Insurance Law FOCUS

New E & O insurance can provide executors peace of mind

IAN HULL

The role of the executor has always been complex, and that hasn't changed. The composition of a typical estate also remains the same, with perhaps a house, vehicles, household contents and some financial assets. What has changed is the environment in which the executor must perform his or her duties, which has become more fraught with risk than ever. Another related change is the recent availability of errors and omissions insurance for the non-professional executor and the estate.

Conflicts with beneficiaries generally involve errors — or the perception of errors — in any or all of the following areas in the administration of an estate:

- Preferential or prejudicial treatment of certain beneficiaries resulting in a loss of entitlement by another beneficiary;
- Timing issues related to the sale of real property or various types of financial instruments that result in diminished value of the asset;
- Allegations of conflict of interest on the part of the executor whether the executor is also a beneficiary, or not; and
- Failure to valuate, or improper valuation of assets.

Changing families, an unstable economy and increasing litigation — in a context where easy access to information via the Internet can make anyone an "expert" — is the new reality for executors. And risk is not primarily driven by the size or complexity of the estate. Relationships between beneficiaries and family dynamics can have a profound effect on the relative risk to the executor.

Factors leading to increased risk for executors

The "modern family" is now often characterized by second marriages and the blended families that accompany them. In this context, relationships between beneficiaries tend to be more complex. According to Human Resources and Skills Development Canada, over one-third of marriages in Canada are expected to end in divorce before the 25th anniversary. Traditional families make up just 34.6 per cent of all families, compared to 55 per cent in 1981.

In the past, real estate was a safe choice, financial investments were stable and Guaranteed Investment Certificates always seemed to grow six per cent annually. In the past decade, however, it has become evident that real estate and financial instruments are more susceptible to external influences, more volatile in nature — and thus more sensitive to timing — than previously experienced. Anyone with a mutual fund investment or stock portfolio knows that a significant portion of an estate can quickly evaporate.

We are all aware that society in general is more litigious today than in the past. Individuals no longer look at a lawsuit as a dispute resolution of last resort. The proportion of people who use litigation to reach a divorce settlement is an obvious testament to this trend.

This is compounded by the fact that beneficiaries today have almost-instant online access to information about investment practices, real estate trends, beneficiary rights and just about anything else in which they may be interested. This newfound knowledge brings with it a host of expectations from the beneficiaries that today's executors must manage.

Insuring for personal liability and defense costs

A new insurance product can provide executors with risk protection. ERAssure — exclusively available with the counsel of a lawyer — is errors and omissions insurance available for the estate and the executor client. ERAssure insures executor clients for the costs of defense and indemnity for damages awarded against them that arise out of errors and omissions committed during the administration of an estate.

ERAssure is available for estates of up to $5 million in assets. ERAssure premiums depend on the estimated value and complexity of the estate, type of assets, number and qualification of executors and the amount of coverage. For a typical estate valued at less than $1 million, the approximate cost would be $1,700 for a three-year term. ERAssure policy provisions include:

- Claims-made liability coverage with a single occurrence and aggregate limit applicable over the term of the policy;
- A three-year term that will cover the typical time frame required by most executors to deal with the assets of the estate;
- First dollar coverage for legal expenses and indemnity without deductible;
- Coverage limits that are similar to estate asset values with a minimum coverage limit of $500,000 and a maximum coverage limit of $5 million.

Executors need good counsel — and risk protection. Because, while a well-written will is essential, the reality of emotions and reactions of beneficiaries can be difficult to predict — and a well-written will doesn't pay the cost of litigation against the executor and estate in the event of a claim for damages. ■

Ian Hull co-founded Hull & Hull with his father, Rodney Hull, in 1998. He also maintains a mediation practice through Hull Estate Mediation Inc. He is a lecturer at the Ontario Bar Admission Course and guest lecturer for the Canadian Bar Association and the Law Society of Upper Canada.

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Key factor: perception of coverage by insureds

Unintended

Continued From Page 10

noted that the trial judge found Ecclesiastical was not entitled to premiums for coverage in June because it did not tell Kouri there would be a cost for the 30-day extension. "Even if it had," she said, "the trial judge found that Ecclesiastical had been negligent in not determining the issue of renewal in a timely way, and that Kouri had as a result suffered damages equivalent to the premiums paid on account of the purported renewal."

The appeal court disagreed. "What's interesting is that the formal renewal was done without the knowledge of the insurance company. When the campground owners received the renewal certificates, they would have thought they were bound by insurance coverage," said McKillop.

Indeed, noted Gomery, "the key factor was the perception the insureds had that they were covered."

In his decision, Justice Russell Juriansz stated that, "The issue is not Kouri's authority under its contract with [the broker], but its ostensible authority from the point of view of the insureds. Whether Kouri breached its contract is a different question from whether the insureds could rely on the certificates of insurance.

"Section 402 clearly applies on the facts pleaded by Kouri," he added. "Even if Kouri were allowed to advance a position inconsistent with its pleadings, I would take the view that its ostensible authority was sufficient to create binding contracts of insurance on behalf of Ecclesiastical."

The impact of that reasoning may apply only to the specifics of this particular case or extend to many cases. "The court could look at the decision as one very much on its facts," said Gomery. "On the other hand, if the court's reasoning is it's the insureds' perception [that matters], then what difference does it make what the facts are?

"I don't think the court had to do that to get to the conclusion it reached," she added. "You could have resolved this solely on the language of s. 402. Clearly this was an issue of principle for the court."

The decision was not surprising, said McKillop. "They applied s. 402 and determined this was a deemed trust."

Whether the decision will resonate beyond the unusual situation explored in *Kouri* remains to be seen. "We're waiting for the other shoe to drop in terms of whether this will have an impact," said Gomery. ■

Reasons: *M.B. Kouri Insurance Brokers Ltd. v. R.L. Gougeon Ltd.*, [2010] O.J. No. 5584.

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