PRACTICE GEMS: THE ADMINISTRATION OF ESTATES 2014

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Identifying Drafting Errors During an Administration

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I. Introduction

The role of estate trustee can be a difficult one, bringing with it numerous obligations and expectations and requiring the trustee to act in a balanced, tactful and neutral manner, particularly when he or she is faced with disgruntled beneficiaries or unclear or contradictory instructions in the testamentary instrument. A prudent trustee might also be aware of the potential liabilities that come hand in hand with the responsibilities involved in the administration of the estate. For trustees to fulfil their duties and obligations to the best of their abilities, it is necessary to ensure that they can do so without fear of being reprimanded for exercising their judgement – or for seeking guidance where there is a legitimate legal question.

Estate trustees are protected by statutory remedies, often found in provincial trustee acts. In Ontario, one of these safeguards is section 60(1) of the *Trustee Act*[1] (the "Act"), which provides that an estate trustee may apply to the court for advice when managing or administering trust property or regarding the assets of a ward, a testator, or an intestate. In addition, section 60(2) of the Act sets out that by acting upon such advice or direction, the trustee will be deemed to have discharged his or her duties, shielding the trustee from conviction of fraud, wilful concealment, or misrepresentation. Moreover, the Canadian courts have frequently reiterated that trustees are not merely permitted, but are under a duty to seek the court's advice when they are legitimately in doubt about an aspect of administration. Section 35 of the Act protects trustees who have technically breached their responsibilities under the trust, but have otherwise acted to administer the trust honestly and reasonably.

Despite the fact that the above provisions have been implemented to protect trustees in the administration of their duties, the courts have historically been somewhat inconsistent with regard to whether an application was or was not appropriate,[2] leaving trustees – and their counsel – uncertain about whether or not the risk of proceeding with an application outweighs the legitimate need for guidance. Notably, there are numerous cases where the courts have deemed an application for advice and direction inappropriate or unwarranted; in these situations, trustees can be held personally liable for costs, making the process of applying for advice and direction much less appealing. As such, it is not surprising that executors and their counsel may have difficulty ascertaining whether or not an application for advice and direction from the court will be well received.

This paper will focus on how a trustee should move forward after identifying drafting errors during an estate administration and provide a framework for trustees and their counsel to use when making a decision about proceeding with an application to the court for advice and direction. The first part of the paper sets out the appropriate circumstances in which a trustee can and should apply to the court for advice and direction, while concurrently discussing the body of case law on the matter. The second part focuses on practicing defensively, discussing situations where the court has made it clear that it is inappropriate to ask for advice and direction, and setting out the practical steps of making a proper

[1] R.S.O. 1990, c. T.23.

[2] See the contradictory decisions involving the same corporate trustee in *Fales v Canada Permanent Trust* (1976), 70 DLR (3d) 257, 1976 CarswellBC 240 (SCC) [*Fales*]; and *Wright, Re* (1976) 74 DLR (3d) 504, 1976 CarswellOnt 567 (Ont HC).

application. Ultimately, this paper will provide a comprehensive picture of applications for advice and direction brought by estate trustees, minimizing the ambiguity that has developed through inconsistent or unclear decisions made by the courts.

II. When Should an Executor Bring an Application for Advice and Direction?

There are a number of specific situations where the trustee should apply for the court's advice and direction, which generally arise when an executor requires help with a problem stemming from a genuine legal issue.[3] Some of these instances include where trustees have neglected to exercise their discretion, where co-trustees are deadlocked on one or more issues, where the trustee seeks the court's approval after having exercised business discretion but prior to enacting the decision, where a hypothetical or academic question is put to the court, where there is a question of ownership between the estate and third parties, where the question is one of trite law, and where the trustees are hostile to one another.[4] A thorough understanding of why courts have been willing to offer advice and direction in the aforementioned situations is useful in developing an awareness of when to bring such an application.

The Exercise of Discretion

Time and again, the courts have made it clear that they are unwilling to exercise a trustee's discretion in his or her place.[5] The premise behind this is simply that the will or testamentary instrument conferred discretion on the trustee, not the court. Moreover, trustees acting honestly and with good intention can avail themselves of the statutory protections to avoid liability for poor business decisions.[6] The proper and typical application involving the discretion of the trustee concerns the actual construction of the will itself and an interpretation of an unclear or contradictory provision.

In *Fulford (Re)*, Middleton J. addressed the concept of a trustee hesitant to exercise the discretion assigned by the will, noting that it is not the court's responsibility to determine what the most advantageous business decision might be. Specifically, he made the following oft-quoted statement:

> The executors cannot come to the court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorized to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.[7]

This concept ties into the idea that the court will not exercise a trustee's business judgment, which is discussed in a more fulsome way below. Essentially, the court can help interpret, but will not take over for a trustee who is neglectful of or ineffectual in their role. Trustees cannot offload their responsibility in the event that they are uninterested or nervous about making a poor business decision, but if the trustee is truly unable to make a decision due to a legal question – such as whether certain assets should be paid out to beneficiaries or kept in trust in the case of unclear instructions – the court will be willing to provide advice and direction.

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[3] Carmen S. Thériault, ed, *Widdifield on Executors and Trustees*, 6th ed – Release 9 (Toronto: Thomson Reuters Canada Limited, 2012) at 12.3.1 [*Widdifield*].
[4] *Ibid* at 12.3.
[5] Donovan W.M. Waters, Q.C., Mark Gillen, and Lionel D. Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2012) at 1155 [*Waters' Law of Trusts*].
[6] *Supra* note 1 at s 35.
[7] *Fulford, Re*, [1913] OJ No 139, 1913 CarswellOnt 854 at paras 23-24 (Ont SC).

Trustees are Deadlocked

The proper construction of the power may also be a problem where joint trustees are in disagreement as to the exercise of discretion. In such cases, trustees are looking to the court to make a decision because they are unable to agree as to the manner of exercise.[8] Though it is within the power of the court to remove a trustee in the situation of a deadlock if the beneficiaries' interests are being compromised by the dispute, such an action is rare. More frequently, the court will determine the discrete matter at issue, as in *Re Haasz*.[9] In that case, given that both the discretionary powers to sell and retain had been conferred on the trustees, both LeBel J. and Mordon J. noted that it was in the interests of the residuary beneficiaries of the estate for the court to intervene and end a deadlock when the trustees are clearly unable to reach an agreement about how their discretion should be exercised.[10] The court dismissed the appeal, upholding the trial judge's decision that the assets in question should be sold, and not removing any of the six deadlocked trustees.

In *Re Billes*,[11] a trust company put a planned course of action before the court, which was subsequently approved as being prudent and correct. The court referenced *Re Haasz*, and noted that in other cases where the court seemed to make contradictory decisions, it was simply because on the particular facts of those cases that intervention was inappropriate.[12] In the case at bar, where the executors had two discretionary powers conferred and were required to be in unanimous agreement, yet could not reach such agreement, the court was right to intervene to prevent the income and capital beneficiaries from suffering.[13]

Where trustees are deadlocked over a decision that will negatively impact the beneficiaries' interest if not broken, the trustees are required to apply to the court for advice and direction. In *Fales v Canada Permanent Trust Co*, the court criticized the corporate trustees of an estate for failing to sell shares that formed a portion of the estate before they drastically depreciated in value. Canada Permanent acted as co-trustee with the testator's widow, who had resisted an opportunity referred (but, importantly, not specifically recommended) by Canada Permanent to sell the shares for a decreased value prior to their devastating depreciation. Canada Permanent made another vague suggestion to its co-trustee the following year regarding the sale of shares, which she agreed to consider, though ultimately no decision was made. In the year leading up to the estate's bankruptcy, Canada Permanent also neglected to recommend to her that the shares be sold immediately in light of their decreasing value.

When the action was brought against Canada Permanent, the beneficiaries of the estate argued that Canada Permanent had breached its duty to make a proper inquiry and exercise reasonable skill and care. The court opined that Canada Permanent had clearly breached its duty, noting that the co-trustee's refusal to sell was insufficient to insulate Canada Permanent from culpability. Specifically, the court stated that "it would not have been enough for Canada Permanent merely to have acquiesced in the refusal of its co-trustee to sell; if after a recommendation and proper explanation Mrs. Wohlleben remained adamant, the proper course would have been to have applied to the court for advice and directions."[14] This case illustrates that regardless of the fact that the court has been clear that trustees should only

[8] *Waters' Law of Trusts*, *supra* note 5 at 1156-1157.
[9] *Haasz*, *Re* (1959) 21 DLR (2d) 12, 1959 CarswellOnt 234 (ONCA).
[10] *Ibid* at 7 and 22.
[11] *Billes, Re* (1983) 42 OR (2d) 110, 1983 CarswellOnt 613 (Ont HC).
[12] *Ibid* at 23.
[13] *Ibid* at 24.
[14] *Fales*, *supra* note 2 at 40.

apply for advice and direction in cases wherein it is legitimately required, there may also be sanctions for a failure to make such an application where it is required.

In *Kaptyn Estate, Re*, two co-executors of an estate brought motions before the Court, one seeking leave to commence an action on behalf of the estate as sole plaintiff against several defendants (with his brother, the co-executor, joined as a co-defendant), and the other seeking an order directing that the co-executors act jointly to retain a lawyer to commence an action against the same group of defendants on behalf of the estate. D.M. Brown J. returned to Middleton's J.'s famous passage, quoted earlier, from *Fulford (Re)*, and noted:

> As a general rule, courts do not give advice or directions as to whether or how a person should commence an action […] Instead, courts adjudicate actions once commenced; they do not offer advice as to whether to sue, whom to sue, or how to sue. It is the obligation of the executors, not the courts, to decide whether an action should be commenced for the benefit of the estate and how to do so. Any risks associated with a decision about whether or not to sue should rest squarely on the shoulders of the executors.[15]

In the judgment in the case made in April 2011, Justice Strathy noted:

> The parties acknowledge that the court has inherent jurisdiction over the activities of trustees and that where the trustees are unwilling or unable to exercise their discretion, or where a disagreement makes it impossible to exercise their discretion, the court is entitled to direct the trustees to take appropriate action […] While the removal of deadlocked trustees is one option, the court can intervene and resolve the impasse between the trustees by, in effect, making the "casting vote."[16]

Later in his reasons, Justice Strathy provided specific direction to the Trustees to "bring the necessary application for opinion, advice or direction" if the parties were unable to agree on an expedited process.[17] This point of view was reiterated by Perell J. in the most recent iteration of the ongoing litigation, where he noted that "when the Estate Trustees have shown themselves to be at an impasse, all the parties have turned to the court to break up the logjam. Justice Strathy went so far as to refer to himself as the third trustee."[18] In that case, the court repeatedly intervened, deeming it appropriate to continue to offer its advice and direction after it did so initially.

The Exercise of Business Judgement

As discussed briefly above, a trustee cannot apply to the court as a means of discarding the discretion intended to be exercised by the trustee himself. In *McKay Estate v Love*,[19] Steele J. differentiated between the instances where the court would be willing to offer advice and direction about business decisions made by the trustee, emphasizing that it was important that the business decision be made by the trustee prior to seeking direction from the court. A trustee could not apply to the court ahead of time to request business advice; however, if the decision to sell had been made pursuant to the powers conferred on the trustee by the will, the trustee was within his rights to apply to the court for approval of the sale.[20] The court had been faced with a situation where the trustee had previously made the decision to sell and sought approval from the court in light of his fear that a beneficiary would litigate if he followed

[15] *Kaptyn Estate, Re*, [2009] OJ No 1685, 2009 CarswellOnt 2160 at paras 30-31 (Ont SCJ).
[16] *Kaptyn Estate, Re*, [2011] OJ No 1631, 2011 ONSC 2212 at para 17(Ont SCJ).
[17] *Ibid* at para 44.
[18] *Kaptyn Estate, Re*, 2013 ONSC 4908, 2013 CarswellOnt 10156 at para 8 (Ont SCJ).
[19] *McKay Estate v Love*, [1991] OJ No 172, 1991 CarswellOnt 548 (Ont Gen Div).
[20] *Ibid* at para 10.

through with the sale. In offering the court's opinion about the propriety of the sale, Steele J. directed that the court should not interject its view on whether the sale was advantageous, as that would construe an imposition into the decision-making process; rather, the court should simply consider, based on the evidence before it, whether or not the sale impacted the trustee's duties of good faith or fairness.[21]

The BC Supreme Court considered this further in *von Hopffgarten Estate v Rommel*,[22] where the Court was asked to provide an executor with advice and direction about whether or not he might sell real property to pay off the estate's liabilities. The Court echoed the principle stated in *McKay Estate*, noting that its role was not to advise an executor "about business decisions he or she makes pursuant to the discretionary power bestowed under a will."[23] Essentially, the trustee can come to the court after the discretionary decision of how to invest or dispose of an asset has already been made in order to seek approval of the decision; however, the trustee cannot come to the court and request direction on how to make said investment in the first place.

The Issue Is Based on Actual Fact

The court is more amenable to providing advice or direction where the question is based on actual fact, and not on a hypothetical or academic question. The BC Supreme Court considered an executor's application for direction in *Ketcham v Walton*.[24] In that case, the testator left his estate to a number of friends and charities, disinheriting his estranged, adult dependent children. The testator also added a clause to the will wherein he outlined his reasons for doing so and instructed the executor to actively defend the will in the event that any of the disinherited children brought an action to vary the will. Notably, the clause specifically authorized the executor to go to great legal lengths to defend against any action for variation, even by depleting the assets in the Estate, if necessary. The disinherited children brought an action to vary the will and the executor, in turn, brought an application to the court for direction in the interpretation of the defence clause in the will and on how to proceed in the face of the claim.

The court was willing to offer advice and direction, concluding that the facts constituted proper circumstances for the court to provide direction pursuant to British Columbia's *Trustee Act*, given that the executor was seeking a proper interpretation of the will and needed advice about what was the proper course of conduct in the face of the children's action.[25] Moreover, the issue was not simply based on a hypothetical or academic inquiry as the specific scenario contemplated by the will had come to pass and the Executor, from a practical standpoint, required directions on how he should proceed.[26] The clause in question specifically directed him to act contrary to the mandate that "the basic principle of an Executor's duty to specified and potential beneficiaries of the Will is neutrality."[27]

Recent Situations Where the Court has Given Advice and Direction

In *Wieckoski Estate, Re*, the Saskatchewan Court of Queen's Bench provided advice and direction on the application made by the Public Guardian and Trustee of Saskatchewan on the issue of whether it was authorized to distribute the assets of an estate to the deceased's nieces and nephews,

[21] *Ibid* at para 13.
[22] *Von Hopffgarten Estate v Rommel*, 2012 BCSC 393, 2012 CarswellBC 679 (BCSC).
[23] *Ibid* at para 37.
[24] *Ketcham v Walton*, 2012 BCSC 175, 2012 CarswellBC 320 at para 17 (BCSC).
[25] *Ibid* at para 6.
[26] *Ibid*.
[27] *Ibid* at para 10.

answering in the affirmative.[28] Notably, B.A. Barrington-Foote J. stated, "Although I am not aware of any Saskatchewan case law on point, it is my opinion that the court has jurisdiction […] to provide its advice, opinion or directions as to whether the assets of the estate may be distributed to the potential beneficiaries identified by the applicant."[29] The court was willing to intercede because the trustee had brought a question "respecting the management or administration of the estate" before the court that would not determine the entitlement of certain beneficiaries or foreclose outside claims, but rather was simply one of administration.[30]

Recently, in *Baliko Estate v Baliko*,[31] the British Columbia Supreme Court considered an application made by an executor requesting the court's direction in determining the intended beneficiary of the estate in question. Having determined that the executor took no position on the competing claims to the estate, the court eventually named the correct beneficiary and awarded costs on a solicitor-and-client basis payable to all participants in the litigation out of the estate. The court noted that the executor "had no option but to refer this matter to the Court for resolution,"[32] and reiterated that litigation costs in the course of the interpretation of a provision in a will comprise part of the estate administration process and are thus payable by the estate.[33] The court confirmed that the trustee was in the right for bringing an application where there were legitimate competing interests that deserved a hearing and required resolution.[34]

III. Practicing Defensively

In order to better understand how to practice defensively and minimize the chances of a reprimand from the court, it is useful to also consider the situations when the court has declined to give advice and direction. A trustee or the solicitor for a trustee must always ensure that the trustee be neutral when applying to the court for advice and direction on the question of whether it has discretion and whether there is a duty to maintain an even hand. The trustee should not be asking the court for advice and direction on how its discretion should be exercised, such as where or how to invest assets that the will has instructed the trustee to periodically invest. In fact, Professor Donovan W.M. Waters, Q.C., recently noted that "it is easier to say what the courts will not do rather than what they will do under the *Trustee Act*."[35]

Costs Consequences of an Improper Application

It is a well-established principle in the jurisprudence that trustees should be indemnified for reasonable legal costs incurred in the due administration of an estate or trust, including legal costs. In his recent article, Professor Oosterhoff reiterated this idea, noting "an application for advice and directions is normally regarded as reasonably necessary for the proper administration of the estate, although the estate will not have to bear the costs if the court finds that the application was unwarranted or unnecessary"[36] It is the latter half of Professor Oosterhoff's comment, coupled with the sanctions from the

[28] *Wieckoski Estate, Re*, 2013 SKQB 297, 2013 CarswellSask 584 (SKQB).
[29] *Ibid* at para 11.
[30] *Ibid*.
[31] *Baliko Estate v Baliko*, 2013 BCSC 2485, 2013 CarswellBC 4060 (BCSC).
[32] *Ibid* at para 16.
[33] *Ibid*.
[34] *Ibid*.
[35] *Waters' Law of Trusts*, *supra* note 5 at 1164.
[36] Albert H. Oosterhoff, "Indemnity of Estate Trustees as Applied in Recent Cases," (2013) 41 The Advocate's Quarterly 144.

court discussed below, that contribute to the confusion and hesitation surrounding the decision to bring an application for advice and direction.

In some cases, the courts have injected ambiguity into what otherwise looks to be a straightforward statutory protection. Regardless of the protection offered by section 35, such a shield may not be afforded to trustees who neglect to seek advice and direction pursuant to section 60(1).[37] Justice Cullity discussed this in *Merry Estate v Merry Estate*,[38] where he commented that the trustee in that case should not face criticism for bringing an application for advice and direction. He delved into the statutory protections in Ontario, explaining:

> Section 60 of the Act entitles trustees to seek the opinion, advice and direction of the court with respect to the administration of a trust and, in cases where significant doubt exists as to the scope of their powers and responsibilities, they may not be protected under section 35 if they fail to do this. Although such applications must not be made frivolously – and not merely to relieve applicants from making decisions that are part of their responsibilities under the terms of the trust – they are entitled to have their costs paid out of the trust property if, in the opinion of the court, the application was properly brought.[39]

In that case, Justice Cullity found that the application was properly brought and subsequently awarded the trustee full indemnity costs for the legal expenses he incurred in the process of bringing the application. The principle that trustees should be indemnified for reasonable legal costs incurred in the due administration of an estate or trust, including legal costs, is widely accepted and frequently cited.[40]

Where the testator's vague or contradictory instructions are the root of the problem, the court will not hold a trustee personally responsible for bringing an application for advice and direction. The recent Ontario Court of Appeal case, *Gicas Estate v Gicas*, sheds more light on a situation where a court is willing to give advice and direction. There, the Court made a costs award in favour of the trustee, emphasizing the principle that costs of reasonable proceedings should not be personally borne by a trustee when certain circumstances require resort to the court.[41] There, an estate trustee had made an application to the court for advice and direction about the quantum of assets in the estate of Constantine Gicas. The trustee believed that certain assets fell into the estate; however, the Respondent to the application, the trustee of a separate family trust, believed that the assets were part of the separate trust and did not form any of the estate.

Initially, the application judge ruled against the trustee, holding that the assets in question were part of the trust and not the estate, and ordering costs against her personally, both of which she appealed. The Court of Appeal affirmed the application judge's decision insofar as the assets were concerned, but granted leave to appeal the costs decision both because he had not provided adequate reasons for the costs award and, without sufficient reasons, it was not possible to determine whether the proper approach to the costs award had been applied. The principle that where problems in the administration of an estate are caused by the testator, it is appropriate for the estate to bear the costs has

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[37] Chris M. Graham, "The Importance of Seeking the Court's Advice in Trust Administration" *Toronto Estate Law Blog* (13 October 2010), online: Hull and Hull LLP <http://estatelaw.hullandhull.com/>.
[38] *Merry Estate v Merry Estate*, [2002] OJ No 4472, 2002 CarswellOnt 3993 (Ont SCJ) [*Merry Estate*].
[39] *Ibid* at 35.
[40] See *Goodman Estate v Geffen*, [1991] 2 SCR 353, 1991 CarswellAlta 91 (SCC); *Gicas Estate v Gicas*, 2014 ONCA 490, 2014 CarswellOnt 8536 (ONCA) [*Gicas*]; and *Merry Estate*, *supra* note 32.
[41] Heather B. Hogan, "The Court of Appeal Reaffirms the Principle of Trustee Indemnification" *Whaley Estate Litigation Blog* (18 July 2015), online: Whaley Estate Litigation, <http://whaleyestatelitigation.com/blog/>.

been cited frequently, particularly in recent cases.[42] In this case, the testator's vague instructions were the cause of the problem the trustee faced in the interpretation of the will. The trustee had the responsibility of administering the will. The Court of Appeal was aware of this, noting "To do so she needed to know the extent of the assets with which she was dealing. Constantine Gicas could provide no assistance on this issue. Ms. White's recourse to the courts was a reasonably necessary step for her to take as Estate Trustee. The Estate should be responsible for her costs of the application and of the appeal."[43]

Another matter for the trustee to keep in mind when bringing an application before the court is that the trustee is under an obligation to maintain a neutral position or risk facing costs consequences. In *Mackey Estate v Mackey*, the trustee "defended its actions with warmth and vigour, in an obvious attempt to protect itself,"[44] attracting the sanction of the court. The trustee cannot be seen to favour one interpretation over another, or place the interests of one beneficiary before those of one or more of the others.

The above discussion does not mean that trustees are always at the mercy of a frustrated court. The courts have been understanding of tight timelines faced by trustees; in *Reinisch Estate, Re*[45] a Manitoba Master found that, contrary to allegations made by the plaintiff that the executors of the estate in question had failed to seek advice and directions from the court, the executors did not have an opportunity to advance such an application, given the timeline between the actions that were brought against them. The court is aware that trustees are not infallible and are sometimes placed in situations where, in spite of the fact that advice and direction from the court are required in order to reach an appropriate resolution, there is not always sufficient time to do so. In such cases, where it is not due to the trustee's intentional inaction that advice and direction were not obtained, the trustee will not be penalized.

Where the Court will Decline to Offer Advice and Direction

It is considered improper for a trustee to bring an application for advice and direction in cases where the wording of the will or the testamentary instrument is clear and unambiguous. In such cases there is no need to waste the court's time and the estate's assets on an unnecessary application. As discussed above, the court has repeatedly established that it will not entertain applications that are unnecessary and ill-advised. In *Montreal Trust Co of Canada v James*[46] the executor applied to the court for a grant of powers not bestowed on the executor by the will, to the staunch opposition of the beneficiaries. The executor had claimed that he was acting in the best interests of the beneficiaries, though the court was of a different mind, noting, "[i]t is important that an executor or trustee not be deterred from seeking the advice and direction of the Court in a matter where there is room for serious doubt or difference of opinion. That in my judgment was not this case."

The court in *Dornan v Dornan Estate*[47] considered whether or not it was appropriate for the court to give advice and direction concerning whether a personal representative should institute legal proceedings. In answering that question, Veit J. noted:

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[42] See *Gicas*, *supra* note 40; see also *Sawdon Estate v Watch Tower Bible and Tract Society of Canada*, 2014 ONCA 101, 2014 CarswellOnt 1274 (ONCA).
[43] *Gicas, supra* note 40 at 73.
[44] *Mackey Estate v Mackey*, [1986] OJ No 410, 1986 CarswellOnt 666 at 10 (Ont HCJ).
[45] *Reinisch Estate, Re*, 2011 MBQB 200, 2011 CarswellMan 457 (MBQB).
[46] *Montreal Trust Co of Canada v James*, (1985) 19 ETR 135, 1985 CarswellBC 616 (BCSC).
[47] *Dornan v Dornan Estate*, 2002 ABQB 766, 2002 CarswellAlta 1005 (ABQB).

> The court does not give advice and directions to personal representatives as to whether or not they should initiate law suits. A personal representative can be sued if he does not litigate when he should have and can also be sued if he litigates when he should not have done so. The court therefore does not give advice to a personal representative as to whether legal proceedings should be undertaken not only because the testatrix has chosen a personal representative – not the court – to make those decisions, but also because the court may be called upon to decide whether a personal representative's decision to litigate or not to litigate was proper.[48]

This passage was adopted by P. Hrabinsky J. in *Powell Estate, Re*, where the court considered an application by the administrator of an estate for the advice of the Court regarding the extent of his discretion in administering the estate. The administrator had been asked by one of the four adult child beneficiaries to commence legal proceedings against two of the other beneficiaries based on allegations that they misappropriated assets. The administrator inquired about how he should exercise his discretion and what his required standard of care was. The Court turned to *Dornan* and *Collins*, ultimately stating, "I had considered setting a time limit for the guidance of the administrator to follow in his administration. However, on reflection, the most I can say is that the administrator should use diligence in proceeding with the administration of the estates."[49]

Process for bringing an application for direction

Having addressed the question of when it is appropriate – or inappropriate – to bring an application before the Court asking for advice and direction, it is also useful from a practical standpoint to consider what materials should comprise the application. When applying to the court for advice or direction, such proceeding should be brought by way of motion, application, or summary format. When requesting an interpretation of a will, the application should be brought under subparagraph (a) of the *Ontario Rules*, which pertains to opinion, advice and direction, in conjunction with subparagraph (d), which pertains to the interpretation of a will.[50]

The title provided should set out the question(s) before the court regarding the administration of the estate, as well as note that the action is being brought pursuant to the relevant Act, Rule, or other additional statute. For the most part, applications are brought by asking the court a number of questions that can be answered in a yes or no format. The evidence before the court should be in the form of an affidavit that includes a complete chronology of the facts and circumstances that led to the application. In past cases where the will itself was unambiguous as to the testator's true meaning and intent, evidence about the surrounding circumstances was not included. However, this resulted in odd and inconsistent results and eventually the Court changed its position. Direct extrinsic evidence is still not admissible, except in limited circumstances, but indirect evidence of the testator's intention is admissible when it can shed light on the preparation and execution of a testamentary instrument.

Rather than simply proceeding with the application to the court, a trustee should first consult with external counsel. In *Re Collins*,[51] the court specifically noted "where trust companies accept the task of administering estates for gain, they ought to be willing to be judged by that standard. In case of doubt or difficulty they can secure sound advice from their own solicitor, and should, generally speaking, act on it instead of expecting the Court to tell them what to do."[52] *Re Collins* and *Re Banko* both stand for the

[48] *Ibid* at 24.
[49] *Powell Estate, Re*, 2002 PESCTD 81, 2002 CarswellPEI 113 at para 17 (PESCTD).
[50] *Widdifield*, *supra* note 3 at 12.4.
[51] *Collins, Re* [1927] 4 DLR 770, 1927 CarswellOnt 139 (Ont SC).
[52] *Ibid*.

proposition that only questions that are impossible for the trustee to answer and make the administration of the estate unfeasible should be put before the court.[53]

A Notice of Application, governed by Rules 38.05 and 14.07, must be issued at the court before it is served. Additionally, under Rule 14.07, a copy of the originating process must also be filed with the court when it is issued. It is best practice to serve the Notice of Application and supporting materials on all persons with any interest in the outcome of the questions asked of the court. This includes person with even a contingent interest, and, in the case of a possible intestacy or partial intestacy, the Notice of Application should also be served on next-of-kin. There is a 10 day minimum Notice period, with the exception being where the Notice is served outside of Ontario; in such cases it must be served a minimum of 20 days before the date of the hearing.

IV. CONCLUSION

Ultimately, the jurisprudence on the matter reiterates consistently that for an application to be appropriate, the question must not require the court to stand in the place of the trustee. A trustee can seek the court's approval after a business decision has been made, as a means of confirming the legality of enacting said decision. The court cannot, however, exercise a trustee's discretion in place of the trustee. Rather than turning to the court to answer any given question, a trustee should first consult external counsel, after which point it may be appropriate to request the court's guidance only for legal questions, mainly on the construction of the discretion conferred, that are impossible for the trustee to answer alone and must be resolved in order to properly administer the estate.

Despite the statutory protections that theoretically allow a trustee to administer an estate without fear of personal sanction, there are expectations that the trustee will act in a diligent and responsible manner and will seek advice and direction where there is no clear answer. It is possible for trustees to face personal costs consequences for inappropriate applications or in situations where they have negligently failed to seek advice and direction where required. However, with a thorough understanding of the basic reasons that the court is amenable or hostile toward applications for advice and direction, it is easy to practice effectively and defensively after having identified a drafting error or encountered an unforeseen obstacle during the administration of an estate.

[53] Kimberly A. Whaley, "Applications for Advice and Directions," *Whaley Estate Litigation Blog* (6 October 2008), online: Whaley Estate Litigation, <http://whaleyestatelitigation.com/blog/>.

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