

Helpful Legal Information for MAHCP Members

Duties of Executors and Trustees

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Because of the positions as highly trained, intelligent professionals working in the medical field, members of the Manitoba Association of Health Care Professionals are often chosen to act as representatives for friends or families during periods of ill health or death. There are three distinct offices that one may be appointed to during this time. They are (1) executors under a will, (2) proxies under a living will or health care directive or (3) agents under a power of attorney. The topic of this article is the duties and responsibilities that an executor has when appointed under a will to administer an estate. The role of proxy and agent will be the subject of a future article.

An executor, or executrix, is designated in a person's last will and testament to represent the deceased after they die to take care of their estate. This normally means collecting all of the deceased's money and assets, paying off any debts of the deceased, and then distributing the remaining property to the beneficiaries designated in the will to receive them. An executor's work is usually completed or at least substantially completed in the year following death.

Generally, and not necessarily in order of importance, the following are some of the duties accompanying the office of the executor.

1. One of the prime responsibilities of the executor is to ensure appropriate arrangements made for disposal of the deceased's body. Usually the family takes care of these arrangements but the ultimate responsibility and authority for this duty lies with the executor. If there is a dispute as to what arrangements should be made, the executor has the authority to resolve the matter.
2. The first obligation on the assets of the estate are the funeral and testamentary expenses. The expenses should be commensurate with the

wealth or ability to pay of the estate. If the estate does not have a lot of assets, the funeral arrangements should not be extravagant.

3. The executor has a duty to call in assets that the deceased owned at the time of death. This may be as simple as transferring the contents of a bank account or it could be very complicated. Complications can arise when the deceased owns a business or is involved in a law suit or any other of a number of complicating factors.
4. The executor will usually have to make a request for probate. This is an application to court to be appointed as the fully sanctioned, legally appointed, personal representative of the estate.
5. The executor should as a rule advertise for creditors of the deceased in a local newspaper or the Manitoba Gazette. If the advertisement is not done and a creditor comes forward later, after the assets of the estate have been distributed to the beneficiaries, the executor may be personally liable for the debt that is owed.
6. The executor must ensure that all reasonable debts of the deceased are paid. Failure to pay may lead to personal liability of the executor.
7. The executor must ensure to file tax returns and pay income taxes for deceased in year of death and for estate in subsequent years, so long as income is generated in the estate.
8. The executor has a duty to pay

out specific cash gifts or transfer specific assets as required by Will to the beneficiaries under the will.

9. Then when all of the duties of the executor are fulfilled and a clearance certificate has been obtained from Revenue Canada, the executor must obtain approval from beneficiaries or the court of tasks performed while executor.

The term "trustee" is sometimes used interchangeably with "executor". When a Will directs that the assets (or some of them) are to be held for a period of time, then the person designated to hold them is more properly referred to as a "trustee". The trustee's job is to hold the assets over the long term while the executor's job is to restructure them over a short-term period following death.



There is a trend in today's highly complex society for more and more estate plans to include long-term testamentary trusts. These are formal arrangements written out in a person's will which provide that their assets are not to be given directly to their beneficiaries but instead to be held by trustees for some length of time into the future. This can span years or even decades, and is done to preserve an asset to provide a source of ongoing income for a deceased's beneficiaries or to minimize the income tax burden falling on the beneficiaries of the assets.

This trust document usually provides some guidance to persons who are asked to serve as executors and trustees under such arrangements. It is general advice only and may not be appropriate in all cases.

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*Legal Advice
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As you will see, the duties and obligations of a trustee are quite different than that of an executor. Some of the duties of a trustee are:

1. The trustee must arrange for the transfer of ownership from the deceased or the estate to that of him or herself as trustee.
2. The trustee must open bank accounts or transfer the trust assets into investment accounts.
3. The trustee must determine the investment policy or intent of deceased when developing the trust's investment strategy. The intent of the deceased may be determined from a review of the terms of the will or trust document or from discussions with former advisors to deceased, or from discussions the trustee may have had with the deceased during life. The intent may also be gleaned from a review of any letters of direction left by deceased.
4. The trustee has the obligation to obtain appropriate investment advice, accounting advice and legal advice, as required.
5. For a long term trust, the trustee should diarize the 21 year deemed disposition of trust assets or have advisor do so. This 21 year rule is imposed by the Income Tax Act to trigger a capital gain on any capital asset held in trust every 21 years.
6. The trustee must make annual decisions regarding income distributions or capital distributions.
7. The trustee must arrange for a trust tax return to be filed annually. This is a specialized tax return and appropriate accounting advice should be obtained for the purpose.
8. The trustee should be aware that tax laws are subject to change. Trusts established for tax purposes should be monitored for changes

that may impact on their utility. An accountant, well versed in the area, can normally be relied on to address changes that may arise.

9. Simple book keeping and papertrail procedures should be in place. This is easily done at the outset, but more difficult if the records have to be created after the fact.
10. The trustee may have to retain legal or accounting advice if a significant change is contemplated to the trust. Such changes that typically occur over the period of a long term testamentary trust are:
 - Removing or adding trustees;
 - Appointing a trust company to act as custodian;
 - Changing the residence of the trust from one province or country to another;
 - Blending the trust assets with any other assets, from another trust or otherwise; or
 - Winding up the trust.

All in all the duties required of an executor and trustee are quite onerous and should not be entered into lightly. The key to successfully undertaking these duties is to seek out competent accounting, legal and investment advice.

As you know, Inkster Christie Hughes LLP offers a legal assistance program to the members of MAHCP. Under this plan you receive reduced rates on a number of specific legal matters such as the purchase or sale of a home, Wills, Powers of Attorney, Health Care Directives, separation agreements, divorces as well as a reduction on general legal rates.

This paper is intended as an introduction to the topic and not as legal advice. If you require specific advice with respect to your situation, you should contact a lawyer.

This series of articles will continue in future editions of the MAHCP News. If there is a topic that you would be interested in, please contact Wendy at 772-0425.