



YOUR LAWYERS FOR LIFE

WILLS & ESTATES PROBATE

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Probate is a legal procedure where the Will is approved and the appointment of your Executor is confirmed by the courts under provincial legislation.

Depending on various factors such as the simplicity of the estate, the value of the assets and the number of dependants your Will may not have to be probated. Many estates, whether it be by choice or circumstance, end up being probated.

There are reasons why one would want to have a Will probated. If the Executor has not been through the legal confirmation process, third parties such as government agencies and banks could and often will, refuse to recognize the Executor's authority until the courts have validated the Will. There are some situations where applying to probate a Will may be advantageous. For example, in British Columbia the time period for commencing an action to vary a Will under the *Wills Estates and Succession Act* ("WESA") does not commence until the issuance of probate of the Will in British Columbia.

When to Probate

The sooner a Will is probated the sooner you have legal access to administer and ultimately distribute the estate. Applying to the Court for probate includes completing a number of documents to be filed with the courts. This requires a great deal of detailed work and can be a lengthy process so it is recommended to start the probate process as soon as possible.

Executors Duties / Liabilities

As an Executor of an estate you have many duties and liabilities. Depending on the state of the deceased's affairs this can be relatively straightforward or an enormous job requiring a great deal of skill and commitment.

As an Executor your duties include:

Locate and Read the Will

Under ideal circumstances, as the Executor, you already know where the Will is located. If not you must search the most likely places where the Will Maker may have stored important documents to determine whether or not they have left a valid Will. Our laws now permit the Court to find a document that does not meet the formal requirements of a Will to be effective. Any documents reflecting testamentary intentions should be reviewed.

If the Will has been stored in a safety deposit box you must first obtain the Death Certificate and, if available, the key to the safety deposit box. Once the bank or other institution holding the safety deposit box determines that you are the Executor named you will have access to take the Will.

In the case that the safety deposit box was held jointly with someone else it can be transferred to the surviving joint holder immediately.

If only a copy of the Will is located you may have to contact the law firm that drew up the Will or possibly a trust company that has been named the executor on the Will to determine if they are storing the original Will.

You will need to do a Wills Notice Search with the Division of Vital Statistics, which normally takes several weeks. If a Will is located you will receive Wills Notice Search Results that will state the location of any Will or codicil made when notice of it was filed with the Provincial Division of Vital Statistics. A Wills Notice Search must be conducted where you intend to apply for probate.

If you cannot locate a Will, the law presumes that the Will Maker destroyed the Will with the intention of revoking it. This presumption could be rebutted. If a Will is presumed to be revoked or if the deceased never

had a Will then the deceased is presumed by our laws to have died intestate and the provisions of *WESA* will govern the distribution of the assets of the estate. In the case of an intestacy, typically an interested person will make an application to the Court to be appointed the Administrator and the Court issues a Grant of Administration to that person. Our laws set out the priorities concerning who may apply.

Obtain the Death Certificate

Immediately upon the Will Maker's death, you should apply for the Death Certificate. You can normally obtain a Death Certificate from the funeral home director. A Death Certificate is required to prove the death of the Will Maker.

Make Funeral Arrangements

The Executor has the right to determine how the deceased's body is to be disposed of. Any arrangements contained in the deceased's Will regarding burial are not legally binding on the Executor. Normally the family of the deceased makes the funeral arrangements, as the Will often isn't found until after the funeral has been arranged. Expenses incurred by any party for funeral arrangements may be reimbursed by the estate if the arrangements are reasonable under the circumstances. The person making the funeral arrangements will be responsible for any additional extravagant expenses they have incurred.

Arrange Immediate Funds for Survivors

Assets of the deceased are typically frozen until a Grant of Probate or a Grant of Administration ("Estate Grant") is received. The Estate Grant legally allows the Executor or Administrator to deal with the assets of the deceased. For immediate funds one should turn to any assets that pass outside of the estate which are not frozen such as joint bank accounts, properties held in joint tenancy or assets passing to a designated beneficiary. If the deceased had a life insurance policy the designated beneficiary can immediately apply to have the benefits of the insurance policy paid directly to that beneficiary.

If there are no funds immediately available and the banks are unwilling to make alternate arrangements to help the survivors, the Executor may have to arrange a loan for the survivor until the estate assets can be distributed.

Notify Beneficiaries and Others

Normally, by law you are required to notify all parties who have or may have an interest in the estate. If the person to be notified is a minor you must deliver notification to their parent or guardian and the Public Guardian and Trustee of British Columbia. If the person you are to notify is mentally incompetent the notice must be mailed to their committee or the person in charge of their affairs and the Public Guardian and Trustee of British Columbia.

Parties who need to be notified are:

- Beneficiaries.
- All heirs-at-law.
- All persons entitled under *WESA* to vary a Will which include: a spouse and the children of the deceased.

- A spouse who is separated where divorce proceedings are still in process but not complete.

Prepare a list of assets and liabilities

You must prepare a complete list of all the deceased's assets and liabilities as well as their value at the time of death. Only assets and liabilities that make up the estate must be listed, assets that pass outside of the estate by right of survivorship under joint tenancy or designation of a beneficiary do not have to be listed. You are responsible at all times to account for the estate assets.

Protect the Assets

The Executor or Administrator is responsible for the protection of all estate assets including automobiles and real estate. This includes theft, fire, loss and any other destruction. If the Executor or Administrator fails to preserve the assets he or she can be held liable. One way to protect the assets of the estate is to take them into your possession. This should be done with any valuable assets including important documents. Secured storage and or insurance for these assets are recommended. If the deceased owned a business you must arrange for continued, proper management as well as review any investments and collect any income from such items as stocks, bonds, rents or other investments.

Advertise for Creditors and Other Claimants

It is very important to advertise for creditors and other claimants to legally protect yourself, as the Executor or Administrator, from becoming personally liable for future claims. This only protects you, as the Executor or Administrator, and the beneficiaries can still be held liable. Typically an executor advertises in the British Columbia Gazette asking that any creditors of the deceased send their claims to you for settlement.

Apply to Probate the Will

In most instances the Executor will have to arrange for the probate of the Will. The sooner the Will is probated the sooner the Executor has legal access to distribute the estate. Applying for probate (or administration where there is no Will) includes completing a number of documents to be filed with our Courts. This requires a great deal of detailed work and without legal assistance, many times, results in initial rejection. It is recommended that you seek legal assistance to be sure full and complete information is collected and the probate or administration application documents are prepared properly.

File Income Tax Returns

An Executor or Administrator is required to prepare and file income tax returns on behalf of the deceased person. The main types of taxes to be paid by the estate would be income and capital gains. It is good practice to obtain clearance certificates from CRA that certify all taxes, interest and penalties have been paid. An Executor or Administrator's failure to obtain a clearance certificate may result in personal liability for outstanding amounts.

Pay Debts and Expenses

Before distributing the estate to the beneficiaries the Executor or Administrator must pay all outstanding debts including funeral expenses, estate administration expenses and taxes. Administration expenses would include probate fees, asset safeguarding costs, any legal or accounting fees and the executor's fee.

If there is not enough cash available to pay off all of the debt you must convert assets into cash by selling or redeeming them.

In the case that the total liabilities of the estate are greater than the total assets you must pay the debts and expenses in accordance with *WESA*.

Keep Accurate Records and Release from Beneficiaries

It is imperative that you keep complete accounting records, as you are accountable to the beneficiaries for the assets of the deceased. Beneficiaries must review and approve a statement of accounts before the Executor finalizes distribution of the estate and is discharged. You should also have every beneficiary agree in writing to give up any claims he or she may have against the estate.

Slow Distribution of the Estate

Although there is no given time period for how long it should take to distribute an estate there is usually a year of grace, known as "the executors year." After this period the beneficiaries may take action against the Executor or Administrator for failure to satisfactorily perform their duties. An action will only succeed if in fact the Executor or Administrator has not been performing his or her duties. It is not uncommon for distribution of an estate to take several years.

Wills Variation Legislation

The surviving spouse and / or children of the deceased have time set by *WESA* to submit an application to the courts to have the Will varied if they have not been adequately provided for. This means that as an Executor you should not distribute the estate until the statutory time period set out in *WESA* has expired. You may become personally liable if the Will is successfully challenged and you have already distributed some or all of the estate.

Provincial legislation provides a certain period of time from the date of the Estate Grant to apply for a share of the estate, even in the case that there is no Will. It is recommended that the executor wait the required period of time before distributing the estate if there is a possibility that a claim could be made.

Distribute the Estate

Once you have performed all the previous duties you can arrange for the distribution of the estate. You should payout any cash legacies and deliver property gifted under the Will first. If there is not enough cash to pay the cash legacies you may have to sell other assets.

If there was any trusts to be established pursuant to the Will you must make arrangements to have them set up. After all Issues have been dealt with you can distribute the residue of the estate. Keep Accurate Records and Releases from Beneficiaries following the distribution of the estate.

It is imperative that you keep complete accounting records, as you are accountable to the beneficiaries for the assets of the deceased.

Beneficiaries must review and approve a statement of accounts before the Executor or Administrator finalizes distribution of the estate and is discharged. You should also have every beneficiary agree in writing to give up any claims he or she may have against the estate.

Trustee Duties

The duties of a Trustee include the following:

- Execute the trust in accordance with the terms of the trust or will.
- Any duty that requires the trustee to exercise skill and judgment cannot be delegated to another person unless specifically provided for in the trust deed or Will. This does not prohibit the trustee from hiring a professional to evaluate a matter where it would be prudent to do so.
- Implement a rational degree of care, skill, diligence and judgment when managing the trust assets.
- Possess and safeguard the trust property. The trustee must also defend the trust and the beneficiaries against anyone who would dispute the validity of the trust.
- Act in a prudent manner when it comes to investing, acquiring, selling, and managing the trust property in order to make the property productive.
- Treat all of the beneficiaries impartially.
- Avoid any conflict of interest.

Probate Fees

Probate fees are calculated by the value of the assets you pass on through your Will. Fees are due at the time that the Executor makes application for probate of your Will. Many estate plans use strategies to reduce assets that will be subject to probate fees. In British Columbia probate filing fees are calculated as follows:

- For estates under \$25,000 there is no fee payable
- For estates over \$25,000 but less than \$50,000 a filing fee of \$200 plus \$6 per thousand (or part of a thousand) is payable (\$150)
- For estates over \$50,000 a filing fee of \$200, plus \$150 plus \$14 per thousand (or part of a thousand) on the amount over \$50,000.

For example, if the gross value of an estate is \$125,000, the court filing fee will be \$1,400.

The information provided in this document is not intended to be legal advice but rather to provide answers to a number of questions that we are commonly asked. If you have other questions, please call us and one of our lawyers or experienced staff will be happy to help you.