



# High Conflict Estates

December 7, 2018

CBA NS 2018 Annual Conference

Presented by: Richard Niedermayer, TEP; Partner, Stewart McKelvey and Holly Allardyce, LLB., MTI, TEP; AVP, Senior Legal Counsel Trust, MD Private Trust Company

# Disclaimers

The information contained in this document is not intended to offer foreign or domestic taxation, legal, accounting or similar professional advice, nor is it intended to replace the advice of independent tax, accounting or legal professionals. Incorporation guidance is limited to asset allocation and integrating corporate entities into financial plans and wealth strategies. Any tax-related information is applicable to Canadian residents only and is in accordance with current Canadian tax law including judicial and administrative interpretation. The information and strategies presented here may not be suitable for U.S. persons (citizens, residents or green card holders) or non-residents of Canada, or for situations involving such individuals. Employees of the MD Group of Companies are not authorized to make any determination of a client's U.S. status or tax filing obligations, whether foreign or domestic. The MD ExO® service provides financial products and guidance to clients, delivered through the MD Group of Companies (MD Financial Management Inc., MD Management Limited, MD Private Trust Company, MD Life Insurance Company and MD Insurance Agency Limited). For a detailed list of these companies, visit [md.ca](http://md.ca). MD Financial Management provides financial products and services, the MD Family of Funds and investment counselling services through the MD Group of Companies.

These presentations are provided for informational purposes only and should not be considered investment advice or an offer for a particular security or securities. The views and opinions expressed by the speaker [presenter] are his or her own, as of the date of the recording [presentation]. The views and opinions expressed do not necessarily represent those of MD Financial Management and are subject to change at any time, based upon market or other conditions. Please consult your MD Advisor for additional information concerning your specific wealth management needs. ©2018 MD Financial Management Inc. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, photographing, recording or any other information storage and retrieval system, without the express written consent of MD Financial Management Inc.

# Agenda

- How to remove the fiduciary
  - Executor
  - Trustee
  - Attorney
  - Delegate
- How to avoid having to remove the fiduciary
  - Choice of fiduciary
  - Drafting
  - Administration
- Ancillary issues
  - Replacement
  - Estate trustee during litigation

# Removal of Fiduciaries

- Different thresholds for different offices
- Consider all alternatives before litigating
- Consider costs issues (own and court-ordered)
- Ensure correct forum

# Removal of Executors

- Section 61 of *Probate Act*
- Probate Court has jurisdiction
- Application by “any person” – broader than “persons interested in an estate” under Regulation 52

# Removal of Executors (Continued)

## Power of court and effect of removal

61(1) On the application of any person, the court may remove a personal representative **where the court is satisfied that removal of the personal representative would be in the best interests of those persons interested in the estate** and, without limiting the generality of the foregoing, if the court is satisfied that

- (a) the personal representative has not complied with an order of the court;
- (b) the personal representative
  - (i) is neglecting to administer or settle the estate,
  - (ii) is wasting the estate,
  - (iii) has failed to comply with an order to pay into a chartered bank any money of the estate remaining in the hands of the personal representative,
  - (iv) is insolvent,
  - (v) is mentally incompetent,
  - (vi) has, within five years of the application, been convicted of theft, criminal breach of trust, destroying documents of title, fraudulent concealment, theft related to improper use of a credit card, possession of property obtained by crime, obtaining anything by false pretences or fraud under the *Criminal Code* (Canada), or
  - (vii) cannot be found or has left the Province without any apparent intention of returning.

# Removal of Executors (Continued)

- What comprises “best interests of those persons interested in the estate”
  - A. Positive misconduct
    - Abuse of trust (not mistake or negligence)
    - Acts or omissions that endanger the trust property, show want of honesty, want of proper capacity to execute the duties or want of a reasonable fidelity<sup>1</sup>
  - B. Continuance of executor in office likely to prevent the trust being properly executed<sup>2</sup>

# Removal of Executors (Continued)

- Insufficient grounds:
  - Mere hostility between executor and beneficiaries absent further seriously aggravating circumstances or conflict between executor's personal interest and beneficiary's interest<sup>3</sup>
- Removal granted
  - Not obtaining a grant of probate or an inventory four years after death
  - Advancing loans from estate to executor personally and pre-taking commission
  - Difficulties with vision and hearing and lack of clear understanding of proceeding or position as executor, but where executor was also sole beneficiary<sup>4</sup>
- Courts consistently state that removal should not be done lightly or without good reason
- Requires serious misconduct or a breach of fiduciary duties



# Removal of Executors (Continued)

- Two part test established in *Finlayson Estate (Re)*<sup>5</sup>
  - First, it must be established that the executor is unable to perform his duty to administer the estate on account of age, infirmity or illness; and
  - Second, it must be shown that a primary beneficiary's interest in the estate is at risk.

# Removal of Executors (Continued)

- Consider other statutory provisions in 61(1) of *Probate Act* particularly:
  1. Failing to comply with a court order;
  2. Neglecting to administer or settle the estate;
  3. Wasting the estate

# Removal of Trustees

- *Trustee Act* and common law
- Supreme Court has jurisdiction
- Different than non-contentious trustee changes under section 16(1) of the *Trustee Act*

# Removal of Trustees (Continued)

## Appointment of new trustee by Court

31(1) The Court or a judge may, **whenever it is expedient** to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees or although there is no existing trustee, or although no trustee was appointed in a will containing provisions rendering a trustee necessary to carry them into effect.<sup>6</sup>

# Removal of Trustees (Continued)

- What does “expedient” meant?
- Note removal can also occur under common law principles<sup>7</sup>
- Common law goes beyond *Trustee Act*

# Removal of Trustees (Continued)

- Circumstances resulting in removal
  - Acting dishonestly and in bad faith as trustee
  - Administration motivated by unlawful or criminal intent
  - Not competent or capable of the exercise of sound and fair judgment in relation to the affairs of the estate
  - Exhibiting bad faith decisions<sup>8</sup>
  - Withdrawal/misappropriation of trust/estate funds (breach of trust)
- Similar principles and circumstances as for executor removal

# Removal of Attorneys

- Governed by *Powers of Attorney Act*
- Supreme Court has jurisdiction
- Note: Only applicable when donor becomes “legally incapacitated”
- Common law agency principles apply otherwise
- Donor can terminate the agency arrangement

# Removal of Attorneys (Continued)

## 5(1) Power of judge

Where a donor of an enduring power of attorney becomes legally incapacitated, a judge of the Trial Division of the Supreme Court may for cause, on application,

- (a) require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor;
- (b) (b) require the attorney to attend to show cause for the attorney's failure to do anything that the attorney is required to do as attorney or any order made pursuant to this Act;
- (c) **substitute another person for the attorney;**
- (d) allow or disallow all or any part of the remuneration claimed by the attorney;
- (e) **grant such relief as the judge considers appropriate;**
- (f) make such provision respecting costs as the judge considers appropriate.

[...]

**5(3)** An attorney may apply to a judge of the Trial Division of the Supreme Court for an order substituting another person as attorney in the same manner as a person interested in the estate of the donor, upon giving notice of the application to the Public Trustee at least ten days before the application is heard.<sup>9</sup>



# Removal of Attorneys (Continued)

- Test is whether attorney is acting in best interests of the donor?
- Not exactly!
- *Vernon v. Sutcliffe*, 2014 N.S.S.C. 376 – test is whether care has been given to donor’s interests and acts done in good faith
- Removal appropriate only if misfeasance, misconduct or neglect
- If act in good faith (even if wrong) may not be removed

# Removal of Attorneys (Continued)

- Can an attorney be required to account for acts done as attorney prior to incapacity?
  1. Application must be brought after legal incapacity
  2. **BUT** 5(1)(e) allows judge to grant relief preceding donor's incapacity (not limited to "during the incapacity of the donor" like 5(1)(a))<sup>10</sup>

# Removal of Delegates

- Authority is *Personal Directives Act*<sup>11</sup>
- Supreme Court has jurisdiction
- No case law on removal of a delegate yet in Nova Scotia
- Application can be made by “any other interested person”

# Removal of Delegates (Continued)

**13** A delegate's authority under a personal directive ceases...

(c) on a determination by the court that the delegate's authority ceases.

[...]

**31(1)** The court may, on hearing an application under Section 29, do any one or more of the following: ...

(h) substitute another person as delegate;

...

(k) make any order that the court considers appropriate

## Removal of Delegates (Continued)

- Suggest test would be similar to Alberta Act:  
*...if the agent is failing to comply with the personal directive or the duties of an agent and the Court considers that the failure is likely to cause serious harm to the physical or mental health of the maker<sup>12</sup>*
- Case law suggests need evidence of lack or proper care of maker by delegate

# Conflict Cases

## ***M.(B.) v. S.(K.) 2015 N.S.S.C. 105***

- *Personal Directives Act*
- Son as delegate wanted to modify wishes stated in personal directive about remaining at home
- Applied to court for relief
- Application challenged by co-attorney/alternate delegate
- Application dismissed
- “Wishes” honoured

# Conflict Cases (Continued)

## *Isnor Estate, Re 2001 CarswellNS 551*

- Financial advisor applied to be guardian under *Incompetent Persons Act*
- Court dismissed application
- No basis to remove attorney
- *Powers of Attorney Act* prevailed over *Incompetent Persons Act*

# Conflict Cases (Continued)

## *Winter Estate, Re 2001 N.S.S.C. 121*

- One of four children applied for removal and replacement of executor
- Favoritism by executor, unreasonable delay and conflicts of interest alleged
- Application dismissed (confirmed on appeal)
- Animosity between executor and a beneficiary not sufficient to warrant removal
- Administration beyond one year is not an unreasonable delay
- No evidence of unlawful or bad faith acts
- Welfare of beneficiaries not at risk



# Conflict Cases (Continued)

## ***Gillis Estate, Re, 2017 N.S.S.C. 6***

- Son-in-law appointed sole executor of estate
- Discretion to divide residue among children
- A son complained of administration and applied for removal
- Application dismissed
- Estate not being improperly administered
- No evidence of endangering estate property, lack of honesty, lack of fidelity or concealment of estate assets

# Conflict Cases (Continued)

## ***C.(S.) v. B.(M.)*, 2008 A.B.C.A. 336**

- Power of attorney and personal directive granted to son and daughter
- Son suffered from mental disorder
- Mother removed from son's care and hospitalized
- Son banned from hospital
- Hospital authority (!) applied to suspend personal directive
- Different son brought application to be appointed as guardian and trustee
- Court found that power of attorney and personal directive were not in mother's best interests and were set aside

# Conflict Cases (Continued)

## ***Schwartz Estate, Re*, 2003 N.S.S.C. 109**

- Estranged wife of deceased and one son brought application to remove executors
- Application dismissed
- Consider welfare of beneficiaries as a whole
- Carelessness in administration of the estate not cause for removal
- But is a factor in determining amount of executor's commission

# Avoiding Removal

- Choice of executor/trustee/attorney/delegate
- Drafting
- Administration

# Qualities to look for in a fiduciary

- Trustworthy, Organized & Resourceful
- Impartial and Independent
- Healthy
- Available
- Experienced
- In for the long haul

# Family

## PRO

- If trustworthy, can be a good choice
- Often won't seek compensation
- Will act efficiently & economically
- Should be asked if they want the job

## CON

- May not have the skills
- May be too much of a burden
- May be in a conflict of interest
- May not be impartial

# Friend

## PRO

- If trustworthy, can be a good choice
- Knew the deceased personally but may be less emotionally involved
- May have the respect of the family
- Be sure to ask if they want the job

## CON

- Big job to put on a friend
- May not be impartial
- More likely to seek compensation

# Professional (broker, lawyer, accountant)

## PRO

- Respected by the family
- Business people
- Understand the role
- Accountable to their professional body
- Less likely to get sucked into the drama

## CON

- May be hard to get their attention at busy times of the year
- Will charge. Can they charge separately for their legal/accounting work?
- May not be impartial
- May not be allowed to accept the role



# Trust Company

## PRO

- Good choice if there are difficult assets, ongoing trusts, special needs beneficiaries
- In-house expertise
- Full time job
- Longevity
- Accountability
- Family unites against the trustco over Thanksgiving dinner

## CON

- No personal connection to the deceased
- Can't meet your Trust Officer ahead of time
- Staff turnover
- Will charge

# Drafting

- Can good drafting solve all conflicts?
- Can good drafting assist in minimizing conflicts?

# Drafting (Continued)

- Appointments of alternates/substitutes
- Majority rules

*If a difference of opinion exists among my trustees, the opinion of the majority will prevail, even if one of them is personally interested in matter in question, provided \* is part of that majority.*

# Drafting (Continued)

- Clarity over circumstances for changing trustees
  - Trustee resignation
  - Trustee residency
  - Trustee ineligibility (i.e. bankruptcy)
  - Trustee incapacity
- Burden of administration if trust company co-executor/trustee
- Clarity of roles between executors of will and trustees of testamentary trust
- Transactions with executors/trustees

# Drafting (Continued)

- Compensation clarity
  - For trust company (i.e. fee agreement incorporated by reference)
  - Professional lawyer or accountant (i.e. hourly rate)
  - Ability to pre-take commission
- Majority of adult, competent beneficiaries ability to change executors/trustees
- Advanced dispute resolution mechanisms such as arbitration/mediation
- Effective general powers to permit appropriate administration of estate/trust

# Are Powers of Attorney Different?

- Similar principles apply re alternates/substitutes, circumstances of attorney changes, compensation, etc.
- Consider expressly stating attorney's duties:
  - Of accounting and recording keeping;
  - To act honestly, in good faith and in best interests of donor;
  - To exercise reasonable care and skill;
  - To not co-mingle assets

# Are Personal Directives Different?

- Similar issues in respect of alternate delegates and circumstances of delegate change
- Consider expressing wish that delegate consult with others concerning health and care and personal care of maker
- Consider setting out additional instructions of maker's values, beliefs and wishes **but:**
  - Use of the word "wish" may constitute binding "instructions" so need to draw maker's attention to whether statement is intended to be binding or merely precatory
  - "Wish" may override determination of the maker's "best interests"
  - Consider linkages to power of attorney re payment for homecare expenses
  - Must consider whether maker wishes to have the delegate consider future circumstances that might override an expressed wish in light of "changed circumstances" concept in *Personal Directives Act* <sup>13</sup>

# How to Avoid Being Removed Once In the Role - Good Communication

- #1 complaint
- Be pro-active, answer questions, admit mistakes (after obtaining suitable advice)



# How to Avoid Being Removed Once In the Role – Set Expectations

- Always a good idea in estate administration
- Cheques are not handed out after the reading of the will right after the funeral

# How to Avoid Being Removed Once In the Role – Transparency

- All beneficiaries should get the same information and get it from the fiduciary

# How to Avoid Being Removed Once In the Role – Be a “by the book” fiduciary

- Unlikely to be successfully criticized if the fiduciary considers the matter, acts in good faith and acts for the intended purpose
- Co-trustees need to talk

# Other Ways to Keep Beneficiaries Happy

- Interim distributions
- Year-end “bonus”

# Some Problem Areas

- Remains of the Deceased
- Catto v. Catto 2016 ONSC 3025
- Personal Property
- Family Cottage

# Ancillary Issues

# Replace a Fiduciary with a Trust Company

- Need time to review
- Court order incorporates a fee agreement and absolves the trustco of liability for prior actions of prior fiduciaries
- Additional terms in the court order that mirror standard clauses: broad investment power, ability to hire own investment arm (self-deal), burden of administration, majority rule
- May need additional clauses to deal with special assets if the governing document does cover them
- Passing of Accounts?

# Trust Company as Estate Trustee Pending Litigation

- Need time to review; not all trustcos will take them
- Some have a long list of clauses
- Fees – flat or as per the fee agreement. Can be paid without further consent? Care & management fee kicks in after a certain time?
- Neutral party. Main job to protect the assets
- No liability for acts of previous fiduciary
- Order must be carefully drafted. The ETDL cannot do anything not set out in the order (file tax returns, hire an agent, make a distribution)
- Keep on as estate trustee once the dispute is settled?



# Conclusions

- **Avoid having to remove a fiduciary if you can!**
- **Help pick the right person to act**
- **Support them by good drafting**
- **Advise on strategies to reduce conflict**
- **Make sure the tests are likely to be met if do apply for removal – don't open the client up to costs awards!**

# Questions?

**THANK YOU!**

# Contact Information

**Richard Niedermayer, TEP**  
Partner

**Stewart McKelvey**

Purdy's Wharf, Tower I  
1959 Upper Water Street, Suite 900  
Halifax, Nova Scotia B3J 3N2

[RNiedermayer@stewartmckelvey.com](mailto:RNiedermayer@stewartmckelvey.com)

Tel: 902-420-3339

[www.stewartmckelvey.com](http://www.stewartmckelvey.com)

# Contact Information

**Holly Allardyce, LLB., MTI, TEP**  
AVP, Senior Legal Counsel,  
**MD Financial Management**  
**MD Private Trust Company**  
1100-522 University Ave.  
Toronto, ON M5G 1W7  
416 598-1442 | 1 800 387-2646 | x 4211  
Cell 647 456-4927  
[holly.allardyce@md.ca](mailto:holly.allardyce@md.ca)  
[md.ca](http://md.ca)

Estate and trust services are offered through MD Private Trust Company.