

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF YETTA BLUESTEIN

APPLICATION FOR PASSING OF ACCOUNTS

BETWEEN:

ALBERT RESNICK, Estate)	<i>Howard J. Alpert</i>
Trustee of the Estate of Yetta)	for the Estate Trustee of the
Bluestein)	Estate of Yetta Bluestein
)	
Moving Party)	
)	
- and -)	
)	
GARY BLUESTEIN, IRENE)	<i>Mark L. Goodman</i>
BLUESTEIN, ROBERT JASON)	for the Beneficiary,
BLUESTEIN, SAMANTHA JO)	Gary Bluestein
BLUESTEIN and DENISE)	
BLUESTEIN)	
)	
Responding Parties)	

HIMEL J.

REASONS FOR DECISION

[1] Yetta Bluestein died on June 13, 1996. On November 13, 1996, Albert Resnick was appointed estate trustee. He has made application to pass accounts for the period from June 13, 1996 to October 31, 1998. Objections to the accounts were filed by Gary Bluestein, one of the beneficiaries of the estate. The remaining beneficiaries consent to the passing of accounts.

FACTUAL BACKGROUND:

[2] Yetta Bluestein was predeceased by her husband. They had two sons: Ronald and Gary. Ronald is married to Irene. In her will, Yetta Bluestein provided that certain jewellery and other personal property be distributed to named beneficiaries including her sons, daughter-in-law and grandchildren. Legacies of \$25,000 were made to each grandchild and were to be distributed when they became 25 years old. The assets of two private companies were to be sold, the companies wound up and the net proceeds transferred to the residue of the estate. The two residual beneficiaries under the will are Gary and Irene who are to share equally.

[3] Albert Resnick, a chartered accountant, knew the family for years and was named by Mrs. Bluestein to be executor of her will. In 1994, before her death, the two brothers had a falling out. Mr. Resnick claims that as a result of the poor relationship between the two brothers, he has had difficulty performing his duties as estate trustee.

[4] The assets of the estate consisted of a house in which Mrs. Bluestein had lived for approximately thirty years, cash in the bank, some jewellery and the shares of two private corporations: Greenlight Developments Ltd. and M. & Y. Holdings Ltd. Both companies were managed by Gary Bluestein who is experienced in real estate development.

[5] As estate trustee, Mr. Resnick listed the house for sale in August, 1996. The listing was with Ronald Bluestein's brokerage firm, Brougham Realty Ltd. first at \$550,000 followed by various reductions in price. Because of an oil spill in the house and a lawsuit with Imperial Esso and the insurer, the house was not sold until October, 1997. The sale price was \$440,000. Mr. Resnick claims fees for management of the house in the interim period.

[6] The estate trustee attempted to deal with the two corporations owned by the estate. Mr. Resnick says that he tried to obtain financial information including access to original books of the companies especially bank deposit books, bank statements and financial statements. Records were not up to date and, in particular, financial statements which were dated 1996 were in draft form only. Mr. Resnick says that he requested access to working papers and original records in order to ascertain the accuracy of financial information but that Gary instructed the accountants of the companies not to provide the information. Gary's position was that the companies had no value. Mr. Resnick's position was that he required information to confirm the financial status of the corporations.

[7] In 1997, Gary brought an application to remove Albert Resnick as estate trustee. Mr. Resnick brought a counter-application to gain access to records of Greenlight and M. & Y. on behalf of the estate shareholders. He also sought to gain access to financial information of Gary's other corporations to determine where assets of the two estate corporations may have been transferred. Mr. Resnick now says that he received poor legal advice and relied on his solicitor in bringing the counter-application. The application to remove Mr. Resnick as estate trustee and the cross-application to gain access to

financial records were dismissed by Matlow J. who also ordered that everyone bear his own costs, including Mr. Resnick. Mr. Resnick, who had paid his solicitor approximately \$55,000, reimbursed the estate for that amount.

[8] Mr. Resnick believes that the underlying problem in this estate is that Gary is unhappy with the will written by his late mother. He viewed the two corporations as his own and is not prepared to disclose information about them.

[9] In addition to objecting to the accounts, Gary says that he made a loan to Yetta Bluestein of \$54,000 for which he claims reimbursement. The estate trustee says that there is no documentation tendered to support the claim and in the absence of evidence, he has denied the validity of the claim. He is not convinced that this was a debt of the estate and says that for ten years prior to her death, Yetta received money from the companies for household expenses and that was reflected as a management fee to her. In the year of death, the payment was referenced as a loan receivable from the corporation but there is no documentation in support other than an unaudited draft financial statement. Gary now claims that he made the loan.

[10] There is also an allegation by Gary that Greenlight had a loan obligation to the Toronto Dominion Bank and that the estate had guaranteed the loan of \$69,000. Mr. Resnick says that there is no evidence of indebtedness of the estate to the bank.

THE ACCOUNTS AND THE OBJECTIONS:

[11] The accounts set out the executor's claim for compensation of \$19,014 which is based on the tariff guidelines. There are three additional claims described more fully in Notes for approximately \$9,000.

[12] The objections of Gary to the accounts and the response of the estate trustee are summarized below:

1. The claim for tariff compensation for capital receipts is excessive as the capital consisted of two main assets, a bank account and a house making the estate simple to administer. The estate trustee submits that it is the conduct of Gary, in resisting access to financial information necessary for the administration of the estate, that has made the estate more complex. Without original records, the estate trustee was unable to value the shares in the corporations owned by the estate and distribute the residue.
2. The claim for compensation on capital disbursements is excessive as it relates to disbursement of money to the estate's bank account, payment of taxes and maintenance on real property and funeral expenses. It is alleged that there was a premature payment to a legatee and an unauthorized payment to the estate trustee and his counsel and that

there have not been any proper capital disbursements. The estate trustee submits that disbursements were necessary to maintain the house property, pay the legacies to the beneficiaries and deal with other assets of the estate.

3. The charge for special estate work (Note 1) is excessive as the beneficiaries had to conduct the litigation and the litigation yielded an insignificant result. The estate trustee says that extra work was required to deal with the oil spill and the insurance claim involving Imperial Esso. Without that litigation, the house could not be sold.
4. The claim for a management fee should not be allowed as costs of the application before Matlow J. were disallowed. The estate trustee says that the management fee relates to a special investigation requested by a beneficiary into the conduct of the management of Greenlight Developments Ltd. and M. & Y. Holdings Ltd. which were owned by the deceased. That resulted in Gary seeking the removal of the estate trustee. Mr. Resnick says that he spent 43.4 hours of his time and some of his staff time in order to perform this work.
5. The charge for income tax work was excessive as there was no tax planning and the trustee filed simple returns. The estate trustee says that this work was for tax planning and filing of personal and estate tax returns which resulted in the estate receiving a benefit of \$7,000 for an allowance for business investment loss.
6. The conduct of the estate trustee is negligent as he has pre-taken compensation without authority, paid lawyers to prosecute an unfounded application, and paid expenses not connected with the estate. The estate trustee responds that he has repaid the estate the legal fees of \$55,000, took compensation without complaint and that when he received a letter of complaint in July of 1997, he stopped. Furthermore, expenses were necessary to allow someone to live in the house in order to maintain insurance until the sale transaction was completed.

DECISION:

[13] What is clear in the case before me is that the estate of Yetta Bluestein began as a relatively simple estate and has become a somewhat complex estate as a result of the animosity between the beneficiaries and the estate trustee. This is most unfortunate as the administration of the estate is requiring much more time and effort than should have been necessary. Without access to certain information, the estate trustee has been unable to value certain assets and finalize administration. On the other hand, one of the beneficiaries believes that the estate trustee is not acting impartially but, rather, is acting

on the initiative of another beneficiary. The time has come to put aside all of this animosity and finalize the administration of the estate in a prudent and efficient manner.

[14] The evidence is that the estate trustee has been a chartered accountant for over 30 years and has experience as an estate trustee. He has expended much time and effort in administering the estate. As a result of his long history of friendship with the Bluestein family, he has persisted in fulfilling his obligations to the testator but as he says, is "caught in a cross-fire". He has also made efforts to reconcile the parties which is certainly beyond his duties as an estate trustee. The evidence of Albert Resnick was uncontradicted as the objecting beneficiary, Gary Bluestein, did not appear in court to give evidence. All other beneficiaries have provided their consents to the passing of accounts.

[15] Counsel for the estate trustee submitted to the court that the estate was above average complexity. He says that Gary submits that it is a simple estate yet his own objections are eight pages long. There was a house to sell, term deposits to cash, debts had to be paid, legacies had to be paid and residue had to be distributed. There were two trusts that had to be held until the infants turned 25. In my view, what was a relatively straightforward estate became a complex estate as a result of the conduct of the parties involved. Given Gary's efforts to prevent access to certain financial information that was relevant since the two corporations were specifically named as part of the residue of the estate, time was spent by the estate trustee in endeavouring to call in and value those assets.

[16] The tariff guidelines have been developed to provide an executor with compensation for an estate of "average complexity". That is precisely the level of compensation suitable for the estate of Yetta Bluestein.

[17] An estate trustee may be compensated for his duties by "... such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge": Trustee Act, R.S.O. 1990, c.T.23, s. 61. In determining the amount of compensation which is "fair and reasonable", I consider the five factors referred to in the case of Re Toronto General Trust Corp. and Central Ontario Railway (1905) 6 O.W.R. 350 (H.C.) at p. 354.

[18] First, with reference to the magnitude of the trust, this estate is of average size given the house, cash in the bank, shares in two private companies with an unknown value, jewellery and other personalty. Second, with respect to care and responsibility, while it is argued by Gary that the estate trustee delegated responsibility to the main beneficiaries in determining the price for the house and investing the monies from the sale, given that the sale took many months and was not without obstacles, I find the care and responsibility displayed by Mr. Resnick to be in the average range. It is argued with reference to the third factor of the time spent, that the estate trustee spent a disproportionate amount of time on unnecessary litigation. I find that the time spent was necessitated by the lack of co-operation of Gary in providing information required for the orderly administration of the estate. Fourth, I accept that the estate trustee displayed an appropriate level of skill and ability in distributing assets and investing cash in the estate.

Finally, on the factor of the success of the administration, while the estate is not finalized, the house has been sold and efforts are being made to conclude the administration. The estate trustee has endeavoured to do what is necessary in fulfillment of his fiduciary obligations.

[19] The application of the guideline amounts in this case results in fair and reasonable compensation in the circumstances.

[20] Claims for special fees are justified where extra or specialized work by the estate trustee is necessary as a result, for example, of the complexities in the administration arising from the nature of the assets, taxation problems, numerous categories of beneficiaries or litigation by or against the estate. The estate trustee must establish that the special work performed was outside the "average" estate such that the estate trustee would not be compensated adequately for all the work required to be done.

[21] In the case before me, the claim is made for a fee for special estate work (Note 1). In my view, additional work was necessary to resolve the issue of the oil spill, pursue the insurance claim and advance the sale of the house. The fee of \$1,295 to cover those services is fair and reasonable.

[22] The claim of a management fee for "a special investigation" requested by a beneficiary into the conduct of the management of the two companies owned by the testator is an unusual use of time for an estate trustee. This was necessitated by Gary's unwillingness to provide access to the information about the companies. The two companies' shares were to be sold and transferred to residue under the will. Gary controlled the information as manager of these corporations. Had Gary co-operated and provided the financial information so that a proper valuation could be done, the assets could have been distributed and the estate administration would have been finalized.

[23] However, the estate trustee pursued a cross-claim which was dismissed by the court as ill-founded in law. The request lacked merit and the court held that the estate trustee had other, more appropriate, corporate remedies. As legal costs were disallowed and now repaid to the estate, the costs of the services of the estate trustee in pursuing that course of action should also be disallowed. To do otherwise would be inconsistent and would fly in the face of the decision in the cross-application. The estate trustee has not met the onus of demonstrating that the special nature of the work performed and the time spent was justified and over and above the average estate for which he is being compensated.

[24] The estate trustee claims a special fee for income tax work which is outlined at Note 3 as being for tax planning and filing of personal and estate tax returns. The charge of \$1,900 is made for these services.

[25] When an estate trustee takes on the responsibility of administering an estate, he is presumed to have the ability to meet his obligations including the keeping of proper accounts. It is recognized that some aspects of administration are beyond the ordinary

competence of an executor and fees for service rendered to the estate may be allowed as proper disbursements. Whether income tax advice and the preparation of terminal and estate tax returns is allowed as a charge against the estate depends upon a number of factors including the complexity and size of the estate. In cases where a claim was allowed for special fees for accounting advice, the court held that was justified due to the complexity of the testator's personal and corporate financial affairs: Re Goldlust Estate (1991) 44 E.T.R. 98. In the circumstances of this case, where the estate trustee is a chartered accountant and the estate is of average size and complexity, the charge for income tax advice and planning claimed in the accounts is justified as a special fee in the amount of \$1,000. The balance of \$900 is considered part of the executor's compensation.

[26] On the question of pre-taking compensation, the estate trustee takes the position that he had a long history with the Bluestein family, that copies of his accounts were sent to the beneficiaries including Gary, with supporting time dockets. There were never any complaints and Mr. Resnick believed that he had the consent of all beneficiaries. When Gary retained new counsel and complained about pre-taking compensation on July 25, 1997, then the estate trustee stopped. The amount that was pre-taken was \$12,700 and GST.

[27] I accept that Mr. Resnick believed that up until July 25, 1997 he had authority from all beneficiaries to pre-take compensation.

[28] The leading decision of Re Knoch (1982), 12 E.T.R. 162 (Ont.Surr.Ct.) is authority that a trustee is prohibited from pre-taking compensation without either the agreement of the beneficiaries or a court order. In Re William George King Trust (1994), 2 E.T.R. (2d) 123, the court held that so long as trustees pay themselves for services already rendered and the amount is fair compensation for those services, pre-taking may be proper and cost effective.

[29] Applying the authority of Re Wright Estate (1990) 43 E.T.R. 69 (Ont.Gen.Div.), in that Mr. Resnick pre-took compensation without the approval of all the beneficiaries or the sanction of the court, he is, however, required to pay interest on the amount by which the compensation taken exceeded the compensation allowed from July 25, 1997 until the pre-taking of compensation stopped.

[30] There is also objection to certain expenses paid such as telephone bills for the house. Mr. Resnick provided the explanation that someone had to live in the house in order to maintain insurance. The telephone was necessary for safety reasons. Had Mr. Resnick provided the explanation earlier, there may not have been an objection. In any event, in the circumstances, those expenses are justified.

SUMMARY:

[31] The accounts as presented for the period June 13, 1996 to October 31, 1998 by the estate trustee are approved subject to the following:

1. the claim for a special fee for a management fee of \$6,060 for a "special" investigation is disallowed for the reasons outlined above.
2. a portion of the claim for a special fee for income tax work of \$900 is disallowed for the reasons outlined above.

[32] The estate trustee shall pass accounts for the period October 31, 1998 to October 31, 2000 within six months of the end of the period.


HIMEL J.