

HP258.2 Private Law Property, Wills and Estates

Property Law is one of those fields of endeavour that is complicated both with respect to the big picture and its component small pictures. It is so complex at the practical level that lawyers who act for parties in real estate transactions often specialize in this field to the exclusion of all others; and it is both rare and unwise for lawyers to take on the occasional real estate transaction as a part of a law practice.

When we talk about 'Property Law' we really mean the law respecting the ownership and transfer of land and the permanent structures (buildings) on that land. Land law is and, throughout the history of law itself, always has been a very big deal and it is important that we should reflect on why that should be so.

1. When we were hunter-gatherers individual ownership of chunks of land would have been unimportant, irrelevant. But territory, claimed by the clan or tribe would often have been of immense importance - important enough to kill for; important enough to die for. We are a physical presence on the planet. We take up space. We cannot live without taking up space. We need space to gather or grow food and space to obtain all of the other material needs essential to our existence.
2. So from the very earliest times the question of land use ( who was entitled to occupy and use land) was of life and death importance. Land (space) is essential to our existence and so land disputes are ultimately a matter of life and death. We should not be surprised, therefore, that that organized murder (warfare) was an early answer to the question 'Who shall have this land?'
3. But constant warfare takes its toll and so the concept of 'territory' is as familiar to humans as it is to many other species. If there can be inter-tribal agreement as to the core of each tribe's territory then the necessity for warfare can be reduced.
4. The advent of agriculture changed the manner in which land was used. But for most of our history we have never been far from subsistence agriculture - that is to say, for most of history, most of us lived our lives growing and getting what we needed to survive from the land. In a sense that is still inescapably true; as

the materials that we use for all human purposes come from the planet; but our extraordinarily complex chains of manufacture, distribution and sale now remove any sense for most of us that our lives are dependent on manipulating the surface and sub-surface of the planet.

5. When agriculture, fixed human settlement and sufficient division of labour to generate towns occurred human society became, one imagines, much more hierarchical. Dispute resolution between individuals becomes much more complex as soon as the individuals in dispute no longer share a concrete common purpose (kill the deer, for instance) known equally to both of them. Now the need for law (abstract rules of just conduct) is plain. Law substitutes for actual knowledge of the particulars of other lives. Land law will be of primary importance, because for most of our history, to control land is to control life itself. The difference between starvation and not, is access to land.
6. When we look down on England after the Norman Invasion of 1066, what do we see. The Normans who invaded England were a martial society. Their great talent was war. And the organization of their society reflected that priority. Feudalism met the needs of a society organized for war. Let us now look at what it was, what it did well and what it did badly:

**i) What it was**

a) The King was a warrior; whose formal legitimacy might flow from heredity (his father was King before him) but who would be unthroned by murder (civil war) if he was not perceived to be warrior enough to hold what heredity had granted him. The weak attract predators, the strong repel them. We are a very predatory species.

b) Kings, like CEO's or coaches today, inspired loyalty, or didn't. What went into that mix. First, people must sense that they are backing a winner, or at least, not an inevitable loser. To back a loser is to invite war and therefore death. Second, people must be rewarded for their loyalty. The King's best fighters needed to be recognized as such, and rewarded, so that fighting skills were seen to be valued and the best fighters were retained.

c) In a society close to subsistence agriculture the only reward sufficient to hold loyalty was land. Land meant life, power, prestige. Thus the needs of a warrior society generating meagre agricultural surplus could only be met if:-

A) The warrior king owned the land within his kingdom (territory);

B) He was free to grant possession of pieces of that land to warriors, whose loyalty he wished to win and retain;

C) In exchange for possession of the land, each warrior owed the King martial service (would fight for him and with him);

D) And given that growing plants and animals was what most people had to do most of the time, just to stay alive, the fighters that each warrior brought to the King's battles and wars had to be the people living and working on each warrior's land- there were no other people and most days of their lives, if they were not farming they were starving.

That arrangement, formalized as a system of rules and mutual obligations, from the king to the lowliest peasant was feudalism. An agricultural society, generating meagre and uncertain surplus, organized for war, in which each person received an interest in land from the person above them in exchange for farming and, when the need arose, fighting.

Here is a brief summary of the social features of feudalism, from Britain Express, which you will find here:-

[http://www.britainexpress.com/History/Feudalism\\_and\\_Medieval\\_life.htm](http://www.britainexpress.com/History/Feudalism_and_Medieval_life.htm)

## **Feudalism and Medieval life**

**Feudalism.** The social structure of the Middle Ages was organized round the system of Feudalism. Feudalism in practice meant that the country was not

governed by the king but by individual lords, or barons, who administered their own estates, dispensed their own justice, minted their own money, levied taxes and tolls, and demanded military service from vassals. Usually the lords could field greater armies than the king. In theory the king was the chief feudal lord, but in reality the individual lords were supreme in their own territory. Many kings were little more than figurehead rulers.

**Feudal Ties.** Feudalism was built upon a relationship of obligation and mutual service between *vassals* and lords. A vassal held his land, or fief, as a grant from a lord. When a vassal died, his heir was required to publicly renew his oath of faithfulness (fealty) to his lord (suzerain). This public oath was called "homage".

**A Vassal's Obligations.** The vassal was required to attend the lord at his court, help administer justice, and contribute money if needed. He must answer a summons to battle, bringing an agreed upon number of fighting men. As well, he must feed and house the lord and his company when they travelled across his land.

This last obligation could be an onerous one. [William the Conqueror](#) travelled with a very large household, and if they extended their stay it could nearly bankrupt the lord hosting them. In a few days of Christmas feasting one year William and his retinue consumed 6,000 chickens, 1,000 rabbits, 90 boars, 50 peacocks, 200 geese, 10,000 eels, thousands of eggs and loaves of bread, and hundreds of casks of wine and cider.

**A Lord's Obligations.** On the lord's side, he was obliged to protect the vassal, give military aid, and guard his children. If a daughter inherited, the lord arranged her marriage. If there were no heirs the lord disposed of the fief as he chose.

#### Open field farming in Somerset

**Manors.** Manors, not villages, were the economic and social units of life in the early Middle Ages. A manor consisted of a manor house, one or more villages, and up to several thousand acres of land divided into meadow, pasture, forest, and cultivated fields. The fields were further divided into strips; 1/3 for the lord of the manor, less for the church, and the remainder for the peasants and serfs. This land was shared out so that each person had an equal share of good and poor. At least half the work week was spent on the land belonging to the lord and the church.

Time might also be spent doing maintenance and on special projects such as clearing land, cutting firewood, and building roads and bridges. The rest of the time the villagers were free to work their own land.

**Food and Drink.** The fare at the lord's table was as full of variety as the peasant's was spare. Meat, fish, pastries, cabbage, turnips, onions, carrots, beans, and peas were common, as well as fresh bread, cheese, and fruit. At a feast spitted boar, roast swan, or peacock might be added.

#### Normans dining

Wine or ale was drunk, never water, which was rightly considered suspect. Ale was the most common drink, but it was not the heady alcoholic drink we might imagine. It was thin, weak, and drunk soon after brewing. It must have had little effect on sobriety. Fruit juices and honey were the only sweeteners, and spices were almost unknown until after the Crusades.

**Table Manners.** Meat was cut with daggers and all eating was done with the fingers from trenchers, or hollowed out husks of bread. One trencher was used by two people, and one drinking cup. Scraps were thrown on the floor for the dogs to finish. There were no chimneys, and the fireplace was in the middle of the hall. Smoke escaped by the way of louvres in the roof (at least in theory).

**House Layout.** In the early medieval period the centre of life in castles and manors was the great hall, a huge, multipurpose chamber safely built upon the second floor. These halls were dimly lit, due to the need for massive walls with small windows for defense from attack. In the 14th century the hall descended to the ground floor, and windows grew in size, indicating increased security. The solar, or family room, remained on the first floor. It became the custom for the family to eat in the solar, leaving the great hall to minor guests and servants.

Hall life decreased as trade increased. Trades specialized and tradesmen and women moved out of the hall. The communal life of the hall declined and families became more private. Manors sustained fewer people as trades separated from the manor community.

**The Peasant's Life.** Villages consisted of from 10-60 families living in rough huts on dirt floors, with no chimneys or windows. Often, one end of the hut was given over to storing livestock. Furnishings were sparse; three legged stools, a trestle table, beds on the floor softened with straw or leaves. The peasant diet was mainly porridge, cheese, black bread, and a few home-grown vegetables.

Peasants had a hard life, but they did not work on Sundays or on the frequent saints' days, and they could go to nearby fairs and markets. The lot of serfs was much harsher.

**The Serf's Life.** Although not technically a slave, a serf was bound to a lord for life. He could own no property and needed the lord's permission to marry. Under no circumstance could a serf leave the land without the lord's permission unless he chose to run away. If he ran to a town and managed to stay there for a year and a day, he was a free man. However, the serf did have rights. He could not be displaced if the manor changed hands. He could not be required to fight, and he was entitled to the protection of the lord.

Now, to continue,

ii) **What it did well**

Think of an army that must get busy farming or starve; a caste of warriors whose loyalty must be tied to the person of the king; a society made more peaceful by 'everyone knowing their place'; a system of reciprocal obligations that over time will come to be seen as, 'Rights'. Thus, in the intricacy of its hierarchy, its system of enforceable obligations and its continuity, generation after generation, we see the beginning of the law based society that will emerge. And, of course, the fundamental importance of 'land' is cemented.

iii) **What it did badly**

In 1066, no sooner had Harold gotten himself crowned King of England than he had to gather his modest army and march North to turn back invasion from Scandinavia by fighting the King of Norway and Harold's own brother Tostig at a place called Stamford Bridge. Harold won and then had to march South to meet

another invasion by William, Duke of Normandy at Hastings, inconveniently located at the other end of the country. It was a remarkable march but Harold's troops paid the price in fatigue. At the Battle of Hastings, Harold was killed and his army was defeated. William the Conqueror, as he would become known, was the very fierce leader of a very martial people. He had been fighting since his teens and war was his business. By his ferocity he cowed enough of the country that, by the time he arrived in London, Londoners were prepared to crown him King. No doubt it seemed a better deal than having London burned down and innocent people cut down. There were about 2.5 million people in England at the time of the invasion. William invaded with an army of 7000 men! Note this ratio. 7000 to 2.5 million. It hints at something profoundly characteristic of our species. We are made for obedience. All governments exist by and with the consent of the governed, even tyrannies. We vastly outnumber our masters, but we do what they tell us to do anyway.

Feudalism was imposed on the country. It was a system finely tuned to the needs of the chief of an occupying army. Simply put: the King owned all the land; he gave his bravest, fiercest and most loyal officers (as we would say today) possession of large parcels of land. These Barons got possession but not ownership of this land in exchange for a duty of military service in support of the King. In turn, the Barons gave possession but not ownership of land within each estate to his knights who had a duty to provide the Baron with agricultural produce, farm service and, above all, military service. The King's army consisted of the Barons and all those who owed service to the Barons. We should not imagine that choice had much part to play in any of this. The lowest rung on the social ladder, the serfs or peasants, were in many respects slaves. In return for the use of a little land for subsistence purposes, the peasant's duty was to provide the knight with free labour, food, service on demand. Peasants were not free to quit nor to leave the Baron's land. But *nobody* had the sort of freedom of action that we take for granted. Everyone was born into a place in the hierarchy and most people spent their lives trying to fulfill duties that they had not asked for or chosen. No vassal of a Lord was free to leave or transfer his allegiance to another Lord without the first Lord's consent. The modern employee's fundamental right to yell, "I quit!" was beyond conception in a feudal world. Most everybody was owned by somebody.

Note how Feudalism is as much about the absence of contract law as the shape of early land law

Here are some of the problems of such an arrangement:

1. People are not free to do what they are good at; in fact often they must do what they are demonstrably bad at.
2. The Barons got to be Barons because they proved to be good, loyal warriors. They knew little and could care less about farming. So in a primarily agricultural state, where the struggle is to create any wealth beyond subsistence farming, people, who are contemptuous of the very idea of labour, control most of the land.

In short there is a gross mis-allocation of talent, ability and desire in the most important economic endeavour in the country.

3.If peace drags on too long the Barons will want to pass on what they have to their children. So there is pressure for the King to guarantee that the Baron's children may inherit. Sounds like land ownership doesn't it? But if the Barons come to believe that the land is sort of theirs they may want to spend more time improving it and less time fighting for the King. Peace makes Barons uppity and Kings weaker. It is war that keeps an army fighting fit. Plus, if you are the King and live long enough to have this problem, how do you reward each new generation of warriors without enraging the older fellows.

4.Problems are no less serious at the top. **The Normans bought primogeniture with them to England; the idea that the eldest son inherits, to the exclusion of the other siblings. This concept applied not only to land owned by the King but to the throne itself.** When the King died, his oldest surviving son was supposed to become King.

At a time when Kings were warriors first, (Unlike modern generals, the King led his army into the very thick of battle) this system created serious inherent problems.

Children disappoint overbearing parents by being who they are. Your son is destined to become King, which means the war leader of the country; the man who must inspire loyalty to the death in all those Barons. Trouble is he hates horses and keeps dropping his sword. His younger brother, who is good at all the kingly things, realizes that if he is ever to fulfill his sense of destiny then his older brother is going to have to have a fatal accident. Plus their cousin realizes if he kills them both then he can be king.

**Every system of governance must solve three problems well enough to prevail:**

**a) Legitimacy and Succession** - by what mechanism do you choose or say who the leader is and what happens when he or she dies;

**b) Allocation of Ability** - Somehow you have got to get people who will be good at the job, doing it;

**c) The leader of the country is the job that** the most ambitious, aggressive people in the country want - the kind of people who truly believe that the destiny of the country may depend upon them, or at least have little difficulty convincing themselves of that (which may be almost the same thing). Either a peaceful means is provided for seeking the top job or some of the competitors will choose war. I suggest to you that Feudalism solved these problems badly because it locked people into position based on accidents of birth, place and who your father was. We solve the above same problems very well. But it took us centuries of bloody experience to get there.

**The problems at the top**, which we would now call constitutional problems, we solved with 1. limited life government, 2. free speech, and 3. an independent judiciary that decides cases in the manner most consistent with previously decided cases (that is, according to law).

**The problems at lower levels of the feudal hierarchy** we solved with freedom of contract, freedom of employment, tort law and property law and, once again, free speech ; the combination of all of which allowing our individual goals and actions to be coordinated into what we call 'the market' without any of us intending the collective order or pattern that results. In this sense we are as unconscious as ants.

The difference is that, unlike ants, we can reflect on and marvel at the order that is created that none of us intended

Linger in feudal England a few minutes longer we try to get a sense of what is a product of feudalism and what is more fundamental still.

1. Land is the essential asset. Without access to land - starvation
2. Land is the repository of value - it is how wealth is stored
3. Land is the currency that creates loyalty to the Crown.
4. Land is the symbol of influence and importance (proximity to the Crown)
5. Land is the great organizing agent; one's relationship to land and its owner tells each of us who and what we are.
6. Land is a symbol of martial vigour. Great and loyal warriors get land.
7. Primogeniture (to the oldest son) has the following advantages:-
  - i) It is a rule, which is better than no rule which would mean that the rule of naked force would apply;
  - ii) It prevented the break up of land into smaller and smaller estates, which may have perpetuated the existence of a peasantry in countries where a rule of equal division applied.
8. But primogeniture had one great disadvantage; it caused us to lose the talent and leadership qualities of half the species, much if not most of the time; and, while we can never know for sure the results of a path not taken, it feels today like it was a mistake. Leadership was quickly about something else than raw muscle power and horsemanship and whatever we call it, didn't Elizabeth I have that quality more clearly ( at least in our historical tradition) than any of the males who went before or came afterwards.

9. But the idea that women were to be both the owners of property and leaders of last resort was deeply entrenched and it has taken the West until today to un-hobble ourselves from the idea that strength and weakness have gender, and from the primitive and misleading idea that muscle power is a measure of strength. In an uncertain age, one truly great advantage that free societies have over many repressive societies is that we employ the talent, energy and wisdom of all of us and not half of us.
  
10. It becomes tremendously important to determine who has what rights to any particular piece of land. The whole concept of title to land, a state that determines in some fundamental fashion, the question of rights to that land is bound up with the importance of the commodity. Land transactions have a gravitas that selling your travel trailer or your G.M. shares just do not have. Each land transactions is regarded as being uniquely important, such that the general rule, at common law, is that specific performance will be ordered rather than damages. By this I mean that, if you are the seller of land and breach your contract to sell it to me ( you refuse to complete the sale) then I can seek an order from the court compelling you to transfer your land to me. The presumption is that only *that* land will do and could not be fairly compensated by money damages and an admonition to take my money and go buy something else.
  
11. In the middle ages, not only was one's attachment to the land equally an attachment to one's Lord or King, but marriage, with all it's property consequences was subject to supervision by one's 'better in station'. And what survived from that time for a very long time was the idea that marriage was a union of person and property in the name of the man. So, until well into the 19th Century a married woman had no right to own property and had very diminished legal rights both with respect to the world, and with respect to her husband.
  
12. Revolutions require passion, and so it is necessary (and perhaps desirable) that such an arrangement be vilified before it is abolished. But when we look around the world, there are many cultures that still regard marriage and the legal and property consequences of marriage in that medieval light. That is, different cultures have to some degree arrived at the same place ( convergent evolution).

What is going on?

13. Let's start with any day in family court in Prince George. Somebody will be seeking child maintenance from the other parent. What inevitably strikes a person listening to such applications, is roughly this sequence of thoughts:-

- i) The father isn't being asked for that much money given the cost of raising a child;
- ii) Neither of these people is wealthy; in fact they are both struggling to make ends meet;
- iii) The cost of running two households is a massively inefficient way to raise one set of children;
- iv) Marriage is a way of conserving capital and saving expenses

14. Meagre assets, painfully acquired must be preserved and must not be dissipated. Better that one person have a savings account large enough to create a stake in life than it be divided and redivided into meaningless amounts.

15. Marriage practices that pool resources and give clear control to one party are first and foremost an adaptation to grinding poverty. Or to put it another way, we overturned male hegemony when it made economic sense to do so. That may explain a part of our history but it doesn't mean that the adaptation was useful. Sometimes we get it wrong anyway. To preserve capital and reduce expense we create a social institution that makes half the species second class citizens without the right to fully employ their energy, knowledge and talent in their own service and in the service of others. Has the price been greater than any benefit even in very poor countries. Humanity itself is the greatest experiment of all - we have to watch and wait and see.

16. But if there is anything to paragraph 15 herein, then it is the possibility of economic liberation, that made the West ready for the social revolution.

17. Ironically the only place 'male preference primogeniture' has survived to this day in Canada and the UK is in the inheritance of the throne itself. Elizabeth's oldest child is Ann. But she will be bi-passed for Charles, who will be followed

by William and if Charles died and William and his brother Harry died too, the throne would pass to Andrew, Charles' younger brother, and not Ann.

18. In the UK to be landed (have land) meant proximity to the throne and therefore carried status and therefore was bound up with the awful, intricate business of class.
19. But Canada and America have always been places where the servants get uppity and strike out on their own. To hell with class and to hell with you! People could not avoid breathing in freedom. And, on the frontier, old world rules about what women should and should not do made little sense. The circumstances of frontier life make genuine partnership plainly advantageous. But the law is a very conservative beast; it lags behind us and means to do so. Its regard for and loyalty to the past is the touchstone of its legitimacy. And so, even on this continent, throwing off the shackles of our feudal past has continued well into the twentieth century.
20. A general survey of common law jurisdictions for much of the 19th century would have revealed that:
  - i) Upon marriage a woman's property became that of her husband;
  - ii) If she held copyrights, those went to her husband;
  - iii) She could not sue or be sued by her spouse;
  - iv) She could not make a will without her husband's consent;
  - v) If her parent died intestate ( without a will) she would not inherit land if there were any male siblings as the male preference primogeniture rule would mean the land would go undivided to the eldest male sibling.
21. In the last quarter of the 19th Century, across the common law world Married Women's Property Law Acts were passed which finally established that women could keep, acquire or inherit real (land) or personal (not land) property before

and during marriage. The statute was passed in 1873 in B.C..

22. The rules of primogeniture have been abolished in every province including B.C. If you die without a will, the distribution of your property, both real (land) and personal (not land) will be governed by the Estate Administration Act, whose distribution scheme is as follows:-

**Intestate leaving spouse but no issue**

**83** If an intestate dies leaving a spouse but no issue, the person's estate goes to the spouse.

**Intestate leaving issue**

**84** If an intestate dies leaving issue, subject to the rights of the spouse, if any, the person's estate must be distributed per stirpes among the issue.

**Intestate leaving spouse and issue**

**85** (1) In this section, "**net value**" means the value of an estate wherever located, both in and out of British Columbia, after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees.

(2) This section applies if an intestate dies leaving a spouse and issue.

(3) If the net value of the person's estate is not greater than \$65 000, the estate goes to the spouse.

(4) If the net value of the person's estate is greater than \$65 000, the spouse is entitled to \$65 000, and has a charge on the estate for that sum.

(5) After payment of the sum of \$65 000, the residue of the estate goes as follows:

(a) if the intestate dies leaving a spouse and one child, 1/2 goes to the spouse;

(b) if the intestate dies leaving a spouse and children, 1/3 goes to the spouse.

(6) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the spouse takes the same share of the estate as if the child had been living at the date.

**Spousal share if 2 or more persons are entitled as spouse**

**85.1** For the purposes of section 85, if 2 or more persons are entitled as a spouse they share the spousal share in the estate in the portions determined by the court as the court considers just.

**Estate going to parents**

**86** (1) If an intestate dies leaving no spouse or issue, the person's estate goes to the person's father and mother in equal shares if both are living.

(2) If either of the person's mother or father is dead, the estate goes to the survivor.

#### **Estate going to brothers and sisters**

**87** (1) If an intestate dies leaving no spouse, issue, father or mother, the person's estate goes to the person's brothers and sisters in equal shares.

(2) If a brother or sister is dead, the children of the deceased brother or sister take the share their parent would have taken if living, but further representation must not be admitted.

#### **Estate going to nieces and nephews**

**88** If an intestate dies leaving no spouse, issue, father, mother, brother or sister, the person's estate goes to the person's nephews and nieces in equal shares, and representation must not be admitted in any case.

#### **Estate going to next of kin**

**89** If an intestate dies leaving no spouse, issue, father, mother, brother, sister, nephew or niece, the person's estate must be distributed equally among the next of kin of equal degree of consanguinity to the intestate, and representation must not be admitted in any case.

#### **Kindred and half blood**

**90** (1) For the purpose of this Part, degrees of kindred are to be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative.

(2) The kindred of the half blood inherit equally with those of the whole blood in the same degree.

#### **Posthumous births**

**91** Descendants and relatives of the intestate, conceived before the person's death but born afterwards, inherit as if they had been born in the lifetime of the intestate and had survived the intestate.

#### **Advances to children**

**92** (1) If any child of a person who has died wholly intestate has been advanced by the intestate by portion, the portion must be reckoned, for the purposes of this section only, as part of the estate of the intestate distributable according to law.

(2) If the advancement is equal to or greater than the share of the estate that the child would be entitled to receive as above reckoned, the child and the child's descendants must be excluded from any share in the estate.

(3) If the advancement is not equal to the share, the child and the child's descendants are entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and advancement equal as nearly as can be estimated.

(4) The value of any portion advanced is deemed to be that which has been expressed by the intestate or acknowledged by the child in writing, otherwise the value is the value of the portion when advanced.

(5) The onus of proving that a child has been maintained or educated, or has been given money, with a view to a portion is on the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing.

### **Land to be distributed as if intestate was Canadian citizen**

**93** The land in British Columbia of a person who is not a Canadian citizen and who dies intestate must be distributed as if the person had been a Canadian citizen.

### **Estate undisposed of by will**

**94** All the estate not disposed of by will must be distributed as if the testator had died intestate and had left no other estate.

### **Abolition of dower and curtesy**

**95** (1) No widow is entitled to dower out of land of which her deceased husband died wholly or partially intestate, or in land which was absolutely disposed of by her husband in his lifetime or by his will.

(2) No husband is entitled to an estate by the curtesy in the land of his deceased wife dying intestate.

### **Spousal home and household furnishings to spouse**

**96** (1) In this section and section 97:

"**charter**" has the same meaning as in section 1 (1) of the *Business Corporations Act*;

"**household furnishings**" means chattels usually associated with the enjoyment by the spouses of the spousal home;

"**spousal home**" means

(a) a parcel of land that is

(i) shown as a separate taxable parcel on a taxation roll for the current year prepared under the *Taxation (Rural Area) Act* or on an assessment roll used for the levying of taxes in a municipality, and

(ii) has as improvements situated on it a building assessed and taxed in the current year as an improvement, in which the deceased and his or her spouse were ordinarily resident, owned or jointly owned by the deceased, and not leased to another person, or

(b) a share owned or jointly owned by the deceased in a corporation the charter of which provides that a building owned or operated by the corporation must be owned and operated exclusively for the benefit of shareholders in the corporation who are occupants of the building, if the value of the share is equivalent to the capital value of a suite owned by the corporation, in which suite the deceased and his or her spouse were ordinarily resident, and which was not leased to any other person.

(2) Despite section 95, and in addition to any other provision in this Part, but subject to section 98, in an intestacy,

(a) except where it would otherwise go under this Part to a surviving spouse, the spousal home devolves to and becomes vested in those persons by law beneficially entitled to it and, subject to the liability of the land comprising the spousal home for foreclosure or the payments of debts, those persons must hold the spousal home in trust for an estate for the life of the surviving spouse, or so long as the surviving spouse wishes to retain the estate for life, and

(b) the household furnishings go to the surviving spouse.

(3) This section applies to the estate of a person who dies on or after April 1, 1972.

### **Contiguous land not incidental to spousal home**

**97** On application by any person who is entitled, but for section 96, to a share in the distribution of the spousal home, if it is shown that any land contiguous to the spousal home could not reasonably be regarded as contributing to the use and enjoyment of the spousal home as a residence, the court may decrease the size of the parcel of land that devolves to and becomes vested in those persons by law beneficially entitled to it under section 96.

### **Separation of spouses as a bar**

**98** (1) In an intestacy, unless the court on application orders otherwise, the surviving spouse takes no part of the deceased spouse's estate if the spouses

(a) had, immediately before the death of one spouse, separated for not less than one year with the intention of living separate and apart, and

(b) had not during that period lived together with the intention of resuming cohabitation.

(2) On the application of the surviving spouse, the executor or administrator or any person interested in the estate of the deceased spouse, and on evidence the court considers relevant, the court may

(a) determine the matter, and

(b) in its discretion, direct the costs to be paid out of the estate of the deceased spouse.

(3) An application to the court under this section must not be made unless it is commenced not later than 6 months after the date of the issue of letters of administration of the deceased spouse's estate.

### **Uniform construction with laws of other provinces**

**99** This Part must be so interpreted and constructed as to effect the general purpose of making uniform the law of those provinces that enact identical or substantially the same provisions.

24. There you have it. 'Issue' are the legislature's rather clinical name for children.

25. So if property law is about getting and gathering stuff, including land. Succession law (wills and estates law) is about a very special kind of promise; what you promise to give people *after* you are dead. If you think about, the existence wills and estates law is a good test of the integrity of a legal system. '*Will it still happen even after I am not around to ensure that it does?*', is the question people will naturally ask. The answer is Yes, provided you follow the rules and speak/write clearly. Wills and estates law is property law for the dead.

26. But before we get there we must wrap up property law itself. The Family Relations Act was first passed in B.C. in 1972 and it made life a lot fairer for women who had separated from their spouses. The Supreme Court of Canada case of Murdoch illustrates just how unfair things could get; she funded him, worked with him, fed him, comforted him, kept him going, helped keep them both going, but what's his is his because 'title' is his. That was the law in B.C. too until the reform that was the Family Relations Act took effect; and it remained close to the law for common law couples until a few weeks ago when Kerr v. Baranow was handed down by the SCC.

27. In every land transfer system the fundamental question is how does the

seller prove the land is his/hers to see. In the four western provinces we use what is called a Torrens system, named after the inventor Sir Robert Torrens, who pioneered the system in Australia. The best way to describe a Torrens system is to first describe a traditional or non-Torrens system, like exists in the Atlantic provinces and some parts of Ontario. In order to prove ownership one must prove the prior ownership back and back until one gets to the original grant from the Crown, or one satisfies the statutory limit on that trace back process. So I know I have good title and therefore ownership of the land because I proved that the Crown gave it to Sam, who therefore owned it and who sold it to Jim, who sold it to Burt, who sold it to me. Here are all the title deeds proving the authenticity of that chain of ownership, all the way to me. The problem is that if the documents are only evidence of something more fundamental then one could never be certain that somewhere in the chain, an undisclosed or un-noticed interest by some party might be shown that would then have a cascading effect on the rights of every 'owner' of the property thereafter. Result:- complex, expensive, vulnerable to fraud, and the cause of long-term anxiety.

28. That Torrens did is to establish a system in which the proof of ownership was registration of that ownership in the land-title book. Thus the Registrar of Land Titles became the ultimate authority and if you bought from the person that the book said was the owner, and then registered your purchase in the same book, you too became the indisputable owner. If the Registrar made a mistake or was the victim of a fraud, then your claim would not be against the new owner who had purchased and registered in good faith and without knowledge of the fraud; but instead your claim would be against the Registrar for money damages. So, we placed a system that asked us to gaze into the mist of history in search of the semi-holy grail of title, and it replaced it with a book. It has worked well, since 1861 in what was to become B.C.

29. Now the system is going online. Below is a bulletin very recently released by the Law Society of B.C.

**PRACTICE WATCH, by Barbara Buchanan, Practice Advisor**

## **Lawyers will be required to e-file LTO documents starting January 2012 – Are you ready?**

*The Land Title and Survey Authority of BC launched its Electronic Filing System (EFS) in 2004. LTSA Director of Land Titles, Craig D. Johnston, has informed the Law Society that he will announce, on March 11, 2011, that lawyers, notaries and land surveyors will be required to electronically file certain documents with the Land Title Office in a phased implementation plan. Filing paper documents will not be permitted, with limited exceptions.*

*To file documents electronically, a lawyer must sign them digitally, using a secure digital signing certificate (see “[Registering with Juricert](#)” on page 11). Once a document has been signed digitally by the lawyer, the lawyer can register it in the LTO or have it submitted electronically by another party (e.g. the lawyer’s conveyancer or registry agent). As is now the case, a lawyer’s conveyancer may prepare the documents but can’t sign them. The lawyer will review the documents before submission to the LTO and will digitally sign them. Think of a lawyer’s digital signature as a very secure kind of pen that only the lawyer can use.*

*Though the LTSA’s timeline could change, lawyers will be required to file the following documents electronically as early as **January 1, 2012**:*

- *Form A Freehold Transfer of Fee Simple*
- *Form B Mortgage*
- *Form C General Instrument as a Release and as a Charge without an accompanying plan*
- *Claim of Lien Form, Builders Lien Act*

*The Director is also expected to announce limited exceptions to the electronic filing requirements and LTSA future plans. Subsequent phases will include subdivision plans, strata plans, Form C charges with an accompanying plan and Form 17 applications. Eventually, electronic filing will be required for most LTO applications and registrations.*

*The LTSA has recently added new features to the existing EFS and will pilot an “electronic meets” service. Participants will have an option to log in to “meet” and see each others’ documents, be alerted if any documents are removed or changed and use other features.*

*Before taking this step, the LTSA consulted with various stakeholders, including a survey of lawyers and notaries completed in December 2010. Director Johnston, a lawyer himself, appreciates that some real estate practitioners are apprehensive about e-filing. He notes, however, that “those who file electronically like it.”*

### ***Benefits of e-filing***

*There are benefits to e-filing over manual filing: speed, convenience and security. Electronic filers won’t receive a phone call from a frantic courier who travelled in a storm or heavy traffic only to arrive a minute after the LTO counter closed. Rush couriers to the LTO and the risk of documents being lost or misplaced along the way could be a thing of the past. There are obvious “green” benefits as well.*

*E-filing allows you to submit documents whenever BC Online is available (currently 6 am to 10:50 pm Monday to Saturday and 1 pm to 10:50 pm on Sunday), but you should review your client's contract and any undertakings to ensure compliance with specific time limitations. Note whether there is a "time of the essence" clause.*

*You may also receive some new clients, as the LTSA website helps users find lawyers and notaries, by location, who use electronic filing ([ltsa.ca/efs-locator](http://ltsa.ca/efs-locator)).*

*There is a service charge to e-file, but other costs normally incurred, such as courier charges, are reduced or eliminated.*

### ***E-filing and retention of documents – What to do?***

*Some lawyers have asked what to do with the paper version of real estate documents that they have e-filed. Section 168.6(1) of the Land Title Act provides that an electronic instrument that has been received by the registrar under s. 153 is conclusively deemed to be the original of the instrument. For example, an electronically filed Form A is the original, not the paper Form A with the actual signatures.*

*Lawyers concerned about retaining paper versions of documents (in the event the registrar requires their production for inspection after application but before registration pursuant to s. 168.51 of the Land Title Act), are encouraged to read the LTSA's Practice Bulletin 0306 ([ltsa.ca/documents/ltd/bulletin\\_0306.pdf](http://ltsa.ca/documents/ltd/bulletin_0306.pdf)). Lawyers should be in a position to comply with inspection requests from the registrar before final registration of the electronic instrument.*

*In most cases, you can return the paper originals to the client by enclosing them with the final reporting letter. You will also want to keep a copy in the client's file (electronic file or paper file) for the normal file retention period (see [Practice Watch](#) in the November-December 2006 Benchers' Bulletin).*

### ***Getting ready – Juricert, EFS training, office needs and processes***

*If you're not e-filing and intend to file LTO documents in 2012, it's time to get ready. You'll need to obtain a Juricert digital signing certificate and to learn how to electronic file. You likely already have the basics to get started: a computer, printer, scanner, email, Internet connection, Adobe Acrobat and a BC Online account. Juricert advises that you will need either Google Chrome or Internet Explorer to download your Juricert digital signing certificate. The LTSA website has information about its minimum recommended EFS requirements ([ltsa.ca/data/img/publication/EFS-System-Requirements.pdf](http://ltsa.ca/data/img/publication/EFS-System-Requirements.pdf)).*

### ***Registering with Juricert and obtaining a digital signing certificate***

*The LTSA contracts with the Law Society to act as a certification authority under the Land Title Act. The Law Society operates the Juricert service which authenticates applicants and issues digital signing certificates for use with the LTSA's electronic filing system. There is no charge for lawyers to register with Juricert or to obtain a signing certificate.*

*Law Society Member Services Representative Sherry Sarnowsky has helped many lawyers register with Juricert and obtain a signing certificate. "People think it's going to be a complicated process but it's not; it's simple," she says. Here's a brief overview:*

- 1. **Register with Juricert.** Go to the Juricert website ([juricert.com](http://juricert.com)) and complete an online registration form. Review the form, print it out, sign it (witnessed by a lawyer or notary) and fax it to Juricert for authentication. Juricert will check your information against Law Society records to confirm your identity and membership status (which normally takes two business days). Carefully take note of your Juricert identification number which you will receive during the registration process as you will need it for the next step. Your identification number is not your digital signing certificate.*
- 2. **Apply for a digital signing certificate.** Once you are notified by email that your authentication is complete, return to the Juricert website to add EFS and obtain the digital signing certificate for use with Adobe Acrobat. Juricert will email instructions on when and how to download your digital signing certificate. You will need to use Internet Explorer or Chrome to download; Mozilla Firefox won't work. The certificate will allow you to digitally sign documents for electronic submission to the LTO via BC Online.*

*You are responsible for maintaining the security of your digital signing certificate and keeping your digital signing certificate password secure and confidential. Don't provide it to anyone else or let anyone else have access.*

*If you need assistance to register or download your certificate, contact Juricert support at 604-605-5307 or [support@juricert.com](mailto:support@juricert.com). BC Online can assist you with the installation of your digital signing certificate for use with Adobe Acrobat and use of the EFS system. Contact the BC OnLine Help Desk at 250-953-8200 or toll free at 1-800-663-6102. The LTSA can also assist you to learn how to apply your digital signature to EFS forms using your signing certificate.*

*Note that non-payment of Law Society member fees will cause your Juricert registration to be suspended and you will not be able to electronically file LTO documents.*

### ***An offence for your assistant to affix your digital signature***

*Be aware that you must not allow anyone, including any staff member, to affix your digital signature to electronic filing applications, and that you must not use anyone else's.*

*Your digital signature is a representation that you are a "subscriber" as defined in the Land Title Act, that you have applied your digital signature in accordance with s. 168.3, and that a true copy or a copy of that true copy is in your possession.*

*Section 168.1 of the Land Title Act defines "subscriber" as follows:*

***"subscriber"*** means an individual who is authorized by a certificate to sign one or more of the following:

- (a) electronic applications;*
- (b) electronic instruments;*
- (c) electronic plan applications;*

- (d) electronic plans;*
- (e) electronic returns under the Property Transfer Tax Act;*

*An electronic instrument is signed for the purposes of s. 168.3 when a subscriber incorporates his or her electronic signature into the instrument in accordance with the requirements established by the director.*

*Also be aware of the offences set out in s. 168.9 of the Act:*

*A person commits an offence if the person*

*(a) incorporates his or her electronic signature into an electronic application, electronic instrument, electronic plan application or electronic plan without first complying with the provisions of this Part, or*

*(b) incorporates the electronic signature of another person into an electronic application, electronic instrument, electronic plan application or electronic plan.*

### ***Free EFS training and CPD credit***

*The LTSA currently offers a free two-hour EFS training course at locations in Metro Vancouver and via webinar anywhere in the province. Lawyers can apply to the Law Society for two hours of continuing professional development credit for taking the course (course no. LTSAEFS01).*

*To take the course, contact the BC OnLine Help Desk at 1-800-663-6102 or 250-953-8200 or [bcolhelp@accessbc.com](mailto:bcolhelp@accessbc.com).*

*In addition to the EFS training course, the LTSA provides online tutorials, an EFS User Guide, practice bulletins and other information: see their website at [ltsa.ca](http://ltsa.ca). The Continuing Legal Education Society's courses, Land Title Practice Manual, Land Title Forms Guidebook and BC Real Estate Practice Manual, are additional resources.*

### ***Further information***

*Read the LTSA's announcement for important details and any changes to the information provided here ([www.ltsa.ca](http://www.ltsa.ca)).*

*Contact Practice Advisor Barbara Buchanan at 604-697-5816 or [bbuchanan@lsbc.org](mailto:bbuchanan@lsbc.org) for confidential advice or more information regarding any items in Practice Watch.*

### ***Dishonest conveyancers target lawyers in mortgage frauds***

*Dishonest conveyancers are targeting lawyers, often sole practitioners. First they become integral and trusted employees and then they abscond with mortgage funds, leaving you personally exposed, before moving on to their next victim. The Law Society of Upper Canada reported this problem in the Fall/Winter 2010 Ontario Lawyers Gazette, and a variation of the*

*scam has recently surfaced in BC. These conveyancers are sophisticated and may work for you for a number of months before you realize that anything is wrong.*

*To protect yourself and your clients, you must supervise your staff and personally review documents. You should also separate office functions so that the conveyancer is not responsible for accounting, bookkeeping and banking.*

*For more information on how to protect yourself from fraud, including employee fraud, go to the Fraud Alert section of the Law Society's website ([lawsociety.bc.ca](http://lawsociety.bc.ca)) and read the Gazette article, "Beware: Dishonest conveyancers target lawyers," at [rc.lsuc.on.ca/pdf/olg/2010/olg\\_fw10-mortgagefraud.pdf](http://rc.lsuc.on.ca/pdf/olg/2010/olg_fw10-mortgagefraud.pdf). Consult your insurance broker, as well, to help you determine how to best protect yourself.*

30. In two senses land remains every bit as important as it was when William the Conqueror hit the beach at Hastings in 1066.

i) For most Canadians, the home that they have paid for is their single biggest investment, their single biggest asset. After all these centuries and after serial industrial, commercial and technological revolutions, land is still the essentially important repository of value.

ii) Prime Minister William Pitt (Pitt the Elder), said in 1763,

*"The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter."*

However so humble, your dorm room is your castle. It is from there that you have the best right to say to the most powerful, 'Stay out, be gone, leave me alone'. Or to put it as the Charter of Rights and Freedoms expresses it, in section 8,

Everyone has the right to be secure against unreasonable search or seizure.

31. Section 8 protects your reasonable expectation of privacy, and nowhere is that reasonable expectation greater than in your home. Space, refuge, security, privacy, freedom from fear; these ideas, centuries old, are intimately connected to land.

Wills and Estates- how to keep your promise, even after you are dead.

32. Make a will. Either hire a lawyer to draft one or at least take it to a lawyer before you 'execute' ( sign) it. Why involve a lawyer - because you want the will to be clear, uncontestable, such that your sore-headed brother will have no hope of success in contesting it and will therefore have no opportunity to add to the misery of your family by involving them in litigation. The legal fee to do the will right is a small fraction of the cost of litigation your family must bear if you do it wrong. In your will you will name an executor who will ensure that the distribution of assets and other directions set out in your will happen. Your executor will, gather up your assets, pay your bills and distribute the balance.

33. Buy life insurance as soon as possible. One day your ability to bring home money will be important. Others will depend on it. If you die before you complete that task of looking after your family, life may be very hard for them. The great majority of you will not die young or before you are old. For that reason life insurance is cheap; very cheap. Everybody puts a little into a pool so that the few who need it get paid a lot.

34. Provided you name a beneficiary ( and you can change that beneficiary as the years go by) then the beneficiary will receive those funds tax free and creditor proof. Tax free, is kind of self-explanatory - the beneficiary will not pay any tax on the amount received. What about creditor proof - the debts of the deceased will not be paid from his life insurance proceeds.

35. One day you will become uninsurable, that is to say your health will decline such that no insurance company will ensure you. But if you already have life insurance it cannot be taken away from you, nor the premium changed because your health has deteriorated. Life insurance creates the estate you hope to earn. It is a brilliant invention.

36. When we are very young and very old or sick we do not have the ability to look after ourselves. When we are young, this is not much a problem. We don't miss what we have never had and it's fun to be looked after by people who love us. But things are more complicated at the other end of life. First, we have gotten used to having a substantial say in what happens to us. Second we do

not lose the ability to look after ourselves evenly; we may lose subtle aspects of our capacity for independence and what may be apparent to others may not be apparent to us.

So how does the law handle the problem of the individual who is losing or has lost the capacity for independence? It depends upon the circumstances. There is a broad distinction to be made between the individual who has voluntarily planned ahead for a loss of capacity and the person who has lost capacity without a plan.

### 37. Planning ahead

i) Power of Attorney An individual of sound mind may grant another power over his or her financial affairs by way of a power of attorney agreement. Once the agreement is in force the person with power of attorney may act in every way as if he/she were the person who granted the power. A special power of Attorney, known as a 'Continuing Power of Attorney', is necessary if the Power is continue after you have lost mental capacity.

ii) A Representation Agreement may cover financial as well as health related incapacities

At one time it was thought that Representation Agreements would largely replace Powers of Attorney in non-commercial contexts. But instead there is a sort of messy overlap between the old and still needed and the new and untested. The Canadian Bar Association page on this topic is to be found here

[http://www.cba.org/bc/public\\_media/wills/180.aspx](http://www.cba.org/bc/public_media/wills/180.aspx);

and the page looks roughly like this

## Power of Attorney and Representation Agreements

Printer Friendly

Script 180 gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call Lawyer Referral at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses both powers of attorney and representation agreements, starting with powers of attorney.

### **What is a power of attorney?**

A power of attorney is a document that appoints another person, called an “attorney,” to make financial and legal decisions for you.

### **A power of attorney can be very specific**

For example, you may give your daughter a power of attorney just to cash your old age security pension cheques for you. In fact, you can get power of attorney forms for cashing these cheques at your local federal Service Canada office. Your bank can also give you a form if you need a power of attorney for a specific bank account.

### **A power of attorney can also be very general**

If you wish, you can give your attorney very wide powers to deal with all of your assets.

### **There are specific rules for powers of attorney dealing with real estate**

The *Land Title Act* requires the attorney to do certain things and follow certain procedures, and there are certain rules that apply. For example, a power of attorney dealing with real estate is only valid for three years from the date of signing, unless otherwise specified or unless it is an enduring power of attorney as described in the *Power of Attorney Act*. You can get a copy of the *Land Title Act* at your local library or find it on the government’s legislation website at [www.legis.gov.bc.ca](http://www.legis.gov.bc.ca). But because real estate involves large amounts of money, you should consult a lawyer for real estate transactions rather than trying to do it yourself.

### **Who should you appoint as your attorney?**

Consider carefully who to appoint as your attorney and the powers you want to give. It’s important that you trust that person’s honesty and judgment. If you have no family member or friend that you can or want to appoint, you can appoint a respected professional such as your lawyer, accountant or trust company. As a power of attorney gives your attorney very broad power, it can cause you a lot of harm if misused.

### **Does the person you appoint have to act as your attorney?**

No. Merely granting a power of attorney to someone (and even delivering the written document to them) doesn’t mean that this person has to act as your attorney if they don’t want to. The attorney doesn’t have to take any specific steps to say “no,” or to later decline to act if they no longer wish to be the attorney.

### **How do you end a power of attorney?**

The most effective way to terminate a power of attorney is to give your attorney a written notice saying that their power has ended, and preferably also to destroy all originals or duplicates of the document (to prevent misuse by the terminated attorney). To cancel or revoke a power of attorney dealing with land, you must file a document called a “Notice of Revocation” in the Land Title Office where the land is registered. The court can also terminate a power of attorney – this might happen if your attorney abuses their power. It’s also possible to put an end-date in the document itself.

### **A power of attorney automatically ends in certain circumstances**

It automatically ends when you die or if you become bankrupt. It also ends if you become mentally incompetent, unless you say that the power should continue, and then you've made an "enduring power of attorney."

### **What is an enduring power of attorney?**

An enduring power of attorney allows your attorney to make the necessary financial and legal decisions for you in case you become mentally incapable because of age, accident or illness. To make an enduring power of attorney, the document must say that the agreement will continue to be in effect if you're no longer able to make decisions for yourself.

### **When is an enduring power of attorney useful?**

An enduring power of attorney may help avoid having the court appoint a "committee" of one or more people to look after your legal and financial affairs in the event that you become mentally incompetent. A committee appointment is much more expensive than making an enduring power of attorney.

### **What decisions can be delegated with a power of attorney?**

A power of attorney is used to delegate financial and most legal decisions. This is true for both a power of attorney and an enduring power of attorney. But your attorney cannot make medical or health care decisions for you, such as consenting to surgery or dental work for you. For these decisions, you need to make what's called a "representation agreement."

### **What is a representation agreement?**

The *Representation Agreement Act* allows you to appoint someone as your legal representative to handle your financial, legal, personal care and health care decisions, if you're unable to make them on your own. The document is called a representation agreement, and it creates a contract between you and your representative.

### **Your representative has certain duties they must follow**

For example, your representative must consult with you, as much as is reasonable, to determine your wishes. Generally speaking, unless your representative is your spouse, the representation agreement must name another person as a "monitor" to help ensure that the representative lives up to their duties, or the agreement must state that a monitor isn't required.

### **Are there different types of representation agreements?**

There are two types:

- Section 7 limited agreement – to cover straightforward, everyday decisions
- Section 9 general agreement – to deal with complex legal, personal care and health care matters

A Section 9 agreement is needed for your representative to make such decisions as refusing life support if you become terminally ill.

### **Do you need a lawyer to make a representation agreement?**

The law says you must consult a lawyer to make a Section 9 agreement, but you should actually

see a lawyer for both agreements. A lawyer can help you to understand the wide range of issues that arise with a representation agreement.

**Can you register these documents somewhere?**

At the Nidus Personal Planning Resource Centre & Registry, you can register both enduring powers of attorney and representation agreements. Hospitals, banks and government services can search there to find out who your attorney or representative is if they need to. See [www.nidus.ca](http://www.nidus.ca).

**Summary**

A power of attorney is a document that allows you to give another person, called the attorney, the authority to act for you in financial and legal matters. The power can be as specific or as general as you wish. But unless you use an enduring power of attorney, it will automatically end if you become mentally incompetent. A representation agreement, on the other hand, can cover personal care and health care decisions, as well as certain financial and legal decisions, if you're unable to make them on your own.

**Where can you find more information?**

- The Public Guardian and Trustee of British Columbia has detailed information on powers of attorney, representation agreements and court orders appointing a committee to look after the affairs of a person who is mentally incapable. Their phone number is 604.660.4444 in Vancouver and their website is [www.trustee.bc.ca](http://www.trustee.bc.ca).
- The Nidus Personal Planning Resource Centre & Registry provides detailed information on representation agreements. Their phone number is 604.408.7414, and their website is [www.nidus.ca](http://www.nidus.ca).
- Refer to scripts [426](#) on “Committeeship” and [427](#) “Adult Guardianship.”  
[updated October 2009]

Dial-A-Law© is a library of legal information that is available:

- by phone, as recorded scripts, and
- by audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at [www.cba.org/bc](http://www.cba.org/bc) in Public & Media.

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

© Copyright 1983-2009 The Canadian Bar Association, British Columbia Branch

38. What if you become incapacitated and there is no plan in place. Surprisingly,

this is a very complicated subject in BC. There are too many statutes, whose conflicting or overlapping provisions have not yet been tested in court.

The best understood of these statutes is the Patients Property Act, which invokes the protection of the court, in the appointment of a ‘Committee’, who is then the person charged with looking after the affairs of the person incapacitated. If no family member or friend steps forward, the Committee can be the public trustee. Then things can get expensive quickly. Having the government look after your affairs has something of the quality of asking foxes to look out for the interests of ailing chickens. The one thing that you can be sure of is that, at the end of the day, the foxes will be OK

39. I have included the PPA below, which is concise and to the point. You will also find it here:-

[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96349\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96349_01)

Copyright (c) Queen's Printer,  
Victoria, British Columbia, Canada

**IMPORTANT INFORMATION**

**Patients Property Act**

**[RSBC 1996] CHAPTER 349**

*Contents*

<u>Definitions</u>	<u>1</u>
<u>Application and service of notice</u>	<u>2</u>
	<u>3</u>

Hearing of application

4

Order declaring person no longer incapable

5

Examination

6

Appointment of committee

7

Service of notice of application to appoint committee

8

Discharge of committee

9

Nomination of committee by patient

10

Inventory, security and accounts

11

When a person ceases to be a patient

12

Application for discharge of committee

13

Passing of accounts

14

Compensation for acting as committee

15

Powers of committee

16

Special direction limiting powers of committee

17

Rights, powers and privileges included

18

Exercise of powers

<u>Effect on power of attorney or representation agreement of person becoming a patient by court order</u>	19
<u>Effect on power of attorney or certain representation agreements of person becoming a patient other than by court order</u>	19.1
<u>Termination of committee if representation agreement applies to all property of person becoming a patient other than by court order</u>	19.2
<u>Conveyances</u>	20
<u>Effect of things done by committee</u>	21
<u>Actions for and against patient</u>	22
<u>Cost of maintenance, care and treatment</u>	23
<u>Death of patient</u>	24
<u>Repealed</u>	25–26
<u>Costs</u>	27
<u>Orders by court</u>	28
<u>Repealed</u>	29
<u>Appointment of new Public Guardian and Trustee</u>	30
<u>Persons outside British Columbia</u>	31
<b>Definitions</b>	

**1** In this Act:

"**court**" means Supreme Court;

"**patient**" means

(a) a person who is described as one who is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his or her affairs, in a certificate signed by the director of a Provincial mental health facility or psychiatric unit as defined in the *Mental Health Act*, or

(b) a person who is declared under this Act by a judge to be

(i) incapable of managing his or her affairs,

(ii) incapable of managing himself or herself, or

(iii) incapable of managing himself or herself or his or her affairs;

"**Public Guardian and Trustee**" means the Public Guardian and Trustee holding office under the *Public Guardian and Trustee Act*.

"**representation agreement**" means an agreement made under the *Representation Agreement Act*.

### **Application and service of notice**

**2** (1) The Attorney General, a near relative of a person or other person may apply to the court for an order declaring that a person is, because of

(a) mental infirmity arising from disease, age or otherwise, or

(b) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs.

(2) Subject to subsection (3), a notice setting out the time and place of the application must be served personally on the person who is the subject of the application not less than 10 days before the date of the application.

(3) On an application under this section, the court may

(a) direct that any person be served with notice of the application, or

(b) dispense with service on any person of notice of the application.

(4) Despite subsection (3), unless the court is satisfied that service on the person who is the subject of the application would be injurious to that person's health or would for any other reason

be inadvisable in the interests of that person, the court must not dispense with service on that person.

### **Hearing of application**

**3** (1) If, on

(a) hearing an application, and

(b) reading the affidavits of 2 medical practitioners setting out their opinion that the person who is the subject of the application is, because of

(i) mental infirmity arising from disease, age or otherwise, or

(ii) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs,

the court is satisfied that the person is, because of

(c) mental infirmity arising from disease, age or otherwise, or

(d) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs, it must, by order, declare the person

(e) incapable of managing his or her affairs,

(f) incapable of managing himself or herself, or

(g) incapable of managing himself or herself or his or her affairs.

(2) The court may, on hearing an application under this section and reading the affidavits described in subsection (1), direct an issue to be tried, and in that event the following provisions apply:

(a) the question in issue is whether the person who is the subject of the application is, because of

(i) mental infirmity arising from disease, age or otherwise, or

(ii) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs;

- (b) this Act applies to the issue and the trial of it;
- (c) the Supreme Court Civil Rules apply;
- (d) the court must
  - (i) dismiss the application, or
  - (ii) by order, declare that the person who is the subject of the application
    - (A) is incapable of managing his or her affairs,
    - (B) is incapable of managing himself or herself, or
    - (C) is incapable of managing himself or herself or his or her affairs.

**Order declaring person no longer incapable**

**4** (1) At any time after one year from the making of an order under section 3 or sooner by leave of the court, the Attorney General, the patient or other person may apply to the court for an order declaring that a patient is no longer

- (a) incapable of managing his or her affairs,
- (b) incapable of managing himself or herself, or
- (c) incapable of managing himself or herself or his or her affairs.

(2) Except by leave of the court, a patient must not be the subject of an application under this subsection more often than once in any year.

(3) If, on

- (a) hearing an application under this section, and
- (b) reading the affidavits of 2 medical practitioners setting out their opinion that the patient is no longer
  - (i) incapable of managing his or her affairs,
  - (ii) incapable of managing himself or herself, or
  - (iii) incapable of managing himself or herself or his or her affairs,

the court is satisfied that the patient is no longer

- (c) incapable of managing his or her affairs,
- (d) incapable of managing himself or herself, or

(e) incapable of managing himself or herself or his or her affairs,  
the court may, by order, so declare.

### **Examination**

#### **5 (1) If**

- (a) an application is made or an issue is tried under section 3,
- (b) an appeal is taken from an order under section 3, or
- (c) an application is made under section 4,

the court hearing the appeal or application or trying the issue may order the person who is the subject of the application or the patient to attend and submit at the time and place the order directs to examination.

(2) An examination under this section must be made by

- (a) one or more medical practitioners other than those whose affidavits were before the court on the appeal, application or trial, or
- (b) a board of 3 or more medical practitioners designated by the College of Physicians and Surgeons of British Columbia at the request of the court.

(3) If the person who is the subject of the application or the patient requests an examination under this section, unless the court hearing the appeal or application is satisfied that the person or patient is not mentally competent to form and express the request, the court must order the examination.

### **Appointment of committee**

**6 (1)** Subject to section 13, on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient.

(2) On application by the Attorney General, the Public Guardian and Trustee or any other person, the court may, subject to section 13, rescind the appointment of a person appointed as committee.

(3) Subject to section 16, except during the time that a person appointed under subsection (1), other than the Public Guardian and Trustee, is the committee of a patient, the Public Guardian and Trustee is the committee of the patient.

(4) An application under subsection (1) and an application under section 2 may be made as one application.

### **Service of notice of application to appoint committee**

**7** Notice in writing of an application to appoint a committee must be served, not less than 10 days before the date of the application, on

- (a) the Public Guardian and Trustee, and
- (b) the committee of the patient if one has been appointed.

### **Discharge of committee**

**8** If the court appoints a committee to succeed another committee, the former committee, on being discharged under section 13,

- (a) ceases to be the committee of the patient, and
- (b) must transfer the estate of the patient to the appointed committee.

### **Nomination of committee by patient**

**9** On an application for the appointment of a committee, if there is presented to the court a nomination in writing of a committee by the patient,

- (a) made and signed by the patient at a time when the patient was of full age and of sound and disposing mind, and
- (b) executed in accordance with the requirements for the making of a will under the *Wills Act*,

the nominee must be appointed committee unless there is good and sufficient reason for refusing the appointment.

### **Inventory, security and accounts**

**10** (1) If a committee other than the Public Guardian and Trustee has been appointed under this Act, the following rules apply:

- (a) [Repealed 2003-37-38.]
- (b) if property belonging to the patient is discovered after the first passing of accounts under paragraph (d) and that property is valued at \$25 000 or more, the committee must, within 30 days of the discovery of the property, deliver to the Public Guardian and Trustee a true account of the property as it is discovered;
- (c) if ordered by the court, either on the person's appointment as committee or subsequently on the application of the Public Guardian and Trustee, the committee must give security for the proper performance of the committee's duties in the amount the court directs in the form of a bond that must be in the name of the Public Guardian and Trustee, approved by the Registrar of the Supreme Court, and filed with the Public Guardian and Trustee;

(d) the committee must pass the committee's accounts before the Public Guardian and Trustee at the times directed by the Public Guardian and Trustee, including, if the Public and Guardian Trustee requires it, a true inventory of the whole estate of the patient, stating the estimated revenue of it and setting out the debts, credits and effects of the patient to the extent they have come to the knowledge of the committee;

(e) if required by the Public Guardian and Trustee, the committee must pass the accounts before the Supreme Court in the county in which the committee was appointed committee.

(2) A committee may at any time appeal the passing of accounts by the Public Guardian and Trustee to the Supreme Court.

### **When a person ceases to be a patient**

**11** (1) A person ceases to be a patient on any of the following events:

(a) being discharged from a Provincial mental health facility or a psychiatric unit, under the *Mental Health Act*, except if the Public Guardian and Trustee continues as committee under subsection (2);

(b) an order being made with respect to the person under section 33 (8) (a) or (b) of the *Mental Health Act*;

(c) being released on leave under section 37 of the *Mental Health Act* or being transferred to an approved home under section 38 of the *Mental Health Act*, if one of the conditions specified by the director of the Provincial mental health facility from which the person is released or transferred is that the person ceases to be a patient for the purposes of this Act;

(d) the delivery to the patient's committee of a certificate, signed by the director of a Provincial mental health facility or psychiatric unit as defined in the *Mental Health Act*, that the person is no longer incapable of managing his or her own affairs;

(e) the making of an order declaring that

(i) the patient is no longer incapable of managing his or her affairs,

(ii) the patient is no longer incapable of managing himself or herself, or

(iii) the patient is no longer incapable of managing himself or herself or his or her affairs.

(2) Subject to an order made under section 4, or to a certificate under subsection (1) (d), the Public Guardian and Trustee may continue as committee of the estate of any person who has been discharged from a Provincial mental health facility or psychiatric unit, and may retain the control and administration of the person's estate, so long as it is in the Public Guardian and Trustee's opinion necessary or desirable in the interests of that person or of the person's estate.

(3) Despite anything in this Act to the contrary, the Public Guardian and Trustee may carry out and complete a transaction entered into by the Public Guardian and Trustee in relation to a patient's estate which is not completed before the patient ceases to be a patient.

### **Application for discharge of committee**

**12** If a person ceases to be a patient, the person or the committee of the person's estate other than the Public Guardian and Trustee may apply, on 10 days' notice in writing to the Public Guardian and Trustee, to the court for the discharge of the committee.

### **Passing of accounts**

**13** (1) If

(a) an application is made under section 12 for the discharge of a committee other than the Public Guardian and Trustee, or

(b) an application is made for the rescission of the appointment of a committee other than the Public Guardian and Trustee,

the court may, and must if requested by the Public Guardian and Trustee, order that the committee pass the accounts and may, in the order, specify the time and the manner of passing the accounts, and must adjourn the application until the carrying out of the order.

(2) If a committee fails to pass the accounts as ordered, or if the accounts are found to be incomplete or inaccurate, the committee may be required to attend before the court to explain why the accounts have not been passed or a proper proceeding in connection with them taken, and the court may give the direction it considers proper.

(3) After the order made under subsection (1) has been carried out, and the court is satisfied that no further passing of accounts is necessary, the court may order that the committee is discharged.

(4) If the Public Guardian and Trustee or a committee is discharged under this section, the Public Guardian and Trustee or the committee

(a) has no further powers or duties with respect to the estate of the person who has ceased to be a patient, and

(b) is released, except in respect of undisclosed acts, neglects, defaults or accounts or dishonest or unlawful conduct, from all actions, claims and demands for or concerning the Public Guardian and Trustee's or the committee's management or administration of the estate.

### **Compensation for acting as committee**

**14** (1) A person may be allowed reasonable compensation from the estate of a patient or from the estate of a person who has ceased to be a patient for services rendered as committee of the patient or of the person who has ceased to be a patient.

(2) The compensation, if any, to be paid to a person other than the Public Guardian and Trustee must be fixed on the passing of accounts.

(3) If, in the opinion of a person who is entitled to compensation under this section, the estate of a patient or the estate of a person who has ceased to be a patient is so limited in value that the payment out of it of compensation would create poverty or hardship for the patient or person who has ceased to be a patient or the patient's dependants, no compensation need be claimed or paid or no amount need be retained out of the estate.

(4) A committee of a patient or a person who has been the committee of a person who has ceased to be a patient has a first lien or charge on the estate of the patient or person who has ceased to be a patient for all costs, expenses and advances made by him or her for or incidental to the administration of the estate of the patient or the person who has ceased to be a patient or for the benefit of the patient or person who has ceased to be a patient, the patient's family or other dependants.

### **Powers of committee**

**15** (1) Subject to section 16,

(a) the committee of a patient as defined by paragraph (a) of the definition of patient in section 1 has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind, and

(b) the committee of a patient

(i) declared to be incapable of managing his or her affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind,

(ii) declared to be incapable of managing himself or herself has the custody of the person of the patient, and

(iii) declared to be incapable of managing himself or herself or his or her affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind, and as well the custody of the person of the patient.

(2) For investing money, a committee is a trustee within the meaning of the *Trustee Act*.

### **Special direction limiting powers of committee**

**16** (1) On the appointment of a committee, the court may, by the same order, attach conditions or restrictions on the committee's exercise of certain rights, privileges or powers specified in the order, including requiring the written consent of the Public Guardian and Trustee prior to the committee's exercise of any right, privilege or power.

(2) If, under subsection (1), the court has attached a condition that the consent of the Public Guardian and Trustee is required prior to the committee's exercise of any right, privilege or power, the registrar of the court must send a copy of the court's order to the Public Guardian and Trustee.

### **Rights, powers and privileges included**

**17** The rights, powers and privileges vested in the committee include all the rights, powers and privileges that would be exercisable by the patient as a trustee, as the guardian of a person, as the holder of a power of appointment and as the personal representative of a person, if the person were of full age and of sound and disposing mind.

### **Exercise of powers**

**18** A committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family.

### **Effect on power of attorney or representation agreement of person becoming a patient by court order**

**19** On a person becoming a patient as defined in paragraph (b) of the definition of "patient" in section 1,

(a) every power of attorney given by the person is terminated, and

(b) unless the court orders otherwise, every representation agreement made by the person is terminated.

### **Effect on power of attorney or certain representation agreements of person becoming a patient other than by court order**

**19.1** (1) On a person becoming a patient as defined in paragraph (a) of the definition of "patient" in section 1, the following are suspended:

(a) every power of attorney that was given by the person;

(b) every provision of a representation agreement made by the person in respect of his or her property unless the representation agreement is one referred to in section 19.2 (1) (b).

(2) After receiving a copy of the suspended power of attorney or of a representation agreement any provision of which has been suspended under subsection (1) and any information that the Public Guardian and Trustee may require, the Public Guardian and Trustee must determine whether it is necessary or desirable for the Public Guardian and Trustee to manage the patient's property under this Act.

(3) If the Public Guardian and Trustee determines that it is necessary or desirable for the Public Guardian and Trustee to manage the patient's property, then on the making of the determination

(a) the power of attorney that was suspended under subsection (1) is terminated, or

(b) the provisions of the representation agreement that were suspended under subsection (1) are cancelled,

as the case may be.

(4) If the Public Guardian and Trustee determines that it is not necessary or desirable for the Public Guardian and Trustee to manage the patient's property,

(a) the Public Guardian and Trustee's authority as committee under the certificate referred to in paragraph (a) of the definition of "patient" in section 1 is terminated on the making of that determination, and

(b) the suspension of the power of attorney or of the provisions of the representation agreement ends on the termination of the Public Guardian and Trustee's authority as committee.

**Termination of committee if representation agreement applies to all property of person becoming a patient other than by court order**

**19.2** (1) This section applies if

(a) before becoming a patient as defined in paragraph (a) of the definition of "patient" in section 1, a person made a representation agreement in respect of which a certificate was completed under section 9 (2) (b) of the *Representation Agreement Act*,

(b) the representation agreement, by virtue of the authority given to a representative under section 9 (1) (g), (h) or (i) of the *Representation Agreement Act*, or under both that section and section 7 (1) (b) or (d) of that Act, applies to all of the person's property, and

(c) the Public Guardian and Trustee receives a copy of each of the following:

(i) the representation agreement;

(ii) the certificates referred to in sections 5 (4), 9 (2) (b), 12 (3) and 13 (6) of the *Representation Agreement Act*;

(iii) an undertaking in the prescribed form signed by the representative.

(2) If the conditions in subsection (1) are met, the Public Guardian and Trustee's authority as committee under the certificate referred to in paragraph (a) of the definition of "patient" in section 1 is terminated on the Public Guardian and Trustee notifying the representative that those conditions have been met.

(3) The Lieutenant Governor in Council may prescribe a form of undertaking for the purposes of subsection (1) (c) (iii).

### **Conveyances**

**20** Every gift, grant, alienation, conveyance or transfer of property made by a person who is or becomes a patient is deemed to be fraudulent and void as against the committee if

(a) the gift, grant, alienation, conveyance or transfer is not made for full and valuable consideration actually paid or sufficiently secured to the person, or

(b) the donee, grantee, transferee or person to whom the property was alienated or conveyed had notice at the time of the gift, grant, alienation, conveyance or transfer of the mental condition of the person.

### **Effect of things done by committee**

**21** Everything done by a committee in the exercise of the committee's powers under this Act has the same effect with respect to all other persons as if done by the patient at a time when the patient was of full age and of sound and disposing mind.

### **Actions for and against patient**

**22** (1) A person other than the committee of the patient must not bring an action on behalf of the patient.

(2) An action against a patient must be brought against the committee as litigation guardian.

### **Cost of maintenance, care and treatment**

**23** (1) A patient is liable for the cost of the patient's maintenance, care and treatment and, subject to section 18, the committee must pay out of the estate of the patient the amounts necessary to defray all just and reasonable charges for the maintenance, care and treatment of the patient.

(2) The Public Guardian and Trustee may permit a patient of whose estate the Public Guardian and Trustee is committee to hold, manage or control a part of the estate to defray normal living expenses or part of them, and the Public Guardian and Trustee is not liable for loss or damage to the estate of the patient resulting from the patient holding, managing or controlling that part of the estate.

### **Death of patient**

**24** (1) Subject to subsection (2), on the death of a patient and until letters probate of the will or letters of administration of the estate of the patient are granted and notice in writing of the grant is served on the committee, the committee of the patient

(a) continues to have the rights, powers, duties and privileges that the committee would have had if the patient had not died, and

(b) has the powers of an executor of the last will and testament of or the administrator of the estate of the patient.

(2) Despite section 10 (1) (d), the Public Guardian and Trustee must not require the committee to pass accounts before the Public Guardian and Trustee after the death of the patient.

(3) After the death of the patient, the committee must provide the committee's accounts to

(a) the executor or administrator of the patient's estate, or

(b) if the committee and the executor or administrator of the patient's estate are the same person, the beneficiaries of the patient's estate.

(4) The executor, administrator or beneficiaries of the patient's estate may provide to the committee written approval of, and consent to, the accounts received under subsection (3).

(5) If a committee fails to provide its accounts as required under subsection (3), or if the accounts are incomplete or inaccurate, a person entitled to the accounts may require the committee to attend before the court to explain the committee's failure to provide the accounts or to provide a satisfactory accounting, and the court may give the direction it considers proper.

(6) The court may, on being satisfied that no further accounting by the committee is necessary, order at any time that the committee is discharged.

### **Repealed**

**25–26** [Repealed 1999-25-23.]

### **Costs**

**27** The costs of all proceedings under this Act are in the discretion of the court.

### **Orders by court**

**28** If there is insufficient provision in this Act, the court may at any time, on the application of any person, make an order not in contradiction to this Act or the regulations that it considers necessary for or in the interests of the proper, honest and prudent management and administration of the estate of a patient.

### **Repealed**

**29** [Repealed 1999-25-23.]

### **Appointment of new Public Guardian and Trustee**

**30** (1) If a new Public Guardian and Trustee is appointed, the new Public Guardian and Trustee is committee to every patient of whom the predecessor was the committee.

(2) [Repealed 1999-25-23.]

### **Persons outside British Columbia**

**31** (1) If a person resident in another province who would be, if resident in British Columbia, a patient as defined under this Act has estate in British Columbia, the Lieutenant Governor in Council may appoint the person who is charged with the duty of managing, handling, administering or caring for the estate of that person in that province to be the committee of the estate of the person in British Columbia.

(2) The order in council making an appointment under subsection (1) is conclusive evidence that all conditions precedent to the appointment have been fulfilled.

(3) Every person appointed a committee under subsection (1)

(a) has as committee in respect to the estate of the person in British Columbia the same rights, powers, privileges and immunities as are conferred by this Act on the Public Guardian and Trustee as committee of a patient in British Columbia, and

(b) is subject to the same obligations and must perform the same duties

and this Act applies to the person in the same manner as to the Public Guardian and Trustee acting as the committee of the estate of the person.

(4) All acts of a person appointed committee under this section are binding in all courts and land title offices in the same manner and to the same extent as the acts of the Public Guardian and Trustee acting as the committee of the estate of a patient are binding.

Copyright (c) Queen's Printer, Victoria, British Columbia, Canada