

CHAPTER SIXTEEN B: PROBATE & ESTATE ADMINISTRATION

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CHAPTER SIXTEEN B: PROBATES & ESTAE ADMINISTRATION

I. PROBATE AND ADMINISTRATION OF THE ESTATE

A. *Introduction*

The area of law known as “estate administration” is primarily concerned with legal rights and responsibilities that arise after death. The death of an individual will give rise to a number of immediate legal questions: Who will have authority to deal with assets and liabilities? What are the rights and responsibilities of that person? What assets form part of the estate? How is the estate to be divided? How are liabilities to be paid? This section will answer these questions in a summary fashion and will aim to give readers a sense of the basic principles and practices of estate administration. Readers are advised to seek professional legal advice for their own individual situations.

B. *Testate and Intestacy*

The authority to administer the estate of a deceased individual vests with the personal representative, whose identity will depend largely on whether the deceased individual had a valid will when he or she died.

If the deceased individual died with a valid will, it is said that that individual died “testate”. The executor named under the last valid will, if he or she accepts the appointment, will be vested with legal authority over the estate. In theory, an executor takes authority from the will, and accordingly has authority immediately upon death. This concept is expressed through the legal adage that a will “speaks from death.” In practice, although an executor has legal authority from the date of death, most third parties (e.g. banks and the Land Title and Survey Authority) will not recognize that authority without a representation grant from the court.

If the deceased individual died without a valid will, he or she is said to have died “intestate”. In such a case, an application must be made to the court for the appointment of an administrator for the estate. As there is no valid will, the authority to deal with the estate originates from the court grant of administration. This concept is codified in section 102 of the *Wills, Estates and Succession Act* (“*WESA*”), which provides that in the case of an intestacy, or if an executor is not named in a will, the estate of the deceased person “vests in the court”.

C. *Representation Grants Generally*

Grants of probate and grants of administration are two types of “representation grants”. As a valid will grants authority to the named executor, there is theoretically no need for a named executor to obtain a representation grant from the court. As a practical matter, however, an executor may not be able to accomplish much without a representation grant.

If there is no will, all of the property of the deceased vests in the court (*WESA*, s 102), and accordingly, no person has authority unless the court issues a representation grant to that person.

Two provisions in *WESA* are particularly important to understanding the basic effect of obtaining a representation grant. First, section 136 of *WESA* provides that a representation grant, when issued by the court, gives exclusive authority to the person named in the grant to administer the estate. Second, section 137 of *WESA* provides that a person who transfers estate property or releases a document or information to a personal representative is not liable for any damage that may result. These two sections give legal assurance to third parties dealing with a personal representative.

D. *Jurisdiction*

An administration grant is usually applied for in the jurisdiction where the deceased was domiciled at the time of death. Where a person was last residing is a good indicator of domicile, but it is not determinative.

If the deceased had assets in multiple jurisdictions, it may be necessary to obtain a representation grant in one jurisdiction, and then to have that grant “resealed” locally in each jurisdiction where assets are located. Furthermore, in such a situation, British Columbia law, including intestacy rules for example, may not apply. These situations are governed by the rules of “conflict of laws”.

E. Probate

1. Generally

A grant of probate is a form of representation grant that is issued to the executor appointed by a will. Pursuant to sections 136 and 137 of *WESA*, a grant of probate gives exclusive authority to the named executor to deal with the estate and grants legal protection to third parties who rely upon the grant.

2. Who May Apply?

An executor appointed under a will may apply for a grant of probate. An alternate executor may apply if the conditions set out for the appointment of that alternate executor are satisfied.

3. Solemn Form versus Common Form

Where the validity of a will is uncontested, the registrar of the court may issue the grant of probate (*WESA*, s 129(3)) upon an application being made in the form and manner set out in the Supreme Court Civil Rules.

Although obtaining a grant in this manner will ordinarily be sufficient, it does not conclusively determine that a will is valid. Where a grant has been obtained this way, the will has been proven only in “common form” or “simple form”. If the will is later found to have been invalid, or a later will is found, the grant of probate may be revoked. In this situation, the personal representative may be liable for having distributed the estate assets to the incorrect beneficiaries.

Obtaining proof of a will in “solemn form” (also known as “proof in form of law” or “proof *per testes*”) gives a greater degree of protection to an executor. This requires a hearing in open court before a judge, with testimony from witnesses to the will. If a will is proven in solemn form, the grant cannot be revoked unless a later will shows up, or it was obtained by fraud (see *Romans Estate v Tassone*, 2009 BCSC 194 for a discussion).

F. Administration

1. Generally

A grant of administration is a form of representation grant issued to an individual other than an executor appointed under a will. A grant of administration will be required on intestacy, or where there is a will, but the appointed executor is unwilling, incapable or dead, or where no executor is appointed. The procedure for administration is similar to probate, except that the court must appoint an administrator, and bonding may be required.

The consent of the Public Guardian and Trustee’s office is required where a minor’s property is involved. The Public Guardian and Trustee’s consent is also needed on probate if any minor is a beneficiary and a trustee is not appointed in the will for such minor beneficiary. An administrator’s powers and duties are indistinguishable from an executor’s and are set out in *WESA*.

2. Who May Apply?

Under sections 130 and 131 of *WESA*, an individual may apply to the court to be appointed Administrator of an estate. Section 130 enumerates the order of priority for applicants of an intestate estate, favouring the spouse of the deceased, followed by a child of the deceased

who obtains the consent of the majority of the children of the deceased. Section 131 enumerates the order of priority for applicants of an estate where the appointed executor is unable or unwilling to act. Priority is given to a beneficiary that applies with the consent of the beneficiaries who, along with the applicant's interest, are entitled to a majority interest in the estate.

G. Probate Fees

Before a grant is issued, probate fees must be paid on the value of the deceased's assets as at the date of death. Only secured debts (i.e. debts secured on property by a mortgage) may be subtracted from the value of assets when determining the amount of fees payable.

It should also be noted that probate fees in British Columbia are low. As stated in section 2(3) of the *Probate Fee Act*, SBC 1999, c 4.

2(3) If the value of the estate exceeds \$25 000, whether disclosed to the court before or after the issue of the grant or before or after the resealing, as the case may be, the amount of fee payable for an estate over \$25,000 up to \$50,000 is \$6 for each \$1,000 or part of \$1,000. For estates over \$50,000, the fee is \$14 for each \$1,000 or part of \$1,000.

An easy way to calculate probate and application fees for estates over \$50,000 is to round the value of the estate to the next \$1,000, multiply it by 0.014 and subtract \$350 from the result.

H. Assets Passing Outside of Estate

Not all assets of the deceased will form part of the estate. It is not necessary to obtain a representation grant to deal with these assets.

There are four primary categories of assets that fall outside of the estate:

1. Pensions and retirement plans, including Registered Retirement Savings Plans, Registered Retirement Income Funds, for which a beneficiary may be designated. If no designation has been made or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will be an asset of the estate and will vest in the personal representative.
2. Life insurance proceeds, for which a beneficiary or successor may be designated. If no designation has been made, or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will form part of the estate.
3. Assets held in joint tenancy with another will pass to the surviving joint tenant.
4. A Tax Free Savings Account for which a beneficiary has been designated will not form part of the estate. If no designation has been made, or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will pass through the estate.

I. Vehicles

A vehicle registered in the name of a deceased owner can be transferred at an Insurance Corporation of British Columbia Autoplan broker. If the motor vehicle is owned jointly, the surviving owner will need to bring the current vehicle registration and the original death certificate or a certified copy of it.

If the estate is valued at less than \$25,000, the executor of the estate may transfer the vehicle without obtaining probate of the last will. The executor will need to provide the original death certificate or a certified copy of it, a statutory declaration stating that the estate is not worth more than \$25,000 (which can be provided by the Autoplan dealer and must be sworn before a lawyer or notary public), and the original last will.

A summary of other situations in which a vehicle can be transferred without a grant of probate may be found at <https://www.icbc.com/vehicle-registration/sell-vehicle/Documents/estate-transfers.pdf>.

II. DUTIES OF A PERSONAL REPRESENTATIVE

A. *General Duties*

The basic duties of an Executor/Administrator are to:

- Obtain a death certificate from the Department of Vital Statistics. Ordinary, however, a funeral home will likely order and provide a death certificate
- Locate the last will if there is one and apply for a search of wills notices
- Arrange for the disposition of the deceased's body and the funeral
- Determine the names and addresses of the beneficiaries and intestate heirs and notify them
- Cancel subscriptions, redirecting mail and wrapping up personal matters
- Gather papers relating to assets and ascertain the value of the assets (by way of an inventory, taking into account debts and liabilities)
- Safeguard assets until they are sold or distributed, including the transfer of ownership registration and the collection of any debts
- Sell assets if it is necessary and distributing the estate
- Prepare and file tax returns
- Notify appropriate agencies (pensions, subscriptions, charge accounts, etc.)
- Consider advertising for creditors
- Pay all valid debts left to the estate (please note that an executor or administrator may be held personally liable for unsettled debts after the distribution of the estate)
- Prepare and obtain approval for the beneficiaries for distribution of estate

B. *CPP Death Benefits*

The Canada Pension Plan (CPP) death benefit is a one-time, lump-sum payment to the estate on behalf of a deceased CPP contributor.

If an estate exists, the executor named in the will or the administrator named by the court to administer the estate applies for the death benefit. The executor should apply for the benefit within 60 days of the date of death.

If no estate exists or if the executor has not applied for the death benefit, payment may be made to other persons who apply for the benefit in the following order of priority:

1. The person or institution that has paid for or that is responsible for paying for the funeral expenses of the deceased;
2. The surviving spouse or common-law partner of the deceased; or
3. The next-of-kin of the deceased.

To be entitled to a CPP death benefit, the deceased must have made contributions to the lesser of:

- One-third of the calendar years in their CPP contributory period, but no less than 3 calendar years; or
- 10 calendar years

The amount of the death benefit depends on how long and how much the deceased contributed to his/her CPP, with the maximum benefit set at \$2,500.

As of January 1, 2019, the death benefit for all eligible contributors is set at a flat rate of \$2,500.

To apply, complete the Application for a Canada Pension Plan Death Benefit (ISP1200), include certified true copies of the required documentation, and mail it to the closest Service Canada. Addresses are provided on the form (ISP1200).

C. *Search of Wills Notice*

If the deceased made a will, he or she may have filed a Wills Notice with the Vital Statistics Registry. Note that the Vital Statistics registry does not keep a copy of the will, and will only have a record of the date the will was made.

To obtain a representation grant through the court registry, a personal representative needs to provide two copies of a Wills Notice Search, which can be obtained on application to the Vital Statistics Registry. A Wills Notice Search provides the date the person signed the will registered in the wills notice, the location of the will at that time, and the date the Vital Statistics Agency received the wills notice.

If the will-maker is alive, only the will-maker can request a Wills Notice Search. However, a person who provides the documentation and payment listed below can apply for a Wills Notice if the will-maker is deceased:

- A photocopy of the death certificate
- A completed VSA 532 form

To apply for a search, a person has to mail the requested documents to: **Vital Statistics Agency**, PO Box 9657 Stn Prov Govt, Victoria, BC V8W 9P3. Alternatively, they can deliver the requested materials to a Service BC Counter to request for a Search of Wills Notice. Please note that you cannot ask for a search online, unlike filing a Wills Notice.

The cost to conduct a Wills Notice search is \$20 per will search, plus \$5 for each additional name the will-maker may have used. The results are usually printed within 20 business days. If you are pressed for time, you can also request Courier Delivery. In the case of Courier Deliveries, there is an additional \$33 fee for the courier, but it prints next business day.

D. Other Asset Distribution Instruments

If life insurance policies and RRSPs have pre-existing designated beneficiaries, they will not form part of the will-maker's estate and will be administered outside of the probate process.

For life insurance policies with designated beneficiaries, the proceeds do not form part of the estate. A beneficiary designation in a will is invalidated by a subsequent designation made in an insurance policy or is revoked when the will is revoked (see *Insurance Act*, s 61(2)).

Also, a will cannot revoke an earlier life insurance designation unless it complies with section 60 of the *Insurance Act*. It requires that the policyholder file a contract or declaration with the insurance company, designating the beneficiary of the policy irrevocably. If this document is filed, the beneficiary must consent to any change to the designation. However, a general revocation clause that does not specifically refer to the insurance policy or contract does not revoke the designation made prior to the will because it does not meet the definition of "declaration" under the *Insurance Act*; see *Hurzjin v Great West Life Assurance Company*, (1988) 23 BCLR (2d) 252 (SC).

Those with a significant amount of money in RRSPs should consult a tax lawyer or tax accountant for estate tax planning advice, as there are several tax rules that apply solely to the final year of a person's life.

E. Time for Distributing the Estate

As a rule of thumb, an Executor has one year from the date of death (known as the "Executor's year") to distribute the estate. The concept of the executor's year derives from presumption that an executor will be capable of dealing with the estate's affairs within this period.

The concept of the executor's year has two aspects:

1. A court will ordinarily not compel an executor to make a distribution before the expiry of this period.
2. Except when specifically provided in a will, a legacy will not carry interest until a year after the death of the will-maker.

However, it should also be noted that under section 155 of *WESA*, a personal representative of a deceased person must not distribute the estate of the deceased in the **210 days following the date of the issue of a representation grant** except with the consent of all the beneficiaries and intestate successors entitled to the estate or by an order of the court. This period is to allow any individuals

who wish to make a claim against the estate to file a claim. Additionally, the personal representative must not distribute the estate after 210 days without the consent of the court if:

- There is a commenced proceeding to determine if a person is a beneficiary or if a person is an intestate successor,
- If relief is sought under a wills variation claim, or
- Other proceedings have been commenced which may affect the distribution of the estate.

F. Payment of Debts

The personal representative is personally liable for payment of creditors if he or she pays the beneficiaries before the debts of the estate. Thus, a personal representative should advertise under section 38 of the *Trustee Act*, wait 21 days from the last publication, pay any claims that arise, and then pay the beneficiaries. Having advertised, the personal representative will not face personal liability. But the personal representative would still be responsible for the debts, regardless whether he/she has advertised or not, if the personal representative has knowledge of the creditor's claim prior to distribution.

G. Income Tax Clearance Certificate

Section 159(2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) prohibits distribution of the assets until a certificate is obtained from the Minister of Finance certifying payment of all taxes. Without such a certificate, the personal representative may be personally liable for the unpaid amount.

However, there have been changes in Canada Revenue Agency (CRA) procedure. It is now possible to review information via online terminals, and usually it is not necessary to obtain the return itself from a taxation centre. The clearance request and necessary documents are not filed with the return, but are forwarded separately to CRA's district office.

The personal representative needs to file a terminal tax return, as well as an estate tax return for every year following death. Generally, the terminal tax return is due on or before the following dates:

- If the death occurred between January 1 and October 31 inclusive, the due date for the terminal tax return is April 30 of the following year; or
- If the death occurred between November 1 and December 31 inclusive, the due date for the terminal tax return is six months after the date of death.

H. Discharge of Personal Representative

When the estate is large, when litigation is involved, or when the estate is insolvent, the personal representative may wish to protect himself or herself before distributing the estate by obtaining a discharge per section 157 of *WESA*. This discharge is not generally necessary where a small estate is involved.

Generally, a personal administrator can consider their duties at an end once all the residuary or intestate beneficiaries have approved their accounts and signed a release, and when they have obtained clearance from the CRA.

I. Passing of Accounts

Section 99 of the *Trustee Act*, RSBC 1996, c 464 sets out the procedure for the passing of the trustee's accounts. Absent written and approved consent by all beneficiaries or a court order, an executor, administrator, and trustee under a will and judicial trustee must, within two years of the grant of probate or grant of administration or within two years from the date of appointment, pass his or her accounts. This is often the process by which an executor, administrator and trustee will have their fees approved.

III. TAXATION: RRSP & RRIF & TFSA

A. *RRSP: Registered Retirement Saving Plan*

In British Columbia, a person may by will gift a property which he or she is entitled at law or in equity at the time of his or her death. This means that the proceeds from a deceased's Registered Retirement Saving Plan ("RRSP") can be distributed to the beneficiary outside of the will if a valid beneficiary designation has been made. However, please note that the deceased's estate will likely need to pay taxes on the value of the RRSP as at the deceased's date of death. This will be taxed as the deceased's income for that year.

A person is "deemed" to have disposed of all assets at the moment before death, and is accordingly taxed in the year of death as such. For example, if the deceased owns a rental property, then that rental property is considered to be sold at the moment of the deceased's death and as a result, the deceased may have earned capital gains from this deemed disposition. Taxes will then be paid on these capital gains.

Additionally, the value of any RRSP or RRIF will also be considered to have been earned in the year of death. This is significant because the inclusion of all these capital gains will most likely bump the deceased to the highest tax bracket. In B.C., this bump could mean that an individual is taxed close to 50% of the income.

The major exception to this rule is the "spousal rollover" rule in section 73 of the *Income Tax Act* ("ITA"). This rule effectively defers payment of taxes owing from the deemed disposition if the asset is given to the spouse of the deceased until the death of the spouse.

If a beneficiary has been designated to receive the proceeds of a RRSP, those proceeds will pass directly to the beneficiary. However, the deceased will be considered to have earned the entire value of the RRSP during his or her year of death and the estate must declare the value of the RRSP on the T1 Terminal Tax return. Accordingly, unless a roll-over provision, such as the spousal roll-over, applies, the estate will be liable to pay taxes on the value of the RRSP.

If the estate is unable to pay the taxes, the beneficiary receiving the proceeds will be liable to pay the taxes owing (s 160.2(1) of the ITA provides that the estate and a designated beneficiary are jointly and severally liable for tax on the value of the RRSP at the date of death).

B. *RRIF: Registered Retirement Income Fund*

The same rules applies to RRIFs as they apply to RRSPs.

C. *TFSA: Tax-Free Savings Account*

TFSA's receive specialized treatment under the *Income Tax Act*. As TFSA's came into effect in 2009, the proportion of the chapter will not be material to the estate of deceased taxpayers who died in 2008 or earlier.

The fair market value of the TFSA will be received by the estate of the deceased taxpayer or any gains that accumulated in the account will continue to be tax-free until the end of the year following the death of the account holder. The tax-free status of the TFSA is preserved if the deceased taxpayer named his/her spouse or common-law partner as the successor account holder.

It is unlikely that tax liability for the income generated by the TFSA from amounts contributed to the TFSA during the taxpayer's lifetime. This is different from RRSPs or RRIFs.

IV. LSLAP FILE ADMINISTRATION POLICY

This section is specific to LSLAP clinicians. It sets out internal LSLAP practice and policy regarding probate and estate administration.

A. LSLAP File Administration Policy – Probate

LSLAP does not advise clients on probate issues. Such clients should be referred to a private lawyer. The potential liability in administering estates is too great to permit greater student involvement; the client should always be referred to a lawyer.

B. LSLAP File Administration Policy – Taxation

Estate taxation is complicated. Clients should be referred to lawyers who specialize in these matters or the CRA, which has agents who specialize in estate taxation.

V. APPENDIX INDEX

A. GLOSSARY

A. GLOSSARY

Administrator – a person appointed by the court to manage the estate of a person who dies intestate (without a valid will)

Attestation – an act of authenticating, affirming to be true, genuine, or correct, in an official capacity of a legal document

Beneficiary – (a) a person named in a will to receive all or part of an estate, or
(b) a person having a beneficial interest in a trust created by a will

Cash legacy – a grant by will of money

Codicil – an addition to a will that changes, explains, revokes, or adds provisions

Equitable title – a title to property in which a party has a beneficial interest and will eventually acquire legal title. For example, the beneficiary of a trust has an equitable title in assets held in the trust

Estate – properties of a deceased person

Exclusion clause – a provision in a will that leaves something or someone out of the will

Execution – an act of signing and otherwise completing a testamentary document, such as acknowledging the signature if required to make the document valid

Executor – a person appointed by will to manage the estate of a person who has died leaving a valid will. The executor must ensure that the person's desires expressed in the will are carried out. Practical responsibilities include gathering up and protecting the assets of the estate, obtaining information in regard to all beneficiaries named in the will and any other potential heirs, collecting and arranging for payment of debts of the estate, approving or disapproving creditor's claims, making sure estate taxes are calculated, forms filed and tax payments made, and in all ways assisting the lawyer for the estate (which the executor can select)

Express powers – stated rights, authorities and abilities in a will of the Executor to take some action or accomplish something, including demanding action, executing documents, contracting, taking title, transferring, exercising legal rights and other acts

Indemnify – to guarantee against any loss that another might suffer

Intestacy – a situation where a person dies without a legally valid will

Joint tenancy – an ownership of real property in which each party owns an undivided interest in the entire property, with both having the right to use all of it and the right of survivorship

Legal title – the ownership of real property, which stands against the right of anyone else to claim the property. In real property, legal title is evidenced by a deed, judgment of distribution from an estate, or other appropriate document recorded in the public records

Personal representative – either the Executor named in the will of a deceased individual or a court appointed Administrator; charged with administration and distribution of the estate

Probate – the process of proving a will is valid and thereafter administering the estate of a dead person according to the terms of the will

Survivorship – the right to receive full legal title or ownership of a property due to having survived another person in a joint tenancy

Testamentary capacity – having the mental competency to execute a will at the time the will is signed and witnessed

Will-maker – a person who has made a will that is in effect at the time of his/her death.

Trust – an entity created to hold assets for the benefit of certain persons or entities, with a trustee managing the trust (and often holding title on behalf of the trust)

Trustee – a person or entity who holds the assets (corpus) for the benefit of the beneficiaries and manages the trust and its assets under the terms of the trust stated in the declaration of trust which created it

Wind up – to liquidate (sell or dispose of) assets of an entity