The Continuing Legal Education Society of Nova Scotia

Section One B
Changes to the Probate Act - How They May Affect Your Practice

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CHANGES TO THE PROBATE ACT: HOW THEY MAY AFFECT YOUR PRACTICE

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1. HISTORICAL BACKGROUND

- In July 1996, the then Minister of Justice and Attorney General of Nova Scotia referred the matter of probate reform to the Law Reform Commission of Nova Scotia.

- In March of 1999, the Law Reform Commission released its Final Report - Probate Reform in Nova Scotia.

- In January, 2000, the Minister of Justice and Attorney General of Nova Scotia created a Probate Reform Project, the result of which is the introduction of a bill which attempts to improve and modernize the Probate Act and process.

- The Probate Act passed 3rd reading and received Royal Assent on November 30, 2000, bringing with it some historic changes to the probate system in Nova Scotia. Most of the Act awaits proclamation, which is anticipated in the spring of 2001, however the sections dealing with probate taxes (sections 85-89) are now in force.

- Attempts to reform Nova Scotia's Probate Act have been long standing. There have been more than fifty submissions and proposals for probate reform made by lawyers, registrars of probate, county barristers' associations and others over the past twenty years.

- Nova Scotia's Probate Act dates back to 1842 with the introduction by the judge of the Supreme Court and Master of the Roles of "An Act Relating to the Courts of Probate and to the Settlement and Distribution of the Estates of Deceased Persons". That Act forms the basis for the procedure in Probate Courts today and is reflective of the fact that lands represented wealth in its most tangible form.

- Nova Scotia is one of two provinces in Canada that established a court of probate prior to Confederation. Section 96 of the British North America Act reflects this unique characteristic in stating, "the Governor General shall appoint the Judges of the Superior, Districts and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

- In the mid 19th century land represented the only wealth of most Nova Scotians and, as women were economically dependent upon their husbands, dower was a very important right.

- Social and economic conditions have changed dramatically since 1842, as has technology and Nova Scotian's access to it, yet many probate practices are still reflective of those times.

- Today there are eleven probate districts in Nova Scotia, with a court of Probate in each one.

- The twenty two recommendations for change made by the Law Reform Commission in 1999 were among the proposals for change which have been reviewed.

- Consultation has been made with various stakeholder groups and the reform process has been greatly assisted by a volunteer Advisory Committee, Legislation Sub-Committee, Regulations Committee and ADR Committee, the members of which include Justice Linda Lee Oland (Nova Scotia Court of Appeal); Estelle Theriault,Q.C. (Public Trustee for Nova Scotia); John Arnold, Q.C.; Larry Graham Q.C.; John K. MacDonald (Bank of Montreal Trust);; Roberta Clarke, Q.C.; Neil McMahon; Richard Coughlan, Q.C.; Gregg Knudsen (Scotia Trust); Susannah Starnes (AMS Mediation); Cheryl Hebert (Consultant/ADR Mediation); Marian Tyson, Q.C. (Executive Director, Court Services); Jim Hahnen (Court Administrator, New Glasgow).

MAJOR CHANGES TO THE PROBATE ACT

- **Oath Of Witness To A Will** (section 30(2))

  Before the new Act, the affidavit of a witness to a will, (which proves that they watched it being signed) was made *after death* at the Court of Probate. Quite often years pass between the signing of a will and the death of a testator. Sometimes witnesses to the will are dead or cannot be located. This has caused delay and added to the expense in processing an estate.

  Under the new Act an affidavit of execution of a will may be made *at any time after the will is signed* including at the time of the application for a grant from the Court, and the affidavit may be deposed to by a barrister of the Supreme Court, notary public, registrar or deputy registrar of probate or any other person that the registrar directs.

  Practitioners may want to incorporate the taking of this affidavit into their wills practice. The form of affidavit will be contained in the Regulations to the Probate Act. A draft form, now being considered, is attached to this paper.

  If the affidavit is not taken before death, it may be taken at the Probate Court or elsewhere by the above mentioned persons. If none of the above persons are available the Registrar will provide directions for the execution of this affidavit.

- **Asset Protection Prior to a Grant** (sections 17,18, 45)

  The personal property of an intestate person vests in the Public Trustee until a grant of administration issues from the Court. (section 45).

  Our probate legislation did not allow for the court to issue an order to restrain people from dealing or intermeddling with the property of a deceased person. The new Act contains such a provision. The Registrar can entertain an application to restrain persons from dealing or intermeddling with the property of a deceased person before a grant of probate has been made and to award costs as the court sees fit. (section 17)

  Prior to a grant being issued by the Court the Public Trustee may take possession of the property of a deceased which has not been taken into possession by an executor/administrator for its protection and preservation. This may be done without court order. (section 18)

- **Devolution of Property** (sections 44 - 56)

  Perhaps the most significant change is to the law by which real property devolves. Nova Scotia has been unique in Atlantic Canada, and indeed in Canada, in vesting the "heirs-at-law" of a deceased intestate person with title to their land. We are also unique in allowing the testator to bypass the executor in devising land directly to a beneficiary.

  With the proclamation of Bill 74 all that changes. The executor under a will and the administrator on an intestacy becomes vested with the real property of the deceased that does not pass on survivorship to another person or that did not end upon death (section 46(1)).

  The executor or administrator, called "personal representative" in the new Act, holds the real property as trustee for entitled persons and is deemed to be the heir of the deceased in the interpretation of statutes and in the construction of instruments to which the deceased person was a party (section 46(6)(7)). Deeds from a personal representative will be required to convey title to land. Deeds will contain recitals that show the personal representative's title from the deceased (section 50(6)).

  The gap in time between the death of an intestate and the appointment of the administrator is considered non-existent for the purposes of title. (section 46(2)). This means that registered judgements against "heirs-at-law" of the intestate person do not attach to the land owned by the deceased. However, registered encumbrances (including judgements against the deceased), are caught by the estate and will need to be dealt with as they are now.

This fundamental change has an impact on laws relating to conveyancing. Gone are provisions requiring licences to sell real property and for partitions (except in cases where property devolved under a will signed before the date of proclamation of the new Act). There are new sections relating to the vesting of real property in the personal representative, for selling real property to pay debts, to distribute the estate, and for distribution of real property *in specie*; provisions for leasing and mortgaging real property; for conveyancing to a beneficiary who is entitled one year after the grant; for the sale of real property one year after the grant; provisions for debts or liabilities of the deceased and for real property conveyances to purchasers in good faith for value and to beneficiaries entitled to the real property.

In cases of intestacy, the heirs-at-law currently have the right to deal with the property, including the right to sell it. Problems arise when the heirs-at-law sell the property before it is determined that the remainder of the estate is not large enough to pay the outstanding debts of the deceased. Other problems arise concerning maintenance and repairs to property and where one or some of the heirs are unwilling, unable or unavailable to join with the other heirs at law in conveying the property. Under the new Act the administrator of the intestate's estate is the only person with such ownership rights over the land.

The intent of these sections, which vest title to real property in the personal representative as trustee for those beneficially entitled to it in the same way that personal property vests in them at common law, is to accept the recommendation of the Law Reform Commission and fall into the system used in the other common law provinces. For a useful comparison of estate conveyancing under our current Probate Act and under Bill 74, readers are directed to a commentary entitled "Estate Conveyancing in Nova Scotia".[1]

Property practitioners are likely to raise questions concerning the practical effects of these changes. Indeed, many are raised by Mark Penfound in his excellent paper prepared for this conference. Regulations will deal with some practical concerns. Practitioners are encouraged to raise questions and seek answers by calling or writing to us at the Probate Reform Project (telephone #424-7525, fax #424-6403).

- **Non-Resident Administrators** (sections 32(1)(d))

In the past, non-residents of Nova Scotia who were entitled to share in the distribution of the estate of a person who died without a will have not been permitted to be administrators of that estate. Under the new Act, non-resident persons entitled to share in the distribution of estates will be entitled to be appointed as administrators, subject to receiving the consent of the Public Trustee and acquiring

[1] ¶14,420 CCH: Canadian Estate Administration Guide, Volume 1

a bond or other form of security for the performance of their duties.

Non-residents are entitled to act as administrators in the provinces of Prince Edward Island, British Columbia, New Brunswick, Saskatchewan and Alberta. Non-residents are not permitted to be administrators of estates in the provinces of Ontario, Newfoundland and Manitoba. However, in Ontario they allow a non-resident with entitlement to inherit the estate to nominate an Ontario resident to act as administrator.

- **Nominee Administrator** (section 32(4)(5))

In the past, the persons who are entitled to act as administrator of a person dying without a will have not been allowed to appoint a nominee to act as an administrator instead of themselves. This is now permitted, and allows persons who are entitled to the administration of an estate to nominate a person, including a trust company, to obtain a grant of administration of the estate, subject to first receiving the consent of the Public Trustee.

There are provisions in the statutes of Alberta , Saskatchewan and Ontario legislation which allow for the persons entitled to administration to nominate some other person as their nominee to obtain a grant of administration. The provinces of British Columbia, Newfoundland, Prince Edward Island, New Brunswick and Manitoba allow for such appointments to be made by the court.

- **Bonds/Security** (sections 40 - 43)

To date security for the performance of the administrator is required, by way of a bond or surety, from administrators of the estate but not from executors of the estate under a will.

Under the new Act, administrators residing in and outside of Nova Scotia will be required to give the Registrar of Probate Court security for their administration of the deceased's property, without exception.

Executors residing outside Nova Scotia will be required to give security in certain situations. It will be required for a will signed after the date the Act comes into force if it does not provide for a waiver of the need for security, where there is no co-executor residing in the Province, and where the persons who are beneficially interested in the estate have not consented to dispense with the need for such security or are unable to do so because they are not all adult or mentally competent to do so.

Practitioners may want to revise their will precedents to include a waiver clause, and take specific instructions from clients on this subject.

Also under the new Act, the Court will have the right to dispense with the need for security if the administrator or executor is the sole beneficiary of the deceased person.

- **Notification of Estate Opening** (section 43)

  There has been no requirement for the personal representative to notify the persons entitled to share in the distribution of any estate of the fact that a grant has issued from a Court of Probate. In the new Act this notice will be required to be sent by the personal representative to those persons once a grant has issued from the Probate Court. The Regulations will set out the time frame for giving such notices and the forms.

- **Inventory** (sections 57 - 58)

  Filing an inventory within 3 months after the grant continues to be a mandatory probate procedure, but the enforcement of this requirement is stronger in the new Act. After the expiry of three months from the grant of probate or administration, the registrar may give notice to a personal representative requiring them to file an inventory within 30 days after receipt of the notice. Failure to comply may result in an order requiring the inventory to be filed.

  Failure to comply with an order may result in an order removing the personal representative (section 61(1)(a)).

- **Appraisal of Assets** (sections 59 - 60)

  Under the new Act the requirement for an appraisal of the assets of the estate will be optional, at the request of a person with an interest in the estate.

- **Advertising For Claims of Creditors** (section 63)

  The present form of advertising for claims against an estate is through the Royal Gazette, for one month if the value of the estate is less than $800.00 and for six months in all other cases. This procedure will continue under the new Act, but with the elimination of any distinction for estates of a small value.

  Creditors will have the right to file their claim within that six month period. The personal representative will be entitled to pay any debts, (reserving funds to pay claims filed,) and distribute assets among the persons entitled to them without personal liability to a claimant once the six month period has expired. Claims may continue to be filed at the Probate Court until such time as the Registrar issues an order passing the accounts of the personal representative and discharging them from their role as such to the estate. Thereafter claims may not be made against

the estate in the Court of Probate. (section 64(2))

- **Estates From Outside Nova Scotia** (section 37)

  In the past there were two procedures for dealing with estates from other provinces, countries or territories, called resealing and ancillary grants. The new Act combines these into one procedure which will be named "Extra-Provincial Grants". The current requirement to advertise before the application for such a grant is made to the Court will be eliminated.

- **Removal of Executor /Administrator** (sections 61,62)

  Under the new Act, the court may remove a personal representative if it is satisfied that it would be in the best interest of persons interested in the estate to do so. A partial list of reasons for removal is set out in the Act and is more comprehensive than were the provisions of the current Act. Another change is a provision allowing for a "friendly" application by a personal representative to be dismissed from those duties.

  The Act requires a personal representative who wishes to step down or who is removed by the Court to make an accounting of the administration of the estate up to the time of the discharge or removal.

- **Passing the final accounts** (sections 69 - 77)

  In the past, all executors and administrators under a grant from the Probate Court were required to make application to settle the estate within eighteen months from the date of the grant. This is normally referred to as "closing" the estate. Under the new Act the personal representative is required to make application to close the estate within the same time limit - unless the court extends the time frame - but this process may be accomplished by either documentation or by a hearing before a registrar, at the option of the persons who are interested in the estate.

  Also new is the option to avoid closings in testate estates, where the surety (if there is one) and all unpaid beneficiaries, (who must all be adult and competent), agree in writing that a final accounting is unnecessary.

  The form for the final accounting will be set out in the Regulations to the Act.

  Another change is a provision which allows a person interested in the estate (including unpaid creditor and a surety) to apply to the Probate Court for an order requiring the personal representative to give an accounting. This is intended to be used when a personal rep has not complied with the 18 month time frame for an accounting and allows the court to assess the personal representative for the cost

of the application and the accounting. (section 69(2))

- **Technology**

  The Courts of Probate do not currently use computer technology for managing the documentation. There have been concerns about consistency of practice in the various courts and about the availability of document information from one probate district of the province to another. Document management by computer and electronic linking of probate courts, with accessibility across the province's intranet service is underway, with completion anticipated by April, 2001. This will enable someone at the Yarmouth Probate Court to search current Sydney Probate Court records. Phase II and III will permit a broader based use of the technology and searches of probate documentation that predates April 1, 2001.

- **Unascertained Heirs** (section 82)

  Until now there has been no provision for a personal representative to distribute an estate if there is the possibility of unascertained persons entitled to the estate. This has presented problems. The new Act contains a provision that allows a personal representative to apply to the court for an order that they be at liberty to distribute the proceeds of an estate that they are administering, having regard only to the claims of persons that they have been able to ascertain to be entitled and whose residence and address the personal representative has been able to ascertain.

- **Probate Tax** (sections 85 - 89)

  Effective June 8, 2000 probate court has collected only one tax (formerly called fee), at the time the estate is 'opened'. Effective November 30, 2000, the tax payment schedule is as follows:

  (a) in estates not exceeding $10,000, $70;
  (b) in estates exceeding $10,000 but not exceeding $25,000, $150;
  (c) in estates exceeding $25,000 but not exceeding $50,000, $250;
  (d) in estates exceeding $50,000 but not exceeding $100,000, $700;
  (e) in estates exceeding $100,000, $700 plus an additional $12 for every $1,000 or fraction thereof in excess of $100,000.

  Probate taxes will continue to be collected on the gross value of personal property and net value of land of the deceased.

Form:
Probate District:
Probate File No:

IN THE COURT OF PROBATE FOR NOVA SCOTIA

Estate of.....Deceased,

AFFIDAVIT OF EXECUTION OF WILL OR CODICIL

I, *(insert name)*, of *(insert city or town and county or district/regional municipality of residence)*, make oath and say/affirm:

1. On *(month), (day), (year)*, I was present and I saw the document marked Exhibit "A" to this affidavit executed by *(name of deceased)*.

2. *(Name of deceased)* executed the document in the presence of myself and *(insert name of other witness, address of other witness)*, who were present at the same time, and signed the document in the testat*(or's)(rix's)* presence as attesting witnesses.

Sworn/affirmed before me at)
In the County of)
Province of)
This day of , 2) _____
(Signature of witness)
)
)
)
)

_____
A Barrister/Notary Public, Registrar of Probate, Deputy Registrar of Probate

Note: If the testat*(or)(rix)* was blind or signed by making his or her mark, add the following paragraph:

3. Before its execution, the document was read over to the testat*(or)(rix)*, who (*was blind*)(*signed by making his or her mark*). The Testat*(or)(rix)* appeared to understand the contents.

WARNING: A beneficiary or the spouse of a beneficiary should not be a witness.