

The Challenge of Removing an Estate Trustee

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A word of caution to anyone engaged in estate planning - take care when choosing the person who will administer your estate. Since estate trustees are not required to have any relevant experience or expertise,¹ it can be quite difficult to remove a trustee after probate is granted, even if complications arise during an estate administration. Ontario courts have consistently reiterated that they “will not lightly interfere with the testator’s choice of estate trustee”.²

Removing a trustee may be a difficult task, but luckily, it is not impossible. This article addresses the procedure for applying to remove a trustee, the grounds for removal, and also explores potential alternatives.

Procedural considerations

An application to remove an estate trustee is largely governed by the *Trustee Act*³ and the *Rules of Civil Procedure*.⁴ While the *Trustee Act* codifies the court’s power to remove a trustee,⁵ the actual removal application is brought under the *Rules* - either rule 14.05(3)(c) or rule 75.04(c).⁶ The application must be made by an individual who has an interest in the estate,⁷ such as a beneficiary, a fellow estate trustee, an alternate executor, or a spouse who has applied for equalization under the *Family Law Act*.⁸

There are no prerequisites to seeking this relief. Unlike a will challenge, it is not necessary to satisfy a minimal evidentiary threshold before the application can be heard, and it is also unnecessary to first seek leave or to bring a motion for directions.⁹

Since a removal application will only be granted if there is “the clearest of evidence that there is no other course to follow,”¹⁰ it is advisable to present a full evidentiary record to the court, including transcripts of cross-examinations.¹¹ The application may not be granted if, for

¹ *Meuse v. Taylor*, 2022 ONSC 1436 at para. 43 [*Meuse*].

² This principle has been reiterated in a number of cases, including *Re Weil*, 1961 CanLII 157 (Ont. C.A.); *Virk v. Brar Estate*, 2014 ONSC 4611 at para. 48 [*Virk*]; *Radford v. Wilkins*, 2008 CanLII 45548 (Ont. S.C.J.) at para. 100 [*Radford*]; and *Meuse*, *ibid.* at para. 12.

³ R.S.O. 1990, c. T.23.

⁴ R.R.O. 1990, Reg. 194.

⁵ *Trustee Act*, *supra* note 3, s. 37. The court also has inherent jurisdiction to remove an estate trustee: see *St. Joseph’s Health Centre v. Dzwiekowski*, 2007 CanLII 51347 (Ont. S.C.J.) at para. 25 [*St. Joseph’s*].

⁶ See *Kasandra v. Satarelli*, 2022 ONSC 185 at para. 33 [*Kasandra*].

⁷ *Trustee Act*, *supra* note 3, s. 37(3).

⁸ R.S.O. 1990, c. F.3, s. 5. See also Ian M. Hull and Suzana Popovic-Montag, *Probate Practice*, 5th ed (Toronto: Thomson Reuters, 2016) at 250 [*Probate Practice*].

⁹ *Kasandra*, *supra* note 6 at paras. 32-34.

¹⁰ *Virk*, *supra* note 2 at para. 48.

¹¹ See *Kasandra*, *supra* note 6 at para. 39.

example, only conflicting affidavit evidence is before the court.¹² Depending on the grounds for removal, it may also be prudent to apply for removal after the trustee has passed his or her accounts.¹³ The applicable standard of proof for the application is the balance of probabilities.¹⁴

Grounds for removal

When faced with a removal application, the court's main considerations include the welfare of the beneficiaries, whether the estate trustee's acts and omissions are of such a nature as to endanger the administration of the estate, and whether non-removal will prevent the proper execution of the trust.¹⁵

While the outcome of any application will ultimately turn on the facts before the court, a number of bases for removal are relatively non-contentious, such as when the estate trustee:

- lacks capacity due to illness and/or old age;¹⁶
- resides outside Ontario;¹⁷
- is bankrupt;¹⁸ or
- is a convicted felon.¹⁹

In comparison, the outcome of a removal application argued on other grounds may be difficult to predict. Consider the following examples:

- Delay in administering an estate: While delay certainly can result in removal,²⁰ the success of the application will depend on whether the delay can be reasonably explained, whether it compromised the estate, and whether such behaviour will be repeated.²¹
- Misconduct: Benign errors, mistakes and breaches of trust may not warrant the removal of an estate trustee,²² particularly if past misconduct is not likely to continue.²³ However, if an estate trustee has defied the testator's will and his or her conduct demonstrates lack of intention to carry out the terms of the trust, removal will be justified.²⁴

¹² *Koglin Estate (Re)*, 2021 BCSC 2525 at para. 56.

¹³ See *Byle v. Byle Estate*, 2006 BCSC 1695 at paras. 22-23; *Bull-Noel v. Kebe*, 2010 ONSC 1056 at para. 13.

¹⁴ *St. Joseph's*, *supra* note 5 at para. 37; see also *Schaeffer Estate (Re)*, 2016 ABQB 180 at para. 175 [*Schaeffer*].

¹⁵ See *Virk*, *supra* note 2 at para. 48; *Meuse*, *supra* note 1 at para. 12.

¹⁶ See *Kullman Estate (Re)*, 2022 NLSC 159.

¹⁷ *Probate Practice*, *supra* note 8 at 255.

¹⁸ *Ibid.* at 254, but see *Chambers v. Chambers*, 2013 ONCA 511 at para. 96 [*Chambers*].

¹⁹ *Probate Practice*, *ibid.* at 255.

²⁰ See, for example, *Kinnear v. White*, 2022 ONSC 2576; *Knight Estate (Re)*, 2014 ABQB 8.

²¹ *Radford*, *supra* note 2 at paras. 108-109.

²² See *Probate Practice*, *supra* note 8 at 259.

²³ *Virk*, *supra* note 2 at para. 48; *St. Joseph's*, *supra* note 5 at paras. 28-29.

²⁴ See, for example, *Scott v. Scott*, 2022 NLCA 61 at para. 22; *Wood's Homes Society v. Selock*, 2021 ABCA 431.

- Conflicts of interest: If an individual's duty as the administrator of the estate is at odds with his or her personal interests, removal may be ordered.²⁵ Examples of such conflicts include the estate trustee owing unpaid debts to the estate,²⁶ or challenging the will after probate is granted.²⁷ However, not all conflicts will merit removal - for example, many beneficiaries are executors of the estate they administer, creating an inherent conflict of interest. A testator may also expressly authorize a trustee to administer the estate notwithstanding a conflict.²⁸
- Hostility and friction: Regardless of whether there is hostility amongst an estate trustee and the beneficiaries of the estate, or among multiple estate trustees, friction on its own may not merit removal.²⁹ It is only if friction will prevent the proper administration of the trust, or make it difficult for the trustee to act impartially, that removal may be ordered.³⁰ If there are additional grounds to remove an estate trustee, hostility may also tip the scales in favour of removal.³¹

While there are many more grounds available for seeking removal of an estate trustee, these examples demonstrate how difficult it can be to successfully predict the circumstances under which a trustee will actually be removed.

Alternatives to removal

Another point to ponder before applying for removal is whether another, less-costly solution may be available. The removal of an estate trustee can be “bitter, expensive and time-consuming, and is rarely productive of any real positive result,” making litigation something of a last resort.³² Moreover, if the applicant is a fellow estate trustee, there is a real possibility that the court will require the parties to meet to address their issues and explore solutions, rather than grant a removal application.³³

Even if an applicant is not an estate trustee, it would be prudent to consider whether alternative relief can be sought from the court in addition to removal. For example, an applicant may ask the court to utilize its inherent jurisdiction to limit the scope of the estate trustee's authority if removal is not granted.³⁴ Another potential solution may be simply asking the estate trustee to retire.

²⁵ See *Chambers*, *supra* note 18 at para. 96; *Bereskin Estate, Re*, 2014 MBCA 15; *Greeley Estate v. Greeley*, 2016 NLCA 26.

²⁶ See *Re Estate of Rose May Hazlitt*, 2017 MBQB 184.

²⁷ See *Jones (Estate)*, 2017 SKQB 388.

²⁸ See *Stern v. Stern*, 2010 MBQB 68 at para. 14.

²⁹ *Radford*, *supra* note 2 at paras. 111-113; *Chambers*, *supra* note 18 at para. 96.

³⁰ See *Oldfield v. Hewson*, 2005 CanLII 2808 (Ont. S.C.J.) at para 27; *Schaeffer*, *supra* note 14 at paras. 176-177. See also *Meuse*, *supra* note 1 at para. 15.

³¹ *Cordeiro v. Kulikovsky*, 2003 CanLII 37094 (Ont S.C.J.) at para. 49.

³² *Probate Practice*, *supra* note 8 at 263-264.

³³ See *Re Brodylo Estate*, 2022 ABQB 358; *Hill v. McLoughlin*, 2007 CanLII 1334 (Ont. S.C.J.) at para. 23.

³⁴ *Dempster v. Dempster Estate*, 2008 CanLII 59558 (Ont. S.C.J.); *Assaf Estate (Re)*, 2008 CanLII 23489 (Ont. S.C.J.) at paras. 32-33

Conclusion

While it has been noted that a court should not act “too readily” to remove an estate trustee,³⁵ as a general rule, a removal application will be warranted if there is clear evidence that the estate trustee is not acting in the interests of the beneficiaries, and there is no other recourse readily available that will respect the testator’s choice of trustee. Like anything in life though, success cannot be guaranteed. Given the possibility that a removal application may not be granted and that the applicant will have to continue to work with the trustee, such an application should be approached with sensitivity.

³⁵ *Schaeffer*, *supra* note 14 at para. 175.