ESTATES

SUGGESTED RULE OR LEGISLATION CHANGES
(July 2017)

RULES

Item 1: Application to request documents/procedures required by foreign courts

- Add a rule permitting a person to apply to the court and request a document or certificate required by the laws of a foreign jurisdiction; for example, a "certificate of full force and effect" or Hong Kong's special requirements for how a document must be certified. Develop a prescribed form (a variation of notice of application – Form 32, maybe number it 32.1) so these applications can be tracked and are started in a consistent manner throughout the province.

Item 2: Rule 23-3 (5) (a) (i)

- Amend Rule 23-3 (5) (a) (i) to allow a person to submit electronically all applications other than applications requiring the submission of an original will.
    - Specifically the prohibition on filing electronically would continue for any documents related to most applications for estate grant (filed under Rule 25-3); applications for resealing (filed under rule 25-6); or applications related to grants filed under Rule 25-14, (2) (c), 2 (d) or (4).
    - An application for administration without will annexed (which is one type of application for estate grant under Rule 25-3) could be done electronically under the proposed new rule because there is no requirement to file a will.

Item 3: 25-2 (2) (a) (iii)

- Amend Rule 25-2 (2) (a) (iii) to require notice to anyone who may make an application to vary a will under Division 6 of Part 4 of WESA.
    - The concern with the present wording is that it only requires notice to an intestate successor. In accordance with section 21(5) of WESA, if the amount of the estate is less than the spouse's preferential share on intestacy (either $150,000 or $300,000 depending on whether the children are all descended from both the deceased and the spouse) then the spouse would be considered the **only** intestate successor. The deceased's children would not be considered intestate successors and therefore would not be entitled to notice. However, if there is a will, the deceased's children have a right to apply to vary the will regardless of the amount of the estate. Without notice of the application for probate the children may not be aware of their right to file a notice of dispute or be aware that time has started to run on the limitation period for their right to apply to vary the will.

Item 4: Rule 25-2 (10) (a) (ii)

- Amend Rule 25-2 (10) (a) (ii) to also require notice to the equivalent of a statutory property guardian designated by a certificate of incapability. Currently, the Rule only requires notice to the equivalent of a committee appointed by a court outside of British Columbia. This amendment would ensure that Public Guardians and Trustees outside of British Columbia receive notice.

Item 5: Rule 25-3 (6), Rule 25-6 (2), Form P2 & P21

- Amend the probate rules to require an applicant to search for wills held by the law society if a search of the will registry produces a certificate which gives the address at which the deceased's will is located as a law firm that is no longer in business or lawyer who is no longer practicing law. Currently, Rules 25-3 (6) and 25-6 (2), and Forms P2 and P21 only require disclosure of "2 copies of the certificate… indicating the results of a search for a wills notice filed by… the deceased".
- This amendment responds to an issue raised by an individual who advised that his grandfather's estate was mistakenly administered without a will because no copy could be found and the law firm that stored his grandfather's will was put into custodianship by the Law Society. Therefore, the will search was presumed to lead to a dead-end.
- The Law Society already provides the ability to search for lost wills by using a form on their website; therefore, it makes sense to inform applicants of this resource and direct a search of wills held by the law society in the limited circumstances described. This amendment will prevent unnecessary intestacies in the future.

Item 6: Rule 25-3 (23)

- Generally, all documents that form part of a will, such as codicils and properly witnessed lists specifying distribution of personal effects form part of a will and must be disclosed as part of an application of probate. Rule 25-3 (23) provides that if "a reference in the will to a document raises a question as to whether the document ought to form part of the will, the registrar must require the applicant to file [the document]".
- Fee agreements form part of the will. This is because section 90 of the Trustee Act says that the only way to displace the default rules for compensation of an executor or administrator is if "…the allowance is set by the instrument creating the trust" (emphasis added). This means that even if the fee agreement is a separate document that is referenced in a will it is considered part of the will, because the will is the instrument that creates the trust obligation to administer the estate. In turn, this means that the document forms part of the will and in accordance with Rule 25-3 (23) must be disclosed.
- However, while fee agreements form part of the will they are not relevant to an application for probate. There is no basis for a registrar to deny an application for probate because they feel – or a beneficiary alleges – that a fee agreement is unduly generous.

- Fee agreements are only relevant on the passing of the personal representative's account at the conclusion of the administration of an estate. If a beneficiary wishes to learn about a fee agreement prior to the passing of accounts they may request a copy from the personal representative. If a copy of the fee agreement is not freely provided by the personal representative the beneficiary can make a court application to compel disclosure.
- For these reasons it is unnecessary for fee agreements that are referenced in a will to be disclosed when a person is applying for probate. Therefore, it is recommended that either Rule 25-3 (23) be amended or a new Rule 25-3 (23.1) be added to clarify that fee agreements do not need to be submitted as part of an application package to obtain a representation grant and that a registrar cannot compel disclosure.

Item 7: Rule 25-5

- Amend Rule 25-5 to add a sub rule that allows a Registrar to change the name of the deceased, which has been used in the Style of Proceedings upon receipt of affidavit evidence setting out the correct name and an explanation of the reason for the error.

- Currently, registrars amend errors in accordance with Rules 25-3 (1) and (2). However, Registrars have expressed concern about amending an application where an applicant has made an error in the style of proceedings in the Submission for Estate Grant (P2). This is because in regular civil proceedings a court order is required to amend the style of proceedings. Currently there is no provision under Part 25 that addresses how amendments are made to the submission for estate grant (P2) and no specific authority for the Registrar to amend the style of proceedings. Rule 6-1 addresses errors in the style of cause for general pleadings; however, this rule does not apply to probate.

- Therefore, it is requested that Part 25 be amended to add a provision to Rule 25-5 providing specific authority to change the name of the deceased in the style of proceedings upon receipt of affidavit evidence from the applicant explaining the error and providing the correct name of the deceased. However, because an applicant will already have sent notice using the incorrect name in the style of cause, a Registrar should only be permitted to amend the style of cause on affidavit evidence if the correct name of the deceased appears elsewhere in the application material (likely in the section setting out other names the deceased was known as or the deceased's will, if any). Ensuring the correct name appears somewhere in the application material minimizes the risk that the people receiving notice are not misled by the incorrect name in the style of cause. This amendment should either specifically authorize the continuation of the practice of Registrars correcting other parts of the application upon receipt of non-affidavit evidence from applicants or, if not specifically authorize, at least not adversely affect this less formal process to fix other errors.

Item 8: Rule 25-10 (3)

- Amend Rule 25-10(3) to add a paragraph (possibly, a.1) that would allow a person to file a notice of dispute if they claim an interest under a prior or subsequent will.
    - If a person is aware that there is (or may be) an application for a representation grant under a (earlier or later) will to which they are not a beneficiary, they may wish to file a notice of dispute to prevent the issuance of a grant before they have an opportunity to challenge the validity of the will or have an opportunity to apply for probate of a later will that has deficiencies that need to be "cured" (in accordance with Division 5 of Part 4 of WESA).

Item 9: Rule 25-14

- Amend sub rule (1) to remove the following wording ", or, if nothing has been filed in relation to the estate, may, despite Rule 2-1 (1) and (2) (a) and (b), apply by requisition in Form P41,"
    - This change will require all applications under sub rule (1) to be made on notice. Currently, there are very few applications listed under Rule 25-14 that are appropriate to be made without notice. Court Services Branch advises that when applications under Rule 25-14 are made without notice they are often set aside. Those applications that are appropriate to be made without notice would be moved to a new subsection (see below).
- Amend sub rule (1) to add a paragraph allowing a person to apply to have "the court appoint a trustee to hold and administer a minor's interest in the estate until the minor reaches at least 19 years of age" in accordance with section 153 of WESA.
    - Currently applications under section 153 must be made using the general Supreme Court Rule 1-2 (4), which creates a new court file in relation to that application. This is contrary to a goal of the new probate rules, which is to keep most matters in relation to the estate of a deceased in one court file.
- Add a sub rule (likely between (1.1) and (1.2)) that allows certain applications to be made by requisition. This essentially recreates the wording that was in sub rule (1) that will only apply to two applications:

> "If there has been an application for estate grant, a person may apply in accordance with Part 8, or, if nothing has been filed in relation to the estate, may, despite Rule 2-1 (1) and (2) (a) and (b), apply by requisition in Form P41, for an order
>
> (a) under Rule 25-2 (14)
>
> (b) to shorten the 21 day waiting period in 25-2 (1) or to excuse a filing prior to the 21 days expiring."

    - Paragraph (b) would be a new application. Some lay-applicants and law firms are filing applications for probate prior to the 21 day waiting period expiring. This creates a problem as, technically, the registry has already "accepted" these documents

for filing (i.e. stamped the document and started processing it by referral to a DDR). There is no way for the court registry to correct the error created by the early filing, other than to simply reject the application and have the applicant resubmit the application. Paragraph (b) clarifies that the method to address this error is an application to excuse the early filing (and the associated cost and time associated with this procedure). As well, paragraph (b) allows an applicant to apply to shorten the 21 day waiting period where appropriate (for example where all beneficiaries consent or in a matter of urgency).

- Amend sub-rule (2) (f) - change "requisition" to "petition" and amend Form P43 to make it a petition or repeal Form P43 and replace it with a new Form (P44), which would be a petition (based upon Form 66 – Petition to the Court). Add a new Form (P44 or P45 depending on what is done with the P43), which would be an Affidavit for specific use on probate files.
    - The purpose of this amendment and the change to the form is to require notice for this type of application.
- Consequentially amend Rule 2-1 (2.1) to reflect these changes.

FORMS

Item 10: Form P2 (Submission for Estate Grant)

- Amend

  "[ ] I/we request ...[*number of copies*]... copy(ies) of the estate grant."
  "[ ] I/we request ...[*number of copies*]... copy(ies) of the authorization to obtain estate information."

  to say,

  "[ ] I/we request ...[*number of copies*]... **certified** copy(ies) of the estate grant."
  "[ ] I/we request ...[*number of copies*]... **certified** copy(ies) of the authorization to obtain estate information."

  and add the following selections,

  "[ ] I/we request ...[*number of copies*]... certified copy(ies) of the Affidavit of Assets and Liabilities for Domiciled Estate Grant."
  "[ ] I/we request ...[*number of copies*]... certified copy(ies) of the Affidavit of Assets and Liabilities for Non-Domiciled Estate Grant."

    - Adding the word "certified" clarifies that the request is for a certified copy when it is received by the registry. All of the explanatory notes in the P2 already say "certified copy" and this change simply makes the entire form consistent.
    - Applicants often wish to request an Affidavit of Assets and Liabilities and this amendment allows them to do so without completing a separate requisition.
- In Part 4 – Schedule, amend all schedules to remove references to "*other former spouse(s) [provide name(s) of other former spouse(s) and indicate "(former spouse)"]*"
    - This wording was included as part of amendments intended to provide registrars with a complete picture of a deceased's beneficiaries; however, information about a deceased's former spouses is usually not necessary and is currently causing confusion.

Item 11: Form P2 (Submission for Estate Grant), Form P4 (Affidavit of Applicant for Grant of Probate or Grant of Administration with Will Annexed (Long Form)), Form P21 (Submission for Resealing)

- In Part 3 of Form P2 – Documents Filed with this Submission for Estate Grant, add the following selection to paragraph 6 after "[ ] The will refers to one or more documents not attached to the will that cannot be obtained by the applicant(s)."

  "[ ] The will refers to one or more documents not attached to the will that are not filed because the document mentioned in the will is not testamentary:

  1 *[Enter document name and briefly state why the document is not testamentary, for example not witnessed or not related to the disposition of the deceased's estate]*
  2
  3 *etc.*
- In Part 3 of Form P21 – Documents Filed with this Submission for Resealing, reword the second selection from paragraph 6 to read:

"[ ] Filed with this submission for resealing is/are the following document(s),

1
2
3 *etc.*

which document(s) is/are referred to in, but not attached to, the will referred to in section 4:

Not filed with this submission for resealing is/are the following document (s),

1
2
3 *etc.*

which document(s) is/are referred to in, but not attached to, the will referred to in section 4, but which are not testamentary and are not relevant to this application for the following reasons: .....[*briefly state the reasons*]....."

- These amendments allow applicants to identify documents mentioned in the will that are not testamentary and therefore do not need to be included as part of the application package. Such documents may include non-binding (i.e. non-witnessed) statements of desire as to the disposition of personal effects or "will variation statements", explaining why a particular child has received differential treatment under a will.

Item 12: Form P5 (AFFIDAVIT OF APPLICANT FOR GRANT OF ADMINISTRATION WITHOUT WILL ANNEXED)

Paragraph (a) and (c) of section 130 of the Wills, Estates and Succession Act allows spouses or children to nominate someone on their behalf. Sometimes it raises questions when nominees apply because the DDR's are not sure whether the applicant is in fact a nominee or a person who falls under another paragraph and has made an error. Amending the P5 will provide Registrars with greater confidence that an applicant has read and understood section 130 by allowing an applicant to indicate they are a nominee.

It is proposed that a second paragraph 3 be added to the P5 – saying:

"3 [ ] I am a person nominated under paragraph …*[select (a) or (c)]*… of section 130 of the *Wills, Estates and Succession Act*.";

Also add an instruction "[*Check the box for whichever one of the immediately following section 3's is correct and indicate the paragraph which applies.*]" before the existing section 3;

And finally amend the existing paragraph 3 to include a check box "[ ]" after the "3".

Item 13: Form P9 (Affidavit of Delivery)

- There are typos in Form P9 the highlighted text below:

3 [*Complete the following phrase for each person referred to in section 2 who received delivery of the notice on behalf of another person under Rule 25-3 (6), (9) or (11).*]

I delivered the document(s) referred to in section 2 to .....[*name*]..... in his/her capacity as the .....[*identify capacity, e.g. parent, guardian, committee, etc.*]..... of .....[*name of person to whom, under Rule 25-3 (2), the document(s) referred to in section 2 was (were) required to be delivered and on whose behalf the person referred to in this section received delivery of the document(s)*]..... .

These references should be changed to, "Rule 25-**2** (**8**), (**10**) or (**12**)" and "Rule 25-**2** (2).

Item 14: Form P21 (Submission for Resealing)

- After

  "[ ] I am/We are seeking an authorization to obtain resealing information so that I/we can secure the information necessary to prepare and submit an affidavit of assets and liabilities for resealing."

  Add the following wording:

  [*Indicate how many court certified copies of the estate grant/authorization to obtain estate information you require.*]
  "[ ] I/we request ...[*number of copies*]... certified copy(ies) of the resealed estate grant."
  "[ ] I/we request ...[*number of copies*]... certified copy(ies) of the authorization to obtain resealing information."
  "[ ] I/we request ...[*number of copies*]... certified copy(ies) of the Affidavit of Assets and Liabilities for Resealing."

    - The addition of this wording brings the Submission for Resealing in line with the Submission for Estate Grant (above), allowing applicants to more easily request certified copies they may need to administer the estate.
- After "Part 1 – Information about the Deceased", change the wording of "Full legal name of the deceased:" to read "Name of the deceased as it appears on the foreign grant to be resealed"
    - This addresses an issue if the name on a foreign grant does not match the full legal name of the deceased according to Canadian documentation. Resealing a foreign grant simply recognizes the foreign grant; there is no ability to change or modify the name on that grant. If the deceased owns property in BC under a legal name that is different than the name on the foreign grant then the personal representative will need to apply to amend the foreign grant or apply for a new limited grant in British Columbia. This amendment ensures there is no confusion about the name that will appear on the notice of resealing (P28).
- In Part 4 – Schedule, amend all schedules to remove references to "*other former spouse(s) [provide name(s) of other former spouse(s) and indicate "(former spouse)"]*"
    - As with the amendment to Form P2 (above), this wording was included as part of amendments intended to provide registrars with a complete picture of a deceased's beneficiaries; however, information about a deceased's former spouses is usually not necessary and is currently causing confusion.

Item 15: Form 32 (Notice of Application)

- This form is part of the "regular" probate rules. For data collection purposes Form 32 contains an appendix that asks the applicant to "*Check the box(es) below for the application type(s) included in this application*". However, most of the options provided don't account for the applications that occur in probate actions.
- Court registry staff has identified the need to overhaul the appendix choices in general (not just for probate applications). However, at this time, it is proposed that Form 32 be amended to include an additional option, such as "[ ] none of the above" for use in unique applications that occur in probate actions.
- Staff will review use of the "[ ] none of the above" selection over the course of the next year to ensure this selection is being used appropriately and the appendix will undergo a broader review in the near future.