

# Practice Note 01-16

## Land Title and Survey Authority of BC Land Title Division

March 3, 2016

### **Consent to spousal home transfers under the *Wills, Estates and Succession Act***

#### **1. Background**

The Land Title Office has received numerous inquiries regarding the interpretation of ss. 26 and 28 of the *Wills, Estates and Succession Act (WESA)*, and the requirements they set out for consent from a surviving spouse to the disposal of a spousal home.

Sections 26 and 28 read as follows:

#### **Right to spousal home**

26(1) This Division applies to

- (a) an intestate estate that includes a spousal home, and
- (b) an estate in respect of which the spousal home is not the subject of a gift or otherwise disposed of by a will.

(2) If this Division applies, the surviving spouse may acquire the spousal home from the personal representative to satisfy, in whole or in part, the surviving spouse's interest in the estate in accordance with this Division.

#### **Prohibition on disposing of spousal home**

28 A personal representative must not, without the written consent of the surviving spouse, dispose of the spousal home during the 180 days after the date on which the representation grant is issued or for any period of time extended under section 27 (2) unless assets other than the spousal home are not sufficient to

pay the debts and liabilities of the estate and a mortgage or charge on the spousal home would not raise sufficient money to pay those debts and liabilities.

*WESA* section 26(1) specifies that the restrictions on disposal of a spousal home set out in Division 2 of Part 3 of the *Act* apply to

- a) an intestate estate that includes a spousal home, and
- b) a testate estate that includes a spousal home which is not the subject of a specific bequest under the will or otherwise disposed of by the will.

Put into practical terms, section 26 applies where there is either a full intestacy (i.e. there is no will) or where there is a partial intestacy (i.e. there is a will, but the will does not either specifically or generally dispose of the spousal home). While full intestacies are common, partial intestacies are rare, as most wills contain a general clause that disposes of all property owned by the deceased that has not been specifically gifted (i.e. the residue of the estate). A typical blanket residual clause in a will constitutes a disposition by the will, and does not trigger the application of *WESA* s. 26(1)(b).

Where section 26(1) applies, section 28 specifies that a personal representative must obtain the written consent of the surviving spouse to disposal of the spousal home, where that is done during the 180 day period after issuance of the representation grant or extended period ordered by the court.

## 2. Practice:

The registrar will require a personal representative to provide evidence of consent by the surviving spouse to the transfer of the spousal home where

- (a) the spousal home is
  - (i) part of an intestate estate, or
  - (ii) not the subject of either a specific bequest of the real property or a blanket residual clause, and
- (b) the disposition is being done during the 180 day period after issuance of the representation grant or extended period ordered by the court.

The registrar will not require a personal representative who is acting under a will that contains either a specific bequest of the real property or a blanket residual clause to provide evidence of consent by the surviving spouse to the transfer, or to confirm that the property is not a spousal home.

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