

What trustees should (and shouldn't) do

BY James Dolan September 30, 2016

You're probably familiar with the duties of an estate executor. But if you become a trustee, what are your duties? And what are the consequences if you don'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, but as a trustee, you are charged with administering any trusts created under the terms of the will.

That said, for the vast majority of estates, the same person would fill both the trustee and executor roles, she explains.

In most estates, taking on both 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, being a 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, being a trustee comes with several important legal duties that dictate how you should invest, manage and protect assets within a trust.

Failing to act strictly according to these trustee duties comes with big risks. "A trustee can be liable in tort law for negligence," she says. "And negligence can make the trustee personally liable to the beneficiaries of the trust."

If, after considering trustee duties, you worry about getting in over your head, 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 mis-steps could lead to action against you 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 the trustee to reimburse the estate personally, and pay the beneficiaries more than \$280,000[Allan Ton1] in legal costs.

Because of the potential for personal liability, Fleming advises trustees to spend some 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.”

Trustee duties

As a trustee, you have specific duties under estate law:

- A duty to obey the trust instrument
A trustee must act in accordance with the powers granted in the will appointing them, and must not act beyond the limits of those powers.
- Duty to act impartially
You must treat all beneficiaries equally.
- Duty to act in the beneficiaries’ best interests
You must set aside your own personal interests and views when making investment decisions for the assets in the trust, and instead act so that the beneficiaries receive the greatest financial benefit.
- Duty to exercise discretion

The terms of a trust will often include decisions that require you to use your discretion (e.g. whether to encroach on capital to pay for a beneficiary's education, or to protect her health and welfare). While you may decide not to exercise that discretionary power, you must still consider whether discretion should be exercised.

- **Duty of care**
You must care for trust property in the same way as someone of ordinary prudence would care for trust property.
- **Duty of loyalty**
You cannot place yourself in a position where personal interests conflict with your duty as trustee. While you can accept compensation for your work, you must not personally profit from your position or from decisions made on behalf of the trust.