REMOVING PERSONAL REPRESENTATIVES - A MANITOBA PERSPECTIVE

by

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INTRODUCTION

This paper will examine the law relating to the removal/replacement of personal representatives and trustees in Manitoba.

It is not intended to be a comprehensive analysis of the law in the area, but rather my hope is to touch on the important and arguably more common scenarios we are confronted with as practitioners from time to time in this area. [1]

The first part of this paper will be dedicated to the review of the removal and replacement of trustees outside of court intervention and the second half dedicated to court applications.

Statutory Provisions

I have attached as Appendix A to this paper sections 7, 8 and 9 of *The Trustee Act*. Historically, the courts look to their inherent jurisdiction to remove a trustee considering factors relating to unfitness or incapacitation in one form or another.

[1] For a more detailed analysis see *Estates and Trusts Pension Journal*, Vol. 28, No. 3, July, 2009, Personal Representatives and Trustees: Resignation, Removal and Replacement, The Manitoba Perspective, K. Eleanor Wiebe, Q.C., p. 252 and 263. See also in the same Journal article by M. Elena

Most provinces, including Manitoba, have introduced legislation that permits the removal or replacement of trustees without court intervention. Sections 7 and 8 of *The Trustee Act* deal with scenarios with respect to the removal or replacement of trustees where court intervention is not required.

Section 7 permits the retirement of a trustee if after "his discharge", the remaining trustees are either a trust corporation or at least two individuals remain to perform the trust. The co-trustees must consent to the discharge of the trustee who wishes to be discharged and there is no need to appoint a new trustee in the retiring trustee's place.

It is interesting to note that of all the provinces, only Manitoba permits the removal of a trustee in these circumstances without the need to replace the trustee so removed. According to Waters, this position is consistent with Manitoba legislative intent to prevent, where possible, the need for an application to court.[2]

Section 7 and section 8, which deals with the appointment of new trustees do not apply to personal representatives.

Perhaps this explains why most of the case law in the area deal with the removal of executors with very few cases dealing with a contest relating to the removal and

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Hoffstein, The Ontario Perspective, p. 264-288. See also *Water's Law of Trusts in Canada*, 3d Edition (Toronto; Thompson Carswell, 205, p. 843 – 850).

[2] See Waters, page 884.

replacement of trustees. Arguably, however, most "trust" arrangements derive from bequests in wills.

The Trustee Act distinguishes between "personal representatives" and trustees.

> Many wills appoint the same parties personal representatives and trustees. Their function is to first administer the estate (as executors) following which property is to be held and dealt with for the beneficiaries according to specific terms of a trust (as trustees). If the other statutory pre-requisites of this section [section 7] are met, it becomes important to identify in which capacity is the fiduciary acting. If it is a trustee, a resignation as trustee can be effected by deed within the parameters of the section.[3]

Section 8

Section 8 of *The Trustee Act* permits, in certain circumstances, the appointment of new trustees without the need for a court application.

Once more, it is important to note that section 8 does not apply to the appointment of a personal representative.

The following circumstances permit the appointment of new trustees under section 8. Where the trustee is:

(i) dead;

(ii) remains out of the province for more than 12 months;

(iii) desires to be discharged;

(iv) refuses or is unfit to act;

(v) is incapable of acting;

(vi) is an infant.

The instrument creating the trust, if properly drafted, should contain a provision whereby a person is designated or nominated for the purpose of appointing new trustees.

Section 8 provides that if no such person has been so nominated or if, in fact, that person is unwilling or able to act, then the surviving or continuing trustee or the personal representatives of the last surviving or continuing trustee, may in writing appoint a new trustee.

***Booty* v. *Hutton*[4]**

The *Booty* v. *Hutton* decision of Madam Justice Beard illustrates the difficulty that be encountered when the courts are called upon to determine when the role of personal representative appointed under a will ceases and the role of trustee begins.

The facts of the case are reasonably straightforward. Charles George appointed his two sons, Gordon and James, as executors. Mr. George passed away in Saskatchewan in 1976. His estate was comprised primarily of farmland, cash and personal property.

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[3] See Wiebe article, page 254.
[4] 140 Man. R. 2nd 186 (Q.B.) and 1999 CanLII 14282 (MB. Q.B.).

For the next 16 years, his son James ran the family farm until James passed away in 1992.

Gordon was left as the sole executor of his late father's estate and sole executor of his brother James' estate.

In addition to Gordon and James, Mr. George had a daughter, Charlene Booty.

Neither Gordon nor James had made application to pass their accounts as executors of their father's estate. Charlene made application in British Columbia for an order to compel the passing of accounts.

This application was met with some resistance by Gordon. In fact, Gordon put up quite a fight in the British Columbia courts resisting Charlene's efforts to obtain a proper accounting, which resulted in numerous court appearances and orders against Gordon. No accounting was ever provided and Gordon's conduct was characterized by Justice Boyd of the British Columbia Supreme Court as arrogant, displaying a lack of respect for the administration of justice. Justice Boyd went as far as to grant judgment to Charlene against Gordon personally and also in his capacity as executor of his late father's estate in the sum of $40,000.00 plus costs relating to his misconduct.

The late Mr. George's estate had an account in Winnipeg with N.M. Patterson & Sons Ltd. ("Patterson"). While court proceedings were pending in British Columbia, Gordon

directed Patterson to add Gordon's son, Allan, as a trustee to the Patterson account. Gordon advised Patterson that he was the sole executor of the estate of his late father and his late brother James. Patterson complied with the request and added Gordon's son as a named trustee on both accounts.

Patterson was subsequently advised by counsel for both Gordon and Allan that each had given the other "rights of survivorship" in both accounts.

Once Charlene was made aware of Gordon's actions, she wrote to Patterson and advised that Allan's name should not appear on the two accounts as he was neither an executor nor a beneficiary and requested that his name be removed. Patterson began interpleader proceedings to have the moneys in the account paid into court.

Justice Beard was left with the task of determining whether Gordon had the capacity as a trustee under section 8(1) of *The Trustee Act* to appoint his son Allan in the place of his brother James, the deceased trustee, or whether such an appointment was void as Gordon's role as personal representative had not "changed" to that of trustee.

Justice Beard began her analysis by noting that section 8(8) of *The Trustee Act* specifically provides that section 8 does not give anyone the power to appoint a personal representative.

Quoting from the Canadian Law of Wills, 3rd Edition, Volume 1 at page 227, Justice Beard writes:

> An important difference (between the offices of trustee and executor) is that a trustee can appoint other trustees and can also retire from a trust. An executor, however, cannot appoint someone to act as co-executor with him, nor can he retire from the office once he has proved the will.[5]

In reviewing the case law, Justice Beard notes that language such as "when the estate has been cleared" or "when the estate has been wound up" is sometimes used as a demarcation between personal representative and trustee. She writes in part:

> Thus I am satisfied that the term "wound up" refers to the completion of administration of the estate and includes either a formal passing of accounts or an informal accounting to the beneficiaries together with a waiver of the formal passing of accounts. At the very least, there should be some manner of release to the executors in relation to the administration of the estate.[6]

Commenting on the need to pass accounts, Madam Justice Beard notes that:

> While the passing of the account is a duty of an executor, it is not necessarily required and can be dispensed of in appropriate circumstances. This means that the passing of accounts is not the key to the determination of whether or not the role of executor has evolved into that of trustee, rather one must look at all the circumstances to make the determination.[7]

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[5] See *Booty* v. *Hutton*, page 5.
[6] *Booty* v. *Hutton*, page 6.
[7] *Booty* v. *Hutton*, page 7.

The court concluded that notwithstanding the fact that almost 20 years had passed from the time Gordon took on the role as executor, he had not yet completed the administration of his late father's estate by 1996 and therefore still continued in the role as a personal representative.

As a result, the appointment of his son as co-trustee was ineffective.

Madam Justice Beard pointed out that Charlene had commenced her proceedings for an accounting in British Columbia which had not yet been completed. That proceeding could only be dealt with by Gordon in his role as executor. She went on to note that at no time had Gordon challenged the proceeding on the basis that he had completed his role as executor and until such time as the British Columbia proceeding was finally resolved, Gordon would, at law, continue to act as executor of his late father's estate.[8]

Court approval is required if a personal representative wishes to stand down. If, however, a personal representative dies prior to the completion of his administration of the estate and the will does not provide for a successor, the executor of the executor would take on the responsibility for the administration of the estate.[9]

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[8] See also *Re: McLean*, 1982 37 O.R 2nd, 164 (Ont. High Court).

[9] Eleanor Wiebe in her paper points out that section 6(4) of *The Trustee Act* had led to some confusion in this area. **Section 6(4)** Executor of an executor not included.
6(4) The executor of any person appointed as executor under this Act is not, by virtue of such executorship, an executor of the estate of which his testator was appointed executor under this Act where the person acted alone or is the last survivor of several executors.

If a will does not name a successor at common law, the executor of the executor succeeds. The Manitoba Law Reform Commission points out that it is unclear if this provision restricts its application to executors who might have been appointed under section 9(1) of *The Trustee Act* or whether it supercedes the common law with respect to all executors. If an executor dies intestate, the Court of Queen's Bench Rules give the right to beneficiaries to nominate a replacement executor. The Commission has suggested that this tends to support the view that section 6(4) only applies to executors appointed under *The Trustee Act*.[10]

The question that now arises is how is the estate practitioner to approach this particular problem. It has, in fact, been suggested that unless the evidence is compelling, the lawyer should assume that "once an executor, always an executor" and out of an abundance of caution, an application to court may very well be the only option available when the need to replace or remove a trustee presents itself.[11]

As pointed out in Waters, the legislative intent with the introduction of the provisions of *The Trustee Act*, in particular, sections 7 and 8, was to make application to court, where possible, the exception rather than the rule.

I think that it is likely that the need for court intervention will not be required in the context of stand alone "trustees". More caution will have to be exercised in the context

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[11] See Wiebe article, page 257.

of a will. As noted above, the removal and replacement of a personal representative can only be obtained via court order once probate or administration has issued.

Appointment of New Trustees by the Court

Section 9 of *The Trustee Act* reflects to a large measure the inherent jurisdiction the court has always perceived itself to have to remove or appoint personal representatives/trustees in cases where the trustee is no longer in a position to act in his or her fiduciary capacity.

With respect to the appointment of a new trustee, section 9(1)(a) provides that when it is inexpedient, difficult or impractical to appoint a new trustee outside of court intervention and in cases where a trustee who is convicted of a crime or is mentally incompetent or is bankrupt (or has made an assignment), or a corporation that is in liquidation or has been dissolved, the court may make an order appointing a new trustee.

With respect to the appointment of a new personal representative, section 9(1)(b) provides that in cases where a personal representative desires to be relieved from the duties of his office or is guilty of any misconduct or is unfit or incapable, or who remains out of the province for more than 12 months, then the court, in these circumstances, may appoint a new personal representative.

Section 9(2) provides the court with the power to remove a trustee without appointing a new trustee in his place.

Section 9(5) provides that any personal representative appointed under section 9, unless otherwise ordered by the court, shall give such security as may be required to give if Letters of Administration were granted to him under *The Court of Queen's Bench Surrogate Practice Act*.[12]

Arguably, the starting point for any discussion relating to the court's power to remove trustees is the *Letterstedt* v. *Broers* case.[13]

Lord Blackburn sets out two principles that the courts will look to as it considers whether a trustee ought to be removed.

> It is not disputed there is a jurisdiction "in cases requiring such a remedy", as is set in Story's Equity Juris Prudens, section 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so little that Their Lordships are compelled to have recourse to general principles.
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> Story says, section 1289, "but in cases of positive misconduct, courts of equity have no difficulty in interposing to new 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 show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

[12] See Appendix A.
[13] 1884 9 A.P.P. CAS. 371 (South Africa P.C.).

Lord Blackburn concludes:

> In exercising so delicate a jurisdiction as that of removing trustees, Their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, 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 manner so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.[14]

So Delicate a Jurisdiction

It must be remembered that even in cases where clear misconduct has not been found, a trustee or trustees may be removed if, in fact, the court is of the view that there is a danger the trust will not be properly administered because of animosity between the trustees.[15]

There are certain fundamental features that appear to link all of the cases in this area.

1. The courts generally are reluctant to remove an estate trustee as that would be seen as interference with the discretion and choice of the testator preparing his last will. The courts sometimes go as far as to suggest that there must be a case of clear necessity before the personal representative is removed.[16]

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[14] Page 385-387.
[15] See *Bartell Estate, Re* 2006 M.B.C.A. 139 (CanLII 2).
[16] *Weil (Re)* 29 D.L.R. 2nd 308. Reversed on other grounds. 30 D.L.R. 2nd 91 (Ont. C.A.).

2. The onus of proof for the removal is on the party seeking same and the paramount concern of the court will be the welfare of the beneficiaries.[17]

3. Animosity as between the executor and the beneficiary or as between jointly appointed trustees is not a basis for removal of one or necessarily all of the named trustees.[18]

4. An executor who has a conflict of interest should be removed but not every conflict of interest will necessarily constitute sufficient grounds for removal.[19]

5. It will be a question of fact in each and every case whether the personal representative ought to be removed and who should be appointed to replace the personal representative so removed.

6. Where there is more than one executor, the court may suspend the executor who finds himself in a conflict until the dispute has been resolved in limited circumstances.[20]

Misconduct/Conflict of Interest

The recent Manitoba decision of *Stern* v. *Stern* is instructive on the issue of the removal of an executor where an alleged conflict of interest exists.

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[17] See *Letterstedt* v. *Broers.*
[18] See *Bartell Estate*.
[19] *Stern* v. *Stern* 2010 M.B.Q.B. 62 (CanLII).
[20] *Stern* v. *Stern*.

The late Norman Stern had separated from his wife Sharon at the time of Norman's passing. In his will, Norman had named Sharon as one of his three executors.

Lyle and Ronald Stern, the late Norman Stern's brother and cousin were also named as co-executors.

Sharon, prior to Norman's passing, had instituted proceedings under *The Family Property Act* seeking an equalization.

Lyle and Ronald made application to court to remove Sharon on the grounds that she had a conflict of interest.

Sharon argued that, in fact, there was no conflict as she had not yet determined whether she intended to pursue her claim under *The Family Property Act* and as such, the application of her co-executors was premature. It was also argued that her late husband knew of her family property claim prior to his passing and had ample opportunity to amend his will to either remove her as an executor or to delete some or all of the provisions made for her under the will. Sharon argued that in the circumstances the court must give deference to her late husband's wishes as expressed in the will and permit her to remain as executor notwithstanding her pending *Family Property Act* claim.

Justice Hanssen, after reviewing a number of cases that deal with issues of conflict, concluded that in the circumstances he could strike a balance between Norman's wishes and the clear conflict that Sharon placed herself in while her family property claim was pending.

Justice Hanssen states in part:

> Norman must have appreciated that even in the absence of the family property claim Sharon's personal interest would inevitably be in conflict with those of the residual beneficiaries. Yet knowing this he chose to appoint her as one of the executors of his estate. I am satisfied that his wishes in this regard should be respected so far as possible.[21]

Justice Hanssen concluded that he could suspend Sharon as executrix rather than removing her entirely until the disputed issues with respect to the family property claim had been resolved.

In the process of arriving at this conclusion, Justice Hanssen reviewed a number of key decisions in the area. I think it's fair to say that to have Sharon continue acting on "both sides" of the dispute would have been untenable in that she would have been in a position of instructing counsel simultaneously on both sides.

[21] page 5.

Justice Hanssen referred to the cases of *Mardesic* v. *Vukovich Estate*[22], *Re: Lithwick*[23] and *Beatrice Watson-Acheson Foundation* v. *Polk*[24] in coming to the conclusion that suspension was appropriate rather than removal.

In the *Beatrice Watson-Acheson Foundation* v. *Polk* case, one of the three executrices sought the removal of Ms. Polk alleging misconduct both surrounding the making of the late Mr. Watson's will but also her conduct as an executrix of the will.

The residue of the late Mr. Watson's estate was left to a Foundation which had been created by the late Mr. Watson as a charitable organization for the promotion of animal welfare. Under the Foundation's by-laws, an executrix of the late Mr. Watson's estate was to become a member of the Foundation. Ms. Polk was appointed as a member.

In seeking the removal of Ms. Polk, a number of allegations were made with respect to her conduct, in particular:

(a) She advanced the argument that the estate ought not to distribute funds to the Foundation until the Foundation "proved" its viability;

(b) She had failed to disclose she had borrowed and not repaid $145,000.00 from the late Mr. Watson prior to his passing;

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[22] *Mardesic* v. *Vukovich Estate* 1988 CanLII 3125 B.C.S.C.
[23] *Re: Lithwick* 1975 9 O.R. 2nd 643 (Ont. C.A.).

(c) When Mr. Watson passed away, he had two cats and three dogs. Although he left no provision in his will for the ongoing expense in maintaining the animals, there was a disagreement amongst the executrices how his animals should be treated. Ms. Polk insisted on moving Mr. Watson's animals to her home notwithstanding the fact she had "approximately" (the court's word) six dogs and 15 cats of her own. Ms. Polk submitted an expense account to the other executrices for the shelter and care of the two cats and three dogs that totalled several thousand dollars over the course of a few months.

Justice Low noted that even where the will permits a trustee to act in the circumstance where he has a personal interest, the trustee is not relieved from her fiduciary obligation to put the interests of the estate and the beneficiary first.[25]

With respect to the undisclosed loan taken by Ms. Polk from the late Mr. Watson, Justice Low states:

> Whatever may have been Ms. Polk's position as to whether she was legally or morally obligated to repay the loan, she nevertheless had a duty of disclosure that flowed from her fiduciary duty as an executor. In a choice between silence, which was to her own benefit, and disclosure, which was to the benefit of the estate, she chose silence. The non-disclosure was, in my view, a breach of her obligation of honesty and utmost good faith.

Ms. Polk suggested that rather than outright removal, the court could simply order her to "stand aside".

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[24] *Beatrice Watson-Acheson Foundation* v. *Polk* 2006 24 E.T.R. 3rd 124 (Ont. Sup. Ct. J.).

In contrast to the decision in *Stern*, Justice Low states:

> In my view there is no authority for the proposition that an intermediate measure in the nature of a "standing aside" is an appropriate remedy where there is a clear conflict of interest as there is in the circumstances at bar. Here, the circumstances are an aggregate of Ms. Polk's conflict of interest, lack of frank and honest disclosure of the conflict, and a history of conduct in which Ms. Polk has placed her interests over the interests of the estate or has otherwise failed to abide by her duty to place the interests of the estate paramount over others.

The suggestion was also made that perhaps Ms. Polk could simply remain inactive until the conflict had been resolved as a suitable alternate remedy to removal. In quoting from an earlier B.C. Supreme Court decision *Hall (Public Trustee)* v. *Hall*[26] Justice Low adopts and approves a quote from Proudfoot J. as follows:

> The lack of fidelity in the case at bar is clear and unable to be excused. Council for the respondent argues that the respondent should be allowed to remain as trustee but he will be inactive. I find that proposal difficult to follow as a trustee the respondent is responsible for carrying out certain duties he cannot carry out his duties as a trustee and remain inactive. There is simply no provision for an inactive or silent trustee.[27]

In *Re Kostiw Estate*[28] the late Mrs. Kostiw left her estate to be divided equally between her two grandchildren June and Michael. June was sole executrix under her will. Michael brought an application not to remove his sister, but to be appointed co-trustee.

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[25] page 53.
[26] *Hall(Public Trustee)* v. *Hall* 1983 Can LII 36.
[27] page 11.
[28] 2007 CanLII 219423 (On. S.C.).

There was however a suggestion that his sister was unfit to act as sole trustee because of the manner in which she had handled their late mother's estate.

The court dismissed the allegations of misconduct but noted in the course of its review that Michael had, in fact, filed a claim against his grandmother's estate for $108,000.00 and as a consequence, placed himself in a conflict of interest.

Quoting from *Re: Lithwick*[29]*:*

> It is, of course, not the law that an executor can never have a claim against an estate for past services or loans, but he should not place himself in a position where his duty to investigate the validity of such claim against the estate conflicts with his interests in promoting an undocumented and dubious claim.

Justice Grange goes on to state:

> In my view the executor should not have pressed these doubtful claims without at the very least an independent opinion justifying their presentation. It is not enough to say that the accused may be scrutinized on the passing of accounts. The executor represents the claimants and the estate and he cannot perform his task as executor of thoroughly investigating the validity of each claim against the estate when he is one of the claimants and no other person has investigated that validity.[30]

Animosity or Hostility

[29] 1975 Carswell Ont. 462.
[30] See also *Mardesic* v. *Vukovich Estate*.

As noted above, animosity between the executors and a beneficiary or amongst executors may not be sufficient on its own to warrant removal of an executor. The key is to determine whether the animosity or hostility has interfered or will likely interfere with the fiduciary duties of the executors.

The case of *Bartel Estate Re*[31] illustrates how far the court is prepared to go to ensure that the welfare of the beneficiaries is not put at risk by the conduct either potential or realized of appointed executors.

The late Gertrude Bartel appointed her three sons, Walter, Arny and Helmut, as executors of her will.

Walter and Arny sought to take out probate, but Helmut refused to give up the will. Helmut advanced the position that Walter had, in the past, misconducted himself and he had serious concerns that Walter and Arnie were unfit to act as executors. Helmut also explained that Arny was an undischarged bankrupt. Helmut advanced the position that the Public Trustee or an acceptable corporate trustee be appointed in the place of all three named executors.

Because of the animosity, antagonism and distrust between the three brothers, it was acknowledged that it would be very difficult for the three to work together and as a consequence, “something had to give”.

It should be noted the lower court did not find as a fact that any specific act of misconduct should preclude any three of the brothers from continuing to act as an executor. However, the lower court removed Helmut, thereby permitting Walter and Arny, who had demonstrated an ability to work together, to remain as trustees. To appoint the Public Trustee or a corporate trustee as requested by Helmut would have over-ridden the wishes of the testatrix who, it must be assumed, wanted her sons rather than a judicially appointed trustee to administer her estate. The lower court judge ruled that two was better than none and removed Helmut permitting Walter and Arny to proceed on as executors and administer the estate.

On appeal, Justice Freedman determined that all three should be replaced by the Public Trustee.

Justice Freedman disagreed that the "next best solution" would be to retain those named as executors who could work together. The suggestion that to appoint the Public Trustee would over-ride the wishes of the testatrix was met with this response:

> I agree, but must add, that this is always the result when the court finds it necessary or desirable to remove an executor and appoint a replacement not named in the will. Or, as the Judge did, remove an executor and not appoint any replacement.[32]

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[31] supra.
[32] page 5.

Justice Freedman pointed out that the usual course in these circumstances, i.e., where there is disagreement amongst the executors that would likely cause additional expense or perhaps cripple the estate was in fact to replace executors with the Public Trustee.[33]

In the *Re: Consiglio* case, no misconduct could be identified justifying the removal of a trustee. Justice Kelly, at page 650 of the decision, writes:

> It is our view, that misconduct of the power of trustee is not a necessary requirement for the court to act and that the court is justified in interfering and indeed required to interfere when the continued administration of the trust with due regard for the interests of the *cestui que* trust has been, by virtue of the situation arising between the trustees, become impossible or improbable.

Justice Freedman responds to the suggestion that "two out of three is better than none" by pointing out that "this is not a case of majority rule".

In conclusion, Justice Freedman writes

> The result is a dysfunctional trio which cannot remain. The rancour and expense which would be certain to follow could cripple the estate. The clear solution is to appoint a neutral third party and the Public Trustee is ideally placed to step in. The interests of the beneficiaries which should be paramount in these proceedings, are in danger of being overlooked unless such measure is taken.[34]

A Brief Word About Costs

[33] See *Re: Consiglio Trusts* No. 1 (1973) 36 D.L.R. 3rd 658 (Ont. C.A.).
[34] page 7.

The award of costs in estate litigation is different from other forms of litigation where cost usually follow in the cause. In estate proceedings, generally the reasonable costs and expenses incurred in the course of the administration of an estate are payable out of the estate on a solicitor and client scale.[35]

In a relatively recent Manitoba Court of Queen's Bench decision, *Johnson Estate* v. *Forbes*[36] Justice Duval reviewed at some length the law of costs in the context of an estate litigation problem. In that case, the administrator brought an application for advice and directions with respect to a number of issues relating to some of the assets of the estate. The beneficiaries retained independent counsel. The court awarded costs to the administrator, initially on a party and party basis.

Costs were not awarded to the beneficiaries. Justice Duval was asked, on a further application, to revisit the issue of costs and, in particular, to determine whether the applicant administrator was entitled to solicitor and client costs and further, whether any of the respondents were entitled to costs.

Justice Duval concluded that the administrator of the estate had acted properly in seeking advice and direction from the court with respect to the interpretation of the will. She went on to note that in her view, party and party costs were not appropriate or sufficient to properly compensate the administrator with respect to its legal fees and that the administrator's entitlement to indemnification for all reasonably incurred costs and

[35] See Orville L. Currie "Legal Fees and Costs in Estate Matters" 1998 25 Man. L.J. 299.
[36] 2008 2 W.W.R. 494.

expenses relating to the proceedings should be determined as part of the passing of the administrator's accounts by the Master. The administrator's cost should be payable from the proceeds of the estate.

With respect to the other parties, she noted some misconduct on behalf of one of the respondents and states in part:

> Had all the parties acted reasonably in providing their respective list of assets and position these proceedings would have been substantially shortened.

She goes on to state:

> This is not a situation where the testatrix's capacity was questioned or undue influence raised. Personal representatives and beneficiaries can no longer routinely expect to have their costs awarded out of the estate. There is a greater inclination by the courts to have a party bear his or her own costs and even to pay costs personally particularly where a court has determined that the unsuccessful party has acted unreasonably or where a global award from the estate penalizes residuary beneficiaries. The escalating costs of litigation and the rise in unnecessary litigation is a concern which cannot be ignored.[37][38]

In the context of seeking the removal of an executor, both parties should be mindful that the consequences of being on the "wrong side" of the decision may prove to be a costly exercise. A beneficiary who seeks the removal of an executor based on allegations of misconduct which go unproven may find themselves responsible for not only their own

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[37] page 504.

[38] See also Compensation and Duties of Estate Trustees, Guardians and Attorneys Jennifer J. Jenkins and H. Mark Scott, Canada Law Book 2010, page 22-322: 20.10.

legal fees on a solicitor and client basis, but the fees of the executor as well. Similarly, an executor who finds himself in a position of conflict should, in recognition of his fiduciary obligations, consent to his removal or, at the very least, be fully informed that to contest an application for his removal in cases where a clear conflict exists, may result in his being responsible for his own legal fees and the fees of other parties involved rather than having the estate absorb these costs.

Conclusion

Because of the fact driven nature of the exercise, it is difficult to provide a definitive set of rules or guidelines that would predict with any degree of certainty when a trustee is likely to be removed and replaced as a result of the court application.

Cases of clear misconduct, i.e. fraud or misappropriation of funds or where there is a potential for litigation between an executor in his personal capacity and the estate under his administration are relatively easy to “sort out”.

It is the cases that are highlighted in “shades of gray” that become more difficult to manage for the practitioner.

Although many questions will have to be posed as the problem is sorted out, perhaps the key question to be posed is whether there is real potential for the beneficiary suffering a loss should the trustee not be removed.

As noted above, we must be mindful of the cost consequences that may flow with respect to these court applications.