

**CLE/RELANS REAL PROPERTY CONFERENCE**

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

**W. Mark Penfound, Q.C.  
Huestis Ritch  
Halifax, Nova Scotia**

## **NEW PROBATE ACT - CONVEYANCING OF REAL PROPERTY**

### **Introduction**

This paper is intended to be a discussion of aspects of the new *Probate Act*<sup>1</sup> as it relates to the conveyancing of real property. It is not intended to be an academic review of the law, but rather a practical review of various practice and technical issues arising from a consideration of the Act. The Probate Rule and Practice Manual are in the development stages and it may be premature to judge the full impact of the reform process until these further documents are available.

The new Act will become law soon. Before examining it, it will be useful to first briefly consider the current regime, in which the *Probate Act*<sup>2</sup> has very little impact on the conveyancing of real property.

### **Current Regime**

Whether or not there is a will, property held in joint tenancy before death passes to the joint survivor by operation of law.

If there is a will, the terms of the will normally govern the disposition of real property. The probate process confirms the validity of the will and the appointment of the executor. The will is recorded at the Registry of Deeds, updating the ownership of the property on the public record. The executor derives authority from the will, which speaks as of the date of death.

Personal property vests in the executor from the date of death, whether or not the will provided that it was given to the executor upon trust. Real property does not vest in the executor unless the will states that it is given to the executor upon trust. The will could also provide that the real property be devised directly to certain beneficiaries. It then

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<sup>1</sup> S.N.S. 2000, c. 31 [hereinafter sometimes called the “new Act” or “new *Probate Act*”]

<sup>2</sup> R.S.N.S. 1989, c. 359 [hereinafter sometimes called the “old Act” or “old *Probate Act*”]

vests in those beneficiaries under the direct devise immediately on death. The will acts as a transfer document and no further deed is required from the executor to convey title to the beneficiaries. In some circumstances a confirmatory deed might be recorded confirming a more precise legal description of the property. Unless there is a power of sale in the will, the executor cannot sell the property to pay debts or otherwise without a court order or the concurrence of all the persons beneficially entitled.

In the case where real property is devised to the executor in trust, it vests in the executor immediately on death. A trustee's deed from the executor is required to convey title to the persons beneficially entitled. An executor may sell the property to pay debts or for distribution, if the will contains a power of sale. Most wills of this type contain an express or implied power of sale.

On intestacy, real property vests in the heirs-at-law immediately on death. A grant of administration vests only personal property in the administrator as of the date of the grant. The administrator has no control over the real property unless it is needed to pay debts, in which case the administrator may apply to the Probate Court for a license to sell the real property. For the court to sanction the sale, it is necessary to show that there is insufficient personal property to pay the debts. If the personal property is sufficient to pay the debts, the administrator has no power to sell the real property.

If the heirs want to sell the real property, they may list the property for sale and sell it in the normal manner. In this regard, there has been a difference in the practice of conveyancers throughout the province. Some would say it is not necessary to take out administration of the estate to convey the real property. It is sufficient to put recital in the deed listing the heirs and the basis of their title, supporting this by a sworn statement. A separate statutory declaration could be provided or it could be included in the affidavit of status, which accompanies the deed.

Other practitioners require formal administration. In the course of this process, the Petition for Administration is filed on the Registry of Deeds. Included in the Petition is a

statement listing the heirs-at-law. Reliance is then made on s.18 of the old *Probate Act* for protection that the persons named on the Petition are the persons who own the property and are lawfully entitled to convey it. With respect, this is no better than a statement made under oath. Section 18 only protects those persons paying money to or dealing with the executor or administrator. In this case, the purchaser is paying the money to and getting a deed from the heirs, not the administrator. The grant of administration does not give the administrator any authority to deal with the real property. The process of taking out administration necessarily involves additional expense, not the least of which is a bond premium. If the estate is only comprised of real property, it must be opened and closed to release the bond without anything ever passing through the hands of the administrator.

It is not necessary to continue this debate here. It is expected that the new *Probate Act* will be proclaimed in the early summer, bringing with it changes that will affect conveyancing practice.

### **New Regime**

The greatest change in the new Act involves the devolution of property. Upon death, real property and personal property will devolve to the personal representative. The new Act uses the term “personal representative” referring to both executor and administrator.

On intestacy, personal property will vest in the Public Trustee until there is a grant of administration by the Probate Court at which time through the “doctrine of relation back”,<sup>3</sup> the administrator is deemed to be vested with the title to personal property from the date of death. The real property will vest in the personal representative from the date of the grant, but through the doctrine of relation back, the vesting is deemed as of the date

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<sup>3</sup> For a discussion of this doctrine, see Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia, Final Report* (Halifax: Law Reform Commission of Nova Scotia, 1999) [hereafter *Law Reform Commission of Nova Scotia Report*]; British Columbia appears to be the only other jurisdiction in Canada that has adopted the doctrine of relation back in its legislation. *Estate Administration Act* R.S.B.C. 1996 c.122, s.3; see also A. H. Oosterhoff & W. B. Rayner, eds., *Anger and Honsberger: Law of Real Property*, vol. 2, 2d ed. (Aurora, Ontario: Canada Law Book, 1985) [hereinafter *Anger and Honsberger*] at 1457.

of death. Unlike personal property, however, there is no provision for the vesting of real property immediately on and from the date of death until the grant. Until there is a grant, there is no vesting.<sup>4</sup>

In testate situations, real property will always vest in the personal representative on death, regardless of the provisions in the will. Only the personal representative can convey real property. Unless the sale is necessary to pay debts, those persons beneficially entitled must approve the conveyance.

Executors are not generally permitted to distribute assets *in specie* unless it is specifically permitted under the will. This will now be permitted under the new Act with the concurrence of the persons beneficially interested.

The partition provisions<sup>5</sup> under the old Act have been eliminated.

Consider now the devolution of property sections in the new *Probate Act*.

### Limits of Application

*44 (1) Nothing in Sections 45 to 56 affects the interest of a spouse in a matrimonial home under the Matrimonial Property Act.*

*(2) Sections 45 to 56 do not apply with respect to real property that devolves under a will that was executed before the coming into force of this Section.*

*(3) Sections 50 to 64 of Chapter 359 of the Revised Statutes, 1989, the Probate Act, apply with respect to real property that devolves under a will that was made before the coming into force of this Section as if Sections 50 to 64 had not been repealed.*

All rights of a spouse under the *Matrimonial Property Act* are preserved.

The sections relating to devolution of property in the new Act do not apply to a will signed before the coming into force of these sections. The relevant date is the date of

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<sup>4</sup> *Anger and Honsberger* at 1456-7.

<sup>5</sup> Sections 86 – 104.

execution of the will not the date of death. The provisions of the old *Probate Act* dealing with a License to sell Real Property<sup>6</sup> continue to apply for wills signed before the coming into force of the new Act.

For a person who dies intestate after the new Act comes into force, the provisions of the new Act apply.<sup>7</sup> The new Act is not expected to apply retroactively. If a person died intestate before the new Act comes into force, under the current regime, the real property vests in the heirs-at-law and can be conveyed by the heirs-at-law.

With respect to the application of the new Act to testate and intestate estates generally, it is expected that it would apply where the deceased died after the Act comes into force. Where the deceased died before the Act comes into force, the provisions of the old Act should apply. Does the old Act continue to apply to estates generally where the deceased died before the new Act comes into force? On proclamation, s. 107 of the new Act repeals the old Act. What provisions are relevant to determine who is entitled to apply for administration both in the case where there is no will and where there is a will, but no executor? Is it relevant whether the deceased died one day or ten years before the date of proclamation of the new Act?

The *Interpretation Act* provides that where an enactment is repealed and other provisions are substituted by way of amendment, revision or consolidation, and where there are no provisions in the substituted enactment relating to the same subject matter, the repealed enactment shall be read as unrepealed as far as necessary to maintain or give effect to the unrepealed enactment.<sup>8</sup> Although of some help this is not a complete answer. The issue needs further consideration.

### **Vesting of Personal Property**

*45 (1) From the death of a person who has died intestate or has died testate but there is no executor, all personal property owned by the person immediately*

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<sup>6</sup> s. 50 – 64

<sup>7</sup> *Interpretation Act*, R.S.N.S. 1989, C.235, as amended, s.9.

<sup>8</sup> *Interpretation Act*, s. 24.

*before that person's death is, until a grant is made with respect to the person's estate, vested in the Public Trustee, subject only to the power of a court of competent jurisdiction to grant administration in respect of the personal property.*

*(2) Nothing in subsection (1) means that the Public Trustee is authorized to take any action with respect to the personal property vested in the Public Trustee by subsection (1) or that the Public Trustee has any of the duties that are imposed by law on a personal representative with respect to the personal property and, notwithstanding any other enactment, no action, proceeding or prosecution lies against the Public Trustee by reason of the Public Trustee not taking any action with respect to the personal property or not dealing with the personal property.*

*(3) Notwithstanding any other enactment, the Public Trustee is not the assessed owner for municipal taxation purposes of any personal property that is vested in the Public Trustee by subsection (1).*

On an intestacy or if there is no executor under a will, personal property vests in the Public Trustee on death until a grant is made. The Public Trustee is not authorized to act with respect to personal property and has no duty as a personal representative to act. No action lies against the Public Trustee for failure to act. In addition, the Public Trustee is not the assessed owner of personal property for purposes of municipal taxation. If no one takes possession of property, either real or personal, the Public Trustee may take possession of the property to preserve and protect it.<sup>9</sup>

### **Vesting of Real Property**

*46 (1) Notwithstanding any will, on the death of a deceased person, all real property that the deceased person owned immediately before the death of the deceased person for an interest not ceasing on the death and without a right in another person to take by survivorship devolves to and is vested in the personal representative of the deceased person as if it were personal property.*

*(2) For the purpose of this Act, the administrator of the estate of a deceased person is deemed to be administrator as if there has been no interval of time between the death of the deceased person and the grant of administration.*

*(3) A testator is deemed to have owned, immediately before the testator's death, any real property passing under any gift contained in the testator's will that operates as an appointment under a general power to appoint by will.*

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<sup>9</sup> Section 18.

*(4) The personal representative of a deceased person is the representative of the deceased person with respect to the real property as well as with respect to the deceased person's personal property.*

*(5) A grant may issue in respect of real property only, although there is no personal property.*

*(6) Subject to the powers, rights, duties and liabilities mentioned in this Act, the personal representative holds the real property as trustee for the persons by law beneficially entitled to the real property and those persons have the same right to require a transfer of the real property as persons beneficially entitled to personal property have to require a transfer of the personal property.*

*(7) Where any part of the real property of a deceased person vests in a personal representative under this Act, the personal representative, in the interpretation of any Act of the Legislature or in the construction of any instrument to which the deceased was a party or under which the deceased is interested, shall, while the estate remains in the personal representative, be deemed in law the deceased person's heir in respect of such part, unless a contrary intention appears, but nothing in this Section affects the beneficial right to any property or the construction of words of limitation of any estate in or by any deed, will or other instrument.*

*(8) The rights and immunities conferred by this Act on personal representatives are in addition to and not in derogation of the power conferred by any other Act or by the will.*

This does not apply to real property held in joint tenancy immediately before death, because as stated above, at the moment of death the property passes to the survivor and does not form part of the estate.

Notwithstanding any will, all real property of a deceased person vests in the personal representative as if it were personal property. In view of this provision, it would appear that the structure of wills may return to the previously common practice of giving all property, real and personal, to the executor in trust. A will with a direct devise is no longer a method of avoiding a deed to the beneficiaries.

For intestate situations, the administrator is deemed to be the administrator as of the date of death as if there was no time interval between the death and the grant of administration. This is the “doctrine of relation back”.



If there is no administrator appointed and no grant taken out, it is still an open question as to where the real property vests.<sup>10</sup> Only personal property vests in the Public Trustee from the date of death to the grant<sup>11</sup>.

This leaves open a number of questions about who has the right to deal with the land and who bears the responsibility with respect to the land. In short, it appears that no one can deal with the land until a personal representative is appointed. If a municipality wants to put the land up for sale to pay for delinquent taxes, to whom are notices sent? In a landlord tenant situation, to whom is the rent payable and who assumes the landlord's obligations for utilities and repair and maintenance? Who is responsible to maintain insurance to protect against fire and liability claims? Who is responsible for environmental liability and cleanup? In some of these situations, it may be that no one will wish to assume responsibility and ownership rights and obligations incident thereto will remain in limbo.

Under section 18 of the new Act, where no one has taken possession of the property of the deceased, the Public Trustee may take possession to protect and preserve it. Pending a grant, the Public Trustee has all the powers of a personal representative. It would appear that real and personal property are included within this power. The Public Trustee can be paid compensation and recover expenses in dealing with the property through the court. This may provide a way of dealing with difficult situations, but it depends on the discretion of the Public Trustee and does not deal with the vesting issue.

Section 46(1) of the new Act provides that "notwithstanding any will" real property vests in the personal representative. It does not include the phrase "notwithstanding any other Act". Since there is a period of time between the date of death and the grant when the real property is not vested in any person under the new Act, real property may continue to be

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<sup>10</sup> See *Law Reform Commission of Nova Scotia Report*, note 3, above, at 60, where the gap between the death and the appointment of the administrator was acknowledged as a problem, with the recommendation that any changes should deal with the gap.

<sup>11</sup> Section 45.

vested at common law in the heirs-at-law as determined by the *Intestate Succession Act*<sup>12</sup>. The new Act does not state that only a personal representative can convey real property, it simply provides rights to a personal representative to deal with real property. Arguably, if the property is vested in the heirs-at-law, they could deal with the property.

In *Anger and Honsberger*, it is suggested that

... with respect to real property, the English cases hold that, as at common law, it vests in the heir until the administrator is appointed. The reason for this rule is that real estate must always be vested in someone and that where a statute fails to make provision, the common law applies.<sup>13</sup>

Although the authors go on to state that the Canadian Statutes seem to preclude a temporary vesting in the beneficiaries, this may not apply to Nova Scotia, as it is unique in vesting real property in the heirs-at-law. Other provinces vest real property in the persons entitled after the lapse of a period of time if the personal representative has taken no action whether or not there has been a grant.<sup>14</sup>

In the *Law Reform Commission of Nova Scotia Report*, the Commission recommended that,

In cases of intestacy, where at least 12 months have passed since the date of death, but the estate has not been probated, and no administrator has been appointed, title to any real property forming part of the estate should be deemed to vest directly in the heirs. The gap in time between the intestate's death and vesting in the heirs would be filled by the doctrine of relation back.<sup>15</sup>

Another interesting issue is the priority between the *Intestate Succession Act* and the new *Probate Act*. What happens when a spouse makes an election under the *Intestate Succession Act* regulations to take the principal residence as part of the preferential share? Does this provision take priority over the new Act? If the section operates, it will

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<sup>12</sup> R.S.N.S. 1989, c.236.

<sup>13</sup> *Anger and Honsberger* at 1456-7.

<sup>14</sup> Ontario – 3 years, *Estates Administration Act*, R.S.O. 1990, ass amended, c. E-22, s.9; New Brunswick – 2 years, *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9 as amended, s.19.

vest title in a person other than the personal representative. If the new Act does not provide for vesting during the gap, it is arguable that the real property may vest by common law in the heirs-at-law until there is a grant.

This should receive consideration for amendment. With the approval of the Public Trustee, the section vesting personal property in the Public Trustee from the date of death until the grant could be expanded to apply to real property as well. I understand there are no other provinces where the real property vests in a public official before the grant.<sup>16</sup>

This section also provides that a deceased is deemed to have owned immediately before death any real property passing under the deceased person's will as a gift that operates under a general power to appoint by will. As in the old Act, a grant may issue for real property only. It is not clear why this provision was carried forward as it would appear to be self-evident.

Although the heirs-at-law will no longer own the real property, the personal representative holds the real property in trust for the persons by law beneficially entitled. Those persons have a right to require the transfer the same as they may for personal property. Under section 53 of the new Act, considered later, they can compel the personal representative to convey title to them.

While real property will vest in the personal representative, in the interpretation of any Act or instrument, the personal representative is deemed in law to be the heir of the deceased person unless a contrary intention appears.

The rights and immunities of a personal representative under this Act are in addition to and not in derogation of any power conferred by any other Act or by the will. This appears to provide that all the powers accorded the personal representative in the will by

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<sup>15</sup> *Law Reform Commission of Nova Scotia Report* at 61.

<sup>16</sup> *Anger and Honsberger* at 1456.

the testator are available for use by the personal representative.<sup>17</sup> This will be considered next under disposal of real property and sale of real property.

### **Disposal of Real Property**

*47 Except as otherwise provided in this Act, the personal representative of a deceased person may dispose of and otherwise deal with the real property, with the like incidents, but subject to the like rights, equities and obligations as if the real property were personal property vested in the personal representative.*

A personal representative may dispose of or deal with real property the same as if it were personal property. It is unclear what additional rights a personal representative has as a result of this section. Presumably, if the property is vested in the personal representative then all the rights accorded to a person with ownership would accrue. These rights are restricted, of course, by the provisions of the Act with respect to such actions as mortgaging and leasing.

### **Other Rights Preserved**

*48 Without prejudice to the rights and powers of a personal representative, the appointment of a personal representative with respect to real property does not, except as hereinafter provided, affect*

*(a) any rule as to marshalling or as to administration of assets;*

*(b) the beneficial interest in real property under any testamentary disposition;*

*(c) any mode of dealing with any beneficial interest in real property or the proceeds of the sale thereof; or*

*(d) the right of any person claiming to be interested in the real property to take proceedings for the protection or recovery thereof against any person other than the personal representative.*

The appointment of the personal representative with respect to real property does not affect any rule as to marshalling or administration of assets, the beneficial interest in real property under a testamentary disposition, the mode of dealing with the beneficial interest or the proceeds of sale, or the right of any person claiming to have an interest in the real

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<sup>17</sup> See discussion later in this paper about the effect of express and implied powers of sale in the will under

property to take action for the protection and recovery thereof against any person other than the personal representative. It is not clear what the practical effect of this section is other than to preserve rights and procedures.

### **Rules Relating to Personal Property apply to Real Property**

*49 Subject to this Act, the jurisdiction of any court with respect to the appointment of personal representatives or with respect to grants and all enactments and rules of law relating to the effect of grants as respects personal property and as respects the dealing with personal property before a grant is made and as respects the payment of costs of administration and other matters in relation to the administration of personal property and the powers, rights, duties and liabilities of personal representatives in respect of personal property applies to the real property vested in personal representatives so far as the same are applicable, as if the real property were personal property, except that some or only one of several joint personal representatives may not sell or transfer real property without the approval of the court.*

The jurisdiction of the court and all rules and the rights, liabilities and duties of personal representatives with respect to the administration of personal property apply to real property except that some or only one of several joint personal representatives may not sell or transfer real property without court approval. As with the previous section, the practical effect or need for this section is not clear, particularly in view of section 55.

### **Sale of Real Property**

*50 (1) A personal representative may sell the real property for the purpose not only of paying debts but also for distributing the estate among the persons beneficially entitled thereto, whether there are or are not debts and it is not necessary that the persons beneficially entitled concur in such sale, except where the sale is made for the purpose of distribution only.*

*(2) Subject to this Act, no sale of real property for the purpose of distribution only is valid with respect to any person beneficially interested, unless that person concurs in the sale.*

*(3) Where in the case of a sale for the purpose of distribution*

*(a) a mentally incompetent person or an infant is beneficially interested;*

*(b) an adult beneficiary does not concur in the sale;*

*(c) there is, under a will, a contingent interest or interests not yet vested; or*

*(d) there is a person who may be a beneficiary who has not yet been ascertained, the Supreme Court, upon being satisfied that the sale is in the interest and to the advantage of the estate of the deceased and the persons beneficially interested in the estate, may approve the sale and the sale so approved is valid with respect to the contingent interest and any interest not yet vested and is binding upon the incompetent person or infant, non-concurring person and beneficiary not yet ascertained.*

*(4) Notwithstanding subsections (1), (2) and (3), the non-concurrence of any person who is of the age of majority and entitled to share in immediate distribution does not invalidate the sale of real property if persons entitled to receive in the aggregate at least seventy-five per cent of the net proceeds concur in the sale and the sale is made in accordance with the concurrence and the personal representative is not answerable or chargeable to or by the non-concurring person for selling the real property at an under-value if the sale has first been approved by the court.*

*(5) Where a person of the age of majority accepts a share of the purchase money knowing it to be such, that person is deemed to have concurred in the sale.*

*(6) Every deed given by a personal representative shall contain recitals to show the personal representative's title from the deceased.*

Personal representatives may sell real property to pay debts. This would seem to be the only sale not requiring approval. In most testate situations, a power of sale is included in the will and the duty to pay debts is either express or implied in the will. With respect to debts, this section adds little to testate situations. On intestacy, however, it permits the sale of real property to enable the personal representative to pay debts, where previously, an administrator had to obtain a license to sell from the court.

When does a personal representative need to sell real property to pay debts? Is it only after the personal property has been exhausted? Does the personal representative have discretion as to what assets to sell? The old Act<sup>18</sup> permitted an application for a license to sell real property if the personal property was insufficient to pay debts, legacies and expenses. Only real property charged with the payment of legacies or undivided real property was subject to sale for the payment of legacies. Undivided real property was to

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<sup>18</sup> Section 50.

be sold first to pay legacies, debts and expenses, unless a different arrangement was provided in the will. This implied that after undevised real property was exhausted, specifically devised real property could be sold, all subject to court approval for a license. Under the new regime, is the personal representative bound by the former prioritization scheme? It would seem that the personal representative has complete discretion when selling to pay debts as no approval is required.

It is also suggested that the scope of the section should be expanded to include a sale necessary partly to pay debts and partly for the purposes of distribution without the need for concurrence of the persons beneficially entitled.<sup>19</sup>

Is it incumbent on the person buying from a personal representative to be satisfied that it is necessary to sell the real property in order to pay debts? Since all other sales require approval under the statute, a prudent purchaser might require satisfactory evidence in the form of a declaration. Consideration might be given to a regulatory provision stating that a *bona fide* purchaser for value is protected if informed that the sale is for the purpose of paying debts and there is no actual notice that it is not.<sup>20</sup>

What is the rationale for suggesting that all other sales require statutory approval? This section,<sup>21</sup> in addition to providing for sales of real property in order to pay debts, also refers to a sale for distribution purposes. This type of sale encompasses all other sales of real property made by a personal representative. In a testate situation, unless the real property is dedicated for a specific purpose under the will or a sale is made to pay debts, it is normally sold to convert the property into cash for distribution or for transfer to a trust to be established for beneficiaries. In intestate situations, the only time real property will be sold is to pay debts or distribute the estate. Although the wording in subsection (1) is cumbersome, it essentially provides that a sale for distribution purposes requires the approval of the persons beneficially entitled. This is confirmed in subsection (2), which

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<sup>19</sup> *Anger and Honsberger* at 1459.

<sup>20</sup> *Anger and Honsberger* at 1460.

<sup>21</sup> Section 50 (1).

provides that no sale of real property is valid against a person beneficially entitled unless that person concurs in the sale.

When a person beneficially entitled cannot or will not concur in the sale, the court may approve the sale. This may be the case where a mentally incompetent person or an infant is beneficially entitled, where an adult beneficiary does not concur in the sale, where there is a contingent interest under a will not yet vested or where there is a person who may be a beneficiary who is not yet ascertained. The court must be satisfied that the sale is in the interest of and to the advantage of the estate of the deceased and the persons beneficially entitled. This seems unusual since the purpose of the sale is for distribution purposes. Why would the court need to consider the advantage of the sale to estate of the deceased? This would make more sense if a court was reviewing a sale to pay debts and the question under consideration was whether the real property should be sold as opposed to another asset.

It is not necessary to obtain court approval if only some of the persons beneficially entitled do not concur in the sale. The non-concurrence of an adult person entitled to share in the immediate distribution does not invalidate the sale if the persons entitled to receive in the aggregate at least 75% of the net sale proceeds concur in the sale and the sale is made in accordance with the concurrence. Should a prudent purchaser ensure that the required concurrence is received and should it be stated on the public record as a recital in the deed?

It is also suggested that the approval of persons beneficially entitled, if required, be obtained at the time the Agreement of Purchase and Sale is entered into, since the purchaser may not be able to obtain specific performance against the estate.<sup>22</sup>

The personal representative is not liable to the non-concurring person for a sale under-value if the sale is first approved by the court. But if no court approval is obtained, is the sale invalidated with respect to the purchaser or is there only personal liability of the

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<sup>22</sup> *Anger and Honsberger* at 1460, n. 8.



personal representative to the non-concurring person or persons? Where an adult person accepts a share of the purchase money knowing it to be such, that person is deemed to have concurred in the sale.

This section also provides that a deed from a personal representative shall contain recitals showing the personal representative's title from the deceased. The recitals should, it would seem, also confirm the steps taken by the personal representative to comply with the statutory requirements.

Does an express or implied power of sale in a will override the statutory requirement that the persons beneficially entitled concur in a sale for distribution purposes?

In *Anger and Honsberger*, it is suggested that there is case law to support the proposition that,

An express power of sale contained in the deceased's will overrides the provisions of the Statutes, which are merely in addition to the personal representative's other powers. In that case, the personal representative may sell property at any time free of debts and without the concurrence of the beneficiaries, for the property does not vest in them. The same result obtains if there is an implied power of sale in the will.<sup>23</sup>

Although this is encouraging, until a Nova Scotia court rules on this issue or the statute addresses the issue directly, strict compliance with the statutory provisions is advised. If section 50, dealing with the sale of real property were "subject to the provisions of the will", it might provide some comfort that a power of sale in the will overrides the statute.

In any event, it is prudent to provide a power of sale in a will specifically overriding the terms of the statute requiring approval of persons beneficially entitled or the court on their behalf. A court might find it easier to rely on such a clause when attempting to dispense with statutory requirements.

**Distribution in specie**

*51 The personal representative may convey or divide the real property of a deceased person to or among the persons beneficially interested with the concurrence of*

*(a) each person interested in the estate who is of the age of majority; and*

*(b) the guardian of each infant or mentally incompetent person who is beneficially interested.*

This permits the conveyance of real property directly to the beneficiaries entitled without selling it. This conveyance can only take place with the concurrence of all of the interested persons. If there is an infant or mentally incompetent person beneficially interested, the concurrence of the guardian is required. This is not the parent, but rather the guardian of the estate of the infant or mentally incompetent person appointed by the court.

Should the persons beneficially entitled sign the deed signifying their concurrence? What would satisfy a subsequent purchaser that there had been compliance with the statutory requirements? Are recitals in the deed enough? Section 54 operates to protect a purchaser in good faith and for value receiving a deed from persons beneficially entitled.

Presumably, a deed into all the persons beneficially entitled would not need to be signed by them to signify their concurrence. It is suggested, however, that a recital be added showing the persons beneficially entitled, the basis of their interest and the fact that they or the appropriate court appointed guardian have concurred.

**Lease or Mortgage**

*52 (1) A personal representative may, subject to any will affecting the real property*

*(a) lease the real property or any part thereof for a term not exceeding one year;*

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<sup>23</sup> *Anger and Honsberger* at 1460-61.

*(b) lease the real property or any part thereof for a longer period, with the approval of the Supreme Court;*

*(c) raise money by way of mortgage on the real property or any part thereof for the payment of debts or for the payment of taxes on the real property to be mortgaged and, with the approval of the court, for the payment of other taxes, the erection, repair, improvement or completion of buildings or the improvement of lands, or for any other purpose beneficial to the estate .*

*(2) Where an infant or a mentally incompetent person is beneficially interested in the real property, a mortgage for the payment of debts or taxes is not valid unless it has first been approved by the Supreme Court*

The personal representative may, subject to any will, lease real property for a period up to one year. This could commence at any time after death and might extend well beyond the “executor’s year” which is commonly considered necessary to settle the estate. If the lease extends beyond a year after the grant, it might conflict with section 53, under which the persons beneficially interested can compel the personal representative to convey the property. Presumably they would have to accept the property subject to the lease.

This section makes the right to lease subject to the terms of the will. This would be relevant if the will provided specific terms for dealing with the real property inconsistent with a lease. As with any properly drafted will, consideration should always be given to providing the widest possible powers to the personal representative in keeping with the purpose and intent of the will.

Real property may be leased for a longer period with approval of the Supreme Court. If the will contains a power to lease then presumably approval of the Supreme Court would not be required. It might be useful to amend the standard lease provision in the will to confirm that leasing is permitted without court approval.

The personal representative can mortgage real property to raise money to pay debts or taxes on the real property to be mortgaged. With the approval of the court, real property can be mortgaged to pay other taxes, improve buildings and land or for any other purpose

beneficial to the estate. The first portion of this section deals with the payment of municipal taxes as it refers to “the payment of taxes on the real property to be mortgaged”. “Other taxes” are presumably taxes arising under the *Income Tax Act*. Under normal circumstances these would be considered debts of the estate. Again proper will drafting should be able to deal with these anomalies and ambiguities in the Act. However, in intestate situations, why should a mortgage to pay “other taxes” be treated differently than “debts”.

Where an infant or mentally incompetent person is beneficially interested in real property, the Supreme Court must approve a mortgage for the payment of debts or taxes. Note that the approval of the Supreme Court is required rather than the Probate Court, which is consistent with the Supreme Court having inherent jurisdiction over the welfare of infants and mentally incompetent persons. In guardianship situations, the Supreme Court must always approve actions of the guardian with respect to real property.

### Conveyance after One Year

*53 (1) Where, after the expiration of one year after the grant, the personal representative fails to convey any of the real property to the person entitled thereto after the person has requested the personal representative to do so, the Supreme Court may, on the application of that person and after notice to the personal representative, order that the conveyance be made and, where the order is not complied with, may make an order vesting in that person all the right, title and interest in the real property that would have been conveyed to that person if the personal representative had made the conveyance that the court ordered the personal representative to make.*

*(2) Where, after the expiration of one year after the grant, the personal representative either fails to convey any of the real property to the person entitled thereto or to sell or dispose of it, the Supreme Court may, on the application of a person beneficially interested, order that the real property be sold on such terms and within such period as the Court thinks reasonable and, where the personal representative fails to comply with the order, may direct such person as the court thinks fit to sell the property for cash or credit or partly cash and partly credit upon such terms as the court thinks fit.*

If the personal representative fails to convey the real property to the person beneficially entitled within one year after the grant, after having been requested to do so, the court

may order the personal representative to make the conveyance. If the order is not complied with, the court may make an order vesting the title in the person entitled.

If the personal representative fails to convey or dispose of the real property within one year after the grant, the court may, at the request of the persons entitled, order the real property be sold. If the personal representative fails to comply with the order, the court may direct the sale of the property by such person on such terms as it thinks fit.

### **Title of Purchaser in Good Faith and for Value**

*54 (1) A person purchasing in good faith and for value, from a personal representative the real property or from a person beneficially entitled to the property to whom the property has been conveyed by the personal representative, holds the property free and discharged from all debts or liabilities of the deceased person, except such as are specifically charged thereon otherwise than by the will of the deceased person and, where the purchase is from the personal representative, freed and discharged from all claims of the persons beneficially interested.*

*(2) Real property that has been conveyed by the personal representative to a person beneficially entitled to the real property or that vests in that person by reason of subsection 53(1) continues to be liable to answer the debts of the deceased person so long as it is vested in that person or any person claiming under that person who is not a purchaser in good faith and for value, as it would have been had it remained vested in the personal representative and, in the event of a sale or mortgage thereof in good faith and for value by such person beneficially entitled, that person is personally liable for the debts to the extent to which the real property was liable when vested in the personal representative, but not beyond the value of the real property.*

A purchaser who purchases real property in good faith and for value from the personal representative or from the person beneficially entitled after having received a conveyance from the personal representative, holds the property free and discharged of all debts and liabilities of the deceased person, except those as are specifically charged against the property otherwise than by Will. A purchase from the personal representative is free and discharged of all claims of persons beneficially entitled to the property.

Can a purchaser receiving a deed from the personal representative rely on this section for assurance that the personal representative has complied with all the statutory requirements? As noted in the commentary under section 50, there may be a possibility that a sale may be invalid if the persons required to approve the sale have not done so. I would suggest that the purchaser make inquiries and be satisfied there has been compliance with the statutory requirements.

Real property that has been conveyed by the personal representative to a person beneficially entitled or that has vested in the person beneficially entitled under section 53(1) continues to be chargeable to pay for the debts of the deceased person so long as it is vested in that person or any person claiming under that person who is not a purchaser in good faith and for value, as if it had remained vested in the personal representative. If the person beneficially entitled or person claiming under that person sells or mortgages the property in good faith and for value, that person is personally responsible for the debts to the extent to which the real property was liable when it was vested in the personal representative, but not beyond the value of the property.

Before taking a conveyance, persons beneficially entitled and persons taking under them might wish some assurance from the personal representative as to the payment of debts. Once the property has been transferred to the persons entitled, consideration might be given to a legislated limitation period after which the property or proceeds of sale are free from the deceased debts.<sup>24</sup>

### **Conveyance where more than one Personal Representative**

*55 Where there are two or more personal representatives, a conveyance, mortgage, lease or other disposition of the real property shall not be made without the concurrence of all the personal representatives or by an order of the Supreme Court, but where the grant is made to one or some of two or more personal representatives, whether or not power is reserved to the other or others to probate, any conveyance, mortgage, lease or other disposition of the real property may be made by the personal representative to whom the grant has been issued for the time being, without an order of the court and is as effectual as if all the persons named as personal representatives had concurred therein.*

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<sup>24</sup> *Anger and Honsberger* at 1460.

Where there is more than one personal representative, a conveyance, mortgage, lease or other disposition of the real property shall not be made without the concurrence of all the personal representatives or order of the court.

However, where a grant is made to one or some of two or more personal representative whether or not power is reserved to the other or others to probate, a conveyance, mortgage or lease or other disposition of real property may be made by the personal representatives to whom the grant is issued for the time being, without an order of the court and is as effectual as if all the persons named as personal representatives had concurred therein.

### **Judgments**

*56 (1) Where a personal representative sells real property of a deceased person and before the proceeds of the sale are distributed to each person entitled to the proceeds of the sale or any part thereof a certificate of a judgment is recorded, pursuant to the Registry Act in the registry of deeds for the registration district in which the real property is located and any of those persons is the judgment debtor, the personal representative shall not pay the proceeds to the judgment debtor but shall pay the share to the Accountant General of the Supreme Court.*

*(2) Where money is paid into court pursuant to subsection (1) as a result of a certificate of a judgment having been recorded the court may, upon application, cause accounts to be taken and inquiries to be made and costs to be taxed and may order the distribution of the money to each person entitled thereto in the same proportions and in the same priorities as if the money were real property bound by the judgment that devolved to that person as a result of the death of the deceased person.*

Where a personal representative sells real property and before the proceeds of sale are distributed, a certificate of judgment is recorded in the Registry of Deeds in the registration district in which the real property is located and any of those persons to whom the proceeds of sale would have been distributed is the judgment debtor, the personal representative shall not pay the share of the proceeds to the judgment debtor but to the Accountant General of the Supreme Court.

Under the current regime, on the sale of real property in an intestate situation, since the title vests in the heirs-at-law, a judgment search is done on the heirs-at-law and if any judgments are recorded, they form a charge against the property and are dealt with at the time of sale. In the distribution of the proceeds of sale an accounting is made for the payout of the judgment and the proceeds distributed to the persons entitled. For testate situations, judgments against the persons beneficially entitled are only relevant where the will provides an direct devise. As in the above case, a judgment search would only be done at the time of the sale of the real property as part of the conveyancing process. If the title to real property vests in the executor under the terms of the will, no judgments attach to the interest of the persons beneficially entitled.

Under the new regime, whenever there is a sale of real property by a personal representative, if a judgment has been recorded against a person entitled to share in the proceeds, the judgment forms a charge on that person's share of the proceeds of sale and must be paid into court. There is no provision for settling the debt out of the person's share of the proceeds of sale. This means that a judgment search must be done in the registration district where the real property is located before there is a distribution of the proceeds of sale of any real property, including property sold to pay debts if a portion of the sale proceeds are to be distributed.

This provision would seem to be inconsistent with the intent of the new *Probate Act* to protect the estate of the deceased and the persons beneficially entitled. It appears to be extending the scope to protection of creditors of persons beneficially entitled. It will also result in an extra step before any proceeds are distributed if in the course of administration, real property was sold.

## **Conclusion**

Assuming the new Act will be proclaimed:

1. If a person dies intestate before the new Act comes into force, the common law and the old Act apply. The real property vests in the heirs-at-law and a deed from them is acceptable.



2. If a person dies intestate after the new Act comes into force, the new Act applies. A grant of administration must be taken out. The real property vests in the personal representative. Do not accept a deed from the heirs-at-law. Only the personal representative can give a deed. In accepting a deed from a personal representative, it is important to know whether the property is being sold to pay debts or for distribution as there may be statutory approvals required from the persons beneficially entitled or the court on their behalf.
3. Where there is a will signed before the coming into force of the Act, the current conveyancing practices apply. In this case a deed may be accepted from the beneficiaries receiving a direct devise under the will. If there is a gift to the executor in trust, there must be a trustee's deed from the executor.
4. If the will is signed after the coming into force of the Act, both in an outright distribution will and a trust will, the real property vests in the personal representative. Only a personal representative can convey real property. Do not accept a deed from the persons entitled under a direct devise. Check to ensure that the statutory approvals have been obtained.
5. If acting for a purchaser from a personal representative, you only need to check judgments against the deceased. Property does not vest in the heirs-at-law or persons beneficially entitled under a direct devise.
6. We need to wait until the Probate Rules and Practice Manual are published to know the full extent of procedures that may be required for conveyancing of real property.

