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WHEN CAN A TRUSTEE SEEK THE COURT'S GUIDANCE?

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Trustees of estates, testamentary trusts, and inter vivos trusts are increasingly facing complex decisions while managing diverse assets. Typically, the trustee must exercise their discretion in accordance with the terms of the instrument appointing them. But, occasionally, the trustee may be faced with a situation where the factual circumstances or the beneficiaries raise competing considerations, rendering the exercise of the decision-making more difficult. In such a situation, the trustee must determine whether the issue can be resolved through the exercise of the trustee's own judgment, whether the difficulty may be dealt with by professional advice, or whether the issue requires guidance from the Court. The appropriate course of action depends on the nature of the issue.

It is only in certain situations that the advice of the Court may be warranted. As stated by the Court over one hundred years ago:

> *The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorized to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.*[1]

This blog post will touch upon when the trustee may need to seek the opinion, advice, or direction of the Court, for the purpose of discharging its responsibilities.[2] As will be seen, for the most part, the trustee will need to bring their experience, discretion and practical judgment to complex and evolving circumstances. However, where there is genuine legal uncertainty, an application for advice and directions may be necessary to progress the administration of the Estate/Trust.

Questions that may be asked of the Court

The most frequent situation in which the trustee will require the assistance of the Court is where there is uncertainty about what the governing document (i.e. the Will or the Trust) authorizes or requires, or if the trustee is faced with a legal dilemma.[3] There may be an ambiguity in the language, internal inconsistency in the document, or silence on a material issue, which gives rise to competing interpretations of the document and thus makes the administration difficult or impossible. It may be that the uncertainty was not apparent when the document was created, or subsequent surrounding circumstances have created the uncertainty since the document was made.
The trustee should present the problem to the Court in a fair and impartial manner and should take a neutral position. The trustee will bring the Court application by framing a series of questions for the Court's consideration, that can be answered in a yes/no format. All parties whose rights will be affected by the Court's decision should be named as parties to the application.[4]

When construing or interpreting the Will or Trust, the Court will attempt to ascertain the intention of the testator/settlor. Often, an issue arises as to what type of evidence the Court will admit regarding the testator's intention. Generally, the Court will admit indirect evidence of a testator/settlor's intention, but will not admit direct evidence of intent.[5] By reading the governing document as a whole and considering admissible evidence in an effort to identify the testator/settlor's intended meaning, the Court can clarify the legal framework governing the administration and define the scope of the trustee's powers. Once that framework is established, the trustee generally remains responsible for exercising that framework in accordance with the Court's direction.

Questions that may not be asked of the Court

A trustee may not ask the Court for advice about an academic or hypothetical matter, where the question may or may not be a problem depending upon the happening of future events, or questions about the general state of the law. For example, if a situation may change over time, and the trustee or the parties want to know what to do in the future and in a contingent situation, the Court will likely refuse to provide an answer because it is a hypothetical situation. Generally, the Court will only answer questions that apply to the particular facts of a case, and the questions posed should be phrased so that the Court can answer "Yes" or "No" (as opposed to "What If?").[6]

The Court has also often expressed reluctance to interfere in a trustee's business decisions, or provide answers to how a trustee should exercise its discretion.[7] For example, although the Court may determine whether a trustee has a power of sale, interpret an encroachment power, or define the scope of litigation authority, the Court will not then make the decision for the trustee, including selecting among offers for purchase, determining a discretionary payment, or prescribing litigation strategy. These matters involve prudence and business judgment, and difficulty or risk does not convert them into legal questions.[8]

Effect and costs of seeking the Court Order

Where a question is properly before the Court, the resulting order will resolve uncertainty, and where the trustee then acts upon the Court's opinion, advice, or direction, the trustee will have discharged its duty, limited to the subject-matter of the application.[9]

Generally, where the advice or direction of the Court is required due to a genuine ambiguity in the governing document or a legal dilemma, the costs will be paid out of the Estate/Trust. However, if the Court determines that the answers requested of the Court are obvious, or that the application was unwarranted, the Court will likely revert to the "loser pays" principle that applies in civil litigation.[10]

Conclusion

Estate/Trust administration often requires trustees to make difficult decisions in uncertain circumstances. While an application for advice and directions can be an invaluable tool when legal questions arise or a trustee genuinely requires the Court's guidance, it is not a substitute for the exercise of fiduciary judgment. Knowing when to seek the Court's assistance, and when to act decisively, is an important part of effective trust administration and helps ensure that the interests of beneficiaries remain protected.

REFERENCES

1. See Fulford, Re (1913), 29 OLR 375 (Ont HC) cited in Primo Polionato Grandchildren's Trust, Re, 46 ETR (3d) 310 (SCJ) [D.M. Brown J.]
2. See for example s. 60 of the Trustee Act, R.S.O. 1990, c. T.23 at s. 60(1) and Rule 14.05(3)(a),(b),(d) of the Rules of Civil Procedure, R.R.O. 1990, Reg 194.
3. See Widdifield on Executors and Trustees, 6th Ed., Ch. 12:14: Interpretation and Construction of Wills.
4. See Widdifield on Executors and Trustees, 6th Ed., Ch. 12:16 to 12:18.
5. See for example, Marder v Geller, 2025 ONSC 6611 at 59-67.
6. See Estate Litigation, 2nd Ed., Brian S. Schnurr, Ch. 12:3: Questions that may and may not be asked of the Court. See also Margaret E. Rintoul, The Practitioner's Guide to Estate Practice in Ontario, 8th ed., Chapter 12, "Applications for Advice and Directions" citing Re Coulson, [1959] O.J. No 654 (Ont H.C.J.).
7. See Re Fulford, supra note 1.
8. Waters et al, Waters' Law of Trusts in Canada, 5th ed, ch 20.II.
9. See s. Trustee Act, R.S.O. 1990, c. T.23 at s. 60(2).
10. See Estate Litigation, 2nd Ed., Brian S. Schnurr, Ch. 12:11: Costs.

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