

SO YOU'VE BEEN ASKED TO BE AN EXECUTOR: WHAT YOU DON'T KNOW CAN HURT YOU

Peter J. Glowacki

2200 – 201 Portage Ave.
Winnipeg MB
Ph. 204-934-2572
Email: pjg@tdslaw.com

- Introduction
 - Properly evaluate the potential downside of acting as executor
 - Administration may be lengthy
 - The risk of personal liability
 - Make a reasoned decision if you are asked to act as an executor

A. IS IT TOO LATE?

(i) Intermeddling

- Careful not to deal with the assets of the estate
- Once you have intermeddled, you may not renounce
- Requires a Court Order to resign
- If you have done nothing as the executor, you may renounce your appointment
- Section 18 of *The Court of Queen's Bench Surrogate Practices Act* (“SPA”)

(ii) Insolvency

- Insolvent if its liabilities exceed assets
- May be administered by an executor with debts to be paid under s. 63 of *The Trustee Act*
- Or by a trustee in bankruptcy
- Recommend that you avoid administering an insolvent estate

(iii) Potential Litigation

- Continuation of or becoming involved in litigation can take a significant amount of your time
- Beginning June 30, 2004, a common-law partner, which includes same-sex partners, have all of the same rights and obligations as married couple
- Claims of a spouse and/or common-law partner under *The Family Property Act* (“FPA”), *The Dependents’ Relief Act* (“DRA”) and *The Intestate Succession Act*

- Also obligations pursuant to a Separation Agreement or Pre-Nuptial or Co-habitation Agreement
- Children or other financially dependent relatives may have a claim pursuant to the DRA
- Part IV of the FPA provides for an application for an accounting and equalization

- Executor must serve the surviving spouse or common-law partner with an FPA notice within one month of probate
- If an FPA application is commenced, litigation can take many months or years
- Failing to follow the requirements of the FPA can mean personal liability of executor for damages
- Section 32 of the FPA sets out when you may make a distribution

- DRA claim if adequate provision not made for a dependent
- An application by one dependent is deemed to be an application by all of those who might apply
- Making a distribution prior to resolution of the DRA claim, may result in personal liability of executor for damages

B. Duties

(i) General

- Acting in a fiduciary relationship
- Duties imposed by the will, the common law and legislation
- Must act with the level of skill and prudence that would be expected of a reasonable person
- You will be held to the standard of your profession
- An executor's authority to act comes from the Will
- May be practically limited by various financial institutions

- In addition to the duties described in the Will, an executor's duties include the following:
- Taking possession or control of the assets
- Paying debts of the estate
- Notifying beneficiaries of the terms of the Will
- Acting personally in respect of the management and administration of the estate
- Reviewing the investment of estate assets
- Acting impartially
- Continuing or bringing legal actions
- Keeping proper accounts

- Keeping detailed time records of your actions
- Distributing the assets of the estate

- Two or more executors must act unanimously unless the Will provides otherwise
- Distinction between discretionary and administrative powers
- Discretionary powers may only be delegated if the Will expressly permits
- Section 35 of the *Trustee Act* provides that an executor may employ agents

(ii) Accounting

- One of the most important duties
- Must account to the beneficiaries and any unpaid creditors of the estate
- Court accounting includes all assets of the estate, the value of the assets, the monies received and monies disbursed
- Court accounting is on a cash basis
- Residual beneficiaries may require an executor to account
- Information should be maintained so that you are prepared to account in Court

- Regular passings of accounts are a good idea
- Once a period of time has been the subject of a passing of accounts, not open to being disputed again
- Monies belonging to the estate should be deposited to and all expenses paid from an estate account, with detailed records of all transactions
- Keep copies of invoices, bills of sale or other documentation
- Recommend periodic reporting of estate finances to its residual beneficiaries

- Prior to making a distribution, an executor should provide an accounting to the beneficiaries
- Seek a consent and release from each beneficiary to the accounts
- Residual beneficiaries of an estate who are under the age of majority cannot provide a release and cannot consent to compensation

C. GETTING STARTED

(i) Funeral Arrangements

- One of your first duties
- Executor has the authority to make decisions
- Arrangements often made by next-of-kin
- Must arrange for the payment of or reimbursement for the funeral expenses
- Funeral expenses must be reasonable
- Issues if lavish arrangements or potential shortfall in assets versus debts

- Have the financial institution pay the funeral bills
- You may have to step in and make an overriding decision
- Written wishes of the deceased binding if in writing, consistent with *The Human Tissue Gift Act*, and are not unreasonable

(ii) Formal Will Requirements

Common issues that you should be aware of:

- Identify all of the beneficiaries
- Are the beneficiaries of the age of majority and have mental capacity
- Does Will make provision to deal with all testator's assets so that there is not a partial intestacy

- *The Wills Act Will* requires the Will to be in writing and signed by the testator at the end, in the presence of two adult witnesses who must both have been present at the same time and in each other's presence and in the presence of the testator when signed
- A valid holograph Will is wholly in the person's own handwriting and signed at the end

- Section 23 of The Wills Act gives the Court wide discretion to validate a Will
- Any document that purports to deal with the testator's assets, no matter how informal, could be considered a valid Will
- Section 12 of *The Wills Act* provides if a Will is witnessed by a beneficiary named in the Will or the spouse or common-law partner of that beneficiary, then any bequest is void
- Will itself will still be valid

- Marriage will revoke a Will except if in specific contemplation of the marriage
- Divorce from a spouse or dissolution of a common-law partnership after the making of a Will, revokes the appointment of the spouse or partner as a personal representative and any bequests, as if the individual had predeceased the testator
- If any issue as to their being a later Will:
- Inquire with testator's lawyers
- Notice published in *Headnotes and Footnotes*, *The Manitoba Gazette* and a local newspaper
- Otherwise, risk complications at a later stage

(iii) Identifying Assets and Determining their Value

- Must undertake to identify the assets and liabilities of the estate
- Determine asset values for the purposes of probate and tax
- Review the papers of the deceased, including bank statements and tax returns for pension and annuity income

- Tedious and time-consuming process
- If not undertaken, an asset of the estate may be over-looked
- Search at the land titles offices in Manitoba and other jurisdictions
- Personal Property Security Registry shows not only debts but clues as to assets
- Inventory the contents of any safety deposit box
- Likely will not be able to retrieve items from the box without probate

- Every financial institution will have their own distinct policies to access information and assets
- Determine what type of ownership interest was held by the deceased
- If an asset is held jointly with right of survivorship, it does not form part of the deceased's assets
- This also applies to RRSP's, RRIF's and insurance that has a named beneficiary

- Obtain assistance from qualified professionals
- Particularly important for income tax purposes
- Valuation required for the purposes of calculating the requisite probate fee
- Executor swears value to be correct to the best of their knowledge and belief
- More thorough appraisals needed for tax filings and for distribution purposes
- Amended inventory should be filed at the Court if values substantially incorrect
- Liabilities are not deducted from the value of the estate with the exception of incumbrances specific to an asset
- Income taxes owing are not deductible from the value of the estate for probate

(iv) Do You Need Probate?

- While determining the assets, also determine requirements to allow you to deal with the assets
- Real property in the sole name of the deceased, publicly traded securities or significant insurance payable to the estate will require probate
- Small bank accounts, Canada Savings Bonds or shares in a private corporation may not require probate
- Executor might save time and probate fee

- Cannot open an estate account without a probated Will
- Not obtaining probate can lead to risks, including incurring personal liability
- If Will is invalid, you may inadvertently make distributions to individuals who are not the proper beneficiaries
- Small estates under \$10,000 can be administered pursuant to s. 47 of SPA

D. THE PROBATE PROCESS

(i) Court Forms

- Court of Queen's Bench Rule 74.02(1)
Request for Probate
 - basic information about the deceased
 - his or her assets
 - affidavit from the executor attesting to the accuracy of information
 - promise by the executor to account when required

- original Will filed and on file permanently at the Court
- accompanied by a draft of the grant of probate
- copies of the Will and a cheque to pay the probate fee
- Courts have made a habit of rejecting probate
- Not a legal requirement to have a lawyer assist in the preparation of the Request for Probate

(ii) Probate Fees in Manitoba

- Set by *The Law Fees and Probate Charge Act*
- Flat 0.7% (or \$7 per \$1,000) of the value of the estate assets located in Manitoba, and all moveable assets even if located outside of Manitoba
- If there is immoveable property outside of Manitoba, it will be necessary to have the Probate re-sealed in the jurisdiction(s) where that land is situate
- Probate fee is determined in that jurisdiction

- Probate fee is payable in Manitoba at the time of filing
- It is often possible to have the bank advance a cheque or draft out of the deceased's account payable to the Minister of Finance
- If not, the executor or a beneficiary may have to advance money

(iii) Probate Problems

- Issues that may arise with respect to the Will itself may require further affidavit material to be filed to explain the issue or the Will may have to be proven in solemn form
- Latter process entails an actual hearing before a judge whereas in a normal Request for Probate reviewed by a duty Judge in his office
- Some of the issues
 - changes to the Will document made after the date of execution

- not properly witnessed
- the initials of the testator and/or witnesses not being on each page of the Will
- the Will not being dated
- the whole or a portion of the Will being lost with only a photocopy available
- Not necessarily insurmountable but sufficient evidence will have to be provided to determine if the document being submitted to probate represents the final testamentary wishes of the deceased

E. ADMINISTRATION

(i) Protecting the Assets

- Early administration issue is the protection of the various assets of the estate
- Liquid or semi-liquid assets should be reasonably secure but ensure that the executors are the only persons with authority to deal with the assets
- Any cash should be secured

- If a home, cottage or other premises, ensure that proper liability and property insurance is in place
- If any premises vacant, the insurance company should be advised immediately
- Arrangements should be made for regular inspections of the property
- A more difficult asset is ongoing business related interests

- Ensure that the deceased's interests are protected and the business runs properly for so long as the estate has an interest
- Agreements outside of the Will pertaining to the deceased's rights in the business
- Ensure that the estate's investments meet the test set out in s. 68 of *The Trustee Act*
- If an investment does not meet the requisite criteria, they must be liquidated and/or changed to investments that do qualify as soon as is reasonably possible

- Investments must be reviewed periodically
- Nature of the beneficiaries of the Estate and the length of time that the investments will have to be held must also be taken into account

(ii) Creditors

- Must ensure the payment of debts before the distribution of assets
- Notice to Creditors published pursuant to s. 41 of *The Trustee Act*
- Must be published in *The Manitoba Gazette* and “in one issue of a newspaper published in the district where the donor debtor resided or was domiciled

- Reasonable notice period must be specified
- Practice is to provide for 30 days' clear notice from the date of publication
- Once the Notice period has expired and claims, if any, have been satisfied, the executor will no longer be personally liable for any shortfall in estate assets for the claims of a creditor
- Extreme care before making any distribution to satisfy anxious beneficiaries

- If a Creditor makes a claim after the notice period but is still within *The Limitations of Actions Act*, will be able to follow the assets of the estate to the beneficiaries

(iii) Canada Revenue Agency

- Must final T1 Returns for year of death and all prior years
- T3 Trust Returns to be filed for income earned after date of death
- Distributions prior to final tax clearance certificate, even with Release and Indemnity, are at the risk of personal liability to the executor
- Must also satisfy income tax and estate tax obligations in other jurisdictions or risk personal liability

F. DEALING WITH BENEFICIARIES

(i) Common Issues

- Early and periodic reporting of estate administration recommended
- Written communication avoids misunderstandings
- No changes to Will unless Will specifies or Court Order
- Avoid conflict of interest unless Will authorizes, including where executor is also a beneficiary
- Must maintain even hand between beneficiaries

F. DEALING WITH BENEFICIARIES

(ii) Personal and Household Articles

- Can be hotly contested matter
- If Will silent, must decide on a fair method of distribution
- If no agreement by beneficiaries, sale by auction may be the only alternative

F. DEALING WITH BENEFICIARIES

(iii) Beneficiaries Under the Age of Majority

- Will may establish trusts for beneficiaries under the age of majority
- Payments to parent or guardian may be permitted
- These beneficiaries cannot release executor or agree to compensation – need Court approval

G. THE END IS IN SIGHT

(i) Compensation

- No set method of calculating in Manitoba
- Agreements signed by testator not binding
- Section 90 of *The Trustee Act* provides for compensation
- 5 factors to determine:
 - (a) magnitude of trust;
 - (b) the care and responsibility involved;
 - (c) time occupied in administration;
 - (d) skill and ability displayed; and
 - (e) success achieved.

- May not be remunerated at professional rate
- Global compensation to be divided among executors
- Must have beneficiary consent or Court Order to receive compensation
- Keep detailed time records of executor role and professional role

G. THE END IS IN SIGHT

(ii) Release and Indemnity

- If all beneficiaries are adults with legal capacity, they may consent to administration and compensation
- Recommend comprehensive Release and Indemnity
- If beneficiary refuses or does not have legal capacity, executor must pass accounts

G. THE END IS IN SIGHT

(iii) Passing Accounts

- Authority in the SPA and *The Trustee Act*
- Form of accounts specified in Queen's Bench Rule 74.12
- Have backup documentation for accounts and evidence to support compensation
- Accounts to be served on all beneficiaries – if beneficiary without legal capacity, serve Public Trustee of Manitoba
- Following contested hearing, Master issues Order on Passing Accounts which may require repayment of money to estate, reduce compensation or award legal costs

CONCLUSION

- Executor role not to be taken lightly
- Administration may proceed smoothly or beneficiaries can make executor role seem unbearable
- Professional advice recommended to safely navigate through administration