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DUTIES OF TRUSTEES

Any person owning property may create a trust over that property, either during the person's lifetime (in which case the person is referred to as the "settlor" of the trust) or by his or her will (in which case the person is referred to as a "testator"), and either for the benefit of one or more persons ("beneficiaries") or to carry out certain purposes (especially charitable purposes). In each case, legal title to the trust property will be held by one or more persons known as "trustees." The primary duty of the trustees is to hold the trust property on the express terms set out in the document creating the trust. In addition, trustees have a number of rights and duties that are created by legislation or by the common law, and that apply automatically unless they are excluded or limited by the governing document. This information sheet summarizes the most important of these rights and duties.

Fiduciary Duty

Because trustees hold assets not for their own use and benefit but for the use and benefit of the beneficiaries, they have an overriding duty to act in the best interests of the beneficiaries. This is often referred to as a duty of good faith, or a fiduciary duty. Among other things, it requires that the trustees:

- Not profit from their position as trustees.
- Not enter into any transactions with the trust or otherwise allow themselves to get into any potential conflict of interest with the beneficiaries.
- Treat all the beneficiaries fairly or with an "even hand".
- When exercising their discretion, take all relevant considerations into account and ignore irrelevant considerations.

Duty to Act Personally

The general rule is that trustees must perform their duties personally and cannot delegate, even to a co-trustee, any but the most routine administrative functions. Accordingly, the trustees must:

- Seek professional advice from lawyers, accountants, investment advisors and other professional agents, but take ultimate responsibility for any decisions.
- If a business of the deceased is to be continued, serve as a director or officer, arrange for competent management, and provide continuous supervision.
- Where delegation to agents is allowed by the governing document or because the delegated functions are administrative, carefully select the agents and supervise their assigned duties.

Asset Protection

There can be no trust without assets, and the protection of these assets is the fundamental task that distinguishes trusts from other relationships. The trustees must:

- Keep valuables in safekeeping.
- Keep any tangible real or personal property in good repair.
- Insure assets against loss by fire or theft if necessary.

- Keep the trust assets separate from any other assets, including the trustees' own assets.
- Invest the assets prudently, in a diversified portfolio which will both shelter the capital value of the trust against the effects of inflation and produce income for ongoing needs. For further information, see the publication "Investment Powers of Trustees in Ontario."

Record Keeping

- Keep accounts of all transactions relating to the trust property, including original vouchers and other back-up documentation.
- Produce the accounts to the beneficiaries at regular intervals.
- If some of the beneficiaries are under the age of 18 or mentally disabled, or if there is a possibility of future beneficiaries being born or ascertained, pass the accounts in court at regular intervals.
- Keep notes of trustee decisions and criteria considered in making them (especially investment decisions).

Income Tax

- Prepare and file annual tax returns for the trust.
- Make any necessary tax elections to ensure that income is taxed in the trust, or in the hands of the beneficiaries, in the most tax-effective manner.
- Make distributions of income and capital to the beneficiaries in the most tax-effective way.
- Plan to minimize the impact of any deemed disposition of the trust property after 21 years.

Distributions

- Keep in frequent contact with the beneficiaries and, if applicable, their parents or guardians, to determine their needs.
- Make income payments to the income beneficiaries and, where permitted by the terms of the trust, exercise discretion to encroach on the capital of the trust to meet the special needs of the beneficiaries.
- Make a final distribution of the trust assets at the time directed by the Will, and obtain releases from beneficiaries.

Liability and Indemnification

Trustees are generally entitled to recover from the trust property all their costs reasonably incurred in relation to the administration of the trust. These costs would include damages and legal fees incurred in bringing or defending a legal proceeding on behalf of the trust, if it was reasonable for the trustees to bring or defend the proceeding. However, trustees may be personally liable for the following amounts:

- Expenses and fees incurred unnecessarily or unreasonably.
- Damages or other obligations payable to third parties in excess of the assets of the trust.
- Damages payable to the beneficiaries for breach of trust.

Compensation

By legislation, trustees are 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" or agreed to by the beneficiaries. Traditionally, where trustees are required to go to court to claim their compensation, compensation is allowed in the amount of 2.5% of capital and income receipts, 2.5% of capital and income disbursements, and 0.4% of the annual average value of the assets as a care and management fee, but these rates depend on the size and complexity of the trust, the time spent by the trustees, and various other factors. Alternatively, compensation may be set by or negotiated with the settlor or testator ahead of time. However, if the settlor or testator tries to prohibit the trustees from taking any compensation, he or she may find it difficult to retain competent and dedicated trustees.

For more information, please contact Laura Kerr at (613) 614-7140 or lkerr@estateslaw.ca.