

❧ ESTATES ❧

POST-APPLICATION PROCEDURE

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GENERAL NOTES

The representation grant (of probate/administration or ancillary grant of probate/administration or foreign grant resealed by the Supreme Court of British Columbia) (the “grant”) officially appoints the Deceased’s personal representative as executor (or administrator). Until now, the title to each asset was in the Deceased’s name. Once the grant is issued, the title may be transmitted to the personal representative, who replaces the Deceased as the “holder” of those assets and must distribute them as follows:

- if the Deceased died **testate**: pursuant to the terms of the Will; or
- if the Deceased died **intestate**: pursuant to Division 1 of Part 3 of WESA – **Distribution of Estate When There is No Will** (see **Overview – Intestacy**).



Use the *Post-Application Estate Worksheet – Helpful Information*. Make the necessary changes (e.g. remove any mention to bequests if there are none and add rows for additional assets), then print the Worksheet on coloured paper and keep it on top of a section in your file. It will assist you, the supervising lawyer, or anyone else working on the file in establishing the status of the assets at a glance.

In summary, whether the Deceased died testate or intestate, the title to most assets will have to be **transmitted** to the personal representative before being **transferred** to the beneficiaries under the Will or intestate successors. As this can only occur after the application – and receipt of the grant – in this *Guide* such procedures are referred to as “post-application” matters.

A personal representative has one year from the date of death (or one year from the date of the grant of administration) (called the “executor’s year”) in which to deal with the assets and to settle the affairs of the estate before the beneficiaries can bring on an action for non-performance of the executor’s duties. Unless specifically provided for in the Will, a legacy only carries interest after one year from the date of the Will-Maker’s death. Such interest, if required – which is rare, would be calculated at the rate of 5% set by s. 3 of the *Canada Interest Act*, RSC 1985, c. I-15.

There are several ways in which the assets are dealt with:

- if an article of personal belonging was left in the Will to a beneficiary (for example: jewellery, furniture, china, silverware, etc.) such an asset will normally be delivered *in specie* (i.e. in its specific form) by the personal representative to the beneficiary entitled to such an asset;
- if an asset **registered** in the name of the Deceased was left in the Will to a specific beneficiary (person or charity), generally, the title to such asset must first be transmitted to the personal representative and then transferred to the beneficiary (for example, real estate or, in certain cases, shares of a company);
- if assets were left in the Will as part of the estate (i.e. they are not left to a specific beneficiary in the Will) – or if the Deceased died intestate – such assets fall into and form part of the residue of the estate. In order for the assets to be distributed to the persons entitled to them, the title to such assets must first be transmitted into the name

of the personal representative – in their capacity of executor/administrator – who will then:

- either realize the assets (i.e. sell them) and add the proceeds of such sale to the bulk of the estate or distribute the proceeds obtained among the beneficiaries or intestate successors; or
- transfer the title to the assets to the beneficiaries or intestate successors (for example, transfer title to real estate into the name of a beneficiary).

The supervising lawyer and the personal representative will have to evaluate each situation and develop an overall strategy. It is very important to be clear as to who will do what because duplicating efforts may result in additional legal fees.

To illustrate: Suppose the estate consists of several bank accounts and a house. Pursuant to the Will of the Deceased, the residue of the estate was left equally to the Deceased's three adult children. The personal representative, after consulting with the children, may sell the house, add the proceeds of the sale to the amounts in the bank accounts, and then divide the total among the three children. Alternatively, the personal representative may divide the amounts in the bank accounts among the children, but transfer the house into their names to hold until they decide what to do with the property;

- however, if an asset (for example: real estate or a bank account) was held in joint names of the Deceased and another person, such an asset may be transferred by operation of law (in most cases, by producing a *Death Certificate* and signing and processing the appropriate forms) to the surviving joint tenant and does not form part of the estate. The requirements of the holder of such asset (Land Title Office or bank) have to be complied with in order to effect the transfer.
- if an insurance policy or a Registered Retirement Savings Plan, or any similar plan, has a designated beneficiary, that asset may be transferred to the designated beneficiary and does not form part of the estate. Compliance with the asset holder's requirements (insurance company or bank) is necessary to effect such a transfer.

The final goal is that all the persons entitled to share in the Deceased's estate become the rightful owners of those assets or portion of assets to which they are entitled. To accomplish this, the main steps are outlined below.

POST-ADMINISTRATION STEPS - OVERVIEW

In order to administer the estate in an orderly manner, we are setting out the logical sequence of the administrative steps.

1. Reporting Letter to Client

When you have received the grant, report this to the client. A comprehensive reporting letter is provided (see **Post-Application Letters**). When preparing this report, re-check all items in the file to ensure that everything that can be, and should have been, done to date has been dealt with. Of course, amend the letter to suit the circumstances.

Note: In order to avoid multiple letters going to clients (who, famously, hardly ever read anything you send them) you could either send this letter just after the grant is received or wait until some assets are dealt with. For example, you may have instructions to file certain documents with the Land Title Office immediately upon receipt of the grant, and this can be dealt with prior to sending the reporting letter.

2. **Transmission of Assets to the Personal Representative**

Title to certain assets (such as real estate or motor vehicles) is formally transmitted into the name of the personal representative by completing and filing the required documentation with the appropriate official body.

Note: Although this can happen only after you receive the grant, you can anticipate some of the steps that will be required beforehand, like preparing in advance the requisite documents to transfer the title of certain assets into the name of the personal representative. For this purpose, some of the documentation can be prepared before the grant is received (for example, a Form 17 and other supporting documentation transferring title to the land into the name of the personal representative) (see **Post-Application Documents**).

3. **Payment of Debts**

If sufficient funds are available, all debts of the Deceased must be paid. The personal representative can attend to this, or, if the funds have been forwarded to the law firm, the law firm may do it on behalf of the personal representative.

If the debts exceed the assets, see **Insolvent Estates** on page 15, which sets out the order of priority in which creditors must be paid.

4. **Conditions Precedent to Distribution**

When everything has been attended to, and before distributing the residue of the estate, the following conditions must be met:

- Income Tax Returns have been prepared and filed and *Clearance Certificates* have been received;
- all debts have been paid; and
- limitation dates have expired.

5. **Distribution or Transfer of Assets to Beneficiaries or Intestate Successors**

When all assets are in the hands of the personal representative, he or she can attend to the following:

- “realize” certain assets, e.g. sell the assets to third parties, thus converting them to cash;
- if any trusts were created by the Will, or if any intestate successors are minors, set-up and administer trusts for the minors or persons benefiting from the trust;
- pay, deliver or transfer bequests to the various legatees if there was a Will; and

- transfer the residue to the beneficiaries or intestate successors.

6. **Letter to the Public Guardian and Trustee with Copy of Grant**

This step is only required if any beneficiaries or intestate successors are minors or mentally incompetent persons and you have, accordingly, given Notice to the Public Guardian and Trustee. Section 124(2) of WESA requires that the personal representative deliver to the Public Guardian and Trustee a copy of the representation grant within 45 days of it being issued (see *Letter to Public Guardian and Trustee with Copy of Grant – Post Application Letters*).

7. **Supplemental Affidavits of Assets and Liabilities**

It may happen that, after filing the application documents (and whether or not a representation grant is issued), the following are discovered:

- another asset; or
- a liability (i.e. debt);
- the change in value of an asset because it was over or under-estimated or an asset was reported twice; or
- an error in the description of an asset;

in which case, the appropriate *Supplemental Affidavit* together with an amended *Statement of Assets, Liabilities and Distribution* must be prepared and filed (see *Application – Procedure*).

TRANSMISSION OF ASSETS TO PERSONAL REPRESENTATIVE

The Deceased may have owned numerous and various types of assets. In this *Guide*, only the most frequently held assets are dealt with (for example: the *Guide* does not cover the procedure to deal with boats, planes, and other fairly rare assets).

The title to each asset must be formally transmitted into the name of the personal representative (and then transferred to the beneficiaries entitled to them).

If in doubt as to the manner in which a particular asset must be dealt with in order to:

- **transmit** it to the personal representative; or
- **transfer** it to the beneficiary or intestate successor;

contact the appropriate agency, financial institution, broker, company holding the asset, or Land Title Office where the real property is registered, to determine their requirements to transfer the particular asset.

Real Estate

- **Real Property Held in Joint Tenancy**

Any interest in real property registered in the name of the Deceased and another person or persons as joint tenants, does not form part of the estate and passes to the surviving joint tenant(s) by right of survivorship.

This transfer to the surviving joint tenant is accomplished by filing the appropriate documents with the Land Title Office. Because the grant of probate (or administration)

is not required for such transfer, this can be done at an earlier stage (see *Transfer to Surviving Joint Tenant (Form 17) -- Post-Application Documents*).

Note: Although the property is registered in joint tenancy, it may be affected by the *Family Relations Act*. Consult with the supervising lawyer.

- **Real Property (not in joint tenancy)**

If an interest in real property – or a portion of property – was registered in the name of the Deceased, it can only be dealt with after the grant has been issued. Two consecutive steps are necessary (even if the personal representative and the beneficiary or intestate successor are one and the same person):

- firstly: the property will have to be transmitted to the personal representative (see *Transmission to Executor or Administrator – Form 17) – Post-Application Documents*);

Frequently, only this step is carried out. The property is transmitted into the name of the personal representative and either remains registered that way until the personal representative decides what to do with it, for example, sell it or transfer to a beneficiary.

- secondly: the property will have to be transferred to the beneficiary, intestate successor or, if sold, to the purchaser of the property. This can be accomplished by preparing and filing the appropriate *Freehold Transfer (Form A)* and all supporting documents (see *Freehold Transfer (Form A) (From Executor/Administrator to Beneficiary and/or New Owner) – Post-Application Documents*).

If the real property is transferred to a beneficiary or sold to a third party (or otherwise disposed of) within 210 days from the date of the issue of the representation grant (see: **Limitation dates have expired**), the Land Title Office must be satisfied that:

- no proceeding under Division 6 of Part 4 of WESA will be commenced within that period of time; and
- the transfer is not registered unless expressly authorized by law or an the instrument (s. 180(7) of the *Land Title Act*).

Accordingly, if real property is transferred to a beneficiary within 210 days from the date of the issue of the representation grant without first obtaining either:

- the court’s authorization (very rare); or
- the required Consents (see the **Post-Application Documents** chapter – *Consent of Beneficiaries to Early Transfer of Real Property* or *Statutory Declaration (Early Transfer of Assets)*);⁽¹⁾

the Title to the property will be endorsed by the Land Title Office with the notation that the property “is subject to the liability of being subject to an order under Division 6 of Part 4 of WESA [Variation of Wills]”. The 210-day bar applies only to a transfer to a beneficiary but the sale by the personal representative to a third party may be open to interpretation.

⁽¹⁾ The Land Title Office must know whether or not there is a spouse and who the beneficiaries or intestate successors are. Some law firms file a copy of *Form P2 – Submission* with the transfer documents. However, the Consents and the Statutory Declaration provided in this *Guide* set out this information and should be sufficient.

If such a notation is registered against the Title, it can be removed after 210 days have expired by filing Form 17 to cancel the charge by effluxion of time.

- **Spousal Home**

If an estate includes a spousal home either:

- in an intestacy; or
- the spousal home is not the subject of a gift or otherwise disposed of by a Will;

the surviving spouse may acquire the spousal home from the personal representative to satisfy, in whole or in part, the surviving spouse's interest in the estate.

A surviving spouse must exercise the right to acquire the spousal home within 180 days of the date of the issuance of the grant unless the court (before or after the expiration of that period) extends the time by which the right may be exercised.

Matters concerning the spousal home include its valuation, disputes about its valuation, its purchase or retention, and notice by the spouse. Because these issues are somewhat complicated, lengthy, and involved, they are covered in a separate chapter entitled "**Spousal Home**".

Accounts with Banks and Financial Institutions (Credit Unions, Trust Companies, etc.)

Here again, if:

- any asset (account, investment certificate, etc.) was registered in the **joint names** of the Deceased and another person (with right of survivorship); or
- a **designated beneficiary** was named in a Registered Retirement Savings Plan or any other plan;

such an asset is transferred by operation of law to the surviving joint holder or the designated beneficiary and may be transferred without a grant by complying with the requirements of the holder of the asset (for example, a bank).

Banks have different requirements to deal with their accounts. Usually, the requirements are set out in the bank's letter replying to the law firm's initial inquiry. Make sure that you comply with the bank's requirements (as well as instructions from the personal representative).

There was two basic ways of dealing with an account or investment which was registered in the name of the Deceased (i.e. other than jointly with another or with others):

- all funds are forwarded to the law firm, in trust, and the law firm will "administer" those funds. Usually, this means that the law firm will open an interest bearing trust account in the name of the estate. The funds can be used to attend to the payment of debts and legacies, if any, when appropriate; or
- all funds are forwarded to the personal representative, who should be advised to either open a bank account in the name of the estate or make some arrangements to deal with those funds.

In both cases, the personal representative or the law firm must keep accurate records in order to provide the beneficiaries with an exact and complete accounting of all funds received and disbursed.

Stocks, Shares and Bonds

At the outset, obtain instructions from the personal representative as to the manner in which the stocks, shares, bonds, or securities should be dealt with; mainly, whether they should be:

- sold or redeemed; or
- transferred to a particular beneficiary or any person who may be entitled to them (without first being converted into cash).

Shares or any other securities which are registered in the **joint names** of the Deceased and another person may be transferred to the survivor before a representation grant is issued by delivering the following documents to the company's lawyers (in the case of a non-reporting or private company), or to the transfer agent (in the case of a reporting or public company):

- **Death Certificate** (or notarial copy thereof); and
- original Share Certificate.

Shares in Non-Reporting (Private) Companies

Shares in a non-reporting company registered in the **sole** name of the Deceased are best dealt with by the company's lawyers by requesting that they handle the transmission (and the subsequent transfer) of the shares. If your law firm is also the company's registered and records office, see the *Transfers and Transmissions* chapter in *Guide to Corporate Records*, also published by Evin Ross Publications Ltd.). In any event, provide to the company's lawyers the following:

- the original of the Share Certificate (it does not need to be endorsed);
- a notarially-certified copy of the grant (or in some cases, a copy of the Will); and
- the **Declaration of Transmission (Post-Application Documents)**;

Note: In certain cases, no grant will be required to transfer the shares in a non-reporting company. Contact the law firm acting for the company to ascertain what is required.

Shares in Reporting (Public) Companies

Stocks, shares, bonds or securities in a non-reporting company registered in the **sole** name of the Deceased are best dealt with by forwarding them to a broker with instructions either to sell them or to transfer them into the name of the personal representative and/or beneficiary or intestate successor. The broker will advise as to all requirements, provide the necessary forms, and assist in completing and handling all documentation (see *Letter to Broker or Transfer Agent –Post-Application Letters*).

Notes:

- if the shares are held in a brokerage account, there may be no certificate issued for the shares;
- the broker may require a separate set of documents for each certificate;
- in some instances, only a broker may sell securities;
- save and except in very special cases (e.g. shares of Great West Life), only a transfer agent may transfer the shares;

- there may be a fee payable to the brokerage house or transfer agent – ascertain this and discuss with the personal representative, as sometimes the fee to transfer the securities exceeds the value of the stocks.

Most brokers will prepare the requisite documents and guide you through the process of either selling or transferring the securities.

The personal representative may use a trust company instead of a broker to transmit or transfer securities. Trust companies act as transfer agents for public companies who appoint them to issue and transfer shares in their capital stock. You can obtain the name of the trust company either:

- on the certificate to the security – generally, Share Certificate; or
- by going to the website “**sedar.com**” (⇒ “Company Profiles” ⇒ select the first letter of the name of the company ⇒ scroll down to find the company), which lists all publicly-traded companies with the details of their transfer agents.

The most generally used transfer agent is **Computershare**, and you can download the appropriate documents from their website **Computershare.com** ⇒ in purple menu ⇒ **How Can we help you today** ⇒ **Find a Form** ↓ **Transfer of Ownership Forms**.

All transfer agents will require:

- the original of the Share Certificate (it does not need to be endorsed);
- a notarially-certified copy of the *Death Certificate*;
- a notarially-certified copy of the grant;
- an original *Declaration of Transmission* (one for each certificate) sworn by all personal representatives. Use the *Declaration of Transmission (Post-Application Documents)* or download the form from the website of the transfer agent;
- an original *Power of Attorney to Transfer Bonds or Shares* or an *Assignment and Irrevocable Power of Attorney (Post-Application Documents)*. The signature(s) of the personal representative(s) must either be guaranteed by a Canadian chartered bank or “medallion” guaranteed (see explanation below).

A **Medallion Signature Guarantee** is a special stamp provided by a bank, broker, or credit union that:

- indicates that the person signing a form has the legal authority or capacity to conduct the requested transaction; and
- verifies the authenticity of the signature.

For example, if a person signs a document as the personal representative of an estate, before affixing a Medallion Signature Guarantee, the financial institution providing the Medallion Signature Guarantee will require additional legal documentation verifying the authority to execute such document. A simple **Signature Guarantee** is not a substitute for a Medallion Signature Guarantee.

The transfer agents will be able to provide you with the requirements for documents necessary to transfer such securities (*Letter to Broker or Transfer Agent – Post-Applications Letters*).

Some certificates do not have the name of the owner printed on them. Such certificates are referred to as being “in street form” or “bearer form”. As they are **not** registered in anyone’s name, they can be delivered to the personal representative or beneficiary. Obtain a receipt from the person to whom such a certificate is given.

Canada Savings Bonds may be delivered to the Bank of Canada or to any chartered bank for handling (*Form 2351 - Redemption of Government of Canada Securities or Transfer from a Deceased Registered Owner to a Beneficiary – Post-Application Documents*).

Motor Vehicles

The requirements to transfer a motor vehicle vary from one motor vehicle branch to another, and the cost of the law firm attending to such transfer may be quite high and disproportionate to the value of the vehicle. Accordingly, it is best to encourage the personal representative to attend personally to the transfer of any motor vehicles without involving the law firm. In order to assist the personal representative with such transfers, provide him/her with:

- sufficient notarially-certified copies of the appropriate grant (*Notarially Certified Copy – Post-Application Documents*); and
- a *Death Certificate* – or a notarially certified copy thereof.

The personal representative should then attend at any Autoplan insurance agent with the following documents, in addition to the documents described above:

- vehicle registration; and
- insurance certificate.

The agent will provide the necessary documents, assist in their preparation, and arrange for the transfer of the vehicle. If the vehicle is being transferred to a person other than the personal representative, the transferee must also personally attend at the agent’s office in order to effect the transfer.

If the vehicle must be transferred before the grant is obtained, prepare a letter of undertaking from the lawyer to the Insurance Corporation of British Columbia that promises to provide the Insurance Corporation with a copy of the grant upon receipt (see *Letter to the Insurance Corporation of British Columbia – Pre-Application Letters*).

Insurance Policies

Correspondence received from the insurance company should contain all the information about how to deal with any insurance claim(s). Each insurance company has its own forms, such as a Claim Form, Claimant’s Statement, Physician’s Statement, etc. which is generally attached to the letter that replies to the initial enquiry from the law firm. These forms must be completed, signed by the personal representative (or the person specified as the required signatory of such forms, such as the attending physician, coroner, etc.) and then returned to the insurance company, together with all requested supporting documentation (such as a *Death Certificate* or a copy of the Will).

Miscellaneous

Obviously, the Deceased may have had numerous other assets (such as boats, planes, foreign assets, etc.). Contact the official body where the title to such asset was registered (Ships' Registry, etc.) to determine the requirements and any forms necessary to transfer the asset.

N.B. As mentioned above, notarially-certified copies of certain documents are required by banks, financial institutions, and insurance companies. For instructions as to their preparation, see Section III C-3 *Notarially-certified copy*.

CONDITIONS PRECEDENT TO DISTRIBUTION

When the title to all assets has been transmitted in the name of the personal representative, the distribution of the estate can take place. However, before this happens, certain preliminary conditions must be fulfilled. Some conditions require action (such as filing Income Tax Returns) and some are "passive" conditions which require a certain amount of time to elapse.

Limitation Dates Have Expired

- **210 days from the date of issue of the grant**

A spouse or a child may feel that they have not been adequately provided for in the Will. Pursuant to Part 4, Division 6 [Variation of Wills] of WESA, the spouse and the children may commence proceedings against the estate for proper maintenance and support within 180 days of the issuance of the grant. The initiating pleading or petition must be served on the executor within 30 days of the commencement of the proceeding. A copy of the initiating pleading or petition may be filed in any probate registry.

The court may, in an action by or on behalf of the spouse or children, order that the provision that it thinks is adequate, just and equitable in the circumstances, be made out of the Will-Maker's estate for the spouse or children.

Due to the possibility of such an application, Section 155 of WESA provides that the personal representative shall not distribute any portion of the Deceased's estate until the expiration of 210 days⁽¹⁾ from the issue of the representation grant unless a court authorizes the distribution.

On the other hand, **if there was a Will**, the personal representative of a deceased person may distribute the estate of the deceased person before the expiration of 210 days from the date of the issue of a representation grant with the consent of all of the following:

- all beneficiaries who have an interest in the estate; and
- all persons who may commence a proceeding under Division 6 [Variation of Wills] of Part 4 [Wills] in relation to the estate.

If there is a possibility of such an action, then before distributing the assets, a province-wide registry search for any actions against the estate should be conducted 181 days after the issue of the grant.

⁽¹⁾ The figure of 210 days is the total of the 180 days from the issue of the representation grant required under Part 4 Division 6 of WESA [Variation of Wills] to start proceedings and 30 days to serve the pleadings or petition.

Note: Separated spouses can no longer apply under Part 4, Division 6 of WESA if they have been living separate and apart from their spouse for at least two years, with one or both of them having the intention formed before or during that time, to live separate and apart permanently.

However, if there was **no Will**, the personal representative may distribute the estate of the deceased person within the 210 days from the date of the issue of a representation grant with the consent of all intestate successors entitled to a share of the estate (see *Consent of Beneficiary to Transfer Assets – Post-Application Documents* chapter).

If a beneficiary cannot be located, the personal representative of a deceased person may distribute the estate of the deceased person without the consent of one or more persons whose consent would otherwise be required if the personal representative sets aside all of the following:

- if there is a Will:
 - all the specific gifts to such beneficiaries;
 - a sum equal to the share of the residue of all beneficiaries who have an interest in the residue, and
 - a sum equal to an amount sufficient to satisfy any claim under Division 6 [Variation of Wills] of Part 4 [Wills] in relation to the estate;
- if there is **no Will**: a sum equal to the share of the estate of all intestate successors who have an interest in the estate.

When setting aside a portion of the estate for a beneficiary or intestate successor that cannot be located, a personal representative is liable for loss or damage to any person arising from a distribution of the estate of the deceased person unless the personal representative demonstrates that the personal representative has set aside the specific gifts, amounts equal to the shares of the residue and equal to the total amount sufficient to satisfy the above claims referred if those claims are successful.

After 210 days from the date of the issue of the representation grant, the personal representative may only distribute the estate with consent of the court if:

- a proceeding has been commenced to determine whether a person is or is not a beneficiary or intestate successor in respect of the deceased person's estate,
- relief is sought under Division 6 [Variation of Wills] of Part 4 [Wills], or
- other proceedings have been commenced which may affect the distribution of the estate.

The supervising lawyer must decide as to the manner of the distribution and the setting aside of the shares of the beneficiaries or interstate successors if they cannot be located or if their consents cannot be obtained.

- **A specified period of time (a minimum of 30 days) has expired after the date of publication of the *Notice to Creditors and Other Claimants* in the BC Gazette**

Section 154 of WESA states that, in order to protect the personal representative against any claims by creditors, the personal representative may give notice to creditors and other claimants by publishing a notice in the BC Gazette.

The Notice must state that the creditors and other claimants are required to present their claims against the estate of the Deceased to the personal representative within a specified period of time, which must be at least 30 days from the date of publication.

For more details and an explanation with respect to advertising for creditors and the publication of Notice to Creditors, see:

- ***Letter to B. C. Gazette – Pre-Application Letters***; and
- ***Notice to Creditors and Other Claimants – Pre-Application Documents***.

Although not obligated by law, it is usually recommended that the personal representative publish such notice.

The above provisions only protect the personal representative from personal liability. Please note that if there has been any early distribution, whether by consent or by court order, under Part 4, Division 6 of *Wills, Estates and Succession Act*, it does not affect the rights of a claimant, to pursue funds from the hands of the recipients.

**Income Tax Returns have been Prepared and Filed and
Clearance Certificates have been Received**

The personal representative has the duty to file Income Tax Returns on behalf of the Deceased and of the estate until the estate is fully distributed. The resulting taxes – mainly income taxes and capital gains taxes – are payable as debts of the estate.

Therefore, before distributing the assets of the estate, the personal representative should arrange to prepare and file the required Income Tax Returns, pay all income taxes as assessed by the Canada Revenue Agency (“CRA”), and then obtain a ***Clearance Certificate*** (for distribution purposes) from CRA certifying that all taxes, interest, or penalties assessed under the ITA, and chargeable against the assets of the estate, have been paid.

Sub-sections 159(2) and (3) of the *Income Tax Act* (“ITA”) stipulate that if an executor or administrator distributes an estate before receiving a ***Clearance Certificate*** from CRA, the executor or administrator is personally liable for any unpaid taxes, interest, and/or penalties with respect to any delinquent T1 Returns for the years prior to the date of death, the final T1 Return for the Deceased, as well as the T3 Return with respect to the estate trusts.

To avoid personal liability, until the ***Clearance Certificate*** is received, the personal representative should either postpone distribution of the assets of the estate or hold back from the distribution sufficient assets to cover any additional taxes that may be assessed.

Three *Clearance Certificates* may be required:

- for the Deceased up to the date of death;
- partial certificate (required if there is an interim distribution); and
- final certificate (which includes the Deceased as well as the estate).

Note: If the estate is wound within one year of the date of death, CRA will only issue the date of death ***Clearance Certificate***. If it is a continuing estate, CRA will issue one Certificate up to the date of death and then others as required until the estate is wound-up.

The procedure to obtain the *Clearance Certificate*(s) is as follows:

1. Obtain the name of the Deceased's (or the estate's) accountants from the personal representative and contact the accountants to determine what documents they require in order to prepare the Income Tax Returns for the Deceased and for the estate.

The usual requirements are:

- (a) a copy of the grant;
 - (b) a copy of the Will;
 - (c) a copy of the *Statement of Assets, Liabilities and Distribution*;
 - (d) a trust reconciliation or statement of funds received and disbursed by the law firm or the personal representative;
 - (e) copies of letters from banks or other financial institutions or brokers that contain the financial information (such as interest paid before and after death or the amounts of disposition of the securities); and
 - (f) the latest Income Tax Returns and Assessment Notices – if available.
2. Forward all documents to the accountants for the estate (*Letter to Accountants (Requesting Preparation of Income Tax Returns) – Post-Application Letters*) with instructions to:
 - (a) prepare the necessary Income Tax Returns;
 - (b) estimate the amount of income tax payable;
 - (c) provide you with a figure for their estimated account for services rendered; and
 - (d) if appropriate, make the necessary arrangements to apply for the *Clearance Certificate* (including the preparation of the letter of authority and the request for the *Clearance Certificate – Form TX19*).

If the estate is a large one, a partial distribution may then be made (i.e. some of the assets may be distributed before a *Clearance Certificate* is obtained). This can only be done if sufficient funds are held in reserve to pay any outstanding income taxes, accounting, and legal fees. The amount of that reserve should be estimated by the accountants and the supervising lawyer.

3. Usually the accountants will prepare the following documents and then forward them to the law firm requesting that the law firm arrange for their signature by the personal representative:
 - (a) all copies of the Income Tax Returns (T1 and T3 Returns);
 - (b) a letter from the personal representative authorizing CRA to deal directly with the accountants in the event that there are any questions or problems. (Obviously, it would not be practical to have CRA contact the law firm or the personal representative, who in turn would have to direct the questions to the accountants); and
 - (c) Form *TX19 – Asking for a Clearance Certificate*. This form may also be prepared by the law firm (see **Post-Application Documents**); and

- (d) authorization from the personal representative instructing CRA to mail the *Clearance Certificate* to the law firm (*Authorization to Canada Revenue Agency – see Letter to Canada Revenue Agency (Applying for Clearance Certificate) – Post-Application Letters*).
4. When all documents are signed, mail the following to CRA with *Letter to Canada Revenue Agency (Enclosing Tax Returns) – Post-Application Letters*:
- (a) all signed T1 and T3 Returns;
- (b) authorization from the personal representative; and
- (c) the requisite cheque (if any) for outstanding income taxes.

Form TX19 – Asking for Clearance Certificate and authorization from the personal representative to *Canada Revenue Agency* are kept on file pending receipt of an assessment and are mailed later (see below).

5. In due course, CRA will mail *Assessment Notices*, either to the law firm or to the accountants. Upon receipt of same, and payment of all outstanding income taxes owing, if any, mail to CRA:
- (a) *Letter to Canada Revenue Agency (Applying for Clearance Certificate)* (see *Post-Application Letters*);
- (b) *Authorization to Canada Revenue Agency* authorization from the personal representative instructing CRA to mail the *Clearance Certificate* to the law firm (see above); and
- (c) *Asking for Clearance Certificate – Form TX19* (see above).
6. Upon receipt of the final *Clearance Certificate*, final distribution of the assets may be made subject to conditions as set out below.

Notes: This process may take months and much additional correspondence with CRA. That is why an interim distribution may be necessary to pacify the beneficiaries eager to receive their share of the assets of the estate.

Because of the time period that may elapse between the receipt of the estate assets, the preparation of the Income Tax Returns, and the receipt of the *Clearance Certificate*, evaluate with the supervising lawyer whether or not the funds held in trust (the holdback for taxes, legal and accounting fees) should be invested in an interest-bearing trust account. Interest earned may be taxable and an additional T3 may have to be prepared and filed. The cost of doing so may exceed the amount of interest earned.

Keep in mind that law firms are only permitted to deposit trust funds with designated savings institutions that are insured by either:

- the Canada Deposit Insurance Corporation (“CDIC”); or
- the Credit Union Deposit Insurance Corporation of British Columbia.

For example, if a term deposit is in a foreign currency, the law firm must advise the client that the deposit is not covered by CDIC insurance and should request that the client acknowledge the receipt of the advice and confirm he or she agrees to this.

For a detailed explanation of the Canada Deposit Insurance Corporation (CDIC), see Glossary in chapter IV – Helpful Information and see also the **Trust Accounting Handbook** published by the Law Society of British Columbia.

Debts have been paid

One of the duties of the personal representative is to determine the Deceased's liabilities (debts) and any other claims against the estate, as they must be satisfied before the estate is distributed to the beneficiaries or the persons lawfully entitled to the estate.

If sufficient funds are available, the debts must be paid by the personal representative or by the law firm on behalf of the estate, depending on arrangements made about who is handling the estate funds.

Insolvent Estates

When there are insufficient funds or assets to pay all the debts and liabilities of the Deceased, the estate is insolvent. It also means there will be no residue of the estate to distribute to legatees, beneficiaries or intestate successors, but it does not mean that the estate is bankrupt.

The difference between an “insolvent” estate and a “bankrupt” estate is that a bankrupt estate has gone through the **formal process of declaring bankruptcy** under the *Bankruptcy and Insolvency Act*, whereas an insolvent estate simply lacks sufficient funds or assets to pay all of the Deceased's debts in full. All bankrupt estates are insolvent, but not all insolvent estates are bankrupt.

The personal representative will have to realize (sell) all assets of the estate and pay off the debts as soon as funds are available for the purpose.

Part 6, Division 12 of WESA [Insolvent Estates] sets out the priority in which debts and liabilities must be paid subject to **secured creditors** rights (creditors who holds a security interest registered against an asset of the estate of a Deceased – for example, a financial institution that holds a mortgage registered against the Deceased's residence or the holder of a General Security Agreement registered against a vehicle of the Deceased). The most common debts are:

- **reasonable funeral and other expenses** incurred by the personal representative in administering the estate of the Deceased (for example, probate fees, accounting fees and expenses to maintain and protect assets, such as insurance premiums);
- the **personal representative's fees** for administering the estate (s. 89 of the *Trustee Act* [Application for remuneration]);
- **legal fees and disbursements**;
- **unpaid wages**, salaries, commissions or compensation for services provided to the Deceased during the 180 days immediately preceding the date of the Deceased's death (see s 170 of WESA);
- a claim in respect of a debt or liability for periodic amounts accrued in the year immediately preceding the date of the Deceased's death, plus any lump sum amount, payable:
 - for spousal support, or

- under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse or child, made while the spouse, former spouse or child was living apart from the Deceased;
- **municipal taxes** assessed or levied against the Deceased within the two years immediately preceding the date of the Deceased's death that do not constitute a secured claim against the land of the Deceased, not exceeding the value of the interest of the Deceased in the property as declared by the personal representative;
- back **rents** for a period of 90 days immediately **before** the date of the Deceased's death, and rent for a period not exceeding 90 days **after** the date of death of the Deceased (if the lease provides for accelerated rent);
- debts under the *Workers Compensation Act* and claims resulting from injuries to employees of the Deceased in respect of which the provisions of the *Workers Compensation Act* do not apply;
- claims, not previously mentioned in this subsection, of the government of British Columbia, Canada or any other province, rateably and without preference, despite a statutory preference to the contrary;
- all other creditors whose claims do not come into one of the priorities set out above rank equally.

Creditors whose rights are restricted by this section are entitled to rank as unsecured creditors for the balance of the creditor's claim. For example, if a landlord is owed more than 90 days' back rent, s/he is entitled to rank as an unsecured creditor for the balance of the unpaid rent.

Sections 171 to 174 deal with provable debts, conditional, contingent, and unliquidated (unquantified) claims, secured creditors, and debts contracted individually and on behalf of a partnership, and are beyond the scope of this Guide as they pertain to litigation.

DISTRIBUTION or TRANSFER OF ASSETS TO BENEFICIARIES OR INTESTATE SUCCESSORS

Once the conditions precedent to distribution have been fulfilled, you may arrange for distribution of the assets of the estate to the persons entitled to them. If one of the conditions is not totally fulfilled, for example, you have not received a **Clearance Certificate**, you may (on the instructions of the supervising lawyer and in consultation with the personal representative) arrange for an interim (or partial) distribution.

It is very important that throughout the administration and the winding up of an estate, the law firm (or the personal representative) keep detailed notes as to how each asset has been dealt with, as everything has to be accounted for. In due course you will have to prepare a **Trust Reconciliation Statement** showing of all funds or assets received and disbursed or distributed. A copy of the **Statement of Assets, Liabilities and Distribution** may be used as an initial checklist to verify that nothing has been omitted. A note of caution however: assets passing outside the estate, such as assets held jointly or those with designated beneficiaries, are **not** listed in the **Statement of Assets, Liabilities and Distribution** and, accordingly, you will need to prepare an additional inventory listing those assets.

The assets of the estate are distributed:

- according to the Will (if there is one); or
- pursuant to Division 1 of Part 3 of WESA (if there is no Will) (see **Intestacy – Overview** chapter and **Distribution Statement – Pre-Application Procedure** chapter).

Note: If the proceeds are handled by the personal representative outside the office, confirm in writing that the debts have been paid and that delivery of the specific bequests has been attended to.

Generally, the distribution of the residue (the bulk) of the estate will flow as follows:

Distribute Bequests under the Will and Pay out any Specific Legacies

Any article of personal belonging left in the Will to a specific beneficiary (for example: jewellery, furniture, china, silverware, etc.) should be delivered by the personal representative to the beneficiary as soon as practically possible after the grant is obtained. The personal representative should consult with the supervising lawyer to determine when it should be done.

Any gifts of cash (legacies) under the Will must either be paid by the law firm or through arrangements made for the personal representative to attend to their payment before the residue of the estate is distributed.

For more details regarding specific bequests and legacies, see:

- ***Receipt and Release by Beneficiary/Legatee – Post-Application Documents***; and
- ***Letter to Beneficiary/Legatee – Post-Application Letters***.

Pay Minor's Share to the Public Guardian and Trustee

Pursuant to section 153 of WESA, if:

- a minor is a beneficiary or an intestate successor; and
- there is no trustee, or no trust created for the minor's interest in the estate,

the personal representative (on distribution of the estate), must pay the minor's interest in the estate to the Public Guardian and Trustee in trust for the minor unless, before distribution of the assets of the estate, the court, on application and with notice to the Public Guardian and Trustee, appoints a trustee to hold and administer the minor's interest in the estate until the minor reaches 19 years of age.

In order to help with the payment of funds in trust, the Public Guardian and Trustee's office will provide a **Payment Notice Form** for each payment required. If you do not receive the form, call (Tel: 604-660-4444) and ask for the department of **Child & Youth Services**. They will send you as many **Payment Notice Forms** as are necessary.

On the other hand, if a minor's interest in an estate consists, in whole or in part, of property other than money, the Public Guardian and Trustee may:

- convert the minor's interest in the estate into money (that is, sell the interest); and
- transfer the minor's interest in the estate to the minor; or

- decline to accept the transfer of the minor's interest in the estate and recommend to the court that a trustee be appointed to hold and administer the minor's interest in the estate until the minor reaches 19 years of age.

Prepare Law Firm's Estimated Account for Legal Fees and Disbursements

Depending on your law firm's policy, consult with the supervising lawyer regarding arrangements made for legal fees and then prepare the firm's account following the usual office practice. If the law firm's account is to be paid out of the proceeds of the estate, deduct the amount from the funds held in trust before distributing the assets.

At this point, also check with the accountants preparing the Income Tax Returns to determine their fees, as they will look to the law firm for the payment of their account, especially if the law firm is handling the estate proceeds.

Prepare Trust Reconciliation Statement

At the time of the grant application, the personal representative (in the appropriate applicant's affidavit) swore to "... administer according to law all of the Deceased's estate" and to "prepare an accounting as to how the estate was administered". By doing so, the personal representative acknowledged that he or she was "subject to the legal responsibility of a personal representative".

It is extremely important that the personal representative (and the law firm) keep proper records of any financial or other transaction with respect to the estate as the personal representative must be ready, at all times, to account to the persons beneficially interested in the estate (legatees, residuary beneficiaries, intestate successors, unpaid creditors and the Public Guardian and Trustee, if there are minors or mentally incompetent persons with an interest in the estate) for all assets received and paid out on behalf of the estate. In practical terms, the only persons entitled to a full accounting are the residuary beneficiaries (and in some cases, the Public Guardian and Trustee), whereas the legatees or unpaid creditors are entitled only to a statement showing that their legacies have been paid.

Before the assets of the estate are distributed, prepare a statement of the assets and have it approved by all the beneficiaries. The statement is sometimes called "the personal representative's accounts" and, if prepared by the law firm, is referred to here as "**Trust Reconciliation Statement**". It is usually prepared concurrently with the preparation and execution of **Releases** discharging the personal representative from the duties as executor or administrator of the estate (see below). The **Trust Reconciliation Statement** must set out:

- all funds and/or assets received;
- all expenses of the estate (such as debts, funeral expenses, legal and accounting expenses, income taxes paid, etc.);
- any legacies paid or bequests distributed pursuant to the Will;
- residue of the estate available for distribution; and
- distribution of the residue.

To assist the user, we are providing an Excel Template (see ***Trust Reconciliation Statement Estate Checklists – Helpful Information***). One thing to bear in mind – keep it simple and transparent.

Pursuant to Section 99(1) of the *Trustee Act*, the personal representative must prepare the first statement within two years from the date of the grant, and thereafter, as directed by the court, unless all beneficiaries consent or the Supreme Court orders otherwise.

If, for any reason, a beneficiary is not satisfied with the statement of accounts, he or she may refuse to sign the ***Release*** and the personal representative may be forced to have the accounts reviewed by the District Registrar (called “passing of accounts”). However, this happens very rarely, as in most cases, those entitled to receive an accounting consent to the accounts without the necessity for a court application.

Prepare and Obtain Signed Releases

Before proceeding with a partial or final distribution of the estate, obtain signed ***Releases*** from residuary beneficiaries or intestate successors. No payout or distribution can be made until executed ***Releases*** from all beneficiaries have been received. This is another step, which may take some time and necessitate several reminder letters.

The ***Releases*** cannot be prepared and executed in advance as they can only be drafted when everything is ready for distribution. Only then will the distribution amounts be known, as they can only be determined after the ***Trust Reconciliation Statement*** has been prepared.

For more details and information see:

- ***Release (by Residuary Beneficiary) – Post-Application Documents***; and
- ***Letter to Beneficiaries Forwarding Release – Post-Application Letters***.

A beneficiary is not obligated to sign a Release. As stated above, if for any reason, a beneficiary refuses to sign one, the personal representative will be forced to have his or her accounts reviewed by the District Registrar.

In order to pass accounts, complete and file the following forms (see **Forms** chapter):

- ***Form P38 – Affidavit in Support of Application to Pass Accounts***;
- ***Form P39 – Certificate***;
- ***Form P40 – Statement of Account Affidavit***.

If the distribution takes place before the 210 days from the date of the grant have elapsed and a beneficiary cannot be located, section 155 of WESA allows the personal representative to set aside the beneficiary’s or the intestate successor’s share. However, the supervising lawyer will have to decide as to the manner in which the assets or funds are set aside and distributed.

Distribute the Residue

When signed Releases from all beneficiaries has been received, and after obtaining instructions from the personal representative, the residue of the estate should be distributed. For more details and information, see: ***Letter to Residuary Beneficiary (Forwarding Share of Estate) – Post-Application Letters***.

FINAL REPORTING AND CLOSING FILE

Report to client

When the assets of the estate have been distributed and all matters pertaining to the estate have been completed, prepare a final report to the client. Review the file and the ***Report Letter to Client*** that was prepared and sent to the client after the grant was received and note all the items that were outstanding at that time. When preparing the final report, re-check all these items and review the file generally to ensure that everything has been dealt with.

Close File

Close the file and send it to storage (or similar facility) in accordance with the law firm's procedure and the Law Society requirements. Generally, this means that:

- there are no outstanding matters with respect to the estate;
- all funds have been paid out;
- all matters have been attended to (e.g. receipts obtained from legatees and/or State of Title Certificates received with respect to real property);
- there are no outstanding disbursements or work in progress to be billed;
- all trusts (if any) have been fully administered; and
- all accounts (legal and accounting) have been paid.

Similarly to Will files, retain closed estate files, including instructions, for as long as possible is best practice. We suggest that an estate file be retained for 10 years after the estate assets have been distributed and all trusts (if any) have been fully administered.

