

Introduction

About this Guide

This guide has been written to help people in Manitoba who are planning to administer an estate or act as an executor for an uncomplicated estate with a value of less than \$100,000. This guide is for persons who want to go to Probate Court and apply for a grant of probate or administration by themselves.

Even small estates may be complicated and issues can come up that are beyond the scope of this guide. It is always recommended that even when handling an estate on your own, you should get legal advice.

This guide is primarily to help executors and administrators with the forms needed to apply for probate or administration.

This guide contains some short explanations of some laws that affect applying for estate administration in Manitoba. It gives step-by-step instructions on applying for probate or administration, whether there is a will or not, and whether there is a named executor or not.

This is not a step-by-step guide for dealing with an estate.

This guide does not list all of the duties of an executor or administrator. It does not explain how estate assets are to be collected, transferred, otherwise dealt with or distributed. This guide does not deal with the payment of debts or the filing of tax returns. This guide does not cover passing of accounts in detail.

At the end of this guide you will find an appendix of resources with links to legislation, court addresses, and information about other sources of legal information.

Before you Begin

Is it necessary to probate the will?

If all of the assets of the deceased are held jointly, it may not be necessary to probate the will, since when there is a right of survivorship, as is common with jointly-held property, it automatically passes to the surviving owner. Contact the financial institutions where assets of the deceased are held to find out what the institution needs from you or the Court in order to release the funds or other assets. If all of the assets are jointly held, it is not necessary for the will to be probated. If the estate assets are worth \$10,000 or less, you can apply for an Administration Order ("Administration Order under Section 47 of *The Court of Queen's Bench Surrogate Practice Act*" - see page 11).

One area of law that may cause uncertainty is when there are joint bank accounts. Whether a joint bank account should form part of the estate or simply pass to the survivor on the account is a question of law to be determined according to each fact situation and the intention of the deceased.

When This Guide Should Not Be Used

Do not use this guide if:

- The will has been lost.
- There are multiple wills and it is not known which was the last will.
- The proposed executors or co-executors are non-residents of Manitoba. (See a lawyer who can explain tax consequences of estates and trusts in other jurisdictions.)
- Another party opposes the grant of probate (he or she files a caveat opposing the grant of probate or administration) for reasons such as the deceased was at the time of making the will without testamentary capacity, or because the party in opposition states he or she has reason to believe that the testator's will was affected by undue influence and/or fraud.
- You are aware that there may be potential *Dependent's Relief Act* claim/s, *Family Property Act* claim/s or a *Homesteads Act* claim.
- There is confusion or disagreement about family relationships such as paternity or common-law partner status that make it difficult to determine who is a potential beneficiary or executor.
- There are unclear terms in the will.
- There are disputes among (actual or potential) beneficiaries or executors.
- There are questions about the capacity of the testator at the time of the writing of the will, or suspicion that the testator was affected by undue influence by a beneficiary.
- There are suspicious circumstances relating to the will or the testator's death.
- It is a bankrupt or insolvent estate (where debts are more than assets).
- The deceased held a joint bank account with a beneficiary and it is uncertain whether it was intended to be included in the estate or pass to the survivor on the account.

- There may be circumstances that come up during a probate or administration application that complicate matters. For example, if a caveat is filed by a party who opposes your request for probate, you should see a lawyer.

Hiring a Lawyer

A personal representative is permitted to hire a lawyer to assist in his or her duties. The fees of that lawyer are paid out of the estate and the amount is governed by the *Queen's Bench Rules*, particularly Rule 74.14.

There are many advantages to hiring a lawyer when you are applying for probate or administration of an estate.

- A lawyer will help ensure that you are aware of all of the laws that could apply to you and the estate that you are administering. He or she can explain what your responsibilities as an executor are, how long the estate administration might take, and can answer any questions you have.
- A lawyer will prepare your request for probate or administration forms, and will file the documents at court, and guide you through the legal process.
- A lawyer will be able to identify when certain laws will affect your estate, because of his or her knowledge of the unique circumstances of the terms of the will, types of beneficiaries and their circumstances – such as whether anyone may have a claim against the estate under *The Dependent's Relief Act* or *The Family Property Act*.
- Laws relating to estate administration are complex and sometimes cannot be easily understood or interpreted by non-lawyers, partly because different legislation and court decisions change the meaning of provisions in wills automatically (by operation of law), so that what is written in the will is not how the probate court master or judge will read it. For example, if a man writes a will and names his wife as an executor, but then they get divorced, the law treats the situation as though the wife had died before the husband, so she cannot act as the executor.

Every person has the right to represent himself or herself before any court and is not obligated to hire a lawyer. **However, the consequences of not hiring a lawyer for probate court could potentially be serious. The courts do not make special allowances for people who are not represented by lawyers (unrepresented parties). If you make errors or wrong decisions during the process, it may not be possible to correct the mistakes later.**

Provincial Estate Laws

Estates are mainly governed by provincial laws. The Court in which estates are probated, supervised and otherwise dealt with is The Manitoba Court of Queen's Bench Probate Division. **Each province in Canada has different laws governing estate administration and the procedures related to it. Therefore, you should not rely on advice or information given by authorities from other provinces or advice from people who want to share the experiences they had in another province or country.** It is important to follow the procedures set out in the laws of Manitoba. Manitoba laws can be found online at www.gov.mb.ca/laws.

Laws Relevant to Estate Administration

This is not a complete list, but some laws that govern estate administration in Manitoba are:

The Wills Act

Executors should read this entire act.

The Homesteads Act

Allows spouses and common-law partners the right to live in the family home even after the death of the other spouse. Limits the rights of any other parties to deal with the homestead as an asset.

The Court of Queen's Bench Rules (Regulation 553/88) are regulations of *The Court of Queen's Bench Act* (C.C.S.M. c. C280). They are referred to as the *Queen's Bench Rules*. These regulations set out the rules of court, including how forms and evidence must be presented in court. Executors and administrators should read Rule 74.

The Court of Queen's Bench Surrogate Practice Act

Executors and administrators should read this act, which deals in detail with probate and administration application requirements. (Noted in this guide as SPA.)

The Law Fees and Probate Charge Act

Sets out probate or administration fees on estates by a percentage calculation.

The Family Property Act

Allows spouses and common-law partners to make application for an accounting and equalization of estate assets of the deceased spouse or common-law partner, within six months from the grant of probate of the will or of letters of administration.

The Common-Law Partners' Property and Related Amendments Act

Passed in 2004, gives common-law partners the same rights as married spouses under *The Family Property Act* and *The Intestate Succession Act*.

The Dependants Relief Act

Allows a dependant who is in financial need to apply to the court for an order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant. Dependant includes a spouse, child or common-law partner or other. The dependant can apply whether or not the deceased left a will, and notwithstanding any other provisions in the will or *The Intestate Succession Act*.

The Intestate Succession Act

If a person dies without a valid will, his or her estate is distributed according to this act, which sets out the priority of beneficiaries according to degrees of kinship.

There are many other Manitoba statutes that affect estate administration and some federal ones as well, such as the *Income Tax Act*. We will look at some relevant sections of other laws in the rest of the guide. As well, rules of common law (court judgments) are part of the law, and how cases have been decided before and how sections of legislation have been interpreted affects estate administration as well.

Glossary

(The definitions listed below are specific to the context of this guide.)

Administrator/Administratrix – A person given authority by the Court to administer or look after an estate when there is no will, when the will does not name an executor, or the executor is unwilling to act. A female administrator is called an administratrix. The administrator stands in the place of the deceased and is responsible for all of the tasks related to administering the estate, including, finding, securing and selling assets, paying debts, filing taxes, distributing assets to beneficiaries, and accounting to the court and beneficiaries. (This is not a complete list of an administrator's duties).

Affidavit – A written statement of the facts, sworn or affirmed to be true before a Notary Public, Commissioner for Oaths, or a lawyer.

Beneficiary – A person who receives a gift from an estate.

Bequest – A gift of personal property under a will (for example, a gift of a necklace).

Bond – An agreement made by the administrator and sureties with the Probate Court Judge promising that all of the administrator's duties will be performed, and if they are not, the sureties will pay money to the court. A bond protects the beneficiaries and creditors of the estate in case the administrator does not look after the estate properly.

Caveat – A person with a relationship to the deceased who wants to oppose the granting of probate or administration to someone else for a reason, can ask the court to not do anything further on the estate without notice to him or her by filling in and filing with the court **Form 75A - Caveat**. The caveator then has 30 days to apply for probate, or the caveat will be cancelled.

Codicil – An amendment or addition to a person's will, made by the testator. A codicil must be signed and witnessed with the same formalities as a will.

Commissioner for Oaths – A person appointed by the Province of Manitoba who can take oaths, affidavits, affirmations, or statutory declarations in the province for use within Manitoba.

Common-Law Partners – For the purposes of intestate succession (where there is no will) and dependant's relief, (where a dependant applies to court for support from the estate) common law partners are persons who register a common-law relationship with the Department of Vital Statistics; or persons who are not married but who have lived together in a conjugal relationship for at least three years, or for at least one year and they are together the parents of a child. For the purposes of property division, common law partners are persons who register with the Department of Vital Statistics, or persons who are not married but have lived together in a conjugal relationship for at least three years.

Devise – To give real property by a will.

Estate – All of the assets of a person who died, including real and personal property and rights of action.

Executor/Executrix – a person appointed in a will to control and protect the estate assets, pay debts and distribute the property as directed by the will. A female executor is called an executrix.

Gift – Refers to a provision in the will that gives a beneficiary something. Devise and bequest are other terms used in wills meaning a gift.

Holograph will or codicil – A will or codicil written entirely in the testator's own handwriting and signed at the end by him or her. A holograph will does not need a witness.

Intestate – Dying without a will.

Issue – descendants of a person, including not only children, but grandchildren and great-grandchildren.

Joint Tenants – A form of ownership of property. When one of the joint tenants dies, the property becomes the property of the surviving joint tenant(s). This may or may not be the case with joint bank accounts.

Master – A judicial officer of the Court of Queen’s Bench who can make certain orders under *The Court of Queen’s Bench Act*.

Ministerial Order – A document issued by the Ministry of Indian and Northern Affairs naming the executor/s of the estate of a First Nation member under the provisions of the *Indian Act*.

Notary Public – A public officer authorized to certify and seal documents, take affidavits and administer oaths for documents used in the Province of Manitoba and outside Manitoba.

Personal representative – An executor or administrator of an estate, or administrator with the will annexed.

Personal property – All property except land and buildings, also known as personalty or moveable property. For example, jewelry and bank accounts are personal property.

Per capita – An equal share of the estate or asset is given to each person who is of equal relationship to the deceased.

Per Stirpes – The beneficiary or beneficiaries take the share to which his or her deceased parent would have been entitled.

Probate – The official confirmation by the court that a will is valid and that the executor has the legal authority to administer the estate.

Probate Court – In Manitoba, the Probate Division of the Manitoba Court of Queen’s Bench handles all matters involving the administration of estates and handles requests for grants of probate of a will and letters of administration of an estate without a will.

Real Property – Property that includes land and buildings, also known as realty, or immovable property.

Renunciation – When someone with the right to act as administrator or executor of an estate gives up that right through a written, signed and witnessed document submitted to the court.

Residue – The residue of an estate is the remainder of an estate that is left once all debts are paid and specific gifts are made.

Requisition – A form that requests the court to take certain actions.

Right of action – The right to bring an action before a court or otherwise enforce a legal right.

Specific gift – A gift under a will of specific property.

Surety – A person or insurance company responsible for paying the amount of the bond if the administrator does not look after the estate properly.

Testamentary capacity – Has been interpreted as the ability of a person making a will (testator, if male, or testatrix, if female) to appreciate and understand:

(a) the nature and effect of the act of making a will,

(b) the extent of the property he or she is disposing of, and

(c) the moral claims on his or her estate to which he or she ought to give effect.

The testator must also be capable of appreciating these factors in relation to each other and capable of forming an orderly desire to dispose of his or her property.

Trust – An interest in property that is being held by one person for the benefit of another person or persons.

Trustee – A person who holds legal title to property for the benefit of another. The term trustee may refer to the executor or administrator of an estate.

Will – Includes all papers and documents of which probate may be granted. A will must be in writing, must be made by a person 18 or older, and be witnessed by two people who are not beneficiaries, or spouses, or common law partners of beneficiaries. (Except for holograph wills, and wills written under other certain exceptional circumstances).