

# WESA FOR FAMILY LAWYERS: Legal Proceedings

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# DEATH OF A PARTY: General

- **Cause of action and proceedings survive death**
  - WESA: s. 150(1)  
*Replaced Estate Administration Act ss. 58-63*
  - Rule 6-2(1): the proceedings continue if the claim itself survives death
- **No recovery for damages for:**
  - **Non-pecuniary loss**
  - **Loss of future income**

WESA: s.150(4)
- **Other exceptions** (for example, human rights complaints, claims for punitive damages)

## DEATH OF A PARTY: General (continued)

- Personal representative may *commence or continue* a proceeding the deceased person could have commenced or continued
- Proceedings can commence or continue *against* a deceased person, whether or not a personal representative has been appointed
  - In name of deceased or the personal representative.

WESA: s. 150(2)

# DEATH OF A PARTY: General (continued)

- **Personal representative of plaintiff/applicant must apply to court to be joined as a party**
  - Unless verdict/judgment already in at time of deathRule 6-2(3), (4)
  
- **Judgment effective against estate without changing parties**  
Rule 6-2(2)

# DEATH OF A PARTY: General (continued)

- **If defendant dies, plaintiff can continue even if no personal representative**

WESA: s.150(5)

- But plaintiff should apply for someone to continue

- **If personal representative is not pursuing or defending the proceedings, a beneficiary of the estate can apply to sue, defend or take over in certain circumstances**

WESA: S. 151 “if necessary or expedient for the protection of the estate or the interests of the [beneficiary/intestate successor]”.

# FACT PATTERN

*Please see hand-out entitled “The Jones Fact Pattern”*

# SUPPORT CLAIMS

- **Support claim does not survive death:** support order cannot be made against a dead person

*British Columbia (Public Trustee) v. Price* 1990 CanLII 705 (BCCA)

- **Support order can be made binding on payor's estate**

FLA: s.171

# PRACTICE POINT: Who is Your Client?

- **Client has died – with your retainer**
- **New retainer required:** executor (deceased died with a will)
- **New instructions:** objectives/strategy may have changed
- **Solicitor/client confidentiality:** personal representative must waive on behalf of estate



# EXECUTOR: Renounce or Act?

- **Renunciation:** if no ‘intermeddling’
  - **No stomach for litigation:** matrimonial or wills variation
  - **Conflict of interest:** Can he/she properly fulfil fiduciary duties?
- **Intervening contentious probate matters may complicate/delay matrimonial main proceedings:**
  - Challenge to validity of will
  - Application to vary will (dependants’ relief)  
WESA: s. 132  
Rule 6-2(5)
- **Personal representative can typically charge executor fees and recover legal fees**
- **PR has power to bring and defend proceedings, settle and compromise lawsuits**
  - WESA: s. 142 – PR has same powers as the deceased
  - Typically the will confirms these powers

# ROLE OF PERSONAL REPRESENTATIVE

- **Duty to represent interests of the estate and its beneficiaries:** consider impact on residual beneficiaries (likely children of the marriage)
- **Duty to defend and protect the value of the estate:** accountable to beneficiaries
- **Prudent to consult with beneficiaries re strategy and settlement**
- **Potential personal liability of personal representative to beneficiaries**

# ROLE OF PERSONAL REPRESENTATIVE: Continued

- **May need to seek directions from the court**

Trustee Act: s. 86;

WESA: s. 143(1)

- **Personal representative must not distribute the estate without court consent if proceedings have been commenced that may affect the distribution**

WESA: s. 155(2)(c)

# PERSONAL REPRESENTATIVE: Executor

- **Authority dates from death: steps into shoes of deceased**
- **Probate not needed to commence, continue or defend proceedings**  
WESA: s.102
- **Appointment of spouse as executor is revoked on separation**  
WESA: s. 56(2)

# FACT PATTERN

*Please see hand-out entitled “The Jones Fact Pattern” :  
Intestate*

# ADMINISTRATOR

- **Administrator :**
  - Intestate estate – no will or
  - No executor under will alive or willing to act
- **Estate vests in court until administrator is appointed**  
WESA: s. 102(1)
- **Grant of administration is needed to commence or continue a proceeding**  
Rule 6-2(3): there must be a person on whom the estate has devolved or transferred
- **Once grant is issued, the authority dates back to death**

# PERSONAL REPRESENTATIVE: Administrator

- **Court can appoint an administrator in special circumstances – for limited purpose of proceedings**

WESA: s. 132

- **On intestacy: spouse has first right to apply, unless separated**
  - Then child
  - Then other heirs

WESA: s. 130

- **Administration with will annexed**

WESA: s. 131

# PROBATE PROCESS: General

- **WESA Part 6:** applies to testate and intestate estates
- **21-day notice to specified persons, with copy of will (if applicable)**
- **Application documents:**
  - Affidavits – solicitor, applicant
  - Sworn asset disclosure
- **Public Guardian & Trustee involved if:**
  - Minors
  - Disabled persons
- **Original will (if applicable)**



# PROBATE PROCESS: continued

- **Probate fees:** 1.4% of value
- **Timing:**
  - If no disputes
  - If will is disputed

# FACT PATTERN

*Please see hand-out entitled “The Mitchell Smith Fact Pattern”*

# GUARDIANSHIP

- **Appointment of guardian in case of death:** Parent who is guardian can appoint a successor to assume role of guardian on that parent's death:
  - Prescribed form
  - WillFLA: s.53
- **Appointment of standby guardian:** Appointment of a standby guardian must be made in prescribe form and guardian making the appointment must be facing terminal illness or permanent mental incapacity  
FLA: s. 55

# Q&A