

Wills & Estates
Winter Term 2025

Lecture Notes – No. 16

XVI. CLASS GIFTS

Class gifts are a convenient way for the testator or testatrix to give gifts in the Will to a group. These are not gifts to individuals per se, but gifts to a class of people who share the gift. Absent guidance in the Will itself, there are rules in respect of the *ascertainment of a class* that might take the benefit of a gift, as well as for *determining membership* when the class 'opens' and 'closes' (at which point one may determine the individual entitlements of members of the class).

Thus, for example, a gift of '**the residue of my estate to my grandchildren**' is a gift to the **class of grandchildren** rather than each individually.

Please note that the common law doctrine of lapse doesn't apply to class gifts. The intention to make a class gift is a 'contrary intention' to the normal lapse rule which operates such that only the grandchildren that are alive when the testator died that have any entitlement at all.

There is a common modification, '**the residue of my estate to my grandchildren per stirpes**' thus allowing the great-grandchildren to take their parent's share where the parent dies after execution of the Will but before the testator or testatrix (and sometimes before the Will was executed).

Identifying Class Gifts

The determination of whether there is a class gift is one bound up with the subjective intention of the testator.

Certainly some forms of words clearly indicate a class ('my grandchildren') while other times the issue becomes a bit more complicated when, say, the testator sets out a list of names which correspond to all his nieces and nephews (indicating a class notwithstanding that the more general description of 'my nieces and nephews' is not used).

Re Snyder
[1960] O.R. 107 (H.C.J.)

In this case, a question arose of to whether a gift of the remainder interest in some land to a brother and sister 'if living' at the time of their father's death was a gift to each individually or to them both as a class:

- If individually and per stirpes, their issue would inherit if the named beneficiaries predeceased the testator.

- If individually and per capita, then lapse would operate and the deceased devisee's share would fall into residue of the estate.
- If a class gift, the survivor would take the whole of the gift.

The Court held that the gift here was to operate as a class gift. The sister's remainder share went to her brother after the termination of an existing life interest in the same property.

The testator's Will was made out using a pre-printed stationer's form and contained the following clauses:

1st. I give, devise and bequeath to my son Dorwin Henry Snyder that parcel or tract of land of my farm situated on the East side of the lane comprising Seventy-five acres be the same more or less; said farm being part of lot Seventeen in the Fifth Concession of the Township of Gainsboro. **After his death the Seventy-five acres of land which I gave to him is to be given to his two children Hugh James Snyder and Etta Florella Snyder if living.**

2nd. To my Wife Sarah Elizabeth Snyder and my Daughter Laura Belle Snyder I give devise and bequeath, that certain parcel or tract of land of my farm situated on the West side of the lane containing Seventy-five acres be the same more or less.

3rd. If at the time of (my) Wife's and Daughter Laura Belles death my son Dorwin Henry should be living, the Seventy-five acres of land be the same more or less situated on the West side of the lane which I gave to them is to go my son Dorwin Henry Snyder, **and after his death the same parcel of land is to go his two children Hugh James Snyder and Etta Florella Snyder if living:** And if my son Dorwin Henry Snyder should not be living at the time of the death of my wife Sarah Elizabeth Snyder and Daughter Laura Belle then the same parcel of land is to go to his two children Hugh James Snyder and Etta Floretta Snyder if living.

Thus, there were two devises in respect of two parcels of land: one was to his son Dorwin for life with the remainder to his two children 'if living'. The other parcel of land was to go his wife and daughter for life, with the remainder to go to Dorwin for life and then to his two children 'if living'.

The testator died in 1921, his wife died in 1929, Dorwin's child Etta died in 1949, and the testator's daughter Laura Belle died in 1954. Hugh Snyder claimed the entirety of the land.

One issue was whether there was a class gift. Spence J held there was not and accepted the law as follows based on dicta in **Kingsbury v. Walter, [1901] A.C. 187, 191** per Lord Macnaghten:

In my opinion the principle is clear enough. **When there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and so you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator.**

Spence J went on to hold:

Therefore I have come to the conclusion that the gift to Hugh James Snyder and Etta Florella Snyder was, if not a true class gift, to quote the words of Maugham J. in *Re Woods, Woods v. Creagh*, [1931] 2 Ch. at p. 143, "in the technical sense, at any rate as a group of persons who have got to be living at the death of the testator in order to take any interest under the bequest", and that Etta Florella Snyder having died before the period of distribution, the whole of her interest goes to her brother, the applicant Hugh James Snyder.

Kingsbury v Walter [1901] AC 187 (H.L.)

The testator made a Will in which he appointed his wife and his niece (Elizabeth Jane) to be his executrixes. He settled a testamentary trust with them as beneficiaries as follows:

... upon trust to pay the income thereof to my said wife for her life, and after her decease, upon trust for the said Elizabeth Jane Fowler and the child or children of my sister Emily Walter who shall attain the age of twenty-one years equally to be divided between them as tenants in common.

When the Will was executed, the wife, the niece, and the sister were all alive. The niece predeceased the testator. Thus – *did the gift to the niece lapse, or, was the niece part of a class such that her share was redistributed amongst the rest of the class?* Although not apparent on the face, the court held that there was a 'class of nieces'.

Per Lord Davey:

Now, the peculiarity of this case is that it is a gift to Elizabeth Jane Fowler and the children of Mrs. Walter who shall attain the age of twenty-one years as tenants in common. It may be said, therefore, that in this case the gift to Elizabeth Jane Fowler was absolute, whether she had attained the age of twenty-one years at the testator's death or not, whereas the gift to the children of Mrs Walter would not vest in them until they attained the age of twenty-one. If it stood upon that bare fact alone, I should have been of opinion that North J's decision was right. But we have to look at the context, the whole of the will; and, reading the whole of the will, I find that although Elizabeth Jane Fowler is not described as a niece in the gift itself, still in the previous part of the will the testator had appointed his "niece Elizabeth Jane Fowler", together with his wife, executrixes of his will; and he afterwards described her as his "niece", and gives to her after his wife's death a

message or tenement under the description of "my niece Elizabeth Jane Fowler". He also appoints her trustee of his will for various purposes. Then comes the gift in question, in which, indeed, he does not describe her again as his "niece", but he calls her "the said Elizabeth Jane Fowler", and goes on to speak of "the child or children of my sister Emily Walter". **I do not at all deny that the case is very near the line; but I think there is enough in this will itself to show that the testator gave the property to her as a niece, and that he makes a special class of nieces consisting of the only child of Mrs Fowler and the children of his sister Mrs Walter, and that it was intended to be a class gift to that special class, the nieces.**

**Re Burgess
(1968), 64 WWR 44 (BCSC); cb, p.695**

The Will read in part:

To the two children (Boy and girl) of William Cowan of Lake Johnston, Saskatchewan. One thousand dollars each (\$1,000.00).

On the testator's death, Cowan had six children. Notwithstanding, the court held that there was a good class gift to Cowan's children at large as the subjective intention of the testatrix to give such a gift was discernible from the surrounding circumstances.

Per Macdonald J:

The will indicates that the testatrix had more information about some children she wished to benefit than she did about others. She named the four grandchildren of Mrs. Cartwright. She did not name her cousin, the son of her uncle Arthur Cowan. She did not name "the seven children of Leslie Somerton". She did not name or give the number of the children of Louise Burrows. The material shows that apart from the children of William Cowan, the information set out in the will proved to be accurate.

Mr. Morris argued persuasively that Gladys Belle and William Henry were the two children of William Cowan that the testatrix had in mind because she must have known them before coming to British Columbia; she accurately described them as boy and girl; and it is reasonable to infer that she did not know the four other children, the oldest of which was born after an eight-year interval from the birth of her cousin, William Henry. This submission is weakened, although not fatally, by the failure of the testatrix to name the two children. **Looking at the will as a whole and having regard to the little extrinsic evidence, I am of the opinion that the testatrix did not know the names of her two cousins Gladys Belle and William Henry and did not know the name of her first cousin, the son of Arthur Cowan. Having acquaintance, or even closer relationship, some 40 years ago with two particular cousins whose names are forgotten, is an unlikely basis for referring them to other cousins. My judgment of the question is that there was a dominant intention to benefit the children of William Cowan as a class rather than two of them specifically.**

Determining the Membership of the Class

In the usual case, the actual membership of the class is determined on the testator's death (the 'class closes' on that date). If the testator provides otherwise, the ascertainment of members of the class will be determined accordingly.

Re Hyslop (1978), 3 E.T.R. 216 (Ont. H.C.J.)

The Will read in respect of the residue of the estate:

To divide the residue of my estate in equal shares between my sons, Donald and Glen. With respect to the share for Glen, I direct my Trustees to invest the same and pay the income therefrom to Glen as long as he lives, **and upon his death to divide the assets then remaining in equal shares among his children.**

One issue was whether the class of Glen's children closed at the testator's death or later? It was held to have closed on Glen's death.

Per Craig J:

... there are substantial authorities, some English and some Canadian, indicating that prima facie a gift over to children of the life tenant will keep the class open so as to let in all of those members coming into existence before the date of distribution... I would refer to *Jarman on Wills*, (8th ed.), firstly at pp. 1634 and 1635, para. 8, dealing with the heading "At what period relations, next of kin, etc. are to be ascertained." Then again at p. 1663 Jarman states in part as follows:

Where the Gift is future. -- Mr. Jarman continues (a): Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution.

... Having regard to these authorities... I would hold and apply the rule of construction that prima facie the class remains open until the date fixed for distribution; that is the death of Glen Hyslop. However, I do not feel it is necessary to resort to any rule of construction because giving the words of the will their natural, ordinary and grammatical meaning, it is my opinion that the intention of the testator is reasonably certain. The testator provided that the income from one-half of the residue would be paid to a son and on the son's death the corpus would be distributed among his, that is the son's, children. In my view it is reasonably certain that the testator was referring to or

looking at the son's children as of the time of distribution or putting it another way, it is reasonably certain from the words and the language used, that he did not intend to exclude any of the son's children that came into being after his death.

The General Class Closing Rules

Do all humanity a favour and set out specific rules to ascertain membership of the class and when the class closes in the Wills you draft.

1. Immediate, Unqualified Gift To A Class:

the class closes on the death of the testator absent a contrary intention, express or implied but clearly discernible, in the Will. If a member of the class exists at the time of the testator's death, all those alive or conceived at the testator's death share in the gift.

**Re Charlesworth Estate
(1996), 12 E.T.R. (2d) 257 (Man QB)**

Per Beard J:

The testatrix did not refer to any specific beneficiaries by name, but rather referred to "the children of my niece, LYNNE ARBEZ, and my nephew, WAYNE KINDRET." Given that Kindret had only one child and Arbez was pregnant with her first child at the date of the will, there is no indication as to whether the testatrix intended, by those words, to limit the gift to only those children in existence at the date she prepared the will, or to include children born after that date. Further, there is no direct extrinsic evidence to assist the court in determining her intention. Potentially, the class could remain open as long as there remains the potential for either Kindret or Arbez to have more children...

In this case, neither the will nor the uncontested information which has been placed before the court regarding the testatrix's circumstances at the date of the will provide further clarification as to when the testatrix intended the class of beneficiaries to close. Thus, I find that I must go on to rely on the rules of convenience to resolve this issue...

[Quoting Feeney on Wills:]

If the will provides for a direct or immediate gift with no provision as to the time of vesting, the class will close at the date of the testator's death, if there are any members of that class at that date, even though the date of payment to those beneficiaries may be postponed to a later date.

In this case, the rules of convenience would require that the class of beneficiaries be determined at the date of death of the testatrix. I am therefore in agreement with the executrix that the class of beneficiaries would, according to these rules, exclude Alaina as a beneficiary, as she was conceived and born after the death of the testatrix.

2. Immediate, Qualified Gift to a Class:

if any member of the class has satisfied the condition, all members of the class will be given an opportunity to satisfy the condition before the class closes, e.g. 'to A's children who have attained 21 years'.

3. Postponed Gift to the Class:

the class closes when the postponement ends. For example, to A for life, remainder to B's children – the class of B's children closes at B's death.

**Latta v Lowrey
(1886), 11 OR 517 (Ont SC)**

The disposition in the Will provided:

I give and bequeath unto my son-in-law Emanuel Treadway that part of my real estate commonly known..." [as, and providing a description] "...during his and my daughter Mary Ann's natural life **then and after that** to be given to her children to them their heirs and assigns forever...

The remainder interest thus went to the children of Mary Ann; 6 children were alive when the testator died. Mary Ann had another 2 children after the testator dies. When she died, 5 of her children were still alive. Were the Estates of the 3 dead children of Mary Ann to be counted within the class?

Per Boyd C:

The rule laid down in Hawkins on Wills, at p. 72, appears to be substantiated by the authorities and is in these words: "If real or personal estate be given to A for life, and after his decease to the children of B, all the children in existence at the testator's death take vested interest subject to be partially divested in favour of children subsequently coming into existence during the life of A."... The Court has arrived at this rule of construction impelled by the operation of two principles, one in favour of the early vesting of estates, and the other in favour of including all who come into being before the period of division: *Hutcheson v. Jones*, 2 Madd. 129. **By the terms of the will in this case the estate in remainder vested forthwith upon the testator's death in the six children of his daughter then living and from time to time in the two subsequently born. The death of any child before the period of distribution does not affect the right of that child's representatives to claim the share of the one deceased. My opinion is therefore in favour**

of the estate being divided into eight parts and going to the living children and the representatives of the deceased children on that footing, and I so answer the case submitted.

It was held that the issue of the dead grandchildren would inherit their portions – the class was to take upon the testator's death, but the individual entitlements of members of the class at that time were subject to becoming diminished with the birth of siblings in the future.

4. Postponed, Qualified Gift to a Class:

the class will close when the postponement ends and upon a member of the class fulfilling the condition.

Re Edmondson's Will Trusts [1972] 1 WLR 183

In this case, the testator made a gift of $\frac{1}{4}$ of the residue of his estate to his son Albert for life, remainder to such children or remoter issue of Albert as Albert "should by deed or will appoint." The testator died in 1931.

In 1949, Albert directed the executors/trustees to hold the fund for such of the children of his two sons, John and James, 'whenever born as being a son or sons shall attain the age of 21 or being a daughter or daughters shall attain that age or marry as a single class and if more than one in equal shares.' Albert released his life interest at the same time.

At the date of the release, John had one child, a daughter Margaret age two. James had no children. John had another three children and James had another four children. Margaret attained age 21 in 1968. When did the class close – with children born before the 1949 release or after?

Upon the construction of the words 'whenever born', Russell LJ held that the class remained open until the deaths of John and James (rather than closing when one member of the class attained age 21):

In the reported cases there are instances in which phrases descriptive of the class in apparently unlimited and general terms have been held not to exclude the rule, on the ground that they were capable of referring only to the period before the application of the rule would close the class. Among such phrases we find "all the children . . . whether now born or hereafter to be born": "all and every the children of X": "the children of X as many as there might be": "all or any the children or child of X." Goulding J. considered that it would be too great a refinement to draw a distinction between such phrases (and in particular the phrase "whether now living or hereafter to be born") and the words "whenever born." He described as tempting, and we think that in the end he succumbed to the temptation, to say that both phrases covered the future without any express limit, and therefore why should the latter phrase disclose an intention to hold up the possibility of distribution of the shares of those with a vested interest?

We do not find this proposition thus tempting. In our view there is an important distinction between the two phrases. The former is a general phrase pointing toward the future and therefore to some time in the future. The phrase "whenever born" is in our view a specific and emphatic phrase which in terms points to all time in the future. It is equivalent to "at whatever time they may be born," and is limited only by the course of nature to the lifetime of the parents. If the phrase had been "whenever in the lifetime of their respective parents born" there could be surely no doubt that the class was clearly defined as remaining open to membership by all grandchildren: just as in *Scott v. Earl of Scarborough* (1838) 1 Beav. 154, 156 where the phrase was "hereafter be born during the lifetime of their respective parents." (It is true that there was in that case apparently another phrase also which showed that the rule was inapplicable: though oddly enough this was not the phrase relied upon.) If the phrase used was "now born or hereafter at whatever time to be born" surely the rule would be excluded: and "whenever born" is to our minds the precise equivalent. In summary the phrase "born or hereafter to be born" is a general reference to the future without express limit in time and therefore consistent with a limit in time imposed by the direction for vesting and the rule. But "whenever born" is a particular reference to the future expressly unlimited in time, and therefore readily to be distinguished as inconsistent with a time limitation such as is imposed by the rule.

XVII. PROBATE AND ADMINISTRATION OF ESTATES

- A deceased person leaves his or her financial affairs to be wound up on his or her death. Rather than think about the deceased as an individual, think of him or her as a business which needs to be wound up – people need to be informed, creditors need to be paid, inventories of assets need to be created, taxes need to be paid, etc. Happily there are differences between people and businesses, lawyers notwithstanding.
- There may be a Will that names a specific person to administer the estate. We have referred to this person using the traditional terms executor or executrix, although we must now use the language of the statute and identify that person as the *Estate Trustee with a Will*.
- An Estate Trustee designated in a valid Will draws his or her authority from the Will itself and from the moment of the deceased's death. The *Certificate of Appointment* in such cases (probate as it was called) is conclusive evidence of the authority of the Estate Trustee named in the Will to administer the estate.
- A person might also die intestate in which case the Court may appoint (on application) an *Estate Trustee without a Will* to administer the estate (administration as it was called). Here the Estate Trustee draws his or her authority not from the Will but from the Court's certificate.

- **However appointed, the Estate Trustee is a fiduciary to those interested in the estate and will usually require the advice of a solicitor to discharge the duty of care applicable to him or her, as well as to avoid breach of fiduciary obligations.** Even where a solicitor acts as an Estate Trustee, the nature of the duties of each office are different and the level of remuneration differs accordingly – **a solicitor may not seek compensation at his or her normal rate for legal services for discharging his or her duties as Estate Trustee.**
- It is not always the case that a certificate of administration is required. A small estate of few assets may only require a true copy of the Will to allow the Estate Trustee named in it to deal with third parties.

The Court's inquisitorial jurisdiction is present with respect to the admissions of testamentary instruments to probate and with respect to the appointment of an Estate Trustee. In **Re James Estate, 2024 ONCA 623 (C.A.)**, a disbarred lawyer sought appointment as an Estate Trustee. Gomery J.A. held:

[29] In Ontario, the Superior Court of Justice is responsible for granting probate or letters of administration pursuant to s. 7(1) of the Estates Act. This jurisdiction includes the determination of applications for a certificate of appointment of estate trustees with or without a will. Estate trustees play a critical role in the administration of estates. Using the authority conferred upon them by virtue of the court's appointment, they step into the shoes of the deceased, dealing with their property, taking legal action to enforce the estate's rights, determining which debts should be paid, and distributing the estate's assets based on their interpretation of the testator's instructions.

[30] In *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 22 to 24, Cullity J. observed that the Superior Court's jurisdiction over wills and estates pursuant to the Estates Act and rr. 74 and 75 of the Rules of Civil Procedure was transferred to it from the former Surrogate Courts. The role of those Courts was, to some extent, inquisitorial:

The role of the court is not simply to adjudicate upon a dispute between parties. The judgment of the court granting probate does not bind only the parties to the proceeding. Unless, and until, it is set aside, it operates in rem and can affect the rights of other persons.

[31] This court endorsed this view of the court's inquisitorial role in estates proceedings in *Neuberger v. York*, 2016 ONCA 191, 129 O.R. (3d) 721, at paras. 67-68, leave to appeal refused, [2016] S.C.C.A. No. 207. The court "has a special responsibility to the testator, who cannot be present to give voice to his or her true intentions": *Neuberger*, at para. 68. For that reason, an application for probate can be refused if there is no evidence to support it, and even if the estate's beneficiaries support it: *Otis*, at paras. 24-26; *McLaughlin v. McLaughlin*, 2015 ONSC 3491, 11 E.T.R. (4th) 183, at paras. 31-36.

[32] The court's supervisory role with respect to estate proceedings is recognized in rr. 74 and 75. Notably, pursuant to r. 75.06(3), a court may direct the issues to be decided in a contentious estate proceeding, the parties to be involved, and the procedure to be followed. A party seeking directions for the purpose of challenging a will or the appointment of an estate trustee must provide the court with evidence satisfying at least a minimal evidentiary threshold in support of the order ultimately sought: *Neuberger*, at para. 88; *Seepa v. Seepa*, 2017 ONSC 5368, at para. 27; *Martin v. Martin*, 2018 ONSC 1840, 38 E.T.R. (4th) 161, at paras. 30, 32.

[33] Section 5 of the Trustee Act, R.S.O. 1990, c. T.23, empowers the court to order the appointment of a new trustee "in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee". Even in the absence of the Trustee Act, the Superior Court of Justice has an inherent power to remove a trustee where circumstances require it: *Gonder v. Gonder Estate*, 2010 ONCA 172, 54 E.T.R. (3d) 193, at para. 26.

[34] In my view, this inherent jurisdiction also empowers a Superior Court judge to refuse to grant an application to appoint a trustee. It would be illogical if the court had the power to terminate a trustee's appointment in appropriate circumstances but did not have the power to prevent an inappropriate appointment.

...

[42] The equitable jurisdiction over the appointment and removal of trustees furthermore runs in parallel with any statutory powers to remove or appoint and is not supplanted absent clear and unambiguous language to that effect: *Gonder*, at paras. 40-46. The discretion flowing from this jurisdiction reflects the Superior Court's *parens patriae* jurisdiction and has been variously described as "overriding" (*Public Guardian and Trustee v. Duggan* (1998), 1998 CanLII 14929 (ON SC), 165 D.L.R. (4th) 713 (Ont. S.C.), at para. 22, rev'd on other grounds, (1999), 1999 CanLII 1388 (ON CA), 175 D.L.R. (4th) 466 (Ont. C.A.)); unfettered or unconstrained (*Mohammed v. Heera* (2008), 43 E.T.R. (3d) 273 (Ont. S.C.), at para. 29); and "unqualified" (*Re Lagrandeur Estate*, 2021 ONSC 3447, at para. 47).

[43] This discretion, in my view, may be exercised even if an application is unopposed, due to the inquisitorial nature of the court's role in estate proceedings, and its gatekeeping and oversight functions with respect to the appointment of trustees.

...

[50] The application judge identified the relevant factors in this case as the wishes of Mr. James' heirs, on the one hand, and "the overarching responsibility of the court to promote confidence in the administration of justice and uphold the rule of law" on the other. Although the application judge acknowledged that a disbarred lawyer is not precluded from acting

as an estate trustee, he noted that the appellant had not offered any evidence to allay the court's concern that he might be engaged in the unlicensed practice of law. Having weighed the competing considerations, he concluded that the application should be dismissed.

[51] In my view, the application judge's initial concerns were legitimate given the appellant's professional history, his apparent involvement in executing Mr. James' will despite the revocation of his law license, the resignation of the named executor two days after Mr. James' death, and the steps taken by the appellant a few weeks later to secure the beneficiaries' consent to his application to be named as estate trustee. These concerns were unallayed when the appellant failed to respond to the September Direction, for example with evidence explaining his role in Mr. James' estate planning and management. In these circumstances, it was reasonable for the application judge to conclude that public confidence in the administration of justice would be undermined if he were appointed as estate trustee, giving him full authority to act on the estate's behalf.

FORM 74.13
Courts of Justice

01- [redacted] /15

CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF **Irma [redacted]**, deceased,
late of **City of Toronto**
occupation **Business Person**
who died on **21 October [redacted]**

CERTIFICATE OF APPOINTMENT
OF ESTATE TRUSTEE WITH A WILL

Applicant	Address	Occupation
Gary M. [redacted]	[redacted] Toronto, Ontario, [redacted]	Barrister and Solicitor
Maria [redacted]	[redacted] Ontario, [redacted]	Bookkeeper

This CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL is hereby issued under the seal of the court to the applicant named above. A copy of the deceased's last will (and codicil(s), if any) is attached.

DATE OCT 22 2015

N. Marjadsingh
Registrar

Address of court office: **Natasha Marjadsingh**
330 University Avenue, 7th Floor
Toronto, Ontario M5G 1R7



Sample Issued Certificate of Appointment

The Statutes

- The **Estates Act**, R.S.O. 1990, c.E.21, deals with the process usually called probate (with a will) or administration (no will) – that is, the judicially recognized right of a living person to deal with the assets and affairs of a deceased person in the form of a formal Certificate issued by the Court.
- The **Estates Administration Act**, R.S.O. 1990, c.E.22, deals with the general duties of the deceased's personal representative and gives him or her powers in dealing with property (particularly in a manner that eases strict rules in respect of real property at common law in respect to the transfer of title) which facilitates the discharge of the deceased's obligations to creditors and transfer of assets to those entitled to those assets. In general, the personal representative will have the property of the deceased vested in his or her name and owe a trust obligation to beneficiaries under the will and those entitled at law under the intestacy rules.
- The **Estate Administration Tax Act**, 1998, S.O. 1998, c. 34, deal with the rate of tax and assets that are taxable where a Certificate of Appointment is required. The current rate is .5% on first \$50K, and 1.5% thereafter. The tax and its collection is presently subject to statutory reform.
- The **Rules of Civil Procedure** deals with estates matters in Rules 74 and 75 specifically.

Types of Certificates of Appointment

See [Rule 74 of the Rules of Civil Procedure](#), and, the applicable provisions of the Estates Act.

Name	Description	Reference
certificate of appointment of estate trustee with a will	issued where there is a valid will and named estate trustees are able and willing to act (includes the appointment of trustee where there is a will, no named estate trustee trustee is alive or able or willing act)	R.74.04
certificate of appointment of estate trustee without a will	issued where there is no valid will	R.74.05
certificate of appointment of foreign estate trustee's as estate trustee without a will	issued where a foreign Trustee nominates an estate trustee to	R.74.05.1

	administer assets in Ontario	
certificate of appointment of estate trustee to succeed estate trustee with a will	issued where a second supplemental grant is required, such as on the happening of event that requires the addition of another named estate trustee	R.74.06
	under the will. This also includes the appointment of a trustee to replace the estate trustees and trustees initially named in the will.	
certificate of appointment of estate trustee to succeed an estate trustee without a will	issued where an administrator of an estate dies leaving assets unadministered.	R.74.07
confirmation by resealing of the appointment of an estate trustee with or without a will	issued where a grant of probate has been given by a Commonwealth court outside Ontario; the grant may be "resealed" by the Superior Court of Justice of the county in which the deceased had assets	R.74.08
certificate of ancillary appointment of an estate trustee with a will	issued where a grant had been given by a non-Commonwealth court, an ancillary grant in Ontario is required to administer assets situated in Ontario	R.74.09
certificate of appointment of an estate trustee during litigation	issued in order to preserve assets of an estate where an action has been commenced that contests the validity of the will	R.74.10

Duties of the Administrator and Solicitor Distinguished

Examples:

Personal Representative / Administrator	Solicitor
Locate the will	Review contents of the will with the estate trustee
Make funeral and burial arrangements, and arrange for organ donation(s)	

Retain solicitor	Advise on the retainer of other professional as needed.
Determine assets and liabilities	Assist in determining assets and liabilities; advise on legal actions, etc.
Ascertain identities and contact information for beneficiaries and interested parties	Determine nature of elections and other important information to advise beneficiaries and interested parties
File tax returns and pay tax	Review forms and seek advice where necessary
Maintain proper accounts	Advise estate trustee on setting up and passing accounts; review remuneration
Invest assets when appropriate	Advise on selection of investments and delegation issues under the Trustee Act
Distribute the assets	Advise on the distribution scheme, ademption, abatement, etc

FAQ

When is a Certificate of Appointment with a Will Required?

A certificate of appointment is necessary where there is a Will *and the nature of the asset* requires the personal representative to be formally appointed – but this is properly a matter of the law (usually statute or regulation) that regulates disposition of that particular type of property. For example, real property usually requires a certificate but this is not always true and is truly a matter resolved by regulation under the Registry Act or the Land Titles Act according to value.

Why not always obtain a Certificate of Appointment with a Will?

The process of probating the Will is expensive. Moreover, Estate Administration Tax is payable on the value of the estate set out in the Will.

For an estate valued at \$1,000,000, the probate fee is $(50 \times 5) + (950 \times 15) = \$14,500$, a not insubstantial sum. – more so, once the legal fees to obtain the Certificate are factored into the analysis.

What is the Procedure on an Intestacy?

To obtain a *certificate of appointment of estate trustee without a will* (necessary as property will not vest in the estate trustee without it, and thus property cannot

pass to those entitled under the intestacy rules), an application must be brought under the [Estates Act, s.29](#):

29. (1) Subject to subsection (3), where a person dies intestate or the executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the Ontario Court (General Division) to,

(a) the person to whom the deceased was married immediately before the death of the deceased or person of the opposite sex or the same sex with whom the deceased was living in a conjugal relationship outside marriage immediately before the death;

(b) the next of kin of the deceased; or

(c) the person mentioned in clause (a) and the next of kin,

as in the discretion of the court seems best, and, where more persons than one claim the administration as next of kin who are equal in degree of kindred to the deceased, or where only one desires the administration as next of kin where there are more persons than one of equal kindred, the administration may be committed to such one or more of such next of kin as the court thinks fit.

Where there are no relatives at all, the Public Guardian and Trustee will be the appropriate party under the *Crown Administration of Estates Act*, R.S.O. 1990, c. C.47, s.1.

The general procedure is set out in R.74.05(1):

74.05 (1) An application for a certificate of appointment of estate trustee without a will (Form 74.14 or 74.15) shall be accompanied by,

(a) an affidavit (Form 74.16) attesting that notice of the application (Form 74.17) has been served in accordance with subrules (2) to (5);

(b) a renunciation (Form 74.18) from every person who is entitled in priority to be named as estate trustee and who has not joined in the application;

(c) a consent to the applicant's appointment (Form 74.19) by persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death;

(d) the security required by the *Estates Act*; and

(e) such additional or other material as the court directs.

What about a Foreign Will?

Where the foreign will has been probated in a Commonwealth court it can be 'resealed' for use in relation to assets in Ontario (and tax must be paid here on those assets). Thus the Rules provide:

74.08 (1) An application for confirmation by resealing of the appointment of an estate trustee with or without a will that was granted by a court of competent jurisdiction in the United Kingdom, in a province or territory of Canada or in any British possession (Form 74.27) shall be accompanied by,

- (a) two certified copies of the document under the seal of the court that granted it, or the original document and one certified copy under the seal of the court that granted it;
- (b) the security required by the *Estates Act*; and
- (c) such additional or other material as the court directs.

How long, in general, does it take to complete the administration of an Estate? Is it up to the Estate Trustee?

At common law, it is traditional to talk of the 'executor's year'; that is, we expect that in most cases administration should take about a year. The Estates Administration Act provides in respect of intestacies:

26. Subject to section 53 of the *Trustee Act*, no distribution shall be made on an intestacy until after one year from the death of the intestate, and every person to whom in distribution a share is allotted shall, if any debt owing by the intestate is afterwards sued for and recovered or otherwise duly made to appear, refund and pay back to the personal representative the person's rateable part of that debt and of the costs of suit and charges of the personal representative by reason of such debt out of the part or share so allotted to the person, thereby to enable the personal representative to pay and satisfy such debt, and shall give bond with sufficient sureties that the person will do so.

In a simple estate, a year may not be required at all. In a complex estate, many years may have to be spent on administration. Complicating circumstances include:

- Sale of realty, particularly commercial real estate;
- Sale of operating or foreign businesses;
- Unpaid income taxes which must be determined and paid.

How and when does the Estate Trustee get paid?

Fees charged by the estate trustee are set in principle by the Trustee Act, RSO 1990, c.T.23:

61. (1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.

(2) The amount of such compensation may be settled although the estate is not before the court in an action.

(3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable allowance for care, pains and trouble, and time expended in or about the estate.

(4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.

(5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.

An overall tariff is used:

- 2½ % of the total value of capital & revenue receipts
- 2½ % of the total capital & revenue disbursements
- annual fee of 2/5ths of 1% of the average annual market value of the capital (in the case of an ongoing trust)

Thus, on an estate with a net value of combined real/personal property of \$1,000,000, the Estate Trustee can look to a fee of approximately \$50,000 where all assets must in some way or another be received by the trustee and then later disbursed.

In appropriate cases, the fees are adjusted to reflect the simplicity or complexity of the work involved (overall 'fair and reasonable' compensation) with reference to 5 factors:

- the size of the estate
- the actual care and responsibility involved
- the time occupied in performing the duties
- the skill and ability shown; and
- the success resulting from the administration.

The Estate Trustee can be paid when he or she finishes their work (and the all beneficiaries are of legal age and consent) or, more formally, when he or she 'passes accounts' under Trustee Act and R.74.18. This is an audit of the work of the estate trustee and may be passed without a hearing, or there may be opposition and a hearing will be required.