

FOR YOUR INFORMATION

# Estates

Compliments of



## Who's In Charge?

If you have been asked to be the legal representative for a deceased person, you first need to find out if you have the legal authority to act. If the deceased made a Will, it will appoint someone as the Executor. If you have been named as the Executor, you have some initial rights and responsibilities, such as making the funeral arrangements.

If there is no Will, then the government has created rules to decide who makes the funeral arrangements. First is the spouse. If there is no spouse, then an adult child, then an adult grandchild, then a legal guardian if the deceased was a minor, then a parent if there are no others with priority. The full list is in the Cremation, Internment and Funeral Services Act, section 5. If two or more people are eligible but unable to agree, then the oldest is allowed to make decisions. The Act allows a person to apply to Court if he disagrees with the decision.

A person who is appointed in a Will is called an Executor. If there is no Will (or if the Executor named in the Will is deceased or not able or eligible to act), the person who acts as the legal representative is called the Administrator.

The Wills & Estate Administration Act (WESA) lists the people who can apply to be Administrator in order of priority - starting with the spouse, then a child (or other person) who has the consent of the majority of the children, and then other next of kin. If there are no kin, then the court will look to the approval of the Public Guardian and Trustee to select an Administrator.

I will use the term Trustee to refer to the Executor or Administrator.

The Funeral Home is very helpful in making the funeral arrangements, in applying for the Death Certificate and providing forms for the Canada Pension Plan application.

## First Duties of the Trustee

Aside from the funeral arrangements, the Trustee should ensure that the assets of the estate are preserved and protected. The Trustee should control access to the deceased's home and personal effects. If anything goes missing or if the Trustee or others give assets away, the Trustee may be personally liable to account for those items later.

Generally, when a loved one passes away, emotions are high and people often act in ways they would not normally. The Trustee needs to be aware that people will be affected by grief or other emotions in different ways. This can happen to families that are normally close - and even more intensely to families that don't get along well. This can occur even where the death was anticipated as well as where it was unexpected or untimely. The emotions are at their highest immediately following the death and up to and following the funeral service. As a general rule, the Trustee should tell the family that the estate will be dealt with after the funeral, so that everyone can focus on the things that need to be done immediately.

There are instances where the family agrees to deal with the division of personal assets shortly after the deceased has passed away. If everyone is in agreement and is dealing with matters in a level headed way, the Trustee may feel that doing so is appropriate. However if anyone appears to be having trouble dealing with the division of assets, it should be postponed.

## When Court is Unnecessary

Often when one of a couple passes away, it is not necessary to make an application to court as some assets will pass automatically to the survivor in one of two ways:

- (a) Where the deceased owned something with another person as joint tenants (ie. land, bank accounts). This does not include where you only share ownership with another person, as a partner or tenant-in-common.
- (b) Where the deceased directly named a beneficiary, such as in an insurance policy, an RRSP or a pension.

In those events, all the survivor has to do is to provide a death certificate to the appropriate person and complete any forms that may be required. For those assets, it doesn't matter whether the deceased had a Will or what the Will said - the assets will go automatically to the survivor or beneficiary.

BC also has rules for small estates that may allow assets to transfer without an application to court. For example, although couples will have most assets in joint names or have each other as beneficiaries, there is often a motor vehicle which was in the sole name of the deceased. ICBC will allow the vehicle to be transferred to the surviving spouse or next of kin if the estate is worth less than \$25,000. The value of the estate does not include the assets that transfer by joint tenancy or to named beneficiaries.

Banks will often allow accounts to be transferred without court application depending on the amount of the assets and the relationship of the deceased and/or family with the bank.

Some assets can't be transferred informally, regardless of value. If the deceased owned an interest in land, even if it was worth a very small amount, the estate must go to court.

## How The Estate Is Divided If There Is No Will

If you have no Will, your estate is divided between your spouse and children. Read below for the rules about when someone qualifies as a spouse or child.

The surviving spouse receives the first \$300,000 (if all of the deceased's children are also children of the surviving spouse) or the first \$150,000 (if the deceased had children that are not the children of the surviving spouse). The balance is divided with 50% to the spouse and 50% to children. The spouse also receives the household furnishings and an option to purchase the family home.

If you have a spouse but no children, the spouse receives your estate. Similarly the children will inherit if you have no spouse. If you do not have either spouse or children, the estate is divided between next of kin according to rules set out in the Wills & Estate Administration Act (WESA).

## Spouse & Children

The definitions of 'spouse' and 'children' are important in determining what happens to your estate.

"Spouse" includes both a married spouse and someone in a "marriage like" relationship of at least two years prior to the date of death. A person is not a spouse if the couple is separated at the date of death.

A gift in a Will to a spouse, and an appointment of the spouse as Executor, are revoked on a separation - even if they later reconciled.

"Children" refers to biological children or adopted children, but not children of the deceased's spouse or former spouse (ie step-children), unless specifically included in the Will. The definition also includes children borne within two years following the person's death (ie from cryogenically stored reproductive material).

## Searching For Wills & Other Records

The Trustee must search for any Will that the deceased may have made, as well as for any other records or evidence that show "testamentary intentions" of the deceased. At the very least, this will include a search of the Wills Registry in Victoria, and also searching records, documents and any written or electronic material (including emails).

## Applications to Court

If the estate has to make a court application to distribute assets, then the Court will appoint a legal representative by a Court Order. If the deceased had a Will, then the Executor asks for a Grant of Probate. If the deceased did not have a Will, then an applicant asks for Letters of Administration. Despite the different names, both refer to a Court Order that gives a Trustee authority to act on behalf of the Estate.

Until that Order is made, the Executor or Administrator has only limited authority to deal with the Estate assets. In addition to the funeral arrangements, the Trustee will normally be allowed to have access to the deceased's bank accounts to allow bills to be paid and to view and list the contents of any safety deposit box, in the presence of a bank officer.

The Trustee is not normally expected to pay the deceased's bills from his own money, but can bring those bills to the bank, which will pay them from the deceased's funds. The Trustee should ensure that there is enough money left in the account to pay the Court's Probate Fees (discussed below). If there is not sufficient money, the Trustee or the lawyer acting for the Estate, normally advises the creditors to wait until the Court Order has been made.

Once the Grant of Probate or Letters of Administration have been issued, the Executor has the full authority to deal with the assets and can, at that time, deal with the bank accounts, transferring or selling property and doing almost everything that the deceased had been able to do.

## Time

On average, a straightforward application to Court will take about 4 to 6 months from the time the legal representative hires a lawyer to act for the Estate. The first appointment is a consultation, where some information is gathered. The lawyer then sends letters to search the Wills Registry in Victoria and the various banks or other places where the deceased may have had assets.

Although someone making a Will is not required to file a notice with the Wills Registry, the Court does require that a search be done before it will accept the documents. The Wills Registry does not get a copy of the Will - only a one page notice to say that a Will had been made and giving the date and the location the Will is stored. If the search shows that there was no notice registered or that the Will the Executor has is the last registered Will, then the application for Probate or Letters of Administration can proceed. If the notice shows a more recent Will was made, then the Trustee must attempt to find it. It usually takes about 4 to 5 weeks to get a reply from the Wills Registry and the various banks.

With that information, the lawyer makes two affidavits for the Trustee to sign. The first affidavit sets out the information on the deceased, attaches a copy of the Will (if there is one) and a list of the assets and debts of the Estate (not including assets that went directly to a joint tenant or beneficiary). The second is an Affidavit of Notice listing the beneficiaries in the Will and the next of kin who would inherit if the Will were invalid. Those persons get a copy of any Will and a one page notice that the Trustee is making the application. They are not normally provided with a list

of the assets or proposed distribution at this stage. Those two Affidavits are filed along with a number of other papers, including the Wills Registry search.

Once the papers are filed with the court registry, it normally takes about three to four months before they are reviewed and ready for a judge's signature and then returned to our office.

## Cost

The cost will depend on the value of the estate and the difficulty of the application. The costs are both the legal fees and the legal expenses (disbursements). Lawyers used to charge up to 3% of the value of the estate for legal fees, but that rule has been changed and lawyers are normally expected to charge their time on an hourly fee basis.

Our fees for an average estate are generally around \$3,500. If the estate is very simple, the fees may be lower. If the estate is more complicated, or if a formal application for court approval of accounts is required (for minors or non-competent beneficiaries) the fees will be higher. The fees are paid from the Estate funds after the Court Order has been made. In addition, the Estate will pay the Probate Fee and the court filing fees, agents/courier fees, and all the other usual expenses. For an average estate expect to pay legal fees and expenses of around \$3,500 to \$4,000, plus the Probate Fee.

Before the Court Order will be signed, the registry requires payment of a BC government Probate Fee. The Fee is .6% of any amounts between \$25,000 and \$50,000 and 1.4% for any amount above. The Registry advised the lawyer of the amount needed and the lawyer normally gets those funds from the deceased's bank.

There may be additional fees for related work, such as the sale or transfer of any real estate and accountant's fees for taxes.

## Taxes & Debts

Once the Trustee receives the Grant of Probate or Letters of Administration, the Trustee can begin dealing with the Estate assets. The first step is to pay any outstanding debts and to ensure that money is put aside for income taxes. We recommend that the Trustee retain an accountant and, on getting an estimate of the expected taxes, put aside twice the recommended amount.

The Trustee will normally file at least two tax returns - the first is for the deceased for the period from January 1 until the date of death. The second is for the Estate from the date of death to December 31. The Trustee is advised to keep a sufficient holdback and, once the tax returns are filed in the following year, the Trustee can either apply for a Tax Clearance Certificate - basically a mini-audit by the Canada Revenue Agency - to ensure that no further monies are owing, or hold the funds for three years -which is the usual length of time that the CRA can audit tax returns. Once this has been done, the remainder of the holdback can be divided between the beneficiaries.

The Trustee can be personally liable to any creditors of the Estate who are unpaid. If the Trustee has give out all of the money and either CRA or another creditor makes a claim, the Trustee may have to pay the money from his own funds and then try to collect from the beneficiaries.

The Trustee has to consider whether to publish a Notice to Creditors in the newspaper giving them a time limit to come forward. If they don't notify the Estate of a potential claim until after the assets have been distributed, the Trustee is not personally liable. In many cases the finances of the deceased are well known and the Trustee may elect not to publish a Notice to Creditors. However, if there is any doubt whatsoever, the Notice should be published.

### Paying Out the Estate Assets

A challenge to an Estate can be made up to 180 days after the Court Order, with an additional 30 days for service on the Trustee. The Trustee must either wait for those 7 months to pass or get consents and releases from all persons having a potential interest before distributing the Estate assets. If everyone signs, then the Trustee does not have to wait for the nine months.

When the Trustee is ready to distribute the estate, a Statement is prepared and sent to each of the main beneficiaries (it is not necessary to send it to a beneficiary that is only receiving a fixed cash gift or a specific item).

That Statement shows the value of the Estate, the expenses paid from the Estate (including the court costs, legal fees, accounting fees, tax holdback as well as the fees and expenses of the Trustee - see below). The Statement then shows the net value of the Estate and the proposed distribution according to the Will or, if there is no Will, as in the Estate Administration Act.

The Trustee is permitted to charge up to 5% of the value of the Estate for fees. The normal percentage is 3%, but may be higher or lower depending on the difficulty and value of the Estate. In addition, the Trustee is entitled to payment of reasonable expenses. Many Trustees initially say that they do not intend to charge fees, but later find out that there is a lot of work involved in acting as an Executor. The decision about the amount of Executor fees should be made near the end of the process.

The Statement and a Release are usually mailed to the beneficiaries. In some cases they will come to the lawyers office to sign, or the Trustee will meet with them individually. It may be necessary to make an application for court approval if any of the beneficiaries are minors or not mentally competent.

Once all of the beneficiaries have approved the Statement and signed the Release, the assets can be disbursed (either cheques written or land transferred as the case may be). Often the lawyer's office collects the monies from the bank and then makes the cheques and sometimes the Trustee does this personally.

If any of the beneficiaries disagree with the accounting or the fees charged, then none of the funds should be disbursed. Very rarely are concerns raised (the beneficiaries are usually more interested

in receiving their inheritance), and if there are concerns they are usually dealt with quickly and easily.

However, if there is a serious issue, either the Trustee or a beneficiary can make an application to a court officer to have the Statement reviewed.

## Conclusion

This handout is intended to provide you with some basic information on dealing with an Estate and acting as a Trustee. There may be complicating factors in some Estates that can't be dealt with here. If you have any questions about the information in this handout or on any other Estate matter, please contact us and we will be pleased to assist you.

An Estate Instruction form is attached to assist you in gathering information to deal with the Estate.

We also strongly recommend that, if you know that you are to be the Executor of an Estate, that you have the person complete the Estate Information forms attached to our Will Kit. The person making the Will can keep these papers at their home, in a location where you will be able to find them when and if needed, and on those papers let you know the names and phone numbers of important contacts and the location of their assets (not in great detail - just letting you know where they do their banking and where they keep important papers).

And if you haven't done your own Will, get our Will Kit for yourself.

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## ESTATE INFORMATION

Date: \_\_\_\_\_ Lawyer: \_\_\_\_\_

### INFORMATION ON DECEASED

Full Legal Name: \_\_\_\_\_ (also known as: \_\_\_\_\_)

Address: \_\_\_\_\_ Postal Code: \_\_\_\_\_

Birth Date: \_\_\_\_\_ Birth Place: \_\_\_\_\_

Date of Death: \_\_\_\_\_ Place of Death: \_\_\_\_\_ Marital Status: \_\_\_\_\_

Name of Deceased or Former Spouse(s): \_\_\_\_\_

### INFORMATION ON EXECUTOR/ADMINISTRATOR

Full Legal Name: \_\_\_\_\_ (also known as: \_\_\_\_\_)

Address: \_\_\_\_\_ Postal Code: \_\_\_\_\_

Phone: cell: \_\_\_\_\_ home: \_\_\_\_\_ work: \_\_\_\_\_

Occupation: \_\_\_\_\_ email: \_\_\_\_\_

### INFORMATION ON PERSONS ENTITLED TO NOTICE

Persons named in Will; Spouse/children of deceased; grandchildren of any deceased child; next of kin if no spouse/children

Note: add birth dates for any beneficiaries aged 18 or younger

Full Legal Name

Address

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

IS THERE A WILL? \_\_\_\_\_ No \_\_\_\_\_ Yes Date of Will: \_\_\_\_\_

DEATH CERTIFICATE RECEIVED? \_\_\_\_\_ No \_\_\_\_\_ Yes

APPLICATION FOR CPP? \_\_\_\_\_ No \_\_\_\_\_ Yes Who Will Apply: \_\_\_\_\_

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INCOME TAX FILING?  No  Yes Who Will Apply: \_\_\_\_\_

SOCIAL INSURANCE NUMBER OF DECEASED: \_\_\_\_\_

ASSETS OF ESTATE

Real Estate Address	Value
_____	_____
_____	_____
_____	_____

Life Insurance, Pensions, RRSP's	Value
_____	_____
_____	_____
_____	_____

Bank	Branch
_____	_____
_____	_____
_____	_____
_____	_____

Vehicles, Boats, Stocks/Bonds, Coins, Jewellery, Art, Other Assets	Value
_____	_____
_____	_____
_____	_____

Debts, Liabilities & Creditors (including funeral home)	Amount
_____	_____
_____	_____
_____	_____

Publish Notice to Creditors?  No  Yes

Does the Deceased have any ongoing spousal or child support obligations?  No  Yes

Did the Deceased have any stored reproductive material?  No  Yes

Was the deceased a Nisga'a citizen or member of a treaty First Nation?  No  Yes

Fees Quoted: \_\_\_\_\_