

# **Report on New Probate Rules**

**A Report prepared for the British Columbia  
Law Institute by the Members of the Probate  
Rules Reform Project Committee**

# British Columbia Law Institute

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The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its strategic mission is to be a leader in law reform by carrying out:

- the best in scholarly law reform research and writing; and
- the best in outreach relating to law reform.

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# INTRODUCTORY NOTE

## Report on New Probate Rules

The rules of court relating to probate procedure are an important component of the law relating to wills and estates. They must operate in concert with the legislation and common law governing wills and estates. Enactment of the *Wills, Estates and Succession Act* has created an urgent need to revise the existing probate rules, because certain rule changes must be in place in order for the Act to be fully implemented.

There are additional reasons for reform of the present probate rules, namely Rules 21-4 and 21-5. Competing priorities and constraints on time and resources did not allow for probate procedure to be given much attention in the process that led to the recently introduced *Supreme Court Civil Rules*. Rules 21-4 and 21-5 are essentially the same as the former Rules 61 and 62. They preserve some anomalies that were present in the former rules as well and require probate procedures that are overdue for modernization.

The British Columbia Law Institute undertook the Probate Rules Reform Project with the support of the Ministry of Attorney General to address the need to reform probate procedure and facilitate the implementation of the *Wills, Estates and Succession Act*. A distinguished Project Committee consisting of prominent wills and estates practitioners, a master of the Supreme Court of British Columbia, and experienced probate registry officials devoted much time and collective expertise to this task. This report reflects the results of the Project, including an annotated draft of new probate rules. The Institute recommends their adoption.

D. Peter Ramsay, Q.C.  
Chair,  
British Columbia Law Institute  
October 2010

## Probate Rules Reform Project Committee

The British Columbia Law Institute formed the Probate Rules Reform Project Committee in December 2007.

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The Honourable Madam Justice D. Jane Dardi was also a member of the Project Committee prior to her appointment to the Supreme Court of British Columbia.

## Acknowledgments

The British Columbia Law Institute gratefully acknowledges the members of the Probate Rules Reform Project Committee, who all dedicated an immense amount of time, effort and expertise to this project. A special debt is owed to D. Peter Ramsay, Q.C. current Chair of the Board of Directors of the Institute, who chaired the Project Committee.

The Institute also extends its gratitude to the Ministry of Attorney General for its support of this project, and to the officials of that Ministry who have been closely associated with the Probate Rules Reform Project for their steadfast support and encouragement. Special mention is due to Ms. Nancy Carter, Executive Director of the Civil Policy and Legislation Office, and Mr. Tyler Nyvall, Senior Policy Analyst, who provided excellent liaison with the Ministry throughout the project.

The Institute is grateful also to Scotiatrust for its support in the completion of the later stages of the project.

The Institute extends its thanks all the individuals and organizations who provided comments on the *Consultation Paper on New Probate Rules*. Their comments were most valuable to the Project Committee in refining the conclusions reflected in this report.

The support provided to this project by Alexander Holburn Beaudin Lang LLP, who hosted all the meetings of the Project Committee at their offices, is most gratefully acknowledged.

The Institute wishes to acknowledge the contribution of the legal staff of the Institute to the successful completion of this project, in particular Greg Blue, Q.C. and Carolyn Laws. Mr. Blue served as the project manager and was chiefly responsible for the drafting of the consultation paper and this report. Ms. Laws made an extremely valuable contribution in the earlier stages of the project by carrying out much of the initial research and analysis on which later work of the Project Committee was based. The Institute also thanks the other present and former staff members listed below who contributed to the Probate Rules Reform Project at various times:

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## EXECUTIVE SUMMARY

This report results from the Probate Rules Reform Project undertaken by the British Columbia Law Institute (BCLI) with the support of the Ministry of Attorney General.

Two major legal developments led to the Probate Rules Reform Project. The first was the enactment of the *Wills, Estates and Succession Act* (WESA) in 2009. Changes to the rules of court dealing with probate business are needed before the WESA can be brought into force. The second development was the general reform of the rules of the Supreme Court of British Columbia that culminated in the *Supreme Court Civil Rules* (Civil Rules). The former Rules 61 and 62 could not be given a high priority for revision in that process and appear largely unchanged as Rules 21-5 and 21-4, respectively, in the Civil Rules. Comprehensive revision of Rules 21-4 and 21-5 was needed to accommodate the WESA and modernize the probate process in keeping with the spirit of the Civil Rules.

The Project Committee's approach to reform of the probate rules was fourfold. First, there would be an attempt to design an optimal procedure instead of simply improving on the existing one. Second, aspects of probate procedure that have outlived their usefulness would no longer be retained simply for historical reasons. Third, in recognition of the fact that unrepresented persons initiate much probate business, procedures would be simplified where possible. The revised probate rules would provide more explicit guidance than Rules 61 and 62 now do. Fourth, differences between procedures in probate matters and general civil procedure as remodelled under the new Civil Rules would be harmonized to the extent possible.

Part One of the report explains the background to the procedural reforms that the new probate rules intended to replace Rules 21-4 and 21-5 would introduce. Part Two contains the recommended new probate rules and commentary on them. Following the general format of the Civil Rules, the new probate rules take the form of subrules grouped under one principal rule. The numbering of that principal rule is left to the decision of the Supreme Court Rules Revision Committee. As the new rules abandon the present contentious / non-contentious classification of probate business, division of the subrules between two principal rules of court was not seen as necessary.

The new probate rules in Part Two are intended to accommodate a system in which a single court file for the estate would be opened when the first filing (typically an application for a common form grant) is made. Subsequent proceedings that currently must be pursued in separate actions with different court files and file numbers, such as probate in solemn form and revocation, would be initiated instead by

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interlocutory application within the same estate file. The relatively rare cases in which a proceeding for probate in solemn form is begun before any other step has been taken in the estate, such as an application for a common form grant, would be exceptions. In those cases, the proceeding would commence by petition.

The procedure in contested matters would be only as elaborate as necessary to resolve the particular matter, ranging from an ordinary chambers argument to summary trial on affidavits to a regular civil trial with oral evidence. This is seen as serving the principle of proportionality embraced by the Civil Rules.

Among the other significant changes to probate procedure proposed in this consultation paper are the following:

- a 21-day notice period that must elapse between the notice of an intended application for a grant of probate or administration and the filing of the application;
- a single application form for a grant or resealing, comprising the information now found in the applicant's affidavit and the disclosure document concerning the deceased, the last will if any, and the deceased's estate;
- abolition of the need to "clear off" potential administrators having equal or prior right to a grant;
- provision for an application to remove a caveat;
- provision for new procedures at the probate stage contemplated by the *Wills, Estates and Succession Act*, such as curative orders to admit wills to probate despite formal defects, rectification of wills and upholding of gifts to attesting witnesses in some circumstances;
- deletion of the schedule of proposed distribution from an application for a grant or resealing;
- disclosure of debts in an application for a grant or resealing would be limited to debts encumbering specific assets;
- discontinuance, consent dismissal, and settlement without leave of the court would be permitted in contested probate proceedings as in other civil matters, and default judgment would be possible except in proceedings for revocation;

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- to avoid the need for a second chambers application to confirm a registrar's findings on an inquiry for passing of estate accounts or fixing the remuneration of a personal representative, the registrar's findings would be certified unless the court orders otherwise when directing the inquiry. Thus, they would be binding on the interested parties, subject to appeal.

BCLI believes the new probate rules set out in this report will modernize and simplify probate procedure in keeping with the objects of the new Civil Rules.

## ABBREVIATIONS

BCLI	British Columbia Law Institute
WESA	<i>Wills, Estates and Succession Act</i>

## PART ONE

### I. INTRODUCTION

#### A. General

Two recent developments in the legal system of British Columbia have led to this report. One was the reform of the law of succession on death initiated by the Succession Law Reform Project, which culminated in the enactment of the *Wills, Estates and Succession Act*<sup>1</sup> (WESA) in September 2009. The Succession Law Reform Project focused on legislation and common law. Review of Rules 61 and 62 of the former Rules of Court,<sup>2</sup> commonly referred to as the “probate rules,” was not possible within its limited timeframe.

The other recent development was the general reform of the rules of court that flowed from the 2006 report of the Civil Justice Reform Working Group,<sup>3</sup> part of the Justice Review Task Force established earlier by the Attorney General of British Columbia. That initiative has culminated in the new *Supreme Court Civil Rules* (“Civil Rules”) that were released in July 2009 and came into force on 1 July 2010.<sup>4</sup>

The former Rules 61 and 62 are largely preserved with only minor changes in the Civil Rules as Rules 21-5 and 21-4, respectively. The size and complexity of the task of overhauling the rules of court did not permit a review of the probate rules in depth by the Civil Rules Drafting Group or the permanent Supreme Court Rules Revision Committee. Instead, that task has been left to the Probate Rules Reform Project which, like the Succession Law Reform Project that preceded it, is being carried out by the British Columbia Law Institute (BCLI) with support from the Ministry of Attorney General.

Implementation of the WESA will require changes in the probate rules because the Act leaves the details of certain procedures it creates to the rules of court. The details are not to be found now in Rules 21-4 and 21-5 because the WESA introduces

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1. S.B.C. 2009, c. 13. The Act is not yet in force.

2. B.C. Reg. 221/90.

3. Civil Justice Reform Working Group, *Effective and Affordable Civil Justice* (November 2006), Ministry of Attorney General, online: [http://www.bcjusticereview.org/working\\_groups/civil-justice/cjrwg\\_report\\_11\\_06.pdf](http://www.bcjusticereview.org/working_groups/civil-justice/cjrwg_report_11_06.pdf).

4. B.C. Reg. 168/2009.

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new procedures in some instances and changes some existing ones. While revision of the probate rules is essential for this reason, it is also timely in light of the introduction of the Civil Rules and the significant changes they contain.

### B. The Project Committee

The members of Probate Rules Reform Project Committee are:

Mr. D. Peter Ramsay, Q.C. - Chair	<i>Ramsay Lampman Rhodes, Nanaimo UBC Faculty of Law</i>
Mr. Jim Andrews	<i>Deputy Administrator, Probate / Bankruptcy, Supreme Court of British Columbia, Vancouver</i>
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Mr. Scott Wheeler	<i>Probate and Adoption Registry Supervisor Deputy District Registrar Supreme Court of British Columbia, Victoria</i>

The Hon. Madam Justice D. Jane Dardi was also a member of the Project Committee until her appointment to the Supreme Court of British Columbia in June 2008, at which time Ms. Taylor joined the Project Committee.

### **C. The Consultation Paper**

A consultation paper containing draft probate rules and commentary preceded this report. Due to time constraints under which the Project Committee was operating, responses had to be requested within a two-month interval, considerably shorter than the norm for BCLI consultative documents. Despite the regrettably but unavoidably brief consultation period, BCLI received several detailed submissions on the draft rules. The Project Committee considered all responses fully in the process of finalizing its report.

### **D. Structure of the Report**

Part One of this report is divided into three chapters. Chapter I is a general introduction explaining the background to the Probate Rules Reform Project. Chapter II explains the reasons why reform of the probate rules is needed. Chapter III describes the approach taken by the Project Committee in carrying out the task of reforming the probate rules and the key elements of a new probate procedure.

Part Two contains draft rules intended to replace the present Rules 21-4 and 21-5 and commentary.

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## II. WHY THE PRESENT PROBATE RULES REQUIRE REFORM

### A. General

The present Rules 21-4 and 21-5 are essentially re-enactments of the former Rules 61 and 62 with some relatively minor changes. Implementation of the WESA will require some additional provisions. The need to revise the probate rules to reflect changes in the governing wills and estates legislation also affords an opportunity to address certain deficiencies in the existing rules.

### B. Changes Required by the WESA

The WESA contemplates the transfer to rules of court of some matters of procedure that are now addressed in the existing *Estate Administration Act* and other legislation that it will repeal. It also provides for some new procedures and types of orders that the rules of court must accommodate. Among the matters that the WESA will require the probate rules to cover are:

- notice of an application for a grant, or of the intended filing of a small estate declaration;
- security to be provided by a prospective administrator in cases where it is required;<sup>5</sup>
- applications for probate of wills executed under the *Convention Providing a Uniform Law on the Form of an International Will*;
- applications for orders
  - that a formally defective testamentary document be effective as if it had been properly executed;
  - for rectification of a will;

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5. The WESA only requires an administrator to provide security when a minor or mentally incapable adult is interested in the estate. Unlike the *Estate Administration Act*, the WESA does not require the security to be in the form of a bond.

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- that a gift under a will to an attesting witness or the spouse of the witness take effect despite the attestation.

These changes and others reflecting the WESA are incorporated into the draft probate rules in Part Two. They are described in more detail in the commentaries accompanying the draft rules.

### C. Other Reasons for Reform of the Probate Rules

#### 1. LACK OF CLARITY IN DISTINCTION BETWEEN “CONTENTIOUS” AND “NON-CONTENTIOUS” BUSINESS

Rule 21-5 ostensibly applies to “non-contentious” common form probate business and Rule 21-4 applies to “contentious” business, but the allocation of various matters between the two rules is confusing and creates considerable obscurity.

The treatment of probate in solemn form is one prominent example.<sup>6</sup> As a procedure for formal proof of a will in a trial setting in which the validity of the will may be contested, probate in solemn form is treated as contentious business under the English practice in which our probate procedures are rooted.<sup>7</sup> It is classified as contentious business in the majority of the common law provinces and in two territories of Canada.<sup>8</sup> Solemn form is covered in both Rules 21-4 and 21-5, however, and each rule specifies a different procedure.

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6. There are two types of probate: common form and solemn form. Common form is the more familiar type and is what is generally meant by a reference to “probate.” In common form, a will is proven by the sworn evidence of the executor or other applicant identifying it as the last will of the testator and by the deposit of the original will with the court. In solemn form, a proceeding is commenced by the executor or other person wishing to prove the will, and all persons interested in the estate are named as parties. The will is proven in a trial in open court, or alternatively in British Columbia by summary trial on affidavits if oral evidence is not required.

7. See R.F. Yeldham, J.S. Gowers, M.J. Downs and R.B. Rowe, eds., *Tristram and Coote’s Probate Practice*, 27<sup>th</sup> ed. (London: Butterworths, 1989) at 571. See also the present English *Civil Procedure Rules*, S.I. 1998, No. 3132 L.17, Rule 57.1(2)(iii).

8. Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, the Northwest Territories and Nunavut all locate solemn form probate in the portion of their rules of court or practice dealing with contentious business: *Surrogate Rules*, Alta. Reg. 130/95, s. 75(1)(a); *Court of Queen’s Bench Rules*, Man. Reg. 553/88, Rule 75.03(1)(c); *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 75.01; *Probate Court Practice, Procedure and Forms Regulations*, N.S. Reg. 119/2001, s. 71(1); *Queen’s Bench Rules* (Sask.), Rule 734; *Consolidation of Probate, Administration and Guardianship Rules of the Supreme Court of the Northwest Territories*, SOR/79-515, Rule 54 (identical provision applicable in Nunavut). The relevant legislation and court rules in Newfoundland and Labrador and P.E.I. do not divide probate business into “contentious” and “non-contentious” categories.

Rule 21-4(3) requires a “probate action,” including probate in solemn form (“an action for...an order pronouncing for or against the validity of an alleged testamentary paper”) to be commenced by notice of civil claim. Rule 21-5(14) nevertheless requires “a *proceeding* for proof of will in solemn form” to be started by petition. There is no indication in either rule as to whether the two forms of proceeding are alternatives or if there are circumstances in which one is available to the exclusion of the other. The confusion is compounded by the proviso in Rule 21-4(1) that Rule 21-4 “does not include a proceeding governed by Rule 21-5.” This suggests that solemn form is excluded from the scope of Rule 21-4 because it is mentioned in Rule 21-5, even though the definition of “probate action” in Rule 21-4(1) definitely covers it.

The court resolved this confusion under the former Rules 61 and 62 that corresponded closely to Rules 21-5 and 21-4, respectively, by holding that the two procedures were not alternatives: an executor or other supporter of the will could use the petition procedure only if the application was unopposed.<sup>9</sup> Once a caveat had been filed, the supporter of the will had to proceed by writ of summons (now supplanted by the notice of civil claim) in an action.<sup>10</sup> While judicial interpretations afford some guidance to the initiated, clarity in the rules themselves would be preferable.

Other confusing anomalies are present in the probate rules. Caveats and challenges to caveats are dealt with in Rule 21-5 as non-contentious business, although there clearly is some element of contention present whenever a caveat is filed to prevent a grant from issuing. Again, a majority of provinces and two of the three territories treat caveats and proceedings arising from caveats as contentious business.<sup>11</sup>

A close examination of the actual division of subject-matter between Rules 21-4 and 21-5 reveals that the division does not depend on whether a matter is intrinsically contentious, but instead on whether the procedure for bringing a matter before the court is an application or an action. This creates uncertainty and confusion as to the

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9. *McNeill v. McKinley*, [1998] B.C.J. No. 1821 (S.C.) at para. 13.

10. *Hetherington v. McLeod*, [1991] B.C.J. No. 2063 (S.C.).

11. Alta. Reg. 130/95, ss. 71-74; Man. Reg. 553/88, Rule 75.02; R.R.O. 1990, Reg 194, Rule 75.03 (notice of objection); *Probate Rules*, N.B. Reg 84-9, Rule 3.01; (N.W.T. and Nunavut) SOR/79-515, Rules 37, 51, 52. In English probate practice, the filing and “warning” of caveats (similar to the notice to caveator procedure under B.C. Rules 21-5(45)-(48) are treated as non-contentious business under the *Non-contentious Probate Rules 1987*, S.I. 1987 No. 2024 (L.10), but when a caveator’s objection cannot be resolved, a probate claim is commenced under Part 57 of the *Civil Procedure Rules*.

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rule under which a party should proceed to seek resolution of a dispute regarding the validity of a will or who should administer an estate.

### 2. INCOMPLETE DESCRIPTION OF PROCEDURES

The probate rules provide incomplete guidance concerning distinct procedures in a number of instances:

- Rule 21-5(43) refers to the possibility of withdrawal of a caveat, but there is no prescribed form for withdrawal. The only form for withdrawing a caveat prescribed in the *Supreme Court Civil Rules* relates to caveats in admiralty actions.
- While Rule 21-5(58) requires that an answer to a citation be filed, nothing in Rule 21-5 requires the citation itself to be placed on the court file other than as an exhibit to an affidavit of service.
- The probate rules are silent as to how disputes leading to the filing of caveats are to be resolved. Rule 21-5(48) states that the registrar shall cancel a caveat if no notice of interest in response to a notice to caveator is filed, but does not indicate what is to occur if an appearance is filed. A reader of Rule 21-5 is left in doubt as to the procedure for resolving a caveator's objection to the issuance of a grant if the caveator files an appearance to the notice. Is the applicant for the grant to set the application down for hearing under Rule 21-5(8) so that the matter can be argued? Should a probate action be commenced under Rule 21-4? Who is to be the moving party, the applicant for grant or the caveator?<sup>12</sup>
- The probate rules do not state what the next step should be if an executor or person in possession of a will does not respond to a citation to accept or refuse probate or to propound a will.

Again, experienced wills and estates practitioners may know what is commonly done in each of these situations, but the opacity of the probate rules leaves others guessing.

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12. By analogy to English practice, it appears the appropriate step would be for the party who delivered the notice to caveator to commence a probate action under Rule 21-4 either to prove the will in solemn form or to obtain a grant of administration: *Tristram & Coote's Probate Practice supra*, note 7 at 516. The reader of Rules 21-4 and 21-5 is left wondering, however, and it would be much better if the probate rules set out the procedure to be followed.

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### 3. GAPS AND INCONSISTENCIES BETWEEN THE PROBATE RULES AND COURT FORMS

Information that does not appear in the probate rules themselves sometimes appears in court forms. Form 98 (the notice to caveator) indicates the time for responding to a notice to caveator delivered under Rule 21-5(45) is seven days. This time limit is not set out in Rule 21-5. Rule 21-5(48) merely refers to “the time stated in the notice to caveator.” As a result, the reader is forced to consult a form to find out an important time limit that should be readily apparent from the rules themselves. As court forms may be varied by the parties to a proceeding “as the circumstances of the proceeding require,”<sup>13</sup> a time limit that is rooted in a form may not have an appropriate degree of certainty.

Forms 95 (administration bond) and 96 (administration bond on resealing) mention a requirement for the administrator to lodge the grant with the court after the estate is fully administered as a condition of cancellation of the bond. The probate rules contain no requirement to deposit the grant in the court registry once the administration is complete, and it is seldom done in practice.

In some cases, the probate rules and the prescribed forms are expressly contradictory. Rule 21-5(44) states that the effect of a caveat is that no grant shall issue while the caveat is in force. The caveat form (Form 97) merely directs, however, that “let nothing be done” in the estate without notice to the caveator. The wording of the form suggests that steps may be taken in the estate despite the caveat, and that the purpose of the caveat is merely to require notice of them to the caveator.

Forms 99 (citation to accept or refuse probate) and 100 (answer to citation) both indicate the person to whom the citation is addressed must respond either by applying for probate within 14 days or undertaking to do so within 14 days of the date of the answer, and by showing cause why administration should not be granted to someone else. The wording of Rule 21-5(49), which authorizes this type of citation, suggests that showing cause why a grant should not be made to someone else is a response that is alternative to accepting or refusing probate and makes no reference to an extension of time predicated on an undertaking to apply for probate.

Forms should not be relied upon to supplement gaps in the rules of court. Procedural details such as time limits that are stated in forms but have no basis in the rules are of very doubtful effect. At the very least, the rules and forms should be consistent.

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13. Rule 22-3(1).

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### 4. INCONSISTENCY BETWEEN THE PROBATE RULES AND ACTUAL PRACTICE

In one instance, Rule 21-5 is highly misleading with regard to actual practice in the British Columbia Supreme Court concerning applications for common form grants. Rule 21-5(8) provides that an applicant may set the application down for hearing at any time after the registrar has approved the application or refused to approve it. A reader who was not familiar with probate procedure would assume that an oral hearing is a necessary step, but in fact it is seldom necessary to speak to an application for a common form grant.

In the Vancouver and Victoria registries, probate desk staff may place applications that are found to be in order and raise no concerns on a list which a judge or master signs to signify that the grants should issue. In other Supreme Court registries in British Columbia where the volume of applications is lower, an informal desk order is made to direct the issuance of a grant. No oral hearing takes place unless the registrar determines that a grant cannot be issued without a prior ruling by the court on one or more matters of concern or the applicant disputes the registrar's decision on the adequacy of the material.

Thus, despite the wording of Rule 21-5(8), an applicant for a common form grant does not "set down the application for hearing" as with regular civil chambers applications. To compound the confusion, Rule 21-5 gives no guidance to the reader as to when an application for probate in common form or administration of an estate must be spoken to and when it does not.

### 5. SUBSTANTIVE LAW IN PROBATE RULES

Rule 21-5(59) purports to enable the court to issue an ancillary grant to a foreign personal representative or grant probate or administration in respect of assets located in British Columbia to an attorney of a foreign personal representative when the foreign grant cannot be resealed.<sup>14</sup> This is not a matter of procedure but of substantive jurisdiction. The *Court Rules Act* authorizes the making of rules governing "practice and procedure."<sup>15</sup> The *Estate Administration Act* authorizes rules of court

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14. Resealing is available under the *Probate Recognition Act*, R.S.B.C. 1996, c. 376 only in respect of reciprocating jurisdictions designated by order in council. These include Canadian provinces and territories (except Nunavut at the present time), the U.K., the Australian states of New South Wales and Victoria, New Zealand and a handful of other Commonwealth countries. Under s. 138(1) of the WESA, resealing will be extended to all Canadian provinces and territories and to other jurisdictions prescribed by regulation.

15. R.S.B.C. 1996, c. 80, s. 1(2)(a).

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made for the purpose of “carrying out this Act.”<sup>16</sup> It is questionable whether these enactments authorize rules conferring jurisdiction rather than merely stating how it can be invoked and applied.

When the WESA is brought into force, the jurisdiction to make ancillary grants to foreign personal representatives and limited grants to attorneys will be derived from sections 138(4) and 139 of the WESA. Rule 21-5(59), which is of doubtful validity, should then be repealed.

### 6. OUTDATED PROVISIONS

The probate rules contain some provisions that have clearly outlived any rationale they may once have had. Rule 21-5(33) prohibits the issuance of a grant of probate or administration within seven days of the deceased’s death. Rule 21-5(34) requires a sworn explanation for the delay if a grant is applied for more than three years after the deceased’s death. There seems to be no reason for their presence except that they are a time-honoured part of probate practice inherited from England.

#### **D. Clearer Rules Are Desirable**

While lawyers highly experienced in probate matters know how gaps and inconsistencies in the present probate rules are managed, the anomalies and inconsistencies of the rules outlined above present an obstacle for other legal practitioners in coming to an understanding of probate procedure, and an even greater one for the many unrepresented laypersons who apply for grants of probate and administration. A substantial revision of the probate rules is clearly needed.

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16. R.S.B.C. 1996, c. 122, s. 119.





### III. REFORM OF THE PROBATE RULES

#### A. General

Apart from addressing the rule amendments needed to accommodate the WESA, the Project Committee's approach to reform of the probate rules rests on four fundamentals:

1. Seeking an optimal procedure;
2. Willingness to discard features that have outlived their usefulness;
3. Simplification;
4. Harmonization of probate procedure with the rest of civil procedure where possible.

#### B. Seeking an Optimal Procedure

The Project Committee attempted to devise an optimal procedure for handling common form probate business and probate-related litigation within the parameters of the governing legislation and common law, rather than simply improving on the existing rules and procedures.

Thus, some existing requirements that the Project Committee considered to be superfluous have been dispensed with in the draft rules in Part Two and some new procedures introduced with a view to accommodating the provisions of the WESA.

The most prominent new feature of common form procedure under the draft probate rules is a 21-day period that must elapse between notice to interested persons of an application for a grant and the filing of the application itself. Prescribed text in the notice would inform the recipient of the right to oppose the application by filing an estate caveat, and refer to the possibility that rights may exist against the estate under the *Family Relations Act* or the will variation provisions of the WESA. It would also refer to the right of a surviving spouse of an intestate to acquire the spousal home from the estate in satisfaction of the spouse's share in the intestacy. It would warn the recipient that any steps to pursue these rights, if they exist, must be taken within legally established time limits.

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This will transform the largely illusory notice under section 112 of the *Estate Administration Act*<sup>17</sup> into a true informative statutory notice allowing an opportunity to the recipient to assess his or her legal position and take the steps warranted, such as filing a caveat or making a counter-application. The present “section 112 notice” is often a perfunctory exercise because it can be sent at the same time the application is filed. The 21-day notice period was originally proposed in the 2006 report containing the recommendations emerging from the Succession Law Reform Project.<sup>18</sup>

As a corollary to the introduction of the 21-day notice period, “clearing off” potential administrators in applications for administration with or without will annexed would be abandoned. Instead, the onus will be on persons having an equal or prior right to administer to come forward either by filing an estate caveat or launching a counter-application if they wish to oppose a grant to the applicant. They will have an actual opportunity to do this because they will have had three weeks’ prior notice that the application will be filed, unless the court abridges the time.

Other new procedures flowing out of the WESA and which are incorporated in the draft probate rules in Part Two are applications to invoke the dispensing power to validate formally defective wills and for rectification of wills.

### C. Willingness to Discard Features That Have Outlived Their Usefulness

The probate rules of British Columbia are fairly conservative in retaining more features of historical English probate practice than those of most of the other common law provinces. The Project Committee has approached reform of the probate rules on the basis that the longevity of a particular feature of probate procedure is not justification in itself for retaining it.

The historical division of probate matters into non-contentious and contentious business is somewhat confusing and not entirely functional, because both categories of matters deal with the same subject-matter, namely the validity of wills and judicial recognition or confirmation of the right to represent and administer an estate. In British Columbia the distinction has been considerably blurred for reasons mentioned above. Preserving the distinction contributes little to an understanding of grants of representation and estate-related litigation.

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17. *Ibid.*

18. British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (Report No. 45) (Vancouver: the Institute, 2006) at 68, 218-227.

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The draft rules in this consultation paper abandon the historical distinction and treat the probate process as a continuum in which contested matters may arise within what is essentially a single proceeding under the name of the estate. They are organized into a single new rule that would replace Civil Rules 21-4 and 21-5.

### **D. Simplification**

#### **1. GENERAL**

A large proportion of the probate business in British Columbia Supreme Court registries is initiated by laypersons acting without professional legal assistance. In view of this, the Project Committee attempted to simplify probate procedure within the framework of the governing legislation and common law. Abolition of “clearing off” in intestacies, a more expeditious procedure for passing accounts, and the single court file approach explained in section E below are examples of the simplification of procedure under the revised rules set out in Part Two. Another is the elimination of the citation to bring a testamentary document into the registry. The same purpose can be more effectively served by a subpoena.

There is a need, however, to reach a balance between speed and simplicity on one hand with an adequate degree of procedural protection for legitimate, competing interests surrounding an estate on the other. The most motivated family member who moves rapidly to secure an appointment as the administrator of an intestate estate may not necessarily be the most appropriate administrator. There may be well-founded doubts about the validity of a will. The door to contest the appointment of a particular administrator, to challenge the validity of a will, to pass over an executor in favour of an alternate, or to have a grant revoked on proper grounds must be left open without expanding opportunities to harass and impede a properly appointed personal representative who is fulfilling the obligations of the office in a diligent manner.

One illustration of how the draft rules in Part Two attempt to achieve this needed balance between simplicity and adequate protection for diverse interests relates to estate caveats. The draft rules preserve the ability to file an estate caveat to prevent a grant from issuing, but also provide an applicant for a grant or an intended applicant a straightforward right to apply for removal of the estate caveat. The goal of simplification is served by abandoning the notice to caveator and notice of interest in response that are now required by Rules 21-5(45)-(48) as prerequisites to a challenge to a caveat.

The right to apply to have an estate caveat removed will force the validity of the caveator’s objection to the grant to be tested. There will be a ruling to let the estate

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caveat stand or for its removal, and in either case directions may be given for determination of the issues in dispute that stand in the way of the due administration of the estate. A caveator will not be able to produce a complete stalemate for the entire period the estate caveat is in effect, in contrast to the present.

### 2. FILING OF THE ORIGINAL WILL

The draft rules in Part Two retain the requirement to file the original will in the court registry in applications for grants of probate or administration with will annexed.

The Project Committee gave extensive consideration to the view of the Court Services Branch that the original will should no longer be filed. In response to the consultation paper, the Court Services Branch proposed that instead of filing the original will, an applicant for a grant should be required to file an electronic copy of the will, or alternatively submit the original in order for it to be scanned by registry staff and returned to the applicant. The grant would be issued on the basis of the scanned electronic copy of the will, which would replace the original for all court purposes. The original would only be deposited in the registry if an interested party demanded that this be done in connection with a subsequent proceeding concerning the estate.

The Court Services Branch proposal to dispense with the filing of wills in the probate process arises in the context of an initiative to digitalize court records, and is also related to reduction of system-wide storage costs. At the present time wills are preserved permanently in their original paper form in the provincial archives after a certain number of years have elapsed since the issuance of the grant.

While indefinite preservation of original wills is not essential from a legal standpoint, the conventional requirement for the original to be filed in the court registry is intrinsic to the function of probate as “proof of a will” in an open and public manner. Producing the actual will to court officials is the basic step in proving its existence and ostensible formal validity to the court.

Provision of an electronic copy by the applicant is not satisfactory because it is not possible to know if the copy has been made from the original. There would be a temptation to scan from a readily available copy rather than to search for the original, and the original may never be found. If the testator made any changes to the original will after the copy was made, these may never come to light. There is also a well-established presumption that a will that was last known to be in the possession of the will-maker and that cannot be located after the will-maker’s death was re-

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voked by the will-maker.<sup>19</sup> Depending on the circumstances, this can be an additional reason to produce the original at an early stage.

Interlineations, markings and staple marks may be indistinct in a scanned copy. Marks indicating the deletion and substitution of pages may not be apparent. These visual clues are important in determining whether a testamentary document has been altered or tampered with.

The Project Committee also believes that there would be a considerable danger that personal representatives and others will lose track of original wills if the requirement to file the original in the registry is abandoned. If a need arose at a later date for access to the original will, such as a proceeding for probate in solemn form, it would be less likely to be available.

For these reasons, the Project Committee was not persuaded that it was appropriate or desirable to dispense with filing the original will in the court registry as part of the process leading to a grant of probate in common form or administration with will annexed. This should not be taken to preclude alternatives to the present indefinite archival preservation of original wills in paper form.

The Project Committee does recommend a change in the current practice of attaching the will as an exhibit to the affidavit of the applicant. The draft probate rules call for the original will to be filed as a free-standing document, unattached to the application form or any other application material. This is to facilitate photocopying of the will within the registry and its use as an exhibit if necessary in any later proceeding.

### 3. CHANGES TO BE EFFECTED THROUGH SIMPLIFIED COURT FORMS

#### *(a) General*

While the mandate of the Project Committee did not extend to revision of the court forms associated with probate procedure, this report recommends further changes to simplify probate procedure that would be implemented primarily through simplified court forms. As many persons who will use the various probate forms will do so without legal advice, the forms should be as clear and simple as possible.

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19. James Mackenzie, ed. *Feeney's Canadian Law of Wills*. 4<sup>th</sup> ed., looseleaf (Markham: LexisNexis, 2000) para. 5.64.

### *(b) Application form for grant*

The version of the draft probate rules in the consultation paper called for applications for grants to be made using an affidavit of the applicant and a requisition, much as in keeping with the existing practice. The requisition had been considered necessary in order to commence a proceeding to lead to a grant under the *Supreme Court Civil Rules* and to authorize the opening of a court file. It would not be needed for other purposes. In its response to the consultation paper, however, the Court Services Branch of the Ministry of Attorney General supported the use of a single application form that would contain the information concerning the deceased, the will if any, and the property comprised in the estate that would currently be contained in the applicant's affidavit in one of Forms 95, 96, or 98 and attached exhibits.

The Project Committee supports abandonment of the requisition and existing forms of affidavits in favour of a single prescribed application form to start the procedure leading to a grant of probate, administration, or resealing and to cause the opening of a court file for the estate in the name of the deceased.

The application form evidently envisioned by the Court Services Branch would use checkboxes and sidebar explanations to guide the applicant in completing the form. The Project Committee also endorses the use of a form of this kind, with the qualification that the form should contain a jurat or statutory declaration blank and should not be treated as complete unless the applicant has sworn or affirmed to the truth of its contents.

The reasons for insisting that the applicant depose to the truth of the information in the application for the grant are threefold: first, the applicant is invoking a court process and the court acts on sworn evidence; second, it discourages fraud and fraudulent concealment of wills or property; and finally, it emphasizes the seriousness of the obligation the applicant is assuming for the proper administration of the estate.

### *(c) Renunciation form*

Renunciations by executors are fairly common, but no form of renunciation is currently prescribed. The Project Committee believes that a prescribed form of renunciation would be helpful. To correct a commonly encountered misconception, the form should expressly emphasize that filing the completed renunciation form does not operate to release the renouncing executor of liability for anything the executor has done previous to that point in relation to the assets of the estate.

*(d) The “disclosure document”*

A prescribed Statement of Assets, Liabilities and Distribution, commonly referred to as the “disclosure document,” is currently a part of every application for a grant of probate or administration or resealing.<sup>20</sup> Part of the prescribed application form envisioned by the draft rules in Part Two would serve the same function of disclosing the property in the estate passing to the deceased’s personal representative, as required by section 122(1) of the WESA.<sup>21</sup>

In the view of the Project Committee, the following features of the currently prescribed Statement of Assets, Liabilities and Distribution should not be carried forward into the portion of the prescribed application form that will serve the same function:

- a listing of all debts of the estate regardless of their size or significance. Instead, only debts that encumber specific assets would be listed;
- the location and number of the deceased’s safety deposit box;
- a schedule showing how the estate will be distributed under the will or amongst intestate successors.

The present requirement to list in Part III of the disclosure document all debts outstanding at death is seen as unnecessary for several reasons. Under the WESA, the consent of creditors to the appointment of an administrator will no longer be needed in intestacies. Unsecured debts are not relevant to the calculation of probate fees, which are based on the gross rather than net value of the estate. Therefore, a complete listing of creditors is not necessary for registry purposes.

In one submission made in response to the consultation paper, the existing requirement to list all debts of the estate regardless of amount was defended on the ground that it helps interested parties such as potential will variation claimants or creditors of the deceased to decide whether it is worthwhile launching a will variation claim or other proceeding against the estate. An estate may have a large amount of unse-

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20. See the Statement of Assets, Liabilities and Distribution forming part of the current Forms 91, 92, 93 and 105 under the *Supreme Court Civil Rules*.

21. Section 122(1)(b) of the WESA requires an applicant for a grant of probate or administration to “disclose information as required under the Rules of Court concerning the property of the deceased person, irrespective of its nature, location or value, that passes to the applicant in his or her capacity as the deceased person’s personal representative....” This requirement is qualified by some exceptions listed in the provision.

cured indebtedness which substantially reduces its net value. Another reason offered for retaining full debt disclosure was that it brings conflicts of interest on the part of potential administrators to light by showing who is owed money by the estate.

It is often impossible, however, to obtain full information about the deceased's liabilities before an application for a grant needs to be made, especially in intestacies where the administrator has no status as a personal representative before appointment by the court. Financial institutions often withhold information from prospective administrators, citing the possible contravention of privacy laws as an obstacle to providing it. As a result, the debts and liabilities portion (Part III) of the disclosure document is frequently incomplete, or simply reads "To be determined." The Project Committee considers it pointless to require what amounts to misleading or simply uninformative disclosure. When Part III of the disclosure document does include a complete listing of debts, many of them will often be for inconsequential amounts, such as utility bills.

Debts that encumber specific assets, however, are likely to be significant and more easily discovered. Listing them in conjunction with the assets on which they are secured is informative with respect to the size of the estate.

For these reasons, the draft probate rules do not require a separate listing of debts and liabilities, but only require debts charging particular assets to be listed together with the assets on which they are secured. A new form of disclosure document would be organized accordingly.

Stating the location and number of the deceased's safety deposit box in the disclosure document is also thought to be superfluous. The chief non-fiscal purpose of disclosure of an estate inventory on an application for probate or administration is to identify the property to be administered under the grant. The safety deposit box itself does not constitute an asset. It is only a receptacle. The safety deposit box may have been jointly held with a surviving spouse or another, and disclosure in a court file of its location and number is a potentially dangerous infringement of that person's privacy.

Part IV of the currently prescribed form of the distribution document, which details the distribution of the estate among those entitled to a share, is a source of many rejected applications. Arguably, it adds little to the probate process while contributing to delay and registry workload.



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Part IV of the distribution schedule is used by the Land Title Office to determine who is beneficially interested in an estate and who therefore must consent before a transfer by a personal representative that is not specifically contemplated by a will can be registered.<sup>22</sup> It is also used to determine whose consent is necessary for the registration of a transfer of land by a personal representative to a third party not interested in the estate before the expiry of the period within which the *Wills Variation Act* prohibits the transfer of real property following the granting of probate.<sup>23</sup> Without Part IV, the Land Title Office would require those persons to be identified by affidavit.<sup>24</sup>

Retention of Part IV was defended in a submission in response to the consultation paper on the grounds that it enables the registry to bring errors regarding the proper distribution of the estate to the attention of applicants acting without legal assistance at an early stage, and that it gives early warning of any disagreement between the personal representative and other interested parties regarding the distribution.

It could be said, however, that the proposed distribution of the estate is not properly a concern at the probate stage. Opinions may differ as to how the distribution schedule should be completed because of differing views of the meaning of a will. These matters are properly the subject of an application for construction. They cannot be resolved within the probate process, which is concerned with what writings constitute the deceased's last will and with confirming who has, or determining who should be given, authority to administer the estate.

If a grant is made, the presence of the Part IV distribution schedule in the application for the grant sometimes misleads laypersons into thinking that the court has tacitly approved the manner in which the schedule has been completed. The Project Committee considered, but ultimately rejected, recommending the inclusion of a statement in the disclosure document indicating that the court, in making a grant, neither approves nor disapproves the information in Part IV. Instead, the Project Committee favours deleting Part IV altogether. While deleting Part IV would add to the paperwork in some land transfers out of estates, this factor does not outweigh the drawbacks of retaining the distribution schedule in the disclosure portion of the prescribed application form.

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22. E-mail message from the Registrar, Victoria Land Titles Office to BCLI staff, 18 February 2008.

23. *Ibid.*

24. E-mail message from the Director of Land Titles, Land Title and Survey Authority of B.C. to BCLI staff, 16 March 2008.

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### *(e) Simplified form of grant*

Currently there is no prescribed form of grant. The precedents in use are cumbersome and archaically worded. The Project Committee concurs with the Court Services Branch in the view that a simplified and standardized form of grant capable of being easily read and understood by people without legal training should be introduced. Many grants will still need to incorporate some language addressing the particular circumstances in which the application arises. For example, the standardized form may need to be adapted by adding wording to take account of the reserved rights of non-applying executors. It should be possible to design a standardized form of grant that is capable of being modified in this fashion like other court forms, however.

Grants have traditionally been prepared by registry staff, rather than being prepared and submitted in draft by applicants and their solicitors for signature and sealing like draft orders in regular civil matters. It is understood that a great deal of registry staff time is taken up with the preparation of grants. While it would probably be quite feasible for grants to be prepared outside the registry by solicitors, it is doubtful that such a change would have a significant impact on the registry workload because of the high volume of “in person” applications (i.e., those filed by laypersons without legal representation). There may also be some basis for concern that grants not generated completely by the court may not carry the same degree of authority and evidentiary weight in some foreign countries that is now usually accorded to British Columbia grants. Personal representatives might then encounter more difficulty in gathering and dealing with assets situated abroad. As a result, no change in the present practice of preparing grants within the registry is recommended, although the change to a simpler standardized form of grant should reduce the staff time taken up by grant preparation.

### **E. Harmonization with General Civil Procedure Where Possible**

As probate procedure and probate-related causes of action originated in the ecclesiastical courts rather than in the common law courts, differences remain between procedure in probate and general civil procedure. This has contributed to probate being an arcane area of law that is well-understood only by those who have long experience with it.

In an effort to move within the general stream of reform of court procedures in British Columbia represented by the new *Supreme Court Civil Rules*,<sup>25</sup> the Project Committee has attempted to fit revised probate rules within the general scheme of the

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25. *Supra*, note 4.

## Report on New Probate Rules

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Civil Rules and make as much use of regular procedures as possible, rather than creating ones specifically for the area of probate. At the same time, we have preserved the registry-dominated nature of common form procedure, which allows for common form grants of probate and administration to issue with a minimum of judicial involvement where there is no dispute that requires adjudication.

Dispensing with “clearing off” of potential administrators with an equal or prior right to that of the applicant and relying instead on the right to 21 days’ notice of the intended filing of an application for a grant is an example of this approach. If the recipients of the notice do not come forward and oppose the application by filing an estate caveat, a grant may legitimately issue out of the registry, just as an order could issue if no one appeared in response to a notice of application in a regular civil chambers matter.

Discontinuance, dismissal by consent, and settlement without leave of the court would be allowed in contested matters concerning wills and grants of probate and administration, as they are in other civil proceedings. Judgment by default would also be permitted, except in the case of a claim for revocation of a grant because of the potential difficulty a default judgment for revocation might create for persons interested in the estate or third parties who are dealing with the personal representative.

The present probate rules create an environment in which many open court files relating to the same estate can exist simultaneously. The draft rules in Part Two allow for a system in which a single court file for the estate would be opened when the first filing (typically an application for a common form grant) is made. Proceedings for probate in solemn form or revocation that must now take the form of separate actions with different court files and file numbers would be initiated instead by interlocutory application within the estate file. The procedure for dealing with them would be only as elaborate as necessary to resolve each contested matter, ranging from an ordinary chambers argument to summary trial on affidavits to a regular civil trial with oral evidence, in keeping with the principle of proportionality emphasized in the *Supreme Court Civil Rules*.<sup>26</sup> Several other provinces deal with contested estate matters in this fashion. It is more like normal civil procedure and a move away from the separate world of probate procedure inherited from the ecclesiastical courts and their intermediate successor, the English Court of Probate.

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26. See Rule 1-3(2).

### F. Format of the Revised Probate Rules

Revised probate rules could be placed either in the *Supreme Court Civil Rules* or could form a third set of self-standing rules of court in addition to the Civil Rules and the *Supreme Court Family Rules*.<sup>27</sup> As a separate set of revised probate rules would have to duplicate many provisions of the Civil Rules or incorporate them by reference in any event, the Project Committee thought it best to frame the revised probate rules with a view to their inclusion within the Civil Rules.

Abandonment of the present distinction between contentious and non-contentious proceedings under Rules 21-4 and 21-5 means it would no longer be necessary to group the probate-related subrules under two distinct rules of court. Accordingly, Part Two of this consultation paper sets out proposed probate rules in the framework of a single new rule that would replace Civil Rules 21-4 and 21-5. The general format and terminology of the Civil Rules is followed.

### G. Conclusion

The reforms outlined above would serve the purposes of “ensuring the just, speedy and inexpensive determination”<sup>28</sup> of probate-related proceedings, reducing multiplicity of proceedings, and the principle of proportionality that is one of the overarching objectives of the *Supreme Court Civil Rules*. BCLI proposes the draft rules in Part Two as the means of implementing them.

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27. B.C. Reg. 169/2009.

28. See Rule 1-3(1).

**PART TWO**

**NEW PROBATE RULES AND COMMENTARY**



**RULE 21-4 - PROBATE AND RELATED MATTERS**

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**RULE \_\_\_ - PROBATE AND RELATED MATTERS**

**Application of rule**

- (1) This rule applies to
- (a) the manner in which notice of the proposed filing of a small estate declaration is to be given;
  - (b) an application to obtain a general, special or limited grant of probate in common form or administration with or without will annexed;
  - (c) an estate caveat or citation;
  - (d) a matter that may be the subject of an application to the court under subrule (91);
  - (e) a proceeding for proof of a will in solemn form started by petition under subrule (95);
  - (f) passing estate accounts and remuneration of a personal representative;
  - (g) resealing of foreign grants of probate or administration.

**[Source: New.]**

**Comment:** The scope of these proposed rules is restricted principally to “probate business,” i.e. procedures for proof of wills, obtaining grants of probate and administration, revocation of grants, and for asserting a right to administer an estate or to continue to hold the office of personal representative when the right is in dispute.

These revised probate rules abandon the distinction under the present Rules 21-4 and 21-5 between “contentious” and “non-contentious” probate business. Instead, they treat proceedings relating to grants of probate or administration as a continuum that will normally begin with an application for a grant of probate in common form or administration, with the possibility of contested matters arising at various stages of the continuum before and after issuance of a grant. The present definition of “probate action” in Rule 21-4 is also abandoned. The proceedings covered by the present definition of “probate action” (proof in solemn form, revocation of a grant, and actions to obtain a grant of administration or admini-

stration with will annexed) will be capable of being brought before the court initially by way of an interlocutory application on notice to the personal representative and persons financially interested in the estate, although the court will be able to direct trial of issues and give all necessary procedural directions when necessary. (See subrules (91) to (100) grouped under the heading “Probate in Solemn Form and Contested Matters.”) A proceeding for proof of a will in solemn form commenced when there has been no previous step taken to cause a court file for the estate to be opened, such as an application for a grant of probate in common form, would be an exception. In that case, a petition would be used to start the proceeding for probate in solemn form.

This proposed rule does not extend to matters referred to in Rule 2-1(2)(c) or (d) that arise from the construction of wills or in the course of the administration of an estate, such as issues concerning entitlement to a share of an estate under a will or an intestate distribution. These are not properly classified as probate proceedings. They will continue to be brought before the court by way of petition under Rule 2-1(2).

The term “letters of administration” has been abandoned in these proposed new probate rules in favour of “grant,” which is now commonly understood to refer to both probates and letters of administration. This contemporary usage is also reflected in the *Wills, Estates and Succession Act*, R.S.B.C. 2009, c. 13 (“WESA”).

### Interpretation

- (2) The definitions and interpretation section of the *Wills, Estates and Succession Act* applies to this rule except where the context otherwise requires.

**[Source: Rule 21-5(1).]**

**Comment:** Subrule (2) incorporates by reference the definitions in s. 1(1) of the WESA of terms also employed in this rule, including “will,” “beneficiary,” “estate,” “small estate declaration,” “will-maker” and “declarant.” It corresponds to the present Rule 21-5(1) incorporating definitions in the equivalent section of the *Estate Administration Act*, R.S.B.C. 1996, c. 122, which the WESA will repeal and supplant.



## Small Estates

### Notice of small estate declaration

- (3) A declarant who proposes to file a small estate declaration under Part 6 of the *Wills, Estates and Succession Act* must, at least 10 days before filing the small estate declaration in the registry, send a copy of the completed small estate declaration by ordinary or e-mail to, or leave a completed copy with, each of the following persons:
- (a) a spouse of the deceased, unless the declarant is the spouse and there is no other person who is a spouse of the deceased within the meaning of the *Wills, Estates and Succession Act*;
  - (b) each child of the deceased;
  - (c) if the deceased left a will;
    - (i) each beneficiary under the will, and
    - (ii) each person who would have been entitled as an intestate successor if the deceased had not left a will;
  - (d) if the deceased did not leave a will, each intestate successor of the deceased.

**[Source: WESA, ss. 109(1), 110(1), 112(1)(b); BCLI Report *Wills, Estates and Succession: A Modern Legal Framework*, pp. 282-283.]**

**Comment:** The Small Estate Administration provisions of Part 6, Division 2 of the WESA call for a declarant to give notice of the proposed filing of a small estate declaration “in accordance with the Rules of Court.” A small estate under the WESA is one that does not include any real property and has a gross value below a monetary ceiling that will be set by regulation. A declarant is a person willing to take on the obligations of a personal representative and administer a small estate under those provisions with less formality and less court involvement than the regular probate process. The class of potential declarants is limited and in most cases would be essentially the same people who would have a right to apply for probate or administration, and the Public Guardian and Trustee. A small estate declaration is a statutory declaration that the declarant completes and files

in order to invoke the small estate administration procedure under Division 2 of Part 6 of the Act.

The notice requirements of subrule (3) are intended to make the deceased's immediate family and other successors, if any, aware of the declarant's intention to administer the estate without a formal grant in enough time for them to react appropriately. (For example, a member of the recipient class who objected to the declarant acting could file an estate caveat.) For the sake of simplicity, only three methods of giving the notice are allowed: leaving a copy of the notice with the recipient, ordinary mail, and e-mail. Section 112(1)(b) of the WESA requires that a 10-day period elapse between the giving of notice of the small estate declaration to each recipient and the filing of the small estate declaration.

### Notice of small estate declaration to Public Guardian and Trustee

- (4) If a person referred to in paragraphs (a) to (d) of subrule (3) is
- (a) a minor, or is believed by the declarant to be a minor,
  - (b) a mentally incompetent person who has a committee appointed under the *Patients Property Act*, or the equivalent of a committee appointed by a court outside British Columbia,
  - (c) a person who is believed by the declarant to be mentally incompetent and paragraph (b) does not apply to the person,
- the declarant must send a copy of the completed small estate declaration by ordinary or e-mail at least 10 days before filing the small estate declaration in the registry to
- (d) the Public Guardian and Trustee,
  - (e) if paragraph (a) of this subrule applies, to a parent or the guardian of the estate of the minor if the declarant is not the parent or guardian of the estate,
  - (f) if paragraph (b) of this subrule applies, to the committee, and
  - (g) if paragraph (c) of this subrule applies, to that person in addition to the Public Guardian and Trustee.

[Source: BCLI report, s. 169(3).]

**Comment:** This subrule requires notice of the intended filing of a small estate declaration to be given to the Public Guardian and Trustee, and to the parent, guardian or committee, if a minor or mentally incompetent adult is entitled to share in the small estate.

### Public Guardian and Trustee as declarant

- (5) The Public Guardian and Trustee as a declarant is not required to comply with subrule (3) except with respect to a spouse or child of a deceased who left a will.

[Source: WESA, s. 112(2); BCLI Report *Wills, Estates and Succession: A Modern Legal Framework*, pp. 282-283.]

**Comment:** This subrule exempts the Public Guardian and Trustee from having to notify successors of the deceased when preparing to file a small estate declaration other than the spouse and children of a deceased who died leaving a will, i.e. persons who are eligible to claim under the wills variation provisions in Part 4 of the WESA. This exemption corresponds to a similar exemption of the Public Guardian and Trustee from notice requirements under regular probate procedure. (See subrule (19)). The basis for the exemption is that the Public Guardian and Trustee only acts when no relative of the deceased is willing or able to take out a grant. It would serve no useful purpose to require notice in advance to collateral relatives of the Public Guardian and Trustee's intention to administer the estate.

### Documents to be filed with small estate declaration

- (6) A declarant must file the following together with a small estate declaration under Part 6 of the *Wills, Estates and Succession Act*:
- (a) the original will, if any, of the deceased;
  - (b) if the deceased died in British Columbia, an original or legible photocopy of a certificate of death of the deceased issued under the *Vital Statistics Act*;

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- (c) if the deceased died outside British Columbia, an original or legible photocopy of an official certificate of death of the deceased issued by the competent authority of the jurisdiction in which the deceased died;
- (d) a certificate issued under Part 4, Division 7 of the *Wills, Estates and Succession Act* stating the results of a search for a notice filed in respect of a will of the deceased;
- (e) the original renunciation of any executor or alternate executor of the deceased who would have been entitled to a grant of probate in priority to the declarant;
- (f) if the declarant is not
  - (i) a surviving spouse of the deceased,
  - (ii) an executor of the deceased,
  - (iii) a beneficiary under the will of the deceased,
  - (iv) an intestate successor of the deceased, or
  - (v) the Public Guardian and Trustee,

the written consents required by Part 6 of the *Wills, Estates and Succession Act*.

**[Source: New. Cf. BCLI report, Part Two, s. 168. See also *Interim Report on Summary Administration of Small Estates* (BCLI Report No. 40, 2005, pp. 32-35.)]**

**Comment:** This subrule prescribes the documents that must be filed together with a small estate declaration for the purposes of ss. 109(1)(b) and 110(1)(b) of the WESA. While a death certificate is not required as part of a regular probate filing, it is required in connection with a small estate declaration because of the reality that financial institutions and other third parties routinely demand to see a death certificate as a minimum requirement for the release of estate assets without a formal grant of probate or administration. A wills registry search result is required in order to confirm that there is no record of a will, or of a later will than the one accompanying the small estate declaration.

Part 6, Division 2 of the WESA requires a renunciation by any executor with a prior right to probate, and written consents by the surviving spouse and persons

beneficially entitled to a share of the estate, before a declarant who does not come within those categories can validly file a small estate declaration and administer the estate under it. Thus, if a declarant is not an executor, a surviving spouse, someone entitled to inherit a share of the deceased's estate, or the Public Guardian and Trustee, the consents of those who are entitled to inherit must accompany the small estate declaration as well as the renunciations of any executors.

### Notice of Application for Grant

#### Notice of intended application for grant or resealing

- (7) A person intending to apply for a grant of probate or administration with or without will annexed or resealing must serve notice in the prescribed form referred to in subrule (9) at least 21 days before filing the application on every person other than the applicant who, to the best of the applicant's knowledge, is
- (a) a personal representative who does not join in the application;
  - (b) if the deceased left a will,
    - (i) a beneficiary under the will, and
    - (ii) a person who would have been entitled as an intestate successor if the deceased had died intestate;
  - (c) an intestate successor of the deceased;
  - (d) a spouse or child of the deceased;
  - (e) if the deceased is an intestate, a creditor of the deceased whose claim exceeds \$10,000.

**[Source: Remainder of subrule (7) adapted from s. 109(1) of Part Two of BCLI Report No. 45, *Wills, Estates and Succession: A Modern Legal Framework*.]**

**Comment:** Subrule (7) above and subrule (9) are based on the original recommendation contained in s. 109(1) of the proposed legislation in Part Two of the BCLI report *Wills, Estates and Succession: A Modern Legal Framework* (BCLI

report). That proposed provision was intended to supplant s. 112(1) of the present *Estate Administration Act*, R.S.B.C. 1996, c. 122. As s. 121(1) of the WESA states that an applicant for probate or administration must give notice of the application to the persons required by the rules of court, however, the list of those entitled to receive the notice must be relocated to the rules.

Subrule (7) largely preserves the categories of persons entitled to notice of a probate or administration application under present law, i.e. beneficiaries entitled under a will, successors in intestacy, and persons eligible to claim relief under the existing *Wills Variation Act*, R.S.B.C. 1996, c. 490 (the spouse of the deceased as of the time of death and the deceased's children.) Non-applying co-executors are added as a new category of notice recipient under paragraph (a). Note that paragraph (b) refers to beneficiaries "entitled" under a will, rather than merely to those named in a will, because named beneficiaries may predecease the testator and not inherit personally, or may only be contingent beneficiaries who do not actually take because the contingency on which their entitlement depends does not occur.

An important difference between s. 112(1) of the *Estate Administration Act* and the proposed subrule (7) above is that some persons who are now entitled to notice under s. 112(1)(a)(v) as surviving spouses separated from the deceased for more than one year prior to death would no longer be entitled to receive notice after the WESA and this proposed rule are in force. This change arises because of the way "spouse" is defined in s. 2(1) of WESA. That definition of "spouse" is imported into this rule by subrule (2).

The definition of "spouse" in the WESA does not include persons still legally married to the deceased at the time of the deceased's death but who had been separated from the deceased for at least two years before that time. It also excludes persons who are or have been legally married to the deceased if an event has taken place before the deceased's death to cause a statutory interest in family assets to arise on marriage breakup under Part 5 of the *Family Relations Act*, R.S.B.C. 1996, c. 128. (These so-called "triggering events" are a separation agreement, an order for dissolution of marriage or judicial separation, a declaratory judgment of no reasonable prospect of reconciliation under s. 57 of the *Family Relations Act*, or an order declaring the marriage null and void.) Persons who were in a marriage-like relationship that ended prior to the deceased's death are also excluded from the definition of "spouse." Persons who ceased to qualify as "spouses" under the WESA before the deceased's death will have no claim against the estate based on spousal status, and therefore will not receive notice of the application for grant.

Another important difference between s. 112 of the *Estate Administration Act* and subrule (7) is the minimum 21-day period between the service of notice of the application for the grant and the filing of the application. Subrule (16) allows the notice to be served by e-mail or ordinary mail at the latest known e-mail or postal address of the recipient, respectively, as well as any other method permitted for service of a document under the new *Supreme Court Civil Rules*. Rule 4-2(4) applies to deem service by ordinary mail to be effective one week after the date of mailing. In effect, this means that if any notices under subrule (7) above are served by mail, 28 days must elapse between the mailing date and the date on which the application may be filed.

### **Court may abridge time or dispense with notice**

- (8) The court may
- (a) extend or abridge the period of 21 days,
  - (b) vary the classes of persons the applicant must serve, or
  - (c) dispense with the requirement to serve notice

under subrule (7) if prejudice to the personal representative or to another person or to the estate would otherwise result.

**[Source: Adapted from BCLI report, s. 109(2).]**

**Comment:** In some cases there will be a need to obtain a grant of probate or administration on an expedited basis. For example, the personal representative may need to complete a real estate transaction that was in progress at the deceased's death. Subrule (8) allows the court to waive the requirement of notice under subrule (7) or vary the notice period.

Note that s. 141(1) of the WESA provides that a grant of probate or administration cannot be revoked solely on the ground that a notice could not be given to a person who could not be discovered, identified, or found, or to someone to whom the rules of court do not require notice to be given. This reverses *Re Hoicka and Royal Trust Corporation of Canada* (1984), 59 B.C.L.R. 262 (S.C.).

**Form of notice of application**

- (9) A notice under subrule (7) must be in the prescribed form signed by the applicant or the applicant's lawyer and must contain:
- (a) the name, residential address, and date of death of the deceased;
  - (b) the name and address for service of the applicant;
  - (c) if the applicant is an individual, the place where the applicant ordinarily lives;
  - (d) the registry of the court where the application will be filed;
  - (e) prescribed text stating that a person entitled to receive the notice
    - (i) has a right to oppose the application to which it refers;
    - (ii) may or may not be entitled to claim relief against the estate, including a claim under
      - (A) the *Family Relations Act*, or
      - (B) Division 6 [*Variation of Wills*] of Part 4 of the *Wills, Estates and Succession Act*;
    - (iii) may, if that person is the surviving spouse of the deceased and the deceased left no will, acquire the spousal home from the personal representative to satisfy, in whole or in part, the interest of that person in the estate according to Division 2 of Part 3 of the *Wills, Estates and Succession Act*;
    - (iv) must, if that person chooses to take a step referred to in subparagraphs (i), (ii) or (iii), do so within the time limited by any relevant enactment or rule of court;
  - (f) prescribed text containing statements that
    - (i) a representation grant may issue to the applicant after 21 days from the date on which the notice is served but may also issue earlier by order of the court;



- (ii) a personal representative must account to the beneficiaries or intestate successors of the deceased;
- (iii) a person who is entitled to receive the notice may consult with that person's own lawyer concerning the interest in, or rights against, the estate, and
- (iv) in the case of an application for a grant of administration, that a person entitled to receive the notice may apply for an order requiring the applicant to provide security unless the applicant is the Public Guardian and Trustee.

**[Source: Adapted from BCLI report, s. 109(3).]**

**Comment:** Subrule (9) requires a notice of an application for a grant of probate or administration to be in the prescribed form. The prescribed form of notice contemplated by this subrule is intended to include text designed to alert recipients that they may take steps to oppose the application and that they may have rights against the estate which must be asserted within statutory time limits. It is also intended to provide essential information about such matters as who the personal representative is (or is likely to be), where the application for grant will be made, and how to contact the personal representative. Subrule (7) would permit the notice to be signed by the applicant's lawyer, whereas s. 112 of the *Estate Administration Act* currently does not. As the applicant's lawyer will likely send the notices rather than the applicant personally, the lawyer should be able to sign them rather than having to insist that the applicant sign them personally.

### **Notice to be accompanied by copy of will**

- (10) A copy of the will, if any, must accompany a notice under subrule (7).

**[Source: BCLI report, s. 109(4).]**

**Comment:** Subrule (10) carries forward an existing requirement under s. 112(1)(b) of the *Estate Administration Act* to deliver a copy of the will, if any, with the notice of the application for a grant. The need for carrying this requirement forward has been considered carefully. Privacy considerations have been weighed, as well as the utility of sending a complete copy of a will in all cases even if the financial interest of a particular notice recipient in the estate is very small. The decisive considerations in the decision to retain the requirement were

that recipients who are eligible to make a claim for variation of the will under Division 6 of Part 4 of the WESA would not be able to properly assess their position without seeing the entire will, and it may be the only means by which charities would be alerted to the fact they have been left a legacy, and to its size and nature.

### **If person to be served is a minor**

- (11) If a person on whom notice is to be served under subrule (7) is a minor, or if the applicant has reason to believe that the person may be a minor, the applicant must, instead of serving the notice required by subrule (7) on that person, serve the notice on
- (a) a parent or the guardian of the estate of the minor, if the applicant is not the parent or guardian of the estate, and
  - (b) subject to subrule (12), the Public Guardian and Trustee.

**[Source: BCLI report, s. 109(5); Estate Administration Act, s. 112(4).]**

**Comment:** Subrule (11) specifies how a notice must be given under subrule (7) to a minor, or to someone who is possibly a minor. The Public Guardian and Trustee must receive notice as well as the parent or guardian of the minor's estate in order to be in a position to carry out certain statutory responsibilities, except in the circumstances covered by subrule (12) below. Subrule (11) continues the effect of s. 112(4) of the *Estate Administration Act*, apart from the exception created by subrule (12).

### **Exception where testamentary trust exists**

- (12) An applicant need not serve notice under subrule (11)(b) on the Public Guardian and Trustee if
- (a) the applicant is an executor,
  - (b) the minor is not a spouse or child of the deceased, and
  - (c) the deceased's will
    - (i) creates a trust for the interest of the minor in the estate, and

- (ii) appoints a trustee for that trust.

[Source: BCLI report, s. 109(6).]

**Comment:** Subrule (12) provides in effect that notice to a parent or guardian of a minor beneficiary and to the Public Guardian and Trustee is unnecessary if the will appoints a trustee of the minor's interest in the estate. Subrule (12) removes a discrepancy that exists between ss. 75 and 112(4) of the present *Estate Administration Act*. Section 75 indicates that payment of the interest of a minor in an estate to the Public Guardian and Trustee is not necessary where there is a trustee of the minor's interest, unless the will provides otherwise. This is not reflected in s. 112(4), which requires an applicant for probate to give notice of the application to the Public Guardian and Trustee in any event.

The exception in subrule (12) does not apply to intestacies. This is because the Public Guardian and Trustee must receive notice in every intestacy or administration with will annexed in which a minor is interested in order to be able to provide comments to the court on the security to be provided by the applicant. The exception is also inapplicable where the minor is eligible to claim under the will variation provisions of the WESA. Notice is then required in order to preserve the ability of the Public Guardian and Trustee to assert rights under those provisions on the minor's behalf if the will does not make adequate provision for the minor.

### **Mentally incompetent person a member of class entitled to notice**

(13) If a person referred to in subrule (7)(a), (b), (c) or (d)

- (a) has a committee appointed under the *Patients Property Act*, or the equivalent of a committee appointed by a court outside British Columbia,
- (b) is believed by the applicant to be mentally incompetent and paragraph (a) of this subrule does not apply to the person,

the applicant must serve the notice required by subrule (7) on

- (c) the committee or the equivalent of a committee, if any,
- (d) the Public Guardian and Trustee, and

- (e) if paragraph (b) applies, that person in addition to the Public Guardian and Trustee.

[Source: BCLI report, s. 109(9).]

**Comment:** Subrule (13) is intended to carry forward the principle of s. 112 (5) of the present *Estate Administration Act* concerning the giving of a notice under subsection (1) to mentally incompetent persons (the term used in the new *Supreme Court Civil Rules*) and those who possibly may be mentally incompetent. One difference from section 112 (5) is that if the person entitled to receive the notice is believed to be mentally incompetent, but no committee has been appointed for that person, the notice must be given to that person in addition to the Public Guardian and Trustee. By tying the requirement for dual notice to the applicant's own belief, subrule (13) (b) delineates the circumstances in which a potentially mentally incompetent recipient must receive notice more specifically than the present section 112 (5) of the *Estate Administration Act*. Section 112(5) simply refers to someone who "...may be a mentally disordered person..." without making it evident who must hold the opinion that the person entitled to notice may be mentally disordered.

### Contents of notice to Public Guardian and Trustee

- (14) A notice to the Public Guardian and Trustee under subrules (11) or (13) must
- (a) state the name and last known address of any person mentioned in subrules (11) or (13) other than the Public Guardian and Trustee, and
  - (b) be accompanied by a copy of every document to be filed with the court in respect of the application, except a document that is to be filed only as proof of service of the notice.

[Source: BCLI report, s. 109(8).]

**Comment:** Currently s. 112(8) of the *Estate Administration Act* requires a notice of an application for grant to the Public Guardian and Trustee to contain a list of all beneficiaries and other persons entitled to inherit and their addresses and copies of all documents to be filed with the court in respect of the application. As the documents filed will include proof of notice to those entitled to notice, the effect of the present section 112 (8) is to require two complete sets of application material (the second being attached as an exhibit to the affidavit proving notice was given) to be delivered to the Public Guardian and Trustee. This proposed subrule (14)

eliminates the requirement to deliver the supporting documentation twice. It also requires the applicant to list only the names and addresses of the interested persons with which the Public Guardian and Trustee is concerned, namely minors and the mentally incapable.

### **Deceased member of class entitled to notice**

- (15) If a person referred to in paragraphs (a) to (e) of subrule (7) is dead, the applicant must give the notice under subrule (7)
- (a) to the personal representative of the person, or
  - (b) if there is no personal representative, as ordered by the court on an application under Rule 8-4 for directions.

**[Source: BCLI report, s. 109(9).]**

**Comment:** Section 112(3) of the *Estate Administration Act* currently requires an application to be made to the registrar for an order dispensing with notice requirements or other steps when a person entitled to notice of a probate or administration application is dead. This proposed subrule (15) simplifies the procedure by allowing the applicant to merely give the notice to the deceased recipient's personal representative, if there is one. If not, the applicant must make an application for directions under Rule 8-4 (by requisition without notice) and the court will order the manner in which notice will be given.

### **How notice is to be served**

- (16) An applicant may serve the notice under subrule (7) by any method permitted by Rules 4-2(2) and 4-3(2).

**[Source: New. Rule 4-3(2) provides for personal service. Rule 4-2(2) provides for "ordinary service."]**

**Comment:** Subrule (16) would allow the applicant to serve the notice of an application for a grant under subrule (7) by personal service as detailed in Rule 4-3(2) or by any of the methods for "ordinary service" under Rule 4-2(2). The permitted methods for ordinary service under Rule 4-2(2) are: leaving the document

at the person's address, ordinary mail, e-mail, or fax. Subrule (17) below deals with the recipient's initial address for service.

**Deemed address for service of individual for notice under subrule (7)**

(17) For the purposes of this rule, the address for service of an individual referred to in paragraphs (a) to (e) of subrule (7) is deemed to be the latest known residential, postal, or e-mail address or fax number of the person inside or outside British Columbia, unless the person provides a different address for service in accordance with Rule 4-1.

[Source: new.]

**Comment:** As the recipient of a subrule (7) notice will usually not be a party to any proceeding in the court in relation to the estate and will not have provided an address for service as required by Rule 4-1, subrule (17) provides a deemed address for service for the purpose of this proposed Rule. The deemed address for service is the latest known residential, postal, or electronic address of the recipient. This will remain the address for service of the person for the purpose of serving any other documents under this rule, whether the address is physically inside or outside British Columbia, unless that person provides a different address for service in accordance with Rule 4-1 at any point following receipt of the subrule (7) notice. A recipient of a notice of an application for a grant under subrule (7) is simply a person financially interested in the estate or a non-applying personal representative and may never take any active step in connection with the process leading to issuance of a grant of probate, administration, or resealing. In that case, documents called for by this rule may continue to be served at that person's deemed address for service. If the recipient of a subrule (7) notice does take an active step in the process contemplated by this rule, such as filing an estate caveat or applying to have a grant revoked, Rule 4-1 will apply and the recipient will have to provide an address for service in British Columbia in accordance with that rule.

**When service by mail of notice under subrule (7) deemed to be completed**

(18) Rule 4-2(4) applies to a notice under subrule (7) sent for service by ordinary mail.

[Source: new.]

**Comment:** Rule 4-2(4) deems a document served by ordinary mail to have been served one week after the date of mailing on the same day of the week, e.g. a document mailed on a Wednesday is deemed to have been served the following Wednesday. Subrule (18) makes Rule 4-2(4) applicable to a notice under subrule (7). Subrule (18) is not mere surplusage, however, because Rule 4-2 applies to documents served by a “party” to a proceeding and usually an applicant for a grant of probate, administration or resealing will not yet be a “party” when the subrule (7) notice is served.

If notices under subrule (7) are served by mail, the combined effect of subrule (18) and Rule 4-2 is to require 28 days to elapse between the date of mailing and the filing of an application for grant, unless the court abridges the time.

### **Public Guardian and Trustee not required to serve notice under subrule (7)**

(19) The Public Guardian and Trustee is

- (a) required to serve a notice under subrule (7) on a person referred to in subrule (7)(d) only if the deceased left a will; and
- (b) not required to serve a notice under subrule (7) on a person referred to in subrule (7)(a), (b), (c) or (e).

**[Source: BCLI report, s. 109(14).]**

**Comment:** The proposed subrule (19) carries forward the effect of s. 112(9) of the *Estate Administration Act* in exempting the Public Guardian and Trustee from having to give notice of an application for a grant of administration, except in relation to those persons who would be eligible to claim under the will variation provisions of the WESA, i.e. the spouse and children of a deceased testator. This coincides with the practice of the Public Guardian and Trustee to give the s. 112(1) notice to this class, although there is currently no statutory obligation resting on the Public Guardian and Trustee to do so. The current exemption of creditors from having to provide notice to beneficially interested persons when applying for administration of a deceased debtor’s estate, found currently under s. 112 (9) of the *Estate Administration Act*, is not carried forward into this revised rule. It is thought that a creditor seeking administration should be required to provide notice to the persons financially interested in the estate in the usual manner.

## Application for Grant

### Where to apply for grant

- (20) An application for a grant of probate or administration with or without will annexed or resealing may be made in any registry.

**[Source: Rules 21-5(3) and (63).]**

**Comment:** Subrule (20) carries forward the present Rules 21-5(3) and 21-5(61). The Probate Rules Reform Project Committee debated whether some restriction should be placed on the venue of an application for probate or administration, e.g. the registry nearest the last residence of the deceased, but ultimately concluded that no geographical restriction should be imposed. The existence of a searchable automated province-wide registry database for civil matters was seen as strengthening the case against imposing a geographical restriction on applications for grants.

### What applicant for grant must file

- (21) An applicant for a grant must file the following documents:
- (a) an application in Form \_\_ *[form to be prescribed]* verified by the oath or affirmation of the applicant;
  - (b) proof of service of the notice required by subrule (7), unless the applicant is the Public Guardian and Trustee or the court has dispensed with notice;
  - (c) if subrules (4), (11) or (13) apply to the circumstances, proof of service of notice to the Public Guardian and Trustee;
  - (d) proof of death in accordance with subrule (22);
  - (e) the original will, if any, in accordance with subrule (23);



- (f) if applicable to the circumstances, any affidavit or other material required by subrules (25) to (36) inclusive.

**[Source: New.]**

**Comment:** An application for a grant would be made by filing a prescribed application form requesting the category of grant that is sought, e.g. probate, administration, administration with will annexed. In the case of limited or ancillary grants, the applicant would need to provide details of the nature and purpose of the grant that is needed. The prescribed application form would replace the affidavit in one of Forms 91, 92, or 93 that is required by the present rules. It is contemplated that the application form would provide information concerning the deceased, the date and place of death, the will if any, the executors if any, and the deceased's property similar to that now contained in the present Forms 91, 92, 93 and 105. It is also contemplated that the application form would include a jurat and in order to complete the form, applicants would have to swear or affirm that the information they have provided in it is true to the best of their knowledge.

If the applicant has personally effected service of the subrule (7) notice or the facts surrounding service of the notice are within the applicant's personal knowledge, proof of service could be incorporated into the application form in the form of a declaration by the applicant that notice was duly given. If not, proof of service in accordance with Rule 4-6 would need to accompany the application.

### **Proof of death**

- (22) An applicant must do one of the following to provide proof of death:
- (a) state in the application form the day on which the deceased died;
  - (b) state in the application form the date on which the deceased was last seen alive and the date on which the deceased's body was found;
  - (c) file a copy of a death certificate;
  - (d) file a copy of an order presuming death under the *Presumption of Death Act*;
  - (e) state other information in, or file other documents with, the application form to prove the death of the deceased to the satisfaction of the registrar.

[Source: Rule 21-5(5); English *Non-Contentious Probate Rules 1987*, Rule 5(5); New in part.]

**Comment:** Subrule (22) provides several options for proving the death of the deceased and covers situations that the present Rule 21-5(5) does not address, such as instances in which the date of death or the date on which the deceased was last seen alive are not known to the applicant.

### Deposit of original will

(23) An original will filed in accordance with subrules (21) or (52) must not be attached to other documents.

[Source: Man. Court of Queen's Bench Rule 74.02(2.1). New.]

**Comment:** Subrule (23) is a change from present probate procedure, which calls for the original will to form an exhibit to the affidavit of the executor or proposed administrator with will annexed. Instead, subrule (23) requires the will to be unattached to any other application material. Leaving the original will unattached makes it easier for registry staff to photocopy and facilitates its use as an exhibit in trial proceedings that may take place later, such as a proceeding for proof in solemn form.

Subrule (23) also refers to the filing of the original will under the new procedure contemplated by subrule (52) to facilitate renunciation by a sole executor.

Consideration has been given to dispensing with a requirement for the original will to be filed in the court registry. As wills are kept permanently as paper documents in the provincial Archives rather than being included in a destruction schedule or recorded as electronic images, the Court Services Branch would prefer to dispense with filing the original will in the court as part of probate procedure. The Probate Rules Reform Project Committee has concluded nevertheless that the original will should continue to be filed in the court registry as a measure to prevent loss, damage, fraud, fraudulent concealment, or deliberate destruction of the original. This conclusion is reflected in subrules (21)(e) and (23). It is not intended to preclude alternatives to indefinite archival preservation of original wills in paper form once access to the original is no longer needed for the resolution of any matters relating to the validity or integrity of the will.

**Proof of search for will by applicant for probate or administration with will annexed**

- (24) An applicant for a grant who swears or affirms that the applicant is presenting the last will of the deceased and who files a certificate from the chief executive officer under the *Vital Statistics Act* indicating the results of a search for a notice of a will filed by or on behalf of the deceased is not required to prove by affidavit that a search was made for a later will.

[Source: Rule 21-5(37).]

**Comment:** Subrule (24) carries forward the substance of the present Rule 21-5(37), with the additional reference to applicants for administration with will annexed. Proof of a search for a later will is considered unnecessary if the applicant deposes that the will being propounded is the last will, and files an official search result indicating that no notice of a later will is on record in the registry operated under the authority of Division 7, Part 4 of the WESA by the Chief Executive Officer under the *Vital Statistics Act*.

Subrule (24) does not refer, as does the present Rule 21-5(37), to a search for “a will or other testamentary document” because the extended definition of “will” in s. 1(1) of the WESA is incorporated into this rule. That definition encompasses testamentary documents other than wills, apart from beneficiary designations governed by other specific legislation.

**Proof of search for will by proposed administrator**

- (25) An applicant for a grant of administration without will annexed must
- (a) swear or affirm that a diligent search for a will has been made in all places where the deceased usually kept his or her documents, and
  - (b) file, together with the documents referred to in subrule (21), a certificate from the chief executive officer under the *Vital Statistics Act* showing the results of a search for a notice of a will filed by or on behalf of the deceased.

[Source: Rule 21-5(36).]

**Comment:** The content of subrule (25) is carried forward from the present Rule 21-5(36). The purpose of subrule (25) is to require an applicant for a grant of

administration to carry out a diligent search for a will before applying for administration of the estate, including a search of the wills registry operated under the authority of Division 7, Part 4 of the WESA by the Chief Executive Officer under the *Vital Statistics Act*. The search result in the form of the certificate issued by the Chief Executive Officer must be filed as part of the application material.

### **Proof of proper execution of will not required if attestation clause present**

(26) If a will contains an attestation clause, an applicant for a grant is not required to submit further proof that the requirements of Part 4, Division 1 of the *Wills, Estates and Succession Act* as to execution of wills were met unless, in the opinion of the registrar, the attestation clause is insufficient or there are other circumstances bringing the proper execution of the will into question.

**[Source: Rule 21-5(9); English *Non-Contentious Probate Rules 1987*, Rule 12; New.]**

**Comment:** Subrule (26) makes explicit the feature of B.C. probate practice that is implicit in the present Rule 21-5(9), namely that proof of compliance with execution of the will by affidavit of a subscribing or other witness is not required when the will has a sufficient attestation clause.

### **Proof of proper execution of will by affidavit of subscribing witness**

(27) If a will contains

- (a) no attestation clause,
- (b) an attestation clause that is insufficient in the opinion of the registrar,  
or
- (c) in the opinion of the registrar, circumstances exist that bring the proper execution of the will into question,

an applicant for a grant must provide an affidavit from at least one of the subscribing witnesses to prove that the requirements of Part 4, Division 1 of the *Wills, Estates and Succession Act* as to execution of wills were met when the will was signed.

[Source: Rule 21-5(9); English *Non-Contentious Probate Rules 1987*, Rule 12(1); New.]

**Comment:** Subrule (27) continues the effect of the present Rule 21-5(9) in requiring proof of proper execution by the affidavit of a subscribing witness to a will if there is no sufficient attestation clause in the will. Subrule (27) provides in addition that other circumstances raising doubt as to the proper execution of the will in the registrar's opinion are also grounds for requiring the affidavit of a subscribing witness.

### **Proof of proper execution of will where subscribing witness unavailable**

(28) If an affidavit from a subscribing witness is not obtainable, the registrar may accept as proof that the requirements of Part 4, Division 1 of the *Wills, Estates and Succession Act* as to execution of wills were met:

- (a) an affidavit by any other person present when the will was signed, or
- (b) if no affidavit under paragraph (a) is obtainable, an affidavit by a person
  - (i) able to depose
    - (A) that the signature of the will-maker is in the handwriting of the deceased, and
    - (B) the signatures of the subscribing witnesses are in the handwriting of those witnesses,
  - or
  - (ii) deposing from personal knowledge to circumstances that raise a presumption in favour of proper execution.

[Source: Rule 21-5(9); English *Non-Contentious Probate Rules 1987*, Rule 12(2); New in part.]

**Comment:** Subrule (28) continues the effect of the present Rule 21-5(9) in allowing proof of proper execution by affidavit of anyone who was present and can depose from personal knowledge of the circumstances surrounding the signature and attestation where no affidavit by a subscribing witness can be obtained. If no affidavit by anyone present at the execution of the will is obtainable, proof of

compliance with the requirements of proper execution can be provided by proof of the signatures being in the handwriting of the testator and subscribing witnesses, or of circumstances raising a presumption that the execution of the will met the formal requirements.

### **Proof of proper execution of privileged will by member of military force**

- (29) If a will that is the subject of an application for a grant appears or is alleged by the applicant to have been made in a form permitted by the *Wills, Estates and Succession Act* for a will by a member of the Canadian Forces while placed on active service under the *National Defence Act* (Canada) or a naval, land or air force of any member of the British Commonwealth of Nations or any ally of Canada while on active service, the applicant must provide proof satisfactory to the registrar that
- (a) the will-maker was authorized to make a will in that form at the time the will was made, and
  - (b) the circumstances surrounding the execution of the will met the requirements of the *Wills, Estates and Succession Act* as to execution of a will in that form.

**[Source: Adapted from English *Non-Contentious Probate Rules 1987*, Rule 18.]**

**Comment:** Section 38 of the WESA, like s. 5 of the present *Wills Act*, R.S.B.C. 1996, c. 489 allows members of the Canadian Forces, or the naval, land or air forces of a member country of the British Commonwealth of Nations or any ally of Canada the privilege of making a valid will while on active service without the normal formalities of signature and attestation in the presence of two subscribing witnesses. Such a will needs only to be signed by the will-maker or by some other person in the presence of or at the direction of the will-maker. If the will is signed by the will-maker, no witness is needed. If it is signed by someone other than the will-maker, the signature of that person must be witnessed by at least one other person who must sign in the presence of the will-maker and the person who signed it at the will-maker's direction.

Proof of proper execution meeting the requirements of subrules (26), (27), and (28) may not be available in the case of a privileged military will validly made under s. 38 of the WESA. Subrule (29) empowers the registrar to accept any satisfactory proof of the military status of the will-maker authorizing him or her to make

a privileged will and the facts surrounding the execution, e.g. that the signature is that of the will-maker.

**Execution of will by blind or illiterate will-maker**

- (30) If the will-maker of a will that is the subject of an application for a grant
- (a) was blind,
  - (b) was illiterate,
  - (c) did not fully understand the language in which the will is written,
  - (d) signed by means of a mark instead of handwritten words, or
  - (e) directed another person to sign the will on behalf of the will-maker in the will-maker's presence,

and the attestation clause of the will does not explain or refer to the circumstances of execution to the satisfaction of the registrar, the registrar may require the applicant to file an affidavit by any person with personal knowledge of the facts proving to the satisfaction of the registrar that the requirements of the *Wills, Estates and Succession Act* as to execution of a will were met and that the will-maker had knowledge of the contents of the will.

**[Source: English *Non-Contentious Probate Rules 1987*, Rule 13; Alberta *Surrogate Rules*, Rule 17; Nova Scotia *Probate Court Practice, Procedure and Forms Regulation*, s. 11(8).]**

**Comment:** The present Rule 21-5 does not address proof of execution by a blind, illiterate, or non-English-speaking testator, or signature by proxy even though it is permitted by both the present *Wills Act*, R.S.B.C. 1996, c. 489 and the WESA. Subrule (30) is drawn from Rule 13 of the English *Non-Contentious Probate Rules 1987* and s. 11(8) of the Nova Scotia *Probate Court Practice, Procedure and Forms Regulation*.

### Will not in English

- (31) If a will is written in a language other than English, the applicant must file an English translation verified by an affidavit of the translator.

[Source: *Alberta Surrogate Rules, Rule 18.*]

**Comment:** The present Rule 21-5 does not address the matter of wills not in English. Subrule (31) follows standard court practice and the practice of probate courts in other Canadian jurisdictions in requiring submission of a sworn translation of the original document if it is not in an official language of the jurisdiction.

### Foreign will

- (32) A copy of a will that is the subject of a foreign grant and is to be annexed to

- (a) a grant of administration,
- (b) a resealed grant of probate,
- (c) an ancillary grant of probate or administration, or
- (d) a grant to an attorney of a foreign personal representative

must be certified by the court out of which probate or administration with will annexed has been granted in respect of the will.

[Source: *Rule 21-5(60).*]

**Comment:** This subrule corresponds to the present Rule 21-5(60).

### Interlineations, alterations, erasures and obliterations

- (33) If an interlineation, erasure, obliteration or other alteration appears in a will and is not

- (a) made in accordance with the requirements of the *Wills, Estates and Succession Act* as to execution of a will,



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- (b) recited in or otherwise identified in the text of the will or the attestation clause, or
- (c) authenticated by the re-execution of the will or subsequent execution of a codicil

an applicant must file an affidavit stating whether the interlineation, erasure, obliteration or other alteration was present when the will was executed unless the registrar determines the interlineation, erasure, obliteration or other alteration is of no practical importance.

**[Source: Rules 21-5(16), (17); English *Non-Contentious Probate Rules 1987*, Rules 14(1), (2).]**

**Comment:** Subrule (33) carries forward the subject-matter of the present Rules 21-5(16) and (17), except that the initials of witnesses would no longer be required to accompany an interlineation, erasure or obliteration or other alteration that is of no practical importance in order for the registrar to be able to exercise the discretion conferred by the rule to dispense with affidavit evidence of whether the alteration was present at the time the will was executed.

### **Incomplete erasure or obliteration**

- (34) If there is no satisfactory evidence of the time when an erasure or obliteration referred to in subrule (33) was made and the words erased or obliterated are not entirely effaced and can be read, the words must form part of the probate.

**[Source: Rule 21-5(18).]**

**Comment:** Subrule (34) is adapted from the present Rule 21-5(18).

### **Appearance of will**

- (35) If the appearance of a will indicates that
  - (a) words in a will have been erased or obliterated,

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- (b) an attempt was made to revoke the will by burning, tearing, or otherwise destroying it, or any other circumstance leading to a presumption of revocation by the will-maker,
- (c) a page or document may previously have been attached to it and is missing, or
- (d) any other suspicious circumstances exist,

the registrar may require an applicant for a grant in respect of the will to file

- (e) any previously attached page or document that is apparently missing, or
- (f) an affidavit explaining the circumstances surrounding the appearance of the will to the satisfaction of the registrar.

**[Source: Rules 21-5(19), (23); English *Non-Contentious Probate Rules 1987*, Rule 15; N.B. *Probate Rules*, Rule 2.02(11).]**

**Comment:** Subrule (35) carries forward the subject-matter of the present Rules 21-5(19) and (23). Paragraphs (35)(b) and (d) are derived from the English *Non-Contentious Probate Rules 1987* and N.B. *Probate Rules*, Rule 2.02(11) and are added for the sake of completeness. All of these rules concern the registrar's powers to require explanatory evidence where there are indications that a will submitted for probate may have been revoked or redacted.

### Document referred to in will

- (36) If a will refers to a document in a manner that raises a question whether the document ought to form part of the will, the registrar may require the applicant to
  - (a) provide the document to the court, or
  - (b) explain to the satisfaction of the registrar why the applicant cannot provide the document.

**[Source: Rule 21-5(20); English *Non-Contentious Probate Rules 1987*, Rule 14(3); Alta. *Surrogate Rule 23*.]**

**Comment:** Subrule (36) regarding documents potentially incorporated into a will corresponds to the present Rule 21-5(20).

### International Wills Convention

(37) An applicant for a grant in respect of a will in the form required by the *Convention Providing a Uniform Law on the Form of an International Will* enacted as Schedule 2 of the *Wills, Estates and Succession Act* is not required to provide proof of the authenticity of the signature of the authorized person before whom the will purports to have been signed by the will-maker.

[Source: New.]

**Comment:** The *Convention Providing a Uniform Law on the Form of an International Will* calls for signature and attestation of a will before an “authorized person” designated by the law of the jurisdiction where the will is executed. (Section 83(3) of the WESA designates lawyers and notaries public as persons authorized to act in relation to a will executed under the Convention in British Columbia.) The Convention stipulates that the signature of the will-maker and witnesses are not subject to legalization or other formality in other jurisdictions adhering to the Convention, but that the domestic authorities may require proof of the authenticity of the authorized person’s signature. Subrule (37) provides that no special proof of the authorized person’s signature is required for probate in British Columbia.

### Application by one or more of several co-executors

(38) A grant of probate resulting from the application of one or more, but not all, co-executors must reserve the right of a co-executor who does not join in the application and has not been cited to accept or refuse probate to apply at a later time, unless the renunciation of the co-executor is filed.

[Source: New.]

**Comment:** If not all co-executors join in an application for probate, the practice is to protect the right of the non-applying executors to apply for double probate at a later time by reserving it in the grant, unless they have renounced executorship. No present rule addresses this expressly, however. Subrule (38) expressly affirms the existing practice and in doing so, increases the transparency of probate procedure.

## Disclosure of Estate Property on Application for Grant

### Disclosure of estate property (probate or administration)

- (39) Subject to subrule (40), an applicant for a grant of probate or administration must disclose in the application
- (a) the property of the deceased that passes to the applicant in the capacity of the personal representative of the deceased,
  - (b) whether the property is located in or outside British Columbia,
  - (c) the value of the property at the death of the deceased, and
  - (d) any debt or liability that charges or encumbers a specific item of property.

[Source: See WESA, s. 122(1). New.]

**Comment:** This subrule sets out requirements for disclosure of the property belonging to the estate which the grant being applied for will cover. This subrule is intended to complement s. 122(1) of the WESA by indicating what information an applicant for probate or administration must disclose concerning the property forming the estate to be administered. Section 122(1) of the WESA requires the applicant to disclose “information as required under the Rules of Court concerning the property of the deceased, irrespective of its nature, location or value that passes to the applicant in his or her capacity as the deceased’s personal representative,” subject to the exception that is covered by subrule (40).

Disclosure of debts and liabilities of the estate would no longer be required except with respect to debts and liabilities that are charged on or otherwise encumber a specific asset. These would be listed in association with the asset they encumber. There are several reasons for dispensing with a full listing of estate debts and liabilities in the disclosure document. One reason is that the WESA abolishes the requirement of consent by creditors to the appointment of an administrator. Part III of the currently prescribed form of the disclosure document (Statement of Assets, Liabilities and Distribution), where debts and liabilities are listed, will no longer be needed to allow the registry to identify the creditors whose consent is necessary.

Another reason is that it is often impossible to obtain complete information concerning amounts owing by the estate before the grant is obtained. This is especially true in intestacies, where a third party such as a financial institution or creditor may be reluctant to release information concerning outstanding debts pending the appointment of an administrator. Often privacy laws are cited as grounds for withholding financial information about the deceased's financial obligations from a prospective administrator.

Part III of the current form of disclosure document is often incomplete for this reason when an application for grant needs to be made, and a common practice is to simply enter "To be determined." Part III of the disclosure document therefore is often misleading and uninformative. It is thought to be counter-productive to retain a disclosure requirement that too often is meaningless out of necessity.

Oftentimes relatively small amounts of money, not having significant financial bearing on the size of the estate, are owed to creditors such as utilities at the time a person dies. It is a cumbersome and lengthy process to identify and itemize all of them before the grant is obtained, and one that yields little informative value.

Secured debts, however, have a direct effect on the market value of the assets they encumber and are likely to be more significant in size. Including them in the estate disclosure, juxtaposed with the assets on which they are charged, does have informative value and the proposed subrule (39) therefore requires this.

### **When disclosure of estate property not required (probate or administration)**

(40) The disclosure required by subrule (39) need not refer to property of a deceased if the property is situated outside British Columbia and

- (a) the property has been, is being, or will be administered by a foreign personal representative, including the applicant, or otherwise under the law of a foreign jurisdiction, and
- (b) the deceased was not domiciled or ordinarily resident in British Columbia at the time of death.

[Source: WESA, s. 122(1)(b). New.]

**Comment:** This subrule indicates what property of the estate may be left out of the estate disclosure because s. 122(1)(b) of WESA exempts it from disclosure

on a probate or administration application. The property exempted by s. 122(1)(b) consists of assets of a deceased who was not domiciled or ordinarily resident in British Columbia at death, and which are situated outside this province and are being administered by a foreign personal representative or otherwise (i.e., otherwise than by a personal representative) under foreign law. For the purpose of this exemption from disclosure, it does not matter whether the foreign personal representative is the applicant or some other person.

## Procedure After Filing of Application

### Duty of registrar on receipt of application for grant

- (41) On receiving an application for a grant under this rule, the registrar must
- (a) if the application is the first step or proceeding in relation to the estate, open a court file for the estate under the name of the deceased,
  - (b) examine the application to determine if
    - (i) the application is in compliance with this rule,
    - (ii) the applicant has given the notices required by subrule (7) and, if applicable, subrules (11) and (13) to all persons entitled to receive them, and
    - (iii) there is any question, matter or circumstances surrounding the application that
      - (A) would prevent the court from approving issuance of the grant without a hearing, and
      - (B) has not been resolved to the satisfaction of the registrar.

[Source: *New. N.S. Probate Court Practice, Procedure and Forms Regs.*, s. 5(4).]

**Comment:** Subrule (41)(a) contemplates a typical situation in which the application for a grant of probate in common form or administration with or without will annexed is the first step to be entered in the court record in relation to an estate. Like subrules (91) and (96), however, it also contemplates and facilitates a single

estate file system in which the first matter to be entered in the court record would lead to the opening of an estate file and subsequent applications of any nature relating to the same estate could be treated as interlocutory matters in the same file, rather than generating separate court files in the probate and civil chambers or trial divisions.

Subrule (41)(b) corresponds to the normal practice of the registry when receiving and reviewing applications for probate or administration, which the present rules cover in a very sketchy fashion.

A reading of the present Rule 21-5(8) would create the impression that a hearing of an application for grant must take place whether the registrar has approved the application or not. The actual practice is that the registry refers an uncontested application to the court to be spoken to in chambers only if there is an issue arising from the application documents and appearance of the will that cannot be resolved to the registrar's satisfaction, or if the applicant takes issue with the registrar's position on the adequacy of the original or revised and re-submitted application documents. In other uncontested cases, the registry approves the application for disposition by the court without the need for a hearing. An informal desk order is made authorizing the issuance of a grant, either on the individual estate file or by signing a list of approved applications, and the grant is subsequently prepared and sealed by the registry. In contrast to the implication from the present Rule 21-5(8) that a hearing is essential, the proposed subrules (41), (42) and (43) reflect the actual practice.

### **Approval by registrar of application for grant**

- (42) If the registrar finds an application for a grant to be in compliance with this rule and is satisfied that there is no reason to require a hearing, the registrar must
- (a) approve the application for disposition without a hearing, and
  - (b) either
    - (i) refer the application and estate file to the court for disposition, or
    - (ii) enter the application on a list of applications for simultaneous disposition by the court.

[Source: New.]

**Comment:** Subrule (42) regularizes existing practices of the Supreme Court registry that are not officially recognized on the face of the present Rule 21-5(8), which appears to suggest that a hearing is needed before a grant will issue. In practice, a hearing is seldom necessary in the case of applications for probate. Hearings are more common in connection with grants of administration, where there may not be universal consent to the applicant serving as the administrator. If the registry staff are satisfied that an application for a grant is in order and there is no need for it to be spoken to in chambers, they place it before a judge or master who signs a fiat authorizing the issuance of the grant. In Vancouver and Victoria, where the volume of probate business is much higher than other registries, the registrar may compile a list of probate applications that have been approved and the list is signed by a judge or master to denote that the listed grants shall issue. In either case, the authorization by the judge and master for issuance of the grant is the order of the court disposing of the application. Subrule (42) affirms these aspects of present registry practice.

It is open to question whether a need exists for judicial involvement in the process leading to issuance of common form grants of probate and grants of administration when no dispute surrounds the application. Note that as the present *Estate Administration Act* and the WESA both provide that grants of probate and administration are made by “the court,” a change in practice that would permit the registrar to issue grants without an order of a judge or master would require legislative amendment.

### **Refusal by registrar to approve application for grant**

- (43) If the registrar determines, after making any inquiry that the registrar considers appropriate, that an application for a grant does not comply with this rule or that for any other reason a hearing is necessary, the registrar must refuse to approve the application for disposition without a hearing and inform the applicant by any convenient and effective means of
- (a) any defect in
    - (i) the application, or
    - (ii) compliance with subrule (7),



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- (b) any other question or matter surrounding the application that prevents the registrar from referring it to the court for disposition without a hearing, or
- (c) any further information or material the registrar requires as proof of a matter of which the registrar must be satisfied under this rule before referring the application to the court for disposition without a hearing.

**[Source: New.]**

**Comment:** Subrule (43) requires the registrar to communicate the reasons for refusing to approve an application for disposition without a hearing. Instead of having to mark the reasons for not approving an application on the application documents themselves as Rule 21-5(7) now requires, the registry staff will be able to use any means to communicate the reasons to the applicant or the applicant's lawyer that is convenient (to the registry and applicant) and effective (in the sense of ensuring the reasons are actually communicated). This could include e-mail, telephone, or a written or faxed memo, as well as the traditional marking of the application documents that derives from historical English probate practice.

### **Procedure after refusal by registrar to approve application**

- (44) If the registrar refuses to approve an application for disposition without a hearing the applicant may
  - (a) file further information and material
    - (i) to correct a defect of which the registrar has informed the applicant under subrule (43)(a), or
    - (ii) required by the registrar under subrule (43)(c), or
  - (b) proceed under subrule (46) to obtain a hearing by the court.

**[Source: New.]**

**Comment:** Subrule (44) indicates the options available to the applicant after the registrar has refused to approve the application for disposition without a hearing. The applicant may file further information and material that the registrar requires or which the applicant believes will correct the defects pointed out by the registrar under subrule (43). This will lead to reconsideration of the application as sup-

plemented by the new material. Alternatively, the applicant may request a hearing by the court. The second alternative would be pursued, for example, if the applicant disagrees with the registrar's position or is unable to furnish material that will satisfy the registrar, and wishes to have the court decide whether the grant should be issued.

### **Subrules (42) and (43) applicable after filing of revised or additional material**

(45) Subrules (42) and (43) apply to a reconsideration by the registrar of an application after the filing of revised or additional material by the applicant to address a matter under paragraphs (a) to (c) of subrule (43).

**[Source: New.]**

**Comment:** If an applicant files revised or additional affidavits or other material in response to a communication from the registrar under subrule (43), subrules (42) and (43) will again apply to the registrar's consideration of the new material supplementing, or in substitution of, the material initially filed. This reiteration of the process will lead either to referral to the court for a desk order under subrule (42) if the new material is satisfactory, or to a second refusal to approve under subrule (43) if it is not.

## **Hearing of Application for Grant**

### **Applicant may request hearing**

(46) If the registrar has determined that an application for a grant for disposition cannot be referred to the court for disposition without a hearing, the applicant may request a hearing by the court by filing a requisition in Form 17.

**[Source: New. Corresponds to present Rule 21-5(8).]**

**Comment:** Subrule (46) corresponds to the present Rule 21-5(8), but makes it clear that a hearing of an application for probate or administration is only needed where the registrar refuses to approve the application for disposition without a hearing.

The applicant requests a hearing by filing a requisition in Form 17 of Appendix A to the *Supreme Court Civil Rules*. This is the general purpose requisition form. As notice of the application will already have been given under subrule (7) and the recipients of the notice have been able to file estate caveats if they object, the applicant does not need to give another notice merely because a hearing is being requested.

**Date and time of hearing to be set by registrar**

(47) The registrar must fix the date and time of a hearing requested under subrule (46).

[Source: New.]

**Comment:** Self-explanatory.

**Notice of hearing not required except to caveator**

(48) Subject to subrule (61), an applicant is not required to serve notice of the date and time of a hearing unless the court otherwise orders.

[Source: New.]

**Comment:** As the persons interested in the estate will have received the initial notice under subrule (7) informing them that an application for the grant would be made, and will have had an opportunity to place an objection on the record by filing an estate caveat, there is no need to give them notice of the hearing if they have not taken that step. If an estate caveat is filed, subrule (61) requires notice of the hearing to be served on the caveator. The applicant will likely have to apply to have the estate caveat removed and arrange for that application to be heard prior to or concurrently with the application for the grant itself.

**Hearing by court not an appeal from registrar**

(49) A hearing of an application for a grant

(a) must take place in chambers, and

(b) is a hearing at first instance and is not in the nature of an appeal from the registrar.

[Source: New.]

**Comment:** The effect of subrule (49) is that the court is not bound by any factual or other determination made by the registrar, nor is it limited to considering the documentary record that was before the registrar when it hears an application for a grant of probate or administration. The court may allow the applicant and any interested parties to file additional affidavits or submissions. While *Re Bradford Estate* (1990), 40 E.T.R. 50 (B.C.S.C.) indicates this is the correct approach to a hearing pursuant to the present Rule 21-5(8) (former Rule 61(6)), the present rule is not explicit in this regard. Subrule (49) explicitly provides that the hearing of an application for grant is not an appeal but is one at first instance. Thus, the court may make all required determinations.

## Issuance of Grant

### Registrar to issue grant following disposition of application

(50) If the court disposes of an application for a grant of probate or administration with or without a hearing by ordering that a grant be issued, the registrar must prepare and issue a grant in accordance with the order.

[Source: New.]

**Comment:** This subrule continues the historical and current practice whereby grants are prepared and issued in the registry.

The Project Committee gave consideration to a change that would call for grants to be prepared outside the registry by counsel and submitted in draft for issuance, much in the same way as draft orders are prepared for signature by the registrar in civil litigation. The Project Committee believes, however, that due to the high volume of “in person” applications (applications filed by laypersons without legal representation), such a change would have little effect on registry workload. In addition, the Project Committee sees some basis for concern that a document not generated by the court would not have the same degree of authority and evidentiary weight in some foreign countries as court-generated British

Columbia grants now receive. As a result, personal representatives might experience greater difficulty in gathering estate assets outside Canada.

## Renunciation

### Renunciation

- (51) A renunciation by an executor must be
- (a) in writing in the prescribed form,
  - (b) signed by the renouncing executor,
  - (c) witnessed by one subscribing witness 19 or more years of age, and
  - (d) filed in the registry.

[Source: New.]

**Comment:** Subrule (51) contains the formal requirements for a renunciation and requires that the signed original renunciation be filed in the registry. This subrule maintains the principle that a renunciation is not fully effective until it is filed in the probate registry: *In the Goods of Morant* (1874), 30 L.T. (N.S.) 74.

### Renunciation by sole executor

- (52) An executor who has no co-executor may renounce by filing:
- (a) a renunciation complying with subrule (51),
  - (b) either
    - (i) the original will, if the original will is in the executor's possession or control, or
    - (ii) if the original will is not in the executor's possession or control, a signed statement providing what information the executor knows regarding the whereabouts of the original will,

- (c) a certificate by the chief executive officer under the *Vital Statistics Act*, dated subsequent to the date of the original will appointing the renouncing executor, showing the results of a search for a notice of will of the deceased, and
- (d) a copy of a death certificate for the deceased.

[Source: New.]

**Comment:** Subrule (52) provides a new procedure whereby a sole executor can renounce executorship. A similar procedure is available as a matter of practice in England and Nova Scotia. The renouncing sole executor must deposit the original will if it is in the executor's possession or control, or provide what information is known about its location. A death certificate and wills search result are also required because the fact of death and the finality of the will naming the renouncing sole executor are not being established by the sworn evidence contained in an affidavit by an applicant for probate.

#### **Witness to renunciation not disqualified by interest or kinship**

- (53) A subscribing witness to a renunciation is not disqualified as a witness on the ground of an interest in the estate or a relationship of kinship or affinity with the renouncing executor or another person interested in the estate.

[Source: New.]

**Comment:** Subrule (53) clarifies that a subscribing witness to a renunciation is not disqualified because of being interested in the estate, either financially or as a co-executor, or being a relative by blood or marriage of the renouncing executor or other person who is interested in the estate in some manner. This is in keeping with the tenor of s. 3 of the *Evidence Act*, R.S.B.C. 1996, c. 124, which abolishes interest as a general ground of disqualification of witnesses in civil proceedings. The subrule removes doubt as to the validity of a renunciation witnessed by someone interested in the estate that may stem from the mention in *Tristram & Coote's Probate Practice* (see 27<sup>th</sup> ed. at p. 437) that a witness to a renunciation should be disinterested.

### Registrar may require affidavit of witness to renunciation

- (54) If the registrar is not satisfied of the authenticity of a renunciation or the identity of a witness, the registrar may require the filing of an affidavit of a witness to the renunciation.

[Source: New.]

**Comment:** This subrule is intended to give the registrar a discretion to require an affidavit of execution by a witness to a renunciation if there is some circumstance raising doubt about the authenticity of the renunciation or the identity of a witness. In other cases, an affidavit of execution is not required to accompany a renunciation.

## Estate Caveats

### Estate caveat

- (55) A person intending to oppose the issue of a grant of probate or administration may file an estate caveat in Form \_\_ *[form to be prescribed]* on one occasion at any time before a grant is issued or the hearing of an application for a grant, whichever is earliest.

[Source: See WESA, s. 106. ]

**Comment:** Section 106 of the WESA states that a person may oppose the issuance of a representation grant in accordance with the rules of court. The historical method of doing so is to file a caveat to prevent a grant from issuing. The present Rule 21-5(39) provides for caveats. These proposed rules retain that mechanism under the term “estate caveat” to distinguish the caveat used in probate matters from caveats under the *Land Title Act*, R.S.B.C. 1996, c. 250 and in admiralty proceedings.

Some uses of estate caveats listed in the 27th edition of *Tristram & Coote’s Probate Practice* are:

- (a) to obtain time for the caveator to obtain information for the purpose of determining whether there are grounds for opposing the grant;

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- (b) to allow a person interested in the estate an opportunity to bring questions surrounding the grant before the court;
- (c) to enable an interested person to be informed of the application for the grant;
- (d) to allow an interested person to apply for an order requiring a prospective administrator or applicant for resealing to provide security;
- (e) as a step preliminary to a probate action or issuance of a citation.

To some extent, the notice requirement and 21-day notice period under subrule (7) will serve the purposes in (a) to (d) above. The Project Committee is not persuaded that it can completely supplant the legitimate use of estate caveats, however.

Misuse of estate caveats can be controlled through the application to remove an estate caveat contemplated by subrule (62) below.

As an additional curb on the abuse of caveats, subrule (55) provides that an estate caveat may only be filed once. This is a change from the present rules that permit successive filings by the same caveator merely to prevent issuance of a grant indefinitely without justification. The ability to amend or seek renewal of an estate caveat under subrules (58) and (59), respectively, will compensate for the prohibition of successive filings of caveats by the same caveator.

### No grant while estate caveat in force

- (56) The court must not issue a grant of probate or administration with respect to the estate of the deceased named in an estate caveat while the estate caveat is in force.

**[Source: Rule 21-5(44).]**

**Comment:** This subrule corresponds to the present Rule 21-5(44). Under the present rules, however, there is some ambiguity about the effect of a caveat. The ambiguity stems from the wording of the current form of caveat (Form 97), which says nothing about preventing a grant from issuing but appears to require only that notice of any step or proceeding in relation to the estate be given to the caveator while the caveat is in force. This would imply that steps may be taken in



relation to the estate in the meantime, without restriction as to their nature. Rule 21-5(44) and the wording of the present Form 97 appear to be contradictory.

The only purpose of an estate caveat under this proposed subrule would be to prevent issuance of a grant of probate or administration. Separate subrules, and not the caveat itself, require notice to the caveator of various proceedings that may take place in relation to the estate. This will require a change in the wording of the current Form 97.

### **Time estate caveat is in force**

(57) An estate caveat remains in force for one year from the date of filing, unless withdrawn sooner by the caveator or renewed by an order of the court on application made before the estate caveat expires, or afterwards with leave of the court.

**[Source: New.]**

**Comment:** Caveats now remain in force for six months under Rule 21-5(43). This proposed subrule would extend the duration to one year, subject to earlier withdrawal or renewal pursuant to an order of the court. The reason for extending the duration is to prevent frequent re-filing of caveats based on the same grounds, which the Project Committee sees as an abuse of process.

In contrast to the present Rule 21-5(39), this proposed subrule also makes it clear that the application to renew an estate caveat must be made before its expiry, unless the court grants leave to apply afterwards.

### **Amendment of estate caveat**

(58) An estate caveat may be amended once without leave, and afterwards only with leave of the court.

**[Source: New.]**

**Comment:** The current Rule 21-5 does not allow amendment of a caveat. As an estate caveat may need to be filed in haste, it is reasonable to think that occasions will arise in which amendment is useful. Faced with the need for amendment, a caveator would now have to withdraw and re-file. To discourage multiple estate caveats, it is thought advisable to allow amendment on a footing similar to

the amendment of a pleading, i.e. on one occasion without leave, and thereafter only with leave.

### Renewal of estate caveat

- (59) Subject to Rule 8-5, an application to renew an estate caveat must be made on notice to
- (a) a person who has applied for a grant of probate or administration,
  - (b) a person who has filed another estate caveat, and
  - (c) any other interested person to whom the court directs notice to be given.

[Source: New.]

**Comment:** The present Rule 21-5(39) refers to the possibility of renewal of a caveat, but is silent as to whether the application to renew is brought on notice, and if so, who is to receive notice. This subrule addresses the mode of application and identifies proper respondents. It is thought that anyone who has applied for a grant and other caveators should receive notice of an application for renewal of an estate caveat. Depending on the situation, other persons interested in the estate may also be affected and the court therefore has an express discretion to direct the applicant to serve notice on others.

The subrule is expressly made subject to Rule 8-5, which is the rule that will deal with urgent applications (short notice) once the *Supreme Court Civil Rules* are in force. The subrule is not intended to preclude short notice when it is justified in urgent circumstances. Rule 8-5 allows the court to give directions regarding notice and service when it hears a matter on short notice.

### Withdrawal of estate caveat

- (60) A caveator may withdraw an estate caveat by filing Form \_\_ [form to be prescribed].

[Source: New.]

**Comment:** While the present Rule 21-5(39) refers to withdrawal of a caveat, there is no mention in Rule 21-5 of how to do so and no currently prescribed withdrawal form. This subrule fills the gap in the probate rules by specifying how to withdraw an estate caveat. A caveat withdrawal form will have to be prescribed.

### **Caveator to receive notice of proceeding relating to a grant**

(61) While an estate caveat is in force, a person who applies for a grant or starts a proceeding relating to issuance of a grant of probate or administration must serve a copy of all documents to be filed in connection with the application or other proceeding on the caveator by ordinary service.

**[Source: New.]**

**Comment:** Caveats under the present Rule 21-5 have been thought to have a dual function: to prevent issuance of a grant and also to require notice to the caveator of steps in the estate. There is a lack of clarity surrounding this supposed dual function and also regarding who has the obligation to provide the notice, the registry or the moving party. As the public now has the ability to search province-wide for estate caveats entered on the CEIS system through Court Services Online, applicants for grants and litigants can perform checks for the existence of estate caveats. In addition, a caveator must provide an address for service in the caveat. Rule 4-2(2) of the *Supreme Court Civil Rules* permits several expedient means of ordinary service, i.e. ordinary mail, fax and e-mail. It is therefore feasible to place the burden on the moving party, rather than the registry, to serve application material on caveators. Subrule (61) does this.

### **Application to remove estate caveat**

(62) A person who has applied or intends to apply for a grant of probate or administration or who is interested in the estate may apply on notice to the caveator for an order removing the estate caveat.

**[Source: New.]**

**Comment:** This subrule substitutes a straightforward interlocutory application for an order removing a caveat for the current procedure under Rules 21-5(45)-(48), whereby a prospective applicant for a grant serves a notice to caveator and the caveator files a notice of interest in response to the notice to caveator, in default

of which the caveat lapses. Rule 21-5 does not specify what procedure is followed if the notice of interest is filed. This proposed subrule invokes normal interlocutory procedure to resolve a challenge to the grounds on which a caveator seeks to block a grant of probate or administration. An application under this subrule to remove an estate caveat could be made and heard simultaneously with an application for grant, since the estate caveat only blocks the issuance of a grant and not the filing of an application for it.

### **Deemed removal of caveat**

- (63) An estate caveat is deemed to be no longer in force if
- (a) the caveator fails to file an application response to a notice of application served under subrule (62) within the time allowed, unless the court otherwise orders,
  - (b) judgment is given for probate in solemn form, or
  - (c) a grant of probate in common form is issued as a result of a default judgment under subrule (100) in a proceeding for probate in solemn form.

**[Source: Rule 21-5(48).]**

**Comment:** Failure by a caveator to respond to an application to remove the estate caveat would result in the automatic deemed removal of the caveat. This subrule is to the same effect as the present Rule 21-5(48). The same result should hold if the caveator does not appear in a proceeding for probate in solemn form, resulting in default judgment in the nature of a common form grant under subrule (100).

## Citations

### Citation to apply for probate

(64) If an executor does not apply for a grant of probate of a will, a person interested in the estate may serve a citation on the executor in Form \_\_.

**[Source: Rule 21-5(49). New in part.]**

**Comment:** The “citation to apply for probate” under this subrule corresponds to the “citation to accept or refuse probate” under the present Rule 21-5(49). It is one of the two kinds of probate citations retained in this proposed rule because they can be a simple, inexpensive and quick way of initiating or expediting the administration of an estate without having to go to the length of obtaining an order from the court.

The 14-day grace period under Rule 21-5(49) following the death of the will-maker, within which a citation may not be served, is not carried forward into this proposed rule. While it would seldom be necessary to cite an executor to take out probate within 14 days of the will-maker’s death, there may be occasions where it is appropriate to force a dispute or dilemma over who will take the grant to quick resolution. The time allowed for applying for probate in response to a citation is also being extended from 14 to 42 days, which reduces the need for a 14-day window of time following death before the executor can be cited to apply for probate.

The references in the present Rule 21-5(49) to the executor “showing cause” why administration of the estate should not be granted to the executor or another person with a prior right willing to accept the grant are not carried forward here. No “show cause” hearing actually takes place in response to the citation under present practice, despite the wording of the rule. Rule 21-5(49) is silent as to how the cited executor is to “show cause.” This is left to instructions printed in the current form of answer (Form 100 under the *Supreme Court Civil Rules*).

A cited executor will typically either apply for probate or do nothing, and ultimately the citor or someone else will eventually apply for a grant of administration with will annexed. In this revised rule, the consequences of no response or a refusal to apply for probate without giving a reason are that the executor is deemed to have renounced. See subrule (66) below.

**Answer to citation to apply for probate**

- (65) An executor who is cited to apply for probate under subrule (64) may serve an answer on the citor in Form \_\_ stating that the executor:
- (a) will apply for probate within 42 days from the date on which the citation was served, or within a further period that the court may allow on the application of the executor, or
  - (b) refuses to apply for probate for reasons which the executor must specify in the answer.

[Source: Rule 21-5(47). New in part.]

**Comment:** An executor who is unwilling to obtain probate and does not renounce should not be allowed to stand in the way of another interested person seeking a grant of administration with will annexed. Therefore, an executor cited to apply for probate and who is unwilling to do so should either renounce or justify the refusal to apply by stating grounds in the answer to the citation. This subrule does not contemplate the cited executor being able to object in the answer to the citor applying for a grant of administration of the estate.

The time for applying for probate in response to a citation is extended to 42 days from service of the citation instead of the 14 days specified in the present form of answer. This is because of the introduction under subrule (7) of the 21-day notice period before a probate application can be filed.

**Effect of failure to answer citation or to give reason for refusing probate**

- (66) If an executor who is cited under subrule (64) to apply for probate fails to serve an answer or refuses to apply for probate and fails to give a reason for refusing, the executor is deemed to have renounced the executorship.

[Source: New.]

**Comment:** This subrule declares that the effect of a cited executor's failure to answer a citation to apply for probate or to explain in the answer the reason for refusing to apply is that the executor is deemed to have renounced. This is in accordance with s. 105 of the WESA (and with s. 25(1) of the existing *Estate Administration Act*), which provides that failure of an executor to appear when required to take probate terminates the appointment of the executor. It also leaves

the way clear for the citor or another interested person to obtain a grant of administration with will annexed if there is no alternate executor named in the will.

If a cited executor answers by stating an intention to apply for probate within the time required and then fails to do so, it is arguable that this is also a “failure to appear” within the meaning of s. 105 of the WESA and the executor would be deemed to have renounced. An amendment to provide for this result specifically is recommended.

### **Citation to propound an alleged will**

- (67) If a document is or may be in existence that may be alleged to be a will, a person interested in the estate may serve a citation to propound the document as a will in Form \_\_ on
- (a) the executor, and
  - (b) every person beneficially interested in the estate under the document.

**[Source: Rule 21-5(51).]**

**Comment:** The citation to propound a will, currently available under the present Rule 21-5(51), is an expedient and inexpensive mechanism to bring a will to light that may otherwise be concealed or suppressed. Serving such a citation is an alternative to applying to the registrar for issuance of a subpoena to compel the production of a testamentary document. (See subrule (76)). While a subpoena is a powerful tool, being a court-issued order enforceable by civil contempt proceedings, it only forces the person to whom it is directed to deposit the testamentary document, not to probate it. The citation to propound, on the other hand, has the added feature of requiring the executor named in an alleged will or other person who may have possession or control of the document to prove the document as a valid last will through the probate process.

While similar to a citation to an executor to apply for probate, a citation to propound a document as a will is used in a different type of situation. A citation to an executor to apply for probate would most likely be employed when the executor is dilatory in obtaining probate, but the will is known to exist and the citor is not disputing its validity or intending to probate another will made by the deceased. The citation to propound would be the preferable mechanism where there is suspicion that a will is being concealed.

In cases where more than one will may be in existence and there is a dispute or difference between the beneficiaries as to the validity of one or more wills, this type of citation is also an expedient means of clearing the way for the citor or another interested person to propound a different will or obtain a grant of administration on the footing of intestacy if the proponents of the other possible will are not about to bring it forward. There is clear authority that if the citee does not propound the alleged will in response to the citation, the citor or other interested persons can seek probate of a different will, or obtain a grant of administration. See *Morton v. Thorpe* (1863), 3 Sw. & Tr. 179, 164 E.R. 1242; *Re Bell Estate* (1946), 62 B.C.R. 400 (S.C.); *Re Trinder Estate*, [1987] B.C.J. No. 1476 (S.C.) (QL). This serves to break stalemates in the handling of estates. The citation to propound is retained here for all the above reasons.

### Citation to be supported by affidavit

(68) A citation under subrule (67) must be supported by an affidavit stating the grounds for the citor's knowledge or belief for the existence of the document that may be alleged to be a will.

[Source: Rule 21-5(52)(b).]

**Comment:** The existing requirement under Rule 21-5(52)(b) for a citation to propound an alleged will to be supported by an affidavit is carried forward. The grounds of the citor's knowledge or belief that a document that may be a will is in existence should be disclosed.

### Answer to citation to propound an alleged will

(69) An executor or other person who is cited to propound a document as a will under subrule (67) may serve an answer on the citor in Form \_\_ stating that the executor or other person cited

- (a) will apply for probate or administration with will annexed within 42 days from the date on which the citation was served,
- (b) will apply within 42 days for directions or an extension of time to apply for probate, or
- (c) refuses to propound the document as a will for reasons which the executor or other person must specify in the answer.



[Source: New.]

**Comment:** This subrule restricts the content of an answer to a citation to propound a will to three possible responses: that the citee or other person will either apply for probate within 42 days from the date of service of the citation (extended from the 14 days specified under the form of citation currently in use), that the citee will apply for directions or an extension of time to apply for probate, or that the executor refuses to propound the alleged will. The grounds for refusal, which could include denial that the document referred to in the citation is in existence, must be stated.

**Effect of failure to answer citation or give reason for refusal to propound alleged will**

(70) If no one who is cited to propound a document as a will under subrule (67) serves an answer or gives a reason in the answer for refusing to propound the document as a will, the citor or another person interested in the estate may serve a notice on each beneficiary who is known or believed by the citor to be named in the alleged will that the citor or other interested person intends to apply for

- (a) a grant of administration with will annexed,
- (b) a grant of administration as on intestacy,
- (c) proof of the alleged will in solemn form, or
- (d) a grant of probate or administration with will annexed in respect of another will,

and after serving the notice, may take any of the steps in paragraphs (a) to (d).

[Source: New.]

**Comment:** If the person cited to propound an alleged will ignores the citation or refuses to propound the document without giving tenable grounds, the citor is free to prove another will or seek a grant of administration on the basis that the deceased died intestate. (See *Re Trinder Estate*, [1987] B.C.J. No. 1476 (S.C.) (QL) and *Re Bell* (1946), 62 B.C.R. 400 (S.C.).) The beneficiaries under the al-

leged will to which the citation relates should be made aware that the alleged will under which they benefit will not be probated, and the administration of the estate may move forward without regard to it. If they were made aware of this, they could take independent steps to protect their interests.

For this reason, this subrule requires the citor to give notice to the beneficiaries under the document to which the citation relates before applying for probate of another will or obtaining a grant of administration on the footing that the estate is an intestacy. The citor may not have seen the document referred to in the citation and may not be in a position to know the identities of the beneficiaries, so the subrule requires only that the notice be given to those beneficiaries of whom the citor is aware.

The notice may be given by ordinary service under Rule 4-2(2), which allows ordinary mail, fax, or e-mail.

### Time for serving answer to citation

(71) An answer to a citation under subrules (64) and (67) must be served within 14 days after service of the citation.

[Source: New.]

**Comment:** The current form of citation refers to a 14-day period for filing an answer, although Rule 21-5 is silent on when an answer must be filed. This subrule expressly states that an answer must be served within 14 days.

### How to serve citation and answer

(72) A citation and the supporting affidavit must be personally served on an executor and an answer may be served by ordinary service.

[Source: Rule 21-5(57).]

**Comment:** This subrule preserves essentially the same service requirements for citations and answers now found in Rule 21-5(57). A citation is an important document similar to an originating process, and requires a response. In default of response to a citation, the right to executorship or to administer the estate can be forfeited. See subrules (66) and (70) and the commentary following them. It is therefore reasonable to require citations to be personally served.

Ordinary service, however, is adequate for the answer as the citor will anticipate receiving it and will have given an address for service. Rule 4-2(2) allows several convenient methods for ordinary service, namely ordinary mail, fax, e-mail, and leaving a copy at the recipient's address for service.

### **Citations and answers to be filed**

(73) An answer must be filed with proof of service and a copy of the citation to which it relates.

**[Source: New.]**

**Comment:** While the present Rule 21-5(58) requires answers to be filed, there is no requirement in Rule 21-5 to file citations. This proposed subrule corrects this anomaly by requiring a copy of the citation to be filed with an answer.

### **Co-executors to be cited concurrently**

(74) A citation under subrules (64) and (67) must

- (a) be served on all co-executors;
- (b) not be served on an alternate executor before an event that entitles the alternate executor to assume the office of executor.

**[Source: New.]**

**Comment:** As all co-executors have equal responsibility for taking the necessary steps to prove the will, they should be cited together. There is a greater chance that at least one executor will be spurred to action in this manner than if the co-executors are cited in succession.

An alternate executor, however, has no power to deal with the estate until the principal executors are no longer in office. An alternate executor should therefore not be subject to citation until after taking over from a principal executor.

### **Executor refusing probate or seeking extension must surrender original will**

(75) An executor who is cited under subrules (64) or (67) and who refuses to apply for probate, or who intends to seek directions or an extension of time for so applying, must surrender the original will to the registry, if the will is in the executor's possession or control.

**[Source: New.]**

**Comment:** An executor who has been cited and who does not intend to seek probate immediately should surrender the original will and deposit it with the court, so as not to obstruct the administration of the estate. This subrule requires surrender of the will. If the executor fails to surrender the will, a subpoena may be issued under subrule (76) below to compel the executor to bring it into the registry.

## **Subpoena for Testamentary Document**

### **Subpoena for testamentary document**

(76) If the registrar is satisfied that a testamentary document or representation grant is in the possession or control of a person, the registrar may issue a subpoena in Form \_\_ addressed to that person, requiring that the person bring the testamentary document or representation grant into the registry for the purpose of any application or other matter under this rule.

**[Source: Rule 21-5(56)].**

**Comment:** The subpoena under this subrule corresponds in part to the subpoena currently available under Rule 21-5(56), and is intended to supplant the citation under Rule 21-5(54) to bring a testamentary document into the registry. The citation to bring in a testamentary document is not being carried forward here because it is considered redundant and inferior to the subpoena. It is not a faster or simpler mechanism than the subpoena because, in contrast to the citations to accept or refuse probate or to propound a will, it is not available as of right. The facts justifying its issuance must be established by affidavit to the registrar's satisfaction, and it is signed by the registrar and issued from the registry instead of simply being generated by the citor and served on the person cited. A subpoena carries more weight than a citation as it is enforceable by contempt process, and the procedural requirements for obtaining it are the same as for the citation.

There is considerable duplication between the present Rules 21-5(54) and (56) and ss. 113 and 114 of the *Estate Administration Act* in terms of processes for compelling attendance of persons with knowledge of matters concerning an estate for examination and the production of documents relating to or belonging to estates. The equivalents of ss. 113 and 114 of the *Estate Administration Act* are found in s. 123 of the WESA. In order to eliminate confusion and overlap between the legislation and rules of court, the subpoena under this proposed rule is confined to a purpose consonant with probate business, namely production of a testamentary document or a representation grant (which includes a small estate declaration). Means of compelling attendance for examination concerning a matter connected with the estate and production of other kinds of estate-related documents and assets will continue to be available by order under s. 123 of the WESA, as they are now under ss. 113 and 114 of the *Estate Administration Act*. These procedural remedies under the governing legislation by way of order are not confined to probate matters, but could be used in any proceeding.

### **How to obtain a subpoena for testamentary document**

(77) A person who wishes a subpoena under subrule (76) to issue must file:

- (a) a requisition in Form 17;
- (b) an affidavit stating the facts on which the requisition is based.

[Source: Rule 21-5(56).]

**Comment:** This subrule preserves a requirement now found under Rule 21-5(56) for a supporting affidavit to accompany a request for issuance of a subpoena to produce a testamentary document.

## **Resealing**

### **Who may apply for resealing**

(78) A foreign personal representative or an attorney may apply to reseal a grant of probate or administration under Part 6 of the *Wills, Estates and Succession Act*.

[Source: Rule 21-5(61).]

**Comment:** This subrule corresponds to the present Rule 21-5(61). It allows an attorney of a foreign personal representative to apply for resealing of a foreign grant in British Columbia. “Foreign grant” and “foreign personal representative” are defined in s. 1(1) of the WESA. “Foreign” in this context includes “extra-provincial.”

### What applicant for resealing must file

(79) An applicant for resealing must file:

- (a) an application in Form \_\_ [*form to be prescribed*];
- (b) a copy of the foreign grant certified by the court that issued the grant to be resealed;
- (c) proof of service of the notice required by subrule (7).

[Source: Rules 21-5(62), (63).]

**Comment:** This subrule corresponds to the present Rules 21-5(62), (63). The requirements for resealing are largely unchanged, except that a single application form would replace the requisition and affidavit to lead to resealing now required.

### Testamentary paper must accompany grant to be resealed

(80) A foreign grant or certified copy must include a copy of any testamentary instrument admitted to probate by the issuing court in order to be resealable.

[Source: Rule 21-5(67).]

**Comment:** This subrule corresponds to the present Rule 21-5(67).

### Domicile of deceased on resealing

(81) If the domicile of the deceased at the time of death as it appears from the application differs from the domicile at death suggested by the foreign grant, the registrar may require further evidence as to domicile of the deceased.

[Source: Rule 21-5(64).]

**Comment:** This subrule corresponds to the present Rule 21-5(64). Rule 21-5(65) is not carried forward here. It requires the registrar to mark the application if satisfied that the deceased was not domiciled in the jurisdiction of the court that issued the foreign grant at the time of death. Marking of the application is anachronistic. Under present practice, the registry staff would draw the attention of the court to any matters of concern arising from the application material by memorandum.

### **Disclosure of estate property on resealing**

- (82) The application to lead to resealing required by subrule (79) must disclose
- (a) the real and personal property of the deceased situated in British Columbia that the applicant seeks to administer,
  - (b) the value of the property referred to in paragraph (a) at the death of the deceased, and
  - (c) any debt or liability specifically charging or encumbering an item of real or personal property referred to in paragraph (a), shown together with the item that the debt or liability charges or encumbers.

[Source: new. See WESA, s. 138(2)(b).]

**Comment:** This subrule states the requirements for asset disclosure on a resealing application. It is intended to complement s. 138(2)(b) of the WESA, which requires disclosure of “information as required under the Rules of Court” concerning only the assets situated in British Columbia that will be administered under the resealed foreign grant. This is a change from the extent of disclosure required by the present form of affidavit to lead to resealing (Form 105), which calls for disclosure of the totality of the assets of the estate regardless of location.

### **Procedure after application for resealing filed**

- (83) Subrules (41)-(49) apply to an application for resealing.

[Source: Rule 21-5(66).]

**Comment:** A resealing application would be handled the same way as an application for probate or administration under subrules (41) to (49) above. If the application is in order and no issues arise from it that will require a hearing, the registrar will approve it for disposition without hearing. If not, it would have to be spoken to in chambers.

### **Notice to issuing court of resealing**

(84) If a grant is resealed, the registrar must notify the court that issued the grant of the resealing.

**[Source: Rule 21-5(68).]**

**Comment:** This subrule corresponds to the present Rule 21-5(68). Notice of resealing to the issuing court enables the issuing court to notify the registrar if the original grant is later revoked in the issuing jurisdiction.

### **Notice of revocation or amendment of resealed grant**

(85) If the registrar knows that a British Columbia grant has been resealed, the registrar must notify the resealing court of a revocation or amendment of the grant.

**[Source: Rule 21-5(69).]**

**Comment:** This subrule corresponds to the present Rule 21-5(69). Continuing to let the obligation to inform the resealing court of the revocation or amendment of a British Columbia grant rest with the registrar is a better guarantee that the obligation to inform the resealing court will be fulfilled than leaving the matter to the holder of the revoked or amended grant.



## Remuneration and Passing of Accounts

### Remuneration and passing of accounts

- (86) A personal representative or a person interested in an estate may apply for an order for the passing of accounts or to fix and approve the remuneration of a personal representative
- (a) under subrule (91), or
  - (b) if each interested person other than the applicant has consented to the accounts or the proposed remuneration, under Rule 8-3.

**[Source: New. Functionally corresponding to the present Rule 21-5(70).]**

**Comment:** In contrast to the present Rule 21-5(70), subrule (86) allows both personal representatives and other interested persons to obtain an order for passing accounts and fixing the personal representative's remuneration by way of notice of application rather than by petition. At the present time, interested persons other than the personal representative must proceed by petition under Rule 2-1(2) for the order, which requires a new proceeding to be commenced.

Subrule (86) also allows for an application by requisition under Rule 8-3 for a consent order approving the accounts and/or the remuneration of a personal representative, if all interested persons have consented to them.

### Service unnecessary if consent obtained

- (87) In an application under subrule (86)(a), it is unnecessary to serve the notice of application on a person who has already consented in writing to the accounts or proposed remuneration.

**[Source: New.]**

**Comment:** Self-explanatory.

### Directions and referrals

- (88) In an application under subrule (86), the court may
- (a) hear and decide any matter relating to the accounts or remuneration of a personal representative,
  - (b) make an order approving the accounts or fixing and approving remuneration of a personal representative,
  - (c) direct that the registrar conduct an inquiry, assessment, or accounting in relation to any matter relating to the accounts or the remuneration of a personal representative and, subject to subrule (89), Rule 18-1 applies thereafter to the matter as if the application and the direction had been made under that rule, or
  - (d) make any other order or give any direction that the court considers appropriate in the circumstances.

[Source: New.]

**Comment:** Subrule (88), in combination with subrule (86), is intended to allow passing of estate accounts and/or approval of the remuneration of a personal representative in a single step where possible. This is to avoid the multiple applications that could be necessary if the matter proceeded directly under Rule 18-1, the general rule dealing with inquiries, assessments, and accounts. If the nature of any outstanding matters arising from the estate accounts is such that the court is not able to resolve them summarily in a chambers application, the court may refer them to the registrar to make the necessary findings. If a reference to the registrar is made, the matter proceeds from that point as if the reference had been sought originally under Rule 18-1, with the difference that unless the court directs otherwise, the registrar's findings will be incorporated in a certificate under Rule 18-1(2) instead of a report and recommendation to the court. By the terms of Rule 18-1(2), the registrar's certificate when filed is binding on the parties, subject to appeal. (See subrule (89) and commentary below.) This avoids the need for a further application to the court under Rule 18-1(4) to vary or confirm the registrar's recommendation.

**Effect of referral to registrar**

- (89) Unless the court otherwise orders, if the court directs the registrar to conduct an inquiry, assessment or accounting under subrule (88)(c),
- (a) the registrar must certify the result , and
  - (b) if filed under Rule 18-1(9), the certificate is binding, subject to appeal, on the persons interested in the estate who
    - (i) have had notice of the inquiry, assessment or accounting,
    - (ii) have consented to the accounts or the remuneration, or
    - (iii) are the subject of an order made under Rule 18-1(20)(b).

**[Source: New.]**

**Comment:** Subrule (89) is intended to avoid the need for confirmation of the registrar’s findings by the court on a subsequent application insofar as estate accounts or the remuneration of personal representatives are concerned. It does this by reversing the standard or “default” procedure under Rule 18-1(3), whereby the findings made on an inquiry, assessment, or accounting are contained in a report and recommendation to the court. The report and recommendation requires confirmation on a subsequent application to the court under Rule 18-1(4) unless the court directs that the registrar or other official who conducted the inquiry, etc. certify the result, in which case the certificate is binding on the parties. Under subrule (89), the binding certificate is made the “default” procedure rather than the report and recommendation. Except on appeal, the certificate could not be subsequently challenged by any persons interested in the estate who had notice of the inquiry, who had consented to the accounts or remuneration, or who were named in an order under Rule 18-1(20)(b) declaring them to be bound by the certificate to the same extent as if they had been served with notice of the proceeding.

**Affidavit required for passing of accounts and remuneration**

- (90) As part of an application for the passing of accounts and remuneration under subrule (86), the applicant must file an affidavit, in Form \_\_
- (a) describing the assets and liabilities of the estate as at the later of

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- (i) the date of the deceased's death, and
- (ii) the effective date of the most recent of any previous accounting done under this rule,
- (b) describing capital transactions since the applicable date referred to in paragraph (a) in chronological order,
- (c) describing income transactions since the applicable date referred to in paragraph (a) in chronological order,
- (d) describing the assets and liabilities of the estate as at the effective date of the statement of account,
- (e) describing all distributions made and any distributions anticipated to be made out of the estate,
- (f) including a calculation of the remuneration, if any, claimed by the applicant for
  - (i) the applicant, and
  - (ii) any previous personal representative or trustee for whom a claim for remuneration has not yet been made, and
- (g) including, in any other schedules, details or information the court may require or the applicant may consider relevant.

**[Source: Rule 21-5(72).]**

**Comment:** This subrule corresponds to Rule 21-5(72). The purpose of the form of account contemplated by this subrule is to show how the net value of the estate has changed in the period covered by the account. The form would include a reconciliation of the capital and income transactions with the initial value of the estate and the value at the end of the accounting period.

Paragraphs (90)(b) and (c) have been modified to require transactions to be listed in chronological order for easier comprehension, and references in the corresponding paragraphs of Rule 21-5(72) to the treatment of certain expenses as income or capital have been deleted because they have engendered confusion.

## Probate in Solemn Form and Contested Matters

### Application for order relating to grant

- (91) Despite Rules 2-1(1) and 2-1(2)(a) and (b), a person may apply by notice of application or, if Rule 17-1 applies, by requisition for an order
- (a) under subrule (8);
  - (b) for proof of a will in solemn form, if a grant of probate in common form has been issued, or an application for a grant has been made, in respect of the will;
  - (c) granting administration with or without will annexed in circumstances where the right to the grant is contested;
  - (d) that a gift under a will to a witness who has attested the will or to the spouse of that witness take effect despite the attestation by that witness ;
  - (e) revoking a grant of probate or administration;
  - (f) removing or substituting a personal representative;
  - (g) discharging a personal representative;
  - (h) terminating the authority of a declarant;
  - (i) passing over an executor;
  - (j) removing or renewing an estate caveat;
  - (k) that a foreign grant of probate or administration not be resealed;
  - (l) requiring security for the administration of an estate;
  - (m) varying or substituting security for the administration of an estate;
  - (n) directing that security be assigned to a person named in the order;

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- (o) that a record or document or writing or marking on a will or document be fully effective as though it had been made as
  - (i) a will or part of a will of a deceased person,
  - (ii) a revocation, alteration or revival of a will of a deceased person, or
  - (iii) as the testamentary intention of a deceased person;
- (p) rectifying a will;
- (q) for the passing of accounts;
- (r) fixing and approving the remuneration of a personal representative;
- (s) respecting any other matter concerning a grant of probate or administration with or without will annexed, resealing, a small estate declaration or the office of personal representative, other than a question or matter covered by Rule 2-1(2)(c) or (d).

**[Source: New.]**

**Comment:** For historical reasons, the present Rule 21-4 requires proceedings for proof of a will in solemn form, obtaining the right to administer an estate where there is a dispute over who will be the administrator, and revocation of a grant, to be initiated by writ of summons. These are the proceedings that can be said with some degree of confidence to fit within the obscure definition of “probate action” in Rule 21-4(1). Many other probate-related and estate-related matters are dealt with in chambers by petition or interlocutory application, however. In many cases, the full panoply of pre-trial and trial procedure in a civil action is not necessary to determine the validity of a will or whether a grant should be revoked, or to sort out who among several contending relatives of the deceased is the appropriate administrator. Several other provinces allow these matters to be dealt with summarily through chambers procedure, with the court having the power to tailor the procedure to the particular needs of the matter and the circumstances, up to and including full trial with oral evidence when necessary. Much time and expense to the parties and the court system could be saved by allowing solemn form, revocation, and contests for the administration of an estate to be handled this way. That is the purpose of this subrule.

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This subrule is intended to be primarily confined to probate business, i.e. obtaining and revoking grants, and determining who will represent the estate as personal representative. Paragraph (s) excludes from the scope of this subrule matters covered by Rules 2-1(2)(c) and (d), namely matters that are purely ones of construction or which arise in the course of the active administration of an estate. Matters covered by Rules 2-1(2)(c) and (d) would continue to be initiated by petition.

Applications to remove or substitute personal representatives are of a borderline nature, as they would most often arise in the post-probate phase. This subrule treats them as part of probate business because they concern the right to represent the estate.

Applications for passing accounts and fixing remuneration would also occur almost exclusively in the post-probate phase. Until now, however, passing of accounts and remuneration of personal representatives have been covered by the probate rules. The degree of involvement of registry officials in these procedures is significant, as it is in the pre-grant process, and the registrar's expertise is relied upon to a considerable degree. For these reasons, and because the procedures for passing accounts and fixing remuneration can be handled more efficiently and inexpensively as interlocutory matters than as separate proceedings by petition, they are included in this subrule.

The application described in paragraph (d) relates to s. 43(4) of the WESA, which empowers the court to uphold a gift under a will to an attesting witness. The applications described in paragraphs (o) and (p) relate, respectively, to the curative power regarding testamentary formalities under s. 58 and rectification under s. 59 of the WESA. Section 59 of the WESA expressly allows an application for rectification of a will to be made at either the probate or construction stage, and rectification applications are listed in this subrule for this reason.

### **Personal representative to be served**

- (92) A person applying to the court under subrules (91)(b) to (s) must serve the notice of application and other application materials referred to in Rule 8-1(7) on
- (a) each personal representative of the deceased other than the applicant, and
  - (b) any other person who may be affected by the order sought,

unless Rule 17-1 applies or the court otherwise orders.

[Source: New.]

**Comment:** This subrule is to ensure that a personal representative will be served in all cases when an application is made under paragraphs (b) to (s) of subrule (91), regardless of whether any relief is claimed against the personal representative. Personal representatives should have notice of every application that affects representation of the estate.

### When personal service is required

(93) A notice of application under paragraphs (e), (f), (g), (h) and (i) of subrule (91) must be personally served on a personal representative, including a declarant.

[Source: New.]

**Comment:** An application for revocation of a grant, removal or substitution of a personal representative, discharge of a co-executor, passing over an executor in making a grant of probate, or the termination of a declarant's authority to administer a small estate under Division 2 of Part 6 of the WESA is of sufficient importance to the personal representative concerned and any co-executors that it should be served personally on each personal representative. In appropriate cases, alternative service could be ordered under Rule 4-4.

### Court may direct proof in solemn form

(94) The court may direct that a will be proved in solemn form, without an application having been made for an order under subrule (91)(b) and before or after a grant is made respecting the will or the estate, if the circumstances appear to justify the direction.

[Source: Rule 21-5(13).]

**Comment:** This subrule corresponds to the present Rule 21-5(13). In some situations, no one may be challenging a putative will, but the court may still have a salutary concern for the integrity of the probate process that is raised by suspi-



rious circumstances surrounding the will or its execution. It is appropriate in these cases for the court to insist of its own initiative on proof in solemn form.

**Proof in solemn form if first proceeding in respect of estate**

- (95) A person may start a proceeding for probate of a will in solemn form by petition if
- (a) there has been no previous grant or application for a grant in respect of the will, and
  - (b) no other proceeding in respect of the estate in which an application under subrule (91) may be made is pending.

[Source: New.]

**Comment:** Proceedings for probate in solemn form where no grant in common form has been issued, and no other procedural step has been taken in the estate, are relatively rare. They are possible, however. As the *Supreme Court Civil Rules* treat a notice of application primarily as an interlocutory process rather than one that starts a proceeding, subrule (95) calls for proceedings for probate in solemn form to be commenced by petition in cases where no previous step has been taken that would have led to a court file for the estate being opened, i.e. where there has been no prior grant or application for one, and no proceeding in respect of the estate is currently pending.

**Court may give directions as to procedure**

- (96) The court may give directions concerning the procedure to be followed in any matter under this rule, including without limitation:
- (a) the issues to be decided;
  - (b) who the parties will be, including directions for the addition or substitution of a party;
  - (c) how evidence is to be presented;
  - (d) summary disposition of any or all issues;

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- (e) trial of any or all issues in the matter;
- (f) pleadings;
- (g) examinations for discovery and discovery of documents;
- (h) service of a notice, process, order or document on any persons;
- (i) dispensing with service;
- (j) representation of any person or interest.

**[Source: Alberta Rule 64(1); Ontario Rule 75.06. New.]**

**Comment:** This subrule is to allow the court to tailor the procedure to the matter at hand, serving the principle of proportionality that is entrenched as a guiding principle in the *Supreme Court Civil Rules*.

### Filing of grant in revocation application

- (97) In an application for revocation of a grant,
- (a) if the application is made by the person to whom the grant was made, that person must file the grant within 7 days after filing the notice of application, or
  - (b) if an application respondent has possession or control of the grant, the application respondent must file the grant with the registrar within 7 days after service of the notice of application,

and the person to whom the grant was made must not act under the grant without leave of the registrar until the application is decided.

**[Source: Rule 21-4(5).]**

**Comment:** This subrule corresponds to the present Rule 21-4(5).

### Failure to file grant in revocation application

(98) If a person fails to comply with subrule (97), the registrar may issue on the registrar's own initiative a subpoena under subrule (76) addressed to that person to compel the filing of the grant.

[Source: New.]

**Comment:** The subpoena under subrule (76) can replace the citation by the registrar to bring in a grant under the present Rule 21-5(56). There is no need to retain both processes in the rules.

### No revocation by default

(99) Rule 3-8 does not apply to a proceeding for revocation of a grant of probate or administration with or without will annexed, and an order revoking the grant must not be made solely because of default in filing an application response or, if the court orders service and filing of pleadings in an application under subrule (91)(e), a response to civil claim.

[Source: New.]

**Comment:** This subrule carries forward the effect of the present Rule 21-4(10), but only in relation to proceedings for revocation of a grant. Rule 21-4(10) currently prohibits default judgment (or summary judgment by reason of default of pleading) in any proceeding covered by the definition of "probate action" in Rule 21-4(1), i.e. solemn form probate, actions for the administration of an estate, and revocation actions. The Project Committee has concluded that continuation of the prohibition on default judgment in contested probate business is not warranted, except in the case of an application for revocation. Revocation of a grant by default could create confusion and uncertainty surrounding the estate. The revocation may not come to the attention of persons beneficially interested and third parties dealing with the personal representative, who may continue to assume the grant is in effect.

The repeal of the present Rule 21-4(10) will have the effect of permitting discontinuance, dismissal by consent, and voluntary settlement (compromise) of administration actions and proceedings for solemn form probate and revocation without first having to obtain leave of the court. While the traditional position has been that a will cannot be validated by consent, the Project Committee sees no useful purpose in preventing these alternatives that are available generally in

other types of civil litigation from being available in proceedings related to grants of probate and administration, provided that all interested parties are in agreement with the result in question.

### **Default judgment in solemn form proceeding**

(100) If the court awards default judgment in a proceeding for probate in solemn form by reason of failure to file an application response or response to civil claim, the registrar must issue a grant of probate in common form.

**[Source: New.]**

**Comment:** A grant of probate in solemn form cannot be revoked, except on appeal. A common form grant, however, may be revoked and a new one issued to the same or another executor. A default judgment is inherently capable of being set aside or varied on proper grounds. (See Rule 3-8(11).) Default judgments sometimes occur through inadvertent failure to plead. By analogy, the default judgment in solemn form proceedings that would be possible under these proposed probate rules should take effect as a grant in common form.

## **Miscellaneous Matters**

### **Grant of administration to guardians**

(101) With the consent of the Public Guardian and Trustee, the court may make a grant of administration to the guardians of an infant for the infant's use and benefit.

**[Source: Rule 21-5(28).]**

**Comment:** This subrule corresponds to the present Rule 21-5(28).

### **Security**

(102) Security for the administration of an estate required by the *Wills, Estates and Succession Act* or by the court on the application of a person interested in the estate may be in any form acceptable to the court including, without limita-

tion, a term restricting the proposed administrator from exercising a power in relation to the property of the estate without prior approval of the court or the Public Guardian and Trustee.

**[Source: WESA, s. 128.]**

**Comment:** The WESA changes the existing principle that an administrator must provide security in the form of a double surety bond unless the court dispenses with security or orders it to be provided in a different form. Under s. 128 of the WESA, a prospective administrator is not required to provide security unless a minor or an unrepresented mentally incapable adult is interested in the estate, or the court orders security on the application of an interested person. This change was made because administration bonds are difficult and costly to obtain, and security is dispensed with in many cases. The existing law concerning security from administrators was seen as highly outdated.

Under the original proposals in the BCLI report *Wills, Estates and Succession: A Modern Legal Framework*, there would be no legislative preference for the double surety administration bond and the court would be able to accept any form of security in cases when security is required or ordered. This could include security consisting simply of a restriction on certain powers of the administrator, e.g. a requirement for prior approval from the court or the Public Guardian and Trustee for the sale of land belonging to the estate. This subrule would implement those changes in keeping with the policy of s. 128 of the WESA.

It should be noted that s. 111 of the WESA provides that a declarant administering a small estate under Part 6, Division 2 (Small Estate Administration) cannot be required to provide security.

## Transition

### Application for grant or resealing under former rule

(103) An application for a grant or resealing made under a former rule that is pending at the effective date of this rule is deemed to be an application made under this rule.

**[Source: New.]**

**Comment:** If an application made under Rule 24-5 or its predecessor, Supreme Court Rule 61, has not yet resulted in a grant, nor been dismissed or withdrawn on the date these new probate rules come into effect, this subrule would treat the application as if it had been made under these new rules and they would apply to any subsequent steps in the application.

### **Caveat filed under former rule**

(104) A caveat filed in relation to an estate that is in effect immediately before the effective date of this rule is deemed to be an estate caveat filed under this rule but expires six months after it was filed or renewed unless it is withdrawn or renewed under this rule.

**[Source: New.]**

**Comment:** This subrule would treat caveats filed before these new rules come into effect as estate caveats. Thus the rules applicable to estate caveats would apply to them, including those allowing for amendment, renewal, withdrawal, and proceedings consequent on the filing of a caveat, such as applications to remove under subrule (62). Subrule (57) would be an exception. The duration of a caveat in effect at the time these proposed probate rules come into force would remain at six months from the date of original filing or the most recent renewal (as under the present Rule 21-5(43)). It would not be automatically extended to one year.

### **Unanswered citation to accept or refuse probate**

(105) A citation to accept or refuse probate served under a former rule less than 14 days before the effective date of this rule but not answered by that date is deemed to be a citation to apply for probate under subrule (64) and subrules (65), (66), (71), (72), (73) and (75) apply to the citation and answer.

**[Source: new.]**

**Comment:** The citation to accept or refuse probate under the present Rule 21-5(49) and former Rule 61(43) corresponds to the citation to apply for probate under subrule (64). The present Rule 21-5, like the former rules, does not specify a time limit for delivery of an answer, but the currently prescribed form of citation demands an answer within 14 days. The transitional subrule immediately above would treat an unanswered citation served under Rule 21-5(49) less than 14 days

before the effective date of the new probate rules and not answered before their effective date as if it were a citation to apply for probate under subrule (64). Subrules (65), (66), (71), (72), (73) and (75) governing the form, service and filing of answers, surrender of the original will if certain answers are made, and the consequences of non-answer, would be applicable after the effective date.

### **Citation to propound**

(106) A citation to propound an alleged will served under a former rule less than 14 days before the effective date of this rule but not answered by that date is deemed to be a citation to propound an alleged will under subrule (67) and subrules (69), (70), (71), (72), (73) and (75) apply to the citation and answer.

**[Source: New.]**

**Comment:** This transitional subrule makes the subrules governing the form, service and filing of answers, and the consequences of non-answer, applicable if a citation to propound an alleged will has been served under the present Rule 21-5(51) and not answered at the effective date of the new probate rules.

### **Probate actions under former rule**

(107) Subject to any directions by the court under subrule (96), a proceeding started as a probate action within the meaning of the former Rule 21-4 or a petition for proof of a will in solemn form under the former Rule 21-5(14) that is pending at the effective date of this rule is deemed to continue as an application under subrule (91) in which the court has made orders under subrule (96)

- (a) designating each plaintiff and defendant as a party,
- (b) for pleadings, examinations for discovery, discovery of documents and trial of all issues, and
- (c) giving leave to all parties to apply under subrule (96) for further directions as may be necessary.

**[Source: New.]**

**Comment:** The present Rule 21-4(1) defines “probate action” as covering actions for a grant of probate or administration, revocation of a grant, or “an order pronouncing for or against the validity of an alleged testamentary paper,” excluding a proceeding governed by Rule 21-5 (which covers proceedings for probate in solemn form commenced by petition). Similar proceedings under these new probate rules would be commenced as applications under subrule (91). The procedures necessary to resolve them would be those directed by the court under subrule (96). The procedures could range from informal hearings in chambers to a full trial in open court, depending on the nature of the particular matter. In order for the seamless continuation of probate actions already pending at the effective date of the new probate rules, this transitional subrule treats them as if they had been matters commenced as applications under subrule (91) in which the court has directed under subrule (96) that the normal procedure in an action be followed, and in which the parties have leave to apply for further directions if necessary.



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