h ESTATES g

PRE-APPLICATION PROCEDURE

INDEX

Page

INITIAL MATTERS

Interview

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

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

- the original Will and any Codicils or other testamentary documents – if any (if not kept by the law firm for safekeeping);
- all available personal documentation, such as copies of titles to any real or personal property, Marriage Certificate, bank and brokerage statements, etc.;
- family trust, joint partner or alter ego agreements, separation agreement, or any other documents relating to the family situation; and
- Death Certificate, if one is available.
- Prior to the appointment, the legal assistant should take the initiative to provide the supervising lawyer with the following:
- original Will and any Codicils (if kept by the law firm for safekeeping);
- all information and/or files concerning the Deceased's affairs (i.e. Wills, personal, matrimonial, real estate and corporate files);
- Master Information Checklist (***Master Information Checklist*** – **Checklists – Estates – Helpful Information**).

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

Open file

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

BLOE, Joseph Patrick
Re: Estate

and to address the correspondence to:

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

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

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

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

Ascertain that there is a Will and that it is valid

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

be fully effective as a Will.

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

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

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

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

Prepare Preliminary Letter to Personal Representative

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

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

Obtain Death Certificate

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

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

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

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

Order Search of Wills Notice

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

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

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

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

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

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

If, at a later date, it is discovered that there is another variation of the Deceased's name and that the additional name is not included in the original search, you will have to order a new Search of Wills Notice listing only the new name. The resulting searches must collectively cover all the names and the names will be shown in Part 1 of the ***Form P2 – Submission of Estate Grant***.

Bear in mind:

- the names shown in the Wills Registry Search (as prepared by you) and the names in the in the ***Submission for Estate Grant*** or ***Submission for Resealing*** must be identical;
- if one of the names contains initials or punctuation (for example "John P. Brown"), the search must be conducted by using the paper form, as the online form does not allow for punctuation in the names;
- if the search comes back (***Results of Search for Wills Notice***) and is negative (i.e. the Vital Statistics Agency advises that no ***Wills Notice*** has been filed with them), do not assume that no Will exists. It simply means that no ***Wills Notice*** has been filed. Remember: filing a ***Wills Notice*** when a Will is made is optional and many people, including lawyers, omit this step.

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

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

Determine Applicant/Personal Representative

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

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

- probate, the first executor(s) named in the Will usually apply. If the first executor or executors named are unable or unwilling to apply (for example, they are dead or have renounced), the next (or alternate) executors apply.
- administration **with** will annexed, if all of the executors named in the Will are unable or unwilling to apply, section 131 of WESA governs the priority of the applicants.
- administration **without** will annexed (there is no Will), section 130 of WESA governs the priority of applicants. If there are minors or mentally incompetent persons, pursuant to section 128 of WESA, a security may be required to be provided by the applicant, so you have to ascertain that the applicant is bondable or able to provide such security.
- ancillary grants the personal representative(s) named in the foreign grant are the applicants. However, a foreign representative may appoint a attorney to act on the representative's behalf but the grant of probate or administration to the attorney will be limited to the Deceased's estate in British Columbia (s. 139 of WESA).
- resealing of foreign grants, all personal representative(s) named in the foreign grant will must be the applicants for resealing and cannot be represented by an attorney.

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

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

If an executor:

- renounces (unless a court otherwise orders); or
- survives the Will-Maker and dies without being granted probate; or

- is required to take probate and does not appear (for example, pursuant to a Citation see Form P33 and Form P34 in the Forms chapter);

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

When a person dies:

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

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

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

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

Also note:

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

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

  - **Revocation of Gift and Appointment on Dissolution of Marriage (*Wills Act*)** (**Precedent Clauses** chapter**)** and

- **Revocation of Gifts and Appointment when Spouses Cease to be Spouses (WESA)** (**Precedent Clauses** chapter); and
- **Revocation of Gifts or Appointments** (**Overview** chapter).

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

NOTICE OF PROPOSED APPLICATION IN RELATION TO ESTATE

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

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

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

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

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

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

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

REPRESENTATION/ESTATE GRANTS

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

Determine Type of Grant

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

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

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

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

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

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

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

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

All applications are filed at one of the registries of the Supreme Court of British Columbia regardless of where the Deceased was domiciled or had assets in the Province.

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

If there are any subsequent filing requirements with respect to the same estate, such as a change of executor, those documents must be filed in the same registry where the original application was filed.

Description of Types of Grants

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

British Columbia Grants – Domiciled Grants

The following three grants:

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

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

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

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

Grant of Probate

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

In this situation:

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

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

- is/are deceased, the court does not ask for proof of death other than a statement to that effect in the appropriate Affidavit of Applicant (***Form P3*** or ***Form P4***);
- has/have renounced the right to apply, a ***Notice of Renunciation (Form P17)*** must be obtained from the person(s) renouncing and must be filed with the probate registry;
- choose(s) not to apply but does/do not renounce the right to apply, the court will issue a grant of probate reserving that person's right to apply at a later date.

Grant of Administration with Will Annexed

A grant of administration with will annexed is applied for (instead of a grant of probate) if the Deceased left a Will (i.e. died testate) but:

- the Will fails to name an executor; or
- all executors named in the Will have predeceased the Deceased; or
- all executors named in the Will have renounced their right to act as executors. If this is the case, a ***Notice of Renunciation (Form P17)*** must be obtained from the person(s) renouncing Note: There is no requirement to file same with the probate registry.

In this situation:

- the personal representative (administrator) is appointed by the court pursuant to section 131 of WESA (see below); and
- the Deceased's **assets** are distributed in accordance with the terms of the Will.

Section 131 of WESA sets out the priority of applicants in an application for a grant of administration with will annexed[(1)]. The persons listed below may apply in the following order:

- a beneficiary who applies having the consent of the beneficiaries representing a majority in interest of the estate, including the applicant;
- a person nominated by a beneficiary if that person has the consent of the beneficiaries representing a majority in interest of the estate, including the beneficiary who nominated the person to apply for a grant of administration with will annexed; a beneficiary who applies not having the consent of the beneficiaries representing a majority in interest of the estate;
- any other person the court considers appropriate to appoint, including the Public Guardian and Trustee, subject to the Public Guardian and Trustee's consent.

In other words, if a legatee of a small gift wishes to apply and obtains the consent of the beneficiaries representing the majority of interest of the residuary beneficiaries, that person may apply ahead of the residuary beneficiaries. However, determining the majority interest may be difficult, especially if family trusts exist.

However, if the above criteria for consents cannot be met, section 131(c) of WESA applies and the court may grant administration to any other person the court considers appropriate to appoint, including, without limitation, and subject to the Public Guardian and Trustee's consent, the Public Guardian and Trustee. The explanation for this procedure is set out in the **Web Supplement** (for the link, go to the Estates folder on the accompanying Precedents CD (Estates> Applications> Web Supplement).

Although there is no requirement to file evidence of consent with the application, it is prudent practice to obtain one and to keep it on file (see ***Consents*** – **Pre-Application Documents**).

Note: Most of the forms (see the **Forms** chapter) required to apply for a grant of probate and for a grant of administration with will annexed are combined,

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(1) When a death occurred before WESA came into effect, section 6 of the *Estate Administration Act* applies instead of Section 131 of WESA.

Grant of Administration without Will Annexed

A grant of administration (without will annexed) is applied for if the Deceased did not leave a valid Will (i.e. died intestate).

In this situation:

- the personal representative (administrator) is appointed by the court pursuant to section 130 of WESA (see below); and
- the estate assets are distributed pursuant to Part 3 of WESA (see **Intestacy – Overview** chapter);

In an intestacy, section 130 of WESA sets out the priority of applicants in an application for a grant of administration without will annexed[(1)]. The persons listed below may apply in the following order of priority:

(a) the surviving spouse of the Deceased or a person nominated by the spouse;

(b) a child of the Deceased having the consent of a majority of the children of the Deceased;

(c) a person nominated by a child of the Deceased if that person has the consent of a majority of the Deceased's children;

(d) a child of the Deceased not having the consent of a majority of the Deceased's children;

(e) an intestate successor other than the spouse or child of the Deceased, having the consent of the intestate successors representing a majority in interest of the estate, including the intestate successor who applies for a grant of administration;

(e-1) a person, other than the spouse or child of the deceased person, **nominated** by an intestate successor of the deceased person, if that person has the consent of the intestate successors representing a majority in interest of the estate, including the intestate successor who nominated the person to apply for a grant of administration;

(f) an intestate successor other than the spouse or child of the Deceased, not having the consent of the intestate successors representing a majority in interest of the estate, including the intestate successor who applies for a grant of administration;

(g) any other person the court considers appropriate to appoint, including, without limitation, the Public Guardian and Trustee, subject to the Public Guardian and Trustee's consent.[(2)]

Although there is no requirement to file a copy of the nomination or consent with the application, it is prudent practice to obtain same and to keep them on file (see ***Nomination*** and the ***Consents* – Pre-Application Documents**).

If there are minors or mentally disordered persons beneficially interested in the estate, a security may be required (see **Security** below).

Ancillary Grants

Ancillary grants are applied for when the Deceased had some assets in British Columbia that must be administered by the foreign personal representative but:

- the Deceased resided outside British Columbia;
- most of the Deceased's assets were located in the foreign jurisdiction; and

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(1) When a death occurred before WESA came into effect, section 6 of the *Estate Administration Act* applies instead of section 130 of WESA.

(2) If the application is made pursuant to this sub-section (g) of section 130 of WESA, see ***Web Supplement***.

- a foreign grant was obtained in a jurisdiction other than a jurisdiction prescribed for the purposes of section 138 and Regulation 3 of WESA, being:
  - all provinces and territories of Canada;
  - any member of the British Commonwealth of Nations;
  - any of the states of the United States of America;
  - Hong Kong (Special Administration Region of China);

In these circumstances, in order to transfer and transmit an asset of the Deceased located in British Columbia (especially an interest in land), the foreign grant must be brought to British Columbia as an ancillary grant.

Ancillary grants include:

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

Notes: In the case of ancillary grants (*Re Kaime Estate*, [1938] 3 W.W.R. 224 (B.C.S.C.), the court has a discretion to make an ancillary grant to one of several foreign personal representatives named together in a foreign grant, based on a consideration of the circumstances of the case.

Pursuant to section 139 of WESA, a foreign personal representative who has obtained a foreign grant has the option of appointing an attorney in British Columbia to act on his or her behalf. However, the grant of probate or administration to the attorney will be limited to the Deceased's estate in British Columbia.

When an attorney is appointed by a foreign representative to apply for an ancillary grant, a special ***Power of Attorney*** (see ***Power of Attorney for Foreign Grants* – Forms** chapter**)** must be prepared and signed by the personal representative in favour of the British Columbia resident.

Ancillary Grant of Probate

An ancillary grant of probate is applied for in British Columbia when a grant of probate or equivalent grant was obtained in relation to the Deceased in a jurisdiction other than a prescribed jurisdiction (see above).

In this situation:

- the personal representative in British Columbia is the personal representative appointed in the foreign jurisdiction but the foreign personal representative may be represented by an attorney who will become the applicant (see **Personal Representative** page 8);
- the Deceased's assets in British Columbia are distributed according to the Deceased's Will.

Ancillary Grant of Administration with Will Annexed

An ancillary grant of administration with will annexed is applied for in British Columbia when a Grant of Administration with will annexed or equivalent was obtained in relation to the Deceased in a jurisdiction other than a prescribed jurisdiction (see above).

In this situation:

- the personal representative in British Columbia is the personal representative appointed in the foreign jurisdiction but the foreign personal representative may be represented by an attorney who will become the applicant (see **Personal Representative** page 8);
- the Deceased's assets in British Columbia are distributed according to the Deceased's Will.

Ancillary Grant of Administration without Will Annexed

An ancillary grant of administration without will annexed is applied for in British Columbia when a grant of administration without will annexed or equivalent was obtained in relation to the Deceased in a jurisdiction other than a prescribed jurisdiction (see above).

In this situation:

- the personal representative in British Columbia is the personal representative appointed in the foreign jurisdiction but the foreign personal representative may be represented by an attorney who will become the applicant (see **Personal Representative** page 8);
- distribution of the Deceased's assets in British Columbia will depend on the nature of the assets and a determination of where the Deceased was ordinarily resident.

Resealing of Foreign Grants

Resealing is a procedure whereby a foreign personal representative can register a foreign grant in British Columbia rather than having to apply for an ancillary grant to deal with assets in British Columbia. A foreign personal representative may apply to the court for resealing when:

- a foreign grant was obtained in a jurisdiction prescribed for the purposes of section 138 and Regulation 3 of WESA, being:
  - all provinces and territories of Canada;
  - any member of the British Commonwealth of Nations;
  - any of the states of the United States of America;
  - Hong Kong (Special Administration Region of China; and
- the Deceased had some assets in British Columbia that must be administered by the foreign personal representative.

Resealing involves obtaining the foreign grant from a prescribed jurisdiction, filing it with a probate registry in British Columbia, and having it certified and "sealed" by the Supreme Court of British Columbia.

The information relating to resealing a foreign grant is similar to ancillary grants, although there is a separate application process under Rule 25-6 of the Probate Rules.

Foreign grants from the prescribed jurisdictions that can be resealed are:

- grants of probate (or equivalent);
- grants of administration with will annexed (or equivalent); and

- grants of administration without will annexed (or equivalent).

If the foreign Grant has been obtained in a jurisdiction not recognized for the purposes of section 138 and Regulation 3 of WESA, an **Ancillary Grant** must be applied for.

Notes: Pursuant to Rule 25-6(3), **all** foreign personal representatives named in a foreign grant must be the applicants for resealing of that grant and they must have a single address for service. They cannot be represented by an attorney.

In the case of resealing a foreign grant, you have to use the name of the Deceased as shown in the foreign grant. If the Deceased did own property in British Columbia under a name that does not appear in the foreign grant, then the applicant must apply to the foreign jurisdiction to have the foreign grant reissued to include that name.

However, in certain cases, the Land Title Offices will accept a ***Statutory Declaration,*** (Chapter III C-3) especially in the case of a grant from a foreign jurisdiction, where the first and the last names of the Deceased are inversed (for example: the Hong Kong grant describes Mr. So as "So Ling Chen but his name on Title to the property in British Columbia is "Ling Chen So".)

Resealing of Foreign Grant of Probate

A foreign grant of probate (or equivalent) obtained in relation to the Deceased in a prescribed jurisdiction may be resealed in British Columbia (see above).

In this situation:

- the personal representative in British Columbia is the personal representative appointed in the foreign jurisdiction and cannot be represented by an attorney. If there are several foreign personal representatives, pursuant to Rule 25-6, **all** personal representatives named in the foreign grant must apply for resealing of the grant;
- the Deceased's assets in British Columbia are distributed according to the Deceased's Will.

Resealing of Foreign Grant of Administration with Will Annexed

A foreign grant of administration with will annexed (or equivalent) obtained in relation to the Deceased in a prescribed jurisdiction may be resealed in British Columbia (see above).

In this situation:

- the personal representative in British Columbia is the personal representative appointed in the foreign jurisdiction and cannot be represented by an attorney. If there are several foreign personal representatives, pursuant to Rule 25-6, **all** personal representatives named in the foreign grant must apply for resealing of the grant;
- the Deceased's assets in British Columbia are distributed according to the Deceased's Will.

Resealing of Foreign Grant of Administration without Will Annexed

A foreign grant of administration without will annexed (or equivalent) obtained in relation to the Deceased in a prescribed jurisdiction may be resealed in British Columbia (see above).

In this situation:

- the personal representative in British Columbia is the personal representative appointed in the foreign jurisdiction and cannot be represented by an attorney. If there are several foreign personal representatives, pursuant to Rule 25-6, **all** personal representatives named in the foreign grant must apply for resealing of the grant
- distribution of the Deceased's assets in British Columbia will depend on the nature of the assets and a determination of where the Deceased was ordinarily resident.

ASSEMBLE INFORMATION ON ASSETS

One of the main and most onerous tasks leading to the preparation of the application documents for the various types of representation grants is to determine the nature, description, value, location of, and the title to all assets in which the Deceased had an interest – his/her estate. This task may turn you into a detective. It is important to have an accurate description and valuation of assets in order to prepare the list (or statement) of assets, attached to the various Affidavits of Assets that must be filed (the statement is called ***Statement of Assets, Liabilities and Distribution*** and sometimes also called a "D***isclosure Statement***"). It is necessary again later to transmit the assets to the personal representative and finally to transfer them to the beneficiaries[(1)].

The value of the estate assets is like a frozen picture at the date of death, notwithstanding what happens to the value of the assets after that date. For example, the value of a brokerage account may be $1,000,000 at the date of death, but has fallen to $500,000 a few months later when the valuation of the account is obtained. It is the higher amount (at the date of death) that must be listed in the Disclosure Statement.

Often the client will bring documentation showing the value of the assets, such as bank statements or some other documents confirming the value of the assets. As such documentation is often outdated or incomplete, it is prudent to verify all information obtained from the personal representative. The best way to obtain up-to-date information from the asset holder is to request it in writing (see **Pre-Application Letters** for precedents). The information obtained must be in writing – any telephone advice, for instance, must also be followed up by a letter.

In some instances, the holder of an asset (for example, a bank) is unwilling to provide the applicant (or the law firm) with the requisite information or document (for example, a bank is concerned about privacy or security). In such cases, prepare and file an ***Authorization to Obtain Estate Information*** (***Form P18***[(2)] – (Rule 25-4 (1)). If you do not have all the required information, file the application for a representation grant without the relevant ***Affidavit of Assets and Liabilities*** and at the time of filing the application, file the ***Form P18***[(2)]. The court will return the signed ***Form P18***[(2)]**,** which you then can forward to the party who has refused to

(1) An asset is "transmitted" to the personal representative and "transferred" from the personal representative to the beneficiary.

(2) Or ***Form P27*** in the case of resealing (Rule 25-7(1)

provide you with the information. In due course, when you have received the required information, you can complete the relevant ***Affidavit of Assets and Liabilities*** with the ***Statement of Assets, Liabilities and Distribution*** attached to it and file it with the probate registry. The advantage of this procedure is that you do not have to wait for all the information and can file the application promptly, so as to "get in line" to have your application processed. Obviously, the probate registry will not issue the representation grant until all documentation is complete.

When writing letters to the various holders of assets, it is important that you use a well-worded precedent letter in order to elicit the right information. Unless the questions are clearly stated, the person answering your enquiry may provide you with the value as at the date of correspondence (or some other date) and not as at the date of death. An example would be a Guaranteed Investment Certificate (GIC). Only the balance as at the date of death will be listed as an asset of the estate. The interest between the time of death and the time of the request – which may be substantial – will not be included as an asset of the Deceased because it accumulated after the Deceased's death. Nevertheless, at a later date, such information will be required by the accountants in order to prepare the Income Tax Returns.

We have provided an electronic checklist titled ***Pre-Grant Worksheet*** in **Checklists – Estates – Helpful Information**). Make the necessary changes (delete rows that include any mention of land if there is none and add rows for specific assets). We strongly recommend that it be used it for every estate, no matter how small. As there is no such thing as a typical estate, it is impossible to have a comprehensive precedent checklist encompassing all possible assets of an estate.

ë **Print the *Pre-Grant Worksheet* on coloured paper and place it on top of the relevant sub-section relating to the assets in your file. You can complete it as you receive the information and make notes on it. This will save you a lot of time and rummaging through the file to determine the status of your fact gathering regarding the assets**

When determining the gross value of the estate, it is important to understand that the following assets pass outside the estate (i.e. are not added to the value of the estate):

- assets held jointly [(1)] by the Deceased and another person (which are transferred to the survivor by operation of law) for example:
- real estate held in **joint tenancy**;
- **joint** bank accounts with right of survivorship[(1)];
- Canada Savings Bonds registered in **joint** names;
- securities registered in **joint** names;
- insurance policies on the life of the Deceased that name a **designated beneficiary** (who will be entitled to the insurance proceeds upon death);
- refunds of premiums from a Registered Retirement Savings Plan that names a **designated beneficiary** (they are automatically payable to such beneficiary upon death);
- assets which are subject to the *Family Law Act* and pass directly to the surviving spouse; and so they do not form part of the estate;

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(1) See explanation regarding joint bank accounts in Chapter III B-3 – Appendix to Forms

- assets held by the Deceased in trust for another person;
- unpaid wages and employment and statutory benefits that are payable directly to the surviving spouse, if any, of the deceased worker, free from debts of the deceased worker;
- shares in a private company (see below **Shares, Bonds and Securities**) if the articles of that company allow the shares to be transferred without a representation grant.

We are setting out below the procedure with respect to the most common assets.

ë **When gathering information regarding the assets, familiarize yourself with the requirements to describe such assets in the Statement of Assets, Liabilities and Distribution – see to Forms.**

Real estate

In order to determine the correct legal name in which the property is registered, the legal description and the status of Title, obtain a **Land Title Survey Authority ("LTSA") search**, together with copies of financial encumbrances (i.e. mortgages). It is also prudent to conduct a "name" search through the LTSA to determine whether there are any other properties in which the Deceased had an interest. Both can be done through LTSA or the filing agent with whom your law firm has an account.

At this time, also determine the value of the property at the date of death. Property held in joint tenancy and passing to the survivor(s) is not included in the estate (see **Real Estate**, **Real Property Held in Joint Tenancy** in the Post-**Application Procedure** chapter). As with any other information for the estate, proof of such value must be in writing and may be obtained from:

- BC Assessment Authority (by obtaining a copy of the Assessment Notice for the year of death) or through the LTSA; or
- a real estate agent (a letter is sufficient); or
- a real estate appraiser (by ordering a formal appraisal).

In order to determine the **net** value of real property (or the Deceased's equity in it), also ascertain the balance owing under any financial encumbrance (mortgage, Agreements for Sale or an agreement with respect to a Property or Land Tax Deferment Act Program) **registered** against the property. See **Pre-Application Letters** chapter for:

- ***Letter to Mortgagee (Financial Institution or Private Mortgage Holder)***; and
- ***letter to the Ministry of Finance & Corporate Relations – Land Tax Deferment Act Program***;

Taxes deferred pursuant to the ***Land Tax Deferment Act Program*** (plus interest and administrative fees) must be paid when the property is transferred to a different owner, save and except a qualifying surviving joint tenant. To determine if a person qualifies go to **Government of British Columbia** website ð **Pay or Defer your annual taxes** ð **Defer Your Taxes** or see the link **Defer your Taxes** in **Addresses and Links – Helpful Information**.

If funds are available, the balance owing should be paid right away, as the Ministry will only file a discharge of the Agreement when funds are received, and the process may take some time (see ***Payout Letter Land Tax Deferment Program* – Post Application Letters**).

Banks or Financial Institutions

After obtaining the names and addresses of any banks or financial institutions from the personal representative:

- prepare ***Authorization to Release Information to Law Firm*** (**Pre-Application Documents**) and arrange to have them signed by the personal representative (if not already done so during the initial interview);
- prepare letters to banks and financial institutions (see ***Letter of Enquiry to Bank or Financial Institution* – Pre-Application Letters**) to ascertain:
  - the balances in all accounts or any other investments such as term deposits, Guaranteed Investment Certificates, Treasury Bills, etc.;
  - amounts outstanding under any loans; and
  - whether or not there is a safety deposit box.

Because of the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*, banks and financial institutions no longer release information to law firms on simple demand, but require an originally signed written authorization from the personal representative, a copy of the ***Death Certificate*** as well as a notarially certified copy of the Will. In an intestacy situation, some banks accept the authorization signed by the prospective administrator, but many are reluctant to do so. This when ***Form P18*** and ***Form P27*** (in the case of resealing) ***Authorization to Release Information*** are handy.

Depending on the deceased's circumstances, it is recommended that a search for unclaimed property of the deceased be conducted at:

- Bank of Canada: **www.unclaimedproperties.bankofcanada.ca/app/claim-search**;
- British Columbia Unclaimed Property Society **https://www.bcunclaimed.ca/**

(see explanation "Unclaimed Property" in the Appendix to Forms).

Safety deposit box

There is no requirement under WESA to list the safety deposit box in the ***Statement of Assets, Liabilities and Distribution***. However, it is important to determine:

- whether or not a safety deposit box exists; and
- its contents.

Section 183 of WESA deals with the modalities of opening safety deposit boxes and listing their contents. If a safety deposit box was leased or rented in the name of the Deceased (solely or jointly with another person), nothing can be removed from the box until an inventory of the contents of the box is made in the presence of a representative of the Deceased or the other joint holder of the box and in the presence of the custodian of the bank or trust company where the box is located. All persons present must sign and date the inventory.

Section 183 of WESA permits only the original Will (and any copies) to be removed from the safety deposit box after the inventory has been prepared. Some institutions will also permit the removal of Birth, Marriage, and Death Certificates.

Once the inventory of the contents is prepared, the following copies of the inventory must be kept for 12 months:

- one copy in the safety deposit unless the lease to the box is terminated earlier;
- one copy with the custodian of the bank where the box was located.

Generally, the client will provide the law firm with such listing, but if no listing is available, contact the bank or financial institution to determine if they will allow someone else to be present. A written authorization may be required for such purpose.

Shares, Bonds and Securities

Write letters to each broker to determine the value (as at the date of death) of shares, bonds and other securities (see ***Letter to Broker Requesting Valuation of Securities* – Pre-Application Letters**).

The value of shares in a **private** company is usually determined by that company's accountants. In certain cases, the shares of a company may be transferred without the necessity of obtaining a representation grant. Section 118 of the *Business Corporations Act* ("BCA") provides that a person applying for a **transmission** or **transfer** of shares must provide to the company:

- a ***Declaration of Transmission*** made by a personal representative stating the particulars of the transmission (see ***Declaration of Transmission* – Post-Application Documents**).
- the original (or a court-certified copy) of a representation grant; **or**
- the original (or a court-certified or authenticated copy) of the Will, order or other instrument or other evidence of the death under which title to the shares or securities is claimed to vest.

Simply providing the documents required by section 118 of BCA, despite any **restrictions** on **transfer** contained in the company's articles, is sufficient authority to enable a company or its transfer agent, on application by the personal or other legal representative or trustee in bankruptcy, to register that person (in that person's representative capacity) as the registered holder of the shares or other securities (s. 119 of BCA).

In addition, check if there is a Shareholders' Agreement, which may contain a mechanism for the purchase of shares upon the death of a shareholder.

If the Deceased owned Canada Savings Bonds, to determine their value go online to the **Canada Savings Bonds** website ð **How to Redeem** ð **Rates** ð **Redemption Value Tables** or see **Canada Savings Bonds – Redemption Tables** in **Addresses and Links – Helpful Information.**

Cheques

Return to the issuing party any cheques payable to the Deceased with a request to reissue the cheque payable to "the Estate of ***{Name of Deceased}***" (see ***Letter to the Department of Human Resources Development Canada*** **– Pre-Application Letters**).

Once the cheques are returned made payable to the estate of the Deceased, if the amount is small, they may be deposited to the firm's trust account (to the estate file). When the amount is more substantial, the law firm should open an interest-bearing trust account in the name of the estate and deposit the cheque in it. When other assets of the estate are realized, the funds obtained may be deposited to one of the above accounts.

The alternative is for the personal representative to open an account in the name of the estate at the personal representative's bank. However, some banks will only open an account in the name of the estate after the representation grant has been obtained. Discuss with the personal representative the most convenient procedure regarding cheques, keeping in mind that, no matter who handles the cheques, or any other asset of the estate for that matter, an accurate accounting of the funds will have to be produced when the funds are paid out.

In addition, if any interest is earned in an account under your control, it should be reported to the accountants who are preparing the Income Tax Returns for the estate.

Insurance policies

There is a distinction between insurance policies where the proceeds are payable to a designated beneficiary and those payable to the estate. Only in the latter case are the proceeds included in the ***Statement of Assets, Liabilities and Distribution*** and form part of the assets. Write a letter to the insurance company (see ***Letter to Insurance Company*** **– Pre-Application Letters**) requesting the following:

- the name of the payee (estate or designated beneficiary);
- the amount of proceeds of the policy; and
- the appropriate forms required to deal with the insurance policy;

Motor vehicles

Usually, the personal representative will provide you with the details of any motor vehicles owned by the Deceased, preferably a copy of the Motor Vehicle Registration containing the necessary information.

ë **The Deceased's driver's licence should be cancelled. Advise the personal representative to take the Death Certificate and Driver's Licence to any driver licensing office or send a copy of the Death Certificate and the driver's licence to the ICBC Licensing Unit (see Addresses and Links – Helpful Information)**

Each individual situation requires different documents. The Insurance Corporation of British Columbia (ICBC) provides a comprehensive chart with a checklist showing the requirements for the various scenarios to transfer the licence of a motor vehicle. The checklist can be viewed on the ICBC website (see **ICBC Checklist – Addresses and Links – Helpful Information**).

The most practical and cost effective way to transfer a vehicle is to provide the client with the documentation listed in the checklist (such as a notarially-certified copy of the ***Death Certificate*** and Will – if there is one) and have the client attend at the nearest branch to arrange the transfer.

Before the representation grant is obtained (if an application for same will be made or not yet applied for), ICBC requires that the lawyer for the estate provides ICBC with an undertaking that, when the representation grant is received, the lawyer will send to ICBC a notarially-certified copy of the grant (see ***Letter to the Insurance Corporation of British Columbia*** **– Pre-Application Letters**).

Often, in a small estate situation, the only asset not held jointly is a motor vehicle. Section 18 of the *Motor Vehicle Act* allows the Deceased's motor vehicle licence to be transferred to another party when certain conditions are met. The person seeking the transfer must:

- satisfy ICBC that the aggregate value of the Deceased's estate does not exceed $25,000; and
- provide ICBC with:
  - a copy of the Will (if there is one) and the consent of the beneficiary; or
  - if there is no Will, the consent of all the persons entitled to share in the estate.

Usually, in addition to the copy of the Will (if there is one) the ***Statutory Declaration – Estates less than $25,000*** (**Pre-Application Documents**) is all that is required to satisfy ICBC requirements. It can be mailed with the ***Letter to the Insurance Corporation of British Columbia*** (see above).

Pension Plans, 1Superannuations, Registered Retirement Savings Plans, Registered Retirement Income Funds and Tax Free Savings Accounts

As in the case of insurance policies, only the proceeds of those plans which are payable to the estate (that is, there is **no** designated beneficiary) will be included in the list of assets. It is important to obtain written confirmation regarding the plan, and more specifically, to confirm whether or not there is a designated beneficiary (see ***Letter to Trustee of Pension Plan or Registered Retirement Savings Plan*** **– Pre-Application Letters**).

Registered Education Savings Plans

If the Deceased was the sole subscriber of a Registered Education Savings Plan (RESP), or the last to die of a joint subscriber, it is generally preferable for the funds remaining in the RESP to be acquired by a succeeding subscriber who will assume responsibility for the plan for the benefit of the beneficiaries named.

A succeeding subscriber may be named in the Deceased's Will or within the terms of the RESP. Alternatively, if both the Will and the terms of the plan are silent, the personal representative may be able to arrange for a succeeding subscriber to take over, if desirable. The personal representative should consult a financial advisor given there are several factors which will determine whether the RESP should continue. If there is a succeeding subscriber, then the asset does not form part of the application for the Estate Grant.

If there is no succeeding subscriber available to take over the RESP, then the RESP will be collapsed, and the funds remaining in the RESP will fall into and form part of the residual estate of the Deceased, to be distributed in accordance with the Deceased's Will. In this case, the

personal representative should seek legal advice regarding what amount to include for probate, and whether any accumulated income or government grants deposited to the RESP should be excluded. Specific rules regarding RESPs are beyond the scope of the Guide.

Employment Benefits

If, at the time of death, the Deceased was employed or retired from previous employment, he or she may be entitled to benefits provided by the (former) employer. The personal representative should supply you with information regarding such employment. The benefits must be ascertained as they form part of the assets of the estate (see ***Letter to Employer* – Pre-Application Letters**).

On the other hand, wages owing and accrued to the Deceased for a period of three months prior to death are payable to the surviving spouse of the Deceased, free from debts of the Deceased (see Division 13 of WESA [Deceased Worker Wages])

Income Security Programs (Government of Canada – Canada Pension)

The following benefits under the income security programs (Canada Pension, Employment and Social Development Canada or Old Age Security) may be available:

- lump sum death benefit, which is payable to the Deceased's estate.

  Note: Depending on who applies for the death benefit, there are time limitations as to when the benefit can be applied for (see explanation in **Pre-Application Letters – *Letter to the Department of Human Resources Development Canada (Re: Pension Plan and Old Age Security.)***

- monthly pension payable to the surviving spouse of a deceased contributor; and
- flat rate monthly orphan's benefits provided for the children of a deceased contributor who are under the age of 18 or who are between the ages of 18 to 25 years and in full time attendance at school or university.

There may be other benefits available. You can check the **Government of Canada** website ð **Canada Pension Plan (CPP)** ð **Benefits after Death** or see **Canada Pension Plan Death Benefits** in **Addresses and Links – Helpful Information.**

In most instances, the personal representative will obtain and complete the necessary forms to apply for those benefits, and provide the appropriate Government office with the required documents (such as Birth and Marriage Certificates).

Note: If the Deceased was receiving pension benefits or old age pension, usually a cheque for the month in which he or she died would have been mailed before the end of the month. In general, pension cheques issued for the month in which the Deceased passed away belong to the estate. For example, if the Deceased died on May 5 and a cheque for May was received, that cheque will be included in the assets of the estate. If the Deceased did not cash the cheque, as it is payable to the Deceased and he or she is no longer able to cash it, it must be re-issued and the name of the payee changed to "Estate of ***{name of the Deceased}***".

If, subsequently, another cheque arrives in June, it should be returned because neither the Deceased nor the estate is entitled to it.

Small estates

Applying for a representation estate grant is a costly and time-consuming procedure. Therefore, whenever possible determine if assets can be transmitted and transferred without the expense of applying for a representation grant. However, there is **no** provision under WESA waiving the requirement for an application for a grant for a small estate (under $25,000), as was formerly the case under section 20 of the old *Estate Administration Act*.

Keep in mind that it is the supervising lawyer (not the legal assistant) who decides whether or not a grant is applied for.

Basically, the guiding rule to determine the requirement for obtaining a representation grant is to ascertain whether the holders of the assets require a copy of the grant in order to transfer an asset. If any asset forming part of the estate cannot be "brought in" or transferred without providing a copy of the grant to the regulatory body which governs the transfer or the redemption, then you will need to apply for the grant. In some circumstances there may be no need to apply for a representation grant, such as if the estate consists only of:

- a small bank account and there is a Will and only one beneficiary. In this situation, the bank may consent to transfer these funds to the beneficiary without a grant – usually, they will requite an indemnity. It is worth calling the bank manager and discussing this;
- shares in a private company that may be transferred without obtaining a representation grant and there is no other asset that requires a representation grant to be transmitted to the personal representative or transferred to a beneficiary;
- a motor vehicle if the estate does not exceed $25,000 in value (s. 18 of the *Motor Vehicle Act*) (see above);
- Canada Savings Bonds up to specified amounts – check the Bank of Canada website or call them (see **Addresses and Links – Helpful Information**).

Whether or not an estate grant is applied for, assets held in joint tenancy can be transferred to the survivor(s) and any insurance policy or R.R.S.P. can be transferred directly to the designated beneficiary before applying for a representation grant.

On the other hand, even in the case of small estates, a representation grant will be necessary if the holder of an asset, or the circumstances, require such a grant. For example:

- if real property is one of the assets (no matter how small the value), a representation grant **must** be obtained as the Land Title Survey Authority will not transmit any real property without a copy of the grant;
- if the estate will be a party to a lawsuit and a personal representative must be appointed.

ASSEMBLE INFORMATION ON DEBTS AND LIABILITIES

One of the primary duties of the personal representative is to determine and pay the debts of the estate (provided sufficient funds are available to do so). You will need to determine the nature, description and status (whether paid or unpaid) of all of the debts of the Deceased. This is very important as the personal representative is personally liable for debts incurred with respect to the death (such as funeral expenses) and may be personally liable for the debts of the Deceased to the extent of the assets coming into the personal representative's hands.

The personal representative should provide you with information regarding the debts and liabilities of the Deceased. These debts are in addition to the debts registered against assets as set out above (for example mortgages registered against real property or loans registered against a motor vehicle) and may include:

- funeral expenses;
- debts that are payable immediately (such as utilities, amounts owing pursuant to credit cards, etc.);
- income taxes;
- contingent liabilities, such as guarantees and pending law suits;
- continuing liabilities such as spousal and child maintenance or amounts owing under a mortgage or a loan.

Note: In an application for a grant of administration without will annexed, notice must be given to the creditor whose unpaid debt is in excess of the amount of $10,000 (see the **Notice** chapter).

PUBLISH NOTICE TO CREDITORS AND OTHER CLAIMANTS

In order to determine who may have a claim against the estate – or possible creditors – the personal representative **may** publish a Notice to Creditors and Other Claimants in the BC Gazette.

The Notice must state that the creditors and other claimants are required to present their claims against the estate of the Deceased to the personal representative within a specified period of time, which must be at least 30 days from the date of publication.

For precedents and more explanation: see:

- ***Notice to Creditors and Others*** (**Pre-Application Documents**) for the Notice itself; and
- ***Letter to BC Gazette (Re: Publication of Notice to Creditors and other Claimants)*** (**Pre-Application Letters**).

Despite the fact that such publication is optional (section 154 of WESA), it is considered prudent to do so in order to protect the personal representative from any future claims that creditors or other claimants may make after the estate has been distributed. In the case where the lawyer is the executor, it is recommended that the Notice be published.

The personal representative of a Deceased is not liable for any claim against the Deceased's estate if the claim was not presented to the personal representative within the period specified in the notice.

After the expiration of 30 days from the date of publication of the Notice and after the Deceased's estate has been distributed, creditors who have a valid claim against the estate may try to recover their debt from the persons who have received the assets of the estate. The difference is that if the personal representative does not advertise for creditors, he or she may be personally liable to the beneficiaries for any successful claim.

Note: The limitation period for a debt is two years under the new *Limitation Act*, S.B.C. 2012, c. 13, which came into force on June 1, 2013. It used to be six years, which may still apply under the transition rules. Google "limitation transition flow chart" or see **Limitation Transition Flow Chart** in **Addresses and Links - Helpful Information.**

LIMITATION DATES FOR INCOME TAX RETURNS

Diarize the following limitation dates soon after opening the file. Note that there will be other dates to diarize once the representation grant has been issued.

ë **Unless you are a C.P.A. or a C.A., or have some special training in accounting or the income tax field, it is not advisable to attempt the preparation and filing of the Income Tax Returns. This task should be referred to an accountant (after asking the client for instructions).**

Suggest to the client to consult an accountant to determine the dates relevant to the particular estate being worked on. Basically, the following Income Tax Returns may be required:

- **T1 Returns not previously filed** for any taxation year prior to the year of death. The Return for the year prior to the year of death is due on April 30 or six months after the date of death, whichever is later. If the Deceased has not filed the Return for the previous year and the date of death is after May 1st, the Return should be filed as soon as possible.
- **Final T1 Return** for the year of death covering the period January 1st to the date of death. This Return must be filed on or before the later of six months after the date of death or April 30 of the year after the date of death.
- **T3 Estate** Return covering income received from the assets administered – 90 days after the Estate Year End (Estate Year End is any period elected up to twelve months ending within one year of death of the Deceased).
- In the year of final distribution to the beneficiaries, a T3 Return – 90 days after Final Distribution – for the period beginning on the date the T3 Estate Return has been filed to date of distribution (called a T3 Final Distribution Return).

The last two T3 Returns may be combined if the estate administration is completed within the first year after the Deceased's death.

If the estate is small, the T3 Returns may not be necessary and the income earned may be "taken over" by the beneficiaries receiving the assets of the estate. Such income will be reported as income of the beneficiaries and taxed in their hands.

SECURITY

An administrator may be required to provide the court with a security for the performance of the administrator's duties in the case of a grant of administration without will annexed.

Security is a collateral or guarantee for the performance of the administrator's duties as administrator of the estate of an intestate deceased, which is posted by the administrator at the

direction of the Public Guardian and Trustee and as ordered by the court. Under the EAA, it was known as a "bond".

Under section 128 of WESA, no security for the administration of an estate is required to be provided by an applicant for a grant of administration unless:

- a minor or a mentally incapable person without a nominee who has authority to represent the mentally incapable person in estate matters is interested in the estate; or
- the court, on application by a person interested in the estate, requires security.

The Public Guardian and Trustee's preferred form of security is a **bond**. However, it is one of the most onerous and complicated securities.

A bond is an insurance agreement whereby the administrator (as principal) and an insurance company (as surety) guarantee to a third party (in this instance, the court) the performance of the administrator's duties. A bond may be applied for through an insurance broker (or agency), who will instruct the insurance company on the bond's requirements. The cost of the insurance premium for the bond is usually paid out of the assets of the estate.

In the unlikely event that the administrator defaults and the insurance company is required to pay the expense to have the duties completed, the insurance company will look to the administrator to recover its losses. Therefore, prior to issuing the bond, the insurance company will want to be assured that the administrator is bondable that is s/he has sufficient assets from which the insurance company can look to be reimbursed.

If a bond is inappropriate and too onerous, the applicant should contact the Public Guardian and Trustee to discuss an alternate form of security. In certain circumstances, rather than recommending a bond, the Public Guardian and Trustee may recommend another form of security, such as a restriction on the ability of the administrator to sell real property or to access an investment which forms the minor's share – or the share of a mentally incapable person without a nominee, such as a bank account.

In order for the restrictions to be effective, the administration grant will have to include the wording of the restriction and a notation that the court order will be registered as a charge against the real property pursuant to section 284 of the *Land Title Act.* The registration would create an injunction which restricts dealings with the real estate property and would appear on title searches. The application to register the court order with the Land Title Survey Authority is made by way of a Form 17 and must be accompanied by a court-certified copy of the court order.

When the property is being sold, arrangements will have to be made, before completing the sale, to pay its proceeds to the estate lawyer who, in turn, will have to give his or her written undertaking to the Public Guardian and Trustee to pay the net sale proceeds to their office, in trust for the minor.

Once this arrangement is in place, the Public Guardian and Trustee will provide a letter to the estate lawyer for submission to the Land Title Survey Authority stating that the Public Guardian and Trustee do not object to the restriction on title being lifted. This will enable the registration of the conveyancing documents.

PROPOSED DISTRIBUTION OF ASSETS

The other step, just as important, is to determine how the assets of the estate will be distributed.

If there is a Will, the assets will be distributed pursuant to the Will (see the **Notice** chapter for a discussion of beneficiaries and contingent beneficiaries).

If there is no Will – there is intestacy – the assets will be distributed pursuant to Part 3, Division 1 of WESA (see **Intestacy – Overview**). In case of intestacy, if there is a spouse and children and a matrimonial home, the issue of the matrimonial home is dealt separately in the **Spousal Home** chapter.

The ***Statement of Assets, Liabilities and Distribution*** does not contain the distribution scheme. For that reason, we have prepared separate ***Statements of Distribution***, one for a situation where there is a Will, and one in the case of intestacy (see ***Statement of Distribution* – Checklists – Helpful Information**). Complete the appropriate ***Statement of Distribution*** and have it signed by the applicant when the other application documents are signed.

Even if there is a Will, the distribution of the assets may be affected by the following:

- **Revocation of gift or appointments**[(1)]: a gift to a spouse may be revoked if the marriage was dissolved or the spouses cease to be spouses after the gift was made (see **Wills · Precedent Clauses – Bequests**) unless the Will specifically states that it is made in contemplation of such dissolution or separation. However, the Will is still valid (section 56 of WESA or section 16 of the *Wills Act*).
- **Gifts to Witnesses**[(1)]: a gift to an attesting witness (or the spouse or children of the attesting witness) is void if the witness was one of the two witnesses to the Will (section 43 of WESA and section 11 of the *Wills Act*).
- **Lapsed or Adeemed Gifts**[(1)]: a specific gift to a beneficiary who has predeceased the Will-Maker or refuses the gift **lapses** unless an alternate beneficiary is named (see section 46 of WESA and section 21 of the *Wills Act* for alternate distribution of such gift). On the other hand, if the gift in the Will no longer exists, the gift is said to **adeem** – in other words, it fails. If the Will-Maker disposed of the specific gift himself or directed that a nominee (or agent) dispose of the gift on his or her behalf while the Will-Maker had the capacity to do so, then the gift adeems. However, the sale of such property by the Will-Maker's nominee during the Will-Maker's lifetime but without the Will-Maker's knowledge or consent or at a time when the Will-Maker was incapable does not constitute an ademption and the beneficiary is entitled to the value of the property.

Notes:

- Under Part 2 of WESA, when two or more persons die in a common disaster, it is presumed that each survived the other or others (see **Survivorship –Overview**).
- Persons convicted of murder or manslaughter are not allowed to profit from their crime and, accordingly, are barred from inheriting the property of their victims. The *Criminal Injuries Compensation Act* may entitle the dependants of the victim to compensation.

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(1) A more detailed explanation of this subject is found in **Wills and Will-Makers – Overview** under the same title.