

## When to use Rule 14 when applying for a Certificate of Appointment of Estate Trustee

### Introduction

Effective strategic planning for clients facing the job of administering an estate requires consideration of factors such as: whether the deceased person died testate or intestate; if there is a will, whether the original will is accessible or lost; whether the estate trustee named in the will is available and willing to be appointed estate trustee; and whether a request will be made to reduce or waive the required bond. This article illustrates the various scenarios that may require a Rule 14 application, in addition to the more administrative process under Rule 74.

In Ontario, a Certificate of Appointment of Estate Trustee, formerly known as a grant of probate or administration depending on the context (“Certificate of Appointment”) is normally issued following the administrative court processes outlined in Rule 74.04 to 74.10 of the *Rules of Civil Procedure* (“the Rules”). The processes are administrative in the sense that:

- Designated forms and supporting materials are contemplated by the *Rules* and available to the public.
- Normally the registrar has authority to grant the application and issue the Certificate of Appointment upon receipt of all forms and evidence required by the *Rules*.
- Issues that require a judge’s determination are dealt with in writing, and without the formality of a motion record or application record.
- Service is modified. In the past, service by regular letter mail was sufficient irrespective of the place of residence of the interested parties, but service by email is now permitted.

Often, though, an estate does not fit squarely within the rules, forms and processes contemplated by Rule 74. Rule 74 delineates a strict set of documents that need to accompany the application, including affidavits, proof of death, the original will, and certain consents and renunciations from specified persons. Due to these stringent requirements sometimes it is not possible to proceed by way of Rule 74. Lawyers and their clients can spend weeks or months pursuing the required materials such as consents, to no avail. That is when it is important to remember that applications under Rule 14.05 can be made, seeking a court order directing that the Certificate of Appointment be issued. A Rule 14 application allows for much greater flexibility to address difficult or complex estates. Many issues or requirements of Rule 74 that simply cannot be met, can be waived or otherwise addressed in the court order. Although, an application will still need to be made under Rule 74 to obtain a Certificate of Appointment of Estate Trustee, the court order obtained under the Rule 14 application will ensure the certificate is granted even in complicated situations.

While this route may be more costly, it offers greater flexibility and efficiency by permitting applicants to deal with more than one issue in the same application.

Three common complications arise in Rule 74 applications:

- 1) difficulty in obtaining the required consents and renunciations when the deceased dies intestate or the estate trustees named in the will refuse or cannot act;
- 2) the only viable candidates as estate trustees are not Ontario residents, and,
- 3) there is a requirement to post security and the security bond needs to be reduced or waived.

In these scenarios, it may be more effective to make an application under Rule 14 which allows a fuller explanation of the circumstances. It avoids the situation where the Registrar can refuse to issue the certificate, require that the applicant provide required information or evidence (which may not be readily available) or can refer the application to a judge for determination, thereby leading to considerable delay.

For example, where there is a will but the applicant is not named as an estate trustee in the will, Rule 74.04(1)(g) requires the applicant to obtain a consent to the applicant's appointment from the persons who are entitled to share in the distribution of the estate and hold a majority interest in the value of the assets of the estate at the date of death. Or, where the deceased dies intestate, Rule 74.05(1)(c) requires consent to the applicant's appointment from the persons who are entitled to share in the distribution of the estate and hold a majority interest in the value of the assets of the estate at the date of death. Obtaining these required consents can be time-consuming, cumbersome and sometimes impossible.

Let's imagine that Jack dies intestate, leaving four potential beneficiaries to inherit his estate. One of the beneficiaries, Thomas is ready and able to apply for a Certificate of Appointment but cannot obtain the consents or renunciations from the remaining beneficiaries. This would be a situation where Thomas should make a Rule 14 application. If he has made diligent searches but is unable to locate a beneficiary it might be more fruitful for him to bring a Rule 14 application asking that a judge to use their discretion to waive the service and consent requirement for the missing beneficiary.

Even if the deceased dies testate, and the will names an estate trustee, problems may still arise if the named estate trustee is incapable or unwilling to act. The remaining beneficiaries may wish to elect a third party as estate trustee. If the third

party is not entitled to apply under Rule 74, an application under Rule 14 will be required.

Another common reason to apply under Rule 14, is where there is a requirement to post security or a bond which will occur where the applicant is not a resident of Ontario, or where the applicant on an intestacy is not the married spouse of the deceased. Waiving a bond, or modifying security, under Rule 74 requires numerous consents and obtaining the required consents may not be possible. Minor beneficiaries or those under disability cannot consent to bonds being waived. An Affidavit must be filed setting out particulars regarding any debts owed by the deceased, as well as a draft order and a consent from each person entitled to a share in the distribution of the estate, all of which may be impossible to obtain. It therefore makes more sense to proceed with a Rule 14 application which allows judges the flexibility to waive or cure those stringent requirements and also allows the applicant to request relief on any other issues in the same application.

Other complications that may compel a Rule 14 application include:

- when an original will has been lost, proceeding via Rule 74 becomes cumbersome, whereas in a Rule 14 Application, the client can prove a copy of the will and obtain an order appointing him/her as estate trustee;
- where the estate is complicated by a succession of deaths leading to issues with title to real property that forms part of the estate and title must be cleared before the property can be dealt with;
- where the estate trustee may need to sell estate assets, such as real property before the Certificate of Appointment can be obtained and needs a vesting order to do so.

It is important to keep in mind that Rule 14 is not an alternative to Rule 74. A Rule 14 application allows the applicant to seek an order directing the issuance of a certificate but an application must still be made under Rule 74 to obtain the actual Certificate of Appointment of Estate Trustee, with or without a will. Rule 14 is a necessity when the strict requirements under Rule 74 cannot be met or additional relief must be sought and a court order directing the issuance of a Certificate of Appointment of Estate Trustee notwithstanding the complexities is required.



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