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Where There's a Will...

Being an estate trustee is not an easy task.
Here are six steps to administering an estate.

When someone dies in Ontario, the person named in the will who is tasked with administering the estate is called the "estate trustee." The estate trustee identifies and realizes the deceased's assets (called the "estate") and uses the money in the estate to pay for the deceased's debts, taxes and testamentary expenses. Thereafter, in accordance with the will, the estate trustee transfers specific gifts (e.g. of property, cash, etc.) to beneficiaries and then distributes any remaining assets (called the "residue") to the residuary beneficiaries.[1]

Estate trustees are given considerable authority and power to deal with the estate; but they also face significant legal obligations and must account for their actions. Their job is complex, time-consuming and emotionally draining. To help guide estate trustees through these new and murky waters, this article will briefly discuss the six steps they must take to properly administer the estate of a deceased who had a will.[2]

Step 1: Locating the Will(s)

The estate trustee's initial task is to locate the deceased's last fully executed (i.e. signed and witnessed) will. The will needs to be original: whenever someone makes a new will, it generally and in most cases revokes any previous wills. Photocopies or notarized copies (i.e. copies of originals authenticated by a lawyer) of a will are not acceptable. Sometimes, as is the case with a deceased dentist who owned shares in a private corporation, there may be two wills: a corporate and a non-corporate will.

Locating a will is not always easy, as the deceased may not have left instructions on where it is located. Is it with his or her personal papers at home or with the estate trustee? Did the deceased tell the surviving spouse or children where the will is? Ideally, it is sitting in a fireproof box or in a law firm's safety deposit box.

Step 2: Probating the Will

Once the will has been located, the estate trustee has to determine if the court needs to legally verify the estate trustee's authority under the will. This process, formerly called "probate," is now called obtaining a certificate of appointment of estate trustee with a will (the "certificate") from the court. Although the estate trustee has authority under the will to deal with the deceased's assets immediately upon death, the certificate is typically required by financial institutions, land title and other government offices, and transfer agents (of public company shares) before they will allow the estate trustee to deal with the deceased's property.

To apply for the certificate, the estate trustee will need to submit (among other things): a completed application, the original will and any codicils,[3] affidavits from the individuals who witnessed the will being executed, an affidavit from the estate trustee stating that the beneficiaries have been notified of the application, and a completed certificate ready for the court to endorse.

As part of getting a certificate, an estate administration tax[4] must be paid to the minister of finance. This tax is payable on the gross value of estate assets but does not include the value of certain assets that can be transferred outside of the will (discussed briefly below).[5]

Worth mentioning is that obtaining a certificate is not always required. The estate trustee can transfer certain assets outside of probate — thereby avoiding the extra paperwork, costs and delays. This is the case, for example, with jointly held property (such as certain real estate), where the surviving tenants automatically inherit the deceased's interest in the property. This is also the case with registered funds (e.g. RRSPs, RRIFs) and life insurance policies that designate a beneficiary. Finally, if the deceased had a corporate will dealing with his or her shares in a private corporation, a certificate would generally not be required for the estate trustee to transfer those shares.

Step 3: Locating and Dealing With Assets

The estate trustee has a duty to locate and protect the deceased's assets. In a perfect world, the deceased would have left behind a memo or checklist, outlining all of his or her tangible assets (e.g. cash in bank accounts, real estate, jewelry, investments, life insurance, etc.), as well as all online accounts and assets (e.g. email, personal or business websites, social media, etc.). Usually family members, financial advisors and accountants are able to assist in locating important assets and documents. Financial statements and previous income tax returns should also be reviewed.

To protect the deceased's assets, the estate trustee should consider changing locks, paying existing insurance premiums or obtaining new insurance, maintaining vehicles and even renovating a home to be sold (so that the estate receives fair market value for the property).

Step 4: Locating and Dealing With Liabilities

The estate trustee will need to determine the estate's liabilities — such as mortgage and credit card payments. A notice to creditors should be published in the local newspaper where the deceased resided; once the time specified in the notice has expired, the estate trustee will be able to distribute assets without being personally liable for creditors who did not raise a claim within the specified time.

Step 5: Realizing and Distributing the Estate

The estate trustee will transfer the estate in accordance with the will. This involves following through on making specific gifts of property (e.g. shares of a private corporation, real estate, jewelry, etc.) and then liquidating and distributing the remaining assets to the "residual beneficiaries" named in the will). Sometimes, particularly with beneficiaries who are minors, the estate trustee will invest a beneficiary's inheritance and make payments from time to time to the beneficiary or those responsible for their well-being.

The estate trustee typically has about one year from the deceased's death to finish administering the estate. In ***Pilo Estate (Re)***, [1998] O.J. No. 4521 and [1999] O.J. No. 1907, it took the estate trustee (a lawyer unfamiliar with estate administration law) more than 10 years to distribute the estate; the court awarded just over $22,000 in costs against him, in part because he failed to administer the estate in a timely fashion.

Shortly after the deceased's death, the estate trustee should close bank and investment accounts and open "estate accounts." An estate account is an account that is opened and managed by the estate trustee specifically to administer the deceased's estate. Estate trustees must not co-mingle their own money with the estate's money.

The estate trustee will also need to prepare "accounts." Accounts are detailed statements of all the money collected and paid out during the estate administration; they act as a complete record of the estate trustee's activities and help prove that the trustee handled the job prudently and honestly. Estate trustees must keep complete and accurate accounts and be ready and give full information whenever required. Each beneficiary will be asked to approve the accounts before money is distributed. In ***Zimmerman v. McMichael Estate***, [2010] O.J. No. 2162, the trustee was personally ordered to repay the estate nearly $500,000, which he had taken in compensation without "keeping any proper records…and without the consent of the beneficiaries." And in ***Zimmerman v. McMichael Estate***, [2010] O.J. No. 3022, the trustee was ordered to pay the beneficiaries more than $284,000 in costs for presenting accounts that were "manifestly inaccurate, incomplete and false."

Before making distributions, the estate trustee should consider holding back a certain amount for contingencies (e.g. tax or estate litigation). Interim and final distribution schedules should be provided to the beneficiaries for their approval. And releases from the beneficiaries should be obtained prior to final distribution to discharge the estate trustee from any liability.

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Estate trustees face significant liabilities when it comes to erroneously distributing or managing the estate: paying the wrong amounts to the wrong people, showing preferential treatment to one or more beneficiaries, failing to observe investment restrictions, and charging for unreasonable expenses or agent fees are all grounds for legal action against the estate trustee personally.

Where the estate trustee acted honestly and reasonably, they may be excused from liability. For example, in ***Henderson v. Henderson***, [1922] O.J. No. 160, despite expert legal advice and against his own interest, the estate trustee paid out a portion of the estate to the wrong party; the court held, however, that the trustee "acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the court in the matter in question."

Step 6: Dealing with Income Taxes

The estate trustee is responsible for preparing and filing the deceased's tax returns (including a final or terminal tax return from January 1 to the date of the deceased's death). The estate trustee must also pay out from the estate any taxes owing. The amount of taxes can be quite high when compared to previous years. That's because, when people die in Canada, they're generally deemed to have sold all their assets at fair market value at the time of death, which may trigger large capital gains taxes. If the deceased owned rental properties or businesses, the estate may still be earning income after the death, which may require income taxes to be paid.

To offset capital gains and income taxes, the estate trustee should make sure that full tax advantages are taken in connection with charitable gifts made after the deceased died, transferring property to a spouse or dependent child/grandchild, using the lifetime capital gains exemption (e.g. for the sale of shares of a dentistry professional corporation), or using the principal residence exemption if the deceased owned a house or recreational property. It is also critical for the estate trustee to obtain a "clearance certificate" from the Canada Revenue Agency prior to finalizing the estate, as the estate trustee is personally liable for any taxes owing. A clearance certificate certifies that all amounts for which the deceased is liable have been paid.

Compensating the Estate Trustee

In Ontario, the person making a will can specify in the will if he or she wants the estate trustee to be compensated. This can be in accordance with prescribed amounts set by legislation, a fixed amount based on a memo attached to the will, or simply reimbursement for out-of-pocket expenses. If there is nothing specified in the will, the estate trustee is entitled to the prescribed amounts set by legislation and can apply to the court for compensation. It's up to the person making the will to determine how they want to compensate the estate trustee. We suggest that estate trustees be given a gift of cash (which is tax-free since it is not taxable income) and which is conditional upon them completing their duties as an estate trustee.

Conclusion

Being an estate trustee is a long and arduous journey. Dealing with courts, beneficiaries, creditors and the tax man (among others) is no walk in the park. Estate trustees must manage everyone's expectations throughout the process. Thankfully they can (and should) turn to a wills and estates lawyer for professional help along the way. OD

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Tips for Picking an Estate Lawyer

Look for a lawyer who is:

- ✓ knowledgeable and experienced in preparing wills and administering estates
- ✓ experienced at selling a dental practice and real estate
- ✓ responsive about getting back to you
- ✓ able to educate you along the way
- ✓ able to provide cost-certainty (to the extent that he or she can).

References

1. An "executor" is someone who completes the administration of the estate so that debts, taxes and testamentary expenses can be paid, and remaining assets can be handed over to the Trustee. A "trustee" is someone who takes control of trust assets and administers them for the benefit of beneficiaries. Nowadays, the same person is named in the will as the executor and trustee. For the purpose of this article, we will refer to that person as the "estate trustee."
2. This differs from administering the estate of someone who died without a (valid) will, which will not be discussed.
3. Codicils are legal documents that amend and form part of a will and which are signed and witnessed in the same way as a will.
4. Commonly referred to as a "probate tax."
5. Presently, the estate administration tax is calculated as follows: $5 for each $1,000, or part thereof, of the first $50,000 of the value of the estate, and $15 for each $1,000, or part thereof, of the value of the estate exceeding $50,000. For a $1-million dollar estate, for example, the estate administration taxes would be $14,500.