# Estate Administration

## In Newfoundland and Labrador

Benson Buffett PLC Inc
www.bensonbuffett.com

**LIMITATION:** The purpose of these materials is to provide basic and general information. They are not intended to constitute or be relied upon as legal advice. While care has been taken in the preparation and presentation of these materials, as the law can change and because individual cases have many important elements which are beyond the scope of this brochure, the authors assume no liability for their accuracy or applicability with regard to any particular circumstance or to the law in general. Where a specific problem is identified, legal advice for that individual problem should be sought.

Suite 900 Atlantic Place, 215 Water St, St. John's NL
(709) 579-2081 info@bensonbuffett.com

# Table of Contents

## Introduction

You may become responsible for the estate of another individual if they die or become incapable of managing their own affairs while living. If an individual dies, you may apply to administer or probate their estate. The two terms differentiate how the representative comes to fulfill the role of estate representative. An individual probates a Will, in order to carry out the deceased's wishes, if they are named in the Will as the chosen representative. A named representative is known as an executor.

Dealing with the estate of a deceased person is called administration if it is carried out by a person who is not named in a Will. The person approved by the court to represent the estate, even though they are not named in a Will, is called an administrator.

Living individuals may become incapable of managing their own affairs for many reasons, mental illness, injury and Alzheimer's are just a few examples. You can partially prepare for these possibilities by completing an enduring power of attorney or an alternative health care directive. We can provide you with information on these procedures. However, not everyone does prepare, and a situation may arise where you need to apply to become the guardian of the estate of an individual. Information on Guardianship of the estate of a living individual is available on page 7.

## Administration of an Estate

There are two ways in which you may become responsible for the estate of a deceased individual. First, the deceased may have named you as their executor in their Will. Second, there may be no executor for an estate. The deceased may not have even written a Will, or named a representative, or the named executor in a Will may be unwilling or unable to act. If there is no executor you may apply to the Court to become an administrator. There are important differences in the process depending on if you are an executor or an administrator**. If you are named as the executor in a Will we have a separate brochure that covers the duties of an executor. This brochure is specifically written for administrators and guardians of estates.** If you have previously acted as an executor, please read carefully to ensure you understand the slightly different obligations that administrators face.

When deciding whether to become the administrator of an estate, you should ensure you understand what administration entails. To ensure you make an educated decision, we outline below some information about the responsibilities, demands and potential personal consequences of this position. If you agree to take on this task, you agree to become a personal representative of the estate until all aspects of the estate are administered and you have been discharged by the court. Depending upon the size and complexity of the estate and Will (if one exists), managing the affairs of a deceased can be a time consuming task for the period it takes to administer the estate. Finally, as administrator you will also be open to personal liability if you act improperly in your duties.

As an administrator you may be liable for:

**Mismanagement** – If you mismanage the property or cause it to waste away through neglect or squander, you may be liable to the estate and beneficiaries. The amount of money you may be ordered to pay will depend on the specific circumstances.

**Improper Accounting** – It is advisable to maintain detailed, complete and accurate records of all aspects of the estate and your dealings with it. You should provide the beneficiaries with a copy of your accounting of the financial affairs of the estate when you give them their inheritance and ask them to sign a release, a document confirming their agreement with your accounting and their acceptance of the bequests. As a general rule, this bars them from suing you at a later date as long as you were not fraudulent in your accounting. If the beneficiaries do not agree with your accounting, then they may take the matter to court. Accordingly, a detailed correct accounting will ensure you are not wrongly found to have mismanaged the estate.

**Unreasonable Pursuit or Defense of Litigation on Behalf of the Estate** – Hire a competent lawyer you trust. If they advise you that a course of action is unreasonable, then be wary of proceeding. The choice to proceed is yours but, if your decision was unreasonable, you may have to pay the costs of the action from your own pocket. Costs for both sides to a dispute may be a very large sum.

**Carrying on the Deceased's Affairs without Due Care** - If you do this and you materially diminish the estate's value, then you may have to account for money lost. You may wish to hire an investment advisor. They can ensure that all the investments are prudent and reasonable. The estate will pay reasonable costs for an advisor.

The beneficiaries may also take you to court if you unreasonably delay the administration of the estate. As a general rule, you should attempt to administer the estate within one year. If the estate is complex and you will be unable to manage this, you may make an interim distribution and give the beneficiaries a portion of their entitlement. Be careful to ensure that you only distribute what you are certain they are entitled to receive and retain enough to pay any debts or taxes.

Being an administrator is not as bleak as it appears in the face of the possible negative aspects. There are tools available to help you administer the estate properly and protect yourself in the process.

All reasonable costs associated with the administration of the estate will be paid by the estate. This includes all reasonable probate fees, court fees, administration costs and costs for professional advice. You may hire a lawyer, an accounting or a tax adviser and a financial planner to help you administer the estate if the complexity warrants this. They will help ensure that you are not open to liability by keeping a record of all accounting, legal advice and providing a timeline of events.

As an administrator, you are entitled to be paid for the time and effort you expend on behalf of the estate. You may be compensated in accordance with the size of the estate, the

care, responsibility, skill and ability you have shown, the time you expended and the success you achieved in accordance with established rules. Generally, compensation is in accordance with the Registrar Compensation Rules set out by the legislature in the *Rules of the Supreme Court, 1986*.

***Two or more people may agree to act as co-administrators. If another administrator acts improperly you are liable for their acts too. If you agree to become a co-administrator, be certain you trust the other individuals and oversee their activities.***

## Duties of an Administrator

By law, you will be responsible to ensure the deceased receives a proper burial. In reality, the immediate family usually takes care of this but, if they cannot, or there is no immediate family, you may have to take on this role. In any case, you must ensure that a proper burial takes place. You have the final say in all funeral matters.

You should begin by reading the Will, if one exists. A properly drafted Will will set out your responsibilities and authority. If you are uncertain about the meaning of certain clauses in the Will, it is wise to ask your lawyer for advice and consider requesting direction from the court.

During this initial period, you should also determine the exact nature of the estate, what property is owned and what liabilities exist. You may need to advertise for creditors to ensure that you are not liable to creditors that come forward later on. You also have a duty to collect all debts owed to the deceased. To carry out your duties, you must administer the estate following a process which is known as the "administration process". This process ensures that your role as administrator is recognized by the courts. This recognition and permission to proceed by the court will protect you during performance of your duties and give you the legal right to administer the estate.

***Ordinarily, to be granted the right to administer an estate of a deceased resident of Newfoundland and Labrador, you must also be a resident of Newfoundland and Labrador.***

## The Administration Process

This is merely an outline of the process and the documents required to be filed. There are certain formalities required in some of the documents and more information may be required in certain situations. Your lawyer will ensure each requirement is followed and advise you during the process. The process of administration for estates both with and without a Will are described below, please feel free to read only the applicable section as much of the information is repeated.

## Administration of an Estate with a Will

The administration process begins with the filing and posting of a Five-Day Notice. This document is posted in the registry of the Supreme Court and serves as notice to the world that you intend to petition to the court for Letters of Administration to enable you to deal with the estate.

You may file the petition after the five days has passed. It must be supported by a sworn written statement from you or your lawyer called an affidavit. The petition must include information such as: information to identify the deceased, their address, occupation, marital status, date and place of death and whether they married after making their Will. You must also include information regarding all known beneficiaries, their names and addresses, whether they or their spouse witnessed the will and if there are any minors. You must also set out why an application for administration has to be made and if anyone has made a renunciation (see note below) of their right to administer the Will. Finally, you must include information about the estate, including an inventory setting out the estimated value.

Included with the petition must be the original Will, affidavits from witnesses, an estate inventory, a personal oath completed by you and the Order you are seeking from the Court. Upon the Order and Letters of Administration being granted by the judge, you may begin your duties.

As an administrator, you will also be required to post an Administration Bond. An Administration Bond will take one of two forms. You may post a personal bond with two sureties, persons who also guarantee your promise and agree to personal liability for your actions. The second form is a bond from a licensed insurance company. However, you may apply to have the bond dispensed with if there are no debts owed by the estate or if adequate provisions have been made to pay any debts owed. You should be prepared to post the Administration Bond unless you are the only beneficiary under the Will.

Other duties will arise throughout the period it takes to administer the estate. For example, within one year of being granted the Letters of Administration, you should provide a full accounting of the status of your administration of the estate to the Court. Your lawyer will advise you of these duties.

***Executors are not required to post a bond. This is an important difference, due to the degree of trust the deceased has exhibited towards their executor.***

## Renunciation

The *Rules of the Supreme Court* set out who may act as administrator of an estate if there is no executor. Generally, the order of priority of who may administer the estate is: the spouse, children, grandchildren, parents, siblings or nieces and nephews, grandparents, uncles and aunts, creditors of the deceased and the Crown. The estate may be administered by a single individual or a class of no more than three people in the list above. If there are more then three people in a class, or if someone of higher priority does not wish to administer the estate,

you must also file their renunciation or consent to have an attorney act on behalf of all those involved.

## Administration of an Estate without a Will

If there is no Will specifying how the estate is to be administered you must submit the following documentation:

The administration process begins with the filing and posting of a Five-Day Notice. This document is posted in the registry of the Supreme Court and serves as notice to the world that you intend to petition to the court for Letters of Probate to enable you to deal with the estate.

You may file the petition after the five days has passed. It must be supported by a sworn statement in writing from you or your lawyer called an affidavit. The petition must include information such as: information to identify the deceased, their address, occupation, marital status, date and place of death. The affidavit must also set out the priorities of administration and entitlement to the estate.

The *Rules of the Supreme Court* set out who may act as administrator of an estate. Generally the order of priority of who may administer the estate is: the spouse, children, grandchildren, parents, siblings or nieces and nephews, grandparents, uncles and aunts, creditors of the deceased and the Crown. The estate may be administered by a single individual or a class of no more than three people in the list above. If there are more than three people in a class, or if someone of higher priority does not wish to administer the estate, you must also file their renunciation or consent to have an attorney act on behalf of all those involved.

Included with the petition must be an estate inventory, a personal oath completed by you and the Order you are seeking from the Court. Upon the Order and Letters of Administration being granted by the judge, you may begin your duties.

As an administrator you will also be required to post an Administration Bond. An Administration Bond will take one of two forms. You may post a personal bond with two sureties, persons who also guarantee your promise and agree to personal liability for your actions. The second form is a bond from a licensed insurance company. However, you may apply to have the bond dispensed with if there are no debts owed by the estate or if adequate provisions have been made to pay any debts owed. You should be prepared to post the Administration Bond unless you are the only beneficiary of the estate.

Other duties will arise throughout the period it takes to administer the estate. For example, within one year of being granted the Letters of Administration you should provide a full accounting of the status of your administration of the estate to the Court. Your lawyer will advise you of these duties.

## Discharge Process

Only the court may terminate your responsibilities to the estate. There are two methods to obtain a discharge. The first is known as "passing accounts". You may file a detailed account of your administration of the estate that will be assessed by a Master of the Court. If the Master approves your accounting, you may then apply for an order passing the accounts. Alternatively, you may file forms known as Registry releases, completed by all adults and the guardians of all minors with an interest in the estate, to dispense with the passing of accounts. The Registry release must be in a specific form (Form 56.29A) that is contained in the *Rules of the Supreme Court, 1986*. Once these forms are filed or the accounts are passed, a judge may order that you have fully and satisfactorily accounted and are discharged.

## Guardianship of Adults

Living individuals may become incapable of managing their own affairs for many reasons. Individuals can partially prepare for this possibility by completing an enduring power of attorney or and alternative health care directive. We can provide you with information on these procedures. However, not everyone does prepare and a situation may arise where you need to apply to become the guardian of the estate of an individual.

If your loved one suffers from a brain injury or mental infirmity, or if a mentally disabled child is about to reach the age of majority, you may want to apply to Court to become the Guardian of their estate under the *Mentally Disabled Persons Estates Act*. A person may also be declared incapable of managing their own affairs under the *Mentally Disabled Persons Estates Act* due to age, disease, habitual drunkenness or the use of drugs without being declared mentally disabled. You will thereby gain power to deal with their financial affairs, including property and contracts entered into before they became mentally disabled. The guardianship may be temporary or long term depending on the nature of the mental disability or incapacity.

A separate application will be necessary to become the guardian of your loved ones' medical treatment.

## Application Process

To become the Guardian of the Estate of an adult you will need to make an application to the court. Generally the application will consist of a signed document completed by the applicant explaining how the subject of the application is incapacitated, why the applicant is the best representative, and the estimated value of the Estate. As with any application a fee is required to be paid. The affidavit of a qualified medical practitioner should be attached confirming that the individual is incapacitated and setting out their reasoning for this conclusion. If there are individuals equally or more closely related to the incapacitated individual the application should include consents for the applicant to act as Guardian. The applicant will also need to complete an estimated inventory of the assets of the incapacitated individual and swear or affirm an oath promising that they will supply a complete and proper accounting whenever it is needed and faithfully manage the estate to the best of their abilities. Finally, the application should include a copy of the order that you wish the judge to sign to

grant you guardianship. The judge has the discretion over what powers they will bestow upon you. You should consult your lawyer to determine what powers you require and what requests should be made. Further documentation may be required for some requests.

Once the judge has signed the order you may begin to act as the estate Guardian. However, ensure that you act properly and within the boundaries of your duties. You should also be prepared to provide a full accounting as relatives and creditors of the incapacitated individual may apply to have you file and inventory or your accounts. You also have a duty to update the accounting you filed with the court if further assets come to your attention after you take over guardianship.

***The court will likely require you to post security in the form of a Guardianship Bond. You may purchase a Guardianship Bond from a surety company for a fee, payable by you. The Company will pay the court the value of the estate, if ordered, under certain conditions.***