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PRELIMINARY

Title and commencement

1.1 (1) These Rules are the Probate and Administration Rules.

- [1.1.1] History and rule-making power The new *Rules* (Order 28 of 2003) were made under s.66(3), *Judicial Services and Courts* [Cap 270]. See further CPR [1.1.5]. Rules relating to probate and administration were formerly to be found in the *Succession, Probate and Administration Rules* No. 1 of 1974 which are repealed by r.5.4. The rule making power contained in reg.53, *Queen's Regulations* is not invoked.
- [1.1.2] Sources of relevant law Lawyers should have regard to at least the following: The *Queen's Regulation* No.7 of 1972, the *Wills Act* [Cap 55] and the *Administration of Estates Act* 1925 (UK). As to the possible operation of residual French law see the comment of Tuohy J in *Newman v Ah Tong* [2007] VUSC 102; CC 41 of 2007 at [8].

(2) These Rules come into operation on 1 August 2003.

- [1.1.3] See also r.5.2.

Purpose

1.2 The purpose of these Rules is to set out the procedures to be used in probate and administration proceedings brought in the Supreme Court.

- [1.2.1] Purposive interpretation The *Rules* should, in addition to the interpretive requirements of r.1.4(1)(b), be interpreted consistently with their purpose. See further CPR [1.1.3] and s.8, *Interpretation* [Cap. 132]. The long title reads: "To set out the procedure in probate and administration matters".
- [1.2.2] Limited scope of *Rules* The *Rules* do not appear to be comprehensive of the procedures to be used in all proceedings relating to a deceased estate nor even to all proceedings relating to probate and administration. For example, there is no procedure dealing with the way in which an application is to be made under any of regs.16 (dealing with infant's property), 17 (trustee of infant's property), 18 (relinquishment of grant), 24 (revocation of grant) or 26 (estate wasting or endangered), *Queen's Regulations*. See further rr.1.3 and 3.2. The repeal of the former rules by r.5.4 means that any earlier prescribed procedures have been abolished. Accordingly, r.1.3 imports the *Civil Procedure Rules* and persons seeking orders not provided by these *Rules* should commence a claim under the former.

Application of the Civil Procedure Rules

ConPR r1.3
EPR r1.3

1.3 (1) If these rules do not make provision for a matter relating to a proceeding, the Civil Procedure Rules apply to that matter.

- [1.3.2] See further [1.2.2], [3.2.1].

(2) In particular, the Civil Procedure Rules apply to contested proceedings, as set out in Rule 3.2.

ConPR r1.4
EPR r1.4

Overriding objective and case management

CPR r1.3

1.4 (1) The Supreme Court must give effect to the overriding objective, as set out in the Civil Procedure Rules, when it:

- [1.4.1] See CPR r.1.2 as to the overriding objective

(a) does any act under these Rules; or

(b) interprets these Rules.

CPR r1.4(1)

(2) In particular, the Court must actively manage cases brought under these Rules, as set out in the Civil Procedure Rules.

[1.4.2] See CPR r.1.4(2) as to active case management

Interpretation

1.5 (1) Some words used in these Rules have a particular meaning. These are defined as follows:

CPR r20.1
ConPR r1.5

"applicant" means the person who makes an application;

[1.5.1] Meaning of "application" This presumably refers to an application for a grant under Part 2.

"contested proceeding" means proceedings where an application for probate or administration is opposed;

[1.5.2] See Part 3.

ConPR r1.5

"Court" means the Supreme Court;

[1.5.3] Establishment of Supreme Court The Supreme Court is established by art.49 of the *Constitution*. See further Part 4, *Judicial Services and Courts* [Cap 270]. See also the definition of "court" in s.1, *Wills* [Cap 55].

"foreign probate or administration" means probate or administration granted in a Commonwealth country or territory;

[1.5.4] Meaning of "Commonwealth country" The Attorney-General may certify that a country or territory is a Commonwealth country or territory: See reg.2.3, *Queen's Regulation*.

"Queen's Regulation" means the Succession, Probate and Administration Regulation 1972, Queen's Regulation No. 7 of 1972;

[1.5.5] History The *Queen's Regulation* was made by the British Resident Commissioner in the New Hebrides pursuant to the New Hebrides Orders in Council 1922 to 1970 .

[1.5.6] Definitions contained in *Queen's Regulation* Regulation 2(1) of the *Queen's Regulation* also contains a number of relevant definitions, of particular importance are the following:

"administration" includes letters of administration of the estate and effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes; and also exemplification of letters of administration with or without the will annexed and such other evidence of letters of administration purporting to be under the seal of a court of competent jurisdiction as in the opinion of the court is sufficient;

"administrator" includes any person to whom administration is granted;

"intestate" includes a person who leaves a will but dies intestate as to some beneficial interest in his estate;

"personal representative" means the executor, original or by representation, of the will, or the administrator of the estate for the time being, of a deceased person;

"probate" includes "exemplification of probate", and such other formal evidence of probate purporting to be under the seal of a court of competent jurisdiction, as in the opinion of the court is sufficient;

"will" includes a codicil to a will.

- [1.5.7] Formal requirements of a will There is no comprehensive definition, however the formal requirements of a will are set out in s.4, *Wills* [Cap 55].
- [1.5.8] Meaning of "codicil" A codicil is an addition or supplement added to a will. See generally *Re Elcom* [1894] 1 Ch 303.

(2) The Notes in these Rules do not form part of the Rules and are for information only.

- [1.5.9] The notes are not reproduced in this publication.

ConPR r1.6
EPR r1.6
CPR r1.9

Forms**1.6 A reference to a Form by number is a reference to the form identified by that number in the Schedule at the end of these Rules.**

- [1.6.1] In this publication forms for all annotated rules appear in the chapter "Forms". See further rr.2.6(3) and 18.9, *CPR* and s.37, *Interpretation* [Cap 132] as to formal defects.

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APPLYING FOR PROBATE AND ADMINISTRATION

Application of Part 2

2.1 This Part deals with:

- (a) **applying for grants of probate and letters of administration of estates of deceased persons; and**
- (b) **the grant, if there is no opposition to the application.**

[2.1.1] **Application** This Part deals with non-contentious probate and administration. If, after an application and advertisement under this Part a notice of opposition is received, then Part 3 applies.

Application for probate

2.2 (1) An application for the grant of probate of the will of a deceased person must:

[2.2.1] **Proving the will** The application for probate has the effect of confirming the title of the executor which derives from the will. The effect of the grant of probate is described in regs.8, 9, 11, 12 and 14, *Queen's Regulations*.

(a) **set out:**

- (i) **the name, last address and occupation of the deceased; and**

[2.2.2] **How name to be given** The full legal name of the deceased ought to be given. Although probate will issue in this name, if it is possible that there exists some property in alternative names, then setting this out in the application is advisable. Aliases and name changes should also be described in the sworn statement in support, as should any discrepancy between the name on the will and the name of the deceased.

[2.2.3] **How address to be given** The full residential address of the deceased at the time of death should be given. If there is any difficulty about this, the best possible address should be given and the sworn statement should explain that no better address can be given.

- (ii) **the date of death; and**

[2.2.4] **Unknown date of death** If the fact of death is known but the exact date of death is unknown, then the application might be inscribed "unknown" and the sworn statement in support should: (1) Explain the circumstances generating the uncertainty; (2) State the last day on which the deceased was seen alive; and (3) State the date on which the body was found.

- (iii) **the name and address of the applicant; and**

[2.2.5] **How name to be given** The full legal name of the applicant should be inscribed. If there is any discrepancy between this name and the name contained in the will, then it must be explained in the sworn statement in support. Name changes and aliases should also be dealt with in the sworn statement.

- (iv) **an address for service of documents; and**

- (b) **if not all executors are applying, state why the applicant is applying for the grant; and**

- (c) have with it the original will; and
 - (d) have with it a copy of the death certificate or other proof of death; and
 - (e) have with it a sworn statement by the applicant in support of the application.
- (2) The application must be in Form 1.
 - (3) The sworn statement must be in Form 2.
 - (4) If there is more than one executor, each executor applying for probate must make a sworn statement in Form 2.
 - (5) If not all executors are applying for probate, the applicant must:
 - (a) obtain a sworn statement from any executor not applying, setting out why he or she is not applying; or
 - (b) if this is not practicable, include in his or her sworn statement the reasons why it has not been obtained.

Application for administration

2.3 (1) An application for the grant of administration of the estate of a deceased person must:

[2.3.1] *Appropriate circumstances* Letters of administration are granted where a person dies intestate or in the circumstances described in regs.29, 30 and 33, *Queen's Regulations*.

- (a) set out:
 - (i) the name, last address and occupation of the deceased; and
 - (ii) the date of death; and
 - (iii) the name and address of the applicant; and
 - (iv) an address for service of documents; and
- (b) state why the applicant is applying for the grant; and

[2.3.2] *To whom grant may be made* The grant will usually only be made to a person entitled to property of the deceased, unless special circumstances exist or the consent of those persons entitled is obtained: *In Estate of Slattery* (1909) 9 SR (NSW) 577; *In the Estate of Smith* (1972) 2 SASR 477; *In Estate of Rosenthal* (1933) 50 WN (NSW) 228.

- (c) have with it a copy of the death certificate or other proof of death; and
- (d) have with it a sworn statement by the applicant in support of the application.

[2.3.2] What application and sworn statement should contain See annotations to r.2.2.

(2) The application must be in Form 3.

(3) The sworn statement must be in Form 4.

Application for administration with the will annexed

2.4 (1) An application for the grant of administration of the estate of a deceased person with the will annexed must:

[2.4.1] Appropriate circumstances This form of grant is made in the circumstances described in regs.28, 31 and 32, *Queen's Regulations*.

(a) set out:

(i) the name, last address and occupation of the deceased; and

(ii) the date of death; and

(iii) the name and address of the applicant; and

(iv) an address for service of documents; and

(b) have with it the original will; and

(c) state why the applicant is applying for the grant; and

(d) have with it a sworn statement by the applicant in support of the application.

[2.4.2] What sworn statement should contain The matter in para.(c) should usually be the subject of close attention in the sworn statement required by para.(d). The court must be able to see precisely the reason why, if applicable, no executor is applying and what is the interest of the applicant(s) under the will. Mere consent by the executor is probably not sufficient: *Garrard v Garrard* (1871) LR 2 P&D 238. See further the annotations to r.2.2.

(2) The application must be in Form 5.

(3) The sworn statement must be in Form 6.

Advertisement

2.5 (1) After an application has been filed, the applicant must cause an advertisement to be broadcast on the radio in the area where the deceased lived and carried on business.

(2) The applicant must also do any other things reasonably necessary to bring the application to the knowledge of anyone who:

(a) is entitled to any property of the deceased; or

- (b) may oppose the grant applied for; or
- (c) is a creditor of the deceased.

(3) The advertisement must:

- (a) state that the applicant has applied for probate or administration of the estate of the deceased person, as the case requires; and
- (b) give the applicant's name and an address for service of documents; and
- (c) state that anyone who is opposed to probate or administration of the estate being granted to the applicant must file a Response in an office of the Supreme Court within the time stated in the advertisement; and

[2.5.1] **Meaning of "Response"** This word is not defined in the Rules. It is used in several places, sometimes with, and sometimes without, a capitalised "R", leading to a little confusion. The formal requirements of a response are detailed in r.3.1.

- (d) state that if no-one files a Response, the Court will grant the probate or administration to the applicant; and
- (e) state that anyone who thinks they are entitled to property of the deceased, or that the deceased owed them money, must contact the applicant or his or her lawyer.

(4) The advertisement must be broadcast on 3 working days in the same week, at least once in a morning and once in an evening.

(5) The advertisement must:

- (a) be broadcast in Bislama; and
- (b) be in Form 7.

(6) For subrule (2) the applicant may, for example:

- (a) cause the advertisement to be published in a newspaper circulating in Vanuatu or elsewhere; and
- (b) cause the advertisement to be broadcast or published in English or French as well as Bislama.

[2.5.2] **Extreme urgency** In extreme urgency, the court may, using its powers in rr.18.1 and 18.10, CPR, overlook non-compliance with some or all elements of this rule: *Greenway v McKay* (1911) 12 CLR 310.

If no Response filed

2.6 (1) If no response is filed and served on the applicant within 28 days after the advertisement was last broadcast, the applicant must file a sworn statement:

- (a) stating that the advertisement was broadcast; and
- (b) giving details of the dates and times when it was broadcast; and
- (c) attaching a copy of the text that the applicant believes was broadcast; and
- (d) if the applicant did any other things to comply with subrule 2.5(2), stating what was done and attaching a copy of any information published.

(2) A sworn statement must be in Form 8.

Grant if application not opposed

2.7 (1) After the sworn statement about the advertisement is filed, the Court may grant the probate or administration applied for if a person does not oppose the application by filing a response.

[2.7.1] Discretion There appears to be a residual discretion about whether to make a grant. It may be necessary to consider, for example, the adequacy of family provision, pursuant to s.13(2), *Wills* [Cap 55] regardless of whether any response is filed.

(2) The grant of probate must be in Form 9, and the grant of administration must be in Form 10 or 11.

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OPPOSING AN APPLICATION FOR PROBATE OR ADMINISTRATION

Response

3.1 (1) A person who opposes the grant of probate or administration to the applicant must file a response within 28 days after the advertisement required by Rule 2.5 was last broadcast or published.

[3.1.1] Function of response It is important for lawyers to understand that the function of a response is limited to generating consideration of the question of the grant. Other issues, such as the property of the estate, must be dealt with by separate and different proceedings and are not necessarily grounds for opposing the grant: *In re Estate of Kalsakau* [2007] VUSC 103; Prob Cas 1 of 2007 at [6], [7], [10]; *In re Estate of Molivono* [2007] VUCA 22; CAC 37 of 2007.

(2) A response must:

- (a) state that the person opposes the grant of probate or administration to the applicant; and
- (b) state the person to whom probate or administration should be granted; and
- (c) set out the address that is the person's address for service of documents; and
- (d) be in Form 12.

[3.1.2] Costs A party may be ordered to pay costs resulting from an improper response: *In re Estate of Kalsakau* [2007] VUSC 103; Prob Cas 1 of 2007 at [8] - [10].

Application of Civil Procedure Rules to opposition proceedings

3.2 (1) After a Response has been filed, the procedure to be used is the procedure set out in the Civil Procedure Rules, unless:

- (a) these Rules provide otherwise; or
- (b) the Court orders otherwise.

[3.2.1] Scope of rule It is important to note that this rule is not comprehensive of all proceedings under the *Queen's Regulation* (see [1.2.2]) or otherwise relating to the administration of estates. It applies only where an application under Part 2 has met with opposition.

(2) In particular, the Civil Procedure Rules apply as if:

- (a) the application is a claim; and

[3.2.2] Whether application stands as claim This paragraph generates confusion. A superficial reading of this paragraph suggests that an application made under Part 2, if contested, stands as the claim. That interpretation does not seem to be viable. Alternatively, the rule could be intended to mean that that a person making an application under Part 2 (ie. an "applicant" as defined in r.1.5) is to be the applicant in any subsequent litigation. This seems to be a viable interpretation but of course it may be a different person who decides to initiate proceedings, such as a person who seeks a pronouncement against a will. In such a case, there having been no application under Part 2, this rule will not apply.

(b) the applicant is the plaintiff; and

[3.2.3] Meaning of “plaintiff” The word “plaintiff” is not used in the *Civil Procedure Rules*. This is probably a typographical error intended to refer to “claimant”.

(c) the respondent is the defendant.

[3.2.4] Meaning of “respondent” The word “respondent” is not defined, or used elsewhere, in these *Rules*. It is presumably intended as a reference to the person lodging opposition under r.3.1.

[3.2.5] Additional defendants In many types of proceedings it will be appropriate for all potentially interested parties to be joined as defendants, not just the person filing a response.

[3.2.6] Persons bound by judgment A judgment obtained in contested probate is in the nature of a judgment: *Young v Holloway* [1895] P 87 at 90; *Re Millen* [1975] 2 NZLR 605 at 607. It is binding against parties and, uniquely, against interested persons cognisant of the proceedings, even if never served: *In the Estate of Langton* [1964] P 163 at 179. Of course, it might be wise to join all interested persons for the avoidance of doubt: *Wytcherley v Andrews* (1871) 2 P&D 327 at 329.

(3) A document filed in the Court under the Civil Procedure Rules as applied by this Rule must have the same heading as in the forms in Schedule 1 to these Rules.

(4) The fees set out in Schedule 1 of the Civil Procedure Rules are payable.

Grant of probate and administration

3.3 Where the Court grants probate or administration in contested proceedings:

(a) the grant of probate must be in Form 9; and

(b) the grant of administration must be in Form 10 or 11.

Caveats

3.4 (1) A caveat must be in Form 13

[3.4.1] Who may lodge caveat Reg.47(1) provides that “any person” may lodge a caveat. It is suggested, however, that only a person having or asserting an interest in the estate may lodge a caveat: *Re Devoy; Fitzgerald v Fitzgerald* [1943] St R Qd 137 at 143, 145-6, 148.

[3.4.2] When caveat may be lodged Reg.47(1) provides that a caveat may be lodged at any time before probate or administration is granted or sealed.

[3.4.3] Nature and duration of caveat Reg.47(1) provides that a caveat may be lodged against any application for probate or administration, or for the sealing of any probate or letters of administration. It is important to note that the lodgement of a caveat does not itself commence any litigation or proceedings: *Moran v Place* [1896] P 214; *Re Emery* [1923] P 184. The effect of the caveat is to prevent anyone but the caveator from receiving a grant or reseal until the caveat is removed under reg.48 or withdrawn under subr.(2).

[3.4.4] Costs It is conventional elsewhere to treat the costs associated with lodging a caveat as costs in the cause of subsequent litigation. A person filing a caveat without reasonable grounds will usually be ordered to pay costs: *In Will of O’Driscoll* (1929) 29 SR (NSW) 559; 47 WN (NSW) 176.

(2) An application to withdraw a caveat must be in Form 14.

[3.4.5] Discretion The *Queen’s Regulation* does not refer to the possibility of withdrawing a caveat. This subrule refers to an application to withdraw a caveat, implying that removal is not automatic. It is noted, however, that Form 14 does not require reasons to be stated, nor is it required that the

application be accompanied by a sworn statement. It appears that a caveator can apply to remove the caveat at any time. The circumstances in which the court will grant the application are unknown. Presumably the court will be concerned to enquire into the circumstances of lodgement to ensure that appropriate consequential orders (including as to costs) are made.

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RESEALING AND ACCOUNTS

Resealing of probate or administration

4.1 An application to reseal a foreign probate or administration must:

[4.1.1] By whom application made Regulation 46(1) provides that the application may be granted to “any person being the personal representative whether original or by representation or by any person duly authorized by power of attorney in that behalf, under the hand and seal of such personal representative”. See also *Lewis v Balshaw* (1935) 54 CLR 188.

(a) be in Form 15; and

(b) have with it the original probate or administration, and a copy; and

[4.1.2] Difficulties As discussed in [4.1.3], this rule relates only to the Commonwealth. Some Commonwealth legal systems are, however, based on civil law (eg Malta, Mauritius and Quebec). In civil law systems, testate succession occurs by the heir or legatee being made by law the direct successor, thus precluding the need for a grant. There is accordingly no formal authority which the heir can present to the Supreme Court of Vanuatu for resealing.

(c) have with it a sworn statement in Form 16.

[4.1.3] Application This rule relates only to “foreign probate or administration” which is a phrase defined in r.1.5. See further [1.5.3] and reg.46(1), *Queen’s Regulation*.

[4.1.4] Effect of foreign grant on local property Grants of probate or administration in other countries do not entitle the legal personal representative to administer property locally: *Blackwood v R* (1882) 8 App Cas 82 at 92; *Lewis v Balshaw* (1935) 54 CLR 188. Accordingly, this procedure allows a probate or administration obtained in a Commonwealth country or territory to be re-sealed in Vanuatu, thus avoiding the inconvenience of a fresh application. The re-sealed grant has the same effect as a local grant: reg.46(2), *Queen’s Regulation*.

[4.1.5] Other countries Where personal representatives from other countries cannot take advantage of this rule, they may seek to proceed under the exceptions to the rule in *Blackwood v R* (1882) 8 App Cas 82, of which there appear to be two: (1) A person who has a grant of representation or otherwise has authority to represent a deceased person under the law of a foreign country where the deceased died domiciled may apply to the court for an order for the transfer to him of the net balance of assets under the administration but is not entitled as of right to such an order. *Re Achilopoulos* [1928] Ch 433; *In the Estate of Weiss* [1962] P 136; cf *Re Lorillard* [1922] 2 Ch 638; *Re Manifold* [1962] Ch 1; and (2) A foreign personal representative has a good title to movable property of the deceased to which good title has been acquired in a foreign country under the *lex situs* and which he has reduced into possession: See Dicey & Morris, *The Conflict of Laws* (9th ed. 1973) at 579-82.

[4.1.6] Discretion Regulation 46(2), *Queen’s Regulation* confers a discretionary power which will usually follow the interest. For exceptions see *In Will of Lambe* [1972] 2 NSWLR 273 (invalid will); *Bath v British and Malayan Trustees Ltd* [1969] 2 NSWLR 114 (grant would operate as an indirect method of enforcing a foreign revenue claim).

Accounts

4.2 (1) The Court may order that a personal representative file accounts.

(2) The Court may make the order:

(a) on application by a beneficiary, a creditor or any other person with an interest in the estate, or on its own initiative; and

(b) when it grants probate or administration, or at any other time.

Form of accounts**4.3 (1) Accounts filed must list:**

- (a) the property of the deceased; and
 - (b) the debts; and
 - (c) the funeral expenses; and
 - (d) the income of the estate; and
 - (e) if property has been sold, the proceeds of the sale; and
 - (f) any other amounts received by the personal representative; and
 - (g) any amounts paid by the personal representative:
 - (i) in paying debts; and
 - (ii) in bequests; and
 - (iii) otherwise in administering the estate.
- (2) The accounts must be signed by the personal representative.
- (3) A person with an interest in the estate may inspect the accounts and obtain copies.

MISCELLANEOUS

Court fees

5.1 (1) The fees set out in Schedule 2 are payable.

(2) Rule 4.12 of the Civil Procedure Rules applies to fees payable under these Rules.

Commencement

5.2 These Rules come into operation on the 1st day of August 2003.

[5.2.1] See also r.1.1(2).

Transitional

5.3 (1) These Rules apply to an application filed on and after the commencement date.

(2) These Rules apply to a continuing proceeding to the exclusion of the old Rules.

(3) In the application of these Rules to a continuing proceeding:

- (a)** every step to be taken in the proceeding on and after the commencement date must be taken under these Rules; and
- (b)** the Court may give all directions necessary for the application of these Rules to the proceeding.

(4) In this Rule:

"commencement date" means the date these Rules come into operation;

[5.3.1] See rr.1.1(2), 5.2.

"continuing proceeding" means a proceeding started before the commencement date, and includes:

- (a)** an application that is not opposed; and
- (b)** a caveat; and

"old Rules" means the Succession, Probate and Administration Rules No. 1 of 1974, as in force immediately before the commencement date.

Repeal

5.4 The Succession, Probate and Administration Rules No. 1 of 1974, made under the Queen's Regulation, are repealed.

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