

RESPONSIBILITIES OF ESTATE TRUSTEES

INTRODUCTION

This memorandum has been prepared to provide general advice to individuals acting in the administration of an estate. In our experience, family members and friends are often called upon to act as estate representatives. This memorandum will serve to summarize your responsibilities and will also outline the duties to be performed by the estate solicitor.

Every estate has circumstances which should be considered in administering the estate and dealing with the estate assets. This memorandum is intended to provide general comments only. The specifics of each estate will be reviewed when we meet with you.

Over the years, many names and expressions have been used to describe the estate representative. Names such as "Personal Representative", "Executor", and "Trustee" all refer to the same person or persons having the same responsibilities. In Ontario, such a person is now referred to as the "Estate Trustee" and this name will be used throughout this memorandum.

The Estate Trustee acts as a trustee or fiduciary. This means that the Estate Trustee is governed by the laws of general application dealing with trusts and the responsibilities of trustees. The Estate Trustee must put the interests of the estate beneficiaries ahead of his own and must at all time act in the best interests of the estate. Although all property of the deceased is legally held by the Estate Trustee, the Estate Trustee holds the property as a trustee for the ultimate use of the beneficiaries.

The Estate Trustee derives his authority from the Will. Typically, a Will appoints one or more Estate Trustees and provides for the replacement of the Estate Trustee if the original one is unable or unwilling to act. The Estate Trustee's responsibilities commence when he acknowledges that he will act as an Estate Trustee. An Estate Trustee can renounce the office before probate is issued, but after probate is issued, he can only resign either in accordance with terms of the Will or by a Court Order.

In the case of estates where there is no Will, the Estate Trustee derives his authority by way of Court Order.

DUTIES AND RESPONSIBILITIES OF THE ESTATE TRUSTEE

The first responsibility of the Estate Trustee is to make funeral and burial arrangements. In cases where a funeral has been prearranged, the executor will simply advise the funeral home to proceed with arrangements based on the contract already in place. In cases where a funeral has not been

prearranged, the family of the deceased should be consulted and the appropriate funeral/burial arrangements undertaken.

The following sets forth a summary of the Estate Trustee's duties and responsibilities:

1. **Immediate preservation of assets:**
Confirm that insurance is in place for all assets including houses and automobiles. Arrange for storage of automobiles and other equipment. If house is unoccupied, make security arrangements and arrange for an Insurance Vacancy Permit. Arrange for payment of utilities.
2. **Compile an inventory:**
Ascertain and value all assets and debts.
3. **Realize assets:**
Obtain possession of the assets and, where appropriate, liquidate assets and deposit proceeds in an estate bank account (probate may be required).
4. **Pay debts:**
Advertise for creditors, if appropriate; pay or settle any outstanding debts.
5. **Determine Income Tax liability:**
Determine Income Tax liability of both the deceased and the estate: complete and file a Terminal Tax Return and obtain a Clearance Certificate after Notice of Assessment has been issued by Revenue Canada.
6. **Account to the beneficiaries:**
Prepare detailed accounting to the beneficiaries, setting forth a complete list of all assets, their valuations and the distribution of estate assets; unless all beneficiaries consent, prepare and file accounts for approval by a Judge of the Ontario Court (General Division).
7. **Distribute assets:**
Distribute assets or cash under the terms of the Will.

Note: In cases where there is a surviving spouse, assets cannot be distributed if notice of an application under the Family Law Act has been received or until six months after the date of death unless authorized by the Court, or by written authorization of the surviving spouse.
8. **Take compensation:**
Claim compensation as set out under the Will or by agreement with beneficiaries or by a Judge on the passing of accounts.

DUTIES AND RESPONSIBILITIES OF THE ESTATE SOLICITOR

Although the duties of the solicitor may appear to overlap those of the Estate Trustee, they are separate and distinct functions. Under no circumstances can a solicitor be delegated any decision making authority, unless the Will specifically permits.

Generally, the solicitor's role is to act for and advise the Estate Trustee on legal matters that may arise. Strictly speaking, the solicitor does not act for any beneficiary and in the case of a conflict, beneficiaries must be directed to independent legal counsel.

The solicitor will be responsible to keep the estate administration running efficiently and smoothly. The solicitor will report to the Estate Trustee from time to time on the status of the file. Solicitor's fees are calculated based on time spent, the level of complexity and results obtained. Charges are made for time spent by solicitors and staff on preparing documents, meeting with clients and others and for telephone calls. As well, disbursements for such matters as photocopying are also charged.

The following sets forth a summary of specific responsibilities of the solicitor:

1. **Review the Will:**
Review the Will with estate representatives and ascertain any potential problems.
2. **Advise whether Certificate of Appointment (previously called "Letters Probate") is necessary:**
Review the assets of the estate and determine whether a Court Application is required.
3. **Prepare Application for Certificate:**
Where appropriate, prepare Court Application and other documents to obtain a Certificate of Appointment of Estate Trustee with or without a Will, as the case may be (previously called Letters Probate or Letters Administration, as the case may be).
4. **Advise concerning legal matters.**
Various legal matters will arise during the course of the administration. The estate solicitor will provide advice as required.
5. **Advertise for creditors:**
Determine whether there should be an advertisement for creditors, taking into consideration the particulars of the estate and whether there will be a Court passing of accounts.
6. **Prepare documents to transfer assets:**
Assets may be retained in specie, and title merely transferred to beneficiaries or, in the alternative, assets may be converted to cash and deposited to the estate bank account.
7. **Advise on Income Tax matters.**
Tax liabilities should be determined and dealt with prior to any distribution to beneficiaries. Where tax matter become complicated, a tax accountant should also be retained.

8. **Prepare Beneficiary Releases:**

Prepare releases for the personal representative to be given by beneficiaries.

9. **Represent Estate Trustee in Court:**

Where Court appearances are required, a solicitor will represent the Estate Trustee and prepare all necessary Court documents.

CONCLUSION

The actual administration of an estate is divided between the solicitor and the Estate Trustees. There are distinct functions, although at times, the functions and duties of the solicitor and Estate Trustee appear to overlap. Nevertheless, all decision making must be made by the Estate Trustee.

In order for matters to proceed expeditiously, the solicitor can often deal directly with the various banks, trust companies, brokers and accountants, etc. to obtain information required. On the instructions of the Estate Trustee, the solicitor can also file any Income Tax Returns and assist with the preparation of any accounting, although these are functions for the Estate Trustee.

In Ontario, an Estate Trustee is entitled to receive compensation for time and trouble expended in connection with the administration of an estate. If the Estate Trustee chooses to take compensation, the amount allowed is at the discretion of the Court. Experience indicates that the amount currently awarded is approximately 5% of the total value of the estate (excluding the value of any assets passing to a personal representative who is also a beneficiary). If the beneficiaries are all adult and in agreement with the account, it is possible to have them approve the accounts or negotiate the amount of compensation claimed and avoid having the accounts passed before a Judge.

The Estate Trustee may find it more convenient for the day to day administration of the estate to be carried out by the solicitor.

In this event, there will be two legal accounts. One legal account will be for legal matters normally handled by solicitors, which will be paid for out of the estate. If this firm carries on some of the functions of the Estate Trustee, we will submit a further account in respect of this additional work. This second account will be paid by the personal representatives out of their compensation received from the estate.

We hope that this memorandum has provided some indication of your role and responsibilities as an Estate Trustee. Once you have had an opportunity to consider the contents of this memorandum, we look forward to receiving your instructions.