KEEPING THE EXECUTOR OUT OF COURT: WHAT TO WATCH FOR IN THE MINEFIELD OF ESTATE ADMINISTRATION

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SCHEDULE "A"
CHECKLIST OF FACTORS FOR AN EXECUTOR TO CONSIDER
KEEPING THE EXECUTOR OUT OF COURT:
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I. INTRODUCTION

The purpose of this paper is to provide you with an overview of some issues an executor may be required to deal with or end up in court. For the purposes of this paper I will be referring to the obligations of the executor/administrator/trustee (herein for ease of reference encompassed under the term "executor") that occur during the administration of an estate.

As we all know, the courts place a high degree of responsibility on lawyers. Two significant cases have recently been decided in the area of wills and estates and all of you are likely fully aware of them. These two cases are as follows:


   The case canvassed the duty and standard of care owed by a lawyer to testators and intended beneficiaries. Essentially the lawyer who drafted the Will failed to determine the nature of the ownership of assets. Because of this the desired distribution could not be accomplished by the Will. The learned trial judge held and the Court of Appeal confirmed that the services rendered fell below the anticipated standard of care. That duty of care was owed by the solicitors to the intended beneficiaries. The Court of Appeal did not address the standard of care owed by a lawyer to the beneficiaries of an estate, but upheld the Queen's Bench decision.


   In this case it was determined that the lawyer breached the standard of care owed to the Plaintiff. In this case the lawyer acted for the wife as executrix.
and purported to represent her personally as well. He failed to: outline her rights under *The Matrimonial Property Act* (now *The Family Property Act*) and *The Dependants' Relief Act*; assess her current needs, and refer her to a financial advisor; determine when and how assets were accumulated; and identify legal deficiencies in the Will. The lawyer pointed out to the wife an alleged deficiency in a Will he had prepared. The Court held that the wife should have been advised to seek independent legal advice, particularly because of the lawyer's mishandling of the alleged discrepancy in the Will.

You might say, how does this relate to the topic? To my mind, the primary method of keeping the executor out of court is for each of us to obtain the proper facts and appropriately advise clients at the time that the Wills are prepared and when acting on the estate. Most of us are usually making very little, if anything, from Will preparation. The competition is fierce. Many lawyers rely upon Will referrals from financial advisors or others who pride themselves on getting their clients a Will at the least possible expense.

In *The National*, October 2002, Volume 11, No.6, there was an article titled "Thinking like a Client" by Susan Lightstone. In the article she states the following:

"Preventive lawyers and their clients work together to develop methods for anticipating and preventing legal problems, in order to avoid future conflict and expenses."

When a lawyer receives instructions to prepare a Will, it is his or her first opportunity to practice preventive law in the area of Wills and Estates by determining all of the facts relevant to the preparation of the Will; identifying clearly the wishes of the testator; advising the testator on the best way to carry out his/her wishes; and drafting the Will in such a fashion so as to avoid, as much as possible, future conflict and litigation for the executor.

If that is completed then it is up to the executor to perform his or her duty to administer the estate with due diligence. The executor, in carrying out those duties and responsibilities, is responsible for any claims of *devastavit* whether that results from:
(a) Deliberate action: *Commander Leasing Corp. v. Aiyede* (1983), 16 E.T.R. 183 (Ont. C.A.);

(b) As a result of failing to meet the requisite standard of care: *Fales v. Canada Permanent Trust Co.*, [1976] 2 S.c.R. 302 (S.C.c.); or


There are numerous pitfalls that await an executor in the administration of the estate. The ability, experience, and the skill in taking control and handling estate matters, varies with each executor. That is why I recommend that the lawyer advising the executor assume as much control as possible and keep the executor on a very tight leash.

II. CHECKLIST OF FACTORS TO BE CONSIDERED

When preparing this paper I noted that the Saskatchewan Practice Checklists includes one for "Instruction, Drafting and Execution of Wills". It does not include one for "Advising Executors" or "Handling Estates". I do not propose that the attached Schedule "A" is such a checklist, however, I present it to you as a starting point for many of the questions that you should consider when acting on any estate. I am sure you can expand on it. In many circumstances the questions won't apply. I won't go through it to any great length, however, encourage you to start with it and improve upon it.

The second thing I want to suggest is that you develop a routine regarding handing estates. All successful estate lawyers, I believe, have a routine that is clear and flexible. Built into that routine has to be consideration of the maxim: "When you try to recall the words of a document or statute from memory, your mind adopts the fallacy of assuming it is correct".

As you know, it is imperative to go back and reread the Will you are dealing with. Explain each part to your client. Go over it and think about what it means and its significance to
the particular estate. As well, just as important is for you to go back and review the relevant legislation and the rules, whatever might apply.

III. **AREAS OF CONCERN**

1. **Identifying and Resolving Claims**

One of the main duties of the executor is to identify claims. You, as the executor's lawyer, must think in terms of who has a potential claim against the estate and who does the estate have a potential claim against. The executor must investigate matters thoroughly and this information must be passed on and checked by the lawyer advising the executor. These claims can be actual claims, potential claims, or, even, contingent claims.

   (i) **Claims paid in good faith pursuant to grant**

   The executor determines all claims which can be made against the estate in order to establish all possible obligations. There are certain requirements and limitation periods that prohibit the immediate distribution of estate assets. Executors should be aware of the relevant provisions of *The Administration of Estates Act*, S.S., 1998, c. A-4.1. Pursuant to section 27 of *The Administration of Estates Act*, a person who makes or permits any payment or transfer pursuant to Letters Probate or Letters of Administration is not liable as long as the person acts in good faith. This is so even if the Letters Probate or Letters of Administration are later found to be defective or invalid. However, to come under this section it is clear that the Letters Probate or Letters of Administration must have been granted. For an executor to have acted in good faith the actions clearly must have been made pursuant to law.

   (ii) **Advertising for claimants**

   Under section 32 of *The Administration of Estates Act*, an executor "may" advertise for claimants. If the executor does so, this is to be published once a week for two consecutive weeks in either a newspaper published nearest to the last residence of the deceased or a newspaper
designated by a Court on an *ex parte* application. After advertising, the executor is not personally liable for the claim if he or she does not have actual or constructive notice of the claim, and if the claim is not submitted prior to a distribution being made. This is specifically provided for under section 33 of *The Administration of Estates Act*. However, under subsection 33(3) nothing prejudices the right of the claimant, after distribution, to follow the assets into the hands of the person who received them. Thus a claim submitted after the deadline can be enforced against any further assets that remain in the estate; beneficiaries to the extent of the distribution they receive; and against other creditors ratably for the amount they received if the estate has no other assets with which to satisfy the claim.

(iii) **Presentation of claims**

Any creditor who presents a claim to an executor must verify that claim by statutory declaration. The creditor must confirm the security held and the particulars of that security. Under section 34 of *The Administration of Estates Act*, the executor may consent to the credit ranking for the claim, after deducting the specified value of the security or, required assignment of the security. If you are dealing with secured creditors the provisions of section 34 of *The Administration of Estates Act* should be reviewed very carefully.

(iv) **Release of executor**

The release of the trustee from liability for the distribution after having regard to all the claims of which the executor has notice is confirmed in section 78 of *The Trustee Act*, R.S.S., 1978, c. T-23 and subsection (2) thereof verifies the rights of creditors or claimants to follow the trust assets into the hands of the persons who received them.

(v) **Dispute of claim**

Where an executor has received notice of a claim and decides to dispute the claim, then under section 75 of *The Trustee Act* a notice in writing of the dispute of the claim can be provided. A request can be made by the executor that the claimant shall commence his action.
with respect to the claim within six months after the notice is given. Any claim based on an amount immediately due must be commenced within that time period. Any debt or part thereof due in the future allows the claimant a further three months from the due date to commence the claim in respect thereof.

If the executor has not received confirmation within ten days after the notice that the claimant withdraws his claim, then the executor may by originating notice apply to a judge of the Court of Queen's Bench for an order barring the claim, and the judge could make such order as he or she deems appropriate. It is likely easier for the executor to wait for the 6 months to elapse if there appears to be any merit to the claim.

It should be noted that notice under section 75 by an executor does not preclude the executor from defending any action on all grounds available to the estate, including grounds under any limitation provision. It should also be noted that section 75 clearly provides that in default of the claim being made within the required time period, the claim shall "be forever barred".

(vi) Actions by claimants and settlement

In the event that an action is launched against the estate, the executor may be involved in the settlement of the action. However, prior to finalizing any settlement, full notice should likely be provided to the residual beneficiaries. Ideally the consent of the residual beneficiaries should be obtained prior to the settlement being completed. If the beneficiaries are either not contacted or do not consent then the executor will have to make his or her own decision.


In this case the beneficiaries claimed that the executor had sold property for less than fair market value; had mismanaged funds of the estate; had made unnecessary expenditures; and had
failed to provide documentation when requested. In dismissing the action, the learned Court considered whether the executor had acted prudently in settling the claim against the estate. The standard of care owed by the executor was whether the settlement was one an ordinarily prudent person would make in handling his or her own affairs. In assessing this issue the Court looked at whether the executor obtained legal advice as to the validity of the claim and the quantification and risks of defending the claim. The B.C. Court of Appeal affirmed the decision.

2. **Claims by a Spouse or Dependant**

It is important when dealing with possible claims that the executor be advised of the provisions of *The Family Property Act*, S.S., 1997, c. F-6.3 as amended by S.S., 1998, c. 48 and S.S., 2001, c. 34 and 51 and *The Dependants' Relief Act*, 1996, S.S., 1996, c. D-25.01. These must be considered very early in the administration and I submit that the lawyer for the executor should always have the spouse or dependant get separate legal advice on any issue in possible dispute.

If there is a potential claim by a surviving spouse under *The Family Property Act* or a dependant spouse or child under *The Dependants' Relief Act*, then the executor is prohibited from distributing the assets in the estate until six months after the date that Letters Probate or Letters of Administration are issued. If the claimant has not commenced an action by that time, then any claim is barred against the assets that have been distributed. Any claim made after the six-month period can only be enforced against the undistributed assets in the hands of the executor, if the court considers it appropriate to allow the application. So long as the spouse and dependants consent, then an executor may distribute earlier. However, in that case dependant children can only consent by the Public Trustee.

3. **Estates with Insufficient Assets**

If there are insufficient assets in the estate then one looks to section 74 of *The Trustee Act*. Subsection 74(2) confirms that reasonable funeral, testamentary and administration expenses are to be paid in priority of other claims mentioned therein. Under subsection 74(1) it
is clear that all debts, whether due to the Crown, the executor, or others are to be paid *pari passu* without preference or priority. However, this ranking does not prejudice any security that the deceased made in his or her lifetime.

An executor may in certain circumstances be required to plead the defence of "*plene administravit*". This claim is essentially that the deceased had either no or insufficient assets at the date of death or that the estate no longer has sufficient assets to pay the claim. This claim may be necessary in order to absolve any personal liability against the executor. If this is not pleaded then an executor will have been taken to conclusively admit that there are sufficient assets to satisfy the claims against the estate. If that proved not to be the case then the executor will incur personal liability for the full amount of the claim and costs. See: *Slemko v. Dye* (1989), 32 E.T.R. 250 (B.C.S.C.) and *LNM v. Green Estate*, [1998] B.c.J. No. 17 (B.C.S.C.).

4. **Collecting and Protecting Estate Assets**

In this portion I propose to deal only with executor's concerns as it pertains to registered assets and life insurance policies. If there are any registered assets or life insurance policies then the executor must immediately determine whether or not there were any beneficiary designations, including any designations under the Will. I submit that the executor should immediately contact the financial institution or insurance company requesting copies of any designation of beneficiaries and requesting that they not make payment of any proceeds therefrom until such time as the executor has had a reasonable opportunity to review the designations and assets and debts of the deceased. This is necessary because there may be issues as to the timing of the beneficiary designation; the validity thereof; the capacity of the testator to make the designation; the income tax implications; and the requirement of the assets to be available for settlement of claims against the estate. This is a complicated area and I don’t intend at this point to deal with the issues of capacity and undue influence. Those will be dealt with by other capable presenters in their presentations.

Naturally, if the estate is the beneficiary of all registered assets and life insurance policies, then the executor may not have too much of a concern. However, a concern does come
in with respect to registered assets where there is a named beneficiary and the estate does have significant debt, testamentary expenses and administration expenses which may not otherwise be satisfied. Also, a concern does come in with respect to taxable assets, such as RRSPs or RRIFs, passing to a beneficiary directly. In that case the deceased is deemed to have disposed of the asset immediately prior to death and, unless it can roll over tax free to a beneficiary, it is taxed in the last income tax return of the deceased.

In the case of *Royal Bank of Canada v. North American Life Assurance Company and Ramgorta*, [1996] 1 S.C.R. 325, the Supreme Court of Canada held that protection from creditors accorded to life insurance policies extends to RRSPs and RRIFs with life insurance companies. The question as to whether this protection extends more generally to RRSPs and RRIFs with a designated beneficiary other than the estate, is presently open for debate in Saskatchewan.

A court in Ontario has held that the proceeds of registered plans pass to the deceased's personal representative even where a named beneficiary has been designated. Accordingly these proceeds are subject to the claim of creditors of the deceased plan holder. In *Canadian Imperial Bank of Commerce v. Besharah* (1989), 68 O.R. (2d) 443 (Ont. H.C), it was held that the proceeds of an RRSP form part of the deceased's estate available for the distribution to the creditors, even when the deceased had designated his surviving wife as the beneficiary. The Court viewed that the deceased's real and personal property became vested in the personal representative as trustee for persons beneficially entitled thereto, but subject to the payment of the deceased's creditors. This was held to be the case even though the law in Ontario specifically permitted beneficiaries so designated to enforce payment of the plan proceeds, subject to any defences which the plan holder might have against the deceased.

It is clear under common law that RRSPs enjoy no special status whereby they are protected from creditors of the plan holder during the plan holder's lifetime. The *Besharah* case has been followed in *Pozniak Estate v. Pozniak* (1993), 50 E.T.R. 114, [1993] 7 W.W.R. 500 (Man. CA.). However, *Pozniak* has now been overruled by *Clark Estate v. Clark* (1997), 15 E.T.R. (2d) 113 (Man. CA.). The Court there dealt with an insolvent estate. The Court held that
the RRSPs are subject to the creditor's claims if the estate has insufficient funds, even though the RRSPs have named beneficiaries.

However, the matter has recently been complicated by recent cases in the area. The Besharah case was silent as to how liability is borne among beneficiaries where the RRSPs and RRIFs go to named beneficiaries and the rest of the estate goes to other beneficiaries. In Ontario two cases examined the issue: Curley v. MacDonald (2000), 35 E.T.R. (2d) 201 (ant. Sup.Ct.) and Banting v. Saunders Estate, [2000] OJ. No. 2817 (ant. Sup.Ct.). These cases questioned the reasoning in the Besharah case. They did not follow the reasoning and found the Manitoba Court of Appeal decision in Clark Estate v. Clark (1997), 15 E.T.R. (2d) 113 to be more compelling. The decisions concluded that RRIF and RRSP funds payable to a named beneficiary did not form part of the estate. The income tax due on those RRIFs and RRSPs is firstly the liability of the estate. However, the Court also concluded that such RRIF and RRSP funds were available to satisfy creditors of the estate, but only after other assets of the estate were exhausted.

In Saskatchewan this issue appears to be undecided at the present time. Under paragraph 73(2)(b) (re RRSPs) and paragraph 75(2)(b) (re RRIFs) of The Queen's Bench Act, 1998, S.S., 1998, c. Q-1.01, it clearly states that if there is a named beneficiary, "the designated person may enforce payment of the amount payable". However, these sections do not apply to beneficiary designations under The Saskatchewan Insurance Act. In Baltzan Estate v. Royal Bank of Canada et al (1990), 82 Sask. R. 280 Mr. Justice Hrabinsky of the Saskatchewan Court of Queen's Bench was asked to make a declaration that the widow was the beneficiary of the deceased husband's two Registered Retirement Savings Plans and a declaration that the Registered Retirement Savings Plans never formed part of the husband's estate. In the deceased's Will all benefits under the Registered Retirement Savings Plans went to the Trustees in trust. The Will specifically stated and authorized the executors "to transfer and assign all benefits derived from any Registered Retirement Savings Plans to my wife" and went on to say that "my Executors pay to my wife such amounts as may be received by way of refund of premiums arising from any Registered Retirement Savings Plans".
Mr. Justice Hrabinsky found that the Plan allowed the designation of beneficiary pursuant to the terms of the Will. Further, the reference only to "any Registered Retirement Savings Plan" was sufficient to identify the two Registered Retirement Savings Plans which the husband owned. Finally, his Lordship directed that neither of the Registered Retirement Savings Plans passed through the estate as the law permitted the wife to enforce payment directly to her. As a result the declarations were granted and were payable directly to the wife.

The law in Saskatchewan may well be clarified shortly in the event that Bill No. 23 of 2002 is proclaimed. The legislation in Bill No. 23 is The Registered Plan (Retirement Income) Exemption Act. Under section 3 of Bill No. 23, except for Maintenance Orders, the "rights, property and interest of a Plan holder in a Registered Plan are exempt from any enforcement process". However, under section 4 a "payment out of a Registered Plan to the Plan holder or the legal representative of a Plan Holder, is not exempt from any enforcement process". While the transfer of property held in one Registered Plan to another Registered Plan does not constitute a payment out within subsection 4(2), it is open for argument as to whether the designation of the estate as a beneficiary is "a payment out" under the terms of the Plan, even if there is a spouse or dependant children to whom the Plan may roll over without tax consequences under The Income Tax Act.

A question also arises as to whether or not the proclamation of Bill 23 will be applicable to claims by Canada Customs and Revenue Agency (CCRA). It has been thought that CCRA could only exercise it’s garnishment power pursuant to section 224 (1) of The Income Tax Act, R.S.c. 1985, c.l (5th supplement) if Provincial Legislation did not prevent such remedy. In Sun Life Assurance Company of Canada v. MNR, [1992] 2 C.T.C. 315 (Sask. Q.B.) it was determined that CCRA (then Revenue Canada) could garnishee pension payments regardless of restrictions contained within The Pensions Benefit Act. Sun Life argued that subsection 224 (1) of The Income Tax Act could not be employed because of the provisions of section 19 of The Pensions Benefits Act. Under the legislation Pension payments were not attachable by garnishment. The question became one of Federal paramountcy. The Court determined that the collection provisions of The Income Tax Act fit within the scope of Federal jurisdiction and Sun Life was liable to make payments to CCRA. The Court basically determined that the intention of the
Provincial Legislation was not applicable to CCRA and CCRA had a special status as a creditor allowing it to garnishee payments under a registered pension plan, even with an insurance company.

5. **Investing Estate Assets**

Once the estate assets are collected and secured, the executor must properly invest estate funds. This would include all estate assets except for funds that are necessary for immediate cash requirements. The executor must ensure that the investment is, firstly, authorized and, secondly, where authorized, both prudent and proper. The provisions of sections 3 through 10 of *The Trustee Act* provide guidance to an executor with respect to investing trust monies. The executor has to look firstly at the Will to determine what powers are conferred on him or her. Subsection 8(1) of *The Trustee Act* confirm that the powers under the Act are in addition to any powers conferred by the instrument creating the trust. In the event that the executor is governed by section 3 of *The Trustee Act*, then the types of investments that he or she can make are statutorily prescribed.

In both instances it is incumbent upon the legal advisor to the executor to ensure, where the executor is not a professional money manager, that the executor understands the standard of care which is upon him or her and as specified in section 3.1 of *The Trustee Act* as follows:

"3.1 In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a reasonable, prudent investor would exercise in making investments."


The unanimous decision was made by Madam Justice Jackson in that case on appeal from the Saskatchewan Court of Queen's Bench, Smith, J. reported at 184 Sask. R. 161. The facts were that a financially unsophisticated woman, after obtaining a large settlement from her husband on separation, retained a person who held himself out, among other things, as a
qualified financial manager and planner, to look after her assets. Many assets were transferred without the investors knowledge or consent and the financial planner failed to account. The claim was made for breach of fiduciary duty. One of the issues on the appeal was the damages for loss of income on the invested funds. At the trial of the action it was clear that the defendant invested much of the Plaintiff's money in Government of Canada treasury bills paying minimal interest and much of that interest was deposited into the Defendant's own accounts and went to his benefit rather than the Plaintiff. The Plaintiff's counsel called an investment advisor at the trial and the advisor gave testimony that the Defendant's investment strategy of essentially a cash portfolio was unreasonable and a more balanced portfolio would have been more reasonable. Obviously the balanced portfolio generated a higher expected return on the evidence of the Plaintiff's expert and damages at trial were assessed on that basis.

On appeal the Defendant argued that based on the Fales v. Canada Permanent Trust Co., supra, the standard of care required of him was that of "a man of ordinary prudence in managing his own affairs". As such the allegation was made by the Defendant that he should only be responsible to account for and pay the lower return which would have been generated on a money market fund or a cash portfolio fund.

In dealing with this issue Madam Justice Jackson stated the following on page 297:

"[56] The purpose of The Trustee Act is not to permit a negligent Trustee to limit his or her damages, but, rather, to set a minimum standard by which the investment activities of the Trustee can be measured. It, of course, directs the Trustee to what investments he or she may make, but it does not limit the Trustee's liability for negligent behaviour. In this respect, I agree with Viola Siemens's counsel that Kasper Bawolin cannot now use The Trustee Act as a shield against increased damages, in that these are the very provisions he disregarded when he acted as a Trustee. Thus, I would reject this argument."

In the decision the Learned Madam Justice Jackson went on to consider the issue of solicitor and client costs and on page 310 identified the following:

"[118] These are the principles, relevant to this appeal, which I take from my review of the above authorities:
1. solicitor and client costs are awarded in rare and exceptional cases only;

2. solicitor and client costs are awarded in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible;

3. solicitor and client costs are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone;

4. notwithstanding point 3, solicitor and client costs may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred."

In upholding the finding that the Defendant was responsible for solicitor and client costs the Learned Justice of Appeal stated as follows:

"[120] Thus, the trial judge awarded solicitor and client costs on two primary bases:

1. to provide complete indemnification for costs reasonably incurred for a breach of fiduciary duty;

2. to punish Kaspar Bawolin for providing "convoluted, confusing, inconsistent and dishonest evidence" prior to and during the trial."

In a recent decision in British Columbia, Smith Estate (Trustee of) v. Smith Estate, [2000] B.C.J. No. 2556 (R.C.S.C.) the Court applied the principle of restitution to the damages awarded against the executor. The defence of set off of the gain realized on one unauthorized investment against the losses suffered in another unauthorized investment was not permitted. As a result, the estate was entitled to recover it's entire loss in respect to the investment of trust funds.

The specific provisions of The Trustee Act which are worth further consideration are as follows:

"Relief of trustees committing technical breach of trust

57 1f in any proceeding affecting trustees or trust property it appears to the court that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible
as a trustee, is or may be personally liable for a breach of trust, but has acted honestly and reasonably and ought fairly to be excused for the breach and for omitting to obtain the directions or the court in the matter in which it was committed, the court may relieve the trustee either wholly or partly from personal liability.

**Trustee's liability**

57.1 A trustee is not liable for a loss arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property that included reasonable assessments of risk and return and that a reasonable, prudent investor would adopt under comparable circumstances.

**Damage assessment**

57.2 A court assessing the damages payable by a trustee for a loss arising from the investment of trust property may take into account the overall performance of the investments."

6. **When the Executor may want to go to Court**

In some cases an executor may find himself or herself in a quandary as to the interpretation of the Will or the administration of the estate. At that time the executor may want to give consideration to going to Court on his own application. The application could be made for directions pursuant to section 79 of *The Trustee Act* which reads as follows:

"79(1) A trustee, guardian, executor of administrator may, without the institution of an action, apply in court or in chambers in the manner prescribed by rules of court for the opinion, advice or direction of a judge of the Court of Queen's Bench on any question respecting the management or administration of the trust property or the assets of a testator or intestate.

(2) The trustee, guardian, executor or administrator acting upon the opinion, advice or direction given by the judge shall be deemed so far as regards his own responsibility to have discharged his duty as trustee, guardian, executor or administrator in the subject matter of the application, unless he has been guilty of fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction."

Examples of circumstances in which the executor may wish to apply for directions are identified in the following recent Saskatchewan cases:

That application was for directions concerning the distribution of the estate assets. The Will left the property to three sons in equal shares per stirpes. One of the sons and his spouse predeceased leaving five children and six grandchildren alive at the testatrix’s death. In reviewing the law Mr. Justice Klebuc resolved the issue by looking at section 22 of *The Wills Act*, 1996, which provided for distributions by representation and not per capita.


This was a case where the executor applied for directions. Three of six beneficiaries predeceased the testator. The Court found that those gifts did not lapse, rather, pursuant to *The Wills Act* they passed as if there was an intestacy.

It is submitted that in each of those cases the executors would have been entitled to payment of their solicitor and client costs for the application. In facts those costs were specifically granted in the *Re Bennett Estate* case. This confirms the long held position in regard to estates that was expressed by Matheson, J. in *Landsall v. Lysyshyn et al.* (1998), 170 Sask. R. 273 at p. 279, as follows:

"[38] It is the rule, rather than the exception, to permit legal costs incurred in resolving disputes regarding the administration of estates to be recovered from the estate, particularly when a dispute arises from an interpretation of the testator's intention."

Accordingly, an executor should be mindful of the right to apply for directions. If there is any doubt as to how to proceed regarding the interpretation, administration or distribution, then an executor would be wise to get the Court's direction before proceeding.
IV. REMOVING/REPLACING THE EXECUTOR!

1. Law

Although we may strive to keep the executor out of court, there are occasions where it may be necessary to bring the executor to court, seeking their removal. The personal representative of an estate can be removed and/or replaced under *The Trustee Act*, or in accordance with the inherent jurisdiction of the court.

Subsection 85(1) of *The Trustee Act* provides:

85(1) Where application is made to the Court of Queen's Bench or a Judge thereof . . . by or on behalf of a trustee or beneficiary, the court or Judge may in its or his discretion appoint a person, hereinafter called a judicial trustee, to be a trustee either jointly with another person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

Subsection 85(2) provides that the administration of the property of a deceased person, whether a testator or intestate, is a trust and the executor or administrator is a trustee within the meaning of Section 85.

Section 14 of *The Trustee Act* also references the appointment of a trustee in substitution for or in addition to any existing trustee, but provides in subsection 3 thereof that nothing in that section gives the court the power to appoint a personal representative.

Although *The Trustee Act* deals with the replacement of a trustee, it does not provide for removal of a trustee without appointment of a replacement. Baynton, J. held in *Scott v. Scott*, that as a court of equity, the Queen's Bench Court has an inherent jurisdiction to

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1 Prepared by Robert Millar of McDougall Gauley
2 R.S.S., 1978, c. T-23
remove a trustee without appointing a replacement, referencing therein a decision adopting the following commentary of D.W.M. Waters:\(^4\):

"Private trusts, that is *inter vivos* and testamentary trusts, seldom include an express power to remove a trustee. For long the courts have been prepared under their inherent jurisdiction to remove a trustee as part of the process of administering the trust, and settlors are normally content to rely upon an appeal to the court should the need of removal arise."

The decision of Baynton, J. in *Scott* was considered by the Court of Appeal in *Re: Ocean Man Trust* (1993), 113 Sask. R. 179 wherein the court considered the question of whether the court had an inherent jurisdiction at common law to make an order removing a trustee. Wakeling, J.A. held that the court does have such an inherent jurisdiction to remove a trustee, but on the facts before the court concluded that the appellant in that case should not have been removed as a trustee (as was ordered by the Chambers Judge) and allowed the appeal.

Although the trusts before the court in *Scott* and *Ocean Man Trust* were *inter vivos* trusts, the Court of Appeal in *Oleskiw Estate v. Oleskiw*\(^5\) adopted the reasoning of Baynton, J. when dismissing the appeal by an executrix from an order removing her as co-executrix of an estate.

When considering the removal of a trustee, or executor, the guiding principle for consideration by the court is the welfare of the beneficiaries. It is a principle which has prevailed since its enunciation by Lord Blackburn in *Letterstedet v. Broers*\(^6\) in the following terms:

"It is not disputed that there is a jurisdiction 'in cases requiring such a remedy' [i.e. the removal of a trustee], as is said in Story's Equity Jurisprudence, s. 1287, but there is very little to be found to guide us in saying what are the cases

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\(^5\) [2000] SJ. No. 724 (C.A.)  
requiring such a remedy, so little that their Lordships are compelled to have recourse to general principles.

Story says, s. 1289 'But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity'.

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principle duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of the original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated so that the trustee was justified in resisting them, and the Court might consider that in an awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

In exercising so delicate a jurisdiction as that as removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enumerated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.'

What type of circumstances are such that the court would be satisfied that removal of a trustee would serve the welfare of the beneficiaries? They are many.

As noted by Rodney Hull, Q.C. in "Removal of Trustees and Personal Representatives", (1982-84) 6 Estates and Trusts Quarterly at p. 59, the courts have removed trustees or personal representatives in the following instances:

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7 The listing by Mr. Hull is a summary of his more expansive commentary, and numerous case citations, contained in Macdonnell, Sheard & Hull on Probate Practice, 4th ed. (Toronto, Carswell Thomson Professional Publishing, 1996) at pp. 164 to 168.
• bankruptcy of the trustee;
• liquidation of a corporate executor;
• conviction of the personal representative;
• the personal representative taking out permanent residence outside the jurisdiction;
• incapacity through illness, mental or physical, or through old age;
• lack of ability to perform acts necessary for the proper administration of the trust or estate;
• the personal representative committing a breach of trust in his own favour;
• the attempt by a personal representative to acquire an asset of the estate;
• the actions of the personal representative having placed the estate assets in jeopardy;
• failure to keep an even hand between beneficiaries with competing interests;
• the personal representative's personal interests conflicting with his duty as trustee;
• the personal representatives being unable to agree on a course of action and there being no effective way of settling their differences (i.e. a stalemate);
• the personal representative refusing to carry out his duties under the trust or will;
• the administration of the estate being unduly delayed by the personal representative;
• hostility between the personal representatives and the beneficiaries of the estate.

In relatively recent cases, the Saskatchewan courts have seen fit to remove a trustee or executor.

In *Scott v. Scott*, Baynton, J. ordered the removal of a trustee of a family trust where it was shown that:

(a) the trustees were at a stalemate due to the failure by the removed trustee to perform even basic duties as a trustee in the administration of the trust;
(b) the removed trustee was taking action to deliberately frustrate the administration of the trust; and
(c) the trustee's conflict of interest was in direct breach of his fiduciary duties to the beneficiaries.

Barclay, J., in *Christie v. Kirk*, ordered the removal of the applicant's

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8 Supra, note 3
9 (1991), 98 Sask.R. 140 (Q.B.)
co-executor on the basis that the respondent co-executor had not only neglected, but refused, to
attend to her duties as an executrix, and had been responsible for the dissension and
disagreement which had developed between the executors.

The Court of Appeal in Oleskiw Estate v. Oleskiw,10 in dismissing an appeal from an
order removing an executrix, noted that there was evidence before the Chambers Judge
(Matheson, J.) that the appellant had acted in furtherance of her own interests and not the
interests of the estate, had been neglectful, and had refused to attend to her responsibilities and
duties as a co-executrix.

There have also been recent cases where the Saskatchewan courts have declined to
remove a personal representative.

In Re Watson Estate, Welch v. Travis,11 one executor applied for the removal of his co-
executor, and the co-executor made a counter-application to have both executors removed and
replaced by the Public Trustee. Geatros, J. held that "friction and hostility between executors"
is not of itself a reason for removing an executor. In applying the primary principle of the
"welfare of the beneficiaries", as laid down in Letterstedt v. Broers, he concluded that on the
evidence before him, it was unlikely that "continuation in office of the executors" would be
detrimental to the fulfillment of the administration of the estate by them, and dismissed both
applications.

In Ulmer Estate v. Ulmer Estate,12 the primary consideration undertaken by Wimmer, J.
was whether there was "sufficient cause" for the removal of the executor within the meaning of
Section 85 of The Trustee Act. He concluded that the failure of an executor to fully satisfy the
requirements of a maintenance order to which an estate was subject, did not, in the
circumstances before him, constitute "sufficient cause" within the meaning of Section 85,
indicating:

10 Supra, note 5
11 (1997), 159 Sask.R. 275 (Q.B.)
"The phrase 'sufficient cause' does not encompass every mistake of judgment or neglect of duty. Rather, it contemplates serious misconduct of a kind that impairs the trust, frustrates its administration, or puts the beneficiaries at risk."

In *Matiko v. Matiko Estate*13 Allbright, J. was faced with substantially conflicting affidavits regarding the actions of the executor sought to be removed. In his view, the applicant had "not demonstrated on a balance of probabilities that the respondent should be removed as the executor and trustee of the estate" and that it had "not been demonstrated that the testator's choice of executor should be overridden".

2. Procedure

An application for replacement of an executor or trustee, and consequential relief, such as a vesting order, is by way of originating notice. *Queen's Bench Rule* 452 provides:

452. The following proceedings may be commenced by originating notice:
   (a) applications by any person claiming to be interested under a deed, will or other written instrument for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested;
   (b) applications for the appointment of a new trustee with or without a vesting, or other consequential order;
   (c) applications for a vesting order or other order consequential on the appointment of a new trustee, whether the appointment is made by the court or out of court;
   (d) applications by the executors or administrators of a deceased person, or the sureties for administrators, or the trustees under any deed or instrument, or any of them, or any person claiming to be interested in the relief sought as creditor, devisee, legatee or next of kin of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise, under such creditor or other person as aforesaid, for such relief of the nature or kind following as may by the notice be specified, and as the circumstances of the case may require, or for the determination of any of the following questions or matters:
      (i) the administration of the estate of the deceased;
      (ii) the administration of the trust;

(iii) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or cestui que trust;
(iv) the ascertainment of any class of creditors, legatee, devisee, next of kin, or others;
(v) the furnishing and vouching of any particular accounts by executors, administrators or trustees;
(vi) the payment into court of any money in the hands of the executors, administrators or trustees;
(vii) directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as executors, administrators or trustees;
(viii) the approval of any sale, purchase, leave, compromise or other transaction;
(ix) the determination of any question arising in the administration of the estate or trust;
(x) an order that no action be brought, or that all actions and proceedings pending against trustees, executors or administrators be stayed for such period, as to the court may seem necessary or expedient, in order that sufficient time be allowed to such trustee, executor or administrator for the performance of the trusts imposed upon him:

provided that the proceedings under this rule shall not interfere with, or control, any power or discretion vested in any executor, administrator or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought.

While the rule does not specifically address situations where removal, only, is being sought, such an application should likewise be by way of originating notice. That was the procedure utilized in Scott, Oleskiw Estate and Re Watson Estate.

Rule 453 provides that the originating notice is to be in Form 48 and Rule 454 requires eleven days between the date of service and the return date for the hearing.

As is apparent from the foregoing cases, the affidavits in support of the application for removal a personal representative should not only provide particulars of the alleged improprieties of the representative sought to be removed, but also show that the personal
representative's actions are detrimental to the beneficiaries, or putting them at risk, or that the representative's actions will prevent the terms of the will from being properly carried out.

The nature of the order sought should address removal and, if appropriate, replacement of the impugned personal representative, provide for the required vesting of the estate assets in the new representative, and deal with delivery of estate assets, documents and records to the new representative.\textsuperscript{14}

With respect to costs, the courts have, as might be expected, taken divergent views. Costs on a solicitor and client basis have been awarded to a successful applicant out of the trust;\textsuperscript{15} reasonable costs on a solicitor and client basis have been granted to both parties even though their conflicting applications were dismissed;\textsuperscript{16} and the court has refused to grant costs to either party, leaving each to be responsible for their own\textsuperscript{17}.

\footnotesize
\textsuperscript{14} See \textit{Matiko v. Matiko Estate}, supra, note 13 for a form of order sought in that application (although dismissed). \textit{Scott v. Scott}, supra, note 3, contains an order removing a trustee, while \textit{Oleskiw Estate v. Oleskiw}, supra, note 10, contains a summary of the order granted by the Chambers Judge.

\textsuperscript{15} \textit{Scott v. Scott}, supra, note 3

\textsuperscript{16} See \textit{Re: Watson Estate}, supra, note 10

\textsuperscript{17} See \textit{Matiko Estate}, supra, note 13
SCHEDULE "A"

CHECKLIST OF FACTORS FOR AN EXECUTOR TO CONSIDER

1. Is there a Will? If not, who takes the assets and who has right to assume control?
2. Is the Will valid and is this the last Will?
   • Knowledge and approval of contents; undue influence; lack of testamentary capacity.
3. Is the Will clear or is there an issue of interpretation?
4. What are the assets and the debts?
5. Has there been any intermeddling?
6. Is the intermeddling legitimate?
7. Has the executor/administrator assumed control of all assets?
8. Are there any infants or adult dependants? Are there any disabled beneficiaries?
9. Are there any spouses?
10. Did the deceased make reasonable provision for all dependants and spouse(s)?
11. Should someone be advising dependants or beneficiaries separately and independently?
12. Has the deceased complied with The Family Property Act?
13. Is the Devolution of Real Property Act a factor?
14. Are there full powers under the Will and the law to do what the executor/administrator has or proposes to do?
15. Are there potential claims to be made either by or against the estate?
16. Are there issues that may be in dispute among the executors or the beneficiaries?
17. Are there issues in dispute between executors and beneficiaries?
18. Are there any foreign law issues or foreign property outside Saskatchewan?
19. What are the time frames for all required matters to be dealt with?
20. Does any part of the estate result from or pass by intestacy?
21. Are there issues with respect to joint property or property flowing to a named beneficiary?
22. What is the income tax history and consequences on death?
23. Is there any issue of lapse of any gift under a Will or by law?
24. Are there issues of a life interest and, re this, is the Will clear and properly constructed?
25. Are there any limitation periods applicable to the estate?
26. Are there any issues of mistake, fraudulent preference, misappropriation, negligence, breach of fiduciary duty, unjust enrichment, conversion, or prior gifts?

27. Are there interests in other estates?

28. Are all documents available?

29. Are Letters required from the Court? What is the nature of that application?

30. Are there issues of public policy:
   - felonious deaths;
   - restraints re: marriage?

31. Are the gifts clear and determinable?

32. Are there any issues of undue influence on the personal representative concerning possible future removal or assignment of duties?

33. Is the executor honest, straightforward and trustworthy such that you want to act?

34. Are there variation of trusts issues that could arise?

35. Are there vesting or divesting issues that could or do arise?

36. What is required to deal with the estate and how can this effectively and efficiently be done?

37. Are there any false hopes?

38. How will the estate be dealt with and how much will the lawyer be involved?

39. What and when will distribution take place?

40. What is required to distribute the estate assets?

41. How will the accounting be maintained?

42. What tax returns need preparation and filing and who will do that and when?

43. Will the executor claim a fee for work and expenses?

44. Will there have to be a passing of accounts for the executor?

45. What will the legal fees be and will they be more than the tariff?

46. Will all the accounts and bequests be satisfied?

47. Is there anything else that is unique to this estate that requires consideration?

48. How will the executors maintain control and how will you control the executor?

49. Does the estate require other experts and how can they be put in place?

50. How do you stay on top of the file as it grows to be "Fat Albert"?