

ADMINISTERING AN ESTATE THAT INCLUDES A BUSINESS

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When a business is part of a deceased person's estate, an estate trustee may wonder how this particular asset ought to be handled as part of the estate administration process. This Solicitor's Tip explores how to proceed when a business is included in an estate, and what responsibilities an estate trustee ought to be prepared to assume.¹

Checking the deceased's will for instructions

Depending on the deceased's testamentary planning, their will may include instructions related to their business. For example, a will may direct that the deceased's business be sold to a particular individual,² or instruct the estate trustee to continue operating the business.³ Alternatively, it could contemplate a third party operating the business.⁴

If a will addresses the deceased's business, but there is uncertainty as to what exactly that business entails, the estate trustee may apply to the court for direction under section 60 of the *Trustee Act*.⁵ This provision permits the court to provide an "opinion, advice, or direction ... on any question respecting the management or administration" of trust property or a testator's assets.⁶

Running the deceased's business in the interim

While administering an estate that includes a business, it is advisable for an estate trustee to take steps to ensure that the business continues to operate in the interim. For example, if the will includes an option for a beneficiary to purchase the business, the business presumably ought to continue to operate until the beneficiary at least decides whether or not to exercise the option to purchase.

To ensure that the business continues to operate temporarily, the estate trustee can arrange for the continued employment of the business' employees and payment of their salaries, or, if appropriate, the termination of their employment. An estate trustee may also need to determine whether financing is needed to carry on the business in the interim.⁷

¹ Please note that this Tip does not explore more nuanced issues specific to corporations, such as shareholder disputes that may impact an estate. It also does not address how to wrap up the deceased's business.

² See, for example, *VanSickle Estate v. VanSickle*, 2022 ONCA 643. The will in this case gave one of the deceased's children the option to purchase the deceased's farm.

³ See, for example, *Re Bucovetsky*, 1942 CanLII 350 (Ont. H.C.) [*Bucovetsky*].

⁴ See, for example, the deceased's will in *Muchmaker Estate (Re)*, 2019 ONSC 59 [*Muchmaker*], affirmed on appeal: see *Loran v Weissman*, 2019 ONCA 962.

⁵ RSO 1990, c T.23.

⁶ For a case where the court interpreted what the term "my business" referred to in the deceased's will, see *Bucovetsky*, *supra* note 3.

⁷ Anne E.P. Armstrong, *Estate Administration: A Solicitor's Reference Manual* (Toronto, Ontario: Thomson Reuters, 1984) (loose-leaf) at §§ 1:61, 1:63 [Armstrong].

However, estate trustees ought to be aware that they do not have the power to carry on the deceased's business on an ongoing basis simply by virtue of their appointment.⁸ In fact, if the estate trustee continues to operate the business "as a going concern," they could be held personally liable for any losses, or for debts and expenses incurred to operate the business,⁹ although such liability could potentially be forgiven under the *Trustee Act*. Section 35 permits the court to relieve a trustee from personal liability, either entirely or in part, if that person "has acted honestly and reasonably, and ought fairly to be excused for [a] breach of trust."¹⁰

Accordingly, an estate trustee should only operate the deceased's business temporarily in order to sell it; otherwise, the business should be wound down. Before deciding how to proceed, an estate trustee may want to consult with staff or auditors.¹¹

An estate trustee may also delegate the task of running the deceased's business to a third party. This may be a good practice to ensure that any potential conflicts of interest resulting from the same person administering both the estate and directing the business are avoided.¹² While an estate trustee must act in the best interests of the estate and its beneficiaries, an individual who runs a business owes a duty of loyalty and good faith to the business – a conflict of interest could arise whenever the best interests of the estate and the best interests of the business are not aligned.¹³ If an estate trustee does choose to appoint a delegate, this person ought to be selected carefully so that their involvement does not complicate the administration of the estate.¹⁴

While overseeing the management of the deceased's business during an estate administration, other practical steps that an estate trustee ought to take include:

- reviewing corporate documents to ascertain the ownership structure of the business;
- if the deceased was a professional who was governed by a professional regulatory body, consulting with that body to determine how the deceased's business ought to be handled;
- checking to see if the business had any outstanding contracts and, if so, whether they are enforceable; and
- determining whether any tax returns for the business need to be filed.¹⁵

⁸ Ian M. Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto, Ontario: LexisNexis, 2000) (loose-leaf) at § 8.43 [*Feeney's*].

⁹ See *Surette Battery v. Pond Estate*, 2003 NBQB 153; *G. Solway & Sons Ltd. v. Pearlman and Ezrin*, 1963 CanLII 230 (Ont. S.C.), aff'd 1964 CanLII 305 (Ont. C.A.). An estate trustee could also be held liable for debts owed by the business that were incurred prior to the death of the deceased, if those debts are not paid before the estate is distributed: see *Klaptchuk v. Johnson*, 2023 SKCA 25.

¹⁰ *Trustee Act*, supra note 5, s. 35.

¹¹ Armstrong, supra note 7 at § 1:62.

¹² *Feeney's*, supra note 8 at § 8.12.

¹³ See, for example, *Reddy v. Schinagl (Estate)*, 2022 NLSC 73 at paras. 84-85. Also see *Richardson v. Petrie*, 2024 ONSC 911 [*Richardson*].

¹⁴ For example, in *Belajac v. Belajac*, 2008 CanLII 11638 (Ont. S.C.J.), leave to appeal refused 2008 CanLII 16463 (Ont. Div. Ct.), the delegate (the estate trustee's sibling) wanted to run the deceased's business on a long-term basis but could not afford to buy it, and obtained a certificate of pending litigation which had to be vacated before the business could be sold, thereby complicating the administration of the estate.

¹⁵ Armstrong, supra note 7 at §§ 1:61, 1:62, 1:63.

Seeking advice and direction from the court

As previously noted, while carrying on the deceased's business during an estate administration, an estate trustee may apply to the court for advice and direction under the *Trustee Act*.¹⁶ An estate trustee may even seek approval of business decisions, a potentially handy practice for preventing future litigation.¹⁷

It is also appropriate for an estate trustee to apply to the court for advice and direction if the deceased's will includes an option for a beneficiary to purchase the deceased's business, but the terms upon which the business may be sold are unclear.¹⁸

On a similar note, if there is a direction in the will to sell the deceased's business to a named individual, it may be advisable to apply to the court for direction prior to using assets held by the business for a purpose not related to that business. While executors may, generally speaking, use assets in the deceased's business while administering their estate,¹⁹ using those assets prior to a sale to a named beneficiary may have ramifications. For example, in *Muchmaker Estate*, the court questioned the propriety of the estate trustee's decision to use company funds to pay dependant support to the deceased's common law spouse, and returned those funds to the beneficiary who bought the business by reducing its purchase price.²⁰ In comparison, it may not be necessary to repay dividends paid to the estate, so long as those payments were made when it was uncertain whether the named beneficiary would acquire the company. On the other hand, it may be necessary to repay dividends if the company was improperly stripped of assets, or the payments reduced the company's value or impaired the company's ability to operate.²¹

Selling the deceased's business

As a general rule, an estate trustee ought to sell the deceased's business for the best price possible, consistent with the obligation to administer the estate to the maximum advantage of the beneficiaries.²² When valuing a business, relevant factors include the business' cash flow, history, stability of earnings, goodwill, and the value of the business' "brand". An online business should be valued and treated like any other business.²³

To sell a business held by an estate, the estate trustee may hire a business broker to assist or provide advice.²⁴ Alternatively, the estate trustee could work with other businesses to sell business assets and existing inventory on consignment;²⁵ depending on the circumstances, it may even be reasonable to hire a marketing expert.²⁶

¹⁶ *Supra* note 5, s. 60.

¹⁷ See *McKay Estate v. Love*, 1992 CanLII 7508 (Ont. Ct. J. (Gen Div.)), *aff'd* (1991) 44 E.T.R. 190 (C.A.).

¹⁸ See *Muchmaker*, *supra* note 4.

¹⁹ *Feeney's*, *supra* note 8 at § 8.43.

²⁰ *Supra* note 4 at paras. 37-38.

²¹ *Ibid.* at paras. 43, 44.

²² *Richardson*, *supra* note 13 at paras. 38, 41.

²³ See Daniel A. Nelson, "The Challenge of Digital Estate Administration for Executor" in Armstrong, *supra* note 7 at § RA:23.

²⁴ *Ibid.*

²⁵ In *Toller James Montague Cranston (Estate of)*, 2021 ONSC 1347 [*Cranston*], for example, the estate trustee and beneficiaries worked with art galleries to sell the deceased's artwork.

²⁶ In *Cranston*, *ibid.*, the estate hired an expert to assist with marketing and selling the deceased's artwork.

In light of the self-dealing rule, which bars trustees from purchasing trust property, it is inappropriate for an estate trustee to purchase the deceased's business unless the beneficiaries' consent to the sale after receiving full disclosure.²⁷ Such a transaction also ought to be fair and reasonable, with terms comparable to those found in an arm's length transaction.²⁸ Alternatively, if the beneficiaries of the estate are not all *sui juris*, the court could approve the sale of a business to an estate trustee.²⁹

An estate trustee may also be permitted to purchase a business held by the estate if the deceased's will or another legal instrument expressly permits the purchase.³⁰ However, if the estate trustee does wish to purchase the deceased's business, it is advisable to either renounce or ask to be released from their position, since a conflict of interest will arise if an estate trustee occupies the dual position of vendor and purchaser in a transaction.³¹

Estate trustees should also be aware that if the deceased's will gives a beneficiary an option to purchase a business, conditions should not be imposed on the sale which are not included in the will, unless the will expressly gives the trustee the power to impose conditions on the sale.³²

Temporary responsibility for the deceased's business

When a business is included in an estate, it is incumbent on the estate trustee to take responsibility for that business on a temporary basis, whether the estate trustee oversees the business themselves or delegates this task. Ultimately, the business should either be sold or wound down, consistent with any instructions provided in the deceased's will, when applicable. If necessary, an estate trustee may also seek direction from the court.

While administering an estate that includes a business may be more complicated than handling other types of estate assets, an estate trustee does not need to have prior experience with running a business to take on this task, and also need not face this endeavour alone. With the support of others, administering an estate with a business ought to be quite feasible.

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²⁷ See Albert H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9th ed. (Toronto, Ontario: Thomson Reuters, 2019) at 758-759, 780.

²⁸ *Ibid.* at 764.

²⁹ *Ibid.* at 780.

³⁰ See, for example, *Ballard Estate v. Ballard Estate (C.A.)*, 1991 CanLII 7287 (Ont. C.A.).

³¹ See *Holder v. Holder*, [1968] Ch. 353 (C.A.).

³² See *Muchmaker*, *supra* note 4 at paras. 20-22.