

# The perils of appointing a non-resident estate trustee (executor)

There is much talk about the legal issues<sup>1</sup> that can arise when a non-resident (a person residing outside of Canada, in a non-Commonwealth country) 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 estate administration Bond that is required by most provinces. The amount of the Bond is determined by court, and may be as high as twice the value of the worldwide estate.

## Where a person dies with a valid Will: Testacy

Unless the appointed executor lives in Canada or in a Commonwealth country, the court may require a Security Bond, from the applicant executor. 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 appointed executor 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 England or Australia for example, 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. 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 likely 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.

It is possible to ask the court to dispense with the Bond requirement, but this is not always successful. 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) person as executor of their Will.

## 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 to administer and distribute the estate. Ontario laws require that the court appointed estate administrator be a resident of Ontario. Where there is an intestacy, the law requires that the court appointed administrator post a Bond (with the exception of a Corporate Trustee). In some cases, if the court is satisfied that the estate has no outstanding liabilities, the court may dispense with the Bond requirement.

In any event, the court process delaying with an intestacy is time consuming and expensive, leaving less money for the heirs of the deceased. For this reason, among others, it is important for everyone over the age of majority (or, 16, in British Columbia) to have a valid Will.

## Instructing the Investment Advisor

Securities laws on both sides of the Canada – U.S. border prohibit an individual who is not a licensed, registered broker to give instructions to sell, transfer securities in the other country. For this reason as well, appointing an executor who resides in the U.S. is not recommended.



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