

# ESTATES

## WILLS AND INTESTATE SUCCESSION

[§1.01]	The Estate	1
[§1.02]	Disposition of Property on Testacy	2
[§1.03]	Disposition of Property on Intestacy	2
[§1.04]	Further Reading	4

## Chapter 1

### Wills and Intestate Succession <sup>1</sup>

Succession laws are concerned with the transfer of real and personal property from one person to a successor. The area of succession law can include gifts, *inter vivos* trusts, wills and intestate succession. Effective estate planning involves organizing a client's affairs so as to realize the goals of the client, both personal and for dependents, during his or her lifetime, and after death. The *Practice Material: Estates* deals *only* with wills and intestate succession.

The *Practice Material: Estates* is divided into two main parts. The first part deals principally with wills—what they are, their formalities, their planning and drafting. It also includes a discussion of the planning techniques that can be used when dealing with clients who have a mental incapacity. The second part deals with probate and administration of an estate.

#### [§1.01] The Estate

Only property that forms part of the deceased's estate will be distributed under the terms of the will or under the scheme of intestate succession. Thus, to advise a client properly on his or her plan and to draft the will, the lawyer must have a clear understanding of how the client owns property and whether that property will form part of the client's estate upon death.

Property that is subject to the terms of a will is said to “pass” by the will and generally will include all assets over which the client has complete dominion, control, and beneficial interest. Such assets might include:

- (a) the client's tangible personal effects (for example, furniture, artwork, jewellery and automobiles);

<sup>1</sup> Helen Low of Fasken Martineau Dumoulin LLP kindly reorganized and revised this chapter in March 2005. Reviewed and revised annually from April 1994 to February 2001 by Ross Tunnicliffe of Clark Wilson, Vancouver. Reviewed for content relating to the *Indian Act*, in January 2002, by Roger D. Lee, Davis & Company, Vancouver. Reviewed for content relating to persons with disabilities, in January 2002, by Halldor Bjarnason, Vancouver. Prepared for PLTC in February 1990 by a committee consisting of Gordon B. MacRae, Mark Horne, Ross Tunnicliffe and Sandra K. Ballance, drawn in part from articles written for CLE by Professor Donovan W.M. Waters, Q.C., J. Albert Bruce, Q.C., Peter Bogardus, Q.C., William C. Bice, and Sandra K. Ballance.

- (b) intangibles (for example, stocks, bonds, investment certificates, bank accounts, choses in action); and
- (c) real estate interests (for example, fee simple or leasehold).

It is important to distinguish property that a client owns directly from property that the client owns indirectly. For example, a client may purport to gift a parcel of land in her will, yet the land is held by a company owned by her. In this case, the client may direct that only the shares of the company be bequeathed under the will, because she has no authority, in her personal capacity, to directly transfer ownership of the land itself.

Property that does not “pass” by a will, or is not subject to the scheme of intestate distribution, is property that the client may own, but which is nevertheless distributed by operation of law upon death. Such assets do not form part of the deceased's estate upon death and are distributed in accordance with the applicable overriding legal rule.

- (a) Property held in joint tenancy passes to the surviving joint tenant by operation of the right of survivorship. (*Caution*—judicial decisions have shown that the particular circumstances surrounding funds being held in joint tenancy bank accounts between the deceased and a surviving party may rebut the presumption of the right of survivorship held in favour of the surviving party or resulting trust held in favour of the surviving party. See, for example, *Taylor Estate v. Taylor* (1995), 9 E.T.R. (2d) 15 (B.C.S.C.), *Hammond v. Hammond* (1995), 7 B.C.L.R. (3d) 25 (B.C.S.C.) and *Oolup v. Canada* 2004 DTC 2142 (TCC)).
- (b) Proceeds of a life insurance contract pass to the beneficiary designated under that contract because of the *Insurance Act*, R.S.B.C. 1996, c. 226.
- (c) A refund of premiums contributed to a RRSP, RRIF, or pension plan pass to the beneficiary designated under that plan because of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.
- (d) Property otherwise subject to contractual obligations which limit the client's right to alienate the property (for example, a marriage agreement, separation agreement, or shareholders' buy-sell agreement) pass under the terms of that contract. See *Butterfield v. Todd Estate* (1996), 12 E.T.R. (2d) 318 (B.C.C.A.), which confirms the general rule that contractual promises are enforceable against a promisor's estate.
- (e) Gifts of property that are conditional on death (*donatio mortis causa*) pass to the donee. See

*Costiniuk v. Cripps Estate* (2000); E.T.R. (2d) 199, 2000 BCSC 1372, affirmed 2002 BCCA 125, which discusses what circumstances must be met for an effective *donatio mortis causa*.

- (f) Property subject to division under the *Family Relations Act* or some other matrimonial property regime may pass to the surviving spouse directly.
- (g) Property that is subject to an equitable claim, such as that under a constructive trust. See for example, *Clarkson v. McCrossen* (1995), 3 B.C.L.R. (3d) 80 (B.C.C.A.) where a stepchild, who was treated as a child by the deceased for over 40 years, received a very significant portion of the deceased's estate by way of constructive trust. The stepchild's claim was based on unjust enrichment arising from the on-going domestic services rendered by her to the deceased and her efforts of generally nursing and caring for the deceased. The fact that the stepchild's services arose from a familial relationship did not preclude her claim. The stepchild could only rely on the constructive trust remedy because she lacked the status of "child" under the *Wills Variation Act* (*Hope v. Raeder* (1995), 2 B.C.L.R. (3d) 80 (B.C.C.A.)) to vary the terms of the deceased's will which virtually left his entire estate to his second wife who was not the stepchild's mother.
- (h) Cultural property of a Nisga'a citizen, which may be subject to a proceeding under the *Estate Administration Act*.

This subject is discussed in more detail in §9.02.

### [§1.02] Disposition of Property on Testacy

In order for a will to be effective the testator must have:

- (a) intended the will to have a dispositive effect;
- (b) intended that the will not take effect until after death and to be entirely dependent on death for its operation;
- (c) intended for the will to be (and in fact is) revocable;
- (d) executed the will in accordance with the requirements of the Wills Act, R.S.B.C. 1996, c. 489 (see Chapter 2 for a more detailed discussion of these requirements).

Dying with a will (also referred to as dying testate) does not necessarily mean that the testator's property will be distributed in accordance with the wishes set out in that will. A properly executed, unrevoked will may or may not govern how the testator's estate will be administered

on death. In some cases, a will may fail to dispose of all of the testator's property, and the omitted property will pass by intestacy. In other cases, a court may find that all or a portion of a will is invalid for some reason, and the rule of intestacy will dictate the distribution of the affected property.

In some situations, a variation claim might be brought and a court may agree to vary the terms of the will. For more information see chapter 19.

### [§1.03] Disposition of Property on Intestacy

When a person in British Columbia dies without a will, that person is said to have died intestate. When the person dies leaving a will that does not fully dispose of his or her estate, he or she is said to have died partially intestate and the rules about who is entitled to share in that deceased's estate are determined by statute. In British Columbia Part 10 of the *Estate Administration Act* sets out the mandatory legislative scheme for distribution.

Be aware that if the estate is that of a deceased First Nations person, there is a separate regime governing intestate succession under the *Indian Act*, R.S.C. 1985, c. I-5. For more detail, see s. 48 of the *Indian Act*. See also, the papers, "Aboriginal estates—policies and procedures of INAC, BC Region", "Estates under the Indian Act" and "Wills for First Nations persons" in Practice Desk: Aboriginal Practice Points, available on the BC Continuing Legal Education website (<http://www.cle.bc.ca>). See also, Chapter 20 in *The British Columbia Probate & Estate Administration Practice Manual*, (Vancouver: CLE) and Chapter 27 in *Wills Precedents – An Annotated Guide*.

#### PART 10

Section	Dies Leaving	Distribution
83, 85.1	spouse and no issue	entire estate to spouse. If more than one spouse—proportionately according to what the court considers just
85, 85.1, 84 & 96	spouse and one child or issue of deceased child	to spouse: first \$65,000, household furnishings" and "estate for life" in spousal home. Residue: one-half to spouse; one-half to issue per stirpes.
85, 85.1 84 & 96	spouse and more than one child	to spouse: first \$65,000, household

	(issue of a deceased child counted as one living child)	furnishings” and “estate for life” in spousal home. Residue: one-third to spouse; two-thirds to issue per stirpes.
84	issue (no spouse)	to issue, per stirpes
86	father and/or mother	equally to parents, or surviving parent
87	brothers and sisters	equally to brothers and sisters; if a brother or sister has died leaving a child or children, such child or children take his, her or their parent’s share by representation
88	nephews and nieces	equally, with no representation by the children of any deceased nephew or niece
89	other next of kin	equally among next of kin of equal degree of consanguinity, no representation admitted
90	kindred of half blood	inherit equally with kindred of whole blood

Under the *Estates Administration Act*, spouse includes a common law spouse. Section 1 defines a “common law spouse” as meaning either:

- (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law; or
- (b) a person who has lived and cohabited with another person, in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years immediately before the other person’s death.

This definition grants common law and same-sex spouses the same entitlements as legally married spouses. Section 85.1 addresses the situation where there are 2 or more spouses. If there is more than one spouse, the spouses share in proportions determined by the court to be just.

Section 96 provides some special devolution rules regarding a spousal home and furnishings when a spouse dies intestate. A surviving spouse’s entitlement to a life interest in a spousal home survives so long as the surviving spouse lives in the house or rents it, but terminates if the surviving spouse sells the home (*Khan v. Khan* 2004 BCSC 186; *Aho Estate v. Kelly* (1988), 25 B.C.L.R. (2d) 373 (S.C.), and *Kwasnycki v. Kwasnycki* (1990), 43 B.C.L.R. (2d) 148 (S.C.)).

In addition to this scheme of devolution, the following rules apply.

- (a) The descendant or relative of the intestate born after the intestate’s death but conceived before inherits as if he or she were alive at the intestate’s death (s. 91).
- (b) If a testator’s estate is not wholly disposed of by will, the part not disposed devolves as if he or she had died intestate with no other estate (s. 94).
- (c) Separation of spouses for more than one year immediately before death may preclude the surviving spouse from sharing on intestacy (s. 98). See *Walsh v. Elliot* (1994), 91 B.C.L.R. (2d) 315 (S.C.) in which a spouse’s entitlement was not denied where the parties separated after one month of marriage and the deceased died ten months later. See also *Bolton v. Keefe* (2000), E.T.R. (2d) 36; 2000 BCSC 495, which confirmed that the considerations under s. 98 are similar to those used when an application to vary a will is brought under the *Wills Variation Act*.
- (d) Children born inside and outside of marriage are treated equally when determining their rights to a share in an intestate’s estate.

When a person dies leaving no intestate successors, his or her real property escheats to the provincial Crown and his or her personal property vests in the Crown as *bona vacantia*. An application for the return of all or a portion of such real or personal property may be made to the Lieutenant Governor in Council under the *Escheat Act*, R.S.B.C. 1996, c. 120 on the basis of a legal or moral claim, or as a reward for discovering the right of the provincial Crown to the property. If no such application is made within ten years, any money of the estate is deposited into the treasury of the province and becomes part of the consolidated revenue fund under the *Unclaimed Property Act*, S.B.C. 1999, c. 48.

One often overlooked consequence of dying without a will is the effect of distribution of the estate on beneficiaries who are receiving assistance under the *Employment and Assistance for Persons with Disabilities Act* and Regulation – disability assistance or supplement. Under the *Employment and Assistance for Persons with Disabilities Regulation*, if single persons

have assets of more than \$3000 (\$5000 for a person with one or more dependants), they become ineligible for disability assistance. As a result, for a person who is dependent on this financial assistance for survival even a distribution from a small estate can have catastrophic consequences.

When you are dealing with an intestacy, it is crucial to confirm that none of the beneficiaries are receiving disability assistance before distributing the estate. In situations where a beneficiary is receiving disability assistance, it is important to discuss the option of a disability-related trust with the beneficiary *before* the assets are distributed. Disability-related trusts, as permitted under s. 12 of Employment and Assistance for Persons with Disabilities Regulation, are discussed in §4.03.

#### **[§1.04] Further Reading**

CLE publications of interest to general practitioners and legal assistants with some wills and estates work, as well as for legal assistants and lawyers specializing in the area are:

*BC Estate Planning and Wealth Preservation* (updated)

*BC Probate and Estate Administration Practice Manual* (updated)

*Estate Litigation—2007 Update* (November 2007)

*Wills Precedents—An Annotated Guide* (updated)