

### What Is an Estate Trustee?

The estate trustee (also known as the executor) is the representative specified in an individual's will to carry out the terms of the will. The role of the estate trustee is onerous and requires sound judgment, patience, tact and empathy. The estate trustee's responsibility should not be taken lightly: a potential trustee should not accept the role without weighing the time, commitment and tasks involved. When you are making a will, you should choose an estate trustee carefully, considering the candidate's suitability for this demanding position.

The role of the estate trustee is to wind up the affairs of the deceased. The estate trustee collects, manages and invests the assets as required, pays debts and then distributes the assets to the persons entitled to them (the 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. The estate trustee is responsible to the beneficiaries of the estate.

### What Are the Duties of an Estate Trustee?

An estate trustee derives authority to act from the will and has certain statutory rights and obligations. In a well-drawn will, the beneficiaries and their interests are clearly defined, which ordinarily makes the task of distributing the assets straightforward. An estate trustee should commence his or her duties immediately upon the death of the testator. Having a will probated by the court merely confirms the estate trustee's appointment and establishes under the seal of the court that the written instrument is the last will and testament of the deceased person. An estate trustee who is not willing to assume the duties of office, however, may formally renounce the right to act.

The estate trustee carries out the following duties:

- Arranges for the proper funeral and burial of the deceased (contrary to what many people believe, these arrangements are not made by a surviving spouse or other family member).
- Determines that the will that appointing him or her as the estate trustee is the last will of the deceased.
- Determines the names, addresses and ages of the beneficiaries and notifies them of their interests.
- Determines the nature and value of the assets and debts of the deceased and compiles a detailed inventory, which includes the contents of safety deposit boxes.
- Ensures that property is protected (e.g., that real property has sufficient insurance and appropriate supervision).
- Continues and oversees the operation of any business interests.
- Opens an estate bank account.

- Retains a lawyer to advise and assist in the administration of the estate.
- Instructs the lawyer to prepare the documents necessary to apply for a Certificate of Appointment of Estate Trustee With a Will (formerly “letters probate”), if required.
- Arranges for the payment of debts and contests debts if not convinced of their validity,
- Prepares and files the necessary tax returns in all relevant jurisdictions and pays any tax owing.
- Maintains proper accounts.
- If required to do so, provides the beneficiaries and the court with an account of all dealings with the estate assets during the term of administration.
- Sets up and administers any trusts established by the will.
- Distributes the assets according to the terms of the will and obtains releases from the beneficiaries.

A lawyer may be retained to advise the estate trustee and to offer assistance as required, but all decisions must be made by the estate trustee, who cannot delegate this decision-making responsibility to others. The estate trustee will often look to the lawyer to

- advise on all legal matters involving the interpretation of the will and the administration of the estate;
- prepare and file the application for the certificate of appointment of the estate trustee with the Ontario Superior Court of Justice;
- prepare the advertisement for creditors if the estate trustee wishes to advertise for claims against the estate;
- assist the estate trustee in the transfer and/or sale of assets by preparing any documents required for that purpose;
- assist the estate trustee in maintaining bookkeeping records;
- assist the estate trustee in preparing the accounts for audit by the Ontario Superior Court of Justice if the estate trustee is required to present the accounts for a formal audit (called a “passing of accounts”); and
- prepare documents for the beneficiaries to sign to acknowledge that they have received their entitlement under the will and to release the estate trustee from liability.

### **Is an Estate Trustee Entitled to Compensation?**

Under the *Trustee Act* (Ontario), an estate trustee is entitled to a fair and reasonable allowance for his or her “care, pains, trouble and time” spent administering the estate. If the beneficiaries are all adults, they can agree upon the terms of compensation. If the estate accounts are audited, a judge of the Ontario Superior Court of Justice may award compensation. The estate trustee’s compensation entitlement may also be specified in the will.

Generally, the maximum amount of compensation awarded to the estate trustee is about 5 percent of the aggregate value of the estate. Any compensation received by an estate trustee is taxable income and must be declared in the recipient’s income tax return.

## Who Should Be Your Estate Trustee?

### *Who May Serve?*

Any individual who is of sound mind and at least 18 years of age may serve as an estate trustee. A testator may choose to appoint multiple estate trustees who will act together; a variety of perspectives and skills may help resolve difficult estate administration issues.

A testator may appoint a trust company as an estate trustee of his or her estate. There are advantages and disadvantages to appointing a trust company as an estate trustee. A trust company may provide a higher level of experience in matters of investment, estate accounting and other estate administration tasks and may have greater resources than most individual estate trustees. A trust company also offers permanence, which may be desirable if the will provides for trusts of potentially long duration. On the other hand, trust companies are sometimes perceived as inflexible and less responsive than individual estate trustees. A testator may appoint a trust company and an individual to serve as co-trustees.

### *What to Consider in Choosing an Estate Trustee*

In choosing an estate trustee, a testator should consider the following factors:

- the age and health of the prospective estate trustee
- where the prospective estate trustee lives
- the honesty, capability and responsibility of the prospective estate trustee
- the familiarity of the prospective estate trustee with the testator's assets and family situation.

The role of the estate trustee is usually time-consuming and laborious; the office is by no means an honorary or a nominal one. You should select an estate trustee who is likely to be physically and mentally prepared for the job.

Ideally, an estate trustee lives reasonably close to the testator so that he or she can perform estate-related duties conveniently and cost-effectively. If the chosen estate trustee resides outside Ontario and outside the Commonwealth, he or she must provide security (e.g., a bond) before being granted a certificate of appointment by the court.

The law requires that the estate trustee demonstrate care, diligence and reasonable prudence in carrying out his or her duties. The estate trustee should be organized, responsible and capable of making financial decisions. The level of financial or business skill required of the estate trustee will depend to a large extent on the nature of the assets that make up the estate. If a large part of the estate consists of an interest in a family business, you may wish to appoint an estate trustee with a more sophisticated business awareness than would be necessary if the estate consisted of only a principal residence and some Canada Savings Bonds. An estate trustee should also be familiar with the testator's family circumstances. This may be particularly desirable if the testator has established continuing trusts under the will for various family members or others.

Honesty is an essential trait of an estate trustee. This person must act in the best interests of the beneficiaries and must, at all times, avoid favouring his or her interests over those of the beneficiaries.

You should provide at least one alternative estate trustee who will be able to serve if the first named estate trustee is unwilling or unable to act or continue to act, or dies before the testator dies or before the completion of the administration of the estate.

After considering all the factors and choosing an estate trustee, you should ask the prospective estate trustee if he or she would be willing to act. If the person is not willing to act, choose another estate trustee. ■■