PRACTICE MADE PERFECT CLE BC

ESTATES: OUT OF THE ORDINARY PROBLEMS
PAPER 3.1

Valuation of Assets in a Rising or Falling Market

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VALUATION OF ASSETS IN A RISING OR FALLING MARKET

I. Purposes of Valuations

Valuations of assets in estate administration serve several functions including:

1. preparing the statement of assets, liabilities and distribution prescribed by s. 111 of the *Estate Administration Act*, R.S.B.C. 1996, c. 122, Rule 61(3) of the Supreme Court Rules and Forms 69, 70 and 71;
2. calculating probate fees payable pursuant to the *Probate Fee Act*, S.B.C. 1999, c. 4;
3. determining the valuations of assets at death for income tax purposes including calculating the deceased's income tax from deemed dispositions for the terminal tax return;
4. calculating the personal representative's remuneration;
5. accounting to the beneficiaries; and
6. allocating assets distributed in specie to residual beneficiaries.

II. Pre-Grant

Before the grant of probate or administration is issued, the personal representative's immediate concern will be obtaining valuations for the purpose of obtaining the grant.

The personal representative's initial goals may be to get a grant quickly and inexpensively. He or she may be reluctant to spend significant funds, which may not be readily available out of the estate before the grant, to retain professional appraisers and business valuators at this stage. In some cases, getting expert valuations before applying for the grant may delay the application. In some cases, third parties may insist on receiving a copy of the grant before releasing the information required to complete the inventory.

Although the personal representative may need to retain experts to provide valuations during the course of the estate administration to prudently carry out his or her duties, it is not always practical to do so before the grant.

The personal representative may want to minimize the stated value of the assets in order to minimize the amount of probate fees payable.

Personal representatives sometimes use the BC Assessment assessed value for land. The assessments are based on the July 1 values, but the notices are issued on December 31. Accordingly, in a rising or falling market the BC Assessment assessed value will likely understate or overstate the value as at the date of death.

But it is important to keep in mind when obtaining values for the statement of assets, liabilities and distribution that valuations do serve other purposes. For example, if the deceased's principal residence will no longer qualify for a principal residence exemption under the *Income Tax Act* after the deceased's death, in a rising real estate market, the value of the residence at death may have significant income tax implications. Although a low date-of-death valuation may minimize probate fees, it may result in a greater income tax liability to the estate or the beneficiaries of the residence when the residence is sold if the stated value in the disclosure document becomes the cost base for tax purposes.

Is the personal representative bound for all purposes by the values he or she declares in the statement of assets, liabilities and distribution? Is he or she estopped from later asserting that an asset was worth more or less at the date of death than the stated value?

The writer suggests that a personal representative may treat the initial valuation as provisional, provided he or she has made an honest and reasonable estimate of value. In practice, the personal representative often makes reasonable estimates of values for completing the statement of assets, liabilities and distribution. The personal representative may later file a supplementary affidavit later when the personal representative has more information to correct any inaccurate estimates of value. Section 111(2) of the *Estate Administration Act* requires the personal representative to disclose any further information if he or she learns that an asset and liability was not disclosed or not properly disclosed.

The courts have recognized the inherent difficulties in getting precise valuations. In *Rolfe v. Minister of Finance of British Columbia* (1979), 18 B.C.L.R. 1 at 11, Trainor J. quoted the following passage from Viscount Simons reasons in *Gold Coast Selection Trust Ltd. v. Humphrey*, [1948] 2 All E.R. 379 at 384:

> If the asset is difficult to value but is none the less of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed, is it possible. It is for the commissioners to express in the money value attributed by them to the asset their estimate, and this is a conclusion of fact to be drawn from the evidence before them.

The courts have also recognized the provisional nature of the personal representative's initial inventory. In *Blackman v. The King*, [1924] 4 D.L.R. 123 (S.C.C.), the executors of the will of a deceased resident of Pennsylvania applied for a grant in BC in order to sue debtors resident in BC, and to realize on security in BC. They posted a bond with the Province and provided an affidavit of value of the assets in BC pursuant to the *Succession Duty Act*, R.S.B.C. 1911, c. 217. The executors were unable to collect any of the debt. The Provincial Government sought to collect the succession duties on the basis of the affidavit of value. The Supreme Court of Canada reinstated the trial judge's decision that no succession duty was owed (the BC Court of Appeal having allowed the Government's appeal).

All of the judges in the Supreme Court of Canada agreed that the executors were not bound by their affidavit of value. Mignault J. wrote at 132:

> As I have said, there is nothing in the [Succession Duty] Act declaring that the affidavit of value and relationship and the inventories are conclusive against those filing them. It may be urged that they are an admission by the representatives of the estate of the property and its value which has come to the hands of these representatives, but does that mean that in case of a demonstrated mistake in making this admission, or of sufficient evidence that a claim such as the one in question was really valueless at the time of the death of the deceased, the representatives of the estate are nevertheless precluded by their affidavit from alleging and proving the contrary? I would greatly hesitate before answering this question in the affirmative.

In his concurring reasons for judgment, MacLean J. wrote at 134:

> It would be an unthinkable proposition if the applicant as a preliminary to obtaining letters of probate was obliged to search the country over, to ascertain all the debts of the deceased, and in effect guarantee that the amount he placed opposite the item ' debts' at the foot of the inventory shewed the precise amount of the deceased's liabilities. One of the primary objects of appointing executors or personal representatives is to have some person who may by appropriate advertisement and other notice, discover in the course of time, what the actual liabilities of the deceased are.

Although *Blackman* dealt with the language of the now repealed *Succession Duty Act*, the principles should be applicable to the affidavit of executor or administrator. If the personal representative makes an honest estimate of values, he or she should not be bound to those values if they later turn out to be inaccurate. For example the personal representative should not be bound by the values set out in the statement of assets, liabilities and distribution, for the purpose of determining the amount of the deemed disposition of assets on death under the *Income Tax Act*, if the values are in error (although the writer is not aware of any cases specifically addressing whether the personal representative may be bound to the statement of assets, liabilities and distribution under the *Income Tax Act*).

For the deceased's principal residence, if the residence will not be exempt after death, the writer suggests the prudent course is for the personal representative to make a reasonable estimate of the fair market value in the statement of assets, liabilities and distribution. If after the grant the personal representative finds that the estimated value as at the date of death was low, the personal representative should then immediately file a supplementary affidavit setting out the personal representative's revised estimate of the value of the residence as at the date of death.

III. Supplementary Post-Grant Affidavits

As noted above, if after the grant, the personal representative discovers other assets or liabilities, or that the estimated values are inaccurate, he or she is required to file a supplementary affidavit.

The personal representative may have to pay additional probate fees, if the value of the assets is higher that the stated value in the statement of assets, liabilities and distribution. What if in the meantime, the prescribed rate of probate fees has changed? The Court held in *Re Henry Estate* (1994), B.C.L.R. 69 (S.C.) that the probate fees are payable at the prescribed rate on the date the grant was issued. If in the interim the rate increases, the personal representative does not have to pay probate fees calculated on the new rate.

IV. Duty of Care and Determining When to Sell

In a volatile market, the personal representative must exercise reasonable diligence in liquidating high-risk assets (subject to the directions in the will). In the leading decision *of Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, the Court held the corporate trustee liable for failing to sell shares of a company in a reasonable time. The corporate trustee's memoranda indicated that the shares were speculative, and the company was not performing well. But the trustees did not dispose of the shares in a timely manner. The shares lost significant value. The Court found that the trustees did not exercise the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs. (The Court excused the co-trustee, who was the widow of the deceased, from breach of trust pursuant to the what is now s. 96 of *Trustee Act*, R.S.B.C. 1996, c. 464.)

Although estate lawyers may be familiar with this case, our personal representative clients often are not.

V. In Specie Distributions

If the personal representative distributes assets to residual beneficiaries *in specie*, he or she may need to obtain updated valuations at the time of distribution to ensure that the beneficiaries receive assets with values proportionate to their relative shares of the estate as set in the will. By the time the personal representative is ready to distribute the estate, the values will have changed in a rising or falling market since the date of death, thereby requiring more up-to-date valuations.

The personal representative should set out the values as at a date reasonably close to the time of distribution in his or her accounts, and seek the approval of the proposed distribution from the beneficiaries.

The personal representative may also need to get updated valuations to calculate income tax payable by the estate on distributions *in specie* in cases where a rollover is not available.