

THE ESTATE TRUSTEE'S JOB DESCRIPTION

A Short Guide to the Administration of an Estate of a Person Dying with a Will

Introduction

The following is a short descriptive Guide concerning the administration of the Estate of a Deceased Person. The focus is on the role and duties of the Estate Trustees.

This Guide is intended to help Estate Trustees broadly familiarize themselves with the Estate Trustee's job description, and to help beneficiaries of estates to appreciate the Estate Trustee's role, which is not simple, and appropriately adjust their expectations.

This Guide is not legal advice, nor is it analytical in nature. It is summary and descriptive only, and does not substitute for the need to obtain appropriately qualified legal counsel in estate matters.

1. Role and Authority of the Estate Trustees

The Estate Trustees are the person or persons who have the exclusive authority to administer the estate of a deceased person. This power and authority is derived directly from the Will in which the Estate Trustee is named, and does not depend upon the completion of probate proceedings. Therefore, from the moment of death, Estate Trustees of a person dying with a Will have immediate rights and authority even though probate proceedings have not been undertaken and may, in some cases, never be undertaken.

The Estate Trustees used to be called the "executors", and in colloquial discussions, the two terms are used interchangeably, although formal legal documents will always refer to "Estate Trustees". In addition, Estate Trustees sometimes are also called "personal representatives".

2. The Main Duties of Estate Trustees

(a) Inventory the Assets

The first duty of Estate Trustees is to determine what assets belong to the estate. Generally, these are all of the assets which the deceased owned at the time of death, including tangible assets (ie: personal effects, collections, art work, automobiles), real property interests, and intangible assets (ie: shares, stocks, RSPs, RIFs, LIF's, investments, partnership interests, among others).

However, some assets of the deceased do not form part of the estate and are therefore technically outside the Estate Trustee's scope of authority. Most common in this category is real property owned as joint tenants with someone else (typically a spouse), and joint bank accounts.

Another asset which is not included in the estate are monies paid as a result of named beneficiary designations made in insurance contracts, annuities, pensions, RSPs and RIFs. If these financial

instruments do not have a named beneficiary, then the amounts which are payable under them as a result of the deceased death will form part of the estate which the trustee is required to collect and administer.

(b) Gather and Collect on the Assets of the Estate

This involves obtaining possession or control of tangible assets which form part of the estate and asserting control over intangible assets and real property interests. Getting physical possession of tangible assets is relatively self-evident (but not necessarily easy!) In the case of real property interests and intangible property, this duty will usually involve having those assets transferred into the name of the Estate Trustees. This will frequently require that the Estate Trustees apply to the Court in probate proceedings to obtain a “Certificate of Appointment of Estate Trustee with a Will”. See below under the heading “Probate Proceedings”.

(c) Manage the Estate

As the Estate Trustees collect the assets of the estate, there is the further obligation to secure protect and safeguard them and otherwise manage the assets as would a reasonably prudent person. If the estate includes a business, the Estate Trustees do not have to operate the business personally but they do need to make arrangements to ensure that an appropriate manager takes over and operates the business who reports to and is accountable to the Estate Trustees. Managing the estate will often require the Estate Trustees to obtain insurance, or in the case of homes or other properties which become vacant as a result of the deceased’s death, obtaining vacancy endorsements on existing insurance policies to ensure continued coverage. Obviously, what constitutes proper management of the estate is depended upon the type of assets which the deceased owned and which form part of the estate.

(d) Realization of the Estate

Realization of the assets refers to the process of converting the assets of the estate into money, such as redeeming bonds, closing bank accounts or selling assets on the open market. Obviously, this duty does not apply to legacies of specific items set out in the Will, such as delivery of a coin collection to a child. The general rule is that assets of the estate must be converted to money unless there is a clear statement to the contrary in the Will, but this does not mean that the Estate Trustees have to have a fire sale. Also, well-crafted Wills give Estate Trustees discretion to postpone realization for long periods of time if appropriate to maximize the realization of assets.

(e) Payment of Debts

The Estate Trustees are required to consider claims against the deceased and the estate and to ensure that all proper debts and liabilities are paid and settled. Sometimes, the Estate Trustees must continue litigation in which the deceased was a party at the time of death. If there is doubt as to whether a debt asserted against the estate is valid, the Estate Trustees might decide to make an application to the Court for directions or may require the alleged creditor to obtain a court judgement to prove the claim.

Estate Trustees also often publish advertisements in newspapers in the locality of the deceased at the time of his death requiring that anyone with claims against the estate to come forward within a specific period of time. There is no legal obligation on Estate Trustees to advertise for creditors but by doing so, the Estate Trustees should be able to avoid any personal liability to creditors of which they have no knowledge.

Payment of debts of the estate also includes the obligation of Estate Trustees to file tax returns and pay taxes owing by the deceased up to the time of death. Estate Trustees may also be required to pay income tax on income earned in the administration and management of the estate after the date of death. See below under the heading “Income Taxes”.

(f) Distribution of the Estate

The final and the ultimate of goal in the administration of the estate is to distribute the estate to the beneficiaries in accordance with the directions contained in the Will.

3. Probate Proceedings

As stated above, the authority of Estate Trustees comes from the Will in which the Estate Trustees are named. Even though their authority is therefore immediate from the moment of death, as a practical matter Estate Trustees usually find it impossible to gather in and collect the assets until they undertake probate proceedings, resulting in the issuance by the Court of a “Certificate of Appointment of Estate Trustee with a Will”.

When the Estate Trustee is named in the Will, the Certificate of Appointment of Estate Trustee with a Will does nothing more than confirm the legal authority of the Estate Trustees to administer the assets. Third parties with whom the Estate Trustees must deal to get in the assets usually require production of the Certificate of Appointment as proof of the Estate Trustee’s authority. For example, although the bank will no doubt “freeze” the bank accounts of the deceased, they will not normally hand over the balance in the accounts to the Estate Trustees without a Certificate because there is a concern that persons claiming to be the Estate Trustees may not have the legal authority which could result in the bank having to pay out the balance in the account twice. The same reasoning applies to brokers and to companies and their transfer agents with respect to stocks and bonds. Similarly, for real property, the Estate Trustees can not typically deal with real estate interests without obtaining and registering their Certificate of Appointment on title.

If there is no challenge to the Will or to the appointment of the Estate Trustees named in the Will, then Probate proceedings are typically handled administratively “over the counter” at the Court. The process can be quite detailed and very specific, and some Court offices are considerably stricter than others in how the necessary documents must be prepared before being accepted.

4. Probate Taxes

When applying for probate, the Estate Trustees must disclose all of the assets which are dealt with by the Will and disclose their gross value, upon which probate tax is calculated at the rate of .5% on the first \$50,000 and 1.5% on the remaining value of the estate. No deductions in computing the value of the estate are permitted except for the outstanding balance of purchase money mortgages on real estate. Also, there is a quirk in the legal forms which excludes the value of non-Canadian real estate from the value for the purposes of calculating probate tax.

It is important to understand that if a particular asset is governed by the terms of the Will, its value must be included in value for probate purposes and the calculation of probate tax even if it can be realized by the Estate Trustees without having to produce a Certificate of Appointment. For example, when the amounts on deposit are relatively small, many banks are prepared to waive the requirement of the Certificate of Appointment if they receive a personal indemnity from the Estate Trustee. Nevertheless, if the Estate Trustees must obtain a Certificate of Appointment in order to deal with real estate that is

governed by the Will, the amount of such small bank accounts must still be included in the value of the estate which is declared in the probate forms and on which probate tax will be calculated.

As another example, shares of privately owned companies (i.e. the deceased's business) can usually be transferred into the names of the Estate Trustees and/or the names of the beneficiaries without a Certificate of Appointment because the Estate Trustees effectively control the transfer register of the deceased's private company. Nevertheless, if the Estate Trustees apply for probate to, for example, record their interest and sell the matrimonial home, the value of the deceased's shares in his private companies must be included in the value of the estate. For this reason, it is often advisable for people during their lifetime to make two Wills, one which applies only to private companies which they control and another Will for all of their other assets. Only the other Will is submitted for probate and because the shares of the private companies are not governed by the Will being submitted for probate, their value is not included in the value of estate for calculating probate tax.

5. Income Taxes

(a) General

Taxes owing are one of the liabilities of the deceased which the Estate Trustees must pay. In addition, during the administration of the estate, the estate may itself earn income which is subject to tax, and therefore, the filing of trust returns by the Estate Trustees, and perhaps payment of tax by the estate, will be necessary.

It is important that all required tax returns are completed and filed by an Estate Trustee, because if the Estate Trustee distributes property prior to filing all returns, paying any applicable tax and obtaining a clearance certificate from Canada Customs and Revenue Agency, ("CCRA") the Estate Trustees will be personally liable to CCRA and then left with the unpleasant task of attempting to seek recovery from the beneficiaries to whom the distributions were made.

Most beneficiaries are usually not prepared to wait until the bureaucracy of CCRA completes an audit and issues a clearance certificate to the Estate Trustees. Therefore, the practice has arisen by which Estate Trustees establish a reserve out of the estate assets for payment of taxes and distribute the balance as an interim distribution. Only when the clearance certificate is ultimately received is the reserve for taxes also then distributed.

(b) Terminal Returns of the Deceased

The Estate Trustees must make a determination as to whether any tax returns of the deceased are outstanding since people who have been ill sometimes overlook the filing of returns. In addition, there will always be a "terminal return" to be prepared and filed to cover income earned by the deceased during the period from January 1st to the date of death. This return is the usual T1 personal tax return. This terminal return must be filed within 6 months of the date of death or on April 30th of the year following death, whichever is earlier. Failure to file on time may give rise to interest and penalties.

Except in comparatively simple estates of deceased taxpayers with straightforward affairs, the terminal return preparation can be tricky, and there are many opportunities, depending upon the circumstances, for tax planning. As a result, it is often advisable for Estate Trustees to engage an accountant familiar with tax planning in terminal returns to advise and prepare the terminal return of the deceased.

(c) Estate Returns

From the moment of death and thereafter, the estate is considered a taxpayer, so that Estate Trustees will be required to file and prepare T3 trust returns on an annual basis. The Estate Trustees have a freedom to choose the fiscal year end, and if no choice is made, the year-end is deemed to be the anniversary of death. The choice of year-end sometimes presents additional planning opportunities, but often for administrative purposes, a December 31st year end is chosen to coincide with the annual year-end issuance of T5 Supplementary Slips by financial institutions which conveniently reduce the time and cost of preparing trust returns.

For tax purposes, the estate may be looked on as a “flow-through” to the beneficiaries, with the result that to the extent income is paid to the beneficiaries of the estate, it is deductible from the taxable income of the estate. Therefore, if all of the income earned is paid to the beneficiaries in a year, the estate will not have any tax to pay, but it must issue T5 Supplementary Slips to each of the beneficiaries as to the income received by them from the estate. The beneficiaries will then report that income in their own personal returns.

The T3 trust returns must be filed by the Estate Trustees within 90 days of each fiscal year end.

The Estate Trustees frequently also engage an accountant to prepare and file the T3 trust returns because again, there are opportunities for tax planning in how income of the estate is paid and allocated to the beneficiaries.

6. Other Considerations

The foregoing is a highly generalized overview of the administration of the estate, and the role of the Estate Trustees.

In addition to the foregoing, a very important obligation of the Estate Trustees is to account to the beneficiaries in all aspects of the administration of the estate. Since this may require the Estate Trustees to prepare highly detailed financial accounts in a format prescribed by the Courts, it is imperative that the Estate Trustees keep complete and full records, including copies of receipts, invoices and statements, in order that the accounts can be prepared. At the end of the Estate’s administration, or periodically throughout if the administration is protracted, the Estate Trustees will endeavour to obtain the consent of all of the beneficiaries to these accounts. If this consent is not obtained, then the accounts have to be prepared in the format prescribed by the Courts and submitted for approval of the Court which usually takes place in a summary proceeding called a Passing of Accounts. At the Passing of Accounts, beneficiaries can raise their objections to the administration of the estate by the Estate Trustees and to the financial accounts which have been prepared. Disputes as to the Estate Trustees’ compensation are also resolved at the Passing of Accounts. See below under the heading, “Compensation to Estate Trustees”.

Estate Trustees must also be extremely careful to act in the best interest of the estate, and not to allow their own personal interests to conflict with the Estate Trustees fiduciary duty to act in the best interest of the estate. The failure to do so could result in a liability to the beneficiaries and in extreme cases the beneficiaries may successfully apply to the Court to remove Estate Trustees which would typically involve a substantial costs award against the Estate Trustees if successful.

7. Compensation to Estate Trustees

Estate Trustees are entitled to be paid for their time, trouble and pains in the administration of the estate. Since the compensation is taxable income, the Estate Trustee who is also the sole beneficiary (ie

frequently a surviving spouse) will waive the compensation so that the same funds are received as a tax-free distribution of capital under the Will. When the Estate Trustees are family members and the estate is distributed within the family, compensation is also frequently waived. When there is more than one Estate Trustee, the total compensation is shared among them on some agreed basis.

Guidelines have been established to help calculate the Estate Trustees' compensation. The Guideline is:

- 2.5% of capital receipts
- 2.5% of capital disbursements
- 2.5% of income receipts
- 2.5% of income disbursements
- annually, a care and management fee of 2/5ths of 1% of the average value of the estate

This guideline is just that, and will be adjusted up or down depending on the complexity of the estate, the time which the Estate Trustees had to reasonably put into their work, and any especially good results (or especially bad consequences) arising out of the Estate Trustees' efforts. The amount of compensation is subject to agreement between the Estate Trustees and all of the beneficiaries, and if they all do not agree, the Court will settle the amount of compensation on a Passing of Accounts legal proceeding. Not surprising, the amount of compensation is often disputed.

In addition to keeping meticulous financial records, the Estate Trustees should also keep track of their time in and about the affairs of the Estate to help justify their compensation claims. Keeping a separate journal or diary in which an Estate Trustee notes the date, the time spent and a short description of what was done is highly advisable.

Unless the Will permits, Estate Trustees should not take anything on account of their compensation until it has either been approved by all of the beneficiaries or determined by the Court in a Passing of Accounts.

8. The Estate Solicitor

The Estate Trustees usually retain a lawyer to advise and assist in the administration of the Estate. In this capacity, the lawyer retained by the Estate Trustees is acting for the Estate Trustees and is not retained by the beneficiaries, and therefore, the lawyer's clients are the Estate Trustees who have the general duty to act honestly, in good faith and in the best interest of the Estate.

The estate solicitor's responsibilities will usually include preparation and filing of court materials if probate proceedings are necessary to obtain a Certificate of Appointment of Estate Trustee with a Will. In a simple Estate, this may be the full extent of the Estate solicitor's engagement, but more typically, the estate solicitor's are also called upon to advise with regard to the following:

- (a) Advice as to the rights of the beneficiaries, and any other individuals who may have a claim against the estate. In addition to claims of creditors against the estate, this includes advice regarding potential claims by persons who may have been dependent upon the deceased at the time of death and for whom the deceased may not have made "adequate provision" in the will. Also, another claimant against the Estate may be a surviving spouse because The *Family Law Act*

provides that a surviving spouse may elect to receive an equalization of net family property under the *Family Law Act* instead of the survivor's entitlement under the will.

- (b) Advice with respect to the filing of the terminal income tax return and the estate income tax returns.
- (c) Advice regarding record keeping by the Estate Trustees.
- (d) Advice regarding compensation claims by the Estate Trustees.
- (e) Advice as to the winding up and distribution of the Estate, including the establishment and maintenance of reserves, and obtaining the consent of the beneficiaries to the administration of the estate and the beneficiaries' formal Release of the Estate Trustees or failing that, representing the Estate Trustees on a Passing of Accounts legal proceeding.

In addition to the above, most solicitors have much more experience than the typical Estate Trustees in the administration of estates, and therefore often assist and help with the practical administration of the estate, including identifying and valuing the assets for the purposes of the inventory and realizing upon the assets of the estate. Estate Trustees also often enlist the solicitor's assistance to manage the estate, and give instructions and take advice from accountants which have been engaged. Since these practical aspects of estate administration are tasks which are included in the Estate Trustee's compensation, the compensation of Estate Trustees is likely to be reduced to the extent that the solicitor undertakes these tasks. The obvious rationale is that by paying the lawyer's legal accounts, the estate has already borne the expense for the solicitor's assistance in the practical administration of the estate and unless the Estate Trustee's compensation is reduced accordingly, the Estate will effectively be paying twice for the services.

Usually, at or near the beginning of the administration of an Estate, the estate solicitor will discuss the full extent of the role which is expected of the estate solicitor, and this role will often be set out in a retainer letter between the estate solicitor and the Estate Trustees.

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