



WILL DRAFTING TIPS FOR AVOIDING TAXATION ON ESTATE TRUSTEE COMPENSATION

By Suzana Popovic-Montag - September 2023

As anyone who has acted as an estate trustee knows, the role is a job in and of itself. In fact, a recent post on our blog noted that compensation paid to an estate trustee is akin to employment income, insofar as both sources of income are taxable: see [How an Executor/Estate Trustee Receives Compensation for Their Work Administering an Estate](#).

However, taxes may not be inevitable when compensating an estate trustee. If a testator leaves a gift to the estate trustee in lieu of compensation, that inheritance may not be taxed, depending on whether the Canada Revenue Agency (the “CRA”) deems the gift to be executor compensation for tax purposes. This Solicitor’s Tip explores how such a gift may be worded in order to avoid taxation.

When a Gift to an Estate Trustee Is Presumed to Be Compensation

If a legacy or bequest is made to an estate trustee under a will that does not permit the taking of compensation, the CRA may presume that the gift was made in lieu of compensation. For example, if a will contains a legacy payable to the named estate trustee on the condition that he or she act as estate trustee, with a corresponding provision that the estate trustee is not entitled to any compensation, the will may arouse the suspicion of the CRA. Under those circumstances, the CRA may presume that the gift was intended to function as compensation and is thereby taxable.

However, this presumption can be rebutted through the language used in the will, either in respect of the gift to the estate trustee specifically or the will as a whole. If the presumption is rebutted, the gift to the estate trustee should not trigger income tax payable by the estate trustee with respect to the gift.

Will Drafting Options That May Avoid Taxation

To avoid the payment of income tax on funds paid to an estate trustee, a will ought to be drafted with two strategies in mind: i) the will ought to leave a legacy to the estate trustee or trustees; and ii) the will should not stipulate that the estate trustee or trustees are precluded from claiming any compensation from the estate.

A variety of sample clauses are set out below. While the clauses may be used independently, more than one clause may also be grouped together to address the issue of a gift in lieu of compensation:

Payment of legacy to a named estate trustee:

1. “I nominate, constitute, and appoint my estate trustee, [name], hereinafter referred to as my Trustee, to be the Trustee of this my Will and I give, devise, and bequeath all my property of every nature and kind and wheresoever situate, including any

property over which I may have a general power of appointment, to my Trustee upon the following trusts, namely: ... To deliver [amount] to my estate trustee, [name], if she shall survive me, for her own use absolutely.”

Confirming the legacy is payable in addition to compensation:

1. “Any legacy, gift, devise or bequest to any person who is also my executor shall be in addition to, and not in lieu of, any compensation to which that person is entitled by virtue of his or her appointment as an executor or trustee of my Will.”; or
2. “My Trustees are entitled to compensation for acting as Trustees under this will in addition to any gift or benefit given by me under my will or any codicil to it.”

Precluding compensation claim in addition to the legacy:

1. “My Trustees shall not be entitled to claim or receive compensation from my estate, but shall be entitled to receive reimbursement for all expenses incurred in acting as my Trustees. Without limiting the generality of the foregoing, such expenses may include fees paid to an accountant or bookkeeper to prepare tax returns and executor’s accounts, fees paid to obtain valuations of my assets, travel expenses including mileage, and long distance telephone and postage costs.”

Potential Consequences of Making a Gift Rather Than Compensation

There are at least two consequences that clients should be cautioned about if they choose to leave a legacy to an estate trustee. First, if the individual named as estate trustee in the will does not accept the appointment, the estate will still be required to honour the gift made to that individual, even if the legacy was intended to serve as compensation. Second, if the will does not preclude an estate trustee from charging the estate for compensation, the estate trustee may seek compensation from the estate in addition to receiving a legacy, thereby “double dipping”. On this point, compensation may be payable to the estate trustee, even if the will does not actually address this point, in accordance with section 61 of the *Trustee Act*, RSO 1990, c T.23, which entitles a trustee to a “fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice,” unless an allowance is fixed by the instrument.

While these consequences may be unappealing, it may be helpful to remind the client that he or she has the power to ultimately choose who is benefitted by the estate, depending on how the will is drafted – the individual named as his or her estate trustee, or the CRA.