

Death of a Business Owner

By Justin W. de Vries¹ and Gillian Fournie

I. Summary of Steps to take following the Death of a Business Owner

- Find the will
- Determine the estate assets and liabilities. Understand where the estate ends and the business begins²
- Determine the scope of the executor's powers and obligations under the will, including ability to run the business
- Determine the scope of the executor's contractual and statutory obligations under corporate law – such as shareholder agreements, articles of incorporation, and partnership agreements
- Decide whether the executor named in the will is in any conflict of interest, or is otherwise unable or unwilling to act as executor. If so, decide whether an institutional executor or an individual is better suited to act
- Maintain complete accounts (beginning with a list of original assets) and disclose information to beneficiaries early and often
- Act in good faith, use reasonable judgment, and seek help where appropriate (professional advice or direction from the court)

¹ of de VRIES LITIGATION. You can reach Justin at (416) 640-2754 or at jdevries@devrieslitigation.com. Also check out the website at www.devrieslitigation.com.

² In this paper, we have generally assumed “business” to mean a corporation. However, there are many different ways business may be carried on, such as a sole proprietorship or a partnership.

II. What happens on Death?

Assets of the Deceased Devolve to the Personal Representative

If there is a will, assets of the deceased pass immediately to the deceased's personal representative (commonly referred to as "executor" or "estate trustee")³ as named in the will.⁴

If there is no will, a person must apply to the court to be appointed executor of the deceased's estate.⁵ Statute set out who stands in priority to be appointed as executor.

Find the Will

The first thing to do on the death of a business owner is to determine whether or not there is a will. A diligent search is required. Common places to find a will include:

- Safety deposit box at a bank.
 - Bank policies vary, but most will allow a family member limited access to information about the deceased's holdings at the bank. When opening the deceased's safety deposit box, ensure that a neutral third party is present, such as a bank employee. Take an inventory of the safety deposit box and have it signed by the bank employee. This will help avoid accusations that the safety deposit box was plundered by the person opening it or a will destroyed.
- Personal/household safe.
- Office of the drafting solicitor. Inquiries should be made of the deceased's solicitor to find out if the deceased left a will.

³ For the purpose of this paper, these terms are interchangeable. For ease of reading, I will use the term executor throughout.

⁴ The executor gains his authority to act from the will as well as from s. 2 of the *Estates Administration Act*, RSO 1990, c E.22

⁵ See s. 29 and of the *Estates Act*, RSO 1990, c E.21

- Office of the deceased's accountant (if nothing else, the accountant may know about the will and its exact location)

Decide if Probate is Necessary

The next step is to determine whether probate is necessary. Probate is the term commonly used to describe the process of applying for what is now a Certificate of Appointment of Estate Trustee With/Without a Will ("certificate of appointment"). The probate process involves producing the original copy of the will and paying an estate administration tax ("ETA" what was commonly referred to as "probate fees") calculated using the value of the deceased's assets on death. In Ontario, the ETA is equal to \$5 per \$1,000 for the first \$50,000 of the estate's assets, plus \$15 per additional \$1,000. The government has recently tightened the rules surrounding the disclosure of estate assets and the payment of the ETA.

Usually, the assets of the deceased cannot be sold or transferred to the beneficiaries named in the will (or as determined by statute if there is no will) without the executor first obtaining a certificate of appointment. For example, most banks will not release the funds in a deceased's bank account without being provided with a copy of the certificate of appointment; the same is true for insurance companies. In addition, real estate usually cannot be transferred without first sending a copy of the certificate of appointment to the Land Titles Office.

As a result, it is a common practice amongst business owners to create two wills – one for their "primary estate" and one for their "secondary estate." The primary estate will include all the assets that require probate, such as bank accounts and real estate. The secondary estate will include assets that do not require probate, such as assets held in a trust or personal and household effects.

Only one will needs to be submitted for probate (the will dealing with the "primary estate"). This reduces the amount of taxes payable, as the probate tax is calculated based on the value of the

assets in the primary estate only. The concept of primary and secondary wills have been upheld by the courts.

Determine the Assets of the Estate

After carefully reading the will, the executor should find out what assets were owned by the deceased (joint assets are of particular interest). It is at this time that the executor must gain a better understanding of the deceased's business. What was the deceased's role in the business prior to death, and can the business continue without his involvement? Was the business a partnership or a corporation? If it was a corporation, did the testator own a controlling interest? Do the shares in the corporation carry with them voting rights? Are there preference shares and what value are ascribed to them. Are there corporate by-laws restricting the right to transfer the shares?

A careful distinction must be drawn between assets owned by the testator in his personal capacity and assets owned by the business. This distinction has many implications – both in determining the value of the testator's estate and in determining how (and which) assets are disposed of in the will. This is important because the executor does not necessarily have the right to distribute corporate assets to beneficiaries of the estate. In addition, this distinction is important when determining the value of the estate – the value of a business does not necessarily equal the value of the assets held by the business.

It must be noted that assets owned by a corporation are NOT assets of the estate, even where the deceased was the sole owner of the corporation. For example, assume that on death the only asset owned by the deceased were all the shares of a corporation and the corporation owns land. The value of the deceased's estate is not (necessarily) the value of the land owned by the corporation. Rather, the value of the deceased's estate is the value of the shares in the business. The executor's main duty is to maximize the value of the shares for the estate.

In contrast, if the deceased did not run his trade through a corporation or partnership, then all the assets of the business form part of his estate (there is no corporate intermediary). Unless contrary instructions appear in the will, the business must immediately be wound up and sold. The executor's primary concern is in determining whether the assets used by the deceased in running the business would fetch a higher price if sold together or if sold piecemeal (the beneficiaries will be watching closely).

III. Executor Duties – Generally

The following is a list of the duties and obligations that apply to all executors under the common law (legislation has either codified much of an executor's duties and obligations or, in some cases, imposed additional requirements). If the will contains directions to the contrary, the provisions of the will ordinarily take precedence unless those provisions offend public policy (a whole separate topic).

Duty to Follow the Terms of the Will

This is the fundamental duty of an executor. The executor must read and understand the will since it contains the executor's instructions on how to divide and dispose of the deceased's estate (by identifying the beneficiaries of the estate). These are the people to whom the executor is ultimately accountable.

The will also contains the powers and duties of the executor. Generally, the executor's duty is to immediately call in and convert (i.e. consolidate and sell) all estate assets. As a result, wills often give executors explicit permission to postpone the sale of estate assets (called a "power to retain") leaving it up to the (reasonable) discretion of the executor.

If the executor has trouble understanding any parts of the will, he should seek clarification *before* he starts administering the estate. This will help ensure that the executor is not held personally liable for any mistakes he makes during the administration of the estate.

All executors have the right to apply to the court for the court's opinion, advice and direction (courts have an overriding jurisdiction to supervise the administration of an estate).⁶ Common reasons to apply for directions include: interpreting a term of the will; determining the scope of the executor's duties and powers under the will; and resolving a deadlock between co-executors. The reason that an executor may wish to bring an application for directions rather than relying on his own judgment is that a court order gives the executor protection from personal liability (the beneficiary is given notice of the court proceeding). Without a court order, the executor may be required to personally repay money to the estate or compensate a beneficiary for any loss of their inheritance.

Duty to Act Impartially Between Beneficiaries (“Even Hand” Rule)

Unless explicitly authorized to do so by the will, the executor cannot favour one beneficiary over another.

The requirement to maintain an even hand usually become apparent when the will creates a distinction between income beneficiaries and capital beneficiaries. In those cases, the executor may find herself in a position where she must decide whether to reinvest money into the income producing property (thereby benefiting the capital beneficiaries) or to pay out the income directly to the income beneficiaries.

The duty to maintain an even hand becomes even more complicated when the executor must also take into account what is in the best interest of the business – to reinvest profit in the

⁶ The application is brought pursuant to s. 60 of the *Trustee Act*, RSO 1990, c T.23 or Rule 75.06 of the *Rules of Civil Procedure*.

company or to pay it out to the shareholders. For example, if the estate holds shares of a corporation that come with voting rights, the executor is entitled to vote the shares.⁷ When voting the shares, the executor must not only take into account his duty as executor to the beneficiaries, but also the best interests of the corporation. There is no guarantee that the interest of the beneficiaries and the interests of the corporation will align.

In addition, an executor may find himself a director of the business owned by the estate by virtue of his position as executor. The director may be forced to decide where to distribute income as a shareholder dividend (which would benefit the income beneficiaries of the estate) or of reinvesting the income in the company (which would benefit the capital beneficiaries of the estate). The choice that is in the best interest of the corporation may not be the same as his duty to maintain an even hand between the beneficiaries of the estate. Resolving these conflicts is never straightforward.⁸

Avoiding a Conflict of Interest

The executor's first duty as a fiduciary is to the beneficiaries. This means that the executor must put the beneficiaries interests (as determined under the will) ahead of his personal interests (as with any fiduciary). As a result, the executor must avoid all situations where he might be tempted to put his personal interests ahead of the estate. Over time, this rule has evolved to include several specific sub-rules.

- An executor is not allowed to profit from his position.
 - Taken at face value, this would mean that the executor is not allowed to be compensated for his work as executor. However, the *Trustee Act* explicitly

⁷ See s. 67(2) of the Ontario *Business Corporations Act* and s. 51(2) of the *Canada Business Corporations Act*.

⁸ See *Simone v Cheifetz* (1998), 24 ETR (2d) 74, 1998 CarswellOnt 3200 (ONCJ) and *Simone v Cheifetz* (2005), 2005 CarswellOnt 3073 (ON CA) for a further discussion of conflict of interest between the role of executor and director.

allows an executor to take compensation for his work⁹ (although the amount of compensation may be a contentious issue). Compensation is meant to compensate an executor for her time and effort and not amount to unearned windfall.

- It also means that an executor cannot use his position to secure advantages for himself. For example, if the executor also becomes director of the deceased's company, he cannot use his position as executor/director to secure lucrative contracts with the company for himself.
- An executor cannot purchase any estate assets or take out a loan from the estate (and vice versa, she cannot sell her personal property to the estate or loan money to the estate).
 - If the executor wishes purchase an estate asset, he must either obtain approval from the court or the written consent of all the beneficiaries (often both).
 - The reasoning is that the executor will be tempted to use his position to secure the best price for himself, rather than the best price for the beneficiaries of the estate (the duty of an executor is to the beneficiary, not himself).

Not only must the executor avoid personal conflicts with the estate, but an executor who takes over the deceased's business also owes a fiduciary duty to the business. Where his fiduciary duty to the beneficiaries conflict with his fiduciary duties to the business, the executor is put in an impossible bind. In those situations, he is well advised to seek direction from the court and/or the written permission of all the beneficiaries with full and frank disclosure.

⁹ See ss. 23(2) and 61 of the *Trustee Act*.

Duty to Account

The executor has a duty to account to the beneficiaries of the estate. The beneficiaries are entitled to review all information about the estate assets, estate transactions, and advice received by the executor from professionals regarding the administration of the estate. The executor must keep careful record of all transactions and sales involving the estate assets and make those records available to the beneficiaries on request. The scope of disclosure beneficiaries are entitled to is broad.

The duty to account becomes more complicated when the beneficiaries request information about the deceased's business.¹⁰ In that case, the general rule is that the beneficiaries are not entitled to more information than would be available to them as shareholders of the corporation.¹¹ This is usually limited to the financial statements of the corporation.¹² However, where the executor has begun acting as director of the corporation, it may be prudent to offer the beneficiaries additional information, such as the compensation the executor is receiving for acting as director. If the executor/director provides information about the business to the beneficiaries, he would be advised to provide the same information to the other shareholders of the corporation at the same time.¹³

Duty to Act Unanimously

Where the will appoints more than one executor, the executors must act unanimously. For this reason, wills often contain a "majority rule" clause in order to avoid deadlocks between trustees. If there is no majority rule clause and the executors cannot resolve the issue between

¹⁰ See Angela Casey's paper "Passing the Trustee's Accounts When There Are Business Assets" available at <<http://devrieslitigation.com/legal-resources/legal-papers/passing-trustees-accounts-business-assets/>>

¹¹ A. Sean Graham, "Trustee, Director, Officer, Beneficiary ... One Hat Too Many?" (2003), 1 ETR (3d) 158.

¹² Angela Casey, "Passing the Trustee's Accounts When There Are Business Assets."

¹³ A. Sean Graham, "Trustee, Director, Officer, Beneficiary ... One Hat Too Many?"

themselves, they may bring an application to the court for directions (the court may also decide “to cast the deciding vote” where the executors are deadlocked).

Keep Estate Assets Segregated

An executor is prohibited from mixing estate assets in with his personal assets. In addition, discussed further below, the general rule is that the executor is not allowed to use estate assets to fund the running of the business. The business must be run only using funds already held by the business.

Maximize and Protect Estate Assets

It is an executor’s duty to maximize the value of the estate. This means that the executor can be faulted for selling estate assets for less than fair market value. In addition, the executor is expected to sell the estate assets in a timely manner. Where the executor takes an unreasonable amount of time selling the estate assets and the delay causes the asset to decrease in value, the executor will be liable to the beneficiaries for the loss.¹⁴ What is reasonable depends on the circumstances. The well-known “executor’s year” to administer the estate is not a hard and fast rule and may no longer govern given today’s more complex estates.

The executor must act with diligence in calling in and converting (i.e. consolidating and selling) the assets of the estate. Unless an asset is explicitly gifted *in specie* to a beneficiary, the executor’s duty is to sell it for the highest value.

¹⁴ James MacKenzie, *Feeney’s Canadian Law of Wills*, 4th ed., looseleaf (Markham: LexisNexis Canada, 2000) section 8.17. (“*Feeney’s*”)

No Delegation of Duties

Executors are prohibited from delegating their duties to others. However, this does not mean they cannot hire professionals or rely on the advice of others. It does mean that where they employ professional help (for example, lawyers, accountants, or investment advisors), the executors are required to supervise their activities and remain involved in all major decisions affecting the estate assets. In the end, the executor is required to exercise her discretion and make the ultimately decision. The executor must also make available to the beneficiaries the advice received from the professional if asked.

Standard of Care

The executor is required to act with reasonable and ordinary prudence in carrying out the administration of the trust. This is a fairly low standard of care which is met by anyone acting in good faith and with due attention to his duties. In addition, the executor must be careful to act within the scope of his power as executor – if the executor does something contrary to the terms of the will or beyond his power as executor, he will be held personally liable for any loss even if the action was taken in good faith.¹⁵

Standard of Care – Investments

Section 27 of the *Trustee Act* imposes a similar standard of care on the executor when investing the estate assets. This is especially important because a business owned by the deceased is considered an estate investment. Thus the executor will be held to this standard when making decisions about in running the business or selling it. Section 27 reads:

¹⁵ Carmen S. Theriault, *Widdifield on Executors and Trustees*, 6th ed., Vol. 1, looseleaf (Toronto: Carswell, 2002) at section 8.1.2. (“*Widdifield*”)

Investment standards

27. (1) In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

Authorized investments

(2) A trustee may invest trust property in any form of property in which a prudent investor might invest.

...

Criteria

(5) A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

1. General economic conditions.
2. The possible effect of inflation or deflation.
3. The expected tax consequences of investment decisions or strategies.
4. The role that each investment or course of action plays within the overall trust portfolio.
5. The expected total return from income and the appreciation of capital.
6. Needs for liquidity, regularity of income and preservation or appreciation of capital.
7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

Diversification

(6) A trustee must diversify the investment of trust property to an extent that is appropriate to,

- (a) the requirements of the trust; and
- (b) general economic and investment market conditions.

Investment advice

(7) A trustee may obtain advice in relation to the investment of trust property.

Reliance on advice

(8) It is not a breach of trust for a trustee to rely on advice obtained under subsection (7) if a prudent investor would rely on the advice under comparable circumstances.

Terms of trust

(9) This section and section 27.1 do not authorize or require a trustee to act in a manner that is inconsistent with the terms of the trust.

Section 27(2) of the *Trustee Act* would seem to suggest that where the deceased's business would otherwise be considered a risky investment, the executor's duty is to sell the estate's interest in the business immediately and reinvest the funds in a more conservative investment. In addition, s. 27(6) suggests that where the deceased's business is the only investment of the estate, the executor is under an obligation to sell part of the estate's holdings in the business and reinvest the funds in a diverse portfolio. However, s. 27(5) recognizes that there may be special reasons to keep the deceased's business as part of the estate (and possibly its only investment) - for example, where the business is a family business.

IV. Duties of the Executor – To the Business

Duty to Sell

Although many business owners have a personal or emotional attachment to their businesses, on death, the business is treated as any other investment asset of the estate. This means that, absent instructions in the will, the executor is under an obligation to sell the business in a timely manner with a view to obtaining the best price for the business.

The usual rule is that the business is to be sold as a going concern, as opposed to winding it down and selling it for parts.¹⁶ However, where it is not possible to continue the business without the deceased (as is the case with a partnership or where the business relied on special skills of the deceased), then the expectation changes and the only obligation of the executor is to maximize the estate's profit from winding down the business.

¹⁶ *Widdifield* section 2.5.1(b) at page 2-27.

An executor is usually given a one year grace period in which to call in and convert all estate property (i.e. consolidate and turn into cash). However, this is not a hard rule and what is reasonable amount of time is determined by the circumstances. For example, selling a business as a going concern may take more time than selling other types of assets. As a result, there is some case law suggesting that a two year period is not unreasonable to sell a business.¹⁷

The executor must carefully examine the will to determine whether he has the authority to either postpone the sale of the business or the power to retain the business. The distinction is subtle, but goes to the executor's primary duty: either to sell the business as soon as possible, but with the power to postpone the sale for as long as necessary in order to obtain a good price; or to retain the business with the view of operating it as an investment until such time as a good price may be obtained on a sale).

The will does not necessarily have to refer to the business itself – any power given to the executor to retain assets of the estate applies equally to retaining the business. For example, a direction in the will to the executor to sell the estate assets “when and as in his discretion he may deem advisable” has been interpreted as giving the executor the authority to carry on a business with no time limit on selling it, and also as allowing the executor to invest estate assets in the business (which, as discussed below, would normally be prohibited).¹⁸ As a result, the executor must carefully read over all the terms of the will to determine his scope of powers.

Power to Carry on the Business

The general rule is that the power to continue a trade ends on death.¹⁹ As a result, the executor's authority to continue the business is limited to operating the business in the interval

¹⁷ *Widdifield* section 2.5.1(b) at page 2-28.

¹⁸ *Feeney's* at section 8.43.

¹⁹ *Widdifield* section 2.5.1(b) at page 2-27.

before its sale unless the will implies otherwise. If the executor runs the business beyond the period required to sell it, he is acting outside his scope of authority and will be held personally liable for any loss in value of the business, as well as for any debts incurred by the business. If, in the circumstances, it is necessary for the executor to run the business for any length of time, he should obtain a court order approving his actions and thus avoid incurring personal liability.

The executor can only use assets already forming part of the business to continue its operation.²⁰ The executor does not have the authority to use estate assets to run the business unless either explicitly allowed to do so by the will, all the beneficiaries agree to invest estate assets into the business, or if only a very limited investment of estate assets is required to continue the operation of the business before its sale.²¹ If there are no assets in the business to fund its continued operation, the executor should apply to court for directions.²²

Profit/Losses Earned After Death of the Testator

The executor is liable to the estate for all profits earned by the business and must be prepared to account for them. However, the executor can be held personally liable for any debts incurred by the business after death. If the executor was acting within his scope of authority by running the business and the debt was properly incurred in the operation of the business, the executor may be indemnified out of the estate for the business debt.²³ Unfortunately, he will rank behind the other creditors of the estate.²⁴

Management Fee

The executor may be entitled to a reasonable fee for managing the business. However, the management fee must be paid out of the business profits. The estate is not responsible for

²⁰ *Widdifield* section 2.5.1(b) at page 2-27.

²¹ *Widdifield* section 2.5.1(e) at page 2-33

²² *Widdifield* section 2.5.1(c) at page 2-30.

²³ *Widdifield* at s. 2.5.1(b) at p. 2-27.

²⁴ *Feeney's* at s. 8.45 and *Widdifield* at s. 2.5.1(e) at p. 2-32.

paying a management fee to the executor – the running of the company is part of the executor's duties. As a result, if the business cannot afford to pay a management fee, the executor will only be paid executor's compensation for the time he spent managing the business.²⁵ It should be noted that where the executor hires a professional manager to operate the company, there is no question that the manager should be paid his fee, whether from the business or the estate.²⁶

The executor must also be careful to avoid "double dipping." It is not proper for him to be paid both a management fee from the company while, at the same time, taking a fee from the estate for the time spent managing the company as executor. As a result, the executor should keep careful tract of time spent performing executor duties and time spent acting as director of the business.

Duty to Become a Director

The executor has a general obligation to oversee all investments of the estate. As a result, where an estate owns a controlling interest in a corporation, the executor may be required to exercise his voting rights to appoint himself a director of the corporation.²⁷ An executor may appoint a nominee as a director though such an appointment introduces its own set of problems.

In his capacity as director, the executor's first duty is to the corporation, not the estate. As director, he must exercise his discretion in the best interest of the corporation. This may result in a conflict of interest. For example, it may be in the corporation's best interest (or the nature of its business) to engage in high risk endeavours. This contradicts the executor's duty to keep the estate invested in low risk ventures. Where such a conflict arises, the executor may be required to sell the estate's interest in the corporation; he cannot use his vote as director to

²⁵ A. Sean Graham, "Trustee, Director, Officer, Beneficiary ... One Hat Too Many?" (2003), 1 ETR (3d) 158.

²⁶ *Widdifield* at s. 2.5.1(e) at p. 2-34.

²⁷ *Widdifield* s. 8.1.2 at p. 8-17.

cause the corporation to act against its best interests.²⁸ The executor may also have to apply to the court for directions.

Standard of Care as Director

Directors are held to a higher standard of care than executors – they are expected to have some knowledge or experience of running a business. Section 134(1) of the Ontario *Business Corporations Act*²⁹ (“**OBCA**”) reads:

Standards of care, etc., of directors, etc.

134. (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The *Canada Business Corporations Act*³⁰ imposes a similar standard of care for directors.

The OBCA goes on to read:

Duty to comply with Act, etc.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

Cannot contract out of liability

(3) Subject to subsection 108 (5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act and the regulations or relieves him or her from liability for a breach thereof.

²⁸ *Widdifield* s. 8.1.2 at p. 8-18.

²⁹ RSO 1990, c B.16.

³⁰ RSC 1985, c C-44 at s. 91.

The executor is faced with a greater potential for personal liability when he also assumes the role of director. He incurs this liability in his personal capacity, although he may seek to be indemnified out of the estate.

Additional Limitations/Obligations Imposed on Directors Under Corporate Law

The executor acting as a director must be aware of the additional contractual and statutory obligations he must meet. For example, he is restricted in his actions by the articles of incorporation, company by-laws, shareholder agreements, tax laws and environmental statutes.

When running the corporation, the executor/director cannot simply rely on the deceased's pre-death conduct. The executor/director must make his own decisions about how best to run the company and take into account the additional obligations he is under – his duties both to the corporation and the estate beneficiaries. The executor/director must also take into account how the dynamics of the business have changed now that the deceased is no longer involved with the business.³¹

Choosing Not to Run the Business

Given the conflicts of interest, the higher standard of care, and greater risk of personal liability, an executor can be excused for wanting nothing to do with running the business. The executor has two choices – he may renounce/resign as executor altogether, or he may hire a professional manager to take over the running of the business.

If the executor renounces, careful thought must be given to his replacement. At the outset, two options should be considered: either an institutional trustee (such as a bank or professional management company) or an individual, preferably someone already familiar with the deceased's business. The replacement should be someone who has the experience and

³¹ A. Sean Graham, "Trustee, Director, Officer, Beneficiary ... One Hat Too Many?" (2003), 1 ETR (3d) 158.

knowledge necessary to take over both the running of the business and the administration of the estate. The replacement must not be in a conflict or interested in pursuing her own agenda.

An institutional trustee will likely have the experience and knowledge to manage both roles of executor and director. However, institutional trustees usually insist upon set rate of compensation. An individual may be less expensive, but may not have the resources and experience of an institutional trustee.

The beneficiaries of the estate should be consulted for the replacement executor. Absent the consent of the beneficiaries, a court order is necessary to appoint a replacement executor (an executor who has obtain a certificate of appointment must be removed by the court and a succeeding estate trustee appointed).

If the executor wishes to hire a professional manager to take over the running of the business, he must be aware that he has not necessarily escaped personal liability. An executor cannot delegate this authority to others, so he has an ongoing duty to supervise the business manager. However, he is entitled to rely on the advice of the manager where appropriate and delegate the day-to-day running of the business to the manager.

Selling Shares Held by the Estate

Selling and transferring shares of a corporation come with additional concerns beyond maximizing profit. Corporate policies sometimes impose restrictions on when and to whom shares may be offered for sale/transferred. For example, the corporate by-laws may require that all shares be first offered to all shareholders on a *pro rata* basis, or by right of first refusal, before they can be sold/transferred to a third party. However, the will may direct that the shares held by the estate be transferred to a specified beneficiary. How is the executor to resolve this conflict?

This situation was addressed by the Court of Appeal in *Frye v Frye Estate*.³² At trial, the judge hearing the matter determined that since the direction in the will contravened a shareholders agreement, the gift in the will was invalid. On appeal, the court found that the gift was not invalid, yet also found that the executor could not act contrary to the shareholders agreement. The court found that the executors held the shares in trust for the designated beneficiary, but could not transfer the shares to her because doing so ran contrary to the shareholder agreement. The court suggested that the executor hold onto the shares and wait until such time as the conflict resolved itself. How the court anticipated the conflict would resolve itself is unclear.

Selling the Business – General

The executor's duty is to sell the business as a going concern. Professional help may be sought in executing the sale, for example by using a business broker or an accounting firm specializing in privately held corporations. The executor should document all advice received on how to maximize the value of the business on a sale and list the business for sale in a timely (and opportune) manner.

Note that the executor cannot purchase the business for himself. Such is considered to be a conflict of interest. If the executor would like to purchase the business, he requires court approval and/or the agreement of all the beneficiaries of the estate. The executor may also have to resign his post.

³² (2008), 2008 ONCA 606, 42 ETR (3d) 190, 91 OR (3d) 721, 299 DLR (4th) 184, 2008 CarswellOnt 5207 (ON CA).