

Advisory

Estate Administration Basics

This Advisory provides an overview of the basics of the administration of an estate, which for many is often something of a mystery. It is designed to be helpful in particular for prospective and current executors, estate administrators, and estate trustees, by providing a broad overview of how an estate administration works, and hopefully ease any immediate concerns they may have upon first beginning to act in this role. A glossary of terms used in this Advisory is included at the end.

FIRST THINGS FIRST

When a loved one dies, and you are responsible for dealing with their affairs after death, including for administering their estate, you may be experiencing uncertainty about your role, on top of all of the emotions that come when grieving a loved one. Uncertainty can arise from not knowing what needs to be done, when it needs to be done by, and what you are responsible for.

The first thing to know is that there is generally no need to rush to see to the estate administration, barring unusual circumstances. In the typical situation, there are very few matters that need to be completed immediately after a person's death. One of the first duties of the estate trustee, usually along with the deceased's immediate family, will be to deal with the funeral and interment of the remains. It is important for family and friends to take the time to begin the grieving process, and to come to terms with the deceased's passing.

Matters Which May Need Immediate Attention

However, there are a few matters which may come up and which should be taken care of soon after a person's death. One is to determine any immediate needs of the deceased's dependants who relied upon him or her for financial support. Also, soon after death, insurance companies providing coverage for assets such as a house or automobile should be contacted to notify them of the death and to ensure ongoing and adequate coverage in case of accident or fire etc. It is also important to secure any vehicles and usually to ensure they are not used in the interim period of the estate administration.

It is helpful, but usually not urgent, for the estate trustee to obtain preliminary legal advice, which often provides not only clarity and answers to initial questions, but also peace of mind that nothing of immediate importance is being overlooked. It is important to review the Will and confirm the estate trustee's authority to act, or confirm that no valid Will appears to have been made by the deceased, and as a result determine who the applicable court rules provide will be entitled to apply to court to administer the estate.

Income Tax Returns

One matter which does not need to be completed right after death is filing Canadian tax returns. When a taxpayer dies after the end of a year, but before filing their income tax return for the previous year, the estate trustee has six months to file the return. Likewise, no matter when a taxpayer dies in the year, the estate trustee has at least six months to file the deceased's terminal tax return. However, six months can pass quickly, and it is important to contact a tax advisor on a timely basis regarding the preparation of tax returns for the deceased and to diarize applicable filing deadlines.

NEXT STEPS

General Legal Responsibilities of an Estate Trustee

Estate trustees are fiduciaries, and are subject to fiduciary duties which attach to their role, including:

- they must exercise ordinary care and prudence;
- they must follow the directions contained in the will or other governing document or legislation (unless the court authorizes changes or the

beneficiaries consent);

- they must treat all beneficiaries impartially and with an even hand unless otherwise directed in the will;
- they may not delegate their authority to make decisions in connection with the administration of the estate assets to anyone else;
- they may not place themselves in a position so as to be acting in conflict with the best interests of the beneficiaries;
- they must keep and maintain records and produce accounts upon reasonable notice; and
- they must not unreasonably delay the estate's administration.

Recordkeeping

One of the most important duties of an estate trustee is to maintain accurate and complete records showing his or her dealings with the estate, including regarding the real and personal property, cash and investments. The reason for this is that the beneficiaries of an estate have a legal right to request from the estate trustee a detailed account of the estate trustee's dealings throughout the duration of the administration of the estate. Complete records include:

- all bills, receipts and invoices;
- all banking records, such as bank statements, passbooks, cancelled cheques;
- investment statements showing all transactions;

- reporting letters for all real estate dispositions;
- tax returns, notices of assessment/reassessment, and any other communications with tax authorities.

It is also prudent to keep copies of all legal, tax and other professional advice, although these may not be producible as part of an accounting process depending on the circumstances.

Records need not be kept in any particular format, and copies of all of the above-noted records with notes regarding any transaction not immediately obvious from the records, or a separate ledger of all such transactions, will usually be sufficient. Estate trustees should start their records at the beginning of the estate administration to avoid having to recreate them later on, particularly because this is often challenging and can be overwhelming. They should also keep an ongoing record of all of the time they spend on the estate, and a detailed description of the activities on which the time was spent.

Determine Assets and Liabilities

Determining the estate assets and liabilities is of primary importance in any estate administration, including for the following purposes:

- distributing the estate;
- completing tax returns;
- completing the probate application (application for a Certificate of Appointment of Estate Trustee under Ontario court rules) and related Estate Administration Tax filings (discussed below);
- ensuring the estate is solvent (an insolvent estate has unique rules); and,

- ensuring the estate trustee does not fail in their responsibilities, and therefore open him or herself to personal liability.

Even if the deceased kept good records in easily accessible format (which is often not the case, for example because of electronic banking), it may be necessary to correspond with multiple financial institutions to discover or verify assets and liabilities and their various date of death values. Real estate title records may need to be searched, requiring the assistance of a lawyer, safety deposit boxes accessed and inventoried, personal effects catalogued, etc.

It will also often be necessary to obtain valuations for various assets. Values for financial assets are usually easily obtained from the institutions holding the assets upon request and production of proof of death and authority to make such a request. Other assets, including personal effects, may require the help of real estate brokers or other professionals, including qualified appraisers. These valuations will often be necessary for the probate application and may also be important for income tax filings.

Liabilities will often be determined by contacting various financial institutions, and most will usually be patient regarding repayment upon being advised of the deceased's death. In some cases, an advertisement for creditors may be necessary. There may also be litigation or spousal, dependant or other claims to be dealt with, in which case a lawyer's assistance will be necessary. Tax filings, of course, must be completed, and are discussed further below.

Probate Applications and Estate Administration Tax

Obtaining a probate certificate (referred to as a Certificate of Appointment of Estate Trustee under Ontario court rules) or other court appointment of an estate trustee will be necessary in many estates in order to prove to third parties the authority of the estate trustee to deal with the assets of the deceased, although there is no general requirement under Ontario law to apply for a certificate of appointment. Generally, the necessity for a certificate of appointment or other court grant confirming the estate trustee's authority to act will be dictated by the financial institutions holding the deceased's assets, or in the case of real estate, by the land registry system. In some cases it is prudent for an estate trustee to apply for a court grant of authority, regardless of whether or not it is necessary to administer the assets, in order to confirm the validity of the will and protect the estate trustee in administering and distributing the estate.

Ontario Estate Administration Tax (previously and colloquially known as probate fees) is calculated based on the value of the estate and is payable at the time the estate trustee or his or her lawyer files the application for a certificate of appointment. The tax is computed as follows:

- (a) \$5.00 for each \$1,000.00 of the first \$50,000.00 of the value of the Estate; and,
- (b) \$15.00 for each \$1,000.00 by which the value of the Estate exceeds \$50,000.00 (rounded up to the next highest \$1,000.00).

Further, the Ontario Government enacted regulations to the *Estate Administration Tax Act* which came into effect January 1, 2015, and which impose substantial compliance requirements on estate trustees who apply for a certificate of appointment. To summarize, under these reporting requirements, an initial Estate Information Return must be filed within 90 days of the Certificate of Appointment of Estate Trustee being issued by the Court. The Estate Information Return requires certain information, in particular detailed information regarding the estate assets and their fair market value. There are penalties for non-compliance with these requirements. Asset values must be substantiated with appropriate documentation such as appraisals should an Estate Information Return be audited by the Ontario Ministry of Finance, the government body responsible for the collection of Estate Administration Tax in Ontario.

Other and Miscellaneous Matters

Other matters which should be taken care of in the first few months of an estate administration, although some have no particular deadlines and can be seen to when the estate trustee is able to do so, include:

- returning identification such as health cards, driver's licenses, passports, etc. to various government ministries and advising them and other ministries, including Canada Revenue Agency, Service Canada, and Service Ontario, of the deceased's death;

- contacting pension administrators and private health insurers to advise them of the deceased's death and to apply for any final benefits owing to the estate, or ascertain if any overpayment of benefits requires a refund;
- applying for Canada Pension Plan death and other applicable benefits;
- contacting life insurers to apply for the proceeds of any policy not payable to designated beneficiaries or designated to be paid to the estate.

Some of the above matters, such as completing the application for the Canada Pension Plan death benefit, are routinely dealt with by some funeral homes. Before proceeding, the estate trustee should confirm what matters may already have been completed.

INCOME TAX RETURNS AND POST-MORTEM TAX PLANNING

Basics of Canadian Income Tax Returns for Deceased Taxpayers

Under the Canadian *Income Tax Act*, the estate trustee is required to file the following Canadian income tax returns for an estate:

- (a) returns for any taxation year prior to the year of death not previously filed;
- (b) a final or "terminal" return for the year of death covering the period from January 1st to the date of death;
- (c) in certain cases, a T3 trust return covering income received on the estate assets from the date of death to either the end of the calendar year or the estate year (365 days later), whichever period is elected by the estate trustee.

On January 1, 2016, new income tax rules regarding the taxation of estates and trusts came into effect. These rules may require special considerations, tax filings or elections to be made for the estate. For

example, in order to obtain certain income tax benefits for the estate, it will be necessary to ensure that a “graduated rate *estate*” designation is made for the estate in the estate’s first income tax filing. Please see our Special Advisory “New Trust Taxation Rules: Important Considerations”, available on our website or on request, which provides an overview of these new rules and how they may affect the taxation of estates and trusts, as well as trust and tax planning for estates.

Possible Additional Income Tax Filings

If the deceased had a business or profession, or was a director of a private corporation or a trustee of a trust, additional income tax and other filings may be necessary. In those cases, professional advice should be sought without delay to ensure matters get taken care of in a timely manner, given there may be income tax deadlines for such entities which should not be missed. As well, if the deceased had any affiliation with, or connection to, another jurisdiction outside Canada, it will be important to determine whether there are any foreign income tax filings or payment or other obligations and the applicable due dates for them.

Post-Mortem Tax Planning

It is also important to obtain tax advice regarding any post-mortem tax planning which should be undertaken. Planning may be required for private corporations in which the deceased was a shareholder, and may need to be completed within the first year after his or her death given time limitations under Canadian tax legislation. The estate trustee should consult a tax advisor familiar with such planning on a timely basis to determine if any planning may be appropriate in the circumstances, and if so, to formulate a plan.

LIQUIDATION OF ASSETS, PAYMENT OF DEBTS, CLAIMS, AND LEGACIES AND DISTRIBUTION OF SPECIFIC BEQUESTS

Consider the Terms of the Will

Before any assets are sold, it is imperative to confirm the terms of the deceased's Will, so that any specific bequests are carried out and any assets which are to pass to beneficiaries in their current form are not sold. There may be other directions or wishes to take into consideration as well before the estate trustee begins liquidating assets.

Personal and Household Effects

Personal and household effects, including automobiles or other vehicles, even when the deceased has made no specific gifts of any of them, are often dealt with differently than other assets. This is due to the fact that many items, while of modest monetary value, may be of enormous personal or sentimental importance to family or friends. They can often take a disproportionate time to sort and dispose of as well. In some cases, beneficiaries or family and friends may want to purchase or otherwise obtain personal items from the estate, rather than have them disposed of at auction or given to charity. Although an estate trustee may not be under a legal obligation to follow these wishes unless the Will directs him or her to, ignoring them can often lead to family acrimony and disputes.

The delivery of items subject to a specific gift in the deceased's will, called a "specific bequest", and payment of a gift of a specific amount of money, called a "legacy", and the releases which should be obtained for each are discussed below.

Other Assets

In the normal course, the estate trustee will usually proceed to liquidate all assets that have value, particularly financial assets, and deposit the proceeds to the estate bank account. Items in safety deposit boxes or other safe storage should not be forgotten. It is a fundamental duty of the estate trustee to preserve the value of the assets for the estate. Unless the will specifically authorizes it, the estate trustee cannot purchase any assets from the estate without prior court approval.

Payment of Debts

Assuming the estate is solvent, the estate trustee also has a general responsibility to ensure all debts are paid. There may, however, be exceptions, such as debts which may not be enforceable, or mortgages on real property where the property is subject to a specific bequest and the beneficiary is to take over the mortgage as a condition of the bequest. In such cases, legal advice may be necessary to ensure the estate trustee does not inadvertently pay a debt which should not be paid, which can

lead to claims against the estate trustee and may expose him or her to personal liability.

If the estate trustee is not familiar with the deceased's personal affairs, in order to be fully satisfied there are no creditors, or if the deceased died without a will, it may be necessary to advertise for creditors to ensure all debts of the deceased are identified. Trustee legislation can provide protection to the estate trustee from personal liability for having distributed the estate without paying a legitimate creditor if the estate trustee advertised for creditors in the correct manner.

Payment of Claims

In some estates, the deceased will have been involved in litigation prior to his or her death which the estate trustee may need to continue, or there may be claims by or against the estate after death which the estate trustee will need to pursue or defend. Claims against the estate can include a claim by a married spouse under the Family Law Act where the spouse elects to take their entitlement under the equalization of net family property provisions of that legislation, rather than what they are entitled to under the will, or under the applicable legislation if there is no will, or claims by alleged dependants of the deceased for support under the Succession Law Reform Act where they believe they have not been provided with adequate support under the will or otherwise. Claims on behalf of the estate might include an action for damages where the deceased died in a motor vehicle accident caused by someone else, or for payment of a debt owing to the deceased. If any claims are successful or are negotiated to a settlement, the estate trustee will need to ensure all terms of the judgment or settlement are completed and any payments to or by the estate collected or made.

In cases where a claim arises in the course of the estate administration, the estate trustee should immediately obtain legal advice. In other cases, for example where the deceased had a married spouse or possible dependant, the estate trustee should obtain legal advice before making any distributions to beneficiaries, to ensure he or she does not become liable for having made such distributions in the face of a potential claim or before the limitation period for the claim has run out.

Cash Legacies and Specific Bequests

Once the debts and liabilities have been determined and it is certain there are sufficient assets, specific bequests and cash legacies are in the normal course paid and distributed. Releases and receipts for such payments or transfers should be obtained at the time of payment or transfer to ensure the estate trustee is protected from future claims that the beneficiaries did not receive what they are entitled to.

FINAL STEPS

Accounting, Releases and Residual Distributions

Once all other steps are completed, the estate trustee will be in a position to provide an accounting to the beneficiaries of the remainder of the estate which is left after the transfer of specific bequests and payment of cash legacies have been completed, which is called the residue of the estate, obtain releases from the beneficiaries of the residue to confirm their approval of the administration of the estate and the estate trustee's compensation (if requested - discussed below), and make a substantial distribution of the estate. In some cases, one or more interim distributions may be appropriate, in which case an accounting, approval and a release process should be completed up to that distribution, and the final accounting will be for the period after the interim accounting was provided.

Certain tax filings may be necessary if any beneficiaries are non-residents of Canada for income tax purposes, and professional advice should be sought in those cases.

Holdbacks and Tax Clearance Certificates

The estate trustee should keep an amount as a holdback to pay final liabilities and expenses and to ensure he or she has funds for any reassessed income taxes, including upon applying for a tax clearance certificate, discussed below. If a tax clearance certificate is applied for, once the tax clearance certificate is obtained the remaining amount of the holdback can usually be distributed to the beneficiaries with a report as to how it was calculated.

Compensation

In addition to being entitled to reimbursement for all reasonable out-of-pocket expenses, estate trustees are entitled to receive compensation for their care, trouble and responsibility in acting as a fiduciary unless the will provides otherwise. The statutory basis for claims of compensation for estate trustees is found in section 61(1) of the Trustee Act, which provides as follows:

61. (1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.

Aside from stating that the compensation be “fair and reasonable,” the Trustee Act does not contain any rules as to the calculation and amount of compensation. However, in Ontario the courts have developed a “rule of thumb” tariff, which is typically departed from only where the circumstances justify. The “tariff” is calculated for estates with no ongoing trusts as 2.5% of receipts and 2.5% of disbursements, although a rough calculation of 5% of the value of the estate will provide a general guideline in many cases.

In determining the amount of compensation payable to an estate trustee, the court will review the compensation that results from the “tariff” rate and then consider whether this amount is reasonable, based on the following factors established by case law:

1. The magnitude of the estate;
2. The care and responsibility arising therefrom;
3. The time spent by the estate trustee in performing his or her duties;
4. The skill and ability displayed; and,
5. The success which has attended the estate trustee's administration.

The legal and statutory rules regarding estate trustees' compensation is always subject to the specific terms of the deceased's will. The will can fix compensation at a certain amount or rate or method of calculation, or can deny compensation to the estate trustee altogether. The deceased can also enter into a compensation agreement with a trust company or other professional as part of his or her estate planning, or the beneficiaries, if they are all adults and capable, can come to an agreement with the estate trustee about his or her compensation.

Tax Clearance Certificate

In order to protect the estate trustee from being personal liable for any unpaid taxes, a tax clearance certificate can be obtained from Canada Revenue Agency before distributing any property under his or her control. A clearance certificate certifies that all taxes, Canada Pension Plan contributions, Unemployment Insurance premiums, interest and/or penalties assessed or chargeable or payable out of the property of the deceased (prior to death) and his or her estate have been paid, or that security for payment has been accepted by the Minister of Finance. Distribution of property without a certificate renders the estate trustee personally liable for any unpaid amounts if the assets remaining in the estate are insufficient to satisfy the income tax obligations.

SUMMARY

While there are a great many duties that must be completed in the administration of an estate, it is important to remember that the administration can and should in the normal course proceed in an orderly fashion. However, because there are many matters to be completed, it is important to inform the beneficiaries regarding how long the administration of the estate will take, the process involved, and what expenses and other liabilities must be paid before the residue can be distributed. With good organization, communication, diligence and appropriate legal and other professional advice and assistance, all tasks should be dealt with in an organized and methodical manner and within a reasonable amount of time to achieve a successful administration.

GLOSSARY OF TERMS

Certificate of Appointment of Estate Trustee

Ontario probate certificate, where there is a valid will, or letters of administration, where there is no valid will

Estate

all of the assets, liabilities and legal rights that belong to a person at the time of their death

Estate Administration Tax

Ontario probate fees payable when applying for a Certificate of Appointment of Estate Trustee

Estate Information Return

form to be filed after a Certificate of Appointment of Estate Trustee is issued by the Ontario court regarding Estate Administration Tax reporting, not related to income tax filings

Estate Trustee

Ontario term for an executor and trustee under a will or an administrator of an estate without a will

Fiduciary

in broad terms, a person having a duty to act primarily for another's benefit, involving duties of good faith, trust, special confidence and candour towards that other person

Legacy

gift of a specific amount of money in a will

Residue of estate

remainder of the estate which is left after payment of expenses, debts and claims, transfer of specific bequests and payment of legacies

Specific bequest	gift of a specific personal effect or other asset in a will
Will	legal document, created by conforming to certain legislated rules, by which a person dictates who administers their estate and who is to benefit from their estate

The comments offered in this Client Advisory are meant to be general in nature, are limited to Ontario, Canada law and are not intended to provide legal advice on any individual situation. In particular, they are not intended to provide U.S. legal or tax advice. Before taking any action involving your individual situation, you should seek legal advice to ensure it is appropriate to your personal circumstances.