

TAB 3

**Locating Missing Beneficiaries:
A “How-To Approach”
for Estate Administrators and Trustees**

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Locating Missing Beneficiaries: A “How-To Approach” for Estate Administrators and Trustees¹

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Introduction

An estate trustee or administrator is responsible for the final distribution of an estate in accordance with the terms of a will or the rules of intestacy. The trustee or administrator must locate the beneficiaries to carry out the distribution. If they are “missing” or not easily located, the administrator must undertake “reasonable inquiries²” to determine their existence and location. While it has been held that “casual inquiries” will not be sufficient to discharge this duty³, there is no clear standard in statute or common law for what constitute “reasonable inquiries.” This paper explores what might constitute “reasonable inquiries” from a how-to perspective: i.e. what an estate administrator, or trustee, can do to attempt to find missing beneficiaries and to satisfy the Court that its efforts are sufficient.

The Mystery

A paper about missing beneficiaries should begin with a mystery: as an example, a named beneficiary seemingly without any known past or present. A woman named Violet Manning⁴. Who was she? Was she alive or dead? Did she have children, and if so, where did they live?

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² The principle of making “reasonable inquiries” to locate beneficiaries originates in section 24 of the *Estate Administration Act*, discussed in more detail later in this paper.

³ *Re Short Estate*, [1941] 1 W.W.R. 593 (B.C.S.C.) [*Short Estate*].

⁴ All names have been changed.

Violet Manning is the central figure in an unsolved riddle. She is a much sought after but missing beneficiary named in the Last Will and Testament of Walter Allen. Mr. Allen executed a will on June 27, 2006 in which he provided that each of the children of his late sister-in-law Violet Manning was entitled to one share of the residue of his estate. There is only one problem: no family member or beneficiary knows, or has ever heard of, Violet Manning.

There are other problems. After Mr. Allen executed his Will he made a number of hand-written alterations and deletions on the face of the type-written text. The clause making the children of Violet Manning residual beneficiaries has been obliterated and someone, likely Mr. Allen, has hand-written the word “ok” before the obliterated text. The change is not dated or signed, but evidence of the earlier condition of the Will makes it clear that the changes have been made after execution. What then should be given effect: the type-written original clause or the subsequent obliteration? On a review of the applicable legislation, these changes do not constitute valid alterations pursuant to section 18 of the *Succession Law Reform Act*. Therefore, the type written clause stands and the mystery remains.

Who is Violet Manning and how many children did she have, if any, what are their names and where do they live? The search for Violet Manning, and her children, encompasses—to degrees—the two situations in which an estate trustee may need to search for missing heirs:

- (i) To determine the whereabouts of an identified beneficiary who cannot be located and;
- (ii) To ascertain the identity of those who may be entitled to benefit from an estate.⁵

⁵ Diane A. Vieira, “The Responsibility of an Estate Trustee to Search for Heirs” (2008) 12 *The Probater*. [*The Probater*]

Violet Manning has been identified by name but cannot be located and her children, while entitled to benefit, are not identified. Thus, while the missing beneficiaries are the children, as opposed to Violet Manning, it is necessary to obtain information about her in order to ascertain the fact of and the identity and location of her children.

The Legal Obligations of an Estate Administrator/Trustee to Locate Missing Heirs

The legal obligation of an estate administrator to locate missing beneficiaries arises both in statute and common law. Section 53 of the *Trustee Act* provides that while placing a notice or advertisement is sufficient for the administrator or trustee in giving notice to creditors of the existence of an estate before final distribution, it is not sufficient notice with respect to heirs.⁶ A trustee has an obligation to do more in alerting beneficiaries to the existence of an estate than simply placing a notice in a newspaper.

Section 24 of the *Estates Administration Act* requires an estate trustee to make “reasonable enquiries” to locate a beneficiary or someone who may be entitled “by virtue of a relationship traced through a birth outside marriage.”⁷ While this provision speaks specifically to the duty of a trustee to satisfy him or herself that there are no beneficiaries who are children born outside marriage, the standard of “reasonable enquiries” is applicable to the search for any beneficiary.

While it may not be possible to say exactly what constitutes a “reasonable inquiry” in each particular case, the Courts have determined that a casual effort or inquiry will not meet the test. In *Re Short Estate*, the Court held that casual inquiries by an estate trustee or administrator

⁶ *Trustee Act*, R.S.O. 1990, c. T.23, s.53.

⁷ *Estate Administration Act*, R.S.O. 1990, c. E 22, s. 24.

into the whereabouts of a beneficiary were not sufficient⁸. Regarding the defendant estate trustee, the Court found that:

The defendant was negligent in not ascertaining the whereabouts of the infant plaintiff...if inquiry was made in this connection it was of the most casual kind. ...After all, a trustee does owe duties to a cestui que trust and one of the first of them is to let the cestui que trust know of his interest and something about the trust.⁹

Practical Approaches to Locating Missing Beneficiaries

The law suggests that a trustee or administrator should make “reasonable inquiries” to locate a missing beneficiary but, in practical terms, what constitutes such an effort?

The trustee or administrator should start with friends and family of the deceased—not only those who are named as other beneficiaries, but a wider circle of those who knew the deceased. Therefore, this wider circle will encompass friends and family who are not beneficiaries, as well as employers, colleagues, or other professionals who played a role in the life of the deceased.¹⁰

With respect to the other beneficiaries, the trustee may not only want to speak with them, but may send each a letter asking for a written response to a request for information.¹¹ The responses received will be useful inclusions in Court materials to be discussed below. If the people who knew the deceased—beneficiaries and others—cannot shed any light on the location or identity of a missing beneficiary, then the personal effects of the testator may be helpful. Are

⁸ *Short Estate*, *supra*, note 3 at para. 5.

⁹ *Ibid.*

¹⁰ *The Probater*, *supra* note 5.

¹¹ This approach was used in attempting to locate Violet Manning.

there documents or letters—electronic or otherwise—or other records such as an address book¹², diary, or personal papers that the deceased kept that might prove useful in the search?

After speaking with friends and family and examining personal effects, the trustee will need to expand his or her search. At this stage, the trustee should consider advertising to a wider audience for information about the beneficiary. Case law establishes that a trustee is expected to place a newspaper advertisement not randomly, but where the deceased resided, where next-of-kin live or reasonably might be thought to live, or where it is believed or known that a missing beneficiary has resided.¹³ A notice should provide “as much detail as possible about the decedent’s life to assist in the identification of the decedent and possible next-of-kin.”¹⁴ A detailed notice may help trigger a memory and elicit useful information.

If it is believed that the missing beneficiary may reside outside of Canada, then the trustee should consider contacting a consulate or embassy to see if they will provide any assistance.¹⁵ In this regard a trustee is cautioned to proceed carefully. Unentitled individuals may present themselves in the hope of securing a bequest or searchers may simply want to

¹² Again, in the case of Violet Manning the Trustee carefully reviewed the deceased’s address book for clues to her whereabouts.

¹³ See *Bank of Nova Scotia Trust Co. v. Kennedy Estate*, [2009] O.J. No. 1440 (Sup. Ct) where the Court ordered the Trustee to place an advertisement “in a paper having general circulation in the Pittsburgh, Pennsylvania area.” In *Re Bull*, [1934] O.J. No. 57 (High Ct. of Justice) the Court noted that an “administrator should advertise in newspapers published at Beaver Falls, Pennsylvania and Butte City, Montana, being respectively the places where he [the missing beneficiary] had last been heard from and to which he apparently then proposed to proceed. Advertisements seeking information as to the absentee were so published, but no information was received in response thereto.” In *Re Ashman*, [1907] O.J. No. 15 (High Ct. of Justice) the Court held: “Then is the advertisement sufficient? No doubt, if the administrators’ had any reason to believe that the brother was living in any particular part of the world, they should advertise there; or if they had any reason to believe that, though deceased, he had left children, they should have advertised where the children might reasonably be expected to be living. But here, there was no reason to believe either that he was living or that he had ever married; the estate was a very small one; and I do not think the administrators were called upon to do more than they did.”

¹⁴ Monique Charlebois, “The Estate Trustee’s Duty to Search for Heirs” Office of the Public Guardian and Trustee, Ministry of the Attorney General, Ontario, April 4, 2002 at 9 [*Duty to Search for Heirs*].

¹⁵ *Ibid.* at 10.

collect a fee in circumstances where they cannot reasonably provide any useful information. Therefore, efforts may include the following:

...ask if any fees will be charged to the heirs, consider whether these are reasonable in the circumstances, and carefully scrutinize the documentation submitted on behalf of the individuals located.¹⁶

After seeking out information from family and friends, personal effects, and placing a newspaper advertisement, a trustee may also consider hiring a professional investigator or genealogist. An investigative company was retained in the search to determine the whereabouts of Violet Manning and the identity of her children. The company searched Toronto City directories and telephone directories, death notices published by the Toronto Star from 1950 to 2008, the records of the Mount Pleasant Group of Cemeteries and the obituary files stored at the Toronto Reference Library from 1884 to March 4, 2008. The company also conducted a Canada wide media scan for Violet's first and last name, filed a Notice of Death search with the Ontario Registrar General for the ten year period from 1988 to 1997 and filed a search of the Social Security Death Index in the U.S.¹⁷ These searches are probably more than the average trustee can conduct by him or herself. At the same time, these searches were considered cost effective relative to the size of the estate and the fact that prior searches had not yielded any useful information. Please note, however, that while the trustee may seek the assistance of a professional investigator, the responsibility for conducting due diligence in the search for missing beneficiaries still resides with the trustee. To that end, the trustee must carefully review the work undertaken by an investigator and the results provided.

¹⁶ *Ibid.*

¹⁷ This information was included in the Factum submitted to the Court as part of the Application Record to seek its direction, advice, and opinion with respect to Walter Allen's estate and the Trustee's efforts to locate Violet Manning.

Other Resources

In addition to professional assistance, there are a variety of other sources—many on the Internet—that an administrator or trustee may want to avail themselves of in conducting a search.

The Archives of Ontario—with a facility open to the public on the campus of York University—provides a wide array of information about how to use and access various sources of information including finding divorce files, using the “Ontario Land Record Index,” municipal records, vital statistics indices, early land settlement records and newspaper holdings. The Archives can be found on the web at <http://www.archives.gov.on.ca/english/index.aspx> . The website also provides a list of professional genealogical researchers.

If the missing beneficiary is possibly outside Ontario, then an equally good source of information is the Library and Archives of Canada. The Library can help link a trustee to information such as births, deaths and marriages in other provinces as well as records such as national censuses, military records and cemetery databases. Its website can be found at <http://www.collectionscanada.gc.ca/index-e.html>.

Other useful web sources include “Cyndi’s List” which has more than 270,000 links to family histories at <http://www.cyndislist.com/>. There is also “Rootsweb” at <http://www.rootsweb.ancestry.com/> and “Ancestry.com” at <http://www.ancestry.com/>. Both sites have links to dozens of databases around the world.

An estate trustee, with a certificate of appointment or a copy of the Will, has the same authority to obtain certain records as the deceased if he or she were alive and seeking personal

information.¹⁸ This is important as many records, which fall under the *Vital Statistics Act* and are available from the Ontario Registrar General, will only be produced to a trustee. For example, a trustee can obtain a certified copy of a birth, marriage or death registration. These documents can provide a trove of useful information. For example, a birth registration will contain the names of parents, their place and date of birth, as well as—in some forms—the mother's maiden name, an address of the parents, marital status and the total number of children born to the mother as of the date of the registration.¹⁹

Returning to Violet Manning, after efforts undertaken both by the estate trustee and a professional investigative company, her whereabouts and those of any possible children remained a mystery. The final distribution of the estate continued to be frustrated.

Seeking Direction from the Court

When a trustee or administrator has conducted a search without success it is then time to seek the opinion, advice and direction of the Court by bringing an application under the *Rules of Civil Procedure* and Section 60 of the *Trustee Act*. In addition to the Notice of Application and a Factum, the supporting document for the Application is an Affidavit by the trustee detailing his or her efforts to locate the missing beneficiary. If a professional investigator has been hired, then the trustee will want to obtain a detailed report of the investigator's efforts and this report should become an exhibit to the affidavit. The Application Record should be served on everyone with an interest in the estate. The trustee should also consider giving notice of the Application to the Office of the Public Guardian and Trustee and/or the Office of the Children's Lawyer.

¹⁸ *Duty to Search for Heirs*, *supra* note 14 at 15.

¹⁹ *Ibid.* at 15.

“Reasonable Inquiries”—Persuading the Court

As noted, the Court will need to be satisfied that an estate trustee has made “reasonable inquiries” to determine the whereabouts of a missing beneficiary before it can make an Order as to how the estate should be distributed in the absence of that beneficiary. Since there is no precise standard or test, either in statute or common law, which enunciates what constitute “reasonable inquiries” the trustee needs to build a persuasive case for the Court. The trustee needs to establish that he or she has conducted due diligence in searching for the missing beneficiary and that their efforts should be held to have met the standard. The goal is to persuade the Court that it should accept the measures that have been taken as being sufficient and that it should provide direction as to the distribution of the estate in the absence of the missing beneficiary.

In this regard, the trustee needs to establish that he or she has 1) inquired of any other beneficiaries as to their knowledge of the whereabouts of the missing beneficiary; 2) inquired of a wider circle of friends, family, employers, colleagues, or others who may have knowledge; 3) examined the personal effects of the deceased for possible information; 4) considered retaining, or has retained, the services of a professional investigator or genealogical researcher; and 5) undertaken, if possible, other searches through government departments and web resources. The trustee should document its efforts for the reference of the Court and should include materials such as written responses from beneficiaries or other individuals regarding their knowledge of the missing beneficiary and any reports obtained from professional investigators. The Court will evaluate the steps that have been taken in the context of the information available to the trustee and the dollar value of the estate relative to the cost of the searches and the investigative tools available to the trustee.

In the case of Violet Manning, while her whereabouts and those of her children remain a mystery, there has been a resolution for the estate. The Trustee has been able to satisfy the Court regarding its efforts to locate Violet by presenting evidence of all of the steps outlined above and has obtained the required direction of the Court for the distribution of the estate.

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