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***Executor's Duties and Probate***  
***Presented for Leave a Legacy Calgary***  
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# What is an Executor?

- ❑ The Executor is the person appointed by the deceased – known as the Testator – and is charged with carrying out the directions, requests and trusts contained in the Will, and with otherwise administering the Testator's estate
- ❑ The Executor is the Testator's legal representative on death



# Definitions

- ❑ Executor vs. Administrator vs. Personal Representative
  - Executor = the person who has been appointed in a Will as the Executor
  - Administrator = the person who wishes to act and administer a person's estate, when a person dies without a Will (called dying "intestate"), or who has been appointed by the Court to do so
  - Personal Representative = generic term, used in legislation, to refer to the Executor or Administrator (whether male, female or plural)
  - "Executor" will be used in today's presentation



# Should you act as the Executor?

- ❑ The decision to act is yours
  - Compellability: you can renounce your right to act
  - Exception: if you have intermeddled in the estate
  - What constitutes intermeddling?
- ❑ What are the factors to consider in whether to act as Executor?



# *Estate Administration Act* (effective June 1, 2015)

- ❑ A personal representative must:
  - (a) perform the role of personal representative:
    - ❑ honestly and in good faith;
    - ❑ in accordance with the testator's intentions and with the will, if a valid will exists; and
    - ❑ with the care, diligence and skill that a person of ordinary prudence would exercise in comparable circumstances where a fiduciary relationship exists;
  - and
  - (b) distribute the estate as soon as practicable.



# Personal liability

- Personal liability may attach to the Executor:
  - Mismanagement of estate assets
  - Neglect or waste of estate assets
  - Failure to pay legally enforceable debts
  - Improper investments
  - Improper payment of debts or legacies
  - Improper accounting of estate assets
  - Failure to pay all taxes owing by the deceased and the deceased's estate



# Complexity

- ❑ The complexity of the Will
  - Are there trusts involved?
  - What are the age of the trust's beneficiaries?
  - What are the terms of the trusts?
- ❑ The nature of the deceased's assets
  - Do you have a personal interest in any of the estate's assets?
  - Do you have the knowledge to deal with unusual assets – i.e. running a business?



# Duty to act

- ❑ Obligation to act personally
  - Do you have the time, resources and expertise necessary to personally carry out the duties of the Executor?
  - Only administrative functions can be delegated – i.e. legal, accounting
  - Responsibility to make decisions is the Executor's alone





# Personal relationships

- Personal relationship with beneficiaries:
  - What is your relationship with the beneficiaries in the estate?
  - If conflict or difficult issues arise, you will be the one the beneficiaries blame
  - Personal and family rivalries can grow to great proportions in the context of estate administration



# Chain of representation

- Chain of representation
  - Was the deceased acting as the Executor of an estate at the time of death?
  - If so, you will also have to take over the administration of that estate – are you willing to do so?



# Bonds

## □ Bonds

- A bond is required if you – or if more than one Executor is appointed, any one of them – reside outside of Alberta
- Are you bondable?
- If there are 2 or more Executors named, but at least 1 is resident in Alberta, a bond is not required



# Compensation

## □ Compensation

- Do you expect to be compensated for your time and effort?
- If so, what amount?
- Executor's compensation is taxable income and CPP must be deducted
- Will the beneficiaries agree to your compensation? What if they don't?



# Acting as a Fiduciary

- ❑ The Executor owes a fiduciary responsibility to the beneficiaries of the estate:
  - Duty to act in good faith and for no improper purpose
  - Duty to direct your mind to the exercise or non-exercise of any discretionary powers
  - Duty to maintain an “even hand” between beneficiaries



# Disposition of remains

- ❑ Disposing of the deceased's remains
  - Funeral expenses are the first charge against the estate
  - Funeral expenses must be kept reasonable in view of the deceased's circumstances and station in life
  - The executor has the legal duty to dispose of the deceased's remains



# Estate assets

- ❑ Determining the full nature and value of assets and debts of the deceased
  - Real estate
  - Bank accounts, GIC's, share certificates, etc.
  - Arranging for a listing of the contents of a safety deposit box
  - Notifying the appropriate authorities from whom the deceased received benefits prior to death – CPP, OAS, Veteran's Affairs, etc.



# Estate assets

- Ensuring that all estate property is properly secured and insured
  - Examine existing life insurance policies, advising insurance companies of the deceased's death, and placing additional coverage if necessary
  - Arranging regular inspections of real property if to be left vacant
  - Arranging for redirection of deceased's mail





# Estate assets

- ❑ (continued...)
  - Taking possession of or securing cash, securities, jewellery or other valuables
  - If an Attorney under an Enduring Power of Attorney was dealing with the deceased's accounts prior to death, you must advise the financial institutions that the Attorney's authority has ended



# Non-estate assets

## □ Dealing with non-estate assets

- Assets held in joint tenancy pass, by right of survivorship, to the surviving joint tenant
- Designated beneficiaries under life insurance policies, RRSP's/RRIF's, TFSA's and pensions will pass to them outside of the estate



# Retaining an estate lawyer

- Retaining a lawyer to advise on the administration of the estate
  - Reviewing the provisions of the Will, or the intestate succession law (if no Will), to determine the beneficiaries of the estate
  - Instructing the lawyer regarding any litigation involving the estate
  - Applying for the appropriate Grant, if necessary (will be discussed in detail later)



# Retaining an estate lawyer

- ❑ (continued...)
  - Reviewing any other agreements regarding the deceased or the deceased's estate, such as:
    - ❑ Matrimonial Property Agreements
    - ❑ Separation Agreements
    - ❑ Shareholders' Agreements
    - ❑ Cohabitation and/or Pre-nuptial Agreements
    - ❑ Child and/or Spousal Support Orders
  - These may be binding on the estate, and it is **VERY** important that you share these agreements with the estate lawyer



# Collecting the estate assets

- Collecting the estate assets
  - Usually done once the appropriate Grant is issued
  - Applying for any pensions, death benefits, or life insurance payable to the estate
  - Establishing an estate bank account
  - Liquidating the estate's assets and ensuring that they are properly invested



# Estate liabilities

- Dealing with estate liabilities
  - Advertising for creditors and claimants
  - Verifying whether claims made against the estate are legitimate
  - Paying ongoing debts of the estate as they become due
  - Reviewing mortgages, leases, etc. and arranging for payment as become due
  - Determining whether any debts are life insured and if so, making a claim against the insurance



# Foreign assets

- If the deceased owned assets outside of Alberta or Canada:
  - Retaining a lawyer in the other jurisdiction to assist or provide legal advice if necessary
  - Receiving tax advice in the event that tax returns need to be filed in the foreign jurisdiction
  - Resealing may be needed depending on the type of asset that is in the other jurisdiction



# Taxation on death

- Dealing with tax matters:
  - Retaining an accountant familiar with estate issues
  - Determining the terminal tax liability of the deceased – deemed disposition of capital property on death
  - Filing the necessary returns and paying any taxes owing
  - Obtaining a Clearance Certificate from Canada Revenue Agency prior to distribution





# Duty to account

- The Executor must keep accurate records, as the Executor has a duty to account to the beneficiaries of the estate:
  - An inventory of property and debts at the beginning and at the end of the accounting period
  - A statement of all property and money received during the accounting period
  - A statement of all property distributed and money paid out during the accounting period
  - A statement of all expenses incurred or paid during the accounting period



# Distribution of the estate

- Distributing the estate:
  - Setting up and determining a procedure to manage ongoing trusts
  - Preparing the estate accounting, including any claim for compensation and the proposed distribution, and presenting the same to the beneficiaries
  - Obtaining releases from the beneficiaries
  - Distributing the legacies and the residue of the estate



# What is “Probate”?

- “Probate” is a Court Order:
  - Means: “Grant of Probate”
  - Certifies the validity and originality of the deceased’s Will
  - Formally appoints the Executor named in the Will – just because you are named, does not mean you have to act



# What is “Probate”?

- ❑ If the deceased died without a Will, it may be necessary to apply for a Grant of Administration
  - In a Grant of Administration, a Court appoints who the Administrator of the estate will be
- ❑ There are many other types of Court Orders available for specific circumstances



# Is obtaining a Grant of Probate necessary?

- ❑ The need to obtain a Grant of Probate is dictated by the nature or value of the assets in the deceased's estate
- ❑ Generally speaking, it is necessary to obtain a Grant of Probate in the following circumstances:



# Is obtaining a Grant of Probate necessary?

- ❑ (continued...)
  - The institution which controls the transfer of one or more estate assets requires a Grant of Probate in order to transmit and transfer the title
  - Example: One of the banks requires probate on all accounts greater than \$100,000.00
  - The deceased owned an interest in land in the deceased's name alone, or as a tenant in common



# Is obtaining a Grant of Probate necessary?

- ❑ (continued...)
  - The validity of the Will is at issue
  - When the Executor wants to obtain protection from liability; i.e. to start the limitation dates running under certain pieces of legislation
  - Where there is no Will – it is necessary to obtain a Grant of Administration
  - Where there is a Will but all named Executors have died, or have renounced the right to act



# Is obtaining a Grant of Probate necessary?

- ❑ Situations where a Grant of Probate is not obtained:
  - One spouse has died and all assets are held jointly
  - Where bank accounts/investments are within “discretionary limits” of the particular financial institutions
  - Where there are minimal assets in the deceased’s name





# Alberta Court fees

- ❑ The Court's issuance of a Grant of Probate or Grant of Administration attracts court fees, according to the net value of property in Alberta
- ❑ Alberta is the only Canadian jurisdiction that has a maximum limit as to the Court fees payable
- ❑ B.C. charges an average of 1.4% on the gross value of the estate
- ❑ Ontario charges an average of 1.5% on the gross value of the estate



# Alberta Court fees

## Net value of Alberta property

- \$10,000 or under
- Over \$10,000, but not more than \$25,000
- Over \$25,000, but not more than \$125,000
- Over \$125,000, but not more than \$250,000
- Over \$250,000

## Court fees payable

- \$35.00
- \$135.00
- \$275.00
- \$400.00
- \$525.00



# Executor's compensation

- Executor's compensation
  - Not all Executors will charge a fee
  - Many Executors wish to be compensated for their time, effort, and expertise, especially in difficult estates
  - The Will itself may fix the compensation for the Executor
  - If a professional Executor – such as a trust company – is involved, they usually require that the Will reference a fee agreement for their compensation



# Executor's compensation

- Amount of compensation
  - If the amount of Executor's compensation is not otherwise fixed by the Will or in a contract, the legislation gives us guidance only
  - There are no definitive rules; each case must be examined on its own merits
  - General rule of thumb is 1% to 5% of the value of the estate



# Executor's compensation

- ❑ The following factors are relevant when deciding an Executor's compensation:
  - The gross value of the estate
  - The complexity of the work involved
  - The amount of skill, labour, responsibility, support & specialized knowledge needed
  - The time expended
  - The number of Executors appointed in the Will
  
- ❑ The beneficiaries of the Estate must approve the Executor's compensation, if not set in the Will. Failing that, the Court must approve



# Legal fees

## □ Legal fees

- Depends on the complexity of the estate and the estate lawyer retained
- Some lawyers charge their hourly rate for advising the Executor through to distribution of the estate
- Some lawyers charge an estate value fee: base fee of \$2,250.00 plus 1% of the gross value of the estate, if the estate is greater than \$150,000. Ongoing legal assistance in the administration of the estate is then based on the estate lawyer's hourly rate



# The Switch Up: Who should be *your* Executor?

- ❑ Now that you are aware of the responsibilities and duties of an Executor, who should you choose to be your Executor?
  - Someone whom you consider to be trustworthy and fiscally responsible
  - Someone who is ready, willing, and able to act
  - If your estate is complex, you should consider a professional Executor
  - Always consider alternate Executor(s) in case of death/incapacity/ renunciation of first named Executor



# The Switch Up: Who should be your Executor?

- ❑ (continued...)
  - If you anticipate controversy and conflict amongst your beneficiaries, you may want to choose someone from outside of your family to ensure impartiality
  - Someone who is younger than you and likely to outlive you
  - Ideally, someone who is resident in Alberta, due to Alberta's bonding requirements





# The Switch Up: Who should be your Executor?

- ❑ Some options to consider, with the described factors in mind:
  - Family members
  - Friends
  - Professionals
  - Trust companies
  - The Public Trustee



# Final notes....

- ❑ Administering an estate as an Executor is a difficult and time-consuming job
- ❑ There are many legal complexities involved and the job should not be taken lightly; your personal liability is at stake
- ❑ If you have specific concerns, please consult an estate lawyer



# Thank You!

## *Questions?*

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