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Will Planning and the Succession of a Family Business
Ian M. Hull

"Dead"Lines in Estate Administration: A Refresher
A. Sean Graham

Passing Over: Who, What, When, Why and How
Paul E. Trudelle

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WILL PLANNING AND THE SUCCESSION OF A FAMILY BUSINESS

"A family is a business – and – is in the business of family"

Breakfast Seminar
June 2005

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WILL PLANNING AND THE SUCCESSION OF A FAMILY BUSINESS

"A family is a business – and – is in the business of family"

By: Ian M. Hull

INTRODUCTION

Over the next five years, 40 to 50 percent of Canadian business owners are expected to sell or transfer the assets of their company.

Between 2005 and 2010, it is anticipated that the total value of inheritance expected to be received from Canadian sources is approximately five hundred billion dollars.[1]

In 1997 a survey of Deloitte Touché estimated that of the 123,000 family businesses in Canada in 1997 (i.e. business with revenues in excessive of one million dollars a year), 66 percent were still being run by the first generation, and many without a commitment to keep them in the family.[2]

Seventy percent of inter-generational wealth transmissions have statistically failed over the years.[3]

Succession planning for the family business can be difficult and frustrating. There are numerous considerations that must be factored in, legal, non-legal, tax and financial.

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[1] Cap Gemini, Ernst and Young, Report Perspectives on the Canadian Wealth Management Market, 2001.

[2] Pitts, In the Blood, Random House, 1997, p.8.

[3] Williams and Preisser, Preparing Heirs, Robert D. Reid Publishes, 2203, p.3.

For example, many small businesses generate pre-tax returns in the 20 to 40 percent range, whereas investment managers expect 4.5 percent from bonds and 7 percent from equities for the foreseeable future.

When business decisions and the decision to deal with succession are interrelated with family dynamics, the succession plan can be both complex and emotional.

Passing on the business from the parent to the second generation brings with it complex financial and non-financial considerations.

The long-term survival of a business can in large part, depend on an orderly and business like succession.

However, the non-legal and accounting issues are fundamental to the process and need to be a central focus of any good estate plan.

In many cases, the family business is a major asset of the estate and the growth of the family business over the years may have built within it considerable tax consequences on the death of the original owner.

Parents who are considering transferring the business to their children also have to consider whether or not their children are capable of managing the business.

Some preliminary considerations are:

- Maturity of the business.
- Business skills of the next generation children.
- Family relationships.
- Tax considerations.

- The size of the business and the level of responsibility being passed on to the next generation.

- If there are already children from the family involved in the business.

- Monetary equality and division of assets.

- Assessing separate operating and capital assets of the business.

- Protecting the needs of the surviving spouse.

This paper will serve as a preliminary review of some of the legal and tax considerations involved in estate planning for succession of a family business.

METHODS OF TRANSFERRING A BUSINESS

i. Gifting of Shares – Sale of Shares

In either event, a typical method of transfer is to take advantage of the $500,000.00 capital gains exemption if the corporation is a small business corporation. In such circumstances, the taxpayer or related parties must have owned shares of the corporation for more than twenty-four (24) months, and more than 50 percent of the value of the assets of the corporation must be used in an active business.

Another option is of course to proceed with an estate freeze whereby there is a freeze on the value of the business and an issuance of new equity shares to children who are entitled to the future growth of the business only.

The benefit of pursuing a methodology that includes simply gifting existing shares is that the gift may have the distinct advantage of being protected from claims by the spouse of the donee. Under the *Family Law Act*, the gift of any income derived therefrom may be exempt from an equalization claim by a spouse where the gift was made after the marriage of the donee and was subject to the expressed condition that income derived therefrom would not be included in the NFP.

In contrast, the sale of shares may be exposed to an equalization claim on the marriage breakdown of a child if there is no domestic contract which deals with this issue.

Where there are circumstances in which there are children who are not directly involved in the business, the parent may want to proceed with a share sale to the active children in the business rather than a gift, as the purchase price received on a share sale could be used by parents to make equalization payments to other children.

In order to properly assess and determine the best approach, one must understand the goals of the parent and in order to minimize disputes later, involve the children, both active and non-active, in the planning process.

The parent must consider their own future financial needs.

For example, an estate freeze allows children to become shareholders and to share in the future growth. With an estate freeze, the parents generally receive shares equal to the value of the business at the time of the freeze. Those shares do not increase in value and are therefore considered to be frozen.

Much depends on the financial needs of the parent(s).

Each option: gifting shares, selling shares, or an estate freeze, gives a parent different options to consider.

ii. Estate Freeze Considerations

As noted above, reorganizing the shares of a small business corporation to provide for an estate freeze and to facilitate income splitting to beneficiaries in lower tax brackets makes good tax planning sense.

The mechanics of an estate freeze are dealt with in part in Section 86 of the *Income Tax Act* where the provisions of the *Income Tax Act* allow for a share-for-share exchange or a crystallization involving a share-for-share exchange under Section 85 of the *Income Tax Act*.

In either event, a parent would exchange common shares which she holds in the operating company for fixed-value preferential shares, either in the operating company or in the holding company.

This can be essentially accomplished on the tax-deferred basis. Assuming the corporation has a small business capital gains exemption available to it.

An obvious problems arises in the context of an estate freeze, gifted shares or the sale of shares, is that children can become equity owners in the business, in these various scenarios. Parents lose significant control, as the children require legal rights of a shareholder.

Naturally, the parents wish to retain control, to some degree, and this ultimately creates family tension.

Preliminary Will Drafting Issues

There are numerous estate planning tools that need to be considered at the outset of the drafting process. They include:

- using one will or multiple wills

- determining if an asset should be left to the surviving spouse outright or in a spousal trust
- if the spousal trust planning tool is used then how is a family business passed on to the second generation.

The two significant tax considerations in the context of the preliminary matters are of course the estate administration tax or probate tax that is payable on death and the deemed disposition tax owing from the date of death.

Multiple Wills

The use of this planning technique has developed to an degree that it is almost expected that Multiple Wills will be used to avoid probate tax on death.

Outright Gifting to Surviving Spouse

One effective tax planning tool on the date of the death of the parent or owner is the deferral of the income tax on accrued capital gains by virtue of the rollover provisions of the Income Tax Act.

When the shares of the family company are directly gifted to the surviving spouse, the rollover is available.

Spousal Trust

Another method upon which the deemed disposition tax is deferred is where a spousal trust is created, gifting the family company shares to the trust. The provisions of the spousal trust must be exclusively for the benefit of the surviving spouse and it must satisfy the provisions of subsection 70(6) of the *Income Tax Act*.

Ongoing Debate - Outright Giving of Shares or Spousal Trust

Given what can be an overwhelming financial burden in respect of the deemed

capital gain on death, it is always best to be up front with your clients on the most advantageous approach to take on the death of one's spouse.

Both options bring with them certain advantages and disadvantages.

For example, creating a spousal trust can restrict the surviving spouse in a manner which can be problematic and outright gifting may give control to the surviving spouse at a level that is not well-received by the other members of the family company.

While it is often the goal of the parents that the family business not be sold and continue to develop as a family enterprise, the considerable financial impact of the deemed capital gain can be particularly problematic in the context of this goal.

With the rollover provisions of the *Income Tax Act* or the creation of the spousal trust, there is an important deferral of the resulting tax liability. This delay can often allow for the surviving spouse to properly plan for the ultimate tax payment on his or her death and at the same time try to preserve the financial viability of the family company.

There is also the role of the trustee(s) and the role of the directors of the corporation.

Four important issues that can arise from the obvious conflicting duties the directors and trustees have are as follows:

1. The duties of trustees/representatives on the Board of Directors;
2. The even hand rule in corporate distributions;
3. Conflicts of interest;
4. Compensation and corporate bonus payments.

The strategies employed to address these fundamental issues are in large part

motivated by good advisors and sensible business-like conduct on the part of these various fiduciaries.

While certain complexities arise in the context of the arrangement, it does incorporate a fundamental strategy of:

- income splitting
- maintaining small business corporation status
- maximizes the capital gains exemption
- reducing taxes on the sale of business
- reducing taxes on death
- probate planning

The mechanisms employed through operations such as the family trust, holding company, variations of the shareholders' agreements and wills allow for such strategies to be implemented.

Planning to Avoid Double Tax at Death on Private Company Shares

There is always the possibility for double taxation in circumstances where an individual dies owning shares of a private company. Even with the best laid plans and properly drafted wills, there are still circumstances where advisors inadvertently implement a plan that triggers the application of tax rules that create a double tax.

There are post-mortem planning steps that can be taken in such circumstances.

As noted above, the deemed disposition provisions under subsection 70(5) of the *Income Tax Act* provide that the individual is deemed to have disposed of, immediately before that individual's death, each capital property owned by the individual for proceeds of disposition equal to the property's fair market value immediately before death.

To the extent that the fair market value of each capital property immediately before the individual's death exceeds its adjusted cost base, the individual will realize a capital gain.

Subsection 70(6) of the *Income Tax Act* provides an exception to this general deemed disposition at fair market value and allows the capital property to be disposed of at an adjusted cost base rather than its fair market value. There is of course the rollover provisions to the individual's spouse or common-law partner or to a qualifying spousal or common-law partner trust as referred to in Section 70(6)(b) of the *Income Tax Act*.

In addition to the deemed disposition taxes owing on death there is another layer of taxes that arise when a company eventually disposes of its appreciated properties and distributes the proceeds to the shareholders of the company.

It is the combination of the tax arising on the deemed disposition of the private company shares at fair market value and the tax arising on the actual disposition of the private company shares remaining that can, in some circumstances, result in double taxation.

With careful planning after death, it is possible to reduce or eliminate this double taxation.

Conclusion

The importance of passing on the family company to the members of the family is often a bigger priority to your client than the planning and tax considerations needed to be undertaken to achieve that result.

However, given the substantial and often devastating impact of the deemed disposition tax rules, careful consideration needs to be given to the tax planning issues or there simply will be no succession of the family business.

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"DEAD"LINES IN ESTATE ADMINISTRATION: A REFRESHER

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"DEAD"LINES IN ESTATE ADMINISTRATION: A REFRESHER

A. Sean Graham, Hull & Hull

Estate administration practice is very much deadline-driven, with most deadlines commencing from the date of death. The purpose of the following is to provide a refresher as to some key non-tax deadlines as well as some brief thoughts concerning each.

1. **Issue:** Filing Notice of Objection

   Timing: Immediately, once death has taken place and notice is received of a client's or potential client's desire to challenge the validity of a will.

   Source: Rule 75.03, *Rules of Civil Procedure*

   - Whenever a potential client retains a solicitor to challenge the validity of a Last Will and Testament, a Notice of Objection should be filed immediately.
   - If the client does not retain you but is proceeding nonetheless, you should have unambiguous documentation that you gave advice, in writing, concerning whether to file a Notice of Objection.

2. **Issue:** Giving notice to beneficiaries of charitable bequests under a Will.

   Timing: Must be completed within one month of the date of the testator.

   Source: *Charities Accounting Act* (Ontario), section 1.

   - Since Charities do not have the notice of the death in the way family members can be expected to, this narrows the information gap and allows them to become involved early if they see fit.
   - This will have greater importance the larger the bequest relative to the overall assets of the estate, but charities tend to be forgotten early on in the administration. This deadline can be easy to miss, especially if there is a delay in retaining an estate solicitor.
   - Charitable beneficiaries (and their solicitors) sometimes chafe at being treated as an afterthought in estate administration. Complying with this deadline can limit such perceptions and foster a more productive relationship at the outset.

3. **Issue:** Canvassing guardians of orphans before expiry of testamentary guardianship appointment

Timing: Testamentary appointment expires 90 days after testator's death, or upon disposition of appointee's application for a permanent appointment

Authority: *Children's Law Reform Act* (Ontario), section 61.

- Guardians appointed through the will should be advised early that their appointment expires 90 days after death, and canvassed for their views as to whether they want to apply for a permanent appointment.
- If the testamentary guardians do not want to be appointed, other options should be canvassed, and if there are no acceptable candidates, the Office of the Children's Lawyer should be notified.

4. **Issue:** Duty to retain records and information required to pass accounts in the form for passing.

Timing: Immediate upon assuming exectorship.

Source: Rule 74.17, *Rules of Civil Procedure*

- The duty to account and its ramifications is usually a surprise for most executors. Often they have no idea of the records to be kept and the information to be retained. Certainly very few realize that their duty is essentially indefinite unless they pass their accounts. Many ignore the duty despite advice, then deny receiving the advice when criticized.
- Problems with accounting tend to be most severe when there is no estate solicitor or the estate solicitor is not deeply involved. It is rare for an executor to admit that they were advised by the solicitor about the accounting duty but ignored the advice, less rare for an executor to blame the lawyer.

5. **Issue:** Application for Order allowing a claim against an Estate in the face of a notice contesting the claim

Timing: Within 30 days of receipt of Notice of Contestation, or within 3 months thereafter with leave of the Court.

Source: *Estates Act* (Ontario), section 44

- The Notice of Contestation is an excellent tool to knock claims out at the outset of an estate administration.
- One concern is that, when dealing with sophisticated recipients of the notice, you are inviting them to move forward with their claims.
- This could be a very dangerous deadline for the solicitor of the claimant from a liability standpoint. It is likely less dangerous for the estate solicitor, but still potentially problematic.

6. **Issue:** Payment of immediately distributable bequests

Timing: 1 year after date of death

Source: Common Law

- Following the expiry of the Executor's Year, an executor will be expected to earn interest on any undistributed assets. If interest is not earned, liability may attach, or more commonly a claim for reduced compensation when it comes time to pass accounts.

7. **Issue:** Registering a caution to avoid direct vesting of real property to beneficiaries after 3 years if not disposed of by personal representatives.

Timing: 3 years after death

Source: *Estates Administration Act* (Ontario), section 9.

- In cases where debts and liabilities are not yet known, executors should register a caution lest undistributed real property vest in the beneficiaries at the 3-year point. Cautions can be registered after 3 years, but only with the consent to the registration of a caution from the beneficiaries with an interest (or the Children's Lawyer in case of minor beneficiaries), or an Order of the Court. See *Estates Administration Act* (Ontario) section 11.

8. **Issue:** Restriction on distribution on an intestacy

Timing: No distribution of the assets of the estate of an intestate can be made until 1 year after the date of death

Source: *Estates Administration Act* (Ontario), section 26

- This can cause practical problems with, for example, valueless personal property. Significant criticism by the court over distributing invaluable personal property of little value in the face of an intestacy is, in my view, unlikely, but the section is unambiguous.

- Note that this is subject to section 53 of the *Trustee Act* (Ontario), which allows for distribution provided prior notice to creditors.

9. **Issue:** *Family Law Act* (Ontario) equalization application

Timing: Must be brought within 6 months of spouse's death, unless extended by the Court

Source: *Family Law Act* (Ontario), subsections 6(10) and 6(16)

- This leads to the practical problem of having to decide whether to elect before full financial information is available. Often this problem is the basis of an Application to extend the deadline and limit any distributions in the interim

10. **Issue:** Right to rent-free possession of matrimonial home by surviving spouse

Timing: Expires 60 days after death

Source: *Family Law Act*, (Ontario), section 26(2)

- Executors who fail to evict the spouse after the deadline could be criticized for allowing wasting asset, and if damage is done to the property by the spouse, the executor could be found liable.

11. **Issue:** Payment of insurance proceeds

Timing: Insurers must pay proceeds within 30 days of receiving the following: (a) sufficient evidence of the insurable event; (b) the age of the insured; (c) the right of the claimant to the payment; and, (d) the name and age of the beneficiary.

Source: *Insurance Act* (Ontario), section 203(1)

- Helpful only where insurers are not prompt, they are generally prompt.

12. **Issue:** Application for Dependant's Relief under Part V of the *Succession Law Reform Act* (Ontario)

Timing: Application must be brought within 6 months of grant of Certificate of Appointment of Estate Trustee.

Source: Succession Law Reform Act (Ontario), subsections 60(1) and 60(2)

- The Application should be brought as soon as possible, and consideration must be given to naming the designated beneficiaries of section 72 assets, and even in some cases notifying the institution holding the section 72 assets at death.

- Note that an Application can still be brought after the 6-month deadline, with leave of the court, but only with respect to assets undistributed as at the date of the Application

13. **Issue:** Actions by and against executors for torts

Timing: Must be brought within 2 years of the date of death

Source: *Trustee Act* (Ontario), section 38

- The *Limitatons Act* (Ontario) appears to resolve the different limitation periods for torts and contracts, with both now being two years.

- This deadline is largely ignored by executors and sometimes even solicitors, often apparently on the basis that if the deceased chose not to bring a claim during her lifetime, the executors should not do so after death. In my view this is extremely risky, since on a passing of accounts it will not be the views of the testator as to a claim that are relevant, but rather whether the

claim should have been brought on an objective, prudent business decision.

- Executors and estate solicitors should be very careful before agreeing to be as forgiving as a testator may have been, because while the testator could not be sued during his lifetime for not moving forward, the executor can be.

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PASSING OVER:

WHO, WHAT, WHEN, WHY AND HOW

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An errant estate trustee so appointed can be removed from office by the Court upon proper grounds.[1] What happens, however, where the estate trustee has not yet assumed the position, and there is no formal office to "remove" him or her from? The simple answer is that the prospective estate trustee may be "passed over". The purpose of this paper is to explore the situations where a passing over may be appropriate, and the mechanics of passing over an estate trustee.

WHAT

"Passing over" is the mechanism whereby an estate trustee appointed by a Will is formally skipped, so that another estate trustee can assume the position of executor in his or her place. An order of the Court is required. This order declares that the appointed estate trustee cannot act, and another estate trustee is named in the Order, and given authority to apply for a Certificate of Appointment.

Passing over is to be contrasted with the formal removal of an estate trustee: a step that must be taken once the appointed estate trustee has assumed the position of estate trustee and has obtained a Certificate of Appointment.

Passing over is also to be contrasted with a renunciation, deemed or otherwise. Where an appointed estate trustee renounces, the alternate is free to apply for

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[1] *Trustee Act*, s. 37

the Certificate of Appointment, or any other person is entitled to apply, in accordance with s. 29 of the *Estates Act*[2]

The renunciation can be actual (whereby the appointed estate trustee delivers a Notice of Renunciation[3]) or deemed (which occurs when the appointed estate trustee does not respond to an Order to Accept or Refuse an Appointment as an Estate Trustee[4]. This Order for Assistance can be obtained over the counter under Rule 74.15(1)(a) of the *Rules of Civil Procedure*, and is often the easiest way of proceeding where a named estate trustee is not taking on the administration.)

An alternative to a passing over, rarely applied, is the granting of a restraining order. In one case, the court found that the named estate trustee had, after the making of the Will but before the death of the testator, become insolvent and addicted to drink. While he was not removed or passed over, the court made an order restraining him from intermeddling with the estate, and appointing a receiver.[5]

WHEN

The Application to pass over an estate trustee is brought before the Certificate of Appointment is obtained. Once the Certificate is obtained, it is necessary to bring an application for the removal of the estate trustee.

Whether one brings an application to pass over, or seeks an Order to accept or refuse an appointment will depend upon the circumstances that are hampering the administration of the estate. If it is felt that the named estate trustee simply cannot or should not act, then the passing over application should be brought. If, however, the circumstances are simply delay, and it is felt that the estate trustee needs to be nudged into assuming the position, then the better approach may be

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[2] S. 29 stipulates who can act where a person dies intestate, or the executor named in the Will refuses to prove the Will. Case law has established that the section establishes a priority, with spouses or common law spouses having first right, followed by next-of-kin of the closest degree.
[3] Form 74.11
[4] Form 74.36
[5] *Johnson v. McKenzie* (1890), 20 O.R. 131

to obtain an Order to accept or refuse. As discussed below, whether the estate trustee has taken any action as estate trustee will also impact on the decision.

WHO

Any person with a financial interest in the estate may bring the Application to pass over an estate trustee[6]. This would include any beneficiary, any alternate estate trustee, or any creditor of the estate.

In *Marino v. Marino Estate*[7], a spouse who was not provided for in a Will, but who had made a timely *Family Law Act* equalization application, had status to apply for the removal of an executor.

WHY

There are innumerable reasons why a named estate trustee may be passed over. Most of the reasons that can support an application to remove an estate trustee will, similarly, ground an application to pass over an estate trustee.

In the leading case of *Letterstedt v. Broers*[8], the Court observed that there was very little to guide the court with respect to the issue of removal of an executor, other than "general principals", being a duty to ensure that trusts are properly executed. The Court stated that the main guide must be the welfare of the beneficiaries. "Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they [the courts] proceed to look carefully into the circumstances of the case."

Reviewing the case law, it is clear that some of the reasons for passing over relate to the identity and status of the person named as executor. For example:

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[6] *Trustee Act*, s. 37(3)
[7] (2002), 47 E.T.R. (2d) 268
[8] (1884), 9 App. Cas. 371

- A minor is not allowed to act as an estate trustee during his minority. In such a case, the minor may be passed over during his minority. The Order should provide that the minor is entitled to apply for a Certificate of Appointment once he or she attains the age of eighteen (formerly, an Appointment *durante minore aetate*);

- A person criminally responsible for the person's death is not allowed to act;

- A bankrupt is normally not allowed to act;

- A corporation in liquidation cannot act;

- A convict serving a lengthy prison sentence may be passed over;

- An incapable person is not allowed to act.

In the cases justifying a passing over, as cited above, the circumstances of the named executor, without any evidence of improper or inappropriate action, tend to demonstrate that the named executor will not be able to carry out his or her duties in an impartial and objective manner.

Other reasons for passing over relate to the interests or actions of the named estate trustee. A named trustee whose personal interests conflict with his or her duty as estate trustee may be passed over. Thus, a named estate trustee may be passed over in the following circumstances:

- Where the executor has a claim against the estate, or the estate has a claim against the executor;

- Where the named executor demonstrated hostility towards the beneficiary or beneficiaries;

- Where the named executor demonstrated inordinate delay in the administration of the estate;

- Where there was friction and hostility between the named executors that has the effect of jeopardizing the proper administration of the estate. (However, in *Cote v. Cote*[9], the court stated that the removal and replacement of an executor should not be used as a means of dealing with an impasse between executors.)

Questions of conduct can also give rise to the basis of removal or passing over application: however, these usually arise *after* the appointment, and lead to an application for the removal, as opposed to the passing over.

In essence, what the court will look to ensure is that the principal duty of the executor, being the fair and proper administration of the estate, can be carried out.

However, the courts are not anxious to deny the named person the appointment. In *Re Weil*[10], the Ontario Court of Appeal considered an application to pass over a named executor. In doing so, the Laidlaw J.A. observed:

> The Court should no lightly interfere with the discretion exercised by a person in choosing the person or persons to act as his executors and trustees. ... It seems to me that such an interference with the discretion and choice of a person in preparing his last will and testament must be not only well justified but, as has been said before, must amount to a case of clear necessity.

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[9] (1999), 91 A.C.W.S. (3d) 889 (Que. C.A.)
[10] [1961] O.R. 888

In *Re Leguia*,[11] Lord Wright said:

> There is no doubt at all that the passing over of an executor and granting administration to other parties is an unusual and extreme course, though it is within the discretion of the Probate Court; but to do so without citing the executor is indeed a most extreme course. I assume, and I think I rightly assume, that it is within the discretion of the Probate Judge to take this course if he is asked to do so and the circumstances are very unusual circumstances which make it desirable that this course should be taken.

In *Letterstedt*, cited above, the court cautioned that if allegations of impropriety or charges of misconduct were not made out, or were greatly exaggerated, the court might consider that in awarding costs.

HOW

Section 5 of the *Trustee Act* allows the Court to appoint new trustees. Section 5(1) provides:

> The Superior Court of Justice may make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

Section 37 of the *Trustee Act* may, alternatively, be relied upon. This section provides:

> The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.

Note that section 5 of the *Trustee Act* deals with trustees, while section 37 pertains to personal representatives. A personal representative is defined in s. 1 as meaning an executor, and administrator, and an administrator with the will annexed: it does not include a trustee. The *Rules of Civil Procedure* define an "estate trustee" as meaning "an executor, administrator or administrator with the will

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[11] (1936), L.J.P. 72

annexed". At common law, an executor is not a trustee. Thus, s. 37 is likely the appropriate section to rely on for the passing over of an executor, while s. 5 would apply to a trustee.

Reliance may also be placed on s. 11 of the *Courts of Justice Act*, which establishes the Superior Court of Justice as a superior court of record, having all of the jurisdiction, power and authority historically exercised by Courts of common law and equity in England and Ontario. Thus, the Superior Court of Justice has "all of the jurisdiction necessary to deal with executors, administrators and trustees."[12]

As to the Application itself, it may be brought under Rule 14.05(3)(a) and (c), which allows a proceeding to be commenced by an application where the relief claimed is the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person, or where the relief claimed is the removal or replacement of one or more executors, administrators or trustees.

All beneficiaries must be joined as parties. Rule 9.01 of the *Rules of Civil Procedure* allows for a proceeding to be brought without joining the beneficiaries as parties, <u>except</u> where, *inter alia*, the proceeding is for the removal or replacement of an executor, administrator or trustee.

The authority of the court to "pass over" an estate trustee where there has been no probate was conclusively determined in *Carmichael Estate* (Re)[13]. There, Madam Justice Haley reviewed the history of the jurisdiction of the court, and found that the court had authority to pass over an executor under s. 37 of the Trustee Act.

A caveat, however, is that in the *Carmichael* case, Haley J. found that the named estate trustees *had assumed the administration of the estate*. If no such steps were taken, Haley J. indicated that the court would be without jurisdiction, and that the appropriate step would be to apply for an order for assistance, requiring the

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[12] Hull and Hull, *Macdonell, Sheard and Hull on Probate Practice*, 4th ed., p. 161
[13] (2000), 46 O.R. (3d) 630

named executor to accept or refuse appointment as Estate Trustee. If the appointment was accepted by the named executor, the objector would then have to bring a separate proceeding to apply for the removal of the trustee. (Haley J. later dismissed this two-step process as requiring the applicant to take "an unnecessary proceeding", but only in the context where the executor had already assumed the duties of executor and acted in the administration.)

In an earlier case, *Re Becker*[14], the court did not make such a distinction. There, the court found a clear conflict between the interests of the named executor in his capacity as executor and in his personal capacity (he had received significant gifts from the testator just before the testator's death). The court rejected the suggestion that the executor should be appointed first, and then an application for his removal could be brought. The court held that the passing over was justified and clearly necessary, and not premature.

In another earlier case[15], the court relied upon a provision similar to the present s. 29(3) of the *Estates Act*, which allows the court to grant administration, with or without the will annexed, to such person as the court may in its discretion appoint. However, as observed in *Carmichael*, this provision normally applies to administration only, and not to probate, or where the will does not appoint an executor.

In bringing the Application, one should try to lead evidence of actual intermeddling or involvement with the Estate, so as to be able to fall within the jurisdictional determinations of *Carmichael*. Otherwise, one should try to show a clear conflict or circumstances that disqualify the named estate trustee, so as to be able to come within the *Bowerman* and *Becker* cases. Failing that, and as a route of caution, one who challenges the status of the named executor prior to appointment may wish to consider the two-step process of first obtaining an order to accept or renounce, followed by an application to have the executor removed.

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[14] (1986), 57 O.R. (2d) 495
[15] *Re Bowerman* (1978), 20 O.R. (2d) 374