The Law Society of Manitoba

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WILLS AND ESTATES

Chapter 4

Probate and Administration of Estates

November 2023

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A. PROBATE AND ADMINISTRATION

1. Legislation and Jurisdiction

The Court of King's Bench Surrogate Practice Act, C.C.S.M. c. C290 (the *SPA*), *The Wills Act,* C.C.S.M. c. W150, and Court of King's Bench Rules 74 and 75 all apply to probate and administration of estates. Rule 74 sets out the proceedings for both probate and administration and deals with non-contentious surrogate proceedings. Contentious proceedings are considered in Rule 75.

Consideration should also be given to the procedures referred to in *The Trustee Act,* C.C.S.M. c. T160, *The Dependants Relief Act,* C.C.S.M. c. D37, *The Infants' Estates Act,* C.C.S.M. c. I35, the *Indian Act,* R.S.C. 1985, Cap. 1-5, *The Intestate Succession Act,* C.C.S.M. c. I85, *The Vulnerable Persons Living with a Mental Disability Act,* C.C.S.M. c. V90, *The Family Property Act,* C.C.S.M. c. F25, *The Insurance Act,* C.C.S.M. c. I40, *The Beneficiary Designation Act (Retirement, Savings and Other Plans),* C.C.S.M. c. B30, *The Registered Retirement Savings Protection Act,* C.C.S.M. c. R116 and *The Presumption of Death and Declaration of Absence Act,* C.C.S.M. c. P120. This is not an exhaustive list of legislation that may have application to estate matters.

Section 8 of the *SPA* provides that "grants of probate or administration may be made by the court at any judicial centre." Section 10 of that statute gives the probate issued from one judicial centre effect throughout the province. While the application for grant of probate or administration can be filed in any centre in the Province of Manitoba the original documents are sent to Winnipeg for review and approval, and upon approval are sent back to the centre where the application was filed. The physical files are kept in the centres where the application is filed. Other probate and administration matters such as Passing of Accounts or orders related to the administration of an estate are considered in the centre where the application is filed.

> As a practical matter it may or may not be quicker to file in Winnipeg. The decision to do so will affect later access to the physical file. If the application starts in Winnipeg, then that is where the physical file will be situated.

Charges relating to applications for probate or administration have now been eliminated by virtue of *The Law Fees and Probate Charge Act*, C.C.S.M. c. L80, amended November 6, 2020 and now titled *The Court Services Fees Act,* C.C.S.M. c. C297.

Any applications for probate or administration filed on or before November 5, 2020 are still subject to additional probate charges, if additional assets are identified after the filing date or the value of existing assets described in the inventory increase in value, as provided in

The Law Fees and Probate Charge Act. Refunds of probate charges arising from decreases in the value of such assets will also continue to be processed with respect to applications for probate or administration filed on or before November 5, 2020.

2. Probate

Probate is the court procedure by which a will is proved to be valid or invalid. The grant of probate, which issues from the court, certifies that the will was duly proved and that the court has granted the administration of the property of the testator to the executor named in the will.

In determining whether or not to probate a will and/or a codicil, the court must determine the validity of the instrument and, in particular, whether the testator was of the age of majority, of sound mind, understood what they were doing (i.e., had testamentary capacity and intention) and approved the will, and further that the will was executed in accordance with the requirements of *The Wills Act.*

While *The Wills Act* sets out certain formal requirements for the proper execution of a will, section 23 of that *Act* also contains certain dispensation powers. These dispensation powers allow the court to validate the document even though it was "not executed in compliance with any or all of the formal requirements imposed" by the *Act*, if it is satisfied that the document reflects the testamentary intentions of the deceased or the intention to revoke or revive a will or another document setting out their testamentary intentions. The leading case on section 23 applications in Manitoba is *George v. Daily,* 1997 CanLII 17825 (MB CA), (1997), 115 Man. R. (2d) (C.A.).

King's Bench Rule 74.02(3) allows for a person to request probate or letters of administration with will annexed when an original will is lost or destroyed, by filing a copy of the original will, if available, affidavit evidence respecting the loss or destruction of the original will and consents from all persons who would have a financial or proprietary interest in the estate if the deceased had died without a valid will, unless otherwise ordered by the court.

The court has jurisdiction to determine the validity of a will and/or a codicil, as well as the meaning of provisions in the will and/or codicil.

Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved the contents and had the necessary testamentary capacity.

Case law is available to support the conclusion that the mere fact of execution, even imperfect (as opposed to "due") is sufficient to trigger the same presumption.

Where suspicious circumstances are present as to knowledge and approval, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing both testamentary capacity and knowledge and approval. The legal onus on those points is the balance of probabilities and rests squarely on the propounder.

The presumption is there to aid the propounder and, in a vacuum of other evidence, is sufficient to carry the day and prove the will. Actual evidence of the will-maker's capacity or knowledge and approval always trumps the presumption. The onus is on the opposite party when fraud and undue influence are alleged. Those attacking the will bear the burden of proving fraud and undue influence, again on balance of probabilities. There is no presumption of undue influence when dealing with the validity of a will.

See:

- *Hoffman v. Heinrichs,* 2012 MBQB 133 (CanLII)*;*
- *Slobodianik v. Podlasiewicz*, 2003 MBCA 74 (CanLII);
- *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 SCR 876;
- *Ronald v. Ronald,* 2003 MBQB 122 (CanLII);
- *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 SCR 353;
- *Craig v. Lamoureaux* (1920), A.C. 349, reversing (1914), 49 S.C.R. 305;
- *Janicki Estate, Re,* 1997 CanLII 22894 (MB QB); and
- *Leger et al. v. Poirier*, 1944 CanLII 1 (SCC), [1944] SCR 152.

Where such circumstances do not exist, or where the court has ruled that the will and/or codicil is valid, probate is applied for using the procedures set out in the King's Bench Rules and forms.

The appointment of the executor named in the will is effective from the moment of death. The executor's authority does not depend upon probate. However, it may be necessary to probate the will. This largely depends on the nature of the assets of the estate and the dispositions contained in it.

There may be other situations that make it necessary or prudent to admit the will to probate. For example, it may be necessary if there is more than one will, if there is a dispute about the validity of the will, or if there is a family dispute about the administration of the estate. It is also necessary when transferring land under *The Real Property Act,* C.C.S.M. c. R30.

Financial institutions may require a grant of probate to transfer investment and other bank/credit union accounts. Most financial institutions will facilitate transfers of smaller accounts without a grant of probate, depending on the size of the account. In those cases, financial institutions require the named executor to sign an indemnification.

Even where it is not necessary to obtain a grant of probate, it may be prudent for an executor to still do so in order to acquire the protection afforded by a grant of probate. For example, subject to some exceptions, a dependant has a 6-month limitation period from the date of grant of probate to apply under *The Dependants Relief Act* for an order for maintenance and support from the estate of the deceased. Similarly, subject to some exceptions, a surviving spouse or common-law partner may not make an application for an accounting and equalization of assets under Part IV of *The Family Property Act* in respect of the estate of the deceased spouse or common-law partner after 6 months from the date of grant of probate.

The issuance of a grant of probate starts a clock for limitation periods on such claims against the estate that serves to protect a personal representative from personal liability.

a) Procedure for Probate

A non-exhaustive estate information checklist is provided in the precedents. It is a starting point for the preparation of an estate information checklist of your own that you can review with the personal representative. It contains the basic information that will be needed to prepare the court documents and to assist in the administration of the estate.

After obtaining the requisite information from the executor(s), an application for probate should be completed and sworn or affirmed by the executor(s). Prior to October 1, 2022, unless otherwise ordered by a judge, no probate or letters of

administration with will annexed could issue until 7 days after the death of the testator. That rule did not survive the changes that came into effect with the new Rules effective October 1, 2022.

Sometimes a will provides for a survival period for an executor, providing that that the executor must survive the deceased by a certain number of days. Where there is such a provision, the request cannot be filed until the period of time has elapsed. A survival period in a will for an executor is often the result of a misunderstanding of its import.

A survival period was often used between spouses with respect to entitlement to each other's estate to avoid additional probate charges where the death of both occurs in temporal proximity to each other due to a common disaster. If the first spouse dies, and then the second spouse dies 5 days later, if there was no survival period in the will the estate of the first to die would first attract probate charges related to their estate and then attract probate charges again when added to the estate of the last to die.

A typical, though not mandatory, survival period is 30 days. In this example the 30-day survival period would prevent the value of the estate of the first to die from being added to the estate of the last to die because the last to die did not survive for 30 days.

There is no similar significant value in most cases to have a survival period for an executor's appointment. While in most cases a short survival period will not unduly prejudice the administration of an estate, in some cases preventing a person from applying for probate until a survival period elapses could be inconvenient or prejudicial. Since the elimination of probate charges, the rationale behind the survival period for distribution purposes under a will has lost much of its significance.

If the testator is divorced and the will names the former spouse as the executor, the former spouse is not able to act unless there is a contrary intention expressed in the will. Section 18(2)(b) of *The Wills Act* provides that the divorce revokes the appointment of the spouse. A similar revocation of the appointment of a common-law partner as executor in a will is set out in section 18(4) of *The Wills Act* where the common-law partnership has been terminated as set out in that section. In those cases, the alternate executor will act as executor. If an alternate executor is not appointed in the will, then an administrator with will annexed will need to be appointed.

If the deceased died intestate and has both a legal spouse and/or one or more common-law partners at the date of death, consult the Court of Queen's Bench *Notice* dated June 16, 2008 which deals specifically with this situation.

b) Forms Required for Probate (as of October 1, 2022)

i. Request for Probate (*Form 74A*), with cover page (*Form 4C*);
ii. Inventory and Valuation of the Property of the Deceased (*Form 74B*);
iii. Proof of death of the deceased. Rule 74.01(3) provides the documents that establish proof of death under Rule 74 and include a certificate of death issued under *The Vital Statistics Act* or its equivalent from another jurisdiction, a certificate of death issued by a practising physician, a statement of death issued by a funeral director licensed to practise in any Province or Territory of Canada, a presumption of death order made under *The Presumption of Death and Declaration of Absence Act* or its equivalent from another jurisdiction, or such other evidence of death that the court may require. A notarized copy of a certificate of death is not acceptable.
iv. Executed original will and codicil(s) except as permitted under 74.02(3). (Note: The court requires two copies of the will in addition to the original. Do not include photocopies of the Affidavit of Execution);
v. Affidavit of Execution (*Form 74D*);
vi. Renunciation of Probate or Letters of Administration with Will Annexed (*Form 74N*), if required;
vii. Affidavit of Condition (for interlineations or alterations, see Rule 74.02(11) and expanded comments in 2(b)(vii) below) (*Form 74E*), if required;
viii. Two original forms of Grant of Probate (*Form 74F*), (leaving date and judge's name blank); and
ix. One cover page for Grant of Probate (called a "backer" by the court).

i. Request for Probate (*Form 74A*)

This document is signed by the executor.

> An executor can be any person who is 18 years of age or older, or a corporation. Note that if the executor is a corporation, it must be one that has power authorizing it to act in this capacity and it must be licensed to carry on business in Manitoba.

It is imperative that the full name of the testator(s) and the full name and residence(s) of the executor(s) be shown. Often the executor's name is different than that shown in the will (i.e., the executor has married and changed their surname, the corporate executor has changed its name, etc.). In such circumstances, insert the words "shown in the will as" and the name indicated in the will (i.e., Jane Smith (shown in the will as "Jane Jones")). The correction can be made in the first paragraph of the request and also in the Grant of Probate. The legal name then can be used throughout the rest of the document.

It may be that the full legal name of the testator(s) was not shown in the will. Where the will identifies the testator as John Smith but his legal name is John Joseph Smith, the testator will be identified in the court documents as John Joseph Smith (shown in the will as "John Smith.") This should be shown in the preamble to the request and in the Grant of Probate. All other references to the testator's name can use the legal name. Similarly, where "John J. Smith' has been used in the will the testator will be identified as John Joseph Smith (shown in the will as "John J. Smith").

There may be circumstances where the testator used a middle initial but did not actually have a middle name. This may have been done within the community to differentiate the testator from others with a similar name. In those circumstances the name would be indicated as Mary "T" Kehler.

The executor must sign their name on the back of the last page (i.e., the signing page) of the will and codicil(s), if any, as a means of identifying the document. The fact of identification is referenced in the first paragraph of a Request for Probate (Form 74A). This is usually also the page where the exhibit stamp for the Affidavit of Execution (Form 74D) is located. The exact location for the identification is not part of the Rules however documents will typically be accepted for probate provided that the identification line is somewhere on the document.

Paragraph 5 of a Request for Probate references confirmation that the deceased was of the age of majority at the time the will was executed. Subject to certain statutory exceptions (see section 8 of *The Wills Act*) a person needs to be of the age of majority to execute a will, currently being 18 years of age, or 21 if the will is dated prior to 1971.

The Request for Probate must be amended in the few cases of a minor testator who meets the exceptions set out in *The Wills Act*, including where they are or have been married or if they were serving in the Canadian Forces. See *The Wills Act* for a complete list of exceptions to the age requirement for a valid will.

An executor who resides outside of Canada will only be granted probate if they give the same security as is required from an administrator, unless the court, in its discretion, dispenses with security or reduces the amount (see *SPA*, s. 7(2)). This is true even where there are multiple executors where only one resides outside of Canada. The security is in the form of a bond of a guarantee company or personal bond using *Forms 74V*, *74W* and *74Y*.

A personal bond is typically in an amount double the value of the estate as set out in the Inventory and Valuation of the Property of the Deceased (Form 74B) but can be dispensed with entirely or reduced under section 7(2) of the *SPA*. Where all the beneficiaries are adults and sign consents to the waiver of bonds and sureties, or where the executor is the sole beneficiary for the estate, they

may request a waiver of bonds and sureties by filing an affidavit making that request. (See the Court approved non-prescribed form *Affidavit and Consent to Dispense with Bond and/or Surety* on the Manitoba Law Courts Forms *website*).

ii. Inventory (*Form 74B*)

Section 24(1) of the *SPA* requires the executor to provide a complete inventory of the deceased's property, valued as at the time of death. An inventory of assets is required with any form of application or request.

The following assets should **not** be included in the inventory:

- real or personal property held in joint tenancy where the beneficial interest is intended to pass by right of survivorship;
- proceeds of insurance policies, including life insured RRSPs, payable directly to a named beneficiary (*The Insurance Act*, s. 173(1));
- death benefits under the *Canada Pension Plan* (see Regulation 57)[1];
- gifts made by the deceased during their lifetime;
- annuities and pensions not payable to the estate;
- a plan as that term is defined in *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* with named beneficiaries.

Note that in Manitoba those funds are subject to the claims of general creditors of the estate whose claims cannot be met by the estate itself (see *Clark Estate v. Clark,* 1997 CanLII 22786 (MB CA), (1997) 115 Man. R. (2d) 48 (C.A.))[2] The effect of Clark Estate may not be mitigated by *The Beneficiary Designation Act (Retirement, Savings and Other Plans)*[3], however certain transfers from one registered plan directly to another registered plan are protected

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1 CPP, OAS and pension payments to which the deceased is entitled in the month of death should be included on the inventory. The reference to "any benefits under the Canada Pension Plan" in KB rule 74.14(5)(d) is to the CPP Death Benefit which is not included in the inventory. As of Jan 1, 2019 the CPP Death Benefit is $2,500.00.

2 If the situation arises, consideration also should be given to the Ontario Court of Appeal decision in *Amherst Crane Rentals* v. *Perring,* 241 DLR (4th) 176; 50 CBR (4th) 1; 58 DTC 6584; [2004] 5 CTC 5; 187 OAC 336, *2004 CanLII 18104*. The case took the opposite view to *Clark Estate* and found that the creditor had no right to seek repayment of the debt from the proceeds of the RRSPs in the hands of the designated beneficiary when the estate was unable to pay its debts. It may be that an appropriate case to the Manitoba Court of Appeal may lead to a different decision than the one reached in *Clark Estate*.

3 *The Beneficiary Designation Act* replaced *The Retirement Plan Beneficiaries Act* C.C.S.M. R138 which was repealed.

from enforcement proceedings. (See *The Registered Retirement Savings Protection Act*).

An asset owned jointly between the testator and a third party may or may not form part of the assets of the estate depending on the intention of the testator. A testator's intention, if known, is key in determining if the asset forms part of the estate. Sometimes the asset is held in joint names in order to assist the testator with the management or administration of the asset and there is no intention the beneficial interest is to pass by right of survivorship. In that case, the asset would be part of the estate of the deceased and reported on the inventory.

The Supreme Court examined the issue of assets owned jointly by a parent and children in their decisions in *Pecore v. Pecore,* 2007 SCC 17 (CanLII), [2007] 1 SCR 795 and *Madsen Estate v. Saylor,* 2007 SCC 18 (CanLII), [2007] 1 SCR 838. Manitoba cases that have considered *Pecore* include: *Van De Keere Estate, Re,* 2012 MBCA 109 (CanLII) and *The Estate of Rudi Terhoch,* 2013 MQBQ 181 (CanLII).

While values of proceeds of insurance policies, and amounts of annuities and pensions that name beneficiaries other than the estate are excluded from the inventory for filing Requests for Probate, for Administration with Will Annexed or for Request for Letters of Administration, no matter who is named as the beneficiary on a RRSP/RRIF, for purposes of payment of tax, payment is deemed to have been made to the annuitant immediately before death (see *Slater v. Klassen Estate,* 2000 CanLII 21113 (MB QB); [2000] 3 W.W.R. 433 (Man. Q.B.)

However, the proceeds from RRSPs/RRIFs can be included in the income of the beneficiary as a refund of premiums, if either the surviving spouse or a financially dependent child or grandchild is the designated beneficiary.

If there are insufficient assets in the estate to pay the taxes that arise on the registered investments on death, CRA may pursue the named beneficiaries. While the *Income Tax Act,* R.S.C., 1985, c. 1 affixes liability for payment of the taxes arising from the deemed realization of registered investments on the estate by virtue of section 146(8.8), the beneficiaries in receipt of proceeds from registered investments are jointly and severally liable with the deceased's estate for payment of the applicable taxes under section 160.2, subject to applicable rollover provisions.

Unless otherwise provided by statute, all assets of a deceased person pass to the executor or administrator upon death.

When showing the value of an asset that is subject to a mortgage or lien, only the net amount of the asset should be recorded in the inventory. Rule 74.10(1)

provides that the applicable value of property for probate/administration purposes is the fair market value of the property less the amount of any encumbrances. This will be true of real property, but not necessarily true of other assets against which security might have been registered.

While the Court of King's Bench (Probate Division) will routinely allow for reduction of the value of real property by the amount of a registered mortgage, it does not allow the value of a car to be reduced by the value of an outstanding loan secured upon the car. However, it is arguable that a security interest registered under *The Personal Property Security Act* should be recognized as an encumbrance that should reduce the fair market value of the property for purposes of the valuation of property in the inventory.

Since a court has the right to inquire in a summary way where it has reason to believe that the property of the deceased exceeds in value the sum stated in a request, (see Rule 74.10(2)) an explanation should be included where the value of an asset is being reduced by the value of an encumbrance.

Any right of action that the estate may have should be valued at $1.00. If the claim is successful, the inventory must be amended to reflect the actual value. An affidavit of amended inventory is filed and additional probate charges would be paid if the application was filed prior to the elimination of probate charges. If an asset is identified with a value of $1.00, then either the lawyer filing the documents or the executor must provide the court with a letter confirming that an amended inventory will be filed once the value is determined.

If assets are discovered after the grant of probate or administration has issued, or if the assets are later determined to be of greater or lesser value than originally reported or not part of the estate, an amended inventory is required to be filed (Form 74B) together with an affidavit of the personal representative as to the changes in the inventory (*SPA,* s. 24(2)). A revised inventory and affidavit should be filed within thirty days from the date the new assets or amended values are discovered (see the *SPA*, s. 24(2)). If the original application was filed when probate fees were payable then any applicable probate charges would be adjusted accordingly. No adjustment will be necessary in relation to an application originally filed after the elimination of probate fees.

Rule 74.14(5) provides that for the purpose of calculating the fees payable to the lawyer acting for the personal representative, the total value of an estate is the total value of all assets of the estate as set out in the request for probate with 4 exceptions, including property held in joint tenancy where the beneficial interest is intended to pass by right of survivorship.

iii. Affidavit of Executor(s) in Support of Request for Probate

Prior to the Rule changes that took effect October 1, 2022 an affidavit was required to be signed separately from requests for probate and administration. This is no longer required. The information in the requests is now sworn/affirmed by personal representatives. The will and any codicil(s) are now attached as an exhibit to the request for probate or administration with will annexed. The exhibit stamp should be on the will and any codicils, not on the backing, cover or affidavit of execution.

A photocopy of the will and any codicils can be used as an exhibit to the request rather than the originals. The request should be amended accordingly. This may be done in cases where there is a concern with loss of original testamentary documents in the mail, such as situations where the request is being circulated among various applicants for signing in different geographic locations. The original will and or codicil is still deposited with the court when the request for probate is filed.

iv. Original Will and/or Codicil - Identified by Executor

The will and any codicils are identified by the signatures of all personal representatives signing the request for probate, usually on the same page as the exhibit stamps applied to the request for probate. Example wording is:

> This is the last Will and Testament of John Doe
>
> "Jane Doe"
> Jane Doe, Executor (for identification purposes)
>
> or
>
> "Jane Doe"
> Identified by my signature

The fact of identification is part of the first paragraph in a Request for Probate (Form 74A). The signatures must be on the will and any codicil, not on the backing, cover or affidavit of execution. The identification statement can be done on a copy of the will/codicils where there are multiple applicants and documents are being circulated for execution.

v. Affidavit of Execution (*Form 74D*)

An Affidavit of Execution in Form 74D is required with an application for probate. Preferably one is signed at the time of execution of a will or codicil. It is signed by one of the witnesses. They swear or affirm particulars as to the execution, the testator's age of majority, capacity, and knowledge and understanding. Typically the witness will be the solicitor who prepared the will or codicil. The affidavit should conform with the Affidavit of Execution

(Form 74D) to avoid issues, but may be in a different form and substance with direction of the court.

Swearing of the affidavit of execution at the time the will/codicil is signed is the preferred practice. If not sworn at the time of signing or at a later time before the testator's death, one of the two witnesses will have to sign an affidavit of execution "after death" (that is after the testator dies). By then the witnesses may be difficult to locate, deceased, incompetent or otherwise unwilling or unable to sign the affidavit. It will then be necessary to file an affidavit documenting the efforts made to locate the witnesses, explaining why they are not able to then provide an affidavit and otherwise proving the signature of the testator and the facts surrounding the execution of the will. (See the Court approved non-prescribed form *Affidavit Proving Signature (witnesses deceased or cannot be located)* on the Manitoba Law Courts Forms *website*).

> Be aware of the *Practice Direction* issued by the Law Society Discipline Committee in September 1988, expressing concern about the failure of lawyers to ensure that an affidavit of execution is completed by a witness at the time the will/codicil is signed. The best practice is to do the affidavit of execution at the same time the will/codicil is executed.
>
> The committee also advises the profession that when preparing a will/codicil it is inappropriate to charge an additional fee for preparing the affidavit of execution.

If the will or codicil was executed prior to 1971, the age of majority of the testator must have been shown as being 21 years.

Prior to the passage of Man. Reg. 215/79 on December 1, 1979, there was no requirement that the affidavit of execution declare the number of copies of the document that were executed. Consequently, any will or codicil executed prior to December 1, 1979 will be probated even if the affidavit of execution prepared at that time does not contain that information.

If the affidavit of execution is prepared after death, and two or more copies of the will or codicil were executed, the affidavit should refer to the number of copies executed. Those copies should be filed together with the original will or codicil.

A witness cannot swear an affidavit of execution of a will/codicil in front of the other witness to the document (see Rule 74.02(4)).

Gifts in the will/codicil to attesting witnesses and their spouses/common-law partners can be problematic. See *The Wills Act* section 12.

If a beneficiary or a spouse of a beneficiary has acted as a witness, the gift to the beneficiary is void as set out in *The Wills Act*. While an application to validate the gift can be brought under section 12(3) it requires the court to be satisfied that the neither the person nor their spouse or common-law partner exercised any improper or undue influence upon the testator.

The will/codicil is marked as an exhibit to the affidavit of execution of the witness preferably on the back of its last page.

vi. Renunciation (*Form 74N*)

On occasion a person named as an executor in a testamentary document does not want to act as executor for reasons of health, location or other factors. A corporate executor may wish to withdraw as executor if the size of the deceased's estate has become too small to warrant its involvement. Whatever the reason, when an executor wishes to withdraw, they sign a renunciation in Form 74N.

vii. Interlineations in the Will: Affidavit of Condition (*Form 74E*)

See Rules 74.02(11) and 74.02(12). Interlineations, alterations, erasures or obliterations in a will that have not been duly attested or initialed are not valid unless it is shown by Affidavit of Condition (Form 74E) that they either existed at the time the will was signed or they were later validated by republication of the will or by a later codicil.

Where not valid they are not given effect in the probate or letters of administration with will annexed and the invalidity is endorsed on the copy of the will. In addition, the grant is to contain a recital of the invalidity. Since the new rules came into effect on October 1, 2022, at the time of updating of these materials it is unclear how the invalidity is endorsed on the copy of the will attached to the grant of probate.

c) Holograph Wills and/or Codicils

A holograph will/codicil refers to a document written entirely in the person's own handwriting and signed by the person. Such document is valid in Manitoba without formality and without the presence of, or attestation or signature by a witness. (See *The Wills Act,* s. 6).

Rule 74.02(9) details the evidence required to filed to probate a holograph will. The person requesting probate or letters of administration with will annexed needs to file affidavit evidence establishing the following:

- that the will is the last will of the deceased;
- that the handwriting and the signature in the will are those of the deceased;
- that the testator was the full age of majority at the time the will was executed;
- that the testator was of sound mind, memory and understanding at the time of execution of the will.

(See the *SPA,* s. 22(5) and Rule 74.02(9) and the Court approved non-prescribed form *Affidavit Proving Holograph Will* on the Manitoba Law Courts Forms *website*).

d) Double Probate (Rule 74.03) (*Forms 74J* and *74K*)

Where all of the executors in a will have not requested probate and their right to request probate in the future has been reserved (i.e., a minor), or where an alternate executor is required to complete the administration because the executor that made the initial request has become unable or unwilling to continue to act and a part of the estate remains unadministered, then a person may request a grant of double probate.

New forms were created with the rule changes that came into effect October 1, 2022. A request is now made in Form 74J Request for Double Probate and a grant is now issued in Form 74K Grant of Double Probate. Unless ordered otherwise by the court the original grant of probate is surrendered to the court with the request for double probate and is marked as an exhibit to the request. A copy of the will is attached to the request and is identified by the applicant. The Request for Double Probate Form 74J has alternate prompts explaining the need for double probate. A new inventory is filed that sets out particulars of the assets which remain unadministered.

e) Withdrawal of Caveat

Where a caveat was filed in Court of King's Bench and the issues raised by the caveat have been addressed, the caveat must be discharged before the request for probate or request for administration is filed.

The Court of King's Bench forms do not include a form for withdrawal of a caveat which means the lawyer prepares their own form. The form need not be formal. Correspondence by simple letter from the lawyer that filed the caveat has been accepted by the court without formality. Circumstances may dictate need for greater formality in which case it may be similar to a notice of withdrawal for a petition for divorce and titled Notice of Withdrawal of Caveat. A sample of a such a formal document that was successfully filed in Court of King's Bench (Probate Division) is included in the Forms and Precedents.

3. Administration

a) When Granted

An administrator can be appointed by the court if:

- a deceased dies without leaving a will (in which event the administrator applies for Administration by Request for Letters of Administration – *Form 74L*);
- a deceased has left a will, but has failed to appoint an executor to administer their estate; or
- a deceased has left a will naming executors, but those named have died or cannot or will not act.

In the latter two cases *Form 74C* is filed, Request for Letters of Administration with Will Annexed. In the case of an intestacy (the first example above), the administrator distributes the estate in accordance with *The Intestate Succession Act.* If a will exists, the administrator must follow the terms of the will in distributing the estate.

b) Who Can Be Appointed Administrator

An applicant for administration must be a resident of Manitoba (the *SPA*, s. 7(1)). While not referred to in the *SPA,* the degrees of consanguinity for distribution of the estate of an intestate person, as set out in *The Intestate Succession Act*, are followed for determining priority right to act as administrator.

Therefore, the right to apply to be administrator is based on kinship to the deceased, generally in the following successive order, subject to being of age of majority and residence: spouse or common-law partner; children; grandchildren; other issue; parents; siblings; nieces and nephews; grandparents; lineal descendants of grandparents by lines of descent. Persons with equal or greater right to administer an estate than the applicant must either renounce their rights to administer or nominate the applicant to act (see Rule 74.04(2)).

If the only adult child, for example, applies to be administrator and there is a spouse or common-law partner, the spouse or common-law partner shall either nominate the child using *Form 74M* or renounce their right to act using *Form 74O*. If there were other siblings living in Manitoba, then they also must sign nomination forms using Form 74M or renounce their rights using Form 74O.

Section 14 of the *SPA* allows the court, in special circumstances and where it appears to the court to be expedient to do so, to grant administration to someone other than next of kin as outlined above. Such circumstances might arise where the deceased has no family resident in Manitoba or where there are competing claims against the estate assets by family members. A corporate administrator may be an option in such cases. See also section 15 of the *SPA* where application for administration is made by a person not entitled to do so as next of kin of the deceased.

If a person having an equal or superior right to administer refuses to renounce or nominate someone else, any interested party, including a creditor, may apply to have an order in *Form 74P* issue, requiring anyone with a prior or equal right to either refuse or accept administration. If the order is granted and those having the equal or superior right fail to do so, then the interested party can proceed to apply for letters of administration of the estate (see Rule 74.04(3)). Where there is a dispute, the court also has authority under section 17 of the *SPA* to appoint an administrator pending litigation.

Where letters of administration or letters of administration with will annexed are required and the deceased was survived by a legal spouse and one or more common-law partners, the application should provide:

- all of the details of each relationship as set out in Form 74C (Request for Letters of Administration with Will Annexed) or Form 74L (Request for Letters of Administration); and
- a renunciation or nomination from each person habitually resident in Manitoba having an equal or superior right of administration as set out in Rule 74.04(2), or apply for an Order to Accept or Refuse Letters of Administration in Form 74P set out in Rule 74.04(3); and

- comply with section 15 of *SPA,* if the application is not being made by the next of kin within Manitoba. This would apply if the applicant for administration is a beneficiary under a will who is not the next of kin.

Where there is both a spouse and a common-law partner at the time of death, see the Court of Queen's Bench *Notice* dated June 16, 2008.

Prior to the rule changes on October 1, 2022 Rule 74.04(4) provided that administration could not be issued until 14 days after the date of death of an intestate, unless otherwise ordered by a judge. That requirement did not survive the rule change and 74.04(4) now simply provides reference to the form of order for Letters of Administration which was previously Rule 74.04(5).

c) Forms Required for Letters of Administration (as of October 1, 2022)

i. Request for Administration (Form 74L) with cover page;
ii. Inventory and Valuation of the Property of the Deceased (Form 74B) (see above comments under Request for Probate);
iii. Proof of death of the deceased;
iv. Renunciation of Administration (Form 74O) or Nomination of Administrator (Form 74M);
v. Security required under Rule 74.11, being a bond by a guarantee company or a personal bond in Form 74V, Affidavit of Execution of Bond (Form 74W) where applicable, and Affidavit of Justification by Sureties (Form 74Y), where applicable (Sections 25-31 of the *SPA* and Rule 74.11 deal with required security;
vii. Two original forms of Administration (*Form 74Q*) (leaving date and judge's name blank); and
viii. One cover page for Administration.

d) Bonds

An applicant for administration, other than the Public Guardian and Trustee (*SPA*, s. 25(1)) or a trust company, must file a bond unless dispensed with by the court (*SPA,* s. 25(4)). The bond amount is double the sworn value of the estate, unless otherwise directed by a judge (*SPA*, s. 25(3)). Where the bond is given by a surety company, the amount of the bond is for the amount of the sworn value of the estate (*SPA*, s. 25(7)).

The administrator must apply for a bond and, if approved, the cost of the premium will be determined by the surety company. Paying the premium for the bond is an estate expense and not an expense of the administrator personally. The original bond must be filed with the court. If an administration bond does not have a red wafer seal attached it will be rejected.

Where the only asset in the inventory is a right of action valued at $1, the bond must be in the amount of $1,000, regardless of the size of the claim. As referenced above, if the claim is successful, the inventory must then be amended to reflect the actual value.

e) Sureties

A surety is responsible for payment in the amount of the bond signed by the proposed administrator if the administrator fails to properly administer the assets of the estate. A surety must be a person who is a resident of Manitoba (Rule 74.11(3)). Where one surety is required, the surety must provide evidence that their net worth is equal to the amount of the surety's penalty in the bond, typically double the amount of the sworn value of the property of the deceased. Where two sureties are required, they together must provide evidence that their combined net worth is equal to the amount of the surety's penalty in the bond. A surety cannot be the lawyer acting for the applicant or the registrar of the court (Rule 74.11(5)).

The size of the estate determines whether or not one or more sureties are required in addition to a bond. The following are the statutory requirements related to sureties as set out under sections 25(5) and 25(6) of the *SPA* and Rule 74.11.

Sworn Value of Estate	**Surety Requirements**
$50,000 or less	no surety required (s. 25(5))
more than $50,000 but less than $100,000	not more than one surety required (s. 25(6))
$100,000 or more	at least two sureties are required, except as otherwise provided by an Act or otherwise directed by the court (Rule 74.11(4))

The court may accept more than one bond in order to limit the liability of a particular surety (*SPA*, s. 25(2)).

f) Dispensing with Bonds and Sureties

The court has the discretion to dispense with a bond or surety(ies) where all beneficiaries of the estate are adults capable of giving their consent and do consent (*SPA.* s. 25(4)). An affidavit is filed by the applicant (commonly called an affidavit of debts and heirs) stating that the beneficiaries are adults, are capable of consenting to dispensing with the bond (and surety if applicable), have given such consent. It also sets out the status of estate debts, typically giving reference to funeral expenses and

other known debts of the deceased that exist or are expected and status of payment. The consents of the beneficiaries must be filed with this affidavit.

> The affidavit should refer to all known debts that are outstanding and it is also a good practice to refer to anticipated future debts in unknown amounts such as taxes, potential accounting and legal fees and potential personal representative compensation.

g) Release of Administration Bond

Cancellation of security is dealt with under section 31 of the *SPA* and Rule 74.11(8). The requirement for the administration bond will continue until it is cancelled by a justice of the Court of King's Bench. The judge may cancel an administration bond where:

- the administrator has passed their final accounts and has shown that the distribution has been completed; or
- the administrator has paid the debts, made distribution and obtained releases from the beneficiaries and filed an affidavit of debts and heirs.

Where the bond is given by a surety company, there may be a minimum period that must be purchased (for example, three years) and premiums for all three years must be paid before the bond is issued. Once the administration of the estate has been completed, an order cancelling the security can be made by motion with affidavit evidence.

No appearance is necessary where all parties whose interest in the estate may be affected by the order cancelling security have signed final releases in respect to the estate, or the court has passed accounts and the appeal period related to the passing of accounts has expired without an appeal being filed. The affidavit in support of the motion would provide evidence that the estate has been fully administered and either evidence of the signed releases or of the passing of accounts.

In conformity with Rule 74.11(8) the motion to obtain the order to have the bond removed does not have to go onto the uncontested motions list. A motion in blank can be filed in Court of King's Bench with a request that it be provided to the deputy registrar for probate division. It then will be provided to the duty judge in the ordinary course.

A surety company will require a copy of the order before it will refund any unused premiums. Once the surety company has been provided with a copy of the order, it

may refund a portion of the premiums paid by the estate which then would be distributed in the same fashion as the residue of the estate was distributed.

4. Letters of Administration with Will Annexed

a) When Granted

Where a will exists, but there is no executor to administer the estate, an applicant applies for Request for Letters of Administration with Will Annexed (Form 74C). This may occur in a variety of circumstances, including:

- the will and any codicil may fail to name an executor or all named executors may be deceased, incompetent or otherwise unable or unwilling to act; or
- the named executors may fail to apply for probate. In this event, any interested person (defined in Rule 74.01(1) to include a person who has or may have a financial or proprietary interest in the estate of the deceased, including creditors of the deceased), may apply for an order calling upon the executor to accept or refuse probate or to show cause why the applicant, or some other willing person, should not be granted administration with will annexed (Rule 74.02(21)).

b) Forms Required for Letters of Administration with Will Annexed (as of October 1, 2022)

The following forms are required to apply for Letters of Administration with Will Annexed:

i. Request for Administration with Will Annexed (Form 74C) together with cover page. Note that on the last line of paragraph 1 of the request, the persons applying must identify the will by their signatures. The signatures should be on the will and not on the backing, cover or affidavit of execution (see comments above under the heading Request for Probate);
ii. Inventory and Valuation of the Property of the Deceased (Form 74B) (see comments above in section 2(b)(ii) on Inventory);
iii. Proof of death of the deceased;
iv. Executed original will and codicil(s) except as permitted under 74.02(3). (Note: The court requires two copies of the will in addition to the original. Do not include photocopies of the Affidavit of Execution);
v. Affidavit of Execution of the original will and/ or codicil (Form 74D);
vi. Renunciation of Letters of Administration with Will Annexed (Form 74N) or Nomination of Administrator (Form 74M);
vii. Security required under Rule 74.11, (similar to that set out above in reference to a Request for Letters of Administration);
viii. Affidavit of Condition (for interlineations or alterations, see Rule 74.02(11) and expanded comments in 2(b)(vii) above) (Form 74E), if required;

x. Two original forms of Administration with Will Annexed (*Form 74G*) (leaving date and judge's name blank);
xi. One cover page for Administration with Will Annexed; and
xii. Two photocopies of the will and codicils (if any).

5. Administration of Estate Unadministered (Rule 74.05) and Forms

Rule 74.05(1) specifically refers to an application for letters to complete administration due to the inability of an executor or administrator to complete the administration of an estate due to their death. This type of application also applies to an executor or administrator that fails to complete administration for another reason, such as incapacity or being otherwise unable or unwilling to act. In such a case, administration of estate unadministered is granted to an administrator of the estate unadministered (formerly known as administrator *de bonis non*), to complete the administration.

The request for administration of an estate unadministered is made in similar form to a request for letters of administration and includes the words "of estate unadministered" in its title after "letters of administration". The person applying is required to:

- provide particulars of the first grant of probate, letters of administration with will annexed or letters of administration, as the case may be;
- confirm the death of the first executor or administrator;
- confirm the assets of the estate that remain unadministered;
- confirm the names of all beneficiaries who still have an interest in the estate; and
- specify the ground on which the claim to the grant is being made (see Rule 74.05(2)).

(See the Court approved non-prescribed form *Letters of Administration of Estate Unadministered* on the Manitoba Laws Courts Forms *website*).

In addition, if an executor of an estate has died intestate and there are no other executors to carry on the administration of the estate, or if the administrator with will annexed of an estate has died leaving part of the estate unadministered, a beneficiary under the will may nominate a person who is resident in Manitoba to request a grant of administration of estate unadministered with will annexed, to complete the administration. (See Rule 74.05(3) and the Court approved non-prescribed form *Letters of Administration with Will Annexed of Estate Unadministered* on the Manitoba Laws Courts Forms *website*).

The inventory for a request for administration of an estate unadministered only refers to the unadministered property and its value as of the time of the request (see Rule 74.05(4)).

The original grant of probate, letters of administration with will annexed or letters of administration, as the case may be, are surrendered at the time of the application.

6. Probate Charges

As referenced earlier, *The Law Fees and Probate Charge Act* eliminated probate charges. This act is now known as *The Court Services Fees Act* (Court of Queen's Bench *Notice* dated November 6, 2020).

Previously when a request for probate, request for administration, or request for administration with will annexed was filed with the Probate Division of the Court of Queen's Bench, the court charged a probate fee based on the value of the estate as disclosed in the inventory. Fees were determined under the schedule to *The Law Fees and Probate Charges Act*. The probate fees for applications made after July 1, 2005 and before their elimination were set out in section 7:

> *7. For an application made on or after July 1, 2005:*
> *(a) where the value of the property devolving is $10,000 or less, $70.*
> *(b) where the value of the property devolving is more than $10,000, $70, plus $7 for every additional $1,000 of value or fraction thereof.*

With the amendments made on November 6, 2020, charges for probate or administration were eliminated for matters filed after November 5, 2020.

Fees are still payable or refundable, as the case may be, on the value of assets of any amended inventory that is filed with the court where the original grant issued before November 5, 2020.

7. Resealing of Foreign Grants and Letters of Administration – Rule 74.06

The changes to the King's Bench Rules that came into effect on October 1, 2022 made some significant changes to resealing of foreign grants.

There are two separate processes for applying for an order from a Manitoba court to recognise foreign grants of probate, letters of administration or similar types of orders. Such an order would be required where there is property in Manitoba, real or personal, that a foreign executor or administrator cannot access and liquidate or transfer without a Manitoba court order. An example would be an Alberta resident executor for an Alberta deceased who died owning Manitoba real property.

One process is to reseal, where allowed; the other is to apply for an ancillary grant.

Section 48 of the *SPA* provides for a resealing process for Manitoba courts to receive foreign grants of probate or administration. However, that section does not apply to any foreign state, country or territory other than those specifically listed in section 50 of the *SPA*. Generally, that list includes all provinces and territories in Canada, and a limited list of other countries (as well as their respective provinces, states, districts or territories) including Australia, New Zealand, India, Ireland, Pakistan, the United Kingdom, the United States, as well as any declared as qualifying by the Lieutenant Governor in Council.

Section 48 of the *SPA* and Rule 74.06 apply for qualifying jurisdictions, allowing for resealing of the foreign grant of probate, letters of administration with will annexed and letters of administration. For jurisdictions not listed in section 50 an ancillary grant is necessary and Rule 74.07 applies. To reseal a foreign grant of probate for jurisdictions referred to in section 50 of the *SPA* the executor files the following:

i. Request for Resealing of Foreign Grant of Probate, (*Form 74R*);
ii. Inventory and Valuation on Request for Resealing (*Form 74S*);
iii. Affidavit of Execution (*Form 74D*), where the inventory includes immoveable property; and
iv. Two certified copies of the grant of probate under seal of the court that granted the foreign grant, or a notarial copy of the original grant of probate and one certified copy under seal of the court that granted it.

Only those assets of the deceased located in Manitoba are shown in the inventory and valuation on request for resealing.

Rule 74.06(4) provides that the evidence of resealing foreign grants of probate or administration with or without will annexed is the same as required upon a request for grant of probate or letters of administration with or without will annexed, except that only assets of the deceased in Manitoba need be shown in the inventory and valuation. The grant or letters sought to be resealed may be accepted as proof of death of the testator, the proper execution of the will and that it is the last will of the deceased, provided no immoveable property is shown in the inventory. In the case of intestacy, the grant or letters sought to be resealed may be accepted as proof that the deceased died without leaving a will.

An affidavit of execution of the will in Form 74D is required where there is land in Manitoba that is included in the inventory and valuation. An affidavit of execution is not required if the assets do not include real property.

A bond is not required on a request for resealing a foreign grant of probate.

Where an application is being made related to a foreign grant of letters of administration with will annexed or of letters of administration the new rules that came into effect on October 1, 2022 specifically provide the security required by sections 25(1) to (8) of the *SPA* are required.

This appears to create a small contradiction between the rules related to foreign grants and the *SPA*. Section 49 of the *SPA* specifically authorises resealing in Manitoba of letters of administration with or without will annexed where the applicant files a certificate from the registrar or other proper officer of the court that issued the letters that certifies that security has been given in that court in an amount sufficient to cover both the assets within the jurisdiction of that court and those in Manitoba. In the absence of such a certificate then similar security is required covering the Manitoba assets as would be required in granting original letters of administration in Manitoba.

It appears as if the new court rules have omitted reference to the foreign certificate of security. If such a certificate exists in any application for resealing it is recommended that a letter be sent to the court referencing section 49 of the *SPA* and asking the court to dispense with the need for the security now referenced in Rules 74.06(2) and 74.06(3).

That is another good reason for a person to have a will. Resealing is easier in Manitoba if the foreign person died with a will probated in their jurisdiction of residence.

Separate forms of request exist for requesting resealing of foreign letters of administration with will annexed (*Form 74T*) and requesting resealing of foreign letters of administration (*Form 74U*). In both of those types of applications it is necessary to file the other documents referenced above for filing a request for resealing of a foreign grant of probate as well as any required security.

In the case of jurisdictions other than those set out in section 50 of the *SPA*, an application must be made to a judge for an ancillary grant.

Rule 74.07 allows for the application for such an ancillary grant and provides that such an application must, at a minimum, comply with all the applicable requirements for resealing with such modifications as required by a judge.

8. Administration Orders for Estates Under $10,000 (*The Court of King's Bench Surrogate Practice Act*, s. 47(1))

Where the deceased's estate does not exceed $10,000, a Request for Order under section 47 of *SPA* (*Form 74FF*) can be filed. See also Rule 74.15. If the deceased had a will, it should be filed with this request. An inventory need not be filed. An order in *Form 74GG* will be granted. Neither probate nor administration will be issued. The form of order must be filed, in duplicate, with the request.

Requests for administration orders are made where, for example, all of the deceased's other property passed by survivorship, with the exception of an asset such as a vacant lot or cottage with a value of under $10,000. In such a case the court may order the real property be vested in such person as it directs and that the proceeds therefrom be disposed of as provided in section 47(1) of the *SPA*. The order is deemed to be made under section 176 of *The Real Property Act.*

The request for an administration order is straightforward and can be made expeditiously. The use of this procedure avoids the costs inherent in probate and administration. While the applicant need not necessarily be the executor or next-of-kin, unless a judge otherwise directs, the person ordered to administer the estate of a deceased under section 47 must send a copy of the administration order, via personal delivery or regular prepaid mail, within 30 days of the date of the order, to all next-of-kin of the deceased where there is no Will and to all beneficiaries and executors where there is a Will and the person is not the named executor (see Rule 74.15(3)).

A judge has a very broad discretion under section 47. Accordingly, an administration order could possibly be granted to a non-resident of Manitoba. In such cases, the fact that the person requesting the order is a non-resident should be specifically drawn to the judge's attention.

Although there are advantages to proceeding by way of an administration order, it may not be satisfactory for all purposes. For example, it is not sufficient authority to issue a statement of claim under *The Fatal Accidents Act,* C.C.S.M. c. F50. If there are issues that will require litigation, then a request for probate or administration may be more appropriate.

Where an estate is modest, some financial institutions will simply allow the transfer without even an administration order.

9. Probate and Administration of Estates Under the *Indian Act*

Pursuant to section 42 of the *Indian Act*, R.S.C. 1985, c. I-5 all jurisdiction and authority with respect to testamentary matters involving deceased Indians are vested in the Minister of Indigenous Services. It is important to ascertain whether the deceased is an Indian within the definition of the *Indian Act*.

The role of the Minister is to appoint executors and administrators, approve wills and reserve transfers, and adjudicate estate disputes. Upon the death of an Indian, the superintendent of the department is required by section 4(1) of the *Indian Estates Regulations,* C.R.C., c. 954 to forward an itemized statement of inventory in prescribed form to the Minister, showing all the real and personal property of the deceased, the estimated value of each item and a list of known debts or claims against the estate.

The superintendent is also required to state whether the deceased left a will and give the names of all persons entitled to share in the estate, either in accordance with the will or under the provisions of the *Indian Act* if no will exists, and such other information as may be required by the Minister.

The superintendent acts in the capacity of an administrator and is required to take all necessary steps for proper safekeeping/guarding of the deceased's assets, collection of moneys due and owing to the deceased and disposal of money collected or held.

Where the deceased left a will, the superintendent is required to cause application for probate to be completed and signed by the executor (see *Indian Estates Regulations*, s. 5). If the superintendent considers the executor to be incapable due to age or other cause, the supervisor will record this on the form, and complete the application. If there is a will but no executor is named, an application for administration with will annexed is filed with the department.

Where the deceased did not leave a will, the superintendent will forward the inventory statement and the application for administration to be signed by the applicant. Section 43 of

the *Indian Act* gives the Minister the power to appoint personal representatives of the estate of a deceased Indian. Where the executor/administrator requests the Probate Division of the Court of King's Bench to process the estate, Indigenous Services Canada will forward a consent to transfer jurisdiction form to the court for this purpose.

The Minister may also, upon application, consent to the transfer of jurisdiction from the federal department to the particular provincial probate court that would have jurisdiction if the deceased were not an Indian (see ss. 43 and 44 of the *Indian Act*). The applicant must file a request for consent to transfer of jurisdiction with the Minister.

From a review of the *Act*, it would appear that the Minister is completely responsible for the administration of all estates. However, as a result of the decision in *A.G. Canada v. Canard,* 1975 CanLII 137 (SCC), [1976] 1 SCR 170, (1975), 52 D.L.R. (3d) 548 (S.C.C.) family members are given the first option to administer the estate and the department acts as the administrator of last resort, a role similar to that of the provincial Public Guardian and Trustee. With the implementation of this policy, approximately fifty percent of the estates under the Minister's jurisdiction are being administered by family representatives.

Consider whether the deceased is a member of a band which has signed a self-governance agreement. For example, the Sioux Valley Dakota Nation signed a self-governance agreement with the federal and provincial governments. The federal legislation was proclaimed in March 2014. Section 30.03 of the agreement confirms that the SVDN has jurisdiction on the estates of those who were ordinarily resident on SVDN at the time of death and sets out the process.

The *Indian Act* provides for a hierarchy of distribution on an intestacy that is different than *The Intestate Succession Act* and practitioners should be aware of the potential application of the different regimes of distribution.

10. Applications Where Unable to Prove Death

There are situations in which the court is called upon to rule on applications where proof of death cannot be provided. See *The Presumption of Death and Declaration of Absence Act*, S.M. 2019, c. 20 and *The Insurance Act,* C.C.S.M. c. I40.

The court may make an order under section 4(1) declaring a person is presumed to be dead if satisfied that:

- the person has been absent and the applicant has not heard from them or of them, and, to the knowledge of the applicant, no other person has heard from them or of them, since a day named;
- the applicant has no reason to believe that the person is living; and
- reasonable grounds exist for supposing that the person is dead.

Any resulting order must state the date on which the person is presumed to have died.

Under section 5(1) a court may also make an order declaration a person is absent and appointing a committee to administer the person's property if satisfied of certain matters as set out in that section.

11. Miscellaneous Issues

a) Service Canada Notice

In order to avoid the risk of fraud by someone using the deceased's social insurance number, Service Canada must be informed. In Manitoba, this is done electronically by Vital Statistics. The personal representative still needs to contact Service Canada to deal with Canada Pension Plan (CPP) and Old Age Supplement (OAS) benefits and the application for the CPP Death Benefit. If the personal representative has the deceased's social insurance (SIN) card, it should be destroyed.

The deceased's passport should be mailed to Passport Canada to be cancelled. A copy of the death certificate and a letter indicating if the cancelled passport should be destroyed or returned to the personal representative should be included. It may be a wise precaution to send the package by registered mail. The address is:

Passport Canada
Foreign Affairs and International Trade Canada
Gatineau, Q.C. K1A 0G3

b) Signing Remotely

Remote witnessing of affidavits, including those which are part of probate and administration, is now authorised by section 64.1 of *The Manitoba Evidence Act*, C.C.S.M. c. E150 and Regulation 78/2021 which came into force on October 1, 2021. The regulation sets out the procedure for an authorised person to administer an oath, affirmation or statutory declaration without the authorised person being in the presence of the deponent or declarant. A form of jurat is set out in section 6(2) of the regulation.

> For more information, see the module on *Remote Witnessing* in the Practice Resources section on the Law Society website.

B. DISTRIBUTION OF THE ESTATE

1. Timing

Timing of estate distribution depends on a number of factors, including whether or not there are any outstanding debts, liabilities, or taxes, the nature of the property, whether there are any claims being made under *The Homesteads Act,* C.C.S.M c. H80, *The Dependants Relief Act*, or Part IV of *The Family Property Act,* and the terms of the will.

The will may provide for an outright distribution of the estate. This may involve the payment of legacies and then the immediate distribution of the residue. Alternatively, the will may provide for a continuing estate with distribution periodically throughout the administration and a final distribution upon some future event. The following items will deal with those matters common to both outright distribution estates and continuing estates.

a) Executor's Year

As a general rule an executor is allowed one year from the testator's death to call in the assets and settle the affairs of the estate. All investments which are not proper to retain should be realized within the year. At the end of the year, the court, for the sake of general convenience, presumes the estate to have been reduced into possession, and interest then starts accruing on unpaid legacies (see *Re Scadding*, [1902] 4 O.L.R. 632 (Div. Ct)). Executors are entitled to withhold payment of legacies during the first year after the death of the deceased, even though the will indicates that, unless inconvenient, payment should be made sooner (*Re Girvin Estate,* 1932 CanLII 482 (MB QB), (1932), 40 Man. R. 481 (Man. K.B.)).

The executor's year does not apply to the payment of debts. The executor is liable to be sued for payment of debts the moment after the testator's death (*Barrett v. Harper*, [1907] 3 E.L.R. 89 (P.E.I.)).

The executor's year is a rule of general application and distribution of estate residue commonly takes place within the first year following death. However, no distribution can take place until all liabilities have been ascertained and provisions have been made for paying them. Notice to creditors should be published in accordance with section 41 of *The Trustee Act* and, if applicable, notices should be served under Part IV of *The Family Property Act, The Homesteads Act*, and *The Dependants Relief Act*. In some cases, the ability to distribute the estate will be affected by the notice provisions.

The executor should also consider the timing of the distribution of the estate in relation to the filing of the final tax return to date of death and any trust returns for the estate, as well as obtaining the appropriate clearance certificates from Canada Revenue Agency.

b) Administrator's Year

It has been held that an administrator cannot be compelled to make a distribution within the year of the death of the deceased (*Slater v. Slater*, [1870] Chy. Chrs. 1).

2. Order of Application of Assets

Once the assets of the deceased have been collected, one of the first duties of the personal representative is the payment of the debts and liabilities of the deceased.

A personal representative has the power to pay or allow any debt or claim on any evidence that they think sufficient (*The Trustee Act*, s. 51(1)). If the personal representative disputes the claim of a creditor, notice in writing should be given to the creditor who then has 6 months after the written notice was given to commence a claim, if the debt or part of it was due at the time of the notice, or within 6 months from the time the debt or part of it falls due if no part was then due. (*The Trustee Act*, s. 51(2)). If the creditor fails to bring and serve a claim within one month of receipt of notice, that claim is barred.

It may be a wise precaution to advertise for creditors in the Manitoba Gazette and a local newspaper. A period of time in which any creditor must come forward is stipulated in the notice. Once the period has passed, the personal representative is able to distribute the estate without being personally liable to any creditor who subsequently comes forward (*The Trustee Act*, s. 41(1)).

a) Insolvent Estates

In the case of insolvent estates, the contest is between creditors themselves as to the priority in which their debts are to be paid (*Halsbury's Laws of England*, 4th ed. Vol. 17, para. 1163). In a case of a deficiency of assets, debts are to be paid *pari passu* (or 'on equal footing') and without any preference or priority of debts of one rank over those of another (*The Trustee Act*, s. 63(1)).

If a personal representative of an insolvent estate is sued for a debt the personal representative should plead *plene administravit* (that the estate has been fully administered)*;* otherwise they will be personally liable for the debt if it cannot be paid out of the assets of the deceased (*Urbanowski v. Demkiw (Executor of Medwid Estate),* 1986 CanLII 4827 (MB QB), (1986), 41 Man. R. (2d) 28 (Q.B.)).

b) Bankrupt Estates

The scheme of distribution of the estate of a deceased bankrupt to creditors under the *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3 is similar to any other bankruptcy, except that reasonable funeral and testamentary expenses have a first

priority on the proceeds of the estate. The courts have interpreted the words "deceased bankrupt" in section 136 to include debtors who die either prior or subsequent to the date of bankruptcy (see *Re Bertram* (1972), 18 C.B.R. (N.S.) 64 (Ont. S.C.)).

In all other respects, the legal personal representative of the deceased bankrupt steps into the shoes of the deceased and undertakes the rights and responsibilities of the bankrupt on behalf of the estate.

c) Solvent Estates

Where the estate is solvent, the creditors are paid in full. The contest is then between the beneficiaries, first as to the order in which resort is to be had to the various parts of the estate for payment of the debts and liabilities, and second as to which parts of the estate are charged with payment of the pecuniary legacies and in what order.

d) Personalty

The primary fund for the payment of debts, legacies and annuities is the personal property of an estate. The fact that the real estate is also expressly charged with their payment is not of itself sufficient to exonerate the personalty. There must always be an intention, either express or to be gathered by the terms of the will, if the personalty is to be exempt (*Re Watson*, [1922] 52 O.L.R. 387 (C.A.) at 389).

e) Payment of Statutory Claims

The payment of claims under *The Family Property Act, The Homesteads Act* and *The Dependants Relief Act* have a first charge on the assets of the estate.

> Prior to distributing any part of the estate, the personal representative should take care to meet the requirement in section 31 of *The Family Property Act* for serving notice on the surviving spouse or common-law partner of their right to apply for an accounting and equalization of assets.

Under section 32(2) of that *Act*, the personal representative will be personally liable for any loss suffered by the surviving spouse or common-law partner as a result of a wrongful distribution of the estate without such notice. *Peyton v. Peyton (Estate of)*, 2014 MBQB 66 (CanLII) considered the limitation period in the *FPA*, section 29(1) as well as the issue of service of the notice in section 31.

A personal representative should also ensure they have met the requirements of *The Dependants Relief Act,* or face potential liability to dependants for a wrongful distribution in violation of the *Act.*

Claims under *The Family Property Act* are in addition to claims under *The Homesteads Act*. The rights of a surviving spouse or common-law partner under both *The Homesteads Act* and Part IV of *The Family Property Act* respecting equalization of assets after death have priority over rights of a dependant under *The Dependants Relief Act* (s. 18(1)).

3. Transmission and Transfer of Estate Assets

The transmission and transfer of assets are administrative matters which involve determining the requirements necessary for effecting the transmission or transfer, completing any documents necessary, having them executed by the personal representative and then proceeding with the communication or filing of the transmissions and transfers.

Taking control of, and managing the assets of the estate are two of the primary responsibilities of the personal representative and will not ordinarily form part of the duties of the lawyer included in consideration of the legal fees on the tariff pursuant to Rule 74.14(8).

> Care should be taken to differentiate between the role of the personal representative and the role of the lawyer for the personal representative.

The lawyer should consider carefully if they are prepared take on aspects of the personal representative's job. Any legal fees charged for the completion of the personal representative's duties will be subject to approval by the beneficiaries. If the lawyer takes on roles properly belonging to the personal representative, on a passing of accounts the court generally will not permit the lawyer to be paid their hourly rate without a specific agreement in writing by the personal representative and the beneficiaries.

a) Assets with *Situs* in Manitoba

i. Real Estate

The Land Titles office will require the following documents in order to adjust the title of real property:

- Probate or Administration, colour copy uploaded with registration;
- transmission - to have title vest in the name of the personal representative;
- transfer of land from the personal representative to the beneficiary(ies) or to a purchaser if the will contains a power of sale or the direction of the beneficiary. (Land Titles no longer examines the will for either a power of sale or beneficiaries, as section 190 of *The Real Property Act* protects them from liability in this regard.)

A transmission and transfer of land may be filed at one time in series, or the transmission can be filed when Grant of Probate or Letters of Administration issue from court. Title will then issue in the name of the personal representative in their capacity as personal representative. No land transfer tax is payable upon transmission into the name of the personal representative.

If the deceased owned two or more pieces of property registered in the same Land Titles office, it may be possible to file one transmission to change all titles held by the deceased. This saves the estate additional filing fees. Using one transmission can be done as long as all other information (name in which property is registered, address for service etc.) is the same for all parcels of land.

The Land Titles office no longer requires an affidavit of debts and heirs for Torrens property, but pursuant to section 41(5) of *The Trustee Act* consideration should be given to publishing a notice to creditors.

Where ownership of the property is registered under *The Registry Act,* C.C.S.M. c. R50 the proper procedure is to file a notarial copy of the Probate or Administration as well as an executor's deed. In this case, an affidavit as to debts and heirs could be filed.

Where the deceased died intestate, the provisions of *The Intestate Succession Act*, apply. Where the deceased died leaving a surviving spouse or common-law partner and no issue, or leaving only issue which are also the issue of the surviving spouse or common-law partner, the entire estate goes to the surviving spouse or common-law partner (ss. 2(1) and 2(2)). A transfer of land in favour of the surviving spouse or common-law partner, and executed by the personal representative of the estate, would be used.

Where the deceased died leaving a surviving spouse or common-law partner and issue, and one or more of the issue are not also issue of the surviving spouse or common-law partner, per section 2(3) of *The Intestate Succession Act*:

- The surviving spouse or common-law partner is entitled to a preferential share of $50,000 or one-half of the estate, whichever is greater, (s. 2(3)(a)) and a distributive share of one-half of any remainder after distribution of the preferential share (s. 2(3)(b));
- Where the estate is under $50,000.00, the surviving spouse or common-law partner receives the entire estate and any land in the estate may be transferred to them upon proof of the value of the entire estate verified by the affidavit of the personal representative as representing the true value of the entire estate at the date of death. In cases where the value is near $50,000.00, some additional verification may be required (i.e., confirmation from other beneficiaries);
- Where the estate is worth $50,000.00 over and above the value of any land in the estate, the surviving spouse or common-law partner's preferential share can be paid from the other assets and the land distributed in accordance with the distributive provisions of *The Intestate Succession Act*.

There are some shortcuts that may be available when filing documents at the Land Titles office in some cases. For example, a personal representative need only file a single document after death of the last to die of a joint tenancy, where the last to die had failed, during their life as survivor, to file a request to remove the name of the first to die. In that situation, the transmission, with proper evidence, can transmit title into the name of the personal representative of the last to die, by filing the Probate or Administration for the last to die and the death certificate of the first to die and stating appropriate evidence in a transmission. Regard should be had to land titles procedures on a case-by-case basis.

ii. Real Property Mortgage

The Land Titles Office requires the following documents:

- notarial copy of the Probate or Administration;
- transmission - to have title vest in the name of the personal representative; and
- transfer of mortgage from the personal representative to the beneficiary(ies).

Preparing the transmissions and related document to transmit land to the personal representatives and preparing transfers and related documents to transfer land to beneficiaries is part of the duties of the lawyer for the personal representative set out in Rule 74.14(8). If there are complexities in dealing with the land, additional fees may be appropriate.

Sale of land is the responsibility of the personal representative. The lawyer acting on the sale of an estate asset and finding purchasers of an estate asset, including land, is entitled to receive additional fees for those services as set out in Rule 74.14(9).

iii. Canada Savings Bonds

The personal representative should ascertain whether the beneficiary wants to cash in the bonds or to have them transferred into the beneficiary's name. Generally, if they are to be cashed, the bonds can be delivered to the deceased's bank with the request that they be cashed and the proceeds deposited into the deceased's account. If the bonds are being transferred to a beneficiary, the transfer is done through the Bank of Canada.

The Bank of Canada requires the following documents:

- notarial copy of the Probate or Administration;
- the original bonds;
- a transfer form setting out the bond numbers, the name and address of the transferees, and signed by the personal representative whose signature must be guaranteed by a Canadian chartered bank or other financial institution approved by the Bank of Canada;
- if the registered owner's name on the bonds is not exactly as shown in the Probate or Administration, a certificate to the effect that the deceased and the registered owner of the bonds are one and the same person. The personal representative, the spouse of the deceased or even the solicitor may sign this affidavit if they can satisfy the Bank of Canada that they have sufficient knowledge concerning the names; and
- the Bank of Canada will waive production of the probate if the value of the bonds is less than $40,000. If the beneficiary under the will is also the person who would inherit on an intestacy, the bank has a form for this purpose.

Preparing the documents for the transfer of stocks and bonds to the personal representative and then to beneficiaries entitled to them under the will and on an intestacy is one of the duties of the lawyer in Rule 74.14(8). If there are complexities in dealing with the stocks and bonds, additional fees may be appropriate. Redemption of the asset is the responsibility of the personal representative.

iv. Manitoba Government Bonds

If these bonds are to be sold, the procedure is the same as for Canada Savings Bonds.

If the bonds are to be transferred to a beneficiary, write the Provincial Treasurer of the Province of Manitoba requesting their requirements for doing so.

Generally, they require:

- notarial copy of Probate or Administration;
- the original bonds;
- declaration of transmission; and
- transfer form on the bonds duly completed with the signature of the personal representative being guaranteed by an officer of a chartered bank.

Preparing the documents for the transfer of stocks and bonds to the personal representative and then to those entitled to them under the will and on an intestacy is one of the duties of the lawyer in Rule 74.14(8). If there are complexities in dealing with the stocks and bonds, additional fees may be appropriate. Redemption or sale of the asset is the responsibility of the personal representative.

v. Share Certificates of Public Corporations

The method of transfer of shares of any corporation is usually set out in its general by-laws. It is a good idea to correspond with the transfer agent of the corporation to determine the exact requirements.

Generally, they require:

- notarial copy of Probate or Administration;
- the original share certificates;
- declaration of transmission (any number of certificates may be covered by the same declaration of transmission, provided they are of the same class of stock or issue of bonds, debentures or trust notes. Where different classes of stock, and/or different issues or series of bonds, debentures, or trust notes are involved, a separate declaration of transmission must be provided); and
- transfer form on the reverse of the share certificate or a separate stock transfer duly completed with the signature of the personal representative being guaranteed by an officer of a chartered bank, a trust company that is a member of the Trust Companies Association of Canada, or a member firm of a recognized Canadian Stock Exchange.

The documents are then sent to the transfer agent of the corporation and in due course a new share certificate will be issued.

Preparing the documents for the transfer of stocks and bonds to the personal representative and then to those entitled to them under the will and on an intestacy is one of the duties of the lawyer in Rule 74.14(8). If there are complexities in dealing with the stocks and bonds, additional fees may be appropriate. Redemption or sale of the asset is the responsibility of the personal representative.

vi. Publicly Traded Debentures, Bonds, Guaranteed Investment Certificates

Even if these sorts of investments appear to be locked in, most institutions allow that on death, the estate has the option of either cashing them in or transferring them to beneficiaries. The decision in this regard should be made by the personal representative in accordance with the will and instructions received from the beneficiaries.

Whether they are to be cashed or transferred to a beneficiary, the requirements will be to provide:

- notarial copy of Probate or Administration;
- the debenture, bond, guaranteed investment certificate, etc.;
- declaration of transmission; and
- transfer form on the debenture, bond, guaranteed investment certificate, duly completed with the signature of the personal representative being guaranteed by an officer of a chartered bank.

Preparing the documents for the transfer of stocks and bonds to the personal representative and then to those entitled to them under the will and on an intestacy is one of the duties of the lawyer in Rule 74.14(8).

Dealing with a Guaranteed Investment Certificate may not be considered the same as it is a different type of an investment instrument. If there are complexities in dealing with the stocks and bonds, additional fees may be appropriate. Redemption or sale of the asset is the responsibility of the personal representative.

vii. Shares, Debentures of a Private Corporation

To transfer shares or debentures of a privately held company it is necessary to review the constating documents, any shareholder agreement and by-laws, and the conditions attaching to the shares or debentures. Depending on the nature of the directors and shareholders it may not be necessary to produce the Probate or Administration. Similarly, where the shares in a privately held company are the only assets of an estate it may not be necessary to apply for Probate or Administration.

Preparing the documents for the transfer of stocks and bonds to the personal representative and then to those entitled to them under the will and on an intestacy is one of the duties of the lawyer in Rule 74.14(8). If there are complexities in dealing with the stocks and bonds, additional fees may be appropriate. Redemption or sale of the asset is the responsibility of the personal representative.

viii. Bank Accounts

For accounts registered in the deceased's name alone, the financial institution will require:

- a notarial copy of the Probate or Administration;
- a death certificate; and
- a request that the account be closed and the proceeds paid to the personal representative.
- Many financial institutions will require a signed direction from the personal representative. It is a wise precaution to include the direction in all cases, when requesting that an account be closed.

If the personal representative wants to have the funds transferred within the same bank to an estate bank account, a notarial copy of the Probate or Administration is provided together with a request that the bank proceed in that fashion.

Occasionally, the combined balance of accounts held in one financial institution will be below that institution's threshold for requiring that Probate or Administration be presented in order to liquidate. On such occasions, the bank or financial institution may agree to issue a draft or cheque made payable to the estate. This will depend on the policies of the bank or financial institution.

Redemption of the bank accounts is the responsibility of the personal representative.

ix. Chattels – Motor Vehicle, Furniture, etc.

If chattels or items of personal belongings are bequeathed to a named beneficiary, the personal representative can turn the article over to the beneficiary named and obtain a receipt. For articles which have proof of ownership (i.e., a motor vehicle) the personal representative should provide the beneficiary with a notarial copy of the Probate or Administration as well as a bill of sale, and the transfer of ownership portion of the motor vehicle registration will need to be completed.

Distribution or sale of chattels is the responsibility of the personal representative.

x. Commercial Businesses, Unincorporated Partnerships or Sole Proprietorships

These usually consist of assets such as land, buildings and chattels owned and registered in the deceased's name or along with one or more partners. Title to land and buildings should be dealt with as set out in the section dealing with real estate. Chattels should be dealt with as discussed above. In the case of a partnership, confirm whether the deceased had entered into any partnership agreements.

Management or sale of the asset is the responsibility of the personal representative.

xi. Life Insurance Policies Payable to the Estate

Write to the insurance company to determine their requirements. Generally insurance companies will require the following:

- notarial copy of Probate or Administration;
- the insurance policy itself;
- birth certificate of the deceased - where this was not satisfied during the deceased's lifetime;
- death certificate of the deceased;
- claimant's statement; and
- physician's statement (although this requirement may be waived if a death certificate is produced).

Obtaining the life insurance benefit for the estate is the responsibility of the personal representative.

xii. Pension Fund Payable to the Estate

If the deceased was receiving a pension, write to the pension plan administrator to determine if there are any benefits payable to the estate and how to access them. Various options for payment out of the pension may be provided and it would be wise for the personal representative to discuss the tax ramifications of the various options with an accountant.

Obtaining the pension benefit for the estate is the responsibility of the personal representative.

b) Assets Registered in Deceased's Name with *Situs* in a Province of Canada Other than Manitoba

i. Real Estate

Write to the land titles office or registry office in which the land is situated in order to determine their requirements for transmission and transfer. The land titles office in another province will likely require a re-sealed probate or administration and some form of transmission or transfer. In some cases, they may request the original probate or letters of administration document and will not be satisfied with a notarial copy.

It may be necessary to retain an agent in the province in which the land is registered in order to satisfy the requirements. Check with the Law Society of the other province or the Law Society of Manitoba if you intend to complete the documentation yourself but are not certified to practise in the other province.

Dealing with land outside of Manitoba is complex. In general, preparing the documents necessary to transmit or transfer real property is part of the duties of the lawyer for the personal representative set out in Rule 74.14(8). It is very likely that charging additional fees under Rule 74.14(9) will be appropriate.

ii. Share Certificates with Transfer Agent Outside of Manitoba

Write to the transfer agent to determine the requirements. Generally, the share certificates are dealt with in the same fashion as those with transfer agents in Manitoba.

Preparing the documents for the transfer of stocks and bonds to the personal representative and then to those entitled to them under the will and on an intestacy is one of the duties of the lawyer in Rule 74.14(8). If there are complexities in dealing with the stocks and bonds, additional fees may be appropriate under Rule 74.14(9).

iii. Debentures, Bonds, Guaranteed Investment Certificates Issued by a Corporation with No Office in Manitoba

Write to the transfer agent to determine the requirements. Generally, the debentures, bonds and guaranteed investment certificates are dealt with in the same fashion as those with transfer agents in Manitoba.

Preparing the documents for the transfer of stocks and bonds to the personal representative and then to those entitled to them under the will and on an intestacy is one of the duties of the lawyer in Rule 74.14(8). Dealing with a guaranteed investment certificate (GIC) may not be considered the same as it is a different type of an investment instrument. If there are complexities in

dealing with the stocks and bonds, additional fees may be appropriate under Rule 74.14(9).

iv. Bank Accounts in Banks Outside Manitoba

Usually a local Manitoba branch of the bank can arrange for the transfer of funds. The documentary requirements are much the same as dealing with bank accounts in Manitoba. In some circumstances, a resealed Probate or Administration may be required. The bank will inform you of its requirements.

Liquidation of the bank accounts is the responsibility of the personal representative.

c) Assets Registered in Deceased's Name with *Situs* in a Foreign Country

i. Real Estate

The procedure is the same as dealing with real estate in a province of Canada other than Manitoba. One further complication is that if the deceased died testate, the will may have to have been executed in accordance with the requirements of the foreign jurisdiction in order for the will to be valid to transfer the deceased's interest in the real estate in question. The will must be resealed in the foreign jurisdiction and the personal representative may also have to file a bond.

Preparing the transmissions and related documents to transfer the land to the personal representative and preparing the transfers of land and related documents to transfer the land to the beneficiary, if any, are part of the duties of the lawyer for the personal representative set out in Rule 74.14(8). However, there often will be complexities in dealing with land outside of Manitoba, in which case additional fees may be appropriate under Rule 74.14(9).

ii. Share Certificates

Write the transfer agent and ask for the company's requirements. Each company may have slightly different requirements. They may or may not be the same as the requirements for share certificates of corporations with transfer agents in Manitoba.

Preparing the transmissions and documents to transfer the share certificate to the personal representative and then to the beneficiary, if any, are part of the duties of the lawyer for the personal representative set out in Rule 74.14(8). However, there will often be complexities dealing with share certificates outside of Manitoba, in which case additional fees may be appropriate under Rule 74.14(9).

iii. Savings Accounts

Write to the financial institution and find out its requirements in order to transfer the money. Follow the same procedure as set out above for bank accounts outside of Manitoba.

Redemption of the savings accounts is the responsibility of the personal representative.

d) Administration of Assets that Do Not Form Part of the Estate

i. Jointly Held Real Property

The Land Titles Office will require the following documents:

- a Request (same form as transmission) duly executed by the surviving joint owner; and
- a death certificate. A notarial copy is sufficient. Proof of death requires a Government of Manitoba form of death certificate issued by Vital Statistics. Anything less, such as a funeral director statement of death will be insufficient.

> It is the responsibility of the surviving joint owner(s) to attend to filing a survivorship request. This is not an estate expense. Legal fees and disbursements relating to the preparation and filing of a survivorship request are the responsibility of the surviving owners.

When title is held by joint tenants and one of the tenants has died, the surviving joint tenant should be able to transfer the land by transfer of land alone without also needing a separate request to remove the name of the deceased tenant. This is another possible shortcut in filing at land titles office. The current form of eTransfer allows a notarized copy of the death certificate to be attached as a supporting document and with the appropriate evidence set out in the eTransfer.

ii. Joint Real Property Mortgage

The same documentation and comments apply as for joint real property.

Where a mortgage is held jointly and one of the mortgagees has died, the surviving mortgagee can discharge the mortgage without the need for a separate survivorship request with appropriate evidence set out in the eDischarge.

It is also possible for the executor of an estate to discharge a mortgage without Probate with the appropriate evidence set out in the eDischarge, and appropriate evidence filed with the eDischarge including a notarized copy of the will, a notarized copy of the death certificate, evidence establishing that the deceased is the named mortgagee, and approval of all heirs.

iii. Joint Bank Accounts

Contact the institution and request its requirements. Usually, a funeral director's statement of death or death certificate alone should be sufficient to remove a deceased account holder. Some institutions draw a distinction between joint accounts and joint accounts with right of survivorship. Generally, you will have to comply with the institution's requirements.

> Whenever dealing with jointly owned accounts care, caution and consideration should be given to the resulting trust principles set out in the Supreme Court Canada decisions in *Pecore v. Pecore,* 2007 SCC 17 (CanLII), [2007] 1 SCR 795, and *Madsen Estate v. Saylor*, 2007 SCC 18 (CanLII), [2007] 1 SCR 838.

In some cases concerning jointly owned accounts, often in parent/child relationships, survivorship law will not apply to the account on the death of the parent, and instead a surviving joint owner is expected by the parent to hold and distribute the account as part of their estate after their death. A review of the Supreme Court of Canada's related decisions above, and the many cases that have since considered those decisions is recommended.

Legal fees and disbursements relating to the transfer of joint assets are not estate expenses and should be paid by the surviving owner.

iv. Joint Bonds, Debentures, Guaranteed Investment Certificates

Contact the institution and request its requirements. A death certificate is usually sufficient.

It is the responsibility of the surviving joint owner to attend to placing the joint asset into their own name. This is not an estate expense. Legal fees and disbursements relating to the transfer should be paid by the surviving owner.

v. Life Insurance Policies Payable to a Named Surviving Beneficiary

The insurance company will inform you of its requirements, but generally they are:

- the insurance policy itself, often not found, or particulars of the insurance policy;
- claimant's statement, sworn;
- physician's statement (although this requirement may be waived if a death certificate is produced);
- death certificate; and
- possibly a copy of the Probate or Administration (to see if the deceased has attempted to change the beneficiary of the policy in the will).

It is the responsibility of the beneficiary to make arrangements to obtain the benefit. This is not an estate expense. If the lawyer is assisting, then legal fees and disbursements relating to the transfer should be paid by the beneficiary.

vi. RRSPs/RIFs Payable to a Named Surviving Beneficiary

Contact the financial institution to determine requirements. Usually, these requirements include a notarial copy of the death certificate and a signature on the transfer form, if the RRSP/RIF is being rolled over to a spouse or dependent child.

It is the responsibility of the beneficiary to make arrangements to obtain the benefit. This is not an estate expense. If the lawyer is assisting, then legal fees and disbursements relating to the transfer should be paid by the beneficiary.

As noted earlier in these materials in the paragraphs dealing with procedure for probate, the *Income Tax Act* affixes liability for payment of the taxes arising from the deemed realization of registered investments on the estate. However, the beneficiaries in receipt of proceeds from registered investments are jointly and severally liable with the deceased's estate for payment of the applicable taxes, subject to applicable rollover provisions.

vii. Pension Funds Payable to a Named Beneficiary

Contact the pension company to determine what benefits are payable and what the requirements are for paying them. Often it is not possible to transfer benefits under a pension to anyone other than a spouse without a waiver from the spouse/partner.

It is the responsibility of the beneficiary to obtain information about the benefit and to make arrangements to obtain the benefit. This is not an estate

expense. If the lawyer is assisting, then legal fees and disbursements relating to the transfer should be paid by the beneficiary.

e) Canada Pension Plan

A deceased contributor must have made contributions for 1/3 of the calendar years for which they could have contributed to the plan or for ten calendar years, whichever is smaller, but in any case, for a minimum of three calendar years.

If the personal representative is not certain whether the deceased qualified for a CPP death benefit, advise them to make the application anyway. While the CPP website indicates the application is to be made within 60 days of the date of death where there is a will, applications filed later may be honoured.

If there is no will or the personal representative does not apply within 60 days of death then one of the following persons can apply (and payment of the benefit will be made in the following order of priority, upon application): the administrator appointed by the Court; the person or institution who had paid or is responsible for the payment of the deceased's funeral expenses; the surviving spouse or common-law partner of the deceased; or the next-of-kin of the deceased.

It is the responsibility of the personal representative or the person who paid the funeral expenses to make the application for the CPP death benefit.

For any other benefits payable by CPP, it is the responsibility of the beneficiary to obtain information about the benefit and to make arrangements to obtain the benefit. This is not an estate expense. If the lawyer is assisting, then legal fees and disbursements relating to the transfer should be paid by the beneficiary.

i. If Eligible, Documents Required

If applying for a death benefit (to be paid to person who paid funeral expenses):

- birth certificate;
- death certificate;
- social insurance number; and
- statement of previous year's earnings.

If applying for survivor's benefits:

- birth certificate;
- death certificate;
- marriage certificate (if the claimant was married to the deceased);

- statutory declaration (if the claimant was living in a common-law relationship with the deceased);
- birth certificate of surviving spouse or common-law partner;
- birth certificate of each child; and
- social insurance number for surviving spouse/common-law partner and eligible children.

ii. Types of Benefits

Benefits available to eligible survivors of a deceased contributor include:

- a lump sum death benefit payable to the estate of the deceased contributor;
- a monthly pension to the surviving spouse or common-law partner;
- monthly benefits for the dependent children of a deceased contributor.

All survivors' benefits are payable to the eligible survivors of a deceased contributor regardless of any other income or earnings they may have.

iii. Surviving Spouse or Common-Law Partner's Pension

The amount of pension a surviving spouse or common-law partner is entitled to receive varies with that individual's age and circumstances.

There are two categories:

- spouses under age 65;
- spouses 65 years of age and older.

iv. Children's Benefits

When a contributor dies, children's benefit is payable monthly to or on behalf of any dependent children whether or not the other parent is living and whether or not they reside with their other parent.

To be eligible for a children's benefit, each child must be a dependent child, as described below.

v. Who is a Dependent Child?

To be eligible for a children's benefit, the child must be the natural or legally adopted child of the deceased contributor, or a child that has been in the custody and control of the deceased contributor and:

- is less than 18 years; or
- if between 18 and 25, is in full-time attendance at a school or university.

vi. Documents Required

All birth documents must be originals or be certified as true copies of the original documents by one of the following: an official of a government department, magistrate, lawyer, or postmaster, etc. They must indicate that the document conforms to the original document which has not been altered in any way.

The forms and more information are available on-line:

CPP Death Benefit:
https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-death-benefit.html

CPP Survivor Benefit:
https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-survivor-pension.html

C. ACCOUNTS AND FEES OF PERSONAL REPRESENTATIVES AND SOLICITORS

1. Passing of Executors' and Administrators' Accounts

In connection with many estates, the lawyer for the personal representative(s) will request a release in favour of the personal representative from the heirs or beneficiaries to avoid the time and expense of passing the estate accounts. Usually the heirs or beneficiaries are only too glad to avoid the additional expense which they properly consider to be unnecessary because in the case of a simple estate the disposition of the property has either been clearly handled in accordance with the will of the deceased or in accordance with the provisions of *The Intestate Succession Act*.

However, it may either be necessary or desirable to pass accounts:

- where an estate is more substantial or complex;
- where there are continuing trusts over a period of years;
- where there is a bond which will not be released by its issuer until accounts are passed;
- where all of the beneficiaries are not *sui juris* (i.e., if they are infants, or persons of unsound mind who have no committee or substitute decision maker); or
- where one or more of the beneficiaries requests it.

The passing of accounts of executors or administrators is governed by sections 41-46 of the *SPA*. In order to understand the nature of an executor's or administrator's account, Rule 74.12 and *Forms 74Z* to *74DD* must be studied. A notice of application in Form 74Z as provided for in Rule 74.12 and a verifying affidavit in *Form 74AA* should be prepared and filed with the appointment.

In essence, when executors and administrators prepare their accounts for passing, they are setting forth in complete detail the following:

- a statement of the assets of the estate in the form in which they were received;
- a daily statement of which disbursements were made in respect of estate assets (both income and capital);
- a daily statement of receipts in respect of estate assets (both income and capital);

- details of disposition of estate assets in accordance with the provisions of the will, the trusts or *The Intestate Succession Act* (i.e., all transfers and payments to beneficiaries);
- a statement in detail of the expenses claimed for solicitors' fees and proposed compensation to themselves; and finally
- a statement of what assets are left in their hands at the date of the account. (The accounts need only show income and capital separately if the will directs that income and capital be dealt with separately.)

An affidavit of service with respect to service of *Form 74EE* upon the residuary beneficiaries also must be filed.

> It is important to ensure that Form 74EE is served in accordance with the rules which require service personally or by an alternative to personal service on the personal representative and the each beneficiary whose interest in the estate may be affected by the lawyer's fees or disbursements no later than 60 days after the lawyer is retained by the personal representative (Rule 74.14(4)).

Estate accounts can be relatively simple or extremely complicated, depending on the nature of the assets of the estate, the directions given to the executors by the testator, the nature of the disposition of the various properties and other matters of a comparable nature. Actual values must be shown on a final passing of accounts, (Rule 74.12(9)) as distinct from the ability to use book values on an interim passing of accounts (Rule 74.12(11)).

Section 43(2) of the *SPA* provides that when estate accounts are filed in the court, at least 14 days' notice (or such lesser notice as the court may direct) must be given to all persons interested in the estate, including sureties, if there are any. If there are persons interested who are not habitually resident in Manitoba, notice shall be given as the court directs or the court can dispense with notice to them. Those served would then have an opportunity to appear at the time appointed by the master to state their views on the propriety or otherwise of the accounts.

In practice, the form of appointment (*Form 74BB*) is usually submitted with the notice period left blank, and the master who is signing the appointment fills in a notice period keeping in mind the following timelines which are set out in Rule 74.12(8).

- at least 14 days before the appointed day on a person in Manitoba;
- at least 30 days before the appointed day on a person outside Manitoba but in Canada; and
- at least 45 days before the appointed day on a person outside Canada.

The application, affidavit, appointment and notice to beneficiaries (*Form 74CC*) must be served on these individuals personally, or by an alternative to personal service, as specified in Rule 16.03.

Where an infant has an interest in an estate, the Public Guardian and Trustee (PGT) must be served, unless a guardian of that estate has been appointed under *The Infants Estates Act*. In the event that a guardian of the infant's estate has been appointed, then that guardian must be served. The parent(s) of a minor beneficiary are not the automatic guardians for legal purposes and, in order to have standing in court, must be appointed as guardian of the infant's estate pursuant to *The Infants Estates Act*. That being said, it is a wise precaution to serve the parent(s) if they are not already being served with the documents in an individual capacity.

Where no committee is appointed under *The Mental Health Act*, C.C.S.M. c. M110 or substitute decision maker appointed under *The Vulnerable Persons Living with a Mental Disability Act* for a person lacking mental competence, the PGT must be served (*SPA*, s. 43(3) and Rule 74.12(7)). If a committee or a substitute decision-maker has been appointed for the mentally incompetent person, then that committee or substitute decision-maker must be served.

Normally, after the application and supporting material is filed with the court, the appointment for passing is obtained from the master, and the material is served upon all the interested parties. The only remaining question is usually the matter of the personal representative's remuneration.

This is not to say that there may not be questions about the accounts of the personal representatives either in part or in their entirety; every case is different from the next. However, in the majority of cases of estates sufficiently large and complicated to require a passing of accounts, the propriety of the accounts is rarely called into question, particularly where one of the personal representatives is a trust company. However, the proposed remuneration of the personal representatives is potentially more contentious.

2. Remuneration of Personal Representatives

Whether a solicitor is acting for the personal representative seeking compensation or for beneficiaries challenging amounts proposed by a personal representative, it is a difficult and arbitrary exercise to determine what constitutes compensation payable to personal representatives.

Section 90(1) of *The Trustee Act* provides a broad metric for consideration of compensation as follows:

> *a trustee, guardian, or personal representative is entitled to such fair and reasonable allowance for his care, pains, and trouble, and his time expended in and about the estate as may from time to time be allowed by a judge of the court or by any master or referee to whom the matter may be referred.*

There is no rule for determining remuneration payable to personal representatives, except that the amount must be fair reasonable from both the point of view of the personal representative and of the beneficiaries in light of the circumstances of the particular case. Each case must be dealt with on its own merits.

A personal representative who intends to seek compensation should keep ongoing detailed records of the time spent attending to estate matters. This information can be valuable to substantiate the basis of a claim for compensation. The time records should be kept contemporaneously with the work being performed.

Often personal representatives are not cognizant of the amount of time, work, stress and liability that is associated with administration of an estate, and don't realize until it is too late the value a detailed time record would have provided to the determination and consideration of what is fair and reasonable compensation. Compensation may be denied or reduced where appropriate time records have not been provided.

> Lawyers acting for personal representatives should advise personal representatives, in writing, early in the retainer of the importance of keeping such detailed time records, whether the personal representative expects to request a fee or not.

In fixing the compensation to be allowed to an executor or administrator, the court never adopts a rule of fixing compensation by a rigid adherence to fixed percentages either of the probate value or of the revenue and disbursements.

In many estates, no fairer method can be employed than by the application of percentages. In others, while percentages may be of assistance, it would be manifestly unreasonable to apply them slavishly and to do so would violate the true principle upon which compensation is based. This may be because the application of percentages would underpay an executor in a complicated case or would overpay in a relatively simple one.

In recent years, the court has required personal representatives asking for remuneration to set forth in considerable detail in memorandum form the difficulties encountered, the work done, the degree of success achieved, and the principles upon which they are basing their proposed remuneration. For a discussion of the principles on which remuneration has been allowed (or partially disallowed) see:

- *Lloyd Estate (Re),* 1954 CanLII 237 (MB CA), *Lloyd, Lloyd* v. *Williams,* [1954] 3 D.L.R. 834 (Man. C.A.);
- *Green v. Fingard,* 1961 CanLII 570 (MB CA), *Re Fingard Estate* (1961), 34 W.W.R. 426 (Man. C.A.);
- *Re Evashuk* (1983), 23 Man. R. (2d) 208 (Surr. Ct.);

- *Re William Estate* (1983), 24 Man. R. (2d) 15 (Surr. Ct.);
- *Re Ruttan Estate* (1983), 24 Man. R. (2d) 35 (Surr. Ct.);
- *Re Murphy Estate* (1982), 20 Man. R. (2d) 361 (Surr. Ct.);
- *Re Rychliski Estate; Rychliski Estate v. Rychliski,* 1982 CanLII 3997 (MB QB), *Rychliski v. Rychliski* (1982), 15 Man. R. (2d) 340 (Surr. Ct.);
- *Canada Permanent Trust Co. v. Browne* (1981), 10 Man. R. (2d) 142 (Q.B.);
- *Fouillard Estate, Re,* 1997 CanLII 22930 (MB QB), *Re Fouillard Estate,* [1997] M.J. No. 486 (Q.B., Master Harrison);
- *Brehaut Estate v. Dyker,* 1999 CanLII 14201 (MB QB), *Brehaut Estate* v. *Dyker,* [1999] M. J. No. 291 (Q.B., Senior Master Goldberg);
- *Gillespie Estate v. Gillespie,* [1999] M. J. No. 330 (Q.B., Master Sharp);
- *Estate of Geoffrey Philip Money,* 2004 MBQB 287 (CanLII), *Money Estate,* [2004] M.J. No. 287 (Q.B., Master Cooper);
- *The Estate of Rubin Levene,* 2006 MBQB 236 (CanLII);
- *The Estate of Diana Louise Thompson*, 2009 MBQB 235 (Q.B., Master Cooper);
- *The Estate of Ronald Larry Madison*, 2012 MBQB 293 (CanLII) (Q.B., Master Cooper);
- *The Estate of Ann Barbara Kirk,* 2012 MBQB 132 (CanLII) (Q.B., Master Cooper).

The cases involving various applications of the general rule as to executors' remuneration, adhere to the principle that in determining the proper compensation for personal representatives it is essential to consider in sufficient detail the nature and extent of the services rendered to the estate.

Once that has been done, the method of computing the value of the services, whether by percentages or by allowances for specific items, is of secondary importance. In either case, due consideration must be given to such matters as unusual simplicity or complexity of the estate under consideration, extended or onerous services, the exercise of wise judgment to the advantage of the estate, and whether most of the work was done by the personal representative or by their solicitor.

Personal representatives should not take any compensation before, and unless, it has been approved by all beneficiaries representing 100% of the residuary interests in the estate (or those whose interests in the estate may be affected by the compensation), or it has been awarded by the court where there are minor beneficiaries or other beneficiaries who are not able to legally consent to the compensation. Taking compensation before it is approved may result in a reduction of what might otherwise have been granted for compensation.

3. Lawyers' Fees

Complaints about wills and estates fees are among the most frequent made to The Law Society of Manitoba. Aware of the challenge, in 2010 the Benchers approved a Statement of Principles – Fees in Estate Matters. The principles apply to lawyers who act as personal representatives and also to legal fees generally in the context of estate administration.

These principles were developed as result of the work of the President's Special Committee on Lawyers Acting as Executors and Trustees, which was struck in 2008 to address some of the difficult issues that may arise when lawyers act in a representative capacity as either personal representatives or trustees. In some instances, the lack of a clear line of accountability may put trust funds at risk or result in excessive fees, improper distributions, and misinformed beneficiaries. For these reasons, the Committee was struck to consider the related practice and billing issues, to identify concrete solutions, and to make recommendations to the Benchers as to how best to inform and regulate members in the field of estate administration.

The lawyers' tariff of fees, which applies to all estates respecting which either probate or administration is issued, is contained in King's Bench Rule 74.14. This rule sets out in definite terms the fees that are chargeable by solicitors, generally depending upon the size of the estate.

This rule applies in determining the fees and disbursements payable to a lawyer retained by a personal representative when the request for probate or administration is filed in court after January 1, 2013. When dealing with an estate where probate or administration was granted before January 1, 2013, the previous version of Rule 74.14 will apply.

Unless the fees and disbursements have been consented to under Rule 74.14(10) the fees are subject to review by the court as set out in Rules 74.14(12) to (16). There can be a passing of accounts (Rule 74.14(12)) or an assessment in accordance with the provisions of Rules 74.14 (13) to (16). The process of an assessment is set out later in these materials.

In the relevant rules relating to fees, the words "fees" does not include proper disbursements which shall be allowed to a solicitor in addition to the fees, and does not include any remuneration to which a lawyer may be entitled as a personal representative (Note Rule 74.14(7)).

For purpose of calculating the fees payable to the lawyer acting for the personal representative Rule 74.14(6) provides a percentage fee on the aggregate value of the estate as defined in Rule 74.14(5). The aggregate value of the estate is a total of all assets as shown in the request for probate or administration but does not include the following:

- gifts made by the deceased during their lifetime;
- proceeds of insurance, annuities and pensions not payable to the estate;

- property held in joint tenancy where the beneficial interest is intended to pass by right of survivorship;
- the death benefit under the *Canada Pension Plan*.

Rule 74.14(6) provides that, subject to 74.14(7), the lawyer's fees for an estate of average complexity are as follows:

(a) 3% on the first $100,000, or the portion of that amount, of the total value of the estate, subject to a minimum fee of $1,500;

(b) 1.25% on the next $400,000, or the portion of that amount, of the total value of the estate;

(c) 1% on the next $500,000, or the portion of that amount, of the total value of the estate;

(d) 0.5% on the total value of the estate over $1,000,000.

In assessing whether a fee calculated under Rule 74.14(6) is fully disclosed, fair and reasonable in an estate of average complexity, Rule 74.14(8) sets out the services that the lawyer would be expected to have done in order to charge the full tariff for an estate of average complexity:

(a) receiving instructions from the personal representative;

(b) giving the personal representative information and advice on matters in connection with the administration of the estate;

(c) reviewing the will or the provisions of *The Intestate Succession Act,* with the personal representative;

(d) receiving information from the personal representative about the following:

(i) the deceased,

(ii) the deceased's death,

(iii) the beneficiaries,

(iv) minors, or

(v) the estate property;

(e) receiving details from the personal representative of the property and debts of the deceased for the purpose of preparing a request for probate or administration, including the following:

(i) the full nature and value of the property of the deceased as at the date of death, including the value of all land and buildings and a summary of outstanding mortgages, leases and any other encumbrances,

(ii) any pensions, annuities, death benefit and any other benefits payable to the estate, and

(iii) any debts owed by the deceased as at the date of death;

(f) preparing necessary documents to obtain probate or administration for the estate, attending on signing documents, filing documents in the court and receiving the probate or administration;

(g) preparing and serving all required notices;

(h) advising and assisting the personal representative in settling debts, including advertising for creditors, if instructed to do so;

(i) preparing declarations of transmission and powers of attorney and related documents for stocks and bonds transferable to the personal representative under the probate or administration, and preparing documents to transfer the stocks and bonds to the persons entitled to them under the will or intestate succession provisions;

(j) preparing transmissions and related documents for land transferable to the personal representative under the probate or administration, and preparing transfers of land and related documents to transfer land to the persons entitled to the land under the will or intestate succession provisions;

(k) advising the personal representative of any trusts required by the will;

(l) advising the personal representative to prepare and file tax returns;

(m) confirming receipt of clearance certificates from the Canada Revenue Agency;

(n) advising the personal representative to provide an accounting to the beneficiaries and a report on the administration of the estate;

(o) requesting approval from the beneficiaries of the compensation for the personal representative and the fees and disbursements of the lawyer for the personal representative;

(p) preparing and obtaining releases, if instructed by the personal representative;

(q) advising and assisting the personal representative in distributing the estate property in accordance with the will or intestate succession provisions.

The percentage fees under Rule 74.14(6) are to be reduced to 40% of the tariff amount where the personal representative is a lawyer who is acting as both personal representative and as lawyer for the personal representative, is a trust company, or is the Public Guardian and Trustee (Rule 74.14(7)). This is subject to the minimum fee of $1,500.

Rule 74.14(9) provides that a lawyer is entitled to additional fees to those set out in Rule 74.14(6) and Rule 74.14(7) as follows:

(a) appearances in court, in an amount set by the court;

(b) services related to passing the accounts of the personal representative in court under Rule 74.12 in an amount set by the court;

(c) acting on the sale of an estate asset;

(d) finding a purchaser of an estate asset;

(e) assisting the personal representative with estate administration duties, including:

(i) keeping and preparing the accounts of the personal representative,

(ii) listing and valuing assets and debts, and

(iii) safekeeping, insuring and disposing of estate assets;

(f) advising the personal representative with respect to an estate of above-average complexity;

(g) advising and assisting the personal representative as to ongoing trust administration matters, including:

(i) the personal representative's duties,

(ii) the personal representative's powers of sale, investment and encroachment, and

(iii) the allocation of assets as capital or revenue.

Care must be taken to ensure that the lawyer keeps track of their time and differentiates between time that would be charged pursuant to Rule 74.14(8) or (9) as this will play a role in the preparation and issuance of statements of account for the estate.

In addition to the amounts in the tariffs, the lawyer will be entitled to additional fees for services rendered in connection with assets that do not properly form part of the estate (i.e., to a request application for a surviving joint tenant), or any assistance rendered to a designated beneficiary in connection with insurance policies, RRSPs and the like.

> The fees for dealing with assets that fall outside of the estate should be billed directly to the joint owner or beneficiary and should not be paid from the assets of the estate.

Contrary to common-law, the lawyer is not entitled to charge additional fees for transferring stocks and bonds or land belonging to the estate to the personal representative and preparing the subsequent documents to transfer the stocks or bonds or land to the persons

entitled to the stocks and bonds or land under the will or intestate succession provisions. (See Rule 74.14(8)(i) and (j)).

As indicated, the tariff of fees is set out in definite terms. Rule 74.14(3) stipulates that the lawyer retained by the personal representative must not accept payment for services to the personal representative or to the estate, except in accordance with Rule 74.14.

Form 74EE Information for Personal Representatives and Beneficiaries is found in the King's Bench Forms. Form 74EE must be served personally or by an alternative to personal service in accordance with Rule 16 on the personal representative and on each beneficiary whose interest in the estate may be affected by the lawyer's fees and disbursements.

> The form is to be served no later than 60 days after the lawyer is retained by the personal representative. See Rule 74.14(4). A record of when the lawyer is retained and when Form 74EE is served should be kept on the file.

It is a wise precaution to immediately prepare an affidavit of service in the event problems arise on the file and it is necessary to conduct a passing of accounts. For example, it can be challenging to obtain proof of service by registered mail if there has been a significant passage of time. Service of Form 74EE by regular first-class mail in and of itself is not sufficient. Service must be done in accordance with Rule 16.

Rule 74.14 sets out two different types of accounts that can be issued and the process which must be followed.

As set out in Rule 74.14(11), an account for interim fees and disbursements for services that have been completed for the estate can be issued if:

(a) the requested fees are within the fees allowed under Rule 74.14(6) or (7);

(b) all beneficiaries whose interests in the estate may be affected by the lawyer's fees or disbursements have been served with:

  (i) a copy of Form 74EE in accordance with 74.14(4);

  (ii) an itemized statement setting out the lawyer's fees and disbursements, with the fees and disbursements for the services for an estate of average complexity under 74.14(8) set out separately from those for additional services under 74.14(9), if any;

(c) the personal representative consents, in writing, to the interim fees and disbursements requested by the lawyer.

If a beneficiary referred to in (b) above is a minor or mentally incompetent then service of 74EE and the itemized statement needs to follow the manner detailed in 74.14(21)(a) for minors and 74.14(22)(a) for persons lacking mentally competence.

On completion of the estate, the invoice for the final fees and disbursements is subject to the requirements of Rule 74.14(10). The lawyer is entitled to be paid the fees and disbursements they request if:

(a) all beneficiaries whose interests in the estate may be affected by the lawyer's fees or disbursements:

  (i) are adults,

  (ii) have been served with a copy of Information for Personal Representatives and Beneficiaries (Form 74EE), in accordance with subrule (4),

  (iii) have been given an itemized statement setting out the lawyer's fees and disbursements, with the fees and disbursements for the services for an estate of average complexity under Rule 74.14(8) set out separately from those for additional services under Rule 74.14(9), if any, and

  (iv) consent, in writing, to the fees and disbursements requested by the lawyer; and

(b) the personal representative consents, in writing, to the fees and disbursements requested by the lawyer.

A lawyer for any person other than the lawyer for the personal representative, who attends on an assessment of the fees and disbursements or passing of accounts may be allowed fees and disbursements in the discretion of the court (Rule 74.14(17)).

In contentious matters, a lawyer's fees and disbursements are determined by the court (Rule 74.14(18)).

The court may direct the payment of fees and disbursements from the estate generally, or from funds of the estate belonging to any legatee, heir, beneficiary or other person interested therein (Rule 74.14(19)). Generally, costs are allowed and paid out of the estate, but the court would frown upon any needless litigation or expense merely because there is a ready source available for costs in the form of assets in the estate.

A leading case in Manitoba is *Re Ballen's Estate* (1992), 76 Man. R. (2d) 241 (C.A.), in which the court held that the estate should pay the costs of litigation only in exceptional circumstances and only where the estate benefited from the legal work that was undertaken. In that case, the court ordered that the amount of legal costs which had been paid out of the estate be charged against the interest of the party who incurred the account. This decision includes an excellent review of a number of decisions where costs were denied to, or awarded against, parties in estate litigation situations.

Form 74EE sets out in a general sense the role that would ordinarily be undertaken by the personal representatives. The form also advises that further information is available in the Law Society's *Revised Statement of Principles – Fees in Estate Matters* which can be found on the Law Society's website. While not required, it is useful to provide the personal representative with a copy of the Role of the Personal Representative at an early meeting. A discussion of the difference between the Personal Representative's role and the role of the lawyer for the Personal Representative helps to clarify the job for each and manage expectations of the client.

Where the personal representative chooses to have the lawyer perform tasks that are ordinarily the responsibility of the personal representative, the personal representative should be responsible for the legal fees related to those tasks. In such a case, the lawyer should take care to keep track of the time spent on those tasks so that the time can be identified when asking for approval by those affected by the fees or by the court. Approval will be required since the estate would not ordinarily be responsible for paying the legal fees where the lawyer has done the work of the personal representative.

One circumstance where it might be appropriate for the estate to pay the legal fees for the lawyer who has done some or all of the work of the personal representative is where the personal representative is not seeking compensation personally. However, decisions have repeatedly indicated that the lawyer who chooses to take on administrative tasks for the personal representative may find themself being compensated at an hourly rate that is less than their usual professional rate.

When first meeting with the personal representative, it is important to discuss the issue of legal fees and it is wise to provide copies of the information on the role of the solicitor and the role of the personal representative.

4. Lawyers' Fees Where the Lawyer Assists in Obtaining Probate Only

Rule 74.14(8) sets out the tasks that form part of an estate of average complexity. There may be situations where the lawyer does not do everything on the list. For example, the personal representative may decide that they do not need the lawyer's assistance beyond obtaining probate. In those circumstances, it is unlikely a court would find it appropriate for the lawyer to charge the full tariff for the work that has been done. Keep in mind that Rule 3.6-1 of the *Code of Professional Conduct* requires lawyers' fees to be fair, reasonable, and disclosed in a timely fashion.

5. Lawyers' Fees Where the Executor is not Obtaining Probate

The King's Bench Rules relating to legal fees are of no help in the situation where the personal representative doesn't have to apply for probate because of the nature of the assets owned by the deceased on the date of death (for example, where the only assets are the shares in a closely held family corporation). Rule 74.14(1) provides that:

> ***74.14(1)*** *This rule applies in determining the fees and disbursements payable to a* lawyer *retained by a personal representative when a request for probate or administration is filed in the court on or after January 1, 2013.*

If Rule 74.14 doesn't apply, how is the lawyer to determine what an appropriate fee will be and how to have it approved? Here is a possible process:

1. The lawyer should determine how they want to charge fees. Will the fees be based on an hourly rate, a block fee, or on the basis of the tariff as if the assets were subject to probate? (Note: charging on the tariff may be appropriate because most of the tasks set out in Rule 74.14(8) will be undertaken by the lawyer even if the personal representative isn't applying for probate.)

2. Obtain approval in writing in advance from the personal representative and those affected by the fees to the manner in which the fees will be charged. Since Rule 74.14 doesn't apply, it is good practice to use a retainer agreement. Having approval in writing in advance from those affected by the fees helps protect the personal representative.

3. It is generally understood that a retainer agreement isn't a blank cheque from the personal representative and those affected by the fees. It would be wise to get written consent (as set out in Rule 74.14) to the fees. In this fashion, there are clear, written authorizations on the file.

4. If any of the people affected by the fees refuses to sign the retainer agreement, it may be a sign of a challenging estate. Consider having a discussion with the personal representative about filing for probate as a precaution in case a passing of accounts or assessment of costs is required.

   That being said, be aware of *re: Silver Estate* [1999] 31 ETR (2d) 256 (Ont S.C.J.) (also known as *re: Silver Estate #1*) in which the Court said it is not necessary for the executor to have obtained a certificate of appointment of estate trustee in order to voluntarily pass their accounts. The Ontario and Manitoba court rules are similar and *Re Silver Estate* #1 might be used to bring an application of accounts or taxing of fees without having to obtain probate.

It is wise to serve Form 74EE on every estate file (whether or not probate or administration is being sought) as it may come to pass during the administration that probate is needed. Rule74.14(4) provides that a lawyer is to serve Form 74EE within 60 days of being retained.

6. Assessment of Costs

Rule 74.14(13) makes general provisions for the assessment of costs. This rule provides that a personal representative, the lawyer for the personal representative, or a beneficiary whose interest in the estate may be affected by the legal fees or disbursements may obtain a notice of appointment for the assessment.

Rule 58 (assessment of costs) applies with necessary changes to the assessment process, however, the party obtaining the appointment shall serve all interested persons set out in Rule 74.14(13) at least 30 days before the date for assessment hearing (Rule 74.14(14)(a)). In addition, if a master is available in the centre where the notice of appointment is filed, the master must conduct the hearing (Rule 74.14(14)(b)).

At least 14 days before the hearing, the personal representative's lawyer must file and serve upon the personal representative and each beneficiary whose interest in the estate may be affected by the fees and disbursements the notice of appointment and the following:

(a) an itemized statement, setting out the lawyer's fees and disbursements with the fees and disbursements for the services for an estate of average complexity under Rule 74.14(8) set out separately from those for additional services under Rule 74.14(9), if any; and

(b) an affidavit setting out the following:

  (i) that the lawyer has served a copy of Form 74EE as required by the rules on the personal representative and each beneficiary whose interest in the estate may be affected by the lawyer's fees or disbursements,

  (ii) the date of service of Form 74EE on each person referred to in subclause (i),

  (iii) the fees and disbursements requested by the lawyer,

  (iv) the lawyer's fees that are allowable under Rule 74.14(6) or (7) with respect to the services referred to in Rule 74.14(8) (fees for an estate of average complexity),

  (v) if the requested fees exceed those payable under Rule 74.14(6) or (7), the reasons why increased fees should be allowed.

Rule 74.14(16) states that when assessing the legal fees, regard must be given to:

(a) the complexity of the matter;

(b) the nature of the estate assets relative to the value of the estate;

(c) the time spent and the nature of the services performed by the lawyer;

(d) the results achieved;

(e) any other matters considered relevant by the court.

In order to approve a fee higher than the percentage fee permitted by the rules, the amount, time spent and results achieved are all considered. In preparing your affidavits for the hearing on the application, it is strongly suggested that you set out in considerable detail the services that were performed and also the amount of time involved, in order to assist the court as much as possible. It is not sufficient to say "To additional time spent" in your statement of account. Put in the actual time in terms of hours and the hourly fee which you are claiming. Be specific about your attendances and list them exhaustively.

If you review matters in detail initially with your client, the personal representative, any account at the end of the work will not come as such a shock and may save you the time involved in making an application to pass the accounts. If you must assess your accounts, be thorough in the preparation of your affidavit and of your bill of costs in order to render all the assistance possible to the court to support your application.