



Statutory Notice Provisions to Beneficiaries Under Estates

by

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Relevant provisions of the British Columbia *Trustee Act* and *Estate Administration Act* and the Ontario *Trustee Act* are contained in Schedule “A” to this memo.

Section 38 of the *Trustee Act* states that an executor is entitled to distribute the estate after giving proper notice to “creditors and others”. After doing so, the executor will not be obliged to satisfy the claims of such “creditors and others” that were not brought forward during the specified time period. The *Trustee Act* does not limit the definition of “others”.

Some case law suggests that “others” includes beneficiaries. In *Re Ashman* (1907), 15 O.L.R. 42, the court held that notice to “creditors and others” is broad enough to cover next of kin, and that this interpretation applies to claims for the distribution of assets (followed in *Re Ramsay*, [1943] O.W.N. (Ont. H.C.)), The court also held that executors are entitled to distribute the estate where a proper advertisement to creditors and others has been duly published.

Ontario specifically excluded the application of the rule in *Re Ashman* by inserting a provision in their *Trustee Act* which states that the notice and distribution provision does not apply to beneficiaries (see s. 53(1) and s. 53(3) of the Ontario *Trustee Act*). In British Columbia, however, the Rule in *Re Ashman* may still be good law. There is no provision in our *Trustee Act* which excludes beneficiaries from being subject to the notice provisions for “creditors and others” contained in s. 38.

Executors must remember that proper advertising and notice will not protect them if they distribute the estate despite having actual or constructive notice of a claim against the estate. Section 66 of the *Estate Administration Act* states that once an executor has given a claimant notice that they reject or dispute the claim in accordance with s. 66, the claimant only has 6 months after the notice is given to commence an action if the debt or a part of it is due at the time of the notice, or must bring an action within 6 months of the time the debt or a part of it falls due, if no part of it is due at the time of the notice. This limitation period, however, does not apply to beneficiaries. Accordingly, if an “other” is found to be a beneficiary, they can bring an action against the estate for the amount they are owed after the limitation period in s. 66 expires.

Section 67.1 of the *Estate Administration Act*, however, permits an executor to sell the real or personal property left to the beneficiary and hold the net proceeds in trust, if after one year of making “all reasonable efforts” they are unable to locate the beneficiary, and the application of s. 66 has not been excluded by the will. If they locate the beneficiary and notify them of the specific bequest, and the beneficiary neglects or refuses to make arrangements for the delivery of the property within 6 months, the executor may sell the property, deduct any costs related to the storage, transportation and sale of the property and send the net proceeds to the beneficiary.

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SCHEDULE "A"

RELEVANT STATUTORY PROVISIONS

1. Trustee Act (British Columbia)

Distribution of estate after notice

38 If a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or a particular class or classes of creditors if the creditors are not designated by name in it, or an executor or administrator, has given, by publishing once in the Gazette and twice each week for 2 consecutive weeks or once a week for 4 consecutive weeks in a newspaper published or circulating in the county in which the debtor or the person deceased resides or resided, a notice to creditors and others to send in to the trustee, assignee, executor or administrator their claims against the person for the benefit of the creditors of whom the deed or assignment is made, or the estate of the testator or intestate, as the case may be, the trustee, assignee, executor or administrator is, at the expiration of the time named in those notices for sending in the claims, which time must not be less than 21 days after the date of the last publication, at liberty to distribute the proceeds of the trust estate, or the assets of the testator or intestate, as the case may be, or any part of them, among the parties entitled to them, having regard to the claims of which the trustee, assignee, executor or administrator then has notice, and is not liable for the proceeds of the trust estate or assets, as the case may be, or any part of them, so distributed to a person of whose claim the trustee, assignee, executor or administrator did not have notice at the time of the distribution of them, or a part of them, as the case may be, but this Act does not prejudice the right of a creditor or claimant to follow the proceeds of the trust estate or assets, as the case may be, or any part of them, into the hands of the persons who may have received them.

2. Trustee Act (Ontario)

Distribution of assets under trust deeds for benefit of creditors, or of the assets of intestate

53 (1) A trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or of a particular class or classes of creditors, where the creditors are not designated by name therein, or a personal representative who has given such or the like notices as, in the opinion of the court in which such trustee, assignee or personal representative is sought to be charged, would have been directed to be given by the Superior Court of Justice in an action for the execution of the trusts of such deed or assignment, or in an administration suit, for creditors and others to send in to such trustee, assignee or personal representative, their claims against the person for the benefit of whose creditors such deed or assignment is made, or against the estate of the testator or intestate, as the case may be, at the expiration of the time named in the notices, or the last of the notices, for sending in such claims, may distribute the proceeds of the trust estate, or the assets of the testator or intestate, as the case may be, or any part thereof

among the persons entitled thereto, having regard to the claims of which the trustee, assignee or representative has then notice, and is not liable for the proceeds of the trust estate, or assets, or any part thereof so distributed to any person of whose claim there was no notice at the time of the distribution. R.S.O. 1990, c. T.23, s. 53 (1); 2000, c. 26, Sched. A, s. 15 (2).

Right of creditor to follow assets not affected

(2) Nothing in this section prejudices the right of any creditor or claimant to follow the proceeds of the trust estate, or assets, or any part thereof into the hands of persons who have received the same. R.S.O. 1990, c. T.23, s. 53 (2).

Subs. (1) not to apply to heirs, etc.

(3) Subsection (1) does not apply to heirs, next of kin, devisees or legatees claiming as such. R.S.O. 1990, c. T.23, s. 53 (3).

3. Estate Administration Act (British Columbia)

Limitation period for disputed claims against estate

66 (1) This section applies if an executor or administrator gives notice in accordance with subsection (2) to

- (a) a creditor or person of whose claim against the estate the executor or administrator has notice, or
- (b) the attorney or agent of the creditor or person.

(2) The notice must

- (a) be in writing,
- (b) give notice that the executor or administrator rejects or disputes the claim, and
- (c) refer to this section and give notice of the intention of the executor or administrator to take advantage of it.

(3) If notice is given in accordance with this section, the claimant must commence the claimant's action in respect of the claim whichever of the following is applicable:

- (a) within 6 months after the notice is given, if the debt or a part of it is due at the time of the notice;
- (b) within 6 months of the time the debt or a part of it falls due, if no part of it is due at the time of the notice.

(4) If the claimant's action is not commenced within the applicable time under subsection (3), the claim is forever barred.

(5) Subsection (4) does not bar a claim by a beneficiary of the estate with respect to a claim by the beneficiary against the estate in the person's capacity as a beneficiary

Powers when legatee cannot be found or fails to claim specific bequest

67.1 (1) This section applies only if

(a) the deceased died testate leaving a specific bequest of real or personal property to a beneficiary, and

(b) the will does not expressly exclude the operation of this section.

(2) If the personal representative, after making all reasonable efforts, is unable to locate the beneficiary within one year of the date of the grant of letters probate or administration with will annexed, the personal representative may sell the real or personal property, deduct any costs related to the storage, transportation and sale of the property and hold the net proceeds in trust.

(3) Section 27.1 of the *Public Guardian and Trustee Act* applies to net proceeds under subsection (2) that are held in trust by the Public Guardian and Trustee and are not claimed by a beneficiary within the applicable period prescribed under that Act.

(4) If net proceeds under subsection (2) are held in trust by a personal representative other than the Public Guardian and Trustee, the personal representative must promptly pay the proceeds into court after deducting the costs of doing so.

(5) If a beneficiary under an estate described in subsection (1) has been located and notified of a specific bequest but neglects or refuses to make arrangements to take delivery of the property within 6 months of the notification, the personal representative may sell the real or personal property, deduct any costs related to the storage, transportation and sale of the property and send the net proceeds to the beneficiary.

(6) If a beneficiary described in subsection (5) does not accept the net proceeds, the personal representative must hold the net proceeds in trust and subsection (3) or (4) applies.

(7) This section does not prevent an application by a personal representative to the court under section 39 of the *Trustee Act* or under section 3 of the *Survivorship and Presumption of Death Act*.