



Holding Estate Trustees Accountable

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Introduction

Most complaints made about persons responsible for the administration of the estate of a deceased person (called the Estate Trustee) arise out of the failure on the part of the Estate Trustee to give a proper accounting of what they have done. This article is intended to help beneficiaries appreciate the Estate Trustee's duty to account and to help Estate Trustees understand the duty and the potential consequences for failure to keep accurate and complete accounting records. For a more complete description of the Estate Trustee's role see [*The Estate Trustee's Job Description: A Short Guide to the Administration of an Estate of a Person Dying with a Will*](#) by [Wesley Brown](#).

The following describes the duty to account and the two types of accounting that a beneficiary can expect to receive from an Estate Trustee.

The Duty to Account

A very important part of the Estate Trustee's fiduciary duty to the beneficiaries of the estate is to account to the beneficiaries in all aspects of the administration. Estate accounting is the process of communicating to the beneficiaries of an estate what assets were received, how they were dealt with, what money was received, what money was spent, why it was spent, what money is left over and the proposed distribution of the estate. Providing an accurate and complete accounting is beneficial to all parties involved with the estate. It allows the beneficiaries to be sure that they are getting what they are entitled to receive and provides comfort that the Estate Trustee has managed the estate honestly and competently. Also, it enables the Estate Trustee to be sure that the beneficiaries are satisfied with the administration of the estate and protects the Estate Trustee from the ongoing threat of liability.

What Records Must the Estate Trustee Keep?

It is essential that the Estate Trustee keep accurate and complete accounting records, including all back-up documentation, to enable them to prepare and support the information in the accounts. At the outset the Estate Trustee must obtain and keep originals of all documents that evidence the assets being administered such as deeds, life insurance policies, bank books and share certificates and should prepare an inventory of the assets. During the administration of the estate the Estate Trustee must prepare and keep a record of all money received and disbursed and a record of all investments made and retain all documents such as bank statements, brokers statements,

cancelled cheques, invoices, income tax returns and notices of assessment.

It may be extremely difficult to obtain copies of the documents from financial institutions if questions arise years after the date of death and if an Estate Trustee is unable to account for all assets and monies of the estate then they may be liable for any losses and may have to reimburse the estate from their own pocket. In addition, if the Estate Trustee has not acted in the best interests of the estate and has allowed his or her own personal interests to conflict with the fiduciary duty owed to the estate, the Estate Trustee could be found liable to the beneficiaries and may be removed as estate trustee by the Court which would typically involve a substantial costs award against the Estate Trustee.

Informal Accounting

An Estate Trustee may discharge his or her duty to account by delivering an informal accounting to the beneficiaries of the estate or by commencing a court proceeding for formal approval the Estate Trustee's administration of the estate.

Generally speaking, an informal accounting lists the assets that were collected and the monies received and subtracts the estate expenses to show the amount remaining for distribution. An informal accounting is usually done by way of report or financial statement to the beneficiaries or their legal representatives and should include the following information:

- details about the Last Will and Testament, including the date of the Will, who was appointed Estate Trustee, specific bequests and devises, the number of residual beneficiaries and their respective shares of the estate;
- details about any Certificate of Appointment of Estate Trustee issued by the Court;
- a list of the assets and debts of the estate as at the date of death;
- a list of receipts including amounts from the sale and investment of assets;
- a list of disbursements including amounts paid to settle debts, taxes and distributions to beneficiaries;
- any compensation being claim by the Estate Trustee; and
- a list of assets which remain in the estate including, if appropriate, a plan for distribution of the assets.

It is important for beneficiaries to understand that the Estate Trustee's power and authority is derived directly from the Will of the deceased person and the Estate Trustee is the only person who has the exclusive authority to deal with the assets of the estate. In that regard, the Estate Trustee is entitled to deal with the assets in a manner that they see fit so long as the Estate Trustee is acting reasonably and in good faith and not contrary to the deceased's wishes as set out in the Will. As such, the Estate Trustee is under no obligation to confer with the beneficiaries

with regard to decisions which need to be made concerning the administration of the Estate. However, the Estate Trustee must answer the beneficiaries' legitimate questions and concerns regarding discrete decisions and financial transactions which have been made and be ready to provide back-up documentation for review if further questions or concerns persist.

An important aspect of an informal accounting is that the Estate Trustee will also deliver a release for signature by the beneficiaries or their respective representatives. If the beneficiaries approve the accounts and the proposed distribution of the estate, the Estate Trustee will ask the beneficiaries to sign the release, releasing him or her from all liability in connection with the administration of the Estate, and then make a final distribution of the funds to the beneficiaries. It is important to note that the common practice of withholding distribution from the beneficiaries until they sign a release has been held to be improper by the Court.

Formal Accounting

If the beneficiaries are not satisfied with the informal accounting (i.e. one or more beneficiaries feels like the Estate Trustee has not administered the estate properly in some manner) or ignores or refuses to sign the release or if one or more of the beneficiaries is incapable of consent (i.e. is a minor or mentally disabled) then a prudent Estate Trustee will commence a proceeding called a "passing of accounts" in the Superior Court of Justice whereby a Judge will decide if the Estate Trustee has discharged the fiduciary duty to act reasonably and in good faith in administering the estate. Alternatively, a beneficiary may commence a formal passing.

A formal passing of accounts is essentially an audit of every transaction that the Estate Trustee has undertaken during the administration of the estate. The Ontario *Rules of Civil Procedure* specify the form of the accounts that must be prepared and filed with the Court and it is usually necessary for the Estate Trustee to retain an accountant to assist in the preparation of the accounts. Notice of the passing of accounts is given to all interested parties who then have the opportunity to appear before the Court and object to the management of the estate or to the amount of compensation claimed by the Estate Trustee. The objective of a formal passing of accounts is to obtain a judgment of the Court approving the Estate Trustee's administration of the estate and the Estate Trustee's compensation, if any is claimed. If the Judge is satisfied that the Estate Trustee has made sufficient disclosure, acted reasonably and in good faith and the Estate Trustee's claim for compensation is reasonable, a judgment approving the accounts will be issued, which also has the effect of releasing the Estate Trustee from all liability in connection with the administration of the estate during the accounting period. Alternatively, the Judge may order more thorough accounts, a change in the accounting or may reduce the amount of trustee compensation claimed by the Estate Trustee.

Conclusion

We often assist Estate Trustees with their duty and compliance. We also customarily advise beneficiaries who, for example, have not received distribution of the estate or an accounting of the administration of the estate, or who have been provided with an informal accounting and have been asked to sign a release.

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