

So Now You Are an Executor; What to Do?

The task of being an executor may be an onerous task and not to be undertaken lightly. Without familiarity with the tasks to be completed important points may be missed and opportunities to save money may be lost. This pamphlet is of a general nature only and does not constitute Legal Advice. Please consult a lawyer for details.

Should the Personal Representative Agree to Act?

No one can be forced to be a personal representative, and an executor always has the option of renouncing, but this must be done before the executor "intermeddles with assets of the estate." Any prospective personal representative should give serious consideration as to whether or not he or she is prepared to act as the personal representative. Under no circumstances should the prospective personal representative deal with the assets or otherwise intermeddle in the estate, until he or she has in fact decided to act as the personal representative.

Some of the preliminary considerations for the prospective personal representative to consider are:

- a) the potential for personal liability that may arise under many circumstances;
- b) the possibility for conflict of interest, such as where the executor is also a business partner of the deceased;
- c) the nature of the deceased's assets, including the complexity of the estate;
- d) the personal relationship of the prospective personal representative with the beneficiaries or intestate successors;
- e) the time, stress, and hassle of being an executor and dealing with lawyers, beneficiaries, and the like;
- f) the time involved versus the potential remuneration available; and
- g) the actual terms of the Will and such factors as whether there will be ongoing lengthy trusts.

Once a personal representative accepts an appointment, he or she becomes a trustee for the estate, and must exercise the powers bestowed upon the office, with diligence and care. A personal representative may become personally liable if his or her office is carried out in a negligent or improvident manner.

What to do.

We assume that you do not expect anyone to challenge the validity of the will. If no one challenges the will, you may apply for probate "in common form". After you have filed the appropriate affidavits in the Court Registry, a grant of probate should be issued to you. (If someone does challenge the will, you may have to use a more complicated procedure, and we would discuss this with you at that time.)

You must contact the Division of Vital Statistics to confirm that they have not received any notice of a will later than the one you have. However, because a person who makes a will is not required to file a notice with the Division of Vital Statistics, the report you receive from the Division does not prove that a later will does not exist.

Before you can prepare the documents that are needed for the common form application, you need you to do the following things:

- (1) List all the assets and liabilities of deceased's estate, including descriptions and approximate values as at the date of death. We have included a section called "How to prepare your listing of the estate assets and liabilities" which will help you do this.
- (2) List each beneficiary under the will, giving full name, address, social insurance number, and that person's relationship to Deceased.

- (3) List anyone to whom Deceased was or had ever been married or with whom Deceased ever had a common law relationship. For each, please provide the full legal name, the address, and details about the date of marriage, date of divorce, date of death of the person, and so on.
- (4) List all Deceased's children, whether they were born inside or outside of marriage. For each, please provide the full legal name and the address. If any child is under 19 years of age, list his or her birth date and the name of his or her guardian.
- (5) List each person (other than people you have already listed) to whom the estate would pass if Deceased had not made a will. This would include the deceased's parents, brothers, and sisters.

Once you have all the details about the estate's assets and liabilities and the information noted above, you will prepare the probate application documents. You will then contact you to arrange for you to review the documents.

After that, you will file the probate application documents with the Probate Registry in the Courthouse in Vernon. When you file the documents in the Registry, you will have to pay a probate filing fee to the Supreme Court of British Columbia. The initial filing fee is \$208.00 for the first \$50,000.00 of the estate plus \$14.00 for every \$1,000.00 or part thereof over \$50,000.00 of the gross value of the estate assets that were located in British Columbia when Deceased died. For example, if the gross value of an estate is \$ 250,000.00 the court filing fee will be \$3,800.

You are required by law to mail or deliver a notice of your intention to apply for the grant of probate, together with a copy of the will, to each beneficiary in the will, each person who is entitled to apply under the *Wills Variation Act* to vary the will, and each person who would have been entitled to share in the estate if Deceased had not left a will. You will be preparing the notice and will cause it to be mailed.

We expect to receive the grant of probate within one month after we file the documents in the Registry. When we receive the grant, we will send you a copy. We will then ask you for further instructions about the administration of Deceased's estate.

Administration

As executor of Deceased's estate, your duties and responsibilities began when the Deceased died.

In addition to providing us with the list of the assets and liabilities of Deceased's estate, you should take whatever steps you can to safeguard the estate assets, including taking possession of assets and papers that might otherwise go missing. As a guide, see the section titled "How to safeguard the assets of an estate".

You should keep a diary of all the steps you take and decisions you make with respect to the administration of the estate, starting **at the date** of death. For each item, record the date, what you did, and any expenses that you incurred personally. You must keep a complete record of all expenditures and receipts because you must be able to provide a complete accounting for your administration of the estate before the estate is finally distributed.

Once you are granted probate, there are various things you can or must do. You can arrange for the transmission of the estate assets into your name, as executor. You must settle Deceased's debts and any expenses that you have paid as you administered the estate. You can convert assets into cash, if you think this is appropriate. If you do so, any money you receive from the sale of estate assets should be reinvested in your name as "Executor of the Estate of "name of Deceased", deceased". You will have to ensure that any such investments, as well as Deceased's own investments, are permitted under the will or section 15 of the Trustee Act.

Income Tax

As Deceased's executor, you must file certain income tax returns for Deceased and his or her estate. The basic filing obligations are as follows:

- (1) You must file a T1 (General) return for any year before the year of death, if Deceased had not filed a return for that year and if tax is payable. The return must be filed within six months of the Deceased's

death.

- (2) You must file a T1 (General) return for the year of death (January 1 to the date of death), in most circumstances. The return must be filed either six months from the date of death or on April 30 of the year following the year of death, whichever date is later. We recommend that you arrange for this return to be filed as early as possible, so that you can get a Clearance Certificate to Date of Death from Revenue Canada, Taxation. The Clearance Certificate is discussed in more detail later in this letter.
- (3) You must file a T3 (Trust Information Tax Return and Information Return) within 90 days of each fiscal period of the estate. The first fiscal period begins with the date of death. You may choose the date on which the first fiscal period ends, but that date must be no later than 365 days after Deceased's death.

Depending on the nature of Deceased's income, the estate may be allowed to file other income tax returns, and it may be desirable for you to do so.

Executor's Fees

As executor of Deceased's will, you are entitled to recover from the estate for any out-of pocket expenses you incur in the proper administration of the estate.

You are also entitled to fees from the estate for your time and effort in the administration of the estate. The maximum fee you can receive for your time and effort is 5% of the aggregate realized value of Deceased's assets, 5% of the income earned on the estate assets during your administration, and an annual .4% "care and management" fee based on the average market value of the estate you are administering. The "care and management" fee is traditionally sought only when there is an ongoing trust for the executor to administer according to the terms of the will. You should also note that your fees may be subject to G.S.T. and will be considered as income for your tax purposes.

Distribution of the Estate

You will probably be interested to know when you might be in a position to distribute the estate to the beneficiaries, and when this matter might be finally wound up. It is difficult to forecast these dates with any degree of certainty. Various factors may influence the speed with which matters can be resolved. We discussed some of these matters when we met, and the discussion is summarized below.

(1) Wills Variation Act

This Act says that, when a person dies leaving a will, any spouse or child of that person can bring proceedings to vary the will if that spouse or child believes that the deceased person did not adequately provide for him or her.

A spouse or child who wants to bring such an action must begin the proceedings within six months of the grant of probate of the will. This means that an executor should not make any distribution of estate assets until at least six months after he or she receives the grant of probate.

(2) Executor's Year

As an executor, you will have what is called an "executor's year" (which is a year from the date of Deceased's death) before you must distribute Deceased's estate to the beneficiaries. The reason for this executor's year is that it gives you an opportunity to identify and gather in all the estate assets and to pay all debts.

For this year after Deceased's death, the estate could be treated as a separate taxpayer with respect to the income it earns. This tax treatment is only available to the extent that the estate, and the income earned by it, is not distributed to the beneficiaries during that period. *[It may be, depending on the income situation of each of the beneficiaries, that there is some advantage to having the estate not distribute assets to beneficiaries until some time before the first anniversary of Deceased's death. If some of the beneficiaries are already paying income tax at high marginal rates, there may be a*

significant tax saving if the estate files as a separate taxpayer and pays at the lowest possible marginal rates.]

(3) Clearance Certificate

The *Income Tax Act* requires that an executor not distribute property to a beneficiary until he or she has received a Clearance Certificate from Revenue Canada.

In normal circumstances, Revenue Canada does not give a Clearance Certificate until you have paid any tax that is payable based on an assessment by Revenue Canada of the date of death tax return. We therefore recommend that you file the date of death income tax return as soon as possible so that you can request a Clearance Certificate at an early date.

If you do distribute the estate before you have received a Clearance certificate, and if you have not kept enough property in your hands as executor to pay any income tax that may be owing, you may be personally liable for paying that tax.

(4) Advertising for Creditors

You will have seen in your newspaper, in the legal advertisement part, a section called "Notices to Creditors and Others". An executor advertises in this section, in accordance with the *Trustee Act*, as a way to avoid becoming personally liable for any of a deceased's debts that come to the executor's attention after the estate has been distributed to the beneficiaries. Advertising in the prescribed form does not mean that the beneficiaries can avoid valid claims by creditors, but it does help the executor to distribute the estate once he or she has settled all the claims against the estate of which he or she is aware.

If you wish to advertise for creditors, we would be pleased to advise you about the formalities. The advertising should be done at least 21 days before you distribute the estate. If you feel confident that there are no creditors that you do not know about, then you may wish to save the expense of advertising.

Accounting

Before you distribute the estate among the beneficiaries, we recommend that you give them an accounting of your administration of the estate for their approval, and a form of Release of Executor for their signature which we will prepare.

The accounting should include:

- (1) details of the assets and liabilities of the estate at the date of Deceased's death,
- (2) details of each receipt and disbursement during your administration of the estate,
- (3) a list of the assets that you now have on hand, and
- (4) a statement of the distribution that you propose making.

We would be glad to assist you with an accounting to the beneficiaries, and with the ultimate distribution of the estate.

Please call us if you have any questions about any of the information set out in this letter, or about matters that we have not covered in the letter.

These suggestions apply to many estates but they may not all apply to the estate that you are administering.

- (1) Arrange with the deceased's bank to view and list the contents of the safety deposit box.
- (2) Record all the expenses you incur in doing your job as executor, including funeral expenses.

- (3) List all the banks where the deceased had accounts or loans. Include the account numbers. For each account, request the balance and the interest accrued to the date of death. Collect any bank books or statements of account, and have them posted up to the date of death. Note that accounts may include term deposits, Registered Retirement Savings Plans, and Registered Retirement Income Funds.
- (4) List all securities, stocks, or bonds owned by the deceased. Obtain the market value at the date of death.
- (5) List all real estate which the deceased owned alone or with others. Also list any mortgages or agreements for sale that the deceased held or owed. Provide the full addresses of all property. Have appraisals done, as of the date of death, on any properties that were not jointly owned.
- (6) List all estate income that will be received after the date of death. This may include cheques that have not been received or deposited from pensions, deferred profit sharing plans, dividends, interest, salary, or any repayments or refunds due to the deceased.
- (7) List any business assets or shares in a company owned by the deceased. Obtain appropriate valuations.
- (8) Identify all people and businesses who owed money to the deceased. Provide any details you can of the nature of the debt and the amount owing.
- (9) List any other assets, including cars, boats, household goods, jewelry, cameras, and other personal effects. Provide descriptions including serial numbers, if possible. Include estimated values.
- (10) List all outstanding debts and liabilities of the deceased.
- (11) List any agreements or court orders to which the deceased was a party, or under which the deceased was liable. This might include divorce decrees, maintenance orders, marriage agreements, *Family Relations Act* orders, guarantees, buy-sell agreements, partnership agreements, leases, employment contracts, and insurance owned by the deceased on the life of another.

How to safeguard the assets of an estate

These suggestions apply to many estates but they may not all apply to the estate that you are administering. This is not a complete list of assets; there may also be other assets that require protection and that aren't dealt with below.

- (1) Search for cash, insurance policies, securities, jewelry, and other valuables, and arrange for their safekeeping. Cancel the deceased's credit cards.
- (2) Lock up the deceased's residence if it is not occupied. Advise the police if it is not under proper supervision.
- (3) Arrange for an immediate inventory of all personal assets.
- (4) Check the insurance on the deceased's assets (e.g., house, furniture, motor vehicle). Check the expiry dates and check the vacancy provisions to ensure that the coverage continues (a 30 day vacancy limit applies in most policies insuring residential property). Notify the insurers of the death.
- (5) Arrange for interim management of the deceased's business.
- (6) Collect and deposit any outstanding cheques (e.g., pensions, dividends, interest, salary).
- (7) Redirect mail if necessary.
- (8) Check for mortgages (and determine if they are life-insured) and agreements for sale and make the payments to keep them up to date.

- (9) Check leases and tenancies. Give tenants notice about where to send rent payments and give notice of termination if necessary.
- (10) Review the last cheques written by the deceased to ensure that there were no irregularities.
- (11) Apply for Canada Pension Plan Death Benefits.

Depending on the particular estate, this list may not be exhaustive and may require further advice or assistance of the appropriate professionals.

How to prepare your listing of the estate assets and liabilities

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Please contact our office if you have any questions.