
❧ **DISPENSING WITH NOTICE** ❧

Background

Sometimes, a person who is entitled to Notice pursuant to Section 121 of WESA cannot be located. The missing person may be ⁽¹⁾:

- a spouse;
- a child of the Deceased;
- a beneficiary named in the Will;
- a person who is entitled to receive all or part of the estate of a person who dies without a will;
- a person named as executor or alternate executor in the Will (with prior or equal right to the applicant) who is still alive and who has not renounced and does not join in the application;
- a person who would have been an intestate successor if the Deceased had not left a Will or an intestate successor if any gift in the Will lapses;
- in the case of administration without will annexed, a creditor of the deceased, if any, whose claim exceeds \$10,000:

In such case, it may be necessary to apply to the court to vary the requirements for Notice set out in subrule 25-2(14). If no prejudice would result to the personal representative or to anyone else, a court may:

- vary the classes of persons to whom the applicant must deliver Notice; or
- dispense with the requirement to deliver Notice to one or more people who are entitled to Notice, save and except the Public Guardian and Trustee (for example, if a person entitled to Notice cannot be located).

The applicant will have to disclose in an Affidavit his or her efforts to locate the missing person in support of the application for such an Order.

The supervising lawyer should advise the applicant of the steps to take in order to locate the missing person. For example, the applicant may try the following:

- conduct a search on the internet (Google, Canada 411, or a name search);
- check the telephone directory(ies) in the city where the missing person is believed to have last resided;
- enquire of relatives, friends and acquaintances of the Deceased as well as those of the missing person;
- advertise for the missing person in a newspaper circulating in the location where the missing person is believed to have resided;

⁽¹⁾ For a detailed list of the persons entitled to Notice pursuant to S. 121 of WESA, see chapter III B-2 – pages 6 and 7.

- search through Facebook and other social media;
- engage the services of a private detective or skip tracer;
- search Vital Statistics Registry; or
- search the Deceased's personal papers and records for any information concerning the missing person.

Of course, the circumstances will vary with each situation.

Procedure

After all efforts to locate the missing person have proved unsuccessful, an Order dispensing with Notice may be sought. In other words, the Court may order that it is not necessary to deliver the Notice to the missing person or persons. This is done before the application documents are filed.



When preparing documents below, delete all text between { } as it is only instructions to the drafter.

1. Prepare *Form 109 – Affidavits*

The Affidavits in support of the Order sets out the circumstances of the missing person and the efforts made to locate such person.

If there are several applicants, it is only necessary for one of them to swear this Affidavit and paragraph 2 should read: "I am one of the applicants..."

The facts in the Affidavit of applicant described in the example below are suggestions only. The supervising lawyer should review the file and decide what information should be included in the Affidavit to support a claim for an Order dispensing with Notice to the missing person.

Describe in detail the circumstances of the person's disappearance. The supervising lawyer should obtain this information from the applicant, and dictate the facts, for example:

- when the person was last seen by the applicant, or a family member of the Deceased;
- when the applicant (or a family member) was last in contact with the missing person and the circumstances of such contact;
- when the person left the city/province/country.

Sometimes, two or more Affidavits may be necessary, one by the applicant setting out the family circumstances, or the explanation as to why the missing person cannot be found; and another by the paralegal or lawyer setting out the efforts to locate the missing person.

To give the Court a clear picture of the situation, it may be useful to attach to this affidavit the following exhibits:

- copy of the Will (if there is one);
- draft of *Form P2 – Submission for Estate Grant*; and

- draft of the *Statement of Assets, Liabilities and Distribution* ⁽¹⁾.

Arrange for the Affidavits to be sworn by the applicant and any other affiant and ensure that all exhibits referred to therein are properly attached.

2. Prepare *Form 35 - Order*

Prepare the *Order* (see example below), have it signed by the supervising lawyer and attach to the *Order* a *Backing Sheet* (see chapter **Wills – Documents**).

Note: There are two forms of Order shown below:

- one shows the Order prepared without hearing; and
- one shows the Order prepared when there is a hearing (see below “Setting down the matter for Hearing”)

3. Prepare *Form P41 – Requisition*.

Prepare the *Requisition No. 1* (see example below). If you require a Court-certified copy of the Order, insert the words “Court-certified copy of the Order required” after the word “Required”.

Have the *Requisition* signed by the supervising lawyer.

4. File documents with the probate registry

When the above documents have been finalized, file them with the probate registry. Keep in mind that, if the Court is not satisfied with the explanation and the documents submitted, the Court may request a further affidavit or additional documents or request that the matter be set down for hearing (see below).

5. Refer to the Order in Form P2 – Submission for Estate Grant

When you receive the Order, insert the description of the Order in paragraph 7 of *Form P2 – Submission for Estate Grant*, second option:

“In addition to the documents described elsewhere ...

- (i) Order dated *{date}* dispensing with Notice on *{name(s) of missing person(s)}*.

and proceed to finalize and file the application documents in the usual way.

⁽¹⁾ For the preparation of these documents, see chapter III B-3 – **Forms**.

SETTING THE MATTER FOR HEARING

In some instances, when the application to dispense with notice has been filed and reviewed by the court registry, the adjudicator or the duty master may not be satisfied with the material submitted and will request that the matter be “spoken to” or set for hearing.

In such case, you will have to prepare and file a **Form 32 -- Notice of Application** and set the matter down for hearing.

The instructions set out below for the preparation of a **Notice of Application** relate to estates only and are not meant for other applications.

Procedure

1. In addition to the **Requisition No. 1**, the **Affidavits** and the draft **Order** that have already been filed, in order to set a matter down for hearing, you will have to prepare:
 - (a) **Form 32 – Notice of Application;**
 - (b) **Application Record;**
 - (c) **Application Record Index.**
2. When preparing the **Notice of Application**, obtain a date from the lawyer who will be attending at the hearing and diarize the hearing date and time using your office procedure for diary reminders.
3. Arrange to have the **Notice of Application** signed by the lawyer.
4. When the **Notice of Application** has been prepared and signed, file it with the Supreme Court Registry where the original documents were filed.
5. Diarize the dates one week before the date the **Application Record** may be filed (see below);
6. Prepare the **Application Record** and the **Application Record Index**:
 - (a) Prepare two three ring binders – one for the court and one for the lawyer;
 - (b) Put the **Application Record** in the front of the binder. Suggestion: use binders that have a plastic sleeve on the cover.
 - (c) Assemble copies of all documents that are already filed;
 - (d) Separate each document with a numerical tab (see **Application Record Index**);
 - (e) Prepare an extra copy of the **Notice of Application** and, if there are several Orders sought, highlight Part 1 – Order Sought – of the **Notice of Application** with a yellow highlighter to indicate which Order will be spoken at the hearing.

File the **Application Record** and the **Application Record Index** with the court registry:

- no earlier than 9:00 a.m. three clear business days before the date set for hearing; and
- no later than 4:00 p.m. on the business day that is one full business day before the date set for the hearing.

For example: if the matter is set for hearing on a Friday, the window for filing the **Application Record** is between 9:01 a.m. on a Tuesday and no later than 3:59 on a Wednesday.

Notes: If the **Application Record** is not filed by 4:00 p.m. on the business day that is one full day before the date set for hearing, the application will be struck from the hearing list.

If the application is struck from the hearing list and the hearing has to be adjourned (temporarily cancelled) and you do not have a future date, prepare and file a **Form 17 – Requisition – General (Requisition No. 2)** until you have a more convenient date or if you know a specific date

To reset the hearing to a later date when you have a new date for the hearing, prepare and file another **Form 17 – Requisition – General (Requisition No. 2)** setting out:

- the new time and date of the hearing;
 - the relief sought – in one paragraph;
 - estimate of the time;
 - whether or not the matter is or is not within the jurisdiction of a master.
7. If approved, the master will sign in the box headed “To be completed by the court only:” either:
 - Approving the terms of the Order as requested; or
 - Setting out the variations and additional terms which is unusual in this case).
 8. When the Order is approved, a signed and filed original will be picked up by the agent (that is why the backing is very important) and returned to your office.
 9. If the Order is not approved, you will receive a stamped copy of the order.

AFFIDAVIT**FORM 109**

This is the *{1st/2nd}* Affidavit of *{Name}* in this case and was made on *{date}*

No. _____
*{Location}*Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the Estate of *{NAME OF THE DECEASED}*, Deceased

AFFIDAVIT

I, *{NAME OF APPLICANT}*, *{occupation}*, of *{residential address}*, in the *{City}* of _____, in the Province of British Columbia, **SWEAR/ AFFIRM THAT:**

1. I am the prospective applicant for *{name of estate grant}* in relation to the estate of the deceased and *{a son/daughter/nephew}* of the Deceased.
2. The Deceased died intestate/The Deceased left a Will dated *{date}* (the “Will”) in which he appointed me as the Executor *{one of the Executors, the alternate Executor}* of it. Attached hereto as Exhibit “A” is a copy of the Will.
3. The following are the beneficiaries under the Will of the Deceased:
 - (a) *{list the names of the beneficiaries and their relationship to the Deceased};*
4. The following are the intestate successors of the Deceased *{if the Deceased has not left a Will}*:
 - (a) *{list the names of the intestate successors and their relationship to the Deceased};*
5. The estimated gross value of the estate is \$ _____ and it consists of:
 - (a) *{list the main assets and their estimated value};*

{optional} and attached hereto as Exhibit A is the Statement of Assets, Liabilities and Distribution.
6. I have not mailed a copy of the Form P1 – Notice of Proposed Application in Relation to Estate (the “Notice”) *{if there is a Will, add “and a copy of the Will”}* to *{name of the missing person}* who is *{describe why the missing person is entitled to Notice – see above}* because, despite numerous efforts, I have been unable to contact *{him/her}* or obtain *{his/her}* address.

- 7. *{describe in detail the circumstances of the person’s disappearance}*.
- 8. I have made the following efforts to locate *{name of the missing person}* ...
 - (a) *{describe the efforts}*
- 9. I swear this Affidavit in support of my application for an Order dispensing with delivery of the Notice to *{name of the missing person}*.

SWORN/AFFIRMED BEFORE ME at the)
 {City} of _____, Province of British)
 Columbia, this ___ day of _____, 20___)
)
) _____)
) *{NAME OF APPLICANT}*
)
) _____)
) A Commissioner for taking Affidavits)
) in British Columbia)

REQUISITION NO. 1**FORM P41 (RULE 25-14(1))**

No. *{Number}*
{Location} Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the Estate of *{NAME OF THE DECEASED}*, Deceased

REQUISITION – ESTATES

Filed by: *{NAME OF THE APPLICANT}*

Required: *{Court-certified copy of the Order required}*

1. The rule or other enactment relied on is 25-2(14).
2. Attached to this requisition is a draft of the Order required.
3. The evidence in support of the application is:
 - (a) Affidavit of *{name of applicant}* made *{date}*;
 - (b) copy of the Will of *{name of the Deceased}* dated *{dated}*;
 - (c) *{describe any other attachments}*.

This requisition is filed by *{NAME OF THE APPLICANT}* whose address for service is as follows:

Street address for service:	<i>{address of law firm}</i>
Fax number address for service (if any):	<i>{fax No. of law firm}</i>
E-mail address for service (if any):	<i>{e-mail address of supervising lawyer}</i>
Telephone number:	<i>{tel. No. of law firm}</i>

Date: *{date}*

Signature of
 filing person
 lawyer for filing person

ORDER

FORM 35 (RULES 8-4(1), 13-1(3) AND 17-1(2))

No. {Number}
{Location} Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the Estate of {NAME OF THE DECEASED}, Deceased

ORDER MADE AFTER APPLICATION

BEFORE	}	◆ THE HONOURABLE JUSTICE ◆ or AJUDGE OF THE COURT or ◆ ASSOCIATE JUDGE or AN ASSOCIATE JUDGE OF THE COURT	}	{dd/mmm/yyyy}
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{Insert this paragraph if the Order is without hearing:}

ON THE APPLICATION of the Applicant, {NAME OF THE APPLICANT}, without notice and without a hearing and on reading the materials filed by {NAME OF LAWYER};

{Insert this paragraph if the Order is after a hearing:}

ON THE APPLICATION of the Applicant, {NAME OF THE APPLICANT}, without notice and on hearing {NAME OF LAWYER}, lawyer for the Applicant;

THIS COURT ORDERS that it is not necessary to mail the Notice required by section 121 of the *Wills, Estates and Succession Act* to {name of missing person} {describe the relationship of the missing person, for example: a beneficiary under the Will of the Deceased, a nephew, etc.}

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of
 party lawyer for the Applicant

{NAME OF LAWYER}

BY THE COURT

Registrar

NOTICE OF APPLICATION

A *Notice of Application* is used to set down an application for hearing and to obtain an Order.

The regulations with respect to the *Notice of Application* state that it must:

- not exceed 10 pages in length (not counting the pages of the above Order);
- set out the orders sought;
- attach a draft of the order sought (see above Order);
- briefly summarize the factual basis for the application. The facts should be summarized from the Affidavits;
- Insert the legal basis that is the rule or other enactment relied on which should be copied from *Form P41 – Requisition* that has already been filed;
- list the affidavit(s) and any other documents that have already been filed – they should not be attached again;
- set out the lawyer’s estimate of the time the application will take for hearing as well as the time and date of the hearing.
- provide the data collection information required in the appendix to the form (Note: this section is left blank).

To complete the first paragraph: check with the supervising lawyer to determine a suitable date and insert it. As the application is without notice, it can be any date. It has to be away at least _____ days. The time is always 9:45.

The other way if the matter is urgent is: nothing is filed – the lawyer has all the original documents and goes to court and files the documents and then waits to be heard. This is not a preferred way of the court.

The procedure to handle the preparation and filing of the *Notice of Application* is set out on page 9.

NOTICE OF APPLICATION**FORM 32 (RULE 8-1(4))**

No. *{Number}*
{Location} Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the Estate of
{NAME OF THE DECEASED}

NOTICE OF APPLICATION

{Rule 22-3 of the Supreme Court Civil Rules applies to all forms}

Name of applicant: *{NAME OF APPLICANT FOR GRANT}*

TAKE NOTICE that an application without notice will be made by the applicant to the presiding judge or master at the courthouse at *{address of registry in which the proceeding have been started}* on *{day/month/year}* at **9:45** for the order set out in Part 1 below.

PART 1: ORDER(S) SOUGHT

1. *{copy the wording from the Order below}*

PART 2: FACTUAL BASIS

1. *{Summarize the reason why the missing person cannot be located and the efforts made to locate the missing person. Most of the facts should be summarized from the Affidavit previously filed}.*
2. ◆

{Examples of the facts to be included: }

1. The relationship of the applicant to the Deceased;
2. The date and place of the Deceased death;
3. The date of the Will (if there is one) and description of its contents:
 - (a) Who was appointed as executor;
 - (b) Who were the beneficiaries and their relationship to the Deceased;
 - (c) If there were any specific bequests and their nature;
 - (d) The Deceased's family situation (married, children, etc.) and who would be the Deceased's intestate successors;

4. Summary description of the Deceased's Assets or attach a copy of the Affidavit of Assets and Liabilities if too lengthy;
5. Efforts made by the Deceased (see the applicant's Affidavit);
6. Instructions given to the law firm to locate the missing person.

PART 3: LEGAL BASIS

1. Rules 1-3, 8-2 and 25-2(1) and (14) of the Supreme Court Civil Rules.

PART 4: MATERIAL TO BE RELIED ON

{Using numbered paragraphs, list the affidavits served with the notice of application and any other affidavits and other documents already in the court file on which the applicant(s) will rely. Each affidavit included on the list must be identified as follows Affidavit No.{sequential number, if any, recorded in the top right hand corner of the affidavit} of {name} made {dd/mmm/yyyy}"}.

1. Form 109 – Affidavit No. _____ of *{name of applicant}* made *{date}* and filed in these proceedings.
2. Form 109 – Affidavit No. _____ of *{name of solicitor/paralegal}* made *{date}* and filed in these proceedings.
3. ◆

The applicants estimates that the application will take *{time estimate} {usually, 10 minutes}*.

{Check the correct box and delete the statement that is not applicable.}

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

{Leave the text below despite the fact that the application is without notice}

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

-
-
- (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated: *{month/day/year}*

Signature of

applicant lawyer for applicant

{Type or print name}

To be completed by the court only:

Order made

- in the terms requested in paragraphs *{specify}* of Part 1 of this notice of application
- with the following variations and additional terms:
1. ◆
 2. ◆

Dated: *{month, day, year}*

Signature of Judge Master

APPENDIX

{The following information is provided for data collection purposes only and is of no legal effect.}

THIS APPLICATION INVOLVES THE FOLLOWING:

{Check the box(es) below for the application type(s) included in this application.}

{Leave blank}

- document discovery
- oral examination for discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders
- experts

APPLICATION RECORD

FORM 32 (RULE 8-1(4))

No. *{Number}*
{Location} Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the Estate of
*{NAME OF THE DECEASED}***APPLICATION RECORD****(DISPENSE WITH NOTICE TO BENEFICIARIES)***{NAME OF LAW FIRM}***Barristers and Solicitors***{Address}*

Telephone: _____

Fax: _____

{NAME OF LAWYER}

Lawyer for the Applicant

{date, time and location of hearing}

Time estimate _____

Application Record Provided by: Lawyer for the Applicant

APPLICATION RECORD INDEX

FORM 32 (RULE 8-1(4))

No. *{Number}*
{Location} Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the Estate of
{NAME OF THE DECEASED}

APPLICATION RECORD INDEX

TAB	DATE FILED	DOCUMENT
1.		Notice of Application dated _____
2.		Form 109 – Affidavit No. _____ of <i>{name of applicant}</i> made <i>{date}</i> and filed in these proceedings.
3.		Form 109 – Affidavit No. _____ of <i>{name of lawyer/paralegal}</i> made <i>{date}</i> and filed in these proceedings.
4.		

REQUISITION NO. 2**FORM 17**
(Rule 23-1(9))No. *{Number}*
{Location} Registry**IN THE SUPREME COURT OF BRITISH COLUMBIA**In the matter of the Estate of *{NAME OF THE DECEASED}*, Deceased**REQUISITION – GENERAL**Filed by: *{NAME OF APPLICANT}*

Required:

To reset the hearing of the Notice of Application without Notice filed *{date}* to 9:45 a.m.
on *{date}* at *{address of courthouse}*.

The applicant is seeking to dispense with Notice to beneficiaries/intestate successors.

The applicant estimates that the Application will take ten minutes.

Thus matter is within the jurisdiction of the Master.

Dated *{date}*_____
Signature of *{name of lawyer}*
Lawyer for filing party