

The Perils of Appointing a Non-Resident Estate Trustee (Executor)



There is much talk about the legal issues that arise when a non-resident (a person residing outside of Canada) who was appointed in the Will of a deceased person, accepts his or her appointment and wishes to begin acting as executor. Specifically, the concern people express is regarding the bond required under most provincial laws, usually in the amount of double the value of the probatable estate (i.e. the value to which the applicant executor swears is the value of the estate, in the court Application for the Certificate of Estate Trustee with a Will).

The legal issues of concern are as follows:

1. Where a person dies with a valid Will: Testacy
Provincial estates statutes require the posting of a bond (paid to the Accountant, Superior Court of Justice) in an amount twice the value of the probatable estate, to be posted by a person who was appointed executor in a Will, unless the appointed executor lives in Canada or in a Commonwealth country. However, the court has jurisdiction to reduce (or eliminate) the amount of bond posted, and in practice, where the court finds that it is necessary to post a bond, the court generally requires the bond to be in an amount equal to the value of the estate. If the person resides in Canada or in a Commonwealth country he or she can act as executor without posting a bond. This means that an appointed executor who lives in Australia (a Commonwealth country) does not have to post a bond, but an appointed executor who lives in Buffalo, N.Y. does have to post a bond, because the United States is not a Commonwealth country. Interestingly, Hong Kong was part of the British Commonwealth but is no longer a Commonwealth country now that it's been given back to the Chinese government. So, while an appointed executor who resided in Hong Kong while under British mandate was not required to post a bond in Canada, an appointed executor currently living in Hong Kong would be required to post a bond.

The bond is usually obtained from an insurance company for an annual fee. The bond is meant to provide protection to creditors and beneficiaries of the estate from dishonesty, misappropriation or negligence on the part of the executor. There are very few insurance companies in Canada who enter into such agreements, and those who do, require a very high fee.

Since the court process to do away with the bond requirement is time consuming and costly, whenever possible individuals should consider appointing a Canadian resident (or Commonwealth resident) as executor of their Will.

2. Where a person dies without a valid Will: Intestacy

Since there is no person with authority to administer the estate, the court must appoint an estate administrator (grant a Certificate of Appointment of Estate Trustee without a Will) to administer and distribute the estate. Ontario estates statutes require that the court appointed estate administrator be a resident of Ontario. In

any event, there is a statutory requirement that the court appointed administrator post a bond. In some cases, if the court is satisfied that the estate has no outstanding liabilities, the court dispenses with the bond requirement. Again, the court process is time consuming and expensive, leaving less money for the heirs of the deceased.

For this reason, among others, it is important for individuals to ensure that they have a valid Will.

Contact your BMO Nesbitt Burns Investment Advisor for more information on appointing an executor, or for assistance in finding an estate planning professional.

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