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WHAT A TRUSTEE SHOULD (AND SHOULDN'T) DO

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Most Canadians are familiar with the duties of an estate executor. But what are the duties of the trustee? And what happens if the trustee doesn't perform them properly?

DIFFERENT ROLES; SAME PEOPLE

Anthea Law, partner at Vogel LLP in Calgary, says that, legally, an executor of an estate is distinct and different from a trustee. The former is the administrator of the estate, while the latter is charged with administering any trusts created under terms of the will.

That said, for the vast majority of estates, it's the same person who takes on both roles, she

explains.

In most estates, the confluence of these responsibilities isn't a problem. Law cites the typical "one-house estate" as an example—an estate of an elderly parent, consisting of a family home, some personal effects and a bank account, to be distributed equally between two adult children.

"The executor wouldn't need to hire a professional manager to invest the estate assets," Law says. "Pending distribution, the executor would have an obligation to prudently invest the estate assets. In Alberta, that's generally interpreted to mean a GIC or a bond—something that secures the capital, never puts it at risk, and earns a small-to-moderate amount of interest."

With more complicated estates, however, the role of trustee can be onerous. "It shouldn't be looked upon as a reward," she says candidly. "It's a burden. The position is that of a fiduciary, which is one of the highest duties under the law."

While the general idea of a trustee is easy enough to understand, as Law explains, a trustee has several important legal duties that dictate how they should invest, manage and protect assets within a trust (see "[Trustee duties](#)").

Trustees who fail to act strictly according to these duties do so at their own risk. "A trustee can be liable in tort law

Trustee duties

A duty to obey the trust instrument

This means acting in accordance with the powers granted.

for negligence,” she says. “And negligence can make the trustee personally liable to the beneficiaries of the trust.”

If, after considering such duties, trustees worry about getting in over their heads, Law says the prudent thing to do is get help. “Trustees are entitled to receive legal, tax, accounting and investment advice, and such expenses are payable from the trust.”

A FAIRLY HIGH STANDARD

Paul Fleming, founder, Fleming Estate Law in Kingston, Ont., explains the high standard of care can present headaches for trustees. “There are pitfalls: you haven’t properly secured assets in banks or trust companies. Or if you’re dealing with property, you may not have changed locks, or purchased fire insurance, or kept property in repair. You failed to invest cash properly.” He says any one of these missteps could mean beneficiaries have cause for action against the trustee for breach of trust.

As Fleming explains, the financial consequences of being found in breach of trust can be devastating. “In some cases, only compensation is reduced,” he says. “However, sometimes the consequences are far more grave.”

Fleming cites an Ontario case as an example. In *Zimmerman v. McMichael Estate*, the court found the estate trustee negligent in his duties; in addition to being deprived of compensation, the court ordered that the trustee reimburse the estate personally, and pay the beneficiaries more than \$280,000 in legal costs.

Because of the potential for personal liability, Fleming advises trustees to spend time with the trust document before accepting the job. “You would want to truly understand the nature of the document you’re dealing with.”

Beyond that, Fleming advises the best advice for trustees is to document their actions and keep a detailed paper trail that explains their decisions. “You have to be able to account for your actions and keep an updated record of financial accounting at all times. If you can do that, you’ve solved nine-tenths of your problems.”

Duty to act impartially

This means treating all beneficiaries equally.

Duty to act in the beneficiaries’ best interests

This means setting aside personal interests.

Duty to exercise discretion

This means choosing when to use this power, and when not to.

Duty of care

This means caring for property as someone of “ordinary prudence” would.

Duty of loyalty

This means not personally profiting from decisions made on behalf of the trust.



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