

Wills & Estates
Winter Term 2024

Lecture Notes – No.16

XVII. PROBATE AND ADMINISTRATION OF ESTATES

- A deceased person leaves his or her financial affairs to be wound up on his or her death. Rather than think about the deceased as an individual, think of him or her as a business which needs to be wound up – people need to be informed, creditors need to be paid, inventories of assets need to be created, taxes need to be paid, etc. Happily there are differences between people and businesses, lawyers notwithstanding.
- There may be a Will that names a specific person to administer the estate. We have referred to this person using the traditional terms executor or executrix, although we must now use the language of the statute and identify that person as the *Estate Trustee with a Will*.
- An Estate Trustee designated in a valid Will draws his or her authority from the Will itself and from the moment of the deceased's death. The *Certificate of Appointment* in such cases (probate as it was called) is conclusive evidence of the authority of the Estate Trustee named in the Will to administer the estate.
- A person might also die intestate in which case the Court may appoint (on application) an *Estate Trustee without a Will* to administer the estate (administration as it was called). Here the Estate Trustee draws his or her authority not from the Will but from the Court's certificate.
- **However appointed, the Estate Trustee is a fiduciary to those interested in the estate and will usually require the advice of a solicitor to discharge the duty of care applicable to him or her, as well as to avoid breach of fiduciary obligations.** Even where a solicitor acts as an Estate Trustee, the nature of the duties of each office are different and the level of remuneration differs accordingly – **a solicitor may not seek compensation at his or her normal rate for legal services for discharging his or her duties as Estate Trustee.**
- It is not always the case that a certificate of administration is required. A small estate of few assets may only require a true copy of the Will to allow the Estate Trustee named in it to deal with third parties.

FORM 74.13
Courts of Justice

01- [redacted] /15

CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF Irma [redacted], deceased,
late of City of Toronto
occupation Business Person
who died on 21 October [redacted]

CERTIFICATE OF APPOINTMENT
OF ESTATE TRUSTEE WITH A WILL

Applicant	Address	Occupation
Gary M. [redacted]	[redacted] Toronto, Ontario, [redacted]	Barrister and Solicitor
Maria [redacted]	[redacted] Ontario, [redacted]	Bookkeeper

This CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL is hereby issued under the seal of the court to the applicant named above. A copy of the deceased's last will (and codicil(s), if any) is attached.

DATE OCT 22 2015

N. Marjadsingh
Registrar

Address of court office: **Natasha Marjadsingh**
330 University Avenue, 7th Floor
Toronto, Ontario M5G 1R7



Sample Issued Certificate of Appointment

The Statutes

- The ***Estates Act***, R.S.O. 1990, c.E.21, deals with the process usually called probate (with a will) or administration (no will) – that is, the judicially recognized right of a living person to deal with the assets and affairs of a deceased person in the form of a formal Certificate issued by the Court.
- The ***Estates Administration Act***, R.S.O. 1990, c.E.22, deals with the general duties of the deceased's personal representative and gives him or her powers in dealing with property (particularly in a manner that eases strict rules in respect of real property at common law in respect to the transfer of title) which facilitates the discharge of the deceased's obligations to creditors and transfer of assets to those entitled to those assets. In general, the personal representative will have the property of the deceased vested in his or her name and owe a trust obligation to beneficiaries under the will and those entitled at law under the intestacy rules.
- The ***Estate Administration Tax Act***, 1998, S.O. 1998, c. 34, deal with the rate of tax and assets that are taxable where a Certificate of Appointment is required. The current rate is .5% on first \$50K, and 1.5% thereafter. The tax and its collection is presently subject to statutory reform.
- The ***Rules of Civil Procedure*** deals with estates matters in Rules 74 and 75 specifically.

Types of Certificates of Appointment

See [Rule 74 of the Rules of Civil Procedure](#), and, the applicable provisions of the Estates Act.

Name	Description	Reference
certificate of appointment of estate trustee with a will	issued where there is a valid will and named estate trustees are able and willing to act (includes the appointment of trustee where there is a will, no named estate trustee trustee is alive or able or willing act)	R.74.04
certificate of appointment of estate trustee without a will	issued where there is no valid will	R.74.05
certificate of appointment of foreign estate trustee's as estate trustee without a will	issued where a foreign Trustee nominates an estate trustee to administer assets in Ontario	R.74.05.1

certificate of appointment of estate trustee to succeed estate trustee with a will	issued where a second supplemental grant is required, such as on the happening of event that requires the addition of another named estate trustee	R.74.06
	under the will. This also includes the appointment of a trustee to replace the estate trustees and trustees initially named in the will.	
certificate of appointment of estate trustee to succeed an estate trustee without a will	issued where an administrator of an estate dies leaving assets unadministered.	R.74.07
confirmation by resealing of the appointment of an estate trustee with or without a will	issued where a grant of probate has been given by a Commonwealth court outside Ontario; the grant may be "resealed" by the Superior Court of Justice of the county in which the deceased had assets	R.74.08
certificate of ancillary appointment of an estate trustee with a will	issued where a grant had been given by a non-Commonwealth court, an ancillary grant in Ontario is required to administer assets situated in Ontario	R.74.09
certificate of appointment of an estate trustee during litigation	issued in order to preserve assets of an estate where an action has been commenced that contests the validity of the will	R.74.10

Duties of the Administrator and Solicitor Distinguished

Examples:

Personal Representative / Administrator	Solicitor
Locate the will	Review contents of the will with the estate trustee
Make funeral and burial arrangements, and arrange for organ donation(s)	
Retain solicitor	Advise on the retainer of other professional as needed.

Determine assets and liabilities	Assist in determining assets and liabilities; advise on legal actions, etc.
Ascertain identities and contact information for beneficiaries and interested parties	Determine nature of elections and other important information to advise beneficiaries and interested parties
File tax returns and pay tax	Review forms and seek advice where necessary
Maintain proper accounts	Advise estate trustee on setting up and passing accounts; review remuneration
Invest assets when appropriate	Advise on selection of investments and delegation issues under the Trustee Act
Distribute the assets	Advise on the distribution scheme, ademption, abatement, etc

FAQ

When is a Certificate of Appointment with a Will Required?

A certificate of appointment is necessary where there is a Will *and the nature of the asset* requires the personal representative to be formally appointed – but this is properly a matter of the law (usually statute or regulation) that regulates disposition of that particular type of property. For example, real property usually requires a certificate but this is not always true and is truly a matter resolved by regulation under the Registry Act or the Land Titles Act according to value.

Why not always obtain a Certificate of Appointment with a Will?

The process of probating the Will is expensive. Moreover, Estate Administration Tax is payable on the value of the estate set out in the Will.

For an estate valued at \$1,000,000, the probate fee is $(50 \times 5) + (950 \times 15) = \$14,500$, a not insubstantial sum. – more so, once the legal fees to obtain the Certificate are factored into the analysis.

What is the Procedure on an Intestacy?

To obtain a *certificate of appointment of estate trustee without a will* (necessary as property will not vest in the estate trustee without it, and thus property cannot pass to those entitled under the intestacy rules), an application must be brought under the [Estates Act, s.29](#):

29. (1) Subject to subsection (3), where a person dies intestate or the

executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the Ontario Court (General Division) to,

(a) the person to whom the deceased was married immediately before the death of the deceased or person of the opposite sex or the same sex with whom the deceased was living in a conjugal relationship outside marriage immediately before the death;

(b) the next of kin of the deceased; or

(c) the person mentioned in clause (a) and the next of kin,

as in the discretion of the court seems best, and, where more persons than one claim the administration as next of kin who are equal in degree of kindred to the deceased, or where only one desires the administration as next of kin where there are more persons than one of equal kindred, the administration may be committed to such one or more of such next of kin as the court thinks fit.

Where there are no relatives at all, the Public Guardian and Trustee will be the appropriate party under the *Crown Administration of Estates Act*, R.S.O. 1990, c. C.47, s.1.

The general procedure is set out in R.74.05(1):

74.05 (1) An application for a certificate of appointment of estate trustee without a will (Form 74.14 or 74.15) shall be accompanied by,

(a) an affidavit (Form 74.16) attesting that notice of the application (Form 74.17) has been served in accordance with subrules (2) to (5);

(b) a renunciation (Form 74.18) from every person who is entitled in priority to be named as estate trustee and who has not joined in the application;

(c) a consent to the applicant's appointment (Form 74.19) by persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death;

(d) the security required by the *Estates Act*; and

(e) such additional or other material as the court directs.

What about a Foreign Will?

Where the foreign will has been probated in a Commonwealth court it can be 'resealed' for use in relation to assets in Ontario (and tax must be paid here on those assets). Thus the Rules provide:

74.08 (1) An application for confirmation by resealing of the appointment of an estate trustee with or without a will that was granted by a court of competent jurisdiction in the United Kingdom, in a province or territory of Canada or in any British possession (Form 74.27) shall be accompanied by,

- (a) two certified copies of the document under the seal of the court that granted it, or the original document and one certified copy under the seal of the court that granted it;
- (b) the security required by the *Estates Act*; and
- (c) such additional or other material as the court directs.

How long, in general, does it take to complete the administration of an Estate? Is it up to the Estate Trustee?

At common law, it is traditional to talk of the 'executor's year'; that is, we expect that in most cases administration should take about a year. The Estates Administration Act provides in respect of intestacies:

26. Subject to section 53 of the *Trustee Act*, no distribution shall be made on an intestacy until after one year from the death of the intestate, and every person to whom in distribution a share is allotted shall, if any debt owing by the intestate is afterwards sued for and recovered or otherwise duly made to appear, refund and pay back to the personal representative the person's rateable part of that debt and of the costs of suit and charges of the personal representative by reason of such debt out of the part or share so allotted to the person, thereby to enable the personal representative to pay and satisfy such debt, and shall give bond with sufficient sureties that the person will do so.

In a simple estate, a year may not be required at all. In a complex estate, many years may have to be spent on administration. Complicating circumstances include:

- Sale of realty, particularly commercial real estate;
- Sale of operating or foreign businesses;
- Unpaid income taxes which must be determined and paid.

How and when does the Estate Trustee get paid?

Fees charged by the estate trustee are set in principle by the Trustee Act, RSO 1990, c.T.23:

61. (1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.

(2) The amount of such compensation may be settled although the estate is not before the court in an action.

(3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable allowance for care, pains and trouble, and time expended in or about the estate.

(4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.

(5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.

An overall tariff is used:

- 2½ % of the total value of capital & revenue receipts
- 2½ % of the total capital & revenue disbursements
- annual fee of 2/5ths of 1% of the average annual market value of the capital (in the case of an ongoing trust)

Thus, on an estate with a net value of combined real/personal property of \$1,000,000, the Estate Trustee can look to a fee of approximately \$50,000 where all assets must in some way or another be received by the trustee and then later disbursed.

In appropriate cases, the fees are adjusted to reflect the simplicity or complexity of the work involved (overall 'fair and reasonable' compensation) with reference to 5 factors:

- the size of the estate
- the actual care and responsibility involved
- the time occupied in performing the duties
- the skill and ability shown; and
- the success resulting from the administration.

The Estate Trustee can be paid when he or she finishes their work (and the all beneficiaries are of legal age and consent) or, more formally, when he or she 'passes accounts' under Trustee Act and R.74.18. This is an audit of the work of the estate trustee and may be passed without a hearing, or there may be opposition and a hearing will be required.