British Columbia Probate Kit

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Note: Laws change frequently or without notice so the probate and administration forms may be updated from time to time to ensure compliance with laws and regulations. Please click the "Check for Updates" link on the CD that came with this book before you proceed to see if there is anything new of which you should be aware.

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Probate and estate administration is a complicated area and it is especially challenging since the legislation is continually changing. I hope I have demystified some of the procedures involved. It is a practice area I enjoy and work in every day.

Good luck!

Mary-Jane Wilson

Introduction: An Overview of Probate and Administration

Probate is the act of having the court legally establish that a will is valid. The will in your possession may look like a valid will but various banks and registries (e.g., land title, motor vehicle) will want the Supreme Court of British Columbia to validate it, meaning, the executor (the person named to perform the deceased's last wishes) will need to probate the will.

If the deceased's estate is more complicated, contentious, or you do not have enough time, you should consider retaining the services of a lawyer. However, if the estate is uncomplicated, and you have the time, you may want to tackle the paperwork necessary to obtain probate yourself.

This book will guide you through the probate and administration process whether you decide to take on the job yourself or hire a lawyer to assist you.

If the deceased left a will naming an executor, the executor will go through the probate process where necessary and obtain a grant of probate. If the deceased left no will, an administrator must be appointed and a grant of administration without will annexed must be obtained. If there is a will, but there is no executor appointed, the named executor has died, or is unwilling or unable to act and there is no replacement executor named in the will, an administrator

must be appointed and a grant of administration with will annexed must be obtained. An administrator performs a similar role to the executor of a will, but where there are no instructions in a will, the administrator must distribute the estate of the deceased according to the rules laid down by the *Estate Administration Act* [RSBC 1996, Chapter 122] if the deceased died prior to March 31, 2014, or the *Wills, Estates and Succession Act* (WESA) [RSBC SBC 2009, Chapter 13] if the deceased died on or after March 31, 2014.

Many people believe that if there is no will, the estate of the deceased goes to the government, but that is not always the case. WESA outlines who will receive the deceased's estate and it will go to the government only if there are no descendants prior to the fifth degree of relationship (e.g., a grandniece).

The procedure to apply for a grant of administration is similar to that of a grant of probate, but consents must be obtained from those who have a greater or equal right to apply to act as administrator in certain situations, and in certain cases a bond is required to be posted by the administrator to ensure that once he or she is appointed the assets are protected.

If there is a will, the will-maker chose his or her executor, a trusted individual, so the court does not require a bond to be posted in this case.

All wills do not need to be probated and all estates do not need to be administered. In British Columbia, estates worth more than $25,000 require probate, but there are certain exceptions. Often the deceased holds assets jointly with someone else or appoints designated beneficiaries under life insurance policies, Tax-Free Savings Accounts (TFSAs), Registered Retirement Savings Plans (RRSPs), or Registered Retirement Income Funds (RRIFs). These types of assets are not included in the deceased's estate. They pass to the survivor or beneficiary by operation of law. Many couples will hold all their assets this way so when one of them dies, no probate or administration is required.

If the assets held in the deceased's name are worth more than $25,000, probate or administration will usually be required. For example, if the deceased held a vehicle in his or her name with a value of $15,000 and also had a bank account with $15,000, the value of the estate is $30,000 and it will require probate. However, in certain situations, financial institutions will not require probate if the

bank balance is more than $25,000, provided that the executor signs a letter of indemnity. This is often a standard bank form. The letter of indemnity will outline that if the financial institution is wrong in recognizing that the will is valid and pays the bank balance to you in error, you will indemnify the bank or pay back the money you were paid in error.

Banks have different thresholds for using the letter of indemnity. If the deceased was a regular client, and had an excellent relationship with his or her banker, then the financial institution is more likely to use the letter of indemnity. Some financial institutions will insist on probate of the will if the value of the bank account is more than $25,000, even by $1,000. If there is no will, it is unlikely that the financial institution will pay out the bank balance without a grant of administration.

If the only asset is a piece of land and it is worth less than $25,000, the Land Title & Survey Authority of BC will insist on probate of the will or administration if there is no will. For example, if the deceased's only asset was 10 percent of a piece of property in British Columbia worth $150,000, the value of the estate is $15,000 (less than the $25,000 threshold), but probate is still required.

The probate registry is very particular about the documentation filed with it. Remember, the will is the last word of the deceased, so the paperwork must be in order. The executor or administrator must be very careful to ensure everything is accurate and pay close attention to every detail.

If you are appointed as an executor under a will, or you are considering applying to become the administrator of the deceased's estate, you should review Chapter 3 on the responsibilities of the personal representative, before deciding to take on the role. It may be an honour to be appointed as an executor or you may feel some responsibility to apply to be an administrator, but be advised that acting as an executor or an administrator can be very challenging, and you should only take on this responsibility knowing that the task will be time-consuming and stressful. Once you begin the process of dealing with the estate assets, you are legally bound to complete the job, and you can only be relieved of your responsibility by a court order.

The CD that comes with this kit includes the forms that you will need to apply for a grant of probate, grant of administration with

will annexed, or a grant of administration without will annexed. The information provided in the book will help you choose the forms that will apply to your situation. There is also a glossary at the end of this book to help guide you through the terms used throughout the process.

Note: Laws change frequently or without notice so the probate and administration forms may be updated from time to time to ensure compliance with laws and regulations. Please click the "Check for Updates" link on the CD that came with this book before you proceed to see if there is anything new of which you should be aware.

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British Columbia's New *Wills, Estates and Succession Act* (WESA)

British Columbia's new *Wills, Estates and Succession Act* (WESA) received Royal assent on October 29, 2009, and came into force on March 31, 2014. This statute amalgamates many of the statutes that govern estate administration in British Columbia including the *Wills Act*, the *Estate Administration Act*, the *Probate Recognition Act*, and the *Wills Variation Act*. The changes are an attempt to modernize the legislation that governs wills and estate administration. Some of the statutes have been on the books since the early 1900s.

An Order in Council (OIC) came into effect July 1, 2015, which made some further changes to these statutes. The legislators will continue to make additional changes to the legislation as issues come up and on recommendations of registry staff. With any new legislation, there are "glitches" that need to be fixed and the July 1, 2015, OIC is an attempt to "fix" any issues that have been discovered thus far.

If you follow the old procedure to apply for an estate grant after March 31, 2014, the probate registry will reject your application and you will be expected to follow the new procedure. This will delay any grant of probate or grant of administration with or without will annexed being granted. These grants are now all being referred to as an "Estate Grant" or "Representation Grant." You are also expected to use the "new" July 1, 2015, forms or your application will

be rejected. (**Note:** These updated forms are included on the CD that comes with this book. Before using the forms on the CD, please use the "Check for Updates" link to make sure you are using the most current forms.)

This new Act is a comprehensive statute designed to modernize and streamline the making of wills and the administration of estates in British Columbia. Wills made before March 31, 2014, will not be invalidated, but the Act will apply to the interpretation of existing wills if the deceased died on or after March 31, 2014. If the deceased died prior to March 31, 2014, then the old *Estate Administration Act* will apply to the interpretation of any will. Regardless of the timing of the deceased's death, the new procedures for the estate grant apply.

Some of the key changes to the existing regime include the following:

1. The use of the term "will-maker" rather than "testator."
2. The court now has power to declare a document, which does not meet the formal requirements of a will, to be effective as a will.
3. Marriage will no longer revoke a prior will. However, it is important to note that wills revoked by marriage by virtue of s. 15 of the old *Wills Act* continue to be revoked after WESA. Only those wills executed on or after March 31, 2014 will no longer be revoked by marriage.
4. The rules that apply in the case of intestacy have changed significantly. It will be important to note whether the deceased died before or after March 31, 2014. If the deceased died after March 31, 2014, the spouse will take an increased share, if there are children of the deceased and the surviving spouse. Prior to March 31, 2014, the spouse was entitled to the first $65,000 and to a life interest in the spousal home; if the deceased died on or after March 31, 2014, the spouse will receive the first $300,000 and have an opportunity to purchase the spousal home within 180 days from the date of the representation grant. If the deceased's children are not also children of the surviving spouse, the spousal share is reduced to $150,000.
5. Survivorship rules have also changed. Under the old legislation, in an accident where it was impossible to tell who died first (e.g., a motor-vehicle accident or an airplane crash) the

youngest person who died was deemed to have survived the older person who died. Under WESA, each person is deemed to survive the other. Thus, in the case of joint tenancy of an asset such as land, the asset is deemed to be held as tenants in common and will not pass to the survivor.

6. The definition of "spouse" acknowledges both marriages and marriage-like relationships of at least two years, including relationships between persons of the same gender. Note that separated married spouses will not inherit on intestacy or have standing to bring a variation claim, and the rights granted by the WESA to a spouse in a marriage-like relationship will end when one or both spouses terminate the relationship. This includes the right to inherit on intestacy.
7. A gift in a will to a person, who has ceased to be a spouse, or an appointment of that person as executor, is revoked and any gift is treated as though the person predeceased the will-maker unless a contrary intention appears in the will.
8. The intestacy regime has changed to a parentelic distribution scheme, in which the descendants of parents take priority to descendants of grandparents. Under the old intestacy rules, where there was no spouse and there were no descendants, the persons in the nearest degree of consanguinity (blood relationship) shared in the estate. Now, if there is no next of kin closer than the fourth degree of relationship (grandniece), the deceased's estate will escheat to the Crown, which means the estate will go to the provincial government.
9. The presumption that a gift by the will-maker during his or her lifetime to a child is an advancement of a gift in the will has been abolished. Now, such a gift takes effect according to its terms.
10. A person who is 16 years of age or older, and mentally capable of making a will, can now make a valid will.
11. Survivorship rules have changed. Now, if a person fails to survive a deceased person by five days, he or she is deemed to have died before the deceased person for all purposes affecting the estate or property the deceased person was competent to give by the will.
12. Witnesses to a will must be 19 years of age or older.