

REVISED¹

Statement of Principles – Fees in Estate Matters

A. Legal Fees Generally

1. A lawyer must not charge a fee or disbursement that is not fully disclosed fair and reasonable.
2. The fee that a personal representative's lawyer may charge is governed by *Queen's Bench Rule 74.14*. The lawyer must serve a copy of Form 74AA on the personal representative and each beneficiary whose interest in the estate may be affected by the lawyer's fees and disbursements within 60 days after the lawyer is retained by the personal representative.

If the beneficiary is a minor or is incompetent, Form 74AA must be served in accordance with 74.14(21)(a) and 22(a) respectively.

3. The fees under *Queen's Bench Rule 74.14(6)* and (7) for basic estate services are calculated as a percentage of the value of the estate assets, and are intended to cover the work involved in estates of average complexity. A simple estate may not warrant a fee based solely on a percentage of the value of the estate.
4. In accordance with *Rule 74.14(5)*, the aggregate value of an estate is determined by taking into account those assets under probate and specifically does not include a numbers of items, including gifts made by the deceased during his or her lifetime; insurance, annuities and pensions not payable to the estate, property held in joint tenancy and the death benefit under the *Canada Pension Plan*.
5. Where there is a change in the aggregate value of the estate that is more than nominal, an amended application for probate should be filed. In the absence of an amended application for probate, the lawyer's fees should not be calculated on the basis of the increased value of the estate.
6. Where an estate does not proceed to formal probate or administration the fee that is charged to the client will not fall within the Queen's Bench tariff. The lawyer may bill his or her hourly rate subject to agreement with the client and providing that the fees are fully disclosed, fair and reasonable.

¹ Revised to reflect amendments to Queen's Bench Rule 74.14 which came into force July 1, 2017

7. A lawyer must not accept payment for services to the personal representative or to the estate except in accordance with *Queen's Bench Rule 74.14*.

Role of the Lawyer

8. In assessing whether a fee is fair and reasonable and in accordance with *Queens Bench Rule 74.14(8)*, the Law Society generally would expect that in an estate of average complexity the following services would be provided to the personal representative:
- (a) receiving instructions from the personal representative;
 - (b) giving the personal representative information and advice on all matters in connection with the administration of the estate;
 - (c) reviewing the will or the provisions of *The Intestate Succession Act* with the personal representative;
 - (d) receiving information from the personal representative about the following:
 - i. the deceased;
 - ii. the estate property;
 - iii. the deceased's debts;
 - iv. the beneficiaries; or
 - v. minors;
 - (e) receiving details from the personal representative of the property and debts of the deceased for the purposes of preparing a request for probate or administration, including the following:
 - i. the full nature and value of the property of the deceased as at the date of death including the value of all land and buildings and a summary of outstanding mortgages, leases and any other encumbrances;
 - ii. any pensions, annuities, death benefits and any other benefits payable to the estate;
 - iii. any debts owed by the deceased as at the date of death

- (f) preparing necessary documents to obtain probate or administration of the estate, attending on signing documents, filing documents in the court and receiving probate or administration;
- (g) preparing and serving all required notices including under *The Dependants' Relief Act* and *The Family Property Act* and advising the Public Guardian and Trustee, if necessary;
- (h) advising and assisting the personal representative in settling debts, including advertising for creditors if instructed to do so;
- (i) preparing declarations of transmission and powers of attorney and related documents for stocks and bonds transferable to the personal representative under the probate or administration and preparing documents to transfer the stocks and bonds to the person entitled to them under the will or intestate succession provisions;
- (j) preparing transmissions and related documents for land transferable to the personal representative under the probate or administration and preparing transfers of land and related documents to transfer land to the persons entitled to the land under the will or intestate succession provisions;
- (k) advising the personal representative on any trust required by the will;
- (l) advising the personal representative to prepare and file tax returns;
- (m) confirming receipts of clearance certificates from Canada Revenue Agency;
- (n) advising the personal representative to provide an accounting to the beneficiaries and a report to the beneficiaries on the administration of the estate;
- (o) requesting approval from the beneficiaries of the compensation for the personal representative and the fees and disbursements of the lawyer for the personal representative;
- (p) preparing and obtaining releases if so instructed by the personal representative;
- (q) advising and assisting the personal representative in distributing the estate property in accordance with the will or intestate succession provisions.

Role of the Personal Representative

9. The following services would typically be considered by the Law Society as falling within the realm of the personal representative's responsibilities and therefore are not typically the responsibility of the lawyer:
- (a) making arrangements for the funeral, memorial or other similar services;
 - (b) determining the names and addresses of those beneficially entitled to the estate property and notifying them of their interests;
 - (c) arranging with a bank, trust company or other financial institution for a list of the contents of a safety deposit box;
 - (d) determining the full nature and value of property and debts of the deceased as of the date of death and compiling a list, including the value of all land and buildings and a summary of outstanding mortgages, leases and other encumbrances;
 - (e) examining existing insurance policies, advising insurance companies of the death and placing additional insurance if necessary;
 - (f) arranging for the proper management of the estate property, including continuous business operations, taking control of property and selling property;
 - (g) retaining a lawyer to advise on the administration of the estate where appropriate, to apply for a grant of probate from the court or bring any matter before the court;
 - (h) applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate;
 - (i) advising any joint tenancy beneficiaries of the death of the deceased;
 - (j) advising any designated beneficiaries of their interests under life insurance or other property passing outside the will;
 - (k) arranging for the payment of debts and expenses owed by the deceased and the estate;

- (l) determining whether to advertise for claimants, checking all claims and making payments as funds become available;
- (m) taking the steps necessary to finalize the amount payable if the legitimacy or amount of a debt is in issue;
- (n) determining the income tax or other tax liability of the deceased and of the estate, including retaining the services of an accountant where appropriate, filing the necessary returns, paying any tax owing and obtaining income tax or other tax clearance certificates before distributing the estate property;
- (o) instructing a lawyer in any litigation;
- (p) administering or arranging any continuing testamentary trusts or trusts for minors;
- (q) preparing the personal representative's financial statements, a proposed compensation schedule and a proposed final distribution schedule;
- (r) distributing the estate property in accordance with the will or intestate succession provisions.

Additional Fees Under Queen's Bench Rule 74.14(9)

10. In addition to the fees for basic estate services provided for in *Queen's Bench Rule 74.14(8)*, a lawyer is entitled to receive payment for the following services:
- (a) appearances in court, in an amount set by the court;
 - (b) services related to passing the accounts of the personal representative in court under Rule 74.12 in an amount set by the court;
 - (c) acting on the sale of an estate asset;
 - (d) finding a purchaser of an estate asset;
 - (e) assisting the personal representative with administration duties, including:

- (i) keeping and preparing the accounts of the personal representative;
 - (ii) listing and valuing assets and debts, and
 - (iii) safekeeping, insuring and disposing of estate assets;
- (f) advising the personal representative with respect to an estate of above-average complexity;
- (g) advising and assisting the personal representative as to ongoing trust administration matters, including:
- (i) the personal representative's duties,
 - (ii) the personal representative's powers of sale, investment and encroachment, and
 - (iii) the allocation of assets as capital or revenue.
11. Where a lawyer has performed some or all of the responsibilities of the personal representative the lawyer is entitled to be compensated for those services. The lawyer should be aware, however, that it may not be appropriate to seek to be remunerated at legal rates for doing administrative tasks. It is important for the lawyer to discuss with the personal representative at the outset of the retainer the nature of the services to be provided, and the basis upon which the lawyer will charge for services that are otherwise the responsibility of the personal representative. In such circumstances the personal representative may themselves have to compensate the lawyer, or alternatively accept a reduced executor's fee.

B. Statements of Account and Consent of Beneficiaries

Interim Account

Interim Account – All Types of Beneficiaries

12. The lawyer is entitled to be paid interim fees and disbursements for basic legal services that have been completed if the personal representative has consented in writing, and:
- (a) the requested interim fees for basic estate services under *Rule 74.14(8)* do not exceed the applicable amounts set out in *Rules 74.14(6) and (7)*;

- (b) all beneficiaries whose interests in the estate may be affected by the lawyer's fees or disbursements have been served with:
 - (i) Form 74AA; and
 - (ii) an itemized statement setting out the lawyer's fees and disbursements with the fees and disbursements for basic estate services under *Rule 74.14(8)* set out separately from those for additional services under *Rule 74.14(9)*, if any.

Interim Account – Adult Beneficiaries Only

13. The lawyer is entitled to be paid interim fees and disbursements for legal services that have been completed if the personal representative has consented in writing to the fees and disbursements requested and, if all the beneficiaries whose interests may be affected by the fees and disbursements are adults, and they:
- (a) have been served with Form 74AA;
 - (b) have received a detailed statement of account clearly delineating between fees for basic estate services in accordance with *Rule 74.14(6)* or (7), excess fees for basic estate services in accordance with *Rule 74.14(8)* and fees for additional services in accordance with *Rule 74.14(9)*;
 - (c) have received an explanation of why any fees in excess of those charged in accordance with *Rule 74.14(6)* or (7) are being requested; and
 - (e) consent, in writing, to the fees and disbursements requested.

Final Statement of Account on Completion of Estate

14. On completion of the estate, in accordance with *Rule 74.14(10)*, the lawyer is entitled to be paid the fees and disbursements that the lawyer requests, if the personal representative has consented in writing to the fees and disbursements requested and, if all the beneficiaries whose interests may be affected by the fees and disbursements are adults, and they:
- (a) have been served with Form 74AA;

- (b) have received a detailed statement of account clearly delineating between fees for basic estate services in accordance with *Rule 74.14(6) or (7)*, excess fees for basic estate services in accordance with *Rule 74.14(8)* and fees for additional services in accordance with *Rule 74.14(9)*;
 - (c) have received an explanation of why any fees in excess of those charged in accordance with *Rule 74.14(6) or (7)* are being requested; and
 - (d) consent, in writing, to the fees and disbursements requested.
15. On completion of the estate in which there is a minor or a mentally incompetent beneficiary, the fees and disbursements of the lawyer must be reviewed by the court on a passing of accounts under *Rule 74.12* or on an assessment of fees and disbursements under *Rules 74.14(13) and 58*.

C. Legal Fees Where Lawyer acts as Personal Representative

16. Where a lawyer acts as personal representative, his or her legal fees will be reduced by virtue of *Rule 74.14(7)*, which states:

If the personal representative is

- (a) *an individual who is a lawyer and, while acting as the personal representative, also acts as the lawyer for the personal representative;*
- (b) *a trust company; or*
- (c) *the Public Guardian and Trustee of Manitoba;*
the lawyer for the personal representative is allowed only 40% of the fees calculated under subrule (6), subject to a minimum fee of \$1500.

D. Fees of Personal Representatives

Calculation of Fees

17. Where compensation is not set out in the will, a lawyer may take executor's compensation if all the residual beneficiaries are legally competent

adults and they consent to the claim for compensation. Otherwise, an application to pass accounts for any executor's compensation should be made.

18. Where a lawyer acts as the personal representative, he or she is entitled to be paid a fair and reasonable allowance for his "care, pains, trouble and time: as provided for under Section 90(1) of *The Trustee Act*. The courts have set out the generally accepted principles with respect to executor's fees, and the following matters have been considered when fixing the remuneration of an executor:

- (a) the magnitude of the trust;
- (b) the care and responsibility springing therefrom;
- (c) the time occupied in performing the duties;
- (d) the skill and ability displayed; and
- (e) the success which has attained its administration.