



Fleury, Comery LLP
Barristers & Solicitors

ESTATE ADMINISTRATION: LAWYER DUTY OR TRUSTEE DUTY?

There are separate roles for the lawyer and the estate trustee in an estate administration. As lawyers acting for estate trustees, often we perform "trustee duties". An estate trustee must understand that such work is chargeable to their trustee compensation.

ESTATE TRUSTEE'S ROLE

The major and fundamental duties of an estate trustee include the following:

1. Deal with the deceased's remains;
2. Determine and gather in the deceased's assets and pay the deceased's debts;
3. If necessary, apply for court appointment as Estate Trustee ("Probate");
4. Complete and file tax returns;
5. Pay estate administration expenses, including: funeral, legal, taxes and the Estate Administration Tax (formerly, probate fees);
6. Distribute the estate;
7. Invest trust assets, if necessary; and,
8. Keep accounts.

TRUSTEE COMPENSATION

An estate trustee is entitled to compensation from the estate for his or her time, care, and responsibility. The rate is loosely based on a percentage of 2 ½ per cent of receipts ("getting in") and then 2 ½ per cent of expenses and distribution ("paying out") - roughly 5 per cent of the estate. Such compensation may ultimately be reviewed and adjusted by a court, considering the complexity and amount of work actually involved.

DELEGATING DUTIES

A trustee is not, by law, permitted to delegate duties to a third party unless the ordinary prudent person would do so. Retaining a lawyer for legal activities is acceptable, as is, nowadays, the retainer of a financial advisor where there are significant investments, without reducing the trustee's entitlement to trustee compensation.

LAWYER'S ROLE

The lawyer is the lawyer for the estate trustee and not for "the estate". His or her duties depend on the retainer agreement with the estate trustee. Most commonly, the estate trustee may legitimately use estate funds to pay a lawyer to prepare and file the court Application for a Certificate of Appointment of Estate Trustee (formerly, "Letters Probate" or "Letters of Administration"). In addition, although preparation of accounts is trustee work, the submission of accounts for a court "passing of accounts" would be a lawyer's role and chargeable to the estate. Finally, a lawyer may legitimately be retained and paid from the estate to assist with the distribution of the estate and prepare and obtain Releases from the beneficiaries.

ESTATE ACCOUNTING

As indicated above, estate accounting is a fundamental trustee duty. Frequently, however, a lawyer is asked to assist in preparation of estate accounts by reason of a required format that is suitable for a court review - a "passing of accounts". We believe a simple re-formatting of estate accounts is a legitimate expense to the estate - a lawyer duty - as part of a court application to pass accounts. The estate trustee must, however, deliver the accounting information in a reasonable format and retain and put in order the supporting documents for all account transactions. Our legal fees to do the latter, the substantial accounting work, are chargeable to trustee compensation.

WHEN A LAWYER IS AN ESTATE TRUSTEE

On occasion, we act as the estate trustee as well as the lawyer for the estate. In such circumstances we charge the estate separately for each role.

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**Edward R. Fleury, Q.C. ♦ William F. Comery, Q.C. (1930-2008) ♦ Gregory E. McConnell, M.A., LL.B.
Stephen P. Fleury, B.Sc., LL.B. ♦ Donald C. MacVicar, LL.B., LL.M.**

215 Morrish Road, Suite 104, Scarborough, Ontario, M1C 1E9
Telephone (416) 282-5754 Telecopier (416) 282-9906 E-mail thefirm@fleurcom.on.ca
Website: www.fleurcom.on.ca