

Canadian Bar Association Nova Scotia Online CLE
Being an Executor: How to Stay Out of Court
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“The risk of personal liability is an incident of the office of trustee.”

Justice Maurice Cullity, “Personal Liability of Trustees and Rights of Indemnification” (1997), 16 E.T.J. 115





I feel like
a target for
disgruntled
beneficiaries.



Executors' Core Duties

- duty to comply with the terms of the will
- duty of care
- duty not to delegate
- duty of impartiality
- duty of loyalty
- duty to provide information



Two Types of Liability

1. liability in contract to third parties
2. liability in negligence to third parties, to beneficiaries, and to co-executors



Liability To Third Parties in Contract

Issue:

- an executor who contracts for goods or services in administering the estate is personally liable to the contractor
- e.g.
 - funeral home services
 - accounting services
 - investment broker services
 - real estate services
 - legal services

- “... the traditional rule has been that a trustee normally incurs personal liability to the full extent when contracting with a third party. The trustee may limit that personal liability to the value of the trust assets, or limit it to the extent that a right of indemnity exists against such assets, but that depends essentially on the terms of the contract with the third party...”

Justice Maurice Cullity, *supra*

Liability To Third Parties in Contract, cont'd

- executor has a right of indemnity against estate, if expenses were properly incurred in the circumstances
- if not, executor may be on the hook
- contractor may be subrogated to executor's right of indemnity

Liability To Third Parties in Contract, cont'd

Best Practices:

- the common law allows you to enter into the contract—check the will to see if anything prevents it
- is the contract commercially reasonable?
- make sure you're not improperly delegating your authority (more later)
- get the contract in writing
- check to make sure the estate can pay the bill

Liability for Income Taxes

Issue:

- “legal representative” is jointly and severally liable with taxpayer to pay any tax, file any return, or perform any requirement under the *Income Tax Act* that is the taxpayer’s responsibility (s. 159(1) *ITA*)
- legal representative personally responsible for unpaid tax liability if he or she distributes property to beneficiaries before paying tax
- personal liability is limited to value of property actually distributed (s. 159(3) *ITA*)

Income Taxes, cont'd

- if estate is insolvent, at common law, income taxes take priority over all other unsecured creditors: *Re Sourour Estate* (1986), 72 N.B.R. (2d) 168 and *Crowther v. Canada (A.G.)* (1959), 17 D.L.R. (2d) 437

Best Practices:

- get clearance certificate before making any distribution large enough to leave insufficient funds for tax liability behind
- see s. 159(2) *ITA* for requirement to get clearance certificate
- be very careful if estate could be insolvent (more later)

Probate Taxes

Issue:

- relevant when estate may be insolvent
- if estate is insolvent, probate taxes rank second in priority, over everything but funeral expenses, per s. 83(3)(b) of *Probate Act*

Probate Taxes

Best Practices:

- practically speaking, won't be able to get a grant if taxes not paid by executor in advance
- might get bank to advance from deceased's account if funds available
- Halifax Registrar gives credit to certain law firms and trust companies
- any advance by executor personally will be reimbursable from estate assets (if estate is insolvent, in same priority as taxes paid directly from estate)

Liability for Management of a Business

Issues:

- if deceased was owner-manager of a business, executor will have to determine whether to continue to run business or wind it up
- in either case, executor will have to step in and assume control of business in the short-term

Management of a Business, cont'd

if the business is incorporated...

- limited liability means executor not responsible for corporate debts
- liability only generally arises as a director (i.e., executor becomes controlling shareholder and votes him- or herself director)

Management of a Business, cont'd

directors' core duties:

- fiduciary duty which directors owe because they are in a position of trust and confidence in respect of the corporation and its property (e.g., avoiding conflicts of interest or misappropriating business opportunities)
- duty of care and skill which directors must exhibit in making business decisions

Management of a Business, cont'd

- as director, may be liable for source deductions and other remittances (e.g., income tax under *ITA*, CPP under *Canada Pension Plan*, EI under *Employment Insurance Act*, HST under *Excise Tax Act*, WCB under *Workers' Compensation Act*)
- defence of due diligence affords protection for obligations incurred prior to becoming a director

Management of a Business, cont'd

- as director, potential conflict of interest between duties as director and duties as trustee if there are shareholders who are not beneficiaries (e.g., declaration of dividend could be criticized by third-party shareholders as putting beneficiaries' interests ahead of corporation's interests)
- with closely held corporations, trustee-director is often also a paid officer/manager/employee and/or owns shares personally, introducing yet another potential conflict (i.e., his or her personal financial interest in corporation)

Management of a Business, cont'd

- lifetime of trust may be shorter than that of corporation—what may make sense long-term for a corporation may not make sense for a trust that will last five years
- for corporation, may make sense to reinvest profits over time, making it impractical or even impossible to pay large dividends or redeem shares held by estate
- successful corporations often take risks—trusts and risk are not good bedfellows!

Management of a Business, cont'd

if the business is a sole proprietorship...

- executor steps into the shoes of the sole proprietor and into privity on all the deceased's contracts, and into all deceased's potential liability as sole proprietor to business creditors
- executor becomes employer and thus similarly responsible for source deductions and other remittances (e.g., income tax under *ITA*, CPP under *Canada Pension Plan*, EI under *Employment Insurance Act*, HST under *Excise Tax Act*, WCB under *Workers' Compensation Act*)

Management of a Business, cont'd

- potential liability for both executors and directors of deceased's corporation for contaminated sites under *Environment Act*
- in case of executor, liability is limited to the value of the assets the executor is administering
- but limitation of liability does not apply if executor contributes to further accumulation or continued release of contamination

Management of a Business, cont'd

- also potential liability to beneficiaries if executor carries on business without authority under the will and business suffers losses
- potential liability to beneficiaries if executor makes imprudent decisions in running business, or carries on business when more reasonable to wind it up
- deceased may have chosen to run a losing business, but a trustee doesn't have that luxury
- often goodwill of business died with deceased

Management of a Business, cont'd

Best Practices:

- do appropriate due diligence on the deceased's business before assuming role of executor
- check to see if there are any unanimous shareholder agreements which govern treatment of shares, and seek legal opinion if necessary before selling shares
- often a judgment period involved in determining whether to carry on business or wind it up, but that period should be months, not years



Management of a Business, cont'd

- disclose!—obligations of a trustee to disclose information to beneficiaries may warrant more disclosure of corporate information than one normally would to shareholders
- get written consent of beneficiaries on periodic basis (e.g. secure consents of beneficiaries or Court approval before taking director's fees in addition to trustee compensation)
- get advice or direction where appropriate—from solicitor, accountant, officers, independent experts in the business, or the Court (last resort, given risk of costs award if application not merited)



Liability for Misrepresentation

Issue:

- liability to a purchaser stemming from misrepresentation in relation to sale of real property

Best Practices:

- when selling estate real property, give a trustee's deed, not a warranty deed
- provide very limited (qualified to executor's knowledge) information about the property condition to potential purchasers

Improperly Interpreting or Not Following Terms of the Will

Issue:

- fundamental duty of any trustee is to adhere to the terms of the trust

Best Practices:

- always look to the will first and then the *Trustee Act* or *Probate Act* for authority before taking a particular step
- get a formal opinion from estate solicitor where appropriate
- apply to Court for advice and direction if terms of will are really not clear

Liability Relating to Creditors

Issue:

- liability for improper disbursements for funeral expenses and creditor claims
- liability for improperly preferring one creditor over another
- creditors may also surface with quantum meruit claims where services were provided to deceased but no written contract exists to document value of services
- settlement of quantum meruit claims must be reasonable—claim may need to be tested in Court

Liability Relating to Creditors, cont'd

If estate is insolvent, *Probate Act* sets out priority for payment:

1. reasonable funeral expenses
2. probate taxes and court fees
3. executor's commission and legal fees
4. medical expenses incurred in last 30 days of deceased's life
5. all other debts

Liability Relating to Creditors, cont'd

Best Practices:

- just because deceased had significant assets, doesn't mean he or she didn't also have significant liabilities or an estate plan that leaves unforeseen estate debts, particularly tax liability
- make inquiries regarding net worth of estate prior to paying debts, in case risk of estate being insolvent
- if executor is not sole residual beneficiary, ensure funeral expenses are reasonable or executor may be on the hook for extravagant funeral, unless prepaid (or arguably just pre-arranged) by the deceased

Failure to Protect Estate Assets

Issue:

- assets can be lost, destroyed, or improperly wasted
- often family will arrive in town for funeral, expect to stay at family home, and suddenly items are missing from the home, or the family are driving deceased's car when inadequately insured
- funds from deceased's accounts can be improperly withdrawn
- liquid and/or untraceable assets such as currency, coin or stamp collections, gold and silver, jewelry, art, silver cutlery, etc. can be pilfered from the deceased's home, cottage, safety deposit box, safe, etc.

Estate Assets, cont'd

Best Practices:

- keep property secure, and change locks when necessary
- be diligent about securing the deceased's personal files and papers
- get control of the deceased's safety deposit box
- freeze bank and investment accounts as soon as possible after death to prevent improper withdrawals by spouse, child, other heirs, or former power of attorney holder
- ensure adequate insurance is in place
- keep property in repair

Joint Assets

Issue:

- executor's duty to gather in estate assets extends to any assets held jointly with others, but on resulting trust for the estate
- per *Pecore v. Pecore*, 2007 SCC 17 and *Madsen Estate v. Saylor*, 2007 SCC 18, assets held jointly by the deceased and a spouse or minor child are presumed to be a gift to the spouse or child and pass by right of survivorship

Joint Assets, cont'd

- but assets held jointly with anyone else, including an adult child or common law spouse, are presumed to be held on resulting trust for the beneficiaries of the estate, and are thus administered by the personal representative
- presumption is rebuttable, depending on evidence of deceased's intent
- disputes often arise as to whether presumption is rebutted and whether a surviving joint account holder is entitled to balance of the account

Joint Assets, cont'd

Best Practices:

- make inquiries about assets held jointly by deceased and others
- make inquiries about deceased's intent regarding those assets
- take steps to secure assets, pending resolution of any disagreements

Liability Relating to Distribution

Issue:

- paying wrong amounts to the wrong parties
- undue delay in distribution to beneficiaries—but note the executor’s “year” is 18 months for a probated will

Liability Relating to Distribution

Best Practices:

- follow the will
- be diligent about distributing estate and follow timelines in the *Probate Act*—that sets the standard of care
- if circumstances reasonably result in distribution being later than 18 months (i.e., timing of liquidation of assets, tax reassessments, etc.), keep beneficiaries informed—communicate!

Liability Relating to Distribution

Issue:

- missing an heir

Best Practices:

- give required notices under the *Probate Act*
- advertise in local newspaper or employ skip tracer if unable to locate an heir
- don't forget to ask about children born outside of marriage!

Liability Relating to Investments

Issue:

- failure to invest assets prudently
- failure to diversify investments
- failure to invest excess cash

Investments, cont'd

- s. 3(1) of *Trustee Act* codifies the standard:

A trustee may invest trust property in any form of property or security in which a prudent investor might invest, including a security issued by a mutual fund as defined in the *Securities Act*.

- not enough to follow testator's practice—testator is not bound by the prudent investor standard
- does not authorize investment that is inconsistent with terms of trust

Investments, cont'd

- s. 3A of *Trustee Act* further codifies prudent investor standard:

In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

8 Statutory Factors Court will Take into Account When Assessing Liability for Investment Losses

1. general economic conditions;
2. possible effect of inflation or deflation;
3. expected tax consequences of investment decisions or strategies;
4. role that each investment plays within overall trust portfolio;

8 Statutory Factors, cont'd

5. expected total return from income and appreciation of capital;
6. other resources of the beneficiaries;
7. needs for liquidity, regularity of income and preservation or appreciation of capital;
8. an asset's special relationship or special value to purposes of the trust or to beneficiaries.

Investments, cont'd

- s. 3C of *Trustee Act* exempts trustee from liability for investment losses if
 1. conduct of the trustee conformed to a plan or strategy for the investment of the trust property,
 2. comprising reasonable assessments of risk and return,
 3. that a prudent investor could adopt under comparable circumstances.

Investments, cont'd

- in assessing damages for a loss arising from investment of trust property, Court may take into account the overall performance of the investments
- thus, gains elsewhere in portfolio can effectively set off losses on a particular investment
- net performance is relevant

Investments, cont'd

Best Practices:

- seek professional advice, and follow it
- have an investment policy statement in place
- have regard to 8 factors in creating investment policy statement
- conduct annual or more frequent reviews to ensure compliance with investment policy statement

Improper Delegation

Issue:

- basic rule:
 - *delegatus non potest delegare*
 - “one to whom power is delegated cannot himself further delegate that power”
- can delegate administrative duties (see also s. 23 of *Trustee Act* allowing solicitor to receive funds as agent of executor)
- can employ agents when reasonably necessary or in conformity with common business practice: *Speight v. Gaunt* (1883), 9 App. Cas. 1
- the will may specifically authorize employment of agents, for example if executor has to carry on a business

Improper Delegation, cont'd

- may also delegate investment to stockbroker, investment dealer, investment counsel, etc. if reasonable for testator to have delegated in the circumstances: s. 3F of *Trustee Act*
- must exercise prudence in selecting the agent, establishing terms of authority delegated, and monitoring agent's performance to ensure compliance with terms of the delegation

Improper Delegation, cont'd

Best Practices:

- follow the will
- follow the *Trustee Act*

Self-Dealing

Issue:

- executor is in a conflict of interest vis-à-vis beneficiaries if self-dealing with estate assets

Best Practice:

- don't put yourself in a situation where you can be accused of self-dealing
- follow the will—if it allows executor to purchase estate assets, get an independent appraisal
- if no power to purchase estate assets, get Court approval



Breach of the Even-Handed Rule

Issue:

- executor has a duty to remain impartial as between beneficiaries
- in some cases, executor has discretion as between income beneficiaries, and must not be partial to one beneficiary
- more often arises in context of remaining impartial as between successive interests of income beneficiaries/life interests and capital beneficiaries/remaindermen

Breach of the Even-Handed Rule

- wasting assets may provide benefit to income beneficiaries leaving little for capital beneficiaries
- long-term investments may benefit capital beneficiaries, but generate little for income beneficiaries
- distributions to shareholders from a corporation may be treated as income or capital
- trustee fees and expenses may be taken from income or capital

Breach of the Even-Handed Rule

Best Practices:

- check the will to see if testator has modified duty of impartiality
 - e.g., a power to encroach on capital for benefit of income beneficiaries may permit all of capital to be expended
- when exercising discretion between income beneficiaries, make sure exercise is justifiable
- exercise discretion to sell or retain wasting or appreciating assets with attention to potential uneven treatment

Liability Relating to Sale of Assets

Issue:

- improvident sale of assets
- failure to sell assets in a timely way

Best Practices:

- get assets appraised when in doubt
- be timely in selling investments—don't sell too early, but don't sit on them either when sale is prudent course of action

Failure to Keep Accurate Records

“.... The duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required.”

Sandford v. Porter (1889), 16 O.A.R. 565 (Ont. C.A.)

Accounts, cont'd

Issue:

- failure to account upon request may lead to show cause hearing in Probate Court
- costs may be awarded personally against executor for obliging beneficiary to resort to court

Best Practices:

- keep receipts and clear records from the beginning
- open an estate bank account and run everything through it—don't commingle estate funds with your own!



Estate Litigation

- executor may be involved in various types of litigation:
 - claims under *Testators' Family Maintenance Act*
 - claims under *Matrimonial Property Act*
 - constructive trust, quantum meruit or unjust enrichment claims against estate
 - claims of undue influence and lack of testamentary capacity
 - disputes regarding joint assets
 - applications for construction of will or for advice and directions

Liability Relating to Litigation

Issue:

- unreasonably prosecuting or defending litigation on behalf the estate
- failing to prosecute a claim against a third party in time
- making improvident settlements
- may be personally liable to third parties for other litigants' costs

Litigation, cont'd

Best Practices:

- consultation and consent from beneficiaries when potential for future dispute
- do not inappropriately seek direction of Court when terms of will are clear or where question is exercise of trustee's discretion
- get a formal legal opinion before proceeding to Court



Co-Trustees

- basic rule:
 - trustees must act together
 - trustees must be unanimous in their decisions unless the will provides otherwise (normally a majority rule clause)
 - cannot delegate administration of estate to a co-trustee

Co-Trustees, cont'd

- s. 29 of *Trustee Act* provides some protection for trustee from liability for conduct of co-trustees (and agents):

A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any bank, bankers, broker or other person with whom any trust moneys or securities are deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default...

Co-Trustees, cont'd

- courts are hesitant to indemnify passive trustee against active trustee
- Fry, L.J. described such an indemnity between trustees as a potential “opiate upon the consciences of the trustees”
 - ...so that instead of the *cestui que trust* having the benefit of several acting trustees, each trustee would be looking to the others for a right of indemnity, and so neglect the performance of his duties.

Bahin v. Hughes (1886), 31 Ch. 390 at 468

Co-Trustees, cont'd

Best Practices:

- either stay involved in administration of estate, or retire!

Range of Possible Remedies for Executor Breach

- executor's compensation may be reduced or disallowed completely
- executor's expenses may be disallowed
- damages may be awarded against executor e.g., ordered to disgorge profit made by self-dealing or fraud, or personal damages for imprudent estate investments
- executor may not be allowed litigation costs out of the estate
- other litigants' costs may be awarded personally against executor e.g., if a beneficiary had to resort to litigation to uncover self-dealing



It turns out "fiduciary"
means you have to give it back.

Factors for Setting Executors' Commission

1. the magnitude of the trust;
 2. the care and responsibility arising therefrom;
 3. the time occupied in performing the duties;
 4. the skill and ability displayed;
 5. the success which has attended the administration.
- *Re Toronto General Trusts Corporation and Central Ontario Railway Co.* (1905), 6 O.W.R. 350 at p. 354
 - s. 62(3) of *Probate Court Practice, Procedure and Forms Regulations*

Protection for Executors

1. exculpation clause in the will
2. statutory relief under *Trustee Act*
3. beneficiary acquiescence
4. E & O insurance for executors



1. Exculpation Clauses

- clauses included in the will that are intended to relieve executors from liability in executing their duties
- generally broadly worded, intended to catch negligence or unintentional breach of trust, but not fraud or intentional wrongdoing
- worded to exonerate executor so long as he or she acted in good faith



Sample Exculpation Clause

- My trustees will not be responsible for any error in judgment or for any act of omission or commission not amounting to wilful default or actual fraud in the management and administration of my estate or any trust established in this will. My trustees are entitled to be indemnified by my estate or any trust established in this will for all expenses and liabilities howsoever arising out of the performance in good faith of their duties as trustees. My trustees will not be personally liable for any moneys to become due from, or by any claims against, the trust property, or upon any investment made by my trustees under the provisions hereof. The legal title to all the trust property will be and remain vested in my trustees and their successors. My trustees have the power to bind the trust property without becoming personally liable.



Exculpation Clauses, cont'd

- effective to a point
- as Dickson J. (as he then was) stated in *Fales v. Canada Permanent Trust Co.* (1976), [1977] 2 S.C.R. 302,

“Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs ...”

Exculpation Clauses, cont'd

“... This standard, of course, may be relaxed or modified up to a point by the terms of a will ... But however wide the discretionary powers contained in the will, a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence nor from the application of common sense.”



Exculpation Clauses, cont'd

- the more sweeping the clause, the more likely the court will find it not valid
- Court will ask, “Did testator draw his or her mind to this type of breach when including this clause? Did the testator intend to exempt their trustee from this breach?”
- can't rely on boilerplate language to protect executor from breach of trust
- especially for gross negligence, intentional wrongdoing, or bad faith

Exculpation Clauses, cont'd

- see also s. 29 of *Trustee Act*, which provides trustee is not liable for loss arising from acts of agents, co-trustees
nor for any other loss, unless the same happens through his own wilful default...
- “wilful default” held to include simple or ordinary negligence: *Underwood v. Stevens* (1819), 1 Mer. 712
- subsequent decision in *Vickery v. Stephens* (1931), 1 Ch. 572 limited to consciousness of negligence or recklessness, but not clear this is good law in Canada
- if so, s. 29 isn't so much an exculpation clause as a statutory exemption from liability for non-negligent losses



2. Statutory Relief

- judicial discretion to relieve trustee from liability pursuant to s. 64 of the *Trustee Act*.

If it appears to the Court that a trustee is or may be personally liable for any breach of trust whether the transaction alleged to be a breach of trust occurred before, on or after the twenty-seventh day of March, 1902, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

3. Beneficiary Acquiescence

- confirmation or acquiescence by a beneficiary to a breach of trust may operate as a defence to a claim
- acquiescence may be inferred from beneficiary's failure to object within a reasonable time after learning of the breach
- where trustee commits a breach of trust at the instigation or request or with consent of a beneficiary, the Court may order the beneficiary to indemnify the trustee: s. 49 of *Trustee Act*

4. E & O Insurance

- new product on Canadian market, targeted at non-trust company executors
- only vendor currently is ERASSURE Insurance
- coverage for damages arising out of a claim resulting from error, omission or negligence in performance of executor's duties

E & O Insurance, cont'd

- covers defence costs, damages, and costs awarded against the insured
- not a silver bullet—doesn't cover everything
- for example, doesn't cover:
 - intentional wrongdoing (like exculpation clauses or statutory relief)
 - reduction in executor's commission
 - income tax or probate tax liability
 - failure to insure



E & O Insurance, cont'd

- “For a typical estate valued at less than \$1 million, the approximate cost would be \$1,700 for a 3-year term.”
- Who pays? Not clear yet if executor pays personally (or deducts from commission) or if this would be an appropriate estate disbursement.



Sample Will Clause - E & O Insurance

- *Errors and Omissions Insurance.* My trustees may purchase, at the expense of my estate, such errors and omission insurance as my trustees determine in their discretion is sufficient to protect them against claims and losses arising from any error of judgment or mistake of law or other mistake other than the wilful conduct or wilful breach of trust or fraud by such trustee during the course of the administration of my estate or any trust established in this will. I confirm that the cost of such insurance shall not be deducted from the compensation to which my trustee may otherwise be entitled.

- Questions?



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