

ELECTRONIC CONVEYANCING IN ESTATE SITUATIONS

by Bonnie Yagar, Pallett Valo LLP

Although there are some differences in the way conveyancing is done in the electronic format, and still some “bugs” to be worked out, in my opinion the most significant change relates to the use of law statements and our ability to rely on same. In most cases supporting evidence that was examined by the Land Titles staff when registering in paper is replaced by law statements when registering electronically. This places an onus on the lawyer “signing” these documents electronically to review and retain whatever evidence he or she feels is necessary to be able to make these law statements. This will become apparent as we discuss some of the law statements required on the various documents.

Transmission Applications

When registering in paper, a notarial copy of the Certificate of Appointment of Estate Trustee and the death certificate are attached to the application together with an affidavit of the applicant attesting to whether or not the property is subject to the debts of the deceased. When registering electronically, this evidence is replaced by the following law statements:

- the date of death
- that the applicant is appointed as Estate Trustee (With a Will or Without a Will) by the ____ Court, under file no. ____ dated _____, and is still in full force and effect
- if there is no Certificate of Appointment of Estate Trustee and the application is being made without same as the total value of the estate is not more than \$50,000.00, a law statement to this effect must be made
- that the property is subject to debts of the deceased or that the debts of the deceased are paid in full.

The statement regarding the date of death should be relatively easy to make on obtaining an original or notarial copy of the death certificate or funeral director's statement of death. The fact that the Certificate of Appointment of Estate Trustee has been issued and particulars of same is also fairly straightforward, however the lawyer is further required to state that it is still in full force and effect. If you acted on the application for Certificate of Appointment and it was issued relatively recently, perhaps no further inquiry is necessary, however if someone else acted on the application and particularly if some time has passed since the Certificate was issued, I suggest that further inquiry is necessary to satisfy yourself in this regard.

More problematic is the requirement that the lawyer state that the total value of the estate of the deceased owner is not more than \$50,000.00 if the transmission application is being made without a Certificate of Appointment of Estate Trustee on that basis (discussed further below).

What evidence should we require before making this law statement? Previously it was the applicant's affidavit to this effect that as attached to and formed part of the transmission application. I would suggest that at a minimum we should have the applicant make such an affidavit and retain it in our file and that some further questioning of the applicant as to what the deceased owned, etc. would be prudent.

Also problematic is the requirement that the lawyer state either that the property is subject to debts of the deceased or that the debts of the deceased are paid in full. When acting for the estate we often have first hand knowledge of the existence of debts and this statement is not usually difficult to make, however what evidence do we need to see to enable us to state that the debts of the deceased are paid in full? Again, I suggest that at a minimum the lawyer obtain affidavit evidence from the estate trustee to this effect after discussions with the estate trustee about any debts the deceased had, how/when they were paid, etc. It would be hard to imagine anyone dying without any debts at all as most people would have at least the final bills of ongoing accounts to be paid.

Transmission Application by Devisee/Heir-at-Law

Where the transmission application is being made by the devisee or heir-at-law as the land has vested in the beneficiaries of the estate (further discussion below), unless the title is subject to spousal rights (and the applicant can make a statement to this effect), a law statement is required stating that the title to the land is not subject to spousal rights under the *Family Law Act*. Again we must obtain evidence to satisfy ourselves that we can make this law statement, where previously in the paper format the applicant's affidavit in this effect formed part of the transmission application and was retained by the Land Titles Office.

Transfer by Personal Representative

There are many law statements required in the transfer by personal representative, i.e.

- One of the following:
 1. the property is subject to debts of the deceased
 2. the debts of the deceased are paid in full
 3. the transfer is for the purpose of paying debts
 4. the sale is bona fide and for value

Interestingly, although the transfer may be for the purpose of paying debts and the sale may be bona fide and for value, the electronic system will only take one of these statements. Also, although any one of statements 2, 3 or 4 should clear the debts from the parcel register, I recently had a Land Registrar advise that she would not clear the debts from the parcel register where statement 4 was made as the transmission application stated that the property was subject to the debts of the deceased, and would only do so if statement 3 was selected. In subsequent discussions with the Ministry, I was advised that the Land Registrar was incorrect and that statement 4 should also have cleared the debts in this situation. This is just one indication of how things haven't really changed and we will still have issues with our electronic documents requiring discussions with Land Titles staff and the Ministry to resolve issues.

When acting on a sale, one would expect to know that the sale is bona fide and for value and could make statement 4, and when acting for the estate and aware of debts that need to be paid from the sale proceeds and could make statement 3, or that the property will remain subject to debts could make statement 1, however I have the same comments as set out above regarding obtaining evidence of the payment of debts in full before statement 2 could be made.

- One of the following:
 1. All required parties have given their consent to this transfer
 2. No consents are required for this transfer

The purchaser's solicitor is entitled to rely on the law statement made and does not need to review the will or make further inquiries about the deceased's estate unless he or she has notice of something that would lead him or her to question the statement made. I frequently have other solicitors ask for a copy of the Certificate of Appointment of Estate Trustee and am certainly willing to share it with them, however in my opinion they are far better off relying on the law statements rather than reviewing all of the supporting documentation as is the case when registering in paper. This is a significant shift in thinking, as well as responsibility. When registering in paper, one would hope that the transferor's solicitor had reviewed all supporting documents and information and prepared the transfer correctly incorporating everything that was required, however we are all aware that this did not always happen and we frequently had to requisition amendments, consents be provided, etc. In paper, we also took comfort in the fact that if the property was in Land Titles, we submitted our documents for pre-approval and had some assurance that the approved documents would be certified without further amendment. In the electronic format, neither the Land Titles staff nor the purchaser's solicitor need review the will or make other inquiries and can rely on the law statements. Instead it is the vendor's solicitor who has the full responsibility for reviewing all documents, making all inquiries and obtaining the evidence he or she requires to be able to make the appropriate law statement.

It is interesting to note that although the transfer will be accepted for registration with the statement that all required parties have given their consent to the transfer, the transfer will not be certified that way and will be returned to have the names of the parties consenting inserted and a statement as to age and spousal status for each consenting party and consent of his or her spouse, if the property was the matrimonial home of a consenting party and his or her spouse. One might have expected that this field in the transfer would contemplate the need for this additional information, but it doesn't and this additional information gets inserted in statement 61 of the electronic transfer.

For those not yet familiar with electronic registration, statement 61 is a field that appears in every electronic document and is where additional information or explanations can be inserted that no other provision has been made for in the document.

- One of the following:
 1. The personal representative has the authority to transfer the land under the terms of the will, if any, the *Estates Administration Act* and the *Succession Law Reform Act*.
 2. This transfer is authorized by Court _____, under file no. _____, dated _____ and is still in full force and effect.

Again, the onus is on the vendor's solicitor to review all documentation and make all inquiries necessary to be able to make the appropriate statement, not the purchaser's solicitor.

- Unless the title to the land will be subject to the rights of a spouse (transferor's statement accepted for this), a law statement is required stating that title to the land is not subject to spousal rights under the *Family Law Act*.

Searching and Clearing Executions in Transfer by Personal Representative

When the transmission application has been registered by the estate trustee, the electronic system shows the title as being in the name of the estate trustee. Executions against the deceased's name are not searched at the time of registration of the transmission application. When registering a transfer electronically when not dealing with an estate, you can search executions against the name of the transferor within the transfer and clear any executions that are disclosed against the transferor or a name similar to that of the transferor within the transfer by selecting the appropriate writ statement. Also, in a "regular" transfer, executions are automatically searched on the registration of the transfer and the registering party has notice of any applicable executions at the time of registration. Because the electronic system does not "carry" the deceased's name after the transmission application has been registered and only shows the name of the estate trustee, executions cannot be searched within the document and must be searched by a separate writ search. It is imperative to do this separate writ search and deal with any executions against the deceased or a name similar to that of the deceased in statement 61 within the transfer or the transferee will take subject to the execution. The transfer by personal representative will be accepted for registration without any execution search and executions are searched manually by the Land Titles staff at the time of certification of the transfer. If any executions against the deceased or a name similar to the deceased have not been dealt with in statement 61, the transfer will be registered subject to the executions.

Where the property being transferred is owned by more than one owner, and only one of them has died, the appropriate form to choose is the transfer by personal representative and the required statements for the living party are incorporated in statement 61.

First Dealings After Property is Converted to Land Titles

When property is in Land Titles, we are required to obtain Certificate of Appointment of Estate Trustee for the estate trustee to deal with the land, unless the total value of the deceased's estate

is less than \$50,000.00. In Registry, it is possible to deal with land without obtaining this Certificate of Appointment by registering the will with evidence as to the execution of the will and proof of death, regardless of the size of the estate. Prudent conveyancing also requires some evidence as to the age of the deceased at the date of execution of the will and that the will had not been revoked by the marriage of the testator or otherwise. When the transmission application is the first dealing with the property after it has been converted to Land Titles from Registry, we can register it without obtaining a Certificate of Appointment, regardless of the size of the estate, provided that a covenant to indemnify the Land Titles Assurance Fund is provided and the following law statements are made:

- the property has been converted from Registry to Land Titles by the Ministry
- the transaction is the first dealing after conversion of the property
- the value of the estate is
- that the will is the last will and that a certificate of appointment of estate trustee was not applied for
- that the testator was of the age of majority at the time of the execution of the will and that the will has not been revoked by the marriage of the testator or otherwise
- proof of death
- evidence as to the execution of the will

Survivorship Applications

The only law statement required on a survivorship application is the date of death and I make the same comments about obtaining the evidence required to make this statement as set out above. All of the other statements that would in paper be incorporated in the affidavit of the applicant are made on the survivorship application, but these are not law statements.

The statement about the deceased's spousal status on the survivorship application for land is made by the applicant and is not a law statement. The spousal statement is required to verify that

the joint tenancy has not been severed (as it would be immediately prior to the time of death if the deceased joint tenant held an interest in a family residence with a third person - not the spouse of the deceased) and a transmission application required instead.

Executions are searched against the deceased joint tenant at the time of registration of the survivorship application for land and should be searched within the document prior to registration and any executions against the deceased or a name similar to the deceased's cleared within the document.

When executions are cleared within a document, there is a menu to choose the appropriate statement from. Unfortunately this menu is not complete for a survivorship application and does not address a situation where an execution against the deceased or a name similar to the deceased's is filed after the date of death. There just isn't a statement for this and the system defaults to "the land is subject to the execution" unless another statement is chosen. When registering in paper this was never a problem as the Land Titles staff clearly understood that we didn't need to be concerned about an execution filed against a deceased joint tenant after the date of his or her death. Until this problem is solved and an appropriate statement included in the menu for a survivorship application, the Ministry suggests that in this situation we either register in paper or instead of preparing the electronic survivorship application form, do it on an application general inserting all of the statements required in the survivorship application because an application general does not force an execution search. I raised this issue with the Ministry when only Middlesex had mandatory electronic registration (it seems a long time ago) and I encountered this problem the first time. I have had to deal with the same issue many times since. There are many titles where the deceased joint tenant died some years before the property is dealt with by the surviving joint tenant, increasing the possibility of a similar name execution being filed after his or her death, but before the property is dealt with. These occurrences will increase greatly as properties continue to be brought into the Land Titles system from the

Registry system. In the Registry system, where title was held as joint tenants, we typically registered evidence of death and then incorporated the statements regarding the death, survivorship and spousal status of the deceased joint tenant in the transfer from the surviving joint tenant. When these properties are brought into Land Titles from the Registry system prior to the conveyance from the surviving joint tenant, we are required to register a survivorship application before dealing with the land, even if evidence of death was deposited on title in Registry, and this may be many years later. Hopefully the Ministry and Teranet will address this issue soon. I suggest that adding a statement to the survivorship application “writ statement menu” to the effect that the execution was filed after the death of the deceased joint tenant should be all that is required. We could, of course, make inquiries as to whether the deceased was the judgment debtor, and on ascertaining that he or she was not, make the statement to that effect in the survivorship application. We should not have to make any inquiries whatsoever in this regard, and would still need to deal with this problem (i.e. by registering in paper or on an application general) if we discovered that the deceased was in fact the judgment debtor in the execution.

Cautions and Vesting

Land not disposed of by the personal representative or conveyed, divided or distributed among those persons beneficially entitled thereto, either under the will or in an intestacy, within 3 years of the deceased’s death, vests in the persons entitled to the land¹, unless:

- a caution under the *Estates Administration Act* has been registered, in which case the land will not vest for 3 years from the registration of the caution, or renewal of the caution
- the personal representative is registered as owner, in which case vesting will not occur if the will contains an express or implied power of sale² and these still exist at the end of the 3 year period.

¹*Estates Administration Act*, s. 9

²*Estates Administration Act*, s. 10

As set out above, neither the Land Titles staff nor a purchaser's solicitor is required to review the deceased's will to look for an express or implied power of sale and can rely completely on the law statement made by the vendor's solicitor in the transfer stating that the personal representative has the authority to transfer the land under the terms of the will, if any, the *Estates Administration Act* and the *Succession Law Reform Act*. Making this law statement should not present any challenge where the will contains an express power of sale, which we would expect to find in any solicitor-prepared will. It can be more problematic, however, where there is no express power of sale, but only a direction to pay debts (creating an implied power of sale), or no power of sale at all, as we frequently find in home drafted wills. Even where there is an implied power of sale, we need to ensure that power still exists. For example, if there is an implied power of sale due to the direction to pay debts, if the debts have been paid in full, the implied power of sale no longer exists, and vesting would occur where more than 3 years have elapsed since the date of death and no caution or renewal or caution has been registered. Accordingly the solicitor making the law statement is required to obtain whatever evidence is appropriate to enable him or her to make the law statement.

If vesting has occurred, a transmission application can be made by the devisee or heir-at-law to be entered as owner. That application does contain law statements as to the date of death, whether or not the debts have been paid or the property is subject to debts and that the title is not subject to spousal rights, however the statements that the applicant is entitled to be the owner as devisee or heir-at-law and that the interest is now vested in all the beneficiaries of the estate of the deceased owner under the provisions of the *Estates Administration Act*, the *Succession Law Reform Act* and the *Family Law Act* are not law statements and are made by the applicant. This seems rather peculiar to me in that certainly some knowledge of the applicable law is required to be able to make these "applicant statements".

The law statements required on registering a Caution are only with respect to the fact that the

applicant is appointed as Estate Trustee, either with or without a will, identifying the Court, file number and date, and that the Certificate of Appointment is still in full force and effect.

Alternatives to Making Law Statements

In most cases, instead of making law statements it is possible to file the appropriate evidence in the Land Titles office, have it indexed and referenced by the number assigned to it in the document being registered, however this is certainly not what the electronic system intended usually be done and this practice is discouraged. Although this does permit someone other than a lawyer to prepare and sign the documents, Land Titles staff are then required to review this documentation as they would have in the paper format. If all documents were dealt with this way, it would slow down the process significantly.

Conclusion

The electronic registration system has been designed to enable us to work more quickly and efficiently, and I believe that the requirement for law statements really put the onus where it belongs – on the solicitors representing the estate trustee and preparing the documents to review all documentation and make all necessary inquiries to ensure that the applicable law is complied with and all proper parties are joining in and consenting to the documents. If we are to take full advantage of the electronic registration system, rather than focusing on the differences between it and the paper format we are all familiar with, we need to embrace this new system and work with it. I believe that it is a better and more efficient system (just ask my law clerk who cringes when she needs to deal with property where electronic registration isn't yet available), and that any bugs still in the system will eventually be worked out.

I'll leave you with one last thought as we move forward with electronic registration and the hope that this will result in a reduction in the amount of paper generated. When we registered in paper, the Land Titles or Registry Office retained the original documents and all supporting

material on file. Although prudent practice usually resulted in us keeping copies in our files, we knew we could always obtain a copy from the Land Titles or Registry Office if required. With law statements replacing the supporting material, I submit that we lawyers are now required to be the keepers of the evidence we have obtained to enable us to make these law statements. For how long? Can we destroy our file and this evidence when the time the Law Society says we are required to retain our files has expired? I don't know the answer to this question, but I certainly won't be destroying the evidence I have gathered in support of a law statement any time soon.