



Real Estate Primer

WITH LAURA HOLLAND

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Conveyancing and Wills Issues

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When a person dies (the "Deceased"), the most significant asset that is left behind is often that person's home and there are a number of legal issues that must be taken into account in such situations. This primer will address some of those issues and will provide some tips to help you prepare ahead of time and to help you attend to those matters after the owner's death.

The Wills Estates and Succession Act ("WESA")

The WESA is incoming legislation that will change the landscape of wills and estate law in British Columbia ("BC"). The following are a few of the most significant and relevant changes:

- the definition of "spouse" will now include common law relationships and same-sex relationships. The general test for common law relationships is whether or not the couple have lived in a marriage-like relationship for at least two years;
- if the Deceased leaves behind a spouse and dies without a will in British Columbia, his or her assets will now be divided up as follows:
 - if there are children from the spouse and the Deceased's relationship, the spouse takes \$300,000 and half of the remainder with the balance of the estate to the children; or
 - if the Deceased had children from a previous marriage, the spouse will receive \$150,000 and half of the remainder;
- the surviving spouse of the Deceased no longer has a life estate in the residence but instead has an option to acquire the house from the Deceased's estate within 6 months of death for fair market value;
- if the Deceased and his or her spouse die within 5 days of one another, the WESA deems each person to have pre-deceased the other. The effect of this is that it will sever all joint tenancies, including properties held in joint tenancy, which will effectively create two estates;
- gifts of specific assets will now transfer any charges registered against those assets (e.g. mortgages, liens, secured loans, etc);

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- the threshold for small estates has been increased from estates with a value up to \$25,000.00 to estates with a value up to \$50,000.00; and
- the subsequent marriage of a person will no longer revoke a prior will made by that person.

These changes to wills and estate law in BC highlight the importance of having a will to ensure that the distribution of a person's estate flows in accordance with his or her goals.

Homeowners in Ill Health – Limits of a Power of Attorney

If a person attempting to sell a home (the "Seller") is experiencing significant health issues, it is often the case that a power of attorney giving authority to another individual will be drawn up for the Seller. Unless the power of attorney is a general power of attorney, it is important to explicitly give the attorney authority to sell real property of the Seller.

It is also wise to obtain the signature of the Seller or their attorney for the Form A Title Transfer form as soon as possible prior to completion. This is because a power of attorney ceases to be effective immediately upon the death of the person giving the power of attorney. As a result, a deal may fail to close because there will not be anyone with authority to sign the transfer in time for closing.

Double Checking Title

It is important to make sure that spouses hold title as joint tenants. If spouses do not hold title as joint tenants, the Deceased spouse's share in the property will have to be probated.

What is Probate and How is it Relevant to Buying and Selling Real Property?

Probate is the process by which a will is authenticated by a judge of the BC Supreme Court and where the executor is provided with a grant of probate from that court which gives the executor authority to deal with the Deceased's estate.

On average, obtaining the grant of probate for an estate will take between three to five months. It is important to take this timeline into account when selling the real property of the Deceased as there are significant concerns that may arise if the Deceased's real property is sold prior to the grant of probate. The timeline can be shortened by applying to the court for an expedited probate but this requires a purchase contract for the Property that is for all intents and purposes complete. For example, the purchase contract must have had all subjects removed prior to the death of the owner.

Issues for Sales Prior to Probate

Among the issues that can arise where the Deceased's real property is sold prior to probate are legal challenges of the Deceased's will and potential *Wills Variation Act* ("WVA") claims. Both issues can cause significant delays towards issuance of the grant of probate.

With respect to WVA claims, there is a six month limitation period for potential WVA claimants to bring forward their claims which often runs from the date of the grant of probate. Dealing with any property in the Deceased's estate during this period is very dangerous. In addition, if a claim is made, there will most often be a certificate of pending litigation filed against title to the Deceased's real property which can block a sale.

In order to avoid potential WVA claims, the executor with the help of a lawyer should obtain consents to probate from all potential WVA claimants.

It is worthwhile to note that if the Deceased dies without a will, the Wills Variation Act will not apply. The timeline for obtaining a grant of probate will still be between three to five months however.

Assessing Property Values for Probate

When applying for probate, it is often necessary to obtain a valuation of any real property of the Deceased. The valuation should be as realistic and as close to fair market value as possible. Some valuations will use the property's value as



described by BC Assessment. The valuation by BC Assessment is often quite different from fair market value however. When choosing a value, it is often wise to select the highest value provided.

This is because if the fair market value of the property is higher than the valuation provided for probate, it is likely that the difference will be taxed as a capital gain. It is important to know that while probate taxes must be paid, the probate tax rate is significantly lower than the capital gain tax rate.

Listing Properties Before Probate

The Multiple Listing Service (“MLS”) allows properties to be listed “subject to probate” prior to grants of probate being issued. It is important to remember that an executor does not have any authority to deal with the property of the De-parted until after grant of probate is issued however. As a result, if listing properties prior to probate, the person named as executor in the will may not be approved.

Adding Children on Title

Often times, parents will want to add children on title to their home. The benefits of this are not necessarily very straightforward however. It is important to know that unless the child resides in the home as their principal residence, that child’s interest in the property is taxable.

For example, if a child is on title with one parent with equal interest in the property, if the value of the home increases by \$200,000, that child will have to pay a capital gains tax on \$100,000 if the home is not the principal residence of the child.

Escrow Closing

Escrow closing, where buyers are allowed possession prior to having paid the full price for the property, are sometimes used where transfer of a property is delayed by probate. The use of escrow closing, however, contains significant dangers.

If a buyer changes his or her mind prior to closing, he or she can collapse the entire deal during the escrow period.

In addition, there are concerns revolving around the percent rate for the buyer’s mortgage, particular where a delay is for a long period of time.

Disclaimer

All information provided in this Information Sheet is general in nature and is not intended to be specific legal advice. Should you wish more information, or should you find yourself in a position where you are dealing with an estate issue involving real property, legal advice should be sought by a lawyer well-versed in this area of the law and based on the specific facts of your situation.