

Frequently Asked Questions:

Administering an Estate

My spouse/relative/friend has just died. I am appointed the Estate Trustee. Do I have to act?

You are not obliged to act as an Estate Trustee and you may decline. If you do decline and you were the only Estate Trustee, someone else will need to apply to the courts to become the Estate Trustee.

I have decided to act. What are my duties as an Estate Trustee?

As Estate Trustee, you are the person who has responsibility for the administration of the Estate.

While this is not an exclusive list, your responsibilities include:

1. Burial and funeral arrangements;
2. Determining the beneficiaries and notifying them;
3. Protecting the assets of the Estate;
4. Determining the value of the Estate for probate and tax purposes and preparing an inventory of all assets. You are required to value all assets including real estate;
5. Ensuring there is adequate insurance on assets;
6. Listing the contents of any safety deposit box(es);
7. Employing a lawyer to advise you on the administration;
8. Determining whether there are any pension or death benefits;
9. Determining any debts and arranging for payment;
10. Disputing and/or settling any debts if you are not satisfied such debts are legitimate debts of the deceased;
11. Advertising for creditors, if appropriate;
12. Determining the income tax liability of the deceased and the Estate, preparing and filing the necessary returns, arranging for the payment of tax, and ultimately obtaining clearance certificates from Canada Revenue Agency before finally distributing the Estate;
13. Preparing estate accounts to the satisfaction of the beneficiaries or for audit before the court; and
14. Distributing the Estate in accordance with the terms of the Will and obtaining releases and indemnities for yourself from beneficiaries, if necessary.

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Can I delegate decisions about the administration of the Estate?

As Estate Trustee, you have the responsibility to make decisions. You cannot delegate your decision-making role. If you wish, you can delegate the implementation of your decisions and the day-to-day administration of the Estate. Your lawyer can give you advice and assistance. You are also entitled to seek other expert assistance in appropriate circumstances (such as regarding investments of the Estate).

What records or accounts should I keep regarding the Estate?

You have a duty to keep accurate records of the administration of the Estate. As part of this you must retain all invoices, cancelled cheques and receipts. You must not mix the Estate's money or other assets with your own or anyone else's. You must be ready to account to the Estate's beneficiaries for your administration. If you fail to perform these duties, you could be removed from your position and be liable for damages or costs.

From the beginning you should keep careful records, especially financial accounts. If you do not, it can be very expensive and time consuming to reconstruct accounts afterwards. Bear in mind that estate accounting is not like normal accounting. Please speak with us about its requirements.

You should ask the beneficiaries to review and approve the Estate accounts and sign a release before they receive their bequests.

Usually the simplest way to manage the Estate accounting is to handle all the Estate's financial transactions through one separate estate bank account.

Should I open a bank account for the Estate?

We suggest that you open a bank account in the name of the Estate. You should deposit the Estate's cash into that account, as well as any proceeds from a sale of the deceased's assets. From the balance of the Estate's bank account, you can then pay the Estate's expenses and distribute the amount remaining. The transaction statements for this bank account can serve as a record of the expenses and receipts for the Estate.

Am I entitled to compensation as an Estate Trustee?

In Ontario, Estate Trustees are entitled to be paid for their services. They are also required to pay tax on this income. Sometimes compensation is specified in the will. If it is not specified, then you need to determine what compensation is fair and reasonable. To help you determine this, Ontario has established a compensation guideline which provides that compensation should be approximately 5% of the value of the estate. This, however, is a guideline and not a rule and needs to be applied with reason. To determine whether the guideline amount is fair and reasonable, you need to consider the size of the estate, the care, skill, ability, responsibility and risks assumed by you as executor, the time spent by you, and the results obtained by your efforts. Basically, if a large estate is simple to administer, 5% of the value will be excessive compensation. On the other hand, if a small estate is complicated, 5% of the value may not be enough. Once you arrive at what you believe is appropriate compensation, it cannot be paid to you until the beneficiaries (or the courts, if required) approve the amount.

What would be your fees and expenses? Do you require a retainer?

Our accounts are divided into two parts: fees and expenses. Our fees will depend on the complexity and urgency of the administration of the Estate. We can give you an estimate when we know more about the Estate.

Usually, our fees will be higher when dealing with:

- Disputes between Estate Trustees and the beneficiaries or among Estate Trustees;
- Claims made by or against the Estate;
- Foreign assets; and/or
- The transfer of many different assets.

We also charge for our out of pocket expenses, like postage, courier charges, etc. All our fees and some expenses are subject to 13% Harmonized Sales Tax. For new clients, we ask for a retainer payment which we hold in our trust account and apply to our invoices when we render them.

What is probate? When is it required?

Probate is a process whereby the Estate Trustees of an Estate apply to the Ontario Court for a Certificate which confirms that the Will submitted to the Court is in fact the last Will of the deceased.

Probate is not always necessary. It will be required for an Estate to sell or to transfer certain assets which are in a public domain, for example, stocks, bonds and other securities issued by a public company. It is also required to transfer assets outside of Ontario and real estate.

What is probate tax? How much is it?

When the Estate Trustees of an Estate apply for probate (now called a Certificate of Appointment), the Ontario Court charges tax based on the value of the assets held by the deceased and subject to the Will. Except for mortgages against real estate, debts cannot be deducted from the value of these assets.

Presently, probate taxes are \$5 per \$1,000 for the first \$50,000 of assets, and \$15 per \$1,000 on the value of the Estate assets over \$50,000. This equals approximately 1.5% of the value of the assets dealt with in the Will.

What income taxes will the Estate pay?

Under the *Income Tax Act of Canada*, a deceased person is deemed to have disposed of capital and appreciable assets on death and as a result is required to pay tax on any gains from such dispositions. There are, however, two exceptions. There will be no capital gains on the deceased's principal residence and capital gains tax will be deferred on those assets which pass to or are held in trust for qualified beneficiaries. The Estate will also pay tax on its income.

What income tax returns should the Estate file?

You should ask your accountant to prepare tax returns for the Estate for the date of death and any tax returns for you as Estate Trustee for the period up until the final distribution of the Estate. You are required to file the following tax returns:

1. A return for the deceased for any taxation year prior to death which was not previously filed. These returns should be filed within six months of the date of death;
2. A T-1 Terminal Tax Return for the deceased covering the period from January 1st of the year of death up to the date of death. This return is due either:
 - a. within six months of the date of death, if the deceased died in November or December; or

- b. on April 30th of the following year if the deceased died before November.

A copy of the Will and a list of assets should be filed with this return.

- 3. A T-3 Trust Tax Return reporting any income received on assets of the Estate from the day after death to the end of either the calendar year, or the Estate year (365 days after the date of death), whichever period you elect.

T-3 Trust Tax Returns must be completed in each subsequent year. These returns are due within 90 days of the end of taxation year chosen.

In the year of final distribution of the assets of the Estate to named beneficiaries, the T-3 Trust Tax Return will cover the period from the first day of the tax year chosen to the date of final distribution. The person who prepares the final tax return should also apply for a tax clearance certificate.

What would happen if these tax returns were not filed? Would I be personally liable for unpaid taxes?

If returns are not filed, the tax is not paid, and you do not obtain a clearance certificate from Canada Revenue Agency, you may be personally responsible for the payment of any tax owing by the deceased or the Estate.

Should I apply on behalf of the Estate for a tax clearance certificate from Canada Revenue Agency?

You should apply for a tax clearance certificate for the Estate from the Canada Revenue Agency. Until a final clearance certificate is granted, you should retain some of the Estate's funds in case the deceased or the Estate is reassessed and required to pay more tax. However, once all debts of the Estate have either been paid or determined, there is nothing to prevent a distribution of most of the Estate prior to obtaining a clearance certificate.

Should I advertise for creditors of the deceased? What is the effect of such advertisement?

Depending on the occupation and financial affairs of the deceased, it may be appropriate to advertise for creditors.

Under the *Trustees Act* (Ontario), as an Estate Trustee, you can advertise for creditors of the deceased in a major newspaper in the location where the deceased lived and died. The usual practise is to advertise for three consecutive weeks with a deadline a little more than one week after the last advertisement.

If the advertisements are published, and the deadline for creditors' notices passes without any notices being received, the Estate Trustee is entitled to distribute the residue of the Estate to its beneficiaries. Afterwards, if a creditor makes a claim against the Estate for payment of a debt, the Estate Trustee will not be personally liable for it. However, the advertisement for creditors does not extinguish any debts. The beneficiaries are still liable to any creditor of the Estate who proves his claim within the statutory limitation period.

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