October 5th, 2009

A Custodian of a lawyer's practice is like a . . . [what?]

By Jonnette Watson Hamilton

Cases Considered:

Polis v. Edwards, 2009 ABQB 520

There are very few written decisions on the powers, rights and duties of custodians appointed by the Court of Queen's Bench at the request of the Law Society of Alberta (LSA) pursuant to the *Legal Profession Act*, R.S.A. 2000, c. L-8, section 95. Unfortunately, this decision does not add to that small body of precedents. Although the question of whether a custodian is entitled to tax the accounts of the member of the LSA whose legal business they were appointed to manage or wind up was squarely before the court, Madam Justice Jo'Anne Strekaf declined to answer the question, deciding it instead on a more factual basis. This is to be regretted, not only because there is so little law in the area, but also because, in answering these types of questions, the courts have tended to rely on interesting analogies with others in roles that require them to stand in the shoes of another person and because the answer to the question about taxation seems like an easy one.

The practice that required a custodian in this case was the practice of former Cochrane lawyer, Mary Jo Rothecker. She was suspended from the practice of law almost two years ago, on November 30th, 2007, for failing to pay fines and costs amounting to $23,601.53, as ordered by two separate LSA Hearing Committees. See the Notice of Suspension – Mary Jo Rothecker. Another lawyer began acting as an informal or private custodian to maintain the practice following her suspension, but that arrangement did not work out. On January 14, 2008, Madam Justice Rosemary Nation appointed one of our alumni (and a friend of mine), Brenda Edwards, as custodian of Rothecker's practice.

Under section 95(1) of the *Legal Profession Act*, the LSA can apply to the Court of Queen's Bench to appoint a custodian of a lawyer's practice only in fairly dire circumstances:

> (a) when the name of a member has been struck off the roll [i.e., when the lawyer has been disbarred];
> (b) when the membership of a member has been suspended;
> (c) when a member's conduct is the subject of any proceedings under Part 3 and there is reason to believe that the conduct involves the misappropriation or wrongful conversion of property;

(d) when a member has died or become mentally incapacitated;
(e) when by reason of illness or for any other reason a member is unable to practise as a barrister and solicitor;
(f) when a member has absconded or is otherwise improperly absent from the member's place of business or has neglected the member's practice for an unduly extended period;
(g) when there is reason to believe that the trust money held by a member is not sufficient to meet the member's trust liabilities;
(h) when other sufficient grounds exist.

As should be obvious from this list, a custodian often steps into a mess. There are no figures available for Alberta, but in British Columbia according to a 2006 Bencher's Bulletin, about two-thirds of custodianships arise from discipline matters and discipline-related custodianships can be complex and costly, especially if the Law Society is also conducting a forensic audit and investigation of the lawyer's practice at the time. A custodian can be appointed "to have custody of the property of the member and to manage or wind up the legal business of the member," according to section 95(1). Management of a practice as a going concern appears to be rare, and winding up the practice of the disbarred, suspended, charged, dead, incapacitated, ill, absconded or insolvent lawyer seems to be the usual task of the custodian.

In order to protect custodians who manage or wind up legal practices in these circumstances, section 115(1) the *Legal Profession Act* grants them immunity from being sued so long as they act in good faith:

115(1) No action lies against
. . .
(d) a person who is or was a custodian appointed under Part 4,
. . .
in respect of anything done by any of them in good faith pursuant to this Act, the rules or any direction of the Benchers.

This type of statutory immunity provision — common in all provinces where lawyers are appointed custodians, or trustees, or receivers, of disbarred or suspended lawyers' practices — might help explain why there are so few cases involving custodians. Anyone who wants to sue a custodian must prove the custodian acted in bad faith in the performance of her or his duties, an exceedingly difficult burden to meet. Acting in good faith basically means the person need only act honestly and without serious carelessness or recklessness: *Finney v. Barreau du Québec*, 2004 SCC 36.

In addition to being suspended, Mary Jo Rothecker is one of 32 lawyers scheduled for a LSA disciplinary hearing. According to the LSA's Notice of Hearings Scheduled to April 22, 2010, Rothecker is scheduled for a three day hearing on February 16-18, 2010 in order to face six allegations, two of which state:

3. It is alleged that you failed to follow the provisions of the Rules of Court or of your own written fee agreement with your client when calculating your fees, and thereby breached Chapter 1, Rules 1 and 7 of the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.
4. It is alleged that you failed to charge your client a fair and reasonable fee with respect to a Contingency Fee Agreement and thereby breached Chapter 13, Rule 1 of the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

Allegations 3 and 4 allege impropriety by Rothecker in the handling of her accounts with her clients. Perhaps not surprisingly, this case and Justice Strekaf's judgment involve a fee dispute between two of Rothecker's former clients and the custodian.

The facts of this case are fairly messy, and recounting them takes up two-thirds of this judgment. However, the basic situation is relatively simple and all that I need be concerned with here. Jason Fraser was involved in a custody dispute with his ex-wife. Mr. Fraser and his "domestic partner," Gerri Polis, together retained Rothecker in December 2006 to handle his custody dispute. Polis alone provided security for Rothecker's fees by signing a promissory note for $25,000 and agreeing to it being registered by way of caveat as a charge against her home. Rothecker was suspended in November 2007. Two months after that, on January 10, 2007, and while the informal private custodian was trying to keep Rothecker's practice going, Polis re-financed her home through that custodian and just over $26,800 of the re-financing proceeds was retained in Rothecker's trust account. Four days later, on January 14, 2007, Edwards was appointed custodian of Rothecker's practice at the LSA's request and by court order. In that role, Edwards took custody of Rothecker's practice, including her trust account with the Polis sale proceeds and the Polis promissory note and caveat.

The day Edwards was appointed custodian of the Rothecker practice, Rothecker asserted a solicitor's lien over the Polis $26,800 held in trust. A solicitor's lien is, in essence, a lawyer's right to retain client property in the lawyer's possession until the lawyer is paid the legal fees and disbursements he or she is owed. Polis alleged that not only did she not owe Rothecker anything, but she had a $4,000 credit. Rothecker's accounts and files — nine banker's boxes worth — showed Polis and Fraser owed Rothecker about $79,000. On January 21, 2008, $25,700 was transferred from the Polis trust account to Rothecker's general account, where it was used to pay some of the debts of the practice. The judgment (at para. 4) states that the suspended Rothecker transferred this amount but it must have been the custodian, Edwards, who did so on the basis of the Polis promissory note and other documentation in Rothecker's files. A custodian takes custody of the property of the lawyer they are appointed with respect to on their appointment.

Polis commenced an action against the custodian, Edwards, despite the provisions of section 115(1) of the *Legal Profession Act*. She sued for a declaration that Rothecker had no solicitor's lien against herself or her domestic partner, Fraser; for an order that the custodian release her and Fraser's property and for an order that the custodian immediately pay her $30,906.25. Edwards responded in July 2008 by suggesting Rothecker's account to Polis and Fraser be taxed.

The *Alberta Rules of Court*, Alta. Reg. 390/68, provide that any eligible party has the right to have a lawyer's account (a.k.a. bill of costs) reviewed by a taxing officer, who has the authority to allow, reduce or disallow the fees and charges as he or she sees fit. Under Rule 628, a taxing officer can hear evidence; direct the production of books, papers and documents; etc. Unique to the legal profession, taxation of a lawyer's account is an inexpensive, simple, and quick way for a client to, in effect, "appeal" a lawyer's bill.

Edwards' suggestion that the Rothecker-Polis/Fraser account be taxed, in the context of Polis saying nothing was owed by her to Rothecker and Rothecker saying $79,000 was owed, is obviously a sensible one. All of the details of the work that Rothecker had done in Jason Fraser's custody dispute would be put before a taxing officer by Edwards, using Rothecker's files and accounts, and the taxing officer would hear from Polis and Fraser about any concerns they had with the account and its amount. If Polis was serious about her allegations of impropriety in Rothecker's accounts, one would expect her to insist on a taxation.

On August 18, 2008, Justice Wilson granted an order which, among other things, ordered Rothecker's account with Polis and Fraser be taxed. An appointment for taxation was set for November 19, 2008. Over a year later, however, the account has still not been taxed.

At the November 19 taxation, Polis and Fraser objected to it going ahead, arguing that Edwards, as custodian of Rothecker's practice, did not have the authority to tax Rothecker's legal accounts. The taxation did not proceed; the issue of the taxing officer's jurisdiction needed to be dealt with first. Polis then applied for an order barring Edwards from taxing the Rothecker-Polis/Fraser account. Justice Wilkins heard that application on February 24, 2009 and ordered the taxation proceed on February 24, 2009.

On February 11, two weeks before the date of the rescheduled taxation, Polis filed a Notice of Appeal of the order granted by Justice Wilkins. However, her appeal was struck by the Registrar on March 16, 2009 and subsequently deemed abandoned. (Under Rules 515.1 if a case has been struck from the General Appeal List and the case is not restored to that list within six months from the day that the case was struck from the General Appeal List, the appeal is deemed to have been abandoned.)

It is this abandonment by Polis of her appeal of Justice Wilkins' order that the taxation proceed that resulted in Justice Strekaf deciding that the it was not necessary for her to decide if a custodian had the power to tax an account. Instead, she held (at paras. 13-17) that Justice Wilkins' order was final, because the appeal was abandoned, and that Fraser was in a close enough relationship with Polis on the issue of taxation that Justice Wilkins' final order should be binding on him too. The principles of *res judicata* applied and it would have been an abuse of process to permit the issue of whether the accounts could be taxed to be re-litigated.

The decision against Polis and Fraser on the basis that their collateral attack on the taxation of their account with Rothecker was an abuse of the court's process is undoubtedly a correct one. As I said at the beginning of this post, my only criticism is that the question of whether a

custodian has the power to tax the account of the member of the LSA whose legal business they were appointed to manage or wind up was not decided.

The *Alberta Rules of Court* govern taxations between lawyer and client. Rule 643.1 sets out who may request a taxation of a lawyer's account in Alberta. Part (b) of that rule provides that the account may be taxed at the request of the lawyer — the barrister and solicitor — if "(i) the client resides in Alberta, (ii) the principal office or place of business of the client is in Alberta, (iii) most of the services were performed in Alberta and the barrister and solicitor has no office in the jurisdiction where the client resides or carries on business, or (iv) the retainer agreement between the barrister and solicitor and the client so provides." These provisions basically require a connection with Alberta. The rules say nothing about a custodian taxing an account, but, read literally, they do say the client or their lawyer can tax the lawyer's account, period. So, can a custodian tax an account of the lawyer in whose shoes they stand?

There is nothing in the relevant legislation in Alberta and, presumably, there was nothing in the court order appointing the custodian in this case. Neither does the issue seem to be dealt with in similar legislation across the country. Although all Canadian common law provinces appear to have roughly similar provisions, there is not uniformity in the way that legislation and Law Societies deal with the practices of lawyers who are suspended, disbarred, etc. In some provinces (e.g., Ontario and British Columbia), the Law Societies themselves can be appointed to take over those practices, acting through either an employee or a practicing lawyer hired for the occasion.

There is some mention of costs in the legislation providing for the appointment of custodians across the country, which seems to customarily include immunity for the lawyers acting as custodians. The provisions in British Columbia and Manitoba are more protective of custodians than are those in Alberta on the matter of costs. Under British Columbia's *Legal Profession Act*, S.B.C. 1998, c. 9, s. 56, not only is a custodian immune from liability for anything done in good faith, but no costs can be awarded against a custodian for anything done in good faith while acting or purporting to act as custodian. Under Manitoba's *Legal Profession Act*, C.C.S.M. c. L107, s. 60, no action can be commenced against a custodian acting in good faith and no costs can be ordered against a custodian in respect of a proceeding taken in good faith. Still, nothing is said about a custodian's power to tax accounts.

There is no real reason why the ability of a custodian to tax the accounts of the lawyer in whose shoes they stand should receive any special mention in the legislation or court order. Taxation of the account of a client who has refused to pay a bill is a normal part of practice. Neither the legislature nor the courts are interested in micromanaging the practices of suspended or disbarred lawyers. That is why a practicing lawyer is appointed as custodian.

Nevertheless, in deciding questions about custodian's powers, the courts have tended to analogize to other representatives. In some provinces this reasoning process is not as necessary because the legislation appoints "trustees" to take possession of a lawyer's property and the powers and duties of a trustee are quite well settled. In Saskatchewan, for example, the appointment is an appointment of a trustee under the *Legal Profession Act*, S.S. 1990, c. L-10.1, section 61 and the Act helpfully and explicitly provides in subsection 61(2)(ii) that the trustee can "do anything that the member was capable of doing in connection with the member's practice." In Ontario too, under the *Law Society Act*, R.S.O. 1990, c. L.8, s. 49.47, the Law Society of Upper Canada may ask a judge of the Superior Court of Justice for an order appointing that Society or another person as trustee of the property of a lawyer who has ceased to practice.

In British Columbia, however, the province where most of the scant case law comes from, the appointment is one of a custodian. Under that province's *Legal Profession Act*, section 50, on sufficient grounds the Law Society of British Columbia may apply to the Supreme Court of British Columbia for an order appointing a practicing lawyer or the Law Society as a custodian of the practice of another lawyer for the purposes of taking possession of or control over all or part of the property of the lawyer, and determining the status of, managing, arranging for the conduct of and, if appropriate, terminating the practice of the lawyer.

The British Columbia Court of Appeal held in *de Stefanis (Re)*, 2005 BCCA 156, that the nature of the obligations of a custodian appointed under the *Legal Profession Act* of that province was not analogous to that of a receiver or of a monitor appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The Law Society of British Columbia had sought a charge to secure the considerable custodian's fees and expenses in the winding up of a legal practice of an insolvent lawyer, but both the Court of Appeal and the chambers judge whose order was appealed refused to give the Law Society a priority and left it to rank with other unsecured creditors of the practice. The chambers judge, in a passage quoted by the Court of Appeal at para. 15, had distinguished a custodian from a receiver or a monitor as follows:

> A custodian, in contrast to a receiver who is appointed by the court at the insistence of a creditor, is the receiver of the party who sought the custodian's appointment. With few exceptions, receivers cannot use the debtor's property or carry on the debtor's business in a manner that would subject secured creditors to the expenses of receivership. The priority of receivers for remuneration flows from this rule. . . . However, the role of a custodian appointed under the Act is sufficiently dissimilar from those of receivers and monitors that it can be distinguished. While receivers and monitors act on behalf of all interested parties, the primary concern of the custodian is the protection of the clients of the law firm.

Receivers act to protect creditors; custodians act to protect clients. The Court of Appeal also noted (at para 18) that because a custodian is obliged by the Act to protect the interests of clients of the firm, including confidentiality, a custodian is consequently unable to collect accounts

receivable either efficiently or economically. It is true that, by ensuring that client files are not released to new counsel until all outstanding accounts have been paid, and through collection of the lawyer's accounts receivable, a custodian's efforts will preserve the value of the lawyer's practice. Nevertheless, the custodian, rather than focusing on collecting accounts, focuses on transferring files to clients or their new lawyers.

All this means, however, is that the interests of the lawyer over whose practice the custodianship is imposed are secondary to those of the client and the administration of justice. See also *Volrich v. Law Society of British Columbia*, (1988) 29 B.C.L.R. (2d) 392 (S.C.) at para. 23.

Re Kennedy (1997), 58 Alta. L.R. (3d) 345 (Q.B.), was an Alberta decision on an issue similar to that in *de Stefanis (Re).* The issue in *Re Kennedy* was whether funds remaining in the trust account of a lawyer who had abandoned his practice should be paid to the Law Society in priority to Kennedy's other creditors. Justice Lee of the Alberta Court of Queen's Bench analogized custodians under the Alberta *Legal Profession Act* to guardians appointed pursuant to the *Dependant Adults Act*, R.S.A. 1980, c. D-32, to trustees appointed under the *Trustee Act*, R.S.A. 1980, c. T-10, and to legal representatives appointed pursuant to the *Administration of Estates* Act, R.S.A. 1980, c. A-1. Justice Lee held there should be no priority to the Law Society for the custodian's fees on the basis that there was nothing in the relevant legislation authorizing a priority and there was no general practice giving representatives or administrators priority for payment of their claims. A similar analogy was drawn in *Volrich (Re)*, [1990] B.C.J. No. 1122 (S.C.), where the court held that the powers of a custodian are analogous to the powers of a committee appointed pursuant to the *Patients Property Act*, R.S.B.C. 1996, c. 349.

A custodian seems more akin to a receiver than to a guardian, administrator or other representative of a person unable to act for themselves. In those latter cases, the third party owes duties almost exclusively to the person in whose shoes they stand. A custodian may owe some duties to the lawyer in whose shoes they stand, but obligations to that lawyer's clients take priority, as should those to the Law Society and the courts. A receiver's primary duties are owed to the creditors who sought their appointment, rather than to the debtor in whose shoes they stand. The custodian and receiver are analogous in the sense that their primary loyalties are owed to third parties, and not to the person whose shoes they have stepped into. That does not mean that I think the cases deciding custodians did not have a priority for their fees in cases involving insolvent lawyers were wrongly decided. If loyalty is owed by receivers to the creditors, then absent a statutory provision putting a priority on the receiver's fees, the receiver would not rank ahead of the creditors. But the receiver acts primarily in the creditors' interests, maximizing the amount recoverable, and so the legislature has granted a priority to their fees. Custodians do not maximize creditors' interests and so the lack of priority on their fees makes sense as a policy matter. But a custodian does act to maximize the interests of the clients of the lawyer in whose shoes they stand, and so being able to collect that lawyer's fees and disbursements from those clients makes as much sense as the lawyer who rendered the services being able to do so.

The case which is most similar to *Polis v. Edwards* is *Re Kenny*, 2002 BCSC 346, because both involve a question of the custodian's standing. The Law Society of British Columbia had argued that, in essence, "the custodian has the same duties and obligations to Kenny's former clients that Kenny would have concerning the obligation to account for all trust funds received" (at para. 59). This argument was advanced in support of a preliminary determination as to whether the custodian had standing to seek the direction from the court with respect to solicitor-client privilege in cases where clients were suing the suspended lawyer. Note, however, that the key point when it comes to understanding the decision was that the argument was made on the assumption that the custodian did not have standing to seek the directions where competing client interests might be compromised. The court held that assumption was misconceived (at para. 64):

> I have no doubt that the provisions of the Law Society Rules and the *Legal Profession Act* relied upon by the custodian and the Law Society establish their standing, power and entitlement to seek directions concerning whether solicitor-client privilege attaches to any information or documentation and also concerning the extent of a custodian's obligation to account.

Taxation by a custodian following the non-payment of a lawyer's account does not seem to raise any "competing client interests" beyond those raised between a lawyer and client in an ordinary accounts receivable scenario. A lawyer would have had no confidentiality concerns in taxing an account with a client or attempting to collect it. The Law Society of Alberta's Code of Professional Conduct states, in Chapter 7 on confidentiality, that "[a] lawyer may disclose confidential information when reasonably necessary for the lawyer to properly prosecute an action or defend a claim or allegation in a dispute with a client." As the commentary to this rule explains (on page 7-8) "this exception to confidentiality arises when a client undermines the lawyer/client relationship through actions such as . . . refusing to pay the lawyer's account." There is an "implied waiver of the right to confidentiality, since both lawyer and client must presumably disclose some confidential information in support of their respective positions." If it is not a breach of confidentiality by the lawyer, why would it be one for the custodian acting in their place?

There is no apparent reason why the appointment of a custodian should result in a windfall to the clients of the lawyer for whom the custodian was appointed. There is no apparent reason not to tax the Rothecker-Polis/Fraser account. Polis herself had sued first, putting the account in issue. The taxation was ordered by Justice Wilkins, after only being suggested by the custodian. There is no more breach of lawyer-client confidentiality than there would be if Rothecker had taxed the account herself, something she was entitled to do. All the custodian has to work from on the taxation is Rothecker's nine banker's boxes of files with respect to the Fraser custody dispute. The difference between what Rothecker's accounts say Polis and Fraser owed her and what Polis claimed was owed is over $80,000. On the one hand, that is a substantial sum that might go towards the payment of employees or other creditors if it is owed by Polis and Fraser. On the other hand, if a taxation determines that a sum that large is not owed, it might go a long way

toward proving allegation 3 or 4 in the disciplinary hearing set for Rothecker and would relieve Polis and Fraser of the spectre of the account hanging over them.

In any event, and as a result of Justice Strekaf's order, the taxation of the Rothecker-Polis/Fraser account is back on. The new date for the taxation is apparently October 6, 2009 — the day after this comment is to be posted. Will the taxation finally go ahead? And is the account closer to a minus $4,000 as contended by Polis or a plus $79,000 as claimed by the custodian? Unless the taxation does go ahead and is appealed, you and I will never know.