The Executor's Year and the Rule of Convenience

This article is written to update you on the cutting edge of estates law. In short, nothing is changing. Well, that is so at least as it relates to the concept of the executor's year and the related rule of convenience.

The Court of Appeal of Ontario released a decision on February 28, 2018 in *Rivard v. Morris*, 2018 ONCA 181, Justices Rouleau, Trotter and Paciocco presiding, where they reviewed the law as it relates to the duty of executors to administer estates on the timely basis, otherwise known as the executor's year. For obvious reasons, not every estate can be wound up within a year of death. The estate may be complicated for a number of legitimate (or not so legitimate) reasons. When that occurs, executors face the quandary of what to do when time passes and the assets remain undistributed.

Alexander Rivard was survived by a son and two daughters. Following his death the siblings fought amongst themselves over his estate. First, the sisters unsuccessfully challenged their father's will that left most of his property to their brother. Then the siblings litigated about whether the brother, as estate trustee, should be paying the sisters interest on the money they were left under that will. If the sisters were entitled to interest payments, the money for the interest would have come out of the brother's share of the estate, since he was the residual beneficiary.

The deceased acquired appreciable farm property during his lifetime. Shortly before his death, on October 24, 2013, it appeared that he was going to divide the farm property equally between his three children. During his life he had already given his son, Steven Duane Rivard (the brother), a significant tract of farmland. In a will Alexander Rivard executed on August 1, 2013, he instructed that similar size farm properties be given to each of his two daughters, Janine Morris and Julianne Rivard (the sisters). That will provided that the balance of his estate was to be divided equally between the three children. Then things changed. On August 24, 2013, Alexander Rivard executed another, different will. In this, the last will he was to execute before he died, Alexander Rivard did not leave the sisters farm property. Instead they were to receive legacies of money, $530,000 each. The brother would take the residuary of the estate, or what was left, which in this case consisted of significant farmland. As under the first will, Alexander Rivard appointed all three of his children as estate trustees.

The sisters were disappointed. Suspicious of the second will, they decided to challenge it, alleging undue influence. Of course, this challenge held up the division of the estate. It was not until August 8, 2016, that the dispute was settled with a finding that the second will was valid. On consent, on October 18, 2016, the lands held in the estate were ordered to be conveyed to the brother on the condition he paid the money provided for in the will to the sisters. This finally occurred on October 24, 2016.

Another dispute arose. The sisters claimed that they were entitled to interest, in addition to the face amount of their legacies. They claimed interest at 5% per year, payable out of the brother's residuary estate, commencing one year after their father's death. The brother balked. He agreed to retain $63,600 until this dispute could be settled. The issue was referred to the application judge. The application judge confirmed the resignation of the sisters as estate trustees, and granted the parties leave to make submissions on the sisters' entitlement to interest on their legacies.

The interest dispute came before an application judge. He recognized that there is a rule providing for the payment of interest on legacies in a will if those legacies are payable but payment has been delayed for more than a year. Yet the application judge decided not to apply that rule. He claimed, and exercised, a discretion not to do so on the basis that the sisters had been estate trustees during the administration of the estate, and the delay in payment was caused by their challenge to the will. The sisters appealed that decision and the appeal was allowed. The court recognized the common law rule providing for the payment of interest, often called the "rule of convenience", and found that the application judge failed to properly exercise judicial discretion to apply the rule.

Among other things, the Court of Appeal recognized the "executor's year" principle, when they wrote:

> Centuries ago, Ecclesiastical courts in England developed a practice of giving personal representatives one year after the death of the deceased to wind up the estate. To this day, it is still presumed, including in Ontario, that estates will be wrapped up within the "executor's year": Carmen S. Thériault, *Widdifield on Executors and Trustees*, loose-leaf (2016-Rel. 11), 6th ed. (Toronto: Carswell, 2016), at pp. 5-6.3 to 5-6.4. This involves calling in the assets of the deceased, paying off the estate debts, and converting the remaining assets to enable bequests and legacies to be distributed according to the will, and then doing so."

The executor's year rule carries with it an additional obligation, something the Court of Appeal referred to as the "rule of convenience". The court said:

> For more than two centuries, the law of equity has recognized a related rule, often referred to as the "rule of convenience." According to this related rule, described in more detail below, "where no special time is fixed for the payment of a legacy, it carries interest ... from the expiration of a year from the testator's death": *Widdifield*, at p. 5-6.3. See also: James MacKenzie, *Feeney's Canadian Law of Wills*, loose-leaf (2016-Rel. 64-9), 4th ed. (Toronto: Lexis-Nexis, 2000), at p. 8.22. This rule was thoroughly reviewed in the 1997 article by Rosanne T. Rocchi and Michael W. Kerr, "Legacies: A Matter of some Interest" (1997), 16 E.& T.J. 305 ("Rocchi and Kerr").
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> The "rule of convenience" can be easily explained, in my view. One of the maxims of equity is that it presumes as being done that which ought to be done. Since the beneficiaries should be enjoying the earning power of their legacies by at least the anniversary date of the testator's death, where that enjoyment is postponed and the testator has not provided

> an alternative date for payment of the legacy, interest is to be paid: *Hutcheon v. Mannington* (1791), 1 Ves. Jr. 366, at p. 367, 30 E.R. 338 (Ch.); and *Elwin v. Elwin* (1803), 8 Ves. Jr. 547, at p. 557, 37 E.R. 467 (Ch.). This does not mean that the interest is itself a legacy: *Foster v. Wyles*, [1938] 1 Ch. 313, at p. 316. It does mean that equity takes steps to put the legatee in the position they would have been in had the legacy been distributed as the testator, not having set a different date for distribution, is presumed to have intended.

The court observed that the general rule has been adopted in Ontario: see *Re Barton*, 1940 CanLII 330 (ON CA), [1940] 4 D.L.R. 115 (Ont. C.A.), aff'd 1941 CanLII 8 (SCC), [1941] S.C.R. 426; and *McDougald Estate v. Gooderham* (2003), 2 E.T.R. (3d) 52 (Ont. S.C.), aff'd (2005), 2005 CanLII 21091 (ON CA), 199 O.A.C. 203 (C.A.). Rule 65.02(2) is a legislated provision to the same effect. It directs that interest is to be paid on legacies from the end of one year after the death of the deceased, unless the will directs another time for payment.

Under the "rule of convenience", interest is payable even if payment within the executor's year is impractical or impossible, and whether or not the legacy has vested: *Wood v. Penoyre* (1807), 13 Ves. Jr. 325, 33 E.R. 316 (Ch.); *Toomey v. Tracey* (1883), 4 O.R. 708 (H.C.); and *Widdifield*, at p. 5-6.3. Interest is payable even where payment within the first year was never expected: *Walford v. Walford*, [1912] A.C. 658 (H.L.); *Spofford Estate*; and *Re Carter*, [1934] O.J. No. 45 (H.C.). Indeed, interest is payable under the "rule of convenience", "whether the assets have been productive or not", and even where the property is incapable of earning income during the period when interest is accumulating: *Pearson v. Pearson* (1802), 1 Sch. & Lef. 10 (Ch. Ir.), at p.12; *Sitwell v. Bernard* (1801), 6 Ves. Jr. 520, 31 E.R. 1174 (Ch.); and *In re Hoey (deceased), Gordon v. Russell and Others*, [1944] NZLR 900 (S.C.), at p. 905.

The court explained,

> …the most historically accurate and least misleading rationale for the "rule of convenience" is that it is a mechanism for promoting the full enjoyment of specific legacies. By imposing interest payment obligations at the end of the executor's year, specific legatees can more fully enjoy the benefits of the gifts that were intended where distribution has been delayed beyond the executor's year…the "rule of convenience" is blunt. By design, it is intended to "exact rough justice" and achieve convenience, even though "in particular cases both convenience and justice may be disappointed": *Sitwell*, at p. 540; and Rocchi and Kerr, at p. 316. It is called a "rule of convenience" because it is a simple, predictable way of achieving the generally fair outcome of providing for the payment of interest on specific legacies. The value in having a simple, predictable rule is evident when it is appreciated that the "rule of convenience" is not a litigation rule. It is a rule that is meant to be applied by personal representatives even where courts are not called upon to order interest payments. Its rigidity and simplicity are intended to ease the administration of estates by saving personal representatives from having to predict what an estate could have earned, and courts from "endless and immeasurable" inquiries into the performance of the estate, should a more complex rule operate: *Sitwell*, at p. 540.

So the Court of Appeal has confirmed again that as a general rule, the executor's year concept still lives. The Estate Trustee has one year to administer an Estate. Unless a will specifically provides otherwise, the common law rule of convenience, which is said to have been partly codified in Rule 65 of the Rules of the Civil Procedure, also applies so that interest will also begin to run on payments commencing at the end of the executor's year.

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