

## **Handle estate transfers of real property with care**

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### **FOCUS ON WILLS, ESTATES, CHARITIES & TRUSTS**

The devil is in the details for any conveyance of real property. However, the details become more important when an estate is a party to the transaction.

Ontario has recently been converting titles to real property from the registry system to the Land Titles Conversion Qualified (LTCQ) system. The LTCQ system allows for electronic searching and registration of title documents with the goal of making title searches and conveyances easier, while providing some assurances on the quality of the title being dealt with.

When the conveyance of real property involves an estate, Ontario's new system should not provide solicitors with a false sense of security.

Under the registry system, a solicitor handling the conveyance of property from an estate would provide the purchaser with proof of death, the will, if any, and an executor's deed and affidavit. The executor's deed contained recitals giving the background and status of the estate, supported by covenants in the deed. The solicitor for the purchaser would review the will to make sure the property was not gifted to another party and confirm that no spousal rights attached.

The land titles system required the estate executors to probate the will of the deceased and to register the probated will on title. This document and the evidence supporting it would be examined and approved by the land titles staff before registration.

The introduction of electronic registration makes the process simpler. The evidence relating to the estate has been replaced by "law statements," which are selected when preparing the electronic documents. The onus on obtaining and retaining the evidence to support these statements lies with the registering lawyer.

The executors' solicitor will register a transmission of the title to the executors. The transmission application states whether the debts of the estate have been paid. If not, title will be shown as

subject to debts.

The executors' solicitor may then transfer the property to a beneficiary or third party using a transfer by personal representative, which will contain law statements to be made by that solicitor. These statements deal with debts, whether all necessary consents have been obtained, whether the personal representative has authority to transfer, if the transfer of the lands is pursuant to a will, the Estates Administration Act (EAA), Succession Law Reform Act or by court order and whether the transfer is subject to spousal rights under the Family Law Act.

To complete these statements, the solicitor must comply with the legal requirements to convey good title, including claims of creditors, beneficiaries and spouses. For this reason, it is imperative that the solicitor consider the legal and evidentiary requirements and maintain the appropriate documents in their file, such as proof of death; the fact that no spousal rights have attached to the property; and that s. 26(1) of the Ontario Family Law Act dealing with the severance of joint tenancy does not apply.

If you are the solicitor for a third party buying property from the estate, you may rely on the law statements, but you need to ensure that the correct and applicable statements have been made. You will want to ensure that the property is clear of claims of creditors of the deceased and that the seller has authority to make the transfer. You will want to determine whether the automatic vesting provisions of s. 9(1) of the EAA have any impact on the transaction.

Transmission applications for both LTCQ and land titles require law statements to be made containing the date of death, stating that the applicant was appointed as executor, providing the court file number and stating that the appointment is in full force and effect. If the total value of an estate is less than \$50,000, a certificate of appointment of estate trustee (probate) may be waived and law statements must be made to this effect.

The solicitor must be able to satisfy himself that the application is still in full force and effect, that the value of the estate is less than \$50,000 and a covenant to indemnify the land titles assurance fund may be required. Previously, the executor would sign an affidavit as to these matters, and it would form part of the transmission application. As the lawyer making these law statements, lawyers should obtain the same form of affidavit from the executor and retain it in their file, or maintain a memorandum in the file confirming the evidence that the executor provided to them.

In the registry system, it is possible to deal with land without obtaining probate by registering the deceased's will with evidence of execution and proof of death. The value of the estate was irrelevant. Under the land titles system and LTCQ, probate is required (unless as noted above, the total value of the estate is less than \$50,000).

An exception has been made to allow the registration of a transmission application when it is the first dealing with the property after it has been converted LTCQ from registry without probate, regardless of the value of the estate. To transfer this category of property without probate, a

covenant must be given to indemnify the land titles assurance fund and certain law statements must be made. Accordingly, before making a determination as to whether or not probate must be obtained in order to transfer a property, one should always determine whether this is the first dealing with property in LTCQ.

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