



Community Legal Information Association of Prince Edward Island, Inc.

Wills and Estates: Information for Executors

An executor is the person named in a will to carry out the instructions in the will. The person who makes the will, called the testator, decides who he or she wants as executor.

An executor is also called a personal representative, which means someone who manages the legal affairs of another because of incapacity or, in this case, death.

There is no obligation to agree to be someone's executor at the time the will is made or at the time that person dies. The person making the will should ask you to be the executor before naming you in the will. You can withdraw at the time of the person's death if you do not wish to act. If no alternate executor has been named, the court will have to appoint an administrator to carry out the executor's duties. If you know that someone has appointed you as executor, it is important to let the person know as soon as possible if you can't do it, so he or she can make a new choice.

Do not agree to be a person's executor unless you feel willing and able to do the job and give it the time it needs. Once you get involved in working on the estate, it may not be possible to step down - you actually need the permission of the court to do this and you must have a good reason. You may also have to find a replacement - someone who is willing to apply to be administrator of the estate.

Being an executor may be a straightforward, simple job, or it could take a lot of time and effort. More time and effort could be involved if the estate is large, if there is a business, or if there is a trust fund set up for dependent children. Administering trusts for children could be a commitment that lasts for many years. However, being an executor does not necessarily mean you will administer the trust - another person may be named as trustee to do that job.

As an executor, you have legal duties and responsibilities to carry out. If these are not carried out in the way the law expects, you could be personally liable to the heirs or the estate creditors (those to whom the estate owes money). You are expected to show the same care and concern in your duties as you would show for your own affairs - though it is not necessary to be perfect. Most people hire lawyers and accountants to help them carry out their duties. Fees for lawyers and accountants are paid from the estate. Unlike witnesses, executors can be beneficiaries of the estate.

When a person dies, the executor is responsible for:

- Seeing that instructions in the will are carried out
- Seeing that beneficiaries interests are handled properly
- Acting as trustee of the estate
- Gathering together all assets of the deceased person
- Paying outstanding debts and taxes
- Distributing money and property according to the will

First Steps

It is important that you see a lawyer initially to be sure that you are doing things properly. You can choose to have a lawyer do all of the work or you can do some of it yourself, seeking a lawyer's advice and services when necessary.

When a testator dies, an executor can refuse to serve by filling out Form 65K of the Rules of Court Forms (Renunciation of Probate or of Administration With the Will Annexed) or by submitting a written declaration of refusal to the Estates Section of the Supreme Court of PEI.

If you choose to accept the appointment, following this checklist may be helpful:

- Find the will and read it. The original will is required because a copy is not considered valid unless there are exceptional circumstances. You do not need to hold a formal reading of the will.
- Make funeral arrangements, or make sure that someone is looking after this. Sometimes people put requests for funeral arrangements in their will, so these may have to be passed on to whomever is arranging the funeral. Check to see if a funeral has been prearranged and/or pre-paid.
- Apply, or have the lawyer apply, for probate (see the next section, Obtaining Probate, for more information). Letters Probate are issued by the court and confirm your right to act as executor.
- Make a list of the assets of the deceased, as you have to provide a complete inventory of the estate to obtain probate. You may need to meet with the deceased person's lawyer, banker, investment broker, and life insurance agent. Also check the land registry, safety deposit boxes, and personal papers of the deceased for information on assets.
- Get copies of the death certificate. There are 2 types of death certificates – the funeral director's and the death certificate issued by the province. Once you obtain probate, you will need to provide death certificates and Letters Probate to most of the companies and individuals you will be dealing with – most will accept the funeral director's certificate. You can get multiple copies of this from the funeral home. If you need a provincial death certificate, you can get this by phoning the Department of Vital Statistics (838-0880 or 1-877-320-1253).

If there is no real property (i.e. land or buildings) or if the deceased's assets are dealt with through joint-ownership or by naming certain beneficiaries on individual documents, it may not be necessary to obtain probate. Check with a lawyer to see if probate is required.

Obtaining Probate

Probate is a court process by which a will is proven to be the last will and testament of the deceased.

If the will is to be probated, it is your job as executor to do so. Many executors have a lawyer complete the task of obtaining probate. In PEI, you apply to the Estates Section of the Supreme Court in Charlottetown for “Letters Probate”, which confirms your right to handle the estate of the deceased person.

A will must be probated first in the province where the deceased person is domiciled. “Domiciled” is a legal term that means lived in a place with the intention to have that location be home. Some form of probate process must also take place in all out-of-province locations where real property is owned.

If the executor and the person who made the will were both residents of Prince Edward Island, the executor must apply for probate within 30 days of being notified that he or she is executor. Out-of-province executors must apply for probate within 3 months of being notified.

First steps to take:

- Get or make an estimate of the market value of the estate and provide the lawyer with this information. A complete inventory of the estate must be submitted before you can get Letters Probate.
- Have the lawyer prepare an application for probate.
- You must “prove” the will. In order to do this, you need to find one of the witnesses to the will who can swear that he or she witnessed the signing of the will. If none can be found or they have both predeceased the testator, you should speak to a lawyer. You will have to provide a sworn statement (affidavit) telling what you have done to locate them and an additional affidavit from someone identifying the signature of one witness and the deceased. Some lawyers complete the Proof of Will at the time the will is made, so that finding a witness is not necessary later.
- Pay the probate costs to obtain the Letters Probate.
- The court will give you extra copies of the Letters Probate for a small fee. Make sure you have enough copies to deal with all the assets. You may have to prove that you are executor and have Letters Probate in order to deal with insurance companies, banks and other institutions, so several copies may be required.

If you want more information about the process of obtaining probate, you can get a copy of *The Probate Act* and its accompanying Regulations, the Rules of Court and Rules of Court forms. These are available online at the provincial government website (www.gov.pe.ca) or you can visit the Law Library in the Charlottetown courthouse to see the Rules of Court and the Rules of Court forms. Copies of provincial Acts and Regulations are available for a small fee at Island Information Service on the first floor of the Jones Building, 11 Kent Street in Charlottetown (368-4000 or 1-800-236-5196).

The Rule of Court dealing with probate is Rule 65. The court forms dealing with probate are also numbered 65. Petition for probate is form # 65A.

In most cases, once you have filed the necessary documents with the Deputy Registrar of the Estates Section of the Supreme Court (368-6004), and paid the Probate fee, you will get the Letters Probate. This process is called Proof in Common Form and it does not require a court appearance.

Proof in Common Form

The following documents must be submitted:

- 1) Form 65A – Petition for Probate –this is your official application
- 2) Form 65D – Executor’s Oath
- 3) Form 65E – Inventory of Estate
- 4) Form 65F – Proof of Will
- 5) Form 65G – Proof of Codicil (if there is a codicil or addition to the will)
- 6) The original will of the deceased and any codicils
- 7) Affidavit of Petitioner verifying Petition and Inventory
- 8) Death Certificate or Proof of Death

If a beneficiary or other interested party files a formal notice against the will, you will have to go to court. This might happen if someone wants to contest the will or is questioning whether the deceased was of sound mind when making the will. This notice is called a caveat and it is a formal request for a stop to the proceedings until a court looks more carefully at the evidence that the will is valid and that the person who made the will was competent when the will was made. The caveat (Form 65CC from the Rules of Court Forms) indicates that someone is objecting to the granting of Letters Probate. If this happens, you must provide Proof in Solemn Form instead of Proof in Common Form.

Proof in Solemn Form

If you are executor of a will where Proof in Solemn Form is required, consult a lawyer immediately about the situation. This is a court process. After listening to evidence from all sides, a judge makes a decision about the validity of the will. This decision cannot be changed unless a new will is discovered.

Everything must be done according to exact procedure and will be looked at closely. There will be a court appearance at which you present your proof that this is a valid will. It becomes more important at this point that you find one or both of the witnesses or that you find someone who can be a witness to their signatures and the signature of the deceased person.

* * * * *

Once the will has been proved, in either common or solemn form, you will have to pay the probate fee to receive the Letters Probate. The fee is set by the court and is based on the value of the estate - for example, for estates valued between \$10,001 and \$25,000, the fee is \$100 with an extra \$15 for an ad in the Royal Gazette of PEI (the ad is explained later). The fee goes to the Provincial Treasury. Remember to get several copies of the Letters Probate. You will need them to complete your duties as executor.

Once probate is obtained, you can begin to distribute personal belongings and small mementos as the will instructs. Be sure to get receipts for all of these.

Do not distribute anything of value unless you know there is enough in the estate to pay the bills.

Second Steps: Collect Assets

- Notify the beneficiaries by registered mail about their share in the estate. You might want to send a copy of the will to the beneficiaries. Explain to them that it may be some time before they receive their inheritance because of the other things that must be done before the estate is distributed.
- Protect the assets of the estate and any important papers by making sure they are insured against fire and theft and stored in a safe place.
- Arrange to collect any income or benefits owing to the deceased from employment.
- Claim any government pensions or death benefits available to the estate.
- Collect any other monies owed to the estate – this could include RRSP's, group life plans through private health insurance, or director's fees for serving on Boards of corporations.
- Open a bank account for the estate, transferring all funds into the one account. Close all other accounts.
- If the estate is large, invest money that is not immediately required – you are expected to use the money to the benefit of the beneficiaries while the estate is being settled.
- Take paper assets like stocks or bonds from safety deposit boxes. Decide which of those must be sold or transferred to beneficiaries.
- Determine what real property (land and buildings) the deceased owned.
- Deliver, store or sell household and personal belongings according to the will and as you consider proper in the administration of the estate.
- Make decisions about any private businesses the deceased owned or was involved in, following directions included in the will or terms dictated by shareholders agreements.

Some of the above duties are likely to require help from professionals like lawyers, accountants and appraisers. Their fees are paid from the estate.

Keep careful records and receipts for all expenses, income and assets – you are responsible to the beneficiaries for all of the assets of the deceased person. Be sure to keep receipts for your own expenses so you can be reimbursed.

Third steps: Settle Liabilities

- 1) Pay debts and settle liabilities from available cash or as soon as some of the assets can be turned into cash.
- 2) If you need to sell real property to pay the debts, consult with a lawyer to help you.
- 3) If there are not enough assets in the estate to pay all of the debts of the deceased, the debts must be paid in the following order:
 - mortgages and other secured debts
 - funeral expenses up to \$2500.00
 - expenses of administration or probate, including an allowance for the executor or administrator and some legal fees

- medical and nursing home expenses, not exceeding the last one month's expenses
 - all other debts on an equal footing
- 4) When you apply for probate, the Estates Section automatically sends in a notice to The Royal Gazette of PEI. This is a government publication for special notices. It announces the death and asks for creditors to notify you or the law firm dealing with the estate. (The address for the Royal Gazette-PEI: PO Box 2000, Charlottetown, PE, C1A 7N8 Phone: 368-5190)
 - 5) If bills come in as a result of this notice, check to see that they are valid, pay them, and get releases or receipts from the creditors.
 - 6) Prepare a Terminal Income Tax return, or T1, showing income up to the date of death. Pay any taxes owing by the deceased to Canada Customs and Revenue Agency and get a clearance certificate from them to the date of death. Mistakes in this area can take a long time to correct, so some money is usually held back in case of a mistake.
 - 7) If the deceased earned income in another country, you may have to file a foreign income tax return and check on that country's laws regarding inheritances. You may have to file papers and pay taxes on the inheritance. A lawyer and an accountant can help with this.
 - 8) Prepare an Income Tax Trust return for any income earned by the estate after the date of death (Form T3).
 - 9) Pay off any private loans or mortgages that you know about and get receipts or releases. Check first to make sure that these are not life-insured.

Final Steps: Estate Distribution (after all liabilities are paid)

When no trusts are created by the will:

- Distribute all gifts of cash as instructed in the will. Be sure to get receipts for these to show that they have been distributed. Personal belongings and mementos not already distributed may be given out at this time.
- You will need to have a lawyer's help to distribute the deceased's real property.
- Pass on all receipts and clearance certificates to the lawyer to prepare a final accounting. Include your costs and fees. You will be reimbursed for your expenses and you can charge a commission for acting as executor. Sometimes the will says that you are to be paid a certain amount. If no amount is specified in the will, you must either get consent from all residual beneficiaries or approval from the court for your commission. Your commission cannot exceed 5% of the value of the estate.
- If necessary, have the lawyer apply to the Registrar of Probate to set a date to close the estate and approve the accounts. This is usually done only if complications are expected or the will may be contested. If this step is not done, be sure to keep all records in case problems arise or it has to be done at a later date. If a closing is required, there are fees you must pay to do this – the fees are a percentage of the gross value of the estate.

When trusts are created by the will:

A trust is created when one person holds property or money for the benefit of another person, usually a child or someone dependent for other reasons. If the will creates a trust, make sure all the assets are safe or invested. Someone will have been appointed to handle the trust – this person is called a trustee and is named in the will or appointed by the court. Duties of the trustee are:

- Make payments to the beneficiaries as ordered by the will.
- Set up proper records for the trust and see that these are kept up to date. An accountant can be hired to do this if the books are complex.
- Make sure any business involved is properly managed. If land or buildings are involved, make sure they are properly supervised and insured.
- Prepare and file annual income tax returns for the trust.

If the terms of the trust are unclear or an unforeseen event arises, the trustee can apply to the court for directions. The trustee must distribute the trust fund according to the instructions in the will.

A trustee should seek legal advice about the responsibilities involved and how to carry them out properly.

This is one of a series of pamphlets in the area of wills and estate law. The pamphlets in this series are:

- Making Your Will
- Making Your Will Workbook
- Wills and Estates - Information for Executors
- Wills and Estates - Information for Administrators (administration is the process used when someone dies without a will or without an executor).

To receive copies of these, call Community Legal Information Association at 892-0853 or 1-800-240-9798.

This pamphlet contains general information about the law. It is not a complete statement of the law in this area and is not a substitute for legal advice. To receive legal advice, you need to speak to a lawyer.

Community Legal Information Association of PEI Inc. (CLIA) is a charitable organization that receives funding from the Department of Justice Canada, the Prince Edward Island Office of the Attorney General, the Law Foundation of PEI and other sources. CLIA provides Islanders with understandable and useful information about the law and the justice system in Prince Edward Island.

For more information, you may telephone CLIA at 892-0853 or 1-800-240-9798.

ISBN: 978-1-894267-58-8

July, 2003