

No one Wants to Inherit Environmental Liability – Limiting Beneficiaries’ Liability Environmental Protection Act Orders

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When drafting a will, don’t forget to consider your beneficiaries’ personal potential environmental liabilities. If your estate contains contaminated property, your beneficiaries are exposed to unlimited personal potential liability under the *Environmental Protection Act* (*EPA*).

One solution? Leave the contaminated property in the hands of the estate trustee to limit environmental liability.

Under the *EPA*, estate trustees have limited personal liability for costs to comply with Ministry of the Environment and Climate Change (MOECC) Orders. The *EPA* states that if a fiduciary is ordered under the *EPA*, they may incur costs limited to “the value of the assets they hold or administer on the date they are served with the order, less their reasonable costs of holding or administering the assets”.¹

If the estate property includes contaminated property, beneficiaries can limit their personal potential liability by allowing an estate trustee to maintain legal ownership of that contaminated land. At the same time, the beneficiaries can continue to enjoy their beneficial use of the property – for instance, collecting rent.

Will drafters must be aware that if the will does not adequately convey the estate property to the trustee, the property may vest in the beneficiaries after three years. Under the *Estates Administration Act* (*EAA*), s. 9, real estate automatically vests in the beneficiaries if not distributed to the beneficiaries within three years after the death of the deceased.² Once a contaminated property vests in a beneficiary, that beneficiary is not protected from personal liability under the *EPA*.

Note that the *EAA*, s. 9 will not override the testator’s intention. The *EAA*, s. 10 provides that section 9 will not derogate from “any right possessed by an executor or administrator with the will annexed under a will or under the *Trustee Act* or from any right possessed by a trustee under a will”.³

In *909403 Ontario Ltd. v. DiMichele*,⁴ the Ontario Court of Appeal considered a will which gave the estate trustee the power to sell the property “at such time or times, in such manner and upon such terms as my Trustee in his discretion may decide upon”. The Court held that the *EAA*, s. 9 did not cause an automatic vesting of estate property in the beneficiary. The Court held that “[t]he intention of the deceased, as expressed in his or her will, is always paramount” and further that “[w]here a will gives the estate trustee a power to sell property at such times and in such

¹ RSO 1990 c E 10, s 168.23.

² RSO 1990, c E 22, s 9.

³ *Ibid*, s 10.

⁴ 2014 ONCA 261.

manner as the estate trustee sees fit, s. 9 of the *Estates Administration Act* will not limit the scope of that power by requiring that the property vest after a specific period of time”.⁵

If the will deals with potentially contaminated property, you can easily protect the beneficiaries. With some forethought and deliberate drafting, the beneficiaries can enjoy income from contaminated property while simultaneously avoiding personal environmental liability.

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⁵ *Ibid* at para 100.