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## Conveyancing Under The New Probate Act

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The new *Probate Act*<sup>1</sup> changes the devolution of real property. For estates governed by the new real property provisions<sup>2</sup>, title to real property of a deceased person vests in the personal representatives, and only they can convey title.

Some of the new provisions call for the concurrence of beneficiaries in certain circumstances. For example, subsections 50(1) and (2) of the *Probate Act* provide:

“(1) Subject to any will, 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 to the real property concur in such sale, except where the sale is made for the purpose of distribution only.”

“(2) Subject to this Act and any will, 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.”

Subsection 50(3) permits the Supreme Court to approve some sales where consents cannot be obtained. Subsection 50(4) permits a sale to proceed in the face of opposition from competent adults as long as those entitled to 75 percent of the proceeds concur.<sup>3</sup>

If one is acting for a purchaser from an estate, when will the consent of beneficiaries be required? This article examines this question in what is the most commonly encountered case – where there is a will containing a power of sale.

Most standard will precedents contain a power of sale similar to the following power:

“To use her or his discretion in the realization of my estate, with power to my Trustee to sell any part of my estate at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit, as my Trustee may in his or her discretion decide upon...<sup>4</sup>

Does section 50 restrict the power of sale in a will by requiring the consent of beneficiaries in some cases? How is one to read the two provisions together?

The answer lies in other Provinces. Nova Scotia is the last common law province to change the devolution of real property. Case law and commentary interpreting the corresponding provisions of other provinces dealing with the devolution of real property provide a clear answer.

Ontario's *Estates Administration Act*<sup>5</sup> contains similar real property provisions to those of our *Probate Act*, requiring consent of beneficiaries in circumstances much like our *Probate Act*. Ontario began vesting real property in the personal representatives in 1886 when it enacted the *Devolution of Estates Act*. There are a number of cases dealing with the relationship between the power of sale in a will and the provisions of that Act. In *Re Koch and Wideman*<sup>6</sup> although the issue was not the consent of beneficiaries, Street

J. discusses this relationship at p. 267:

“The Act in question is intended, as appears on its face, to aid executors and administrators to deal with the estates which are required for the payment of debts where such aid is necessary to enable them to do so; there is nothing in it to interfere with the provisions which testators may themselves have made as to the time and manner in which their estates are to be dealt with. Where such provisions have been made by a testator, the Act may supplement, but does not detract from them, ... The executor here has a power of sale under the will and can exercise it under the will without regard to the Act.”

Donald H.L. Lamont, in *Real Estate Conveyancing*<sup>7</sup>, in introducing the topic of estate conveyancing, says at p. 261, citing the *Koch* case:

“At the outset it should be emphasized that if the deceased dies leaving a will and its provisions are explicit, the will is the paramount document.”

At p. 270-1, when discussing powers of sale in wills, Lamont states:

“Once again it should be reiterated that if the deceased left a will and gave the executor a wide power of sale the provisions of the will govern the situation. If on the other hand there is no power of sale contained in the will or the power is not sufficiently broad, the executor can resort to the powers of sale under the *Devolution of Estates Act* ... If there is an intestacy, the personal representative has only the powers of sale and conveyance under the *Devolution of Estates Act*.”

Ontario is not alone. The other common law provinces all made the same change in the devolution of real property long ago<sup>8</sup>. In a New Brunswick case, *Re Anthony's Will*<sup>9</sup>, although the issue was not the consent of beneficiaries, Stratton J., after reviewing Ontario cases, came to the following conclusion about the relationship between the powers in a will and

the powers in the statute:

“It follows then that, in my opinion, the express powers conferred upon the Estate Trustee by the Will of the late Mrs. Anthony are unaffected by the provisions of the Act...”

In a 1995 Alberta case, *Re Curlett Estate*<sup>10</sup>, the consent of beneficiaries was the issue. The real property provisions of the Alberta *Devolution of Real Property Act* are similar to our *Probate Act* provisions.<sup>11</sup> In that case, the Ontario and New Brunswick cases were considered and followed. Wachowich A.C.J. Surr. Ct said at p. 552:

“The DRPA is intended to give Executors additional or supplemental powers; it is not intended to eliminate or reduce the powers granted to them by the terms of the Will. Thus, ss. 9 and 10 of the Act are intended to provide a mechanism of sale for those Administrators who were not given an express grant of power of sale or in the case of an intestacy.”

It should be clear, therefore, that in a case where a Nova Scotian will contains a power of sale, that power is unaffected by s. 50 of the *Probate Act* and consents of beneficiaries are not required for conveyances by personal representatives.

Section 50 provides a somewhat restricted statutory power of sale that will be useful in cases of intestacy and in cases where wills do not contain a power of sale. Similarly, section 51 will be useful in allowing distributions in kind in cases of intestacy and in cases where wills do not contain a power to distribute in kind. Given the restrictions in the statutory powers, most testators would probably want to include both of these express powers in their wills. They should therefore be part of a standard set of powers for wills, and will precedents usually include them both.

A power of sale in a standard will precedent, such as the one quoted earlier in this article, does not expressly override the statutory power, nor does it expressly dispense with the need for consent of beneficiaries. These precedents have

been available nationally for many years, and countless wills have been administered with them in the other provinces, without giving rise to interpretation problems. There is no basis for concluding that the standard precedents will not be satisfactory in Nova Scotia.

Section 52 will be useful for leasing or mortgaging in cases of intestacy and in cases where wills do not contain a power to lease or mortgage. These powers are less frequently included in wills than are powers of sale and distribution in kind, perhaps because they are not often needed. Should powers to lease and mortgage be part of a standard set of powers for wills? If the testator wishes the personal representatives to see all available powers set out in the will, for ease of reference, then the answer is yes. But if they are left out, the personal representative can turn to other statutory powers found in the *Trustee Act* (Nova Scotia). One of these, subsection 21(1), provides:

“Wherever a power to sell real property is given to any executor or trustee, such power shall include a power to mortgage or lease, unless the instrument expressly excludes it.”

An express power to lease or mortgage is not necessary as long as the will has a power of sale.

To conclude, the new Probate Act provisions respecting the devolution of real property are included to assist in cases of intestacy and in cases where wills do not contain appropriate powers. The provisions will not require a personal representative acting under a will containing a standard form power of sale to obtain consents of beneficiaries before selling real property. Nor will they require a personal representative acting under a will containing a standard form power of distribution in kind to obtain consents of beneficiaries before transferring real property to beneficiaries. Nor will they require a personal representative acting under a will containing a standard form power of sale to obtain court approval before mortgaging or leasing real property.

### (Footnotes)

<sup>1</sup>S.N.S. 2000, c. 31, as amended by the *Justice Administration (2001) Act*, S.N.S. 2001, c.5.

<sup>2</sup>The new real property provisions are found in sections 44-55 of the *Probate Act*. They apply to the estates of those who die after September 2001 without a will and those who die with a will that is dated after September 2001.

<sup>3</sup>There is a similar provision in section 51 concerning distributions of real property to beneficiaries. It also requires consents. Section 52 contains limited powers for the personal representative to lease or mortgage real property, and Supreme Court approval is needed in some cases.

<sup>4</sup>Sheard, *Canadian Forms of Wills* (4th ed. 1982), p. 18.

<sup>5</sup>R.S.O. 1990, c. E-22, s. 17. Subsection 17(1) reads:

The powers of sale conferred by this Act on a personal representative may be exercised for the purpose not only of paying debts but also of distributing or dividing the estate among the persons beneficially entitled thereto, whether there are or are not debts, and in no case is it necessary that the persons beneficially entitled concur in any such sale except where it is made for the purpose of distribution only.

<sup>6</sup>(1894), 25 O.R. 262.

<sup>7</sup>Law Society of Upper Canada, 1976.

<sup>8</sup>Newfoundland was the first province to make the change, in 1834.

<sup>9</sup>(1977), 17 N.B.R. (2d) 364 (N.B.Q.B.).

<sup>10</sup>[1996] 3 W.W.R. 545 (Alta. Surr. Ct.).

<sup>11</sup>R.S.A. 1980, c. D-3. Section 9 reads:

The personal representative may sell the real property for the purpose not only of paying debts, but also of distributing the estate among the persons beneficially entitled thereto, whether there are or are not debts, and it is not necessary for the persons beneficially entitled to concur in any such sale except when it is made for the purpose of distribution only.