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Appointment of Succeeding Estate Trustees with a Will

Sometimes, during the course of the administration of an estate, one or more estate trustees may die or otherwise become unable to continue in administering the estate (for example, due to an onset of mental incapacity to manage property). Estate trustee turnover may be more likely in circumstances where the administration of an estate is prolonged.

Pursuant to the *Trustee Act*, RSO 1990, c T.23, where there are multiple estate trustees and one dies before the administration is complete, the survivor(s) will possess the same authority that the trustees together were able to exercise (section 3(2)). This provision is subject to a contrary provision appearing within the Will. However, the *Trustee Act* does not address what will happen in the event that the sole (surviving) estate trustee dies.

The *Rules of Civil Procedure*, RRO 1990, Reg 194, address the issue of what will happen in the event that the sole estate trustee dies, leaving no one automatically authorized to act in his or her place. If an alternate estate trustee is named in the Will, the alternate can seek appointment in the place of the original estate trustee(s). However, if there is no alternate estate trustee named in the Will (or the alternate named estate trustee decides to renounce his or her right to seek appointment as estate trustee), the executorship will "devolve to" (*i.e.* pass to) the estate trustee named in the original estate trustee's Will or to some other person on the basis of the consent of the beneficiaries who together have a majority interest in the remaining assets of the estate. In either scenario, the individual can apply to the Court for a Certificate of Appointment of Succeeding Estate Trustee With a Will by filing the materials listed at Rule 76.06 to obtain the authority to continue the administration of the estate.

There are limitations to the ability of an individual to seek appointment as Succeeding Estate Trustee with a Will. In circumstances where an alternate estate trustee is not named within the testator's Will, the executorship cannot devolve unless the sole estate trustee, or the last surviving estate trustee has obtained probate in respect of the testator's Will. In other circumstances, the original estate must be administered as if no executor had ever been appointed. This may result in significant delay and cost in the administration of the estate.

When assisting estate planning clients with the selection of estate trustees, it may be prudent to encourage clients to select an alternate to act in the event that the named estate trustee(s) dies prior to completing the administration of the estate, especially in circumstances where only one estate trustee is being named or where the named estate trustee(s) is the same age or older

than the testator. If a Last Will and Testament does not contemplate the appointment of multiple and/or alternate estate trustees, the estate may ultimately bear significant cost to facilitate its administration by an individual that the testator may not have selected him or herself.