

B.C. EXECUTOR'S GUIDE TO PROBATE AND ESTATE ADMINISTRATION



CAGP GREATER VANCOUVER AREA CHAPTER

A better world through strategic charitable giving...



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An Executor's Guide to Probate and Estate Administration

This guide is prepared as a resource to the Executor of an estate where a charity is a beneficiary of a gift under a Will.

The Canadian Association of Gift Planners (CAGP) is a national association that inspires and educates the people involved in strategic charitable gift planning. We advocate for a beneficial tax and legislative environment that strengthens philanthropic giving, create a networking environment with like-minded professionals and experts, and provide access to outstanding learning opportunities and professional development. The Greater Vancouver Chapter strives to provide educational resources to the charitable sector, estate planning advisors and members of the public in British Columbia that will facilitate estate gifts to the causes and organizations that serve our communities. This guide has been recently updated with the assistance of Alexander Holburn Beaudin + Lang LLP and BMO Private Wealth but is not a substitute for legal advice.

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1. Introduction

Increasingly, charities rely on estate gifts to maintain the important services they supply to the public. We are deeply grateful to the deceased for this most important gift under their Will and to you as the deceased's representative, personally, for your time and efforts in the administration of the estate.

We recognize that the deceased asked you to perform these sometimes difficult and complex responsibilities because you were trusted to carry out their instructions, and not because you necessarily possess particular legal or financial expertise.

To help you with your task, this guide addresses some of the more common areas of estate administration. Many of the principles described in this guide apply equally to all estates, while others are more specific, such as those dealing with income tax issues for charities.

Please keep in mind that this guide applies only to the administration of estates in British Columbia and that there are other excellent, more detailed publications that can help you with your duties. The estate administration process can be unclear or confusing at the best of times. We encourage you to seek appropriate professional advice where and when it is warranted.

If you believe that your role as an Executor could be too demanding, you may want to consider delegating some of your responsibilities to a professional trustee, such as a trust company, if permitted under the terms of the Will. A trust company can take care of all or some of the administrative duties from information gathering, valuing, itemizing and protecting the assets to the final distribution and accounting to the beneficiaries. Your legal or accounting professional may also be able to assist you. Whatever path you take, we hope this guide will help you. Thank you again for your time and efforts in the administration of the estate.

You may come across some unfamiliar terms as you read through the guide. Please refer to the glossary at the back of the guide for a brief explanation.

Recognition of the Gift by the Charity Beneficiary

Charities have different ways of recognizing the generosity of their donors, including those donors who choose to leave a gift through their Will. Recognition varies from charity to charity and you may wish to ask what opportunities the charity can provide. However, public recognition is normally determined by agreement with the donor in advance or by the charity's own policy. This ensures that recognition is fair, transparent and respects the wishes of the donor.

You Are a Named Executor under a Will - First Steps

Locating the Will

First you should find the original Will to confirm your appointment as the Executor. Although the deceased may have kept a copy of the Will at their place of residence, the Executor must search all reasonable places that a person may have kept a Will, which will likely include:

- The deceased's safety deposit box. You will need to make an appointment with the financial institution to access the box. Bring the deceased's key to the box along with a certificate of death and your identification. The bank representative will conduct a listing of the box and allow you to remove the original Will.
- Check with the lawyer who prepared the Will. Many Wills are retained in a secure fireproof vault with the law firm. If the lawyer who prepared the Will has died or retired and the firm is no longer in operation, you can contact the BC Law Society to determine who took over that lawyer's or firm's files.
- Consider whether the deceased may have kept an electronic Will. A search for an electronic Will should include a search of the deceased's electronic devices and any third-party electronic repositories that may have been used by the deceased.

Under the *BC Wills Estates and Succession Act*, SBC 2009, c. 13 (WESA), the Court has the power to declare that a document is a Will even though it may not comply with the formal requirements for making a Will. If you find notes, documents, electronic files, or even a video recording that may be considered a Will, or a Will that is not properly executed, seek legal advice with respect to how to proceed.

Conducting a Wills Search

You should conduct a Search of Wills Notice with the Division of Vital Statistics in Victoria. The deceased or the lawyer who prepared the Will may have filed this notice which sets out the date of the Will and its location. Conducting a Wills Notice search is a requirement before applying for an estate grant so it is a good idea to conduct this search early on, even if you have what you believe to be the original Will. Anyone is eligible to do this by completing and submitting the Application for Search of Wills Notice (Form VSA 532). The application form may be submitted by mail or in person at a Service BC Office. The Vital Statistics Agency will provide you with a Certificate of Wills Search. Two copies of this Certificate must be filed with the application for an estate grant as part of your evidence to the Court that the Will you are applying to obtain an estate grant for is the last known Will of the deceased (or that there is no Will of the deceased, as the case may be).

Your search for the Will must also include a search of the location specified in the Certificate of Wills Search, if any.

Information on conducting a Wills Notice Search can be obtained by calling Vital Statistics at 604-660-2937 in the Lower Mainland, and 1-800-663-8328 for other areas, or can be found on-line at: <http://www.vs.gov.bc.ca>. There is a small fee charged for this service.

You have Located the Original Will

Read the Will carefully. Check for the following:

- Are you named sole or co-Executor? If co-Executor, will you be able to work well with the other named Executor?
- Does the Will or a separate agreement mention a specific fee for you as Executor? If it does not, then you will still be entitled to a reasonable fee for the services you will perform. See below under the heading "Executor's Fees".
- Are there Testamentary Trusts in the Will? If so, how long do they run, is there a separate trustee for such trust, and what degree of discretion is the trustee given? If you as Executor are the trustee, will you be able to administer these to the final distribution? How is your own health and availability over

the expected duration of the trust? Is there a mechanism for appointing a substitute or successor trustee?

- Are any beneficiaries (or your co-Executor) non-residents of Canada? If so, you should obtain tax advice regarding how to distribute to such beneficiaries and whether there are any negative tax implications for such co-Executor to act.
- Are any beneficiaries under the Will charities or persons with disabilities? This may involve addressing certain tax issues with an accountant to possibly benefit the estate and beneficiary.
- Does the Will have any unusual issues of concern such as a spouse or child not having been named as a beneficiary?
- Has the Will been validly executed, that is, was it signed at the Will's end by the deceased in the presence of two witnesses, who are not (and are not the spouses of anyone) named in the Will as an Executor or beneficiary, who also signed in the presence of the will-maker? Note that as of December 1, 2021, a Will can be validly executed by way of electronic signature and electronic presence (refer to the Glossary for more information).
- Does the Will appear to cover all of the deceased's property falling into the estate? You should see a clause dealing with the "residue" of the estate which is all of the property that is not dealt with specifically. If there is no residue clause, the Will may only deal with the specific gifts made therein and the remainder of the estate will pass in accordance with the intestacy laws of BC.
- Is there any indication that there is more than one valid Will? Multiple Wills are often used when a person has assets in different jurisdictions. They are also sometimes made in the same jurisdiction to reduce probate fees applicable to the estate, in particular where a deceased person held private company shares.

How Might the Will Be Challenged?

You should keep in mind some of the ways a Will may be challenged:

- A spouse or child may challenge a Will under the WESA on the basis that it does not make adequate provision for them.
- There may be allegations the deceased did not have the testamentary capacity to make the Will at the time it was signed, or that the Will was not validly executed.
- There may be allegations of undue influence on the deceased at the time when the Will was made.
- There may be allegations that property within the estate is actually held for another party or that property that appears to be outside the estate is actually held for the benefit of the estate.

As the Executor named, you have an obligation to support the terms of the Will until directed otherwise by the Court. As Executor your role, should legal challenges occur, is to assist the Court in whatever capacity the Court may ask.

What Does an Executor Do?

The Executor carries out the wishes of the deceased as expressed in the Will. The Executor is in a position of trust. The Executor has a fiduciary duty to protect and manage the property of the deceased until all debts and taxes have been paid, to satisfy the terms of all gifts made under the Will, and to transfer the remaining property (called the residue) to the named beneficiaries of the Will. The law requires an

Executor to use reasonable prudence and judgment and have the highest degree of honesty, impartiality and diligence.

Responsibilities of the Executor

While the responsibilities of the Executor may vary depending on the deceased's assets and the Will's instructions, it is important to know that the Executor can be held personally liable if the duties are not performed properly.

For example, if you as the Executor failed to pay all the valid debts of the estate and distributed the estate to the beneficiaries, you could be held personally liable for these debts if a valid creditor remains unpaid after the distribution of the estate. Another important duty is to provide a full accounting to the residual beneficiaries of estate assets as at date of death, and their disposition. To do so, you must keep full records of receipts and disbursements, reconcile (balance) these, and provide the accounting to the residual beneficiaries at the conclusion of the administration of the estate. You will also want to obtain a release from each beneficiary. If making interim distributions during the course of the administration of the estate, you should consider providing interim accounts and obtaining interim releases. You may also require consents, depending on the circumstances.

Renunciation

If you are named as an Executor in the Will, one of your first decisions should be whether you will agree to accept the role of Executor. At the outset you are under no legal obligation to accept your appointment as Executor. For example, you might decide not to act despite being named as Executor, if:

- you feel you do not have the time, skill or ability to act;
- you are not resident in Canada, or you are in a location in Canada that is not convenient for the administration of the Estate;
- the Estate liabilities exceed its assets (the Estate is insolvent);
- you have a conflict of interest because you intend to challenge the Will or bring a claim against the Estate; or
- you foresee litigation or conflict involving the Estate and do not wish to get involved.

You are entitled to renounce your appointment if you have not "intermeddled" in the Estate. The term "intermeddling" means you have held yourself out as having the authority under the Will to deal with the Estate assets or have taken control of estate assets. Attending to arrangement and payment of funeral expenses is not intermeddling, however, sending out notices (required under s. 121 of the WESA) that you are applying for probate is intermeddling. If you have already intermeddled in the Estate, you now have an obligation to continue in your duties as the Executor, unless you are formally discharged by the Court.

A renunciation is made using probate Form P17. If there are one or more co- Executors or alternate Executors named, they may apply for probate of the Will by submitting your renunciation with their application. If you renounce and you were named as the sole Executor with no alternates, another person will need to apply to be appointed as Administrator with Will Annexed of the Estate. The Administrator is appointed by the Court and takes on the duties that an Executor would carry out.

Professional Advisor

You are not required to engage a lawyer to apply for an estate grant in British Columbia, although most people do. It may be helpful to seek professional advice at the outset if you see obstacles in the Will itself or in your time and ability to carry out the terms of the Will. Not all Wills are straightforward. Keep in mind that different lawyers have different areas of expertise and varying levels of experience. When seeking a lawyer, you can ask the lawyer who prepared the deceased's Will to assist you, or seek advice from another wills and estates lawyer. Ask questions so that you are comfortable with the person you will be working with over a lengthy period of time. Ask the lawyer to explain the difference between the Executor's duties and the lawyer's duties as this may impact your fees. (See heading Estate Expenses).

2. Probate

Simply put, to probate a Will means to have the Court certify that it is the last Will of the deceased. A grant of probate is proof of your authority to deal with the estate assets, and to carry out the terms and conditions of the Will.

Generally speaking, probate in BC is required when:

- Estate assets (owned by the deceased alone) include real estate in BC;
- Estate assets include securities;
- (stocks and bonds), bank accounts with more than a nominal balance, investment accounts, or vehicles having a total value over \$25,000; or
- The deceased was ordinarily resident or domiciled in BC and the personal representative will be a party to a proceeding commenced in BC.

Probate may not be required where the only assets of the estate are those that pass outside the Will. Examples of an asset that would pass outside the Will would be assets held in joint tenancy, insurance proceeds payable to a designated beneficiary, or registered savings plans payable to designated beneficiaries (i.e., RRSP, RRIF, TFSA).

An application for a grant of probate may be made in any Court registry in BC. The application is made by filing various documents with the Court registry. These documents include, but are not limited to:

- A Submission for Estate Grant in Form P2;
- An affidavit of the applicant, or if there are two or more, from at least one of the applicants identifying him or herself and their relationship to the deceased, in Form P3, P4, P5, P6 or P7 depending on the circumstances;
- If there are two or more applicants, then an affidavit in Form P8 from those executors not giving the affidavit mentioned directly above;
- Two copies of a certificate of wills search from the chief executive officer of the Vital Statistics Agency;
- Any affidavits or materials, if required, relating to the execution or appearance of the Will;
- An affidavit from you, in Form P9, declaring that you have notified everyone entitled to notice of your intention to apply for probate, and that you have supplied them with a copy of the Will;
- An affidavit of assets and liabilities in Form P10 for domiciled estates or in Form P11 for non-domiciled

estates;

- An affidavit of a translator in Form P12 for any documents not written in English;
- A notice of renunciation in Form P17 or an affidavit of deemed renunciation in Form P34, if any of the executors have renounced executorship;
- The original Will, or its signed counterparts if witnesses were electronically present, any codicils, and two photocopies of each Will and codicil;
- An additional affidavit will be required if probating an electronic Will to include information on how to view the Will; and
- Any orders affecting the validity or content of the Will and any codicil, if any have been made.

A probate fee levied on the value of the estate assets must be paid before probate is granted. Probate fees are based on the gross value of the estate assets in BC at the time of death. Jointly owned property and property located in other provinces or outside the country may not be subject to probate fees in BC.

Currently, probate fees are calculated as follows:

Estate Value	BC Probate Fee
the first \$25,000	no probate fee
the next \$25,000 (i.e. \$25,000 to \$50,000)	\$6 per \$1,000 of assets
the balance (i.e. in excess of \$50,000)	\$14 per \$1,000 of assets

In addition, there is a \$200 filing fee on estates valued in excess of \$25,000. Please note these fees are subject to change.

Note to Beneficiaries

(Section 121 of the WESA and Rule 25-2(2) of the Supreme Civil Court Rules)

To apply for an estate grant (i.e., a grant of probate or a grant of administration) in BC, you must be able to certify to the Court that you have made reasonable efforts to notify interested parties of your intention to apply for an estate grant.

Notice and a copy of the Will and any codicil¹ must be provided at least 21 days prior to the application to each person or organization that, to the best of your knowledge, is:

- A named executor, alternate executor or any person with an equal right to make an application for an

¹ You do need to provide a copy of the Will to the charity beneficiary, but it doesn't need to be a notarized copy. A clean, legible photocopy is generally acceptable.

- estate grant who is alive at the time of the deceased's death;
- A named beneficiary under the Will, including any charity; and
- The deceased's next of kin who would be entitled to share in the Estate if the deceased had died without leaving a Will.

If any of the beneficiaries are minors, or are adults who have been declared incapable of managing their affairs, in addition to a parent or committee, the Public Guardian and Trustee of British Columbia (PGT) must also be served notice. The notice to the PGT must set out the following:

- The name of every other minor or incapable adult that is required to receive notice; and
- The most recent residential address, postal address, email address and fax number for those minors and incapable adults.

For further information on this aspect please refer to the PGT website:

<http://www.trustee.bc.ca/Pages/default.aspx>

The Disclosure Statement (also known as the Statement of Assets, Liabilities and Distribution)

The disclosure statement attached to the affidavit of assets and liabilities (Form P10) is the cornerstone of the estate administration. All assets passing through the estate must be listed on this statement together with the market value of each asset at the date of death.²

The disclosure statement requires that any assets that passed to the applicant as the deceased's Executor be included. The disclosure statement also lists the deceased's liabilities as at the date of death.

If other assets or liabilities are identified after Form P10 has been submitted, a further disclosure statement in Form P14 must be submitted to the Court (probate registry).

In order to compile an accurate financial inventory, you will need to do the following:

- Review the tax returns to determine whether additional taxes need to be paid or a refund can be anticipated;
- Review all financial records, including but not limited to: bank statements, brokerage accounts, investment management accounts, TFSA, RRSP or RRIF accounts, business records, private loans made by the deceased, and rental property records;
- Write to financial institutions to request confirmation of assets of the deceased as at the date of death;
- Obtain title searches for any real property owned by the deceased;
- Review mortgages and outstanding loans owed by the deceased;
- Review any outstanding personal bills of the deceased such as rent, strata fees, credit card, cable,

² *As most charities need to present a balanced budget, the disclosure statement is invaluable in assisting a charity in projecting future revenues and assessing what programs can be realistically funded.*

telephone and hydro;

- Check the safety deposit box;
- Determine the estate's entitlement to Canada Pension Plan and other death benefits, such as life insurance, and employer death benefits;
- Determine if any online or virtual assets are owned by the deceased;
- Determine any accrued income such as interest or pension to the date of death; and
- Determine the value of the assets, including the personal effects.

As people age, often it becomes more and more difficult for them to go to their financial institution(s) in person. As a result, they may hold significant cash reserves and even stock certificates or bonds at home. Please keep in mind that the deceased may have stored valuable items in ingenious hiding places.

After an estate grant is obtained, you should publish a Notice to Creditors in the BC Gazette to request that any claims against the deceased not previously known to the Executor be disclosed. In addition, if you have notice of a potential debt claim against the estate, you may give written notice to the potential creditor in accordance with section 146 of WESA to impose a six-month limitation period on the potential creditor within which to bring their claim or else the claim is forever barred.

It is generally considered good administrative practice for an Executor to give each residual beneficiary, including a charity, a copy of the Disclosure Statement. Although you are not required to provide a copy of the Disclosure Statement to the beneficiaries who are to receive a share of the residue of the estate, it can be a very helpful document to them. More importantly, this document is a crucial component of your accounting to the beneficiaries receiving a share of the residue (please see Estate Accounts on page 16). Be aware the Disclosure Statement is not a private document. Copies can be obtained by anyone from the probate registry for a fee.

Grant of Probate

Once the Court has the documents, as long as the application materials submitted are complete and properly prepared, the Court will eventually process and issue a grant of probate. Processing times vary from a few days to several months depending on the workload at the probate registry. The registry Court will contact you should there be additional information required. You should call to check in if you have not heard from them after six to eight weeks.

You should be aware that a Notice of Dispute may be filed in any registry in the province by a person entitled to a Notice of Beneficiaries or a person who claims an interest under a prior or subsequent Will and who intends to oppose a grant of probate. A Notice of Dispute is simply a notice to the Court not to allow proceedings to be taken in the matter of the Will or the estate of the deceased without notice to the person filing. A Court will not issue a grant so long as a notice of dispute is in force.

Unless renewed, withdrawn, or otherwise dealt with, a Notice of Dispute expires one year after it is filed.

3. Estate Administration

While the responsibilities of an Executor will vary depending on the deceased's assets and the terms of the

Will, the following list gives a general idea of what might be required:

Preliminary Steps

- Make funeral arrangements as required and obtain the Certificate of Death;
- Arrange for the safe custody of personal valuables;
- Review security of property and adequacy of insurance coverage (e.g., real property may require vacancy insurance and vehicles may require storage insurance);
- Gather names and addresses of all beneficiaries and next-of-kin, and provide each with a copy of the Will;
- Notify financial institutions and investment firms and obtain date-of-death information about the assets;
- Prepare a list of the contents of any safety deposit box;
- Advise Canada Pension Plan, Old Age Security, Veteran's Pension and employer- sponsored pension plans of the death and determine entitlement to CPP Death Benefits, Survivor's Benefits and any company benefits;
- Cancel driver's licence, passport, credit cards, subscriptions, memberships, cable, telephone and request Canada Post to re-direct mail;
- Open an estate account and deposit any monies;
- Complete an inventory and a valuation of all assets and debts as at the date of death; and
- Arrange for the application for an estate grant and the payment of probate filing fees.

Once the Estate Grant is Obtained

- Take control of all assets, including contents of the safety deposit box and transfer ownership to the estate;
- Consider advertising for creditors;
- Pay all proper debts of the estate;
- Ensure that the time for a wills variation claims under the WESA (180 days from the grant of probate) has expired or any claims have been resolved;
- After the mandatory waiting period of 210 days, distribute specific gifts of property and pay cash legacies;
- Consider making an interim distribution to residual beneficiaries depending on the value of the estate;
- Prepare, or arrange to have prepared, and file appropriate tax returns and obtain tax clearance certificates;
- provide a full accounting to the residual beneficiaries and obtain their approval of the administration and Executor's compensation, if any;
- Arrange for the sale of assets or the transfer of assets to the beneficiaries;
- Apply for a final clearance certificate from the Canada Revenue Agency;
- Close estate account and provide a final accounting to the residual beneficiaries; and
- Obtain a formal discharge from Court or receive a signed discharge and release from all residual beneficiaries.

Sale of Property

Often, the most significant asset in the estate is the deceased's personal residence. As the Executor, you are required to seek out fair market value when selling estate assets.³ Some of the factors to consider are:

- Is there a clause in the Will dealing with a particular piece of property? Does the Will express the wish that a certain individual has the right of first refusal on the property at a specified price? This price may or may not reflect fair market value at the time of sale, but the clause in the Will must be respected.
- Is there a clause in the Will stipulating how long such property can or should be held in the estate?
- Is the property insured properly pending sale?
- Have written valuations been obtained?
- What are the prevailing market conditions?
- Has the property been adequately exposed to the market?
- Is the transaction at arm's length?

You should be aware a realtor's commission is a legitimate estate expense. It may be helpful to keep the residual beneficiaries informed over the marketing, sale price and offers received for the property held by the estate as they will be approving your administration. However, you as the Executor have the final say in how the sale should be conducted.

Accounts of Other "Fiduciaries": Agents, Attorneys, Representatives and Committees

Where the deceased was incapable prior to his or her death, you need to review the transactions of the person or institution that was managing the deceased person's financial affairs.

The management may have been informal (perhaps by way of a joint bank account) or more formal (perhaps by a power of attorney or representation agreement), or by order of the Court (by way of committee or adult guardian) or by certificate of incapability appointing the PGT. Regardless, it is your responsibility to ensure the management of the deceased's finances during the period of incapability was properly carried out. If you have concerns, you should obtain legal advice as to whether there is a claim to be made on behalf of the estate.

Mandatory hold period

The WESA says that an Executor is not permitted to make any distributions from the estate until after 210 days has passed from the issuance of the estate grant. This time period allows individuals who may have claims against the estate or who have a right to challenge or vary the will to bring their claims forward. In general, distribution before the 210 day period has expired is permitted only with a court order, or (if

³ *If the terms of the Will allow it, consider an outright or "in specie" distribution of an asset to the charity beneficiary as there may be significant tax savings to the estate with an in specie transfer.*

there is a Will) if the Executor obtains the consent of every beneficiary under the Will and every person who has a right to commence a wills variation claim.

If the beneficiaries under the Will and the persons who have a right to commence a wills variation claim are generally the same people, and they are not intending to challenge the will, it may not be difficult to obtain their consent. You should consider asking for their written consent to make an early distribution.

If there is no Will, distribution before the 210 day period has expired is permitted with the consent of all intestate successors entitled to a share of the estate.

If you are not able to get consent to make an early distribution, you should diarize the 210-day date. While you are waiting, you can attend to other estate tasks including selling assets and paying liabilities.

Payment of Cash and Specific Legacies

Once the 210 day hold period has expired or has been waived by the relevant persons, and you have determined there are no outstanding Will challenges or claims against the estate, it may be appropriate to pay out the specific legacies as soon as possible. The general rule is that, except when specifically provided in a will, a legacy carries interest only after one year from the will-maker's death. The rate of interest on a legacy is the rate set in s. 3 of the Interest Act, R.S.C. 1985, c. I-15, which is currently 5%.

Use your judgment and exercise caution where these legacies are substantial and there may be a challenge to the Will, or the potential for large income tax levies. You may want to obtain a form of receipt from those to whom the legacies are paid, or specific property transmitted.

Where a specific gift of, for example, jewelry, artwork, shares or real estate is gifted to a charity, that charity will need specifics on the gift to determine whether or not it can be accepted. Most charities have gift acceptance policies and will consider such factors as:

- Is there a potential for liability, such as environmental liability as owner of real estate?
- Are there terms and conditions attached to the gift, such as holding it in perpetuity?
- Can the charity properly house the gift?
- Can the charity afford to insure the gift?

If the gift is for a specific dollar amount, it is usually necessary to pay the gift to the charity in order to receive the appropriate donation tax receipt for filing with the Canada Revenue Agency. This is another reason for making the payment early on in the administration.⁴

Undesignated personal effects of nominal value may also be distributed early in the administration. Even where a charity is the sole beneficiary of an estate, it will usually wish to see the personal effects given to family members or friends of the deceased. Just make sure you seek the agreement of the charity's representative.

⁴ *If the Will provides for a designation of the specific gift or a share of the residue to a particular program or service offered by the charity beneficiary, talk to the charity's representative to make sure they can honour the wishes of the deceased.*

4. Estate Accounts

Executors are obliged to prepare a full accounting of all the financial transactions in the estate starting with the date of death before distributing the estate among the residual beneficiaries (or intestate successors). These accounts must be provided to residual beneficiaries (or intestate successors), that is the beneficiaries entitled to a share of the estate after all the assets have been liquidated, and all the debts and the cash and specific legacies have been paid.

The accounting includes a record of all assets on hand and sales of any assets, all monies received and disbursed, all liabilities owing of the estate and those paid out, all investments made by you as the Executor, all income earned in the estate, a calculation of intended remuneration and the proposal of distribution. Providing detailed descriptions will make it easier for you to complete tax returns and prepare accountings for the beneficiaries. Typically, you should provide an interim set of accounts and obtain releases prior to any distributions from the estate and a final accounting accompanied by final releases when the estate administration is finished. If you were managing the deceased's finances before death, the beneficiaries may also ask to review the accounts for that period.

The passing of the first accounts is required to be done within two years of the estate grant or with the consent of all the residual beneficiaries (or intestate successors), typically by way of a release. If the administration of the estate is delayed for any reason beyond two years from the grant of probate, it is best to provide an interim set of accounts at that time that are approved and consented to in writing by the beneficiaries. If the administration will be ongoing for a number of years, for instance where trusts have been established, further interim statements should be provided to those beneficiaries at regular intervals, and at least annually. Since the residual beneficiaries have to approve your administration by agreeing to the final accounts, it is helpful to establish good communication with them and to keep them fully informed as to the administration.⁵

The passing of accounts can also be done formally to the Court or the Registrar if consent cannot be obtained. A formal passing of the accounts may also be necessary where a minor beneficiary or an incapable adult beneficiary is involved.

5. Estate Income

As you call in and convert the estate assets to cash, the proceeds should be deposited in an interest-bearing account. As it can be up to a year or more before you are in a position to make a distribution from the estate, you may want to consider placing the estate funds in Treasury Bills or similar investments that will maintain their value and can be liquidated in a reasonable time frame, but will not be subject to market fluctuations.

Once the end of the administration of the estate is in sight, you should transfer all monies deposited into non-interest-bearing accounts because each year that income is earned by the estate will require an estate tax return for that year. You should decide when to make the move to non-interest-bearing accounts in consultation with a tax professional.

⁵ Please have patience with the charity beneficiary if their representative has questions about your accounts. Often they have little knowledge about the estate, other than what you tell them. A charity beneficiary has an obligation to its stakeholders which requires an understanding of all estate documents.

6. Estate Expenses

It is your responsibility to find, secure and protect the estate assets, and to pay and settle the legitimate claims of the estate. You can pay the reasonable administrative expenses which you incur as you carry out your duties.

Typical expenses include, but are not limited to:

- Funeral expenses;
- Probate fees;
- Legal and accounting fees;
- Income tax;
- Any unpaid debts of the deceased as at the date of death;
- Cost of agents hired to sell assets or clean up property; and
- Your reasonable out-of-pocket expenses.

The Will may provide guidance as to what additional expenses can be paid from the estate funds such as the costs of shipping personal effects or travel for specific individuals to attend the funeral.

Keep in mind that as Executor, you are not permitted to benefit from your position of trust beyond receiving an authorized Executor's fee. This means that you could not, for example, sell the house on a private basis and claim the realtor's commission for yourself.

Legal Fees

Reasonable legal fees are a legitimate expense of the estate. You want to ensure that any legal bills are based on the time, charges and disbursements of the lawyer, and not based on the value of the estate.

The lawyer's duties may include the following:

- Preparing the documents needed to apply for the estate grant;
- Preparing the documents necessary to transmit title to the assets from the name of the deceased into the name of the Executor;
- Preparing the documents needed to transfer assets to the beneficiaries, or where assets are to be sold, to assist with such transfers;
- Preparing the documents needed to pass your accounts in front of the Court and attend to a Court passing, if necessary;
- Pursuing or defending litigation on behalf of the estate; and
- Providing legal advice as required from time to time concerning all estate administration matters including those arising before and after the estate grant is issued.

If the lawyer is paid to perform services that the executor should have done or that the executor could have done as a lay person, the remuneration paid to the lawyer may be correspondingly deducted from the executor's remuneration.

The lawyer's fees will also depend on the level of difficulty in relation to the estate which will depend factors such as:

- The type of assets in the estate;
- The location of the assets;
- Whether the Will is complicated or includes errors or other potential problems;
- Whether there are any challenges to the Will; and
- The time taken in carrying out the lawyer's duties.

Executor's Fees

You have the right to compensation for the duties you perform as executor to the extent permitted by law and/or by the Will. Sometimes the Will stipulates a specific fee or that you are to receive a cash gift in lieu of fees. This may have been done for your benefit as a gift under a Will is generally not taxable. Executor's fees are earned income under the Income Tax Act and should be reported as income on your tax return in the year that you receive them.⁶

Where the Will stipulates the amount or percentage of the estate to be taken as Executor's fees, you are bound to charge only that amount or percentage. Where there is no compensation agreement and the Will is silent on the matter of fees, the fees permitted by the *Trustee Act* are as follows:

88 (1) A trustee under a deed, settlement or will, an executor or administrator, a guardian appointed by any court, a testamentary guardian, or any other trustee, however the trust is created, is entitled to, and it is lawful for the Supreme Court, or a registrar of that court if so directed by the court, to allow him or her a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble and his or her time spent in and about the trusteeship, executorship, guardianship or administration of the estate and effects vested in him or her under any will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper.

(2) The court or a registrar of the court if so directed by the court, may make an order under subsection (1) from time to time, and the amount of remuneration must be allowed to an executor, trustee, guardian or administrator, in passing his or her accounts, in addition to any other allowances for expenses actually incurred to which the trustee, executor, guardian or administrator may by law be entitled.

(3) A person entitled to an allowance under subsection (1) may apply annually to the Supreme Court for a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets.

⁶ The charity beneficiary wants to see you fairly compensated for your work on their behalf. They also have a duty to their stakeholders to ensure the deceased's intentions to support the charity and the people it serves are honoured.

A fair fee (established through the principles of case law) is wholly dependent upon the facts and circumstances of the estate, but the factors to consider include:

- The size of the estate;
- The complexity of the estate;
- Any particular problems that were encountered;
- The time spent in and about the administration; and
- The success of the administration.

As outlined in Section 88 of the *Trustee Act*, RSBC 1996, c. 464, an Executor, taking into consideration the facts and circumstances of the estate detailed above, is permitted to charge **up to** 5% of the aggregate value of the estate. Typically, for a simple, straightforward estate administration, an Executor would charge in the range of 2% to 3%. An Executor fee of 5% is generally reserved for those estate administrations of the most complex and onerous kind. In addition, as detailed above, the *Trustee Act* permits an Executor to charge up to 0.4% of the average market value of the estate assets under management as a care and management fee for each year they administer the estate.

Where, on the surface, an estate looks as if it would be fairly easy and straightforward to administer but in fact is not, it will help to keep a record of your actions. The charity beneficiary will want to ensure you are compensated for carrying out the deceased's wishes so any clarification of your activities will be appreciated.

Note: You are required to have the approval of the residual beneficiaries (or intestate successors) before taking your fees. Unless the Will provides otherwise or you have a separate fee agreement, you must not "pre-take" Executor fees. In most cases, beneficiary approval is incorporated at the time of obtaining a release for your administration from the residual beneficiaries (or intestate successors). If you and those beneficiaries cannot reach an agreement regarding the estate administration and your requested compensation, each of you has the right to have the accounts passed before the Court in a prescribed format which is why it is essential that you keep complete accounting records. For a Court passing of accounts, it is prudent to consult a lawyer to assist you in this process.

Taxes

One of the most important liabilities of the estate is usually income tax. The following tax returns are required:

- General T1 of the deceased for any year prior to death that had not been filed and tax is payable;
- General T1 of the deceased for the year of death (January 1 to date of death); and
- T3 on behalf of an income earning estate.

The T1 to date of death is due 6 months from the date of death or April 30th of the year following the date of death, whichever date is later. In addition, if the deceased died between January and April, potentially they may not have filed the previous year's return, which is due within 6 months of the actual date of death.

The following must be reported on the final personal tax return or T1 to date of death:

- Income received in the year to the date of death;
- Income accrued to the date of death;

- The full value of any RRSPs and/or RRIFs unless they are gifted to a spouse, or in certain cases, to a dependent child or grandchild; and
- For a death that occurred prior to January 1, 2016, a person is deemed to have disposed of all his or her property for fair market value immediately before he or she dies. Any capital gains arising from such deemed dispositions must be included in the T1 to date of death. For deaths after January 1, 2016, charitable gifts are no longer deemed to have been made immediately before death but instead are deemed to have made at the time the property is transferred.

A rollover of property to a spouse may defer the capital gains tax; and capital gains on the deemed disposition of the principal residence are generally not taxable in the T1 to date of death. It is also possible under certain circumstances that up to four personal income tax returns might be filed for the year of death. This may present an opportunity for income-splitting. Check with a tax professional who has experience in estate and trust taxation, particularly if the deceased was the proprietor or a partner in a business, or received income from a trust fund.⁷

Where the estate earns income from the date of death to the date it is wound up, a trust return or T3 must be filed. For the first 36 months, the estate may qualify as a “graduated rate estate” or a GRE. Estates not designated as a GRE estate will be subject to the highest marginal tax rate applicable to individuals.⁸

Allocating income to the residual beneficiaries (or intestate successors) may reduce the taxable income of the trust. If a capital gain is realized on the difference between the date of death value and the actual sale proceeds, this gain may also be allocated to the residual beneficiaries (or intestate successors). If a capital loss is incurred in like manner on the T3 return within one year of the date of death, this loss may be carried back for application against any capital gains reported on the T1 to date of death.

A donation tax credit is available for donations made to charities. Prior to January 1, 2016, the donation tax credit was only available to be claimed on the deceased’s personal tax return in the year of death or the year immediately prior to death. For a death occurring after January 1, 2016, a GRE may claim for charitable donations made by a Will or by designation in an RRSP, RRIF, TFSA , or life insurance policy. A gift is no longer deemed to have been made at the date of death but is now deemed to have been made by the estate at the time the transfer is made. Subject to certain time limits, the executor of a GRE may allocate the donation and claim the donation tax credit for any of the following:

- The estate in the year in which the donation was made (to a maximum of 75% of net income);
- The estate in an earlier taxation year (to a maximum of 75% of net income);
- The estate in five subsequent taxation years; or
- The deceased in the year of death or the year immediately prior to death (to a maximum of 100% of net income).

In other words, where registered charities are beneficiaries under the Will, there is greater flexibility. This is a major benefit to the estate and the other residual beneficiaries.

It may be possible to provide a letter from the charity to the CRA in which the charity acknowledges the bequest and states the charity’s willingness to accept the bequest in advance of the distribution and receipt of charitable tax receipt. This can save the added time and expense of having to adjust the final tax return and request a refund.

⁷ Where registered charities are significant beneficiaries under the Will, there may be no final year tax liability at all, other than the claw back of Old Age Security payments.

⁸ Charities are not required to pay income tax. Consider allocating the estate trust income to the charity to reduce taxes payable by the estate.

Note that not all not-for-profit organizations are registered charities for tax purposes. Consult with the charity or your professional advisor for help in determining the amount and availability of this credit.

If you are unclear about the income tax requirements, it may be wise to hire an accountant who understands the nature of tax returns for deceased persons and estates. Reasonable accounting fees are a legitimate estate expense if your expertise is not income tax. If you distribute the estate and have not obtained the necessary tax clearances, you will be held personally liable for payment.

Out-of-Pocket Expenses

Do not forget to claim the out-of-pocket expenses you incur during the normal course of the estate administration. Mileage, telephone calls, and postage can all add up, and you are entitled to reimbursement for these expenses. You however, cannot charge your time as an out-of-pocket expense.

Ex-gratia Payments

You may find as the Executor you are presented with claims to the estate which could be called into question as to their reasonableness or validity. For example, travel expenses for persons attending the funeral, claims for reimbursement for promises allegedly made by the deceased during their lifetime but with no documentation to prove the promise was made, or gifts allegedly promised prior to death, but not actually given. These claims require careful consideration because if they are not approved by all beneficiaries of the estate, you may be held personally liable to reimburse the estate for the value. Please consult with the appropriate parties and/or your lawyer when you are asked to make such a payment.

7. Releases

It is prudent to obtain an acknowledgement of receipt from every beneficiary and a form of release from each residual beneficiary (or intestate successor) when making distributions. With signed releases you know the residual beneficiaries (or intestate successors) are satisfied with the receipts and disbursements of the estate and the amount available for distribution, as well as approving your compensation. If you have provided an interim accounting or interim distribution, you will want an interim release on the administration done to date. When you provide a final accounting, you will want a final release for all the work you have done and after obtaining the final releases you can make the final distributions.

Generally, the final releases mean that residual beneficiaries (or intestate successors) can never come back to you and dispute account items or ask for more money from the estate. Of course, if you subsequently discover other assets belonging to the estate, for example, someone else died leaving money to the original estate, you are still obliged to report this to the beneficiaries and submit a supplemental affidavit to the Probate Registry, pay the appropriate amount of probate fees on these assets, and pay out to the remainder to the beneficiaries after having accounted for any relevant tax considerations.

8. Distribution of the Estate

Interim Distribution

If there is a surviving spouse or child, you would not normally distribute the estate until 210 days after the date of the grant of probate due to potential wills variation claims under the WESA. Once this period has elapsed, if all liabilities have been paid and the accounts have been approved, you are in a position to make a distribution from the estate.

If you have not already done so, you will first want to pay the cash legacies and transfer any specific gifts of property to the beneficiaries.

Next, distribute the residue of the estate pursuant to the terms of the Will and the approved accounts. Typically, the interim distribution represents the bulk of the estate with a reasonable amount of cash or other assets held back for the winding up expenses and tax contingencies.

Clearance Certificates

Where there is a real question regarding the deceased's tax filings prior to death that requires investigation or where the estate devolves into a trust, you will want two Tax Clearance Certificates from Canada Revenue Agency, one for the T1 to the date of death, and the other for the T3 return filed for the estate itself. In most cases, the final Clearance Certificate is sufficient as it covers the deceased's filings and the estate filings in one application.

Typically, these requests can take anywhere from 6 weeks to 6 months to process, and sometimes longer after you have received the Notice of Assessment. If the deceased owned assets situated in other countries, you may also need to satisfy the taxation requirements of that jurisdiction, prior to making your final distribution of the estate. There are further taxation filing requirements when distributing an estate to beneficiaries who reside outside of Canada, and you should consult with a tax professional to determine what filings are required, if this is the case.

Final Distribution and Release

Once the final tax clearance certificates have been received from the Canada Revenue Agency, you will need to do a final accounting of the estate to the residual beneficiaries (or intestate successors), obtain final releases, and distribute accordingly.⁹

9. Glossary

Please note these definitions have been provided with a view to giving a definition of the word/phrase in the context of estate administration for the reader for information and assistance only.

Administrator: Individual appointed by the court to administer the estate of the deceased where there may or may not be a Will.

Affidavit: A sworn statement, in writing, made before an authorized officer, usually a commissioner, lawyer, or notary public.

Asset: Property of any kind, including real and personal property, (land, money, shares etc.) which a person

⁹ *At this point, your job as executor is over. Again, we wish to express our most sincere and abiding gratitude for your time and your efforts in the administration of the estate.*

owns or has a quantifiable interest in ownership.

Beneficiary: A person who receives a benefit under a Will of a deceased person, whether money or property.

Capital Gain: Profits realized on the sale of an asset, or profit deemed to be realized on the death of an individual, as if the asset had been sold on the date of death.

Capital Loss: Loss incurred on the sale of an asset, or loss deemed to be incurred on the death of an individual, as if the asset had been sold on the date of death.

Charity: Although the Income Tax Act does not define “charity”, a registered charity is a charitable organization, public foundation, or private foundation that is created and resident in Canada. It must use its resources for charitable activities and have charitable purposes that fall into one or more of the following categories: (1) the relief of poverty; (2) the advancement of education; (3) the advancement of religion; or (4) other purposes that benefit the community. A registered charity in Canada can issue official donation receipts for income tax purposes.

Codicil: A document which amends a valid Will. Instead of rewriting the entire Will, a Codicil is sometimes used to make minor changes to an existing Will. (For example, to change the name of the Executor). It must be executed in the same manner as the Will to be valid. Codicils are not used as frequently today, as computer word processing makes it easy and economical to reproduce the entire Will, with those minor changes.

Committee (of Estate): A person who has been legally appointed by the Supreme Court of British Columbia to manage the financial, legal and sometimes personal (Committee of Person) affairs of an incapable adult. Under s. 24 of the *Patients Property Act*, RSBC 1996, c. 349, the authority of the Committee of Estate continues past death, until the personal representative of the estate is appointed. This does NOT entitle the Committee of Estate to distribute the assets of the estate under case law.

Creditor: A person/company to whom money is due. “Secured creditors” have first entitlement to be paid from a specific asset; “preferred creditors” have priority (e.g. CRA, BC Ambulance) in being paid ahead of “ordinary creditors” who are unsecured and rank equally.

Debtor: A person/company who owes money.

Disclosure Statement: The Statement of Assets, Liabilities and Distribution filed by the applicant with the application documents for the estate grant at the probate registry of the Supreme Court.

Electronic Form: A Will is considered to be in electronic form, a legitimate type of Will, when it is recorded or stored electronically, capable of being read and capable of being reproduced in a visible way.

Electronic Presence: The circumstances in which 2 or more persons in different locations communicate simultaneously to an extent that is similar to communication that would occur if all the persons were physically present in the same location.

Estate Assets: Property of a deceased subject by law to payment of his/her debts and gifts. These are the assets that will “flow through the Will” and do not pass directly to named beneficiaries or joint tenants outside the

estate.

Estate Grant (also known as the Grant of Probate or the Grant of Administration, as applicable): Overarching term to describe the document issued by the Supreme Court of British Columbia in relation to the appointment of an Executor under a Will or an Administrator with or without Will annexed. The Executor uses this document when dealing with third parties about estate assets, e.g., the Land Title Office, financial institutions, ICBC, Canada Revenue Agency among others. It confirms the authority of the Executor to give instructions.

Executor: Individual appointed in a Will to administer the estate of the deceased. The feminine form, “executrix” (plural, “executrices”), is sometimes used, especially in older wills.

Grant of Probate: Court document issued by the Supreme Court of British Columbia confirming the Will as the Last Will of the deceased and the appointment of the Executor(s) named in the Will.

Incapable Person (Adult): A person who is described as incapable of managing his or her financial or personal affairs due to mental infirmity arising from disease, age or otherwise, in certificate signed by the Director of a Provincial mental health facility, or Officer in charge of a psychiatric unit (Certificate of Incapability) or by a Court Order appointing a Committee of Estate, Person, or both.

Intestate: The act of dying without a Will, or a person who dies without a Will. The *Wills, Estates and Succession Act* will determine the distribution of the estate and who is entitled to administer the estate.

Intestate Successor: A person who is entitled to receive all or part of an intestate estate.

Issue: Term commonly used in a Will which may mean either the person’s children or grandchildren, or all the will-maker’s lineal descendants, depending on the context in which it is used.

Liability: A debt. Money owing by the estate.

Liquidate: Selling assets and converting them to money.

Next-of-Kin: Blood relatives of a person. Under the *Wills, Estates and Succession Act*, the persons who inherit under the intestacy distribution provisions.

Non-Profit Organization: An Not-For-Profit organization created for purpose other than profit that is not a registered charity. A Non-Profit Organization cannot issue tax receipts for donations.

Not-For-Profit Organization: An organization that is either a non-profit or a registered charity.

Personal Property: All property other than land and buildings.

Personal Representative: Name given to the individual administering the estate; the person legally entitled to deal with the assets, either the Executor or the Administrator.

Power of Attorney: A legal document by which you grant someone the authority to act on your behalf in financial matters while you are alive. It permits your designated attorney to step into your shoes and handle your affairs as if they were you, and if the document indicates, can authorize the authority to continue, should

you become incapable. The authority under a Power of Attorney ceases at death.

Probate Division of the Supreme Court: The Court responsible for the appointment of the personal representatives, and generally involved with issues arising during the administration of estates.

Real Property: Property that is lands and buildings and things affixed to them, also known as “real estate”.

Residual Beneficiary: The beneficiary to whom the residue of the estate is left.

Residue: Those portions of an estate remaining after the debts of the deceased have been paid and all specific gifts of real and personal property have been made.

Testamentary Trust: A trust created by the terms of a Will.

Transfer: The act of conveying title to real property.

Trust: The entity created when one person (the trustee) holds the property of another person (the settler or benefactor) for the benefit of another person (the beneficiary).

Will: A Will is a written document that expresses a person’s final wishes concerning the disposition of his or her estate following death. To be valid in BC the Will must conform to specific rules, including:

- Will-maker must be at least 16 years old when the Will is made, subject to certain limited exceptions;
- The Will must be in writing; and
- The Will must be signed by the Will-maker at its end in the presence of two witnesses who are not (and are not the spouses of anyone who is) named in the Will as an Executor or beneficiary, who must also sign in the presence of each other and the Will-maker. This requirement can be met through electronic signature in the case of an electronic Will.

If you find a document prepared by the deceased that appears to have been intended to be a Will, but it does not conform to the specific rules set out above, you should obtain legal advice as it may be possible to have the document declared to be a Will by way of an application to the Court.

Wills, Estates and Succession Act or WESA: This British Columbia statute governs wills and estates in British Columbia, including estate administration and wills variation claims. It became law in 2014, replacing BC’s older estate and succession laws.

Wills variation claim: A claim brought under Division 6 of the WESA. Division 6 gives the spouse or child of the deceased person the right to seek a variation of the provisions under the Will if they consider that adequate provision has not been made for them.

Executor's Notes