



LAFRENIÈRE SANNA  
— ESTATE LAW —  
A B O U T I Q U E F I R M

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## Acting as an Estate Trustee

If you are acting as an estate trustee (commonly referred to as an 'executor'), you are responsible for administering the estate of a deceased person. If the deceased named you in his or her Will and if the Will must be 'probated', your appointment as estate trustee is confirmed when the court issues a *Certificate of Appointment of Estate Trustee with a Will*. This process is often referred to as 'probating the Will'. If the deceased did not leave a Will, an estate trustee is appointed when the court issues a *Certificate of Appointment of Estate Trustee without a Will*.

This brochure lists tasks normally performed by a solicitor (lawyer) in assisting an estate trustee to obtain a court-issued Certificate. Work normally done by a solicitor, in other words 'legal work', is listed under Solicitor's Tasks below. Work which may be done by an estate trustee without the assistance of a lawyer is listed under Estate Trustee's Tasks. These lists cover most of the tasks to be performed. However, these lists are not exhaustive since requirements can vary considerably depending upon the amount, nature, and complexity of the assets, the age and residency of the beneficiaries, and the knowledge and skill of the estate trustee.

### Solicitor's Tasks

All tasks listed are not required for every estate. The solicitor advises the estate trustee if some tasks may be optional or unnecessary. Some tasks may be completed by the estate trustee depending on the terms of the retainer between the estate trustee and the solicitor.

- Review provisions of the *Succession Law Reform Act* with the estate trustee and advise as to the distribution of estate required by law,

- Outline what the solicitor will be doing,
- Advise the estate trustee as to the scope of his or her responsibilities,
- Review the assets of the estate,
- Prepare the statement of the original assets,
- Prepare and file the application for a Certificate of Appointment of Estate Trustee,
- Transmit the deceased's property into the estate trustee's name,
- Prepare documents for registration of securities,
- Arrange to advertise for creditors (required if no Will),
- Receive a list of debts and advise the estate trustee as to payment of the deceased's debts,
- If there is a potential for family law, refer the estate trustee for legal advice,
- Advise regarding the settlement of claims against the estate,
- Perform corporate services for deceased's company,
- Advise estate trustee with regard to the *Estate Information Return* (EIR) which must be received by the Ministry of Finance within 180 days of the court issuing a *Certificate of Estate Trustee*,
- As per retainer, complete the EIR based on information provided by the estate trustee and financial institutions and meet with estate trustee to review and sign EIR,

- On request of estate trustee, prepare documents to transfer property to beneficiaries,
- Assist in the preparation of accounts, if requested,
- Prepare court documents for the estate trustee to pass accounts, if needed,
- Prepare beneficiary releases, if requested,
- Search executions (sheriff's office), if needed,
- Prepare applications for paying money into court, if necessary,
- Discuss income tax filing requirements generally and refer estate trustee to a tax professional for preparation and filing and advice regarding distributions, retention of receipts, etc.,
- If necessary and on the estate trustee's instructions, prepare an application to court to obtain advice in the administration of the estate, to interpret the Will, to contest questionable claims, to settle claims under family law legislation,
- Prepare application to court permitting distributions to foreign beneficiaries of designated countries, if any.
- If no Will, meet with solicitor to discuss applying for a Certificate of Appointment of Estate Trustee Without a Will,
- In consultation with a tax professional, if prior year income tax returns were not filed, file (or arranged to have filed) income tax returns for year of death and for all prior years which are due but were not filed at the date of death,
- Determine, locate, and notify beneficiaries of their interest,
- Determine, secure, and protect assets,
- Dispose of all perishables,
- Open estate bank account,
- Review insurance coverage and ensure estate assets are covered against fire and other perils,
- Make provision for the immediate needs of deceased's spouse and any other dependents of the deceased,
- Collect income generated by the estate assets or payable to the deceased,
- Pay bills, mortgages, insurance premiums, credit cards,
- Re-direct mail,
- Cancel email accounts and, if possible, locate and shut down social media and other online accounts of the deceased,
- Cancel health insurance coverage, driver's license, cable, telephone, club memberships, subscriptions, credit cards and obtain any refunds where appropriate.

### **Estate Trustee's Tasks**

This list of estate trustee's tasks is not exhaustive and is not intended as legal advice. For convenience, it is divided into three groups according to when the tasks are usually performed: Immediate, Interim and Final. There is no clear dividing line between these groups in terms of timing.

Unless the estate trustee has expertise in completing and filing income tax returns related to deceased person's and estates and trusts, we strongly recommend that he or she hire a tax professional with such expertise to complete any task pertaining to tax returns and to obtain advice regarding when and how to distribute to beneficiaries.

#### **Immediate Tasks**

- Make proper funeral and burial arrangements, and pay funeral expenses,
- Make a thorough search for a Will,

#### **Interim Tasks**

- Prepare inventory of original assets including safety deposit box listing, real estate, monies on deposit at financial institutions, personalty, life insurance, any interest in an estate or trust and any other investments such as a mortgage,
- Arrange valuation of assets where necessary,
- Provide solicitor with information required for the court application,
- Provide accurate information for preparation and filing of the EIR,
- Review, sign and confirm EIR is filed on time,
- Advertise for creditors and prepare inventory of debts,

- Ascertain if there are any outstanding loans from family members to the deceased or loans to family members by the deceased and locate evidence regarding balance owing,
- Consider any claims or potential claims against the estate and obtain legal advice if necessary,
- Set aside reserve funds for estimated debts, estate administration tax, income taxes (including potential taxable capital gains on property such as a cottage), and estate trustee's compensation,
- Before making an interim distribution to beneficiaries, discuss preparation of releases with solicitor and discuss with a tax professional what amounts and the timing of distributions, and what documents, such as Clearance Certificates, the estate trustee should have before distributing funds.

### **Final Tasks**

- Apply for any benefits payable on death including the CPP death benefit, life insurance proceeds, death benefits from pension plans or annuities, and deposit to estate account,
- Re-register assets in estate's name, if applicable,
- Prepare transfer/deed for conveyance of real property, if required by the Will,
- Arrange transfer or rollover of RRSP or RRIF to the deceased's spouse if appropriate,
- Settle all legitimate claims against the estate,
- File an estate trust return, if appropriate,
- Obtain clearance certificates from Canada Revenue Agency with respect to the final income tax return and any other estate-related tax returns,
- Prepare and maintain estate accounts for approval by the beneficiaries or examination by the court if a passing of accounts is appropriate or required,
- If no Will, distribute assets according to rules for intestate succession,
- Consider obtaining a 'comfort letter' from the Ontario Ministry of Finance with respect to the EIR that was filed,
- For at least four years after the date the *Certificate of Appointment of Estate Trustee* was issued, retain evidence of asset

values for review on an EIR audit and consider whether a reserve should be withheld and, if so, how much,

- In consultation with the tax professional and the solicitor, determine when and how much to distribute to beneficiaries,
- When ready to wind up the estate, convert investments and other assets to cash and deposit to estate account,
- Prepare and have beneficiaries sign releases prior to distributing funds,
- Advise beneficiaries regarding inclusion of income from estate in their own income tax returns, if appropriate,
- Prepare cheques and pay shares to beneficiaries,
- Close the estate account,
- In consultation with a tax professional, determine CRA requirements as to how long records must be retained and store records securely.

### **Notice to Creditors**

An estate trustee should consider advertising for creditors especially if he or she was not familiar with the deceased's financial affairs. If there is no Will, advertising for creditors is required. If there is a Will, this is an optional step. It is important to note that if an estate trustee with a Will chooses not to advertise for creditors, the estate trustee is personally liable for any debts of the deceased if an estate creditor appears after all estate funds have been fully distributed to beneficiaries and insufficient time has passed. Estate funds are used to pay the cost of advertising for creditors. We strongly recommend that estate trustees advertise for creditors particularly if he or she was not fully aware of the deceased's financial situation prior to death.

### **Good Record-Keeping is Essential**

One of the most important responsibilities of an estate trustee is to keep detailed records and receipts of all transactions involving the estate including a detailed list of the assets of the deceased and the values of those assets on the date of death. These records are important for a number of reasons:

- Residue beneficiaries are entitled to know full details of the administration of the estate. If information is not provided voluntarily or is inadequate, an estate

trustee can be required to answer to a judge on a passing of accounts.

- To comply with income tax filing requirements, the estate trustee must provide details about assets, transactions, beneficiaries, particularly foreign beneficiaries, and how and when distributions were made.
- For up to four years after the date that a *Certificate of Appointment* was issued, an estate trustee may be audited by provincial revenue authorities to determine if estate administration taxes, or probate fees, were properly calculated and remitted. Inadequate or poorly maintained records could result in significant fines or penalties.
- Calculation of estate trustee compensation is usually based on a percentage of revenue and disbursements. Without detailed records, estate trustee compensation is difficult to determine and may be reduced as a result.

### **Cash, Dealing with the Bank, Operating an Estate Account**

If any cash is found among the deceased's possessions, it should be deposited, along with any cheques received, into a separate account in the name of the deceased that is used only for the estate. An estate trustee must never mix personal funds with funds belonging to an estate.

When an estate account is set up, the bank should be asked to return all cheques, even if there is an additional charge for doing so. If an estate trustee is required at some future date to provide proof of payment, being able to produce proof of the cancelled cheques can be important. Bank charges for providing such proof at a later date can be considerably more costly than having cheques returned (or images produced on a statement) on a regular basis. Generally, a bank will not allow an estate trustee to operate an estate account until the bank has been provided with a notarial or certified copy of the *Certificate of Appointment of Estate Trustee* issued by the court.

It is unlikely that an estate trustee will be able to write cheques on the estate account or withdraw money from the account until the *Certificate* has been provided. However, an estate trustee can usually open an estate account and make deposits and may, at the discretion of bank personnel, be able to have bank drafts issued to pay debts of the deceased. The estate account will otherwise be frozen pending receipt of the *Certificate*.

### **Safety Deposit Box**

If the deceased had a safety deposit box at a bank and if the keys are located (there are usually two keys) and if the deceased was the sole owner of the box, the estate trustee is not normally allowed access to the safety deposit box until the *Certificate of Appointment of Estate Trustee* has been provided. However, bank personnel can arrange to open the box and make an inventory of the contents of the box in the presence of the estate trustee. Most banks require that an appointment be made and that the estate trustee bring a certified or notarial copy of the Will, an original or notarial copy of the death certificate, at least one of the keys to the box, and one or more pieces of ID of the estate trustee.

When obtaining an inventory of the box contents, ask that full details of certificates of deposits (GIC's), savings bonds, etc. be noted on the inventory including face value, series numbers, and similar details as this information is necessary to accurately calculate the estate administration tax.

### **Real Estate – Caution re Vesting of Property**

If Ontario real property such as a house, cottage, or vacant lot are among the assets of the estate, by operation of law, such real property vests in, or legally belongs to, the beneficiary or beneficiaries three years after the death of the owner, provided that the property has not been sold or transferred within the three-year period. To avoid such vesting, the estate trustee must arrange to file a 'caution' on title prior to the end of the three-year period and every three years thereafter.

### **Being Paid for Estate Trustee Work - Compensation**

Unless the Will states otherwise, an estate trustee is generally entitled to receive compensation from the estate for acting as estate trustee. Compensation is taxable income to the estate trustee whereas an inheritance is not taxable income. Note that the amount of compensation received by an estate trustee is taxable and must be reported to the Canada Revenue Agency (CRA) when the estate trustee files his or her income tax return. We recommend that the estate trustee hire a tax professional to assist with proper filings.

### **Deductibility of Professional Fees**

When an estate trustee hires a professional to assist with certain tasks, it may not always be clear which professional fees are to be deducted from

the estate trustee's compensation and which can be paid directly by the estate rather than being deducted from compensation. For this reason, it is our firm's practice to bill fees for solicitor's work separately from other work related to the estate. Solicitor's work includes tasks which are not normally done by a non-lawyer, such as notarizing documents and preparing court applications. Such fees are not deductible from compensation.

Unless the Will says otherwise, the general practice with respect to fees paid to an accountant for preparation of estate tax returns, is to pay these fees directly from the estate and not deduct them from the estate trustee's compensation. However, in a contested passing of accounts (see below), a judge determines whether professional fees will be deducted from an estate trustee's compensation or not, subject to any provisions in the Will.

### **Beneficiaries to Sign Releases**

Whether or not an estate trustee intends to take compensation for estate trustee work, prior to giving any funds to a beneficiary, a signed release should be obtained from every beneficiary unless the estate trustee intends to pass his or her

accounts. All beneficiaries should approve the estate trustee's estate accounting report which lists all transactions relating to the estate and the proposed amount of estate trustee compensation.

Obtaining releases is especially important when the estate trustee is winding up the estate and distributing the final amounts due to beneficiaries. It is strongly recommended that estate trustees retain a lawyer to draft releases for the beneficiaries to sign and return before any distributions are made.

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