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WILLS THAT AUTHORIZE SELF-DEALING: DRAFTING TIPS TO PROTECT BENEFICIARY INTERESTS AND MANAGE FIDUCIARY RISK

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As a general rule, estate trustees are not permitted to purchase estate assets from the estate they are administering. While it is possible to get around this rule by drafting a will to expressly authorize self-dealing, estate trustees must still comply with their fiduciary duties when purchasing estate assets, including their duty of loyalty to the estate's beneficiaries. This month's Solicitor's Tip focuses on how a will can be drafted to reduce the risk of estate trustees breaching their fiduciary duties while self-dealing. Such risk can be mitigated by directing that sales be conducted by a disinterested trustee, or, alternatively, by articulating the sale price for assets the estate trustee may purchase, setting a deadline for the purchase of an estate asset, and appointing multiple estate trustees.

The Self-Dealing Rule

As fiduciaries, estate trustees owe a duty of loyalty to the beneficiaries of the estate, must avoid situations where their own interest conflicts with the interests of the beneficiaries, and are not permitted to profit from their position as trustee.¹ In keeping with the notion that a trustee may not take advantage of the trust relationship, the self-dealing rule generally bars estate trustees from purchasing estate assets.²

There are a few exceptions to the self-dealing rule, however. An estate trustee may purchase estate assets with court approval, or where all beneficiaries are adults of full capacity and give their informed consent.³ Wills can also expressly authorize the sale of estate assets to estate trustees. When self-dealing is permitted by a will, however, an estate trustee will not be relieved of their fiduciary duties, including their obligation to accord the beneficiaries with their "finest loyalty."⁴

Require an Independent Trustee to Conduct the Sale

To help minimize the risk of a conflict of interest, a will can direct that an independent trustee be appointed to conduct the sale of an estate asset to the estate trustee, so the estate trustee does not act as both buyer and seller in the same transaction.⁵ When an estate trustee purchases an estate asset, they do so in their personal capacity, distinct from their role and obligations as estate trustee.⁶ If a will provides for

¹ Albert H. Oosterhoff, Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts*, 10th ed (Toronto: Thomson Reuters, 2024) at § 3:3.

² Ian M. Hull and Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed (Toronto: LexisNexis, 2000) (loose-leaf) at § 8.46.

³ *Dallas Estate (Re)*, [2024 BCSC 213](#) at paras [10-11](#).

⁴ *Jocham v. MacPherson*, [2010 ONSC 6391](#) at [para 23](#).

⁵ For cases where such will clauses have been analyzed, see *Jocham*, *ibid* and *La Calamita v La Calamita*, [2024 ONSC 4219](#).

⁶ This point was recently confirmed by the Alberta Court of Appeal in *Mast v Mast Estate*, [2026 ABCA 71](#) at [para 50](#).

the appointment of a disinterested trustee, the estate trustee will not be able to conduct a sale of an estate asset to themselves – the use of an independent trustee will be mandatory.⁷

The advantage of requiring a disinterested trustee to conduct the sale is that it significantly reduces the risk of the estate trustee selling an estate asset to themselves on favourable terms, such as setting the purchase price below fair market value, contrary to the estate trustee's duty to maximize the value of the estate for the beneficiaries.⁸ In fact, the Superior Court of Justice has noted that when an estate trustee purchases an estate asset, they ought to recuse themselves from the transaction.⁹

Specify the Sale Price or a Process for Setting the Price

Another way to alleviate the risk of an estate trustee selling an asset to themselves for a favourable price, notwithstanding their fiduciary duties,¹⁰ is to use the will to articulate the price that the estate trustee must pay for the asset.¹¹ Alternatively, the will could direct the estate trustee to pay fair market value when purchasing estate assets, in which case including a process for determining fair market value is also advisable. For example, the will could require the price to be set using multiple independent appraisals.¹² If a will does not specify how fair market value is to be determined, there is a risk that the estate trustee could set the price at the low range of fair market value,¹³ or obtain an inaccurate assessment to reduce the asset's purchase price. It may also become necessary to seek the court's direction as to how or when the asset's fair market value is to be determined.¹⁴

Set a Deadline

If a will requires an estate trustee to pay fair market value for an estate asset, it may also be advisable to set a deadline for the purchase of the asset (or when an offer to purchase must be submitted),¹⁵ and how the asset is to be handled if it is not purchased by the trustee in time. Otherwise, there is a risk that the estate trustee may delay purchasing the asset in order to obtain a more favourable price,¹⁶ contrary to their fiduciary duties, or delay the sale of the estate asset indefinitely.¹⁷

Appoint Multiple Estate Trustees

If a will does not require a disinterested trustee be appointed to conduct the sale of estate assets to the estate trustee, the will could instead appoint multiple estate trustees. Under these circumstances, one trustee could handle the sale of an estate asset to the other trustee, and hopefully ensure that the terms

⁷ *La Calamita*, *supra* note 5 at paras [83](#), [107](#).

⁸ For example, this occurred in *Deziel v Deziel*, [2024 ONSC 5279](#).

⁹ *Ibid* at [para 70](#).

¹⁰ *Jocham*, *supra* note 4 at [para 23](#). In light of this duty, the estate trustee hypothetically will only be able to purchase an estate asset at a discounted price if the will directly states this to be the case.

¹¹ If the estate trustee purchases the asset for the price specified in the will, it would be difficult to argue that they prioritized their own interests over those of the beneficiaries.

¹² See, for example, the wills in *Ballard Estate (Re)*, [1994 CanLII 7305](#) (ON SC) and *Wright v Wright*, [2023 ONSC 6854](#).

¹³ See, for example, *Deziel*, *supra* note 8.

¹⁴ See, for example, *Ward v Ward*, [2026 ONSC 824](#) at paras [51-59](#).

¹⁵ For more on setting a deadline on an option to purchase, see Suzana Popovic-Montag, "A Matter of Timing: Putting a Deadline on an Option to Purchase in a Will", *Solicitor's Tip* (3 January 2025), online (blog): <https://hullandhull.com/2025/01/a-matter-of-timing-putting-a-deadline-on-an-option-to-purchase-in-a-will/>.

¹⁶ This concern was raised by a beneficiary in *Chesko v Chesko Estate*, [2024 BCSC 394](#) at [para 105](#).

¹⁷ This was an issue in *Wright*, *supra* note 12. One estate trustee in this case brought a successful application to remove the other estate trustee, as she refused to vacate a property she had the option to purchase.

of the client's will are followed with respect to the sale. Having a second trustee would be useful in the event that the estate trustee permitted to purchase an estate asset tries to negotiate a purchase price lower than the price set by the will, or refuses to facilitate the sale of the asset on the open market. Under such circumstances, the estate trustee who is not purchasing the asset could take steps to ensure that the will is complied with, such as applying to the court for direction, or even seeking the removal of the other estate trustee.¹⁸

Ideally, having one estate trustee conduct the sale of an estate asset to another trustee will reduce the risk of sales that are contrary to the interests of the estate and its beneficiaries. However, this strategy is not foolproof – there is still a risk that the estate trustees will not comply with the terms set out in the will when selling an estate asset to a trustee.¹⁹ There is also no guarantee of the estate trustees seeking direction from the court.

Conclusion

Where a will authorizes self-dealing, an estate trustee who purchases estate assets is not exempted from complying with their fiduciary duties. Careful drafting can help mitigate the risk of an estate trustee breaching those duties when purchasing estate assets. Incorporating additional safeguards – such as requiring an independent trustee to conduct the sale, or alternatively, requiring the asset to be sold for a prescribed price or fair market value, setting a deadline for the sale, and appointing multiple trustees – can help ensure that the transaction aligns with the testator's intentions while also protecting the interests of the beneficiaries.

¹⁸ Again, see *Wright, ibid.*

¹⁹ See, for example, *Deziel, supra* note 8. In this case, one estate trustee facilitated the sale of an estate asset to the other estate trustee for a price below fair market value. The transaction was subsequently disputed by the beneficiaries.