

**PROBATE PROCEDURES &
DOCUMENTATION SEMINAR**

THE REAL ESTATE - PROBATE INTERFACE

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THE NEW PROBATE ACT AND REAL ESTATE CONVEYANCING

The new *Probate Act* brings significant changes to the area of real estate conveyancing in Nova Scotia. There are many who have helped bring this new legislation to us. There are new forms to use and there will be new ways to learn.

For the most part, I will try to provide you with the practical effect of the legislation, and the practice will evolve from here.

DEVOLUTION OF PROPERTY

The sections of the new *Probate Act* dealing with real property do not apply to wills dated prior to October 1, 2001 or to persons who die intestate before October 1, 2001, whether or not a grant has been issued¹. Certain provisions of the old Act will continue to apply in those circumstances². These are generally the licence to sell provisions and partition of land. The real property provisions of the new Act will apply to all persons who die intestate after October 1, 2001.

Testate deaths

To summarize, when dealing with an estate on or after October 1, 2001 where there is a will, the date of the will is the relevant factor. The new Act will apply to real estate conveyancing issues. If the will is dated before October 1, 2001, the provisions the old Act will apply to real property

¹ S.N.S. 2000, c. 31, s. 44(2) (hereinafter referred to as the new *Probate Act*)

² s. 44(3) of the new *Probate Act*.

conveyancing issues.

Under the regulations, “will” includes codicil and other testamentary documents. The date of the last codicil or other testamentary instrument is deemed to be the effective date of the will³. This means that if you have a Will dated prior to October 1, 2001 and a codicil dated on or after October 1, 2001, the provisions of the new Act will apply with respect to any real property owned by the deceased notwithstanding that the codicil may not amend any provision in the will relating to real property.

Intestate Deaths

For intestate deaths, the date of death is the relevant factor. Where a person dies intestate on or after October 1, 2001, the new Act will apply to real property conveyancing issues within the estate. If the death occurs prior to October 1, 2001, whether or not a grant of Administration has been issued, the provisions of the old *Probate Act* will apply to real property in the estate. Therefore, for all intestate deaths after October 1, 2001, all estates will be subject to the new Act.

To summarize, the date of the will is important for those who die testate and the date of death is important for those who die intestate.

Real Property vests in Personal Representative

The most important change found in the new Act with respect to real property conveyancing is found in section 46(1) of the new Act which reads:

“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

³s. 13(1) of the Regulations

survivorship devolves to and is vested in the personal representative of the deceased person as if it were personal property.” (emphasis mine)

The effect of this section is to vest title to real property in the personal representative on death. This section covers both testate and intestate deaths. For intestate deaths, the heirs-at-law will no longer be able to convey the real property. Likewise, for testate deaths, if the will doesn't already vest title in the personal representative, it will be vested in the personal representative by section 46(1) of the new Act. For wills dated on or after October 1, 2001, a direct devise in a will does not to transfer title of real property to a beneficiary. **Only** the personal representative will have the power to convey real property.

The personal representative holds the real property as trustee for the persons who, by law, are beneficially entitled to the real property⁴. This will tell us to use a Trustee's deed when conveying title. See the appendix for a sample Trustee's Deed. You will need to add extra clauses in some cases. This will be discussed later on in the paper.

Here is a practice point to remember. I have listed all the practice points at the end of the paper in the Appendix:

Practice point:

If the date of the Will or Codicil is on or after October 1, 2001, or a person dies intestate on or after October 1, 2001, you will require a Trustee's Deed from the Executor(s) or Administrator(s) to convey the real property. Do not take a deed from a direct devisee under the Will (or Codicil) or the heirs-at-law in the case of intestacy.

Note, in some cases discussed below, you will require a Supreme Court Application

⁴s. 46(6) of the new *Probate Act*.

or an affidavit of the Trustee to confirm that the appropriate consents have been obtained.

The new Act states that all **personal property** vests in the Public Trustee until there is a grant appointing an administrator⁵. There is no equivalent provision for real property.

It appears that for the purpose of identifying who is vested with title prior to a grant of Probate or Administration, it is the executor(s) in the case of a will and the heirs-at-law of the deceased who dies intestate. However, the heirs-at-law cannot convey the real estate. **Only the personal representative may convey the property**⁶.

If the estate consists of real property only, a grant may be issued in respect of real property only⁷.

Interest of Spouse in Matrimonial Home

The interest of a spouse in a matrimonial home is not affected by the new sections of the Act⁸. If a spouse does not hold title to real property when the other spouse dies, the surviving spouse still has rights to the property. There is a procedure under the *Intestate Succession Act* which allows the spouse to elect to take the matrimonial home as part of his or her share of the estate.

The provision of the new Act which vests title in the personal representative⁹ appears to overlap with the Regulation under the *Intestate Succession Act* this which provides that the election has the effect of a transfer and delivery of title.

⁵s. 45(1) of the new *Probate Act*.

⁶s. 47 of the new *Probate Act*.

⁷ s. 46(5) of the new *Probate Act*.

⁸ s. 44(1) of the new *Probate Act*.

⁹s. 46(1) of the new *Probate Act*.

However there are several arguments which can be made to say that the provisions of the *Intestate Succession Act* and its Regulations remain intact. There has been no express repeal of the provision allowing such election, and the new Act states that it does not affect the interest of a spouse in a matrimonial home under the *Matrimonial Property Act*.¹⁰

The argument is that the vesting provision in the new Act does not affect the spouse's interest in the home and that he or she may proceed to **transfer** the home under the *Intestate Succession Act*. The legislature originally created that simplified provision for a reason: to allow persons whose spouse dies without making a will to inherit the home. It would not seem logical to now take away that simplified process and add a new level of complication.

The forms required to do the election procedure are attached in the appendices. To find the applicable Regulation and form for the election procedure on the Internet, see <http://www.gov.ns.ca/just/regulations/regs/is7577.htm>.

Sale of real property to pay debts

The old Act provided that "only such property as is charged with the payment of legacies or is undevisee may be sold, mortgaged or leased for the payment of legacies"¹¹. If there are not enough liquid assets (cash) in the estate to pay debts, the Executor is required to sell the assets that have been gifted in the will to pay debts. Remember, debts are always paid first.

Under the old Act certain assets were to be sold before others. These provisions will continue to apply if the date of the will is prior to October 1, 2001 or if an intestacy occurs before October 1, 2001. Under the new Act, the personal representative has much broader powers when selling real property for the payment of debts and there is no particular order of sale.

¹⁰s. 44(1) of the new *Probate Act*.

¹¹s. 50(2) of the old *Probate Act*.

Under the new Act, the personal representative may sell the real property for the purpose of **paying debts**, without the consent of any person beneficially entitled to the real property¹². If the personal representative sells the real property for this purpose, it appears that there is complete discretion as to which assets which may be sold to pay debts. However, the will may provide otherwise. Therefore, it would be good advice to review the will to determine if there are provisions which require consent of beneficiaries to pay debts.

The testator may, by his will provide that consent of the beneficiaries is required to sell real property to pay debts or that the assets are sold in a certain priority if there are not sufficient funds in the estate to pay debts.

Practice point:

When taking instructions for a will, discuss with the testator, his intentions regarding which assets are to be alienated in the event real property is to be sold to pay debts.

Sale for distribution

When the personal representative sells real property for the purpose of distributing the proceeds to those beneficially entitled, he or she must obtain the consent of those persons¹³. The conveyance is not valid unless the consents are obtained or the will provides that the consents are not required¹⁴. Therefore, if there is no will or the will is silent, the personal representative must obtain consent of the beneficiaries before the sale of real property and in some circumstances, as discussed below, must obtain a court order to sell real property.

If the personal representative proceeds with the sale without the consent of all the beneficiaries

¹²s.50(1) of the new *Probate Act*.

¹³s. 50(1) of the new *Probate Act*.

¹⁴s. 50(2) of the new *Probate Act*.

entitled to those proceeds, the sale is not invalid, provided persons entitled to receive in the aggregate of at least 75% of the net proceeds concur in the sale and the sale is made in accordance with the concurrence¹⁵.

If a beneficiary who is 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 sale¹⁶.

The real estate solicitor will need to know if the appropriate consents have been obtained. This can be achieved by requesting an affidavit from the personal representative that the consents have been obtained¹⁷. The affidavit from the personal representative must verify the sale complies with the appropriate provisions of the new Act¹⁸. The new Act provides that a person who relies, in good faith on such affidavit is sufficient proof that the sale complies with the Act. It is suggested that it would be practical to add the appropriate language to the affidavit of status in the Trustee's Deed. It will then form part of the permanent record.

Here is a sample clause that may be appropriate:

The personal representative (Executor, Administrator, etc.) hereby confirms that the consent(s) of the beneficiaries as required by the *Probate Act* to this sale or transfer have been obtained.

In an effort to be simple and straightforward, I have not drafted this clause with the specific percentages of how many of the beneficiaries have consented. This clause may also be used for transfers of real property to beneficiaries which will be discussed later. As the practice develops,

¹⁵s. 50(4) the new *Probate Act*.

¹⁶ s. 50(5) of the new *Probate Act*.

¹⁷s. 54(1A) of the new *Probate Act*.

¹⁸s. 50 or s. 51 of the new *Probate Act*.

the wording can be improved among practitioners and feedback is always appreciated.

In certain cases, an application to the Supreme Court will be required to convey the real property for purposes of distribution. If the new Act applies and, either there is no will, or the will is silent with respect to waiving consents of those beneficially entitled, an application to the Supreme Court will be required if:

- (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 ascertained¹⁹

When such an application is made, the court will consider whether it would be “just and appropriate” to order the sale. Any such order is binding on those persons noted above.

Practice point:

The will may provide that the concurrence of beneficiaries in the sale of real property is not necessary. The personal representative may then convey the real property. It is recommended that a recital be added to the Trustee’s Deed to confirm that the concurrence of the beneficiaries was waived in the will.

Here is a clause which I drafted which may allow the personal representative to sell or transfer the real property without the consent required under the new Act:

“Notwithstanding any requirement in the *Probate Act* of Nova Scotia or any successor legislation to obtain consent of any beneficiary or possible beneficiary to sell or transfer real property forming part of my estate, my personal representative

¹⁹s. 50(3) of the new *Probate Act*.

may sell or transfer any real property which forms part of my estate for the purpose of distribution of the proceeds or for the purpose of transfer to a beneficiary or beneficiaries without such consent.”

It is possible that the standard “Power of Sale” clause in a will is sufficient to authorize the personal representative to sell the property without such consents. However, prudence may dictate that a specific power such as one set out in the sample clause should be added to wills executed on or after October 1, 2001.

It may be wise to advise buyers of real estate from an estate to determine if consents of beneficiaries or a court order may be required prior to closing. This may affect the amount of time required by the Seller before closing.

I have attached a Flow Chart in the Appendix to this paper, to assist you in making the determination when consents and/or court approval may be required.

Transfer of real property to beneficiary

Where the real property is to be conveyed to a beneficiary or beneficiaries or divided among the beneficiaries, the personal representative may do so with the concurrence of each person interested in the estate who is the age of majority, and the guardian of each infant or mentally incompetent person who is beneficially interested²⁰. This provision requires 100% concurrence for the transfer. A court application is not required for the consent of infants or persons who are mentally incompetent. The consent of a guardian will suffice for a person who is an infant or mentally incompetent. However, an application under the *Incompetent Persons Act* for a person who is not competent or an application under the *Guardianship Act* for a person who is under the age of majority may be required to appoint a guardian of such person.

²⁰ s. 51 of the new *Probate Act*.

As discussed under the sale for distribution section of this paper, the same proposed sample clause may be added to wills executed on or after October 1, 2001 to authorize the personal representative to transfer the property without the consent of any beneficiary. This may avoid the court application.

Similarly, the clause suggested for the affidavit in the Trustee's deed may be used to confirm that any consents that may be required have been obtained or have been waived.

Lease or Mortgage of Real Property

Leasing of real property by the personal representative is permitted for a term of one year without the consent of any person²¹. However, leasing for any longer period requires approval of the Supreme Court²².

The new Act provides that the personal representative may mortgage the real property to pay debts, unless an infant or mentally incompetent person is beneficially interested in the real property. In that case an application must be made to the Supreme Court to approve the mortgage. However, the will may waive the requirement of such application.

Similarly, the personal representative must make an application to the Supreme Court to mortgage the real property in order to erect, repair, improve or complete buildings or improve lands or for any other purpose beneficial to the estate. The will may waive the requirement of such an application²³.

Here is a sample clause that may be added to wills executed on or after October 1, 2001 if the testator wishes to grant the power to mortgage the real property for all purposes:

²¹ s. 52(1)(a) of the new *Probate Act*.

²²s. 52(1)(b) of the new *Probate Act*.

²³s. 52(1)(c) of the new *Probate Act*.

“Notwithstanding any requirement in the *Probate Act* of Nova Scotia or any successor legislation to obtain approval of the Supreme Court of Nova Scotia to mortgage real property forming part of my estate, my personal representative may mortgage the real property for the purpose of paying debts or to erect, repair, improve or complete buildings or improve lands or for any other purpose that my personal representative in his absolute discretion he deems beneficial to the estate”.

Delay by Personal Representative to Convey

The first year of the estate is a busy one for the personal representative. There is no requirement to convey any portion of the real estate within the estate in the first year. However, after that, a beneficiary may request the personal representative to convey the real estate to him or her according to the terms of the will or to sell the real estate ²⁴.

If the personal representative does not convey the real property after having been requested to do so, the beneficiary entitled to the real property may apply to the Supreme Court for an order that the conveyance be made. If the order is not complied with, a further application may be made for an order vesting title to the property in the beneficiary²⁵.

Further the court may order the real property to be sold if one year after the grant was made, it has not been sold. The Court may set the terms of the sale as are reasonable. If the order is not complied with, the Court may authorize another person (as the Court thinks fit) to sell the property on such terms as the Court thinks fit²⁶.

Do the debts of the deceased follow the property?

Under the old Act, some solicitors had the concern that the debts of the deceased may follow the

²⁴s. 70(2) of the new *Probate Act*.

²⁵s. 53(1) of the new *Probate Act*.

²⁶s. 53(2) of the new *Probate Act*.

real property and would require that the estate be closed before conveyance of the real property could take place. This, in fact, was not necessary as the real property, being an asset of the estate was simply being converted into cash which continued to be an asset of the estate.

It has now been clarified that the debts of the deceased do not follow the real property except those that are secured as an encumbrance on title. Under the new Act, once the property has been conveyed, a purchaser in good faith for value will take free of the claims of creditors²⁷.

However, the proceeds of sale may still be answerable to pay the debts of the deceased even if the title has been transferred to the beneficiary. If the real property is conveyed to the beneficiary as gift in the will, the property is answerable for the debts of the estate up to the value of that real property at the time it was conveyed to the beneficiary. Any increase in value would be for the benefit of that beneficiary. If the beneficiary has transferred the property to any person who is **not** a purchaser in good faith and for value, such person will be answerable for the debts of the estate up to the value of the real property at the time it was conveyed.

This seems to put the onus on the person beneficially entitled not to sell or mortgage the property until he or she is sure that there are no debts that may affect the property. While the purchaser in good faith will not be liable, the seller who was the beneficial owner or a purchaser **not** in good faith will be liable.

Do all personal representatives have to sign the deed?

If there are two or more personal representatives, all of them must execute any conveyance, mortgage, lease or other disposition of the real property unless there is an order of the Supreme Court which directs otherwise.

Designated Residence protected on death

²⁷s.54(1) of the new *Probate Act*.

If a person before his or her death, has designated a residence pursuant to the *Social Assistance Act* or regulations made pursuant to the *Employment Support and Income Assistance Act*, such Act or regulations continue to apply after that person's death²⁸. The designated residence remains protected notwithstanding the deceased may have received Social Assistance prior to death.

The personal representative may not convey, sell, mortgage or encumber in any way a residence that is designated pursuant to *Social Assistance Act* or regulations made pursuant to the *Employment Support and Income Assistance Act* solely for the purpose of repaying assistance given to the deceased before the deceased's death pursuant to that Act²⁹.

Conclusion

The new *Probate Act* has brought to both Estate Paralegals and Real Estate Paralegals new issues of practice. Will drafting will certainly change to deal with the extra complications of conveying real property. Real estate paralegals will be need to understand the effect of the real property provisions of the new Act to ensure appropriate consents and orders are obtained to convey real property. As with all new legislation, the practices will evolve to adapt to the new requirements of the Act.

Finally, a note of caution. My comments should not taken as the only way to deal with this new legislation. They are simply suggestions developed by my personal review of the legislation.

I have attached as appendices, a summary of important points and the practice points discussed in this paper. Good luck!

²⁸s. 68(1) of the new *Probate Act*.

²⁹s. 68(2) of the new *Probate Act*.

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APPENDIX 1

LIST OF PRACTICE POINTS

Practice point:

If the date of the Will or Codicil is on or after October 1, 2001, or a person dies intestate on or after October 1, 2001, you will require a Trustees Deed from the Executor(s) or Administrator(s) to convey the real property. Do not take a deed from a direct devisee under the Will (or Codicil) or the heirs-at-law in the case of intestacy.

Note, in some cases, you will require a Supreme Court Application or an affidavit of the Trustee to confirm that the appropriate consents have been obtained.

Practice point:

When taking instructions for a will, discuss with the testator, his intentions regarding which assets are to be alienated in the event real property is to be sold to pay debts.

Practice point:

The will may provide that the concurrence of beneficiaries in the sale of real property is not necessary. The personal representative may then convey the real property. It is recommended that a recital be added to the Trustees Deed to confirm that the concurrence of the beneficiaries was waived in the will.

APPENDIX 2

LIST OF SUGGESTED CLAUSES

Sample clause to be added to affidavit in Trustee's deed to confirm consents have been obtained from those beneficially entitled to real property when it is being or transferred to a beneficiary or divided among beneficiaries:

The personal representative (Executor, Administrator, etc.) hereby confirms that the consent(s) of the beneficiaries as required by the *Probate Act* to this sale or transfer have been obtained.

Sample clause to be added to wills which may allow the personal representative to sell or transfer the real property without the consent required under the new Act:

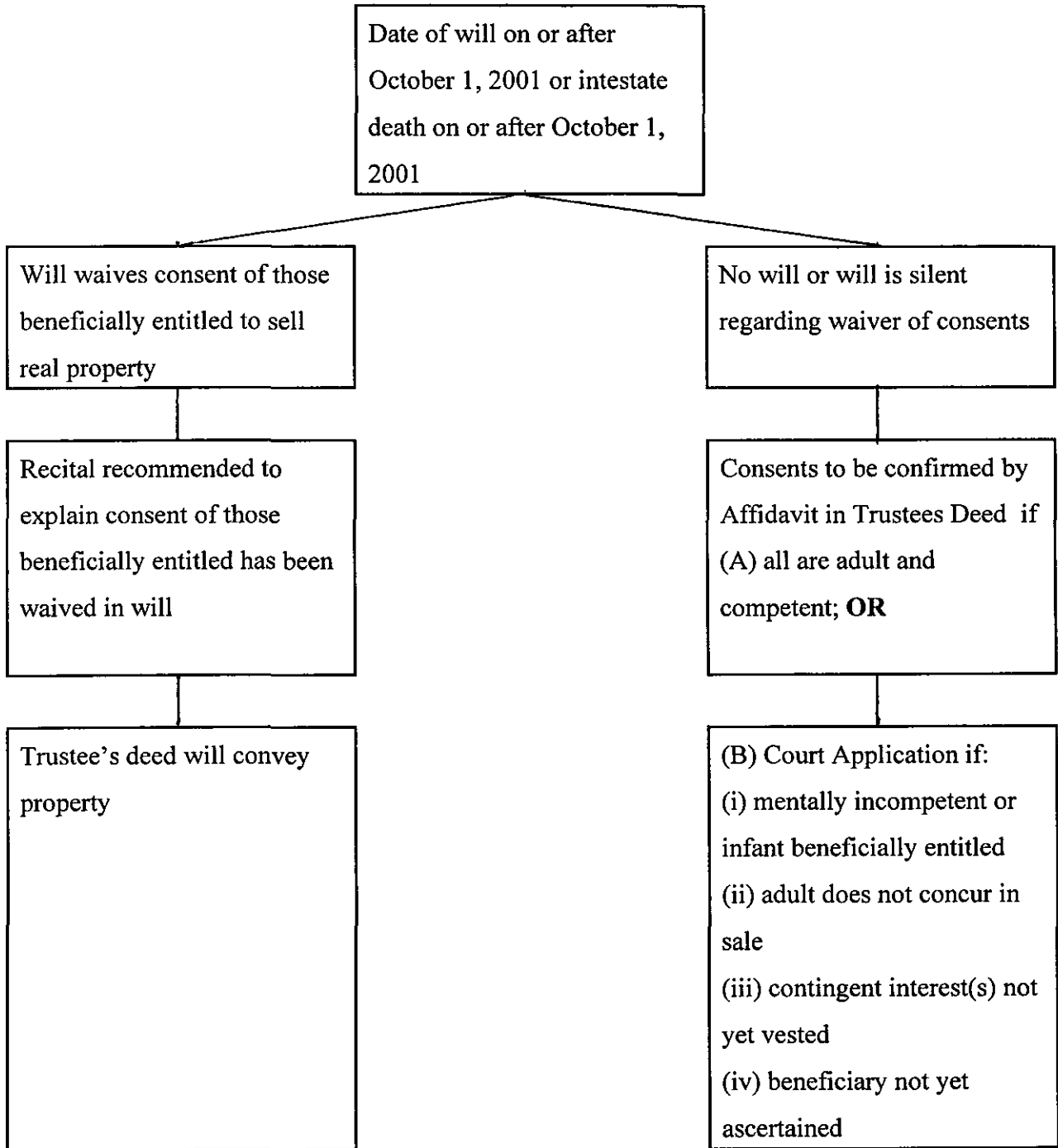
"Notwithstanding any requirement in the *Probate Act* of Nova Scotia or any successor legislation to obtain consent of any beneficiary or possible beneficiary to sell or transfer real property forming part of my estate, my personal representative may sell or transfer any real property which forms part of my estate for the purpose of distribution of the proceeds or for the purpose of transfer to a beneficiary or beneficiaries without such consent."

Here is a sample clause that you may want to add to wills executed on or after October 1, 2001 if the testator wishes to grant the power to mortgage the real property for all purposes:

“Notwithstanding any requirement in the *Probate Act* of Nova Scotia or any successor legislation to obtain approval of the Supreme Court of Nova Scotia to mortgage real property forming part of my estate, my personal representative may mortgage the real property for the purpose of paying debts or to erect, repair, improve or complete buildings or improve lands or for any other purpose that my personal representative in his absolute discretion he deems beneficial to the estate”.

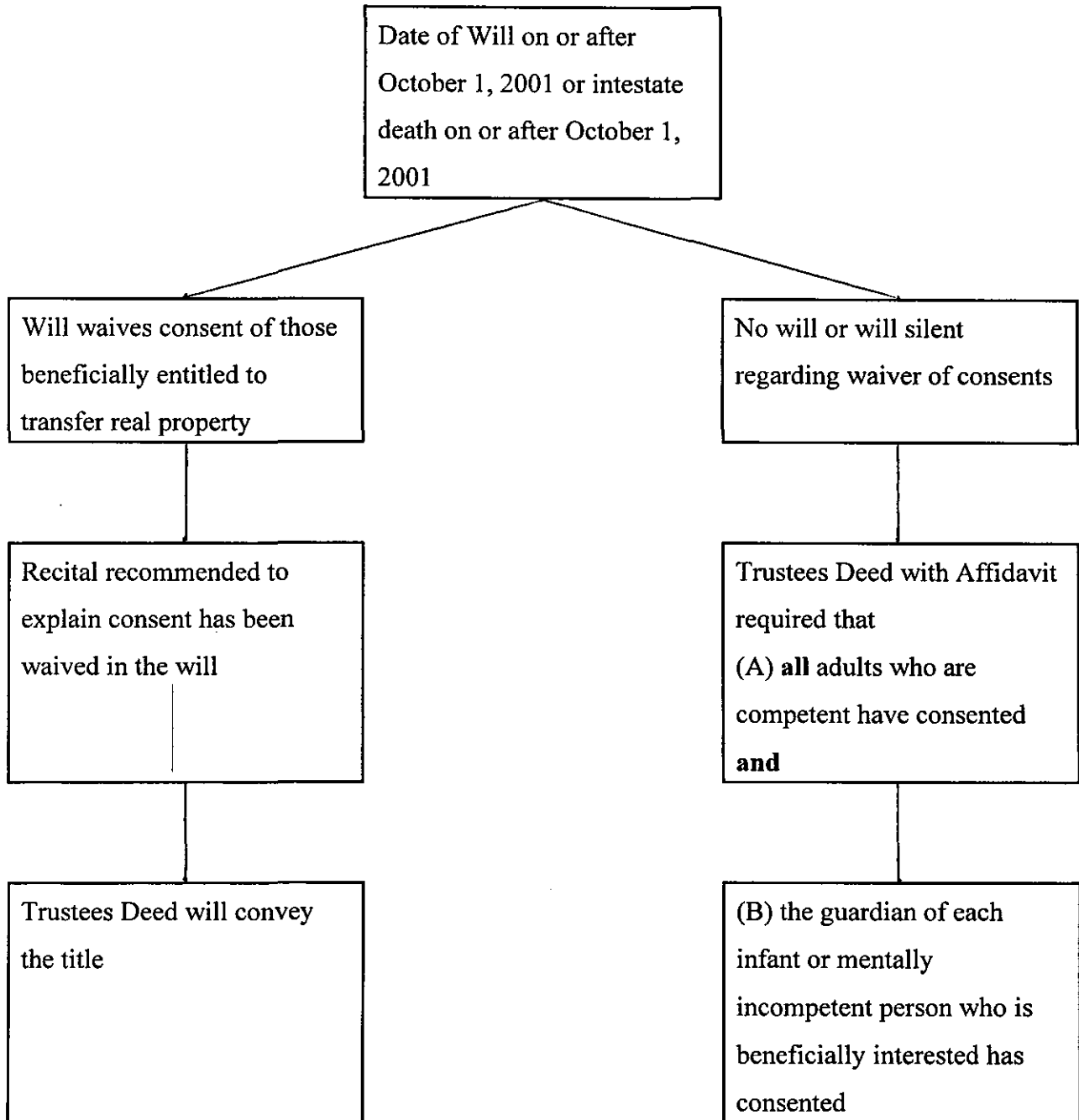
APPENDIX 3

Flow Chart for Determining Consents Required to Sell Real Estate



APPENDIX 4

Flow Chart for Determining Consents Required
to Transfer or Divide Real Property



Date of Will on or after
October 1, 2001 or intestate
death on or after October 1,
2001

Will waives consent of those
beneficially entitled to
transfer real property

Recital recommended to
explain consent has been
waived in the will

Trustees Deed will convey
the title

No will or will silent
regarding waiver of consents

Trustees Deed with Affidavit
required that
(A) all adults who are
competent have consented
and

(B) the guardian of each
infant or mentally
incompetent person who is
beneficially interested has
consented

APPENDIX 5

THIS TRUSTEE'S DEED made this day of November, 2002.

BETWEEN:

PAUL SIMONS of Vancouver, Province of British Columbia,
being the Administrator with Will Annexed, and Trustee of the
estate of **JOHN JONES**, deceased, (hereinafter called the
"Grantor")

- and -

JOHN BUYER and JANE BUYER, of Halifax, in the County of
Halifax, Province of Nova Scotia, as joint tenants, and not as
tenants in common.
(hereinafter called the "Grantees")

WHEREAS the lands and premises hereinafter described were in his lifetime owned by
JOHN JONES;

AND WHEREAS the said **JOHN JONES** died on or about December 1st, 2001 and by
his Last Will and Testament he did devise all of his real and personal property in trust to his
Executor and Trustee;

AND WHEREAS **PAUL SIMONS** was appointed as Administrator with Will Annexed
by the Probate Court for the County of Halifax, on the 10th day of December, 2001;

AND WHEREAS the property described hereto as Schedule "A" forms part of the
residue of the said estate;

AND WHEREAS the said Last Will and Testament of **JOHN JONES** contained a
Power of Sale which authorized the Executor and Trustee to convey the lands described
hereto in Schedule "A" without further consent of any beneficiary;

WITNESSETH THAT in consideration of One Dollar and other good and valuable
consideration;

THE GRANTOR hereby conveys to the Grantees the lands described in Schedule "A" to
this Trustee's Deed (the "lands"), as joint tenants, and not as tenants in common.

AND as Executor and Trustee of the Estate of **JOHN JONES** aforesaid, does hereby covenants with the said Grantees, their heirs, administrators and assigns, in manner and form following: that the said Grantor as Executor and Trustee aforesaid, has not done nor suffered anything to be done whereby said lands and premises herein conveyed, are, can or may be encumbered or impeached in title or estate and that no other covenant or warranty of title of any kind whatsoever on behalf of the Grantor as Executor and Trustee, is to be implied by any of the words used herein.

IN THIS TRUSTEE'S DEED the singular includes the plural and the masculine includes the feminine, with the intent that this Trustee's Deed shall be read with all appropriate changes of number and gender.

IN WITNESS WHEREOF, the Grantor have properly executed this Indenture the day and year first above written.

SIGNED, SEALED AND DELIVERED

in the presence of

PAUL SIMONS

AFFIDAVIT OF SPOUSAL STATUS

CANADA

PROVINCE OF NOVA SCOTIA

COUNTY OF HALIFAX

I, Paul Simons of Vancouver, Province of British Columbia, make oath and swear that:

- (a) THAT I am the Grantor in the foregoing deed and am the Administrator with Will Annexed of the estate of JOHN JONES and I am of the full age of nineteen (19) years.
- (b) I acknowledge that I executed the foregoing instrument under seal on the date of this affidavit.
- (c) This acknowledgment is made pursuant to s.31(a) of the *Registry Act*, R.S.N.S. 1989, c.392 for the purpose of registering the instrument.
- (d) For the purpose of this Affidavit "spouse" means either of a man or a woman who:
 - (a) are married to each other;
 - (b) are married to each other by a marriage that is voidable and has not been annulled by a judgment of nullity;
 - (c) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year; or
 - (d) is a party to a registered domestic-partner declaration made in accordance with Section 53 of the *Vital Statistics Act* but does not include a former domestic partner.
- (e) JOHN JONES was not a spouse and had no former domestic partner with the rights contemplated by Section 55 of the *Vital Statistics Act* at the time of his death.

- (f) The sale of the property in Schedule "A" attached hereto constitutes an exempt supply pursuant to Part I of Schedule V of the *Excise Tax Act*.

Note this is the paragraph to add if consents are required:

- (g) That all consents of the beneficiaries who are required by the *Probate Act* of Nova Scotia to consent to this **sale** have been obtained.

Alternate paragraph to recital on first page of Trustees Deed:

- (h) The Last Will and Testament of JOHN JONES contained a Power of Sale which authorized the Executor and Trustee to convey the lands described hereto in Schedule "A" without further consent of any beneficiary.

SWORN TO at Halifax, in the County of
Halifax, Province of Nova Scotia this
day of November 2002, before me,

PAUL SIMONS

A Barrister of the Supreme Court of
Nova Scotia

APPENDIX 6

THIS TRUSTEE'S DEED made this day of November, 2002.

BETWEEN:

PAUL SIMONS of Vancouver, Province of British Columbia, being the Administrator with Will Annexed, and Trustee of the estate of **JOHN JONES**, deceased, (hereinafter called the "Grantor")

- and -

SUE GREEN of Monastery, County of Antigonish, Province of Nova Scotia,
(hereinafter called the "Grantee")

WHEREAS the lands and premises hereinafter described were in his lifetime owned by **JOHN JONES**;

AND WHEREAS the said **JOHN JONES** died on or about December 1st, 2001 and by his Last Will and Testament he did devise all of his real and personal property in trust to his Executor and Trustee and directed that the property described in Schedule "A" attached hereto shall be transferred to the Grantee herein named;

AND WHEREAS **PAUL SIMONS** was appointed as Administrator with Will Annexed by the Probate Court for the County of Halifax, on the 10th day of December, 2001;

AND WHEREAS the said Last Will and Testament of **JOHN JONES** contained a Power of Sale which authorized the Executor and Trustee to convey the lands described hereto in Schedule "A" without further consent of any beneficiary;

WITNESSETH THAT in consideration of One Dollar and other good and valuable consideration;

THE GRANTOR hereby conveys to the Grantee the lands described in Schedule "A" to this Trustee's Deed (the "lands").

AND as Executor and Trustee of the Estate of **JOHN JONES** aforesaid, does hereby covenants with the said Grantee, their heirs, administrators and assigns, in manner and form following: that the said Grantor as Executor and Trustee aforesaid, has not done nor suffered anything to be done whereby said lands and premises herein conveyed, are, can or may be encumbered or impeached in title or estate and that no other covenant or warranty of title of any kind whatsoever on behalf of the Grantor as Executor and Trustee, is to be implied by any of the words used herein.

anything to be done whereby said lands and premises herein conveyed, are, can or may be encumbered or impeached in title or estate and that no other covenant or warranty of title of any kind whatsoever on behalf of the Grantor as Executor and Trustee, is to be implied by any of the words used herein.

IN THIS TRUSTEE'S DEED the singular includes the plural and the masculine includes the feminine, with the intent that this Trustee's Deed shall be read with all appropriate changes of number and gender.

IN WITNESS WHEREOF, the Grantor have properly executed this Indenture the day and year first above written.

SIGNED, SEALED AND DELIVERED

in the presence of

PAUL SIMONS

AFFIDAVIT OF SPOUSAL STATUS

CANADA

PROVINCE OF NOVA SCOTIA

COUNTY OF HALIFAX

I, Paul Simons of Vancouver, Province of British Columbia, make oath and swear that:

- (a) THAT I am the Grantor in the foregoing deed and am the Administrator with Will Annexed of the estate of JOHN JONES and I am of the full age of nineteen (19) years.
- (b) I acknowledge that I executed the foregoing instrument under seal on the date of this affidavit.
- (c) This acknowledgment is made pursuant to s.31(a) of the *Registry Act*, R.S.N.S. 1989, c.392 for the purpose of registering the instrument.
- (d) For the purpose of this Affidavit "spouse" means either of a man or a woman who:
 - (i) are married to each other;
 - (ii) are married to each other by a marriage that is voidable and has not been annulled by a judgment of nullity;
 - (iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year; or
 - (iv) is a party to a registered domestic-partner declaration made in accordance with Section 53 of the *Vital Statistics Act* but does not include a former domestic partner.
- (e) JOHN JONES was not a spouse and had no former domestic partner with the rights contemplated by Section 55 of the *Vital Statistics Act* at the time of his death.

- (f) The sale of the property in Schedule "A" attached hereto constitutes an exempt supply pursuant to Part I of Schedule V of the *Excise Tax Act*.

Note this is the paragraph to add if consents are required:

- (g) That all consents of the beneficiaries who are required by the *Probate Act* of Nova Scotia to consent to this **transfer** have been obtained.

Alternate paragraph to recital on first page of Trustees Deed:

- (h) The Last Will and Testament of JOHN JONES contained a Power of Sale which authorized the Executor and Trustee to convey the lands described hereto in Schedule "A" without further consent of any beneficiary.

SWORN TO at Halifax, in the County of
Halifax, Province of Nova Scotia this
day of November 2002, before me,

PAUL SIMONS

A Barrister of the Supreme Court of
Nova Scotia

property.

There is a power of sale clause in the will which authorizes the sale of real estate by the personal representative. If we assume that the wording in the will is sufficiently broad to authorize the Trustee to sell without obtaining any consents of the beneficiaries or court orders, the Trustee's Deed will be in the form found in the Appendix.

However, if the will did not have a power of sale clause, or if the clause is not broad enough to allow the sale without consents of beneficiaries, then the consents of those beneficially entitled would be required. The sale would not be invalid if only 75% of those beneficiaries who are the age of majority have consented to the sale.

Since Christopher Aucoin is a minor and cannot consent, a court order would be required for the purposes of his consent. The court would have to be satisfied that it is just and appropriate to order the sale.

An affidavit would be required to prove the appropriate consents have been obtained. This may be found in the affidavit of status in the Trustee's deed. If such consents are not necessary due to the wording in the will, it may be advisable to put a recital in the deed explaining this or add a similar statement to the affidavit in the Trustee's deed.

With respect to the Antigonish property, this property was gifted in the will or codicil to Sue Green. The Administrator will give a Trustee's Deed to convey the property. The new Act requires the consent of **all** beneficiaries to the transfer. If there is a person who is not of the age of majority or not competent, then the consent of the guardian of the person would have to be obtained. In this case, the guardian of Christopher Aucoin may consent to the sale. A guardianship application under the *Guardianship Act* will be required for Christopher Aucoin first. The appropriate affidavit will have to be obtained from the Administrator to prove such consents were obtained prior to the conveyance.

One main difference between the consents required for the sale of real property vs. the transfer to a beneficiary as provided in the will is that with a transfer to a beneficiary, all (not 75%) of the beneficiaries must consent.

APPENDIX 7

Summary of Requirements to Convey Real Property

1. No Will (intestacy)
 - (a) date of death is relevant -
 - (i) death after October 1, 2001, new Act applies, real property vests in personal representative on grant.
 - (ii) death after October 1, 2001, common law applies, real property vests in heirs at law.
2. Will (testate)
 - (a) date of will is relevant -
 - (i) signed after October 1, 2001, new Act applies, real property vests in personal representative
 - (ii) signed before October 1, 2001
 - if direct devise, vests in beneficiaries
 - if devised to Executor in trust, vests in Executor

Effect of changes under the new Act:

1. A direct devise in a will does not convey any interest in the real property to the devisee. A Trustee's Deed is required to convey the real property together with an affidavit of the Trustee that the appropriate consents have been obtained or waived.
2. The affidavit from the personal representative confirming consents have been obtained may form part of the affidavit of status in the Trustee's deed.
3. Heirs-at-law are vested with title until a grant of Administration is issued. However, no one except the personal representative can convey real property.
4. There are strong arguments that the election procedure under the *Intestate Succession Act* remains intact notwithstanding the vesting of real property in the personal representative

in the new Act.

5. Sale for the purpose of distribution only requires the consent of at least 75% of persons who are the age of majority and who are entitled to proceeds of sale, unless the will provides that the consents of beneficiaries are not necessary.
6. Unless the will provides otherwise, a Court application will be required if real property is to be sold for distribution when there are the following persons beneficially entitled:
 - (a) a mentally incompetent person or an infant;
 - (b) an adult beneficiary has not concurred in the sale (unless 75% entitled to sale proceeds have agreed);
 - (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
7. If the property is to be conveyed to a beneficiary or divided among beneficiaries, consent is required of every person who is the age of majority and the guardian of an infant or person who is mentally incompetent who is beneficially interested in the estate unless the will provides otherwise. Obtain affidavit confirming appropriate consents from the Trustee in the Trustees' Deed.
8. The personal representative may sell real property to pay debts.
9. When buying from an estate, add appropriate clauses in the agreement of purchase and sale which disclose if a court application will be necessary to convey real property so that the time allowed for closing is adequate.
10. The personal representative may mortgage real property for the payment of debts unless an infant or mentally incompetent person is beneficially interested in the estate and then a court application is required. Further, unless the will provides otherwise, court approval is required to erect, improve or repair the real property.

APPENDIX 9

Election by Widow Regulations

**made under Section 6 of the
Intestate Succession Act
R.S.N.S. 1989, c. 236
N.S. Reg. 75/77 (February 14, 1977)**

1 In these regulations, "election" means an election by a widow pursuant to subsection (4) of Section 4 of the Intestate Succession Act.

2 Where a widow is entitled to fifty thousand dollars pursuant to subsection (2) of Section 4 of the Intestate Succession Act, and makes an election, the election shall be in Form A in the Schedule.

3 An election shall have no force or effect unless it is supported by two appraisals which shall be in Form B in the Schedule.

4 An election shall have the force and effect of a transfer and delivery of the intestate's home to his widow, when the election is filed in the court of probate for the county in which the home of the intestate is situate, and a copy of the election, certified as such by the registrar of probate for the said court of probate is recorded in the registry of deeds for the said county.

5 The fees prescribed in the Costs and Fees Act shall apply to the recording of documents pursuant to these regulations.

Form A

(note: format altered for HTML version)

PROVINCE OF NOVA SCOTIA)

COUNTY OF)

IN THE MATTER OF THE INTESTATE SUCCESSION ACT

- and -

IN THE ESTATE OF _____, DECEASED

I, _____, of _____ in the
County of _____ solemnly declare that:

1. I am the (widow)(widower) of _____ *(insert name of deceased)*
who died at _____ in the County of _____ on the _____ day
of _____, 19 ____.

2. To the best of my knowledge and belief the deceased died without leaving a will.

3. The address of the home owned and occupied by the deceased as principal residence at
the date of death is _____ and is more particularly
described in Schedule "A" attached hereto. (Schedule "A" should contain the Registry of
Deeds description of the property, or if the property is under the Land Titles, a survey
plan of the property showing its parcel index number.)

4. The value of the home, including land appurtenant thereto, and all household goods
and furnishings thereof, owned by the deceased (except wearing apparel, provisions and
other articles which are necessary for the reasonable sustenance of the deceased's
dependants for ninety days after the death) is \$ _____ as appears from the
appraisals of _____ and _____ attached hereto. (Two
appraisals are required. The value may be determined by adding the two amounts in
Section 3(d) of the appraisal forms, and dividing the result by 2.)

5. I elect, pursuant to S. 4(4) of the Intestate Succession Act, to receive the home:

(a) in lieu of the \$50,000.00 that I am entitled to receive, pursuant to S. 4(2) of the
said Act; or

(b) in the amount of its value as part of the \$50,000.00 that I am entitled to
receive, pursuant to S. 4(2) of the said Act;

(Delete (b) if the value of the home exceeds \$50,000.00; delete (a) if the value of the
home does not exceed \$50,000.00)

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Declared before me at _____,)
in the County of _____,)
Province of Nova Scotia, this _____)
day of _____, 19____)
)
) _____
)
)
)
)

(A Barrister, Commissioner)
or Notary Public))

Note: The Regulations under the Intestate Succession Act provide that in order for this declaration to be effective to transfer the home of the deceased to the declarer, the declaration must be registered with and certified by the registrar of probate for the county in which the land is situate, and the certified declaration must be filed with the registrar of deeds for that county.

Form B

(note: format altered for HTML version)

PROVINCE OF NOVA SCOTIA)

COUNTY OF)

IN THE MATTER OF THE INTESTATE SUCCESSION ACT

- and -

IN THE ESTATE OF _____, DECEASED

Appraisal

I, _____, of _____ in the County of _____
_____ make oath and say as follows:

1. That my occupation is _____ .

2. That I have no interest in the real or personal property of the deceased.

3.(a) That I appraise the fair market value of the home of the deceased and land appurtenant thereto situate at _____ at \$ _____

(b) That I appraise the fair market value of the household goods and furnishings of the said home (except wearing apparel, provisions and other articles which are necessary for the reasonable sustenance of the deceased's dependants for ninety days after death) at \$ _____

(c) That the charges attaching to the home are (here list such charges as a mortgage, lien, judgment, betterment charge and real property taxes) _____

(d) That the value of the said home for purposes of the Intestate Succession Act is \$ _____ [add (a) & (b) and subtract (c)].

11. The personal representative may lease real property for up to one year. If a longer term is required, Court approval is necessary.
12. The Court may order the personal representative to convey real property if one year has passed and the real property has not been conveyed after the personal representative has been requested to do so.
13. The Court may order vesting in a beneficiary if the order is not complied with.
14. The Court may order the property to be sold if one year has passed and may direct another person to complete the sale.
15. The debts of a deceased do not follow the real property when the person buys in good faith and for value.
16. The debts of a deceased do follow to the property while it is held by a beneficiary to whom it has been conveyed, or to a person who has purchased the property, **not** in good faith from the beneficiary. Such person remains liable for the debts of the estate to the extent of the value of the real property at the time it was conveyed to the beneficiary.
17. All personal representatives who have been issued the grant must sign the deed, mortgage or lease unless the Court otherwise orders.
18. The designated residence is protected after death.
19. The personal representative is prohibited from selling the designated residence to pay social assistance costs when the residence was designated before death.

APPENDIX 8

CASE STUDY ESTATE OF JOHN JONES

Real Estate Issues

The will predates the new Act, but the codicil is dated after October 1, 2001. The Regulations to the new *Probate Act* defines “will” as:

(v) “will” includes a testament, a codicil and every other testamentary instrument of which a grant may be issued.

Section 13(1) of the Regulations state:

If a will is amended by a codicil or other testamentary instrument, the date of the last codicil or other testamentary instrument is deemed to be the effective date of the will.

If the codicil is found to be valid (that is if Ms. Piggy Pye loses her application), the new Act will apply. If the codicil is not valid, the only testamentary document will be the will which is dated prior to October 1, 2001 and the old *Probate Act* will apply with respect to the real estate. In that case, the Administrator will have the power to convey the property, as provided in the will, to the beneficiaries or sell it by Trustee’s Deed without any consents.

If Miss Piggy Pye loses her application to throw out the codicil, the codicil will stand and the new Act will apply. The Administrator will be vested with title to the real property by virtue of the provisions in the new Act.

There are two properties in the estate. The property in the Halifax Regional Municipality is not devised to any person in the will or codicil. It forms part of the residue of the estate. Therefore, the Administrator will sell this property and will give a Trustee’s Deed to the buyer of the real

4. That the above is to the best of my knowledge, information and belief a true and impartial appraisal of the home and furnishings of the deceased at the time of death.

Sworn before me at _____,)
in the County of _____,)
Province of Nova Scotia, this _____)
day of _____, 19__)
)
)
) _____)
)
)
)
)

(A Barrister, Commissioner
or Notary Public))

Note: The appraised amount of the home, and land appurtenant thereto, may be the same as the amount for purposes of the Probate Act, or the Succession Duties Act, where applicable. Where the estate is not probated and succession duties do not apply, the appraisal may be made in consultation with the provincial assessor for the county in which the land is situate.

