ESTATES

PRE-APPLICATION PROCEDURE

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INITIAL MATTERS

Interview

When someone dies, the person who plans to look after the Deceased's affairs usually contacts the law firm and requests an appointment to meet with a lawyer. This may be a relative or a person named as executor in the Deceased's Will. This person may, or may not, become the applicant with respect to the application for a representation grant and, in due course, may become the personal representative of the Deceased.

Once the appointment is made, ask the client to bring along:

- the original Will and any Codicils or other testamentary documents – if any (if not kept by the law firm for safekeeping);
- all available personal documentation, such as copies of titles to any real or personal property, Marriage Certificate, bank and brokerage statements, etc.;
- family trust, joint partner or alter ego agreements, separation agreement, or any other documents relating to the family situation; and
- Death Certificate, if one is available.

Prior to the appointment, the legal assistant should take the initiative to provide the supervising lawyer with the following:

- original Will and any Codicils (if kept by the law firm for safekeeping);
- all information and/or files concerning the Deceased's affairs (i.e. Wills, personal, matrimonial, real estate and corporate files);
- Master Information Checklist (***Master Information Checklist*** – **Checklists – Estates – Helpful Information**).

While the client is in the office during the first interview, prepare an *Authorization to Release Information to Law Firm* (see Pre-Application Letters) and have the authorization signed by the client to enable the law firm to obtain the information in a timely manner and to avoid having to write to the client with a request to sign this authorization.

Open file

Open a new file following the office's standard procedure. A practical suggestion is to open the file in the Deceased's name as follows:

BLOE, Joseph Patrick
Re: Estate

and to address the correspondence to:

Mr. J. Soandso
Executor (***or:*** Administrator) of the Estate of Joseph P. Bloe, Deceased.

The information and documentation for the estate may become quite voluminous and the file folder may become difficult to handle. It is, therefore, very important to organize the file at the beginning. Using different file folders (or an expandable folder with several built-in separations or a three ring binder with separate tabs for each asset) will make it easy for anyone involved with the file to work on it or check the status. The following sub-files should be set-up:

- correspondence;
- Notices (see **Notice** chapter);
- court (application) documents and Forms;
- the Deceased's personal documents (***Death Certificate***, original Will – **not** punched in);
- assets (if numerous, should be separated into different categories and sub-files: residence, bank and/or brokerage accounts, insurance policies – with information and subsequent transmissions and transfers for each asset – in the same sub-file);
- debts and liabilities.

Print the *Estate Checklist* on coloured paper and place it on the left hand side of the file. This way, it will be easy to locate by anyone. Subsequently, make it your practice to note any additional information on the Checklist rather than on miscellaneous memos scattered throughout the file.

Ascertain that there is a Will and that it is Valid

First of all, bear in mind the definition of the Will. When we refer to a Will, we include the Codicils (if any), and any other testamentary documents such as a Memorandum (**Definition of Will – Overview**).

The legal assistant (and obviously, the supervising lawyer) should ascertain that:

- the Will is in fact the Deceased's **last** Will (see ***Search of Wills Notice*** in this chapter); that is, no testamentary document of the Deceased dated later than the Will on hand has been found;
- the Will is valid under Part 4 of WESA and is properly signed by the Will-Maker and the witnesses (**Statutory Formalities to Make a Valid Will** and **Wills by Members of Military Forces – Wills and Will-Makers – Overview**);
- no special circumstances applied at the time of the execution of the Will;
- there are no issues with respect to the execution or appearance of the Will;
- the witnesses in the Will are not beneficiaries, spouses, or persons claiming under beneficiaries or spouses of the witnesses.

Hopefully, a Will prepared by, and executed in, a law firm would not have any issues. However, the possible issues listed below must be addressed:

- the attestation clause (the portion of the Will where the Will-Maker and the witnesses sign and which also identifies the persons who signed the Will as witnesses to the Will-Maker's signature) is missing or is not sufficient;

- if a **Military Will**, the Will is not in a form permitted by or executed in accordance with, section 38 of WESA (such a Will is extremely rare);
- there are special circumstances surrounding the execution of the Will that the attestation clause does not indicate. For example, the Will-Maker was blind, illiterate, did not fully understand English, signed by means of a mark instead of a handwritten signature or directed another person to sign the Will on the Will-Maker's behalf and in his/her presence. The attestation clause must indicate that such special circumstances applied to the Will-Maker at the time of signing of the Will;
- other issues regarding the proper execution of the Will are not identified. For example, the Will-Maker printed his/her name instead of actually signing the Will;
- there are interlineation, erasures, obliterations or other alterations in the Will which were not made in accordance with Division 1 of Part 4 or section 54 of WESA – in other words, at the time of the execution of the Will, the Will-Maker and the witnesses did not sign or initial in the space where the alterations were made;
- there are other issues arising from the appearance of the Will. For example, there are suspicious staple holes (quite common – that is why you should never unstaple a Will even when photocopying it).

If there is even one issue with respect to the Will, you will have to:

- prepare a ***Form P4 Affidavit of Applicant for Grant of Probate or Grant of Administration with Will Annexed*** (long form). If in doubt regarding the issues, check paragraphs 3 to 8 of ***Form P4*** as they specifically address each issue;
- where required, prepare and file the requisite affidavits in support of the explanation as to the validity of the Will to be attached to ***Form P4***.

Although it is the lawyer's responsibility to review the Will and ascertain its validity (as well as the validity of all the provisos contained in it), the legal assistant should be familiar not only with WESA with regards to the validity of the Will, but with the previous legislation as it may apply at the time the Will was signed (see the transitional provision in Division 1 of Part 7 of WESA):

- under section 15 of the former *Wills Act*, if the Will-Maker had married **after** making a Will and **before** Part 4 of WESA came into force, the Will was revoked by the marriage of the Will-Maker unless the Will stated that it was made in contemplation of the Will-Maker's marriage to a specific person. Such revoked Will was not revived if the Will-Maker subsequently reconciled or when part 4 of WESA came into force.
- on the other hand, if a Will was made **before** Part 4 of WESA came into force, and the Will-Maker married **after** Part 4 of WESA came into force, the Will-Maker's subsequent marriage does not revoke the Will.
- Part 4 of WESA abolished this revocation.

A Will that is not in writing, is not signed by the Will-Maker at its end, and is not signed by at least two witnesses is invalid unless:

- the court orders that it is valid (s. 58) (see **Court Order Curing Deficiencies – Overview**); or

- it is recognized as validly made in accordance with laws of another jurisdiction related to the Will or the Deceased (s. 80) – WESA expands the choice of jurisdictions under which a Will may be declared valid.

In other words, defective Wills or other records (see below) may be admitted for probate because courts have the power to cure deficiencies in order to render a defective Will valid or to order that any record, including data that:

- is recorded or stored electronically;
- can be read by a person; or
- is capable of being reproduced in a visible form;

be fully effective as a Will.

Accordingly, if it appears that there is no valid Will, the applicant should be advised to make all the necessary searches in order to locate anything that could be the Deceased's testamentary intention. These searches should be carried out not only in the usual places where the Deceased kept his/her important documents, but also his/her computer, hard drive, emails, or any other electronic device, both at home and at work.

If the Deceased was a client of the law firm, and no validly signed Will can be found, the law firm should look for a draft of a Will, signed instructions, emails, or client's files where such testamentary intention could be located.

Keep in mind that, in addition, the court has the power to **rectify an error** in a valid Will and allow it carry out the Will-Maker's intentions (s. 59 of WESA).

Finally, if a Will is invalid, and the cause of the invalidity cannot be cured under section 58 of WESA, the Deceased is deemed to have died intestate (see **Intestacy**).

Prepare Preliminary Letter to Personal Representative

From the very beginning, the duties of the personal representative and the lawyer must be clearly defined to avoid duplication and, therefore, avoid unnecessary legal fees. Send a letter outlining such respective duties to the client (***Letter of Instructions to Personal Representative* – Pre-Application Letters**).

Preparing this letter is also a good opportunity to highlight the main aspects of the estate, its distribution, and any issues regarding the Will, beneficiaries, etc.

Obtain Death Certificate

You will require an original ***Death Certificate*** to obtain information (see below **Assemble Information on Assets**) and to transmit or transfer title to certain assets from the Deceased into the name of the personal representative, the surviving joint tenant, or the designated beneficiary. Order at least one Certificate shortly after opening the file (see ***Application for Death Certificate*** – **Pre-Application Documents**). In most cases, the funeral home will provide the prospective personal representative with several originals.

Depending on the requirements of the Land Title Offices, banks, insurance companies, or trust companies, additional Certificates may be required. If another original Certificate is required,

it may be ordered at a later date. In most instances, a **notarial copy** of the Certificate is usually sufficient (see ***Notarially Certified Copy* – Pre-Application Documents**).

Note: Unless specifically requested, there is no requirement to file a ***Death Certificate*** with the probate registry when filing the application documents.

Order Search of Wills Notice

You must carry out a ***Search of Wills Notice*** in the Vital Statistics Agency. The search may be done by completing a paper application or by applying through BCOnLine (if you have an account). To determine who can apply for and obtain the search, see ***Application for Search of Wills Notice* – Pre-Application Documents**.

Note: If you are not familiar with what a ***Wills Notice*** is, read the detailed explanation in the **Overview** chapter – **Wills Notice**).

This search is required by Rule 25-3(14) of the Probate Rules, mainly to ensure that:

- if there is no Will, no Wills Notice has been filed with the Agency; or
- if there is a Will, there is no Wills Notice filed with respect to more recent Will than the one about to be probated.

Include all variations of the Deceased's name in the Search in order to ensure that the name (or names) under which the Deceased was known and in which the assets are registered are all listed. Accordingly, only prepare this application for the search after obtaining:

- the Will (if there is one);
- the ***Death Certificate***;
- the Land Title Office searches (see below); and
- a search at the Personal Security Registry with respect to any charges registered against personal property (e.g. motor vehicle).
- any other searches of the assets (motor vehicles, boats, planes, etc.);

If, at a later date, it is discovered that there is another variation of the Deceased's name and that the additional name is not included in the original search, you will have to order a new Search of Wills Notice that includes the new name as well as the names in the original search. In other words, you cannot combine two searches covering all the names.

Bear in mind:

- the names shown in the Wills Registry Search (as prepared by you) and the names in the in the ***Submission for Estate Grant*** or ***Submission for Resealing*** should be identical. However, the probate registry will accept a search that contains additional names. For example: if there are four names in the Search (A, B, C and D) but only three names in the ***Form P2 – Submission*** (A, B and C), the probate registry will not reject the application. It does not work the other way;
- if one of the names contains initials or punctuation (for example "John P. Brown"), the search must be conducted by using the paper form, as the online form does not allow for punctuation in the names;
- if the search comes back (***Results of Search for Wills Notice***) and is negative (i.e. the Vital Statistics Agency advises that no ***Wills Notice*** has been filed with them), do not assume that no Will exists. It simply means that no ***Wills Notice*** has been filed.

Remember: filing a ***Wills Notice*** when a Will is made is optional and many people, including lawyers, omit this step.

If applying through BCOnLine, it takes about three to five business days for the ***Results of Search for Wills Notice*** to be issued. When applying in paper format, it takes about ten days. There is also a priority service (see ***Application for Search of Wills Notice*** **– Pre-Application Documents**).

Upon receipt of the Results of Search for Wills Notice, verify the date of the most recent Will (if any) in the Results of Search to ascertain that the Will being probated is the most recent Will. If it is not, the more recent Will disclosed by the Results must be located and is the one to be probated.

Determine Applicant/Personal Representative

One of the first steps when dealing with an estate is to ascertain who is entitled, willing, and able to look after the estate: that is, who will be the applicant for a representation grant and, in due course, become the personal representative of the Deceased. This will be one of the determining factors for the type of application.

The explanation for each application below (probate, administration, etc.) sets out such entitlement and describes who can be appointed if the first, alternate or any other executor or person entitled to be administrator is dead or unable or unwilling to act:

- in the case of an application for probate, the first executor(s) named in the Will usually apply. If the first executor or executors named are unable or unwilling to apply (for example, they are dead or have renounced), the next (or alternate) executors apply.
- in the case of an application for administration with will annexed, if all of the executors named in the Will are unable or unwilling to apply, section 131 of WESA governs the priority of the applicants.
- in the case of an application for administration without will annexed (there is no Will), section 130 of WESA governs the priority of applicants. If there are minors or mentally incompetent persons, pursuant to section 128 of WESA, a security may be required to be provided by the applicant, so you have to ascertain that the applicant is bondable or able to provide such security.
- in the case of applications for ancillary grants and resealing of foreign grants, the personal representative(s) named in the foreign grant will be the personal representative(s) in British Columbia. In the case of an application for resealing a foreign grant, **all** representatives named in the foreign grant must apply. However, a foreign representative who has obtained a foreign grant and who resides outside British Columbia may appoint a British Columbia attorney to act on his or her behalf.

A person named in the Will as executor cannot be forced to act as executor, provided that he or she has not intermeddled in the estate (i. e. has not commenced his or her duties as Executor).

If an executor named in the Will does not wish to apply but does not renounce the right to do so, the remaining executor(s) may apply for an estate grant reserving the right of the other executor(s) to apply at a later date. However, if none of the executors named in the Will are able or wish to apply, a grant of administration with will annexed will be applied for.

If an executor:

- renounces (unless a court otherwise orders); or
- survives the Will-Maker and dies without being granted probate; or
- is required to take probate and does not appear (for example, pursuant to a **Citation** see ***Form P33*** and ***Form P34*** in the **Forms** chapter);

the appointment of the executor terminates and the administration of the estate passes as if the person had not been appointed as executor.

When a person dies:

- if there is a Will that names an executor, the estate of a deceased vests in the named executor, or personal representative, when the personal representative assumes or is appointed to that office (i.e. upon the death of the Deceased). In other words, the Deceased's estate vests in the personal representative upon the death of the Deceased, and the personal representative has authority to act as such from the death of the Deceased onwards. The estate grant merely confirms the authority of the personal representative who has already assumed his or her office.
- if there is no Will (the Deceased died intestate), or if there is no executor named in the Deceased's Will (and a grant of administration with will annexed is applied for), the estate of the Deceased vests in the person's personal representative when he or she assumes or is appointed to that office; that is, when the estate grant is issued.

If an executor does not join an application for a grant of probate or administration with will annexed, the executor is not liable with respect to assets of the estate coming into the hands of a co-executor, an alternative executor, or an administrator with will annexed, whether or not power is reserved to the executor to apply for a subsequent representation grant.

If an executor named in a Will does not apply for a grant of probate of a Will (s. 108 of WESA), any person interested in the estate may, in accordance with the Probate Rules, require the executor to:

- accept or renounce probate of the Will; or
- explain why administration of the Deceased's estate should not be granted to the executor or to another person who is willing to act as personal representative.

Also note:

- pursuant to section 56 of WESA (or section 16 of the Wills Act), unless the Will specifically states that it is made in contemplation of divorce, dissolution of marriage or separation, the ex-spouse cannot act as executor (or trustee) and cannot inherit under the Will. The appointment of a spouse may be revoked if the marriage was dissolved or the spouses ceased to be spouses after the appointment was made unless so specified in the Will.

  For example, in a case where the Will-Maker, although divorcing the spouse, wishes the spouse to be the trustee of the trusts created for their children, if a clause specifying this was not included in the Will, the appointment of the spouse as trustee would be null and void. However, the Will is still valid. In this regard, see:

- **Revocation of Gift and Appointment on Dissolution of Marriage (*Wills Act*)** (**Precedent Clauses** chapter**)** and
- **Revocation of Gifts and Appointment when Spouses Cease to be Spouses (WESA)** (**Precedent Clauses** chapter); and
- **Revocation of Gifts or Appointments** (**Overview** chapter).

- Pursuant to section 145 of WESA, if a deceased Will-Maker was an executor of a person who died before the Will-Maker, the executor of the deceased Will-Maker has all the rights, powers, rights of action and liabilities of the deceased Will-Maker with respect to the estate of the Deceased.

NOTICE OF PROPOSED APPLICATION IN RELATION TO ESTATE

The person who intends to apply for a representation grant (the "applicant") must deliver a Notice in ***Form P1*** to those entitled to notice of proposed application at least **21** days before filing an application.

Because of this, attend to the delivery of Notices as soon as practically possible. For that reason, all procedure relating to the delivery of Notice is set out in a separate chapter entitled **Notice**.

Section 121 of WESA requires that an applicant must give notice of the proposed application to the persons referred to in Rule 25–2 of the Probate Rules [Notice Must be Provided]. Rule 25-2 governs the documents to be delivered with the Notice, the form of Notice, timing, parties to whom Notice must be delivered, and general procedure regarding the Notice.

Keep in mind that, pursuant to section 10 of WESA, there is a default **survivorship** period of five days. However, if there is a longer survivorship clause in the Will (e.g. the Will directs to give an asset to a person if he or she survives the Will-Maker for a period of 30 days), we would suggest that the Notices be mailed when the survivorship period expires. Otherwise, you may have to send Notices to **contingent beneficiaries** (see the **Notice** chapter). For example, a clause might say:

> *"… to transfer the residue of my estate to my spouse if she survives me for a period of 30 days. Should my spouse predecease me or not survive me for a period of 30 days, to transfer the residue of my estate equally to my 14 nieces…"*

In this case, unless you wait 30 days to give notice, you will have to send a Notice to the 14 nieces.

Note: If no one is entitled to Notice, you do not need to wait 21 days to file the application.

REPRESENTATION/ESTATE GRANTS

WESA defines "**representation grants**" as all types of grants. On the other hand, the Probate Rules define "**estate grants**" as all grants except the resealing of a foreign grant.

Determine Type of Grant

The main types of grants covered in this ***Guide*** are:

- grants of probate;
- grants of administration with will annexed;
- grants of administration without will annexed.

For each type of grant, there are three categories of grants depending on the location of the originating grant:

- British Columbia – domiciled grants;
- foreign – ancillary grants; and
- resealing of foreign grants.

In order for the user to see the "big picture" refer to the helpful table that shows an overview of the above applications (see ***Estate Recapitulation*** at the end of **Application Procedure**). It shows at a glance the highlights of each application, their similarities and differences, who can apply, and how the estate assets are distributed. It also lists the probate forms to be prepared for an application for a representation grant.

All forms to be used for an application for a representation grant in Appendix A.1 to Part 25 of the Probate Rules are covered in depth in the **Application Procedure** and **Forms** chapters. The **Forms** chapter contains extensive instructions with respect to each form's use, preparation and processing. These instructions will enable the user to understand each form and guide you through its preparation.

Note: It may also be possible to transfer the assets without obtaining a representation grant (see Small Estates on page 25).

Determine the Location of the Probate Registry where the Application will be Filed

All applications are made to one of the registries of the Supreme Court of British Columbia without regard to where the Deceased was domiciled or had assets in the Province.

If the estate is in a registry other than Vancouver or New Westminster, ascertain filing requirements by telephoning that registry, as the requirements may vary from one registry to another. Most probate registries require just the original of the Will but some registries may require additional copies. For example, the Kelowna registry requires three copies of the Will.

Description of Types of Grants

Below is a summary explanation of the types of estate (representation) grants that may be applied for depending on the circumstances.

British Columbia Grants – Domiciled Grants

The following three grants:

- grants of probate;
- grants of administration with will annexed; and
- grants of administration;

are applied for when the Deceased, at the time of his/her death:

- was ordinarily resident or domiciled in British Columbia;
- most of the Deceased's assets are situated in British Columbia;
- all assets will be administered by the British Columbia personal representative.

However, s. 129 that, in certain cases, the court may, if unopposed and the application is made in accordance with the Probate Rules, issue an estate grant if the Deceased had no connection to BC at all.

Grant of Probate

A grant of probate is applied for if the Deceased left a Will (i.e. died testate). Probate is the procedure by which the Supreme Court of British Columbia validates a Will and confirms the appointment of an executor.

In this situation:

- the executor or alternate executor named in the Will is the proposed personal representative and the applicant for a grant of probate; and
- the Deceased's **assets** are distributed in accordance with the terms of the Will.

If several levels of persons are named as executors in the Will, those named first apply. If the first-named executor(s):

- is/are deceased, the court does not ask for proof of death other than a statement to that effect in the appropriate Affidavit of Applicant (***Form P3*** or ***Form P4***);
- has/have renounced the right to apply, a ***Notice of Renunciation (Form P17)*** must be obtained from the person(s) renouncing. Note: There is no requirement to file same with the probate registry;
- choose(s) not to apply but does/do not renounce the right to apply, the court will issue a grant of probate reserving that person's right to apply at a later date.