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## Manitoba Bar Association Presentation for: Public Sector Lawyers' Section and Wills, Estates and Trust Section

- **Topic: Lawyers acting as Attorneys, Executors or Administrators in their Personal Capacity**
  - Role of executor or administrator
  - Role of attorney under a power of attorney
  - Issues
  
- **Actual Topic: Lawyers should not act as Attorneys, Executors or Administrators in their Personal Capacity with very few exceptions**
  - Why?
  - What are the exceptions?

## Word of Caution

- **Make no assumptions about your abilities:**
  - Having a call to the Manitoba Bar does NOT mean you know your responsibilities as an executor, administrator or attorney
  - The legal (and procedural) issues may not be simple
  - A court may ultimately hold you to a higher standard than a lay person because you are a lawyer

## Summary of Steps in an Estate: Will You Act?

- **If you know you are named as an Executor or plan to act as Administrator (no Will or Will Annexed):**
  - Locate the original Will or confirm that there is no Will
- **Before you do ANYTHING AT ALL**
  - Confirm residency of deceased
    - If deceased is NOT a resident of Canada, engage counsel in foreign jurisdiction to determine if you should renounce as executor or can act as administrator
  - Confirm ***solvency*** of estate
    - If solvent, consider after this presentation if you are going to renounce your appointment (or not apply to be administrator)
    - If insolvent, do **NOT** act (attend seminar on bankrupt estates)

## Summary of Steps in an Estate, Will you Act? cont.

- Confirm status of family relations
  - Are you aware of discord? Serious discord? Dysfunctional?
- Consider your own wishes
  - Do you have time, interest and desire etc.?
- Consider if there are ongoing trusts and if the executor assumes the role of trustee (eg. portion of estate held for infants, persons with disabilities or for period of time)
- Co-executor or multiple executors named
  - Does this affect your decision?
  - Does not change your liability – cannot delegate tasks to co-trustee and avoid liability
  - If more than 1 executor, must act unanimously unless Will stipulates majority or some other requirement

## Summary of Steps in an Estate, Will you Act? cont.

- You can RENOUNCE but you must do so before you take ANY actions as executor
  - if you have taken some action(s) - regardless of whether you have been appointed in a Grant of Probate, renunciation requires a Court Order
- CONSIDER: If after attending this presentation, you have previously agreed to let your name stand as an executor (or alternate) and you are certain you do NOT want to act as an executor, advise testator/testatrix now so he/she can revise the Will and name someone else (including a trust company or the Public Guardian and Trustee, or someone who did not attend this presentation)

## Summary of Steps in an Estate: Organ Donation and Funeral

- **Organ Donation**

- Did the deceased do online sign up on the province's intent to donate registry or sign donor card? *The Human Tissue Gift Act* C.C.S.M. c. H180

- **Funeral**

- Plan the funeral (named executor in Will has authority) or delegate, if appropriate to family
- Did the deceased have a pre-paid funeral plan?
- Wishes of family (religious service, cremation?)
- Cemetery plot authorization?
- Covid-19 restrictions on “crowds” – Postpone “Celebration of Life?”
- Obituary – who is doing, contents?
- Pay funeral bills

## Summary of Steps in an Estate: Read the Will

- **Read the Will Carefully**
  - Understand the gifts (specific and residual)
    - If there are specific gifts, does the deceased still own the property? (eg. cottage)
    - Is the property outside Canada (real property, in particular)?
  - Understand who are the beneficiaries (any infants or persons with capacity issues, long term trusts?)
    - Have any beneficiaries pre-deceased the testator/testatrix?
    - Are any non-residents of Canada?
  - Any terms of the Will subject to interpretation that are obvious (eg. “residue to “my children” and testator has biological children and step children, or something does not make sense)
- **Review the Law on Intestate Succession**



## Summary of Steps in an Estate: Certificates and Notification

- **Death certificates**
  - Obtain Vital Statistics Death Certificate and Funeral Director's Statement of Death
- **Notify various agencies and institutions (eg. CPP/OAS, banks, pension plans) of the death with copy of death certificate**

## Summary of Steps in an Estate: Timely First Steps

- **First Critical Steps**

- **Secure** the deceased's house (and other real property), valuables and documents
- Ensure continued utility services, as needed (eg. heat in winter)
- Obtain **insurance** coverage for all real property, contents and other personal property (as appropriate) and notify the insurers of vacancy. Deal with MPIC on vehicles for insurance
- Find personal ID and cancel or destroy
- Digital “presence” – deal with (if possible)
- Arrange a redirection of Canada Post

## Summary of Steps in an Estate: Preparation and Applying for Benefits

- **Prepare a list of beneficiaries and their addresses**
  - ALERT: are any beneficiaries non-residents of Canada? If so, there may be withholding tax on distributions
  - Have any named beneficiaries pre-deceased the will maker? (either named directly or part of a “class” – eg. “my children”)
  - Obtain a family tree of deceased. REASON: is anyone obvious excluded? If so, possible claim – dependant?
- **Determine if there is life insurance payable to the Estate or no named beneficiary, and if so, file claim forms**
- **Determine if there are death benefits on private pension plans or CPP and if so, file claim forms**

## Law of Lapse: Named beneficiary predeceases

- **Lapse is Rule of law**
  - Gift to a beneficiary who predeceases the testator fails or lapses
  - Certain common law exceptions and statutory exceptions to lapse
  - Specific devise or bequest that fails goes into residue
    - s. 25 of *The Wills Act*
  - Lapsed residuary bequest goes out on an intestacy
    - *Re Smith and McKay et al.* [Sparks Estate v. Wenham] 1994 CarswellMan 138, [1994] 6 W.W.R. 731, 4 E.T.R. (2d) 147, 116 D.L.R. (4th) 308, 95 Man. R. (2d) 181, 70 W.A.C. 181
  - Both lapsed specific gifts and lapsed residual gifts subject to anti lapse legislation that **may save gift** (unless contrary intention in Will)
    - s. 25.2 of *The Wills Act*

## Summary of Steps in an Estate: Probate

- **Assemble the team**

- Hire the appropriate experts to help you properly manage your responsibilities (lawyer for estate, accountant, appraisers, financial manager or broker?) If the deceased owned real estate outside Manitoba, hire local counsel in province or country where it is located
- It may take over a year to administer the Estate. Although *The Trustee Act* may provide some statutory protection, you are at risk for losses to estate assets in these volatile markets (investing, failing to invest, leaving in original form where a delay in realizing the asset may result in significant losses). Need investment advice.
- Do NOT assume both the role of executor and estate lawyer
- Confirm to residual beneficiaries that you are relying on the advice of professionals and make sure confirmed in writing (eg. signing income tax returns – relying on accountant for preparation)

## Summary of Steps in an Estate: Probate, cont.

- **Obtain a list of all of the assets and liabilities of the deceased**
  - Determine if Probate is needed or whether assets can be transferred without it.
  - CAUTION re: proceeding without probate
  - Appraisals needed?
  - File and obtain the Grant of Probate, if required or desired
  - Liabilities:
    - Determine what they are
    - Contingent?
    - Claims against deceased?

## Summary of Steps in an Estate: Probate Fees

- **Current Status of Probate Fees in Manitoba**
  - December 23, 2019 the Manitoba government announced that probate fees would be eliminated effective July 1, 2020.
  - Incorporated in the *Budget Implementation and Tax Statutes Amendment Act, 2020*
  - Bill did not pass in last session and Legislature does not sit until October 2020
  - Currently probate fees exigible in Manitoba. Future status? Retroactive to July 1, 2020???
  - Current rate – essentially \$7 per \$1000 of value of property owned by deceased (excluding real property outside Manitoba and registered encumbrances and mortgages on property)

## Summary of Steps in an Estate: Creditors and Compensation

- **Advertise for creditors in the required form?**
  - s. 41 *The Trustee Act* C.C.S.M. c. T160
- **Executor's Fees**
  - Entitled to “reasonable fee”
  - In family estates, often family member “begrudge” fees to executors who are family
  - Subject to Court approval (and in some instances Court approval is required)
  - Separate from legal fees
  - Taxable in hands of executor
  - Variety of QB Rules, *The Trustee Act* and common law. Attend separate seminar on executor compensation if this is of interest  
[CAUTION: never bother accepting the position to earn compensation – experience shows this is problematic....]



## Summary of Steps in an Estate: Beneficiaries

- **Notify beneficiaries**
  - Copy of Probate
  - Regular progress reports (manage expectations as to timing) by email
  - Owe a duty to beneficiaries. Common law, powers in Will itself, *The Trustee Act*. Beneficiaries are often unhappy:
    - With the amount ultimately realized from an estate (claim that executor did not do enough to maximize the potential value)
    - Allegations of preferential treatment between beneficiaries
    - When executor is a family member, often allegation he/she was acting in a conflict of interest
    - Quantum (if any) of executor's fees
  - Eventually beneficiaries will receive accounting and release (or accounts passed) so full, regular and comprehensive information helpful during administration
- Form 74AA to come from estate lawyer

## Law of Ademption and Abatement

- **Abatement**

- If estate is solvent (ie can pay all debts) but does not have sufficient assets to pay creditors **and make all gifts** –law of “abatement” applies – pro rata reduction of gifts (in particular order). All debts paid first.

- **Ademption**

- If property that is the subject of a gift no longer exists or is no longer owned at testator’s death (destroyed, sold or given away), beneficiary receives nothing
- Solved by substitutionary gift in Will (eg. Jack gets cottage and if I do not own, in my Will it stipulates that on my death, he gets net proceeds of sale at the time I disposed of it)

## Summary of Steps in an Estate: Joint Accounts

- **Determine if there joint accounts and if so REVIEW LAW and facts**
  - Are proceeds of joint accounts part of the Estate?
  - 2007 SCC decisions Pecore and Madsen – what do they mean?
    - *Pecore v Pecore*, 2007 SCC 17
    - *Madsen Estate v Saylor*, 2007 SCC 18
  - Ontario CA decision: Sawdon – can Courts make things more unclear??
    - *Sawdon Estate v. Sawdon*, 2014 ONCA
  - Inventory on Probate Request – executor must take position on joint accounts

## Summary of Steps in an Estate: Beneficiary Designations

- **Determine if there are TFSAs, RRSPs or RRIFs and if so REVIEW LAW**
- **Latest (by date) designation (issuer form or date of Will) prevails**
  - s. 5 and 11 *The Beneficiary Designation Act* (Retirement, Savings and Other Plans) C.C.S.M. c. B30
- **Tax on RRSPs and RRIFs falls in estate of deceased (often at highest marginal rate) and proceeds flow to beneficiary outside estate**
  - Certain rollovers available
  - Now consider if unjust enrichment can get tax from beneficiary or argue named beneficiary is trustee under resulting trust and holds proceeds on behalf of Estate
    - *Morrison Estate (Re)*, 2015 ABQB 769
    - *McConomy-Wood v. McConomy* (2009), 2009 CarswellOnt 914, 46 E.T.R. (3d) 259 (Ont. S.C.J.)

## Summary of Steps in an Estate: The Mechanics (Simplified)

- Obtain control of the assets
- Open an estate bank account
- Plan for sale or disposition of assets not specifically left to a named beneficiary
- Liquidate assets as appropriate or transmit into name of estate
- Transmit title to all real property to the estate (for sale or transfer)
- Pay the bills and debts of the deceased and the estate
- Tax returns filed (see next slide) and receive clearances
- Transfer specific gifts to beneficiaries and pay legacies
- Prepare final accounting and releases (including executor's fees)
- Residual beneficiaries consent or accounts passed (must be done if infants or persons who lack capacity)
- Distribute residue or establish trusts as required under Will

## Summary of Steps in an Estate: Tax Issues (Simplified)

- **Ensure Income Tax Returns matters attended to:**
  - File final T1 return for year of death (and any prior unfilled years)
  - File T3 return(s) for Estate and going trusts (complex rules GREs)
  - Consider obtaining Clearance Certificate(s) prior to distribution of the Estate. Why?
    - Distribution of an estate in advance of a clearance certificate, renders executor **personally** liable to CRA for any of the Estate's unpaid taxes. If you are late in filing an estate's tax return, penalties and interest may be assessed against you **personally**
- US or foreign tax returns?
  - U.S. federal estate tax return must be filed if a deceased Canadian resident (non-U.S. citizen) owned U.S. situs assets exceeding \$60,000 U.S. in fair market value at the time of death
  - Return must be filed within **9 months of death**

## Statutory and Contractual Rights and Obligations

- **Applies whether Testator Dies Testate or Intestate**
- **Testamentary Freedom is fettered by a Statute**
  - *Part IV The Family Property Act*
  - *The Homesteads Act*
  - *The Dependants Relief Act*
- **Testator Can Obligate Estate by:**
  - Prenuptial or Cohabitation Agreement
  - Mutual Will Contract
  - Separation Agreement or Court Order Binding on Estate
    - Spousal or common law partner support
    - Child support
    - Obligations to deal with assets on death



## Rights of Spouse/CLP: Part IV, *The Family Property Act*

- On death, spouse or common law partner has right to an accounting and if appropriate, an equalization payment
- Policy reason: a partner in a relationship should not get less on death than he/she would on relationship breakdown
- Pitfall: special rules (s. 37 FPA) dealing with joint property, beneficiary designations and life insurance (if survivor joint owner or named as beneficiary, these are excluded from accounting and survivor takes)
- No ability for Court to vary (s. 40)



## Rights of Spouse/CLP: Part IV, FPA, cont.

- **Prescribed notice to survivor re: potential rights. Must be served within 1 month of Grant of Probate or Administration (s. 31)**
- **Limitation Period: 6 months from Grant of Probate or Administration or such longer period of time as court extends [s. 29(1), (2)]**
  - Pitfall: no Grant of Probate or Administration, no limitation period running
- **Can contract out [s. 5, 27(1)]. To be enforceable need:**
  - Writing
    - s. 1(1) definition “common-law relationship agreement” and “spousal agreement”
  - Clear, unambiguous language
  - Full financial disclosure of both parties
  - Independent legal advice

## Rights of Spouse/CLP: *The Homesteads Act*

- **A spouse or common law partner has homestead rights in the “homestead” (usually martial home)**
- **Rights include right to life estate on death of the spouse or common law partner (s. 21)**
  - In addition to spouse or clp having exclusive occupation of the homestead, life estate has continuing payment obligations for estate of deceased – eg. capital items for repair
  - Problematic with blended families (if survivor significantly younger or in very good health – life estate can be for many years)
- **Rights are in addition to those under Part IV *The Family Property Act* or amounts property received under Will or *The Intestate Succession Act***
- **Can release rights under HA (s. 11)**

## Rights of Dependents: *The Dependents Relief Act*

- **Allows dependants (as defined in DRA) to apply for maintenance out of an Estate. Includes:**
  - former spouse or common law partner who is entitled to support
  - child who, by reason of illness, disability or other cause unable provide himself or herself with the necessities of life
  - child where deceased stood in *loco parentis*
- **Concept of financial need**
- **6 month limitation period after issuance of Grant of Probate or Administration (can be extended by Court)**
  - Works as bar to distribution for 6 months
  - No limitation period running if no Grant of Probate or Administration

## Administration

- **Requirements**

- Must be Manitoba resident (over 18)
- Must be spouse, child, parent etc. (order of entitlement and requirements for nomination and/or renunciation)
- Bonding/surety requirements
- More restrictive powers than executor
- Statutory distribution in accordance with *The Intestate Succession Act* C.C.S.M. 185
- Actual administration once appointed, not significantly different

## Powers of Attorney: Should I be an attorney??

- **May be much longer period of time than acting as and executor or administrator (eg. incompetence lasts decades)**
- **Appropriate for spouse or common law partner (but cannot be attorney to deal with homestead – need alternate)**
- **May have more difficult ongoing decisions to make**
- **Other options: Trust companies and Public Guardian and Trustee**
- **Useful Resource: Public Guardian and Trustee publication**
  - **ENDURING POWER OF ATTORNEY - A Guidebook for Donors and Attorneys**
  - [https://www.gov.mb.ca/publictrustee/pdf/power\\_of\\_attorney\\_guidebook.pdf](https://www.gov.mb.ca/publictrustee/pdf/power_of_attorney_guidebook.pdf)

## Powers of Attorneys: Some general cautions

- **PITFALLS:**
  - unknowingly disposing of gifts that are subject to specific bequests causing ademption
    - *The Wills Act* C.C.S.M. c. W150 s. 24(1)
  - changing carriers of RRSPs and RRIFs causing ademption
    - *Desharnais v. Toronto Dominion Bank*, 2001 BCSC 1695 (CanLII) affirmed 2002 BCCA 640 (CanLII)
  - what to do with joint accounts
    - Are they part of estate plan – intention?
  - Life insurance
    - Continue paying premiums, extend term? Subject to separation agreement or Court order? Part of estate plan?

## Powers of Attorneys: Compensation

- **Trouble with Compensation**
  - Attorney will not be paid for day to day care issues (can be considerable time)
    - *In Estate of Ruth Jean Colvin*, 2006 MBQB 229 (CanLII)
  - Deal with in power of attorney document (done in advance when maker is competent)

## NOT Acting as Executor, Administrator or Attorney

- **When would Eleanor act? Hardly EVER**
  - I am sole heir and beneficiary (no one else can complain or has any rights) eg. I am spouse (no former spouses, no children of the deceased other than any he had with me)
    - If deceased had former spouse, matters between them are properly settled
    - If deceased had children with someone else, there are no issues – (eg. they get life insurance outside estate)
  - I am parent of adult child who has no spouse/common law partner and no children
  - I am child of parent, family is not dysfunctional
    - All goes to surviving spouse who is my other parent
    - OR all to my siblings and we are all treated equally in the Will and any items that can be contentious (eg. family cottage) are dealt with in advance and known/consented to by other siblings



## Questions??

- **End of presentation**