



BRIEFING NOTE

Probate Applications During COVID-19

May 14, 2020

ISSUE

This briefing note summarizes issues that have arisen with respect to applications for Estate Grants (that is, probate of a deceased's will, or the issuance of a grant of administration with respect to an intestate person) in BC during the COVID-19 pandemic health emergency ("COVID-19"). The CBABC asks that the Supreme Court of British Columbia and the Ministry of the Attorney General direct its attention to this urgent matter to rectify the challenges of executors and administrators who are required to obtain an Estate Grant in order to administer an estate.

While we are aware that there is a plan to resume to normal operations with respect to issuing grants, it remains weeks away. Further, in the event that health considerations place additional limitations on operations, CBABC members ask that the issue of probate grants be treated separately in the future for the reasons which follow.

BACKGROUND

An application for an Estate Grant (more commonly referred to as an application for "probate" in the case of a will, or an application for "administration" in the case of an intestate person) is the court process to establish the validity of a will (in the case of a testate deceased) and to appoint a personal representative who then has the legal authority to act on behalf of the deceased's estate. As a result of COVID-19 emergency orders suspending filing deadlines, many applicants have been unable to have their grant applications processed.

In all cases, section 121 of the *Wills, Estates and Succession Act*¹ requires that notice be provided of an intention to file an application for a grant to all persons named in a will, all intestate heirs, and all persons entitled to commence an application to vary a will. Under Part 25-2 of the Supreme Court Civil Rules, an applicant for a grant must file a notice of their intent

¹ **Notice of proposed application for grant of probate or administration**

121 (1) An applicant for a grant of probate or administration must give notice of the proposed application to the persons referred to in the Supreme Court Civil Rules.

(2) An applicant or personal representative who, in accordance with the Supreme Court Civil Rules, makes reasonable efforts to discover the existence, identity or whereabouts of persons to whom the notice under subsection (1) is required to be given, but is unsuccessful, is not liable for any loss or damage arising from not giving the required notice except for claims to recover property or enforce an order under Division 6 [*Variation of Wills*] of Part 4 [*Wills*].



to do so, at least 21 days prior². An applicant for a grant cannot file the application with the Probate Registry unless the 21 days' notice has been provided to all relevant individuals.

Under the current BC State of Emergency, Ministerial Order MO98 (which replaces Ministerial Order MO86) was enacted on April 15, 2020 and it effectively suspended limitation periods³; this resulted in a subsequent suspension of filing timelines for matters under the jurisdiction of the Supreme Court, as per COVID Notice No. 8 to the Profession, dated April 16, 2020 which states in part:

"LIMITATION PERIODS AND FILING DEADLINES

A. Filing Timelines under the Supreme Court Rules

Effective March 18, 2020, filing and service deadlines under the Supreme Court Civil Rules and the Supreme Court Family Rules are suspended until May 29, 2020, following which they will begin to run again."

Shortly thereafter, COVID Notice No. 12 to the Profession (revised April 24, 2020) was released, which states in part:

"Applications That Cannot Be Processed:

Default orders on applications that would ordinarily be deemed unopposed because a response has not been filed within the prescribed time period cannot be processed

² Notice of intended application for estate grant or resealing

(1) Subject to this rule, unless the court otherwise orders, a person intending to apply for an estate grant or for the resealing of a foreign grant in relation to the estate of a deceased must, at least 21 days before submitting for filing the materials required for that application under this Part, deliver the following to the persons referred to in subrule (2):

(a) a notice that complies with subrule (3);

(b) whichever of the following, if any, that applies to the intended application:

(i) if the intended applicant intends to apply for a grant of probate or a grant of administration with will annexed, a copy of the will in relation to which the application is to be made;

(ii) if the intended applicant intends to apply for the resealing of a foreign grant or for an ancillary grant of probate or an ancillary grant of administration with will annexed, a copy of the foreign grant and, if a copy of the will in relation to which the foreign grant was issued is not attached to the foreign grant, a copy of the will;

(iii) if the intended applicant intends to apply for an ancillary grant of administration without will annexed, a copy of the foreign grant.

³ **MO98:** s. 2 (1) Subject to subsection (2), every mandatory limitation period and any other mandatory time period that is established in an enactment or law of British Columbia within which a civil or family action, proceeding, claim or appeal must be commenced in the Provincial Court, Supreme Court or Court of Appeal is suspended. (2) Subsection (1) does not apply to a mandatory limitation period and any other mandatory time period established under the following enactments: (a) the Builders Lien Act; (b) Division 5 [Builders Liens and Other Charges] of Part 5 [Property] of the Strata Property Act.



during the Suspension Period, regardless of the method of filing, unless the time to file a response expired before the Suspension Period began.

In particular, **the Court cannot process:**

- Undefended family law cases where no response to family claim has been filed;
- Uncontested adoption applications where a party received notice of the application, but has not filed a response;
- **Uncontested probate applications;** or
- Default judgments.” (bolding added)

As a result of the suspension of all timelines, the Probate Registries are refusing to issue grants to applicants even though the 21 day notice has been given. However in some registries some grants are being issued and the profession has a sense of confusion.

On May 13, 2020, the latest COVID Notice No. 19 to the Profession was issued and states, part:

“III. LIMITATION PERIODS AND FILING DEADLINES

Running of Filing Timelines under the Supreme Court Rules Will Resume

Filing and service timelines under the Supreme Court Civil Rules and the Supreme Court Family Rules, which were suspended on March 18, 2020, will recommence on May 29, 2020. Filing and service timelines will begin to run again starting May 29, 2020. With the exception of any document associated with a Request for Urgent Hearing, Telephone Conference Hearing, or Application by Written Submissions, **documents filed between March 19 and May 28, 2020 will be deemed to have been filed on May 29, 2020.**

Parties are encouraged to e-file through Court Services Online. Alternate methods for filing as set out in COVID-19 Notice #8 also remain in place. A party unable to meet a filing deadline for reasons related to COVID-19 may apply through a Telephone Conference Hearing or an Application by Written Submission for an order amending the timeline for filing.” (bolding added)

THE EFFECTS ON THE PUBLIC

In virtually all instances, an estate representative (the “Representative”) requires the Estate Grant in order to administer the estate in a timely manner. The Representative requires the grant in order to confirm their legal authority to third parties. Delays in obtaining the Estate Grant to prove their authority results in a financial hardship for the Representative, concerns regarding the ability of the Representative to fulfill his or her duties to the beneficiaries of the estate, not to speak of the delay in transferring estate assets to beneficiaries. The following examples of normal tasks of the Representative illustrate this:



- A Representative is required to pay all bills of the deceased including rent, property taxes, power and electricity bills, property insurance invoices and other expenses. Without the Estate Grant, it is virtually impossible for the Representative to persuade the financial institution holding the deceased's accounts to access the accounts as financial institutions are concerned for their own liability (note that the *Bank Act* provides a complete indemnification for financial institutions that insist on the Estate Grant being provided prior to the release of a deceased's funds). Creditors may be unwilling to delay payment, resulting in an executor being held liable for any additional charges that may result and possibly being forced to pay the expenses from his or her own pocket.
- Investments – giving the falling capital markets, a Representative will likely need to take steps to minimize any investment losses in the estate, generally by directing an orderly liquidation/reinvestment of the deceased's investments. This would generally be impossible without an Estate Grant as the financial institution holding the deceased's accounts would not be permit it.
- Business operations – a Representative may require an Estate Grant to prove his or her authority to manage operations of a business owned by a deceased; without such proof, the business operations could be compromised and employees or others may not be able to be paid from the business accounts.
- Income taxes – a Representative is responsible for filing the deceased's tax returns and may need an Estate Grant to get access to the information necessary to make those filings. If the returns are not filed within the required time period, a Representative will be personally liable for any penalties or interest which may result.
- Real property – a Representative must take measures to protect, secure and insure real property owned by the deceased, which can prove very difficult without proof of the legal authority to act on behalf of the estate. Property may need to be listed and sold, or a pre-existing sale may be required to be completed by a scheduled closing date, which again requires the Representative to have an Estate Grant to be able to complete a sale, and to sign listing agreements.

These are just a few examples of how executors can be prejudiced or suffer financial hardship, if applications for Estate Grants are not processed in a timely manner.

We appreciate that there may be individuals who wish to object to the application for probate for a number of different reasons, but note there is nothing which prevents them from filing an objection within the 21 day notice period should they wish – notice has been provided in the normal course, there is no barrier to a filing being made within the 21 day period prior to the applicant initiating the filing. We also note that the issuance of an Estate Grant does not prevent an individual from bringing any number of claims against a Representative and/or a



deceased's estate – there is no barrier to such claims being filed after the issuance of the Estate Grant.

REQUEST

As certain registries may not be processing Estate Grant applications due to the interpretation of Ministerial Order (MO98) to mean that the 21 day notice has not lapsed, we respectfully ask that clarification be provided to those registries to ensure that applications resume and are processed in a timely manner.

We request that the Supreme Court of BC lift the restriction on the processing of all filed probate applications. Counsel continue to submit these applications for probate after having complied with the 21 day rule as a matter of procedure, and see no practical reason for the registry to delay processing it. The Supreme Court remains open for online filings or filings by unrepresented persons by mail; as a result, there is no practical need to suspend time periods to file a notice of dispute. We respectfully ask that the Supreme Court issue a COVID Notice to the Profession which permits the registries to process the probate applications in the usual manner once filed.

Lastly, we will continue to press the BC government to allocate funds and technological resources to ensure that the Supreme Court of BC and Supreme Court Registry Services continue to process applications for Estate Grants in a timely manner. Certain documents, such as the original will, cannot be filed electronically and we are pleased to see that a secure drop box is available at Supreme Court registries for physical filing of items. However, we are concerned about the closure of any registry for regular business such as the processing of Estate Grant applications. We urge the government to allocate funds and resources where required, to ensure that Estate Grant applications can be issued in a timely fashion.

For further information or to provide any clarification or additional information that may be of assistance, please contact:

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