



HULL & HULL LLP

Barristers and Solicitors

Trust Experience™

Probate Applications by Non-Spouses

In the past, we have seen error notices issued in respect of applications for a Certificate of Appointment of Estate Trustee because the response to whether or not the applicant is the deceased's spouse who has elected for an equalization of net family properties has been answered improperly. Form 74.4 asks as follows: "If the spouse of the deceased is an applicant, has the spouse elected to receive the entitlement under section 5 of the *Family Law Act*? If yes, explain why the spouse is entitled to apply."

Where the applicant is, in fact, the spouse of the deceased who has elected for an equalization of net family properties under the *Family Law Act*, the "yes" box should be checked off, with an explanation included where indicated on the form. Where the applicant is a spouse and he or she has not elected for equalization, the "no" box should be checked. In all other circumstances, however, in which the application is not made by the surviving married spouse, the question should be answered as "not applicable" rather than by checking either box. While answering "no" may also seem to be appropriate, answering in such a manner may give rise to confusion as to whether the applicant is the spouse of the deceased and/or whether the deceased was survived by a spouse other than the applicant and an error notice may be issued as a result.

Furthermore, where an application is being made for a Certificate of Appointment of Estate Trustee Without a Will or by an individual who is neither a spouse nor named as estate trustee within a testamentary document, the applicant may need to obtain an administration bond in circumstances where a married spouse would not. For example, subsection 36(2) of the *Estates Act* provides that a bond is not required where the deceased dies intestate, the application for a Certificate of Appointment of Estate Trustee Without a Will is made by the surviving married spouse, the net value of the estate is less than the preferential share to which the spouse is entitled (currently \$200,000), and an affidavit filed with the application outlines the liabilities of the estate. Other applicants may nevertheless be able to request the dispensation of the requirement to obtain an administration bond in appropriate circumstances.

While these can be minor points that might not impact whether or not an individual wishes to apply for a Certificate of Appointment, it may nevertheless be prudent to advise clients of these potential considerations when assisting with estate administrations.