

A CAUTION TO PERSONAL REPRESENTATIVES OF AN ESTATE



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It may be an honour to be considered for appointment as Executor in a Will; however, before agreeing to act, you should understand the obligations and responsibilities of this important role.

An Executor of a Will (a “Personal Representative”) is a fiduciary of the beneficiaries of the estate. As such, a Personal Representative owes the beneficiaries a duty of good faith, which includes always acting exclusively, and with undivided loyalty, in the best interests of the beneficiaries. Where there is a Will, the common law dictates that a Personal Representative’s first duty is to follow implicitly the specific terms of the Will. Regarding the duty to carry out the testator’s wishes, a Personal Representative cannot look beyond the terms of the Will or give effect to the unwritten wishes or intentions of a testator.

The Surrogate Rules set out a Personal Representative’s duties, which include but are not limited to:

- Making arrangements for the disposition of the body and for funeral or similar services
- Notifying those beneficially entitled to the estate property of their interests
- Determining the full nature and value of all property and debts of the deceased as at the date of death
- Securing the safety, and arranging for the proper management, of the estate property
- Applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate
- Advising any designated beneficiaries of their interests under life insurance or other property passing outside the will
- Evaluating creditors’ claims and arranging for the payment of debts and expenses owed by the deceased and the estate
- Determining the income tax liability of the estate and filing necessary income tax returns

- Distributing the estate property according to the Will

Executor’s Year

With respect to a reasonable time period for the above duties to be performed, a common law rule allows the Personal Representative one year from testator’s death to administer the estate and transfer the assets. Estate administration may take longer than one year, but after that guideline period interest will accrue on unpaid bequests.

Duty to Invest

The Personal Representative has a duty to invest the estate assets. Investments should be made with a view to obtaining a reasonable return while avoiding undue risk, having regard to all the circumstances of the estate administration. The Trustee Act details the factors that a Personal Representative must consider when investing the estate assets. A failure to exercise reasonable skill and prudence in making investment decisions may expose a Personal Representative to personal liability to the beneficiaries for damages.

Duty to Account

A Personal Representative must always be ready to produce her accounts as, at any time, a person interested in the estate can apply to the Court to compel the Personal Representative to produce her accounts. The Surrogate Rules provide that the Personal Representative must account to the beneficiaries by providing them with financial statements that include a statement of all property and money received, and all expenses incurred or paid, during the accounting period.

Compensation

A Personal Representative may receive “fair

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and reasonable compensation” for her responsibility in performing the personal representatives’ duties. Factors such as the gross value of the estate, the complexity of the work involved, the time expended, and the number and complexity of tasks delegated to others are relevant. In Alberta, a Personal Representative is prohibited from pre-taking compensation, except where the Will provides for it, all the affected beneficiaries agree to it, or the Court orders it.

Expenses

A Personal Representative may be reimbursed from the Estate for expenses properly incurred by her in the administration of the estate. These may include expenses reasonably incurred in carrying out her duties, and fees or commissions to agents, including lawyers, accountants, and other professionals engaged to perform estate administration services or to buy or sell estate property. However, where expenses are not necessary and properly charged as part of the estate administration, the Personal Representative is not entitled to be reimbursed from the Estate assets and may be personally responsible for paying any such expenses.

Personal Liability

Where a Personal Representative is found to be in breach of her duties, she may be personally liable to the beneficiaries to the full extent of her personal assets for any damages, unless the Court determines that the trustee acted honestly and reasonably and ought fairly to be excused.

Significant responsibility and potential liability is imposed on a Personal Representative. Therefore, it is important for a Personal Representative to obtain proper legal advice if she does not fully understand the Will, is uncertain about the full extent of her responsibilities, or is uncertain how to properly carry out her duties. ▲

DISCLAIMER

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