

Estate Essentials: Who Should Administer Your Estate?

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No matter how simple or complex your estate may be, one thing about it is certain: somebody (the executor, now called an estate trustee in Ontario) will need to administer it. One of the many benefits of making a Will as opposed to dying intestate (i.e., without a Will) is that it gives you the opportunity to name one or more person(s) to act as your estate trustee(s). But who should you name to take on this crucial role?

The Basics

In Ontario, a person must be at least 18 years old and mentally competent to act as an estate trustee.

When naming an estate trustee in your Will, choose someone you believe is both capable and willing to take on this responsibility. You may grant a person the entitlement to act as estate trustee, but you cannot force them to act. A person may choose to renounce their right to act as estate trustee.

Even if you name an estate trustee in your Will, he or she may need to formalize the appointment by applying for "probate." Probate is a process whereby a court issues a Certificate of Appointment of Estate Trustee with a Will appointing a person to act as estate trustee or confirming a person's authority to act as estate trustee, where that person is named in a Will. When a person dies intestate, the court will need to appoint an estate trustee by issuing a Certificate of Appointment of Estate Trustee without a Will, on the application of an appropriate person.

When a person dies with a Will, probate is not always required; however, it may nonetheless be necessary to, amongst other things, (1) deal with the deceased's bank accounts; and (2) deal with real property.

Duties of an Estate Trustee and Avoiding Conflicts of Interest

Your estate trustee should be someone you trust to act honestly and in accordance with your wishes. Estate trustees are fiduciaries who owe duties to the beneficiaries of the estate, including the duty to act in good faith and in the beneficiaries' best interests.

Beware of conflicts which may arise if you name a person – often a family member – as both a beneficiary and estate trustee of your estate. Ensure this person will be able to act as a neutral and unbiased estate trustee and will not favour their own interests (as a beneficiary) over the interests of the other beneficiaries.

Keep in mind that your estate trustee(s) will be managing your estate every step of the way – from making funeral arrangements to advertising for creditors, cancelling credit cards and memberships, locating beneficiaries, dealing with bank accounts, investing estate funds, selling property, and distributing each of your assets in accordance with your Will. If your estate trustee fails to perform competently, transparently, or otherwise in accordance with his or her duties, the beneficiaries of your estate may hold him or her

accountable.

Appointing Multiple Estate Trustees

Some people choose to appoint more than one person to act together as estate trustees. On the one hand, as the age-old sayings go, “two heads are better than one” and “many hands make light work.” On the other hand, if you name multiple estate trustees, your estate trustees will need to work cooperatively as a team. Unless your Will provides otherwise, your estate trustees must make decisions unanimously. To avoid decision-making deadlocks, consider naming an uneven number of estate trustees and adding a “majority rules” clause to your Will or providing a certain individual estate trustee with decision-making veto rights.

If Possible, Have a Back-Up

It is prudent to name an alternate estate trustee in your Will who may act if, for whatever reason, your first choice is unable or unwilling to act.

Appointing a Non-Resident Estate Trustee

In Ontario, unlike the estate trustee of an intestate estate, where a person is named as the estate trustee in a Will, they do not need to be a Canadian resident in order to act. But what are the risks of naming a non-Canadian resident?

Firstly, a person residing outside the Commonwealth and applying for a Certificate of Appointment of Estate Trustee will be required to post a bond in a penalty of double the value of the property under the Will, unless, in special circumstances, the court reduces the amount of the bond or dispenses with this requirement altogether (see ss. 6 and 37(2) of the *Estates Act*, R.S.O. 1990, c. E.21).

Secondly, unintended tax consequences may arise where a non-Canadian resident acts as estate trustee. Under Canadian tax laws, the residence of a trust (which includes an estate) is where its central management and control occur. Therefore, if an estate trustee makes decisions regarding the administration of an estate while in another jurisdiction, the CRA may deem the trust to reside in that jurisdiction for tax purposes.

Naming a Professional Estate Trustee

In lieu of or in addition to naming a friend or family member, you may choose to name a trust company or an estates lawyer as your estate trustee.

The most obvious benefit is that these professional trustees come with certain expertise in dealing with estate matters. Further, a trust company can continue to act even if an individual employee of the company is otherwise unable to (as the trust company itself is named as estate trustee and not a specific person). This may provide you with some comfort that your estate will be looked after in perpetuity, particularly if your estate involves a trust that will need to be managed beyond an individual's lifetime.

The cons of naming a professional estate trustee may include: (1) the less personal nature; and (2) the fee arrangements. As a general rule of thumb (also known as the “tariff guidelines”), unless a Will provides otherwise, estate trustees are entitled to compensation for their work equal to (1) 2.5% on capital receipts and disbursements; (2) 2.5% on revenue receipts and disbursements; and (3) a care and management fee equal to 2/5 of 1% of the average annual value of the property under administration. However, professional trustees will often require you to commit to a fee arrangement that exceeds the tariff guidelines before they agree to act.

The process of choosing the right estate trustee is not a one size fits all approach. When deciding who to name as your estate trustee, consider what is best for you and your beneficiaries given your individual circumstances, including the anticipated size and complexity

of your estate, family dynamics, and your own priorities for your estate on your death.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice

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