THE ALBERTA LAW REFORM INSTITUTE

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REVISION OF THE SURROGATE RULES

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REVISION OF THE SURROGATE RULES

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REVISION OF THE SURROGATE RULES

1 INTRODUCTION

1.1 The Surrogate Rules

The Surrogate Rules are the rules of procedure governing the administration of the estates of deceased persons.

The Rules are made and amended as regulations under the *Surrogate Court Act*, R.S.A.1980 chapter S-28 , as amended. Although they are not part of the Alberta Rules of Court, physically they are found at the back of the Rules Binder published by the Queen's Printer. The new Surrogate Rules will be sufficiently large to warrant publication in a separate binder.

1.2 Reason for Reform

The main body of the Rules was enacted under Alberta Regulation 20/71 in 1971. Since then, there have been piece-meal amendments designed to deal with problems in one small part or another. But there has been no complete review of the Rules until now.

The impetus for reform came from the estate bar. The practitioners who must use the Rules are well acquainted with their shortcomings. Over the years the frustrations have increased. In the present Rules, some procedures are inadequately described; some do not follow currently accepted practice; some are completely outdated; some do not exist at all.

Although the Rules should be procedural only, over the years substantive content has crept into them. There is now confusion between the Rules and the statutory context in which they exist.

1.3 Scope of the Project

This project is confined to reform of the Surrogate Rules only.

The Rules must reflect the legislation which deals with this area of practice. There are some 25 statutes which are directly related to the practice of wills, intestacy, and estate administration. Most of these statutes are old and much of their language and procedure is outdated, confusing, and occasionally contradictory. The job of reforming the Rules alone is complicated because of the

unsatisfactory statutory background which they must reflect and because the Rules themselves have not remained purely procedural.

While the long-term goal is to reform and clarify the whole area of estate administration, the problems had to be tackled in manageable pieces.

Collecting, explaining and recommending some of the more obvious changes which ought to be made to the Rules was the first manageable piece. This process had the subsidiary effect of determining the context, suggesting elementary reforms, and creating an informed climate in which further stages of the reform process can be carried on. Specifically, a comprehensive review of the legislation in this area is needed and has begun.

However, the scope of this project is

- to improve the efficiency of practice and procedure in the administration of the estates of deceased persons, and
- for that purpose, to revise or replace
    - the Surrogate Rules
    - procedural provisions of statutes which affect the administration of estates.

1.4 Role of the Alberta Law Foundation

The project could not have been done without generous funding from the Alberta Law Foundation's Special Projects Fund.

The Foundation designed the Special Projects Fund to promote projects designed for completion in two years or less. This is by contrast with the Foundation's major funding of the many programmes which promote legal research and education in Alberta on a continuing basis.

The Surrogate Rules Project was one of the special projects which had a time limit of one year.

1.5 Role of the Alberta Law Reform Institute

The mandate of the Alberta Law Reform Institute is to research law and the administration of justice and to consider, propose, and promote law reform in Alberta.

It is the primary body for law research and reform in the province.

1.6 Role of the Surrogate Rules Committee

The Attorney General of Alberta formed this Committee some years ago. Its role is to review concerns relating to the Surrogate Rules and surrogate practice and procedure as they are raised from time to time by members of the legal profession. The Committee makes recommendations for reform to the Attorney General as appropriate.

The project is a co-operative effort between the Institute and the Committee.

1.7 Joint Management Committee

The project was managed by a Joint Management Committee composed of:

- Two nominees from the Institute:
  Peter Lown, the Director
  Madame Justice Bonnie Rawlins
- Two nominees from the Committee:
  Johanne Amonson
  John Armstrong
- The principal researcher:
  Anne de Villars.

2 ISSUES

Over the years, the Institute, the Committee, members of the bar, the Surrogate Court clerks, judges, corporate trustees and others involved in the administration of estates of deceased persons had amassed lists of problems with the Surrogate Rules. These were collected, the concerns raised were grouped into categories and a preliminary list of issues was developed.

There were some obviously large issues. There were many small points which did not need in-depth research.

From the preliminary list, certain issues were chosen for in-depth research. Others were postponed for consideration until the Forms accompanying the Rules were redesigned. The large number of small issues were left for the stage when the Rules are rewritten.

3 RESEARCH METHODOLOGY

The research methodology was to:

- define the issues which required in-depth research
- define the issues which required changes to the Forms
- define the issues which could be dealt with in a rewrite of the Rules without the necessity for a lot of research
- collect all relevant statutory and Rules material from various jurisdictions:
    - Alberta
    - British Columbia
    - Ontario
    - England
    - Australia — New South Wales
    - Australia — Victoria
    - New Zealand
    - Uniform Probate Code — U.S.A.
- compare statutory and Rules provisions for each subject area covered by the Rules between Alberta and the chosen jurisdictions
- prepare research memoranda on chosen issues:
    - Rules: Table of Contents
    - Persons entitled to a Grant
    - Notice Requirements
    - Bonds
    - Passing of Accounts
    - Solicitor's Tariff
    - Compensation for Personal Representatives
    - Contentious Business
    - Proof in Solemn Form
- the research memoranda consisted of:
    - definition of topic
    - definition of issue
    - statutory considerations
    - existing Alberta Rules
    - objective
    - discussion
    - requirements in other jurisdictions
    - possible solutions — advantages and disadvantages
    - procedural models — for discussion

- the Joint Management Committee considered each research memorandum and made recommendations to the Institute and Committee

- the Institute and Committee then made final decisions on what changes to the Surrogate Rules, if any, they would recommend to the Attorney General. The Institute and Committee were unanimous in their decisions.

4 PHILOSOPHY

An overall philosophy drives the recommendations for change. That is that the system, although supervised by the court, is driven by the personal representative. The term "personal representative" is now used throughout the Rules where there is no need for any distinction between executors and administrators.

The personal representative has the responsibility for moving the administration of the estate through the system, using the courts where their intervention is necessary, but otherwise following an administrative pathway which is clearly set out in the Rules.

However, responsibility is not left entirely to the personal representative. Beneficiaries must also take some responsibility for protecting their own interests. To do this they must, of course, have notice that they have an interest to protect and must be kept informed of progress in the estate administration. If beneficiaries are unhappy with any aspect of the administration, new procedures provide a way to resolve any issues.

5 PROCEDURE

In straightforward estates, the administration process follows a logical continuum from the application for a grant through to accounting and final distribution which requires no court intervention, except to issue the grant. Part I of the Rules called "Non-Contentious Business" provides all these procedures.

Part II of the Rules is called "Contentious Business". If an estate needs the further intervention or supervision of the court, the applicant follows one common procedure whatever the nature of the application.

However, two discrete areas have their own unique procedures. These are Proof in Solemn Form (renamed for the moment "Formal Validation of Will") and Passing of Accounts. The nature of these proceedings is

sufficiently different from the general business of litigation in estate matters to warrant separate procedures.

Different levels of court involvement may be required when the courts are asked to supervise any area of the estate administration. Most issues can be handled in the Chambers setting. Only in more complicated matters will the court supervision move to the more detailed level of trial. Appeal procedures remain unchanged.

Appendix 1 is a diagrammatic representation of the administration process with court intervention where required.

6 FORMS

As research progressed, it became obvious that the Forms which accompany the Rules require a drastic overhaul.

A further application was made to the Alberta Law Foundation for funding for this stage which was granted. Work has begun on revising the Forms.

The principles of Forms design are to

- arrange the Forms in a logical flow of information
- design one Form for each stage of the estate administration procedure so that having provided a set of information once, it need never be repeated
- make the Forms' appearance and content more visually pleasing and comprehensible
- avoid the necessity for duplication of court files between Surrogate Court and Court of Queen's Bench
- make the Forms available in electronic as well as documentary format
- allow for completion of the Forms by hand, machine or computer variables.

7 SPECIFIC AREAS OF RESEARCH

7.1 Table of Contents

Issues

- How should the Rules be arranged
- What topics were missing and should be included
- Should Latin usage be translated into English
- Generally, how to make the Rules flow for easier and more logical use

Recommendations

- Write the Rules and the Forms in clear English
- Write the Rules in gender neutral language
- Make the Rules procedural in content
- Divide the Rules into two parts:
    - Non-Contentious Matters
    - Contentious Matters
- Segregate those parts of the present Rules which are substantive in nature from the procedural Rules. However, retain them in the new Rules pending future statutory amendments. At that time, place the substantive Rules in the appropriate statute and delete them from the new Rules
- Reproduce those parts of the Alberta Rules of Court which apply to deceased estates and trusts in the Surrogate Rules
- Add new Rules to cover matters presently omitted from the Rules; for example, revocation of grants, multiple probate and Wills, grants on copies of Wills, notarial Wills, failure to act by the personal representative.
- Translate names of grants now in Latin into English (with a glossary for cross reference)

- Provide computer compatible, user friendly Forms for most applications.

7.2 Persons entitled to a Grant of Administration

Issues

- Should the present lists of categories of persons entitled to a grant of administration be amended to include any new categories or to exclude any existing categories. Specifically, should cohabitants be given any status to apply for a grant
- Is the present order of priority correct
- Should the lists be combined

Options Considered

- No change to the present Rules
- Leave the categories as they are but re-order the priorities
- Add cohabitants as a category
    - immediately
    - when and if the *Intestate Succession Act* is amended to include cohabitants as an heir
- If cohabitants are added, determine their priority position

Recommendations

- Do not add "cohabitants" as a category until there is an amendment to the *Intestate Succession Act*. The choice of executor is still a matter entirely for the testator.
- Add a category "an adult who, because of his or her relationship to the person in respect of whom a grant is sought, is concerned for the welfare of the person".

  This covers more people than just cohabitants but they fit in this category. In an appropriate case, the court can grant administration to a cohabitant as the best person to do the job. In making this decision, the court can take into account

any conflict of interest where the cohabitant is also a claimant of the estate on a constructive trust or *quantum meruit* basis. Other persons interested in the estate will have notice of any application for a grant. They can object to the appointment if so moved.

- Combine the present two lists

7.3 Notice Requirements

Issues

- Should the personal representative give notice of the application for a grant
- If so
  - to whom should notice be given
  - when should notice be given
  - what form should the notice take
  - how should this requirement be monitored

Options Considered

- No change to the present Rules
- Give notice to further classes of persons
  - Beneficiaries under a Will
    - Specific Beneficiaries
    - Residuary Beneficiaries
    - Contingent Beneficiaries
    - Others
  - Other next-of-kin not in the Will
    - Legitimate adult children
    - Illegitimate adult children

- Others

- Intestate heirs
- Common law spouses
- Beneficiaries under a known previous Will
- Others

- Point in process when notice should be given. When the personal representative
  - Intends to make an application for a grant
  - Has made an application for a grant
  - Receives the grant
- Means of checking
  - Personal representative swears he has given notice
  - Personal representative swears he has given notice and copies of the notice are filed with the application
  - Copies of the notice are filed with the application endorsed with the recipient's acknowledgment of receipt
  - Copies of the notice are given to the clerk with stamped addressed envelopes with the application; clerk mails the notices
  - No grant can be issued before the recipients of the notice have indicated their intentions
- Contents of Notice
  - Mere fact of application
  - Fact of application and suggestion that the recipient seek legal advice
  - Fact of application and advice as to the possible rights of the recipient
  - Other

- Provision of other documents to recipients
    - Application for probate with Will and Inventory
    - Application for probate without Will and Inventory
    - Application for probate with Will only
    - Application for probate with Inventory only
    - Will only

Recommendations

- Give notice to those whose names appear on Schedule A of the Application for a Grant
- Specific gift beneficiaries receive notice only about their gift with no further documents or information
- In a testate situation, the residuary beneficiaries receive copies of
    - Application for Grant
    - Will
    - Inventory
- In an intestate situation, the heirs receive copies of
    - Application for Grant
    - Inventory
- Do not give notice to cohabitants and beneficiaries under previous Wills
- Give notice at the time an application for a grant is made
- Notice is in a short form giving no legal advice but indicates where documents can be reviewed
- No grant is issued without notice having been given
- If beneficiaries are unknown, the personal representative undertakes to the court to give notice once the beneficiaries are known and located. The grant issues
- Provide notices, copies of documents, and stamped envelopes addressed to the beneficiaries (return address: the Court) to

the Clerk of the Surrogate Court when the application for a Grant is submitted. The Clerk mails the documents

- No other proof of service is required

Notice to beneficiaries is crucial if they are to take some responsibility for guarding their interests in an estate administration. No-one can protect rights without knowledge of them. The element of court supervision (through the Clerk's office) protects beneficiaries from fraudulent personal representatives or solicitors to some extent. If the notices are returned unclaimed, the court file demonstrates this. In any subsequent action, the personal representative must deal with the issue of any unlocated beneficiary.

A notice requirement sets time limits (common law if not statutory) on much delayed beneficiary complaints about the estate administration. It allows the personal representative to proceed with confidence.

Giving notice must be balanced against loading the personal representative with extra work and possibly encouraging the proliferation of claims and complaints. The British Columbia experience shows that the burden is not particularly onerous, nor have claims burgeoned. This procedure strikes a compromise between those extremes but accomplishes the principle that a knowledgeable beneficiary bears responsibility for monitoring the personal representative's actions.

7.4 Bonds

Issues

- What principles should apply when determining whether or not a personal representative must post a bond
- Should the guidelines for dispensing with a bond be expanded

Options Considered

- No change to the present Rules
- Rewrite the Rules based on certain assumptions
    - Personal representatives are honest

- Personal representatives are not honest or, at the least, they require insurance
- A distinction should or should not be made between executors and administrators
- A distinction should or should not be made between resident executors and administrators and non-resident executors and administrators
- A bond should protect beneficiaries or creditors or both

Recommendations

- Make no distinction between resident executors and administrators — neither require a bond
- Retain the distinction between resident and non-resident executors and administrators — non-resident executors and administrators require a bond, subject to the court's discretion to waive it
- Expand the guidelines for dispensing with a bond to ensure that the interests of beneficiaries are considered; the consent of beneficiaries to the dispensing is not required
- The court can require a bond even for resident personal representatives for cause — this may be on the court's initiative or at the application of a creditor or beneficiary

The vast majority of personal representatives are not fraudulent. The guiding principle on bonding should reflect this. The present Rules work from the opposite approach. The justifications for the present Rules do not bear scrutiny.

Selection of the executor by the deceased as opposed to appointment of the administrator by the court is a reason given for the present Rules. This assumes administrators are less honest than executors, or at least need insurance, because the deceased did not appoint them. It is extremely unlikely that the deceased's inaction reflects any judgment on the administrator's morality. It is rather the deceased's sin of omission not commission. A deceased chooses an executor with the beneficiaries in mind, not the creditors.

Courts readily dispense with the bond requirement with very little investigation about protection of creditors beyond the administrator's affidavit. Nothing is done to protect beneficiaries.

Bonds are increasingly expensive and hard to come by from bonding companies. A person will renounce before putting up a personal bond with two sureties but that person might be the most suitable for the job.

The courts' inability to supervise a non-resident personal representative demands that the bond requirement be kept subject to the court's discretion to dispense. This is a valid consideration in the protection of creditors and beneficiaries.

7.5 Passing of Accounts

Issues

- To design procedures for passing the accounts of the personal representative at the application of the personal representative and of others interested in the estate on both a formal and informal basis

Options Considered

- No change to the present situation
- Provide a general Rule allowing for the passing of or dispensing with the passing of accounts, the procedure in each case to be determined by the court as each case requires
- Provide definitive formal and informal procedures for passing accounts

Recommendations

- Provide definitive formal and informal procedures for passing accounts
- The principles behind the accounting rules are:
    - Passing of accounts procedures are personal representative driven with court supervision. As well, a beneficiary or creditor can apply for an accounting
    - Greater responsibility is placed upon beneficiaries. To do this, they must have notice of their interest in the estate

- Vouching as matter of course is removed. If any vouching is required, an accountant does it and reports to the court, not the court or the clerk. Neither the court nor the clerk has the expertise to audit and the Crown should not assume liability for the certification of accounts

- Financial statements are in composite form

- There should be some limitation period imposed on sureties and bonding companies to establish when any cause of action arises

- An accounting application to court of some sort is not a necessary requirement. Presenting accounts to residuary beneficiaries and obtaining releases from them is sufficient. The court will not be required to look behind filed Releases. This applies to all personal representatives

- Releases need not be filed but can be

- The level of court supervision required, if any, will depend on the procedure chosen by the personal representative

- The level of accounting required, that is, the actual contents of the accounts, is mandatory. However, the format in which the accounts are presented is flexible. The information can be presented on separate accounts;

  e.g.
  a) capital receipts;
  b) revenue receipts;
  c) capital disbursements;
  d) revenue disbursements; etc.

  or as a composite. In a composite, the capital, revenue and investment receipts might all be on one page

- There is no vouching unless ordered by the court. The court may order vouching for all, several or one item in the accounts. When informal accounts are presented to the residuary beneficiaries, they can request further information about any item in the accounts as they now can do

- The Rules are the same for Executors and Administrators

- There is a procedure to dispense with a formal accounting to cover those situations where one or more residuary

beneficiaries refuse to deal with the informal accounting presented to them and to sign releases

- Informal accounts and releases are filed with any surety or bonding company. They will have a limited time within which to respond. Otherwise the releases will stand

- The personal representative is required to account or report to the beneficiaries at least bi-annually. The beneficiaries can also demand an accounting and the personal representative must respond within 30 days

- Five Procedures are provided

    - An application for a formal passing of accounts by the personal representative

    - An application for a formal passing of accounts by a person interested in the estate — includes beneficiaries and creditors

    - An application to dispense with a formal passing of accounts by the personal representative — where the personal representative cannot get releases from all residuary beneficiaries

    - An application that accounts be passed based on releases filed — releases are available from all residuary beneficiaries but the personal representative wants a formal order for some reason. The court must grant it

    - Obtaining releases from all residuary beneficiaries which may be filed — no court application involved

- There will be no so-called "auditing" procedure by the clerk

- Any audits required will be done by a qualified accountant based on the procedures now used by accountants when dealing with lawyers' trust accounts.

- If beneficiaries object to the accounting, they must specify whether it is an item of accounting, the conduct of the personal representative, or the fees which they object to. The court investigation is confined to those issues identified

This area of the Surrogate Rules is now so confused and difficult to use that, at the request of the Attorney General's office, we are "fast tracking" the new accounting Rules. They will be available before

the complete revisions to the Surrogate Rules are available. The new accounting Rules cannot be used for the passing of accounts in dependent adults' estates without significant modification.

The accounting Rules in deceaseds' estates place the responsibility for scrutiny in the hands of the beneficiaries. They are essentially adverse in interest to the personal representative and will therefore act only in their own best interests when reviewing the accounts. In the dependent adult's situation, the "next nearest relative" is not necessarily adverse in interest to the trustee and will not necessarily act only in the best interest of the dependent adult when reviewing the trustee's performance. Passing of accounts by consent pure and simple without some independent scrutiny therefore is not an option in dependent adults' estates.

7.6 Solicitor's Tariff

The current solicitor's tariff is a maximum fee guide based on the value of the estate and subject to the court's discretion.

Issues

- Should the tariff be retained
- If the tariff is retained
    - o are the present rates adequate, too generous, or insufficient for the work involved
    - o should the description of the work covered and not covered by the tariff be revised
- Should the Rules deal specifically with solicitors performing the work of the personal representative and the basis of compensation for this

Options Considered

- No change to the present Rules
- Abolish the tariff
  Fees will be calculated on a quantum meruit basis
- Revise Schedule C

- Add to / delete from the criteria upon which a fee is based
- Increase the tariff on small estates
- Clarify which legal services are included in the tariff and which are not and which are non-legal services;
- Clarify basis upon which the solicitor is compensated for the three levels of work performed

- Delete requirement for the endorsement

Recommendations

No final recommendation has yet been made on the central issue of whether to retain the tariff or not because there is no clear consensus of opinion.

Opinions are divided on this matter, and strong sentiments are expressed on both sides of the issue.

Those who favour a tariff point to the length of time that the tariff has been in operation and its general acceptance. For some it represents a good guide for both client and solicitor. Especially for solicitors who do not specialize in estate work, the tariff prevents or protects the client from unreasonably high fees being charged by a non-specialist.

While pointing to the general acceptance of the tariff, the same people also argue that the tariff needs revision at the lower end in particular. Now, some practitioners use a retainer letter establishing the fee basis between the personal representative and the solicitor rather than or in addition to relying on the tariff.

It is also argued that the tariff reflects an acceptable market rate which has been established over a number of years. This same market approach is used by professional personal representatives and consistency between the charges of the solicitor and the professional personal representatives might be beneficial.

Further, it is argued, without the tariff, the expert practitioner who has created efficient estate administration systems, is unable to recover proper compensation.

Those who favour removal of the tariff point to the demise of the tariff in almost all other areas of practice in favour of a general rule such as that contained in Rule 613 of the Rules of Court. They

further point to the fact that a retainer letter can alter the tariff to such a degree that the retainer letter becomes the operative agreement rather than the tariff itself. The result, they argue, is that the tariff becomes so factually inaccurate that even a revised tariff ought not to be retained.

Whether the tariff provides any clear information to the client is difficult to determine. Those who favour retention argue that it provides guidance to the client, whereas those who favour removal point to the retainer letter as the source of information.

Whether the tariff is revised or removed, what services should be covered by the legal fees? That question must be answered either by the tariff itself, if revised and retained, or by the retainer letter, if the tariff is removed.

The available choices are to remove the tariff and apply a general charging system such as Rule 613. Under this system, a retainer letter can establish the contract in detail. It becomes the operative document and informs the client of the services and charges.

The alternative is to retain and revise the tariff and to broaden the services covered by it. Ideally, the tariff would apply to all services rendered by the solicitor. In jurisdictions which have reviewed and retained the tariff, an exception allows a solicitor to charge for extraordinary services in addition. In most cases, extraordinary services are litigation on behalf of the estate.

There might be a statutory reduction in the tariff, as is the case now in Manitoba, where the solicitor does not perform any of the duties of the personal representative. In practice in Alberta, many practitioners now reduce the tariff where the personal representative is a corporate trustee.

There are also arguments beyond the conceptual decision as to retention or removal of tariff. The provisions of the *Competition Act* may have some bearing on the specificity and rigidity of the tariff. There may be questions relating to the political acceptability of increases in the tariff and the introduction of a periodic review of the tariff itself.

If the ultimate decision is to retain the tariff, that entails:

- Clarify the tariff as a maximum fee guide, not a fixed charge
- Suggest a retainer letter with the personal representative which describes
    - the existence and operation of the tariff

- the services to which the tariff applies

- Amend the fee guide especially at the lower end and establish guides for estates over 1 million. The following schedule could be adopted:

Aggregating Values	Rate	Gross Value
On the first $10,000 or portion	$800	$10,000
On the next $40,000 or portion	3%	$50,000
On the next $450,000 or portion	2%	$500,000
On the next $1,500,000 or portion	1%	$2 million
On the next $3 million or portion	½ x 1%	$5 million
On any amount over $3 million	¼ x 1%	

- Define the scope of solicitor's work to which the tariff applies to be all services other than personal representative's duties and extraordinary work on behalf of the estate in the following list:

  - acting as conveyancing solicitor on any sale of real property

  - acting as solicitor on the sale of other assets or businesses

  - preparing any accounting documents for the personal representative which are submitted to the beneficiaries or the court

  - acting for the client on any litigation involving the estate, including but not limited to

    - Formal Proof of Will

    - other contentious matters

    - formal passing of accounts

  - negotiations with respect to payment of any succession duties and death and estate taxes in other jurisdictions

- arranging for any resealing of probate in another jurisdiction

- Remove the requirement for the notice about taxation on an estate fees account

WE INVITE THE LEGAL PROFESSION AND PROFESSIONAL PERSONAL REPRESENTATIVES TO COMMENT ON THIS PART, SUBSTANTIATING YOUR OPINION WITH COGENT ARGUMENTS.

7.7 Compensation for Personal Representatives

Issues

- Should this matter be dealt with in the Rules
- Should there be a tariff or a set of guidelines or both
- Would a tariff require legislative sanction

Options Considered

- Describe the basis of compensation as a set of guidelines based on the principles in *Toronto General Trusts* and *Re Berkeley's Trusts*
- Set a percentage tariff for the various services performed by the personal representative (this requires legislation)
- Set a percentage tariff for the various services performed by the personal representative with judicial discretion to raise or lower it
- Detail the services performed by personal representatives and determined which are to be compensated and which not
- Detail the services performed by personal representatives and determined which are to be compensated and which not and set a tariff
- Allow or not allow pre-taking of compensation
- Determine how to divide compensation when there is more than one personal representative

- Allow or not allow additional fees

Recommendations

Fees: This is the second area where no clear consensus has developed.

One recommendation might be to treat professional and private personal representatives differently.

Professional personal representatives work on a fee schedule which is set by each company and operates across the country. The schedules are not identical from one company to another but are substantially similar.

There is a suggestion that a schedule be set for professional personal representatives, subject to the court's discretion in every case, based on the market rates, with the schedule being revised from time to time.

An alternative is to set a limit on fees, for example 5% of the gross value of assets, and give the court the discretion to raise or lower this. The professional personal representatives can bring evidence before the court to show that the market rate is higher than the limit and argue why they should receive more than the limit.

Private personal representatives are also entitled to compensation (although many do not charge) for their time and effort expended. However, the rate is presumptively lower than the rate for the professional personal representatives because the expertise and qualifications of the private personal representative are less. The Rules might list the factors to be considered in setting a fee and designate a maximum which cannot be exceeded, subject to the court's discretion to raise or lower.

Agent's fees and disbursements: A further alternative is to establish general guidelines for calculating compensation for personal representatives but to set no percentages.

Private personal representatives can retain another professional to do their work. This is a proper charge against the estate. The professional can charge in accordance with an agreement between the professional and the private personal representative. If the beneficiaries are unhappy with the fee, any amount disallowed on taxation is the responsibility of the personal representative to pay personally.

There might be no prohibition against pre-taking but notice must be given to the beneficiaries who can object. If the fee is subsequently reduced on a passing of accounts, the personal representative must repay the excess fee with interest.

One fee is calculated for each estate. This is then shared among the personal representatives, not necessarily equally.

Where more qualified outside agents are retained, their fees are necessary disbursements. Examples are accountants, real estate agents, stockbrockers, appraisers.

WE INVITE THE LEGAL PROFESSION AND PROFESSIONAL PERSONAL REPRESENTATIVES TO COMMENT ON THIS PART, SUBSTANTIATING YOUR OPINION WITH COGENT ARGUMENTS.

7.8 Contentious Business

Issues

- Should there be one procedure set out in the Rules which is to be followed for all contentious business (except Proof in Solemn Form and Passing of Accounts which will have their individual procedures)

Options Considered

- No change to the present Rules
- Delete all references to proceedings in contentious matters in the Rules and follow statutory procedures where given, supplemented by the Alberta Rules of Court instead
- Rewrite the Rules to provide a specific procedure and bring into the Surrogate Rules that part of the Alberta Rules of Court which applies to estates

Recommendations

- Rewrite the Rules to provide a specific procedure for all contentious matters except Proof in Solemn Form and Passing of Accounts

- Include in the Surrogate Rules those parts of the Alberta Rules of Court which apply to surrogate matters

- Amend all statutes to conform to the procedures in the Rules

7.9 Proof in Solemn Form

Issues

- Should there be a specific procedure in the Rules for this matter. There is none at present

Options Considered

- No change to the present Rules

- Rewrite Rules to provide a specific procedure

Recommendations

- Provide a specific procedure

- Retain the existing caveat procedure which can be used as a temporary halt on proceedings. However, the caveator must apply to extend the caveat beyond three months; otherwise it is automatically discharged

- The personal representative can force the caveator to take proceedings on the caveat

- The court will direct in each case at what level (Chambers or Trial) the application will take place

- Rename the procedure "Application for Formal Proof / Validation of Will

APPENDIX 1

TIME