

THE ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

**REVISION OF THE SURROGATE RULES**

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# REVISION OF THE SURROGATE RULES

## Table of Contents

<b>1</b>	<b>INTRODUCTION</b> .....	<b>1</b>
1.1	The Surrogate Rules .....	1
1.2	Reason for Reform .....	1
1.3	Scope of the Project .....	1
1.4	Role of the Alberta Law Foundation .....	2
1.5	Role of the Alberta Law Reform Institute .....	2
1.6	Role of the Surrogate Rules Committee .....	3
1.7	<b>Joint Management Committee</b> .....	<b>3</b>
<b>2</b>	<b>ISSUES</b> .....	<b>3</b>
<b>3</b>	<b>RESEARCH METHODOLOGY</b> .....	<b>4</b>
<b>4</b>	<b>PHILOSOPHY</b> .....	<b>5</b>
<b>5</b>	<b>PROCEDURE</b> .....	<b>5</b>
<b>6</b>	<b>FORMS</b> .....	<b>6</b>
<b>7</b>	<b>SPECIFIC AREAS OF RESEARCH</b> .....	<b>7</b>
7.1	Table of Contents .....	7
7.2	Persons entitled to a Grant of Administration .....	8
7.3	Notice Requirements .....	9
7.4	Bonds .....	12
7.5	Passing of Accounts .....	14
7.6	Solicitor's Tariff .....	17
7.7	Compensation for Personal Representatives .....	21
7.8	Contentious Business .....	23
7.9	Proof in Solemn Form .....	24

# 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Rules, some procedures are inadequately described; some do not follow currently accepted practice; some are completely outdated; some do not exist at all.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





























