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Wills, Taxes and
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Issues in Law You Need To Know

Trustees Controlling the Corporation – a Challenging Situation

Estate planning intrinsically results in tax planning; one cannot dissociate the two. Indeed, the easiest manner to maximize the value of an estate is by minimizing the tax payable at death. The same approach applies to the successful business-owner; maximizing profit by minimizing taxes.

Trusts are often used to accomplish effective tax/estate planning. However, the use of a trust to control a private corporation imposes fiduciary obligations on the part of the trustees to administer the corporation for both the shareholders and the beneficiaries of the trust; a challenging balancing act for the trustees at the best of times.

This newsletter will explore the various duties of trustees and some of the conflicts of interest that can arise.

Powers and Authority of Trustees and Directors

Trustees have a duty to carry their powers and authority in accordance with the Deed of Trust whereas Estate Trustees have a duty to act in accordance with the



instructions conferred by the Testator's Will. Trustees have a fiduciary duty to act in the best interest of the beneficiaries; that is a duty of loyalty and a duty of care toward the beneficiaries

Trustees have three fundamental duties they must always comply with:

- they may not delegate their duties to a third-party;
- they may not profit personally from their dealings with the trust property; and
- they must act honestly, with prudence and reasonableness.

Trustees also have a duty to act personally, with care and in good faith and must avoid conflicts of

interest.

Directors, on the other hand, owe a fiduciary duty to the corporation, and only the corporation. Directors are intended to make policy and specific decision concerning a variety of business risks as long as it is for the best of the corporation. It is said that the directors are considered to be the alter ego of a corporation.

Trustees Controlling a Corporation

In many tax planning strategies such as an estate freeze, a family trust is introduced as the majority shareholder of the corporation holding the shares that will

represent the future growth of the corporation.

The introduction of a family trust as the majority shareholder is usually viewed as providing greater flexibility in tax planning strategies and estate planning but results in different considerations for decision-making: the duties of the directors versus the duties of the trustees.

Trustees holding the majority of the shares of a company face the possibility of having to make decisions that may impact the viability and value of the corporation and intrinsically affect the beneficiaries' interest in the trust. It is nearly impossible to avoid some conflict of interest in these circumstances; indeed when acting as both a trustee and a director, the individual has a duality of fiduciary duties which may ultimately conflict.

Where trustees hold shares representing voting control of the corporation, it is difficult to imagine how they can exercise their fiduciary duty without being appointed on the board of directors of the company. They may elect to only have one of them appointed but such does not discharge the other trustees of their fiduciary duties; they nonetheless must place themselves in a position to make informed decisions concerning the company in order to protect the assets of the trust.

If the trustees decide that all of them will be elected to the board of directors, they must vote in accordance with their fiduciary duties as trustees. If the Deed of Trust or the Will requires a decision by vote by majority, then the trustees must vote and make decisions as directors in a fashion similar to casting their vote as trustees.

There are significant differences in the operation of trust law and corporate law. The trustees who must act appropriately as directors must also act in the best interest of the beneficiaries which can sometimes conflict with what is in the best interest of the shareholders; not always an easy juggling act.

Estate Trustees Controlling a Corporation

Estate trustees are faced with the same challenges stated above and, further, they must as well meet their fiduciary duties toward the beneficiaries of the estate. The issue is therefore how can you balance the duty of care to the beneficiaries of the estate and the corporation??

Estate trustees must also deal with estate planning strategies that render their decision-making even more difficult as they are required to consider different beneficiaries who may have different interests. For example, what if the testator leaves a life interest of the income

of the corporation to his spouse but on her death the shares including all income not paid to the spouse, are to be equally divided amongst his children. In whose interest do they manage the corporation, the spouse or the children?

This is just one example of the complex issues that can arise from the duality of acting as estate trustee and director of a corporation. A well drafted Will should provide clear instructions to the estate trustee for such circumstances but often it does not, leaving the estate trustee in a thorny situation.

It is noteworthy that if the estate is dependent upon an income stream from a corporation, the estate trustee must serve as a director to ensure that the appropriate business decisions are made on timing and distributions of profit of a business.

However, an estate trustee/director of a corporation is caught in an impossible situation that can only result in a conflict of interest. The estate trustee/director must then face the possibility of having their decisions reviewed by either the shareholders or the beneficiaries of the estate.

Jurisprudence appears to indicate that the beneficiary of an estate is not entitled to any disclosure of the corporate and financial records of the corporation. However, as long as the beneficiary's interest is involved, the beneficiary is entitled



to disclosure of all trust documents and may seek from the estate trustee all documents or communications between the trustee and the corporation.

Furthermore, trustees may also see their actions as director questioned by the beneficiaries claiming an “oppression remedy.” Professionals who advise on estate planning ought to consider this remedy when discussing estate planning with the testator. The decision of the trustee/director may always be subject to review and remediation in accordance with the available remedy under the legislation or equity.

Conclusion

We have seen that it is nearly impossible to avoid a conflict of interest when one is acting as both a trustee and a director. In those instances, the trustees/directors have a duality of fiduciary duties which may ultimately result in a conflict.

Many professionals view this “conflict” as a novel concept and dismiss it on the basis that in practice, the trustees and directors have the discretion to administer the trust and the corporation “as they see fit.”

I submit that such view fails to properly advise trustees who must carry both the duties of trusteeship and directorship. It is true that

trustees may be absolved of any personal liability if the Deed of Trust or the Will so states. However, that is only partially true as they can still be held liable under equitable remedies or under corporate legislation.

If you are acting as both trustee and director, it is essential that you recognize your fiduciary duties and to whom to you owe such duties. Failure to do so could result in untenable positions and potential personal liability.

If you have any questions concerning the duties of a director or trustee, please do not hesitate to contact me directly at 613-288-3220 or by email at sdesmarais@tslawyers.ca

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CALL TO THE BAR

Law Society of Upper Canada, 2007

PRACTICE SUMMARY:

Sébastien joined Tierney Stauffer LLP as an Associate in the Wills, Estates & Trusts Planning & Administrative Practice Group in 2009. His practise focuses on estate planning, will drafting and personal and corporate taxation. Sébastien has experience in resolving disputes with the Canada Revenue Agency (CRA), filing voluntary disclosures, assisting individuals with their tax related issues and tax planning for families and businesses.

Sébastien is bilingual and practices in both official languages. He has spoken at various seminars on estate, trust and tax matters. Sébastien has also appeared on radio and television discussing legal issues. He is a tutor for the Law Society of Upper Canada for the Estate Practice section.

Prior to joining Tierney Stauffer LLP, Sébastien practiced with another Ottawa law firm where he gained experience in tax law, charity law, estate planning and will drafting.

