Law Reform Commission of Saskatchewan

Discussion Paper
on the Consolidation of Certain Rules and Statutory Provisions
in *The Administration of Estates Act*

March 2005

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Introduction

This report is part of the Saskatchewan Law Reform Commission's on-going review of the law of wills, trusts, and administration of estates. During the course of research on other topics, we have identified a number of statutory provisions that are virtually obsolete, or so obscure that their significance is now uncertain. In many cases, the provisions also appear to be misplaced and included in legislation that relates to other subject matter. This renders them even more obscure. The Commission has also identified some common law and equitable rules that should be clarified and modernized by revising and codifying them.

Many of the provisions and rules in this category in *The Trustee Act* were discussed in our report, *Proposals for Reform of the Trustees Act* (2002). However, that report did not consider the utility of certain miscellaneous powers of personal representatives who are not trustees contained in *The Trustee Act.* This report discusses those provisions, provisions in other legislation relating to personal representatives and administration of estates, and some rules of equity and law that should be codified but do not belong in revised trusts legislation. After an examination of all Saskatchewan legislation governing these matters, we have identified obsolete, obscure and misplaced provisions in *The Devolution of Real Property Act* and *The Wills Act*, in addition to *The Trustee Act*. Some miscellaneous rules associated with these provisions should be codified. In addition, we have identified the equitable marshalling rules that govern the order of payment of debts by personal representatives as a candidate for codification and clarification.

All of the legislation and rules discussed in this report can be broadly classified under the heading "administration of estates". For that reason, we that all the provisions and rules that remain useful be consolidated in *The Administration of Estates Act.* Note that since the entire *Devolution of Real Property Act* is concerned with administration of estates, what would remain of this Act would be subsumed in *The Administration of Estates Act*.

Most of the provisions discussed in this report remain part of the statutes of Saskatchewan in their present form for historical reasons. Many are based on nineteenth-century English legislation that reformed the law of trusts and administration of estates. They were copied, often uncritically, into the first Saskatchewan legislation governing these topics. Some were never required. Others, probably because of their obscurity, were left in place after they were superseded by later legislation. Only a few retain utility, but they are often difficult to disentangle from the obsolete and unnecessary provisions.

This report recommends keeping only what remains necessary or useful. The provisions we recommend repealing can be removed from the statutes without practical consequences.

The Devolution of Real Property Act

The Devolution of Real Property Act[1] establishes the principle that real property devolves upon a testator's personal representative in the same way as personal property, and is distributed among beneficiaries in the same way. In England prior to 1897, only personal property vested in the personal representative. Legal title to real estate did not vest in the personal representative, who instead merely administered transfer of the real property to those entitled to it.[2]

This apparently simple change in the law was not entirely straightforward. English legislators thought it necessary to complement it with a series of provisions to clarify the effect of the reform on such matters as sale of realty to pay debts and distribute the estate. Most of these provisions are reproduced in the Saskatchewan *Devolution of Real Property Act*.[3] Some of these remain necessary, but many of the twenty-two sections of the Act are now redundant.

The Devolution of Real Property Act is essentially concerned with administration of estates. Those parts of it that should be kept should be removed to *The Administration of Estates Act*.[4] Because *The Devolution of Real Property Act* is primarily concerned with preserving a now long-established change in the common law, it is rarely directly consulted by practising lawyers. Nevertheless, its status as a separate enactment may disguise what utility it retains.

1. The basic principles of *The Devolution of Real Property Act*

The basic purpose of *The Devolution of Real Property Act* is contained in section 4:

> **4**(1) Real property in which a deceased person was entitled to an interest not ceasing on his death shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his personal representative from time to time as if it were personal property vesting in him.

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1 R.S.S. 1978, c. D-27.

2 The reform was adopted in England in the *Land Transfer Act, 1897* (U.K.), 60 & 61 Vict., c. 65. Note that this Act and *The Devolution of Real Property Act* do not deal with the question of who is entitled to the testator's real property. *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 21, provides that "a person may by will devise, bequeath or dispose of all real and personal property, whether acquired before or after the making of his or her will." At common law, real estate passed to the deceased's heirs on intestacy, who were in general different persons from those entitled to succeed to personal property. This rule was changed in England by the *Inheritance Act, 1833* (U.K.), 3 & 4 Will. IV, c. 106. The Saskatchewan *Intestate Succession Act, 1996*, S.S. 1996, c. I-13.1, s. 2, now defines "estate" for purposes of the legislation to include "both real and personal property".

3 The Saskatchewan Act was adopted in 1928 (see 7, below). Although derived indirectly from the English legislation, the Saskatchewan legislation was modelled directly on the Uniform Law Conference of Canada's Uniform Devolution of Real Property Act.

4 S.S. 1998, c. A-4.1.

(2) A testator shall be deemed to have been entitled at his death to any interest in real property passing under any gift contained in his will that operates as an appointment under a general power to appoint by will.

(3) The personal representative shall be the representative of the deceased in regard to his real property in which he was entitled to an interest not ceasing on his death as well as in regard to his personal property.

(4) Probate and letters of administration may be granted in respect of real property only, although there is no personal property.

It is interesting to note that Saskatchewan legislation formerly contained a simpler formula achieving the same purpose. *The Devolution of Estates Act* (1909)[5] provided:

21 Land in Saskatchewan shall descend to the personal representatives of the deceased owner thereof and be distributed as if it were personal estate.

The Devolution of Real Property Act was adopted in 1928[6], following a court decision which suggested that Saskatchewan had failed to reproduce English legislation governing wills and succession in a completely satisfactory manner.[7] However, the problem discovered by the courts did not have to do with the subject matter of section 4. Although the reference to "land" rather than "real property" in the older formula was perhaps less precise than is desirable, adoption of the extra verbiage in section 4 from its English precedent was unnecessary. Subsection (1) is all that remains useful of section 4.

Subsection 4(2) appears to have been included to ensure that the general rule applied to a gift by will "that operates as an appointment under a general power to appoint by will." If there was ever any doubt that realty subject to a power of appointment could be regarded as property subject to the will, it is resolved by *The Wills Act, 1996*[8]:

25(1) Unless a contrary intention appears in the will, a general devise of any of the following includes any real property, or any real property to which the description extends, that the testator has power to appoint in any manner he or she considers appropriate and operates as an execution of the power:

(a) the real property of the testator; …

Thus subsection 4(2) is redundant.

Subsections 4(3) and (4) were almost certainly included by the English drafters out of caution to avoid misunderstanding of a rule that was novel in 1897. There is now no reason to

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5 R.S.S. 1909, c. 43 ["*The Devolution of Estates Act, 1909*"].

6 S.S. 1928, c. 27.

7 See *infra* note 18 and accompanying text.

8 *Supra* note 2.

suspect that it is necessary to explicitly state that the same personal representative may serve with regard to both personal and real property, or that probate or administration can be granted even if the estate consists only of real property.

Section 5 of *The Devolution of Real Property Act* provides:

> **5** Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representative of a deceased person shall hold the real property as trustee for the persons by law beneficially entitled thereto, and those persons shall have the same right to require a transfer of real property as persons beneficially entitled to personal property have to require a transfer of such personal property.

This section was copied directly from the English legislation. Its principal purpose was to make clear that personal representatives are fiduciaries, holding legal title to real property for the benefit of the persons entitled to it under a will or on intestacy. This was the status of personal representatives in regard to personal property prior to 1897. A personal representative has been described as "a trustee in the sense that he is personally liable for breach of the ordinary trusts which in courts of equity are considered to arise from his office".[9]

However, apart from section 5, the offices of trustee and personal representative are not entirely equivalent.[10] In most respects, the blurring of the distinction in section 5 is not desirable, and has been ignored in practice. Thus, for example, most provisions of *The Trustee Act* apply to personal representatives as well as trustees. Those that do not are no more appropriate for personal representatives dealing with real property than those dealing with personalty.

But the description of personal representatives as "trustees" of real property has created one important distinction. Unlike a trustee, a personal representative can act without concurrence of co- representatives in many cases, including assenting to legacies and distribution of personal property.[11] If personal representatives are "trustees" of real property in the full sense, they must act jointly in respect to real property.[12] Section 17 of *The Devolution of Real Property Act* explicitly adopts this rule:

> **17** Where there are two or more personal representatives a conveyance, mortgage, lease or other disposition of real property devolving under this Act shall not be made without the concurrence therein of all such representatives or an order of the court, but where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any

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9 *Re Marsden* (1884), 26 Ch. D. 783.

10 "To a large extent the roles of trustee and personal representative have become blurred by statutes which assimilate the functions of the two…. It is still, however, an error to equate the office of trustee with that of personal representative, as significant distinctions and consequences follow a finding of one or the other": A.H. Oosterhoff & E.E. Gillese, *Text, Commentary and Cases on Trusts*, 5th ed. (Toronto: Carswell, 1998) at 99.

11 See generally *Halsbury's Laws of England*, vol. 14 (London: Butterworths, 1907) at 235, 265.

12 See *Attenborough v. Solomon*, [1913] A.C. 76 (H.L.).

> conveyance, mortgage, lease or other disposition of the real property may be made by the proving executor or executors for the time being, without an order of the court, and shall be as effectual as if all the persons named as executors had concurred therein.

It is doubtful that section 5 is of much practical significance in Saskatchewan. Under *The Land Titles Act, 2000*[13], transfer of real property held by the personal representatives must be made jointly, regardless of the effect of section 5. Nevertheless, because concurrence of the personal representatives in dealings with real property is an exception to the general rule, section 17 should probably be retained in some form.

Section 6 of *The Devolution of Real Property Act* provides:

> **6** Subject to the provisions hereinafter contained, all enactments and rules of law, and all jurisdiction of any court with respect to the appointment of administrators or to probate or letters of administration, or dealings before probate in the case of personal property, and with respect to costs and other matters in the administration of personal property in force before the first day of September, 1928, and all powers, duties, rights, equities, obligations, and liabilities of a personal representative in force before the first day of September, 1928, with respect to personal property, apply and attach to the personal representative and have effect with respect to real property vested in him.

Since section 4 implies, and section 8 explicitly states, that real and personal property are to be administered in the same manner, section 6 can have only a limited purpose. It was almost certainly adopted to ensure that any rule governing administration that had been phrased in terms of "personal property", would henceforth be read as though it also referred to "real property" as well. Section 6 may never have been necessary. It is certainly no longer necessary. Statutes and Rules of Court intended to apply to both real and personal property now explicitly apply to "property" or "the estate" generally, and there is little doubt that common rules would now also be interpreted as applying to both species of property.

Section 8 sets out the general rule that "real property shall be administered in the same manner" as personal property. While this proposition is implicit in section 4, it may be useful to retain it for clarity. Section 7, together with the remainder of section 8, sets out exceptions to the general rule, preserving certain administrative rules that apply differently to real and personal property.

Sections 7 and 8 provide:

> **7** Without prejudice to the rights and powers of a personal representative, the appointment of a personal representative in regard to real property does not, except as hereinafter provided, affect:

[13] S.S. 2000, c. L-5.1.

(a) any rule as to marshalling or as to administration of assets;

(b) the beneficial interest in real property under any testamentary disposition;

(c) any mode of dealing with any beneficial interest in real property or the proceeds of the sale thereof;

(d) the right of any person claiming to be interested in the real property to take proceedings for the protection or recovery thereof against any person other than the personal representative.

8 In the administration of the assets of a deceased person his real property shall be administered in the same manner, subject to the same liabilities for debts, costs and expenses and with the same incidents, as if it were personal property, but nothing in this section alters or affects:

(a) the order in which real and personal assets respectively are now applicable as between different beneficiaries, in or toward the payment of funeral and testamentary expenses, debts or legacies; or

(b) the liability of real property to be charged with payment of legacies.

Some of these exceptions appear to represent no more than an overabundance of caution. For example, the charging of legacies against real property (see clause 8(b)) was a common practice long before the Act was adopted. There is no plausible way to argue that the Act would have had any effect on this practice in the absence of the exception.[14] Clauses 7(b), (c) and (d) stipulate that the beneficial interests of persons other than the testator and beneficiaries are not affected by the Act. As a general proposition, there would be little reason to suspect otherwise.

Clause 7(a) preserves the rules governing marshalling of assets. Marshalling is concerned with the order in which assets are applied to pay funeral expenses, debts and legacies.[15] This is also the subject matter of clause 8(a). It may not have been unreasonable to suspect that the rules would, unless an exception was made, be affected by the general direction to administer real and personal property in the same. It is certainly not necessary to include both clauses; they are merely alternative ways of stating the same proposition. If, as is recommended below, the marshalling rules are codified, it is probably unnecessary to retain either clause 7(a) or 8(a).

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[14] At common law, even though real property did not vest in the personal representatives, executors had an implied power of sale in regard to real estate charged with legacies. This "common law power of sale" was extended by the *Law of Property Amendment Act, 1859* (U.K.), 22 & 23 Vict., c. 35. The *Land Transfer Act, 1897*, *supra* note 2, merely made the power of sale less anomalous, since it no longer involved the sale of a asset to which the executor did no have vested title.

[15] In fact, Saskatchewan drafters appear to have assumed as much. *The Devolution of Estates Act, 1909*, *supra* note 5, s. 3, provided that on intestacy, "the real and personal property of the deceased… shall be chargeable with all legal debts, liabilities and funeral expenses; but the personal property shall be exhausted before resort is made to real property." This represents a significant departure from the received marshalling rules. Though attractive in some respects, and certainly simpler than the marshalling rules, the effect of adoption of *The Devolution of Real Property Act*, *supra* note 6, in 1928 was to restore the received rules.

The marshalling rules will be discussed below. Here, it might be noted that the marshalling rules applicable to debt secured by realty were modified by statute in England by the *Real Estate Charges Act, 1854 (Locke King's Act)*[16], and amendments to it in 1867 and 1877, which placed primary liability for paying mortgages and other debts secured against land on the land securing the debt. The Act and amendment of 1867 were received as part of the law of Saskatchewan. A provision based on *Locke King's Act* was adopted in the Saskatchewan *Wills Act* of 1909[17], but it included only part of the amendments of 1867 and 1877. Failure to reproduce the legislation in full led the Court of King's Bench to hold in 1927 that the legislation does not apply to agreements for sale.[18] In 1928, the omitted part of the English legislation was enacted in the Saskatchewan *Wills Act.* It was concerned that other important statutory principles might have similarly been overlooked that led to adoption of *The Devolution of Estates Act* in the same year.

Section 9 of *The Devolution of Real Property Act* provides:

> **9** When any part of the real property of a deceased person vests in his personal representative under this Act, the personal representative, in the interpretation of any Act of this Legislature or in the construction of any instrument to which the deceased was a party or under which he was interested, shall, while the estate remains in the personal representative, be deemed in law the heir of the deceased, with respect to such part, unless a contrary intention appears, but nothing in this section affects the beneficial right to any property or the construction of words of limitation of any estate in or by any deed, will or other instrument.

This rule of interpretation may have been useful in 1928, but is now unnecessary. We have been unable to find any statute in force in the province which would require application of clause 9.

2. The "executor's year"

Section 10 of *The Devolution of Real Property Act* provides:

> **10**(1) At any time after the expiration of one year from the date of probate or of letters of administration if the personal representative has failed, on the request of the person entitled to any real property, to convey the real property to that person, the court may, if it thinks fit, on the application of that person and after notice to the personal representative, order that the conveyance be made, and in default may make an order vesting the real property in such person as fully and completely as might have been done by a conveyance thereof from the personal representative.
>
> (2) If, after the expiration of such year, the personal representative has failed, with respect to the real property or any portion thereof, either to convey the same to a person entitled thereto or to sell and dispose of it, the court may, on the application

[16] (U.K.), 20 & 21 Vict., c. 79.

[17] R.S.S. 1909, c. 44.

[18] *Re McDougall Estate*, [1927] 1 W.W.R. 613 (Sask. K.B.).

> of any person beneficially interested, order that the real property or portion be sold on such terms and within such period as may appear reasonable; and, on the failure of the personal representative to comply with such order, may direct a sale of the real property or portion upon such terms of cash or credit, or partly one and partly the other, as may be deemed advisable.

This section affirms that the notion of the "executor's year" applies to real property. It is almost certainly unnecessary. Traditionally, personal representatives were expected to complete their task within a year. This has been described as "prima facie, and not a fixed rule".[19] Thus, for example, a representative could not be required to pay any legacies in the year after the deceased's death, but could be ordered to do so after the expiration of a year unless the further delay was justified.[20] Note that section 10 merely allows for an application for distribution of realty or proceeds, leaving the court to determine whether an order is appropriate in the circumstances. Thus the section adds nothing to the general proposition that real estate is to be administered in the same manner as personal property.

In practice, the "executor's year" now seems less appropriate than in the past. Under *The Administration of Estates Act*, a personal representative "must render a just and full account of the executorship or administration within two years after the grant of letters probate or letters of administration".[21] There is no statutory rule supporting the traditional "executor's year" in regard to distribution to personal property. There is no need for a statutory rule in regard to realty, and perhaps good reason to remove explicit statutory support for the "executor's year".

3. Sale and distribution of property by personal representatives

Sections 11 to 13 of *The Devolution of Real Property Act* provide:

> **11** 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 debts or not, and it is not necessary that the persons beneficially entitled concur in any such sale except where it is made for the purpose of distribution only.
>
> **12**(1) Subject to the provisions hereinafter contained, no sale of real property for the purpose of distribution only is valid as respects any person beneficially interested, unless he concurs therein.
>
> (2) Where, in the case of such a sale:
>
> (a) a lunatic is beneficially interested; or
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> (b) adult beneficiaries do not concur in the sale; or
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> (c) where under a will:

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19 *Halsbury's, supra* note 11 at 242.

20 *Pearson v. Pearson* (1802), 1 Sch. & Lef. 10.

21 *Supra* note 4, s. 35(1).

(i) there are contingent interests or interests not yet vested; or

(ii) the persons who may be beneficiaries are not yet ascertained;

the court may, upon proof satisfactory to it that the sale is in the interest and to the advantage of the estate of the deceased and the persons beneficially interested therein, approve the sale, and a sale so approved is valid with respect to the contingent interests and interests not yet vested, and is binding upon the lunatic,

(3) If an adult accepts a share of the purchase money, knowing it to be such, he shall be deemed to have concurred in the sale.

13 No sale, where an infant is interested, is valid without the written consent or approval of the public guardian and trustee or, in the absence of such consent or approval, without an order of the court.

At common law, sale of personal property of the deceased to pay debts and distribute property was an inherent power of the personal representative. Halsbury summarized the law thus: "The personal representative has a complete and absolute control over the personal property of the deceased, and can dispose of effects whether they be legal or equitable by mortgage or pledge as well as by sale."[22]

In England prior to 1897, real estate could be sold by the personal representative only if the will of the deceased charged it with the payment of debts or legacies.[23] Adoption of the rule that real estate is to be administered in the same manner as personal property would almost certainly have changed this rule to permit sale at the discretion of the personal representative if the provisions now contained in sections 11 to 13 had not been enacted. The effect of these sections is therefore not to confer a power of sale, but to limit it by creating certain exceptions to the general power of sale of estate property vested in personal representatives. Thus a sale of realty for the purpose of distribution of proceeds (as opposed to sale to pay debts) requires court approval if the beneficiaries are not all consenting, competent adults, or in the case of infant beneficiaries, if the Public Trustee is unwilling to consent on their behalf.[24] These exceptions were no doubt preserved to facilitate distribution of land in kind whenever possible.

Sections 14 and 15 affect other powers to deal with real property:

14 The personal representative may, with the concurrence of the adult persons beneficially interested, with the approval of the public guardian and trustee on behalf of infants or lunatics, if any infants or lunatics are so interested, divide or partition and convey the real property of the deceased person, or any part thereof, to or among the persons beneficially interested.

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22 *Halsbury's*, *supra* note 11 at 296.

23 *Ibid.* at 236.

24 Note that the reference to "unascertained" or "contingent interests and interests not yet vested" in s. 12(2)(c) does not enlarge upon the sections. The interests referred to, by their nature, may vest in persons yet unborn, who cannot, of course, consent.

15(1) The personal representative may, from time to time, subject to the provisions of any will affecting the property:

(a) lease or otherwise dispose of the real property or any part thereof for any term not exceeding one year;

(b) lease or otherwise dispose of the real property or any part thereof for a longer term:

(i) with the approval of the court; or

(ii) with the concurrence of the adult persons beneficially interested, with the approval of the public guardian and trustee on behalf of infants or lunatics, if any infants or lunatics are so interested;

(c) lease, grant a *profit a prendre* in respect of or otherwise deal with or dispose of mines and minerals or sand and gravel forming part of the real property whether they have already been worked or not and either with or without the surface or other real property, or grant any easement, right or privilege of any kind over or in relation thereto:

(i) with the approval of the court; or

(ii) with the concurrence of the adult persons beneficially interested, with the approval of the public guardian and trustee on behalf of infants or lunatics, if any infants or lunatics are so interested;

(d) raise money by way of mortgage of the real property or any part thereof for the payment of debts, or for payment of taxes on the real property to be mortgaged, and, with the approval of the court, for the payment of other taxes, the erection, repair, improvement or completion of buildings or the improvement of lands, or for any other purpose beneficial to the estate.

(2) Where infants or lunatics are interested, the approvals or order required by sections 12 and 13 in case of a sale shall be required in the case of a mortgage, under clause (d) of subsection (1) of this section, for payment of debts or payment of taxes on the real property to be mortgaged.

Since consent is not required to make a simple distribution of property under the terms of a will or *The Intestate Succession Act, 1996*, the effect of section 14 is confined to permitting "division" or "partition" of real estate, as, for example, when several persons are entitled to share in a single parcel of land. Since partition is unique to real property law, an argument can be made that section 14 was required to clearly confer authority on personal representatives to partition land. Section 14 confers this power, though in keeping with the policy in regard to sale, consent to do so is required.

Subsection 15(1) appears to be based on the assumption that leases of real property, like partition, have no direct analog in personal property law. In addition clause 15(1)(b) requires, in the case of leases for more than one year, consent or court approval in terms similar to those imposed on the power of sale. A long-term lease may be regarded as nearly equivalent in effect to a sale, and thus deserve to be treated like them. However, classification of leases for more than one

year as "long term" may represent a certain amount of overkill. The one-year rule was merely copied from the English precedent. Under the Saskatchewan *Land Titles Act, 2000*, leases of more than three years must be registered.[25] Three years, rather than the one year inherited from English legislation, would be more appropriate to distinguish short and long term leases.

Clause 15(1)(c) permits leases and other dealings with mineral rights on consent or with court approval. It is similar to section 42 of *The Trustee Act*[26], which applies to personal representatives as well as trustees. Thus clause 15(1)(c) is redundant.

Clause 15(1)(d) permits personal representatives to mortgage lands for administrative purposes. Subsection 15(2) applies the consent requirements applicable to sales to mortgages. Like the provisions relating to sale, partition, and lease, these provisions remain necessary.

In the Commission's report, *Proposals for Reform of the Trustees Act*[27], it was recommended that trustees and personal representatives should be given expanded statutory administrative powers. The proposed powers would cover the subject matter of sections 11 to 15 of *The Devolution of Real Property Act*, and thus make these sections redundant. However, until administrative powers are reformed, it will be necessary to retain much of the substance of these sections.

Section 16 of *The Devolution of Real Property Act* provides:

> **16**(1) A person purchasing real property in good faith and for value from:
>
> (a) the personal representative; or
>
> (b) a person beneficially entitled thereto to whom the same has been conveyed by the personal representative;
>
> shall hold the same freed and discharged;
>
> (c) from all debts or liabilities of the deceased owner except such as are specifically charged thereon otherwise than by his will; and
>
> (d) where the purchase is from the personal representative, from all claims of the persons beneficially interested.
>
> (2) Real property that has been conveyed by the personal representative to a person beneficially entitled thereto continues to be liable to answer the debts of the deceased owner so long as it remains vested in that person, or in any person claiming under him not being a purchaser in good faith and for value, as it would have been if it had remained vested in the personal representative, and in the event of a sale or mortgage thereof in good faith and for value by the person beneficially entitled he shall be personally liable for those debts to the extent to which the real

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[25] *Supra* note 13, s. (1)(d).

[26] R.S.S. 1978, c. T-23.

[27] Law Reform Commission of Saskatchewan ["LRCS"] (2002).

property was liable when vested in the personal representative but not beyond the value thereof.

A provision protecting third parties purchasers of real estate from personal representatives is of limited utility under a Land Titles regime. However, it may remain useful. The Commission has recommended adoption of a more general provision to protect third parties dealing with trustees and personal representatives. Until this reform adopted, section 16 should be retained.

4. Other provisions

The remaining provisions of *The Devolution of Real Property Act* no longer serve any useful purpose.

Section 18 provides:

> **18** No widow shall be entitled to dower in the land of her deceased husband and no husband shall be entitled to any estate by the courtesy in the land of his deceased wife.

Dower and courtesy were likely never part of the law of Saskatchewan, but if they were, they have been superseded by comprehensive provincial legislation governing intestacy, dependants' relief, and family property.[28]

Sections 19 and 20 provide:

> **19** The rights and immunities conferred by this Act upon personal representatives are in addition to, and not in derogation of, the powers conferred by any other Act, or by the will.
>
> **20** Nothing in this Act alters any duty payable in respect of real property or imposes any new duty thereon.

Both these provisions were likely inserted by drafters out of an abundance of caution. Nothing in the legislation is expressed in a manner that suggests that it abridges any "rights and immunities", nor do any of the limitations on the powers of personal representatives to deal with real property (such as the consent and court approval requirements in regard to sale of realty) abridge any powers possessed prior to its adoption. Whether or not section 20 had any justification when it was adopted, tariffs on estates are now calculated according to a formula that makes the section redundant.

5. Recommendations

We are of the opinion that the provisions of *The Devolution of Real Property Act* which remain necessary should be re-enacted in *The Administration of Estates Act.* These provisions should be

[28] LRCS, *The Status of English Statute Law in Saskatchewan* (1990).

recast for clarity and simplicity, and rationalized to eliminate minor internal inconsistencies. The basic principles of the legislation are simple: (1) real property devolves upon personal representatives, and (2) real property is, subject to specified exceptions, to be administered in the same way as personal property. To the extent that the legislation confers powers on personal representatives with respect to real property that are analogous to powers they possess in regard to personal property, they are now best regarded as statutory powers of representatives, no different in kind than other miscellaneous powers of representatives currently found in *The Trustee Act*. Some of these powers should be retained. Later in this report, we recommend that the statutory powers in *The Trustee Act* that are specific to personal representatives should be removed to *The Administration of Estates Act.* The powers conferred on representatives by *The Devolution of Real Property Act* that should be consolidated with them.

Recommendations

The Commission recommends replacing *The Devolution of Real Property Act* with provisions in *The Administration of Estates Act* providing in substance as follows:

> **Devolution and administration of real property**
> 1(1) Real property in which a deceased person has an interest not ceasing on his death shall devolve upon the personal representatives of the deceased.
>
> (2) Except as otherwise provided in this Act, real property shall be administered in the same manner as personal property.
>
> (3) In all matters relating to real property administered by personal representatives, the concurrence of all the representatives who have been granted probate or administration of the estate is required, unless the court orders otherwise.
>
> **Powers of personal representatives in regard to real property**
> 2(1) Personal representatives have powers to
>
> (a) lease real property
>
> (b) divide or partition real property for purposes of distribution, and
>
> (c) sell real property for the purpose of payment of funeral and testamentary expenses, debts, taxes, and for the purpose of paying legacies and distributing the estate among the persons beneficially entitled to it.
>
> (d) mortgage real property for the payment of funeral and testamentary expenses, debts, taxes, or any other purpose beneficial to the estate.
>
> (2) Except as otherwise provided in this Recommendation, sale of real property for distribution only, a lease real property for a term of more than three years, division and partition real property, or mortgage the property for any purpose other than the purpose of payment of funeral and testamentary expenses, debts, and taxes, shall not be made without the concurrence of the persons beneficially entitled to the property.
>
> (3) If there are infant, incompetent, or unascertained persons beneficially entitled to the property, the court may order a sale for distribution if the court is satisfied

that the sale is in the interests of the estate and the persons beneficially entitled to the property.

(4) The Public Trustee may concur in a sale for distribution without court order on behalf of an infant.

3(1) A person purchasing real property in good faith and for value from:

(a) the personal representative; or

(b) a person beneficially entitled to the property to whom the property has been conveyed by the personal representative;

shall hold the same freed and discharged;

(c) from all debts or liabilities of the deceased owner except such as are specifically charged thereon otherwise than by his will; and

(d) where the purchase is from the personal representative, from all claims of the persons beneficially interested.

(2) Real property that has been conveyed by the personal representative to a person beneficially entitled to the property continues to be liable to answer the debts of the deceased owner so long as it remains vested in that person, or in any person claiming under him not being a purchaser in good faith and for value.

The Wills Act

The Saskatchewan *Wills Act, 1996*[29] is modern legislation, containing little that is obscure or obsolete. There are, however, two survivals from earlier Saskatchewan and English wills legislation that require reconsideration. One of these, contained in section 35 of the Act, is a marshalling rule, providing that real property which is security for a mortgage or other debt should be primarily responsible for payment of the debt secured. This provision will be discussed below with other marshalling rules.

The other provision concerns an obsolete interest in land, the estate tail. The estate tail differed from an estate in fee simple in that entailed property descended to direct descendants of the grantee. The estate tail has now been effectively abolished in England and Canada. In Saskatchewan, it has been extinct since the land titles system was established. *The Land Titles Act, 2000* now provides:

> **157**(1) No words used in a transfer or other dealing with title have the effect of changing an estate in fee simple to a limited fee or fee tail estate.
>
> (2) Any words of limitation that would have created an estate tail are deemed to transfer:
>
> (a) absolute ownership in the land; or
>
> (b) the greatest estate that the transferor had in the land.

Note that, technically, *The Land Titles Act, 2000* does not abolish the estate tail, but operates to convert any estate tail registered or transferred within the system to an estate in fee simple.

Section 34 of *The Wills Act* deals with the consequences of abolition of the estate tail. It provides:

> **34**(1) For the purposes of this section, "estate tail" means a devise that would have been, under the law of England, an estate tail or in *quasi* entail.
>
> (2) Unless a contrary intention appears in the will, where a person to whom real property is devised for an estate tail dies in the lifetime of the testator and leaves issue who would inherit under the entail if that estate existed, if any of those issue are living at the time of the death of the testator, the devise does not lapse but takes effect as if the death of that person had happened immediately after the death of the testator.

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[29] *Supra* note 2.

The substance of this provision was contained in *The Wills Act, 1909*.[30] Interestingly, in its original form, it made reference to *The Land Titles Act* provisions affecting estates tail. But in both its original and present form, the section appears to be based on a misconstruction of the effect of *The Land Titles Act*. Section 34 is designed to ensure that a devise of an estate tail will not lapse in certain circumstances as a result of the abolition of this species of interest in real property. Since *The Land Titles Act* merely converts an estates tail to a fee simple, it is reasonably clear that, even in the absence of section 34, a devise that purported to create an estate tail will not lapse.

It is extremely unlikely that a testator would attempt to create an estate tail in Saskatchewan today. In our opinion, section 157 of *The Land Titles Act, 2000* is now sufficient to affirm that the estate tail is, for all practical purposes, extinct in Saskatchewan. Section 34 of *The Wills Act, 1996* should be repealed.

Recommendations

The Commission recommends that section 34 of *The Wills Act, 1996* should be repealed.

[30] *Supra* note 17, s.34.

The Trustee Act

Sections 61 to 77 of *The Trustee Act* are contained in the Act under the heading "Executors and Administrators". These sections do not apply to trustees who are not also personal representatives. They create a miscellaneous series of rules to be followed in the administration of estates. Most of them were copied or adapted from various nineteenth-century English statutes, and most of them were included in the Saskatchewan *Trustee Act* of 1909.[31]

In its *Proposals for Reform of the Trustees Act* (2002), the Commission suggested that these provisions were "likely included in *The Trustee Act* for lack of a better place to put them." Because they apply only to personal representatives, the Commission recommended that those which need to be retained should be removed to *The Administration of Estates Act.* This report extends this recommendation by examining sections 61 to 77 to determine what part of them should in fact be retained.[32]

1. Distraint for rent by personal representatives

Sections 61 and 62 of *Trustee Act* give personal representatives power to distrain for rents due to the estate:

> **61** The executors or administrators of a lessor may distrain upon the lands demised for any term or at will for the arrears of rent due to the lessor in his lifetime in like manner as the lessor might have done if living.
>
> **62** Such arrears may be distrained for at any time within six months after the determination of the term or lease and during the continuance of the possession of the tenant from whom the arrears became due, and the law relating to distress for rent shall be applicable to the distress so made.

This provision was included in the Saskatchewan *Trustee Act, 1909*, and appears to be based on the English *Civil Procedure Act, 1833*.[33] Legislation was required in England to permit representatives to distrain for rent because, prior to 1897, real property did not vest in the personal representatives, who thus could not claim the rights of a lessor. Since under Saskatchewan law in 1909, real property vested in personal representatives[34], *The Trustee Act* provisions were redundant as authority to distrain even when they were first enacted. The drafters of *The Trustee*

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31 R.S.S. 1909, c. 46, as s. 33-48 ["*The Trustee Act, 1909*"].

32 LRCS, *supra* note 27, 3.22. This report also noted that if the recommendations it contains in regard to the general powers of trustees (including personal representatives) were adopted, s. 61-62, 64-67, and 71 would no longer be necessary. The discussion here proceeds on the assumption that the general powers of trustees are not altered.

33 (U.K.), 3 & 4 Will. IV, c. 42, s. 37-38. This legislation expanded on a power granted by (Eng.), (1540) 32 Hen. VIII, c.37.

34 See above, "*The Devolution of Real Property Act*".

Act, 1909, appear to have copied the English precedent without considering changes in the law of England and Saskatchewan after 1833.

Note, however that section 62 limits distraint by representatives to six months after termination of the lease. Thus it appears to place distraining representatives in a different position than other landlords. Since this limitation was not part of the English precedent, its origin is unclear. In any event, the limitation may not have been redundant, even if the right to distrain was, when it was first adopted. But whatever its effect was in 1909, the status of the section 62 was altered in 1918-19 when the provincial *Landlord and Tenant Act*[35] was adopted.[36] This legislation was largely a compilation of English landlord and tenant statutes. It included a provision based on the *Civil Procedure Act, 1833*, which did not include the six month limitation. It is now section 41 of *The Landlord and Tenant Act*[37]:

> **41** The executors or administrators of a landlord may distrain for the arrears of rent due to the landlord in his lifetime, and may sue for those arrears in like manner as the landlord might have done if living, and the powers and provisions contained in this Act relating to distresses for rent are applicable to distresses so made.

It doubtful that the drafters of *The Landlord and Tenant Act* adverted to the fact that this provision was not necessary to permit personal representatives to distrain for rents. It is equally doubtful that they were aware that *The Trustee Act* also contained a similar provision. However, it appears safe to conclude that *The Landlord and Tenant Act* implicitly repealed the six-month limitation in section 62 of *The Trustee Act*. Neither sections 61 and 62 of *The Trustee Act* nor section 41 of *The Landlord and Tenant Act* are now necessary. If they are repealed, personal representatives will continue to have the same power as other landlords to distrain for rents.

2. Certain powers of sale

Sections 64 to 66 of *The Trustee Act* give personal representatives a power of sale "where by will a testator charges his real estate or any specific portion thereof with the payment of his debts or with the payment of a legacy":

> **64** Subject to *The Devolution of Real Property Act*, where by will a testator charges his real estate or any specific portion thereof with the payment of his debts or with the payment of a legacy or other specific sum of money and devises the estate so charged to a trustee for the whole of his estate or interest therein and does not make express provision for raising the debt, legacy or sum of money out of the estate, the trustee, notwithstanding any trusts actually declared by the testator, may raise the debt, legacy or money by a sale and absolute disposition by public auction or private contract of the real estate or any part thereof or by a mortgage of the same, or partly in one mode and partly in the other, and a mortgage so executed may

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35 S.S. 1918-19, c.79.

36 Marginal notes in the statute identified the English sources of each provision.

37 R.S.S. 1978, c. L-6.

reserve such rate of interest and fix such period or periods of repayment as the person executing the mortgage may think proper.

65 The powers conferred by section 64 extend to all persons in whom the estate devised is for the time being vested by survivorship, descent or devise or to any person appointed under a power in the will or by the Court of Queen's Bench to succeed to the trusts created by the will.

66 Purchasers or mortgagees are not bound to inquire whether the powers conferred by sections 64 and 65, or any of them, have been duly and correctly exercised by persons acting in virtue thereof.

These provisions appear to be based on the English *Law of Property Amendment Act, 1859*.[38] Although until 1897 real property did not vest in personal representatives, if a will charged certain real property for payment of debts and legacies and also instructed the representatives to sell the property for this purpose, the courts recognized a "common law power of sale".[39] The 1859 legislation extended the common law power of sale to cases in which real property was charged with payment of debts and legacies, but the will failed explicitly include an instruction to sell the property.

Special provisions relating to administration of property charged with payments of debts and legacies was rendered unnecessary in England in 1897, when the law was changed to provide that real estate vests in the personal representatives, and a general power to sell real property comprised in an estate to pay debts and legacies was conferred on representatives. In Saskatchewan, these reforms are now contained in *The Devolution of Real Property Act*.[40]

The Trustee Act provisions are made "subject to *The Devolution of Real Property Act*." Thus the latter Act governs in case of any differences in the power of sale provisions. Note also that *The Devolution of Real Property Act* contains the protection for purchasers set out in section 66 of *The Trustee Act.* Thus sections 64 to 66 of *The Trustee Act* have had no purpose since adoption of *The Devolution of Real Property Act*, if in fact they ever had.

3. Borrowing money to pay taxes

Section 67 of *The Trustee Act* creates a special power to borrow money to pay income and estate taxes:

67(1) Notwithstanding anything in section 15 of *The Devolution of Real Property Act*, an executor or administrator of a deceased person may borrow money for the purpose of paying any tax payable in respect of the estate of the deceased under the *Income Tax Act* (Canada) or the *Estate Tax Act* (Canada).

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38 *Supra* note 14, s. 16.

39 *Halsbury's, supra* note 11 at 236.

40 See above, "*The Devolution of Real Property Act*".

(2) The estate of the deceased or any part thereof may be charged by mortgage or otherwise as security for an amount borrowed under subsection (1).

(3) No person advancing money as a loan to an executor or administrator of a deceased is bound to inquire whether the money advanced is to be used or is used for a purpose mentioned in subsection (1).

Since the federal *Estate Tax Act*[41] no longer exists, section 67 now applies only to borrowing money to pay income taxes. Under *The Devolution of Real Property Act*, personal representatives may mortgage or otherwise charge real property to raise money to pay taxes without consent of the beneficiaries.[42] Thus subsection 67(2) is now redundant. Subsection 67(1), however, appears to enlarge on the power of representatives to borrow, presumably permitting borrowing without charging real estate as security. But it is likely that this is as implied power of representatives even in the absence of a statutory sanction. It is a general principle that estates are charged with payment of debts and taxes. Except as otherwise provided by statute, personal representatives have complete control over the estate that vests in them, and can, therefore, borrow money for payment of debts and taxes.[43] Thus section 67 appears to serve no purpose.

4. Effect of *The Devolution of Estates Act* on powers of Personal Representatives

Sections 68 to 71 of *The Trustee Act* provide:

68 Where there is in a will or codicil of a deceased person a direction whether express or implied to sell, dispose of, appoint, mortgage, encumber or lease any real estate, and no person is by the will or codicil or otherwise by the testator appointed to execute and carry the direction into effect, the executors, if any, named in the will or codicil, shall, subject to *The Devolution of Real Property Act*, execute and carry into effect every such direction to sell, dispose of, appoint, encumber or lease the real estate and any estate or interest therein in as full, large and ample a manner and with the same legal effect as if the executors had been appointed by the testator to execute and carry the direction into effect.

69 Where in a will or codicil thereto power is given to an executor or executors to sell, dispose of, appoint, mortgage, encumber or lease real estate or any estate or interest therein, whether the power is express or arises by implication, and where from any cause letters of administration with the will annexed have been by a court of competent jurisdiction in Saskatchewan committed to any person and that person has given the required security, he shall and may subject to *The Devolution*

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41 R.S.C. 1970, c. E-9.

42 See above, "*The Devolution of Real Property Act*".

43 *Halsbury's, supra* note 11 at 296, citing *Vane (Earl) v. Rigden* (1870), 5 Ch. App. 663, permitting, *inter alia*, borrowing for any legitimate administrative purpose on the security of personal property. Representatives are not permitted to borrow money to carry on a business of the deceased except by pledging property already engaged in the business, and then only if expressly empowered to carry on the business (*Halsbury's, supra* note 11 at 294). But this appears to be an exception to protect assets not engaged in the business from loss.

of Real Property Act, exercise every such power and sell, dispose of, appoint, mortgage, encumber or lease the real estate and any estate or interest therin as full, large and ample a manner and with the same legal effect for all purposes as the said executor or executors might have done.

70 Where in a will or codicil thereto power is given to sell, dispose of, appoint, mortgage, encumber or lease real estate or any estate or interest therein, whether the power is express or arises by implication, and no person is by the will or codicil or otherwise by the testator appointed to execute the power, and letters of administration with the will annexed have been by a court of competent jurisdiction in Saskatchewan committed to any person and that person has given the required security, he shall and may exercise the power and sell, dispose of, appoint, mortgage, encumber or lease the real estate and any estate or interest therein in as full, large and ample a manner and with the same legal effect as if the last named person had been appointed by the testator to execute the power.

71 Where a person has entered into a contract in writing for the sale and conveyance of real estate or any estate or interest therein and has died intestate or without providing by will for conveyance of the property to the person entitled or to become entitled under the contract, then, if the deceased would be liable to execute a conveyance were he alive, the executor, administrator or administrator with the will annexed of the deceased shall give to the person entitled thereto a good and sufficient conveyance of such nature as the deceased if living would be liable to give, and such conveyance shall be as valid and effectual as if the deceased were alive at the time of the making thereof and had executed it but shall not have any further validity.

Like sections 64 to 66, sections 68 to 71 were rendered redundant by adoption of the rule that real property vests in the personal representatives. Since adoption of that rule in *The Devolution of Real Property Act*, powers of sale and appointment belong, in the absence of an express direction to the contrary, to the personal representatives as holders of the legal title to the estate property.[44] Note that no analogous rule is contained in *The Trustee Act* in respect to trustees (as opposed to personal representatives) because it was always the law that trust property, both real and personal, vests in trustees. Note also that several of these sections make sales of real property subject to the rules governing sales of realty in *The Devolution of Real Property Act*. Why the drafters who saw fit to insert this reference to *The Devolution of Real Property Act* into *The Trustee Act* did not simply eliminate section 68 to 71 can no longer be discovered.

5. Effect of statutory powers

Section 72 of *The Trustee Act* provides:

72 Every executor, administrator and administrator with the will annexed is, as respects the additional powers vested in him by this Act and any money or assets received by him in consequence of the exercise of those powers, subject to all the

[44] See above, "*The Devolution of Real Property Act*".

> liabilities and compellable to discharge all the duties of whatever kind that, as respects the acts to be done by him under those powers, would have been imposed upon an executor or other person appointed by the testator to execute the same, or, in case of there being no such executor or person, would have been imposed by law or by any court or judge of competent jurisdiction in Saskatchewan.

This section merely affirms that statutory powers conferred on personal representatives have the same status as powers expressly conferred by a will: the duties and liabilities attached to exercise of express powers also apply to statutory powers. Such a provision may have seemed desirable as a matter of clarification when extensive statutory powers were introduced in the nineteenth century.[45] But no parallel provision applying to trustees who are not personal representatives was deemed necessary. There can now be no reason, and almost certainly never was, to doubt that the general law of trusts and administration of estates applying to the duties and liabilities personal representatives applies to the exercise of statutory powers. Section 72 can safely be repealed.

Section 73 of *The Trustee Act* provides:

> **73** Where there are several executors, administrators or administrators with the will annexed and one or more of them die, the powers hereby created shall vest in the survivor or survivors.

When there are two or more personal representatives or trustees, and one dies, the estate or trust property vests in the remaining representatives or trustees, who carry on administration of the estate. Note that section 73 refers to "the powers hereby created", suggesting that the purpose of section 73 is only to ensure that this survivorship rule applies to exercise of the statutory powers contained in *The Trustee Act*. Section 18 of *The Administration of Estates Act* would appear to make section 73 unnecessary. It provides generally that:

> **18** Where two or more persons are granted letters probate or letters of administration with respect to an estate and one of the persons dies, the powers granted vest in the survivors.

Since the survivorship rule was recognized at common law, the need for either provision may not be clear. However, there was some doubt at common law that surviving representatives and trustees had all the powers originally conferred on the trustees (whether expressly or by statute).[46] As the Commission noted in its *Proposals for Reform of the Trustees Act* (2002), section 73 of *The Trustee Act* and section 18 of *The Administration of Estates Act* are the only statutory provisions in Saskatchewan that affirm the powers of surviving personal representatives. No Saskatchewan legislation affirms the powers of surviving trustees who are not also personal representatives.

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[45] See LRCS, *supra* note 27, "Introduction".

[46] *Warburton v. Sandys*, 14 Simm. 622.

These provisions may be based on section 22 of the English *Trustee Act, 1893*[47], which provided that "every power given to trustees which enables them to deal with or affect the trust property" vests in surviving trustees. The English *Trustee Act, 1925*[48] modernized the language of the 1893 Act:

> **6**(1) Where power in a trust is given to, or imposed on, two or more trustees jointly, it may be exercised or performed by the survivors, or the survivor of them for the time being.

Similar provisions are contained in the trusts legislation of most provinces. In our *Proposals for Reform of the Trustees Act*, we recommended that this formula should be adopted in the Saskatchewan *Trustees Act*. Note that in *The Trustee Act*, "trustee" includes "personal representative", so the provision would apply to both. Adoption of this provision would be useful primarily to enact a concise positive statement of the survivorship rule, but would also remove any doubt that survivors assume all the powers of the original trustees.

6. Ranking of debts of the deceased

Section 74 of *The Trustee Act* provides:

> **74**(1) On the administration of the estate of a deceased person, in case of a deficiency of assets, debts due to the Crown and to the executor or administrator of the deceased and debts to others including therein respectively debts by judgment or order and other debts of record, debts by specialty, simple contract debts and such claims for damages as by statute are payable in like order of administration as simple contract debts, shall be paid pari passu and without any preference or priority of debts of one rank or nature over those of another; but nothing in this Act prejudices any lien or charge existing during the lifetime of the debtor on any of his real or personal estate.
>
> (2) Reasonable funeral, testamentary and administration expenses are to be paid in priority to the claims mentioned in subsection (1).

This section gives all unsecured debts of a deceased the same status, ranking them for order of payment "pari passu and without any preference or priority of debts of one rank or nature over those of another," but preserves the rule that funeral, testamentary and administration expenses are a prior charge on the estate. The origin of this section appears to be section 10 of the English *Judicature Act, 1875*, which simplified the common law by applying the rules contained in bankruptcy legislation to insolvent estates. Section 74 was contained in the Saskatchewan *Trustee*

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[47] (U.K.), 56 & 57 Vict., c. 53.

[48] (U.K.), 15 & 16 Geo. V, c. 19.

Act, 1909.[49] Since bankruptcy is in federal jurisdiction in Canada, the drafters of section 74 attempted to codify the rules as they stood in England.[50]

The substance of section 74 should be retained, but since it applies only to personal representatives, it should be moved to *The Administration of Estates Act*. However, the language of the section was designed to refer to the classification of debts that governed priorities prior to its adoption. The section can be considerably simplified. It is necessary only to provide that:

1. where the assets of an estate are not sufficient to pay all the debts and liabilities of the estate, all unsecured debts of the estate shall be paid *pari passu* and without any preference or priority;

2. nothing in Recommendation 1 affects the rule that reasonable funeral, testamentary and administration expenses have priority over other claims against the estate.

7. Limitation of action against an estate for debts

Section 75 of *The Trustee Act* provides:

> **75**(1) Where the executor or administrator gives to a creditor or other person of whose claim against the estate he has notice, or to the solicitor or agent of such creditor or other person, notice in writing that he disputes the claim and that he intends to avail himself of this section, the claimant shall commence his action in respect of the claim within six months after the notice is given in case the debt or a part thereof is due at the time of the notice, or within three months from the time the debt or part thereof falls due if no part thereof is due at the time of the notice, and in default the claim shall be forever barred.
>
> (2) Unless such creditor or other person within ten days after the receipt of the notice notifies the executor or administrator that he withdraws his claim, the executor or administrator may by originating notice apply to a judge of the Court of Queen's Bench for an order barring the claim, and upon the return of the originating notice the judge may allow or bar the claim or make such other order as to him may seem meet with or without costs against either party.

This section establishes a limitation of action against an estate. Its policy should be reviewed in conjunction with limitations of actions legislation in general. Whether it is modified or not, it should be removed to *The Limitation of Actions Act* or *The Administration of Estates Act*.

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[49] As s. 45.

[50] In this, they appear to they appear to have been successful (see *Halsbury's*, *supra* note 11 at 344). Where the English law was unclear, they appear to have followed the sounder opinion. Thus, for example, prior to 1875, estate debts to the Crown had priority. It was still uncertain at the end of the nineteenth century that the bankruptcy rules (which gave no priority to the Crown) applied to estate debts, but Halsbury expressed the opinion that "it is extremely doubtful" that decisions affirming the Crown priority "can be supported".

8. Contingent liabilities

Sections 76 and 77 of *The Trustee Act* provide:

> **76**(1) Where an executor or administrator, liable as such to the rents, covenants or agreements contained in a lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, has satisfied all such liabilities under the lease or agreement as have accrued due and been claimed up to the time of the assignment hereinafter mentioned and has set apart a sufficient fund to answer any future claim that may be made in respect of a fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and has assigned the lease or agreement to a purchaser, he shall be at liberty to distribute the residuary estate of the deceased to and among the parties entitled thereto respectively without appropriating any part or any further part, as the case may be, of the estate of the deceased to meet any future liability under the lease or agreement, and the executor or administrator shall not, after having assigned the lease or agreement and having, where necessary, set apart such sufficient fund, be personally liable in respect of any subsequent claim under the lease or agreement.
>
> (2) Nothing in this Act prejudices the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the persons to or among whom the assets have been distributed.
>
> **77**(1) Where an executor or administrator liable as such to the rent, covenants or agreements contained in a conveyance or rent-charge, whether the rent is by limitation of use, grant or reservation or agreement for such conveyance granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, has satisfied all such liabilities under the conveyance or agreement as have accrued due and been claimed up to the time of the conveyance hereinafter mentioned and has set apart a sufficient fund to answer any future claim that may be made in respect of a fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed or agreed to be conveyed, although the period for laying out the same may not have arrived, and has conveyed the property or assigned the agreement for the conveyance to a purchaser, he is at liberty to distribute the residuary estate of the deceased to and among the parties entitled thereto respectively without appropriating any part or any further part, as the case may be, of the estate of the deceased to meet any future liability under the conveyance or agreement, and the executor or administrator so distributing the residuary estate shall not after having made or executed the conveyance or assignment and having, where necessary, set apart such sufficient fund, be personally liable in respect of any subsequent claim under the conveyance or agreement.
>
> (2) Nothing in this Act prejudices the right of the grantor or those claiming under him to follow the assets of the deceased into the hands of the persons to or among whom the assets have been distributed.

Contingent liabilities, such as a possible call upon shares in a corporation that are not fully paid up or future rents under a lease, rank as debts only when they become due. Thus the personal representatives can distribute assets to beneficiaries even if there are outstanding contingent liabilities. However, it is the general rule that the representatives will be personally liable if, when the liabilities come due, the estate no longer has sufficient funds to meet them.[51]

An exception was made to the general rule in regard to future rents and other liabilities under leases by section 27 of the *Law of Property Amendment Act, 1859*[52], and in regard to rent charges by section 28. These exceptions were copied in sections 76 and 77 of the Saskatchewan *Trustees Act*.

The substance of section 76 remains useful. Rent-charges, on the other hand, are virtually extinct in Saskatchewan. Section 77 can therefore be repealed.

The language of section 76 can no doubt be simplified considerably. It would be sufficient to provide that:

1. Where an estate may be liable for future rents and other liabilities under a lease of real property, the personal representatives may set aside a fund sufficient to pay such rents and liabilities, and distribute the remainder of the estate to the persons beneficially entitled to share in it.

2. Personal representatives who have established the fund referred to in this Recommendation are not personally liable for the rents and other liabilities when they come due, but nothing in this Recommendation affects the right of the lessor or those claiming under him to follow the assets of the estate into the hands of the persons to whom the assets have been distributed.

9. Recommendations

The Commission recommends that:

1. Sections 61, 62, and 64 to 72 of *The Trustee Act* should be repealed.

2. Section 73 of *The Trustee Act* should be replaced by a provision to the effect that:

> 1 Where power in a trust is given to, or imposed on, two or more trustees jointly, it may be exercised or performed by the survivors, or the survivor of them for the time being.

3. Section 74 of *The Trustee Act* should be replaced by a provision in *The Administration of Estates Act* to the effect that:

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[51] See *Halsbury's, supra* note 11 at 255. Note that all debts must be paid, regardless of outstanding contingent liabilities.

[52] *Supra* note 14.

1 Where the assets of an estate is not sufficient to pay all the debts and liabilities of the estate, all unsecured debts of the estate shall be paid *pari passu* and without any preference or priority.

2 Nothing in this Recommendation affects the rule that reasonable funeral, testamentary and administration expenses have priority over other claims against the estate.

4. Section 75 of *The Trustee Act* should be removed to *The Limitation of Actions Act* or *The Administration of Estates Act*.

5. Sections 76 and 77 of *The Trustee Act* should be replaced by a provision in *The Administration of Estates Act* to the effect that:

1 Where an estate may be liable for future rents and other liabilities under a lease of real property, the personal representatives may set aside a fund sufficient to pay such rents and liabilities, and distribute the remainder of the estate to the persons beneficially entitled to share in it.

2 Personal representatives who have established the fund referred to in this Recommendation are not personally liable for the rents and other liabilities when they come due, but nothing in this Recommendation affects the right of the lessor or those claiming under him to follow the assets of the estate into the hands of the persons to whom the assets have been distributed.

Marshalling of Assets

If an estate is insufficient after payment of funeral expenses, estate duties, and debts to satisfy the beneficiaries, then bequests and devises have to be reduced in some manner. Ultimately, of course, creditors are entitled to payment out of any estate asset, and may attach any asset they please in accordance with debtor-creditor law. But in practice the order in which the executor or administrator notionally uses assets to pay debts can have important consequences. The Courts of Equity in England developed a complex set of "marshalling rules" to dictate the order.[53] The rules do not actually constrain the personal representative to liquidate one class of assets to pay debts before looking to another: debts may be paid from whatever cash is immediately available. Rather, beneficiaries entitled to property used to pay debts must be recompensed from other property in accordance with the rules. Thus Halsbury observes that marshalling is "applied as between beneficiaries, so that if a creditor… is paid out of the personal estate, a pecuniary legatee is entitled to be paid out of the real estate."[54]

The effect of the marshalling rules is reduced by the fact that a testator may modify them by the terms of his or her will. However, few wills do so in uncertain terms. Many wills constitute the executor as a trustee of the estate property, and instruct payment of debts, legacies and gifts, but such a formula cannot usually be construed as making all property *pro rata* subject to debts.

In England, a series of enactments have whittled the rules away. In Canada, they have been modified by statute only slightly. An Ontario provision has changed the status of certain types of real property. Saskatchewan has extended the scope of the rule as it applies to debts secured against real property. Otherwise, the rules developed by equity remain intact. The Saskatchewan *Devolution of Real Property Act*[55] expressly preserves them:

> **7** Without prejudice to the rights and powers of a personal representative, the appointment of a personal representative in regard to real property does not, except as hereinafter provided, affect:
>
> (a) any rule as to marshalling or as to administration of assets….
>
> **8** In the administration of the assets of a deceased person his real property shall be administered in the same manner, subject to the same liabilities for debts, costs and expenses and with the same incidents, as if it were personal property, but nothing in this section alters or affects:
>
> (a) the order in which real and personal assets respectively are now applicable as between different beneficiaries, in or toward the payment of funeral and testamentary expenses, debts or legacies….

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53 See generally *Halsbury's*, *supra* note 11, vol. 13 at 144ff.; and F.D. Baker, *Widdifield on Executors' Accounts*, 5th ed. (Toronto: Carswell, 1967).

54 *Halsbury's*, *supra* note 11, vol. 13 at 144.

55 *Supra* note 1.

Unfortunately, the marshalling rules are complicated and uncertain in their application. They are the product of two centuries of case law, and developed at a time when the general law of wills and estates was different in some fundamental respects than at present. Nor is it practical to avoid them by providing an alternative by the terms of a will. The case law discussing the language necessary for this purpose is as uncertain as the rules themselves. The Ontario Law Reform Commission recommended simplification of the rules in its *Report on Administration of Estates of Deceased Persons*.[56] The Alberta Law Reform Institute also recommended revision of the rules in a report for discussion, *Order and Application of Assets in Satisfaction of Debts and Liabilities*.[57] We agree with the Alberta Law Reform Institute that "this archaic area of the law is badly in need of revision." *The Administration of Estates Act* should include a simplified and modernized codification of the marshalling rules.

1. The Marshalling rules applying to payment of unsecured debts

The marshalling rules are contained in the case law, and have rarely been discussed as a unified whole by the courts. Not surprisingly, commentators and textbook writers do not entirely agree on the order in which the assets of the estate can be resorted to for the payment of unsecured debts. However, the marshalling order set out in *Widdifield on Executors' Accounts*[58] is as close to authoritative as is possible and has been cited in several reported Canadian decisions. Widdifield sets out the order as follows:

1. The general personal estate not bequeathed at all, or by way of residue only.

2. Real estate devised in trust to pay debts.

3. Real estate descended to the heir and not charged with payment of debts.

4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by reason of lapsed devise, to descend; or (as to personalty) specifically bequeathed, subject to that charge.

5. General pecuniary legacies, including annuities and demonstrative legacies that have become general.

6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts, to contribute pro rata.

7. Real and personal estate over which the testator had a general power of appointment which has been expressly exercised by deed (in favour of volunteers) or by will.

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[56] Ontario Law Reform Commission ["OLRC"], *Report on Administration of Estates of Deceased Persons* (1991) at 184ff.

[57] Alberta Law Reform Institute ["ALRI"], *Order and Application of Assets in Satisfaction of Debts and Liabilities*, (2001).

[58] *Supra* note 53.

8. Paraphernalia of the testator's widow.[59]

If a general policy can be discerned in the rules, it appears two-fold: (1) the personal residue and property passing on intestacy (including "real estate descended to the heir") are subject to debts before specific legacies and devises, and (2) real property is given more protection than personal property.

This policy reflects the general law of wills and estates at the time they were formulated. Most importantly, the rules were devised before modern devolution of estates legislation was adopted. In England prior to 1897, legal title to real estate did not vest in the personal representative, who instead merely administered transfer of the real property to those entitled to it.[60] In the result, prior to the intervention of equity, creditors could look to the personal representatives only for payment of debts out of personalty.[61] The marshalling rules were originally conceived in large part to protect creditors by making real estate available for payment of debts. However, preferential treatment of real estate remained. As the Alberta Law Reform Institute observed, "The fact that the general personal estate, less the retention of a fund sufficient to meet pecuniary legacies, is primarily liable for payment of debts stems from the common law rule that personal property was originally the only type of asset available for payment of debts and funeral and testamentary expenses."[62]

In Western Canada, a Territorial Ordinance provided that realty devolves on personal representatives even before the change of the law in England. Western Canadian courts, however, applied the marshalling rules without changing their substance, and have held that the change in the law does not affect them.[63] However, some of the uncertainty in the rules appears to arise from the difficulty in reconciling them with the general policy of the devolution of estates statutes. Uncertainty arises from the fact that, because the rules were devised when the general law was different, they make certain assumptions that are no longer obvious.

Note that in many cases the rules override a specific instruction that certain property is to be charged with debts. It might now seem reasonable to assume that if any property is charged with payment of debts, the testator has expressed an intention to at least partially exclude the marshalling rules, and that resort should be had first to the property charged with debts. In fact, if personal property in the residue is charged with debts, it is looked to first, and the charge is

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59 *Widdifield's*, *supra* note 53 at 86-87. Compare *Halsbury's*, *supra* note 11, vol. 13 at 144-47. Halsbury and some other authorities refer to the property included in Widdifield's #1 as "general personalty", which appears to include all personal property not made subject to specific legacies. In practice, there is little difference between Widdifield's #1 and "general personalty". However, Halsbury and some other authorities do not include specific bequests of personalty charged with payment of debts in #4. This is a more important distinction, discussed below. Finally, Halsbury does not include Widdifield's #8.

60 See 2, above.

61 It was, however, a common practice to charge specific land with payment of debts.

62 ALRI, *supra* note 57 at 7-8.

63 See *Re Rigetti Estate*, [1950] 1 W.W.R. 529 (Sask. K.B.).

construed as an instruction to depart from the marshalling rules.[64] Because it takes priority as an exception to the rules, "personalty in the residue charged with payment of debts" is not included in the list all. But the case is different in regard to other types of property charged with debts. Creation of such a charge has not been construed as a modification of the rules, but as a circumstance within the rules. In general, charging real or personal property (other than personal residue) with payment of debts does not alter the real that the personal residue is the primary fund for payment of debts.

The explanation for this peculiar distinction is largely a matter of history. Even before equity intervened to protect creditors, it was a common practice to devise real estate on trust for the payment of debts. The trust mechanism gave the personal representative (who would be named trustee) control over the realty, allowing payment of debts out of it. However, the purpose of such arrangements was not to relieve the personal residue from its primary responsibility to meet debts, but merely to bring realty within the personal representative's control if it was needed to pay all the debts of the estate without depleting specific bequests and legacies. It real property devised in trust for payment of debts was regarded as a fund available only if the personal residue in the personal representative's hands was not adequate to pay debts.

After 1897, it became possible to charge real estate with payment of debts without establishing a trust for that purpose. But rather than assimilating the two methods of charging realty to pay debts, the new form of charge was, for reasons which are now obscure, held to take lower priority than the older one.

According to Widdifield, personal property (other than residue) charged with debts was treated in an analogous fashion to real property charged with payment of debts (other than by trust): such a charge was not construed to usurp the primary place of the personal residue. However, Halsbury and some other authorities exclude specific legacies of personalty from the rule,[65] apparently on the theory that such a charge amounts to an abrogation of the marshalling rules intended to exonerate the personal residue.

The marshalling rules generally treat real and personal property somewhat differently. This of course amounts to a compromise: equity allowed personal representatives to pay debts out of real estate, but left the personalty—and particularly the personal residue—primarily responsible. Why this should have remained the case after 1897 is more a matter of history than policy. It is not surprising that is some uncertainty that the distinction remains intact. As noted above, the class of assets primarily responsible to meet debts is essentially the personal residue. As clearly defined by Widdifield, it includes all the personal property not specifically bequeathed, less the retention of a fund sufficient to meet pecuniary legacies. The English authorities are clear that real property is not part of this class of assets,[66] but an Alberta decision, *Re Randle*[67], appears to waffle on the issue, setting out the rule as follows:

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64 *Re Smith*, [1913] 2 Ch. 216 at 223.

65 *Halsbury's, supra* note 11, vol. 13 at 144-47.

66 E.g. *Manning v. Spooner* (1796), 30 E.R. 923.

67 (1976), 71 D.L.R. (3d) 208 (Alta. C.A.).

> The residue and more specifically residual personalty becomes the primary fund for payment of debts and testamentary expenses…: The actual or de facto residue by plain and simple definition means that the estate assets left over and undisposed after all specific devises and legacies have been accounted for…[68]

Although redefinition of the class to include the entire residue, real as well as personal, may make good policy sense, it is likely that the Alberta court's slip in that direction was the result of considering Ontario decisions without examining Ontario statute law. In 1886, Ontario enacted legislation which provided that real and personal property in the residue is rateably applicable to the payment of debts.[69]

On the other hand, the persisting protection for real property has led some Canadian courts to extend the protected status further than the English courts. Widdifield's class #6 includes both real and personal property: Specific legacies, specific devises and residuary devises not charged with payment of debts. The English authorities agree that all assets in this class must contribute rateably to payment of debts.[70] Most Canadian authorities agree.[71] However, the Alberta Supreme Court refused to follow these authorities, holding that "at common law the personal property of a deceased person was primarily chargeable with the payment of debts due by the deceased, funeral expenses and expenses of administration."[72]

The discussion above has suggested some reasons why there is uncertainty about what is required to avoid the marshalling rules. A more fundamental problem has to do with what is required to "charge" property with payment of debts. An instruction in a will to pay debts might be interpreted either as a mere administrative direction to pay debts according to law, or as a charge on estate property for payment of debts. Because equity was determined to make real property available for payment of debts, it was inclined to construe any clause that might have that effect liberally. A technical distinction between a direction that debts be paid and an instruction that the executor pay debts was developed. According to Halsbury:

> In the absence of an express charge of debts or legacies, a charge will be implied where there is a general direction by the testator that his debts or legacies, shall be paid, even though the only direction to be found is contained in the general introductory words of the will. Where, however, the direction to pay debts or legacies is coupled with a direction that they are to be paid by the executor, and there is no devise of real estate to him, no charge is to be implied.[73]

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[68] However, the imprecision of language made no difference on the facts, since the residue was entirely personalty.

[69] *Devolution of Estates Act*, S.O. 1886, c. 22, s. 7. See now *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 5.

[70] E.g. *Tombs v. Roch* (1846), 2 Coll. 490, 63 E.R. 823.

[71] *Waugh Estate v. Waugh* (1990), 63 Man. R. (2d) 155 (Q.B.)

[72] *In re Meikle Estate*, [1943] 2 W.W.R. 156 (Alta. S.C.).

[73] *Halsbury's, supra* note 11, vol. 13 at 146.

As the Alberta Law Reform Institute observed, the effect of a direction to pay debts is often ignored by both executors and the courts when marshalling of debts is in issue. This amounts to treating the direction as merely administrative. However, when the issue has been litigated, the courts in Saskatchewan and elsewhere in Canada have generally followed the English authorities.[74] A few have denied that a general direction to pay debts is sufficient to charge real estate[75], while some others have held that the property is charged even by a direction to the executor to pay debts.[76]

2. The Marshalling rules applying to payment of secured debts

Prior to 1854, marshalling of secured debts was treated in the same manner as marshalling of unsecured debts. A special rules applying to mortgages was adopted by the English the *Real Estate Charges Act, 1854 (Locke King's Act).* Prior to the Act, the devisee of mortgaged land could look to the general personal estate for payment of the debt secured by mortgage.[77] The 1854 legislation provided that when a person dies possessed of an interest in property that is charged with the payment of money by way of mortgage, the property charged with the mortgage is liable for payment of the charge. Amendments in 1867 and 1877 extended the rule to include equitable charges of any nature as well as mortgages.

The Saskatchewan *Wills Act, 1909* re-enacted the 1854 Act, and part of the amendments, but failed to include equitable charges in the Saskatchewan legislation. It was held in *Re McDougall Estate*[78] in 1927 that the Saskatchewan provision does not extend to agreements for sale. In 1928, what is now subsection 35(4) of *The Wills Act* was enacted to cure this problem.

Section 35 of *The Wills Act* now provides:

> **35**(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his or her will disposes of, an interest in freehold or leasehold property that, at the time of his or her death, is subject to a mortgage, and the deceased has not, by will, deed or other document, signified a contrary intention:
>
> (a) the interest, as between the different persons claiming through the deceased, is primarily liable for the payment or satisfaction of the mortgage debt; and
>
> (b) every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.
>
> (2) A testator does not signify a contrary intention by either of the following unless he or she further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt:

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74 *Grayson v. Walsh*, [1926] 1 W.W.R. 125 (Sask. K.B.).

75 See *Re Steacy* (1917), 39 O.L.R. 548 (Ont. H.C.J.).

76 *Re McCutcheon and Smith*, [1933] O.W.N. 692 (Ont. C.A.).

77 See 5, above.

78 *Supra* note 18.

(a) a general direction for the payment of debts or of all the debts of the testator out of his or her personal estate or his or her residuary real or personal estate, or his or her residuary real estate;

(b) a charge of debts on that estate.

(3) Nothing in this section affects any right of a person entitled to the mortgage debt to obtain payment or satisfaction of the mortgage debt, either out of the other assets of the deceased or otherwise.

(4) In this section, "mortgage" includes an equitable mortgage and any charge, whether equitable, statutory or of any other nature, including any lien or claim on freehold or leasehold property for unpaid purchase money, and "mortgage debt" has a similar meaning.

Locke King's Act has been re-enacted in other western provinces, but only Saskatchewan extended the received legislation to include agreements for sale and other security interests in land in addition to mortgages. The policy o the legislation is sound, though limited in scope. Payment of debt secured against personal property continues to be governed by the rules applicable to unsecured debt.

3. Recommendations

(a) The rules applying to unsecured debt

The general marshalling rules that apply to payment of unsecured debt are clearly no longer satisfactory. The policy of the rules is infected by archaic distinctions, particularly between real and personal assets. From a practical point of view, the rules have become too uncertain to give the guidance to personal representatives they were intended to provide. In the Commission's opinion, they should be replaced with a simpler scheme that reflects contemporary needs and expectations.

There is no longer any reason why, for example, debts should be paid first out of personal property in the residue when other property has been specifically charged with the payment of debts. Nor is there any reason why the law should not be clarified, for example, to make it clear whether or not legacies of personal property and devices of real property contribute rateably to payment of debts.

In our opinion, it is not difficult to formulate the principles that marshalling order should reflect. Distinctions between real and personal property, between devises on trust and other devises, and between bequests and legacies should be avoided. The distinctions made in the present rules are a product of history, not carefully considered policy. The important distinction is between specific gifts of specific assets on one hand, and on the other, general legacies and gifts of the shares of the residue. When a testator makes a specific gift, it is his or her intention that the gift should, if at all possible, be preserved intact for the beneficiary. Thus it is usually the testator's expectation that the executor will look first to other assets to pay debts. If, however, it is necessary to look to specific gifts, in the absence of specific direction to the contrary, it can be inferred that the testator would expect all gifts to abate at the same rate.

Shorn of artificial distinctions, the policy of the existing rules is not dissimilar to what is proposed here. Reform of the rules is more a matter of simplification and clarification than fundamental change. The Ontario Law Reform Commission recommended a simplified set of marshalling rules in 1991.[79] The Alberta Law Reform Institute's recommendations in 2001[80] were based on the Ontario recommendations. We believe the Alberta proposals are sound. Our recommendations are based on the Alberta Law Reform Institute's proposals.

We recommend that:

> 1. For the purpose of marshalling, the order in which assets are applied in payment of unsecured debts and liabilities should be as follows:
>
> (a) property specifically charged with the payment of debts or left on trust for the payment of debts;
>
> (b) property passing by way of intestacy and property passing by way of residue;
>
> (c) general gifts of property;
>
> (d) specific gifts of property;
>
> (e) property over which the deceased had a general power of appointment that has been expressly exercised by will.
>
> Certain other provisions should be included for clarification.

We recommend that the legislation should also provide:

> 2.(1) Each asset within a given class, whether real or personal, should contribute rateably to payment of debts.
>
> (2) Nothing in this provision affects any right of a creditor to obtain payment or satisfaction of a debt, out of the other assets of the deceased or otherwise.
>
> These provisions would do no more than recognize basic principles of marshalling.

It should be remain open to a testator to direct payment of debts in a manner different than the marshalling order dictates. It is important in this context to remember that marshalling does not affect creditor's rights. The order of payment of debts has its primary effect on the beneficiaries, and is thus a matter that should be within the testator's control. A more difficult question is whether a direction "to pay debts" should be construed as creating a charge on assets for payment of debts.

On one hand, to the extent that the law is settled in Saskatchewan, it appears that at present a general direction "to pay debts" creates a charge on the estate, but a direction that "the executor pay debts" does not. Clearly, this artificial distinction should be abolished. But should a general

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[79] OLRC, *supra* note 56 at 184ff.

[80] ALRI, *supra* note 57.

direction to pay debts continue to create a charge? We would be reluctant to change an established rule unless it is a definite source of mischief. However, as the Alberta Law Reform Institute observed, the rule does not appear to be uniformly applied, despite the case law. Moreover, the practical status of the rule has been diluted by the technical distinction between general direction and direction to the executor.

More important, however, is the effect which retaining the existing rule would have on the reformulated marshalling order. At present, because the order is impractical and confused, little harm likely results from ousting it. But if the default order provided by statute does reflect the needs and expectations of testators, it would be unfortunate it were too easily, perhaps inadvertently, ousted. Thus we agree with the Alberta Law Reform Institute that "to charge property with payment of debts… something more than a general direction that debts be paid should be required."

We recommend that:

> The statutory order of application of assets may be varied by will, but a general direction that debts be paid, or a general direction that the executor pay the debts, is not sufficient charge property with payment of debts or create a trust for payment of debts.

(b) Marshalling of secured debts

Section 35 of *The Wills Act* directs executors to look first to the secured asset when paying a secured debt. This policy is sound. Testators almost certainly expect that, unless a specific direction to the contrary is given, secured debts should be paid out of proceeds from the secured party if possible.

Section 35 of *The Wills Act* applies to mortgages, but unlike its counterpart in Alberta, defines "mortgage" broadly to include "an equitable mortgage and any charge, whether equitable, statutory or of any other nature, including any lien or claim on freehold or leasehold property for unpaid purchase money." The expanded definition was adopted to encompass agreements for sale, which are often used as an alternative to conventional mortgages in Western Canada. However, the definition is broad enough to capture virtually any security interest in land. The Alberta Law Reform Institute recommended extending the Alberta provision to encompass agreements for sale. It also considered what it referred to as a "dramatic" expansion to include "non-consensual security interests" such as common law and statutory liens, rights of distress, statutory charges, deemed trusts and statutory trusts. The Institute sought further guidance on this issue. However, the existing Saskatchewan provision is broad enough to include non-consensual security interests in land. The expanded definition does not appear to created any difficulty.

The Alberta Law Reform Institute also recommended extending the rule to include security interests in personal property. We agree that such a reform would be sensible. Most testators would expect personal property subject to a security interest to be used to pay secured debts in the same manner as real property. The extension should include all forms of security. The most significant security interests in personal property are created under *The Personal Property Security Act*,

1993[81], and include purchase-money security interests as well as other security interests created to secure loans. Other miscellaneous security interests such as garage keepers' liens such also be encompassed.

It is important to remember than the marshalling rules do not affect creditors' remedies. Section 35 of *The Wills Act* makes this proposition explicit, but it is inherent in the concept of marshalling. Thus extension of the marshalling rule to include security interests in personal property would not affect remedies or priorities under *The Personal Property Security Act, 1993*.

The marshalling rule in respect to secured property is presently included in *The Wills Act* only because it appeared to be a convenient place to put it when it was adopted from the English *Locke King's Act.* If other marshalling rules are given statutory form, it would of course be desirable to consolidate *The Wills Act* provision with them. Doing so would eliminate an uncertainty as to be scope of the present provision. *Locke King's Act* applied whether the property in question passed by will or on intestacy. Section 35 copied the English formula, and applies on its face in any case "where a person dies possessed of… an interest in freehold or leasehold property… subject to a mortgage." But since the provision is contained in *The Wills Act*, there is at least doubt that it applies on intestacy. Most other jurisdictions that have copied *Locke King's Act* have not placed it in wills legislation. In Alberta, for example, the *Locke King's Act* provision is contained in the *Administration of Estates Act*.[82]

We recommend that:

> Section 35 of *The Wills Act* be replaced with a provision in *The Administration of Estates Act* governing marshalling of secured assets. The marshalling rule should provide that where an asset of an estate, real or personal, is security for a debt, the secured property is primarily liable for payment of the debt secured by the property.

This rule should be subject to the general marshalling rules relating to preservation of creditor's rights and expression of a contrary intention in a will.

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[81] S.S. 1993, c. P-6.2.

[82] R.S.A. 2000, c. A-2.

Summary of Recommendations

1. *The Devolution of Real Property Act*

The Commission recommends replacing *The Devolution of Real Property Act* with provisions in *The Administration of Estates Act* providing in substance as follows:

Devolution and administration of real property

1(1) Real property in which a deceased person has an interest not ceasing on his death shall devolve upon the personal representatives of the deceased.

(2) Except as otherwise provided in this Act, real property shall be administered in the same manner as personal property.

(3) In all matters relating to real property administered by personal representatives, the concurrence of all the representatives who have been granted probate or administration of the estate is required, unless the court orders otherwise.

Powers of personal representatives in regard to real property

2(1) Personal representatives have powers to

(a) lease real property

(b) divide or partition real property for purposes of distribution, and

(c) sell real property for the purpose of payment of funeral and testamentary expenses, debts, taxes, and for the purpose of paying legacies and distributing the estate among the persons beneficially entitled to it.

(d) mortgage real property for the payment of funeral and testamentary expenses, debts, taxes, or any other purpose beneficial to the estate.

(2) Except as otherwise provided in this Recommendation, sale of real property for distribution only, a lease real property for a term of more than three years, division and partition real property, or mortgage the property for any purpose other than the purpose of payment of funeral and testamentary expenses, debts, and taxes, shall not be made without the concurrence of the persons beneficially entitled to the property.

(3) If there are infant, incompetent, or unascertained persons beneficially entitled to the property, the court may order a sale for distribution if the court is satisfied that the sale is in the interests of the estate and the persons beneficially entitled to the property.

(4) The Public Trustee may concur in a sale for distribution without court order on behalf of an infant.

3(1) A person purchasing real property in good faith and for value from:

(a) the personal representative; or

(b) a person beneficially entitled to the property to whom the property has been conveyed by the personal representative;

shall hold the same freed and discharged;

(c) from all debts or liabilities of the deceased owner except such as are specifically charged thereon otherwise than by his will; and

(d) where the purchase is from the personal representative, from all claims of the persons beneficially interested.

(2) Real property that has been conveyed by the personal representative to a person beneficially entitled to the property continues to be liable to answer the debts of the deceased owner so long as it remains vested in that person, or in any person claiming under him not being a purchaser in good faith and for value.

2. *The Wills Act*

The Commission recommends that section 34 of *The Wills Act, 1996* should be repealed.

3. *The Trustee Act*

The Commission recommends that:

1. Sections 61, 62, and 64 to 72 of *The Trustee Act* should be repealed.

2. Section 73 of *The Trustee Act* should be replaced by a provision to the effect that:

1 Where power in a trust is given to, or imposed on, two or more trustees jointly, it may be exercised or performed by the survivors, or the survivor of them for the time being.

3. Section 74 of *The Trustee Act* should be replaced by a provision in *The Administration of Estates Act* to the effect that:

1 Where the assets of an estate is not sufficient to pay all the debts and liabilities of the estate, all unsecured debts of the estate shall be paid *pari passu* and without any preference or priority.

2 Nothing in this Recommendation affects the rule that reasonable funeral, testamentary and administration expenses have priority over other claims against the estate.

4. Section 75 of *The Trustee Act* should be removed to *The Limitation of Actions Act* or *The Administration of Estates Act*.

5. Sections 76 and 77 of *The Trustee Act* should be replaced by a provision in *The Administration of Estates Act* to the effect that:

1 Where an estate may be liable for future rents and other liabilities under a

lease of real property, the personal representatives may set aside a fund sufficient to pay such rents and liabilities, and distribute the remainder of the estate to the persons beneficially entitled to share in it.

2 Personal representatives who have established the fund referred to in this Recommendation are not personally liable for the rents and other liabilities when they come due, but nothing in this Recommendation affects the right of the lessor or those claiming under him to follow the assets of the estate into the hands of the persons to whom the assets have been distributed.

4. Marshalling Rules

The Commission recommends that *The Administration of Estates Act* should include a simplified and modernized codification of the marshalling rules:

1. For the purpose of marshalling, the order in which assets are applied in payment of unsecured debts and liabilities should be as follows:

(a) property specifically charged with the payment of debts or left on trust for the payment of debts;

(b) property passing by way of intestacy and property passing by way of residue;

(c) general gifts of property;

(d) specific gifts of property;

(e) property over which the deceased had a general power of appointment that has been expressly exercised by will.

2. Section 35 of *The Wills Act* should be replaced with a rule governing marshalling of secured assets. The marshalling rule should provide that where an asset of an estate, real or personal, is security for a debt, the secured property is primarily liable for payment of the debt secured by the property.

3.(1) Each asset within a given class, whether real or personal, should contribute rateably to payment of debts.

(2) Nothing in this provision affects any right of a creditor to obtain payment or satisfaction of a debt, out of the other assets of the deceased or otherwise.

4. The statutory order of application of assets may be varied by will, but a general direction that debts be paid, or a general direction that the executor pay the debts, is not sufficient charge property with payment of debts or create a trust for payment of debts.

Contact Information for the Law Reform Commission of Saskatchewan

www.lawreformcommission.sk.ca

Ms. Merrilee Rasmussen, Q.C.
Commission Chair
tel: (306) 537-6607
e-mail: chair@lawreformcommission.sk.ca

Administrative Office
205 Avenue G North
Saskatoon, SK S7L 1Y9
fax: (306) 651-4619
e-mail: office@lawreformcommission.sk.ca

Mr. Michael Finley
Director of Research
410 26th Street West
Saskatoon, SK S7L 0H9
tel: (306) 665-6428
e-mail: mjfinley@shaw.ca