

LEGAL UPDATE

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ADMINISTERING AN ESTATE

The Roles of the Estate Trustee and his Lawyer

Introduction

The purpose of this Legal Update is to make clients responsible for the administration of an estate aware of their responsibilities and the responsibilities of the lawyer they employ to advise and assist them in such administration.

A Word About Terminology

We have all heard and used the word "executor" to describe a person charged with the administration of an estate. Strictly speaking, the word "executor" refers to a person who has been appointed to administer an estate by a person making a will. If the person appointed is a woman she is called an executrix. If there is no will, and a person is appointed by the Court, that person is an "administrator". A woman so appointed is called an "administratrix". Two women appointed are called executrices or administratrices depending on whether the appointment comes from the will or the Court.

These changes of gender have always created problems in preparing documents. A group of people established by the Rules Committee of the Ontario Court came to the conclusion that the use of six separate terms to describe persons administering an estate was nonsense. They suggested use of the term "estate trustee". That suggestion was adopted on January 1, 1995. In this Update that phrase will be used.

At the same time, the group established by the Rules Committee considered the use of the phrase "letters probate" which was the certificate issued by the Court when a will was proven before it as being the last will of a person who had died. The group concluded that while at one time the phrase was self explanatory, the English language has changed, and no one now understands what is meant until it is explained to them. They felt that the phrase "Certificate of Appointment of Estate Trustee" is more easily understood. It's recommendation

was adopted at the same time.

There is one other word that needs some explanation, and that is the word "office". A person who fills a position is said to fill that "office". For example, the President of a corporation fills the office of president for that corporation. The same idea applies to an estate trustee. He or she fills the "office" of estate trustee for the estate in which he or she is acting.

Your Position as a Fiduciary

In your position as estate trustee you are a "fiduciary" and you stand in a "fiduciary" position with respect to the beneficiaries. A person who is in a fiduciary position to others is required to show utmost good faith in dealing with them. While you no doubt intend to act in good faith with respect to the beneficiaries, I cannot stress too strongly the word "utmost".

It means that if there is any conflict whatever between your interests and the interests of the beneficiaries, the conflict must be resolved in favour of the beneficiaries. This is best explained by a couple of examples.

A fiduciary cannot, nor can any member of his family, borrow money from the estate, even if he is willing to pay more than a normal rate of interest.

A fiduciary cannot, nor can any member of his family, purchase anything from the estate, even though he is willing to pay a fair price for it.

It may be that a fiduciary will wish to do something that will be not only of advantage to him but also of advantage to the estate. Nevertheless, he cannot do it.

The Court imposes severe penalties on a fiduciary (read "estate trustee") who contravenes the requirement of utmost good faith. In one case, for example, where an estate trustee borrowed money from an estate and invested it in a real estate development that was very successful, and who repaid the borrowed money to the estate with interest, on the complaint of one of the beneficiaries, the estate trustee was required to turn over to the trust the whole of his profit on the development.

These situations can, of course, be resolved if (1) the will permits the prohibited activity, or (2) if all beneficiaries are adults and all consent to the estate trustee doing the prohibited activity.

If, however, any of the beneficiaries are under a disability (for example, are minors or are mentally incompetent) and therefore not able to give a legally binding consent, the estate trustee cannot do what he might otherwise want to do unless he first obtains a Court order permitting him to do it. The cost of the application must be paid for by the estate trustee personally, and unless he is very persuasive, it is unlikely that he will get requested order.

ROLE OF THE ESTATE TRUSTEE

While the following list is intended to be complete with respect to the administration of most estates, there may be omissions that will apply to the estate in which a reader has a specific interest. It is impossible to predict what that might be in advance in a general discussion such as this.

The order of listing does not indicate relative importance or order in which work is to be done. While it is obvious that some jobs have to be done before others, many proceed at more or less the same time.

Many estate trustees expect the lawyer they employ to do some, if not all, of the work that is their responsibility. Most lawyers are quite happy to do so because their office is equipped to do it. Nevertheless, the ultimate responsibility is that of the estate trustee.

An understanding of who is going to do what should be established at the time of your first interview with your lawyer so that you do not both end up doing it.

The Certificate of Appointment of Estate Trustee

One of the first decisions you are going to have to make is whether or not you are going to apply to the Court to obtain a Certificate of Appointment of Estate Trustee. While it does not have to be obtained in every estate, it is normal to obtain it in

most of them. You should have your lawyers advice in making your decision.

The Certificate is a document issued by the Ontario Court.

It certifies the death of the person who has died, confirms the appointment of the estate trustee named in the last will in his or her office as estate trustee, and certifies that the document attached to it is a copy of the last will.

The purpose of the Certificate and the protection that it gives to the estate trustee and to persons with whom he deals is beyond the scope of this Update.

Funeral and Burial Arrangements

While you will probably have to obtain a Certificate of Appointment in order to administer the estate, you do not have the time to wait for that appointment with respect to funeral and burial arrangements. These arrangements are your first responsibility. Your obligation is to arrange a funeral that is consistent with the "station in life" of the person who has died.

A search should be made at this time to discover whether or not the deceased person left any special burial instructions, or made any disposition with respect to the use of his or her body or any part of it.

Paying for Funeral

If there is enough money in a bank account of the deceased to pay for the funeral, there is no need to wait until your appointment as estate trustee is confirmed by a certificate of appointment. This is because the funeral director comes first, ahead of any other creditor, and ahead of the beneficiaries even if they are arguing among themselves and tie the estate up in quarrels for a long time.

The bank will not issue a cheque to you to pay the funeral director. It will, however, issue a draft payable to the funeral director for the amount of the account. Accordingly, you should obtain the account from the funeral director, take it to the bank, obtain the required draft, and deliver the draft to the funeral director to pay the account.

Search for a Will

Your next job is to make a search to find the last will of the person who died. Normally this is found in the office of the lawyer who acted for him or her during his or her

lifetime. Often a copy can be found at home or in a safety deposit box. If a will cannot be found, enquiries should be made with lawyers in the area where the deceased person lived.

If those searches draw a blank, your lawyer can assist you in advertising for a will in various legal publications that come to the attention of lawyers.

Opening Estate Bank Account

You should open an estate bank account through which to do the business of the estate. This should be an account that allows you to write cheques on it. All money received and all money paid out should be done through this bank account. You do not have to put money into it to open it. You will, however, have to attend at the bank and sign signature cards. Cheques and money can be deposited in it before the Certificate of Appointment has been obtained, but cheques cannot be written until after the Certificate has been issued. The account does not have to be opened in the same bank that the deceased person had an account, although that is normal. The test is what is most convenient for the estate trustee.

At some time in the future, you will be required to give a strict accounting of all money received and disbursed. You should keep a record of the deposits and the payments. Your record should indicate the date, source, and amount of each cheque deposited. If several cheques are deposited at the same time, the record should show the date, source, and amount of each of the several cheques deposited. It should also show the date, payee and reason for each cheque written.

You should, of course, tell your lawyer the name of the financial institution in which you have established the account, the branch address and telephone number, and the estate account number.

Lawyers have sometimes been instructed by an estate trustee to pay the estate debts. Only the estate trustee has this power because only the estate trustee should be able to write cheques on the estate account. The lawyer should not be expected to pay estate debts from his or her pocket.

Notifying Income Security Programs, G.S.T., and Pension Trustees of Death

The estate is entitled to the old age security and Canada Pension plan cheques that would have been received by a deceased pensioner in the month of death. Cheques for subsequent months must be returned. To stop these cheques the Income Security Program should be notified of the death as soon after death as possible.

This comment also applies to persons who received a G.S.T. credit from Revenue Canada during their lifetimes on a periodic basis. The G.S.T. authorities should be notified. The estate is entitled to receive any cheque issued in the month of the death of the deceased recipient. If they are not notified and later cheques are issued, it is difficult to obtain an income tax clearance later on even though the cheque has been returned.

If the deceased was receiving a pension or annuity payment from any other source, the trust company or government agency administering the pension or annuity should also be notified immediately. Whether or not the estate is entitled to a pension and/or annuity payment payable in the month of death depends on the plan giving rise to the payment. Some plans provide that the estate is to receive the payment payable in the month of death regardless of whether the cheque is issued prior to the date of death or not. Others provide that no cheque issued after the date of death is payable and if issued must be returned.

Listing the Assets

You are going to have to prepare a complete list or inventory of the assets of the deceased, and determine the fair market value of each of them as of the date of death. This list forms one of the items of information contained in the application to the Court in order to obtain a Certificate of Appointment, and forms the basis of all accounting an estate trustee must make to the beneficiaries, and if any of them become dissatisfied, to the Court. It is impossible to stress too strongly the importance of the inventory being complete and accurate.

The list should indicate whether the asset is an asset that must be administered as part of the estate or whether it is an asset that passes to another person outside of the estate pursuant to a right of survivorship, through the named beneficiaries provisions of a life insurance policy or R.R.S.P., or otherwise.

There are at least three reasons for including both types of assets. (1) Court fees are not payable on assets that pass to another person outside of the estate. The list makes obvious those assets that should not be included in calculating the fees. (2) The estate trustee does not have to account for these assets to anyone other than the person who received it outside of the estate. It serves as a reminder if the estate trustee forgets whether or not it is an asset for which he must give a general accounting. (3) If a beneficiary asks why an asset has not been included in an

accounting, reference to the inventory may give an immediate answer.

The distinction between assets that must be administered as part of the estate and assets that have passed to a beneficiary "by right of survivorship" or by some other means is beyond the scope of this Update. When you discuss the estate assets with your lawyer, he or she will be able to advise you with respect to them on an asset by asset basis.

PERSONAL PROPERTY

If all items of personal use and all articles of household goods and ornament, including consumable stores, are to go to one person, the list must refer to and value them, but a separate list of each item is not necessary.

The same applies to farm implements, produce, and stock.

If, however, these items are to be divided among several people, they should be separately valued.

REAL ESTATE

The most significant asset owned by most people is their home. You should obtain a copy of the deed, determine the nature of ownership (is it in the name of the deceased person alone or in the name of the deceased person and a surviving spouse as joint tenants), the current fair market value, and the balance owing on any mortgages.

If the deceased person owned any other real property (cottage, farm, etc.), the same information will be needed for each property.

MORTGAGES

If the deceased owned any mortgages at the time of his or her death, you should obtain a copy of the mortgage, the address of the person owing the money, and determine the balance owing.

BANK ACCOUNTS

Each bank account should be identified by the name of the bank, branch address, and account number.

LIFE INSURANCE

You should obtain the original of all life insurance policies, obtain the name and address of the company issuing them, determine the amount payable, and determine the address of any named beneficiary.

INVESTMENT CERTIFICATES, BONDS & DEBENTURES

Investment certificates and bonds and debentures should be identified by company, serial number, face value, interest rate, interest payment dates, and maturity dates. Bonds and debentures should be valued at the bid price as of the close of trading on the date of death. Accrued interest from the date of last payment of interest is an asset of the estate and must be calculated and included in the value of the certificates, bonds and debentures. If the originals cannot be immediately obtained, your lawyer will probably be happy to receive photocopies at this stage. Later on, the originals will be needed to either redeem or transfer them to beneficiaries.

SHARES OF PUBLICLY TRADED CORPORATIONS

Shares of the stock of publicly traded companies should be identified by the name of the company as it appears on the certificates, the serial number of each certificate, and the number and type of each share. The values are closing values as quoted on the financial page of the newspaper on the date of death. It would be helpful to give that newspaper page to your lawyer. If original certificates cannot be obtained immediately because they are in a safety deposit box, your lawyer would be happy to receive photocopies at this stage. Later on, the originals will be needed to transfer them to beneficiaries or sell them.

SHARES OF PRIVATE CORPORATIONS

If the deceased owned shares in a private corporation, you should obtain the name and address of the corporation, the secretary of the corporation, the number and type of shares issued by the corporation, the number and type of shares held by the deceased, and the value of those shares. If the deceased entered into a shareholders agreement during his lifetime with other shareholders, you should also obtain a copy of it.

PENSIONS, RRSPS, AND RIFFS

Complete information should be obtained with respect to pension payments that were being paid to the deceased, the value of any registered retirement savings plans, the value of any registered retirement income funds. In each case, the name and address of the company making the payments, the pension identification number, the monthly amount, and the name of any named beneficiary should be included.

MOTOR VEHICLES

You should obtain the year, make, and model of each motor vehicle owned by the deceased at the time of death, and obtain an evaluation of it. If it is to be transferred to a beneficiary as part of his or her share, the evaluation should be in writing.

Notifying Beneficiaries of Benefits

The Rules of Court require that a Notice (in prescribed form) and a copy of the last will be sent to each beneficiary.

This normally happens some weeks after you have begun your work as estate trustee. You may save yourself some trouble in the future if you give a copy of the will to each beneficiary as soon after death as possible. This does not mean that you do not have to send it again as required by the Rules of Court, but it may prevent future problems by demonstrating to each beneficiary that you are trying to do your best with respect to them.

Employment of Lawyer

You should employ a lawyer to advise and assist you and the sooner you do so, the easier you will find your work to be. The lawyer will want to review with you the terms of the last will, the names and addresses of each beneficiary, and the nature and value of all of the assets. He will probably want the social insurance number of the deceased, the date of birth and death, and the cause of death. He or she will then be able to tell you what must be done in your specific case. It may be that there is very little for the lawyer to do. It may be that he or she will have many things to do. It is impossible for the lawyer to know until he or she has a complete list and valuation of the assets and it is determined who is going to carry the burden of the administration.

Estate Debts

You must determine what debts were owed by the deceased at the time of his or her death. It may be that you have complete information with respect to this because of the relationship of the deceased person to you (for example, a spouse). If, however, you were not close, and you are not the only beneficiary, then to protect yourself from future claims, you should consider instructing your lawyer to advertise for creditors.

If you do not advertise, and distribute the estate, and valid debts are later discovered, you will be personally responsible for payment of such debts.

Income Tax

As estate trustee, you are personally responsible for all income taxes owed by the deceased to Revenue Canada to the extent of the value of the assets of the estate.

To put this another way, if the income tax liability should be \$100,000.00, and the value of the assets of the estate (after payment of funeral expenses) was \$75,000.00, your responsibility is limited to \$75,000.00.

If, however, you should distribute the money in an estate without obtaining tax clearance, you will be personally responsible for payment of the income tax.

In most estates, you are required to file (1) a final (terminal) return, (2) a capital gains return (actually a schedule to the terminal return), and (3) an income tax and trust information return for each year or part year the estate is under administration. Depending on the circumstances of the deceased taxpayer, there may be other returns to be filed as well.

A discussion of each of these returns is beyond the scope of this Update.

Getting in and Transferring or Selling the Assets

The will may specify that certain assets are to be transferred to certain people. Alternatively, the beneficiaries may agree among themselves that certain assets are to be transferred to certain people. If so, it will be your responsibility to ensure that they get it.

If assets are to be divided among beneficiaries, it would be wise to have them valued individually so that informed choices can be made. This may not be necessary if they are all adults and all have a reasonable knowledge of the value of things.

There will be many assets that have to be converted into money. This may involve an auction sale of household goods, the sale of real property, the sale of shares of publicly traded or private corporations, and the redemption of investment certificates. Your lawyer will be needed to prepare the documents that are required to complete such sales.

Accounting to Beneficiaries

When all of the assets that are to be distributed in specie have been distributed, all other assets converted into

money, all debts paid, and all legacies paid, you must then distribute the residue to those beneficially entitled.

Before you distribute the residue, you must protect yourself from the claims of beneficiaries who may believe you have not done your job properly.

You can normally protect yourself on an informal basis whereby you tell them what has been done and they all sign releases releasing you from claims.

If some beneficiaries will not sign a release, or if minors or mentally incompetent persons who do not have capacity to sign a release are involved, your protection will have to be obtained formally through a procedure known as a "passing of accounts".

A full discussion of accounting to beneficiaries is beyond the scope of this Update. Your lawyer will be able to give you advice with respect to this.

ROLE OF THE LAWYER

You may have heard the expression that a lawyer is a "lawyer for the estate". This expression is not completely accurate. The lawyer is employed by the estate trustee, not by the estate, and not by the beneficiaries. He is paid by the estate trustee, although the estate trustee is entitled to reimbursement from the estate, and the account is often paid directly. If the estate trustee is not satisfied with the work that is being done, he may discharge the lawyer and employ another one.

While the lawyer is the lawyer acting for the estate trustee, he is acting for the estate trustee in his capacity as estate trustee, and not in his personal capacity. Accordingly, if the estate trustee, in his personal capacity, is in a conflict of interest in connection with the beneficiaries or in dealing with the assets of the estate, the lawyer may not be able to represent him, and he may have to employ another lawyer for that purpose.

You will see that the lawyer's role is a limited one unless you wish the lawyer to do much of the work that is your responsibility.

Advice to Estate Trustee

The role of the lawyer first, last, and always, is to advise the estate trustee on all matters relating to the administration of the estate. This advice includes advice on the work to be done, how best to do it, and to suggest solutions to problems that arise. The decisions, however, must be made by the estate trustee, because he is the person responsible for them.

Applications to the Court

The lawyer must prepare all applications to the Court. These include the application for the Certificate of Appointment, any application to interpret the meaning of a will if it is not clear, and applications to pass the accounts if that should become necessary or advisable.

Advertising for Creditors

If the estate trustee decides to advertise for creditors, it is the responsibility of the lawyer to prepare the advertisement.

Sale Documents

If real estate is to be sold, if investment certificates, bonds, debentures, or shares of publicly traded or private corporations are to be redeemed, transferred or sold, the lawyer is responsible for preparing all legal documents required for that purpose. These documents include transfers/deeds of land, powers of attorney, and declarations of transmission.

Passing of Accounts

If the estate trustee decides, or is required, to pass his accounts, the lawyer is required to prepare the application to the Court, arrange for service of all documents on those who should be served, attend at the hearing, if any, and prepare the Order. The estate trustee is responsible for preparing the accounts "in Court form".

Preparing Releases

The lawyer is responsible for the preparation of releases to be signed by beneficiaries releasing the estate trustee from further responsibility in the administration of the estate.

Payment Into Court

If money is to be paid into Court on behalf of minors, mentally incompetent persons, or absentees, the lawyer prepares the documents required to make such payment.

Sue and Defend Claims

If the estate is sued for debt or for some other reason, and the estate trustee believes the claim is not valid, the lawyer will act on behalf of the estate in defending the claim.

Similarly, if money is owed to the estate, and has not been paid, the lawyer would sue for the debt on behalf of the estate if so instructed.

Applications for Interpretation and Advice

It sometimes happens that the drafting of a will is not as clear as it might be, and a question arises as to what it means. In these circumstances, an application is made to the Court to interpret the it, or to obtain its advice as to what is to be done. The lawyer must prepare the application to the Court to obtain its interpretation and/or advice.

COMPENSATION

Estate trustees are entitled to be paid for the work that they do and the out of pocket expenses they incur. Payment is normally based on a percentage of the value of the assets under their administration and not on an hourly rate. In some exceptional cases a "special fee" is allowed. It will be based on the time taken and the importance of the work done. A full discussion of compensation is beyond the scope of this Update.

The following is the amount that is normally allowed by the Ontario Court at this time.

Capital Receipts

2.5% of capital receipts received and converted into cash

Capital Disbursements

2.5% of disbursements made by the estate trustee

Revenue Receipts

2.5% of income received by the estate from investments

Revenue Disbursements

2.5% of revenue disbursements made by the estate trustee.

Management Fee

If the will requires the estate trustee to establish a trust for the benefit of a minor who will not receive his or her share of the estate for a few years, or a trust for a spouse that is to continue until the death of the spouse, or for some other purpose where the distribution of assets is to be postponed for a period of time, the estate trustee is entitled to charge a management fee

charged on the value of the assets under his or her administration. At this time, the management fee is normally 2/5ths of 1% of the amount under management each year.

Entitlement to this fee depends on the trustee actually managing the money under his or her control. Merely leaving it in a bank account, for example, is not managing it.

If the estate trustee is also a beneficiary of the estate, he is not entitled to receive compensation on that portion of the estate that is payable to him or her. For example, if a parent named one of three children to be his or her estate trustee, and provided that the estate was to be divided equally among the three of them, the estate trustee would receive 2/3rds of the normal compensation.

The estate trustee is also entitled to receive reimbursement for the out of pocket expenses incurred in the administration of the estate.

In most estates, some assets are transferred to beneficiaries in specie. The percentages referred to above are normally applied to them as well. In large estates this might be considered excessive and the Court might order a lower percentage.

If the estate trustee requests his lawyer to do many of the things that are his responsibility, the lawyers account for doing that work is directed to the trustee who pays for it from his compensation. This also applies to money paid to accountants for preparing income tax returns on behalf of the estate.

LAWYERS FEES

At one time, the amount paid to a lawyer for services in administering an estate was determined by a tariff of fees. Smaller estates paid smaller fees. The result was that the legal work done for larger estates subsidized the legal work done for smaller estates.

That tariff was abolished several years ago. The result is that every estate must now stand on its own feet and pay for the cost of the legal work done for it. This has had the effect of making legal fees on smaller estates proportionately greater than for larger estates. Ironically, it was the consumer movement, in its drive to reduce legal fees, that created this result.

Most lawyers now charge for the time that it takes them and their staff to do the work for an estate on an hourly basis. It is difficult to indicate in this Update what the fee will be in advance because it depends on what work the estate trustee wants the lawyer to do.

COURT FEES

A fee is charged by the Ontario Court to issue a Certificate of Appointment and this must be paid at the time the application is made. This fee is based on the following tariff.

First \$50,000.00 of estate assets

\$5.00 for each \$1,000.00 of value of estate assets or part thereof.

Estate assets valued at over \$50,000.00

\$15.00 for each \$1,000.00 of value of estate assets or part thereof over \$50,000.00.

HOW LONG WILL IT TAKE

Many estate trustees are not aware that in some cases the law imposes penalties on estate trustees who administer an estate too quickly. For example, if an estate trustee should convert an estate into money and distribute it pursuant to the terms of a will within two or three months of the death, if a claim is later made against the estate either pursuant to Part III of the Family Law Act or Part V of the Succession Law Reform Act, the estate trustee will be personally responsible for payment of any awards made. In these instances, claims can be made at any time within six months of death. Similarly, if an estate is distributed without obtaining Clearance Certificates from Revenue Canada (which can take up to a year from time of application), the estate trustee is personally responsible for payment of any unpaid income tax. Other statutes provide for the making of claims up to a year after the date of death.

Nevertheless, it should be possible to administer most estates within six to nine months from the date of death. It simply takes time to do business. Many government and other offices do not respond to inquiries made of them as quickly as might be wished and in many cases the estate cannot be safely distributed without obtaining answers to the questions asked.

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