Replacing an Estate Trustee When He or She Is Still Alive (Without Resorting to Litigation)

A Paper and Presentation delivered by Raymond Murray and Kris Ade of Nelligan Law at Part 3 of the CCLA Solicitors Conference on Wednesday November 25, 2020

Being an estate trustee is no easy task. The duties and liabilities of an estate trustee are significant. Depending on the size of the estate, the number of beneficiaries involved, and the complexity of the estate plan, the administration of the estate may be quite challenging, too. It is for these reasons why we, as estate lawyers, stress to our clients the importance of naming an estate trustee who will accept the appointment and do the job well.

However, even those clients who receive excellent counsel when preparing a will may still pick an estate trustee that will not or cannot fulfil their testamentary wishes. The reasons vary: lack of interest; lack of capacity or intellect; illness; distance. In these situations, it is not uncommon for a named estate trustee to ask to be overlooked or to resign.

Notably, the *Rules of Civil Procedure* now draw a distinction between non-contentious and contentious estate proceedings.[1] Before 1995, separate regulations pursuant to the *Estates Act* addressed the procedure for removing an estate trustee.[2] As part of its overhaul of the *Rules,* the Province of Ontario rescinded those regulations and ushered in the binary classification of estate proceedings – as being either non-contentious or contentious – that exist today and govern the procedure for the removal and replacement of estate trustees.

This paper addresses the replacement of an estate trustee in a *non-contentious* proceeding at two distinct points – before the issuance of a certificate of appointment, and afterwards – and aims to

[1] RRO 1990, Reg 194, rr 74 & 75 [*Rules*].
[2] *Estates Rules,* RRO 1990, Reg 197 [repealed].

provide advice and guidance on how best to navigate the replacement process at these points and to flag issues that may arise during both. This paper also explores those limited instances where it may not be necessary to seek the court's approval to replace an estate trustee. Ultimately, the aim of this paper is to confirm an estate trustee can resign (or be removed due to incapacity) and be replaced without litigation.

Replacing an Estate Trustee Before the Issuance of a Certificate of Appointment

An estate trustee may *renounce* his or her obligations under a will if he or she has not yet been appointed by the court (i.e., prior to the court's issuance of a certificate of appointment) and, importantly, if he or she has not taken any steps to administer the estate. In such a situation, the named estate trustee must file Form 74.11 with the court to officially renounce his or her right to a certificate of appointment.[3]

The *Rules* require, "every living person who is named in a will or codicil as estate trustee who has not joined in the application [for a certificate of appointment of estate trustee with a will] and is entitled to do so," to formally renounce their right to a certificate of appointment.[4] However, even if that person or those people fail to file the necessary documentation renouncing their obligations under the will, the *Estates Act* deems an estate trustee as having renounced that right so long as they have not begun to act in that role.[5] In such a case, the court will summon that individual to apply for probate, failing which the trustee is deemed to have renounced the appointment.[6]

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[3] See Form 74.11, "Renunciation of Right to a Certificate of Appointment of Estate Trustee (or Succeeding Estate Trustee) with a Will", available online: <http://ontariocourtforms.on.ca/en/rules-of-civil-procedure-forms/>.
[4] *Rules, supra,* r 74.04(1)(f).
[5] RSO 1990, c E.21, s 25.
[6] *Ibid.*

Renunciation will not always be effective – or available without a court order. Critically, even if the estate trustee has not applied for a certificate of appointment, that person will be unable to renounce his or her obligations under the will if he or she has begun to take steps to administer the estate.[7] In such a case, courts have found the estate will have devolved to that individual in his or her capacity as a trustee *de son tort* (i.e., a trustee by his own wrong), such that he or she is no longer permitted to renounce; they must instead seek the court's approval to be removed.

> It is trite law that a person not lawfully appointed an executor or administrator may by reason of his intrusion upon the affairs of the deceased be treated for some purposes as having assumed the executorship, as having constituted himself an executor *de son tort*.[8]

The threshold for a court deeming an individual to have assumed the role of estate trustee is not high. On the contrary, an individual may be deemed to be an estate trustee once he or she "intermeddles" with the estate.[9] Intermeddling is the term used to describe the acts of a person who deals with an estate without having been formally recognized as the estate trustee.[10] In such situations, renunciation is no longer available.

> Once a trustee has accepted the office, he cannot refuse, or to use the correct terminology, disclaim it. He can then only resign, his acts between acceptance and resignation being those of a duly appointed trustee. Disclaimer is available to all those who have been appointed trustees, new trustees, or additional trustees, but

[7] See *Chambers v Chambers,* 2013 ONCA 511.
[8] *Ibid* at para 76, citing *Re O'Reilly (No 2)* (1980, 28 OR (2d) 481 at 486, aff'd 33 OR (2d) 352 (CA).
[9] *Ibid* at para 66.
[10] *Ibid.*

> who have not expressly accepted and who have done no act which is deemed implied acceptance.[11]

While there is disagreement amongst courts as to when, and to what extent, an unappointed estate trustee's dealings will render them a trustee *de son tort*, the prudent approach would be to assume, "even a slight act of intermeddling with a deceased's assets," will preclude an estate trustee from afterwards renouncing.[12]

Where, for example, estate trustees, who had not yet been appointed, allegedly acted only to, "protect and preserve trust assets," the court nevertheless concluded the estate trustees' conduct constituted intermeddling.[13] Among other things, the estate trustees had paid outstanding debts, begun to consolidate the estate assets, and paid the fees required under *Estate Administration Tax Act*.[14] The court therefore denied their request to confirm their renunciation and obliged them to propound the will at issue.[15]

Consequently, if an unappointed estate trustee does not wish to assume the obligations under the will, he or she ought to avoid taking any steps to the administer the estate. Instead, he or she ought to move as quickly as possible to renounce his or her right to a certificate of appointment; lest he or she be found to be a trustee *de son tort* who is no longer entitled to renounce but who must instead seek the court's approval to resign.

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[11] *Ibid* at para 67, citing Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada,* 4th ed (Toronto: Thomson Reuters, 2012) at 884.
[12] *Ibid* at para 66, citing *Cummins v Cummins* (1845), 8 I Eq R 723 (Ch) at 737-738.
[13] See *Dueck v Chaplin,* 2015 ONSC 4604 at paras15-16 & 43.
[14] *Ibid.*
[15] *Ibid.*

Replacing an Estate Trustee After the Issuance of a Certificate of Appointment

Once the opportunity to renounce has passed, either because the court has issued the certificate of appointment or the estate trustee has intermeddled, the only sure-fire way estate trustees may resile themselves from their obligations under the will is by way of court order.[16]

Where the appointed estate trustee wishes to resign, he or she may bring an application under sections 5, 16, and 37 of the *Trustee Act* and rule 14.05(3)(c) of the *Rules.* Alternatively, a co-estate trustee or any person who has a beneficial interest in the estate may bring the application.

> **5 (1)** The Superior Court of Justice may make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.[17]
>
> **16 (1)** An order under this Act for the appointment of a new trustee, or concerning any land or personal estate, subject to a trust, may be made upon the application of any person beneficially interested therein, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof.[18]
>
> **37 (1)** The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.[19] […]

[16] An estate trustee *may* be able to retire and, if necessary, be replaced without a court order pursuant to section 3 of the *Trustee Act*, discussed later in this paper; however, there remains uncertainty over whether, and in what circumstances, this section applies to executors and estate administrators. Hence, why a court order is the only sure-fire way an estate trustee may resile themselves from his or her obligations under a will – and why bringing an application for removal and, if necessary, replacement, is the prudent approach.
[17] *Trustee Act,* RSO 1990, c T.23, s 5(1) [*Trustee Act*].
[18] *Ibid,* s 16(1).
[19] *Ibid,* s 37(1).

> (3) The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of the office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased.[20]

> **14.05 (3)** A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
> (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation.[21]

Of note, where there would remain at least one existing estate trustee (i.e., the certificate of appointment had appointed multiple estate trustees), section 37(4) of the *Trustee Act* confers upon the court the discretion not to appoint a replacement.

> **37 (4)** Where the executor or administrator removed is not a sole executor or administrator, the court need not, unless it sees fit, appoint any person to act in the place of the person removed, and if no such appointment is made the rights and estate of the executor or administrator removed passes to the remaining executor or administrator as if the person so removed had died.[22]

In other words, provided the court authorizes the resignation of the estate trustee seeking to resign, there is no obligation on the court to appoint a replacement to maintain the status quo; the authority of the removed estate trustee vests in the remaining one(s).[23]

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[20] *Ibid,* s 37(3).
[21] *Rules, supra,* r 14.05(3)(c).
[22] *Trustee Act, supra,* s 37(4).
[23] See *Gonder v Gonder Estate,* 2010 ONCA 172 at para 44.

When considering whether to remove an estate trustee, courts are guided by various principles, recently summarized by Superior Court in 2019.[24]

- The Superior Court of Justice has inherent jurisdiction to remove trustees.
- An application to remove an estate trustee may be made by any person interested in the estate of the deceased.
- The choice of estate trustee is not to be interfered with lightly.
- The removal of an estate trustee should only occur on the clearest of evidence and if there is no other course to follow.
- In deciding whether or not to remove an estate trustee, the court's main guide should be the welfare of the beneficiaries.
- The applicant must show that the non-removal of the trustee will likely prevent the trust from being properly executed.
- Removal is not intended to punish past misconduct.
- Friction alone is not a reason for removal.

Courts are much more likely to consider these principles in contested proceedings where someone other than the estate trustee has made an application for the estate trustee's removal.

The Non-Contentious Resignation Application

Conversely, where the proceeding is *non-contentious,* and the resigning trustee, the continuing or succeeding trustee and/or the beneficiaries' consent to terms, courts are unlikely to deny resignation. This is particularly true where: the application includes the necessary particulars, the

[24] See *Ford v Mazman,* 2019 ONSC 542 at para 20, citing *Radford v Radford Estate*, 2008 CanLII 45548 (Ont. Sup Ct), at paras 97-113 & *Walsh v Whitford*, 2017 ONSC 4532, at para 19.

resigning trustee has complied with his or her duties, and the court is provided with evidence on how the assets and debts of the estate have been and will be dealt with.

To that end, an application brought to approve an estate trustee's resignation ought to consider the following relief:

- the removal of the individual in his or her capacity as both executor and trustee;
- a certificate of appointment of succeeding estate trustee, and an order that the remaining executors or trustees continue as sole executors and trustees (if there remains one or more named trustees);
- a status certificate (commonly used to confirm an existing trustee is acting alone after the death of a co-trustee);[25]
- an order that the resigning estate trustee's accounts are passed up to the date of his or her removal;
- an order that the estate property vests in the continuing and/or succeeding trustee;
- an order for the agreed upon compensation, if any, for the resigning estate trustee;
- other directions tailored to address the nature and status of the estate (e.g., order for sale of real property);
- an order on who should bear the costs of the application;
- an order for the posting or waiver of security (if applicable);
- where an application is commenced because one of the estate trustees is incapable, an order appointing a litigation guardian for the incapable trustee.

[25] See Form 74.14.2(2), "Court Status Certificate – Certificate of Appointment of an Estate Trustee with a Will" or "Court Status Certificate – Certificate of Appointment of an Estate Trustee without a Will".

The purpose of requesting the estate trustee's removal as *both* executor *and* trustee largely has to do with the fact that these are discrete positions. When an individual is appointed an executor and trustee under a will, he or she is both "personal representative" and "trustee" throughout the course of the estate administration. Therefore, even if that person comes within the provisions of section 2 of the *Trustee Act* (discussed below), which permits a trustee but not an executor to resign by way of deed, the only way he or she may be discharged from his or her obligations as "personal representative" is by way of court order pursuant to an application under section 37.[26] Hence, the need to request removal from both positions in the application.

Where a replacement trustee is required, it is not only necessary to secure and submit the written consent of the replacement and the parties with a financial interest, but it is also important to keep in mind the court still needs to approve that person. To that end, the court will mainly consider whether the replacement's appointment will be in the best interests of all beneficiaries of the trust, despite the different nature of their respective interests.[27] Consequently, in such situations, the outgoing trustee ought to work with the beneficiaries to enlist someone who will satisfy the court's main concern about the suitability of that replacement – and to secure the beneficiaries' consent to that person's appointment, too.

Passing Accounts, Confirming Compensation, and Seeking Costs as part of Resignation

Furthermore, the outgoing estate trustee will almost certainly be required by the court to pass his or her accounts before the court permits the replacement trustee to assume the outgoing estate trustee's duties.[28] As such, the outgoing estate trustee ought to be prepared to include relief seeking

[26] See *McLean (Re)* (1982), 37 OR (2d) 164, 1982 CarswellOnt 614 (H Ct J).
[27] See Brian A Schnurr, *Annotated Estate Statutes,* 2nd (Toronto: Carswell, 2020) at ch 18.
[28] The replacement may similarly want the accounts passed prior to assuming the role of estate trustee.

that his or her accounts are passed, either as a separate application, or as part of the resignation application, in accordance with the *Rules*.[29]

There is good reason for the outgoing estate trustee to pass his or her accounts: "not only will the new trustee know the 'starting numbers' and assets/liabilities for the future administration of the trust (that is start with a clean slate), but the outgoing trustee will have been afforded the proper protection of the Court order."[30] Furthermore, a passing of accounts starts a new accounting period with court-approved opening balances, which allows the estate trustee take his or her compensation even if the beneficiaries' consent cannot be obtained or a compensation agreement has not been signed.

In anticipation of having to pass his or her accounts, estate trustees ought to be mindful of what records the *Rules* require the estate trustee to keep, and what he or she will be required to disclose to the court for the court to pass his or her accounts.[31]

As part of the passing of accounts, the outgoing estate trustee should confirm his or her compensation for having performed the duties of the estate trustee up to his or her resignation with the beneficiaries.

Where there is no provision in the will providing for compensation,[32] estate trustees are entitled to compensation pursuant to section 61 of the *Trustee Act,* which provides they be compensated based

[29] *Rules, supra,* rr 74.16-74.18.
[30] Crag Vander Zee, "Considerations in Negotiating the Removal and/or Replacement of a Trustee" (17 January 2008) at 8, available online: < https://hullandhull.com/wp-content/uploads/2015/01/jan-2008-trustee.pdf>.
[31] See Appendix A.
[32] *Trustee Act, supra,* s 61(5) (the Act's provisions regarding compensation do not apply where the allowance is fixed by the instrument creating the trust).

on a, "fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate."[33]

When the interested parties leave it to the court to determine compensation, the court will undertake a two-step process for determining what constitutes fair and reasonable compensation.[34] The "usual percentages" or "tariff guidelines" are applied,[35] then the appropriateness of the result is checked against five factors: the magnitude of the estate; the care and responsibility required; the time spent in performing the duties; the skill and ability applied; and the success of the administration.[36]

Finally, the outgoing estate trustee may wish to seek his or her costs for the application and associated passing of accounts.

Notably, the costs awarded on an uncontested passing of accounts are mandated by Tariff C of the *Rules*,[37] and range between $2,500 for an estate or trust with less than $300,000 in receipts to $7,500 for an estate or trust with $3,000,000 or more in receipts.[38]

In recent practice, outgoing estate trustees are also able to recoup their costs from the estate for their application for removal.[39]

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[33] *Ibid,* s 61(1).
[34] See *Laing Estate v Laing Estate* (1998), 41 OR (3d) 571, 1998 CarswellOnt 4037 (CA).
[35] *Ibid* at para 7, citing *Jeffrey Estate, Re* (1990), 39 ETR 173 at 178 (Ont Surr Ct).
[36] *Ibid* at paras 5 & 8.
[37] *Rules, supra,* r 74.17(10).
[38] *Rules, supra,* Tariff C.
[39] See Elena Hoffstein, "Resignation" in Carmen S Thériault, ed, *Widdifield on Executors & Trustees,* 6th (Toronto: Thomson Reuters, 2020) at ch 13 at 13.6.

Replacing an Estate Trustee Without Applying to the Courts

As noted previously, there remains uncertainty over whether, and in what circumstances, an estate trustee may withdraw from his or her obligations under a will without bringing an application for removal and, if necessary, replacement. Hence, why a court order is the only sure-fire way an estate trustee may resile themselves from his or her obligations under a will – and is the prudent approach.

That said, there *may* be circumstances when seeking redress from the court is unnecessary; however, these circumstances are likely limited to where an estate trustee has not yet begun to administer the estate, must be replaced, and the will provides the remaining trustee(s) with the discretion to appoint a replacement.

Sections 2 and 3 of the *Trustee Act* provide for the retirement and for the appointment of new trustees.[40] However, section 2, which permits a trustee to resign by way of deed, expressly exempts executors or administrators from the operation of section 2, such that estate trustees may not rely upon section 2 of the Act to retire.[41] Consequently, for practical purposes, estate trustees wishing to retire and be replaced may be only able to avail themselves of the provisions in section 3, which applies where there are *fewer than three* trustees.[42]

> **3 (1)** Where a trustee dies or remains out of Ontario for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on the trustee, or refuses or is unfit to act therein, or is incapable of

[40] *Trustee Act, supra,* ss 2-3.
[41] *Ibid,* s. 2 (in contrast with other sections of the Act, which deal with replacement of trustees by "instrument").
[42] On the basis that section 2 expressly exempts executors and administrators from that section, but section 3 refers generally to a "trustee", which the Act defines to include a "personal representative", which the Act defines as, "an executor, an administrator, and an administrator with the will annexed."

> acting therein, or has been convicted of an indictable offence or is bankrupt or insolvent, the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing appoint another person or other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing or being unfit or incapable.
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> **(2)** Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or where there were two or more trustees, of the last surviving or continuing trustee, are or is capable of exercising or performing any power or trust that was given to or capable of being exercised by the sole or last surviving trustee.[43]

The implication of section 3 is that, pursuant to the operative provision of "the instrument" (i.e., the will),[44] the remaining trustee(s) may accept the resignation of the one so wishing to resign and appoint that person's replacement, and the resigning trustee is so discharged, subject to the provisions of section 6(c).

> **6** On the appointment of a new trustee for the whole or any part of trust property,
> **(c)** it is not obligatory to appoint more than one new trustee where only one trustee was originally appointed or to fill up the original number of trustees where more than two trustees were originally appointed but, except where only one trustee was originally appointed, a trustee shall not be discharged under section 3 from

[43] *Trustee Act, supra,* s 3 [emphasis added].
[44] *Ibid,* s 1 (the Act defines "instrument" as including a will).

> the trust unless there will be a trust corporation or at least two individuals as trustees to perform the trust.[45]

Again, though, the ability of an estate trustee to rely upon section 3 in order to resign without filing an application with the court will depend upon: the number of appointed trustees; the terms of the will under which he or she has been appointed; and if there are other trustees able to accept his or her resignation and appoint his or her replacement.

Unfortunately, the jurisprudence (and legal commentary) is uneven on this last point.[46] Section 3(1) appears to require there to be continuing trustees, such that a sole estate trustee may not be able to rely upon it.[47] Therefore, where, for example, you are dealing with a will under which only a single estate trustee has been appointed, regardless of the terms of the will, it would be prudent to apply for resignation and replacement pursuant to sections 5 and 37.

Resignation and Replacement due to Incapacity

Thus far, this paper has addressed the various processes an estate trustee must undertake if he or she wishes to resign (and be replaced). There may also be instances where the estate trustee is no longer capable of performing his or her obligations under the will and, because of his or her incapacity, needs to be removed (and, possibly, replaced).

The considerations are similar to those instances where the estate trustee is capable but wishes to be removed, namely whether a court application for removal is required will depend upon whether the mentally incapable trustee has been appointed or begun administering the estate.

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[45] *Ibid,* s 6(c).
[46] See Hoffstein, *supra* at 15.1.1.
[47] *Ibid*.

Where an estate trustee named in a will is mentally incapable (or the next-of-kin in an intestacy, who is a resident of Ontario and has a prior right to apply, is mentally incapable), and has not yet been appointed or intermeddled with the estate, another person may simply apply for a certificate of appointment of estate trustee. For example, a person acting under a valid continuing Power of Attorney for Property for the mentally incapable estate trustee may renounce and consent (as appropriate) for the estate trustee and a copy of the Power of Attorney document should be attached to the renunciation and consent.[48]

Note that, depending on the nature and duration of the incapacity, the certificate may reserve the right of the incapable trustee to apply at a later date. In such a case, the certificate of appointment may be limited for a specific period of time, or until a named event happens, or further reserve the right of the named estate trustee to be appointed at a later date should he or she become mentally capable. This is so because the Superior Court of Justice has the jurisdiction historically exercised by the courts of common law and equity in England and Ontario,[49] and probate and surrogate courts had the power to issue grants reserving the right of an executor under disability to make an application should he or she recover.[50]

Where, however, the mentally incapable estate trustee has already been appointed or begun administering the estate, any person appearing to have a financial interest in the estate (or another trustee) may bring an application for removal and replacement pursuant to sections 5, 16, and 37 of the *Trustee Act* and rule 14.05(3)(c) of the *Rules*.

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[48] See Ontario, Court Services Division, *Estates Procedures Manual* (Toronto: Ministry of the Attorney General, March 2020) at 4.7 "Estate Trustee Mentally Incapable" [*Estates Procedures Manual*].
[49] *Ibid,* citing *Courts of Justice Act,* RSO 1990, c C-43, s 11.
[50] *Ibid,* citing *Feeney's Canadian Law of Wills,* 4th ed (Toronto: Butterworths, 2000) at 7-16.

In the alternative, and contingent on the terms of the will itself and where there is at least one other capable trustee still in place, the remaining trustee(s) may rely upon section 3 of the *Trustee Act* to remove the incapable trustee without seeking the consent of the court – though, given the uncertainty with respect to the applicability and scope of section 3, an application is the prudent route.

Final Considerations

While an estate trustee is certainly permitted to withdraw from his or her obligations under a will, the process is not necessarily a simple one – even when the proceeding is non-contentious.

How he or she is able to do so will depend upon several key factors:

- Whether the estate trustee is capable and wishes to resign, or is incapable and no longer able to fulfil his or her obligations under the will;
- Whether the estate trustee wishing to resign is the sole trustee, or one of several;
- Whether the estate trustee has taken steps to administer the estate;
- Whether the trustee has been appointed by way of a certificate of appointment; and,
- Whether, and to what extent, the will permits an estate trustee to resign, and, further, provides a mechanism for replacement.

Because of the ongoing uncertainty with respect to an estate trustee being able resign without needing a court order, the prudent approach is to bring an application for removal and, if necessary, replacement.

Key Issues to be Considered by the Solicitor

If you represent an estate trustee who wishes to resign, you should be mindful of the following when considering how to move the matter forward:

- Whether you will be able to continue representing the estate.
- Whether you have authority to seek out an individual willing and capable of replacing the estate trustee (this will be dependent on the current trustee's ability to instruct you in this regard and the agreement of the beneficiaries to allow you to be part of this process).
- Whether the removal and replacement can be accomplished without resort to the courts.
- Whether your client trustee has carried out all required steps in administering the estate at the time of renouncing (i.e., probate, if necessary, the estate information return, tax filings, and initial distribution).
- What replacement order terms are required to ensure they are in the best interests of the estate but also insolate your client from further liabilities – and, to that end, whether a proper passing of accounts has been prepared or there is a commitment from the interested parties that the necessity of passing of accounts is waived.
- Whether your trustee client has appropriately communicated to the beneficiaries the status of the estate and the reason for renouncing – and, further, whether your trustee client and the interested parties (the beneficiaries) will agree to your prepared terms to avoid a contentious replacement proceeding.
- Whether the order and application materials:
    - appropriately retire the current estate trustee and name a successor estate trustee or confirm that the continuing estate trustee is the sole trustee.

- ensure all liabilities for administering the estate are expired and the current trustee's duties and obligations cease.
- outlines why the court should approve the actions of the estate trustee.
- deal with whether the costs for the renunciation are borne by the estate.
- deal with compensation if it is agreed upon and/or warranted.

If your client and sole estate trustee has lost capacity, then your conversation likely falls to the named alternate estate trustee, the beneficiaries and potentially the Public Guardian and Trustee, particularly if there is no suitable replacement.

Furthermore, if there are issues with how the current estate trustee has carried out his or her tasks, then it is likely incumbent upon you to seek direction from the court to finalize matters with the estate. It will also be essential to ensure that the steps you are taking during the replacement maintain the proper balance between shielding your client from any past, present and futures liabilities, and ensuring your client is acting in the best interest's of the estate.

In addition to the above, if you represent two or more estate trustees and one wishes to resign, you should:

- address that there may conflicting views between the estate trustees on how to deal with all of the above-noted issues, and if there is a conflict, you may need to refer each client out to new counsel.
- obtain the consent of renouncing and continuing trustee to your draft order terms.
- secure the consent of the renouncing trustee to permit you to continue to represent the estate.
- get off record if there is disagreement between the trustees.

Appendix A: Form of Accounts

74.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,

(a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;

(b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;

(c) an account of all money received, but excluding investment transactions recorded under clause (e);

(d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);

(e) where the estate trustee has made investments, an account setting out,

(i) all money paid out to purchase investments,

(ii) all money received by way of repayments or realization on the investments in whole or in part, and

(iii) the balance of all the investments in the estate at the closing date of the accounts;

(f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;

(g) a statement of all money and investments in the estate at the closing date of the accounts;

(h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;

(i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

(j) such other statements and information as the court requires. O. Reg. 484/94, s. 12.

(2) The accounts required by clauses (1) (c), (d) and (e) shall show the balance forward for each account.

(3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.[51]

[51] *Ibid,* r 74.17.