



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

Chantal M.J. Lafrenière  
B. Soc. Sc., JD, CEA

Natalie A. Sanna  
B.A. (Hon.), LL.B.

## Estate Accounting for Estate Trustees (Executors) and Attorneys

If you are acting as an estate trustee (commonly referred to as an 'executor') or an attorney under a power of attorney, this brochure provides some general information which may be helpful. It is not intended as legal advice.

### Definitions

In this brochure, **estate** means all of the assets and liabilities of a deceased individual or of a living individual who is no longer able, or no longer wishes, to manage their affairs.

An **estate trustee** means the person appointed to administer an estate. An estate trustee may be named in a Will and their appointment confirmed by the court issuing a *Certificate of Estate Trustee with a Will*. If there is no Will, an estate trustee is appointed by the court when a *Certificate of Estate Trustee without a Will* is issued.

An **attorney** means a substitute decision-maker appointed by another person, the grantor, who has signed a power of attorney document. An attorney is not necessarily a lawyer, although a lawyer may act in this capacity. In this brochure, when we refer to an **attorney**, we mean an attorney for property who manages the financial affairs of the grantor. We are not referring to an attorney for personal care who may make medical treatment and personal care decisions for a grantor.

A **guardian** is a person appointed by the court to manage the affairs of another person. Some of the information in this brochure may apply to a guardian; however, the order appointing the guardian should be reviewed carefully to determine specific accounting and reporting requirements.

### Who Needs to Know?

When you act as an estate trustee, you are accountable to the beneficiaries of the estate and its creditors. When you act as an attorney under a power of attorney, you are accountable to the grantor of the power of attorney, the person's attorney for personal care (or guardian of the person), and the Public Guardian and Trustee.

You must be prepared to provide, on request, an accounting of the receipts (all income, dividends, liquidated assets, etc.) and disbursements (payments made including bills paid, distributions to beneficiaries but not money transferred to an investment) for review. For this reason, it is important to keep detailed records of all transactions on behalf of the estate or the grantor, so that you can provide an accounting report when needed.

A detailed accounting report also provides the basis for determining how much compensation you may be paid for the work that you do as an estate trustee, attorney, or guardian. The amount of compensation is subject to approval by certain individuals (such as estate beneficiaries) or by the court. If you submit your accounting report for the court's approval, you are said to be 'passing your accounts'. If approved by the court, you do not need the approval of the beneficiaries or anyone else.

Taking compensation is not mandatory; however, if taken, it is taxable income. Whether taken or not, a detailed accounting must still be kept.

The estate trustee or attorney is also encouraged to keep a journal of all aspects of the

administration of the estate or the grantor's affairs. Journal entries would include the date, the amount of time spent, a description of what was done, who the estate trustee or attorney met with and so forth. Such a journal can be of considerable assistance if a beneficiary or other interested party objects to the amount of compensation sought or if the estate trustee or attorney's actions are questioned. Records of mileage and of disbursements incurred while carrying out the estate trustee or attorney's duties should also be kept. Such detailed records may be requested by a judge on a passing of accounts, by beneficiaries, or by the grantor.

### **Keeping Detailed Records**

When you begin to act as an estate trustee or attorney, make a detailed written list of all assets and liabilities of the estate or of the grantor. For example, if the asset is a bank account, include the name and address of the bank, the account number and type of account, and the account balance on the date of death or the date when you took over as attorney. For shares, list the name of the company, the type and number of shares, and when they were acquired or bought. It is better to include too much detail than not enough. If you are not sure what information may be required, consult a lawyer or other professional who understands estate accounting.

Avoid using the grantor's or the estate's cash to pay bills or to re-imburse yourself for expenses. All cash should first be deposited to an account in the name of the grantor or the estate and then cheques written on the grantor's or estate account to make all payments. It is not necessary for you to pay bills out of your own pocket; however, if you inadvertently do so, ensure you are paid back as soon as possible.

You may also be reimbursed for out-of-pocket expenses such as parking, mileage, and so forth, if such expenses are incurred as a result of carrying out your duties as an attorney or estate trustee and providing you document such expenses.

Although it is possible to use more than one bank account for this purpose, it will simplify eventual reporting if you consolidate into one bank account for all incoming and outgoing monies even if some of it is invested in short- or long-term investment vehicles such as bonds or guaranteed investment certificates (GICs). However, we recommend that you consult with a financial and/or tax advisor for advice. It goes without saying that estate funds and your personal funds must never be mixed.

### **Contents of Accounting Report**

Some estate trustees and attorneys prepare the estate accounting report themselves. Others prefer to have the report prepared by a professional with estate accounting experience, particularly if it will be submitted to court for a passing of accounts. Whether you choose to prepare the report yourself or have it done by a professional, the report should include:

- title page showing the name of the estate or the grantor whose affairs are being managed, the period of time that the report covers, and the name, address and telephone number of the person who prepared the report;
- table of contents with page numbers;
- summary of the receipts, disbursements and investments, and the balance at the end of the accounting period (if a trust is on-going, it may also be necessary to separate receipts and disbursements into revenue and capital receipts and revenue and capital disbursements);
- detailed list of the assets at the start and at the end of the accounting period and whether or not an asset has been 'realized' or turned into cash or other readily-negotiable form, during the acting period, detailed chronologic list of every receipt including date, source, sufficient information to identify the item clearly, and the amount (every item is also numbered individually to make cross-referencing easier);
- detailed chronologic list of every disbursement (expenses, distributions) including date, source, sufficient information to identify the item clearly, and the amount (every item is also numbered individually to make cross-referencing easier).
- if compensation is being taken, details as to how it has been calculated.

### **Other Information That May Be Required**

Depending upon the complexity of the assets being managed, the time period covered, and the on-going necessity for reporting, such as for a trust, the accounting report may also include:

- a list of unrealized assets;
- a list of investments being held at the end of accounting period;

- a list of liabilities, real (known but not yet paid) and contingent (estimated or expected but not yet certain).

## Compensation for an Attorney

When acting as an attorney under a power of attorney, compensation is usually based on the regulations under the *Substitute Decisions Act* (SDA), which set out the following percentages:

- 3% of receipts,
- 3% of disbursements, and
- 3/5 (three-fifths) of 1% of the average annual value of the assets as a care and management fee.

## As An Attorney or Guardian, When Can I Get Paid?

Based on regulations under the *Substitute Decisions Act*, an attorney can be paid on a regular basis for the work that she or he is doing to manage the grantor's financial affairs. A guardian must review the guardianship order to determine what is allowed in terms of compensation that may be taken and when.

## Compensation for an Estate Trustee

An estate trustee is generally entitled to slightly lower percentages than an attorney:

- 2½% of receipts (all value received by the estate including assets as of date of death),
- 2½% of disbursements (all payments out of the estate whether to pay liabilities or to distribute to beneficiaries),
- 2/5 (two-fifths) of 1% of the average annual value of the assets as a care and management fee).

However, there is no legislation which sets this out. The percentages have developed as a result of case law and precedent. If a judge reviews your accounting report, she or he will consider a number of factors which can be hard to define such as what is a fair and reasonable allowance for your care, pains and trouble. This is one of the reasons we suggest keeping a detailed journal.

Among other things, a judge is likely to consider:

- the magnitude of the trust,
- the care and responsibility involved,
- the time occupied in performing the duties,

- the skill and ability displayed, and
- the success of your administration.

Although many estate trustees seek payment of the care and management fee starting from the date of death, case law suggests that the care and management fee should not be paid to the estate trustee in the first year after the date of death. If the accounts are contested, it would be up to a judge to decide whether or not the care and management fee would be allowed in the first year of estate administration.

If the estate is very simple, compensation may be reduced from the usual percentages. If the estate is very complex, additional compensation may be awarded by the court but this is not a frequent occurrence. Note that one of the factors which a judge may consider is the time occupied in performing the duties. A detailed journal will be very helpful!

The actual amount of compensation must be approved by the beneficiaries or by a judge on a passing of accounts. Note that estate trustee compensation may be subject to limitations in the Will. Compensation cannot be taken on the estate trustee's share of the estate.

## As an Estate Trustee, When Can I Get Paid?

You can reimburse yourself for legitimate and reasonable out-of-pocket expenses, estate trustee compensation (payment for work done) should not be paid before your accounting report has been approved unless the deceased's will states that 'pre-taking' is allowed. If pre-taking is not mentioned, a majority of adult beneficiaries or the court must approve the accounting before you are paid. If any beneficiary is a minor (under the age of eighteen (18)) or mentally incapable, the estate trustee may be required to provide the accounting report to Ontario's Office of the Children's Lawyer or the Public Guardian and Trustee for review.

## Showing Compensation Calculations and Tax Implications

If compensation is claimed by an estate trustee or attorney, the accounting report must show how the compensation has been calculated. If an estate trustee is requesting a care and management fee or a special fee for a complex estate, calculations for these must also be shown.

When an estate trustee or attorney enlists the assistance of advisors, such as a tax accountant, the professional fees paid for such assistance are

generally an expense and are not usually deducted from the compensation for the estate trustee or attorney. However, the Will or the Power of Attorney document may provide otherwise or on a passing these and other expenses may be challenged. The legal fees and court fees relating to the application for a *Certificate of Appointment of Estate Trustee* are recoverable from the estate as an expense.

Please note that the amount of compensation you receive as estate trustee, attorney, or guardian is taxable income and must be reported to Canada Revenue Agency (CRA) when filing your own income tax return.

In addition, the estate may need to obtain a business number, which is assigned when applying for a payroll account. The estate (or grantor) is effectively an employer for purposes of paying compensation. It is recommended that you seek the advice and assistance of a tax professional in that regard.

## Summary

The information provided in this brochure is intended as a general introduction to the topic of estate accounting. There are many other issues to consider if you are acting as an estate trustee, attorney, or guardian. If you require legal advice or assistance with estate accounting, please consult a lawyer or other knowledgeable professional.

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