A LITTLE HISTORY

We all know that the law of Nova Scotia relating to real estate is a direct descendant of the English common law and certain (but not all) of the early English statutes affecting title to real estate. In the area of succession to title on death, however, the laws of England and Nova Scotia have diverged significantly, with the first provincial (colonial) legislation being An Act relating to Wills, Legacies and Executors, and for the Settlement and Distribution of the Estates of Intestates. (1758). This early legislation is the ancestor of our modern-day Wills Act, Intestate Succession Act and Probate Act.

Likewise, we may assume that the laws of the other common law provinces of Canada (and of the common law jurisdictions in the United States and other parts of the Commonwealth) are similar to those of Nova Scotia - which they are - but it would be wrong to conclude that they are in all respects the same.

One fundamental distinction between our laws on succession and those of England, or, say, Ontario, is this: in Nova Scotia title to real estate does not vest in the administrator of the intestate owner and does not vest in the executor of the owner's will if such will contains a direct devise of that real estate. In the first case, title to the real estate vests directly in the heir or heirs-at-law, as determined by statute; in the second case, title vests directly (by reason of the will) in the devisee or devisees.

In Harvey v. Powell's Estate, (1989), 95 N.S.R. (2d) 37, the Appeal Division interpreted a direct devise of real estate in a will, the trial judge having found that the title passed to the widow as devisee on the date of probate, and thus was distributed

within the meaning of the Testator's Family Maintenance Act, such that no claim could be asserted against it. Hart J.A., wrote:

> The real property was vested in the widow by her husband's will which was duly probated to prove the transmission. No proceeding has been taken to recall these lands to the estate by license to sell for the payments of debts end there is no authority under the Testator's Family Maintenance Act now to do so.

The law is directly opposite in England and Ontario, where title vests in all cases with the executor of the will or the administrator of the intestate estate (upon appointment by the Court), this change in the law having been effected by legislation. No such legislation has been enacted in Nova Scotia. [See, generally, Halsbury, The Laws of England, 4th Edition Vol. 17, para. 1100 et seq.]

For this reason, it is dangerous to rely on English or Ontario textbooks in this area, as the fundamental basis of the personal representative's powers to deal with real estate are wide-ranging in those other jurisdictions, and very narrow in Nova Scotia.

Essentially, on a strict analysis, the personal representative of the deceased owner has the power to convey title to real estate in these circumstances:

1. The Probate Court has granted a license to sell real estate to the executor or administrator, in order to pay the debts of the deceased owner; Probate Act, R.S.N.S. 1989, c. 359, s. 50 et seq.

2. The Probate Court or the Supreme Court has granted a partition order authorizing the executor or administrator to sell real estate.

Probate Act, R.S.N.S. 1989, c. 359, s. 86 et seq.
Partition Act, R.S.N.S. 1989, c. 333.

3. The will devises the real estate to the executor (s) in trust with an express or implied power of sale. In this case, the executor is the direct devisee of the lands and has legal title, by reason of the will.

EXECUTOR'S POWER OF SALE

Example I. If the real estate is devised to the executor in trust with an express power to sell, it is undoubted that the executor can convey whatever title the deceased had in the real estate to the purchaser.

A power of sale clause might look something like this:

I authorize my executors in their discretion to sell at such price and in such manner and from time to time any real and personal property forming part of my estate and to execute and deliver to the purchasers thereof such deeds and other documents of transfer as may, in their opinion, be necessary for the purpose of completing such sale.

Example II. If the real estate is devised to the executor in trust "to divide", there is an implied power of sale, and it is undoubted that the executor can convey whatever title the deceased had in the real estate to the purchaser.

In Re Courtney, [1944] 4 D.L.R. 80, a testator directed his executors to "divide the whole residue of my estate

after payments of my just debts and funeral and testamentary expenser amony my children who may survive me, etc." His estate consisted of real and personal property and his will gave no express pwoer to his executors to sell real estate. Sir Joseph Chisholm, C.J.N.S. found that a division could not be made among numerous beneficiaries without realizing on the assets. "I think there is power to sell implied in the language of the will".

See also Trustee Act, R.S.N.S. 1989, c. 479, s. 19. A power of sale includes a power to mortgage or to lease, unless the instrument expressly excludes it: s.21(1).

Example III If the real estate is devised to the executor in trust with the express direction to convey it to a named beneficial devisee or divisees, then, to effect a sale to a third party,

(i) the best option would be a trustee's deed from the executor to the named devisee (in accordance with the will) followed by a warranty deed from the devisee to the purchaser;

(ii) the second best option would be a combined deed, either from the trustee directly to the purchaser, with the beneficial devisee releasing his interest, or from the beneficial devisee directly to the purchaser, with the executor confirming the conveyance.

It is my opinion that, since the executor has legal title as a bare trustee, the executor should be party to such a conveyance. Further, since the named devisee has beneficial title (and the purchaser has notice of his interest by the express wording of the will), the beneficial devisee should also be a party to such a conveyance. The purchaser would prefer the first option, as he will obtain a warranty deed.

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The question has arisen as to the propriety of a deed from the beneficial devisee directly to the purchaser, without a conveyance from the trustee. I think we can distinguish two situations.

III. (1) If the executor and the beneficial devisee are the same person (why would anyone draft a will this way?), then the same person has both legal and beneficial title. In that case, the missing link trustee's deed would not be a title flaw, in my view, as there would be an implied conveyance of the entirety of the estate and interest of the grantor in all his capacities - the executor/devisee would be estopped from denying the efficacy of the deed. As a bare trustee, the only power the executor has under the will is to convey to himself, and, on a reasonable construction, the deed he executes would be taken to convey both his (bare) legal and his beneficial titles.

III. (2) If the executor and the beneficial devisee are two different persons, then, on its face, the title record has a serious flaw, since the legal title holder has not conveyed his interest. The purchaser may have a beneficial (equitable) interest and there may be one in a position to assert a superior legal interest. I have concerns, however, that creditors of the deceased may be able to assert a claim against the real estate in this situation. The executor may be "off the hook" in that the real estate was conveyed away without his concurrence. He is liable to pay the debts of the deceased out of the proceeds of the assets which come into his possession. In any event, the executor would certainly be entitled to assert his legal interest to protect the creditors, and if the beneficiary has absconded with the sale proceeds, the purchaser will be in trouble and the real estate will be attached to pay the debts.

Example IV. If the real estate is devised directly to a named person in the will, then to effect a sale to a third party, the named devisee would execute a warranty deed to the purchaser.

On the earlier historical analysis, this seems self-evident. The executor would have no involvement in the sale process. No deed from the executor to the devisee is required - the will transfers title directly.

The question has arisen as to the effect of a deed from the executor to the purchaser, purporting to exercise an express power of sale in the will.

In Haagsma v. Millward, (1986), 75 N.S.R. (2d) 358, Mr. Justice Tidman, after referring to English and Ontario precedents, interpreted the will, which contained a power of sale clause, as entitling the executors to convey lands which were expressly devised to beneficiaries.

> Where the authority to sell real estate is given to exeutors, the fee simple is implicitly vested in them for that purpose. See - Re Davies and Jones and Evans, (1883), 24 ch. D. 190; quoted by Teetzel J.M. Re Roberts and Brooks, [1905] O.L.R. 395. And see Anthony v. Rees, (1831), 2 cr & J. 75 at 83 to the same effect.

With respect, I believe that this case is wrongly decided, in that the executor had no title to convey, but it is a useful precedent when you are in a hurry to complete a sale.

EXECUTOR'S DUTY TO PAY DEBTS AND THE POSITION OF THE PURCHASER

Almost every will contains a clause directing the executor to pay the deceased person's taxes, debts, funeral, testamentary and administration expenses. Even if the will is silent, or in the absence of a will, the executor or administrator, respectively, is obligated by law to pay the debts before distributing the residue of the estate.

At common law, the personal estate of the deceased devolves upon the personal representative and is held by him in right of the deceased (and not in his own right), in trust, first to pay debts and expenses, and second, to distribute to the persons entitled by will or by intestacy. The personal representative has full control of all the items of personal estate and a common law power of sale, pursuant to which he can convey title to the personal assets to a purchaser. The beneficiaries have no specific interest in any of the personal property comprising the residue until it has been ascertained in the due course of administration. [Halsbury, Laws of England, IVth Edition, Vol. 17, Executors and Administrators, para. 1078].

A deceased person's legal and equitable estate, to the extent of his beneficial interest in it, are assets for payment of his debts and liabilities. Any disposition by will inconsistent with this rule is void as against the creditors. [Halsbury, supra., para 1129]. The executor or administrator, as of right, can sell the personal property to pay debts, first, selling the residuary personal estate, second, abating cash legacies and third, selling chattels which have been specifically bequeathed to named beneficiaries. If the personal estate is insufficient to pay the debts and expenses, the executor will next sell the real estate devised to him in trust, and if that is still insufficient, the personal representative may apply for a license to sell real estate under the Probate Act.

What is the position of the purchaser of real estate from an estate? What can the purchaser's solicitor reasonably requisition from the vendor's solicitor? What assurances need be given?

EXAMPLE I Purchaser in good faith but not for value

If a person to whom any beneficial interest in real or personal estate is given by will or on intestacy (that is, a person who does not purchase for value, but is simply a volunteer, or done) disposes of it (conveys it) in good faith, he is personally liable for the value of the interest so disposed of by him. This is so, whether or not he knew that the other estate assets were insufficient to pay the debts and expenses of the deceased.

Under the license to sell provisions of the Probate Act, the personal representative can intervene to sell real estate which is either directly devised under the will or descended directly to the heirs-at-law on intestacy. Since these divisees or heirs have not paid consideration, their title is subject to the claims of creditors of the deceased.

As a corollary to these principles, the claims of creditors of the devises or heir-at-law are secondary to the claims of creditors of the deceased, that is, the latter must be satisfied, before the former can be asserted against the successor's title interest. A judgment entered against the devisee or heir-at-law does not not defeat the rights of the deceased's creditors against the lands devised or descended, and the devisee or heir takes no beneficial interest in it except subject to and after payment of the deceased's debts. [Halsbury, supra., para s. 1130, 1132; Kinderley v. Jervis, (1856), 22 Bear 1.]

EXAMPLE II Purchaser in good faith for value

If the executor, direct devisee or heir-at-law sells the deceased person's real estate to a purchaser in good faith for value, the right of creditors is restricted to any in personam claim against the proceeds of sale in the hands of the executor, devisee or heir-at-law; in other words, there is no in rem claims against the real estate in the hands of the purchaser for value. Accordingly, the property cannot be followed into the hands of a purchaser for value in good faith, even though he had notice of the existence of the debt.

[Halsbury, supra., para 1130; Jones v. Noyes and Allen, (1858), 28 L.J. Ch. 47.]

From these examples, it is clear that if you represent a purchaser for value, you need not care whether the estate of the deceased is closed or not, nor do you need to obtain a statutory declaration that all debts of the deceased have been paid, or that the assets of the estate exceed the liabilities. A court cannot grant a license to sell real estate which has been conveyed to a bona fide purchaser in good faith for value. If the vendor is the duly appointed executor with power of sale or the vendor holds title as direct devisee or heir-at-law, the purchaser for value can safely proceed to complete the transaction at an early date in the estate administration.

The only person having an in rem interest in real estate, I would suggest, is the surviving spouse of the deceased, who would have an elective right to title under the Intestate Succession Act to the family home, or a right of possession to the matrimonial home under the Matrimonial Property Act (coupled with a right to apply for division of matrimonial assets). Obviously, as purchaser, you would not be satisfied to take a

deed from the executor or the devisee or heir-at-law (not being the spouse), for the matrimonial home, unless you were satisfied that the surviving spouse's in rem interest was also being conveyed. That surviving spouse is the only creditor who could prevail against a bona fide purchaser for value, I would suggest.

By contrast, in the former case, if you are the successor by gift (that is, not for value) whether as direct devisee or heir-at-law, you are vitally concerned that the debts of the deceased are paid in full, as there remains a potential claim against you or the real estate devised to/inherited by you, and in these circumstances, you would prefer to see the estate closed, or, at least, to receive an assurance from the executor or administrator that the debts have been paid in full.

QUICK QUERIES

QQ #1(a)

Snowbird dies intestate, domiciled in Nova Scotia, owning land in Florida. What law applies to the succession to real estate in Florida?

A. The law of Florida. The lex rei sitae (the law of the place where the real estate is situate) controls the succession. For this reason, when drafting a will dealing with foreign real estate, it would be prudent to ascertain that the language used is adequate to convey the real estate, as intended by the testator. The form of execution of the will and the succession to personal property (whereever situate) is governed by the lex domicillii (the law of the domicile of the testator, at the time of making the will, in the former case, and at the time of death, in the latter case). Tax laws dictate prudence in any event!

QQ #1(b)

Quayle dies intestate, a resident of New York and a citizen of the United States, owning land in Nova Scotia. Under the law of New York, assume his father is the sole heir, even though he has an illegitimate son. Who inherits the Nova Scotia real estate?

A. Nova Scotia law governs and determines his heirs-at-law. Apparently, the illegitimate son would be the heir-at-law here. Surette et al v. Harris Estate, (1989), 91 N.S.R.(2d) 418.

QQ #2 Paula Problem died in 1952 and appointed Tom, Dick and Harry as her executors: All three are now dead, Harry having been the last to die. There remains a piece of land formerly owned by Paula Problem. The will vested all real estate in the executors, giving them power to sell. Who can now convey the title?

A. Assume probate of the will was granted. A conveyance to executors or trustees is deemed to be in joint tenancy, so the survivor could act alone, if now alive: Real Property Act, R.S.N.S. 1989, c.385, s.5(1).

If there is no surviving executor, resort might be made to the equitable doctrine of transmission of executorship. If Harry's estate has also been probated, and his executor is alive, then that executor would have power to complete the trust and to convey the real estate. See Feeney, The Canadian Law of Wills, second edition, volume 1, page 146.

The administrator of a deceased executor does not have successorship rights and cannot convey title, nor can the executor of an administrator, or the administrator of an administrator, so the doctrine is narrow.

However, the Real Property Act, R.S.N.S. 1989, c.385, c.1, widens the successorship powers considerably. The personal representatives of the deceased sole trustee (or remaining trustee) have the power "to dispose of and otherwise deal" with the trust estate. They are deemed in law "his heirs and assigns within the meaning of all trusts and powers." This is useful only if the will or other instrument vests legal title in the executors and trustees.

S.23 of the Act may also be of assistance. If the trustee or executor as vendor has executed an agreement of

purchase and sale of land, but dies before the closing the Supreme Court may appoint an administrator de bonis non with power to execute the conveyance. This is an exception to the general rule that a administrator has no power to convey real estate.

As a last resort, if none of the foregoing provisions are directly applicable, the Trustee Act may be helpful. The Supreme Court has power to appoint a substitute trustee: Trustee Act, R.S.N.S. 1989, c.479, s.31. Note that beneficiaries or remaining trustees can appoint additional or successor trustees in limited circumstances ss. 16,17, Trustee Act.

QQ #3(a)

Hiram Cheapskate's wife Euphemia has just died, and her estate consists solely of real estate - the matrimonial home. Suppose that the home is valued at $75,000.00. What does Hiram need to do to transfer title to the real estate to himself?

A. File an election under the Intestate Succession Act, R.S.N.S. 1989, c.236, s.4(4). The regulations provide for the forms and procedures, including appraisals.

QQ #3(b)

Suppose that the home is valued at $40,000.00. What does Hiram need to do?

A. The safest procedure, if no estate is opened, might be the same as in QQ #3(a), to file an election. Otherwise, how will subsequent purchasers and searchers know that Hiram Cheapskate is the heir, pursuant to s.4(1)? Perhaps a recital in a subsequent deed would satisfy the purchaser and his solicitor. At least, if the estate is opened and an inventory is filed, there is public notice of the application of the section.

Some solicitors choose not to file an election, and the language of s.4(4) (referring to s.4(2)) requires it only when the estate exceeds $50,000 in value, referring to s.4(2).

QQ #3(c)

Suppose Euphemia left a will naming Hiram Cheapskate as executor and devisee. What does Hiram have to do to transfer title? Is probate necessary? Will a notarial copy of the unprobated will or a statutory declaration with the unprobated will attached be sufficient record at the Registry of Deeds?

A. Once upon a time, a distinction was made between "proving" a will and "probating" a will. If you look at the typical Letters Testamentary, you will see that the date the will is "proved" and the date it is "probated" need not be the same. "Proving" occurs when a witness to the will signs the usual

affidavit (proof in common form). "Probate" is the actual grant of letters to the petitioning executor.

S.144(1) of the Probate Act, R.S.N.S. 1989, c.259 requires the Registrar of Probate to send a certified copy of a proved will to the Registrar of Deeds, for the district in which the land lies. (s.144(2) requires him to send the application for administration, but this is seldom done.)

S.17 of the Registry Act, R.S.N.S. 1989, c.392 requires the Registrar of Deeds to register the certified copy of the will sent to him by the Registrar of Probate.

As a result of a memorandum prepared in the Attorney-General's Department and circulated to all Registrars of Probate the distinction between "proving" and "probating" a will was set aside, and Registrars were instructed not to prepare certified copies of wills nor to send wills to the Registry of Deeds unless probated.

Now bearing in mind that it is the wording of the will which conveys title to real estate, and not the probate of the will, in the case of a direct devise, what alternatives are available?

In s.2(c) of the Registry Act, "instrument" is defined as not including a will. Other than the reference in s.17, the Registrar of Deeds is not required to accept a will for registration. I have tried to file a notarial copy of a will, proved but unprobated, and have been refused by the Halifax Registrar. I have been successful, however, in filing a statutory declaration with the proved, but unprobated, will, attached as a schedule or exhibit.

The argument in favour of probate centers on certain

practical questions: -

(i) how does the Registrar of Probate know that the estate includes land in a certain district, unless a petition is filed?

(ii) how does the Registrar of probate know (or how does anyone else know) if the document is the last will, unless a petition and oath are on file?

Nevertheless, in this example, it would be cheaper for Cheapskate if Euphemia had died intestate!

I do not think it would be a valid objection to title to say that probate had not been granted, if the will is proved in common form at the Registry of Probate and is on file in the Registry of Deeds attached to a statutory declaration. More cautious conveyancers may prefer probate, but there is no magic in the appointment of the executor which has any effect on a direct devise. However, if the lands are devised in the will to the executor in trust with power to sell or convey, I believe the executor ought to apply for probate, so that there is a public record that he has accepted the duties of executor. Although his appointment flows from the will (as do his powers, usually) he is free to renounce the appointment prior to applying for probate. In such a case, the better course, it seems to me, would be to confirm the appointment of the executor in the will by a grant of letters testamentary from the Registry of Probate.

Quick Queries (Continued)

STATUTORY ACTS TO GRIND

QQ. # 4:

As solicitor for the purchaser from an estate, what can you reasonably require to ensure compliance with the Matrimonial Property Act?

QQ. # 4(a):

Suppose the land was owned in joint tenancy by the late Stanley Smith and his widow Eldora Smith. John Smith is the executor of the will.

A. This is a "no-brainer". Eldora Smith, as survivor, is the sole owner of the land, and will sign a warranty deed, with the usual affidavit stating that she is not a spouse. John Smith has nothing to do with the title, as it is not conveyed by the will but by operation of law pursuant to the original deed into the Smiths as joint tenants.

QQ. # 4(b):

Suppose the land had been owned solely by Stanley Smith, and he is survived by Eldora, his widow. Again, John Smith is the executor, and has a power to sell pursuant to the will.

A. The Matrimonial Property Act, R.S.N.S. 1989, c. 275, s.3(1) defines "matrimonial home" as "the dwelling and real property occupied by a person and that person's spouse as their family residence and in

which either or both of them have a property interest other than a leasehold interest". In s.3(3) this definition is extended to direct ownership through shares in a corporation. "Spouse", of course, by s.2, is defined to mean the legally married husband or wife, or widow or widower.

Now, the Act confers certain rights on the surviving spouse in respect of the matrimonial home. First, by s.6(1), "a spouse is equally entitled to any right of possession of the other spouse in a matrimonial home". In effect, Eldora Smith as widow has a life tenancy right in the matrimonial home. [Compare this to the legal position prior to October 1, 1980, when Eldora Smith as widow would have had a life tenancy right in the matrimonial home (and other real estate) by dower. Dower was abolished by the Matrimonial Property Act, but would apply to the estate of a husband who died prior to October 1, 1980.]

Second, by s.8(1), "neither spouse shall dispose of or encumber any interest in a matrimonial home unless the other spouse consents by signing the instrument of disposition or encumbrance..."

In this fact situation, John Smith as executor is the legal owner of the lands with power to sell under the will, but his power is subject to Eldora Smith's two rights under the Matrimonial Property Act. If she wants to remain in possession, no sale

can be effected, and otherwise, the sale must be made with her written consent. John Smith would sign an executor's (trustee's) deed and Eldora Smith would sign the deed as releasor to evidence her consent under s.8(1) and to release her right of possession under s.6(1).

QQ. # 4(c):

Suppose the land had been owned by Stanley and Eldora as tenants-in-common. Again, John Smith is the executor and has a power to sell, pursuant to the will.

A. This time, there are two legal owners, each with an undivided one half interest. I would suggest a trustee's deed from John Smith (with Eldora's consent and release under the Matrimonial Property Act, as before) and a warranty deed from Eldora to convey her interest (with the usual Matrimonial Property Act affidavit attached). They could be combined in one deed, with each grantor making different covenants - an executor does not usually warrant title.

QQ. # 4(d):

Suppose Stanley Smith devises his real estate to Eldora Smith, his widow. Then she dies subsequently, and John Smith is her executor, with power to sell.

A. In this case you will ask for an executor's deed from John Smith, and it should contain an affidavit by John Smith, or some person having actual knowledge, that the lands were owned by Eldora Smith, and that at the time of her death, she was not a spouse.

QQ. # 4(e):

Suppose Stanley Smith, widower, devises his real estate to his three children in equal shares. His son John Smith is married to Mary Smith. They do not occupy the lands as a matrimonial home. The devisees wish to sell the lands to Percy Prudence. Does Mary Smith have to sign the deed?

A. Remember, this was a matrimonial home for Stanley and his wife, and at his death, he had no spouse. In s.4(1)(a) of the Matrimonial Property Act, an exception from the definition of "matrimonial assets" is made for

> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children.

As an inheritance not used by John and Mary or their children, it is likely that the lands are not matrimonial assets, and most certainly not a matrimonial home. Mary does not need to sign the

deed as releasor. John should execute an affidavit attached to the deed, stating that he is a spouse, but that the lands are not a matrimonial home. If Percy Prudence has an overly cautious lawyer who insists on Mary's signature, give in - it doesn't matter if she signs or not.

QQ.1 # 5:

You are representing a couple Harry Hardluck and Elsa Hardluck in the sale of certain lands. You represented them when they purchased the lands a few years ago and certified title to them. Carl Cunning, solicitor for the present purchaser, has now written, objecting to the title because in 1973, the land was owned by David Darling, who died, devising the lands in trust to his executor to convey to his son Bill, and nothing is on record to state that succession duties have been paid. Cunning wants a clearance certificate from the Minister. What do you do?

A. The Succession Duty Act, S.N.S. 1972, c.17, is technically still in force, although it applies only to deceased persons who died after December 31, 1971 and before April 1, 1974, and to such a person's property and to successors to such a person's property: s.79, as amended by S.N.S. 1974, c.30.

Unfortunately, the Act applies to David Darling, the lands in question and the succession of Bill Darling. What does the Act say?

The successor is liable to pay any tax owing. We don't know if tax was owing in this case nor do we know if it was paid.

s.46(1) of the Act forbids the transfer of any property without first obtaining the consent in writing of the Minister. s.46(2) directs every Registrar of Deeds to refuse recording of a deed transferring real estate unless the Minister's consent is also registered prior to that date or at the same date. In this case, the executor's deed was registered in 1976 (apparently the Registrar had overlooked the requirement, now that succession duties no longer applied).

s.62(1) provides that the Minister may file a certificate of lien against the real property for unpaid duty, interest or penalties, such to be filed at the Registry of Deeds. The lien, subject to registered prior encumbrances, may be enforced against the property in the same manner as a judgment. No such certificate of lien has been filed.

Practically speaking, you and your clients have no knowledge of the estate of David Darling. Approaching the Minister could cause delay, and who's going to pay the tax if it is owing? Who now has the facts on which the Minister might make an assessment? Your clients are bona fide purchasers for value without notice. No certificate of lien was filed. It's almost twenty years late.

Tell Carl Cunning that the objection is not valid.

QQ. # 6:

Stanley Stiff dies without a will, owing real estate. An administrator is appointed and in due course obtains a license to sell the real estate from the Probate Court, in order to pay Stanley's debts. You act for the purchaser - what assurances do you need?

A. After application, the Probate Court issues a license in Form U in the Schedule to the Probate Act, naming the executor or administrator as the person authorized to sell and describing the lands to be sold. (s.52(1), Probate Act, R.S.N.S. 1989, c.359). You first want to be sure that there is a license, that the Vendor is the authorized person, and that the lands your client wishes to buy are described in or are part of the lands described in the license.

s.53(1) requires the executor or administrator to file a bond before the license is issued. s.55 specifies that the license shall be registered in the Registry of Deeds. The license is in effect for one year: s.56. If the license is issued and recorded, you need not look behind it, in my view - s.55 states that a certified copy is "evidence of such licence in all courts without further proof". You will want to check that the sale is occurring within the one year period.

The procedure involves advertisement in the Royal Gazette, posting of notices in the locality, and a public auction: s.57. Alternatively, a private sale may be authorized: s.64.

The deed is executed by the person authorized in the licence (s. 61) and the affidavit of that person as to compliance with the Act must be filed with the Court. (s.60)

And last, but not least, a deed recorded "shall be taken as presumptive evidence that all the proceedings on which such conveyance is founded were rightly had." (s. 63)

Personally, I would review the Probate Court file to reassure myself that everything was in order. The procedure is unusual enough that it is worthwhile to double check that one's fellow solicitor has complied with the Act. Also, all that the vendor can convey is the interest of the deceased, so a full title search is necessary.

QQ # 7

Stanley Stiff dies without a will, owning real estate. He has twenty-seven heirs-at-law, scattered all over the world. How can a sale of all or part of his real estate be accomplished, practically?

A. Consider partition, either under the Partition Act, R.S.N.S. 1989, c. 333, or the Probate Act, R.S.N.S 1989, c.359. I will discuss the latter, which has some intriguing provisions.

s.86 grants to the Probate Court, on application "of any person interested" - that is, one of the heirs-at-law, (or in the case of land directly devised in a will, one of the devisees) - the power to order division or sale of the land and division of the proceeds among the persons entitled on intestacy (or under the will, as the case may be).

The procedure involves appointment of commissioner (often including a surveyor to determine if division among the heirs is possible, or otherwise, to appraise and value the land. (s.90)

If the land cannot feasibly be divided and it is to be sold, then there is an order of preference among surviving children, in descending order of age! (s.94)

The court can issue a vesting order, conveying title to any heir (s. 100), or can order a sale (s.101). In the latter case, the executor or administrator, or other person appointed by the court, shall manage and conduct the sale and shall execute a deed to the purchaser. (s.103(1)) The sale must be advertised (s.103(2)). The proceeds are divided and paid to those entitled.

As comfort to a bona fide purchaser for value, s.104(3) expressly states:

> The non-performance of the duty hereby imposed shall not operate to defeat any title under any such division.

As solicitor for the purchaser, I would review the partition order to satisfy myself that there had been compliance with its terms, and specifically, that the vendor had authority to sell and to execute the deed, and that the description of the lands was correct. Again, all that is conveyed on partition is the interest of the deceased, so a full title search would be required.

QQ # 8

You are representing the estate of the late Henry Heartbeat, who died, owning land, and with a will leaving everything to his executor in trust to sell. The purchaser's solicitor has raised three matters:

(a) he requires your undertaking to close the estate or

(b) he requires that executor's statutory declaration that all debts have been paid and

(c) he requires proof from the executor that the legacies, in particular, the charitable gifts to be paid out of the proceeds of sale of the property according to the will, have been paid.

A. No, maybe, and no! The closing of the estate may be of benefit to the executor, in that he will be discharged and released from any further claims by estate creditors or legatees, but it does <u>absolutely nothing</u> for the purchaser.

The bona fide purchaser for value takes title free and clear of estate claims. No purchaser from a

trustee is bound to enquire as to the performance by the trustee of the specific duties of the trustee: Trustee Act, R.S.N.S. 1989, c. 479, s.19(3); s.20(2).

So, a declaration is not required for the payment of legacies. With regard to debts, a practice has arisen of providing the executor's declaration as to estate solvency and payment of debts. I don't think it is required or necessary, but it is harmless, and if my client, the executor, wants to sell, I will provide his declaration to the purchaser's solicitor on request. Remember, insolvent estates are very rare - the exception rather than the rule. Don't worry about non-existent problems.

QQ # 9 A gentleman by the name of Gordon Golightly has died intestate and his heirs-at-law are his three sons. Golightly's estate is insolvent and an administrator is appointed under license to sell his land. The land is subject to a small mortgage of $20,000, and Golightly has other debts of $13,000. One of his sons Richard has a judgment filed against him for $5,000. An agreement of purchase and sale is negotiated, to sell the land for $50,000. The purchaser's lawyer searches title, and raises as objections to title:

(a) the mortgage
(b) the judgment
(c) the estate to be closed.

A. Once the licence to sell is granted, the sons of Gordon Golightly no longer have any title right in

the lands, merely a claim to a share of the proceeds. However, their claims are subject to the claims of their father's creditors. Here's where the proceeds would go:

> (i) charges and expenses of the necessary medical and other attendance on the deceased during his last illness, and of his funeral and his granvestone, and the expenses attendant on the settlement of his estate (including probate fees, administrator's commission, legal fees, arguably);
>
> (ii) mortgagee of land (including judgment against land recorded during lifetime of deceased);
>
> (iii) Revenue Canada Taxation - Crown preference;
>
> (iv) general creditors
>
> (see Probate Act, R.S.N.S. 1989, c 359, s.s.106, 107)

Suppose $5,000 is left over after the estate expenses and claims are paid. What happens next?

Each son, as heir, is entitled to one third of the residue. Richard's creditor is entitled to execute upon his interest only - his two brothers receive $1,666.66 each, free and clear.

Back to the objections - yes, no, and no.

Of course, the mortgage must be discharged, as it binds the lands and the license only conveys the title interest (in this case, the equity of redemption) of the deceased.
Richard's judgment does not attach to the land - his interest has been converted by court order from a real estate interest to a claim to a share in net proceeds.

Again, the closing of the estate in these circumstances would be very beneficial to the administrator - in fact, he likely has to close to have his administration bond released - but it has no effect on the title to the land sold under licence. In this case, since you have to close the estate anyway, the undertaking is harmless, even though it is none of the purchaser's concern whether or not you close.

QQ # 10

Gertie Williams dies, leaving to mourn three daughters Elsie, Clara and Faith. They search for a will, but can't find one. Elsie applies to be appointed administratrix. As heirs-at-law to Gertie's lands, Elsie, Clara and Faith contract with your client Joe Purchaser to sell the land. The daughters sign a warranty deed, reciting the intestacy and that they are all the heirs, and the deal closes.

QQ # 10(a)

Five years later, a will turns up in Henry Higgins' office - he hadn't known that Gertie had died and the daughters didn't know mother had gone to him to make out her will. Alas, Gertie had devised the

same lands to the Salvation Army! The Army is anxious to know its rights.

A. Here we have two innocent parties - a bona fide purchaser for value and a charitable donee under the will. However, Elsie, Clara and Faith had no title to convey to Joe Purchaser!

In an ideal world, the will would be proved, Elsie, Clara and Faith would pay the proceeds of sale to the Salvation Army, and the Army would quit claim the lands to Joe Purchaser.

We don't live in an ideal world.

Clara is deceased and bequeathed all her estate to her boyfriend, who left for South America. Faith gambled her share away in one particularly memorable visit to Las Vegas. Elsie is well off and living right here in Nova Scotia. The Salvation Army is uncomfortable with pursuing Elsie or Joe Purchaser, but its solicitor issues a demand letter to both Elsie as administrator and Joe as purchaser. Joe's solicitor gives notice to Elsie that he will sue for damages. You represent Elsie. What do you do? Solution? I have not found a case dealing with this situation. The grant of administration to Elsie would be valid, until set aside by the court on probate of her mother's will. Acts done by her would be effective, it seems to me, but personal property not yet administered (if any) would be subject to the jurisdiction of the executor and the terms of the will. Arguably, the heirs had no title to the land, so the conveyance is void ab initio.

They would presumably have to account to the purchaser for moneys had and received under a mistake of fact and law, and the Salvation Army would be the rightful devisee of the real estate. This is my guess as to the correct outcome!

QQ # 10(b)

Same facts - no will this time. The Bank of Halifax turns up, claiming that Gertie owed them $11,000 and saying that they have a claim against the property now owned by Joe Purchaser.

A. No mortgage, no property right. Go see Elsie, the administrator. Or, if administration was not taken out, go see the three heirs-at-law who received the proceeds of sale. Joe Purchaser is a bona fide purchaser for value without notice of The Bank's claim. Title is not impaired.

I acknowledge the ingenuity of Alan Crowe, Q.C., Mark Penfound and Catherine Walker in developing these devilishly tricky fact situations. I hope the answers will assist many in coping with the intricacies of succession law in this Province. If errors persist in the answers, they are mine, not those of my questioners.

TCM