

# Acting as Estate Trustee/Executor

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## Be Ready for the Liability

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An estate trustee (also known as an executor) is responsible for discharging the terms of the deceased's testamentary documentation (i.e. will(s) and/or codicil(s)), referred to herein as a "Will". Where the deceased did not leave a valid Will (and, therefore, died intestate), the estate trustee is responsible for administering the estate in accordance with the governing legislation (the [Succession Law Reform Act](#) (the "SLRA")).

In this article, I focus on the potential liabilities of an estate trustee and will outline the matters which are most likely to give rise to such liabilities.

### 1. What is an estate trustee (executor)?

An estate trustee is generally designated by the deceased in his or her Will. Where the deceased did not leave a valid Will or did not appoint someone who is willing and able to act as the estate trustee, an application has to be made to the Court to have an estate trustee appointed.

The estate trustee must wind up the affairs of the deceased by collecting and managing the estate's assets, paying the estate's debts and taxes, and distributing the remaining assets to the proper beneficiaries. The estate trustee is ultimately accountable to the estate's beneficiaries as to how the estate is managed.

In November 2019, I wrote an article titled "[Are you ready to be an estate trustee?](#)", where I discuss considerations relevant to determining whether a candidate is able and willing to take on the role of estate trustee and the complex responsibilities involved. Among other things, I address the matter of joint and several liability (specifically, I explain that where there are multiple estate trustees, each individual trustee is, generally, equally responsible for any problems with respect to the administration of the estate).

## 2. Ascertaining assets

The estate trustee is responsible, with the assistance of a lawyer, as required, for gathering and managing the estate's assets. The estate trustee ought to make all reasonable inquiries to ensure that no asset is missed.

Such inquiries include (particularly when there is any concern that there may be unknown/unascertained assets):

- writing to various financial institutions to inquire whether the deceased had assets there at the date of death;
- conducting a search in the jurisdiction in which the deceased resided/carried on business to determine whether the deceased, or any of his/her corporations, owned real property therein;
- searching the deceased's residence(s) to locate any personal property of significant value, including any keys to safety deposit boxes;
- determining whether the deceased had any genetic materials stored and, if so, determining the deceased's intentions regarding such materials after his or her death and taking the necessary action to implement those intentions;
- prompt collection of outstanding debts owing to the deceased;
- cancelling any memberships and other similar affiliations that would cause the estate to incur unnecessary expense.

Failure to determine and protect the deceased's assets on a timely basis could result in reduced compensation for the estate trustee (in the event that the asset is never discovered). It could also lead to liability, to the extent that the asset is later uncovered and found to have diminished in value because the estate trustee failed to act promptly (for example, investments may go bad, businesses may fail to operate, and rent may not be collected and ultimately become unrecoverable).

## 3. Paying debts

The deceased's legitimate creditors are entitled to payment before distribution is made to the deceased's beneficiaries. An estate trustee who distributes estate funds without advertising for creditors is personally liable to any creditor who is subsequently ascertained, to the extent of the lesser of the debts owed to such creditors and the value of the estate that was distributed.

Consequently, many estate trustees advertise for creditors in a newspaper or, more frequently, electronically. The cost of "paper" advertising may exceed \$1,500 (depending on the size and circulation of the publication), while the cost of electronic advertising is, generally, much lower.

An estate trustee who is certain that the deceased had no, or minimal, liabilities at the time of death may decide that the estate should not incur the expense of advertising for creditors. In such cases, the estate trustee may choose to request indemnification from the estate's beneficiaries against any claims that may arise on account of any unknown, legitimate creditors.

## 4. Dealing with taxes

The "terminal" tax return (covering the period from January 1 prior to the deceased's death until and including the date of death) must be filed with the Canada Revenue Agency (the "CRA") within a specific timeframe.

In addition, T3 trust income tax and information returns must be filed as necessary from the date of death until the administration of the estate has been completed to report all income attributable to the estate.

An estate trustee who distributes estate funds without obtaining a final Clearance Certificate from the CRA is personally liable for any unpaid taxes, interest and penalties, to the extent of the lesser of such tax liability and the value of the estate assets that were distributed. Consequently, if the estate trustee decides to make a distribution without obtaining a Clearance Certificate (which can often take an extremely long time to process), the estate trustee should request that the estate's residuary beneficiaries indemnify the estate trustee against any income tax liability which may arise (to the extent of such beneficiary's proportionate share of the estate).

Substantial tax savings may be achieved by elections and allocations permitted under the [Income Tax Act](#). In most circumstances, the estate trustee should consider retaining an accountant to provide tax advice. Failure to take advantage of available savings may result in the beneficiaries looking to the estate trustee to take financial responsibility for the corresponding loss.

## 5. Determining, and distributing to, beneficiaries

If the Will was executed after March 31, 1978, the terms "child", "children" and "issue" include children and issue born out of wedlock (unless the Will provides otherwise). If the Will does not provide otherwise, the estate trustee should not distribute estate funds without making "reasonable" inquiries to determine the identity of all persons who may be within the class of beneficiaries named. In addition, as of 2017, the relevant legislation was amended to include posthumously-conceived children and issue under the respective definitions (i.e. children and other issue conceived after the deceased's death (for example, as a result of the use of stored genetic materials)).

Unless the Will authorizes an estate trustee to do so, a bequest should not be delivered or paid to a minor (a person under the age of 18 years), since a minor cannot give a valid receipt.

Delivery/payment to the minor's parents or other relatives is also not permissible absent authorization by the Will or a court.

Final distribution of the estate's assets should occur only after the estate trustee has provided an accounting of the administration of the estate to all beneficiaries and has received their approval of the accounting. The estate trustee must present a detailed accounting to the Court in order to be finally discharged of his or her responsibilities if any beneficiary will not or cannot (due to age or disability) provide approval.

## **6. Purchasing estate assets**

An estate trustee must not purchase estate assets unless the Will specifically authorizes it or the purchase receives Court/beneficiary approval. If an estate trustee purchases estate assets without such authorization or approval, the purchase may be set aside or the estate trustee may be required to account to the beneficiaries for any profit made by the estate trustee.

## **7. *Family Law Act***

The [Family Law Act](#) (the "*Act*") recognizes the equal contribution of spouses to a marriage and attempts to ensure that, on the death of one of them, the surviving spouse is entitled to at least half of the aggregate net value of the wealth acquired by both spouses during the marriage.

In certain circumstances a surviving spouse may be entitled to choose either the benefits provided under the deceased spouse's Will or to take their entitlement under the *Act*. The choice must be made within six months after the date of death of the deceased spouse. Until that timeframe expires, no distribution should be made out of the estate without the consent of the spouse or an order of the Court.

This issue should be considered any time a surviving spouse is left less under the Will than what he or she would be entitled to under the *Act* (in those cases, the spouse will likely "elect" to take their entitlements under the *Act* rather than receive what is gifted under the Will).

## **8. Dependant support claims**

Under the [SLRA](#), certain relatives of the deceased, including a spouse, a common-law spouse, a former spouse, children, grandchildren, parents and siblings, can bring a claim against the estate asserting that they have not been "adequately provided for" by the deceased. As of 2017, the relevant legislation was amended to include posthumously-conceived children (i.e., children conceived after the deceased's death) as a category of dependant, if certain conditions are met.

Such a claim must, generally, be brought within six months of a grant of a Certificate of Appointment of Estate Trustee. It is extremely important that the estate's assets not be distributed if there is any possibility – however remote – that a support claim may be commenced.



## 9. Conclusion

The obligations faced by estate trustees are fraught with potential liability. That said, with diligent record-keeping and sound advice, there is no reason why a willing participant should not be able to execute the duties of an estate trustee and successfully complete the administration of the estate.

Proper guidance and advice from professional advisors, including not only estate administration lawyers, but also, for example, investment advisors and accountants, can go a long way to managing the estate trustee's liability and ensuring a smooth administration process.

Contact the [Minden Gross LLP Wills and Estates Group](#) for more information regarding becoming, and acting as, an estate trustee at <https://www.mindengross.com/>.