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## ESTATE ADMINISTRATION

### PERSONAL REPRESENTATIVE'S DUTIES

As Personal Representative, you are the person primarily responsible for the administration of the estate. Enclosed is a copy of Schedule 1 of the Surrogate Rules of Court. This Schedule explains the duties of the Personal Representative and those of the lawyer. The Table of Personal Representative's Duties are repeated below and explanatory comments are added where appropriate. Although this is by no means an exhaustive list, your responsibilities as Personal Representative include the following:

[Check \_\_\_ when completed]

1. \_\_\_ Making arrangements for the funeral, memorial and burial or cremation or other similar services.
2. \_\_\_ Determining the names and addresses of those beneficially entitled to the estate.

Where probate or letters of administration is required, the beneficiaries receive notification in the probate process, of their interests in the estate.

3. \_\_\_ Arranging with the bank, trust company or other financial institution for a list of contents of a safety deposit box.

Most financial institutions will only allow the Personal Representative to remove the original will from the safety deposit box. In some circumstances it may be necessary to obtain other documents such as insurance policies with a named beneficiary.

4. \_\_\_ Determining the full nature and value of property and debts of the deceased as at the date of death and compiling a list, including the value of all land and buildings and a summary of outstanding mortgages, leases and other encumbrances.
5. \_\_\_ Examining existing insurance policies, advising insurance companies of the death and placing additional insurance, if necessary.

Vacant real estate requires immediate securing. The insurance company must be notified of the fact that the residence is now vacant. Failure to do so may result in the insurance company disputing a claim for loss should one occur.

6. \_\_\_ Protecting or securing the safety of any estate property.

This may include taking valuable papers, cash, securities and jewellery into your custody, and perhaps placing them in a safety deposit box. You should check the amount of insurance to determine if it fully covers the value of assets and place insurance, if necessary, on assets not already insured.

7. \_\_\_ Providing for the protection and supervision of vacant land and buildings.



You should review the insurance policies in detail. For example, some policies provide that damage due to frozen pipes is covered only if someone checks the property at least every four days.

8. \_\_\_ Arranging for the proper management of the estate property, including continuing business operations, taking control of property and selling property.

This is of course subject to the will. The Personal Representative cannot sell property specifically gifted to a beneficiary unless it must be sold for payment of debts or with the consent of the beneficiaries.

9. \_\_\_ Retaining a lawyer to advise on the administration of the estate, and to apply for a grant from the court or to bring any matter before the court.
10. \_\_\_ Applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate.

The estate may be eligible for a Death Benefit from The Canada Pension Plan and if so, there are also survivor's benefits for a surviving spouse and dependent children. All information can be obtained through the Canada Pension Plan Office. The Deceased may have been receiving other pensions or annuities which carry survivor's benefits with them and the issuing institution can advise you about this.

11. \_\_\_ Advising any joint tenancy beneficiaries of the death of the deceased.

Although this property does not form part of the estate, you have a duty to advise these persons that they are entitled to such property. The surviving joint tenant can then make the arrangements for the transmitting the property into their names. Perhaps we can be of assistance by preparing the documents of transmission.

Keep in mind that just because property is registered in joint tenancy, does not always mean that it is not part of the estate. Further, there may be tax consequences to the estate of owning property in joint tenancy with someone else.

12. \_\_\_ Advising any designated beneficiaries of their interests under life insurance or other property passing outside the will.

Again, although this property may not form part of the estate, you have a duty to advise the beneficiary that they are entitled so that they may claim on their own behalf. In some circumstances you may have to assist them with the claim and we can draft the appropriate documents.

13. \_\_\_ Arranging for the payment of debts and expenses owed by the deceased and the estate.



14. \_\_\_ Determining whether to advertise for claimants, checking all claims and making payments as funds become available.

You do not have to advertise for creditors. If you do not comply with the Rules of Court concerning the advertisement for creditors, however, you may be held personally liable for any debts of the Deceased if you distribute the estate to the beneficiaries without paying the claimants. Note that advertising does not extinguish a claim if a creditor does not respond; it merely removes your personal liability for those claims of which you have no knowledge.

15. \_\_\_ Taking the steps necessary to finalize the amount payable if the legitimacy or amount of a debt is in issue.

For example, a debt is unenforceable if it has not been acknowledged or a partial payment has not been made within six years. There are other limitation periods which may apply. There is also a special estate procedure for contesting a claim of a creditor in court. If the claimant does not prove the claim in court within the time specified, it may be forever barred.

16. \_\_\_ Determining the income tax or other tax liability of the deceased and of the estate, filing the necessary returns, paying any tax owing and obtaining an income tax or other tax clearance certificates before distributing the estate property.

As noted below, if you distribute the estate without paying the taxes, and obtaining a tax clearance certificate, you may be personally liable for payment of the tax, interest and penalties.

17. \_\_\_ Instructing a lawyer in any litigation.

18. \_\_\_ Administering any continuing testamentary trusts or trusts for minors.

19. \_\_\_ Preparing Personal Representative's accounts, a proposed compensation schedule and a proposed final distribution schedule.

You have a duty to make a full accounting to all beneficiaries of the estate. You should therefore start a book of account as soon as possible recording at least the date, from whom received or paid, and the amount. You must also keep all receipts in case the court requires an audit of your accounts. Compensation of the Personal Representative will be dealt with later in this letter.

20. \_\_\_ Distributing the estate property in accordance with the will.

As Personal Representative of the estate, it is your responsibility to make decisions. The responsibility to make decisions is yours and you cannot delegate this responsibility to others. If there is more than one Personal Representative, decisions must be unanimous unless the will provides otherwise.



## **PERSONAL REPRESENTATIVE'S COMPENSATION**

Part 1 of the enclosed Schedule outlines the factors upon which your compensation as a Personal Representative will be calculated should you wish to claim it. A Personal Representative's compensation is for your time and trouble in the administration of an Estate. The amount of the compensation will depend upon the factors in Rule 2 of Part 1. If the administration of the estate is simple and straight forward, the fee will be less than where the estate is very complex.

The Personal Representative's compensation may not be taken until approved by the beneficiaries or the Court unless the will specifically allows this. It is the beneficiaries who approve the amount of the compensation. If an agreement cannot be reached with the beneficiaries, then an application may be made to the Court to set the amount of compensation.

It is therefore important that, whether or not you intend to claim compensation, you keep a detailed record of the amount of time you have spent in acting as the Personal Representative of the Estate. We suggest that you keep a diary and record the date, description of the activity, the actual amount of time spent and a short description of the result achieved on that particular day. The following is an example:

Date Met with lawyer, reviewed Will, reviewed all estate assets, instructed lawyer to prepare application for probate, 2 hours, 16 km. mileage, \$2.50 parking.

As noted in the example, you should also keep track of all expenses, mileage, and keep receipts for everything. Note that there is a difference between compensation and reimbursement of your expenses. You are entitled to reimbursement for your expenses so long as they are reasonable. These might include long distance phone charges, mileage, parking, etc. You must present receipts for all these expenses when requested by the court or the beneficiaries.

Finally, keep in mind that compensation is taxable in your hands as the Personal Representative although a portion of it may be tax deductible in the T3 Trust Tax Return. You do not have to claim compensation but after you have administered the estate, you will realize how much work it takes to be a Personal Representative. If you then wish to claim compensation, it will be much easier to justify if you have kept a careful record of your time.



## **SOLICITOR'S ROLE**

Part 2 of the attached Schedule explains our duties as your lawyers in the administration of an estate. The Schedule divides a lawyer's role into core legal services and non-core legal services.

### Core legal services

Core legal services are described in Table 1 of Part 2 . These are services which will usually arise in every estate administration. Obviously this will include preparing the application for probate and notices to beneficiaries, as well as preparing documents for the transmission and transfer of estate assets.

### Non-core legal services

Non-core legal services are described in Table 2 of Part 2. These are unusual legal services which may arise in the administration of the estate. The most commonly encountered matters under this category are sales of real estate to third parties, preparing transfers of property in joint tenancy and dealing with claims of creditors.

In addition, you as the personal representative may want us to perform some of the duties as personal representative. We have facilities in our office which may not be available to you, and we are prepared to carry out some of the work for which you would normally be responsible. This might include applying for an income tax clearance certificate from Revenue Canada or preparing your accounting to the beneficiaries. Our fees for providing such service would be considered non-core services.

### Solicitor's Compensation

Part 2 of the enclosed Schedule states that a lawyer may charge a fee for the following categories of legal services in the administration of an estate:

- (a) core legal services;
- (b) non-core legal services; and
- (c) for legal services that involve carrying out your duties as Personal Representative.

You will likely be able to perform all your duties as Personal Representative but if you require assistance, such as preparing your accounting to the beneficiaries or managing the estate assets, we are prepared to perform some of the work on your behalf. In this event, the Surrogate Rules of Court require that we agree to the categories of service that we will perform and to a fee and disbursement arrangement or amount for each category. In the course of administering the estate, if you want us to take over some of the duties as Personal Representative, before acting in that capacity, we will discuss our fees and scope of authority.



In addition, we are entitled to reimbursement for expenses paid by us on behalf of the Estate in the course of administration. You are primarily responsible for payment of any account but, practically, they are payable out of the Estate assets.

## INCOME TAX

The *Income Tax Act* provides that immediately prior to death, there is a "deemed" disposition of all capital and certain depreciable assets. As a result of this "deemed" sale, the property is considered to have been sold by the Deceased immediately before death for proceeds equal to the fair market value of such property. The result is that any untaxed capital gains that accrued during the Deceased's lifetime will be taxable in the year of death.

However, there may be circumstances where a tax free "rollover" is available, for instance, for farm property, or any property left to a spouse. There are also income tax elections which can be made by the Personal Representative in order to reduce the amount of tax payable by the estate. It is therefore recommended that you take no steps without first consulting your tax advisers.

Under the *Income Tax Act* you, as the personal representative, are required to file the following Income Tax Returns:

- (a) Returns for any taxation year prior to the year of death which were not previously filed. This is due within 6 months of the date of death, as any penalties that could be assessed on monies owing by the Estate are waived only during this period.
- (b) A T-1 Terminal Return for the year of death covering the period January 1st to the date of death. This is due on the later of 6 months after death or April 30 of the year following death.
- (c) A T3 Trust Return covering income received on the assets in the estate from the date of death to the end of the estate year (from one day to 365 days from the date of death, whichever period you elect). This return is due within 90 days of the end of the taxation year so chosen.
- (d) In the year of final distribution to the named beneficiaries, a T3 Return for the period beginning with that estate year to the date of distribution (called a T3 Final Distribution Return).

The T3 Returns may be combined if the estate administration is completed within the first year. There are other Returns which may be filed, if applicable, with respect to the estate and this should be discussed with your accounting advisor.

If you fail to file the necessary Returns, pay any tax found to be owing or obtain a Clearance Certificate from the Department of National Revenue, you may be personally responsible for payment of any tax owing by the Deceased or the estate. It is therefore advisable that you diarize the important dates listed above for filing Returns.



## **GOODS & SERVICES TAX**

If a Personal Representative distributes assets of an Estate which would attract payment of the Goods and Services Tax (GST), then the Personal Representative will be personally liable for the payment of any GST to the extent of the value of the property distributed. For example, transfer of non-residential property to a beneficiary will require you to collect GST from the beneficiary unless the beneficiary provides you with his or her GST number

Further, if the Deceased was or should have been registered to collect GST (for example with a business or farm) you should check to ensure that all GST has been paid up to date. If there is any GST owing, you may be personally liable for this tax if you make a distribution without paying the outstanding tax, interest and penalties. That liability can be avoided by obtaining a GST Clearance Certificate from Revenue Canada. GST is usually only a concern when there are assets of a commercial nature in an Estate, however, a careful review of all of the Estate assets should be undertaken before making any distribution. In the event of any doubt, an application should be made for a GST Clearance Certificate in order to remove the Personal Representative's personal liability.

## **DISTRIBUTION OF ESTATE**

Where an individual dies leaving a Will, the distribution of his or her estate is governed by the provisions of the Will. Care must be taken, however, to ensure that the beneficiary is entitled to the gift on a proper interpretation of the Will. If you make any distribution to a party not entitled to an interest in the estate, you may be personally liable.

When you are making any distribution to a residuary beneficiary, it is recommended that you obtain an estate release from all residuary beneficiaries before making the final distribution.

If you have questions about administering an estate, please telephone **Tracy L. Hanson** at:

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