



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

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Estate Beneficiaries – Frequently Asked Questions

Question 1: Almost a year ago, I received a letter from my uncle's lawyer letting me know that I'm a beneficiary of my uncle's estate. I still haven't received any of my inheritance. What's taking so long?

Generally, it can take an executor a year to a year and a half to administer an estate. This includes locating and probating the Will, if there is one, arranging the funeral and disposition of the deceased's remains, locating and securing the deceased's assets and liquidating assets including arranging for the sale of real estate, paying debts, filing tax returns, and distributing the estate to the beneficiaries.

However, there are many reasons why this process might require more time and why beneficiaries might have to wait longer to receive their inheritance. Here are some of the most common reasons for delays.

Errors in tax filings: If the deceased failed to file one or more tax returns or if tax returns were filed but information wasn't correctly reported, the executor must catch up on the missed tax filings and must correct any errors that were made. These kinds of problems often occur because the deceased was having mental capacity issues in his or her last years.

Delays by Canada Revenue Agency (CRA) in issuing Notices of Assessment: Notices of Assessment for tax filings after death can take longer for Notices of Assessment issued to a living person. For example, while Notices of Assessment are often issued to a living person within a few weeks of filing, it can take from two to six months to receive the Notice of Assessment for an estate, even if there are no unusual issues or problems with the final tax return or with the estate trust return. If

there are problems with the tax returns, issuing the Notice of Assessment will be further delayed.

Delays by CRA in issuing Clearance Certificates: Under the Canadian *Income Tax Act* an executor is required to obtain a clearance certificate before distributing estate assets that he or she controls. However, the executor cannot request a Clearance Certificate until the executor has received the Notice of Assessment for either or both of the final tax return of the deceased or for the last estate trust return that the executor plans to file. Once the Clearance Certificate has been requested by the executor, typical wait times are six months or more before CRA will issue the clearance certificate.

Foreign beneficiaries: If any of the estate beneficiaries live outside Canada, extra steps will be required by the executor. There may be forms to be submitted and taxes may have to be withheld and submitted directly to the Canadian tax authorities. If an executor is not a resident of Canada, additional forms must also be completed.

Disagreements/Litigation: Any sort of disagreement or litigation affecting the estate will cause delay, sometimes lengthy delays. This could be a claim by a creditor that the executor is questioning, a claim by a former or current spouse or by a dependent of the deceased, or unresolved litigation that existed at the time the person died or that has been started since the person passed away, perhaps by a disappointed beneficiary.

Trusts in the Will: If there is a trust for a beneficiary whether in the Will or outside the Will, an inheritance may be payable to the trust and not to the beneficiary directly.

Minor Beneficiary: If a beneficiary of an estate is under the age of 18, in Ontario they are

considered a minor and their inheritance cannot be paid directly to the minor. The executor may opt to pay the inheritance in to Court for the benefit of the minor (who can apply at age 18 to have it paid out). If the Will has appropriate provisions, the executor or someone else may be appointed as trustee of the inheritance on behalf of the minor.

Question 2: I don't think it's fair how my mother's estate is being divided. Why did her lawyer let her sign a will like that?

When a lawyer meets with a client to have a will prepared, it is the job of the lawyer to listen to how the client would like to have their estate distributed upon their death, advise the client as to the options for achieving their goals, and explore the pros and cons of each option. It is not the job of the lawyer to make decisions for the client.

Question 3: I've been appointed as an executor? I've been told it can be a big job. Can I be paid for this work? If so, how much am I allowed to charge?

Unless the Will denies executor compensation (many Wills do not mention it at all), a person acting as an executor can be paid for doing the work of an executor. How much an executor can be paid depends on many things.

Firstly, look at the Will to see if it says how executor compensation is to be determined. It may be a set amount, based on percentages, or more generalized such as allowing a professional (lawyer, accountant, financial planner) to charge their usual hourly rates. The deceased may have also signed a fee agreement as is usual when a trust company agrees to be executor.

If the Will doesn't say anything, then the common law applies which means looking at what courts have decided over many years. Unlike compensation for POAs for property, there is no statute in Ontario that specifies how to calculate executor's compensation. An executor is generally allowed 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) plus 2/5 (two-fifths) of 1% of the average annual value of the assets as a care and management fee).

If a judge reviews the proposed compensation, he or she consider the following five factors as well as other court decisions:

- the magnitude of the trust/estate;
- the care and responsibility involved;
- the time occupied in performing the duties;
- the skill and ability displayed; and,
- the success which has attended its administration.

Unless the Will allows for 'pre-taking', the executor may have to wait for the approval of the beneficiaries or the approval of the Court on a passing of accounts (see our brochure entitled *Passing of Accounts*) to take his or her compensation. However, an executor can be paid for out-of-pocket expenses

such as mileage, legal fees and so on (without pre-approval). The amount of the expenses can be reviewed and questioned by beneficiaries or a judge on a passing.

Acting as an executor is a big job which comes with a lot of responsibility. The workload is definitely heaviest in the first couple of months as the executor locates assets, determines values, secures them, pays bills, finds and corresponds with beneficiaries, prepares and files tax returns, determines if prior year returns are up to date and if not, deals with them, responds to beneficiaries, creditors, and investment holders, etc.

There is usually less work towards the windup stage of administering an estate while the executor is waiting for CRA to issue Notices of Assessment or Clearance Certificates. It is important that an executor seek the advice of a professional who can help guide the executor through the process, ensure all responsibilities are understood, and assist in determining if the executor will take compensation and in what amount. Compensation is taxable income and, if taken by a layperson (someone who is not in the business of handling estates), the estate must have a business number issued by CRA. All compensation is subject to income tax being withheld and other deductions made, t-slips issued, etc. It is CRA's position that the estate is an 'employer' when an executor takes compensation.

Question 4: My sister died a few months ago. She left everything to me and my two brothers. I'm in long-term care. I have serious health issues so my care costs are climbing. I could really use some extra money to help with those costs. Why can't the executor give me some of my inheritance now and let my brothers wait until the estate is ready to be wound up?

The law requires that an executor treat all residual beneficiaries in the same manner or even-handedly. For example, if you and your two brothers are equal beneficiaries of the residue of the estate, if the executor gives you \$50,000 from the estate, he or she should also give the same amount to your brothers unless your brothers consent in writing to something different. If any of the other beneficiaries are minors (under the age of 18) or are mentally incapable, they cannot consent to an unequal distribution as they lack legal capacity.

If an executor distributes the estate before any of the following, the executor could be in trouble:

- creditors have been notified and any claims dealt with;
- limitation period for a dependent to make a claim has passed (6 months from application for Certificate of Appointment or 'probate' as it is sometimes called);

- limitation period for a spouse to elect to an entitlement under the Family Law Act has passed (6 months from the date of death);
- CRA has issued a Clearance Certificate to (a) the date of death (b) the trust year end for the final trust return being filed;
- if there is no Will (an 'intestacy'), someone has to apply for a Certificate of Appointment of Estate Trustee without a Will and take on the role of executor. As per the Estates Administration Act, no distribution may take place for one year after the date of death. Also if no election was filed pursuant to the Family Law Act, the consent of the spouse or direction of the Court is needed before any distribution can take place.

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