

DUTIES OF AN ESTATE TRUSTEE

Where the deceased made a will, the personal representative of the estate will be the person appointed in the will as the deceased's executor – now referred to as an estate trustee with a will. Where the deceased died intestate, that is, without a will, the person who serves this role is the administrator of the estate – now referred to as an estate trustee without a will. In either case, the individual acting as the estate trustee will most often never have acted as such before and will have only a vague notion of what he or she is to do. Basically, the personal representative may be said to act as the *alter ego* of the deceased; his or her fundamental role is to wind up the affairs of the deceased and distribute the estate to those entitled. More specifically, the duties of the estate trustee include the following:

Immediate Matters

- Make appropriate funeral arrangements.
- Locate the will of the deceased, determine that the will is the last will of the deceased, or that the deceased had no will.
- Retain a solicitor.
- Determine the names and addresses of the beneficiaries/next of kin and notify them of their interest.
- Search for cash, securities, jewellery, etc. and arrange for safekeeping.
- Review will for any interpretation problems.
- Dispose of all perishable assets.
- Open estate bank account.
- Review insurance coverage and insure estate assets against fire and other perils.
- Make provision for the immediate needs of spouse and any other dependants.
- Collect income generated by the estate assets or payable to the deceased.
- Pay bills, mortgage payments, insurance premiums, credit cards.
- Re-direct mail and cancel health insurance coverage, driver's license, cable, telephone, club memberships, subscriptions, credit cards and obtain any refunds which are applicable.

Interim Matters

- Prepare inventory of original assets including safety deposit box listing, real estate, moneys 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.
- Advertise for creditors and prepare inventory of debts.
- Ascertain any debts to family members and locate evidence regarding loan balance.
- Instruct solicitor to apply for the appropriate grant or certificate.
- Supply solicitor with information required to make the application.
- Prepare and file income tax returns for year of death and for all prior years due but not filed at the date of death.
- Make reasonable inquiries for next-of-kin if required.
- Consider any claims or potential claims against estate and obtain legal advice if necessary.
- Set aside reserve funds for estimated debts, taxes (including potential taxable capital gains on property such as a cottage) and estate trustee's compensation.
- Make interim distribution to beneficiaries if appropriate.

Final Matters

- Convert investments and other assets to cash and deposit to estate account or invest estate balance in interest-earning investments pending final distribution to beneficiaries.
- Re-register assets in estate's name, if applicable.
- Prepare transfer/deed for conveyance of real property, if required by the will.
- Arrange rollover of RRSP or RRIF to spouse if required.
- Settle and pay all legitimate claims against the estate.
- Apply for any benefits payable on death including C.P.P. death benefit, life insurance proceeds, death benefits from pension plans or annuities, and deposit to estate account.
- File T-3 income tax return.
- Obtain tax clearance from Revenue Canada, where appropriate.

- Prepare and maintain estate accounts for approval by the beneficiaries or examination by the court, where applicable.
- Prepare final releases.
- If no will, distribute assets according to rules for intestate succession.
- Dispose of or distribute personalty according to instructions in will.
- Prepare cheques and pay legacies and transfer bequests as provided in will.
- Invest assets for establishment of trusts, if the will so directs.
- Send releases to beneficiaries and request signatures, where applicable.
- Prepare cheques and pay balances to residuary beneficiaries.
- Advise beneficiaries regarding inclusion of income from estate in income tax if appropriate.
- Close estate account.

Nobody can be compelled to act as a personal representative of the deceased and, given these potentially onerous duties, a person may well decline to do so. In particular, where it appears that an estate is insolvent or in a borderline position, an executor or other person entitled to apply for a Certificate of Appointment of Estate Trustee would probably be best advised to simply decline to proceed with the application and avoid becoming involved by intermeddling with the estate. The balance of risks, rewards, and responsibilities rarely justify proceeding with an application in such circumstances.

Other factors to be considered before deciding to become the deceased's personal representative include the person's relationship with the beneficiaries (e.g., the potential for sibling rivalry) and the potential for personal liability. With regard to the latter, the personal representative will bear no personal liability for actions or debts of the deceased. However, the personal representative will be liable for contracts made after the death of the deceased and for debts incurred by the personal representative in the course of carrying on a business of the deceased. Similarly, where the personal representative takes over management of the deceased's business, he or she may be personally liable for a failure to deduct and remit deductions for taxes. More, generally, the personal representative may be personally liable if he or she mismanages the estate or commits a breach of trust.

If a person decides not to act as personal representative, a renunciation may be made under section 34 of the *Estates Act* at any time before a certificate appointing him or her as estate trustee has been issued. The renunciation must be in the prescribed form. In an intestacy, the person who has decided not to act as personal representative need only not proceed with the application for a certificate of appointment of estate trustee without a will. In either case, the person who prefers not to act as the deceased's personal representative should be warned against intermeddling with the assets of the estate.

If a person wishes to serve as the personal representative, but is concerned that he or she may not be able to dedicate the time and energy required, certain duties can be delegated to a lawyer, an accountant, or trust company. Certainly, if the personal representative does not prepare his or her own income tax return, the preparation of tax returns should be delegated to an experienced lawyer or accountant. However, a personal representative should be made aware (i) that the ultimate decision-making responsibility will rest with him or her and (ii) he or she has the duty to supervise any agent employed to perform administrative services.

Estate Trustee's Fiduciary Duties

Aside from an understanding of his or her concrete duties and responsibilities, an estate trustee should appreciate the fiduciary nature of his or her position. All too frequent, for instance, are cases where an estate trustee acted as if he or she was entitled to treat the property of the deceased as if it were his or her own.

Duty of Loyalty to the Beneficiaries

The duty of loyalty is perhaps the most fundamental of the trustee's duties. The trustee has a duty to act solely for the benefit and best interests of the beneficiaries. The trustee must avoid any conflict of interest between his or her personal interests and that of the beneficiaries. In particular, the trustee must not allow him or herself to profit or benefit personally by reason of his or her fiduciary position.

The duty generally precludes the trustee from purchasing any of the trust property or any beneficial interest in the trust unless the trust specifically authorizes the purchase. In the case of trust property, the purchase by a trustee is generally not permitted. An exception which has evolved may allow the purchase where it would be

advantageous for the trust, and hence the beneficiaries, for the sale to take place. An example may be where the property must be sold in any event and the trustee is willing to pay more than any other bidder for the property.

In the case of a purchase of a beneficial interest from a beneficiary, the trustee must show that the transaction was honest, for fair consideration and that the beneficiary was fully informed and consented to the transaction.

Duty of Reasonable Care

The trustee must exhibit the common law standard of care and diligence which would be expected of a reasonable and prudent person in conducting his or her own affairs. The Supreme Court of Canada has described this obligation as the duty to exhibit “vigilance, prudence and sagacity” in carrying out the trustee’s functions.

Investments

Authorized investments or guidelines for investments may be set out in the will. If not (or in the case of an intestate estate), the *Trustee Act* now provides that a trustee can make any investment a prudent investor would make or it will provide a list of authorized investments which can be made by the trustee. Beyond the statutory provisions, a trustee must always act in a reasonable and prudent manner.

Duty to Act Personally

As noted above, a trustee must generally act personally in carrying out his or her functions and cannot generally delegate his or her power. The trustee can employ professional advisers and agents to assist in his or her decision-making, to the extent it is normal business practice to employ such persons in the circumstances. However, a trustee should be made aware (i) that the ultimate decision-making responsibility will rest with him or her and (ii) he or she has the duty to supervise any agent employed to perform administrative services.

Duty to Act with an “Even Hand”

The so-called even hand rule provides that, unless the will or trust provides otherwise, the trustee must not favour one beneficiary over another.