

Trusts and Trustees: Some Tips on Risk Management

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By John Wilkinson

Justice Lederer, in the case of *Re Watson Estate*, commented that “being asked to be a trustee of an estate is not a gift”. No truer words could be spoken and, before taking on the role of an executor, estate trustee or a trustee of any trust, you should consider carefully what you are taking on and the possible risks that may arise from this position.

The following are some risk management tips that executors and trustees in Ontario may find useful:

1. It is crucial to understand the terms of the trust. In this regard:

(a) obtain all original trust documents; and

(b) make sure all original documents are signed.

In this context, one reported case involved a situation where original documents could not be found. It was held that the trust did not exist and that the trustees did not hold the property on the intended trust. The trustees therefore did not have the powers that they thought they had and were held liable to account to the beneficiaries for fees the trustees had charged.

2. If you are a professional advisor involved with a trust situation, who is your client? In this context, are you a trustee? If you are, it may not be prudent to act as a trustee and as a professional advisor to the trust for several reasons, including:

(a) you may want someone to sue should the professional advice “have unexpected results”;

(b) if you have a dispute with the beneficiaries, it is important to be able to segregate between what you did in your capacity as a professional versus what you did in your capacity as a trustee;

(c) professional malpractice insurance may not cover you when you are acting as a trustee; and

(d) you may benefit from the perspective of an independent third party.

3. The trust documentation should be carefully reviewed with respect to trustee remuneration, trustee expenses, and trustee indemnification. In this context, consider the “risk profile” of the trust: the players involved, the assets involved, and the status of relevant relationships.

4. The ability of trustee(s) to resign, be removed and replaced should be understood and, as appropriate, acted upon.

5. You must understand the details of relevant corporate structures and family trees. In this context, note that “issue” and other

familial relationships are determined by blood, not marriage, i.e., my husband's niece is not "my niece" for purposes of these words. This area is becoming increasingly complicated with the increased use of human reproduction technology.

6. It is imperative to note deadlines carefully. For example, if a power is exercisable "before" a specific date and a trustee attempts to exercise the power on the specific date, the exercise may be ineffective.

7. You should always consider multi-jurisdictional issues. As appropriate, have your professional advisor consult trusted professionals qualified in the relevant jurisdiction(s).

8. Prepare and retain records regarding the maintenance of the trust. Written resolutions (and, if you are a professional advisor, detailed dockets) are crucial evidence of due diligence and propriety. In this context, we recommend that you use a trust minute book and that sole trustees should pass resolutions (just as would a sole director). In addition, have the trust accounts prepared by a professional familiar with the area: trust accounting is unique and quite unlike other methods of accounting.

9. Whether you are part of a trust's creation or maintenance, endeavour to make sure that the trustee(s) have clear communication with the settlor. Of course, once a trust is settled, the settlor's view is only one of the factors trustee(s) should take into account when making decision(s). As well, note that a settlor may exercise such level of control over trust assets that the trust might be determined, by a court, to be a sham and the trust property attributed to the settlor.

10. You should not rely on intermediaries to communicate the wishes of the settlor or the position of beneficiaries. In one case where the settlor had a life interest, the trustee relied on an intermediary who made an error in interpreting the settlor's instructions and, as a result, the trustee was found to have failed in the trustee's fiduciary duty to ascertain correctly the settlor's instructions.

11. Trustees must make sure that they have secure ownership and control of trust property. This may involve obtaining a local legal opinion if there is a multi-jurisdictional aspect.

12. Trustees should consider the capacity of the person transferring property to the trust. If the transferor is incapacitated, the transfer may be invalid. If you have concerns regarding capacity, you should require or seek proof of capacity.

13. When a trust involves a life interest, the trustee(s) should balance carefully the interests of the life tenant and the interests of remainder beneficiaries. The trustee(s) should invest trust assets accordingly. This requires an understanding of the income and capital requirements of beneficiaries and likely returns on investments.

14. If investment management is being delegated, such delegation should be conducted in compliance with the trust document and the *Trustee Act*.

Acting as an executor or as a trustee is an important and challenging job and certainly isn't a gift!

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