

NOTICE

COURT OF QUEEN'S BENCH

RE: AN APPLICATION FOR ADMINISTRATION INCLUDING WHERE THE DECEASED HAD A LEGAL SPOUSE AND/OR ONE OR MORE COMMON-LAW PARTNERS AT THE DATE OF DEATH

I. General Directions

Where the deceased, at the time of his or her death:

(i) died without leaving a will or left a valid will, but either failed to appoint an executor/trix or the person(s) appointed is/are unable or unwilling to act; and

(ii) was survived by a legal spouse and/or one or more common law partners,

an applicant for administration/administration with will annexed should provide the following in support of the application:

(a) all of the details of each relationship as set out in Form 74L or any other applicable form of the *Queen's Bench Rules* ("the Rules"); and

(b) a renunciation and/or nomination from each person **habitually resident in Manitoba** having an equal or superior right of administration as set out in subrule 74.04(2) of the *Rules* or apply for an order in Form 74Q as set out in subrule 74.04(3) of the *Rules*; and

(c) comply with s. 15 of *The Court of Queen's Bench Surrogate Practice Act* ("the Act"), if the application is not being made by the next of kin within in Manitoba – this would apply if the applicant for administration is a beneficiary under a will who is not the next of kin.

II. Explanation

With the passage of time following the extension of estate and administration rights to a common-law partner, it is becoming more common for a deceased to be survived by a legal spouse and/or one or more common-law partners, which raises the question of who is entitled to administration of the estate in the event of an intestacy or in the event that the deceased has left a valid will, but there is no one appointed to act as executor/trix or there was no one appointed who is

willing and/or able to act. There is no provision in the statutes or in the *Rules* that determines this issue. Unless and until that matter is resolved by way of legislation or by a decision of the court, it is proposed to deal with these applications in the manner noted above for the reasons that follow.

1. According to s. 7(1) of the *Act*, administration shall not be granted to a person who is not habitually resident in Manitoba.

2. Each spouse and/or common-law partner of the deceased whose relationship with the deceased had not been terminated at the date of death will be treated as a next of kin and will be equally entitled to apply for administration. This conclusion arises from the definition of “next of kin” as it appears in s. 1 of the *Act*, which is as follows:

“next of kin” of a person includes a spouse or common-law partner of the person.

3. Please note that having an entitlement to apply for administration does not mean that that person is entitled to be appointed as administrator/administratrix. Section 14 of the *Act* gives a judge a wide discretion to appoint the person who appears to be the most appropriate after taking into account all of the circumstances:

General power of court to appoint

14 Where, by reason of special circumstances, it appears to the court to be expedient to grant administration to some person other than the person who, if this Act had not been passed, would be entitled to a grant, the court, in its discretion, may grant administration to that person upon the giving of such security, if any, as the court directs and the administration so granted may be limited as the court thinks fit.

4. If there is a spouse and/or one or more common-law partners surviving the deceased and habitually resident in Manitoba, then any applicant for administration must comply with subrules 74.04(2) and (3), which state as follows:

Manitoba residents with an equal or superior right to renounce

74.04(2) Subject to subrule (3), upon a request for administration or of administration with the will annexed, all persons habitually resident in Manitoba with an equal or superior right to administration shall either nominate the person making the request in Form 74N or renounce in Forms 74O or 74P.

Order to person having prior or equal right to administration

74.04(3) Where a person having an equal or superior right to administration has neither nominated nor renounced under subrule

(2), any interested person, including a creditor, may apply to have an order in Form 74Q, issued calling upon those having prior or equal right to accept or refuse administration; and, in default of a request being made by them, the interested person may file a request.

This means that the applicant must obtain either a renunciation or a nomination, or both, from the legal spouse and any common-law partners, failing which the applicant must comply with subrule 74.04(3), including obtaining and serving an order in Form 74Q.

III. Intestacy

Where there is an intestacy, there is no one who has a superior right of administration to those in the class of persons that includes a legal spouse habitually resident in Manitoba where there had been no divorce and all common-law partners habitually resident in Manitoba whose common-law relationships with the deceased had not been terminated at the date of death.

IV. Administration with Will Annexed

1. Where the deceased left a valid will, but either failed to appoint an executor/trix or no one who was appointed is able or willing to act as executor/trix, the class of persons with the greatest interest in the estate, and therefore the superior right to administration, would be the beneficiaries under the will, who may or may not also be the next of kin.
2. If the applicant for administration with will annexed is a beneficiary under the will who is not the next of kin, then s. 15 of the *Act* would apply:

Party applying not next of kin

15 Where application is made for administration by a person not entitled thereto as next of kin of the deceased, the court, unless in special circumstances it dispenses therewith, shall, by order, require the next of kin and others having or claiming to have an interest in the property of the deceased, if they are within the province, to show cause why the administration should not be granted to the person applying therefore, and service of the order shall be made in the manner prescribed by the rules or as the court directs.

3. Keep in mind that s. 7(1) of the *Act* still applies, and administration could not be granted to a beneficiary under the will who is not habitually resident within Manitoba even if that person is entitled to receive the entire estate.
4. If the applicant for administration with will annexed is the next of kin who is not a beneficiary, then subrules 74.04(2) and 74.04(3) would apply.
5. Counsel should proceed as follows:

(i) by filing a nomination and/or renunciation from each person with an equal or superior right of administration – this would include the situation where the applicant for administration with will annexed is the next of kin, but not a beneficiary under the will;

(ii) by giving notice to the next of kin and others having or claiming an interest in the property of the deceased who are within Manitoba in accordance with s. 15 of the *Act* – this would include the situation where the applicant for administration is a beneficiary under the will, but not the next of kin.

V. Information Required with an Application

When completing a request for administration/administration with will annexed, you must include the details of each relationship as set out in Form 74L or any other relevant form. This information is crucial to enable the court to determine who is required to provide a nomination or renunciation, who is entitled to notice and to ensure that all those persons have either provided the required documents or received the required notice of the application.

This direction is intended to be of assistance to counsel in determining the information and documents that should be provided with a Request for Administration (with Will Annexed). It is not exhaustive, and there may be other circumstances that are relevant and should be brought to the attention of the court. If that is the case, that information can be provided either by amending the existing request form or by filing a separate affidavit.

ISSUED BY:

Original Signed by _____
Chief Justice Marc Monnin
(Manitoba)

DATE: June 16, 2008