

**Further information on recent legislative amendments to the Crown
Administration of Estates Act in Ontario, Canada**

**COMPENSATION AGREEMENTS RELATING TO
ESTATES ADMINISTERED BY
THE PUBLIC GUARDIAN AND TRUSTEE
OF ONTARIO**

1. What has changed in the law?

Any compensation agreement affecting estates administered by the Office of the Public Guardian and Trustee (the "OPGT"), signed by a potential heir to that estate on or after January 14, 2010, must comply with the new provisions of section 5.1 of the *Crown Administration of Estates Act*, R.S.O. 1990, Chapter C.47.

These provisions were part of Bill 212, *Good Government Act, 2009*, Schedule 2, section 22. The Bill received Royal Assent on December 15, 2009. These particular sections come into force 30 days after Royal Assent.

2. What is meant by 'compensation agreement'?

As defined in the law, this includes a contract to pay a third party for services, fees and expenses related to the location, recovery or distribution of an heir's share in an estate administered by the OPGT. This could include, for example, genealogical research, the collection of vital statistics records, dealing with the other heirs to coordinate the claim, correspondence with the OPGT, preparing affidavits and assisting with forms requiring the heirs' signature. However, legal advice to the heirs provided by a lawyer (or where allowed, by a paralegal) are not affected by this provision.

3. What is required under the new law?

In brief, the new law requires the following:

1. *fair disclosure* by the service provider or heir's agent of important information to a possible heir, before he or she is asked to sign a compensation agreement concerning an estate administered by the OPGT;
2. *a cap on the allowable compensation*, to a maximum of 10% of the amount to be received from the estate, including all expenses of the heir tracer except for legal fees;
3. *a detailed accounting* by the heir's agent charging the compensation, to be given to the heirs and to the OPGT within 60 days of payment of any

funds from the OPGT, showing the amounts received, fees and expenses deducted and proof of payment to the heirs.

A compensation agreement will not be enforceable unless it meets a number of requirements including, for example, disclosing that the property is a share in an estate, the name and estimated value of the estate, and describing the services to be provided.

4. To what estates does this new law apply?

The new provisions governing compensation agreements apply to any estate where the OPGT has been appointed as estate trustee (either with or without a Will), at any time in the past, or has applied for a Certificate of Appointment, or is in the process of investigating whether it has the authority to administer.

[Subsection 5.1(2)]

5. How will the OPGT find out if a compensation agreement has been signed?

If the OPGT is contacted by a lawyer or by another person or company acting as agent for a possible heir to an estate, we will ask them if a compensation agreement has been signed. The lawyer or heir's agent will be responsible for answering that question and providing the OPGT with an original of the compensation agreement (translated into English or French if the original is in another language), if they wish to rely on it – for instance, to collect any funds directly from the OPGT on behalf of an heir, or to pay a fee to an heir's agent.

[Subsections 5.1(3) and (4)]

6. What is required in order for a compensation agreement to be enforceable?

If the OPGT finds out that a compensation agreement was not disclosed, or did not meet the requirements of the law, then the OPGT can pay the inheritance directly to the heir regardless of any direction to pay to the heir's agent or an attorney under a power of attorney previously signed by that heir. [Subsection 5.1(13)]

In order to be enforceable, a compensation agreement must :

- a. be typed in a font of at least 10 points in size;

- b. be signed by the heir (or personal representative or beneficiary of a deceased heir) and a witness who is not acting on behalf of the heir or the heir's agent in the agreement;
- c. set out the addresses and legal names of the heir and the witness, the date and place of signature;
- d. include the name of the estate that it concerns, that the estate is being administered by the Public Guardian and Trustee's office, and an estimate of the amount of the heir's share;
- e. state that the heir does not need to sign the compensation agreement in order to claim his or her interest in the estate from the Public Guardian and Trustee, may contact the OPGT directly, and sets out the OPGT's address and contact information;
- f. set out a description of the services to be provided by the heir's agent to the heir under the agreement;
- g. state that the fee for these services (the 'compensation') will not exceed 10% of the heir's share in an estate, including all expenses and disbursements except for necessary legal services;
- h. state that the heir may wish to obtain independent legal advice before signing the agreement;
- i. provide information about the required accounting (see question 9 below);
- j. state that this agreement is the only one that exists for the heir's interest in the estate. There cannot be any additional agreements for more compensation, and the heir cannot have signed other compensation agreements with different agents related to his or her share in the estate;
- k. state that only the legal heirs as defined by Ontario law will receive funds from that estate;
- l. include any additional statements which the OPGT may require, as set out on its website:
 [<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/>]
 (As of December 15, 2009, there are currently no such additional statements.)

[Subsections 5.1(5) (6),(7) and (8)]

7. Why are you restricting the compensation to 10 per cent?

If an informed heir agrees to pay a fee to an agent for help in collecting documents and applying to the OPGT on their behalf, then the maximum fee charged for this service should be a reasonable one. A 10% fee is reasonable. It is the maximum amount of compensation allowed in many US states which regulate heir finders or agents. The provisions will also allow heirs to seek a lower fee if they believe that a 10% fee is excessive or unjust in relation to the value of the services provided by the heir's agent.

[Subsection 5.1(15)]

8. What work does the OPGT do when it receives an application from an agent on behalf of potential heirs?

Information submitted by agents on behalf of potential heirs must be verified as past experience has shown that the information provided can be incomplete or incorrect. The OPGT must satisfy itself that it has the correct information, and cannot rely on work done by agents whom it has not retained.

As the court-appointed estate trustee, the Public Guardian and Trustee has a fiduciary duty to the estate and to all of the heirs of the estate. By contrast, most agents acting for heirs do not become estate trustee and have no duty to the estate.

In the vast majority of its cases, the OPGT locates the heirs and deals with them directly.

9. What type of accounting is required?

The law requires that a valid compensation agreement must promise to deliver an accounting to the heirs and to the OPGT within 60 days of receiving funds from the OPGT. [Subsection 5.1(5), paragraph (f)] This is necessary to ensure that the estate is distributed in accordance with the laws of Ontario and the terms of the compensation agreement, in order to protect lawful heirs.

The accounting must include the following:

1. the amount that the OPGT determined was the actual entitlement of each heir;
2. the amount of the compensation kept by the heir's agent as authorized by the compensation agreement;
3. the amount paid to the heir by the heir's agent;
4. proof of payment to the heir;
5. any additional documents as may be required on a case by case basis by the OPGT.

If the accounting is prepared in another language, the heir's agent must provide a certified translation to the OPGT. The OPGT may send a copy of the accounting to the heir, to ensure that the heir is kept fully informed.

[subsections 5.1(9), (10), (11) and (12)]

10. How will these provisions be enforced?

Either the OPGT or the heirs will have the ability to apply to court to challenge the validity of a compensation agreement. [Subsection 5.1(14)]

In addition, if a requirement of disclosure or other term of a compensation agreement required by the new provisions is breached, the OPGT will have the power to simply pay the funds directly to the heirs, and the heir and his or her agent can resolve their dispute independently of any OPGT involvement.

This document has been prepared for public information purposes. In the event of any conflict, the statute will prevail.

* Compensation agreement = heir hunter commission fee agreement