequently, the general provisions of the Will contain a clause that permits the estate trustee to make this substitution. Whether it is acceptable to the charity depends on its gift acceptance policy and the circumstances (i.e. such as the type of stock). Further, the charity will ensure that the substitute transaction nets it the same amount as it was entitled to in the Will. Certainly receiving cash is the simplest and if that is what is contemplated and the alternative is too complicated a charity is entitled to say "no thanks, please just deliver the cash."

At this stage there is a clearer idea on the length of time it is taking to administers the estate. Understanding that the circumstances of the particular estate will determine the appropriate time, a charitable beneficiary knows that the estate trustee cannot unreasonably delay the administration. They also understand that while there is no hard and fast rule as to what constitutes unreasonable delay, the practice is to allow an "executor's year" in which to determine the assets, realize them, pay the debts and make an interim distribution, if appropriate. In an uneventful estate administration, at a minimum the estate trustee should be making an interim distribution at least (if not before) when the year has passed.

In any event, estate trustees should (depending on the circumstances) be encouraged to make a distribution as soon and as much as possible. Remember the estate proceeds belong to the beneficiaries. Charities are encouraged to request interim distributions understanding the limitations.

Estate Accounts

At an appropriate time an estate trustee will attend to providing an accounting of his or her activities to the residuary beneficiaries. The presentation of the accounts provides

the beneficiary with the chance to review the activities of the estate trustee and audit the administration of the estate.

It is a fundamental obligation of an estate trustee to maintain proper accounts. This is a common law obligation that, in Ontario, has been codified in Rule 74.17 of the *Rules of Civil Procedure* which states that an estate trustee must "keep accurate records of the assets and transactions in the Estate."

The maintenance of accounts is an absolute duty. This duty is owed to the beneficiaries. It can be satisfied by maintaining proper accounts separate and apart from any other accounts the estate trustee may have, preserving receipts or vouchers to support the transactions, making the vouchers available for inspection, and delivering the accounting at appropriate and regular intervals. However, this obligation is to maintain accounts, not to submit them to the court for approval (unless requested by a beneficiary or court ordered). The estate trustee should also produce the accounting and provide accurate information on a regular basis[7] and when reasonably requested by the beneficiaries. If the estate trustee acts in breach of this duty then he or she risks being removed as estate trustee and being personally liable for any wrongdoing.

Correspondingly, a beneficiary has the right to inspect and investigate the accounts including an examination of the vouchers or back up documentation. At any time during the administration a beneficiary is entitled to complete and accurate information and an answer to any reasonable question. This right exists clear of any solicitor-client privilege claim such that documents containing professional advice taken by the estate trustees as trustees are producible as the documents contain advice taken by the trustee for the beneficiaries.[8] A personal representative should inform the beneficiaries of this right and voluntarily disclose any breaches of trust. With accurate accounts, the beneficiaries can determine the status at any time of the administration of the estate.

In particular, there is a positive obligation or duty on a charity to scrutinize the accounting. In Ontario, in the past, charities could rely upon the Public Guardian and Trustee to act as "watchdog". Times have changed. The role of the Public Guardian and Trustee is much reduced namely because of reduced funding and because charities are considered to be *sui juris*.

The Public Guardian and Trustee used to send a letter (when she was required to be notified of an Application for a Certificate whenever a charitable interest was mentioned in a Will) in response to the notification that contained the following:

> Please be advised that we will not be participating in this Application since the charitable interests in this estate are apparently *sui juris* organizations that are legally competent to protect the charitable interests in the estate, have a fiduciary responsibility for protecting the charitable interests in the estate, are accountable for protecting the charitable interests in the estate and which, together with the person responsible for administering and

> operating the charitable organization, may be held liable for failure to protect the charitable interests in the estate.

Although the letter is no longer sent (because the notification requirements have changed) the principle remains. The responsibility rests with the charity to satisfy itself that everything has been done properly, that the assets have been accounted for, that the liabilities have been properly discharged and that the compensation claimed is appropriate.

A charitable beneficiary may therefore, at any time (realistically not before six months after death), into the administration request an accounting from the estate trustee. This request may be by letter to the estate trustee, or if the communications have been with the solicitor for the estate, to the solicitor. The response should be a letter advising when the accounts will be delivered.

Charities are generally aware that there are different formats for the delivery of accounts and understand the significance of the accounts being in "court format". Ideally accounts should be delivered in this format for all but the simplest estate. If not, the estate trustee may be faced with the request that the accounts be put into that format.

The estate trustee should be advised that if a formal passing is required then they will be required to put the accounts in proper form and that the cost of doing so is their "cost" - i.e. it is not a cost borne directly by the estate but rather is paid from the compensation received as estate trustee. Quite often a beneficiary is advised that the estate trustee would be happy to convert the accounts into court format but that the costs of doing so is to be borne by the beneficiary making the request directly or by the estate. This is not accurate. The estate should not be making this suggestion. The costs of putting accounts in proper form is a cost that is nobody else's responsibility except their own. A beneficiary is entitled to get the accounts in proper "court-format" and is not required to pay for it directly (i.e. as a credit against their share of the residue or as a direct invoice) or indirectly as an additional charge to the estate.

If resistance is met then a charitable beneficiary will often consider retaining counsel to assist in obtaining the accounts. Compelling an estate trustee to pass accounts provides a forum for the suspected and real concerns about the administration of the issue to be resolved by a court, if the parties are unable to resolve them informally. The ability, therefore, to obtain this Order, is not generally underestimated and is a standard tool for solicitors who act for charities.

Rule 74 provides for is the procedure for passing accounts as well as the expected "court" or formal form of the accounts. Rule 74.17 details the information that an estate trustee is required to provide when preparing accounts in court passing format. A common request by a beneficiary is to either ask for further information about a transaction or for a copy of the voucher. These requests should be taken seriously, acknowledged and responded to in a reasonable time. If such requests are not

responded to in a diligent manner then a beneficiary can request that the estate trustee bring an Application to Pass Accounts (if this was not done at the time that the accounts were delivered).

This Rule also requires the accounts to be organized in the following chronological sections:

Statement of Original Assets; Statement of Capital Receipts; Statement of Capital Disbursements; Statement of Revenue Receipts; Statement of Revenue Disbursements; Statement of Investment Account; Statement of Unrealized Original Assets; Cash Summary; Statement of Trustee's Investments; Statement of Liabilities; Statement of Estate Trustee's Compensation.

Some of these sections and entries are of particular interest to the charitable beneficiary including those relating to investments, cash summary, legal fees, compensation, and taxes.

Statement of Investment Account

The Investment Account records the investment of the capital of the estate by the estate trustee pending its ultimate distribution. When an asset is sold and the proceeds reinvested elsewhere than in the estate bank account, the purchase of the investment will be recorded in this Account.

Although estate trustees are frequently given considerable discretion in the investments they make on behalf of the estate and it is not uncommon for estate investments to include mortgages on real property and mutual funds in addition to stocks, bonds, and other forms of investment certificates, guidance is obtained from the trustee's investment power contained in the testamentary documents and in the *Trustee Act*.

In Ontario, an estate trustee may retain the services of a professional investment advisor, however, the advisor and the estate trustee on behalf of the estate must enter into a written agreement. The estate trustee must develop an investment policy and review that policy on a regular basis. It is recommended that this review take place on a quarterly basis unless circumstances dictate otherwise.

This is an area that is closely monitored by beneficiaries, especially if a trust has been created whereby one beneficiary, usually the surviving spouse, is entitled to the income from the trust for their lifetime, and another beneficiary, usually charitable, are entitled to the capital upon the death of the spouse (life tenant). Both beneficiaries may take issue with the investment activities - for different and potentially opposite reasons. An estate trustee should, therefore, document all investment activities including the creation of an investment plan, obtaining investment advice, and the recording of minutes of meetings, all with a view of being able to show that a prudent investor would have taken the same action in similar circumstances. That documentation would form part of the vouchers available for disclosure upon request by a beneficiary.

A beneficiary has the right to examine and question the investments selected by trustees, especially where it appears that competing interests have not been addressed or where original assets retained (such as a significant holding in private corporate shares with a limited market) could result in a significant loss of value to the estate. One area of potential conflict between beneficiaries is where a trust has been created. The estate trustee is expected to maintain an "even hand" between classes of potentially adverse beneficiaries such as the life tenant and the capital beneficiaries. This means that the trust's investments must attempt to maximize the income produced from the capital (the life tenant's interest) with preserving the capital of the trust (the capital beneficiary's interest). This becomes difficult with falling market situations where the life tenant also has the right to encroach on the capital if the estate trustee deems it necessary within the exercise of his or her discretion. If a charity is a capital beneficiary, (which is frequently the case when there is a life tenant) they understand the importance of reviewing the investment portfolio as a whole to see whether that balance is being maintained between these two competing interests. Particulars of all capital encroachments should therefore be given. If this detail is lacking, further information will likely be requested even if the right to encroach exists in the Will.

Cash Summary

This Statement lists all cash from any source on hand at the end of the accounting period. Investments should be listed at their original cost to the estate so that the amount under investment in the Cash Summary must equal the amount under investment in the Investment Account and the total set out in the Statement of Trustee Investments. The cash on hand at the end of the period should also equal the total of all uninvested funds in the estate bank account(s). The amount of uninvested funds should be a minimum amount. If upon review a large amount remains in the solicitor's trust account or the estate's bank account, the reason for this should be queried. An estate trustee has an obligation to preserve and maximize the return on assets which traditionally means investing surplus funds, even if in a rolling 30 day GIC.

Statement of Unrealized Original Assets

The Statement of Unrealized Original Assets represents the summary of any original assets that were not realized by the estate trustee during the accounting period. This Statement lists these assets at the date of death value rather than the market value at the end of the accounting period. If the estate holds corporate shares or mutual funds, especially when the trust will continue for a number of years, the current market value will be different. In order to understand the present value of these assets, a beneficiary will likely ask the estate trustees for that information. It may be that upon receipt of this information that further questions are raised, such as where an original asset has depreciated in value, why it has been or is being retained (i.e. because the asset is subject to a specific in specie distribution).

Legal and Professional Fees

Some of the more important entries for a residuary beneficiary to review (along with compensation and taxes) are the legal and professional fees incurred by the estate trustee.

An estate trustee is entitled to retain the services of professional advisors. Although these professional advisors are retained to act for the estate trustee (and not the estate per se) the cost of these retainers are normally borne by the estate, depending on the type of work undertaken. If the estate trustee shows that the charges were proper and not work that he or she should have been able to do personally then they can be charged against the estate. Where the charges are found to be excessive, only the amount reasonable in the circumstances should be borne by the estate.

Usually estate trustees are lay individuals who require the services of a solicitor to advise them on various aspects of administering an estate. Although, professional estate trustees, such as trust companies, are more sophisticated and experienced in administering estates, legal issues may still arise and legal paperwork still needs to be prepared requiring them also to retain legal counsel. Accordingly, some payment to a solicitor should be expected except in the rare occasion where an estate trustee is a solicitor who waives his or her entitlement to fees.

There is no regulated tariff with respect to legal fees rendered in the administration of an estate (recognizing that in 1999 the Metropolitan Toronto Lawyer's Association prepared a "suggested" fee schedule with the emphasis on "suggested"). The general rule is that the estate will be liable for reasonable legal fees where it is shown that the services related to the estate.

A residuary beneficiary is entitled to ask the estate trustee to provide a copy of the solicitor's invoice(s) or account(s) for review. The accounts should be rendered in sufficient detail to provide a description of the tasks performed and the time spent on each task on a daily basis. Ideally, such things as the detail of the work performed, who performed the work and whether they are a clerk or lawyer, the hourly rate of each timekeeper, and how long it took to perform the task should be provided. The accounts should be more than a "catch-all" description of services rendered followed by a "total fee" amount.

If the accounts lack this detail then a beneficiary is entitled to request the backup documentation or "dockets". Most charities understand and often request a copy of the legal accounts rendered and if lacking sufficient detail, also the docket entries. A solicitor's response to these requests should be prompt and professional – a beneficiary is entitled to see the entries as of right. There is no issue as to privilege.

As well as insisting that the solicitor provide all the detail required if not set out in first instance, a residuary beneficiary can challenge the amount of legal fees charged, even if the account has been paid. Typically by the time the estate accounts are presented for

review at least 9 to 12 months have passed since the date of death. A solicitor does not need to wait (in contrast with estate trustee compensation) for beneficiary approval before the estate trustee pays his or her account. However, the solicitor and the estate trustee should be aware that a beneficiary can challenge the quantum of the fees charged and paid. A solicitor and estate trustee should be prepared to answer questions and attempt to resolve differences over the accounts. If those differences cannot be resolved then a beneficiary can ask for the accounts to be assessed or taxed. This is because the amount paid affects the amount of the residue.[9] The costs of an assessment are considered part of the administration expenses of the estate and are a first charge on the estate. At this stage if there is concern over the extent of the legal fees, a beneficiary will likely consult with its own legal counsel for further advice.

Solicitor Acting as Estate Trustee

Caution will be exercised by a charitable beneficiary when reviewing accounts where the estate trustee is a practicing lawyer. An estate trustee is entitled to employ a solicitor and be reimbursed for those fees properly incurred, but not where the estate trustee should have or might have done the work him or herself.

Whenever a solicitor is acting as estate trustee (whether by default or by appointment) a beneficiary is entitled to insist that separate accounts be provided for the time expended as solicitor as compared to the time spent as estate trustee in order to ensure that the time expended in the role of estate trustee is not billed twice ("double dipping").

This "double dipping" may also occur where a solicitor is assisting an inexperienced estate trustee where the solicitor ends up by default or otherwise doing those things that the estate trustee should be doing.

The general rule (subject to exceptions) at common law was that a solicitor acting as estate trustee was not entitled to charge the estate for professional services as this violated the rule that the estate trustee was not to place him or herself in a position of conflict. In some provinces such as Ontario this common law rule has been (since 1903) overruled by statute. The *Trustee Act* allows for payment of an "allowance" (i.e. compensation) to a solicitor acting as an estate trustee for his or her care, pains, trouble and time expended in administering the estate.

Acting as estate trustee is distinct from acting as a solicitor. Often the two roles have no relation to each other, especially when compensation is being quantified. Usually, the solicitor charges his or her time as in the normal course (i.e. the time spent x hourly rate) when performing estate trustee duties and this may not result in appropriate compensation. Rather, a solicitor should open one matter to record his or her time as solicitor and another matter to record his or her activities as estate trustee. Other personnel in the office performing work for the estate should similarly docket or record their time to the relevant matter.[10] The failure to properly distinguish between estate trustee and solicitor's work and account separately for it, can result in the solicitor being

unable to collect compensation as estate trustee.

If it is anticipated by the circumstances (e.g. co-estate trustee situation where the deceased names his solicitor and widow and she is elderly and not inclined to deal with the details of administering an estate) that this may occur, then a charitable beneficiary will likely trigger to the issue and may send a letter, at the outset to the solicitor and estate trustee stating that it expects that the solicitor will keep separate records of any work done as solicitor from that done as estate trustee and that compensation will be dealt with separately from legal fees and on a global basis as between the co-estate trustees.

Sometimes, a solicitor acting as estate trustee will not charge compensation per se but rather take the position that he or she as estate trustee has "delegated" those functions to him or herself as solicitor and charge his or her time in the normal course as a solicitor. The solicitor then takes the further position that he or she is not "claiming" compensation. Leaving aside whether an estate trustee can "delegate" his or her duties, in such a case, a beneficiary should still review the amount taken (usually described as legal fees) as it would any other claim for compensation. The same factors and considerations apply to determine whether the amount taken is "fair and reasonable" in the circumstances.

Finally, it should be noted that the Will may address the situation where a solicitor is named an estate trustee. A clause may be included in the Will that allows the estate trustee to charge for his professional services. These clauses tend to be strictly construed. Even so, a beneficiary still retains the right to challenge, and the court retains the inherent jurisdiction to review, the charges.[11]

Estate Trustee's Compensation

An estate trustee is entitled to receive but is not required to receive compensation for his or her work as estate trustee. The claim by an estate trustee for compensation is normally a source of frequent carelessness and unintentional abuse. It is one item that will always be reviewed.

The presentment of accounts also allows an estate trustee to claim and receive compensation. The Statement of Compensation shows the amount of compensation claimed by the estate trustee. It must be in sufficient detail to allow the beneficiary to know the basis for the calculation.

At common law, before statutory enactment, an estate trustee was not allowed to "profit" from his or her position. This meant that an estate trustee could not charge for his or her services. By statute this general rule was overturned. Accordingly, an estate trustee is now entitled, but not required, to receive compensation for his or her work as estate trustee. This remuneration paid for his or her services will be a primary charge against the estate and rank before the payment of most debts and before the payment of bequests.

Trustee compensation is a matter of provincial. In Ontario, these principles are set out in section 61 of the *Trustee Act*, which provides for the "fair and reasonable allowance" for the estate trustee's "care, pains and troubles, and the time expended in and about the estate" unless the allowance is "fixed" (i.e. by compensation agreement) by the Will.

The basis for the claim should be very detailed and include docketed information and affidavit evidence.

The calculation of compensation is not as simple and is not simply the "customary rate". In Ontario, there is no statutory rate for estate trustees although the starting point is the mathematical calculation colloquially described as 2.5% of the "ins and outs". Although these rates are the "custom" (and have been in Ontario since 1975) they are not an automatic entitlement. For example, in one case the solicitor for the estate sent the following letter (in part) to the beneficiaries:[12]

> ... In accordance with the Estate Department of the Ontario Court the Trustee Act allows the Executors to receive a fee of FIVE PERCENT (5%) of the total value of the estate. Accordingly this would equate to the sum of $24,032.81. We have enclosed herewith a consent form which we would ask that you sign and return to our office consenting to the said amount being paid to Stephen Kelly, the Executor of the said estate.
>
> Please be advised that should you not agree to execute the said consent, we will have no other option to apply to the Supreme Court for a ruling on the same thus eliminating any distribution of the said estate until Judgment has been set down.
>
> As well, we wish to advise that our legal fees for the administration of this estate will be THREE AND ONE HALF PERCENT (3 1/2%) of the total value of the estate plus any applicable taxes and any actual disbursements, i.e. beneficiary registrations, courier charges, etc. incurred by our firm in the settling of the same. We have enclosed herewith a consent form which we would ask that you sign and return to our office consenting to the said amount being paid to our firm...

In reviewing this letter the court stated that it was "greatly concerned with the tenor of the letter" and "its misstatement regarding the basis for calculating compensation". It also stated that the comment that the "Estate Department of the Ontario Court" and the Trustee Act allow a fee of 5% was "patently false" and if consents had been signed relying upon this statement the beneficiaries would not be bound by them.[13] Further, the court repeated that the estate trustee is not allowed to take compensation before it is allowed by the court.[14]

The customary rate of 2.5% of the receipts and 2.5% of the disbursements should be seen as the maximum normally allowed (recognizing that compensation is ultimately a matter of discretion and there is provision for a special fee in the rare case). Further,

care should be taken to ensure the proper deductions are taken to the to total receipts and disbursements values. For example, an estate trustee is not generally entitled to compensation on transfers between bank accounts or other adjusting entries, payments on account of compensation, payments for executors' duties performed by someone else, capital losses, and refunds of payments made previously by the trustees such as income tax refunds. On capital receipts compensation is allowed on the total but may be reduced for large receipts and capital disbursements made in investing and liquidating capital funds should not attract compensation.

There are certain other "exclusions" from the percentages calculations. Cross entries or book entries (i.e. showing a loss in the realization of investments) although they must show in the accounts are not subject to compensation. The payment of income tax and receipt of income tax refund are also typically excluded. As are the write off of bad debts.

Where the estate is ongoing (i.e. a life interest exists) the estate trustee is entitled to a care and management fee. Estate trustees must indicate in their Statement of Compensation how the average value of the trust assets has been determined. An estate trustee is not entitled to a care and management fee if the estate is distributable outright, but it has taken the estate trustee time (over a year) to administer.

The mathematical calculation is subject to various factors. [15] The courts will consider various other factors besides the mathematically calculated result, such as if the Will fixes the amount of compensation, whether a legacy is left to the estate trustee (and whether this is in lieu of compensation)[16] and the existence of a compensation agreement.[17] Finally, the mathematical calculation may also be modified by the "five factors" as developed in the case law.[18] The five factors which should be considered in determining appropriate compensation include the size of the estate, the care and responsibility involved, the time spent performing the duties, the skill and abilities shown, and the results obtained or degree of success in the administration. This requires an overall review of the administration of the estate as well as the particular calculation of compensation on specific assets. For example, no compensation should be taken for merely taking over assets. And, no compensation should be taken for assets passing outside the estate either by way of joint tenancy or beneficiary designation.

The bottom line: the percentage basis for awarding compensation, although a short cut, should only be considered a rough guide. Each claim for compensation must be looked at on its own merits each and every time. Hence, this is one item that is reviewed each and every time.

Finally, a charitable beneficiary will also review the accounts to see if the estate trustees have pre-taken compensation.

During this phase of the administration and reviewing the accounts a charitable

beneficiary will examine whether there are any entries showing the payment of income taxes. Frequently, gifts to charities result in no or relatively little tax payable, depending on the size of the gift. In some estates, the payment of taxes may not be avoidable. However, this is an area where too often taxes are paid. In the case where a significant portion of the residue of the estate is to be donated outright to charities, the estate trustee should file a terminal tax return including the donation credit in order to minimize the tax payable. Further, where some or all of the estate is immediately distributable to charities the estate trustee may be able to file T3 returns allocating some or all of the estate income to the beneficiary charities in order to minimize the tax payable. In estates with a life tenant preceding the interest of residual charitable beneficiaries, the taxable income is usually allocated to the life tenant, resulting in no tax payable by the estate (the life tenant pays the tax). If income tax is paid in the estate, the estate trustee should allocate the taxes against the income to which the life tenant is entitled. While it is not the beneficiary's role to notify the estate trustee of the deadlines for filing, for example, a charitable beneficiary has a general idea on the rules and deadlines.

A charitable beneficiary knows that the responsibility for filing returns on time and accurately rests absolutely on the estate trustee (and estate solicitor). If a deadline is not met then CCRA can impose interest and penalties on any amount owing. Any payments made beyond the actual tax due should not be an expense of the estate. These expenses (i.e. interest, penalties, and arguable the costs of correcting the situation) should be borne by the estate trustee personally. One way this can be done is for the charitable beneficiary to request that these amounts (with interest) be set-off against any compensation claimed (in addition to complaining about the amount of compensation taken).

Charitable beneficiaries are obligated to protect the charitable status of their interest in the estate by evaluating the gift, properly valuing the gift and issuing proper receipts. A receipt cannot be issued until the gift is actually received. Typically, a copy of the Will is filed with the income tax returns that support the filing showing the existence of charitable beneficiaries. Sometimes this is not enough and a charity will be asked to provide confirmation. As a receipt cannot be issued (in advance of actual receipt of the gift) a charity may be asked by the estate trustee (through the estate solicitor) or the charity itself may suggest that instead it will issue a Letter of Undertaking. By this letter the charity indicates its acceptance of the gift and undertakes to issue a receipt. A charity will be careful in this situation and will, to the extent possible, place its reliance on a third party, such as the estate accountant, for the valuation estimate. It may be that at the time of receipting the gift the value is less (or more) than the value expected. It is not within the charity's ability to "opine" on the expected value until the gift is actually received.

In auditing the estate accounts some of the questions a charitable beneficiary will therefore ask themselves are:

- Is there any commercial or business real property?

- Are any of the assets located outside Ontario? (Foreign assets should be reported in Canadian Dollars using the exchange rate as of the date of death.)

- Are the assets cross-referenced to related entries in the Capital Receipts?

- Do the estate assets include mutual funds?

- Are capital payments made to income beneficiaries? If so, why?

- Have legacy payments and specific bequests of assets *in specie* been made?

- Are details provided with respect to estate trustee's out-of-pocket expenses?

- Is the estate trustee also the solicitor for the estate? Do payments to solicitor or solicitor's firm detail whether the services were provided as solicitors or in the solicitor's capacity as estate trustee. Request and review legal accounts.

- If there are ongoing investments paying semi-annual or annual income, do all payments appear to have been received?

- Do the securities pay regular dividend income?

- Does the estate hold a "wasting asset" (such as a cottage property which does not generate income but has ongoing expenses)? How are these disbursements allocated?

- Has the estate trustee appeared to maintain an "even hand" when selecting investments?

- Has the compensation calculation been adjusted for capital losses, transfers between accounts, adjusting entries, refunds and solicitor or other professional accounts?

- Has compensation been reduced by interim payments made to the estate trustee on account of compensation?

- If an interim distribution is the holdback reasonable?

- The mathematics will be checked.

Remember a charitable beneficiary should not be asked to "cross the line" when it comes to making decisions or considering consenting to request for a course of action proposed by the estate trustee. It is the estate trustee's responsibility to make those

prudent decisions and it is at the passing of accounts that the beneficiary reviews those decisions. A charity's duty is to be a conscientious and diligent beneficiary.

In the End ...

Near the end of the estate's administration there are further considerations for the charitable beneficiary. In Ontario it is not uncommon for an immediately distributable estate to take over a year to administer. As stated, once the estate trustee is in a position to windup the estate, he or she should provide the beneficiaries with an accounting detailing the estate assets, expenses and investments.

Release and Indemnity

With the estate account "package" is usually the request that the beneficiary sign the release (and indemnity) provided. A release is requested in order to protect the estate trustee as it binds the beneficiary's acceptance of the estate trustee's administration (absent fraud) of the estate. An estate trustee can request this sign-off at any stage. There is no standard legal form and can contain whatever the drafter (usually the solicitor for the estate trustee) wants to include.

As there is no standard form release, it is possible for a charity to modify the release to include language that better suits its purposes or the particular circumstances. This is just another legal document that the parties can argue over and negotiate the language to everyone's satisfaction. Any changes should be initialed.

As residuary beneficiaries are the only class of beneficiary concerned with the administration of the estate, only they should be asked to review the accounts and sign a release. Legatee beneficiaries can be asked to sign a receipt (and not a release) upon receiving their legacy. Sometimes there is confusing over this and a legatee is asked to sign a release. Legatees should resist this request (although there may not be any practical objections to signing a release that limits the acknowledgement to the amount received once the legacy is received) and instead offer to sign a receipt.

The request to sign a release is an indulgence. The estate trustee is asking the charity to put its name on the "bottom line" - a function in the old days that was done by the Judge. The role should be taken seriously, as the Board of Directors is ultimately responsible. As a release (subject to extenuating circumstances) usually means that the activities of the estate trustee during that particular period cannot be revisited, a charitable beneficiary is aware that it is very important to take the time to read the release, and if in doubt, to obtain legal advice.

Quite often the covering letter requesting the "sign-off" also states that the beneficiary will not receive or is not entitled to receive the distribution until the release is signed (and sometimes also by all the beneficiaries). A charity should not be made to feel pressured into signing the release. After any holdback for income taxes, there is usually

no reason why the estate trustee cannot distribute the estate leaving a reasonable amount as a holdback. The release relates to the administration of the estate by the estate trustee and bears no relationship to the charitable beneficiaries' direct entitlement to its gift.

The release may also include a request for an indemnity for the estate trustee. This is a contentious area and not always easy to resolve. Typically, it is understood that an estate trustee's personal liability is limited to the value of the assets, translated to mean that the estate trustee will be liable only to the extent that it is entitled to be indemnified or exonerated out of the assets. Despite this understanding, estate trustees seek the comfort of a written indemnity (that may or may not be expressly limited to the share received from the assets of the estate).

The indemnity usually provides that the charity agrees that if, in the future, the estate trustee determines that there are further estate liabilities and no estate assets left to discharge them, then the charity agrees that it will, in effect, reimburse the estate trustee for that liability. By the charity agreeing, in effect to pay the liability, the estate trustee is relieved of any personal liability for these debts.

Historically, there was no need for an indemnity (or a release for that matter) as the courts reviewed the administration and the estate trustee could rely on the Judgment (again assuming no fraud) obtained. However, as formal passing of accounts are not always the norm today, the request for an indemnity is becoming more common.

Ideally, the charity should not be asked to sign an indemnity. It is the estate trustee's responsibility to ensure that all the debts of the deceased are paid before making any distribution. Sometimes this section is simply included because it is in the "precedent." A charity is entitled to make inquiries of the estate trustee as to what in particular he or she is concerned about. Is there a debt or pending action against the estate that may result in a further liability? If there is no real reason for its inclusion then consideration should be given to removing it from the form.

Income taxes are a joint liability of the estate trustee and the estate because of section 159 of the *Income Tax Act*. It may be because of this section that estate trustees are requesting an indemnity. If that is the case (i.e. it is this particular liability that is of concern) then instead of signing the document, the estate trustee (and the charity could request) could either provide for a larger holdback or limit and particularize the indemnity to this potential liability.

Finally, consider that a charity may not be able to provide an indemnity given its charter. In effect, giving an indemnity is like incurring a potential liability of an unknown amount.

When the administration is essentially complete a tax Clearance Certificate will be requested from CCRA. The estate trustee should apply for the Clearance Certificate once all tax returns have been filed and assessed (or re-assessed) and any additional

assessment is paid. Once the Clearance Certificate is issued, CCRA cannot assert a claim for unpaid taxes, interest or penalties.

As a last step a final set of accounts will be delivered for approval. A final distribution is usually made of all or part of the holdback. With the receipt of the final distribution and the signing of the release the administration of the estate is usually (absent fraud) over.

It is at this point that a charity is finally in a position to receive the balance remaining under the estate and confirm acceptance by issuing a charitable tax receipt (and release) together with whatever may be appropriate in the circumstances, such as a letter of thanks to the family.

B. Estate Litigation Management

Litigious proceedings involving an estate revolve around the last Will of a deceased or claims made against the estate. Disputes over the validity of a Will, between a beneficiary and the estate trustee, between classes of beneficiaries, and claims by third parties can all arise during an administration of an estate. Some areas are of particular concern for the charitable beneficiary.

The *cy-près* doctrine

In the particular case of charities a unique application seeking the opinion, advice and direction of the court revolves around the misnaming or misidentifying a charity or clarifying the purpose of a gift that is impossible or impractical to administer. Such an application will invoke the *cy-près* doctrine (loose transaction from Roman French meaning "as near as possible") that has been around since the medieval period. Traditionally, the courts have fostered charitable activities by upholding whenever possible charitable gift intentions. Therefore, in order for the court to avail itself of the *cy-près* doctrine using the court's inherent jurisdiction over charities, the deceased must have had a general charitable intent.

The policy rationale is that if a person intended to benefit the public (via a charity) then the courts should honour that intention by ensuring that the benefit is upheld. Hence, in a misnaming situation, the courts will identify the charity with the closest name and objects; where the gift is impossible to carry out, the courts will modify it so that it can be carried out.

There are a variety of types of *cy-près* applications. One is where there is the beneficiary named is non-existent. This can arise where the "named" organization does not and never did exist. In this case, the court will entertain extrinsic evidence going to the testator's intention, relationship to various competing organizations and circumstances surrounding the taking of the Will instructions. After examining the evidence, the court will decide which organization the testator intended to benefit. In such cases, where enough is at stake, it is possible that the solicitor who drafted the

Will could be brought into the litigation on the basis that the solicitor should have accurately determined who the testator intended to benefit and ensure that the organizations' proper legal name was used.

For example, in *Royal Trust Corp. and the Hospital for Sick Children*[19] the testator that the residue of his estate should go the "Crippled Children's Hospital" in Toronto and in Vancouver in equal shares. The "Crippled Children's Hospital" in Toronto never existed. The executor applied to the court to interpret the Will to determine the beneficiary of the half share allocated to the "Crippled Children's Hospital" in Toronto.

There were a number of Ontario charities whose purpose was to treat or assist in the treatment of crippled children. The Hospital for Sick Children, the Ontario Society for Crippled Children, Bloorview Children's Hospital, Hugh MacMillan Rehabilitation Centre, and the Crippled Children's Committee of the Rameses Shrine Temple, Toronto all responded to the application. As these charities had agreed in advance to their proportionate share each would receive, the main question for the court was whether these organizations came within the general description of "crippled children's hospital". The court found that there was a definite charitable intention expressed by the testator and that it was to benefit crippled children in Toronto. The court agreed that these charities fell within that general description and satisfied that charitable intention.

A second type of application relates to successor beneficiaries. Sometimes the passage of time from when the Will was executed and the testator dies, can see the merger or transferring of assets and operations from the named organization to another.

In *Conforti Estate and Conforti*[20] the testator left the residue of his estate to the Sacred Heart Child and Family Centre. Shortly before he died, the Centre transferred its assets and operations to the Aisling Centre in Scarborough and ceased operations. The Centre had been operated by the Order of Sisters of St. Joseph.

The court was asked to determine who was entitled to the residue – the Aisling Centre, the Order of Sisters of St. Joseph, or the deceased's relatives. The court found a general charitable intent and that the gift did not fail just because of the legal "disappearance" of the Centre. The *cy-près* doctrine required the residue to fulfill the testator's objects "as near as possible". As the Aisling Centre was fulfilling those objects now, it was held to be the recipient of the residue.

A third type of application is where there is an omission in determining the extent of the gift to charity. For example, in *Urquhart Estate v. Urquhart*[21] the testatrix had failed to insert the amounts she intended to go to each of the three charities named. The question was whether this made the gifts void for uncertainty. The court held "no", finding that the use of the "=" sign meant that the testatrix wanted the three charities to share equally.

A fourth type of application is to remedy terms that are contrary to public policy. It could be with the passage of time that the conditions imposed on the gift are no longer

socially acceptable. For example, where the recipients of a university scholarship are stated to be limited to "white male catholic British subjects". Such a condition would be considered repugnant and contrary not only to public policy but also the university's anti-discriminatory policy.

In *Canada Trust and Ontario Human Rights Commission*[22] the Ontario Court of Appeal held that the *cy-près* doctrine could be used to remove race, colour, creed, ethnic origin restrictions on charitable gifts so that the gift could be administered in accordance with contemporary public policy. In so doing, the Court of Appeal recognized that the public interest would not be promoted by the creation of a charity that by the lapse of time ceased to be useful.

Likewise, the gift may contain too precise limitations. These limitations can cause problems if they are inconsistent with the charity's objects. A charity would not be able to accept the gift with the limitation as it would result in the charity acting outside the scope of it's authority. In such a case, an application could be brought to determine whether the court will invoke the *cy-près* doctrine or its inherent scheme approval power to modify the terms of the gift.

Another variant of the use of the *cy-près* doctrine is to request the court to modify the administrative terms of a charitable trust in order to further its charitable objects. In *Killam Estate v. Dalhousie University*[23] the court was asked to relieve the trustees from the Will provision which restricted them to pay only income to beneficiaries. The trustee's sought the court's approval for the implementation of an agreement between the trustees and beneficiaries that would provide for a combined capital and income payments to the beneficiaries. The court agreed on the basis that the alterations were in the best interests of the beneficiaries and for the better administration of the trust.[24]

Accordingly, using this doctrine provides an opportunity to "save" the gift. However, sometimes the courts will refuse to apply the doctrine – often where there is insufficient charitable intent by the testator or where the application is brought as a matter of "expediency".

In such cases, that particular gift "fails" and the property in question reverts to the estate to be distributed in accordance with the Will (usually this means the gift falls into residue and forms part of the property to be distributed to the residuary beneficiaries). For example, if the residue is to be divided among three organizations and one of the organizations is non-existent and there was insufficient evidence for the court to identify that organization, then the residue, instead of being divided in three equal shares, would be divided in half.

Hence, although a helpful doctrine the *cy-près* doctrine does not always work. In *Re Stewart Estate*[25] the court was faced with an interesting twist. The testator left $10,000 to the local YMCA. The language of the bequest was general with no prohibition as to its use. He also directed that his housekeeper be allowed to reside in his house until her

death. The estate was cash poor so it was not able to make the bequest to the YMCA until the house was sold which could not happen until the housekeeper died. By the time that happened, the YMCA had ceased operations - the directors had resigned and it had significant liabilities. But it was still incorporated and still existed in a legal sense.

The court held that the estate could not rely upon the *cy-près* doctrine to direct the gift to another similar charity that was operational (as the estate trustee wanted to do) because the YMCA still "existed". The estate was required to pay the $10,000 to the Board of the YMCA knowing that it was not going to be used for philanthropic purposes but rather to pay off creditors.

In *Cumberland Trust v. Maritime Electric Co.*[26] a charitable trust received monthly payments on a lease that had been granted in 1853 to the Charlottetown Gas Light Company for the life of a 999 year lease. The trust sought to have the lease amended by increasing the annual rent, adding a term limiting the unexpired portion of the lease to 20 years, and empowering the trust to terminate the lease on reasonable notice.

The court rejected the application noting that the original objects could still be carried out even if in a diminished capacity due to the low rental payments. It also noted that the *cy-près* doctrine could only be exercised where the objects were either impossible or impractical to carry out.

In *Re Baker*[27] the residue was left to the Northwestern General Hospital "to be used for the general purposes of the said Hospital." After the testator's death the hospital incorporated a foundation for the purposes of holding funds to advance medical research and education. Another charitable organization was also subsequently created in the name of the testator and his wife for the purposes of operating a nursing home and daycare center.

The trustees brought an application to permit the residue of the testator's estate to be paid to the foundation. The application was on consent of all but the Public Trustee who opposed. The court after noting its inherent jurisdiction to vary trusts, stated that it was a limited jurisdiction based on the principle of aiding the preservation of trust property and the administration of such trusts. In this particular case, the court was being asked (in its view) to vary the trust for the sake of expediency and that was not within the court's jurisdiction.

Procedurally, in Ontario such applications are made pursuant to Rule 14.05(3) of the *Rules of Civil Procedure*. Typically, the estate trustee serves the application (i.e. gives notice) on all organizations that are either similar in name or in object to that which the testator appears to want to benefit.

At this stage, the organization must decide whether to participate. It should also check to see whether the deceased had any connection to the organization – i.e. were they on a mailing list, receiving a newsletter or materials or had they (or their spouse) made a donation. Where that search shows a connection to the organization, the more likely the

organization will benefit from participating in the process. Of course, it also depends on who else responds.

An organization will usually seek the guidance of counsel in this decision making process. If the organization decides to participate it will require the assistance of counsel as evidence from the organization, participation in negotiations and making submissions to the court is required.

With respect to the costs of these kinds of applications, the general trend is for the costs to be paid by the estate. The estate trustee's costs are borne by the estate. Generally, with respect to the competing beneficiary costs, the court takes the position that the matter required the assistance of the court and as such the litigation was no one's "fault. However, be aware that more frequently, a beneficiary who is clearly the appropriate recipient may take the position that the other organizations are "taking advantage" of the ambiguity and, if unsuccessful, should bear their own costs. A further variation is to argue that the costs should be borne in the same proportions as the gift is allocated. Again, the question of cost is a matter of negotiation and ultimately the discretion of the court.

The doctrine of *cy-près* is a rule of Will construction where the court may end up effectively altering the terms of the Will. Accordingly, these applications should not be taken for granted.

Will Challenges

The next-of-kin may prefer an intestacy to a Will with a charitable bequest. They may, accordingly, seek to defeat the Will in order to create a total or partial intestacy, by challenging the Will on the basis set out in the subsequent sections.

The power to deal with these claims rest with the estate trustee with the assistance of counsel. However, as a practice it is common for the estate trustee to seek the consent of the beneficiaries on the major decisions that may have to be made – for example, deciding to accept or make an offer to settle or going to trial. In these cases, the beneficiaries may be called upon to "cast a vote" on the options presented. It is suggested in these cases that the charitable beneficiary be given (voluntarily) by the estate solicitor a summary of the evidence to the litigation, a range of options and the recommended course of action before requesting that the beneficiary to "cast their vote". It is quite likely that the charitable beneficiary will consult with other "similar class" beneficiaries and retain common counsel.

Sometimes a charitable residuary beneficiary is asked to consent to "giving" a sum (from their residue share) to the friend, housekeeper or family member that was "forgotten" from the Will. The estate trustee when making the request may indicate that they know the deceased wanted to benefit the person and that they would have been included in the Will if only they had "gotten around" to added them. These requests will be considered carefully. Although there are many nuances to such a request and the

questions to ask and decision-making process varies depending on the circumstances, the general inclination for a charity is not to agree. It is a very difficult request and the estate trustee and solicitor should really think twice before making it. Despite the good will potentially generated by agreeing to the request, the charity's obligation is to ensure that the deceased's wishes are carried out. For whatever reason (and it is not for the estate trustee or the charity to guess) the person was excluded or not added. Where the situation is that the person will (if the request is rejected) assert a claim against the estate then a charity (after confirming this) has more flexibility in agreeing to the request. In this case, the charity is compromising or settling potential/actual litigation.

A charitable beneficiary is generally familiar with the "orders for assistance" provided in the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194. These *Rules of Civil Procedure* also set out the procedure, documentation required, parties to be served and deadlines to be met with respect to these applications. If represented by counsel, then a charity should be treated like any other party. It should consider participating in all the steps of the process. For example, participate in identifying and framing the issues set out in the Order for Directions, consider the obligation to produce relevant documentation, be involved in the discovery process and work with the other parties in attempting to resolve the litigation.

With respect to charities, it is not common for a charity to have any relevant document to the deceased. However, with the increase sophistication in record keeping, it is becoming more common for charities to be able to search for records relating to the deceased such as a history of giving or being on a mailing list. This documentation is helpful in supporting the argument that the deceased intended to give to charity as it was consistent with a pattern established by the testator before his or her death. Counsel for the other parties should consider requesting an affidavit of documents from the charitable beneficiary if relevant to the issues being litigated.

As litigation is costly, it is prudent for classes of beneficiaries who share the same interest to consider retaining a common solicitor (who must in Ontario consider Rule 2.04 of the *Rules of Professional Conduct*) to act for those common interests. If the matter begins with various different representation for the same interest then it is incumbent on counsel involved in the litigation to suggest that the similar classes of beneficiary work with "lead" or "representative" counsel.

Consequences of the Estate being in Litigation: Impact on Beneficiaries

The role of the beneficiary depends upon the type of beneficiary and their interest under the Will. Challenging a Will has a direct impact on the beneficiaries in a number of ways. First, it invariably reduces the total value of the assets available for distribution to the beneficiaries because at least some of the costs of litigation (depending on the issue litigated and the circumstances of litigation) will be paid out of the estate. Without a doubt the estate trustee's costs of propounding the Will are paid by the estate. Will

interpretations costs are typically also paid by the estate. Costs of reasonable challenges can also be paid (partially or totally) out of the estate.

Second, litigation delays the distribution of all or part of the estate, as distributions may have to be frozen until the challenge is dealt with.

Third, the result of the challenge can improve, worsen, or destroy a given beneficiary's entitlement. For next of kin, invalidating a Will can often serve to increase their proportionate share of an estate. This is especially so for spouses, who receive favourable treatment under the intestate succession regime in Ontario. For more distant beneficiaries, including friends and charities, litigation often adversely affects their share, or render gifts to them void altogether. Unlike close relatives, charities are not entitled to a share of the estate in the event of an intestacy.

Of course, this is not always the case. In some cases invalidating the most recent testamentary instrument will not result in an intestacy but in the upholding of an earlier Will, which may provide for a greater share of the estate than the more recent Will. Further, some litigation is between charities or other individuals where there are errors made in naming them in the Will. In these circumstances the likely result of the litigation is not an intestacy but merely the choosing of one beneficiary over another or the sharing of the interest among those that participate.

Charities' Perspective and Response

Charities by virtue of being a beneficiary of someone's estate can become involved in estate litigation for various reasons including; outdated estate plans, inadequate estate planning, poorly drafted documents, the nature of the estate assets, conflicts between the beneficiaries and the personal representatives of the deceased. The extent to which a charity becomes involved may be, however, more discretionary. The charity's experience, reporting structure and organization framework often impacts the role played.

There are, however, key differences between charities and other litigants. Some include the following.

Form and structure: Charities comes in a variety of forms and governing structures.

Directing minds: The direction mind of a charity is usually a board of directors. The members of the board of directors are volunteers. Although, well meaning individuals they may have a limited understanding of their legal duties and responsibilities and the litigation process. There may not be access to legal counsel with the relevant and necessary expertise in estate matters.

Inherent Court Jurisdiction: Regardless of structure, a charity is subject to certain controls imposed by statute and the common law. A court retains an inherent jurisdiction over the affairs of a charity. The public guardian and trustee also has statutory control.

Restrictions: A charity is limited by its charitable objects. Although its objectives may change over time, a charity must constantly be aware of the limiting framework of its charitable objectives. Acting outside that framework is unauthorized and can lead to the revocation of the charities' charitable status – its raison d'etre.

Degree of knowledge: A charity involved in estate litigation is usually once removed from the factual background to the dispute. Although, charities have a self-interest in the outcome of the litigation (or else they would not be participating), they typically have very little knowledge of the events or facts being challenged. A charity is typically less familiar with family history and dynamics.

Public Perception: An aware charity is always conscious of its public image. Maintaining a positive image in the mind of the public and the charity's community is fundamental. Such considerations colour a charity's reaction and attitude. However, knowing the importance of maintaining this image with the public, may lead to being taken advantage of by the other parties (and their counsel) involved in the litigation.

The most common types of estate proceedings that involve a charity are Will challenges, Will interpretations (including *cy-près* applications), and passing of accounts.

A charity may be named in a Will to receive a legacy or part or the entire residue. As a beneficiary, even if only as legatee, a charity is entitled to notice of any estate proceeding which may affect its entitlement or require its consent and is entitled to participate in the resolution of these issues.

There are several ways in which a charity may be involved in an estate dispute. First, a charity may decide to "submit its rights" (see earlier discussion). Like any other beneficiary a charity may decide to leave the "battle" to the other beneficiaries. By submitting its rights the charity is not required to retain counsel or participate in the process thereby not exposing it to costs directly and not entitling it to costs. The charity, however, retains the right to participate in any settlement discussions and must consent to any settlement.

Second, a charity may decide to monitor the litigation and not be an active participant. A charity, by a staff person with or without the input of the board, may self-monitor the litigation in-house or with the assistance of outside counsel. In some charities internal governance requires the staff person to bring every aspect of the litigation (not just the information to make a decision) to the attention of the board; in other cases the staff person has the discretion and delegated responsibility to make the basic decisions. Depending on the structure of the organization many layers of decision makers may have to be consulted, which in turn results in timing issues.

Third, a charity may decide to be an active participant. Factors which may cause a charity to be more active include being the sole beneficiary or the only charity who believes in the "cause", unhappiness with the handling of the matter by the solicitor for

the estate, and where the other charities beneficiaries have agreed to let it (though its counsel) take the lead.

Factors Considered

There are several factors that affect when and why a charity may participate in litigation. The following list is not intended to be exhaustive.

Adequate representation: a charity will want to ensure that it is an informed participant. This means that it should know the facts leading up to the proposed litigation, the remedial options or relief being sought by the various parties, the identity and positions of the other parties, the alternatives to litigation, the anticipated outcomes of the litigation, and the likelihood of cost recovery. A charity will expect that good counsel would provide this information to their client. A staff person handling the litigation will try to ensure that he or she has the requisite authority to retain and instruct counsel. It may be that a by-law or board resolution is needed.

The duties: a charity faces and owes certain duties. The directors must act in good faith and in the best interests of the organization. A director has a duty of knowledge, a duty of care, a duty of skill and prudence, a duty of diligence, a duty to manage, a duty to act in their scope of authority. The staff person correspondingly must carry out the organization's policies in the best interests of the organization. The organization has a duty to its members and a duty to the donor or testator. All of these duties culminate in a duty to investigate, a duty to defend and where necessary a duty to compromise. These duties should significantly influence a charity's approach to making decisions and participation in any alternative dispute resolution process.

There is also the public duty. There is a reason for charities in our society. As noted by the court in *Public Trustee v. The Toronto Humane Society*:[28]

> The basic justification for the existence of a charity in the legal sense is that it confers a public benefit of a nature recognized by the courts as such. In return for that benefit, charitable institutions have been accorded certain legal immunities and advantages. Originally, these pertained largely to matters of mortmain and perpetuities, and a judicial bent to ensure that such gifts did not fail. Latterly, a principal advantage has been the right to receive contributions which may be deducted by the donor for income tax purposes ... it must be recognized that this loss of revenue reflects on the taxpayers as a whole so that it may properly be said that all taxpayers contribute to every charity to a greater or lesser extent.

This public duty requires a charity to act in certain ways. For example, a charity will try to ensure issues are resolved promptly, actively canvass alternative dispute resolution methods, avoid acting unreasonably or aligning themselves with unreasonable positions, minimize the appearance of charity fighting charity, be responsive and proactive as necessary, scrutinize the administration (and refrain from formal passing of

accounts where not required), urge reasonable compromise and be prepared to seek costs against unreasonable parties, seek out similarly situated organizations with a view of co-operating, and consolidate legal representation and expenses and adequately investigate legal matters to form an educated assessment of the issue and ultimate course of action, and be flexible and consistent.

The philosophy of the organization: each charity has its own culture and decision making philosophy. Some charities are more aggressive or are seen to be more aggressive than others. To a large extent this perception of "aggression" is unfair, as it is more likely the result of the charity being more informed of their rights and more inclined to defend those rights.

The public relations aspect of the matter: charities are particularly sensitive to the public relations aspect of any decision that has to be made. They are also sensitive to the family of the deceased and are genuinely concerned about the families' perception of their actions. The manner in which the charity conducts itself will be scrutinized by the other parties, the public guardian and trustee and the court. A balance between defending the right to a gift and being reasonable in the circumstances must be found and maintained. Acting at either end of the spectrum can have repercussions on the charities' image and consequent donor base.

This does not mean that a charity will not "fight" if it believes "in the cause" or if it believes that some moral stance should be taken. A charity does not appreciate being "threatened" with such comments as "I'll go to the press", "you should feel fortunate that the deceased left you anything", "by the way if it weren't for me suggesting your organization you would not have received anything", and "everybody else has agreed so why can't you". (As an aside, personally these comments are unprofessional and do no service to our profession.)

The number of residuary beneficiaries: the fewer the residuary beneficiaries the more likely that the participation by the charities will be more balanced. It should be possible (and to be encouraged) for one counsel to represent the common interests of the charities. This eliminates duplication of legal fees and makes the channels of communication more efficient. The larger the number of residuary beneficiaries, the more complicated and unbalanced the involvement of the charities. A charity may decide, given the number of other charities involved, to take a back seat and let others deal with the litigation. Other charities may decide the opposite - if they are involved they can direct the process more and retain some measure of control over costs and the issues.

Ability to work with others: if the opportunity exists to join forces with similarly interested charities then this influences the decision to participate. If charities of like mind can agree on joint representation and course of action then not only are the costs shared but the costs overall are reduced. Courts like this. The failure of charities to consolidate

legal representation has been the subject of adverse judicial comment.[1] Claims for excessive costs are often trimmed.[1]

Size of the charity: a smaller charity will have fewer resources to participate in protracted litigation. It will have less discretion to tie up resources for the payment of legal fees and will generally be more anxious to have the matter resolved. The larger charities have more resources and more importantly more experience with litigation and hence are more understanding of the time frames and unpredictability of litigation.

Timing: each charity will have a fiscal year end and it may vary from one to the other. Depending on how the fiscal year goes (this may also depend on the size of the organization), this may impact the decision making process.

Access to advisors: some charities have access to counsel - someone they have developed a relationship with and whom they can call if they have a legal question or a matter that is or appears to be headed towards litigation or mediation. These charities may also have a budget for legal fees. Some charities' regular counsel are volunteer lawyers to give advice on a *pro bono* basis. Those charities who do not have legal budgets or who have not developed a relationship with counsel tend to be less active. A charity is encouraged to develop relationships with the legal community in order to ensure access to the advice they may require when required. It is even suggested that the failure to develop such a relationship could be a breach of a charities' obligation to its stakeholders and board of directors.

The failure to meet obligations: a charity should remember the consequences of failing to respond or act in accordance with its obligations. It must remember the supervisory power of the public guardian and trustee and the inherent jurisdiction of the courts. In Ontario, for example, the Public Guardian and Trustee enjoys board powers over charities under the *Charities Accounting Act* and the *Public Inquiries Act*.[29] Under section 6 of the *Charities Accounting Act* any one can complain about the manner in which a person or organization has solicited or procured funds by way of contribution or a gift from the public or as to the manner in which the funds have been dealt with or disposed of. If such a complaint is made the Act provides the procedure to be followed to allow the court to authorize the Public Guardian and Trustee to conduct an investigation. If so ordered, the Public Guardian and Trustee has not only the powers that may be given in the Order but also the powers of a commission under Part II of the *Public Inquiries Act*.

The power of the court's inherent jurisdiction over charities can be shown by the case of *Public Trustee v. The Toronto Humane Society*.[30] In that case, the court was concerned about the use of charitable funds for political purposes and improprieties in the election and operation of the board of directors. The court concluded that the Society was a trustee or fiduciary and accountable to the Public Guardian and Trustee and that the directors themselves were also fiduciaries and accountable to the obligations and members of the charity. The court (in part) appointed a representative to have full

access to the Society's books and records and empowered to oversee the election of a new board of directors at the next annual meeting.

Estate litigation is distinctive. The person in the best position to interpret the Will and know the wishes of the testator is the deceased, is not around to explain or defend his or her decisions. This fact colours the litigation.

Finally, in estate litigation matters the following points should be remembered by counsel:

* Nobody should assume that a charity is not interested or unsophisticated - many charities have access to counsel and have the confidence to assert their rights.

* A charity should be respect like any other beneficiary. It has equal rights to ask questions and receive information and, a charity tends to be reasonable and fair.

* Charities are sensitive to the donor/deceased and upholding his denotative intent. They believe in simply defending a valid will and if treated right can be a strong ally.

* A charity should be given a complete copy of the Will, even if only receiving a legacy.

* A charity, like any other beneficiary, is entitled to complete and regular reports on the status of the administration even while waiting for the Clearance Certificate.

* Where there are numerous charities, they should be encouraged to obtain representative counsel for the group - it can be like herding cats if the group is not organized and acting with a unified thrust; it can affect the course of the litigation.

Costs in Estate Litigation

> *There is, perhaps, too much litigation in this province growing out of disputed wills. It must not be fostered by awarding costs lightly out of the estate. Parties should not be tempted into a fruitless litigation by a knowledge that their costs will be paid by others.* [1]
>
> *There is no hard and fast rule stating that costs of all parties must always be paid out of the estate. Each case is to be considered on its own merits.* [1]

All litigious proceedings ultimately require consideration of the legal costs incurred by the parties involved. This is especially true with charitable beneficiaries are involved as they are acutely aware of the costs of litigation.

It is worth repeating the general rule in litigation: the unsuccessful party should pay the costs of the successful party (and of course, their own costs). This rule aims to caution litigants to ensure that only those matters that required judicial interference reach trial and so that limited judicial and client resources are used effectively.

In Ontario, the award of costs remains a matter of judicial discretion guided by statutory provisions such as section 131 of the *Courts of Justice Act* which states: "subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". A court is not prevented, however under Rule 57.01(2) of the *Rules of Civil Procedure*, from awarding costs against a successful party in a "proper" case.

In estate proceedings all of these factors are relevant; some more than others. For example, apportionment of liability is not as important as testamentary instrument interpretation or challenge cases usually ending in an all or nothing result. A testator either did or did not have capacity. A testator either was unduly influenced or was not. There can be no sharing of fault. In contrast, whether a party took an unnecessary step can have significant impact, especially, for example, where the evidence discloses that the testator had capacity, yet the party objecting continues to pursue the position that capacity was lacking.

The general consensus among practitioners may be that in estate matters courts have traditionally departed from the usual cost rule whereby the unsuccessful party pays the costs of the successful party, such that the estate, not the unsuccessful party, bears the costs. This perception is an assumption (although counsel is starting to recognize the belief and refer to a "trend away from that principle"). The case law does not justify the perception or assumption. In fact, it demonstrates there was never was such a trend - only exceptions for those cases where the cause of the litigation was the fault of the testator or those interested in the residue, or if there was sufficient reason to question either the execution of the Will, the capacity of the testator, or to allege undue influence or fraud. In addition, there has not been a "trend away" from awarding costs out of the estate; indeed there has never been such a trend (unless the comments were intended to be limited to cases falling under the exceptions).

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[1] R.S.O. 1990, c.T.23

[2] R.S.O. 1990, c.C.8

[3] R.S.O. 1990, c.C.10

[4] *Ontario (Public Trustee) v. Toronto Humane Society* (1987), 27 E.T.R. 40, 60 O.R. (2d) 236 (H.C.)

[5] *Re Schroeter Estate* (2001), 57 O.R. (3d) 8 (S.C.)

[6] (1998), 155 D.L.R. (4th) 40 (B.C.C.A.)

[7] *Barkin v. Royal Bank* (2002), 45 E.T.R. (2d) 1 (Ont. S.C.); *Re Ballard Estate* (1994), 20 O.R. (3d) 350 (Gen.Div.)

[8] *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L) quoted with approval in *Barkin v. Royal Bank* (2002), 45

E.T.R. (2d) 1 (Ont. S.C.)

[9] *Hardy v. Rubin* (1998), 23 E.T.R. (2d) 113 (Ont. Gen.Div.)

[10] *Kimberley & Naylor v. Prior* (1974), 5 O.R. (2d) 593; *Re Goldlust Estate* (1991), 44 E.T.R. 97 (Ont. Gen.Div.); *Vanek v. O'Hara* (1995), 7 E.T.R. (2d) 187 (Ont. Gen.Div.)

[11] *Walker v. Bostwick* (1986), 26 E.T.R. 52 (B.C.C.A.)

[12] *Cronan Estate v. Hughes*, [2000] O.J. No. 4491 at para. 25

[13] At para. 27

[14] At para. 27

[15] *Re Laing Estate* (1996), 11 E.T.R. (2d) 268 (Ont. Div.Ct.) affd (1998), 25 E.T.R. (2d) 139 (Ont. C.A.); *Re Jeffery Estate* (1990), 38 E.T.R. 173 (Ont. Surr. Ct.); *Re Wright Estate* (1990), 43 E.T.R. 82 (Ont. Div.Ct.)

[16] The rebuttable presumption is that the legacy was intended as compensation. It is fairly easy to rebut the presumption by showing a contrary intention.

[17] The *Trustee Act* R.S.O. 1990 c.T.23 specifies that an agreement between the estate trustee and the testator overrides the entitlement to claim compensation on the basis of the "care, time, pain and trouble" expended. The agreement must be in writing: s,61(1) and 61(5)

[18] *Toronto General Trust Corp. v. Central Ontario Railway* (1905), 6 O.W.R 350 (H.C.); *Re Atkinson Estate*, [1952] O.R. 685 (C.A.) affd [1953] 2 S.C.R. 41 (S.C.C.)

[19] 17 E.T.R. (2d) 57 (B.C.S.C.)

[20] (1990), 39 E.T.R. 32 (Ont. Gen.Ct.)

[21] [1990] O.J. No. 4585 (Ont. Sup.Ct.)

[22] (1990), 74 O.R. (2d) 481 (C.A.)

[23] [1999] N.S.J. No. 492 (N.S.CS.C.)

[24] At para. 81

[25] 88 A.C.W.S. (3d) 278, per DesRoches, J.

[26] [2000] P.E.I.J. No. 1 (S.C.)

[27] (1984), 47 O.R. (2d) 415 (H.C.)

[28] (1987), 60 O.R. (2d) 236 at 251-2.

[29] R.S.O. 1990, c.P.41

[30] (1987), 60 O.R. (2d) 236