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Will Drafting Tips for the Appointment of an Estate Trustee

January 2023 ***by Suzana Popovic-Montag***

One of the most important components of a will is the appointment of an executor. In Ontario, this role is also referred to as an "estate trustee".[1] Regardless of which title is used, this person is entrusted with administering the testator's estate and ensuring that the testator's wishes are followed. As explained below, it is important to use precise language when making this appointment.

The dangers of using the term "trustee"

When drafting a will, it is best practice to refer to the executor as either the "estate trustee", the "executor", or the "executor and trustee" when making the appointment. This role should not be referred to simply as the "trustee". Historically, if a will appointed a "trustee" rather than an "executor", the named individual would not be appointed to administer the estate "unless it [could] be gathered from the terms of the will that the testator intended that the person named should pay the debts and legacies under the will".[2]

If a client wishes to make a codicil naming a new estate trustee to replace a previous appointment, the language used in the codicil ought to (again) appoint an "estate trustee", an "executor", or an "executor and trustee", rather than refer to the appointment as a "trustee", and the language used also ought to be consistent with that used in the will. The outcome in *Overand Estate*[3] demonstrates the potential risk of using inconsistent (and imprecise) language in a codicil. In this case, a codicil struck out one of the testator's "Trustees" and named a replacement "Trustee". The initial instrument, however, appointed that individual to act as both executor and trustee. In light of the inconsistent language used, the court held that the

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[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 74.01 "estate trustee".

[2] Ian M. Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th ed. (Toronto: Thomson Reuters, 2016) at 244 [*Probate Practice*].

[3] *Overand Estate*, 1963 CarswellBC 80 (B.C. S.C.).

appointment in the codicil was only effective as a trustee and did not include the role of executor.[4]

[4] The outcome may not be the same if *Overand Estate*, *ibid.* was decided today. The court refused to consider evidence from the lawyer who drafted the codicil which confirmed that the testator had intended to appoint a new executor and trustee in the codicil, rather than limit the appointment to the role of trustee. Today, the court may correct an error in a will made by the draftsperson that does not conform with the testator's instructions, and parol evidence may be used to prove the mistake. See Ian M. Hull and Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis, 2020) at §3.28; *Verity Estate v. Fedorek*, 2012 BCSC 650; *McLaughlin et al v. McLaughlin et al*, 2014 ONSC 3162.

The Superior Court of Justice also recently affirmed that it has jurisdiction to rectify a will and correct unintended errors where a testator's intentions have not been carried out: see *Gordon v. Gorden et al.*, 2022 ONSC 550 at para. 36.

Avoiding appointments that are void for uncertainty

Another potential issue to be aware of when appointing an estate trustee is that the appointment may be void if it is impossible to know for certain who the testator intended to appoint. For example, the following appointments have been declared void for uncertainty in the past:

- the appointment of “any of my two sons” when the testator had three sons;[5]
- the appointment of “one of my sisters” – the testator had three sisters when the will was executed;[6] and
- the appointment of “two partners of the firm”.[7]

A will drafter ought to specify who the client wishes to appoint to the role of estate trustee by name whenever possible. If the client wishes to appoint more than one person, such as multiple siblings, then the appointment ought to expressly name all members of the group to eliminate any possibility of uncertainty.

Summary

To recap, in addition to practical considerations, such as encouraging the selection of an estate trustee that the testator can trust and naming an alternate in the event that the selected individual is unable to act, the following guidelines ought to be followed when appointing an estate trustee, to ensure that the appointment is effective:

- the testamentary instrument ought to appoint an “estate trustee”, an “executor”, or an “executor and trustee”, rather than a "trustee";
- the language used in a will and a codicil ought to be consistent; and
- the testamentary instrument ought to specify who the client wishes to act as estate trustee by name.

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[5] *Baylis, In the Goods of* (1862), 2 Sw. & Tr. 613, 164 E.R. 1135 (Eng. Ecc.), cited in *Probate Practice*, *supra* note 2 at 245.

[6] *Blackwell, In the Goods of* (1877), 2 P.D. 72 (Eng. Prob. Ct.), cited in *Probate Practice*, *ibid.* at 245.

[7] *Johansson Estate, Re*, 1992 CarswellBC 650 (B.C. Master), affirmed 1993 CarswellBC 3006 (B.C. S.C.).