

# Are you ready to be an estate trustee?

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## Here's what you need to know.<sup>1</sup>



**Danna Fichtenbaum**  
Associate – Wills and Estates  
Minden Gross LLP  
T. 416.369.4122  
[dfichtenbaum@mindengross.com](mailto:dfichtenbaum@mindengross.com)

November 2019

The first step you should take after learning you have been named as an estate trustee is to get advice from an estate administration lawyer, who will guide you through the probate application (i.e. the Application for a Certificate of Appointment of Estate Trustee), and ensure you understand the responsibilities and potential liabilities of being an estate trustee.

A wills and estate lawyer can provide you with the relevant information and advice to assist you in determining not only whether you are *able* to fulfill the role of estate trustee, but also whether you are *willing* to do so.

Assuming you are *not* a qualified estate administration lawyer, it would be, almost without exception, beneficial to be walked through the process in fairly significant detail. This paper addresses four aspects of estate administration that ought to be considered by estate trustees.

1. The impact of retaining an estate administration lawyer.
2. The issues which arise when there are multiple estate trustees.
3. Legal work versus trustee work.
4. The initial questions, considerations and information to be considered.

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<sup>1</sup> This paper has been adapted from a paper originally prepared for the Ontario Bar Association's continuing professional development program "Your First Estate Administration" (April 10, 2019) titled *Your First Estate Administration: During the Client Meeting*.

## 1. Retaining an Estate Administration Lawyer

You, the estate trustee, are the client in an estate administration matter. None of the estate – which is itself not a legal entity (except for taxation purposes) – or its beneficiaries, is the client.<sup>2</sup>

Be aware that while you are entitled to use estate assets to pay the (reasonable) legal fees incurred during the estate administration file, you may be responsible for legal fees for advice relating to anything *other than* the legal work required to administer the estate. For example, legal fees associated with completing the probate application is a proper estate expense. However, the legal fees associated with gathering information from financial institutions regarding the assets of the estate may be more appropriately paid by you, in your personal capacity (if you chose to retain a lawyer to complete that type of task on your behalf). (More on the division of work as between legal and trustee work below.)

The estate trustee is the person from whom the estate administration lawyer takes instructions. However, solicitor/client privilege does not apply to certain documentation and communications between the estate trustee and the lawyer with respect to disclosure to the beneficiary(ies) of the estate.<sup>3</sup>

## 2. Multiple Estate Trustees

Several issues arise when more than one estate trustee is appointed, including the joint nature of the retainer, the division of compensation and the joint nature of liability.

### a. Joint Retainers

If two or more estate trustees retain the same estate administration lawyer, the Law Society of Ontario's *Rules of Professional Conduct* require that the clients must be advised that no information received from one estate trustee is to be kept confidential from any of the other estate trustees, and that if an unresolvable conflict develops between or among the estate trustees, they may both/all need to retain a new lawyer<sup>4</sup>.

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<sup>2</sup> *Bott v. Macaulay*, [2005] O.J. No. 3493, 76 O.R. (3d) 422.

<sup>3</sup> *Re Ballard Estate*, 1994 CanLII 7513 (ON SC). *Chang v Lai Estate*, 2014 BCSC 128 [*Chang*] at para 16. *Chang* also provides that if there is an adversarial relationship between the estate trustee and a beneficiary, there is not necessarily a joint interest which would entitle the latter to the production of documentation (para 17).

<sup>4</sup> Law Society of Ontario ("LSO"), *Rules of Professional Conduct*, Rule 3.4-5. The LSO comments that even if all concerned parties consent to a joint retainer, a lawyer ought not proceed if it is likely that a contentious issue will arise between them, or their interests, rights or obligations will diverge as the matter progresses (see the Commentary at Rule 3.4-7).

## **b. Joint Liability**

Where there are multiple estate trustees, they would all be equally responsible for any breaches of trust or shortfall with respect to the administration of the estate. This is generally the case regardless of each estate trustee's actual participation in the administration of the estate.

While courts have some discretion to relieve innocent trustees of liability (for example, when there is an intentional breach by a "rogue" trustee or if the "innocent" trustee can demonstrate that he or she acted honestly and reasonably), at minimum, you should ensure that you are aware of, and are comfortable with, all steps taken and decisions made. It is important to be aware of your commitment early on, as once you begin acting as an estate trustee, you are obligated to carry through until the administration of the estate is complete (unless you are removed from the position by Court Order).

## **c. Estate Trustee Compensation**

Where there is more than one estate trustee, the amount of compensation payable is to be divided between or among the estate trustees in whatever proportion they agree. It is important that you consider the anticipated division of work and compensation at the beginning of the administration process (or, at least, as soon as is reasonably possible).

## **3. Legal Work versus Trustee Work**

The administration of an estate involves two types of work: "legal work" and "trustee work". Although the two types of work are interrelated, they are separate and distinct areas of responsibility. An example of legal work is preparing and submitting the probate application. An example of trustee work is opening an estate bank account. Attached as Appendix A is a (non-exhaustive) list of legal work and trustee work. It is important that you understand the division of work and that you instruct the estate administration lawyer regarding the services for which you will be retaining him or her. Ensure that your lawyer properly documents/confirms this.

Be aware that even though you are entitled to compensation for the services you provide in administering an estate, if you retain professional advisors (including lawyers) to complete work that would otherwise be your responsibility, your compensation may be reduced.<sup>5</sup> (This assumes that no specific/alternate payment arrangements were directed by the Deceased.)

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<sup>5</sup> Clients ought also be made aware that estate trustees are entitled to – and in fact, usually ought to, in many cases – seek professional advice (from lawyers, accountants, investment advisors, appraisers, etc.) in order to ensure the proper administration of the estate. Fees payable to many of these experts were traditionally deducted from compensation payable to the estate trustee. However, the courts are now more willing to recognize that in light of the increasing complexity of estate assets, it is prudent for the estate trustee to seek the advice of experts and, as such, the fees of those experts are generally payable from the estate assets rather than out of the estate trustee's own compensation.

In many instances, estate trustees who have little experience in estate administration request the estate administration lawyer to perform part or all of the estate trustee's work. The allocation of the estate trustee's work and estate trustee's compensation between the estate trustee and the lawyer should be determined at an early stage of the estate administration process.

## 4. Questions, Considerations & Information

Basic information and documentation is required to complete the probate application, including:

- personal information (names, relevant dates, etc.);
- testamentary documentation (original);
- family information (marital status, family tree, etc.);
- asset information; and
- administration information (beneficiary contact information, etc.).

See Appendix B for a form of checklist in this regard.

There are also other matters regarding which your estate administration lawyer ought to advise you early on in the process, including certain time-sensitive administrative matters and your duty to account.

### a. Time-Sensitive Administrative Matters

In addition to gathering the basic information required to proceed with the probate application, the first meeting is also an appropriate time to discuss with the estate administration lawyer potentially time-sensitive matters. Doing so at this early stage not only helps to, potentially, preserve estate assets, but also helps to protect you from potential liability.

Some of the more common time-sensitive matters to be addressed include the following:

1. **urgent matters:** you ought to inquire as to any matters of immediate urgency (e.g. a pending real estate closing);
2. **the terminal tax return:** this return is due, if the death occurred between January 1<sup>st</sup> and October 31<sup>st</sup> (inclusive), by April 30<sup>th</sup> of the following year or, if the death occurred between November 1<sup>st</sup> and December 31<sup>st</sup> (inclusive), within six months of the date of death;
3. **insuring property:** inquiries ought to be made into the nature of the property owned by the estate,<sup>6</sup> and insurance ought to be confirmed (or, if necessary, put into place), where appropriate to protect the assets;

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<sup>6</sup> It is prudent to conduct title searches to confirm ownership, in any event.

4. **securing assets:** known assets ought to be secured (e.g. locks ought to be changed);
5. **potential conflicts:** you ought to consider whether there are any known conflicts or risks which may require immediate action in order to avoid escalation of the problem (e.g. consider claims which have, or may have, approaching limitation periods);
6. **providing for dependants:** under the *Succession Law Reform Act*, certain relatives of the Deceased<sup>7</sup> can bring a claim against the estate asserting that they have not been adequately supported by the deceased. It may be prudent for you to make interim provision for the support of dependants (while keeping in mind your duty to preserve estate assets for the beneficiaries);<sup>8</sup> and
7. **other administrative matters:** you ought to be aware of the CPP death benefit, the responsibility for funeral arrangements and the prudence of cancelling unnecessary services to the deceased (phone/internet, housekeeper, etc.).

## **b. Obligation to Account**

One of the fundamental duties of an estate trustee is to keep meticulous records of all financial transactions involving the estate, and to maintain records for all payments from estate funds. Beneficiaries are entitled to receive a detailed, written accounting thereof.

You ought to be aware of the proper method of tracking expenses and other transactions undertaken on behalf of the estate, including the need to ensure that estate assets remain separate from your own assets.

## **c. Other Information to Gather**

Attached as Appendix C is a checklist of the information and documentation with which you should do your best to collect at the beginning of the administration process.

## **Conclusion**

Administering an estate is a serious responsibility, with serious consequences associated with incomplete and/or improper work.

Proper guidance and advice from an estate administration lawyer can go a long way to managing those risks, and ensuring a smooth administration process. Contact any lawyer in the Minden Gross LLP Wills and Estates Group for more information at [www.mindengross.com](http://www.mindengross.com).

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<sup>7</sup> Including a spouse/common-law spouse/former spouse, children/grandchildren, parents and siblings.

<sup>8</sup> The combination of these two duties may result in a court-order being appropriate prior to the provision of interim support.

## Appendix A

### Trustee Work versus Legal Work

#### *Trustee Work*

The estate trustee bears the ultimate responsibility for properly administering the estate. The following is a non-exhaustive list of the work involved:

1. making funeral arrangements;
2. locating the Deceased's original Will and any codicil(s) thereto;
3. ascertaining, locating and notifying the Deceased's relatives and beneficiaries of the Deceased's death;
4. obtaining proof of death (provided by the funeral home);
5. opening an estate bank account;
6. ascertaining the estate's assets, including collecting income generated by the said assets, preparing an inventory and arranging for valuations if appropriate;
7. preserving and securing the assets, including ongoing businesses, by appointing representatives, as necessary, and by reviewing the Deceased's insurance coverage (with respect to real estate, household contents, automobiles and other property) and obtaining increased, additional or varied coverage, as appropriate;
8. making provision for the immediate needs of the Deceased's dependants;
9. applying for Canada Pension Plan benefits (forms provided by the funeral home);
10. obtaining details of employee benefits, outstanding salary, death benefits, etc.;
11. determining particulars of any life insurance policies, including amounts, terms and beneficiaries;
12. ascertaining and paying the Deceased's debts and liabilities, including responding to any challenges and/or paying/settling claims against the estate by beneficiaries or third parties;
13. preparing and filing the Deceased's "terminal" tax return (covering the period from January 1<sup>st</sup> in the year of death to the date of death), all tax returns for prior years due, but not filed, as of the date of death, and ongoing trust returns, as necessary;
14. arranging for the sale of the estate assets (where required) to generate funds required to pay debts, taxes and legacies (preserving, as much as is possible, assets which are specifically gifted under the Will);
15. arranging to advertise for creditors (where appropriate);

16. notifying various government and private institutions of the Deceased's death (including banks, financial advisors, insurance companies, employers, the post office, the passport office, the Ministry of Health, Service Canada, credit card companies and private clubs);
17. cancelling memberships, driver's license, subscriptions and Social Insurance Number, etc.;
18. maintaining estate accounts reflecting all receipts into and disbursements out of the estate for approval by the beneficiaries or examination by the court, as necessary;
19. paying interim distributions to the Deceased's beneficiaries, where appropriate, and obtaining confirmation of receipt and releases, where possible;
20. reporting from time to time to the Deceased's beneficiaries;
21. obtaining Clearance Certificates from CRA; and
22. arranging for the payment or distribution of all bequests, legacies and residue in accordance with the terms of the Deceased's Will, and obtaining final releases.

### ***Legal Work***

It is prudent to retain the services of a lawyer to ensure that appropriate and reasonable action is taken in the estate administration process. The following is a non-exhaustive list of the tasks to be executed by a lawyer:

1. advising the estate trustee as to his or her rights, duties and responsibilities in connection with the administration of the Deceased's estate;
2. preparing and filing an application for Certificate of Appointment of Estate Trustee (with or without a Will), when required, and making sufficient notarial copies of said Certificate for the purpose of the estate administration;
3. advising the estate trustee regarding the filing of an Estate Information Return with the Ministry of Finance within 90 days of the issuance of a Certificate of Appointment of estate Trustee (the purpose of said return is to confirm the details of the estate assets; a guide to completing the return can be located on the Ministry of Finance's website);
4. assisting the estate trustee to properly interpret the Will and distribute the assets of the estate to the lawful beneficiaries (the estate may be immediately distributable, or some or all of the property may have to be held in trust until a specific event or for a stated period of time);
5. advising the estate trustee regarding any legal issues, including claims by or against the estate, arising in the course of the administration, including any necessary or advisable motion for directions;

6. preparing the documentation required to transfer title to the Deceased's property;
7. preparing a form of release to be signed by the beneficiaries at the conclusion of the administration (where appropriate); and
8. preparing the documentation required for, and conducting, an application to pass accounts (where required/appropriate).



## Appendix B

### Preliminary Information & Documentation Checklist

#### *Deceased's Personal Information*

- Legal name
- Any alternate name(s) by which the Deceased was known
- Date of birth
- Last known address
- Last occupation
- Place and date of death

#### *Deceased's Testamentary Documentation*

- Original last will(s) and testament(s)
- Any codicil(s) to said documentation
- The affidavit(s) of execution for each said document
- Any prior will(s) and codicil(s) (if known)

#### *Deceased's Family Information*

- Marital status at the Deceased's date of death
- Family tree (including information regarding prior marriages, if any)
- List of dependants (if any)

#### *Deceased's Asset Information*

- Value of the Estate at the date of death (including a detailed list (description and value) each Estate asset (including personal property and real property, and, if there were any encumbrances on the real property, a description of same)

Note: With respect to quantifying the value of the Deceased's property, the Estate Trustee ought to consider obtaining an appraisal of personal items and real property. This enables the Estate Trustee to justify the amount of Estate Administration Tax paid by the Estate, should the Estate ever be audited (which is unlikely, but a possibility). An appraisal also provides a reasonable starting point in determining the fair market value of any asset, if a sale or distribution of the asset in its current form is required or desired.



***Administration Information***

- Name and contact information of all parties with an interest in the Estate (including address, phone number and relationship to the Deceased)
  
- Name and contact information of all next of kin of the Deceased

## Appendix C

### Information & Documentation Checklist

The following is a non-exhaustive list of information and documentation which may be relevant to the administration of an estate (note: some of the information or material may not be applicable or available in all cases).

1. original Will(s) and Codicil(s);
2. funeral director's Statement of Death;
3. marriage contract, separate agreement and/or divorce judgment;
4. Social Insurance Number (for tax purposes);
5. a list of the Deceased's dependants (or potential dependants);
6. the name and address of the Deceased's employer;
7. the addresses of the estate trustee(s), beneficiaries and legatees;
8. passbooks and/or statements for all bank accounts held by the Deceased alone or jointly with one or more other persons;
9. confirmations for all term deposits or deposit receipts held by the Deceased alone or jointly with another person;
10. safety deposit box key;
11. certificates for all stocks, bonds, GICs and debentures held by the Deceased at death;
12. statements and transaction slips from all investment dealers or brokers showing all transactions since January 1st of the year in which the Deceased died;
13. statements or transaction slips (or other information) from brokers showing the cost to the Deceased of all securities:
  - a) sold by the Deceased since January 1st of the year in which the Deceased died; and
  - b) held by the Deceased at the time of death;
14. promissory notes;
15. evidence of accounts receivable;
16. particulars of all pensions and annuities received by the Deceased since January 1st of the year in which the Deceased died
17. information regarding RRSPs, RRIFs, annuities, etc., and the beneficiaries of same, if any;

18. life insurance policies held by the Deceased at the time of death, and the beneficiaries of same, if any;
19. deeds (transfers) for all real estate held by the Deceased at the time of death;
20. particulars of any business interests;
21. partnership agreements;
22. ownership certificates for motor vehicles;
23. a list of jewellery and other valuables;
24. an estimated value of Deceased's interest in household furnishings and personal effects;
25. a list of any other assets not previously mentioned;
26. particulars of all outstanding liabilities including names, addresses and account numbers of all creditors, including:
  - a) mortgagee(s);
  - b) credit card issuers;
  - c) bank loans;
  - d) guarantees;
  - e) leases (real estate; vehicle; and equipment); and
  - f) senior citizen's residence or nursing home;
27. name and address of general insurance agent(s) and copies of insurance policies on home, automobile, boat, jewellery, etc.;
28. municipal realty tax bill;
29. statements from various utilities; and
30. tax returns and assessment notices for the last two or three years.