

## Delegation and Estate Administration

**By Suzana Popovic-Montag**

The responsibility that estate trustees assume when they agree to administer an estate should not be underestimated. Depending on the size and complexity of the estate, its administration could seem comparable to a full-time job, particularly if the deceased only appointed one person to act as estate trustee. Accomplishing all of the work necessary to settle the affairs of an estate and distribute the assets within the “executor’s year”<sup>1</sup> may be a Herculean task.

As such, it is not surprising that a growing body of case law refers to estate trustees and executors delegating some of their responsibilities to third parties. While this is a practical solution for estate trustees, particularly if administering an estate includes responsibilities outside of a trustee’s realm of knowledge or expertise, care should be taken before an estate trustee engages in delegation. As a general rule, trustees, including estate trustees, are not allowed to delegate their powers or duties.<sup>2</sup> In fact, the Supreme Court of Canada recently confirmed that, as a matter of law, the fiduciary relationship which exists between a trustee and the beneficiaries of a trust “impresses the office of trustee with certain duties”, including a fundamental duty whereby “a trustee cannot delegate [their] office to another.”<sup>3</sup>

In light of this seeming contradiction between the general rule that an estate trustee may not delegate and the previously noted body of case law demonstrating that delegation is becoming increasingly prevalent in estate administration, this article explores a variety of circumstances where an estate trustee may lawfully delegate their responsibilities to an agent.<sup>4</sup> It also explores how the law in this area is evolving in other Canadian jurisdictions, as compared to Ontario.

### Delegation permitted under legislation

Multiple sections of the *Trustee Act*<sup>5</sup> expressly permit a trustee to delegate authority to an agent, but only under specific circumstances. Section 20, for example, permits a trustee to appoint:

- a solicitor to receive and discharge money or valuable consideration or property receivable by a trustee; and

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<sup>1</sup> For more on the executor’s year, see Ian M. Hull & Suzana Popovic-Montag, *Feeney’s Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis, 2000) at §8.17 [*Feeney’s*]. See also *Rivard v Morris*, 2018 ONCA 181.

<sup>2</sup> Albert H. Oosterhoff et al., *Oosterhoff on Trusts*, 9th ed. (Toronto: Thomson Reuters Canada, 2019) at 14.3 Delegation [*Oosterhoff*]; Carmen S. Thériault et al., *Widdifield on Executors and Trustees*, 6th ed. (Toronto: Thomson Reuters Canada, 2002) at §9:1 Rule Against Delegation [*Widdifield*].

<sup>3</sup> *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8 at para. 17. This passage has been cited in the context of estate administration by Justice Gilmore in *Mayer v Rubin et al.*, 2023 ONSC 4214 at para 97.

<sup>4</sup> This article does not explore all circumstances in which delegation may be permitted. For example, in *Oosterhoff*, *supra* note 2, at 14.3 the authors note two circumstances where a trustee may be permitted to delegate which are not addressed herein – if the delegated powers or duties are not required to be performed personally by a trustee, and if there is no other practicable way for the trustee to perform the powers or duties.

<sup>5</sup> R.S.O. 1990, c. T.23.

- a bank manager or branch manager of a bank, or a solicitor, to receive and discharge money payable to the trustee.<sup>6</sup>

Section 27.1 also permits a trustee to authorize an agent to invest “trust property to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would authorize,” as long as the agent prepares a satisfactory written plan or strategy that complies with the legislation. Once authorized to act on behalf of the trustee, the agent must follow the plan or strategy and report to the trustee at “regular stated intervals.”<sup>7</sup>

Ultimately, the circumstances under which an agent may be authorized to act on behalf of an estate trustee pursuant to the *Trustee Act* are quite narrow, particularly considering the broad scope of work that estate administration can entail.

### Delegation permitted under testamentary instruments

Another circumstance where an estate trustee may delegate responsibilities to a third party is when the testator expressly authorizes delegation in the will, or another testamentary instrument.<sup>8</sup> However, in light of controversy as to the type of delegation a testator may authorize, it is advisable for estate trustees to limit delegation pursuant to a will clause to administrative tasks.<sup>9</sup> Not only is the law clear that trustees may not delegate their fiduciary duties,<sup>10</sup> but the Ontario Law Reform Commission has also pointed out that testators cannot authorize unlimited delegation in light of those fiduciary duties – a trustee may only make a delegation which a “careful and prudent person” would have made.<sup>11</sup> As such, an estate trustee should not abdicate decision-making responsibility related to the estate pursuant to a will clause, particularly decision-making that involves discretion, as doing so would contravene the common law rule which generally prohibits such delegation.<sup>12</sup>

### The common business practice of delegation

Case law also firmly establishes that an estate trustee may delegate authority for managing estate assets or estate administration if delegating a particular power or duty is considered a common business practice. Historically, estate trustees have been able to retain lawyers, accountants, real estate agents and stock brokers to assist with an estate, as long as such professionals were retained to complete work within their special area of competence – a trustee may only authorize an agent to perform the kind of work that the agent usually performs.<sup>13</sup>

However, depending on the estate assets, an estate trustee may be able to delegate tasks to other types of experts as well. For example, in *2197088 Ontario Limited v. Cadogan Corporation*, Justice Ferguson held that it was “entirely appropriate” for a corporate estate trustee to retain an expert to assist with managing a business owned by the estate and to “delegate the decision making process”

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<sup>6</sup> *Ibid.*, ss. 20(1), (2).

<sup>7</sup> *Ibid.*, ss. 27.1(1), (2), (3).

<sup>8</sup> In *Pilkington v. Inland Revenue Commissioners* (1962), [1964] A.C. 612 (UK HL), Viscount Radcliffe held that the law is that trustees cannot delegate “unless they have authority to do so.”

<sup>9</sup> It may also be possible to delegate the financial aspects of the estate - see *Knight Estate (Re)* (1999), 30 E.T.R. (2d) 225 (Ont. S.C.J.) at para. 35.

<sup>10</sup> See, for example, *Law Society of Upper Canada v. Paul John Anderson*, 2009 ONLSPH 13 at para 48b.

<sup>11</sup> Ontario Law Reform Commission, Report on the Law of Trusts (1984) at 43. See also *Widdifield*, *supra* note 2 at §9:5 Specific Provisions in a Will or Trust Agreement.

<sup>12</sup> See Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Final Report 109 (Jan. 2017) at para. 97 [ALRI]. But see *Law Society of Ontario v. Wellenreiter*, 2019 ONLSTH 37 at para. 10 – the will in this case expressly permitted delegation of powers, discretions or duties, but only to a trust or investment company, or an advising person or corporation.

<sup>13</sup> *Feeney's*, *supra* note 1 at §8.64.

regarding that corporation to the expert.<sup>14</sup> In another case where the deceased was an artist, the court took no issue with the estate trustee retaining a marketing expert to assist with the marketing and sale of the deceased's artwork. In fact, the deceased had retained the marketing expert to assist him with selling his work shortly prior to his death.<sup>15</sup> It appears that any delegation by an estate trustee will be acceptable as long as "an ordinary prudent man in the ordinary course of business would do the same."<sup>16</sup>

### Delegating with the consent of beneficiaries

It also appears that a beneficiary will be unable to contest delegation of tasks related to the administration of the deceased's estate, or the cost of those services, if the beneficiary previously consented to such delegation. Returning to the previously noted case where the deceased was an artist, the court permitted the expense incurred by the estate to work with a marketing expert to be included in the passing of accounts, despite the beneficiaries' objections, as the beneficiaries had previously consented to retaining the expert and the expense was both reasonable and incurred for the benefit of the estate.<sup>17</sup>

### The consequences of delegation

While an estate trustee will often benefit from delegating their responsibilities related to estate administration to an agent, such a decision could also expose an estate trustee to liability. A trustee is expected to choose their agent with care, assign work to the agent in keeping with the agent's professional qualifications, supervise their work, ensure that the agent deals with any trust property properly, and, if necessary, terminate the delegation – for example, if the agent's work is inadequate. If the trustee fails in any of these duties, it may constitute a breach of duty, resulting in the imposition of liability on the trustee.<sup>18</sup>

### Trends in delegation

In 2012, the Uniform Law Conference of Canada ("ULCC") released the *Uniform Trustee Act*,<sup>19</sup> which endorses the inclusion of much broader powers of delegation for trustees. Section 47 permits trustees to appoint an agent "to exercise any power or perform any duty in the administration of a trust," as long as such an appointment is "reasonable and prudent," although in keeping with the recognition of fiduciary duties, does not permit trustees to appoint an agent to "exercise a discretion to distribute or transfer trust property."

In addition to this expanded power of delegation, the ULCC also recommends permitting trustees to appoint temporary substitute trustees in cases of temporary absence or incapacity,<sup>20</sup> and to permit trustees to delegate their responsibilities through a power of attorney for up to 12 months.<sup>21</sup> In the comments accompanying the *Uniform Act*, the ULCC explains that these changes provide "a practical

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<sup>14</sup> 2018 ONSC 3070 at para. 8.

<sup>15</sup> *Toller James Montague Cranston (Estate of)*, 2021 ONSC 1347 [*Cranston*]. It is interesting to note, however, that for the purpose of determining the estate trustee's entitlement to compensation, the court held that there was no delegation and that the expert was simply retained to assist the estate with selling the deceased's artwork: para. 154. This case was affirmed on appeal on different issues: see *Baran v Cranston*, 2022 ONSC 6636.

<sup>16</sup> Anne Armstrong, *Estate Administration: A Solicitor's Reference Manual* (Toronto: Thomson Reuters Canada, 1984) at Appendix C1, §C1:27.

<sup>17</sup> *Cranston*, *supra* note 12 at paras 84-85.

<sup>18</sup> *Oosterhoff*, *supra* note 2 at 14.3. See also *Feeney's*, *supra* note 1 at §8.64.

<sup>19</sup> Online: <[https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Trustee-Act\\_1.pdf](https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Trustee-Act_1.pdf)>.

<sup>20</sup> *Ibid.*, s. 8.

<sup>21</sup> *Ibid.*, s. 50.

alternative to the resignation and replacement of a trustee in instances in which resignation and replacement would create their own problems or in which the continuing trustees or beneficiaries would prefer that [a] particular trustee remain in office.”<sup>22</sup>

While Ontario has not adopted the recommendations made by the ULCC, other jurisdictions have. In 2023, Alberta’s new *Trustee Act* came into force; it includes provisions which permit trustees to:

- appoint another person to act as temporary trustee,<sup>23</sup>
- use a power of attorney to delegate the exercise of any powers and the performance of any duties for a specified period,<sup>24</sup> and
- appoint an agent to exercise a power or perform a duty, including administrative functions related to the trust, although agents may not “exercise a discretion to distribute or transfer trust property.”<sup>25</sup>

New Brunswick also has similar provisions in that province’s legislation, which came into force in 2016.<sup>26</sup>

The advantage of these kinds of legislative provisions is that they provide trustees, including executors, with greater flexibility. It is no longer implicit in New Brunswick and Alberta that executors who are temporarily incapable of performing their duties, or find themselves unable to administer an estate on their own, should resign the role of executor. There is also, arguably, an inherent advantage to permitting trustees to appoint a temporary trustee or delegate through a power of attorney, rather than require all delegation to go through an agent, since “agents cannot exercise discretion to distribute or transfer trust property” and the delegation of trust powers that involves the exercise of discretion to agents is generally prohibited under common law.<sup>27</sup>

Should such flexibility also be embraced in Ontario? It will be interesting to see if the law is amended in the future to permit estate trustees more flexibility with respect to delegation and estate administration. As long as the current law remains in place, however, it is advisable to limit delegation in accordance with the *Trustee Act*,<sup>28</sup> and to only allow delegation of administrative tasks or powers and duties that are considered an ordinary business practice.

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<sup>22</sup> *Ibid.* at 41.

<sup>23</sup> S.A. 2022, c. T-8.1, s. 11.

<sup>24</sup> *Ibid.*, s. 14.

<sup>25</sup> *Ibid.*, ss. 51-54.

<sup>26</sup> *Trustees Act*, S.N.B. 2015, c. 21, ss. 11, 12, 49.

<sup>27</sup> ALRI, *supra* note 12 at para. 97.

<sup>28</sup> *Supra* note 5.