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## Compensation and Record-Keeping of the Estate Trustee(s) And Their Lawyer in Ontario

The information that follows is intended to explain how compensation for an estate trustee is determined, and what fees or charges can properly be billed and paid out of the estate. It is not a substitute for specific advice on your matter from a qualified estate lawyer.

### 1. Record Keeping by the Estate Trustee

Estate trustees, executors, administrators, and guardians are required by the common law, the *Trustee Act* and Rule 74.17(1) of the *Rules of Civil Procedure* to keep complete and accurate accounts of the assets and transactions of the estate under their administration. A beneficiary is entitled, on notice, to inspect the accounts and any of the supporting documentation. All trustees, and especially lawyers who hold trust funds, should maintain accurate, up to date estate accounts, and organize and keep all source documents such as bank statements, duplicate deposit slips, cancelled cheques, receipt confirmations and vouchers (receipts) to support the records.

If a lawyer is working closely with the Estate Trustee, both are responsible for keeping proper accounts of their respective tasks. I also advise you to keep a diary of your work as Estate Trustee, showing the dates worked, travel time and mileage incurred, tasks and time spent on these tasks.

### 2. What does the law say about compensation for Estate Trustees?

Estate trustees are entitled to claim compensation for their work, unless a testamentary document forbids it. Unfortunately there isn't a specific section in a statute to which we can turn for detailed guidance on how to calculate the compensation.

If the Will doesn't have a clause that sets out how the Estate Trustee's compensation is to be calculated, the *Trustee Act* states that the compensation is based on "fair and reasonable allowance for [the trustee's] care, pains and trouble, and [the] time expended in or about the estate". This has been argued and discussed in many court cases which now provide some guidance.

It is a complex area. In a nutshell: the Courts have applied "tariff guidelines". For an estate of average complexity the allowance is usually set at 2.5% for capital receipts, 2.5% for revenue receipts, 2.5% for capital disbursements, and 2.5% for revenue disbursements. If liquid assets need to be managed and invested for a period of time (such as in a trust), the compensation may include an additional annual 'care and management fee', calculated as 2/5 of 1% of the assets under administration. Transfers between the estate accounts and payment of executor's compensation itself are deducted from the calculation. Direct transfers of property (such as jewelry, a house, a car) are usually compensated at a reduced rate.

For uncomplicated estates, the Court is likely to expect a reduction in compensation. For complicated estates, a higher amount could be justified.

These amounts are the total compensation for all estate trustees as well as for anyone (e.g. estate solicitor) who claims fees for performing estate trustee duties. This is discussed in more detail in Question #4 below. In addition, if there are two or more Estate Trustees, the total compensation (calculated as above) must be shared between them as they may agree.

Once the Estate Trustee has completed the estate administration, he or she can take executor's compensation if all the residual beneficiaries are legally competent adults and they specifically consent in writing to the amount of compensation claimed, which should be in accordance with the court guidelines. Beneficiaries should be fully informed, preferably by independent legal advice, of the appropriate procedure for billing for estate work. If they do not agree (or if there is a beneficiary who is a minor, or is mentally incapable and not represented by a guardian or an attorney for property), then the Estate Trustee must apply to the Court to pass the estate accounts and obtain judicial approval for any executor's compensation. (See *Re: Knoch* (1982), 12 E.T.R. 162 (Surr. Ct.))

3. What is the difference between the lawyer's legal work for the estate and the work of the Estate Trustee?

**A. Work that is properly done by the Estate Trustee's lawyer:**

Generally speaking, legal fees for the following tasks are accepted as expenses of the estate's administration and payable from the estate in addition to the Estate Trustee's compensation:

- a. Prepare all the documents required for an Application for certificate of appointment for the estate trustee.
- b. Assist with an application for a Bond of Administration, if required.
- c. File those documents with the Court and responding to any questions or corrections as may be asked by the Court.
- d. Prepare notarial copies of the Certificate, Proof of Death and vital statistics records as required, to assist the Estate Trustee.
- e. Prepare and arrange for the publication of the Notice to Creditors, if advisable, and notices seeking information about a Will or more recent Will.

- f. Prepare or review such documents as may be required to transfer or realize the assets of the deceased, such as Transmission Applications, Indemnities and Powers of Attorney.
- g. Generally, provide advice on matters in connection with the administration of the estate, including:
  - Interpretation of the Will and advising on any ambiguities.
  - The ownership of the deceased's assets and the validity of estate liabilities.
  - Conducting execution searches.
  - Issues arising from the Family Law Act or dependent's relief claims.
  - Identification of the legal heirs or beneficiaries, as may be required.
  - Preparing and filing the application for CPP benefits, insurance claims, and the Estate Administration Return.
  - Preparation of estate accounts, drafting of the estate release, and sending the documents to beneficiaries for review and signature if in agreement.
  - Estate trustee compensation and on a passing of accounts if required.
  - Distribution of cheques to beneficiaries.
- h. If necessary, pay the share of a minor beneficiary to the Accountant of the Superior Court of Justice.
- i. Prepare the necessary documents to obtain a court order to arrange for cancellation of any Bond of Administration.

Note that as the solicitor, I also owe a fiduciary duty to the beneficiary in respect of his or her beneficial interest, and ensuring that it is not unreasonably depleted. Generally speaking, I will act *on behalf* and as instructed by the Estate Trustee. As the lawyer for the Estate Trustee(s), I make recommendations but do not make the decisions.

#### **B. Estate Trustee's fiduciary responsibilities:**

These include making the *decisions* as well as additional duties including:

- a. (If appointed in a Will) Dealing with the funeral and burial of the deceased.
- b. Locating the last Will of the deceased and providing all necessary documents and instructions to a solicitor.
- c. Determine the names & addresses of the beneficiaries and sending notices.
- d. Securing and evaluating the assets; preparing the inventory of assets and liabilities to support the Estate Administration Return filed with the Ministry of Finance.
- e. Collect the estate assets; opening the Estate bank account.
- f. Arranging for the deceased's residence to be prepared for sale or released to landlord; dealing with a real estate agent.
- g. Advertising for creditors to avoid personal liability; paying debts out of estate assets, including taxes. Contest any debts that do not appear legitimate.

- h. Locating, securing, preserving, disposing or transferring estate assets in accordance with any instructions contained in the will or legal principles that may apply, with legal advice as may be required.
  - i. Managing the assets during the administration of the estate.
  - j. Collecting information to give to the tax accountant and ensuring that all tax returns are filed on time to avoid penalties and interest.
  - k. Keep and prepare proper estate accounts for the approval of the beneficiaries or the court. Payment to legal heirs in reasonable time, as provided by law and the Will.
4. How does this division of responsibilities affect the compensation charged by the Estate Trustee?

Lawyers who are appointed as Estate Trustee, or do some of the work of an estate trustee (for example if so requested by the Estate Trustee) in addition to doing the legal work for an estate, must be careful to distinguish between these two roles in their billing and record keeping. Legal work and estate trustee work are compensated differently, and the remedies for the estate trustee and beneficiaries to dispute the legal fees and executor's compensation are different. (see *Rooney Estate v. Stewart Estate (2007), Carswell Ont 6560* )

The proper legal work of the lawyer for the Estate can be paid out of the Estate assets on a 'time spent' basis as an expense of administration of the estate. However, if you ask me to provide services which are properly the responsibility of the Estate Trustee (see List B above), then the legal fees will be billed to you as the Estate Trustee in accordance with our fee agreement. In the end these fees must be deducted from the amount of compensation claimed by the Estate Trustee; otherwise the estate would be charged twice for the same service. In other words, the trustee cannot claim compensation for time he/she did not expend; rather, he/she must pay the accounts for services of others out of his/her compensation.

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