

REPORT #2

POWERS OF PERSONAL REPRESENTATIVES TO GRANT OPTIONS  
1969

INSTITUTE OF LAW RESEARCH & REFORM

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of ALRI.

June, 1969

POWER OF PERSONAL REPRESENTATIVES  
TO GRANT OPTIONS

---

1. Introduction

As an aspect of one of its projects involving the examination of certain problems arising in the law of wills and trusts and the administration of estates, the Institute undertook to consider whether the law of Alberta should be amended so as to permit personal representatives to grant options to purchase property comprised in estates, and whether to make recommendations to the government of Alberta respecting the same.

2. Position at Common Law

At common law, a personal representative has no power to grant an option to purchase property comprised in an estate, unless such power is conferred by the terms of a will. This restriction upon the competence of personal representatives is based on the decision of the English Court of Appeal in Oceanic Steam Navigation Co. v. Sutherland (1880) 16 Ch. D. 236. The reason given for this restriction is that, since there may be significant alterations in the value of property, it would be "most dangerous" if personal representatives (or trustees generally) could grant options binding on estates for long periods.

The power to grant options may, however, be conferred expressly by, or arise by implication from, the terms of a will. Thus, where executors were empowered "to sell and dispose of my real estate . . . in such manner and at such times as they may deem advisable", it was held that they could validly grant options to

purchase the real property: Close v. McMeans [1932] 1 D.L.R. 210 (Court of Appeal, Manitoba). It is predicated that as the law presently stands the existence of powers to grant options is likely to become an increasingly nice matter of testamentary construction.

As a general rule, it appears to us to be expedient that personal representatives should be enabled to exercise their powers and carry out their duties in such manner as shall be most advantageous to the beneficiaries of estates. In the light of modern commercial practice, particularly in relation to real property, we consider that the restriction currently imposed by the law on the power of personal representatives to grant options offends against this general rule and unduly impedes the proper administration of estates. Requests to grant options have become increasingly frequent in recent years, and a personal representative should be empowered to grant an option covering real property, at least for a limited period.

### 3. Trustee Act Provisions

In our examination of this matter we have taken account of section 17 of The Trustee Act (see Appendix A), which enables personal representatives, as well as trustees generally, to apply to the court for orders conferring on them certain powers of management and administration. By virtue of this section, the court can undoubtedly authorize the grant of an option. We have come to the conclusion, however, that where a personal representative wishes to grant an option he should be able to proceed under The Devolution of Real Property Act, sections 10-12 (see Appendix B). This

would be simpler and, therefore, more satisfactory than an application under section 17 of The Trustee Act.

#### 4. Recommendations

We recommend, therefore, that, subject to the limitations mentioned below, the Wills Act should be amended so as to provide that where any duty, power or authority to sell real property is imposed or conferred upon a personal representative by the terms of a will, such duty, power or authority should, in the absence of contrary intention, carry with it the ancillary power to grant an option.

We consider that, since our recommendation is designed to permit personal representatives more effectively to discharge their duties, it should be provided that the amendment to the Wills Act applies retroactively.

We further recommend, again subject to the limitations mentioned below, that the Devolution of Real Property Act should be amended so as to provide that the power of sale conferred on a personal representative by section 10 of that Act carries with it the ancillary power to grant an option.

We suggest, however, that the recommended power to grant options should be limited in the following particulars. First, the power should be available with respect only to real property. We recognize that there is much logic in the argument that the power should extend to all property, whether realty or personalty, comprised in an estate. We have, nevertheless, concluded that no purpose is served by conferring upon personal

representatives wider powers than will in normal circumstances be required, and at the present time the power to grant options is needed almost exclusively in connection with real property.

Secondly, in order that arrangements shall not be entered into which will be binding on estates for unnecessarily long periods, we advise that no option should be granted for a term exceeding one year.

Thirdly, we emphasize for the sake of clarity that where a personal representative seeks to exercise the power to grant an option in circumstances which fall within section 11 or 12 of The Devolution of Real Property Act - namely, where the power is exercised for the purpose of distribution only, or where an infant is interested in the property - the exercise of the power to grant an option should be subject to the same restrictions as are currently imposed by those sections upon the exercise of the power of sale.

In the course of our research we have deliberated whether further statutory amendments are necessary in order that our recommendations may be consistently and comprehensively implemented. In particular, we have considered whether section 28 of The Trustee Act should be amended so as to provide that where a personal representative is empowered to sell real property with a view to the application of the income for the maintenance and education of an infant pursuant to section 27, the power of the court to give leave to sell should include the power to give leave to grant an option. We have also considered whether a like amendment should be made to section 2 of The Infants Act, which has a purpose similar

to that of sections 27 and 28 of The Trustee Act. We have, however, concluded that these provisions are applicable only to special circumstances, and that it is not necessary to amend them in order to effect our principal recommendations.

We take the view that our recommendations should have no application to inter vivos trusts. Much care is usually given to the drafting of the terms of such trusts, and there is no impediment to the inclusion of a power to grant options in respect of settled property. Furthermore, we are of the opinion that section 17 of The Trustee Act adequately enables trustees to obtain such special powers, including the power to grant options, as are necessary for the proper management and administration of the property vested in them.

#### Acknowledgements

In conclusion, we acknowledge with thanks the assistance received from S. W. Field, Q.C. of Edmonton, and the suggestions of Robert Lloyd, Esq., and John Neilson, Esq., both of Edmonton, members of the Wills and Trusts Subsection for Alberta of the Canadian Bar Association, who prepared a memorandum on the subject under the direction of Blaine Archibald, Esq., of Edmonton, Chairman of the Subsection.

G. W. Acorn  
D. T. Anderson  
W. F. Bowker  
H. G. Field  
S. A. Friedman  
W. H. Hurlburt  
J. S. Palmer  
A. R. Thompson  
M. Wyman

by

  
Chairman

  
Director

## A P P E N D I X      A

The Trustee Act [R.S.A. 1955, c. 346]

2.            In this Act, "trustee" includes
- (a) an executor, an administrator, or a guardian  
                     of the estate of any person, . . .

. . . . .

17.(1)      Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is expedient in the opinion of the Supreme Court or a district court or a judge thereof, but it cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court or judge,

- (a)    may by order confer upon the trustees,  
             either generally or in any particular  
             instance, the necessary power for the  
             purpose, on such terms, and subject to  
             such provisions and conditions, if any,  
             as the court or judge thinks fit, and
- (b)    may direct in what manner any money  
             authorized to be expended, and the costs  
             of any transaction, are to be paid or  
             borne as between capital and income.

(2)            The court or judge may, from time to time,  
rescind or vary any order made under this section, or  
may make any new or further order.

(3) An application to the court or judge under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.



## A P P E N D I X      B

The Devolution of Real Property Act  
[R.S.A. 1955, c. 83]

2.            In this Act, . . .

. . . . .

(c) "personal representative" means the  
 executor, original or by representation,  
 or administrator for the time being of  
 a deceased person.

. . . . .

10.          The personal representative may sell the real property for the purpose not only of paying debts, but also of distributing the estate among the persons beneficially entitled thereto, whether there are or are not debts, and it is not necessary for the persons beneficially entitled to concur in any such sale except where it is made for the purpose of distribution only.

11.          (1) Subject to the provisions hereinafter contained, no sale of real property for the purpose of distribution only is valid as respect any person beneficially interested, unless that person concurs therein.

(2) Where, in the sale of real property

(a) a mentally incompetent person is  
 beneficially interested,

(b) adult beneficiaries do not concur  
 in the sale,

(c) under a will there are contingent interests or interests not yet vested, or

(d) the persons who might be beneficiaries are not yet ascertained,

the Court upon proof satisfactory to it that the sale is in the interest and to the advantage of the estate of the deceased and the persons beneficially interested therein, may approve the sale, and any sale so approved is valid as respect the contingent interests and interests not yet vested, and is binding upon the mentally incompetent persons, non-concurring persons and beneficiaries not yet ascertained.

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

12. No sale, where an infant is interested, is valid without the written consent or approval of the Public Trustee, or in the absence of that consent or approval, without any order of the Court.