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WILLS

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## Chapter 1

### Wills and Intestate Succession

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: Wills* deals only with wills and succession.

The whole area of wills and estates is undergoing a significant revision since the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 (“WESA”) came into force on March 31, 2014.


Among many other changes to practice, WESA required substantial changes to probate procedures under the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the “SCCR”). B.C. Reg. 149/2013 repealed certain pre-WESA rules and forms, and added the new Part 25–Estates (B.C. Reg. 149/2013), and new forms dealing with probate and estate administration.

A narrative overview and the full text of WESA appears in the 2010-2011 edition of *Annotated Estates Practice* (CLEBC, 2010). In November 2010, CLEBC also published a *WESA Transition Guide*.

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The *Practice Material: Wills* 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.

The Lawyers Insurance Fund cautions that wills practice and estate planning is a challenging area of the law, with many pitfalls for the “dabbler.” The inexperienced lawyer who tries to bring in a few thousand dollars by doing some wills may see those dollars (and more) disappear as the lawyer’s deductible when a negligence claim is made. Lawyers should only undertake wills practice and estate planning when they have the appropriate knowledge of the law and the requisite drafting skills to do a good job. In other words, do not practice in this area of the law unless you are prepared to apply the same degree of diligence and care that you would apply to any other.

### §1.01 The Estate

When a person dies, that person’s assets fall into one of two general categories: 1) assets that were the deceased’s property and form part of the deceased’s estate, and 2) assets that may or may not have been the deceased’s property but which do not form part of the deceased’s 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 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.

Other law may affect the distribution of the assets of an Aboriginal person upon death. Note that ss. 42–50 of the *Indian Act*, R.S.C. 1985, c. I-5, may apply to “matters and causes testamentary” when the deceased is a registered Indian who was “ordinarily resident” on reserve or Crown land. Division 3 of WESA also deals with some First Nations and Nisga’a property.

Property that is subject to the terms of a will is said to “pass” by the will and generally includes 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);
(b) intangibles (for example, stocks, bonds, investment certificates, bank accounts, and 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 only direct that 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 form part of the deceased’s estate upon death does not “pass” by a will and is not subject to the scheme of intestate succession. This is property that the client may or may not own but which nevertheless is distributed to others by the operation of law upon death. Below are some examples; this subject is discussed in more detail in §9.02.

(a) Subject to the 5 day survival rule in section 10 of WESA, 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. See e.g. 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. 2012, c. 1.

(c) A refund of premiums contributed to a RRSP, RRIF, or pension plan passes 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 promissor’s estate.

(e) Gifts of property that are conditional on death (donatio mortis causa) pass to the donee. See Costiniuk v. Cripps Estate, 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 Law 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, passes according to the finding of claim. See e.g. 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 ongoing 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 left virtually his entire estate to his second wife who was not the stepchild’s mother.

(h) Cultural property of a Nisga’a citizen may be subject to a proceeding under WESA.

[§1.02] Disposition of Property by Will

In order for a will to be effective the will-maker 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 it in fact must be) revocable; and
(d) executed the will in accordance with the requirements of WESA (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 will-maker’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 will-maker’s estate will be administered on death. In some cases, a will may fail to dispose of all of the will-maker’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 rules 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.

Note that 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, and who may become disentitled to benefits if their assets exceed a certain threshold. This topic is discussed further in §4.03.

1. Intestacy under WESA

In British Columbia, Part 3 of WESA sets out the mandatory legislative scheme for distribution (except where the regime under the Indian Act applies, discussed in the next subsection).

The table that follows summarizes the legislative scheme under WESA.

**PART 3**

<table>
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<th>Section</th>
<th>Dies Leaving</th>
<th>Distribution</th>
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<td>20</td>
<td>spouse and no descendants</td>
<td>entire estate to spouse.</td>
</tr>
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<td>21(2) &amp; 21(3)</td>
<td>spouse and descendants of intestate and spouse</td>
<td>to spouse: first $300,000, household furnishings and right to purchase spousal home from estate for 180 days after representation grant. Residue: one-half to spouse; one-half to intestate’s descendants pursuant to section 24.</td>
</tr>
<tr>
<td>21(2) &amp; 21(4)</td>
<td>spouse and descendants of intestate but not spouse</td>
<td>to spouse: first $150,000, household furnishings and right to purchase spousal home from estate for 180 days after representation grant. Residue: one-half to spouse; one-half to intestate’s descendants pursuant to section 24.</td>
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<td>22</td>
<td>more than one spouse</td>
<td>spousal share divided as the spouses agree or as determined by the court.</td>
</tr>
<tr>
<td>23</td>
<td>descendants but no spouse</td>
<td>equally among the descendants pursuant to section 24.</td>
</tr>
<tr>
<td>23</td>
<td>mother or father</td>
<td>equally to surviving parents.</td>
</tr>
<tr>
<td>23</td>
<td>brother and sisters</td>
<td>equally to the descendants of the intestate’s parents or parent.</td>
</tr>
<tr>
<td>24</td>
<td>nephews and nieces</td>
<td>equally to their deceased parent’s share.</td>
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Under WESA s. 2, “spouse” includes persons who have lived together in a marriage-like relationship for at least 2 years. This includes persons of the same gender. The definition of a “spouse” grants common law and same-sex spouses the same entitlements as legally married spouses.

Section 2(2) sets out when a person ceases to be a spouse for purposes of WESA:

Two persons cease being spouses of each other for the purposes of this Act if,

(a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or

(b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

Section 2(2.1) provides that:

For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,

(a) they begin to live together again and the primary purpose for doing so is to reconcile, and

(b) they continue to live together for one or more periods, totalling at least 90 days.

Section 22 addresses the situation where there are two or more spouses. If there is more than one spouse, the spouses share in proportions they agree to or, if they cannot agree, in proportions determined by the court to be just.

Part 3, Division 2 (ss. 26-35), provides some special devolution rules regarding a spousal home when a spouse dies intestate. A surviving spouse is no longer entitled to a life interest in a spousal home. Instead, he or she has a right to purchase the spousal home from the estate for a
For situations where the intestate is not survived by a spouse, descendants, parents or descendants of parents, ss. 23(2)(d)(e) and (f) set out the distribution scheme.

Section 24 deals with distribution to the descendants of a person. “Descendant” is defined as all lineal descendants of that person through all generations so it seems to have the same legal meaning as “issue.” Section 24(1) sets out how the number of shares is determined:

(1) When a distribution is to be made under this Part to the descendants of a person, the property that is to be so distributed must be divided into a number of equal shares equivalent to the number of

(a) surviving descendants, and

(b) deceased descendants who have left descendants surviving the person,

in the generation nearest to the intestate that contains one or more surviving members.

Section 24(2) describes how those shares are distributed:

(2) Each surviving member of the generation nearest to the person that contains one or more surviving members must receive one share, and the share that would have been distributed to each deceased member if surviving must be divided among that member’s descendants in the same manner as under subsection (1) and this subsection.

In addition to this scheme of devolution, the following rules apply under WESA:

- 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, provided he or she lives for 5 days (s. 8).

- If a will-maker’s estate is not wholly disposed of by will, the part not disposed of devolves as if he or she had died intestate with no other estate (s. 25).

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 estate escheats to the provincial Crown under s. 23(2)(f) of WESA. Nevertheless, s. 23(4)(b) permits a person to apply to the Lieutenant Governor in Council under the Escheat Act, R.S.B.C. 1996, c. 120 for the return of all or a portion of such real or personal property on the basis of a legal or moral claim, or as a reward for discovering the right of the provincial Crown to the property.

2. Intestacy under the Indian Act

When the estate is that of a deceased registered Indian, a separate regime governs intestate succession under s. 48 of the Indian Act.

Section 48 of the Indian Act reads as follows:

**Distribution of Property on Intestacy**

**Surviving spouse’s share**

48. (1) Where the net value of the estate of an intestate does not, in the opinion of the Minister, exceed seventy-five thousand dollars or such other amount as may be fixed by order of the Governor in Council, the estate shall go to the survivor.

**Idem**

(2) Where the net value of the estate of an intestate, in the opinion of the Minister, exceeds seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, shall go to the survivor, and

(a) if the intestate left no issue, the remainder shall go to the survivor,

(b) if the intestate left one child, one-half of the remainder shall go to the survivor, and

(c) if the intestate left more than one child, one-third of the remainder shall go to the survivor,

and where a child has died leaving issue and that issue is alive at the date of the intestate’s death, the survivor shall take the same share of the estate as if the child had been living at that date.

**Where children not provided for**

(3) Notwithstanding subsections (1) and (2),

(a) where in any particular case the Minister is satisfied that any children of the deceased will not be adequately provided for, he may direct that all or any part of the estate that would otherwise go to the survivor shall go to the children; and

(b) the Minister may direct that the survivor shall have the right to occupy any lands in a reserve that were occupied by the deceased at the time of death.

**Distribution to issue**

(4) Where an intestate dies leaving issue, his estate shall be distributed, subject to the rights
of the survivor, if any, per stirpes among such issue.

**Distribution to parents**

(5) Where an intestate dies leaving no survivor or issue, the estate shall go to the parents of the deceased in equal shares if both are living, but if either of them is dead the estate shall go to the surviving parent.

**Distribution to brothers, sisters and their issue**

(6) Where an intestate dies leaving no survivor or issue or father or mother, his estate shall be distributed among his brothers and sisters in equal shares, and where any brother or sister is dead the children of the deceased brother or sister shall take the share their parent would have taken if living, but where the only persons entitled are children of deceased brothers and sisters, they shall take per capita.

**Next-of-kin**

(7) Where an intestate dies leaving no survivor, issue, father, mother, brother or sister, and no children of any deceased brother or sister, his estate shall go to his next-of-kin.

**Distribution among next-of-kin**

(8) Where an estate goes to the next-of-kin, it shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and those who legally represent them, but in no case shall representation be admitted after brothers’ and sisters’ children, and any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister.

**Degrees of kindred**

(9) For the purposes of this section, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

**Descendants and relatives born after intestate’s death**

(10) Descendants and relatives of an intestate begotten before his death but born thereafter shall inherit as if they had been born in the lifetime of the intestate and had survived him.

**Estate not disposed of by will**

(11) All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

**No community of property**

(12) There is no community of real or personal property situated in a reserve.

(13) and (14) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 9]

**Equal application to men and women**

(15) This section applies in respect of an intestate woman as it applies in respect of an intestate man.

(16) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 9]

For the purpose of determining succession under this scheme, anyone who is legally adopted or adopted according to Indian custom is treated as if he or she was related by blood to the adoptive relative. Before the child can inherit, there must be a finding of adoption by custom.

**[§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:

- British Columbia Estate Planning and Wealth Preservation (updated)
- British Columbia Probate and Estate Administration Practice Manual (updated)
- Wills, Estates and Succession Act Transition Guide (updated to June 1, 2014)
- Wills and Personal Planning Precedents—An Annotated Guide (updated)

Regarding intestacy under the Indian Act, see also the papers, “Aboriginal Estates—Policies and Procedures of INAC, BC Region” and “Estates under the Indian Act” in Practice Points: Aboriginal Law, available on the CLEBC website at www.cle.bc.ca/PracticePoints/ABOR/Aboriginallaw.html.

Regarding wills for First Nations persons see “Wills for First Nations persons” in Practice Points: Aboriginal Law, available on the BC Continuing Legal Education website (www.cle.bc.ca). See also Chapter 20 in the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) and Chapter 27 in Wills and Personal Planning Precedents—An Annotated Guide.
Chapter 2

Formal Validity of Wills and Interpreting Wills

[§2.01] Formalities

The Wills, Estates and Succession Act, R.S.B.C. 2009, c. 13 (“WESA”) sets out the formal requirements that are necessary to make a will valid, including:

(a) The will must be in writing (s. 37(1)(a)).

(b) The will must be signed at its end by the will-maker or by another person in the will-maker’s presence and by the will-maker’s direction in either the will-maker’s name or the name of the person signing (ss. 1, 37(1) and 39). See Ellis v. Turner (1997), 43 B.C.L.R. (3d) 283 (B.C.C.A.) where the Court of Appeal determined that the s. 4(a) and (b) requirements of the former Wills Act were not satisfied and the will was invalid because the testator did not sign while in the presence of the witnesses (the witnesses signed a document without seeing the testatrix sign it and the testatrix’s signature did not actually appear at the end of the document). While some of the case law on this issue seemed to allow a degree of latitude as to the required formalities under the former Wills Act, the court in Bolton v. Tartaglia (2000), 33 E.T.R. (2d) 26 (B.C.S.C.), following Ellis, confirmed that it had no discretion to find a will valid if it had not been executed in complete compliance with the former Wills Act. In Bolton, a witness forgot to sign the will, although the evidence amply showed that the witness had intended to place her signature on the will. The court held the will invalid. See also Toomey v. Davis et al., 2003 BCSC 1211. However, under WESA, if the court is satisfied the improperly executed will represents the testamentary intentions of the deceased, the court may apply s. 58 and order the will is valid (see Re: Yaremkevich Estate, 2015 BCSC 1124).

(c) The will-maker’s signature must be made or acknowledged by him or her in the presence of two or more witnesses both present at the same time (s. 37(1)(b)). See, however, Simkins Estate v. Simkins (1992), 5 W.W.R. 418 (B.C.S.C.) where the court found that a will was validly executed where it was signed by the testator in the presence of one witness, then signed by that witness, then signed in the presence of the testator and first witness by a second witness brought into the room. See Morris v. Morris (24 December 1993) Smithers Doc. 7133 (B.C.S.C.) where the court discussed the nature of evidence necessary to meet the burden of proof imposed on an executor to propound the validity of a will by proving that it was properly executed. See Ball v. Taylor (1999), 27 E.T.R. (2d) 208 (B.C.S.C) where the court found that it is permissible for the witnesses not to see the actual execution by the testator, provided that the testator otherwise identifies the signature.

(d) Two or more witnesses must subscribe the will in the presence of the will-maker (s. 37(1)(c)). An exception to this rule exists for wills of individuals on active service as a member of the Canadian forces or a member of the naval, land or air force of the British Commonwealth, or any ally of Canada. Such wills do not require attestation unless signed by another person at the request of the will-maker, in which case only one witness is required (s. 38).

(e) The will-maker must be at least 16 years old unless he or she is in the armed forces as described above (s. 36).

With respect to the witnesses subscribing their names to a will, note the following:

(f) A signing witness to a will-maker’s signature must be at least 19 years of age (WESA, s. 40(1)).

(g) A will is not invalid as a result of the incompetence of the witness at the time of execution of the will or if the witness later becomes incompetent (WESA, s. 40(3)).

(h) A will is not invalid by reason that a beneficiary, or a spouse of the beneficiary, is an attesting witness. Subject to (j) below, any bequest or appointment in favour of such a beneficiary/witness or his or her spouse will, however, be rendered void (WESA, s. 40(2), 43(1)). See Hammond v. Hammond (1992), 72 B.C.L.R. (2d) 141 (S.C.), and see s. 43(2).

(i) A will is not invalid by reason that one of the witnesses is the executor/executrix (WESA, s. 40(2)). If the will also contains a “charging

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clause” which permits an executor to charge professional fees in addition to any remuneration to which he or she may be entitled, and the executor/executrix or his or her spouse acts as a witness, then the charging clause, treated in the nature of a gift, will be void under s. 40(2) or 43(1) of WESA.

(j) Under s. 43(4), the court may, on application, declare that a bequest, appointment, or charging clause in favour of a witness who is a beneficiary or his or her spouse is not void, if the court is satisfied that the will-maker intended to make the gift to the person even though the person was a witness to the will. It is up to the witness to establish the testamentary intent to make a gift to the witness: Re: Bach Estate, 2015 BCSC 548.

[$\text{§2.02}$] Curing Formal Deficiencies in a Will

If there are deficiencies in a will or other document representing the deceased’s testamentary intentions or the intention of the deceased to revoke, alter or revive a will or testamentary disposition, such as not following the formal execution requirements as set out in s. 37(1) of WESA, a person may apply for an order under s. 58 of WESA curing the deficiencies and declaring that the document is effective as a will, revocation, alteration or revival of the will or testamentary disposition (see §11.05). On such an application, the court is concerned that the document is authentic and that it represents the deceased’s testamentary intention: Re: Estate of Young, 2015 BCSC 182.

[$\text{§2.03}$] Conflict of Law

WESA considers requirements of foreign jurisdictions that certain formalities be observed by will-makers or that witnesses have certain qualifications, to be formal requirements only that do not affect the essential validity of the will (s. 79(2)).

The formal validity of a will, insofar as it relates to both moveable and immovable property, is governed by the law of any of the jurisdictions listed in s. 80(1) under which the will is valid. Counsel will have to work his or her way through the following options until finding one that works:

- the law of the place where the will is made;
- the law of the will-maker’s domicile, either at the date the will is made or at the date of the will-maker’s death;
- the law of the will-maker’s ordinary residence, either at the date the will is made or at the date of the will-maker’s death;
- the law of a country of which the will-maker was a citizen, either at the date the will is made or at the date of the will-maker’s death;
- the law of British Columbia, even if the will was made outside British Columbia;
- the law of the place where the will-maker’s property is situated at the date the will is made or at the date of the will-maker’s death;
- in the case of a will made on board a vessel or aircraft, the law of the place with which the vessel or aircraft is most closely connected; or
- to the extent that the will exercises a power of appointment, the law governing the essential validity of that power.

The classification of the estate into moveable and immovable property will still be relevant for determining the essential validity of a will.

Other conflict of law issues relating to probate and estate administration are discussed in Practice Material: Wills, Chapters 11 and 12.

[$\text{§2.04}$] First Nations Wills

The Indian Act governs the requirements of wills for registered Indians and provides that they need not comply with the formality provisions of WESA. Subsection 45(2) allows the Minister to “accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death.”

Section 15 of the Indian Estates Regulations provides: “Any written instrument signed by an Indian may be accepted as a will by the Minister whether or not it conforms with the requirements of the laws of general application in force in any province at the time of the death of the Indian.”

Consequently, while it would be good practice to comply with the statutory formalities when drawing a will for a registered First Nations person, it may not be necessary for the signature on the will to be witnessed in compliance with the provisions of WESA, or at all. For more detail, see the British Columbia Probate and Estate Administration Practice Manual §20.9.

[$\text{§2.05}$] Revoking a Will

A properly executed will is revocable even if the language of the instrument states that it is irrevocable and even if the will-maker covenants not to revoke the instrument. When a will is revoked in breach of a contract or a covenant not to revoke it, the will-maker and his or her estate may be liable in damages or subject to some other equitable remedy for the breach. The equitable remedy may be in the form of an order for specific performance, a declaration of trust or an award based on unjust enrichment in favour of the party with whom the will-maker had covenanted. However, the will itself is
revoked by the subsequent valid action of the will-maker in making the revocation.

Section 55 of WESA provides that a will may be formally revoked by any of the following:

(a) a later will made in accordance with WESA (s. 55(1)(a)). (See Judge Estate v. Judge Estate, [1994] B.C.J. No. 123 (B.C.S.C.) where a subsequently discovered letter purportedly signed by the deceased and two witnesses was found to be merely a letter of intention and not a valid will.) However, even if the document or writing did not meet the formal requirements for a will under s. 37, the court may order that the document or writing be fully effective as a revocation of the will, provided that the court is satisfied that the document or writing represents the deceased’s intention to revoke the will (ss. 58(2), (3));

(b) a writing which declares an intention to revoke the will, executed in accordance with WESA (s. 55(1)(b));

(c) destruction of the will by the will-maker or any other person acting in the presence of the will-maker and by his or her direction, with the intention to revoke it (s. 55(1)(c)). (See Allen (Committee of) v. Bennett (31 August 1994), Kamloops 21231 (B.C.S.C.), which confirms that a committee appointed under the Patients Property Act has no authority to revoke a will-maker’s will. There is a rebuttable presumption that a will last known to have been in the hands of the will-maker but which cannot be found at death has been destroyed with the intention to revoke it (Re Wherry (1991), 41 E.T.R. 146 (B.C.S.C.) and Kumari v. Kumari, [1993] B.C.J. No. 108 (B.C.S.C.)); or

(d) a court under s. 58 of WESA, if the court determines that the consequence of the act of burning, tearing or destroying all of part of the will is apparent and the will-maker intended to revoke all of part of the will (s. 55(1)(d)).

Revocation of a will by destruction or by subsequent will or codicil may be conditional. If the revocation is subject to a condition that is not fulfilled, the revocation does not take effect. For example, the will-maker destroys a will intending to make a new valid one, then makes a second will but the second one is not valid for some reason. In these circumstances the first will has not been revoked.

A revocation that does not strictly comply with the formal requirements in s. 55 can be “cured” by the court, as long as the court determines that it represents the intention of the deceased to revoke the will (ss. 58(2), (3)).

There is a common misconception that separation, which would trigger a division of family property under the

\[\text{Family Law Act, or divorce would also revoke a will. WESA is actually much more limited in its application in this regard.}\]

Section 56 of WESA provides:

(2) If a will-maker

(a) makes a gift to a person who was or becomes the spouse of the will-maker,

(b) appoints as executor or trustee a person who was or becomes the spouse of the will-maker, or

(c) confers a general or special power of appointment on a person who was or becomes the spouse of the will-maker,

and after the will is made and before the will-maker’s death the will-maker and his or her spouse cease to be spouses under section 2 (2), the gift, appointment or power of appointment is revoked and the gift must be distributed as if the spouse had died before the will-maker.

The application of s. 56 is subject to a contrary intention appearing in the will.

Thus, the fact that the will-maker and his or her spouse ceased to be spouses under s. 2(2) of WESA only invalidates certain will provisions made in favour of the will-maker’s spouse, and then only where no contrary intention appears in the will. Ceasing to be spouses will not invalidate the will as a whole.

Under s. 2(2) of WESA, persons who are legally married cease to be spouses when an event occurs that causes an interest in family property, within the meaning of the Family Law Act, to arise (i.e. separation). Two persons in a marriage-like relationship cease to be spouses when one or both of them terminate the relationship (s. 2(2)).

\[\text{[§2.06] Altering a Will}\]

The client can alter his or her will by:

(a) executing a new will with desired changes (this will usually revoke the earlier will);

(b) executing a codicil; or

(c) making an interlineation.

A codicil is an amending instrument to the existing will, which is prepared and executed like a will but refers only to those provisions being altered. An interlineation involves a physical change to the existing will by the deletion or addition of words.

By far the most preferable way of effecting an alteration to a will is through a new will or a codicil. Interlineations should be avoided as their legal validity can be questioned as follows:
(a) Interlineations made before the execution of a will are technically not an addition to the will and thus need not be separately executed by the will-maker and two witnesses.

(b) Interlineations made after the execution of a will are, technically, an addition to the will and thus must be attested to by the will-maker and the subscribing witnesses. Attestations are usually in the margin or some other part of the will opposite to or near to the interlineation or at the end of or opposite to a memorandum referring to the interlineation and written in some part of the will. Unless the interlineation is attested to in this manner, s. 54 of WESA provides that the alteration will have no effect, except to invalidate a word or provision that the alteration makes illegible, unless the court reinstates the original word or provision under s. 58(4), or unless the court orders the alteration to be effective under s. 58. An example of an alteration that makes a provision illegible is where a phrase is blacked out and thus unreadable with the naked eye (Re Springgay Estate, [1991] B.C.J. No. 984 (S.C. Master)). If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with WESA, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was (s. 58(4)).

(c) The law presumes that any interlineations to a will were made after its execution. Thus, even if interlineations are made before the actual execution of the will, those interlineations should be formally attested to so this presumption will not need to be rebutted when probate of the will is sought.

§2.07 Republishing and Reviving a Will

Revival restores a revoked will: republication confirms a valid will, while making it operable as if it were executed on the date of republication.

Republication can occur when a will-maker re-executes his or her will with the intention of it operating as of that new date. Also, when someone makes a codicil and refers to the codicil as being to an existing will, an inference can be drawn that the will-maker wants to have the codicil considered as part of the will, such that the existing will is considered to exist as at that later date.

A will or a part of the will that has been revoked can be revived by a later codicil made in accordance with WESA so long as the wording of the codicil shows the testator’s intention to give effect to the will or the part of the will that was revoked (WESA, s. 57(1)). To revive a will, the will must exist (that is, not have been destroyed).

Sometimes a document exists that is completely separate from the will and is unexecuted. The doctrine of incorporation by reference may apply, such that the document is considered as part of the duly executed will. To qualify as part of the will, the document must have existed at the time the will was executed, and must be referred to in the will in a reference clearly identifying the document (See Re Marshall Estate (2001), 39 E.T.R. (2d) 87 (Nfld. Gen. Div) and Tucker v. Tucker (1985), 56 Nfld. & P.E.I.R. 102)). The court may apply s. 58 of WESA and determine that the documents are part of the deceased’s testamentary intentions: see Re: Yaremkewich Estate, 2015 BCSC 1124.

§2.08 Special Types of Wills

1. Mutual Wills

Mutual wills (two wills which contain a covenant not to alter the provisions) remain revocable notwithstanding the terms of the mutual wills. However, the mutual wills may give rise to a constructive trust that cannot be revoked. It is the agreement within the mutual will made by the will-makers not to alter or revoke the provision without the other’s consent that gives rise to a constructive trust that will not be revocable. That trust will be imposed on the personal representative and to the extent possible, the court will direct the property that is subject to the trust in accordance with the agreement reached between the two will-makers although the surviving will-maker may have altered his or her will. See University of Manitoba v. Sanderson (1998), 47 B.C.L.R. (3d) 25 (C.A.).

For there to be a valid mutual wills agreement, there must be the mutual agreement itself not to revoke the individual will, and the first will-maker to die must have done so without having revoked or changed his or her will in breach of the agreement.

There is some case law regarding the possibility that the surviving will-maker must have been unjustly enriched as a result of the will-maker’s breach of the agreement after the death of the first will-maker.

The proof of a mutual will requires evidence apart from an inference from the mere fact of making mutual wills containing identical terms. A separate agreement not to revoke must be found from all the circumstances in order to establish that there was a mutual agreement not to revoke the wills. See Brynelsen v. Verdeck, 2002 BCCA 187.

2. Conditional Wills

A will that is made conditional on the occurrence of some event, or to be effective only during the continuance of a temporary state of affairs, is said to be a conditional will. Probate of the will will be
denied if the conditional event has not yet occurred or the temporary state of affairs has altered or passed. When determining whether the will is conditional, the circumstances surrounding the making of the will and evidence of the intention of the will-maker are admissible to construe the will and the conditions.

3. Holograph Wills
A holograph will is a will made wholly in the will-maker’s handwriting and not witnessed. Holograph wills are recognized in other jurisdictions (for example, Alberta) without restriction. Holograph wills are recognized in British Columbia only under very limited circumstances (for example, the military forces exception in WESA, s. 38).

The curative provision in s. 58 may, however, allow a holograph will to be recognized in British Columbia. Even if the holograph will does not meet the formal requirements for a will under s. 37(1), the court may find that the document represents the deceased’s testamentary intentions and order that it be effective as the deceased’s will (ss. 58(2), (3)); see Beck Estate (Re), 2015 BCSC 676.

3. Lapse
Wills should be drafted with a view to the future. A competent legal drafter will take account of contingencies and events that the client might not think about. However, sometimes circumstances change between the time a will is executed and the time of the will-maker’s death. A gift “lapses” when the beneficiary of the gift predeceases the will-maker.

Section 46 of WESA establishes a default scheme for determining alternative beneficiaries of a lapsed gift, whether that gift is specific or residual. This section applies only where no contrary intention is indicated in the will. Under s. 46, gifts which fail to take effect because of lapse will be distributed according to the following priorities:

- to the alternate beneficiary of the gift, if any (s. 46(1)(a)); or
- if the beneficiary was the brother, sister or a descendant of the will-maker, to their descendants (s. 46(1)(b)); or
- to the surviving residuary beneficiaries, if any, in proportion to their interests (s. 46(1)(c)).

In the case of a gift of the residue that lapses, if s. 46 does not apply, the gift passes on intestacy under s. 44.
Chapter 3

Testamentary Capacity

§3.01 Introduction

In addition to satisfying the formal requirements set out in WESA, in order to make a valid will, a will-maker must have the requisite testamentary capacity to make a will. This requisite mental element can be categorized into two components:

(a) the will-maker must understand the nature of the act in which he or she is engaged, that is, making a will. By this it is meant that he or she should intend by his or her act to make a disposition of property, effective on death; and

(b) the will-maker must be free of mental disorder.

When the will-maker has testamentary capacity as described above, the will-maker must also exercise genuine free choice in the making of the will in order to have the requisite intention.

§3.02 Minors

In British Columbia, a person is capable of making a valid will if he or she has reached the age of 16 (WESA, s. 36). Certain exceptions apply to this general rule. An individual who is younger than 16 years of age may make a valid will if he or she is on active service in the armed forces.

§3.03 Test for Mental Capacity

Case law shows that medical evidence is persuasive but not conclusive, because the question of whether the will-maker has a sound and disposing mind “so far as evidence based on observation and experience is concerned, may be answered as well by laymen of good sense as by doctors.” (See Re Price, [1946] O.W.N. 80 (C.A.); Candido v. Ciardullo (1991), 45 E.T.R. 99 (B.C.S.C.) and Kournossoff Estate v. Chapman, 2000 BCSC 1195). For an example of a case where medical evidence was persuasive, see Heron Estate v. Lennox, 2000 BCSC 1553.

The leading case of Banks v. Goodfellow (1870), L.R. 5 Q.B. 549 at 567, suggests the test is one of a “sound and disposing mind and memory”:

In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, the persons who are the object of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed and the disposition of his property in its simple forms.

Note that there are four separate components to the test. As a practitioner, you should ensure that you are in a position to satisfy the court as to the presence of each of those elements. Your notes ideally will deal with those points under separate headings so that it is clear that you have canvassed the will-maker on all points.

With respect to the second requirement from the Banks test—the recollection of the property the will-maker means to dispose of—the will-maker need not recall every item of, say, an extensive portfolio of stock or real estate which passes under the will. The expression “persons who are the object of his bounty” refers not merely to those who are the actual beneficiaries in the will, but those who might be considered as having “moral claims” on the will-maker. The courts have restricted the class of those who have moral claims for this purpose to spouses, children and those to whom the will-maker stood in loco parentis. Murphy v. Lamphier (1914), 31 O.L.R. 287 (H.C.) at 317, aff’d (1914), 20 D.L.R. 906 (Ont. C.A.) stands for the broader proposition that the will-maker “must understand the extent of what he is giving to each beneficiary and the nature of the claims of others whom he is excluding.”

The cases show that the courts are engaged in a balancing act which does not set the test of soundness of mind too high, thus discouraging attacks on wills, or too low, thus preventing probate of absurd instruments. However, the cases are not altogether consistent. Consider the statement of Sir James Hannan in Boughton v. Knight (1873), L.R. 3 P.D. 64 that:

… whatever degree of mental soundness is required for crimes, contract, marriage, to give evidence, the highest degree of all is required in order to constitute the capacity to make a testamentary disposition.

Contrast that with the more measured observation of Cockburn, C.J. in Banks v. Goodfellow, supra:

In deciding upon the capacity of the will-maker to make his will, it is the soundness of the mind,
and not the particular state of the bodily health, that is to be attended to: the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men, at different periods of their lives, have meditated the subject of the disposition of their property by will, when called upon to have their intentions committed to writing, find much less difficulty in declaring their intentions than they could in comprehending the business in some measure new.

\[§3.04\] Types of Cases

Most cases attacking a will on the ground of incapacity can be divided into two groups. First, those in which it is alleged that the will-maker suffered from delusions that affected him or her in making the will; second, those in which it is alleged that the will-maker suffered from dementia. In the latter situation, the will-maker’s mental capacity is so reduced by advanced illness that he or she is incapable of making a will.

1. Delusions

Dew v. Clark and Clark (1826), 3 Add. 79 defines a delusion as a belief in the existence of something which no rational person could believe, and which cannot be eradicated from the will-maker’s mind by reasoned argument. It is clear, however, that where the delusion does not affect either the will-maker’s property or the object of the will-maker’s bounty, it will not prevent him or her from making a valid will. There is also authority (although criticized) which supports the view that delusional disorder may affect only part of the testamentary act. Only those parts that are gravely affected are struck out (Re Estate of Bohrmann, [1938] 1 All E.R. 271).

For example, in Banks v. Goodfellow, supra the will-maker was subject to certain fixed delusions that he was molested by evil spirits. Because of the absence of any reasonable connection between the delusions and the dispositions made by the will-maker to his niece to whom he was close, the English Court of Appeal upheld the will. On the other hand, in Smee v. Smee (1879), 5 P.D. 84 the will-maker’s will leaving his estate to strangers was set aside as the will-maker falsely believed that his brother, his nearest relative, had defrauded him of an inheritance. In Royal Trust Co. v. Ford, [1971] S.C.R. 831, the will-maker’s delusion that his son was illegitimate was found to be only a cover for not wishing to leave more of his wealth to the son.

The delusion, if it existed at all, was not the cause of the limited bequest.

The most difficult cases involve an aversion to spouse or children, as opposed to more obvious delusions. For example, in Re Barter (1939), 13 M.P.R. 359 (N.B.S.C.), the will-believer believed the daughter had wired his chair to give him electric shocks. At what point does a harsh or eccentric view of an object of bounty become sufficiently irrational to constitute an incapacitating delusion? A will leaving property to strangers will stand where the will-maker, apart from his or her delusions about the will-maker’s family, simply does not care for them and had no intention to provide for them (Beal v. Henri, [1950] O.R. 780 (C.A.)).

2. Dementia

Lack of testamentary capacity is often alleged in situations where the will-maker suffered from dementia, which includes an increasing number of diagnoses of Alzheimer’s disease (all ages), those in the advanced stages of AIDS, and those with other terminal illnesses. Although certain types of dementia have been associated with aging, neither advanced age nor the existence of a disease is itself evidence of a lack of capacity. At some point in the progression of some diseases, however, the will-maker’s testamentary capacity may be affected.

The existence of some mental impairment is not fatal according to Re Cranford’s Will (1975), 8 N. & P.E.I.R. 318 (Nfld. S.C.):

In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains (Banks v. Goodfellow, supra).

On the other hand, the leading case of Leger v. Poirier, [1944] S.C.R. 152 established that the understanding displayed by a will-maker of diminished mental capacity must be genuine:

There is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying comprehension beyond a limited range of familiar and suggested topics. A ‘disposing mind and memory’ is one able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like…
A lawyer must also take special care when taking instructions from clients suffering from dementia. Preferably instructions will be taken from the client before the onset of dementia; however, if not, the solicitor should be concerned particularly with the client’s first language and whether the client is deaf or has any other language or hearing impairments. A client who is blind, under stress, and has language difficulties may need to be even more aware of his or her delivery. The solicitor should be concerned particularly with the client’s first language, is either to send the client to a solicitor who does speak that language, or if that is not possible, employ an interpreter. If the will-maker is deaf consider referring the client to a lawyer who is deaf, or if that isn’t possible, employ an interpreter. If you take the latter course, it is better to avoid having a

Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole.

Knowledge and approval means simply that the will-maker realizes what is in the will, and agrees that is what he or she wants. The term “knowledge” does not exactly mean “understanding” what is in the will. So far as legal terms are concerned the will-maker takes the risk that he or she knows what each of them means. By employing them, the will-maker adopts them, and here he or she is relying upon the skill and experience of the lawyer who explains how they convey the will-maker’s intentions.

The lawyer will normally explain clauses that dispose of the will-maker’s property to intended beneficiaries carefully. Yet the cases lead one to wonder how often the same treatment is given to the so-called boilerplate clauses. For instance, why does the will-maker want that clause that grants the power to retain original assets? Is it because he or she wants the executors and trustees to have the means to wait and sell at the best possible moment? Or does he or she want the assets retained indefinitely as a permanent investment, income return, and capital gain or loss arising for the beneficiaries as fate would have it? On the other hand, so far as the non-technical language is concerned, matters which a non-lawyer should be able to understand, “knowledge” could reasonably be equated with understanding.

The lawyer will usually meet the requirement of “knowledge and approval” by reading or explaining the will to the will-maker before execution. Even if a draft of the proposed will has been mailed to the will-maker for perusal before the execution interview, the will-maker should follow a copy of the will as the lawyer reads or explains it. Voice inflection with the proper stress, language and sentence structure will bring greater understanding to the more literate will-maker if he or she has a copy to follow. Particularly with wills involving trusts (as opposed to outright distributions) it is most advisable to have the will-maker actually convey his or her understanding to the lawyer by describing the effect of the provisions rather than simply acknowledging as the will is reviewed. Needless to say, the lawyer will have carefully proofread the final typed original of the will before the lawyer and the will-maker meet for the execution, and will have checked off the provisions of the will against the instructions.

The lawyer should always express himself or herself clearly and maintain a moderate speed when explaining the will’s provisions. When reading those provisions to a client who is blind, less literate or illiterate, the lawyer may need to be even more aware of his or her delivery. As for the will-maker whose first language is other than English, the wisest course, if the lawyer does not speak the client’s first language, is either to send the client to a lawyer who does speak that language, or if that is not possible, to employ an interpreter. If the will-maker is deaf consider referring the client to a lawyer who is deaf, or if that isn’t possible, employ an interpreter. If you take the latter course, it is better to avoid having a

[§3.05] Knowledge and Approval

Though a full discussion of knowledge and approval is beyond the scope of this chapter, the distinction between capacity and knowledge and approval is important.

Despite a will-maker having the capacity to make a will, one or more of these vitiating elements may have been at work upon him or her. For this reason, the lawyer should always interview the will-maker personally. Even reliance upon instructions taken by an employee of the lawyer is to be avoided in these circumstances. At the very least, the lawyer should interview the will-maker when execution is to take place, in order that the lawyer may satisfy himself or herself that the provisions in the will do in fact represent the free determination and choice of the will-maker. When conducting any interview for instructions or execution, the lawyer should be alone with the will-maker.

Apart from whether or not fraud, force, fear or undue influence has been brought to bear upon the will-maker, the person propounding the will, in addition to proving compliance with the formalities of WESA, must establish both:

(a) that the will-maker possessed the requisite capacity; and

(b) that the will-maker knew and approved of the contents of the will.

It is important to note that while a will-maker who is incapacitated cannot “know and approve” of the contents of the will, it is possible to have a will-maker who does satisfy the test for capacity, and nevertheless does not “know and approve.”

In Oates v. Baker Estate, [1993] B.C.J. No. 406 (B.C.S.C.), the will-maker, who suffered from the AIDS virus, made out a new will one month before his death. The solicitor took “exemplary” care while intervals) and in whose presence those instructions are received.

Preferably instructions will be taken from the client before the onset of dementia; however, if not, the solicitor should be concerned particularly with the client’s first language and whether the client is deaf or has any other language or hearing impairments. A client who is blind, under stress, and has language difficulties may need to be even more aware of his or her delivery. The solicitor should be concerned particularly with the client’s first language, is either to send the client to a solicitor who does speak that language, or if that is not possible, employ an interpreter. If the will-maker is deaf consider referring the client to a lawyer who is deaf, or if that isn’t possible, employ an interpreter. If you take the latter course, it is better to avoid having a

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member of the will-maker’s family act as interpreter, if that is at all possible.

When there are suspicious circumstances, the particular importance of these procedures increases. When examined, the circumstances may reveal that force, fear or undue influence were present and deprived the will-maker of a genuine intent. Even if those elements are absent, the circumstances may be enough to show that there was “no approval.” For instance, if the person who conveys the instructions to the lawyer is a beneficiary, especially if he or she is a substantial beneficiary, and the lawyer does not personally speak with the will-maker, there is a grave danger that the real intentions of the will-maker will not be reflected in the will. The courts have consistently stated that it is the lawyer’s duty to flush out and to examine suspicious circumstances by way of personally interviewing the will-maker. Consider the difficult position of the propounder seeking to discharge the burden of proving there was “approval”, if this talk between the solicitor and the will-maker did not take place. See the Litman and Robertson article at (1979), 4 E.T.R. 136 in which the authors suggest that the lawyer who fails to discharge his or her duty in suspicious circumstances may be liable to disappointed beneficiaries under the failed will. Consider also the comments of Sopinka J. in Vout v. Hay, [1995] 2 S.C.R. 876 at §3.07.

§3.06  Burden of Proof—Testamentary Capacity

Notwithstanding the various “tests” enunciated in the cases, the question of testamentary capacity will always be one of degree and the lawyer will need to use judgement.

No particular type of evidence as to incapacity is likely to be conclusive, except in the “extreme cases” referred to earlier. For instance, the mere fact that a will-maker has been declared “incapable of managing his affairs” in a committeeship proceeding does not preclude him or her from having testamentary capacity (Royal Trust Company v. Rampone, [1974] 4 W.W.R. 735 (B.C.S.C.)). It may be, as in Rampone, that the will-maker has “good days and bad days.” A will may be made during a lucid interval. The nature of the mental health issue may not be sufficient to affect the will-maker’s memory and understanding (O’Neil v. Royal Trust Co., [1946] S.C.R. 622). With respect to incapacitating delusions, the question is not “could the delusions possibly have an influence upon the disposition to be made,” but rather “did the delusions in fact influence or affect the disposition actually made?” (McIntee v. McIntee (1910), 22 O.L.R. 241 (Ont. H.C.)).

If the solicitor has doubts about the existence of testamentary capacity, he or she should have a medical doctor, preferably the attending doctor or hospital physician, give an opinion as to capacity. If possible, the doctor should also be present when the will is executed (Re Kaufman (1961), 27 D.L.R. (2d) 178 (Ont. C.A.)).

While the doctor’s opinion or presence when a will is being executed (even his or her witnessing the will) does not mean that there can be no attack later upon the will-maker’s capacity, in practice it will make it much easier for the propounder to discharge the burden of proof that the will-maker had capacity.

The test for testamentary capacity is ultimately a legal and not a medical one. Thus, it is important for the solicitor to focus the physician’s attention on the requisite elements for testamentary capacity. For instance, if asked simply whether an individual has capacity, a doctor may provide a general opinion based on the apparent understanding of the will-maker, without inquiring into the possibility of any incapacitating delusions. A declaration of incapability as to the management of one’s affairs, which doctors are accustomed to provide in committeeship proceedings, will not be conclusive of a lack of testamentary capacity.

It may also be advisable to obtain a mental status examination (W.G. Estate v. T.G., [1998] B.C.J. No. 2369 (B.C.S.C.)). An examination is particularly desirable in cases of progressive dementia, such as Alzheimer’s disease. A medical specialist who is knowledgeable about diseases that impact memory and understanding can often provide useful objective evidence. However, the evidence of lay people as to their conclusions may be accepted (Re Schwartz (1970), 10 D.L.R. (3d) 15 (Ont. C.A.); aff’d (1971), 20 D.L.R. (3d) 313 (S.C.C.)).

The following cases illustrate some further steps a solicitor may pursue in order to substantiate testamentary capacity.


   Interview the will-maker with sufficient depth; make enquiries about the possibilities of specific assets being given to specific relatives, friends or charities.

   Ensure that the enquiries are not too general regarding the nature and extent of the will-maker’s property.

   Ascertain the value of the will-maker’s main assets and whether those assets are encumbered.

   Discuss with the will-maker the effect of the purported will and the legislation which might have an effect on the proposed disposition.

   Take reasonable steps to ascertain the existence of suspicious circumstances; for example, determine whether the will-maker’s proposed will departs substantially from previous express testamentary intentions.

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Be sensitive to the existence of suspicious circumstances. Here the will-maker was a 78-year-old man who was seriously ill and exhibiting signs of mental dysfunction. The court stated:

The solicitor appeared to treat the matter as if he was acting for a man in good health and in full command of all faculties, although he knew or became aware of the sensitive situation into which he had been introduced.


Obtain reliable information upon which an objective assessment of mental capacity can be made. Ensure that an interested party is not present during the interview.


It is best to meet personally with the will-maker for the will’s execution, particularly where the will-maker is ill and hospitalized when he or she signs the will.

A lawyer should keep notes, not only of the will-maker’s instructions, but also of any observations the lawyer made concerning the will-maker’s capacity while instructions were being given. These notes should be kept on file after the will has been executed (and even after probate of the will). If the lawyer hasn’t recorded observations while with the will-maker, the lawyer should do so immediately afterwards. The lawyer should also record his or her observations of the will-maker’s state of mind at the date of execution.

The lawyer should also do a memorandum to file of all medical advice sought and received and of the circumstances in which the instruction-taking and execution took place. If time permits, the lawyer should obtain a letter of opinion from the physician substantiating his or her views. Alternatively, the lawyer should have the physician endorse the patient’s chart. In extreme circumstances, the lawyer may wish to electronically record his or her interview with the will-maker (*Re Wright Estate* (1981), 13 Sask. R. 297 (Surr. Ct.)). It is part of the solicitor’s duty, as the judge said in *Murphy v. Lamphier*, supra, “to satisfy the Court that the steps he took were sufficient to warrant his satisfaction.” The lack of a mental status report, or of solicitor’s notes (either of the solicitor’s own observations of the will-maker, or of his or her discussions with the will-maker’s doctor, relatives or old friends), could deprive the court of extremely pertinent contemporary evidence if capacity were later called in question. See also *Re Worrell*, [1970] 1 O.R. 184 (Surr. Ct.).

Drugs and alcohol may deprive a person of testamentary capacity. While inebriation is a condition most can recognize, this is by no means true in the case of drugs. The practical problem most likely to confront the lawyer is the prospective will-maker who is receiving medication. Before taking instructions, the lawyer should ask the attending physician about what effect the particular treatment may have upon the mind and memory of the patient. If there is any possible effect, the lawyer should ask that such treatment be suspended for the necessary time before giving the instructions. In this way, the mind of the will-maker will be as free as possible of any drug influence during the instruction giving period. If the lawyer is medically advised that the drug treatment cannot be suspended, he or she may still proceed if satisfied on the advice of the physician that testamentary capacity will not be adversely affected. More considered judgment is called for if the drug has an influence that cannot be avoided at any time during the medication cycle.

The lawyer may encounter an extreme situation where the will-maker had capacity at the time when he or she gave instructions to a lawyer, but has only limited powers of understanding at the time of execution. Provided the will-maker is capable of understanding on a later occasion that the document before him or her contains the instructions that were given earlier, that will be sufficient. Even though the will-maker may not be able to repeat or comprehend the instructions on a later occasion, nor ascertain that the document for execution does indeed represent those instructions, the rule in *Parker v. Felgate* (1833), 8 P.D. 171 requires only that the will-maker should be able to think thus far:

I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.

The rule is narrowly construed to prevent abuse; it may not apply to a situation other than one in which instructions have been given directly to the lawyer and it is that lawyer who himself or herself attends on execution (*Battan Singh v. Amirchand*, [1948] A.C. 161 (P.C.) and commentary by M.M. Litman at (1979), 4 E.T.R. 136). For an application in British Columbia of *Parker* and *Battan Singh*, see *Re Mcphee* (1965), 52 D.L.R. (2d) 520.

Where the will-maker possesses the required powers of understanding and memory when he or she gives instructions to the solicitor, but there is a possibility of a later and rapid decline of mental condition before execution of the prepared will can take place, it is wise for the solicitor to have the will-maker sign the instructions and witnesses attest that signature. Even the limited capacity required by the rule in *Parker v. Felgate*, supra may have gone by the time the lawyer is ready with the prepared will.
Those propounding the will must establish that the will-maker knew and approved of its contents. In ordinary circumstances (as opposed to suspicious circumstances), the knowledge and approval of a will by the will-maker will be sufficiently established by proof of capacity and proper execution.

A review of the case law suggests that there are the following rules with respect to the burden of proof of testamentary capacity:

1. The primary burden lies with the propounders who “must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable [will-maker]” (Barry v. Butlin, [1838] 2 Moo. P.C. 480).

2. If the will is rational on its face, it is presumed that the will-maker was capable at the time when it was made.

3. If the person attacks the will on grounds that rebut the presumption, the burden is on the propounder to establish that notwithstanding that general incapacity, there was adequate capacity at the time the will was made.

4. If the will is irrational on its face, there is a presumption that the will-maker did not have adequate mental capacity so that those propounding must satisfy the court of the will-maker’s capacity at the time the will was made. It may of course be moot whether a will displays mere eccentricity as opposed to irrationality.

5. The burden is an evidentiary one in accordance with the civil standard.

§3.07 Suspicious Circumstances

A lawyer must be particularly vigilant for “suspicious circumstances.” Practitioners must develop a “sixth sense” to alert them to any circumstances surrounding the execution or preparation of a will which “individually or cumulatively” casts doubt upon the will-maker’s capacity to make a will or his or her knowledge and approval of the will’s contents.

1. Test

Circumstances that courts have found to be suspicious include:

(a) physical or mental deterioration;
(b) secret preparation of a will;
(c) “unnatural” dispositions;
(d) involvement of beneficiaries in will preparation;
(e) lack of control of personal affairs by the will-maker;
(f) drastic changes in the personal affairs of the will-maker;
(g) isolation from friends and family;
(h) drastic changes in the testamentary plan of the will-maker; and
(i) physical, psychological or financial dependency on the beneficiaries.

When suspicious circumstances exist, it is not enough for the lawyer simply to have the will-maker confirm his or her instructions. If the will-maker’s mental health is deteriorating, it is particularly important to ensure that the will-maker is not simply responding to a series of leading questions about the contents of the will. The will-maker may be very practised at anticipating and providing the desired response through picking up a combination of verbal and non-verbal cues. Even experienced practitioners are surprised to find difficulties in comprehension when the will-maker is asked to explain the disposition scheme in his or her own words. Judicial determinations make it clear that the conduct of the lawyer’s enquiries and the responses to those enquiries will be closely examined to determine whether the mind of the will-maker was free and unfettered.

The lawyer must explore in detail such matters as:

(a) Is the will rational on its face?
(b) Have any potential beneficiaries of equal degree been excluded or forgotten?
(c) What did the previous will provide?
(d) What precisely are the reasons for the changes at this time?
(e) Do those reasons dispel any suspicion arising from the circumstances?
(f) What assets comprise the overall estate?
(g) Where does the will-maker bank?
(h) Does he or she own any real property?
(i) What is the estimated size of the residue after the payment of debts and legacies?
(j) Can the will-maker give an outline of his or her family tree?
(k) Does the family tree disclose the existence of someone who would be a natural object of the will-maker’s bounty?
(l) Has he or she considered and does he or she appreciate the provisions of WESA?
(m) Is the will-maker taking any medication?
(n) Has anyone suggested the scheme of disposition?

(o) Has the will-maker discussed the scheme of disposition with any beneficiary?

(p) If the will-maker has become alienated from a previous beneficiary, what are the circumstances surrounding that alienation?

(q) Can the circumstances surrounding alienation be objectively verified?

(r) If the will-maker is making dispositions on the basis of care and assistance provided to him or her, is his or her memory sufficient to evaluate that assistance in the context of assistance previously given by others?

(s) Is there someone with whom the solicitor can speak to verify the family relationships?

The particular circumstances will suggest what additional enquiries should be made.

When the solicitor comes to the conclusion after seeking out and considering all the evidence, especially an unambiguous medical opinion, that the will-maker lacks testamentary capacity, and the will-maker (whether with or without this information) remains anxious to make a will, the solicitor is clearly placed in a difficult professional position. The situation seems to call for the solicitor’s own reasoned judgement in the particular circumstances. The solicitor must consider that to refuse to take instructions may cause considerable distress to the would-be will-maker, all evidence of incapacity is opinion until a court has ruled on the matter, and the lawyer should give the benefit of any doubt to the will-maker.

The trial judge in *Hall v. Bennett Estate* (2001), 40 E.T.R. (2d) 65 found a lawyer to be negligent when he failed to draw a will for a will-maker who frequently drifted into unconsciousness as the lawyer attempted to obtain instructions from him. The lawyer successfully appealed the decision. The Ontario Court of Appeal held that the relevant question to ask on the issue of solicitor liability is whether a reasonable and prudent solicitor could have concluded that testamentary capacity was absent (*Hall v. Bennett Estate* (2003), 50 E.T.R. (2d) 72 (Ont. C.A.)).

In some circumstances, the lawyer may be convinced that to draw a will for the client would only lay the groundwork for a lengthy probate action at the expense of the estate. The lawyer may think that by drawing a will, he or she would simply be charging a fee for an act that he or she believes would be void. If the solicitor is convinced (on strong evidence) that no testamentary capacity exists, the lawyer can reasonably refuse to draw a will for the client.

In difficult cases it may be appropriate to retain a second lawyer with experience in the wills area to provide a second opinion. If a will is ultimately prepared, both lawyers should attend on execution of the document. It can only assist the court in its ultimate determination to have not only the medical evidence available, but also the evidence of two practitioners mindful of the legal principles involved.

2. Burden of Proof

When a will is prepared under circumstances that raise a well-grounded suspicion that it does not express the mind of the will-maker, the propounders of the will face a burden of proof to remove the suspicion by proving knowledge, approval testamentary capacity, or both. The evidence must be carefully evaluated in accordance with the gravity of the suspicion raised (*Barry v. Butlin* (per Sopinka J. in *Vout v. Hay*, [1995] 2 S.C.R. 876)).

In *Vout v. Hay*, the Supreme Court of Canada examined the doctrine of suspicious circumstances and what effect it has upon the burden of proof. This has become the leading decision on the issue.

The will-maker, Hay, was an unmarried 81-year-old man who was murdered while living alone on his farm. The appellant, Vout, the executor named in the will, was a 24-year-old woman who was unrelated to the will-maker. Apparently, the appellant and the will-maker had been friends for several years, as the appellant had helped Hay on the farm. There was no evidence that the friendship was any more intimate. None of Hay’s relations were made aware of Vout, despite their frequent contact with the deceased.

Under a will dated in 1985 (three years before his death), Vout inherited one farm and the residue of the estate, while the respondents, Hay’s relations, inherited another farm and some minimal cash. The respondents challenged the validity of the will dated 1985, putting forward a previous will, dated 1966, and raised the question of Vout’s involvement in preparing the will (which she had lied about according to an interpretation of the evidence). Moreover, they challenged the veracity of Vout’s testimony as there were discrepancies between what she had told the police when questioned while a suspect to the murder and her testimony at the trial.

Witnesses testified as to Hay’s self-reliance, independence and to the fact that he was not easily influenced. On this basis, the trial judge concluded that the will-maker had the requisite capacity, that the will had been duly executed, and that there was no undue influence. The Court of Appeal set aside
the trial judge’s decision, stating that the trial judge erred by considering only the mental competence of the will-maker and failing to determine whether “suspicious circumstances” existed. If there had been a finding of suspicious circumstances, the burden would have shifted to Vout to disprove undue influence. A new trial was ordered. Vout appealed to the Supreme Court of Canada.

Sopinka J. for the majority held that the Court of Appeal had erred and that the trial judge had properly considered the doctrine of suspicious circumstances. In so doing the Court stated at paras. 26, 27 and 28:

. . . The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the [will-maker] to make a will. Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a [will-maker] who appeared to understand it, it will generally be presumed that the [will-maker] knew and approved of the contents and had the necessary testamentary capacity.

Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

It might have been simpler to apply the same principles to the issue of fraud and undue influence so as to cast the legal burden onto the propounder in the presence of suspicious circumstances as to that issue… Nevertheless, the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will. They, therefore, bear the legal burden of proof … Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will … It should be noted that the challenged will had been prepared by the legal secretary to a lawyer who had previously acted for Vout’s parents: although executed in the lawyer’s office and witnessed by another secretary, the lawyer was not involved.

[§3.08] Undue Influence

1. Test

The intention of the will-maker to make a will includes the requirement that his or her intention is genuine. If any provision of the will was due to force, fraud, fear or undue influence brought to bear on the will-maker by another person, this genuine intention does not exist.

2. Burden of Proof

The propounder of the will must prove that the formalities of making the will were followed, that the will-maker possessed the requisite capacity to make the will, and that the will-maker knew and approved the contents of the will.

A party alleging undue influence in a proceeding must show only that a person other than the will-maker was in a position where there was the potential for dependence or domination of the will-maker. The propounder then has the onus of showing that the person did not exercise undue influence over the will-maker (WESA, s. 52).

No presumption arises because of any particular relationship between the will-maker and a beneficiary. Note, in the words of Sir J.P. Wilde in Hall v. Hall (1868), L.R. 1 P & D 481: “persuasion is not unlawful, but pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment of the will-maker, will constitute undue influence.” The attack will fail if there is insufficient affirmative evidence of undue influence to displace proof of knowledge and approval by the propounders (which must only meet a balance of probabilities test). For this reason those alleging undue influence will almost invariably also put testamentary capacity in issue.
Allegations of undue influence, like those of fraud in other proceedings, should not be made lightly and if made on insufficient evidence, may result in the attacker (and perhaps his or her solicitor) being penalized in costs.

In the case of the estate of a First Nations person, the Minister has the power to declare a will void if he or she is satisfied that there was undue influence or that the deceased lacked capacity at the time the will was signed: s. 46(1)(a) and (b). For more on the voidance of wills of First Nations persons see §20.10 of the *British Columbia Probate and Estate Administration Practice Manual* (Vancouver: CLEBC).

### [§3.09] Further Reading

For a more detailed analysis of testamentary capacity consult texts, manuals and journal articles on wills, such as the following:


For a general discussion of various types of dementia, the mental status examination, and mini-mental status examinations, see K.I. Shulman, “Medical Conditions that May Affect Testamentary Capacity” (1995) 14 Est. and Tr. Journal 347.

Refer to Rodney Hull’s articles at 1 E.T.Q. 122 and 3 E.T.R. 74 for a practical discussion of case organization, and to Chapter 15 of the *British Columbia Probate and Estate Administration Practice Manual* (Vancouver: CLEBC), which sets out the procedure in British Columbia for proof in solemn form.
Chapter 4

Preparing a Will

[§4.01] Introduction to Preparing a Will

Although a will is merely one component of a client’s overall estate plan, preparing it constitutes one of the most difficult and challenging aspects of a lawyer’s practice in the estate planning field. To begin with, the lawyer needs an understanding of a broad range of legal principles. In addition, the drafting skills necessary to produce a will present at least three unique difficulties.

First, unlike practice in commercial transactions, will drafting has no aspect of the bargain between competing individuals that results in the careful scrutiny of the legal documents by parties opposed in interest. Second, it is necessary to take into account contingencies that are not ordinarily apparent to non-lawyers (for example, an unexpected order of deaths). Third, and most significantly, difficulties arise from the fact that wills are interpreted by the court only after the will-maker dies.

Under s. 58 of WESA, the court has the power to order that a document or “record” be effective to make, alter, revoke, or revive a will even if the formal requirements for making, altering, revoking, or revive a will have not been complied with. In addition, under s. 59 of WESA, the court has the power to rectify errors in a will so as to meet the will-maker’s intentions. Practitioners should preserve correspondence, notes, instructions, and other evidence of their client’s intentions. Practitioners should also warn their clients of the danger that notes, emails, or other expressions of thought may inadvertently alter or revoke a will and that such “musings” should be clearly marked as “draft.”

Proper will planning requires a delicate balance to be maintained between implementing a client’s instructions and advising the client on how his or her real, as opposed to perceived, estate planning goals can be best achieved. The unique difficulties of will drafting require close coordination between the lawyer and the client. The lawyer is not a mere scribe. The client usually understands the needs and circumstances of his or her family but the lawyer must advise the client of the legal and practical implications of meeting those needs. The lawyer must also assist the client in developing a will plan that will deal with contingencies and avoid pitfalls that the client might not have foreseen.

[§4.02] Taking Instructions

1. Taking Instructions Directly

When taking instruction for the preparation of a will, it is important that the lawyer take the instructions directly from the client. In addition it is preferable to meet with the client in person to receive those instructions. As well, where possible the lawyer should meet with the client alone. If this is not possible, the lawyer should obtain confirmation of the instructions from the client directly, and alone or at least in a setting that is conducive to the client being able to freely and fully describe his or her circumstances and express his or her wishes. Generally it is not prudent to take will instructions in the presence of a beneficiary.

In circumstances where a couple want to make wills at the same time and wish to be present with each other for the entire process, the lawyer must inform both that there is no solicitor-client privilege between the lawyer and each of them and that the lawyer is obliged to inform both of any information or instructions that the lawyer receives or gives to either. The lawyer should communicate this from the outset and determine if the couple would prefer to retain separate lawyers.

The lawyer, rather than the paralegal, should be involved in the direct taking of instructions because part of the will preparation process involves not only obtaining the client’s information and wishes but also providing legal advice from the lawyer as to how best to effect those wishes and the legal consequences of the particular objectives.

In some circumstances, it may be prudent for the lawyer to obtain the client’s consent to secure information and to review the will plan with the client’s other advisors (e.g. accountant, financial planner, foreign lawyer, etc.).

2. Making Notes of the Meeting

Making complete notes of will instructions and retaining them as part of the permanent will file is good practice. The extent of the notes that are made may depend on whether certain issues are identifiable at the time the lawyer meets with the client. If the client is elderly or ill at the time the instructions are taken, the lawyer should consider whether the client has testamentary capacity and reflect that evaluation in his or her notes. If the dispositions contained in the will are likely to be contentious amongst the client’s family, the lawyer’s notes

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should record the client’s intentions and rationale for the particular distribution scheme. The recording of the client’s intentions is also important in the event that there is subsequent litigation where the evidence of the will-maker’s intention is admissible. The practitioner’s notes will also be important if an application is required under s. 58 of WESA because the will-maker dies after giving instructions but before executing the will, or if an error in the will needs to be rectified under s. 59.

3. Obtaining Background Information

It is important to understand the family of the will-maker and the relationships he or she has in order for the lawyer to determine which persons might have legal claims against the estate. For example, a client may not appreciate that he or she is in a common law spousal relationship or that there is a child who has been dependent upon the client who could assert a claim for maintenance and support from his or her estate.

It is important to consider not only the will-maker’s family structure at the time of the taking of the instructions but also into the future if death clearly is not imminent. This affects the provisions that might be made in respect to whether certain trusts should be established, who should be remaindermen of a life interest in the estate or part of it and what contingencies might need to be considered.

Often it is helpful to review the earlier will of the client, if available, to identify provisions that the client wishes to keep and to alter.

If the client is a First Nations person, the lawyer should consider carefully whether a particular asset is located on reserve. This fact could have significant repercussions for tax planning and transmission, especially if it is real property. Under s. 50 of the Indian Act, land on reserve cannot be left to a person who does not have a right to reside on the reserve. For more information about the special status of real property, see the British Columbia Probate and Estate Administration Practice Manual §20.13. See also S. Evans, “Aboriginal Estates—Policies and Procedures of INAC, BC Region”, published in the Practice Points area of the CLE website at www.cle.bc.ca.

4. Ascertaining the Assets and Liabilities

It is important to know the client’s present financial circumstances, even though the will may not take effect until long into the future. This enables the lawyer to determine the appropriateness or comprehensiveness of the will as the estate planning vehicle. For clients whose death is more imminent, it is even more critical for the lawyer to be aware of the nature of the assets and liabilities and their values in order to ensure that the dispositions under the will are effective to achieve the will-maker’s wishes.

The starting point is to understand what the client owns, what the nature of the interest owned is, and whether that asset would form part of the estate on death. To do this, it is advisable for the lawyer to review original documentation regarding the asset ownership (for example, brokerage statements, insurance designation forms) or conduct an investigation (for example, company or title search). Understanding title ownership to assets, direct beneficiary designations that might apply to assets and legislative schemes that govern disposition of assets (such as pensions) is necessary to determine what a client has to dispose of under his or her will. This will better ensure that the lawyer is able to create an estate plan that reflects all of the client’s testamentary wishes. For the same reason, having a clear picture of the testamentary liabilities, including contingent liabilities such as guarantees, is also a useful part of this exercise.

Knowing the scope and ownership of assets and the extent and nature of liabilities is necessary in order to provide tax advice on the manner by which the client is seeking to arrange his estate under his will. For example, where the client wishes to make specific bequests of personal assets or devises of real property that are encumbered (for example, mortgaged) or subject to tax on disposition (for example, RRSP) then knowing the liabilities ensures that the lawyer addresses with the client whether the recipient of a specific gift or the estate is to bear the responsibility for the debt associated with the asset.

In circumstances where a client is reluctant to disclose information about his or her wealth, and the lawyer cannot convince the client otherwise, the lawyer should inform the client that the will may not end up reflecting the client’s testamentary wishes and that the lawyer cannot provide relevant legal advice. Qualification should be expressly communicated to the client and noted in the lawyer’s client file.

5. Providing Basic Information to the Client

It is good practice for a lawyer to discuss with the client some administrative matters relating to the use of a will as an estate planning tool at the same time the lawyer is taking instructions for preparing a will. Areas that should be discussed, depending on the sophistication of the client and the particular circumstances and testamentary wishes, might include:

- the application and calculation of probate fees;
• the availability and purpose of the registration of the will with the Department of Vital Statistics;
• the alternatives available for the storage of the original will;
• the basis upon which the fee to the client will be charged;
• the possible preparation of other estate and personal planning tools, such as a power of attorney, representation agreement, inter vivos trust, deed of gift, property transfer documents;
• the general probate process; and
• the advisability of informing third parties about the will or its contents.

6. Naming Executors and Trustees

(a) Appointment

Clients will generally have a person(s) in mind for the roles of executor and trustee, although they may not fully understand the role themselves. The lawyer should explain to them that the executor is responsible for the administration of the estate and the trustee is responsible for administering any trusts created under the will. The two positions are usually held by one or more persons acting in both roles but in some cases it may be prudent or appropriate to name a different person as trustee of some special trust created under the will. Also, if the will provides for more than one testamentary trust, different persons may be appointed as trustees for the different trusts.

An executor’s duties include arranging for the funeral and disposition of remains, collecting and protecting estate assets until distribution, conversion of assets to money where appropriate, payment of debts of the estate and distribution of estate to the beneficiaries or trustees as directed under the will.

Because of the risk of personal liability and the onerous and time-consuming nature of the job, many people are reluctant to act as an executor. The will-maker should approach them before the will is executed.

A typical will-maker may find his or her choice of executors to be one or more of the following:

(i) One or More of the Residuary Beneficiaries

This is appropriate in most circumstances as they are the recipients of the estate, except possibly where:

• a beneficiary resides outside of the province;
• the residuary beneficiary is a charity or a minor;
• there is an anticipated dispute amongst beneficiaries; or
• the estate is of a complex nature requiring special expertise on the part of the executor.

(ii) Spouse

This is usually the appropriate choice when the whole of the client’s estate is left to the surviving spouse.

When the spouse is the life tenant of a trust, the client should consider naming the spouse to act as one of the co-trustees. The advantage of appointing the spouse to act as one of the co-trustees of a spouse trust is that he or she has a role in the exercise of any discretion, particularly where there is a right to encroach on capital in favour of the spouse. The disadvantage may be the possibility of actions taken to frustrate the other co-trustees, which could be eliminated by an odd number of trustees, with a direction that the spouse’s views be considered by the trustees, together with a majority rule provision to avoid a deadlock.

Note that, under s. 56 of WESA, the appointment of a spouse as trustee or executor is revoked if the will-maker and his or her spouse cease to be spouses as set out in s. 2(2) of WESA, unless a contrary intention appears in the will.

(iii) Adult Children

It may be advantageous to name children who are beneficiaries as a way of reducing the costs of administration. However, the appointment of a number of children, or children and a spouse who is not the parent of the children, can be problematic. It is a rare case where step-children and spouses can happily work together as co-trustees of spousal trusts.

(iv) Close Relatives and Friends

When the client is concerned about avoiding acrimony among the beneficiaries, one option is to appoint a person or persons close to the family but who is not a beneficiary. The lawyer should ask the client about possible conflicts of interest between the suggested executor and the
beneficiaries and avoid an appointment where potential conflicts exist.

(v) Business Associate or Professional Advisor

The choice of a business associate, lawyer, accountant or other professional to act alone or together with a beneficiary is often appropriate where additional expertise is required or where the presence of a neutral party may be of assistance in the administration of the estate or trust. When the client chooses a professional as one of the executors or trustees, the lawyer should talk with the client about what they would like to do regarding remuneration for the professional. As well, it is usually helpful to canvass the professional to determine his or her willingness to act on that basis. Many professionals will prefer that they be compensated based on their normal professional fees and not on the basis prescribed by the Trustee Act.

Clients need to be fully and properly informed regarding succession of executorship. Ordinarily this is best addressed through providing for the appointment of an alternate executor in the will. Where a professional is being appointed as one of the executors, the client may wish to specifically provide for the appointment of a replacement professional. Depending upon the nature of the estate, the complexity of the will and the particular wishes of the will-maker, the executor appointment clause can be quite complicated.

(vi) Lawyers

Lawyers, and in particular the solicitor preparing the will, are often asked by clients to be their executor and trustee. Before doing so, the lawyer should consider the extent of his or her liability coverage for performing the duties of executor and trustee; whether acting would place the lawyer in a conflict in respect of the estate in the future; and the remuneration that the lawyer would be entitled to receive. Since, ordinarily, the law prohibits a witness to a will from receiving a benefit under the will, a lawyer appointed as executor who also witnesses the will cannot be remunerated under a charging clause in the will that permits the lawyer to receive remuneration on the basis of the lawyer’s professional fees for providing legal services to the estate, unless the court orders otherwise under s. 43 of WESA. In that case, the lawyer’s remuneration will be limited to the amounts set out in the Trustee Act. Law firm partners are similarly prejudiced.

(vii) Corporate Executor

In some cases, it will be appropriate for the client to appoint a trust company either to act alone or as one of the executors/trustees. This is especially so when:

- the nature and complexity of the assets require the experience, expertise and skill of a trust company;
- the duties of the administration are likely to be too onerous for individuals;
- there are assets to be held over a period of years and continuity in the administration, which can be provided by a trust company, is required;
- the will-maker wishes to take advantage of the security (for example, retaining valuables), protection against default (for example, negligence) that is offered by a trust company; and
- there is a high probability of a dispute or conflict due to the particular makeup of the family members.

The lawyer should also advise the client of the limitations of appointing a trust company over an individual who is familiar with the will-maker and the will maker’s family, which may include the following:

- Trust companies may be limited in how they can deal with decisions that require the exercise of discretion in relation to the administration of a discretionary trust. Therefore, the joint appointment of a family member or close friend to give guidance to a corporate trustee may be appropriate.
- Trust companies will have demands as to their fees before they will agree to act and these arrangements should be, where possible, secured when the will-maker is making his will.
- The statutory limits for remuneration under the Trustee Act may make it difficult to have both a trust company and other individuals appointed together to act as trustee.
(viii) Specific Executors for Foreign Assets

When the client owns assets in foreign jurisdictions which pass under the British Columbia will, it is important to consider whether the executor named in the will is the appropriate person to deal with the foreign assets or whether it is better to appoint an executor in that foreign jurisdiction to deal specifically with the foreign assets.

(ix) Numerous Executors

There is no legal limit on the number of executors that may be appointed. However, there is a practical consequence to the efficiency, cost and effectiveness of having more than one executor and trustee. With respect to executors who do not need to act unanimously (except with respect to matters concerning real property), the actions of one executor binds the other, even if that action has not been approved by the others. With respect to trustees, they are required to act unanimously on all trustee matters, unless the will provides otherwise. The potential for lack of agreement and conflict amongst the executors/trustees is a practical consideration for not having too many act at one time. Even the largest of estates do not warrant more than five executors and generally three is sufficient in circumstances where more than one or two executors are thought to be required. The appointment of alternates is a possible answer to the problem of excessive numbers of trustees.

(b) Compensation

It is important to advise the client that an executor/trustee is entitled to statutory compensation, even if the will is silent, on the basis set out under the Trustee Act, unless the will expressly provides otherwise or there is a contractual arrangement between the will-maker and the executor separate from the will. The compensation of executors and trustees is paid out of the residue of the estate and, therefore, any estate accounting and claim for remuneration is to be approved by the residuary beneficiaries unless there is a governing contract between the will-maker and the executor.

When the executor or trustee is also a beneficiary of the estate, the lawyer should confirm with the client whether the client intends that the executor or trustee receive remuneration in addition to the gift made to the person under the will. In some circumstances, the law will presume that the gift under the will to the executor or trustee is to compensate the executor or trustee for acting, unless the will provides otherwise.

The lawyer may also alert the client to the possibility of securing a fee agreement that provides for the amount of remuneration and the timing for payment of remuneration. The fee agreement can be set out in the will or in a separate document incorporated by reference in the will. This fee agreement may be agreed to by the executor/trustee during the will-maker’s lifetime or on death if the executor/trustee accepts the appointment and commences acting under the will.

7. Naming Beneficiaries

(a) Spouse and Children

If the client informs the lawyer of intended beneficiaries of his or her estate, and they do not include the client’s married or common law spouse (of the same or opposite sex) or children, the lawyer needs to inform the client of the possible legal and moral obligations owed to those persons and their entitlement to apply for a variation of the will pursuant to WESA (see Chapter 19). If the client’s exclusion of his or her spouse and children is intended, then the lawyer should consider whether the will is the appropriate planning tool for the client or whether the client’s interests are better met with planning devices that are not subject to judicial variation. If the will remains the appropriate planning tool, then the lawyer should consider preparing a memorandum of the client’s reasons, which may be used to clarify the will-maker’s rationale if an application for variation is ultimately brought.

(b) Separated Spouse

If there is provision in a will for a spouse and the will-maker and his or her spouse cease to be spouses under s. 2(2), the gift is automatically revoked. If the client does not intend this result, then the lawyer must draft a provision that expresses a contrary intention; namely, that the benefit is conferred notwithstanding the occurrence of the events under s. 56 of WESA that would revoke the gift.

(c) Complex Families

If the client’s family involves complex arrangements (such as a second spouse and children from a first spouse, children from separate spouses, stepchildren, common law relationships, married but separated spouses), the lawyer should make sure that the lawyer advises the client as to the various problems that
certain dispositions can create. For example, having the children from a first marriage as the trustees of the spousal trust for a second wife might create practical problems. Children to whom the will-maker stood as parentis in loco, though they may have rights against the will-maker in the event of a relationship breakdown, do not have rights to seek a share of the will-maker’s estate, notwithstanding that they have been supported by the will-maker.

(d) **Minors**

If the client names beneficiaries who may be minors at the time the will takes effect, the lawyer should advise the client as to the implications of this. The client may wish to create a trust for any gifts to minors such that the minor does not take the gift until he or she reaches a certain age. If that age is beyond the age of majority, the minor can, on reaching the age of majority, seek to collapse the trust and receive the whole of the gift under the principle established in *Saunders v. Vautier*, unless the will provides for a gift-over in the event that the minor does not survive until the age that he or she is entitled to the whole of the gift.

If no trust is created and no provision is made to permit the executor to pay the gift to the minor’s guardian, the gift must be paid to the Public Guardian and Trustee, who will retain the funds, as trustee, until the minor reaches majority. During the period of minority, the Public Guardian and Trustee may authorize payment of all or part of the money for the maintenance, education or benefit of the child (s. 14 of the *Infants Act*). However, in practice, the Public Guardian and Trustee may provide for those needs where they cannot be otherwise met, without undue hardship, by the minor’s guardians or some other source.

(e) **Charities**

Many clients, who want to leave a gift to charity, do not have the proper legal name of the charity. The lawyer should advise the client that the lawyer will research the proper name and the lawyer should discuss any confusion where there are similar charities with similar names and make provision for the gift in the event that the particular charity is no longer in existence at the time the will takes effect. The lawyer should also advise the client regarding including a clause in the will to protect the executor in respect of whom at the charitable organization the benefit may be paid.

(f) **Solicitor**

If the client informs the lawyer that the lawyer is to be named as a beneficiary, the lawyer should not prepare the will and have the client seek another lawyer to assist. The lawyer who drafts a will when another lawyer is the beneficiary should inquire into the circumstances of the bequest and clearly record the will-maker’s explanation in order to ensure that the wishes of the will-maker in making such a bequest is upheld in the event of a future challenge.

8. **Tax Considerations**

The lawyer drafting the will should know of the general tax issues and inform the client of those general tax implications arising from death and the manner that the client is disposing of his or her estate under their will. In addition, the lawyer should advise the client to seek specific tax advice from a tax lawyer or tax accountant where the circumstances warrant.

The lawyer should inform the client that while there are no succession taxes per se applicable in British Columbia, assets that pass on death under the client’s will may be subject to capital gains tax and other taxes arising from the deemed disposition of assets on death, including potential double taxation (unless proper planning is effected) on certain assets such as shares in a company.

If the client is a First Nations person with assets located on a reserve, the tax situation for such an estate will be different and the lawyer needs to seek, or have the client seek, specific tax advice.

See also Chapter 14.

9. **Naming Guardians**

In British Columbia a person under the age of 19 is legally an “infant.”

A parent can appoint a guardian of his or her children by deed or by will (s. 53 of the *Family Law Act*). A guardian may appoint a successor guardian. If no guardian is named in a will and no individual is appointed by the court under the *Family Law Act, s. 51 of the Infants Act* provides that the Director of Child, Family and Community Services is the personal guardian of the minor and the Public Guardian and Trustee is the property guardian of the minor.

Appointment of a guardian by a parent under a will might not necessarily be effective on the will-maker’s death, for instance if the will-maker has ceased to be a guardian as a result of a relationship breakdown. The inclusion of such a provision,
10. Enduring Powers of Attorney, Representation Agreements and Committeeship

The onset of mental incapacity seldom happens suddenly, except where caused by a physical trauma or an accident. Sometimes mental capacity diminishes over time; sometimes mental incapacity is characterized by alternating periods of incapability and lucidity. When discussing a will with a client, it is essential to discuss whether the client would also like to plan for these circumstances. Though many clients know about wills and estates planning, many are less familiar with the concept of “personal planning”, that is, making legal arrangements in case of incapacity, for end-of-life and other support needs.

It may be appropriate for the client to authorize other people to make decisions about the client’s financial and personal affairs in the event the client loses capacity by executing an “enduring power of attorney” and a “representation agreement.”

- **Enduring powers of attorney** are the primary tool for personal planning about finances, property, and legal affairs.

- **Representation agreements** are used for personal planning about health care and personal care matters, and can also cover some limited financial and legal matters.

One of the main differences between an enduring power of attorney and a representation agreement is in the duties of those appointed under these agreements. An attorney appointed under the *Power of Attorney Act*, R.S.B.C. 1996, c. 370 must act in the best interests of the adult while taking the adult’s wishes and values into consideration (s. 19(2)). A representative appointed under the *Representation Agreement Act*, R.S.B.C. 1996, c. 4 has the duties set out in s. 16, which give priority to the adult’s wishes, values and beliefs, and are based on the principle of self-determination.

In certain situations, particularly if there is no enduring power of attorney or representation agreement in place, the affairs of an adult who becomes incapable may need to be handled by a committee appointed under the *Patients Property Act*, R.S.B.C. 1996, c. 349, or by the Public Guardian and Trustee, under the *Patients Property Act* and the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6 (collectively, these arrangements are often referred to as “adult guardianship”). As well, if the adult is a registered Indian, the Minister of Indigenous and Northern Affairs may become involved.

A description of each of the personal planning tools, and of other legal arrangements in the event of incapacity, follows.

(a) **Enduring Power of Attorney**

Enduring powers of attorney may be used for planning about financial and legal matters only (not health or personal care matters). At common law, a power of attorney terminates when the principal becomes mentally incompetent. However, under Part 2 of the *Power of Attorney Act*, an enduring power of attorney can be created, which continues to be in effect if the adult becomes mentally incompetent. An enduring power of attorney should state that it is in effect while the adult is capable and that the authority of the attorney continues despite the adult’s incapability. In an enduring power of attorney, an adult may appoint a spouse, family member, trust company or other trusted person(s) as his or her attorney. An adult may make an enduring power of attorney unless the adult is incapable of understanding the nature and consequences of making the enduring power of attorney, as specified in the Act: see s. 12 of the *Power of Attorney Act*.

Note the following points of caution with respect to an enduring power of attorney:

- the attorney (agent) (i.e. the donee of the power) cannot be compelled to act;
- the adult (principal) cannot supervise the attorney’s actions or revoke the power of attorney following the onset of mental incapacity; and
- subject to an express contrary direction contained in the power of attorney, the attorney cannot use the principal’s assets for the benefit of the attorney or others.

The main advantage of an enduring power of attorney is that it allows adults to make their own arrangements in case of incapacity. An enduring power of attorney is also less costly and time-consuming than an application for the appointment of a committee of estate, and can prevent the need for the involvement in the adult’s affairs of the Public Guardian and Trustee (all discussed further below).

Generally, an enduring power of attorney is effective when it is signed by the person and the attorney. However, an enduring power of attorney can also be “springing”, that is, triggered to become effective only if certain events occur (s. 26, *Power of Attorney Act*). In

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2 This section was revised in April 2017 with the kind assistance of Joanne Taylor, Executive Director of the Nidus Personal Planning Resource Centre and Registry, Vancouver, and Hugh S. McLellan, McLellan Herbert, Vancouver.
Section 26 of the Power of Attorney Act confirms that an enduring power of attorney can be made effective when a specified event occurs. If the effectiveness of the enduring power of attorney is to be deferred until a specified event, the enduring power of attorney must provide “how and by whom the event is to be confirmed” (s. 26(2)). For example, the enduring power of attorney might require a statutory declaration from a physician that the person is incapable of managing his or her affairs by reason of mental or physical incapacity. However, it is generally not advisable to make the enduring power of attorney come into effect only on a physician’s confirmation of mental incapacity—as noted earlier in this section, mental incapacity is often gradual or may be interrupted by periods of lucidity, so a physician may be unwilling to sign a form saying the adult is mentally incapable of managing their affairs.

If the person’s spouse is the attorney and their marriage or marriage-like relationship ends, the authority of the attorney under an enduring power of attorney ends unless the document states that the authority continues regardless of whether the relationship ends (ss. 29(2)(d)(i) and (3)). For the purposes of s. 29, a marriage or marriage-like relationship ends when the parties to the relationship are separated within the meaning of s. 3(4) of the Family Law Act (Power of Attorney Act, ss. 29(4) and (5)).

Section 30(4)(d) of the Power of Attorney Act states that an enduring power of attorney terminates if the enduring power of attorney is terminated under section 19 or 19.1 of the Patients Property Act. Section 19 of the Patients Property Act terminates all powers of attorney once the person becomes a “patient” by court order (that is, when a committee is appointed by court order). However, the power of attorney will not automatically terminate where a person becomes a patient by a means other than by court order, including where the Public Guardian and Trustee is appointed as statutory property guardian under the Adult Guardianship Act.

(b) Representation Agreement

Representation agreements can cover both health care planning and personal care matters as well as limited legal and financial affairs. Personal care includes such matters as living arrangements, diet preferences, participation in activities, and contact with others. Note that there is no “default scheme” in legislation for personal care as there is for health care.

A representation agreement may be made under either s. 7 or s. 9 of the Representation Agreement Act. The test for incapability, and the representative’s authorities, are different under each section. A brief description of each type of agreement follows.
A representation agreement under s. 7 (also known as a “Representation Agreement with Section 7 Standard Powers”, or “RA7”) can cover minor and major health care, personal care, obtaining legal services and instructing counsel, and routine management of financial affairs as defined in the Representation Agreement Regulation, B.C. Reg. 199/2001. The test for incapability to make an RA7 (in s. 8) does not specify criteria, but gives examples of factors that must be considered. Adults may make RA7 agreements even if they are incapable of making a contract; managing their health care, personal care, or legal matters; or routine management of their financial affairs (s. 8(1)).

A representation agreement under s. 9 (also known as a “Representation Agreement with Section 9 Broader Powers”, or “RA9”) is the most comprehensive tool for health and personal care matters. It includes the authority to refuse life-supporting health care. An adult must understand “the nature and consequences of the proposed agreement” at the time of signing it (s. 10).

(c) Adult Guardianship by Committee or Public Guardian and Trustee

If personal planning has not been done, then adult guardianship by means of a court-appointed committeeship or the involvement of the Public Guardian and Trustee as statutory property guardian may be necessary. Note that in BC, adult guardianship by these means is considered as a last resort.

Committee

Where an adult becomes mentally incapable, any person may apply to the court to be appointed as a committee of estate (to handle the adult’s financial and legal affairs) or as committee of person (to handle the adult’s health and personal care matters), under the Patients Property Act.

A judge has discretion as to whether to appoint a committee if there is a representation agreement that authorizes the relevant health and personal care matters or financial matters. A court-appointed committee is costly to obtain and difficult to reverse. Because it takes time, an application for a committee is not an effective way to respond to immediate needs or emergency situations.

Public Guardian and Trustee

Where an adult is not capable and decisions need to be made about the adult’s financial and legal affairs, and no one is available to assist the adult, the Public Guardian and Trustee may assume authority as statutory property guardian by way of a certificate of incapability issued under the Adult Guardianship Act. The Public Guardian and Trustee’s authority is governed by the Patients Property Act and the Adult Guardianship Act. Note that the Public Guardian and Trustee’s authority applies only to financial and legal affairs. The Public Guardian and Trustee also reviews the actions of a court-appointed committees of estate.

(d) Authority of the Minister under the Indian Act

Under s. 51 of the Indian Act, the Minister of Indigenous and Northern Affairs Canada (or whomever the Minister appoints) has exclusive authority in relation to the property of a registered Indian who is mentally incompetent. Provincial statutes govern the process by which that person would be declared incompetent.

A registered Indian may also make a representation agreement or an enduring power of attorney in order to plan for the management of his or her affairs in the event of incapacity.

(e) Health Care Decisions When an Adult is Incapable

When a health care provider determines that an adult is incapable of informed consent and health care decisions need to be made, depending on the circumstances, those decisions are made by one of the following:

- a representative under a representation agreement that includes the authority to make decisions on health care matters;
- a committee of person appointed by the court under the Patients Property Act; or
- if there is no representative or committee of person, a temporary substitute decision maker selected by the health care provider under s. 16 of the Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181.

In terms of the relative authority of these decision makers, a representative named in a representation agreement that includes authority for health care matters has more authority than a temporary substitute decision maker. A representative can access information and records about the adult in all areas under the representative’s authority, and may assist the adult at any time and advocate for the adult’s care needs and wishes. An adult may also put their wishes with respect to health care decisions in
writing in a separate document than the representation agreement, and give those to their representative.

A temporary substitute decision maker is part of the default scheme for health care consent under the Health Care (Consent) and Care Facility (Admission) Act, and is only selected when the health care provider determines an adult is incapable of consent and a health care decision needs to be made. A temporary substitute decisions maker has the authority to access information and records about the adult that are relevant to the specific health care decisions at hand.

With respect to committees of person, if a committee is not already in place, obtaining a committeeship is not a particularly effective way to respond to the adult’s immediate needs about healthcare decisions, as it requires a court application and usually takes three to four months.

(f) Advance Directives
An advance directive is a written instruction to give consent or refuse consent to certain health care. The Health Care (Consent) and Care Facility (Admission) Act outlines the requirements for making a valid advance directive. A stand-alone advance directive means a health care provider would follow the instruction if the adult/patient is determined incapable of informed consent for the specific health care decision. If the instruction is not clear enough to follow, the health care provider must select someone to be a temporary substitute decision maker. Advance directives have very limited use as most instructions depend on a variety of factors and it is impossible to predict the future. If clients wish to put instructions or wishes in writing, they should be advised to give these instructions to the representative named in their representation agreement.

11. Using a Memorandum
When there are many specific items to be gifted, the lawyer should advise the client to consider the use of a separate memorandum. There are two types of memoranda: one that forms part of the will, and one that does not.

For the document to be a valid testamentary document, it must be in writing, the will-maker must sign it before the will is executed, and it must be specifically incorporated in the will by reference. The lawyer should advise the client that it is necessary for the assets to be clearly identified in any memorandum incorporated by reference because the memorandum, as a testamentary document, is subject to the same strict rules of construction that apply to a will. Any changes to such memoranda require an amendment to the will and therefore, the lawyer should advise the client of the limitations of the use of such memoranda.

It is also possible to create a memorandum that is not intended to be a legally binding testamentary document, which the will-maker can freely amend as he or she desires, without the involvement of a lawyer. These memoranda can be provided to the trustees to guide them in the exercise of their discretion in respect to the distribution of assets in specie. Such memoranda can go beyond guidance about dealing with distribution of specific assets, such as advising as to the principles that could be used on the exercise of the power of encroachment on income or capital for the benefit of a beneficiary.

[§4.03] Circumstances Requiring Special Consideration

1. Homestead or Dower Legislation
   If the client is domiciled in a jurisdiction in which there is homestead or dower legislation (there is none in British Columbia), consider what effect the rights conferred by such legislation on a spouse may have on his or her ability to alienate his or her property freely.

2. Restrictions on Alienation
   Are there restrictions on alienation of either movables or immovables under the applicable law or by personal covenant?

   Consider, for example:
   (a) community of property;
   (b) joint tenancies;
   (c) limited interest, e.g. estates for life or years, partnership property;
   (d) corporate shares with limitations on transfer;
   (e) franchises;
   (f) currency controls;
   (g) laws restricting absentee ownership of property;
   (h) rules of professional or business associations;
   (i) agreements relating to any of the client’s assets;
   (j) property subject to a lien or charge; and
   (k) property located on reserve.
3. Life Insurance Declarations

Any written and signed document is sufficient to effect the beneficiary designation under a life insurance policy (Insurance Act, R.S.B.C. 2012, c. 1, s. 59). If the will is the instrument used to make a direct beneficiary designation, the lawyer should advise the client to provide the insurance company with notice of the designation in the will. For that reason, it may be prudent to draw the declaration in a separate instrument from the will. Further, if the designation is made in the will, any alteration would require an amendment to the will itself and if the will is revoked, intentionally or not, the designation would be revoked.

4. Registered Retirement Savings Plans and Similar Assets

A person may designate, by will, a beneficiary of a registered retirement savings plan, a tax-free savings account or a registered retirement income fund (ss. 1 and 84 of WESA). Designations may be made by will by specifically identifying the plan(s) or by using general wording to cover all plan(s) (WESA, s. 85).

A person may designate, by will, a beneficiary of an employee pension, retirement, welfare or profit sharing fund, trust or plan (WESA, s. 84). However, a designation by will may not be possible in all circumstances (s. 84(2)). For example, the Pension Benefits Standards Act restricts, in some cases, the right of the will-maker to dispose of pension benefits as certain pre and post-retirement benefits are statutorily provided to a surviving married or common law spouse, including a former spouse, unless there is a specific waiver by the spouse in respect of the statutory entitlements.

5. Charitable Gifts

If the client wants to benefit a charitable organization, be sure that the organization is registered with the Canada Revenue Agency. Be sure also that the correct name of the organization is used in the will, to avoid the expense and inconvenience of an application to court for advice and directions. See the discussion in §1.08 on cy-pres applications.

It is also prudent to include a clause that:

(a) exonerates the personal representative if the gift is paid to a person professing to be an authorized representative of the organization;

(b) relieves the personal representative of any obligation to see to the application of the gift by the charity; and

(c) provides that a gift to a charity may be paid to a successor organization (where the client so wishes).

6. Understanding the Rule against Perpetuities

The common law rule against perpetuities is that any provision that creates a future interest in property is void ab initio if it is not absolutely certain at the outset of the creation of the provision that the vesting of the interest would occur before the later of either 21 years from the death of the will-maker or 21 years from the death of a “life in being” (any person alive at the date of the deceased’s death expressly or by necessary implication mentioned in the will). Examples follow.

A will-maker leaves her estate in trust for her son with a right for him to receive capital and income during his lifetime, with the remainder on his death to be paid to his children who reach the age of 21 years. This provision does not offend the rule against perpetuities.

A will-maker leaves her estate in trust for her son, with a right for him to receive capital and income during this lifetime with the remainder to be paid to his children who reach the age of 25 years. This provision offended the common law rule against perpetuities because it was not absolutely certain that the capital would vest within the requisite time (being son’s life plus 21 years).

The Perpetuity Act did not repeal the common law rule against perpetuities but enacted a number of saving provisions to ameliorate the harsh consequences of breaches of the common law rule. The Act permits a “wait and see” approach to whether the vesting in fact occurs within the time allowed by the common law rule. If the vesting occurs within the time, the provision is effective; if the vesting does not occur within the time, the gift falls into the residue of the estate. Future or contingent interests, at the outset, are presumed valid until the actual events establish that the gift did not vest within the perpetuity period. Additionally, the Act permits an 80 year perpetuity period if the will expressly or by necessary implication provides that the 80 year period is to govern.

The Perpetuity Act, R.S.B.C. 1996, c. 358, applies only to property devolving under the law of British Columbia and not to real property situated outside of the province. Therefore, it is not prudent in most circumstances to create contingent interests that may vest outside of the perpetuity period permitted under common law if there are out of province assets in the estate. However, if provisions are being drafted that may offend the common law rule, you may be well advised to provide that the interest will vest, if it has not vested at the expiration of the 80-year period permitted under the Act or the period permitted by common law, whichever is shorter.
7. Termination, Revocation and Variation of Trusts

A trust may be varied or prematurely brought to an end in one of two ways: under the rule in *Saunders v. Vautier* (1841), 41 E.R. 482 (Ch.) or under the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463.

(a) Termination under *Saunders v. Vautier*

The rule in *Saunders v. Vautier* may defeat a trust created by will or by *inter vivos* grant, in certain circumstances. The rule applies if the trust meets the following conditions:

(i) it gives the beneficiary or beneficiaries an absolute vested gift in the whole of the trust property that is payable at a future event (usually the beneficiary reaching a stipulated age), and

(ii) it directs the trustee either to pay the income to the beneficiary or to accumulate it and pay it with the capital.

In such a case, the beneficiaries, if they all agree, are of the age of majority, and have mental capacity, may require the trustee to distribute the capital of the trust regardless of the will-maker’s or settlor’s direction not to pay out until the stipulated event has taken place.

For example, the rule in *Saunders v. Vautier* would operate in the following situations:

- Where a legacy of $50,000 is made payable to A on his 25th birthday, with the income to be payable to him annually until he attains that age.

  In this case, A (assuming he is mentally competent) could require the trustees, as soon as he reaches the age of 19, to pay him the whole of the $50,000.

- Where $80,000 is payable to the children of T (the will-maker), the capital to be divided equally between them on the youngest attaining the age of 25, with the power of maintenance in favour of the class in the meantime, and surplus income to be accumulated and added to the capital.

  In this case, as soon as the youngest child of T reaches the age of 19, as long as all the children are in agreement and have capacity, they can require the trustee to divide the capital among them.

If this rule applies, without a doubt, the trustees should on request terminate the trust without requiring a court order to that effect, provided that they are fully indemnified from those having a beneficial interest. In case of doubt, however, it is proper and advisable to apply for construction of the will.

(b) Revocation and Variation under the *Trust and Settlement Variation Act*

A trust that cannot be terminated pursuant to the rule in *Saunders v. Vautier* can possibly be varied or terminated pursuant to the *Trust and Settlement Variation Act*. This requires notice to the Public Guardian and Trustee and the court’s approval of the proposed variation or termination on behalf of the non-*sui juris* beneficiaries (generally, the contingent interests of unborn or minor children or incapable adults). In addition, all of the *sui juris* beneficiaries must agree to the proposed variation or termination.

For example, a common application brought under the *Trust and Settlement Variation Act* is to seek a revocation of a trust to entitle an adult beneficiary to acquire the capital of a trust immediately by acquiring life insurance on the beneficiary’s life to provide for the contingent beneficiaries in the event that the beneficiary were not to survive to the stipulated date under the trust provision.

The Act permits the court the discretion to approve trust variation based on the standard of a “prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks of the proposal would be likely to accept” (*Russ v. British Columbia Public Trustee* (1994), 89 BCLR (2d) 35 (CA)). The preservation of the “basic intention” of the will-maker does not form part of the consideration.

Little can be done to avoid *Trust and Settlement Variation Act* applications but the lawyer should inform the client of the possibility that the trust arrangement may not ultimately be effected as he or she has instructed. This is most likely to arise where trusts are created for children either for their lives or with a distribution date far into the future.

8. Beneficiaries who are Receiving Disability Assistance

The use of a testamentary trust to provide for people with disabilities is relatively common. However, special considerations arise that the lawyer should discuss with the client. If the person is receiving or may be entitled to receive BC disability assistance, a trust can be established in a way that the maximum benefits are preserved for the beneficiary who is disabled. This is important given that
certain asset levels will disentitle a person who is disabled from receiving those benefits (assets of more than $100,000, or $200,000 for a person with one or more dependants). A fully discretionary trust (one in which the beneficiary has no vested entitlement to the receipt of any income or capital from the trust and where the beneficiary is not the sole trustee) does not qualify as an asset of the beneficiary and therefore, is not taken into the calculation of the disabled person’s assets.

The Planned Lifetime Advocacy Network, at 604.439.9566, is a superb resource for further information on estate planning for situations involving family members with disabilities.

[§4.04] Practical Tips for Drafting the Will

1. Planning for Contingencies

When there are a number of consecutive interests created under the will, or when there are many beneficiaries, it is useful to draw a chart summarizing the client’s dispositive instructions before beginning the first draft of the will. A chart of this kind will ensure that:

(a) no intestacies will arise in the event of an unexpected sequence of deaths;
(b) all the assets have been distributed; and
(c) during periods in which the distribution of capital is postponed, the income is directed either to be accumulated or paid out.

2. Language Use

The use of clear and precise language and proper explanation is important to ensure that the testamentary wishes are reflected in the will. Lawyers drafting wills should refer to the numerous sources for drafting clauses. Some tips and examples follow.

(a) Be Consistent

Do not, for example, refer to an interest in the estate as a “share” in one place in the will and then later in the will refer to the same interest as a “portion.” Using different words to mean the same thing is inadvisable because the court may conclude that the change in language was intended to reflect a change in meaning.

(b) Avoid Ambiguity

The phrase “for the use of ‘A’ exclusively for general farm purposes” may mean that the asset is to be used by ‘A’ exclusive of others or, alternatively, may mean that the asset is to be used exclusively for farm purposes.

(c) Use Technical Words Correctly

One example will illustrate this point. “De-vise” refers to a gift of real property; “be-queath” refers to a gift of personal property. The two verbs were confused in the will considered in Patton v. Toronto General Trust Corporation, [1930] A.C. 629 (P.C.) at 633. Likewise, do not interchange the words “issue” and “children”: the former encompasses all lineal descendants, whereas the latter encompasses the first generation of descendants only.

(d) Avoid Ambiguities in the Meanings of Non-Technical Words

The use of the word “deliver” will likely result in shipping costs for specifically gifted chattels being paid out of the residue of the estate; whereas the use of “gift” will leave the burden of such costs on the specific legatee. The words “between” and “among” are also often misused.

(e) Avoid Redundancies

There is a tendency in legal drafting to use multiple words and expressions which have the same meaning. The use of couplets such as “have and hold” in legal documents arose for historical reasons. Uncertainty as to which English word was preferable when translating a Latin or Norman French law term led to such redundancies. Moreover, the practice of paying for legal documents according to their length also led to wordy wills. Why, for example, should one use the phrase “nominate, constitute and appoint”, when appointing the executor of the will? The word “appoint” by itself would be sufficient. Other common redundancies include the following:

(i) for and during the period;
(ii) release and discharge;
(iii) sole and exclusive;
(iv) then and in that event;
(v) order and direct;
(vi) known and described as;
(vii) full force and effect;
(viii) all and every;
(ix) from and after; and
(x) rest, residue and remainder.

While brevity is good, do not be so abrupt as to obscure the will-maker’s intended meaning. Repetition may be the best way to express the will-maker’s true intention.
(f) Punctuate with Care

Although proper punctuation assists in clarifying meaning, its careless inclusion has resulted in much unnecessary litigation. One way to test for clarity of meaning is to have another lawyer read the will before it is presented to the will-maker for execution.

(g) Beware of Interlineations

While sometimes unavoidable, interlineations should be avoided whenever possible. A document is more presentable to your client, to the beneficiaries, and to a court, if changes are incorporated in the original form rather than by handwritten corrections.

3. Numbering, Headings and Order

For clarity number the paragraphs and subparagraphs of the will. Headings may be useful in organizing a will and in assisting the reader (and the client) to locate a particular paragraph.

Always try to insert the various provisions of the will in a logical sequence. For example:

(a) all specific gifts should be inserted before the clause containing the executor’s power to convert unauthorized investments into money;
(b) a specific gift of money should logically follow the power to convert unauthorized investments into money; and
(c) gifts out of residue should follow specific gifts.

4. Organizing the Contents of the Will

Determine which numbering system you are comfortable with and so long as it is clear, simple and typical, routinely use that system. Descriptive headings can also be useful in drafting, in particular for long, complex wills. The various provisions in the will should also be ordered in a logical fashion. A typical well-organized will might be structured as follows:

(a) preamble identifying the will-maker and confirming his or her intention that the will is intended to be his or her last will;
(b) revocation of all former wills and codicils;
(c) appointment of the executors and trustees and, where appropriate, alternatives if the first appointed are unable or unwilling to act or to continue to act;
(d) appointment of a guardian or guardians for minor children of the will-maker;
(e) RRSP or RRIF beneficiary designations, if any;
(f) life insurance beneficiary designations, if any;
(g) gift of the will-maker’s property to the executors and trustees upon the trusts specified in the will, which might include,
(i) gifts of specific assets;
(ii) a trust for the executor and trustee to use his or her discretion in converting into money any assets which are not in the form of investments approved by the executor and trustee, and, if desired, a separate and substantive power to retain the assets in the form in which the executor and trustee receives them;
(iii) a direction to the executor and trustee to pay debts, funeral and administration expenses. Where appropriate, a direction may be given to pay all duties, probate fees, and estate taxes payable in respect of the provisions of the will or arising as a consequence of the death of the will-maker in respect of gifts made by the will-maker during his or her lifetime, interests in life insurance policies on the life of the will-maker or property held with the will-maker in joint tenancy. If a specific beneficiary is intended to bear any income tax or other costs payable relative to an asset gifted to that beneficiary, the will must so provide;
(iv) payment of cash legacies;
(v) provision for surviving spouse, perhaps outright, or in a trust (if desired, a trust qualifying as a “spousal trust” for purposes of the Income Tax Act);
(vi) provision for children if the spouse fails to survive or, in the case of a trust, on the death of the spouse. If the children are minors or have not attained the age for distribution chosen by the will-maker, then further trusts should be established for their benefit; and
(vii) provision for the disposition of the estate if the spouse and children all fail to survive the will-maker or, having survived, if they die before their interests under their trusts have indefeasibly vested in interest.

(h) administrative powers, which might include,
(i) a power of sale, if not contained earlier in the will;
(ii) a power to compromise claims of creditors;
(iii) a power to value and distribute property in specie;
(iv) a power to pay monies for minors to their guardian;
(v) a power of investment;
(vi) a power to carry on and invest in any business conducted by the will-maker;
(vii) a power to borrow, secured by mortgage or pledge;
(viii) a power to manage, lease or option real estate; and
(ix) a power to make income tax elections and designations.

5. Drafting Dispositive Clauses

Because of the virtually unlimited number of ways that the assets of an estate can be distributed, the dispositive clauses of the will must be specifically drafted to reflect the will-maker's instructions. Where the scheme of distribution is complex, ensuring the accurate drafting of the dispositive provisions is a common problem. At times, the complexity arises from the instructions of the client and for practical reasons you may want to encourage your client to simplify the distribution scheme to make the administration of the estate more efficient and less likely to result in problems or disputes.

When drafting the dispositive provisions, clearly identify the beneficiary by using the full legal name and the beneficiary's relationship to the deceased. Where there is a class gift, describe the class with particularity. For example, a gift to “my nephews and nieces” raises an ambiguity as to whether the class refers only to the will-maker's siblings' children or includes the will-maker's spouse's siblings' children.

Many clients will provide instructions based on their family arrangements that exist at the time. In advising your clients, you should review with them how they would want their estate distributed in the event of:

(a) unusual sequence of deaths, including the beneficiary predeceasing the will-maker;
(b) marriage or marriage breakdown;
(c) adoption or birth of children;
(d) other potential future beneficiaries; or
(e) minor, incapable or financially immature beneficiaries.

Consider whether it is desirable to provide for a survivorship period in the case of outright gifts. Without a survivorship period, if both the will-maker and the beneficiary are involved in a common accident, then:

(a) additional duties, probate fees and estate taxes and additional administrative expenses will be incurred because the same assets will be administered twice; and
(b) an unintended distribution may occur if the provisions of the survivor's will are not the same as those of the first to die.

The most common survivorship periods are 10 days, 30 days or 60 days. The assumption is made that if a person survives for at least the survivorship period, it is unlikely that he or she has died as a direct result of the common accident. If the survivorship period is not too long it will not cause undue inconvenience to the beneficiary nor delay the administration of the estate unduly. It usually takes at least a month before an inventory of assets and liabilities can be prepared and probate obtained. A longer survivorship period is seldom desirable because of the inconvenience to the beneficiaries, particularly if the spouse of the deceased is the only beneficiary. If a survivorship period is not specified in the will, s. 10 of WESA imposes a mandatory 5 day survival period.

The drafter should always consider, and where appropriate deal in the will with, the possibility of a beneficiary predeceasing the will-maker.

The drafter should also be aware of the implications of s. 5 of WESA, which provides that if two or more persons die at the same time, or in circumstances in which it is uncertain as to who died first, rights to property will be determined as if each person survived the other. Consequently, if persons hold property jointly, they will be deemed to have held the property as tenants in common and each person's estate will receive that person's respective share in the property (rather than all of the jointly held property going to the estate of the youngest joint tenant).

When creating ongoing trusts, consider including provisions dealing with the following matters, namely:

(a) The Distribution or Accumulation of Income

For example, the income may be payable to the beneficiaries in fixed proportions or as determined by the trustees in their discretion. On the other hand, the trustees may have the discretionary power to accumulate some or all of the income as well as to distribute it unequally among the beneficiaries.

(b) The Distribution of the Capital

The capital may be held intact for a fixed period after the death of the will-maker. For
example, it might be held intact until the youngest child attains the age of majority or age 21. Alternatively, the capital may be divided immediately into shares for the beneficiaries. The individual shares might then be held for a fixed period—for example, until the beneficiary attains a specified age.

If the capital is to be divided among several beneficiaries it is usually better to divide it into "shares" or "parts" rather than percentages. This practice makes it easier to avoid an inadvertent intestacy if one of the beneficiaries predeceases the will-maker or survives the will-maker but dies before the date of distribution. When the beneficiaries are young, consider distributing their shares of capital in several stages, for example, at ages 25, 30 and 35. It is also prudent to give the trustees a discretionary power of encroachment on the capital during the period they are holding it. The power of encroachment may be unlimited or may be limited to a specific amount to a percentage of the value of the capital or for specific purposes (for example, medical or other emergencies).

Whenever an ongoing trust is created, the lawyer must ensure that he or she has provided, to the extent reasonable, for a gift over in case the trust property fails to vest absolutely in interest.

6. Capital and Stirpital Distributions

Ensure that you secure the client’s understanding, instructions and approval as to whether a distribution is to be “per stirpes” or “per capita.”

As the following explanation shows, the concepts are not complex. (See the chart at the end of this subsection.)

(a) Distribution Per Capita

Per capita ("by the head") is used to reflect a scheme of distribution where the beneficiaries must be alive at the time of the death of the will-maker in order to take their shares of the estate. If any of the beneficiaries predeceases the will-maker, that deceased’s beneficiary’s share passes to the other beneficiaries who are living at the time of the will-maker’s death. It does not fall into the estate of the deceased beneficiary and does not pass to the intestate heirs or wills beneficiaries of the deceased beneficiary.

For example, Andrew Bates, a widower, makes a will leaving his estate to his children per capita. At the date he makes his will, Mr. Bates has five children, all over the age of majority.

At the date of his death, Mr. Bates leaves an estate worth $100,000. One of his children, Craig, has died before him. Craig leaves behind a wife, Denise, and two children, Elizabeth and Frank. Mr. Bates’ other four children survived him.

Mr. Bates’ will contains a clause that directs his trustee “to divide the residue of my estate among my children who are living at my death in equal shares per capita.”

Because the distribution is per capita, each of Mr. Bates’ four surviving children receives $25,000. Denise, Elizabeth, and Frank, Craig’s next of kin, receive nothing.

(b) Per Stirpes Distribution

Per stirpes ("by the root") is used to reflect a scheme of distribution that recognizes each line of lineal descendants of a named beneficiary as a root. If the beneficiary predeceases the will-maker, that beneficiary’s share of the estate passes on to his or her lineal descendants (i.e. issue).

Consider again the Bates fact pattern and assume that Mr. Bates has distributed the residue of his estate to “my issue in equal shares per stirpes.” In such a case, the 1/5 or $20,000 that would have gone to Craig, had he survived the will-maker, passes to Craig’s issue: Elizabeth and Frank each receives $10,000, being 1/2 of Craig’s share or 1/10 of the residue. Denise, because she is not issue of Mr. Bates, receives nothing. If Craig had died before the will-maker, and had no children who survived him, then there would be only four shares to distribute. Accordingly, each of Mr. Bates’ four surviving children would receive $25,000.

The phrase “per stirpes” does not of itself specify the generation in which the stirp (root) should commence. For example, if Mr. Bates was not survived by any of his five children, but did have eight grandchildren who survived him, then it would not be clear whether there should be five shares or eight shares. In order to prevent this ambiguity, the will should specify whether the lineal line should commence in the first generation of descendants or in the first generation in which there is at least one living descendant.

The two schemes of distribution can be graphically illustrated as follows:

1. **Capital Distribution**

   - **Andrew Bates** (Will-maker)
   - Residue $100,000
   - **Child 1**
   - **Child 2**
   - **Child 3 (Craig)**
   - **Child 4**
   - **Child 5**
   - **Denise** $0
   - **Elizabeth** $0
   - **Frank** $0
   - **Child 1** $20,000
   - **Child 2** $20,000
   - **Child 3 (Craig)** $20,000
   - **Child 4** $20,000
   - **Child 5** $20,000
   - **Denise** $5,000
   - **Elizabeth** $5,000
   - **Frank** $5,000

2. **Stirpital Distribution**

   - **Andrew Bates** (Will-maker)
   - Residue $100,000
   - **Child 1**
   - **Child 2**
   - **Child 3 (Craig)**
   - **Child 4**
   - **Child 5**
   - **Denise**
   - **Elizabeth** $10,000
   - **Frank** $10,000
   - **Child 1** $20,000
   - **Child 2** $20,000
   - **Child 3 (Craig)** $20,000
   - **Child 4** $20,000
   - **Child 5** $20,000
   - **Denise** $10,000
   - **Elizabeth** $10,000
   - **Frank** $10,000

*Wills*
7. Clauses Benefiting the Executor and Trustee

(a) Purchasing Assets

If the will-maker wants the executors and trustees to be able to purchase assets from or sell assets to the estate, he or she must specifically empower them to do so. The will-maker must also provide for how the terms of the sale will be determined. In the absence of such a power, the executors and trustees could only purchase assets from or sell assets to the estate if all of the beneficiaries beneficially interested under the will were *sui juris* and agree.

(b) Remuneration

If the will-maker intends the executor and trustee to receive remuneration calculated on a different basis than under s. 88 of the *Trustee Act*, R.S.B.C. 1996, c. 464, then this should be set out in the will. Provisions which you may wish to consider include:

(i) a provision that any pecuniary legacy is given in addition to any remuneration to which the executor and trustee may be entitled, if appropriate;

(ii) a payment of a lump sum in lieu of other remuneration; and

(iii) a provision for a minimum level of remuneration.

(c) Employment of Experts

Consider including in the will a power for lay executors and trustees to employ and delegate discretionary powers to trust companies, solicitors, accountants, investment counsel or other experts to assist in the administration of the estate, and an exoneration of the executor and trustee for following or failing to follow any advice received.

(d) Gifts to Executor and Trustee

It is prudent to provide that any gift to an executor and trustee is not given conditional upon his or her so acting and is to be enjoyed beneficially.

8. Common Drafting Pitfalls

The following are illustrations of some of the problem areas which can, in great measure, be avoided by a combination of obtaining proper instructions and careful drafting.

(a) Class Gifts

It is very important to ensure that the class is clearly defined. For example, suppose the residue of the estate is given to “my nieces and nephews.” In addition to the problem of determining when the class is to close, it may be unclear whether the phrase “nieces and nephews” was intended to mean only the children of the will-maker’s brothers and sisters, or to include children of the will-maker’s spouse’s brothers and sisters.

(b) Ademption

Ademption occurs when the subject matter of a gift is disposed of during the lifetime of the will-maker. Consider, for example, a provision which states “To my friend, John, if he survives me all my shares in the capital of ABC Company Ltd.” If at the death of the will-maker, the will-maker owns no shares in the ABC Company Ltd., the gift adeems and John receives nothing. Is this what the will-maker wants? If not (and only by discussing it with the will-maker will you find out), perhaps some form of substitution can be made, such as: “To my friend, John, if he survives me all my shares in the capital of ABC Company Ltd., but if I do not have any shares in the capital of ABC Company Ltd. at my death, I give to him if he survives me the sum of $1,000.”

Note that s. 48 of *WESA* provides that if a “nominee” (committee, attorney, or representative) disposes of the subject matter of the gift during the will-maker’s lifetime, the beneficiary is entitled to receive from the estate, an amount equivalent to the proceeds of the gift, unless there is a contrary intention in the will or the disposition was made in accordance with the will-maker’s instructions given at the time the will-maker had capacity.

(c) Gifts to Infants

It is rarely sensible to hold up completion of the administration of an estate by compelling the executors and trustees to retain small gifts in specie to infants until they attain the age of majority. Unless a will otherwise provides, an executor must transfer all property in which a minor has an interest to the Public Guardian and Trustee in trust for the minor (*WESA*, s. 153). Two alternatives should be considered:

(i) include a provision in the will that the gift may be paid or delivered to the guardians or guardian of the infant to hold for the benefit of the infant until he or she is of age. Couple this with a direction that upon such payment or delivery the executor and trustee is discharged from all liability in respect of the gift; or

Wills
(ii) specifically provide for the executor to purchase an asset, such as a bond, which will mature when the infant is entitled to his or her money.

It is also important to set out what access should be permitted to property being held in trust for an infant during his or her minority. In the absence of specific provisions in the will, s. 24 of the *Trustee Act* allows access to income for “maintenance and education” only and s. 25 permits access to capital only with the court’s approval.

### [§4.05] Will Execution Procedures

You must thoroughly familiarize yourself with the formalities for the execution of a will as required by *WESA* (see Chapter 2). Because of the very strict formalities in British Columbia, it is always best to personally attend on execution or have another lawyer or notary do so. When the will is being executed in your absence, you must ensure that the directions to the will-maker and the witnesses are complete and clear or otherwise you could face liability in negligence (*Ross v. Caunters*, [1980], Ch. 297 (Ch.D.)). See Appendix 2 for a sample of instructions for out of office execution of wills.

If you have not taken instructions from the will-maker directly, then you must attend on execution, or meet with the will-maker prior to the execution of the will, in order to confirm the will-maker’s wishes. Otherwise, you risk a claim that the will did not reflect the will-maker’s intentions. When confirming the instructions from an elderly or possibly incapacitated client who has not given you the instructions directly, you should not ask the person to indicate his or her agreement to the provisions—rather, ask the person to inform you what his or her dispositive intentions are, to ensure that he or she has knowledge and approval of the will you have drafted (*Re Worrell* (1969), 8 D.L.R. (3d) 36).

There is a presumption that the execution requirements have been complied with where there is a proper attestation clause, unless there is evidence to the contrary. Nevertheless it is still important to engage in a consistent practice for the execution of wills and the selection of witnesses (who may be available to testify if necessary). If the client has special needs (e.g. blind, illiterate, unable to read the English language and requires translation), the testimonium clause should be amended to reflect the circumstance in which the will was executed so as to record compliance with *WESA*. See Appendix 1 for examples of special testimonium clauses.

### [§4.06] Post Execution Procedures

#### 1. Wills Notices

After the will is executed, a wills notice should be filed with Vital Statistics, setting out the full name, address, occupation, date and place of birth of the will-maker and the date of execution and location of the will. Since a wills notice search must be conducted before a grant is applied for, this filing, though not mandatory, is recommended as a useful protection for the client and also for the lawyer if the lawyer is storing the will for the client.

#### 2. Wills Storage

Wills should be kept in safekeeping in a place where they can be readily located and retrieved when required and free from risk of accidental loss or destruction. If you are retaining the will as the solicitor, you must ensure appropriate storage of the original will, and deal directly with your client regarding any storage expenses and the delineation of responsibilities. If the client is retaining the will, you should advise the client to store it in a safety deposit box.

Best practice indicates that if you retain the will in safekeeping, you should:

(a) ensure that the will is stored in an appropriate place and that you have a copy in another location;

(b) insist on filing a wills notice;

(c) ensure that you have negated in writing any obligation to the client that might be implied by retaining the will to keep the client informed of any changes to the law that might affect the estate planning effected under the will or otherwise; and

(d) maintain a wills index system to readily ascertain the location of the will when required, which should include the following information:

(i) name and address of will-maker;

(ii) index number of the wills file;

(iii) name and address of executor;

(iv) date of execution of will; and

(v) exact location of will.
3. Reporting to the Client

After the will has been executed and a wills notice has been filed, you should report to your client in writing. If you have not already done so, this is the time to provide the client with a copy of the will and to confirm the location of the original. You might also take the opportunity to recommend periodic reviews of the will to ensure it is up to date as the will-maker’s circumstances change.

4. Destroying Prior Wills and Will Files

The client, or the lawyer under express written instructions of the client, may safely destroy a will that has been revoked unconditionally by a later valid will.

A lawyer should not destroy a wills file in respect of an unrevoked will until after the will-maker has died and the limitation period for claims by disappointed beneficiaries against the lawyer has expired. Note that if the distribution date under the will is postponed, the limitation period could be many years after probate is obtained.

5. Releasing a Will from Safekeeping

A will should only be released by a lawyer from safekeeping in accordance with and on receipt of written instructions from the client or from the executor named in the will, after receiving satisfactory proof of death of the client and identity of the executor. In all circumstances, a copy of the executed will and written receipt should be placed on the file. Where appropriate, the obligation to verify these matters may be asked (on undertaking if necessary) of the lawyer acting for the client or the executor.

6. Releasing a Wills File

During the period of the will-maker’s life, the file may be released to the client at his or her request. The law provides that solicitor-client privilege with respect to a wills file passes to the executor on the death of the will-maker. There is a general common law exception to solicitor-client privilege that permits the admission of solicitor-client communications dealing with the existence, execution, tenor or validity of wills.

If after the death of the client, you are asked to release your wills file, you should give consideration to the law regarding the release of solicitor-client communications in the context of the particular legal issue that has given rise to the request for the file.

For a detailed discussion of this see M. A. Laidlaw, “Solicitor-Client Privilege: to Disclose or Not to Disclose ... Remains the Question, Even After Death” (1995) 15 Est. and Tr. Journ. 56.

[§4.07] Further Reading

For more detailed information on drafting wills, refer to the following publications:


Encyclopaedia of Forms and Precedents. London: LexisNexis UK (loose-leaf and online).

In addition, refer to the appropriate checklists from the Law Society’s Practice Checklists Manual on the Law Society’s website (www.lawsociety.bc.ca). A few precedents are appended to the Practice Material: Wills, Chapter 6.

For commentary and strategy for estate planning issues relating to wills, see British Columbia Estate Planning & Wealth Preservation (Vancouver: CLEBC).
Chapter 5

Claims Made Against an Estate\(^1\)

[§5.01] Introduction

Before preparing a will, the lawyer must have some knowledge of the types of claims that can be made against the will and the estate. The most common types of claims are introduced in this chapter.

[§5.02] Challenges to a Will

Under WESA, a child or spouse of the deceased may seek a redistribution of the will-maker’s estate if it can be established that “adequate provision” has not been made for the “proper maintenance and support” of the claimant.

Part 4, Division 6 of WESA, which deals with variation of wills, is described in more detail in Chapter 19.

If the dispute is over the will or estate of a First Nations person registered under the Indian Act, s. 46 of the Indian Act gives the Minister of Indigenous and Northern Affairs the ability to declare the will void in whole or in part under specified circumstances set out in s. 46. However, both the Minister and, with the consent of the Minister, the party contesting the will or estate can apply to transfer the proceedings to a provincial superior court (s. 44). There are advantages to each process and the decision will depend on the nature of the dispute and the preferred remedy being sought. For example, under s. 46, the Minister may declare the will of an Indian void if its terms would “impose hardship on persons for whom the [will-maker] had a responsibility to provide,” a class that seems broader than the class of children and spouses entitled to seek variation of a will under WESA, or if it purports to dispose of land on a reserve contrary to the Act. Unlike the court under WESA, the Minister cannot create new provisions or reword the will. If the Minister declares a will or a gift in a will void, the estate or the gift passes on an intestacy under s. 48 of the Act. For details about proceedings under the Indian Act, see s. 46 of the Indian Act and the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC), §20.05, §20.06 and §20.11.

On intestacy, the deceased’s property will devolve in accordance with the fixed statutory scheme of WESA. In certain circumstances, however, contentious issues may arise concerning the entitlement of separated spouses or where there are two or more eligible spouses.

Under WESA, a spouse has the meaning given to it in s. 2. Subsection 2(1) provides that two people are spouses for purposes of WESA if they were married to each other or lived together in a marriage-like relationship for at least two years. Same-sex couples that lived together in a marriage-like relationship for at least two years are spouses for the purposes of WESA.

It is possible for more than one eligible spouse to survive an intestate. Section 22 of WESA addresses this possibility. If two or more persons are entitled to a spousal share of an intestate estate, they share the spousal share in the portions to which they agree, or if they cannot agree, as determined by the court (s. 22(1)). If two or more persons are entitled to apply or have priority as a spouse under WESA in respect of an intestate estate, they may agree on who is to apply or who is to have priority, but if they do not, the court may make the decision (s. 22(2)).

Regarding the position of separated spouses, subsection 2(2) of WESA provides that two persons cease to be spouses if:

(a) in the case of marriage, an event occurs that causes an interest in family property, within the meaning of the Family Law Act, to arise, or

(b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

Under WESA, once a person ceases to be a spouse, the person no longer has a right to claim variation of a deceased former spouse’s will under Part 4, Division 6. The person would also not be able to claim a spousal share of the estate under Part 3 if his or her former spouse died without a will.

Since separation is an event that causes an interest in family property to arise, for family law purposes it is particularly important to determine whether a couple truly separated before the death of one of them. If the couple has truly separated, the surviving former spouse may be able to make a claim under the Family Law Act or a claim for unjust enrichment, but not under WESA.

This is an evolving area of the law which the courts may clarify in due course.

Section 48 of the Indian Act governs intestacy for First Nations people whose estates fall within the process set out by the Act. The Act defines “survivor” in relation to a deceased individual, as his or her surviving spouse or common-law partner. A “common-law partner” is defined as “a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year.”

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The law remains unclear regarding the degree of kinship that has status to inherit under ss. 48(6) and (8) of the Indian Act. Does the right to inherit the right of possession to reserve land stop at brothers and sisters or extend to nieces and nephews? In Wilson v. Bonneau (sub nom. Okanagan Indian Band v. Bonneau), 2002 BCSC 748, affirmed 2003 BCCA 299, the court held that the right to possess land vests in Her Majesty for the benefit of the Band because the right to inherit land did not extend to nieces and nephews.

**[$5.04] Claims Against an Estate by Unrelated Parties**

In both testate and intestate estates, creditors and tort victims of the deceased may make claims, subject to certain limitations set out in s. 150 of WESA. This section, among other things, excludes claims by the estate of a deceased person for damages for pain and suffering, loss of expectation of life, and expectancy of earnings after death.

Maintenance obligations of the deceased in his or her lifetime may be enforceable against the estate provided such an intention can be gleaned either from the court order or an agreement.

There may be cases where the deceased has contractually obligated himself or herself to devise a specific property by will, or to make certain testamentary dispositions in consideration of reciprocal dispositions being made by another, usually the spouse. This is the so-called mutual wills doctrine, which is noted for its complexity and uncertainty; see Albert H. Oosterhoff, “Mutual Wills” (2008), 27 Est. Tr. & Pensions J. 135, Keith B. Farquhar, “Mutual Wills: Some Questions Recently Answered” (2000), 19 Est. Tr. & Pensions J. 327, T.G. Youdan, “The Mutual Wills Doctrine” (1979), 29 U.T.L.J. 390 and “Some Comments on Re Ohorodnyk and the Mutual Wills Doctrine” (1979), 4 E.T.R. 249; and see Feeney’s Canadian Law of Wills, 4th ed. (Butterworths, loose-leaf), Chapter I.E.

**[$5.05] Unjust Enrichment and Quantum Meruit**

Note also the area of contractual and quasi-contractual claims against the estates of deceased persons for services rendered. See, for example, the decision of Dhillon v. British Columbia (Official Administrator), [1993] B.C.W.L.D. 1749 (B.C.S.C.), where the claimant successfully proved an oral contract to receive the entire estate in return for providing services to the deceased. Those who are members of the deceased’s family and allege a specific contractual arrangement will be met with the presumption from Balfour and Balfour, [1919] 2 K.B. 571, that legal consequences do not normally attach to familial arrangements. However, the law of restitution and unjust enrichment allows for recovery in a much broader range of circumstances than the presumption would suggest. See the comment on Re Mandyke (1980), 6 E.T.R. 104 (Sask. Q.B.). See also Guzzo v. Scarcelli (1986), 23 E.T.R. 186 (B.C.S.C.), varied (1989), 33 E.T.R. 163 (B.C.A.), in which a daughter provided substantial services to her mother over a long period of time, in reasonable expectation that she would receive benefits on her mother’s death. In Guzzo, Houghton J. suggests that, depending on the circumstances, either a constructive trust or a quantum meruit assessment of services may be used as part of the “equitable weighing” by the court of the plaintiff’s efforts, the advantage which accrued to the deceased, the deprivation which accrued to the plaintiff, and the value of everything which she received or might receive from the deceased. The case stands for the proposition that a claim in trust may be joined with a variation action. If successful, the trust claim would reduce the size of the estate available for redistribution. In varying Justice Houghton’s decision, the Court of Appeal determined that because there was no link between the contributions provided by the respondent to the deceased and the assets of the estate, it was inappropriate to make a declaration of constructive trust against the assets of the estate. However, the Court of Appeal instead ordered a money judgment which would constitute a debt of the estate, payable before legacies.

Peter v. Beblow (1993), 77 B.C.L.R. (2d) 1 (S.C.C.) is the leading case on the principles to be applied when determining if a constructive trust should be imposed. The Supreme Court of Canada held that domestic services can meet the basic test of a claim in constructive trust (that is enrichment, a corresponding deprivation, and the lack of juristic reason for the enrichment) if there is a demonstrated link between the domestic services provided and the property in which the trust is claimed. See Crick v. Ludwig (1994), 95 B.C.L.R. (2d) 72 (C.A.), for a subsequent application of these principles; see also CLE Annual Review of Law & Practice (March 2008), for a discussion of unjust enrichment and constructive trusts.

Clarkson v. McCrossen Estate (1995), 3 B.C.L.R. (3d) 80 (C.A.) deals, among other things, with the issue of when a successful claim of unjust enrichment entitles the claimant to a monetary award rather than to the imposition of a constructive trust.

In Clarkson, the plaintiff stepdaughter succeeded in her claim based on unjust enrichment for care she had provided, first to her deceased mother, and later to her stepfather. To adequately care for each of her mother and her stepfather, she had reduced the number of hours where she had been employed elsewhere. It had been her understanding that the property owned by her stepfather would be left to her in recognition of her devotion. The stepfather remarried subsequent to the death of the claimant’s mother but not long before he himself died. In determining the appropriate remedy the trial court held that, because the claimant had contributed little
toward the property in question directly, and because she hadn’t attached any particular significance to the actual property (which had been sold), she was entitled to a monetary award rather than to the imposition of a constructive trust. The Court of Appeal held that while the appropriate remedy in the circumstances was a monetary award, if it were to decide the case at first instance, it would also have found (unlike the trial court) that there were adequate circumstances to have imposed a constructive trust.

In *Antrobus v. Antrobus*, 2009 BCSC 1341, varied 2010 BCCA 356, the court held that the defendant parents were unjustly enriched by the plaintiff, their eldest daughter. As a teenager, the plaintiff performed the majority of the household work, such as housecleaning, after-school childcare, cooking, laundry, and grocery shopping. She also worked at her parents’ business without compensation. Her parents promised her that they would leave their entire estate to her in return for all the work she had done for them. Because of their promise, the plaintiff continued to assist her parents by purchasing a rental property on their behalf and taking responsibility for the mortgage. She was their mainstay for at least 20 years. The court found that the volume of work performed by the plaintiff as a teenager and young adult was outside of the usual exchange that is part of family life, and the fact that her parents made the promise of their estate suggested that they recognized what they had asked their daughter to do was unusual and worthy of compensation.

The court awarded monetary compensation to the plaintiff. The court declined to impose a constructive trust because there was not a strong link between the services the plaintiff performed and the real property owned by her parents and there was no evidence that her parents would be unable to pay an award of damages.


See *Pickelein v. Gillmore*, [1997] 5 W.W.R. 595 (B.C.C.A.), in which the Court of Appeal recognized that trial courts may adopt a “value received” or “value survived” approach in making monetary awards to compensate for unjust enrichment. The “value received” approach does not factor in value conferred on the property in the course of the relationship, while the “value survived” approach does consider that contribution of value. The choice of measuring stick is to be made in accordance with common sense and the goal of a fair result. This flexibility in choice of valuation approach “permits all factors relevant to the acquisition and maintenance of property to be brought into account, while it enables the trial judge to reflect in the award the reality of current market value.”

The Court observed that the value survived approach will usually be the best choice for long term marriage-like relationships, because contributions in these partnerships cannot be measured with precision and because that approach is consistent with the expectations of both parties in this type of relationship, barring evidence of a contrary understanding. Where the unjust enrichment is an uncompensated but measurable contribution to the will-maker’s general estate that is not reflected in a particular property, the value received approach will be appropriate.

The Court in *Pickelein* stated that courts should always factor in contributions made by third parties and the capital brought into the relationship in determining whether a constructive trust is the appropriate remedy and in determining the amount of compensation. The first step in determining the appropriate compensation for unjust enrichment will be assessing the net appreciation of value during the relationship that is attributable to the contribution of the parties.
Chapter 6

Solicitors’ Duties and Responsibilities

[D6.01] Duty of Care when Taking Instructions

Lawyers who practise in this area continue to be exposed to liability for professional negligence long after they stop drawing wills or retire from practice altogether. Under the current Limitation Act, S.B.C. 2012, c. 13, the basic limitation period for a disappointed beneficiary to bring a claim begins two years from the date that the cause of action is “discovered”, as that term is defined in s. 8 of the Act.

The ingredients of a cause of action in negligence are as follows:

(a) a duty;
(b) a breach of that duty; and
(c) injury.

In the case of a disappointed beneficiary, the duty arises when the lawyer undertakes to prepare the will. The breach occurs when the lawyer commits the error. The injury occurs when the will comes into force. Consequently, the cause of action will arise when the disappointed beneficiary “discovers” the lawyer’s error. An example will illustrate the enduring nature of the risk. A 26 year old lawyer makes an error in the preparation or execution of a will for a 30 year old client. The client dies 45 years later at age 75. According to the Limitation Act, the right to sue begins to run when the error is “discovered.” Assume that this happens shortly after the will-maker’s death, when the lawyer is 71 years old. The limitation period does not expire, at the earliest, until the lawyer reaches 73 years of age. The basic two-year limitation period may be extended under the discovery, disability or confirmation provisions of the Limitation Act, to a maximum of 15 years from the date the cause of action arose.

Lawyers can take steps to protect themselves. In addition to carrying adequate errors and omissions insurance coverage, lawyers should:

(a) use checklists when taking the client’s instructions;
(b) record the client’s instructions carefully;
(c) keep detailed notes of the client’s assets and next of kin;
(d) keep detailed notes of the advice that the lawyer has given;
(e) confirm the nature of the client’s interest in his or her real property (i.e. joint tenancy or tenancy in common) and in special assets such as a business, particularly where these assets are specifically bequeathed or devised or represent a substantial portion of the client’s estate; and
(f) confirm any “unusual” instructions by letter.

Office procedures and organization should be established to avoid problems in this area. For instance, what is the practice in the office when instructions are taken from a very elderly client late on Friday afternoon? What practice is followed after instructions are taken at a sick bed? In either of these instances should a short will be handwritten and executed on the spot, the longer office generated will to follow later? In a busy office what arrangements have been made to ensure that will instructions do not sink to the bottom of the “to do” list? What is the office procedure in place when the unilingual lawyer is about to take instructions from a client who has only a limited knowledge of English, or has an accompanying close relative who advises that he or she is there to translate the client’s wishes and will assist at execution?

In addition to understanding the laws of wills, trusts and estates, the lawyer will need to understand the laws concerning income tax, property, conflict of laws, insurance and corporations. Taking advantage of available courses assists the lawyer in keeping up with changes in the relevant law.

[D6.02] Duty of Care towards Beneficiaries

The starting point so far as the liability of the lawyer to the third party is concerned, is the judgment of Aikins J. in Whittingham v. Crease & Co. (1979), 88 D.L.R. (3d) 353 (B.C.S.C.). In that case, the solicitor prepared the will, was present at the will-maker’s house for the execution of the will, and allowed a beneficiary’s spouse to act as a witness of the signing of the will. Aikins J. held the solicitor’s firm liable to the disappointed beneficiary on the grounds that Hedley Byrne & Co. Ltd. v. Heller & Partners, [1964] A.C. 465 (H.L.) applied. Hedley Byrne has three components:

(a) a negligent misstatement;
(b) reliance by a third person who could have been foreseen as one who would rely upon the statement; and
(c) injury.

In order to succeed, the third party (the disappointed beneficiary) must show that he or she has relied on the skilled, though negligent, solicitor. How does a will
beneficiary show reliance? Aikins J. focused on the specific facts of the case he was trying, what he called “the practical realities of the situation.” In this case, the disappointed beneficiary had been instrumental in securing the solicitor’s services for the will-maker, and was present at the execution. He was “keenly interested in the will being effective”, and he “relied on the solicitor to see to it that it was effective.” Aikins J. concluded by emphasizing that he was indeed deciding the case on the particular facts and that he was making no pronouncement on the general issue of a solicitor’s liability for negligence to a third-party will beneficiary.

In the English case of *Ross v. Caunters*, [1979] 3 All E.R. 580 (Ch.D), a will was sent to the client by his solicitor for execution. The will was accompanied by instructions as to how the will should be executed. The will was duly executed and returned to the solicitors. However, one of the witnesses was a spouse of a beneficiary; the will-maker had not been warned of the statutory prohibition against any such person witnessing, the instructions did not refer to it, and the solicitors neither checked the will for such an error on its return to them, nor discovered the error in the two years which then elapsed before the will-maker’s death. The beneficiary, who was unknown to the solicitors except by name, sued the solicitors to recover her loss, and succeeded.

In a carefully reasoned judgment, Megarry V.C. concluded that the true basis of a solicitor’s liability to third parties is the duty of care which he or she owes under the principles of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.):

A solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an unidentified third party . . . owes a duty of care towards that third party in carrying out that transaction, in that the third party is a person within his direct contemplation as someone who is likely to be so closely and directly affected by his acts or omissions that he can reasonably foresee that the third party is likely to be injured by those acts or omissions.

The judge was prepared to concede that the same result can be reached by the route of *Hedley Byrne* and negligent misstatements, but he did not see the necessity for invoking the doctrine, of which reliance and injury consequent upon that reliance are required elements.

Megarry V.C. also decided that, though the matter is still one of some judicial debate, an action may be brought on the basis of *Donoghue v. Stevenson* even though the damage suffered is purely financial. And, if there is a doubt as to the duty of care in some situations, he said he could have no doubt in a will case where the solicitor knows the name of the third party to whom the duty is owed, and the amount of the loss is quantified by the will itself.

The difficulty with *Ross v. Caunters*’ duty of care is that it opens up an ambit of possible liability of lawyers to third parties, the borders of which cannot be described with any certainty, and which triggers causative liability of what today are unknown dimensions.

The House of Lords in *White v. Jones*, [1995] 3 All E.R. 691 (H.L.), subsequently differed from the views expressed in *Whittingham v. Crease* and *Ross v. Caunters*. In *White v. Jones*, the client died before the solicitor had drawn the will. While the will-maker’s daughters had been excluded from his previous will, the will-maker had since reconciled with his daughters and had instructed the solicitor to give legacies to them in his new will. The disappointed beneficiaries sued the solicitor in order to recover their losses.

The trial judge held that the solicitor’s conduct towards his client was wrongful, but distinguished *Ross v. Caunters* as he found that there had been no reliance here. The will-maker, he concluded, was not intending to create a relationship between the solicitor and any proposed beneficiary. Indeed, whether any beneficiary would have become or remained a legatee (and therefore have suffered loss) at the will-maker’s death was speculative and uncertain.

The decision was reversed by a unanimous Court of Appeal. The Court considered whether the 1979 decision in *Ross v. Caunters* was correct in going beyond negligent misrepresentation and reliance in order to base liability on a solicitor’s duty of care towards both his client and a third party to carry out properly the client’s instructions to confer a benefit on the third party. The Court concluded that *Ross v. Caunters* remains good law, despite later House of Lords decisions.

The solicitor (or rather his professional insurer) appealed to the House of Lords. This was the first time the issue of solicitor’s negligence in the drawing or execution of wills had come before the House and the appellant took the opportunity to mount a major argument in favour of the position that solicitors can only be liable in breach of contract. Any liability in tort was contested, but in particular the argument that a solicitor has a duty of care under the rule in *Donoghue v. Stevenson*, supra. In other words, the appellant argued that the decision in *Ross v. Caunters* was wrong.

The House divided narrowly 3:2 with the majority holding that the solicitor was liable to the would-be beneficiaries. The narrowness of the decision appeared surprising considering the history throughout the Commonwealth countries in favour of those suing negligent solicitors. While all members of the House expressed sympathy for the disappointed would-be beneficiary in these cases, they divided over the doctrinal justification for holding the solicitor liable.

Two members of the majority were of the view that *Ross v. Caunters* ought not to be followed. A duty of care under the *Donoghue v. Stevenson* principle, they reasoned,
gives rise to too many conceptual problems. For example, is a solicitor to be liable for financial loss, albeit caused by his negligence? Further, must the plaintiff have suffered loss, or instead failed to obtain a benefit? Following a Donoghue v. Stevenson duty of care means that the solicitor is to be liable to anyone, despite the fact that he or she may never have spoken to or corresponded with the third party (Hedley Byrne). Indeed, the solicitor is unlikely even to know of the would-be beneficiary’s existence, except through the will-maker’s instructions. Lords Goff and Browne-Wilkinson found the Ross v. Caunters duty of care too uncertain as to the circumstances in which, and the persons to whom, it would apply.

Lord Nolan alone (the third member of the majority) was prepared to support the Court of Appeal’s decision to follow Ross v. Caunters. It is to be noted, however, that neither of the other two majority members was prepared to rule that the decision in Ross v. Caunters is wrong. Instead, they noted that the duty of care remedy available to the would-be beneficiary has existed for 15 years without apparently causing any difficulty, and that in fact other jurisdictions, including Canada, had adopted Ross v. Caunters. They cited Peake v. Vernon & Thompson (1990), 49 B.C.L.R. (2d) 245, and Heath v. Ivens, supra. As a result, having considered Ross v. Caunters, the House merely declined to apply it to the facts at hand.

Nevertheless, the injustice to the would-be beneficiary’s position, if nothing were done, was such that Lords Goff and Browne-Wilkinson were prepared to “extend” the principle in Hedley Byrne, supra, so as to give a remedy, and Lord Nolan, unable to persuade them to apply Ross v. Caunters, agreed with them.

The Hedley Byrne principle does not strictly apply to the solicitor and the disappointed beneficiary, because the solicitor who receives instructions and fails through dilatory behaviour to draft a will before the client dies has made a misrepresentation to no one, let alone the third party of whom the solicitor knows nothing save by report. On the other hand, the solicitor who takes instructions knows who it is the will-maker wishes to benefit, and also knows the property the intended beneficiary is to have. In the view of the majority members of the House, the solicitor, like any other agent in receipt of instructions from the principal, can be said to be subject to an “assumption of responsibility.” The remedy against the solicitor would ordinarily be an action for breach of contract, but the deceased client has suffered no loss, so no action can be brought by the estate. It seemed to the majority members that in those circumstances it is justifiable to “extend” the principle of tort liability in Hedley Byrne, which would give the would-be beneficiary a remedy. By contrast, Lord Nolan, though he accepted the “extension”, was of the opinion that the tort liability of a solicitor was already otherwise established in their Lordships’ own recent precedents.

It is important to remember, however, that the courts are merely asking for the level of attainment of the normally competent lawyer. It may well be that those professionals who also advertise or otherwise hold out to the public their skills in some particular field of legal practice will be required to perform at that level (see Fales v. Canada Permanent Trust Co., [1977] 2 S.C.R. 302, and Bartlett v. Barclays Bank Trust Co., [1980] 1 All E.R. 139 (Ch.D.)). That being said, the courts appear to be stressing that it is only when the lawyer falls below the level of normal efficiency that he or she will be denied the opportunity to disclaim responsibility for the injury that he or she causes.

[§6.03] Common Errors

In 1993, the Law Society of British Columbia published a summary of claims and potential claims brought against lawyers for negligence in the wills and estates area. The acts of alleged malpractice include the following:

(a) failure to determine what close relatives were alive at the time of making the will so that they could either be provided for in the will or expressly excluded;

(b) failure to determine the share structure of the will-maker’s corporate interests so as to draw a will which reflected the will-maker’s intentions;

(c) failure of the lawyer to proof-read a revised will before execution;

(d) failure to draft a will and have it executed after receiving instructions from the will-maker to draft the will; and

(e) failure to determine that the ownership of an asset was not as the will-maker thought when he gave instructions for the will.

It is not only the drafting of wills, but their formal execution that has caused litigation. The statutory rules for formal execution are easily capable of mastery by a competent lawyer, and what the courts appear to be demanding is that in the process of execution the lawyer be both knowledgeable and alert.

The following are instances of technical faults:

(a) will-maker not signing in the presence of witnesses;

(b) witnesses not signing in the presence of the will-maker, or of each other;

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2 Taken in part from a paper entitled “A Lawyer’s Liability to Disappointed Beneficiaries” prepared for CLE in December 1989 by Madam Justice Sandra K. Balance, then of Legacy Tax & Trust Lawyers, Vancouver.
(c) a witness not in the physical presence of the will-maker, but only by telephone;

(d) the spouse of a beneficiary or a beneficiary witnesses the will;

(e) informing a client in British Columbia that divorce will revoke the will (WESA, s. 55);

(f) writing “null and void” across a will which the will-maker intends to revoke; and

(g) receiving telephone instructions to “tear up” a will, and carrying out the act without being in the presence of the will-maker.

Under s. 58 of WESA the court now has the power to declare that a will or a gift in a will is valid in spite of technical faults such as failing to meet the statutory formalities for execution.

Other difficulties can arise when the will-maker is devising real estate in a jurisdiction other than British Columbia, especially when the jurisdiction is not in Canada. Does the situs require any formalities different from those required in this province before British Columbia will recognize the will? American jurisdictions differ as to the number of witnesses required, though many have enacted legislation that gives effect to instruments that are formally valid according to the law of the place of execution. This information can be discovered by standard research techniques.

The public has expectations of the lawyer, but the fees charged by lawyers for preparing wills are not reflective of the responsibility assumed nor the time, skill and care that must be taken. For this reason, lawyers are tempted to reduce their costs. They rely heavily on precedents and paralegals. They spend as little time as possible drafting wills and reviewing prepared wills. The better approach is for lawyers to spend an appropriate amount of time obtaining instructions and preparing the will. They should charge an appropriate fee for such service. Alternatively, lawyers should consider referring will clients to solicitors with the necessary expertise in the area. This is to approach will preparation in the same way as one would approach conveyancing, where few solicitors are willing to “dabble” in an area which, at first glance, appears routine and repetitive, while on closer examination reveals an area fraught with traps and liability risks. These risks are not justified from a business perspective—in other words by the fee received. By paying close attention and charging realistic fees, or by passing the work to a will specialist, lawyers will educate the public and each other about the value of a properly drawn will. Perhaps more importantly, they may avoid the eventual cost of an improperly drawn one.
Chapter 7

Initial Advice to Prospective Personal Representative¹

[§7.01] Introduction

This second part of the Practice Material: Wills is designed to provide a general introduction to practice in the area of probate and estate administration. The materials summarize the following:

(a) principles of law relating to administration of estates, executors and trustees, probate actions, and claims that can be made against the estate;

(b) procedural rules relating to grants of probate and administration, probate actions, and claims for a variation of a will under Division 6 of Part 4 of WESA;

(c) practice guidelines relevant to substantive and procedural matters; and

(d) areas of potential liability and other pitfalls.

This chapter offers an overview of the initial advice that should be given to a prospective personal representative and the initial steps that should be completed in preparing to make the application for probate or administration. Not all of the material in this chapter will be relevant in each case. What issues should be discussed with the client and when they should be raised are matters of judgement in each case.

Probate is the court-based procedure used to establish the validity of a will, if one exists, and to appoint the personal representative who will then have the authority to act on behalf of the deceased’s estate. When a person in British Columbia dies without a will, or with a will that only partially disposes of the estate, the person seeking to be the personal representative of the deceased must apply to court for letters of administration. If a person dies with a will but failed to appoint an executor or the executor predeceased the will-maker or is unwilling or unable to act, the person seeking to be the personal representative of the deceased must apply to court for “letters of administration with will annexed.”


The personal representatives under a will are the executor and trustee appointed in the will. The executor must apply for probate of the will, collect the assets of the deceased, pay all of the debts (including taxes) of the deceased and the estate, and distribute the assets in accordance with the terms of the will. The trustee must hold, administer, and distribute assets governed by the terms of any trust established in the will in accordance with those terms. Often one person acts both as executor and trustee under a will. The source of authority for the executor and trustee is the will.

The person to whom the court grants letters of administration or letters of administration with will annexed becomes the deceased’s personal representative and is known as the “administrator” of the estate. The source of the administrator’s authority is the order of the court awarding letters of administration to the administrator.

[§7.02] Identification of the Personal Representative

Ordinarily, a will expressly appoints one or more executors, with an alternate or alternates in case a person initially named is unable or unwilling to act or continue to act.

In some cases, particularly with “home-made” wills, no executor is named but some person is directed to perform some or all of the duties that would ordinarily be performed by an executor. In these situations, that person may be able to apply for probate as “executor according to the tenor” of the will (see British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) §5.75).

If there is no will, an administrator must be appointed by the court to administer the estate. The persons who are entitled to apply for letters of administration are generally those entitled to share in the estate.

If there is a will but no effective appointment of an executor, the person seeking to be adminstrator would apply for letters of administration with the will annexed.

Sections 130 to 132 of WESA set out to whom the court may grant administration when there is no will, or a will with no executor, and in what priority (see §7.05(4)).

[§7.03] Deciding Whether to Act as Personal Representative

The client should consider a number of factors before deciding to act as a personal representative. Some of the more significant factors are as follows:

(a) the potential for personal liability arising from a breach of trust in the course of administering the estate; also the potential personal liability arising by statute and for omissions when acting as an executor;
(b) the terms of the will if there is one (e.g. whether there are ongoing trusts which must be administered and whether the client is a beneficiary);

(c) the nature of the deceased’s assets (e.g. whether the client has the requisite expertise to deal with unusual assets; whether the estate is solvent);

(d) any conflicts of interest that are apparent or may arise in the administration of the estate;

(e) the personal relationship of the client with the beneficiaries or intestate successors; and

(f) the time involved and remuneration payable.

The client should also be made aware of the onerous duties associated with acting as a personal representative. Although they can be prescribed by a will, the duties almost invariably include the following matters:

(a) taking possession or control of the deceased’s assets;

(b) paying debts and making provision for other liabilities;

(c) notifying beneficiaries;

(d) acting personally, although delegation may be allowed in certain circumstances;

(e) ensuring that investments are authorized;

(f) insuring against perils;

(g) filing all appropriate tax returns;

(h) continuing or bringing and maintaining actions on behalf of the estate; and

(i) keeping proper accounts.

An executor who does not wish to act, and who has not intermeddled can renounce the appointment. A co-executor who does not wish to act can either renounce or allow another co-executor to proceed while reserving the right to apply for probate later (if, for example, the proving co-executor later is unable or unwilling to complete the administration).

The client appointed as an executor should be warned not to deal with the assets or otherwise intermeddle in the estate until he or she has decided to accept the appointment. Such actions may compromise his or her ability to renounce the executorship and may attract personal liability. Payment of funeral expenses, acts of necessity and inquiries into the deceased’s assets and liabilities do not by themselves amount to intermeddling, but collecting or releasing debts due to the deceased, or taking possession of a legacy given in the will or holding oneself out as an executor have been held to amount to intermeddling. If there has been no intermeddling, the client should be advised that he or she cannot be compelled to act as the personal representative.

An infant has no capacity to apply for a grant or to renounce, and a renunciation cannot be obtained from an infant’s guardian. In the case of a patient, as defined in the Patients Property Act, R.S.B.C. 1996, c. 349, a renunciation can be signed by the patient’s committee.

A renunciation must be in Form P17 and in the case of a renunciation by an individual, should be witnessed by an adult who does not have an interest in the estate. Once an executor has renounced, his or her rights in respect of the executorship terminate unless the Court otherwise orders (WESA, s. 104).

[§7.04] Immediate Responsibilities of a Personal Representative

Once the client has decided to act as a personal representative, the lawyer should advise the client about the client’s immediate responsibilities.

1. Disposition of Remains

Section 5 of the Cremation, Interment and Funeral Services Act, S.B.C. 2004, c. 35, sets out the hierarchy of persons who are entitled to control the disposition of remains. At the top of the list is the personal representative named in the will of the deceased. The right of the executor takes priority over the right of a spouse or other close relative. As a matter of practice, the family of the deceased typically makes the funeral arrangements. If the executor or another individual has the duty to or undertakes to dispose of the remains, but neglects to do so without lawful excuse, he or she is guilty of an indictable offence under s. 182 of the Criminal Code.

Under s. 6 of the Cremation, Interment and Funeral Services Act, the deceased’s written preference contained in a will or in a pre-need cemetery or funeral services contract as to disposition is binding, as long as compliance with the preference is consistent with the Human Tissue Gift Act, R.S.B.C. 1996, c. 211, and would not be unreasonable or impracticable or cause hardship.

2. Care and Management of Assets

As soon as possible after death, the personal representative should take steps to safeguard the deceased’s assets. The lawyer should advise the personal representative that he or she is not entitled to make personal use of estate assets. Some of the important steps are as follows:

(a) searching for cash, securities, jewellery and other valuables and arranging for safekeeping;

(b) locking up the residence, including changing the locks if needed, and, if the residence is not under proper supervision,
advising the police and making arrangements with a security firm to patrol the residence;

(c) ensuring that there is sufficient insurance coverage for the deceased’s assets, checking the insurance expiry dates and notifying the deceased’s insurance agent or company;

(d) arranging for interim management of the deceased’s business until distribution of the estate or sale of the business;

(e) notifying financial institutions of the death;

(f) arranging for redirection of the mail, if necessary;

(g) checking mortgages and agreements for sale; arranging for payment of instalments as and when due;

(h) checking maturity dates on bonds and expiry dates of warrants and share conversion rights;

(i) checking leases and tenancy agreements, arranging for payment or collection of rent, and giving notice if appropriate;

(j) preparing an inventory of personal assets, e.g. furniture, furnishings, jewellery, artwork; consider taking photographs; and

(k) arranging for appraisals for the deceased’s assets such as real property, personal assets, jewellery and other valuables.

3. Dealing with Liabilities

The personal representative should review the deceased’s debts and liabilities (e.g. mortgages, leases, income and property taxes, guarantees), check all payment due dates, and decide what arrangements can and should be made for payment or release.

4. Preparing to Administer the Estate

The personal representative must identify the beneficiaries and next of kin, including potential claimants for a variation of a will under Division 6 of Part 4 of WESA (if there is a will), including any common law spouse of the same or opposite gender. A list of names, addresses, ages, guardians, and Social Insurance Numbers for these people should be made. The representative should open a bank account for the estate.

5. Accounting and Expenses Prior to the Grant

The personal representative has a duty to keep proper records and to be ready to account to the estate. These records should include full particulars of all expenses incurred by the personal representative.

The personal representative is entitled to be indemnified out of the estate for all expenses properly incurred.

However, money expended before the grant of probate or of letters of administration is potentially at risk. This is particularly true for an administrator, who cannot bind the estate, except with regard to reasonable funeral expenses, until the letters of administration have been issued. And although an executor may bind the estate immediately after the death of the deceased, there are many complications. For example, the will may not be the last will or may not be enforceable, and many financial institutions and other third parties holding assets of the deceased may be reluctant to deal with the personal representative until probate has been issued.

6. Safety Deposit Boxes

If a safety deposit box is leased in the name of a deceased person, solely or jointly with another person, the custodian may not allow any of its contents to be removed until the personal representative or joint lessee attends to make an inventory of the contents of the box in the presence of the custodian (WESA, s. 183). The will may then be removed, but the custodian normally will permit other contents to be removed only after production of the grant of probate or letters of administration.

[§7.05] Preparing to Make the Application for Probate or Administration

1. Gathering Information

The personal representative should assemble and bring to his or her lawyer all relevant information and documents, including testamentary instruments, information concerning the deceased, information concerning the beneficiaries and other persons interested in the estate, and documents and information concerning the deceased’s affairs.

The lawyer should use client information forms and checklists to ensure that no essential information is overlooked. See the Probate and Administration checklists in the Law Society’s Practice Checklists Manual online (www.lawsociety.bc.ca) and the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC).

There are a large number of documents and types of information that may be relevant. The following few paragraphs highlight some of the important documents that may be applicable.

(a) Testamentary Instruments

The will itself is not necessarily a single instrument. For example, it may consist of a will and codicils, a will with documents
incorporated by reference, or several wills which, when read together, comprise one will. Other documents might be held to be testamentary instruments pursuant to WESA s. 58, so the lawyer must ensure that the client is advised to bring any document that appears to express a testamentary intention to the lawyer for consideration.

Because, under s. 58 of WESA, the court may order that data recorded or stored electronically (a “record”) may be a will or a revocation, alteration or revival of a will or state a testamentary intention, searches of a deceased’s electronic records need to be made in case there is a document that might be determined to be such a record.

Order a wills notice search. A lawyer or a member of the Society of Notaries Public of British Columbia upon written application in the prescribed form, or any other person upon written application with a certificate of death, may ascertain from the registrar general whether or not a wills notice has been filed in respect of the deceased person (WESA, s. 77).

The registrar general issues to the applicant a certificate of wills notice search. The certificate annexes copies of the most recent notice, if any, which has been filed in the name or names specified in the application. The certificate must be filed with the application to court for a representation grant.

The wills notice search and the resulting certificate of wills notice search and the style of proceeding of the probate or administration documents must, at a minimum, include all names used by the deceased in his or her lifetime. This is particularly important if the assets of the estate include real property. If title to real property is registered in a name which the deceased used, but which is not identical with the name by which the deceased was described in the testamentary documents, then a statutory declaration for the name appearing in the land title records may be inadequate to transmit real property in some land registries. Consequently, wills notice searches should be done after land title searches are done and the name on title should be included in the wills notice search.

Applications for wills notice searches should be sent to:

Vital Statistics Agency
PO Box 9657 Stn. Prov. Govt.
Victoria, BC V8W 9P3

The fee (at the time of writing) is $20, plus $5.00 for each additional alias named, payable to the Minister of Finance. A search can also be done using BC Online (see www.bc online.gov.bc.ca/).

Sometimes, even though a wills notice search indicates that a will was executed, the original document cannot be found. In those circumstances, it may be possible to probate a copy, a draft, or a reconstruction of its contents.

(b) Income Tax Returns

The lawyer should check previous income tax returns of the deceased to discover assets of the deceased. He or she should also ensure that the deceased’s return for the year preceding the year of death is properly filed. The lawyer should also advise the client as to when the final tax return is due for the deceased’s income from January 1 of the year of death up to the date of death, or should advise the client to seek timely accounting advice.

(c) Canada Pension Plan

The lawyer should also advise the personal representative on Canada Pension Plan death benefits, surviving spouse’s benefits and orphan’s benefits, if applicable.

(d) Life Insurance

The lawyer should obtain full particulars of any insurance on the deceased’s life, and determine that there is no conflict between a beneficiary designation in the will and a designation made in the insurance policy.

A beneficiary designation may be revocable or irrevocable. Generally, a later designation supersedes a prior designation unless the prior designation was irrevocable. An irrevocable designation cannot be altered or revoked without the consent of the beneficiary as long as that beneficiary is alive. A designation in a will is revoked when the will is revoked (Insurance Act, R.S.B.C. 1996, c. 226, s. 50(3)).

The personal representative or the lawyer should provide a copy of the Certificate of Death to the life insurance company, obtain forms for claiming the proceeds of the policy, and request confirmation in writing of the death benefit, including dividends, and determine whether the deceased had borrowed against the policy. Also, the cash value on any policies owned by the deceased on the lives of others must be determined.


Wills
(e) RRSPs and RRIFs

The lawyer should review any designation of beneficiaries made in respect of Registered Retirement Savings Plans (RRSPs) and Registered Retirement Income Funds (RRIFs). If a designation has been made by will, the plan must be checked to ensure that the designation was made in accordance with the plan. If a valid designation is made, the benefit does not form part of the estate.

2. Reviewing the Will and Advising on its Terms

After a search of testamentary documents has been conducted, and after the lawyer has ensured that the will has not been revoked (in the ways described in Chapter 2 of these materials), the lawyer should review the will and advise the client of its terms.

The will should be checked for formal validity to ensure, for example, that it was properly attested. The lawyer may have to ensure that the will is formally valid in a place outside of British Columbia, that is, if the will was made outside of British Columbia, if the will relates to land outside of British Columbia or if the will-maker was domiciled outside of British Columbia at the time of death. These matters are discussed in Chapter 2.

The will should be checked carefully for any indications that documents have been attached (e.g. staple marks) and that any alterations or erasures have been properly executed and attested (see Supreme Court Civil Rule 25-3(20-23)).

The lawyer should review the gifts for any that may be void, revoked or lapsed. A gift to an attesting witness or to his or her spouse is usually void if there are not two other witnesses who are not beneficiaries, but the Court may declare that the gift is not void if satisfied the will-maker intended to make that gift (WESA, s. 43). When a beneficiary of a specific gift under a will predeceases the will-maker, the gift to that beneficiary may lapse and fall into residue or may devolve to the beneficiary’s next-of-kin (WESA, s. 46).

A gift can be made to an executor or trustee. However, the will must be clear that the executor intended to take the gift beneficially and not just legally in his or status as trustee of the estate. Further, if a will contains a gift to an executor or trustee, the law presumes that the gift is in lieu of executor remuneration, unless the will shows a contrary intention.

3. Intestacy, Lapse and Ademption

If there is no will or the will does not dispose of the entire estate, the personal representative must be advised regarding intestacy. The provisions in WESA dealing with the devolution of property are discussed in Chapters 1 and 2.

4. Choice of Applicant for Letters of Administration

When a person dies without a will, s. 130 of WESA sets an order of priority for the court when it decides whom to appoint as administrator of the estate. A spouse or, with the consent of a majority of the deceased’s children, a child of the deceased may nominate a person to be the administrator. The applicant for letters of administration must list in the Submission for Estate Grant (SCCR, Form P2) all such persons as well as any other person entitled to receive all or part of the intestate’s estate, and any creditor with a claim exceeding $10,000 and deliver notice of the application to all of those listed (Supreme Court Civil Rule 25-2 (2)(b)(ii)).

WESA, s. 131 sets priorities for persons applying for grants of Administration with Will Annexed when there is a will but the executor has renounced, is unable or unwilling to act, or where the will does not name an executor.

The court may, because of special circumstances, such as the insolvency of the estate, appoint a person the court considers appropriate to be administrator other than one normally entitled (WESA, s. 132).

It is prudent to have each person entitled to an interest in the estate and each person with an equal or prior right to apply for letters of administration provide written consent to the application, in order to eliminate the risk of competing applications and minimize the risk of the court requiring the administrator to provide a bond or other security.

A committee may consent on behalf of a mentally incompetent person. Neither the Public Guardian and Trustee nor the guardian of an infant can consent on the infant’s behalf.

A consent must be in writing and, if it is signed by an individual, should be witnessed by someone who does not have an interest in the estate. Although it is not required under Rule 25-3, the best practice is to file the consents along with the other documents filed when an application is made for a grant of letters of administration.

A consent can be withdrawn up until the time an application is heard.

In some situations, it is prudent to ensure that the applicant is bondable before proceeding with the application. The court may require a bond or other form of security if there is an infant or mentally incapable beneficiary or on the application of another beneficiary (WESA, s. 128) (the factors and procedure are outlined in §10.06.5). An executor is
appointed by the deceased and thus is not required to post security. The Public Guardian and Trustee, the Official Administrator and trust companies are also exempt from this requirement.

Division 11 of WESA provides that where a person died intestate or where there is no executor, the Public Guardian and Trustee, the Official Administrator and trust companies are also exempt from this requirement. The Supreme Court has held that the general discretion of the court is not over ridden by the predecessor section of this Division (Re Roberts Estate (1987), 26 E.T.R. 71 (B.C.S.C.)).

5. Other Grants of Administration

Special circumstances can give rise to special grants of administration that cause variations in the ordinary powers of the administrator and the ordinary procedure. Special circumstances may include the following:

(a) an administrator dies leaving part of an estate unadministered;
(b) an estate is small (i.e. under a prescribed amount); or
(c) an estate needs interim administration until a pending or commenced action against the estate has been concluded.

These special grants are described in §10.06.4.

6. Murder

A person convicted of murder or manslaughter is barred from inheriting any property under the victim’s will or as an intestate heir of the victim (Dhaliwall v. Dhaliwall (1986), 6 B.C.L.R. (2d) 62 (S.C.); Re Fenotti Estate, 2014 BCSC 1533). The same prohibitions apply if a person never stands trial for murder but a court finds it is likely the person would have been convicted had the matter proceeded to trial.

7. Survivorship

The general rule regarding survivorship is outlined in WESA, s. 5 which provides that if two or more persons die at the same time or in circumstances that make it uncertain which person survived the others, unless a contrary intention appears in an instrument, each person is presumed to have survived the others. WESA, s. 10 provides further that a person must survive by five days in order to receive a gift under an instrument.

However, situations arise where this general rule is overridden by other statutory presumptions. For example, ss. 83 and 130 of the Insurance Act, R.S.B.C. 2012, c. 1 provide that if the life insured and the beneficiary die at the same time or in circumstances in which the order of death is not clear, the beneficiary is treated as having predeceased the insured, unless a contract policy provides otherwise (WESA, s. 11). If a situation arises which creates conflict between two Acts (that is, where the beneficiary is younger than the life insured and both die at the same time), it may be prudent to seek the advice and directions of the court before distributing the estate.

8. Presumption of Death

If a person is missing and reasonable grounds exist for supposing that he or she is dead, an application can be made to the court for an order under s. 3 of the Presumption of Death Act, R.S.B.C. 1996, c. 444, that the person is presumed to be dead, either for all purposes, or for those purposes specified in the order. The order constitutes proof of death. It enables the personal representative of the person presumed to be dead to administer the estate. Determining the actual date of death is not a matter of presumption; it is determined on the basis of the evidence presented (Re Schmit (1987), 12 B.C.L.R. (2d) 186 (C.A.)). Subject to s. 4 of the Presumption of Death Act, any distribution of property made in reliance on such an order is deemed to be a final distribution. The property is deemed to be the property of the person to whom it has been distributed as against the person presumed to be dead (s. 5(1)).

Circumstances which the court will wish to consider before making such an order include:

(a) the age and health of the missing person;
(b) the circumstances in which he or she went missing;
(c) whether he or she has relatives whom he or she might be expected to contact;
(d) the likelihood of such contacts being made; and
(e) what efforts have been made to locate the missing person.


9. Other Duties and Powers of Executors and Administrators

The statutory and common law powers of an executor may be restricted or widened by the will. The principal powers of personal representatives are briefly summarized below.
(a) Where there are two or more personal representatives

Where there are two or more personal representatives, acts done for purposes of the administration of the estate with respect to real estate require unanimity. However, acts done by one respecting personal property are deemed to be the acts of them all (that is, each of the personal representatives has joint and entire authority over the whole of the personal estate (see Williams, Mortimer and Sunnucks, Executors, Administrators and Probate, 20th ed., 2013, at 955)). Use caution when advising the personal representative of this power to bind the others, for example, regarding the possibility of a conflict of interest.

Where the personal representatives become the trustees of a trust in a will, the rules regarding trustees apply and unanimity is required in respect of all trust property unless the trust instrument (for example, the will) provides to the contrary.

(b) Duty to convert unauthorized or wasting assets and investments

Subject to the terms of the will, there is a duty to examine each asset and investment with a view to maintaining and preserving its value and, in general, to convert, in a reasonable and timely fashion, assets that do not qualify as investments for the estate (for example, wasting, speculative, unauthorized, or reversionary assets). Subject to the terms of the will, the proceeds of converted assets must be invested in the manner provided in ss. 15.1 to 15.6, and 17.1 of the Trustee Act, R.S.B.C. 1996, c. 464.

(c) Power to sell assets

At common law, a personal representative has power to sell personal estate in order to pay debts. This power is extended to real estate by statute (WESA, s. 162). In this case, however, the power must be exercised jointly by all personal representatives. It is unclear whether there is a power of sale if the sale of assets is not required to pay debts and not authorized under the will.

(d) Payments for infants

A Trustee may make payments for the maintenance or education of a minor beneficiary out of the income of the trust property held contingently upon the minor attaining 19 or on any earlier event, such as marriage (Trustee Act, s. 24). Payment may only be made out of the capital property with a court order: Trustee Act, s. 25. Payment may be made to the guardian, but there is no obligation to do so. As well, most wills provide the personal representative with authority to pay amounts to a guardian on behalf of a minor.

(e) Defending actions in representative capacity

A personal representative may defend actions brought against himself or herself in his or her representative capacity and, if the action did not arise out of the personal representative’s wrongful act, is entitled to a full indemnity out of the estate in respect of all expenses incurred.

A personal representative cannot maintain or defend an action where he or she and the estate are on opposite sides. If such a conflict arises, the personal representative will either have to resign as personal representative or discontinue his or her involvement as a plaintiff in the action.

However, WESA now allows a beneficiary to seek leave of the court to prosecute an action without the need to replace the personal representative first (WESA, s. 151). The granting of leave is discretionary (Bunn v. Bunn Estate, 2016 BCSC 2146).

10. Scope of Lawyer’s Retainer

The lawyer must ascertain the scope of his or her instructions. Is the lawyer only to obtain a grant of probate or letters of administration, or is he or she also to attend to transmission of assets, to make claims under insurance policies, to prepare income tax returns, and to perform other duties? It is important to clarify which duties of the client as personal representative, if any, are to be delegated to the lawyer. If the lawyer has been paid from the estate for services that the personal representative should have performed, the payment will be deducted from the personal representative’s remuneration (Re Lloyd Estate (1954), 12 W.W.R. (N.S.) 445 (Man. C.A.)).

It is prudent for a lawyer to set down in writing to the personal representative both his or her duties and his or her understanding of the scope of the instructions. The retainer should advise the client of the right to have the lawyer’s bill reviewed under the Legal Professions Act.

11. Insolvent Estates

Bankruptcy and insolvency are in the exclusive legislative jurisdiction of the federal government. Consequently, in an insolvent estate, the executor may be ousted by the appointment of a trustee in bankruptcy at the instance of creditors. The personal representative who undertakes to administer an insolvent estate under Division 12 of WESA therefore runs the risk of losing the right to remuneration. He
or she should be advised to observe the order of priorities for payment of debts laid down in *WESA*, s. 170, which is similar to s. 136 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

12. First Nations

If the deceased was a First Nations person, an officer appointed by the Minister of Indigenous and Northern Affairs may administer the person’s estate. If the deceased was a member of a Treaty First Nation, reference should be had to Division 3 of *WESA* dealing with the devolution of certain property.

[§7.06] Public Guardian and Trustee as Official Administrator

The death of persons whose estates the Public Guardian and Trustee might administer are often reported to the Public Guardian and Trustee’s office by coroners, police and hospitals. If the deceased has a “fixed place of abode” in British Columbia or died outside British Columbia leaving British Columbia assets, and there is no other person willing and competent to administer the estate, the Public Guardian and Trustee acting in its role as Official Administrator may do so (*WESA*, s. 165). This may be advantageous where the net value of the estate is small, the estate is insolvent, or there are other problems in administering the estate. Relatives and other persons interested in estates of this kind should be advised of this option.

The Public Guardian and Trustee charges fees which are paid from the estate. Section 167 of *WESA* provides that the Public Guardian and Trustee has certain authority to act as personal representative if it intends to apply for a grant.

[§7.07] Guardians and Committees

If a minor is named sole executor under a will, the court must grant letters of administration with will annexed to the minor’s guardian or, if the guardian does not apply, to another person the court considers appropriate, including the Public Guardian and Trustee (*WESA*, s. 134).

A committee, including the Public Guardian and Trustee, has the rights, powers and privileges that would be exercisable by the patient as the personal representative of a person, the committee may obtain letters of administration of the person’s estate (*Patients Property Act*, s. 17). The committee of a patient who, but for mental incapacity, would be entitled to administer an estate, would then complete the administration of the estate in his or her capacity as committee.
Chapter 8

Assets and Liabilities: Valuation and Inventory

[§8.01] Introduction

This chapter discusses, in general terms, the valuation of assets and liabilities and gives some guidelines on the preparation of an inventory. Preparing an inventory to be used in the administration of an estate can be complicated. Please refer to Chapter 3, Parts III to V, of the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) for examples of an accepted format for the inventory and for accurate descriptions of particular assets.

[§8.02] Purpose of the Inventory

The personal representative will require an inventory and valuation of the deceased’s assets and liabilities at the date of death. The inventory may be used by the personal representative for a number of purposes, including the following:

(a) to assist in the preparation of the Affidavit of Assets and Liabilities (often referred to as the “disclosure document”) submitted with the application for a grant of probate or administration;

(b) as a checklist to ensure that the assets are gathered in, administered, and distributed;

(c) to comply with the duty to pay debts;

(d) to file an income tax return to the date of death and subsequent income tax returns until the estate is distributed;

(e) to assist when preparing the personal representative’s accounts;

(f) to consider the implications on the estate of claims for the variation of a will under Division 6 of Part 4 of WESA; and

(g) to assist in determining the solicitor’s fees and the personal representative’s remuneration.

The inventory should be kept up to date throughout the administration of the estate by recording sales, distributions, investments, and other changes.

[§8.03] Assets and Liabilities

The inventory should include every asset and liability of the deceased, although the final disclosure document that is submitted to the probate registry need not include assets passing outside the estate.

1. Property that Passes to the Personal Representative

The inventory must include all real and personal property that devolves to the personal representative, whether the deceased held the property beneficially or in a representative capacity.

2. Property that Does Not Pass to the Personal Representative

Property that does not pass to the personal representative includes the following:

(a) property of which the deceased was a joint tenant and that passes by law to the surviving joint tenant;

(b) property that by contract or will passes directly to a beneficiary other than a personal representative; for example, insurance payable to an assignee for value or a named beneficiary. Also included are the proceeds of a pension plan, RRSP, or RRIF payable to a named beneficiary (see Granovsky v. Ontario (1998), 156 D.L.R. (4th) 557, discussed below);

(c) property that, although apparently belonging to the deceased, was the subject within his or her lifetime of division under the Family Law Act or a community property regime; and

(d) property held by the deceased as trustee.

The devolution of these forms of property is discussed in §9.02.

Property that does not pass to the personal representative need not be accounted for by the personal representative. Disbursements for dealing with that property should be kept separate from those associated with the administration of the estate and should not appear in the personal representative’s accounts. It may be necessary for the solicitor to be separately instructed and retained by persons other

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3. Liabilities

A personal representative may be personally liable for the debts of the deceased to the extent of assets coming into the hands of the personal representative. Therefore, it is extremely important that the debts are properly listed and valued in the inventory of assets and liabilities. Debts should include not only those immediately payable, but also deferred debts, contingent liabilities, and guarantees outstanding. If the debt is or may be disputed, then it should be indicated that the validity of debt has not yet been determined. Particular care is necessary in describing liabilities in an application for a grant of administration because consents from creditors may be required or the existence of creditors may affect bonding requirements.

[§8.04] Form of Inventory

There are many acceptable formats for inventories, but the form used should be simple and easy to read. It is also important to include in the inventory all assets passing within and without the estate.

The inventory is used primarily as an accounting record for the estate and the personal representative, and is not usually the document that will be submitted as a disclosure document with the application for the grant. If, however, the inventory is complete and carefully prepared, it can be of great help in preparing the disclosure document.

[§8.05] Valuation

Valuation is part of the process of preparing the inventory. The assets of an estate should be valued for several reasons, including the following:

(a) to determine capital gains and losses for income tax purposes;
(b) to calculate foreign taxes arising as a result of the death of the deceased;
(c) to resolve questions arising in the course of administration (for instance, regarding buy/sell agreements, the sale or distribution of assets, insurance against fire and other perils, and determination of option prices);
(d) to comply with the requirement to disclose value in the disclosure document;
(e) to calculate the amount of probate filing fees payable in an application for a grant; and
(f) to determine what property transfer tax, if any, is payable.

This list is not exhaustive.

Valuation may be difficult and complex, depending on the nature of the assets and the particular circumstances. For instance, the value of a business interest may be affected by the terms of a partnership agreement, the articles of association, or a buy/sell agreement existing at the date of death.

If valuation is a problem, and if the estate is of significant value, it may be prudent for the personal representative to employ a professional appraiser or, in a case of company valuation, an accountant or other expert. Even in simple estates, a personal representative may be well advised to establish the asking price on a sale by means of one or more appraisals by experts. For example:

(a) in a proposed distribution of personal goods to beneficiaries, it may be advisable to have an auctioneer’s appraisal; and
(b) if a house is going to be sold or distributed in specie, it may be appropriate to get an independent appraisal and valuation report from one or more real estate agents.

The general rule is that the relevant date for purposes of valuation is the date of death, although there may be other dates on which valuation is required for tax purposes.

[§8.06] Authorization to Obtain Information

One of the difficulties encountered at this stage, particularly where there is no executor applying for probate, is that third parties, such as banks, will sometimes refuse to provide the information necessary to complete the Affidavit of Assets and Liabilities (Form P10 or P11) needed for the estate grant application. The Supreme Court Civil Rules have addressed this problem by allowing a person to apply to the court registry for an Authorization to obtain estate information. The applicant would submit all of the required documents for a normal grant application to the registry except for the Affidavit of Assets and Liabilities of the estate (see SCCR 25-4, and Form P18). SCCR 25-8 deals with the effect of the issuance of an Authorization to obtain estate information. If a third party refuses to provide the requested information within 30 days of delivery of the Authorization, the court may make orders compelling the production of the information and other orders it considers appropriate including costs. Once the applicant has obtained the necessary information and filed the Affidavit of Assets and Liabilities, the application for probate or administration may proceed.

It is also good practice to have the executor client execute some simple authorizations allowing third parties to deal with the lawyer on behalf of the executor.
Chapter 9

Devolution of Assets

§9.01 Types of Assets

This chapter divides assets into two categories:

(a) assets that were property of the deceased and pass by will or on an intestacy to the personal representative; and

(b) assets that may or may not have been the property of the deceased but to which another person may become entitled either by operation of law (for example, joint tenancy), by statute (for example, survivors’ benefits under the Canada Pension Plan) or by contract (for example, insurance proceeds, RRSPs).

It is important to distinguish the two types of property because, generally speaking, only assets that pass to the personal representative are subject to the claims of creditors or to actions regarding the will (for example, variation of wills proceedings under Division 6 of Part 4 of WESA).

§9.02 Assets That Do Not Pass to the Personal Representative

1. Joint Tenancies

In a tenancy in common, the share of the deceased tenant in common passes to his or her estate. In the case of a joint tenancy, the surviving joint tenant becomes the absolute owner of the property.

With personal property, if there is no indication that the parties own the property in shares, the common law presumes a joint tenancy. If the parties have taken shares, the presumption is of a tenancy in common. In the case of land, a tenancy in common is presumed unless a contrary intention appears in the instrument (Property Law Act, R.S.B.C. 1996, c. 377, s. 11).

Holding legal title in joint tenancy is not always conclusive proof that there is a joint tenancy in equity. The parties may intend to hold equitable title in a different manner—for example, as tenants in common or for some other person. It is important to make the necessary inquiries to determine ownership. Only when there is a joint tenancy in equity will the beneficial interest pass to the survivor.

For example, an elderly parent and an adult child may open a bank account in their joint names using the parent’s funds, with the intent that the child be able to use the account to deal with the parent’s day-to-day expenses. As a result of the Supreme Court of Canada decision in Pecore v. Pecore, 2007 SCC 17, there no longer is a presumption of advancement (that is, of a gift in advance of the parent’s death) in favour of an adult child; rather there is a presumption of a resulting trust. In a resulting trust situation, legal title to the account passes to the child upon the parent’s death; however, equitable ownership of the account remains in the parent’s estate.

As a result of Pecore, a parent who owns property jointly with a child and who intends the child to become the sole owner of the property on the parent’s death, should clearly express that intention in writing to rebut the presumption of a resulting trust.

A joint tenancy that appears to exist may in fact have been severed. Severance of a joint tenancy converts it into a tenancy in common. There are a number of ways of severing a joint tenancy. The three main ones are by express or implied agreement, by a joint tenant transferring property to himself or herself or to another person, and by a separation under the Family Law Act, S.B.C. 2011, c. 25.

Also note that a joint owner must survive for at least five days after the death of the other joint owner, in order to receive the whole asset by right of survivorship (WESA, s. 10(2)).

2. Life Insurance Policies and Proceeds

The proceeds of an insurance policy may pass by designation outside the will, rather than passing to the personal representative (Insurance Act, R.S.B.C. 2012, c. 1, ss. 59, 60, 65, 68). While the ownership of the policy may also pass outside the will pursuant to s. 68, ownership will generally pass through the will. In each case, proceeds payable to a designated beneficiary, other than the deceased insured’s estate, do not form part of the deceased’s estate and are not subject to claims of the deceased’s creditors.

3. Pensions and Retirement Plans

The owner of a retirement savings plan (RRSP) registered under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) or a retirement income fund registered under that Act (RRIF) may designate a person to receive a benefit under the plan upon the owner’s death (WESA, Part 5).

Such a designation:

(a) must be made in accordance with the requirements of the plan;

(b) may be made by written declaration or by will, and, if by will, only where authorized by the plan; and

(c) is revocable.

If a valid designation is made, the benefit does not form part of the estate (WESA, s. 95).

An employee who participates in an employee benefit plan may designate a person to receive a benefit payable under the plan upon the employee’s death (see WESA, s. 85).

Section 8 of the Pension Benefits Standards Act, S.B.C. 2012, c. 30 (the “PBSA”), requires every pension plan to provide for benefits and entitlements on the death of a member or former member of the plan. Section 29(1) of the PBSA provides that an employee, at a minimum, may become a member of the plan after the completion of two years of continuous employment with the participating employer. Plans may have more generous vesting provisions.

The PBSA provides for both pre- and post-retirement death benefits. With respect to pre-retirement benefits, a form of pension is available to a surviving spouse who meets the definition in the PBSA (includes same sex partners). If there is no surviving spouse, or the spouse executes a spousal waiver, then a lump sum benefit will be payable to the deceased member’s designated beneficiary or to the personal representative of the deceased member’s estate.

With respect to post-retirement benefits, the pension payable to a member must be a joint pension payable during the joint lives of the former member and the spouse (if the member has one). After the death of either the member or the spouse, the pension continues to be payable to the survivor for life. The joint pension for the survivor must not be decreased by more than 40%. Section 35 of the PBSA provides that the joint option must be chosen unless the spouse executes a spousal waiver. The waiver is a prescribed form and each pension plan will have a version of it. The obligation to choose the joint pension does not apply if a matrimonial property order is filed with the administrator which act affects the pension or payment of the pension commenced before January 1, 1993.

The Canada Pension Plan provides for three kinds of benefits:

(a) death benefits that are payable to the personal representative and become the property of the estate;

(b) survivor’s benefits that are payable to the contributor’s spouse or common law spouse and do not form part of the estate; and

(c) survivor’s benefits that are payable to children under the age of 18 or children over 18 and under 25 in full-time attendance at school. These benefits do not form part of the estate.

4. Imminent Death Donation

A person may, in expectation of his or her imminent death and conditionally upon it occurring, make a gift transferring the legal and beneficial ownership of personal property to a donee. Such a gift is known as a donatio mortis causa, and such a gift does not form part of the donor’s estate. No gift mortis causa of land is possible.

The gift must be delivered to the donee or there must be some indication made that title to the property has changed.

For a case on this issue, see Costiniuk v. Cripps Estate (Official Administrator of), 2000 BCSC 1372.

5. Powers of Appointment

A person (the “donee”) given property with the power to appoint the property to whomever the donee pleases (including him or herself), is said to have a “general power of appointment.” The property subject to the general power of appointment forms part of the donee’s estate. A “special power of appointment” is restricted to appointing property to a particular class of persons that excludes the donee. The property subject to a special power of appointment does not form part of the donee’s estate. If a will-maker has been given a general power of appointment and exercises it by will, the property subject to the power forms part of the will-maker’s estate. On the other hand, property over which the will-maker exercises a special power of appointment in a will does not form part of the estate. If the will-maker grants a power of appointment to a donee under a will, then the property forms part of the will-maker’s estate.
6. Employment Benefits

The spouse of a deceased employee who was subject to the Workers Compensation Act is entitled to claim from the employer not more than three months unpaid salary or wages (WESA, ss. 175 to 180). Such wages do not form part of the employee’s estate and are not liable for the satisfaction of debts.

7. Contractual and Other Obligations

The deceased’s estate is subject to rights and obligations under court orders and contracts entered into during the lifetime of the deceased, provided that the obligations survive the death. Examples of the kind of obligations that could survive death include support orders, marriage contracts, separation agreements and buy-sell agreements.

8. Insolvent and Bankrupt Estates

If a receiving order is made against the deceased’s estate after death, the assets vest by operation of law in the trustee in bankruptcy; the personal representative has no further standing.

9. Statutory Benefits

Statutory benefits that may become payable to the spouse, children or other dependants, such as compensation under the Family Compensation Act, R.S.B.C. 1996, c. 126, compensation for spouses under the Workers Compensation Act, R.S.B.C. 1996, c. 492 in fatal cases, and I.C.B.C. “no fault” death benefits, do not form part of the estate.

10. Voluntary Payments

An employer may make voluntary payments directly to a person in recognition of the deceased employee’s services. These payments do not form part of the estate.

11. Family Property

The Family Law Act, S.B.C. 2011, c. 25, creates a tenancy in common in family property as defined in s. 84 of the Act upon the separation of spouses. The portion that belongs to the deceased’s spouse does not form part of the deceased’s estate but a portion of the surviving spouse’s assets may ultimately form part of the deceased’s estate once the property division issues under the Family Law Act have been determined.

12. Community of Property

The most frequently encountered community of property jurisdictions are Washington, California and Quebec. Assets that may appear to be part of the deceased’s estate may be subject to division with the surviving spouse, or possibly a set distribution will be imposed on the asset. Watch for situations such as the following:

(a) a deceased who resided in British Columbia but was married in a community of property jurisdiction;

(b) a non-resident deceased with assets in British Columbia who lived in a community property jurisdiction before death; or

(c) a deceased who resided in British Columbia and had property in a community property jurisdiction.

In such cases, it may be necessary to obtain legal advice in the relevant jurisdiction to find out the rules on devolution.

13. Interests in Trusts

If the deceased was a trustee or a beneficiary under a trust, the terms of the trust should be reviewed. The trust documents may indicate whether the deceased’s executor will replace the deceased as trustee. If the deceased had a beneficial interest, the trust document may indicate whether the deceased’s estate will receive a benefit.

[§9.03] Assets That Pass to the Personal Representative

At common law, personal property devolved at death upon the personal representative, but real property devolved upon the heir. WESA, s. 162, provides that real property devolves to and vests in the personal representative.

If there is a will appointing an executor, the devolution takes effect from the moment of death, subject to the executor’s right to renounce.

If a person dies intestate, his or her estate vests in the court until an administrator is appointed. When the court appoints an administrator, the appointment relates back to the death (WESA, s. 135). The devolution of property on an intestacy is described in Practice Material: Wills, Chapter I.

[§9.04] Conflict of Laws

If there is a grant of probate or letters of administration in British Columbia and some of the estate assets are located outside of the province, the personal representative must obtain control of and administer those foreign assets.
1. Immovables

Generally, immovable property (such as an interest in land) passes pursuant to the law of the jurisdiction where the land is situated—the *lex situs*. It is necessary first to consult the foreign law to see if the British Columbia personal representative has an entitlement to that property. This may vary, depending on whether the personal representative is an executor or administrator.

When there is a will that is recognized in the foreign jurisdiction, the British Columbia executor will need either to get an ancillary grant or to resell the British Columbia grant in the foreign jurisdiction in order to deal with the immovable assets in that jurisdiction. The law that applies to the application and to the administration of the immovable assets is the law of the foreign jurisdiction.

When there is an intestacy in British Columbia, or a will made in British Columbia that is not recognized in the foreign jurisdiction, the immovable assets in that jurisdiction will devolve according to the law of that jurisdiction. In those circumstances, the personal representative in British Columbia will have to apply under the law of that jurisdiction for an ancillary grant.

2. Movable

Generally, movable property (all property that is not immovable) passes under the law of the deceased’s domicile. The foreign jurisdiction may or may not require the personal representative in British Columbia to do something in order to administer the movable asset in that jurisdiction (e.g. to obtain an ancillary grant, to resell a grant, to obtain a tax clearance). In some cases, a foreign financial institution may allow the personal representative to gather in the foreign asset on the basis of the British Columbia grant. Practice differs in different jurisdictions and for different types of assets. If personal property relates to immovable property, the personal property may be governed by the law of the jurisdiction where the immovable property is located (*WESA*, s. 82).

### [§9.05] Location of Assets

The location (the “*situs*”) of an asset may be important in determining other matters besides its devolution. For example, an asset will generally be liable for any death duties or probate filing fees that apply in the jurisdiction in which it is located.

At common law, the location of tangible personal property, (bearer securities, debts under seal, bonds and debentures, and insurance policies under seal) is the place where they are physically located at death. The location of insurance policies that are not under seal is the place where they are payable, except that if the deceased was resident in British Columbia and the insurance company is licensed to carry out business in British Columbia, the policy is situated in British Columbia.

At common law, the location of bank accounts and similar deposits is the place where the accounts are kept. The location of simple contract debts is the deceased debtor’s residence at death. The location of stocks is generally the place where they can be transferred at death (or if they can be transferred in more than one place, where the deceased would have been most likely to transfer them). For an interesting decision on the common law rules as they relate to the location of uncertificated securities, see *Bernstein v. British Columbia*, 2004 BCSC 70. The location of interests in trusts is the place where they are being administered. The location of an interest in a business, trade or profession is the place where it is principally carried on.

Canada Savings Bonds (and likely treasury bills) are “specialty debts”, that is, debts due from the Crown pursuant to statute. Such securities are sited in the province where their existence is documented (*Royal Trust Co. v. Attorney General of Alberta*, [1930] 1 D.L.R. 868). This case was argued successfully such that Canada Savings Bonds held by the deceased at an institution outside British Columbia were “without” the province for the purpose of the probate filing tax applicable in British Columbia.

Under the *Probate Fee Act*, S.B.C. 1999, c. 4, probate fees are based on the “value of the estate”, which includes: (a) real and tangible personal property of the deceased situated in BC and (b) if the deceased was ordinarily resident in BC immediately before death, the intangible personal property of the deceased, wherever situated that passes to the personal representative. The *Probate Fee Act* permits the Lieutenant Governor in Council to make a regulation defining “situated in British Columbia” for the purposes of levying the probate fee. While awaiting the passing of regulations, the registry has issued guidelines for personnel to follow. These guidelines do not have the authority of regulations, and in some instances do not comply with the common law location rules.

If there are assets on First Nations reserve land, there may be tax implications and other complications, especially if the asset is real property.
Chapter 10

Applications for Probate and Administration

§10.01 Introduction

This chapter deals with the procedures and documents to obtain grants of probate and administration when the matter is not contentious. This chapter focuses on situations in which the validity of the will is not in issue. Contentious probate matters are discussed in Chapter 18.

This chapter deals only with grants for residents. See Chapter 8 of the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) for procedures on grants for estates of non-residents where a foreign grant has been issued.

This chapter uses the terminology and procedure mandated by the Supreme Court Civil Rules (the “SCCR”).

§10.02 Jurisdiction

The first step is to determine whether the court has jurisdiction and which law will apply. The courts in British Columbia assume jurisdiction if the deceased was domiciled in British Columbia or had assets in British Columbia at the date of death. The exception to this is if the deceased was a First Nations person, registered as an Indian, in which case the estate may be probated through the procedure set out in the Indian Act, R.S.C. 1985, c. I-5.

In most circumstances, probate is applied for first in the place of domicile of the deceased. The domicile of the deceased at the date of death is important to determine several issues, including:

(a) applicability of tax legislation;

(b) devolution of movables (typically personal property); and

(c) Proceedings to vary wills under Division 6 of Part 4 of WESA.

Domicile is a question of mixed law and fact. An individual who has mental and legal capacity can acquire a domicile of choice by residing in a jurisdiction with the intention of residing there permanently or indefinitely. Residence alone is not sufficient to create a domicile of choice; it must be accompanied by the intention to reside permanently or indefinitely in the new jurisdiction. If the domicile of choice is abandoned and no new domicile of choice arises, the domicile of origin revives. A domicile of choice, once abandoned, may only be acquired again on the same terms as it was originally acquired.

Section 28 of the Infants Act, R.S.B.C. 1996, c. 223 contains rules for determining the domicile of an infant. Typically, the domicile of origin of an infant will be the domicile of the parent or parents with whom the infant resides.

Section 1 and Part 6 of WESA give the Supreme Court jurisdiction for administration of estates. Note that masters have jurisdiction to hear all interlocutory applications under the Supreme Court Civil Rules as well as certain final orders, including orders in non-contentious matters under SCCR, Part 25 (Rules 25-1 to 25-16).

§10.03 Practice

Part 25 of the Supreme Court Civil Rules governs the procedure and documents required for administration and probate of estates. WESA sets out the substantive procedures and individual sections make references to the Rules to provide details and forms.

While WESA does codify much of the law and practice that was previously found only in the jurisprudence, there are still some situations that are not covered by WESA and Part 25 of the Supreme Court Civil Rules. When WESA, the SCCR or other enactments do not provide the necessary law or procedure to deal with the non-contentious matter, the court commonly refers to the practice and procedure described in Tristram and Coote’s Probate Practice, 27th ed., 1989, and MacDonald, Sheard and Hull on Probate Practice, 5th ed. Toronto: Carswell, 2016.

Students who undertake work in this area are urged to review the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC), Chapters 5 and 6. These chapters include some directions for document preparation. The comments in these chapters are very specific, and of great help when dealing with applications when the standard documents need to be modified.

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§10.04 Place and Time of Application

An application for a grant of probate or administration may be made in any registry of the Supreme Court, regardless of the residence of the deceased or the personal representative. Second and subsequent grants of probate or administration are done by amendment or revocation of the original grant and must be made in the registry where the original grant was issued (SCCR 25-5).

§10.05 Probate Applications

1. Documents Required for a Typical Probate Application

For the purposes of this section, a “typical” probate application is one in which the executor named in the will is making the application and the deceased is domiciled in British Columbia.

The documents required for a typical application are set out in SCCR 25-3 as follows:

(a) Submission for Estate Grant (Form P2). This is a comprehensive form setting out the type of grant being sought, information about the deceased, information about the applicant, the documents filed with the Submission, and further details depending on whether the application is for probate, administration, administration with will annexed or in relation to a foreign grant.

(b) Certificate of wills notice search. Both the certificate and Form P2 must set out all names of the will-maker used in the will and any additional names or aliases in which interests in real property are registered. The applicant must file a certificate of wills notice search, even if the results of the wills notice search are negative.

(c) Affidavit of Applicant. The affidavit is in Form P3 for straightforward situations and Form P4, P5, P6, or P7 for other applications. The affidavit requires a number of statements, including that a diligent search for a testamentary document of the deceased has been made and the will is the last known will of the deceased.

(d) Original will, any codicils, and any documents that have been incorporated into the will by reference. These are submitted separately with the application (do not undo the staples on an original will for photocopying or any other reason, or staple the will to any document).

(e) An Affidavit of Assets and Liabilities (Form P10) attaching as an exhibit a Statement of Assets, Liabilities and Distribution (the “disclosure document”) disclosing:

(i) all assets and liabilities of the deceased, regardless of their nature, location or value, which pass to the applicant as the deceased’s personal representative (WESA, s. 122); and

(ii) all property in which the deceased had a beneficial interest, not merely those assets in which the deceased had both a legal and beneficial interest. Note although this form refers to the “Distribution” in the title, it is not necessary for the applicant to set out the proposed distribution.

Assets of the deceased that do not pass to the personal representative do not need to be shown on the disclosure document.

(f) Affidavit of Delivery (Form P9) of notice in Form P1 given under WESA, s. 121, and SCCR 25-2 with a copy of the notice attached as an exhibit.

(g) Cheque for probate filing fees.

Some additional documents that will be required with certain types of applications are as follows:

(h) When, for example, a beneficiary cannot be located or dies subsequent to the deceased’s death but prior to the application for the grant, an order pursuant to SCCR 25-2(14) dispensing with notice.

(i) When, for example, the attestation clause in the will is incomplete or missing altogether, an affidavit of execution of the will (SCCR 25-3(2)(b)(i)(B) and the appropriate affidavits referred to in Form P4 para. 6(a)).

To ensure that the probate registry accepts an application, it is important to include in each document all the information that is required by the registry, and to use the prescribed forms.

2. Other Affidavits That May Be Required

Additional affidavits in support of an application for probate may be required, notably those referred to in Form P4, such as the following:

(a) an affidavit to explain missing attachments to a will or codicil (Form P4, para. 7(c));

(b) an affidavit to explain alterations to a will or codicil made before or after execution (Form P4, para. 7(a));

(c) an affidavit to explain erasures and obliterations made to a will or codicil before or after execution (Form P4, para. 7(b));

(Missing attachments, alterations, and erasures can affect the validity of the will, and students
who undertake any work in the estates area are urged to review the relevant subrules of SCCR, Part 25 and the provisions of WESA, Divisions 1, 4 and 5 of Part 4);

(d) an affidavit of execution, sworn by one or more of the subscribing witnesses or by a person present at the execution or by a person setting out the circumstances of execution. The purpose of such an affidavit is to raise a presumption of proper execution in order to show that the will was executed in accordance with the requirements set out in Division 1 of Part 4 of WESA, in the following circumstances:

(i) there is no attestation clause;

(ii) the attestation clause does not adequately or clearly set out that the will or codicil has been executed in accordance with WESA; or

(iii) there is some doubt about the due execution of the will (for example, the will-maker printed his or her name or only signed with initials);

(Form P4, para. 6(a))

(e) if the attestation clause does not deal with the special circumstances noted below, an affidavit (Form P4, para. 6(c)) to show that the will was read over, or otherwise to establish the will-maker’s knowledge of the contents of the will and how the will was executed:

(i) when the will-maker was blind or illiterate or did not understand English; or

(ii) when the will-maker signed by a mark or directed another person to sign on his or her behalf;

(f) an affidavit to establish the date when there is doubt as to the date on which a will was executed (Form P4, para. 6(d)), or doubt as to when the deceased died.

(3) Procedure

Pursuant to WESA s. 129(3) and SCCR 25-4 (1), application for most grants, if unopposed and compliant with the Rules, including applications for a grant of letters of administration, need not be spoken to if the documents filed in support of the application are in order; in that case the Registrar issues the grant in Form P19 upon payment of the probate fees.

If the matter does not fall in the above category, the registrar will issue a notice identifying why the application has been rejected (SCCR 25-4(4)). In some cases, the applicant may be able to correct the application or supply additional material to satisfy the registrar. If not, then the matter must be dealt with by the court under SCCR 25-9. The applicant must file a requisition, a draft order, the material supplied by the registry (i.e. the notice of rejection) and affidavit or other evidence supporting the application. The court may proceed by issuing a desk order, direct that the matter be spoken to in chambers, or direct that an application be made to prove the will in solemn form. If the court approves the application, the registrar will issue the grant.

4. Probate Fees

Probate filing fees must be paid to the court registry before a grant will be issued. These fees can be fairly substantial, depending on the value of the estate. It is important to determine, in advance, how the fees will be paid. In most cases, the financial institution where the deceased had his or her bank accounts will release the appropriate amount. Upon the registrar providing a statement confirming the amount required to be paid, the financial institution (assuming it is holding sufficient funds to the credit of the deceased) may issue a draft, payable to the Ministry of Finance, for the amount. Alternatively, the executor or one of the beneficiaries may be prepared to lend the money to the estate to enable the grant to be issued.

Section 1 of the Probate Fee Act, S.B.C. 1999, c. 4 provides that probate fees are payable on the gross value, as deposed to in the Statement of Assets, Liabilities and Distribution, of all of the following that pass to the personal representative at the date of death:

(a) the real and tangible personal property of the deceased situated in British Columbia, and

(b) if the deceased was ordinarily resident in British Columbia immediately before the date of death, the intangible personal property of the deceased, wherever situated.

In other words, if the deceased was “ordinarily resident in British Columbia immediately before the date of death”, all of the deceased’s assets, except for real and tangible personal property physically located outside of British Columbia, will be subject to probate fees.

Practitioners have criticized the inclusion of intangible personal property outside of BC (e.g. securities without certificates transferable at a location outside of BC) in the calculation of probate fees because under it the same assets can be subject to probate fees in more than one province, and unlike some provinces, BC has no upper limit on probate fees despite the fact the work of the probate registry
is similar whether an estate is worth $100,000 or $100,000,000.

A court filing fee of $200 is payable for commencing the application for the grant. No filing fee is payable if the value of the estate does not exceed $25,000 (Supreme Court Civil Rules, Appendix C, Schedule 1, Item 1).

For estates with a value of more than $25,000, the following additional fees are payable under the Probate Fee Act.

- $6 for each $1,000 or part of $1,000 of estate value in excess of $25,000, up to $50,000; plus
- $14 for each $1,000 or part of estate value in excess of $50,000.

No probate fee is payable under the Probate Fee Act if the estate’s value does not exceed $25,000.

For an example of how these fees are calculated, if an estate has a gross value of $124,200, the total fee payable will be:

- Court Filing Fee $200.00
- Additional Fee
  (a) \((50,000–25,000) \div 1,000 \times 6\) $150.00
  (b) \((125,000–50,000) \div 1,000 \times 14\) $1,050.00
- Total $1,408.00

Generally, probate fees will not be payable on assets that were situated on reserve lands, if owned by a registered Indian at the time of his or her death (the Indian Act, R.S.C. 1985, c. I-5).

5. Notice Required under WESA

Section 121 of WESA requires that notice of an application for a grant must be provided to specified parties who are or may be beneficially interested in the estate as set out in the Rules. Section 121 applies to nearly every application for a grant, including a grant of probate or letters of administration. The notice must be provided at least 21 days prior to the application for probate (SCCR 25-2(1)). The Public Guardian and Trustee is not required to provide the notice (SCCR 25-2(15)). Notice is not required if the will has been proven in solemn form or if the court orders the notice. For example, notice to beneficiaries of the estate is required in the following cases:

(i) executors and alternate executors named in the will and any person that has a prior or equal right to make an application for a grant;

(ii) beneficiaries under the will, including both residual and contingent beneficiaries;

(iii) persons entitled on an intestacy or a partial intestacy, even if there is a will and no apparent intestacy;

(iv) if there is no will, to creditors of the deceased whose claims exceed $10,000;

(v) if the deceased was a Nisga’a member or a member of a treaty first nation, the Nisga’a or treaty first nation;

(vi) to any person the court orders should get notice; and

(vii) to any person that served a citation on the applicant.

Generally, it is prudent to resolve any doubt as to whether someone should be given notice under SCCR 25-2 in favour of giving notice, even if the will-maker has been out of touch for a long time or it appears that a gift will probably fail, or if the identity of the beneficiary is unclear from the will but the beneficiary is arguably intended to be included. As well, because a “spouse” includes persons living in a marriage-like relationship and since spouses are entitled to notice, anyone who could be considered a spouse should be given notice, even if a court has not yet formally determined his or her status as a spouse. Similarly, if there is any doubt if a spouse was separated, notice should be given, even if a court has not yet formally determined his or her status as a spouse. Similarly, if there is any doubt if a spouse was separated, notice should be given, even if a court has not yet formally determined his or her status as a spouse. Similarly, if there is any doubt if a spouse was separated, notice should be given, even if a court has not yet formally determined his or her status as a spouse. Similarly, if there is any doubt if a spouse was separated, notice should be given, even if a court has not yet formally determined his or her status as a spouse.

If there is a survivorship clause in the will and the survivorship period is reasonably short, or the five day survivorship rule in s. 10 of WESA applies, it may be advisable for the applicant to wait until its expiry. Otherwise it would be necessary to send notices to two different sets of beneficiaries based upon whether or not the event contemplated in the survivorship clause occurs.

The court, on application, has the power to vary the class of persons entitled to notice and to dispense with the requirement of notice (SCCR 25-2 (14)). For example, the court may require notice to be given to beneficiaries...
under a prior will of the deceased, so those persons may then qualify to file a notice of dispute under Rule 25-10.

(b) Methods of Giving Notice

SCCR 25-2(1) requires that the notice required under s. 121 of WESA be “delivered” to each person who is entitled to it. Delivery may be by personal delivery, ordinary mail to the person’s residential or postal address or email, fax or other electronic means to the address provided by the person for that purpose. Delivery of the notice occurs, if the form of notice is sent by ordinary mail, on the date of mailing, and if the form of notice is sent by email, fax or electronic means on the date it is transmitted, but delivery by email, fax or electronic means only occurs if there is a written acknowledgment of receipt (SCCR 25-2(5) to (7)). There is no requirement to prove receipt of a notice that has been mailed. However, before mailing, the executor must make reasonable efforts to verify that the address is current, even when the will-maker has long been out of touch, and if it is not, undertake some research as to the person’s likely address (Desbiens v. Smith Estate, 2008 BCSC 696).

Delivery of the notice to a person other than the person ordinarily entitled to delivery may be required in certain situations:

(i) Minors (SCCR 25-2(8) and (9))

Where a beneficiary who is entitled to notice is or may be a minor, notice must be given as follows:

- if the minor resides with all of the minor’s parents, to all parents;
- if the above does not apply, to the minor’s parent or guardian responsible for financial decisions;
- if the above does not apply, to the address(es) where the minor resides; and
- to the Public Guardian and Trustee.

However, notice is not required to be sent to the Public Guardian and Trustee if the applicant is executor or alternate executor and the minor is not a spouse or child of the deceased and the deceased’s will creates a trust for the minor and there is a trustee (SCCR 25-2(9)).

(ii) Persons with a mental disorder (SCCR 25-2(10) and (11))

Where a person who is entitled to notice is or may be mentally incompetent or has a committee (or the equivalent of a committee appointed outside of BC), the notice must be given both to the committee where there is one, unless the committee is also the applicant, and to the Public Guardian and Trustee. If there is no committee or extraprovincial equivalent, delivery of the form of notice to the person is also required.

(iii) Deceased persons (SCCR 25-2(12))

If a beneficiary survives a will-maker but dies before the grant is applied for, an applicant must deliver the notice to the personal representative of the deceased person but if the personal representative is not known, the applicant must apply for directions and the court may order that delivery is dispensed with or provide other directions for delivery.

(iv) Missing persons

If the whereabouts of a person entitled to notice are unknown, the applicant must apply to court under the general provision for an order varying the class of person entitled to notice or dispensing in whole or in part with notice (SCCR 25-2(14)). To obtain such an order, the personal representative must disclose in an affidavit what efforts he or she has made to locate the missing person. The extent of the efforts that must be made depends on the circumstances.

(v) Unborn and unascertained contingent beneficiaries

The Probate Registry practice appears to require that notices be sent to the Public Guardian and Trustee on behalf of unborn and unascertained contingent beneficiaries, although there is no apparent authority for this practice.

When notice is delivered to the Public Guardian and Trustee, contact information for every other person entitled to notice must accompany it (SCCR 25-2(13)).

Also, if a notice of application for a grant was delivered to the Public Guardian and Trustee, the court must not issue a grant until the written comments of the Public Guardian and Trustee are provided, unless the court otherwise orders (WESA, s. 124).
The form of notice does not include a sentence referring to the rights of a spouse with respect to a spousal home as defined in s. 1 of WESA, even though s. 27(1) of WESA requires the applicant to give the spouse such notice if a spousal home is passing on an intestacy or, if the deceased left a will, is not disposed of by the will. In those circumstances, a separate notice to the spouse informing the spouse of the right to acquire the spousal home must be given. There is no form specified for this notice.

6. Variations of Normal Grant when the Executor is Unable to Act

Events may have taken place since the execution of the will that make it impossible for the executor named in the will to apply for the grant. For example, the executor may predecease the will-maker, renounce, be disqualified, or be missing. An individual may be disqualified from making an application for several reasons, including infancy, incompetence, ceasing to be a spouse (WESA, s. 56), conflict of interest, and criminal conviction.

There are three different kinds of situations.

(a) If the will deals with a specific situation and names an alternate executor, the alternate executor can apply for a grant of probate.

(b) If the will does not deal with a specific situation but names more than one executor, one or more of the executors can apply for a grant of probate stating why the remaining executor cannot apply (e.g. deceased) or reserving the right of that person to apply at a later date for a grant (e.g. just unavailable) (SCCR 25-4(8)).

(c) If the will does not deal with a specific situation and does not name another executor, then a person may apply for administration with will annexed.

Although the Submission for Estate Grant (Form P2) and the several forms of Affidavit of Applicant (Forms P3, P4, P5, P6, and P7) allow for these situations, additional affidavits might be required. Also note that SCCR 22-3(1) allows prescribed forms to be varied as the circumstances require.

Events taking place after the grant may also affect the identity of the personal representative. In some situations, the executor may continue; in other cases, another person may obtain a grant. The following are examples of special situations arising after the grant has issued.

(a) Surviving Executor

If two or more executors prove the will and one of them dies, and no alternative executor was named, the surviving executor(s) will continue unless the will requires a minimum number of executors greater than the number surviving.

(b) Chain of Executorship

If the sole or last surviving executor dies before completing the administration of the estate, and no alternate was named, the executor of that deceased executor...
will become the executor of the original will-maker once the deceased executor’s will has been proved (*WESA*, s. 145). This rule is referred to as a chain of executorship. It applies only if the executor named in the will has been granted probate of the will before his or her death and each will in the chain has been probated.

(c) Second Grant

If a grant has issued, and the sole executor dies, wishes to be discharged or is unwilling or unable to act, and an alternate was named to succeed the executor, a “second grant” may issue.

(d) Failure of Executorship

If the sole or last surviving executor dies leaving no will, wishes to be discharged, or is unable or unwilling to act before the estate has been fully administered, an application may be made for a grant of letters of administration *de bonis non* with will annexed to a new personal representative.

(e) Double Probate

An executor who has reserved the right to apply for a grant may, at any time after the initial grant and before the administration of the estate is completed, either renounce or prove the will by applying for a grant. The registry will issue an additional grant. No additional fee is required.

In all of the above situations, the applicant must apply to the court to amend the grant (SCCR 25-5(3)). The application for an amended grant must be made at the registry where the original grant was issued using the original probate file. If the applicant was also the person to whom the original grant was issued, then the applicant must deliver the original grant and all certified copies concurrent with the filing of the application record. If the applicant was not the person to whom the original grant was issued, notice of the application is required to be given to the person in possession of the grant and that person must deliver the original grant to the probate registry at least one day before the hearing of the application.

7. Special Forms of Probate

Some examples of special forms of probate follow. The several forms of Affidavit of Applicant (Forms P3, P4, P5, P6, and P7) allow for these forms of probate, but additional affidavits might be required. Also note that SCCR 22-3(1) allows prescribed forms to be varied as the circumstances require.

(a) Executor According to the Tenor of a Will

When a person is not expressly named in the will as an executor but is directed by the will to perform some duties which an executor would typically perform, that person may be able to apply to become an executor according to the tenor of the will. For example, the will names as executor, a partner in a specified law firm. The registrar might require the matter to be dealt with by application to the court under SCCR 25-9.

(b) Proof of a Copy of a Will

If an original will or codicil has been lost, misplaced, destroyed or is not available, the applicant should use Form P4 to address the problem. The registrar may require the matter to be dealt with by application to the court under SCCR 25-9.

If the original will was last known to be in the possession of the will-maker and it cannot be found, the executor, if he or she wishes to probate that will, must rebut the presumption that the will-maker destroyed it with the intention of revoking it.

(c) Proof of a Copy of a Will Retained by an Official in another Jurisdiction

On an application for an ancillary grant, when a grant of probate or the equivalent was issued in a foreign jurisdiction, making the original will unavailable, court certified copies of the foreign grant and the will are required (SCCR 25-3(3)(b)).

(d) Cessate Grant (Limited in Duration)

If an original grant is limited for a specific period of time or until the happening of a certain event (such as, for example, the executor named in the will attaining the age of majority) then, upon the expiration of that time or the happening of the event, the original grant will cease to have any effect and a second grant, referred to as a cessate grant, is made (*WESA*, s. 134). It appears that an application to court under SCCR 25-5(3) may be required to revoke or amend the initial grant.

(e) Grant Save and Except Caeterorum (Limited as to Powers)

A will-maker may appoint one executor for a special purpose in respect of a specific portion of the estate (for example, as the executor of a specific property or fund), and another executor for all other purposes.

If the two executors apply for a grant at the same time, a single grant issues in which the

Wills
powers of each executor are distinguished. If the general executor applies for a grant first, a grant will issue to the general executor “save and except” that portion of the estate in respect of which the limited executor is appointed.

If the limited executor applies for a grant first, a grant will issue to the limited executor stating the specific purpose or part of the estate over which that executor has authority.

The general executor will then take probate “caeterorum” (i.e. of the balance of the estate).

(f) Grant Limited as to Subject Matter

If the executor will only receive certain of the assets passing to the personal representative of the deceased, then the executor’s powers to administer the estate are limited to those assets. For example, the deceased may have one will in respect of property situate in British Columbia, naming one person as executor, and another will in respect of property situate in another country, naming another person as executor.

[§10.06] Administration Applications

1. Documents Required for a Typical Administration Application

For the purposes of this section, a “typical” application for letters of administration contemplates a situation in which the deceased died intestate, an intestate successor is making the application, there are no infants or mentally disordered persons beneficially interested in the estate, and all other persons beneficially interested have consented to the appointment of the application without bond.

The documents required for a typical application are the following:

(a) Submission for Estate Grant in Form P2.

(b) Certificate of wills notice search.

(c) Affidavit of Applicant for Grant of Administration Without Will Annexed (Form P5). Among other things, in the Affidavit the applicant must swear that he or she has made a diligent search and believes that the deceased died without having left any will, codicil, or testamentary document. Supreme Court Civil Rule 25-3(14) requires the applicant make a search in all places that could reasonably be considered a place where a testamentary document may be found, including where the deceased usually kept his or her documents.

(d) Affidavit of Assets and Liabilities (Form P10). A Statement of Assets, Liabilities and Distribution (commonly referred to as the “disclosure document”), is exhibited to this affidavit. Note that although the title of the exhibit refers to distribution, it is not required that the applicant set out the proposed distribution.

(e) Affidavit of Delivery (Form P9) (SCCR 25-2).

(f) Notice in Probate Form P1, attached as an exhibit to the Affidavit of Delivery.

(g) Cheque for probate fees.

Additionally, the following documents may be required for certain types of applications:

(h) If applicable, an order of the court, made on application, that varies the class of persons entitled to notice and dispenses with the requirement of notice (SCCR 25-2 (14)).

(i) Consents of all persons having a prior or equal right to apply for letters of administration to the appointment of the administrator (with or without bond). Such consents are not required but the best practice is to obtain them and to file them with the application.

Reference should be made to WESA, s.130, to determine priority. A spouse has the highest priority and may nominate a person to be administrator. This nominated person also takes priority over the deceased’s children. The children follow the spouse in priority and the child nominated by the majority of the children has next priority, followed by another person nominated by the majority of the children. After this comes a child that does not have the consent of a majority of children. This is followed by the deceased’s next of kin having the consent of a majority of the intestate successors, followed by the deceased’s next of kin not having the consent of a majority of the intestate successors. Finally, the court may appoint any other person the court determines is appropriate, including the Public Guardian and Trustee, with consent.

For direction on the preparation of the documents for a grant of administration, consult the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) §6.5 to §6.24. Take care to prepare each document in accordance with the guidelines to ensure the court registry accepts the application.
2. Procedure
The procedure for applying for a grant of letters of administration is the same as the procedure for applying for a grant of probate of a will (see §10.05.3) as is the payment of probate fees (see §10.05.4).
The applicant must give notice to various persons as required by WESA and the Supreme Court Civil Rules in order to complete the Affidavit of Delivery (see §10.05.5).

3. Intestate Successor Not Consenting to Application
If there are intestate successors who have a prior or equal right to apply for the grant and who have not consented, the applicant should apply to the court for the estate grant under SCCR 25-9 and, in accordance with SCCR 4-3, should serve the documents for the application on those not consenting. The usual time limits for service allowed under the Supreme Court Civil Rules for an application under SCCR 8-1 must be observed before the court can hear the matter.

4. Other Grants of Administration
The documents and procedures are similar for all forms of administration, except for small estates. Additional affidavits might be required, depending on the situation. Note that SCCR 22-3(1) allows prescribed forms to be varied as the circumstances require.

(a) Small Estate (WESA, Division 2 of Part 6)
For estates less than a value set by Regulation (anticipated to be $50,000) an executor or a proposed qualifying administrator may obtain a grant of probate or administration upon filing a “small estate declaration” in a prescribed form (yet to be published). No security need be posted and the personal representative need not provide a formal set of accounts. This part of WESA has not been proclaimed yet.

(b) Administration with Will Annexed
When a person dies with a will but there is no executor willing and able to act, someone must apply for a grant of administration with will annexed. The procedure in this situation is similar to an application for a grant of probate as the standard forms (P1, P2, P3, P9 etc.) have boxes to tick where the application is for administration with will annexed. Section 131 of WESA establishes the priority of who may be appointed the administrator with will annexed as follows: first, a beneficiary who has the consent of the beneficiaries having a majority interest in the estate; second, a beneficiary that does not have the consent of the beneficiaries with a majority interest in the estate; third, any other person, including the Public Guardian and Trustee, with consent.

(c) Administration Ad Colligenda Bona
If there is a delay in the appointment of an administrator and it is necessary to appoint someone to collect the assets and to protect the estate, the court may appoint an administrator ad colligenda bona and give the administrator whatever powers the court deems necessary.

(d) Administration Pendente Lite
When an action touching the validity of a will or for obtaining, recalling, or revoking a probate or grant of administration is pending or has been commenced, the court may appoint an administrator pendente lite. The administrator pendente lite has all of the rights and powers of a general administrator other than the right to distribute the estate and is subject to the control of the court (WESA, s. 103).

(e) Administration by Attorney
When a person entitled to administration resides outside BC, probate or administration with will annexed may be granted to that person’s attorney acting under a power of attorney, limited to the deceased’s estate located in British Columbia (WESA, s. 139).

(f) Administration de Bonis Non
When an administrator dies leaving part of the estate unadministered, a grant in respect of the unadministered estate will be issued to a new personal representative to enable the administration to be completed. The new grant is called administration de bonis non.

5. Security for Grant of Administration
Under s. 128 of WESA, an administrator is not required to provide any security for acting as administrator unless there is a mentally incapable beneficiary without a nominee (i.e., a court appointed committee, an attorney or a representative for financial and legal affairs) or a minor beneficiary, or if the court, on application of a person interested in the estate, requires it. If security is required, the applicant must apply to court to determine the security required and the court may impose a form of required security or impose a restriction on the powers of the administrator (WESA, s. 128(1.1)).

A trust company or credit union may not be required to post a bond for the administration of an estate (Financial Institutions Act, R.S.B.C. 1996, c. 141, s. 73(4)).
If the court orders that the applicant post a bond as security, liability under the bond continues until the administrator has fully accounted to the beneficiaries and the bond has been cancelled.

Before the grant of administration is issued, the bond must be prepared, executed by the administrator and sureties, if any, and filed with the registry, together with the affidavit of any sureties if they are individuals. The filing of the bond is by way of requisition.

When bonding companies are involved, the bond premiums are charged against the estate and are usually payable annually. There may be a minimum fee.

When the administration of the estate is complete, an application must be made to deliver the bond for cancellation.

If a notice of application for a grant was delivered to the Public Guardian and Trustee, the court must not issue a grant until the written comments of the Public Guardian and Trustee are provided, unless the court otherwise orders (WESA, s. 124).
Chapter 11

Other Applications in the Course of Administration

[§11.01] Introduction

This chapter is a general review of applications other than the conventional proceedings for grants of probate or letters of administration.

This chapter uses the terminology and procedure mandated by the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the “SCCR”).

Refer specifically to the Supreme Court Civil Rules, Part 25 (Estates) and Rule 8-1 (Applications and setting down for hearing). Refer to Chapter 9 of the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) for further information on this topic.

These applications are not available for the will of a First Nations person, unless there had been consent by the Minister of Indigenous and Northern Affairs Canada under s. 44 of the Indian Act, R.S.C. 1985, c. I-5 to transfer the matter to the provincial superior court. Remember, however, if transferred to provincial jurisdiction there may be consequences such as payment of probate fees or enforcing orders relating to land on reserve. For more information, see the British Columbia Probate and Estate Practice Manual (Vancouver: CLEBC), Chapter 20.

[§11.02] Rectification and Construction of Wills

Traditionally, the Supreme Court of British Columbia sat as either a court of probate or a court of construction. Once probate of a will has been granted, the court has jurisdiction to interpret the will.

In its exercise of the probate jurisdiction, the court certifies that the will is valid and that the personal representative named in the grant is entitled to administer the estate. The court also traditionally had a limited power, confined to deleting words, to rectify the wording of a will to accord with what it determines to have in fact been the will-maker’s intention.

In the exercise of its construction jurisdiction, the court interprets or construes the contents of the testamentary documents that have been approved by the court in the exercise of its probate jurisdiction. The court of construction can only interpret the words that validly constitute the will, as determined by the court of probate.

Therefore, if there was a problem with a will, such as the mistaken inclusion of certain language, it was wise to bring an application for rectification to clarify the issue before proceeding to probate. Otherwise, the relief available would be restricted to the more limited jurisdiction of a court of construction to interpret the wording contained in the will. However, WESA s. 59 specifically allows an application for rectification to be made by a court of probate or a court of construction within 180 days of a grant of probate being issued.

[§11.03] Probate Jurisdiction: Rectification of Will

1. Addition of Words

The traditional jurisdiction of the court to rectify at the time of a grant of probate did not extend to adding words. The wording of WESA s. 59 is broad enough to allow the court to rectify the will by adding as well as deleting words (s. 59(1)).

2. Application of WESA s. 59

A person may apply to the court for rectification of a will under s. 59 of WESA if the will fails to give effect to the will-maker’s intention because of:

(a) an error arising from an accidental slip or omission;

(b) a misunderstanding of the will-maker’s instructions; or

(c) a failure to carry out the will-maker’s instructions (s. 59(1)).

The section expands the relief beyond the situation that would apply if the will-maker read the will, or if its contents were brought to the will-maker’s attention. In that case, there was a presumption that the will-maker knew and approved of the language in the will.

3. Procedure

If there is an existing probate proceeding, the application is brought by Notice of Application in Form P42. If there is no existing probate proceeding, the application is brought by requisition in Form P43 (SCCR 25-14(2)(d) and (c) or (f)).

Section 59 of *WESA* provides that the rectification application must be made prior to the grant of probate being issued or within 180 days of the grant of probate being issued, unless the court extends that date. Therefore a personal representative would not want to distribute the estate for at least 180 days after the grant is issued. In any event, pursuant to *WESA* s. 155, distribution is not allowed for 210 days following the issuance of the grant, without the consent of all beneficiaries or a court order. But, even if all of the beneficiaries at the time consent to early distribution, a rectification order might also change the beneficiaries, so there may be a risk that all beneficiaries have not consented. Since a rectification order could possibly be made after 180 days following the grant of probate, s. 59 also provides that the personal representative is not liable if a distribution takes place after 180 days and before getting notice of an application to rectify the will. When distribution has occurred in those circumstances, however, a person may still recover any part of the estate from a beneficiary.

The section also provides that extrinsic evidence including that of the will-maker’s intentions is admissible.

**[§11.04] Construction Jurisdiction: Interpretation/Construction of Will**

1. **General**

   The terms “interpretation” and “construction” are used interchangeably. Both refer to the court’s interpretation or construction of the contents of a testamentary document that the court has approved in the exercise of its probate jurisdiction.

   An application for construction is made in a separate proceeding after probate has been applied for and granted.

   It is not always necessary to bring on an application for construction of a will in order to protect an executor who is making a distribution in uncertain circumstances. The executor may proceed with distribution when all those having interest or potential interest:

   (a) are ascertained;

   (b) are *sui juris*;

   (c) consent to a particular distribution (which may be reached by compromise or reflected in a deed of arrangement); and

   (d) indemnify the executor for that distribution.

   An example of a typical compromise is the division of a legacy between two charities when the description in the will may be taken to apply to both.

   If, however, there is some doubt as to whether all conceivable potential beneficiaries have been identified, some of the beneficiaries are minors or mentally incompetent, or if it appears imprudent to rely on an indemnification by the parties to the arrangement, it may be necessary to obtain court approval of the arrangement.

   Section 40 of the *Infants Act*, R.S.B.C. 1996, c. 223, provides for the making of an agreement by the guardian of an infant subject to the approval of the Public Guardian and Trustee for amounts under $10,000, and for court approval in other cases.

   With respect to mentally incompetent beneficiaries, unless there is a committee or attorney or a representative appointed under a Representation Agreement covering financial and legal matters for the incompetent beneficiary, no one has jurisdiction to bind the incompetent beneficiary to any particular distribution and a court application will be required.

2. **Ascertaining the Will-Maker’s Intent**

   In construing a will, the court attempts to ascertain the will-maker’s intent when that intent is not clear on the face of the will or when, even though the language appears to be clear, problems emerge at the time the facts are ascertained when preparing for distribution.

   Uncertainty may result from ambiguity or mistake and can arise from poor use of language, clerical error, a misunderstanding of the will-maker’s instructions, a failure to carry out the will-maker’s instructions, a failure by the will-maker to appreciate the effect of the words used, and from other causes.

   The court, in its exercise of jurisdiction as a court of construction, can ignore words and has a limited power to add or substitute words. However, the court can only add or change words if, from reading the will, it is satisfied that a mistake has been made and it is clear what the words are that the will-maker omitted.

3. **Judicial Approaches**

   The case law shows that there are two general approaches to the construction of wills. The two approaches are:

   (a) The Literal Construction of Meaning (that is, the objective approach)

   In this approach, determination of the will-maker’s intention is based on the words in the will itself, and extrinsic evidence of circumstances known to the will-maker at the time he or she made the will (that is, “armchair” evidence) is only examined if the
words of the will have a latent ambiguity when the words are applied to the facts.

(b) The Circumstantial Construction of the Language of the Will (that is, the subjective approach)

In this approach, determination of the will-maker’s intention is made by admitting the “armchair” evidence at once, and interpreting the language of the will and its sentence structure in the light of that evidence.

The strong trend of Canadian and BC courts is to favour the subjective approach (see Re: Thiemer Estate, 2012 BCSC 629).

4. Rules of Construction

WESA should be reviewed at the outset to determine whether any statutory provisions dealing with the construction of wills are determinative of the matter such as ss. 41, 42, 44, 45, 46, 47 48, 50 and 51. It should be kept in mind, however, that many of these sections are subject to “a contrary intention appearing in the will”, and a court application may still be necessary.

There are also common law rules of construction which may assist when interpreting a will.

Some examples of common law rules of construction are as follows:

(a) technical terms are given their technical meanings in the absence of contrary intention;

(b) if possible, the court will avoid construing a will in such a way that it creates an intestacy; and

(c) when particular words are followed by general words, the latter may be restricted in meaning by the former (the ejusdem generis rule).

5. Procedure

An application for construction is brought by petition or requisition (SCCR 2-1(2)(c)). Under SCCR 22-1, the matter is heard in chambers.

The personal representative usually brings the application, but a beneficially interested party other than the personal representative can bring on an application for construction if the personal representative is asked to do so but refuses.

In the course of this procedure, the personal representative’s function is normally limited to ensuring that matters are properly placed before the court, including all relevant evidence. However, if the personal representative has an interest in the estate (for example, he or she is a beneficiary), it may be necessary for the personal representative to retain separate counsel.

Notice of the application must be served on all persons whose interests may be affected by the order sought. Interested parties might include unascertained persons as well as those who have a vested future or contingent interest in the subject matter of the application and may entail service upon intestate successors. It may also be necessary to serve the Public Guardian and Trustee if minors or unborn beneficiaries are involved (Infants Act, s. 49).

[§11.05] Curing Deficiencies

In an application for probate (see Chapter 10), the probate registrar will usually recognize instances of non-compliance under WESA, and either require further evidence, as in the case of an unattested alteration, or reject the application completely as, for example, when only one witness has signed the document.

If a purported will does not satisfy formal requirements, s. 58 of WESA gives the court the discretion to “cure” the formal deficiencies. The court must first determine that a “record, document or writing or marking on a will or document” represents the testamentary intentions of the deceased (s. 58(2)). A “record” includes data that is recorded or stored electronically, can be read by a person, and is capable of reproduction in visible form (s. 58(1)). The key issue is to determine whether the record, document etc. records a deliberate or fixed and final intention as to the disposal of the deceased’s property on death. If the record, document etc. represents the deceased’s testamentary intentions, even if it does not satisfy the formal requirements of WESA, the court may, as the circumstances require, order that it take effect as though it had been made as the deceased’s will or part of it, a revocation, alteration, or revival of the will, or as the deceased’s testamentary intention (WESA, s. 58(3)). Although the circumstances the court will consider will be unique in each case, they could include presence of the deceased’s signature, handwriting of the deceased, witness signatures, revocation of previous wills, funeral arrangements, specific bequests, and the title of the document. (See George v. Daily, [1997] M.J. No. 51 (Man. C.A.); Estate of Young, 2015 BCSC 182; In Beck Estate (Re), 2015 BCSC 676; Lane Estate, 2015 BCSC 2162.)

The court may reinstate words that have been altered or obliterated if the alteration or obliteration is not made in compliance with WESA (s. 58(4)).

Under s. 58 the court may waive strict compliance with the formal requirements to make a valid will set out in WESA s. 37. For example, if one witness initialed all pages but forgot to sign the last page of a document that would otherwise qualify as a will, the court could order it to be effective as the deceased’s will. As well, other
documents, such as an electronic will, may be held to be valid wills.

An application under WESA s. 58 is made in accordance with SCCR 25-14(2)(c). If there is an existing probate proceeding, the application is brought using a Notice of Application in probate form P42. If there is no existing probate proceeding, the order may be sought by requisition in probate form P43.

Section 58 cannot be used to uphold a will that is invalid for substantive reasons such as lack of testamentary capacity or undue influence.

[§11.06] Application for Advice and Directions

An application may be brought under s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464, for the “opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.” A trustee, executor, or administrator is, by s. 87 of the Trustee Act, deemed to have discharged his or her duty by acting on the advice given by the court. WESA s. 143 expressly states that s. 86 of the Trustee Act applies to a personal representative.

The scope of s. 86 is not as broad as it appears to be. Many applications brought under this section ought more correctly to be brought under a different head, particularly those that require interpretation of the will.

Applications under s. 86 have been found to be appropriate in the following circumstances:

(a) when guidance was needed as to the proper disposition of interest on a reserve of income that was being held toward the executor’s compensation;
(b) when direction was needed on whether to exercise a statutory power to compromise an action; and
(c) in construing the extent of a discretion or power given to trustees.

If there is a dispute between the parties, a need for extensive evidence, or a blatant desire to shirk a discretionary decision, a s. 86 application is probably inappropriate.

The application is usually brought by petition under s. 86 of the Trustee Act.

In general, the personal representative has a right of full indemnity for all costs properly incurred by him or her in the due administration of the trust, including costs incurred in s. 86 proceedings. However, when common sense and business prudence should have dictated the proper course of action, the personal representative may be denied his or her own costs and penalized with the costs of the other parties to the proceeding.

[§11.07] Dispute Resolution

1. Disputes among Executors and Trustees

Disputes may arise among executors during the administration of an estate, or among trustees subsequently in the execution of the trusts of the will. Since trustees must act unanimously unless the will otherwise provides, a method of resolving such disputes is necessary. One method is to have a well-drawn “majority rule” clause in the will, which may exonerate a dissenting trustee.

The court has jurisdiction to intervene in the exercise by trustees of their discretion if:

(a) such discretion is exercised in bad faith;
(b) there is a failure to consider exercising such discretion; or
(c) there is a deadlock between the trustees as to the exercise of their discretion.

However, the court should only intervene when failure to do so would be “manifestly prejudicial” to the interest of the beneficiaries (Re Blow (1977), 2 E.T.R. 209 (Ont. H.C.)).

The court will not substitute its discretion for that of trustees who are acting unanimously and properly under their powers. It may step in to compel execution of the trusts of the will in the case of a deadlock between trustees.

The court will not intervene when the trustees are in agreement to sell an estate asset but are not in agreement as to the price because price is a less important matter than the decision whether to sell (Re Wright (1976), 14 O.R. (2d) 698 (H.C.)).

2. Removal of an Executor or Trustee

Misconduct on the part of a trustee is not a necessary prerequisite to the court removing a trustee “when the continued administration of the trust with due regard for the interests of [the beneficiaries] has by virtue of the situation arising between the trustees become impossible or improbable” (Re Consiglio Trusts (No. 1), [1973] 3 O.R. 326 at 328 (C.A.)).

The court will grant an application for removal of a personal representative if the personal representative’s duties are in conflict with his or her personal interests, estate assets have been endangered by the personal representative’s conduct, or the personal representative has benefitted at the expense of the estate. However, mere disagreement between the trustee and beneficiaries will not usually result in
the removal of a trustee; see Conroy v. Stokes, [1952] 4 D.L.R. 124 (B.C.C.A.). Other bases on which the courts have removed personal representatives include bankruptcy, conviction of a felony, taking up permanent residence outside the jurisdiction, incapacity, and breach of trust in his or her own favour.

The court will remove a trustee for a breach of trust in failing to maintain an even hand between the life tenant and the remaindermen.

The court’s jurisdiction to remove a trustee is based on s. 30 of the Trustee Act, R.S.B.C. 1996, c. 464 and its inherent jurisdiction. The court’s jurisdiction to remove a personal representative is based on s. 158 of WESA, which sets out a number of specific, but non-exhaustive, grounds for removal of a personal representative. If the person sought to be removed is both a personal representative and a trustee, applications must be made under both acts.

An application to remove a trustee would be made under SCCR 16-1, but SCCR 25-14(1)(d) governs the application procedure within the existing probate proceeding for removing a personal representative.

[§11.08] Other Applications

1. Giving Trustees New Powers

A trustee has only the powers given by law and by the terms of the will, and the courts have only a very limited inherent jurisdiction to enlarge these powers. This inherent jurisdiction has been supplemented by the Trustee Act and the Trust and Settlement Variation Act, R.S.B.C. 1996, c. 463.

(a) Inherent Jurisdiction

The court will exercise its inherent jurisdiction in limited circumstances. It will not rewrite the trust, but will support the willmaker’s basic purpose when it has been overtaken by an unforeseen event that would otherwise severely prejudice the beneficiaries.

(b) Trustee Act

Under the Trustee Act, the court has the power to approve the following specific applications:

(i) Repairs

Under s. 11 of the Trustee Act, a trustee may apply to expend money for the purpose of “repair or improvement of the land, or for the erection on the land of a building” (or addition or improvement). The court must be satisfied that the repairs or improvements are necessary or expedient to prevent deterioration of the value of the land or to increase its productive power.

(ii) Investments

Sections 15.1 to 15.6 of the Trustee Act, give trustees unlimited powers of investment as long as the investment is in a form of property or security in which a prudent investor might invest, the “prudent investor” rule. A will-maker can restrict or limit the trustee’s powers to deal with funds held in trust, and may specify in a will the type of investments the trustee may make for the estate, and prohibit the trustee from making others.

(iii) Sale of an infant’s property

When the income from the property held for an infant is insufficient for his or her maintenance and education, a trustee may apply under s. 25 of the Trustee Act for an order authorizing the sale of any portion of the property so that the trustee may apply the proceeds of sale for or towards the maintenance and education of the infant.

(c) Trust and Settlement Variation Act

Under s. 1 of the Trust and Settlement Variation Act, the court has jurisdiction to enlarge the powers of the trustee. The court considers whether the benefit to be obtained is one “that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept” (Russ v. British Columbia (Public Trustee) (1994), 89 B.C.L.R. (2d) 35 (C.A.)). If there are minor or mentally incapable beneficiaries, notice of the application must be provided to the Public Guardian and Trustee. The Court may approve the variation on behalf of the minor or incapable beneficiaries.

2. Cy-près

If a trust for a charity or a gift to a charity discloses a general charitable intention, it will not fail for uncertainty or impossibility of performance, but the trust property or the gift will be applied for other charitable purposes cy-près, that is, as nearly as possible to the original purpose that cannot be carried out. The Attorney General, by virtue of his or her parens patriae jurisdiction over charities, is a necessary party.
Even the broadest privative clause, such as one empowering the trustee to make binding decisions at his or her absolute discretion, cannot completely oust the jurisdiction of the court to monitor the performance of a trust or the administration of an estate. The overriding principle is that a trustee must act honestly and exercise care in managing the trust in accordance with the terms of the trust, as a prudent businessperson would. The courts have consistently held that the trustee’s exercise of the discretion must be proper and that a trustee must actually consider the situation and make a decision in order to truly exercise the discretion.
Chapter 12

Transmission and Transfer of Assets¹

§12.01 Introduction

This chapter deals with the procedures and documents required for transmission of assets from the name of the deceased into the name of the personal representative or, if applicable, into the name of the surviving joint tenant, and transfer (distribution) of assets from the personal representative to the beneficiaries or heirs.

§12.02 Executor’s Year

An executor is allowed one year from the will-maker’s death to gather in the assets and settle the affairs of the estate. This is commonly known as the executor’s year, and an executor cannot be compelled to pay a legacy before the expiry of the one-year period. Further, except where specifically provided in a will, a legacy carries interest only after one year from the will-maker’s death. The rate of interest on a legacy is 5% (Interest Act, R.S.C. 1985, c. I-15, s. 3) unless otherwise provided in a will.

§12.03 Legislation Affecting Transfer of Assets

1. Wills Variation under WESA

Under s. 60 of Division 6 of Part 4 of WESA, a spouse or child may commence a proceeding to vary a will if he or she feels that the will does not adequately provide for his or her proper maintenance and support (see Chapter 19). The proceeding must be brought within 180 days from the date of the issue of probate of the will (WESA, s. 61(1)).

A copy of the originating process must be served on the personal representative within 30 days of the expiry of the 180 day period, unless the court extends the time for service (WESA, s. 61(1)(b)).

Section 155 of WESA provides:

155 (1) The personal representative of a deceased person must not distribute the estate of the deceased person in the 210 days following the date of the issue of a representation grant except

(a) with the consent of all beneficiaries and intestate successors entitled to the estate, or

(b) by order of the court.

The court will likely order any distribution made within this period be repaid by the executor or that other security be posted by the executor: see Stevens v. Wood Estate, 2013 BCSC 2380.

Further, if a wills variation proceeding is commenced, a distribution may only occur with the consent of the court (WESA, s. 155(2)). If real property is transferred to a beneficiary within the 210 day period, title to the property cannot be registered in the Land Title Office without either the approval of the court or consents of the beneficiaries entitled to consent. The registration is subject to the liability of being charged by an order under Division 6 (s. 69(2)).

At the end of the 210 day period, if the personal representative does not know whether or not a wills variation proceeding has been commenced, it is good practice for the personal representative to conduct a search of court registries in the province because the court may extend the period for service without the knowledge of the personal representative. The search may not be justified depending on the size of the estate if other inquiries can be made. Also, land title searches can be made to ascertain the existence of a certificate of pending litigation, but the filing of a certificate of pending litigation against estate real property in such a proceeding is optional (WESA, s. 61(5)). The lawyer should explain the matter to the client and seek instructions.

In all cases, the solicitor for the personal representative should advise a person entitled to apply for a wills variation to seek independent legal advice before signing a waiver or consent to distribution within the 210 day period.

The 210 day bar against the transfer of real property contained in WESA applies only to a transfer to a beneficiary, not to a sale by the personal representative, although filing of a certificate of pending litigation may preclude a sale. The sale proceeds remain, however, subject to the 210 day restriction on distribution to the beneficiaries (WESA, s. 155).

See Chapter 19 for more on the variation of wills under WESA.

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2. Income Tax Act

If a personal representative transfers estate assets before he or she has received a certificate from the Canada Revenue Agency certifying that all taxes, interest, or penalties that have been assessed under the Act and are chargeable against the assets of the estate have been paid (commonly called a “clearance certificate”), the personal representative is personally liable for the unpaid taxes, interest, and penalties (Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), ss. 159(2) and (3)).

To avoid personal liability, the personal representative should either postpone distribution until he or she has received the clearance certificate, or reserve from the distribution sufficient estate assets to cover the charges. In the latter case, the lawyer should advise the personal representative to obtain advice and written confirmation from the personal representative’s tax adviser as to the amount of the reserve required to cover unpaid taxes, interest, and penalties. It may be advisable for the personal representative to postpone interim distribution and calculation of the reserve amount until the representative has received a tax clearance certificate to the date of death. A final tax clearance certificate may be obtained on final distribution. The lawyer should also advise the executor client about the risk and about the protection afforded by the beneficiaries providing an indemnity to the executor at the time of the interim distribution.

3. Intestacies

(a) Delay in Distribution

The same provision regarding the period of time before an estate can be distributed applies where there is a grant of administration with no will. Section 155 of WESA requires that the personal representative must not distribute the estate until after 210 days following the date of issue of the grant.

(b) Advances to Children

The concept of “hotchpot” is based on the legal presumption that a will-maker who leaves a gift to a child in the will, and then after the making of the will gives the child a sum of money, does not intend to give the child’s portion to him or her twice. This presumption is rebuttable. Wills may contain a “hotchpot” clause either making the presumption expressly applicable or expressly negating the presumption.

The Estate Administration Act used to provide a hotchpot provision for intestate estates, but this was not carried over in WESA.

(c) Common Law Spouses and Multiple Spouses

Section 2 of WESA provides that two persons are spouses of each other if (a) they were married to each other, or (b) they had lived with each other in a marriage-like relationship for at least 2 years.

If two or more persons are entitled as a spouse, they split the spousal share in an intestate estate in the proportions they agree upon, or failing agreement, as determined by the court (WESA, s. 22(1)).

[§12.04] Transmission and Transfer Procedures

1. General

The legislation, procedures, and documents required to transmit various assets of the deceased to the surviving joint tenant, the personal representative and the beneficiaries (if any) of the estate are described in the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) §10.20 to §10.117.

Generally, subject to the statutory restrictions noted above, when the grant is issued, the process of transmission and transfer can begin, although transfer to beneficiaries may be delayed until the personal representative has obtained a clearance certificate from the Canada Revenue Agency, obtained approval of his or her accounts and published notices to creditors (see §13.06).

When preparing the documents for transmission and transfer, if there is any doubt as to the requirements, contact the appropriate agency, corporation, or office (for example, a transfer agent for stocks or bonds, the Land Title Office, banks, etc.).

Transmission or transfer of assets frequently requires filing of copies of court documents. If copies have not been obtained at the time of application for the grant, the procedure for obtaining them is as follows:

(a) to obtain a court-certified copy of the grant, submit a request to the registry (the registry prefers to make its own photocopies). The fee is $40 for the first ten pages and $6 for each page thereafter.

(b) to obtain a court-certified copy of the real property portion of the Statement of Assets, Liabilities and Distribution (the “disclosure document”), submit a request to the registry. The fee is $40 for the first ten pages and $6 for each page thereafter.
For tables summarizing the documents needed for transfer or transmission of certain assets, see the *British Columbia Probate and Estate Administration Practice Manual* (Vancouver: CLEBC) §10.113 to §10.117.

2. Real Property

Sections 260 to 270 of the *Land Title Act*, R.S.B.C. 1996, c. 250 govern the transmission and transfer of interests in real property. There are other sections of the *Land Title Act*, as well as sections in the *Strata Property Act*, R.S.B.C. 1996, c. 43, the *Trustee Act*, R.S.B.C. 1996, c. 464 and Division 10 of Part 6 of *WESA* that are relevant to interests in land. The practice authorized in the Land Title Office for estate matters is set out in the *Land Title Practice Manual* (Vancouver: CLEBC).

If the deceased was a First Nations person who had real property located on reserve, there is a completely different process to follow, as set out in the *Indian Act*, R.S.C. 1985, I-5 (see *British Columbia Probate and Estate Administration Practice Manual* (Vancouver: CLEBC) §20.13).

The *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 imposes a tax on all land transfers unless the transfer comes within one of the exemptions listed in s. 14. Among the exemptions are:

(a) a transfer by operation of law to the surviving joint tenant (s. 14(3)(m));

(b) a transfer to a person in that person’s capacity as personal representative, if the land transferred is part of the deceased’s estate (s. 14(3)(q)); and

(c) a transfer from a trustee of a deceased’s estate to a beneficiary who is a “related individual” (that is, related to the deceased) if the land transferred is a family farm, a principal residence, or a recreational residence (s. (14)(3)(c)).

“Related individual”, “parent”, “spouse”, “child”, “family farm”, “principal residence”, and “recreational residence” are all defined terms (ss. 1(1), 14(1)). Only one recreational residence may be claimed for exemption purposes in respect of the deceased’s estate (s. 14(5)).

The surviving joint tenant, not the deceased’s personal representative, must arrange for transmission of his or her interest and bear the legal fees and costs of transmission.

Documents required for the transmission of various interests in land are set out in the *British Columbia Probate and Estate Administration Practice Manual* (Vancouver: CLEBC) §10.24 to §10.41.

3. Personal Property

(a) Safety Deposit Box

After the contents of a safety deposit box have been listed, the safety deposit box lease can be transferred. It is the lease, not the contents, that is transferred. A transfer to the surviving joint tenant of the safety deposit box is effected by providing the financial institution with the original or a notarially certified copy of the death certificate. (Note that some banks may not allow a surviving joint tenant to close out a safety deposit box without producing a grant in respect of the deceased joint tenant). A transfer to the personal representative is effected by sending a notarially certified copy of the grant, with appropriate instructions.

(b) Accounts with Financial Institutions

To transmit a joint account to the surviving joint tenant, the financial institution will require the original or a notarially certified copy of the death certificate.

To transmit an account to the personal representative, the financial institution will require a notarially or court-certified copy of the grant (it may also require a signature card and new account agreements). Once the account is in the name of the personal representative, if it is then to be transferred to the beneficiary, a letter of direction to the financial institution should suffice. Alternatively, the account may be closed and the funds forwarded to the estate lawyer on production of a notarially certified copy of the grant and a letter of direction from the personal representative.

(c) Insurance, RRSPs and RRIFs

If there is an insurance declaration or RRSP/RRIF beneficiary designation in the will, the insurance company or plan administrator should be notified and provided with a notarially certified copy of the will. In some cases the insurance company or plan administrator may require a notarially certified copy of the grant to validate the will. Since a designation of a beneficiary under a RRSP or RRIF can only be made in accordance with the terms of the plan (Part 5 of *WESA*), it will be necessary to confirm that the plan permits designation of a beneficiary by will. It should also be confirmed that the deceased did not file a change of beneficiaries with the insurer or plan administrator after signing his or her will.

If there is no declaration or beneficiary designation in the will, the lawyer should contact the insurance company or plan administrator to see what documents are required. If there is a
named beneficiary, instructions from that person to obtain payment to him or her will be required. If the estate is the beneficiary, a notarially or court-certified copy of the grant will be required.

(d) Pensions

The comments regarding RRSPs and RRIFs apply to pensions except that where a designation has been made in a pension plan pursuant to the terms of that plan, the designation cannot be affected in any way by a will executed after making the designation (Part 5 of WESA).

(e) Bonds and Debentures

Documents required for the transmission and transfer of bonds and debentures are set out in the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) §10.60 to §10.68 (see also in that publication precedents FP 122 and 124). Note that the transfer requirements for Canada Savings Bonds and other bonds issued by the Bank of Canada are somewhat different than for other bonds. As a safety precaution against losing the certificates it is advisable to use separate bond powers of attorney to endorse the debenture or bond certificates rather than having the client take the certificates to the financial institution for signature and guarantee. Transfer documents are not required for bearer bonds and debentures (which are transferred by delivery) except perhaps a notarially certified copy of the grant for the account (broker) identification and authority purposes.

(f) Shares

Documents required for the transmission of shares are set out in the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) §10.69 to §10.74. Sections 115 to 119 of the Business Corporations Act, S.B.C. 2002, c. 57, and section 51(7) of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, set out the requirements for share transfers. Note that companies whose shares are not traded on a recognized stock exchange may, by their articles, restrict the transfer of shares. A shareholders’ agreement may also restrict the transfer of shares. The lawyer should check with a non-trading company as to the requirements for transfer and whether there are any restrictions on transfer. Again, as a safety precaution against losing the certificates, it is advisable to use a separate stock power of attorney to endorse the share certificates rather than take the certificates for endorsement and guarantee. Transfer documents are not required for shares in street form.

(g) Motor Vehicles


For details on the transmission and transfer procedures, refer to the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) §10.75 to §10.86.

(h) Furniture and Personal Possessions

Transfer documents are not normally required to transfer furniture and personal possessions, but the personal representative may require a receipt.

(i) Debts Due to the Deceased

Bills of exchange (including promissory notes) should be endorsed, without recourse, in favour of the transferee. For any debt other than a bill of exchange or a mortgage of real property, the personal representative should execute an assignment and send notice to the debtor (Law and Equity Act, R.S.B.C. 1996, c. 253, s. 36).

(j) Other Property

§10.87 to §10.112 in Chapter 10 of the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) outline procedures for the transmission of various assets including mining claims, annuities, mobile homes, vessels, aircrafts, and assets in foreign jurisdictions.

(k) Nisga’a Cultural Property

If cultural property of a Nisga’a citizen is in issue, there may be a dispute as to whether it can pass by the will (see Division 3 of Part 2 of WESA).
Chapter 13

Creditors

[§13.01] Introduction

This chapter is intended to introduce the lawyer to advising the personal representative with respect to creditors’ claims.

For further discussion of this topic see Chapter 11 of the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC).

[§13.02] General

1. General Duties of the Representative Relating to Creditors’ Claims

The personal representative has the following general duties:

(a) to ascertain the liabilities of the estate and to retain sufficient assets to pay those liabilities before distributing the balance of the estate among the beneficiaries;

(b) to perform all contracts made by the deceased and enforceable against the deceased’s estate; and

(c) to pay the liabilities with due diligence as is appropriate to the assets and, so far as the beneficiaries are concerned, in accordance with the terms of the will.

2. Types of Creditors’ Claims

(a) Liabilities

As in any civil case, creditors in an estate administration case may be classified as secured, preferred, or unsecured. Claims may arise in three ways.

(i) Liabilities incurred by the deceased

Liabilities that were incurred by the deceased and were enforceable against the deceased immediately prior to death become the responsibility of the personal representative.

The creditor who brings an action against the personal representative pleads as the cause of action the liability contracted by the deceased before death, in the same manner as if the deceased were still alive, but names as defendant the personal representative (Supreme Court Civil Rule 20-3(10)). Judgment on such a claim establishes the status of the claimant as a creditor of the deceased. The assets of the estate are liable for payment, but the judgment is not a personal liability of the personal representative.

(ii) Liabilities incurred in respect of death

The personal representative likely will incur, and is entitled to incur, liabilities while administering the estate. The personal representative is entitled to be indemnified out of the assets of the estate for proper testamentary or administration expenses.

(iii) Liabilities incurred in administering the estate

The personal representative likely will incur, and is entitled to incur, liabilities while administering the estate. The personal representative is entitled to be indemnified out of the assets of the estate for proper testamentary or administration expenses.

(b) Claims Based on Improper Performance of Duties

A creditor may also bring an action against the personal representative for the improper performance of his or her duties.

(i) Breach of trust

If the personal representative is obligated under the terms of a trust, express or implied, to pay a liability, but fails to apply the assets to make such payment, the personal representative is personally liable to the creditor for breach of trust. For example, if a will directs the executor to pay a specific debt or to pay just debts, funeral expenses, and burial expenses and the executor fails to do so, this is a breach of trust.
(ii) Devastavit (Mismanagement)
If the personal representative fails to administer the estate with due diligence, he or she is personally liable to creditors or beneficiaries who sustain a loss as a result.

3. Defences to Creditors’ Claims
The personal representative is entitled to deny the liabilities on any ground the deceased could have used if he or she was still alive.

The personal representative can also plead as a complete or partial defence that, even if the date-of-death creditor’s claim is held to be valid, the deceased had no (or insufficient) assets at the date of death, or that the personal representative has duly administered the estate and no longer has any (or sufficient) assets. This plea is known as plene administravit (if there are no assets) or plene administravit praeter (if there are insufficient assets).

In addition, s. 96 of the Trustee Act, R.S.B.C. 1996, c. 464 empowers the court to relieve the personal representative from personal liability arising out of breach of trust or devastavit. The court must conclude that the trustee acted honestly and reasonably and ought fairly to be excused for the breach and for failing to obtain directions from the court. The leading Canadian case is Fales v. Canada Permanent Trust Company, [1977] 2 S.C.R. 302 at 319, 1976 CanLII 14 (S.C.C.), where the following questions were considered relevant:

(a) was the personal representative paid for his or her services?
(b) was the personal representative a one-time volunteer or a professional estate administrator?
(c) was the breach of duty merely technical or was it a minor error in judgment?

§13.03 Liabilities of the Deceased

1. Contingent or Continuing
The personal representative must provide for all liabilities, including those that are contingent and continuing, before distributing the estate. Examples of contingent liabilities include the following:

(a) a personal guarantee made by the deceased that is outstanding at the time of death;
(b) a pending lawsuit against the deceased in which the deceased had disputed liability; and

(c) a claim against the deceased that was threatened or contemplated but not admitted by the deceased or the personal representative.

Examples of continuing liabilities include the following:

(a) liability under a separation agreement or court order to pay spousal or child support;
(b) a lease under which the deceased is a lessee in occupation;
(c) liability of the deceased on a mortgage (depending on the terms of the mortgage); and
(d) guarantees (At common law, death of a surety does not of itself terminate his or her liability under a continuing guarantee for advances made afterwards by the creditor to the principal debtor. The creditor must have notice, actual or constructive, of death in order for the estate to avoid liability for such advances. The terms of the contract of guarantee may vary the common law rule. The personal representative should therefore examine the terms of any guarantees to determine whether there is a legal right to terminate liability for future advances. Failure to do so will amount to devastavit).

2. Unenforceable or Statute-Barred
A claim that is unenforceable (e.g. a guarantee not in writing or an illegal contract) or barred by the statute of limitations should not be admitted or paid by the personal representative.

3. Family Creditors
Often, a relative or household member who provides domestic services to the deceased will assert a claim under a contract with the deceased. That creditor must prove that a contract existed. For example, the creditor may have to satisfy the court that the claim is an honest one and rebut the presumption that service was rendered out of affection or familial duty rather than in consideration of a contractual promise. A relative or household member who is unable to establish an enforceable contract may still be able to recover on the basis of an implied contract, quantum meruit or unjust enrichment.

4. Pledges
An outstanding commitment by the deceased to make a gift or donation is unenforceable and must be dishonoured by the personal representative unless it is under seal or supported by such consideration as to make the commitment a contract. For a case on enforceability of pledges see Brantford General Hospital Foundation v. Marquis Estate,
Where this presumption applies, the personal representative must pay the legacy but not the debt. Where the presumption does not apply, the personal representative must pay both the debt and the legacy.

Subject to a contrary intention appearing in the will or otherwise, s. 53(3) of WESA abrogates the common law presumption that a debt owed by the will-maker is satisfied by a legacy to the creditor equal to or greater than the debt so that the legacy takes effect and the debt continues to be a claim against the estate.

(b) Debtor a Beneficiary

A bequest by a creditor to a debtor does not give rise to a presumption that satisfaction was intended. However, if it appears that the will-maker intended satisfaction, the debtor is entitled to receive the gift and the debt obligation is extinguished. Such intention may be expressed in the will, implied in the will, or proven by evidence from other sources.

(c) Creditor an Executor

A personal representative who is also a creditor of the deceased is entitled to retain out of the estate full payment of any debt that was owing to him or her by the deceased.

However, if a defence exists against the creditor/executor that would be valid as against a creditor at arm’s length, the personal representative must reject his or her own claim.

(d) Debtor an Executor

Appointment of a debtor as executor extinguishes the debt but leaves the executor liable to account as if the debt had been collected.

Wills

§13.04 Liabilities Relating to the Death: Funeral Expenses

The personal representative named in the will bears primary responsibility and financial liability for the disposition of the remains (see §7.04.1). There is no similar provision for an administrator, but in reality, an administrator would rarely be appointed before the time of the funeral.

In any event, the personal representative should decide which expenses are funeral expenses, then decide what is a reasonable amount for each expense in the circumstances by, taking into account the size of the estate, the deceased’s station in life, and similar factors. The person who instructs the funeral director is personally liable to pay all expenses incurred but is entitled to recover reasonable expenses from the estate.

If contention is foreseeable, the personal representative should be advised to seek approval, however informal, of the residuary beneficiaries (and perhaps senior creditors) or an indemnity from next of kin who are eager to
arrange a ceremony more costly than what might be considered reasonable.

§13.05 Liabilities Incurred by the Personal Representative

A personal representative likely will incur, and is entitled to incur, liabilities while administering the estate.

A personal representative is personally liable on contracts he or she makes to carry out the responsibilities of the position. For example, the personal representative is personally liable for the full amount of his or her lawyer’s proper account even if the assets of the estate are insufficient to provide the personal representative full indemnity.

The personal representative is entitled to be indemnified out of the assets of the estate for proper testamentary or administration expenses. The indemnity takes priority over all liabilities of the deceased except funeral expenses and in rem claims by secured creditors.

In anticipation of the indemnity, the personal representative usually pays liabilities incurred during administration out of the assets of the estate. Nevertheless, the personal representative must account for each such payment to the satisfaction of all residuary beneficiaries or, on a formal passing of accounts, to the court.

Although personally liable for new business debts, the personal representative is entitled to indemnity out of the assets of the estate provided that he or she was authorized (i.e. directed or empowered by instrument or law) to carry on the business.

Issues of liability and indemnity similar to those in business situations may arise in non-business situations. For example, the deceased may have been engaged in a personal project (e.g. construction of a home or a boat) that was incomplete at his or her death. The personal representative must decide whether to finish the project and dispose of the finished product or to find a buyer on an as-is basis.

The lawyer advising the personal representative must be particularly careful in the advice he or she gives in this area. It is often wise to seek the consent of the beneficiaries to such ventures.

§13.06 Administering the Liabilities

1. Instructions and Retainer

The initial meeting between the personal representative and lawyer usually includes a listing of all of the deceased’s liabilities and the liabilities relating to death (see Practice Material: Wills, Chapters 7 and 8). The lawyer should ask the personal representative to bring to that meeting as much information as is then available.

2. Searches and Inquiries

It is important that the personal representative be diligent in attempting to identify all of the deceased’s liabilities as well as keeping track of his or her own costs relating to the death and the administration of the estate. There are various methods that the personal representative and the lawyer should use. Each should share the results of his or her inquiries with the other.

(a) Lawyer’s Inquiries

Inquiries made by the lawyer are best handled by letter unless personal attendance is considered necessary or advisable.

(b) Searches

In certain circumstances it may be appropriate to search registries of record for liabilities, such as the Personal Property Registry (for car loans and evidence of a company’s indebtedness or personally guaranteed corporate liabilities) and the court registry (for pending lawsuits, maintenance orders, and outstanding judgments).

(c) Advertising for Claimants

Under s. 154 of WESA, the personal representative may publish a notice in the BC Gazette requesting claimants against the estate to send their claims to him or her before a specified deadline, being not less than 30 days from the date of publication. If notice of a claim is so given, and the personal representative distributes the estate after the deadline, the claim is not enforceable against the personal representative unless:

(i) the personal representative had actual or constructive notice of the claim (that is, the advertisement does not free the personal representative from responsibility to make all searches and inquiries that would normally be made in order to determine the liabilities of the deceased); or

(ii) the claim in question is not for a liability of the deceased (for example, a claim by lawful next of kin that the will naming the executor is invalid due to testamentary incapacity).

A date-of-death creditor who claims after the advertised deadline but before the claim is statute-barred can still enforce the claim:

(i) against the assets of the estate if they are still held by the personal representative;
(ii) if the estate was, or would by the claim have been rendered, insolvent by suing the other creditors to refund ratably the amount each received in excess of the rateable payment that would have been payable if the claim had been known to the personal representative; or

(iii) if barred against the personal representative by the advertising procedure, by suing the overpaid beneficiaries or intestate successors.

Under s. 8 of the Indian Estates Regulation, C.R.C., c. 954, the superintendent must give notice to creditors, heirs and other claimants to file claims against the deceased or the estate with the superintendent. To be allowed, the superintendent must receive a claim within eight weeks of giving the notice unless the Minister otherwise orders.

3. Proof of Claims

WESA s. 142 provides that a personal representative has the same authority over estate assets as the deceased would have if alive. This authority includes dealing with the deceased’s debts. Therefore, a personal representative may pay or allow any liability or claim on any evidence he or she thinks sufficient and the personal representative must act in a reasonable and prudent manner and with the fidelity expected of a trustee.

Where the personal representative does not admit a claim, WESA s. 146 provides a method for limiting the time in which the creditor or other claimant can bring an action to enforce the claim to 180 days after giving notice, if part or all of the debt is due at the time of the notice, or to 180 days after the debt or a part of it falls due. If the claimant does not commence an action within that period, the claim is forever barred.

The limitation periods do not apply to a claim against the estate by a beneficiary or intestate successor, or to a will variation claim or proceeding under Division 6 of Part 4 of WESA (s. 146(5)).

4. Compromise of Claims

Often, the terms of a will give the executor the authority to compromise claims against the deceased or the estate. Otherwise, WESA s. 142 impliedly authorizes a personal representative to compromise a claim against the deceased. The risk involved in compromising a claim is that, on approval or passing of accounts, a beneficiary may object to the payment as being entirely unnecessary or more than is necessary. In anticipation of a dispute, the personal representative’s lawyer should record the advice given regarding the validity of the claim, the projected costs of contesting the claim, and the projected delay in distribution that would result if the claim were litigated.

5. Payment of Liabilities

(a) Power to Sell Assets

An executor’s authority to sell is usually a trust for sale or a power of sale expressly set out in the will. A personal representative also has statutory authority to raise money to fund payment of lawful claims of creditors pursuant to the general power to manage the deceased’s assets (WESA, s. 142).

(b) Assets Charged with Payment

WESA s. 47 provides that, subject to a contrary intention appearing in the will, a security interest taken in land or tangible personal property used to acquire, improve or preserve the asset registered under the Land Title Act or the Personal Property Security Act follows the gift of that asset into the hands of the beneficiary. Therefore the beneficiary is primarily liable to pay the debt that goes with the asset. This does not limit creditor’s rights, as the secured party can still seek payment out of other property of the deceased.

If the secured party obtains payment from other assets, the personal representative should be advised to seek a covenant from the beneficiary to assume and pay the debt and to indemnify the estate. If this is not possible, an adjustment may have to be made in the estate accounts or an action may have to be commenced against the beneficiary to recover the debt.

Although WESA s. 47(4) provides that the beneficiary’s liability for the debt is subject to a contrary intention appearing in the will, a general direction in a will for payment of liabilities does not signify a contrary intention.

(c) Time for Payment

Both interest-bearing and non-interest-bearing liabilities should be paid as soon as reasonably possible. There is no fixed rule that such liabilities must be paid within one year (Tankard, Re, [1942] Ch. 99).
6. Distribution under Direction of Court

Section 39 of the *Trustee Act*, R.S.B.C. 1996, c. 464, permits the personal representative to apply by petition for an order that the personal representative:

(a) be at liberty to distribute the estate having regard only to claims that he or she has been able to ascertain; and

(b) is not liable with respect to any claims of which he or she had no notice at the time of distribution.

A notice of hearing should be given to all persons determined by the personal representative to be entitled to share in the estate who have not otherwise consented to the distribution.

The order provides the personal representative with protection against claims of which he or she had no notice; however, the protection does not extend to undisclosed claims of which the personal representative knew or should have known.

7. Insolvent Estates

If the estate’s liabilities exceed its assets, it can be handled as an insolvent estate either under WESA Division 12 of Part 6 or under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Under WESA, the personal representative administers the estate. Under the *Bankruptcy and Insolvency Act*, a trustee in bankruptcy administers the estate. However, if the *Bankruptcy and Insolvency Act* is applied (for example, if a receiving order is made at the instance of a creditor), the federal statute will apply and the provincial statute will be pre-empted. Lawyers should be cautious in advising clients to undertake the administration of insolvent estates as there is a specified hierarchy of priority of payments from the estate and personal liability can attach to the personal representative (and perhaps passed on to the lawyer) if the hierarchy is not strictly followed.
Chapter 14

Tax Consequences Resulting from the Death of a Taxpayer

This chapter provides a basic overview of the tax consequences arising upon the death of a taxpayer. Although it highlights areas of concern commonly encountered by practitioners, it should not be relied on as a comprehensive analysis of all tax matters arising upon death. When you encounter actual problems in practice, refer to the provisions of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

Different tax consequences may or may not arise upon the death of a First Nations person who was registered (or was entitled to be) under the Indian Act, R.S.C. 1985, c. I-5; the consequences will vary depending upon the deceased’s particular circumstances. A discussion of tax consequences relevant to particular circumstances is beyond the scope of this chapter; seek expert tax advice.

§14.01 Duties of Executors, Administrators and Trustees

1. Returns
   
   (a) What and When to File

   The legal representative of the deceased has a responsibility to file a terminal income tax return for the deceased. The fiscal period covered by the terminal return extends from January 1 of the year of death up to and including the date of the deceased’s death. The terminal return is the ordinary T-1 return for the year of death and generally must be filed by the later of six months from the date of death or April 30 of the year following death.

   The exception to this general rule is when the deceased’s will contains a “spousal trust” as described in Chapter 14, §14.03. In such instances, the time for filing a return for the year of death is extended to 18 months from death, but interest on any unpaid tax will accrue from the date the return would have been due had there been no such trust (s. 70(7)(a)).

   In certain cases, as indicated below, the legal representative may elect to file more than one income tax return for the year of death. The advantage of spreading the income of the deceased in the year of death over several returns is that certain personal tax deductions and credits may be duplicated and lower marginal tax rates may be achieved (Interpretation Bulletin IT-326R2 and s. 114.2).

   A separate return may be filed, upon an election by the legal representative, if the taxpayer operated a business as a proprietorship or was a member of a partnership having a fiscal year other than a calendar year. The election is applicable in respect of the amount of income that the deceased, as a member of a partnership or the proprietor of a business, would be deemed under the Act to have received from the partnership or business during the period before the date of death and after the end of the last fiscal period of the partnership or business. In the case of a partnership, this election will only be applicable when the death of the partner causes the fiscal period of the partnership to end (s. 150(4) and Interpretation Bulletin IT-278R2, para. 2).

   The legal representative may also elect to file a separate return if the deceased taxpayer was an income beneficiary of a testamentary trust which had a taxation year other than a calendar year. This return includes only income of the deceased from the trust which arose after the end of the last taxation year of the trust and before the date of death of the taxpayer (s. 104(23)(d)).

   The above-noted separate returns must be filed by the later of April 30 of the year following death or six months following the date of death.

   Finally, an election may be made to file a separate return in respect of the value of “rights or things” owed to the taxpayer at the time of death (s. 70(2)). Generally, “rights or things” include items of income which have been earned and which the taxpayer has an absolute right to receive as of the date of death, but which have not been received by that time. Examples of “rights or things” are matured uncashed bond coupons, dividends which have been declared but are not yet paid at the time of death, and unpaid salaries relating to pay periods ending before the date of death. A “rights or things” return must be filed by the later of one year from the deceased’s date of death and 90 days after the mailing of any Notice of Assessment in respect of tax assessed on income of the deceased for the year of death (s. 70(2) and Interpretation Bulletin IT-212R3).

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(b) Taxation of Property Held at Death

Non-Depreciable Capital Property (s. 70(5)(a))

Non-depreciable capital property (for example, land or shares that are not inventory or the subject of an adventure in the nature of trade) is deemed to have been disposed of at its fair market value immediately before the time of the deceased’s death. Accordingly, subject to specific exceptions, all accrued gains and losses on non-depreciable capital property of the deceased at the time of death are realized. Transfers of non-depreciable capital property to a spouse or spousal trust, and transfers of non-depreciable farm property to a child, are specific exceptions which partially or totally abrogate the general rule of deemed realization of accrued gains and losses (ss. 70(6), 70(9) to (9.8)).

Depreciable Capital Property (s. 70(5)(a))

Depreciable capital property will be deemed to have been disposed of by the taxpayer at its fair market value immediately before death. This deemed disposition may produce recapture of capital cost allowance previously claimed and capital gains or could result in the realization of a terminal loss. Once again, there are specific exceptions to the deemed realization rules when depreciable capital property is transferred to a spouse or spousal trust or depreciable farm property is transferred to a child (ss. 70(6), 70(9) and (9.1)).

Land Inventory (s. 70(5.2)(c))

Any land which is part of an inventory of a business owned by the deceased taxpayer is deemed to have been disposed of immediately before death for proceeds equal to its fair market value at that time. Land inventory includes properties held on speculation as opposed to land held for the production of rental income or for use as a business location. The entire gain realized on this type of property is included in income as business income. Again, there is no deemed disposition when such land is transferred to a spouse or spousal trust (s. 70(5.2)(d)).

Principal Residence

The principal residence of a deceased taxpayer is deemed to be disposed of immediately before death for its fair market value. No gain or loss will arise, however, since the normal exemption with respect to principal residences applies (ss. 40(2)(b) and 40(4)).

(c) Deductions

Capital Losses (s. 111(2))

If the deceased’s allowable capital losses (that is, 50% of his or her capital losses) for the year of death exceed his or her taxable capital gains (that is, 50% of his or her capital gains) for that year, any such excess may be deducted against the deceased’s income from other sources (for example, employment or business source income). This is an exception to the usual rule that capital losses of a taxpayer may only be deducted against capital gains. If the net capital losses are not completely utilized in the year of death, any excess may be carried back to the year preceding the year of death and applied against the taxpayer’s income in that year.

An additional limitation on the utilization of these net capital losses is that they are only deductible in the subject years against sources of income other than taxable capital gains to the extent that the losses exceed the total of the capital gains deduction previously claimed by the taxpayer (s. 110.6).

Charitable Donations

The deduction limits provided for a deceased taxpayer in the terminal return in respect of charitable donations are 100% of the decedent’s income for the year of death (s. 118.1).

If however the charitable donation cannot be deducted in the year of death due to insufficient income, the charitable donation may be carried back to the taxation year immediately prior to death and used to offset up to 100% of the decedent’s income in that year.

(d) Personal Exemptions

In the terminal returns of a deceased taxpayer, full personal tax credits may be claimed.

Wills

Other Properties

Sections 70(5.1) and 70(5.2) contain additional provisions concerning any eligible capital property (for example, goodwill and intellectual property rights) or resource property of the deceased taxpayer. Consult these provisions when the taxpayer holds these types of property at the time of death.

Joint Tenancies

The Canada Revenue Agency considers any property held in a joint tenancy to be held 50% by each joint tenant. While probate fees can be avoided by holding property as joint tenants, the same is not true of income tax unless one’s spouse or common-law partner is the joint tenant.
regardless of when the taxpayer died during the year. Additionally, if an election has been made to file separate returns for each business, trust or “rights or things” income, a limited number of personal tax credits set out in s. 118 may also be deducted on those returns (s. 118.93).

(e) Reserves

A reserve for tax purposes is, in rather simplistic terms, an amount which is kept back or “reserved” from the income reported by a taxpayer. Reserves are permitted under the Act in only very limited circumstances. For example, upon the disposition of a capital property, a taxpayer faces a potential immediate inclusion in income. When the full amount of the proceeds of disposition is not immediately due, however, an amount may be deducted, in certain circumstances, as a reserve for those proceeds not yet due.

No reserve is allowed as a deduction in the taxpayer’s terminal year except when an amount receivable is transferred in consequence of the taxpayer’s death to the taxpayer’s spouse or spousal trust and the appropriate election is made (ss. 72(1) and (2)). When an election is made by the personal representative and the spouse or spousal trust, a reserve may be claimed to the extent the reserve could have been claimed by the deceased taxpayer had he or she survived.

When amounts receivable are not transferred to a spouse or spousal trust, it is not possible to defer the recognition of sale proceeds and such proceeds must be included in income in the year of death even though they are not actually payable until later years.

2. Prior Year’s Returns Not Filed

When a taxpayer has not filed returns for the year before the year of death, the personal representative also has the responsibility of preparing and filing those returns within six months of the date of death when death has occurred prior to May 1. The six-month extension for filing the prior year’s returns does not apply when death occurred after April 30 (s. 150(1)(b)).

3. Clearance Certificates

A clearance certificate certifies that all tax, Canada Pension Plan contributions, unemployment insurance premiums, interest and penalties payable by the deceased have either been paid or have been secured to the satisfaction of the Minister. A legal representative is required to obtain a clearance certificate in respect of the deceased’s obligations under the Act before distributing any property under his or her control (s. 159(2)). Provided all returns have been filed and all tax, interest and penalties have been paid, the Canada Revenue Agency will issue a certificate for final distribution of all property in the estate. If the legal representative distributes the assets of the estate without obtaining an income tax clearance certificate, he or she is personally liable for any tax, interest or penalty that remains payable (s. 159(3)).

Provided acceptable security is furnished to the Minister, the legal representative may file an election to pay tax arising on death by installments (s. 159(5)). A maximum of ten equal consecutive annual payments are allowed, with interest payable from the day the tax would otherwise have been payable on the balance of tax outstanding. Not all sources of income may be paid by installment but “rights or things” included in the deceased’s income, recapture or capital cost allowance in excess of terminal losses, capital gains in excess of capital losses and income in excess of expenses from deemed dispositions of resource property and land inventory qualify for this treatment.

[§14.02] Beneficiaries

1. General

A beneficiary must include in his or her income any portion of the estate income which is paid or payable to him in the year, with certain exceptions for amounts which have been paid to the beneficiary but designated by the estate (ss. 104(13.1) and (13.2)). In general, an amount is deemed under the Act to be payable by the estate if it is actually paid to the beneficiary or if the beneficiary is entitled to enforce payment of the amount (s. 104(24)). In order to prevent double taxation on such income, the estate is allowed to deduct from its income the amount is actually received.

The Act contains provisions that permit certain types of income to the estate to retain their character when they are “flowed through” to the beneficiaries. This conduit principle applies to such income as dividends from taxable Canadian corporations, non-taxable dividends, taxable capital gains and certain types of foreign income (ss. 104(19) to (22)). If there were no “flow through” provisions, then these sources of income would lose their original character in the estate and would be received by the beneficiary as ordinary income. A notable exception to the “flow through” provisions is losses, as losses realized by the estate cannot be flowed through to the beneficiaries.
2. RRSPs

When a refund of premiums from a registered retirement savings plan is paid to the estate of the deceased, the refund may be jointly designated by the personal representative and the beneficiary as the income of the beneficiary and not the income of the deceased (s. 146(8.1)). A refund of premiums is defined as an allowable portion of an amount paid from a RRSP before its maturity (for example, upon the annuitant attaining the age of 71) to a spouse of the annuitant as a consequence of the annuitant’s death or, any amount paid out of the RRSP to a child or grandchild of the annuitant, who was, at the time the annuitant died, financially dependent on the annuitant for support (s. 146(1)). A spouse, financially dependent child, or grandchild may then transfer the refund of premiums into their own RRSP and defer any immediate tax liability on that amount. Or, if the surviving spouse is aged 71 or over, a transfer of the refunded premiums may be made tax-free to an annuity for the spouse (s. 60(1)).

3. Death Benefits

Death benefits are included in income and taxable to the recipient (s. 56(1)(a)(iii)). Death benefits are, in general, defined to mean the aggregate of amounts received by a “taxpayer” in a taxation year upon or after the death of an employee in recognition of the employee’s service in an office or employment. When the surviving spouse of the employee receives death benefits, no benefit is brought into the spouse’s income to the extent the death benefit received is less than $10,000 (s. 248(1)).

If the taxpayer receiving a death benefit is not the surviving spouse of the employee, the tax provisions are not as generous. Once again, there is a $10,000 allowance, but this is reduced by any death benefits received by the surviving spouse of the employee and the remaining exemption is then apportioned among all taxpayers, other than the surviving spouse of the employee, receiving death benefits.

§14.03 Exceptions to the General Rules Outlined Above

1. Spouses and Spousal Trusts

   (a) Result When Capital Property of Deceased Passes to a Spouse or Spousal Trust

   As noted earlier, the rules regarding the deemed realization of capital gains and recapture on death are modified when capital property owned by the deceased passes to a spouse or a spousal trust (s. 70(6)). In these circumstances, the Act provides for a “rollover” of the cost base of the capital property from the deceased to the spouse or a spousal trust with a result that tax on capital gains and recapture is deferred until the surviving spouse or otherwise disposes of the property. The “rollover” of the cost base is automatic in such situations and there is no requirement for an election to be filed. However, as outlined below, it is possible for the legal representative of the deceased to elect not to have these rollover provisions apply to one or more capital properties of the deceased.

   (b) Conditions Necessary for Rollover to Apply

   The requirements necessary for the spousal “rollover” provisions to apply are as follows:

   (i) the deceased must have been resident in Canada immediately before death;

   (ii) if the recipient is a spouse or common-law partner, he or she must have also been resident in Canada immediately before the deceased’s death;

   (iii) the property must have been transferred as a result of the deceased’s death (for example by will, intestacy, joint tenancy, etc.);

   (iv) if the recipient is a trust created by the deceased’s will:

      • the trust must be resident in Canada immediately after the property vests in it,
      • the spouse or common-law partner must be entitled to receive all of the trust’s income during his or her lifetime,
      • no person other than the spouse or common-law partner may receive or obtain use of any of the capital or income of the trust during the spouse’s or common-law partner’s lifetime; and

   (v) the property must vest indefeasibly in the spouse, common-law partner, spousal trust or common-law partner trust within 36 months of the taxpayer’s death or within such longer period as the Minister considers reasonable.

   (c) Electing out of the Rollover

   It is possible for the legal representative to elect not to have the rollover provisions apply when capital property is transferred to a spouse or spousal trust (s. 70(6.2)). Such an election would be beneficial when the deceased had
loss carryforwards, which could be used to offset any gains having accrued on the property of the deceased. When the election is made, the adjusted cost base of the capital property acquired by the spouse or spousal trust is “stepped up” for the purposes of determining future gains realized by the spouse or spousal trust.

(d) Land Inventory

Land that was held as inventory by the deceased may also be rolled over to a spouse or spousal trust (s. 70(5.2)(d)). The requirements for this automatic rollover to occur are the same requirements as outlined with respect to capital property.

(e) Reserves

When property subject to a reserve is transferred to a spouse or spousal trust on the death of the taxpayer, the legal representative and the spouse or spousal trust may jointly elect to claim a reserve in the terminal return of the deceased (s. 72(2)). The amount of the reserve claimed is then included in the income of spouse or spousal trust in the first taxation year ending after the death of the taxpayer. The spouse or spousal trust may then, in turn, claim a reserve to the extent the taxpayer could have claimed it had he or she survived.

2. Farm Property

(a) Result

In addition to the spouse or spousal trust, a rollover with respect to specified farm property is allowed to a farmer’s child, either directly or through a spouse trust (ss. 70(9) and (9.1)). The Act also provides for the rollover of interests in family farm partnerships and shares in family farm corporations (ss. 70(9.2) and (9.3)).

The definition of “child” includes child, grandchild, and great-grandchild, as well as a person who, at any time before he or she attained the age of 21, was wholly dependent on the taxpayer for support and of whom the taxpayer had, at that time, the custody and control (s. 70(10)(a)). The specified farm property rollover is also available to the parents of a taxpayer when the personal representative has so elected (s. 70(9.6)).

(b) Conditions Necessary for Rollover

If a taxpayer’s land in Canada or depreciable property in Canada of a prescribed class

(i) is transferred or distributed on or after the taxpayer’s death and as a consequence of death to his or her child; and

(ii) can be shown within 36 months of death, or such longer period as the Minister considers reasonable in the circumstances, to have vested indefeasibly in the child; and if

(iii) the property was used immediately before the taxpayer’s death by the taxpayer, his or her spouse or common-law partner, or any of his or her children in the business of farming; and

(iv) the child was resident in Canada, immediately before the taxpayer’s death,

then the property is deemed to have been disposed of by the taxpayer and acquired by the child at its adjusted cost base or undepreciated capital cost, as the case may be, to the taxpayer immediately before death (s. 70(9)).

If property which would otherwise qualify for the farm property rollover to a child has passed to a spousal trust on death, a rollover of the property from the spousal trust to a child of the taxpayer in whom it vests indefeasibly will result, provided the property is transferred on the death of the beneficiary spouse and as a consequence of the death (s. 70(9.1)). In addition, the other conditions necessary for a rollover to occur, as mentioned above, must be met.
Chapter 15

Accounts

[§15.01] Introduction

One of the hallmarks of the fiduciary duty imposed on the personal representative is the duty to account to persons who have a beneficial interest in the estate and to creditors of the estate. While this duty arises at common law, the exact procedure and method of passing accounts is derived from common law principles, a few statutory references, and general custom and practice. A complete analysis of this topic can be found in Chapter 15 of the *British Columbia Probate and Estate Administration Practice Manual* (Vancouver: CLEBC).

[§15.02] Duty to Account

The personal representative owes a duty to account to the beneficiaries of the estate (including income and capital beneficiaries, whether vested or contingent), legatees (that is, recipients of specific bequests), unpaid creditors of the deceased, successor trustees, and other persons who have an interest in the deceased’s assets.

The common law requires a personal representative to keep proper books and be ready at all times to account, although this responsibility does not mean that a complete set of accounts must be maintained on a constant basis or that a formal passing of accounts will necessarily ever be required.

Essentially, the personal representative must give to anyone to whom he or she owes a duty to account such information as that party reasonably requires. Thus, the residuary beneficiary would be entitled to a full and complete summary of estate assets whereas a legatee would be entitled only to information showing whether his or her legacy will be paid.

[§15.03] Requirement to Pass Accounts

The *Trustee Act*, R.S.B.C. 1996, c. 464 provides a brief statutory scheme for requiring a personal representative to pass accounts.

*Section 99(1)*

The personal representative must pass the first accounts within two years from the date of the grant of probate or letters of administration, and thereafter as instructed by the court, unless all beneficiaries consent or the court orders otherwise.

*Section 99(2)*

Any person beneficially interested in the estate may require a personal representative to pass his or her accounts annually within one month from the anniversary of the grant or the personal representative’s appointment.

*Section 99(3)*

If the personal representative fails to comply with ss. 9(1) or (2), or if the accounts are incomplete or inaccurate, the personal representative may be required to attend before the court to show cause why the accounts have not been passed.

The delay and expense of passing accounts formally before the court can be avoided by obtaining the approval of the accounts by all persons to whom the duty to account is owed (*Re Mitchell Estate* (1997), 46 B.C.L.R. (3d) 383 (C.A.)). This consensual procedure will not be available if approval is withheld or is not otherwise available (for example, if a beneficiary is unascertained, has unknown whereabouts, or is suffering from a disability, or where there are infant beneficiaries).

[§15.04] The Accounts

While there is no prescribed form of preparing accounts, they typically consist of a statement of receipts and disbursements with a list of the assets on hand at the beginning of the accounting period and a list of the assets on hand at the end of the accounting period. The accounting period must be specified; it will run either from the date of death or from the end of the last period for which the accounts were prepared.

Accounts usually contain the following schedules:

(a) an opening inventory of assets and liabilities at the commencement of the accounting periods;

(b) capital receipts and disbursements;

(c) income receipts and disbursements;

(d) the closing inventory of assets and liabilities at the end of the accounting period;

(e) a reconciliation of the above four statements; and

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(f) a statement of proposed distribution allowing for remuneration of the personal representative.

To prepare a proper set of accounts, it is necessary to maintain detailed records of all transactions. The personal representative must be able to produce proper vouchers for all receipts and payments and to provide full explanations for the administration of trust assets. The preparation of accounts will be simplified if all funds are consolidated into a single estate bank account and if the personal representative maintains complete notes in the form of a diary recording all steps taken, including the exercise of all discretionary powers.

§15.05 Tax Considerations

It is important to note that accounting statements prepared for tax purposes may have significant differences to those prepared for trust purposes. For example, certain types of property that would normally be considered capital assets for trust purposes are not capital properties for purposes of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). Similarly, the payment of a stock dividend may be treated as a capital receipt for trust purposes but as an income receipt for tax purposes.

§15.06 Approval of Accounts

As mentioned previously, generally it is preferable to have all those to whom the duty to account is owed approve the accounts. If approval is probable, all those entitled to a full accounting should be sent the accounts together with a suitable form of release and consent to any remuneration being sought by the personal representative. In the case of specific or pecuniary legatees, releases should be obtained in exchange for their legacies, but no obligation arises to provide accounts unless the legacies have not been fully satisfied.

If consent cannot be obtained, the personal representative or a person interested in the estate may apply under Rule 25-13 of the Supreme Court Civil Rules for a formal passing of accounts.

§15.07 Discharge of Personal Representative

A personal representative may be discharged from his or her duties informally or by application to court.

A personal representative is informally discharged once he or she has:

(a) paid and settled all debts and claims;
(b) distributed the estate to the beneficiaries;
(c) provided accounts to all those to whom the duty to account is owed;
(d) obtained releases from the persons to whom the duty to account is owed;
(e) advertised for creditors, if necessary;
(f) obtained a clearance certificate for distribution under the Income Tax Act; and
(g) where an administration bond has been posted, obtained an order for its cancellation.

If the personal representative wishes to be formally discharged by application to the court, the representative must apply under s. 157 of WESA.

One of the advantages of obtaining a formal discharge is that a court order discharging the personal representative releases the personal representative from all claims in respect of the administration, except those arising from “undisclosed acts or omissions” (WESA s. 157(5)). An order made under s. 157 of WESA does not discharge or remove a personal representative as a trustee or release the person from liability for acts or omissions made as a trustee (s. 157(6)).
Chapter 16

Remuneration of Personal Representatives and Trustees

§16.01 Introduction

Three principal issues arise when considering the remuneration of personal representatives and trustees: entitlement, amount and procedure. For further elaboration on these issues, refer to Chapter 16 of the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC).

§16.02 Entitlement to Remuneration

At common law, a personal representative is not allowed to profit from his or her office, unless authorized by the terms of the will or trust. However, this rule has been relaxed by statute. Section 88 of the Trustee Act, R.S.B.C. 1996, c. 464 provides for remuneration to a personal representative based on the gross aggregate value of the estate, including capital and income, and also provides for an annual care and management fee. The provision is applicable in the absence of any remuneration provisions in the will, or on an intestacy.

Often, the will outlines the remuneration to which the personal representative is entitled and in such circumstances, s. 88 is inapplicable and the will governs. It is important to carefully review the terms of the will when the personal representative is also a beneficiary because there is a presumption at common law that if a legacy, other than a residuary bequest, is made in favour of a personal representative, that legacy is intended to be in lieu of remuneration. The will may expressly provide that the personal representative can take both the legacy and the remuneration.

In addition, a personal representative’s entitlement to remuneration may be fixed by an agreement between the testator and the personal representative, or an agreement between the personal representative and the estate beneficiaries.

§16.03 Amount of Remuneration

If remuneration is fixed by the terms of the will or by an agreement, the personal representative will be limited to claiming the remuneration so specified or agreed to.

If the amount of remuneration is not fixed by the will or by agreement, s. 88 sets an upper limit on the amount of remuneration to:

(a) 5% of the gross aggregate value of the capital of the estate (gross aggregate value is the realized value of the original assets of the estate, without deduction of the value of any mortgages against the assets, and the value at the date of distribution of any original assets distributed in specie to the beneficiaries) (s. 88(1));

(b) 5% of the income earned during the administration (s. 88(1)); and

(c) an annual “care and management fee” of 0.4% of the average market value of the assets (s. 88(3)).

It is important to realize that s. 88 imposes a ceiling on the maximum remuneration which can be claimed. In an estate of average complexity, the personal representative will generally be entitled to 3% of the income and capital, as well as the care and management fee. A court or registrar reviewing a personal representative’s claim for remuneration determines the amount taking into account the s. 88 ceiling and the following criteria derived from case authorities:

(a) the magnitude of the estate;

(b) the care and responsibility involved;

(c) the time occupied in the administration;

(d) the skill and ability displayed; and

(e) the success achieved in the final result.

When there are two or more personal representatives, the total remuneration is determined in the same manner as if there had been one personal representative.

When a personal representative retains someone (for example, a lawyer or trust company) to do administration work that should have been done by the personal representative, the resulting fees should be borne by the personal representative and not charged against the estate as a disbursement of the personal representative.

With respect to the annual “care and management fee”, the case of Re Pedlar (1982), 34 B.C.L.R. 185 (S.C.) sets out the following principles:

(a) the care and management fee allowed under s. 88(3) is an allowance for remuneration in addition to the allowance under s. 88(1);
(b) some of the factors that should be taken into consideration in determining what, if any, fees should be allowed are

(i) the value of the assets being administered,
(ii) the nature of the estate assets being administered,
(iii) the degree of responsibility imposed upon the trustee including the length or duration of the trust,
(iv) the time expended by the trustee in the care and management of the estate,
(v) the degree of ability exhibited by the trustee,
(vi) the success or failure of the trustee, and
(vii) whether or not some extraordinary services has been rendered by the trustee;

(c) the trustee should give the court a general summary of both the estate and his or her services, including information on the factors above;

(d) the court has discretion to determine the amount of the annual care and management fee, up to a maximum of 0.4%;

(e) the average market value of the estate is calculated by determining the market value of the assets at the commencement of the twelve month period, adding the market value at the end of that period, and dividing by two;

(f) the usual practice is to charge the care and management fee two-thirds to capital and one-third to income; and

(g) the application for the care and management fee need not be made within the period for which it is claimed.

[§16.05] Expenses

In addition to remuneration, a personal representative is entitled to recover such out-of-pocket expenses as he or she has properly and reasonably incurred in the administration.

A personal representative may employ a lawyer and pay the lawyer’s bill for fees and disbursements from the estate provided the legal services were necessary and proper with regard to the administration of the estate. However, services that the personal representative should have performed while administering the estate and charges for services rendered in advising the personal representative on his or her right to remuneration cannot be charged against the estate.

A personal representative may retain an accountant to prepare the accounts (except when the estate is small and simple) and to prepare income tax returns.

A personal representative may be required to establish the reasonableness of the expenses he or she has incurred while administering the estate. If any expenses are determined not to be reasonable on a passing of accounts, the personal representative will be required to reimburse the estate.

[§16.04] Procedure

The remuneration may be fixed by the approval of the estate beneficiaries of the amount claimed by the personal representative. If the approval of all the beneficiaries who have a vested or contingent interest in the residue of the estate (it is from the residue of the estate that the remuneration is usually paid) cannot be obtained (i.e. because some beneficiaries are minors, are mentally incompetent, or are unascertained), the remuneration must be fixed by court order obtained on application under s. 89 of the Trustee Act or on a passing of accounts under Supreme Court Civil Rule 25-13(1). Supreme Court Civil Rule 25-13(1) provides that the personal representative or a person interested in the estate can initiate a passing of accounts by filing an application. An application for remuneration may be brought separately or together with an application to pass accounts. If the applicant is someone other than the personal representative, the applicant must file an affidavit explaining why an accounting is required (Supreme Court Civil Rules 25-13(6)(b)).

Unless the court on application otherwise orders, the costs of fixing the remuneration of a personal representative, either on a s. 89 application or a passing of accounts, shall be assessed as special costs and paid from the estate (Supreme Court Civil Rules 25-13 and 14-1(6); Re Kanee Estate (1991), 41 E.T.R. 263 (B.C.S.C.); and Szpradowski (Guardian ad litem) v. Szpradowski Estate (1992), 4 C.P.C. (3d) 21 (S.C.)).
Chapter 17

Lawyer’s Remuneration

[§17.01] Introduction

The following summary reviews issues relating to a lawyer’s remuneration for services rendered in connection with probate and estate administration. Specifically, these issues relate to entitlement, nature of work for which legal fees may be claimed, the mechanics of rendering a bill and, if necessary, having that bill formally assessed.

Rule 14-1(3) of the Supreme Court Civil Rules sets out the criteria that are considered for fees charged for legal work in the administration of estates.

[§17.02] Entitlement to Remuneration

When a lawyer is retained to provide legal services in the administration of an estate, the lawyer’s client is the personal representative and not the estate. Accordingly, the personal representative is personally liable for the lawyer’s fees, but is entitled to be indemnified from the estate for those lawyer’s fees provided that the legal costs have been reasonably and properly incurred and do not relate to work that the personal representative should have performed himself or herself (i.e. work within the competence of a layperson). The personal representative’s personal liability exists even if the assets of the estate are insufficient to fully indemnify the personal representative for legal fees properly charged.

An example of a charging clause is as follows:

Any executor or trustee of my Will who is a lawyer shall be entitled to charge and be paid all usual professional fees for all legal services provided by him or her, or by his or her firm, in connection with the probate of my Will and any codicil to it and the administration of my estate and the trusts of my Will, in addition to any remuneration for acting as an executor and trustee.

A charging clause in a will is considered a legacy and as such is void by operation of s. 43 of WESA if the lawyer is an attesting witness to the will. However, under s. 43(4) of WESA a court can declare that such a gift is not void if the court is satisfied that the will-maker intended to make the gift to the lawyer even though the lawyer acted as a witness.

In the absence of a charging clause, the lawyer who is a personal representative may engage the services of his or her partners and the fees for their services may be paid from the estate provided the lawyer who is the personal representative does not share in or otherwise benefit from the fees (Re Lohn Estate (1994), 98 B.C.L.R. (2d) 26).

[§17.03] Lawyer’s Services

A lawyer’s range of services could include:

1. Services relating to a non-estate asset (for example, life insurance payable to a named beneficiary or joint property being transmitted to the surviving joint tenant). In this case, the lawyer’s fees for these services are not a proper expense for which the personal representative may claim indemnification from the estate because the estate obtains no benefit from these services.

2. Services relating to a personal representative’s responsibilities. Such services might include locating the will, arranging the funeral, ascertaining the names and addresses of beneficiaries and creditors, collecting assets, paying off debts, distributing assets and rendering accounts. Fees paid to the lawyer for doing work that the personal representative could have done should be borne by the personal representative and not charged against the estate as a disbursement of the personal representative.

A lawyer may charge fees for this type of work either on a time basis at the lawyer’s hourly rate), or as a portion of the fee to which the personal representative would be entitled if the personal representative had done the work himself or herself. The personal representative should bear the fees for this type of work. In practice, the estate pays the lawyer’s bill and the portion of the bill that relates to work of the personal representative is taken into account or set off against the personal representative’s remuneration.

3. Legal services. These include reviewing the will and advising on its provisions, advertising for creditors, searching the title of assets, preparing all documentation necessary to obtain probate or letters of administration, transmitting and transferring assets, and passing accounts. Reasonably and properly incurred fees for legal services are payable from the estate.

[$\S 17.04$] Assessment of Account

In preparing his or her account, the lawyer should distinguish work that relates to the personal representative’s responsibilities and true legal services.

Accounts are usually in the form of lump sum bills that contain a description of the nature of the services and the matters performed which would permit a client to ascertain the reasonableness of the charges incurred.

The procedure for reviewing a lawyer’s bill is set out under s. 70 of the Legal Profession Act, S.B.C. 1998, c. 9 and Rule 14-1 of the Supreme Court Civil Rules.

As noted earlier, the reasonableness of a lawyer’s fee is determined by criteria set out in Supreme Court Civil Rule 14-1(3). These criteria are as follows:

(a) the complexity of the proceeding and the difficulty or novelty of the issues involved;
(b) the skill, specialized knowledge and responsibility required of the lawyer;
(c) the amount involved in the proceeding;
(d) the time reasonably expended in conducting the proceedings;
(e) the conduct of any party that tended to shorten, or to unnecessarily lengthen the duration of the proceeding;
(f) the importance of the proceeding to the party whose bill has been assessed and the result obtained; and
(g) the benefit to the party whose bill is being assessed of the services rendered by the lawyer.

In addition to fees claimed on an assessment, the registrar will also allow a reasonable amount for expenses and disbursements necessarily or properly incurred (Supreme Court Civil Rule 14-1(5)).

[$\S 17.05$] Further Reading

A detailed discussion of lawyer remuneration is found in Chapter 17 of British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC).
Chapter 18

Probate Actions

§18.01 Introduction

This chapter discusses various probate actions and procedures. It is divided into two parts:

(a) before grant: notice of disputes, citations, curing of deficiencies and proof in solemn form; and

(b) after grant: citations, curing of deficiencies and revocation of grant.

This chapter uses the terminology and procedure mandated by the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the “SCCR”), as amended by Regulation 149/2013.

Be aware that if there is a dispute over the will or estate of a First Nations person, a completely different regime governed by the Indian Act, R.S.C. 1985, c. I-5 may apply. For more detail, see the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC), Chapter 20.

§18.02 Actions and Procedures before the Grant

1. Notice of Dispute

Section 106 of the Wills Estates and Succession Act, S.B.C. 2009, c. 13 (“WESA”) allows a person to oppose the issuance of a representation grant in accordance with the SCCR.

A person who is entitled to notice of an application for an estate grant or resealing of a foreign grant under Rule 25-2 may file a notice of dispute after death, but before the earlier of the issuance of an estate grant or resealing a foreign grant. An estate grant includes a grant of probate, a grant of administration, and ancillary grant of probate or administration (SCCR 25-1(1)).

A notice of dispute once filed prevents the issuance of an estate grant and the resealing of a foreign grant (SCCR 25-10(8)).

A person entitled to file a notice of dispute may only do so once (SCCR 25-10(2)). A notice of dispute may be amended once without leave of the court. Any further amendments require a court order (SCCR 25-10(4), using SCCR 6-1(2) and (3)).

A notice of dispute must be in Form P29. The person filing the notice of dispute (the “disputant”) must declare in the notice of dispute the address for service of the disputant, which address for service must be an accessible address that complies with SCCR 4-1, and must disclose that the disputant is a person to whom documents have been or are to be delivered under SCCR 25-2(2), and the grounds on which notice of dispute is filed (SCCR 25-10(3)).

The court may renew a notice of dispute before or after it expires (SCCR 25(6)). A disputant must give notice of an application to renew a notice of dispute to an applicant for the an estate grant or resealing, any other person who has filed a notice of dispute, and any other person to whom the court directs notice to be given (SCCR 25-10(7)).

A disputant may file a withdrawal of notice of dispute in Form P30 (SCCR 25-10(9)).

A person who intends to apply for an estate grant or for the resealing of a foreign grant, or who claims an interest in an estate with respect to which a notice of dispute has been filed, may apply, on notice to the disputant, for an order removing the notice of dispute (SCCR 25-10(10)). The court may remove a notice of dispute if it determines that the filing is not in the best interests of the estate (SCCR 25-10(11)). The phrase, “in the best interests of the estate” will likely need judicial interpretation.

A notice of dispute expires after one year from the date of filing unless:

(a) the court renews it,

(b) the notice is withdrawn,

(c) the will is proved in solemn form, or

(d) the court orders the notice of dispute removed (SCCR 25-10(12)).

When the deceased has a will, if the intended applicant for an estate grant or person claiming an interest in the estate cannot convince the disputant to withdraw the notice or persuade the court to remove it, he or she will have to apply to prove the will in solemn form.

2. Citations to Apply for Probate

When the person named as an executor in a testamentary document fails to apply for probate, any person interested in the estate may serve a citation in Form P32 on the executor to require the executor to apply for a grant of probate in relation to the testamentary document (SCCR 25-11(1)). Each alternate executor must also be served if an event occurs

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that entitles the alternate executor to assume the office of an executor (SCCR 25-11(2)).

A person who is served with a citation must within 14 days of service, do one of the following:

(a) if the person has obtained an estate grant then serve a copy of the grant to the citor by ordinary service (SCCR-25-11(4)(a));

(b) if the person has yet to receive a grant of probate:

(i) and has filed a submission for estate grant, then serve a copy of the filed submission for estate grant to the citor by ordinary service (SCCR 25-11(4)(b)(i));

(ii) and has not filed a submission for estate grant, but has delivered a notice of intended application for an estate grant in accordance with 25-2(1) that the cited person intends to pursue concerning the testamentary document, then the notice of intended application and other documents must be served on the citor by ordinary service (SCCR 25-11(4)(b)(ii));

(iii) or has not taken any step in relation to the estate, then serve on the citor by ordinary service, an answer in Form P33 stating the cited person will apply for a grant of probate or refuses to apply for a grant of probate (SCCR 25-11(4)(b)(iii)).

A cited person is deemed to have renounced his or her executorship in relation to the testamentary document if he or she (a) serves an answer stating that he or she refuses to apply for a grant of probate; (b) does not comply with one or more parts of SCCR 25-11(4); or (c) does not obtain a grant of probate within six months after the date of service of the citation unless the court on application has extended this time (SCCR 25-11(5)).

When there is a deemed renunciation of the right to apply for probate, a citor or another person interested in the estate, may apply for probate in place of the person named as executor (SCCR 25-11(6)).

3. Subpoena For Testamentary Document or Grant

Under SCCR 25-12, a person may apply by requisition (Form P35), supported by affidavit, for a subpoena (Form P37) requiring a person to deliver to the registry one or more of (a) a testamentary document; (b) an authorization to obtain estate or resealing information; (c) an estate, foreign or resealed foreign grant; and (d) a certified or notarial copy of such a document. Before applying the applicant has to have asked the person to whom the subpoena is to be addressed to provide the document sought. If the registrar is satisfied that the document is required for a matter under SCCR Part 25 and that the person cited has failed to comply with the applicant’s request for production, the registrar may issue the subpoena. The person cited in the subpoena must, within 14 days of service of the subpoena (the time limit set in Form P37), deliver to the registrar the document or an affidavit indicating that the document is not in the person’s possession or control and what knowledge the person has respecting the document.

If the person cited in the subpoena and served with it fails to comply with it, the court may issue a warrant for the person’s arrest (SCCR 25-12(6)).

A person served with a subpoena issued under SCCR 25-12 may apply to have it set aside on grounds that it is unnecessary or that compliance would work a hardship on the person (SCCR 25-12(8)).

4. WESA, s. 123

Section 123(1) of WESA provides that the court may order a person having control or possession of the following to produce and bring all or any of them to the court or to a place directed by the court:

(a) a testamentary instrument or purported testamentary instrument, including a record as defined in s. 58 (1) (court order curing deficiencies);

(b) a document relating to an estate;

(c) property belonging to an estate; and

(d) a representation grant.

The court may also order that a person with knowledge of the documents or property referred to above attend for examination (WESA, s. 123(2)).

WESA s. 123 has a broader, less specific, ambit than SCCR 25-12. If the subpoena process under SCCR 25-12 cannot be used to produce a document, or if production of estate property is sought, applying under WESA s. 123 pursuant to SCCR Part 8 or SCCR 25-14(1) may succeed.
5. Curing Deficiencies in the Execution, Alteration, Revocation or Revival of a Will

If there are deficiencies in a will or other document representing the deceased’s testamentary intentions or the intention of the deceased to revoke, alter or revive a will or testamentary disposition, a person may seek an order under s. 58 of WESA to cure the deficiencies and have the document declared effective as a will, revocation, alteration or revival of the will or testamentary disposition (see §11.05 for a fuller analysis). Such an application is brought pursuant to SCCR 25-14 (2)(c) either by a notice of application or a requisition.

6. Proof in Solemn Form

When there is a dispute or the potential for a dispute as to the validity of a will, the will should be proved in solemn form as opposed to common form. Probat in common form issues upon the application of the executor without notice and is supported by affidavit evidence. Proof in solemn form, on the other hand, requires proof of the will in a hearing or trial, after notice has been given to all interested parties. The court must be satisfied, upon the evidence, that the will-maker knew and approved of the contents of the will, had testamentary capacity, and that the will was properly executed. A will may be proved in solemn form by notice of application if there is an existing proceeding within which it is appropriate to seek that order under SCCR 25-14(4). If there is no proceeding that exists at the time, a will may be proved in solemn form by commencing a proceeding by petition under SCCR 16-1.

A grant of probate of a will proved in common form can subsequently be revoked if, for example, the will is shown to be invalid (because the will was not properly signed or contains another formal defect, or because the will-maker lacked testamentary capacity or was the victim of undue influence, among other reasons). When a will has been proved in solemn form, it generally is protected by the doctrine of res judicata from attack in subsequent legal proceedings so that the grant cannot be later set aside, unless it is shown that it was obtained by fraud, or a later will is found. A will proved in common form is not so protected.

The executor under the will or any person taking a benefit under the will has standing to commence a proceeding. However, if a person’s only interest is to invalidate the will the person is unlikely to commence a proceeding for proof in solemn form of a will; there are other procedures available.

[§18.03] Actions and Procedures after the Grant

A grant of probate or letters of administration may have to be replaced if the grantee dies, goes missing, or becomes incapacitated, or if facts come to light that indicate that the earlier grant was made in error. When events after the grant make it impossible to complete the administration, the solution may take the form of an action for revocation of grant or, if the grantee has died, an application for a grant of letters of administration de bonis non (see §10.06). If the problem is that the original grant was in error, an action for revocation of grant is probably inevitable.

1. Revocation Applications

One relatively common contentious matter arising out of events after a grant is a beneficiary’s allegation that the grantee is guilty of misconduct in the administration of the estate. Usually the most appropriate course is for the beneficiary to apply to the court to have the grantee removed as trustee and to have a judicial trustee appointed under s. 97 of the Trustee Act, S.B.C. 1996, c. 464.

When the existing grant was obtained after proof in solemn form, an action for revocation of grant is only available in restricted circumstances such as the following:

(a) a later will is discovered;
(b) after the grant in solemn form is issued, it is discovered that a valid marriage not contemplated by the will was contracted by the will-maker after the execution of the will (This basis for setting aside a will proved in solemn form will likely change under WESA’s abolition of the automatic revocation of a will by marriage.); or
(c) the grant pronouncing for the force and validity of the will was obtained by fraud.

A grant of probate or of letters of administration may be revoked when a grant properly made has subsequently become ineffective or when the grant, if allowed to subsist, would prevent the proper administration of the estate. These circumstances arise, for example, when:

(1) a grantee has disappeared leaving the estate unadministered; or
(2) a grant has issued by mistake after the grantee, having applied for the grant, died before it was sealed by the court.
The person applying for revocation of an estate grant must satisfy the following conditions (SCCR 25-5(5)):

(a) If the person applying for the revocation is the person to whom the grant was issued, concurrently with filing the notice of application, that person must provide the registry with the original of the document and all certified and notarial copies of it. The person must also not act under the grant until the application is decided.

(b) If the person applying for the revocation is not the person to whom the estate grant was issued, the person who has possession or control of that document must file it within seven days after being served with the notice of application for the revocation. That person must not act under the estate grant without leave of the registrar until the application is decided.

The registrar has the discretion to grant leave to the person to whom the estate grant was issued to act under the grant before the revocation application is decided if the registrar is satisfied that the harm that will occur if leave is granted is less than the harm that will occur if leave is not granted (SCCR 25-5(6)(b)). In order to apply for leave, the person must file a requisition in Form 17 and affidavit or other evidence in support of the request (SCCR 25-5(6)(a)).

If revoked, that authority to act passes as if the person had never been appointed executor (WESA, s. 141). A former personal representative must give a new personal representative all property and records relating to the estate and administration in his or her possession or control within 30 days of the order of substitution, and sign all documents necessary for the administration of the estate. A failure to sign any document will not affect vesting of the estate in the new personal representative (WESA, s. 161).

2. Rectification

Under s. 59 of WESA, if a will fails to give effect to the will-maker’s intention because of an accidental slip or omission, a misunderstanding of the instructions or a failure to carry out the instructions, the court may rectify the will no later than 180 days after the representation grant is issued unless the court grants leave to make an application after that date (see §11.02 and §11.03).
Chapter 19

Variation of Wills

[§19.01] Introduction

This chapter deals with applications to vary a will under Part 4, Division 6—Variation of Wills in the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 (“WESA”). All statute references in this chapter are to WESA unless otherwise noted.

In particular, this chapter discusses provisions ss. 60 to 72, which replace the Wills Variation Act, R.S.B.C. 1986, c. 490 (the “WVA”). Sections 60 to 72 incorporate substantially the same terms as the WVA, with some procedural changes of importance. The common law principles and the commentary established under the WVA continue to be applicable.

Under WESA, a spouse or child may commence an action, within 180 days from the date of the representation grant, if he or she feels that the will does not adequately provide for his or her proper maintenance and support.

Section 60 of WESA provides:

Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court’s opinion, make adequate provision for the proper maintenance and support of the will-maker’s spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker’s estate for the spouse or children.

Be aware that if there is a dispute over the will or estate of a deceased First Nations person, a completely different regime governed by the Indian Act, R.S.C. 1985, c. I-5 may apply. For more detail, see §20.11 in the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC).

For more detailed information on wills variation claims, see Chapter 19 of the British Columbia Probate and Estate Administration Practice Manual (Vancouver: CLEBC) and Leopold Amighetti, QC, The Law of Dependents’ Relief in British Columbia (Toronto: Carswell, 1991).

[§19.02] Jurisdiction

A number of conditions must be satisfied before the court has jurisdiction to make an order under WESA.

1. Requirements

(a) A Valid Will

The first condition precedent to the court’s jurisdiction is that a valid will must exist (Hammond v. Hammond (1995), 7 B.C.L.R. 3(d) S.C.). If from a construction of the will it is possible that there may be an intestacy as to any part of the estate, the proper course is to have the will construed by the court before proceeding with an action under WESA (although, given the short limitation period, a proceeding would likely be combined, at the very least).

Section 1 of WESA defines a will as follows:

(a) a will;
(b) a testament;
(c) a codicil;
(d) an appointment by will or by writing in the nature of a will in exercise of a power;
(e) anything ordered to be effective as a will under s. 58 [court order curing deficiencies]; or
(f) any other testamentary disposition except the following:
   (i) a designation under WESA Part 5 [Benefit Plans];
   (ii) a designation of a beneficiary under Part 3 [Life Insurance] or Part 4 [Accident of the Insurance Act]; or
   (iii) a testamentary disposition governed specifically by another enactment or law of British Columbia or of another jurisdiction in or outside Canada.

(b) Qualifying Assets

In general, if the will-maker was domiciled in British Columbia at death, WESA applies to all real property and personal property of the will-maker to which the authority of the courts in British Columbia extends or can be made to extend. If the will-maker was domiciled outside British Columbia at death, WESA applies to all of the will-maker’s real property within British

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Columbia but not to the will-maker’s personal property.

Assets that are not part of the estate within the meaning of s. 60 usually includes property held in joint tenancy, assets held in a trust settled in the lifetime of the will-maker, pension funds, insurance policies, and RRSPs declared to be payable to designated beneficiaries. However, assets that pass outside the estate can be considered in an application made under WESA in assessing what the will-maker, as a judicious person, would have considered adequate, just and equitable for the claimant (Viberg v. Viberg, 2009 BCSC 27). Assets may also be subject to a s. 60 claim if the plaintiff is alleging a constructive trust: see Chapter 5, §5.05.

(c) Qualified Applicant

A qualified applicant under s. 60 of WESA is the spouse or a child of a will-maker.

The Nisga’a Lisims Government can commence proceedings under WESA for the will of a Nisga’a citizen if that will provides for devolution of cultural property (s. 13).

(i) Spouses

Section 2 of WESA defines a spouse as follows:

2 (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and

(a) they were married to each other, or
(b) they had lived with each other in a marriage-like relationship for at least 2 years.

. . .

(3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.

Two persons cease being spouses of each other for the purposes of WESA as follows:

- in the case of a marriage, if an event occurs that causes an interest in family property, within the meaning of the Family Law Act, S.B.C. 2011, c. 25 to arise; or
- in the case of a marriage-like relationship, if one or both persons terminate the relationship (s. 2(2)).

Spouses are not considered to have separated if, within one year of separation, they begin to live together again for the primary purpose of reconciling, and they continue to live together for one or more periods, totalling at least 90 days (s. 2(2.1)).

The status of a spouse is fixed once and for all at the date of the will-maker’s death. Therefore, the spouse’s remarriage after the will-maker’s death does not bar a claim under WESA.

A former spouse has no status to apply under WESA. However, a former spouse may have a claim under the FLA if marital property was not settled after separation and before the deceased spouse’s death. In this situation, the surviving former spouse can commence an FLA action against the deceased spouse’s estate (Howland Estate v. Sikora, 2015 BCSC 2248).

(ii) Children

WESA does not contain a definition of children. However, s. 3(2) provides that an adopted child is not entitled to the estate of the person who was his or her parent before the adoption, except through the will of the pre-adoption parent. Section 3(3) provides an exception—if the spouse of the pre-adoption parent adopts the child, the pre-adoption parent remains a parent of the child for the purposes of succession. Section 3(1) provides that if the relationship of parent and child arising from the adoption of a child is in question and must be established if for the purposes of succession, such relationship must be determined in accordance with the Adoption Act, R.S.B.C. 1996, c. 5.

2. Forum

The court that has jurisdiction to make an award under WESA is the Supreme Court of British Columbia (WESA, s. 1(1)). A proceeding can be commenced in any registry of the Supreme Court in the province; it does not have to be commenced in the registry in which probate was granted.

3. Limitation Period

A proceeding for the variation of a will must be commenced within 180 days from the date the representation grant is issued (s. 61(1)(a)). There is no provision in WESA for extension of this time limit.

The commencement of an action by one claimant is deemed to be a proceeding on behalf of all who may apply, so far as limitation periods are concerned (s. 61(4)).
[§19.03] Procedure

1. Commencement and Service

Supreme Court Civil Rule 21-6(1) provides that a proceeding under s. 60 of WESA must be commenced by a notice of civil claim. All further proceedings will follow the usual procedure set out in the SCCR (SCCR 21-6(4)).

A copy of the notice of civil claim must be served on the executor within 30 days after the expiration of the limitation period unless the court grants a time extension (s. 61(1)(b)). An extension is a discretionary matter and the court will consider the merits of the proposed claim (Rodgers v. Rodgers Estate, 2017 BCSC 518).

A copy must also be served on the Public Guardian and Trustee if there are minor children of the will-maker or if the spouse or a child of the will-maker is mentally incapable (s. 61(1)(c)).

If the proceeding concerns the will of a Nisga’a citizen or a treaty First Nation member, a copy must be served on the Nisga’a Lisims Government or the treaty First Nation.

2. Parties

Parties to a proceeding include the surviving spouse, children, all beneficiaries whose interest may be affected, the executor, and any other person the court may order are parties (SCCR 21-6(2)).

The court has jurisdiction to make an award to persons who made no claim for relief but who are included in the proceeding as a party and have status under WESA to seek an award pursuant to s. 61 of WESA (Tomlyn v. Kennedy, 2008 BCSC 331).

3. Representative Actions

Section 60 of WESA states that a proceeding may be brought on behalf of the spouse or children. This contemplates situations where persons entitled to bring actions in their own names are for some reason unable to do so (for example, as a result of infancy or a mental disorder).

A litigation guardian may bring an application on behalf of an applicant who is under legal disability (Re Wong Estate, 2007 BCSC 1189). Proceedings may also be brought on behalf of persons who have died before or during the course of the proceedings (Currie Estate v. Bowen (1989), 35 B.C.L.R. (2d) 46 (S.C.); McGavin Estate v. McGavin Estate, [1992] B.C.W.L.D. 899 (S.C.); and Pelletier v. Erb Estate, 2002 BCSC 1158).

4. Special Considerations with Respect to Land

Sections 61(5), 68, 69 and 70 of WESA contain special provisions with respect to land in BC.

Under s. 61(5), a plaintiff in an action may register a certificate of pending litigation in the Land Title Office within 10 days of the issue of the initiating proceeding or petition.

Under s. 69(1), if real property is transferred to a beneficiary within the 210 day period referred to in s. 155 of WESA, title to the property cannot be registered in the Land Title Office without either the approval of the court or the consents of beneficiaries entitled under the will to consent. A registration under s. 69(1) is “subject to the liability of being subject to an order under [Division 6]” (i.e. the registration could still be subject to a wills variation claim) (s. 69(2)).

5. Settlement

A consent order cannot be obtained under WESA because relief is a matter for the discretion of the judge. However, when all interests are vested and all parties are sui juris, the parties may enter into a settlement agreement and enter a consent dismissal order dismissing the action as if heard on its merits. The effect of the consent dismissal order is that the will is not varied, but the distribution of the estate is carried out pursuant to the terms of the settlement agreement.

When all interests are not vested or some party is a minor or under a disability, the terms of the settlement will require approval from the court, often with input from the Public Guardian and Trustee’s office.

Any party to a Supreme Court proceeding may require other parties to attend a mediation session under the Notice to Mediate process (Notice to Mediate (General) Regulation, B.C. Reg. 4/2001). Mediation in WESA proceedings in which all interests are not vested, or in which some party is a minor or under a disability, is restricted. The results of mediation in these actions would be subject to court order.

6. Evidence

WESA provides that “the court may accept the evidence it considers proper” of the will-maker’s reasons for making the dispositions in the will or for not making adequate provision for the spouse or children (s. 62(1)). The British Columbia Court of Appeal considered this evidentiary issue in some detail in the cases of Bell v. Roy (Estate) (1993), 75 B.C.L.R. (2d) 213 (B.C.C.A.) and Kelly v. Baker (1996), 15 E.T.R. (2d) 219. The Supreme Court has considered it more recently in Atwal v. Atwal, 2010 BCSC 1261.
Such evidence may include statements made by the will-maker during his or her lifetime or a memorandum recording as objectively as possible the will-maker’s reasons for disposing of the estate in a particular way. An advantage of the memorandum, as opposed to expressing the reasons in the will, is that it preserves the confidentiality of the remarks if there is no challenge to the will.

7. The Order

The court may order a lump sum, a periodic or other payment, a transfer of property, or the establishment of a trust in favour of the will-maker’s spouse or children (s. 64).

The court may also order, in whole or in part, the suspension of the administration of the will-maker’s estate (s. 66).

For how orders and costs are dealt with under WESA and how the burden of payment of an order falls on the estate, see ss. 66, 67, 71, and on the question of costs, see SCCR 14-1(9), 14-1(15) and 14-1(16). The general rule is that costs follow the event in wills variation matters (Vielbig v. Waterland Estate (1995), 6 E.T.R. (2d) 1 (B.C.C.A.); followed in Hall v. Pickett, 2007 BCSC 1278, affirmed 2009 BCCA 329). However, in several wills variation cases the court did not follow the general rule and has ordered that the parties’ costs be paid out of the estate on the basis that the executor was obliged to defend the will and the parties were drawn into the action by the provisions of the will (Wilcox v. Wilcox, 2000 BCCA 491 and Mazur v. Berg, 2010 BCSC 109). See also Anna Laing, Estate Litigation—2011 Update, “Estate Litigation Potpourri,” CLEBC, November 2011.

8. Appeals, Variations and Rescissions

Appeals are provided for in WESA under s. 72. Variation and rescission of orders are provided for under s. 71.

[§19.04] Role of the Executor

Section 61(1)(b) of WESA provides that a proceeding commenced by a person to vary a will must not be heard by the court unless a copy of the notice of civil claim has been served on the executor. Once the executor has notice that a proceeding has been commenced or could be commenced, the executor may proceed with the normal duties of an executor, subject to certain restrictions.

The executor may pay duties, taxes, debts, and testamentary expenses (Re Simson, [1949] 2 All E.R. 826 (Ch. D.)). However, a personal representative is prohibited from distributing the estate after the 210 day waiting period referred to in s. 155(1) without a court order if (1) proceedings have been commenced as to whether a person is a beneficiary or intestate heir; (2) a variation claim has been brought; or (3) other proceedings have been brought which may affect distribution (s. 155).

To avoid the possibility of personal liability, the executor should not distribute any of the assets of the estate to any beneficiary in the 210 days following the date of the issue of a representation grant, unless all persons who would be entitled to apply under WESA consent or the distribution is authorized by court order (s. 69 and s. 155).

If an executor distributes any of the estate within the 210 day period, or thereafter if an action has been commenced, and does so without the consent of all persons who would be entitled to apply under WESA, he or she may be personally liable for any loss resulting from that distribution.

The court cannot direct an executor to make a distribution before the executor’s year has expired (Nielsen v. Nielsen, [1990] B.C.D. Civ. 4163-02 (S.C.)).

The court may authorize payment of legacies or bequests, notwithstanding a pending claim under WESA, when the risk is remote that the variation order will encroach on the funds needed to satisfy the legacies or bequests (Hecht v. Hecht Estate (1990), 39 E.T.R. 165 (B.C.S.C.)).

Throughout the proceedings and at the trial of the action, the executor should take a neutral position. The executor should be prepared to provide the court with particulars of assets and liabilities or with any other assistance the court may require. The executor should neither support nor oppose the provisions of the will. To save costs, it is not uncommon for the executor and his or her counsel to ask to be excused from the trial of such a proceeding after providing such financial particulars of the estate as are required from him or her.

If a personal representative wants to bring an action under WESA, he or she must step down as personal representative, and should not apply for a grant because one person cannot be both plaintiff and defendant in an action under WESA (Berry Estate v. Guaranty Trust, Co. of Canada [1980] 2 S.C.R. 931 and Harrison v. Harrison (1982), 40 B.C.L.R. 143 (S.C.)).

[§19.05] Duty to Make Adequate Provision

1. Generally

When, in the court’s opinion, the will-maker has failed to make adequate provision for the proper maintenance and support of a spouse or child, the court may order the provision be made that it thinks is “adequate, just and equitable” in the circumstances (s. 60).

The requirement that the provision be “just and equitable” is an important feature of WESA in British
Columbia, as that wording is not found in most other Canadian jurisdictions that have dependent relief legislation.

The leading authority on the basis upon which the court is to determine the extent of a will-maker’s duty to make adequate provision is the Supreme Court of Canada’s decision in *Tataryn v. Tataryn Estate* (1994), 93 B.C.L.R. (2d) 145 (S.C.C.).

In *Tataryn* the court held that if the will does not make adequate provision for the proper maintenance and support of a spouse or a child, the court may order whatever it thinks to be “adequate, just and equitable.” Furthermore, in determining what is “adequate, just and equitable”, two societal norms must be considered and in the following order of significance:

- first, the **legal obligations** of the will-maker to his or her spouse and children; and
- second, the **moral obligations** of the will-maker to his or her spouse and children.

A testator’s legal obligations “reflect a clear and unequivocal social expectation, expressed through society’s elected representatives and the judicial doctrine of its courts” (*Tataryn* at 821). This analysis often involves consideration of what the testator’s obligations would be, if still living, under the *Divorce Act*, R.S.C. 1985, c. 3 or the *Family Law Act*.

A testator’s moral obligations are found in “society’s reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards” (*Tataryn* at 821). As the Court noted in *Tataryn*, moral obligations are susceptible to being viewed differently by different people. Guidance as to the analysis has emerged in the case law.

Following *Tataryn*, the Court in *Clucas v. Royal Trust Corporation of Canada et al.*, 1999 CanLII 5519 (B.C.S.C.) enumerated several principles with respect to a wills variation claim:

1. The main aim of the *WVA* (now s. 60 of *WESA*) is the adequate, just and equitable provision for the spouse and children of will-makers.
2. The will-maker’s testamentary autonomy should be protected and only interfered with insofar as the statute requires.
3. The “adequate provision for the proper maintenance and support” test is an objective test.
4. “Adequate” and “proper” can mean different things depending on the size of the estate. A small gift may not be adequate if the estate is large.
5. Examples of circumstances which bring forth a moral duty on the part of a will-maker to recognize the claims of adult children are:
   - (a) adult child’s disability;
   - (b) assured or implied expectation arising from the abundance of the estate or from the adult child’s treatment during the will-maker’s lifetime;
   - (c) present financial circumstances of the child;
   - (d) probable future difficulties of the child; and
   - (e) the size of the estate and other legitimate claims.

6. Circumstances that will negate the moral obligation of a will-maker are “valid and rational” reasons for disinheritance. Such reasons must be based on true facts and the reason must be logically connected to the act of disinheritance.

### 2. Factors to Consider

The following are factors to consider in determining the will-maker’s legal and moral obligations.

(a) Standard of Living

The standard of living to which the will-maker has allowed the plaintiff to become accustomed may influence the degree of a will-maker’s moral obligations: *Wilson v. Lougheed*, 2010 BCSC 1868. In *Wilson v. Lougheed*, the court took into account the will-maker’s history of treating the daughter generously, the daughter’s financial circumstances, and the competing spouse’s financial circumstances (the spouse had a net worth of about $32 million). The will was varied to increase the amount received by the daughter to $5.5 million from an estate of approximately $19.5 million.

The will-maker cannot lower the plaintiff’s standard of living by depriving the plaintiff during the will-maker’s lifetime (*Re Berger* (1978), 2 E.T.R. 275 (B.C.S.C.)).

The general principle that the plaintiff should continue to be maintained in the manner to which he or she has become accustomed must be considered in light of the estate’s ability to meet such a claim (*Spinney v. Royal Trust Co.* (1973), 19 R.F.L. 191 (N.S.S.C.)).
In the case of *Sawchuk v. MacKenzie Estate* (1999), 26 E.T.R. (2d) 193 (B.C.C.A.), the court in increasing the award made by the lower court took into consideration the status in life (expensive house in a high income neighbourhood) of the deceased rather than the lifestyle of the applicant daughter.

(b) Financial Need of the Applicant

In *Tataryn*, the Supreme Court of Canada stated that financial need does not have to be proved if the claimant can establish that the will-maker owed a legal obligation or a moral obligation to the claimant that was not met in the terms of the will (See also *Sawchuk v. MacKenzie Estate*, supra).

While financial need is not essential for a plaintiff to succeed, need is certainly a factor to be considered. For example:

(i) The court has taken into account not only the present financial needs of a plaintiff but the future needs (*Klingstal v. Arend*, [1980] B.C.J. No. 144 (S.C.)).


(iii) An adopted child with greater financial and health needs than the preferred child beneficiary received an award equal to the sibling (*Lainf v. Jarvis Estate*, 2011 BCSC 1081).

(iv) The only daughter of the will-maker’s first marriage was held to be entitled to $75,000 of a $435,000 estate, although she was married to a dermatologist who earned a “relatively good income from his practice” (*Re Holt* (1978), 85 D.L.R. (3d) 543 (B.C.S.C.) at 546).

A review of the cases indicates that failure on the part of the plaintiff to show need may not be fatal when the estate is large and:

(i) the plaintiff had contributed to its acquisition (*Re Sleno* (1977), 78 D.L.R. (3d) 155 (B.C.S.C.));


(iii) a second wife or children of a second marriage were preferred over the children of the first marriage (*Re Holt* (1978), 85 D.L.R. (3d) 543 (B.C.S.C.));

(iv) the will-maker left most of the estate to her brother, with only a small provision for her husband (*Hurst v. Benson* (1981), 9 E.T.R. 274 (B.C.S.C.));

(v) persons falling outside the class enumerated in the wills variation legislation (grandchildren) were preferred by the will-maker (*Re Tiernan Estate*, [1976-77] B.C.D. Civ. (S.C.); *Re Michalson Estate*, [1973] 1 W.W.R. 560 (B.C.S.C.)); or

(vi) the will-maker disinherited his only child without adequately weighing the impact of the child’s deteriorating health (*Marsh v. Marsh Estate* (1997), 19 E.T.R. (2d) 184 (B.C.S.C.)).

(c) Restrictive Conditions in the Will

Support may not be adequate if there are conditions in the will that restrict the surviving spouse’s or child’s access to the support. For example, when a dependent is required to rely on an executor’s discretion as to whether to resort to the corpus of a life estate, the courts have generally held that adequate provision has not been made. In these conditions, the plaintiff need not apply to the executor for relief before invoking the wills variation provisions of the legislation (*Re Kirk Estate* (1963), 42 W.W.R. 510 (B.C.S.C.)).

(d) Applicant’s Country of Domicile

The adequacy of the will-maker’s provision will generally be determined with regard to a standard appropriate to the applicant’s country of domicile.

(e) Disability

In *Woods v. Davy*, 2002 BCSC 569, the court varied a will in consideration of the health and mental capacity of the dependents. However, where a plaintiff adult independent child did not establish that her health disabled her from working, the court did not vary a will on the basis of physical disability (*Gould v. Royal Trust Corp. of Canada*, 2009 BCSC 1528 at paras. 113 to 116).

(f) Factors Specific to Spouses

The starting point for considering a testator’s legal obligations to a spouse is often to consider what the spouse would be entitled to on the
breakdown of the spousal relationship under the *Divorce Act* or the *Family Law Act*.

The Supreme Court of Canada in *Tataryn* stated that a surviving spouse ought not to be in any worse position than he or she would be in had the parties divorced as opposed to one of them dying. Under the *Family Law Act*, on separation, each spouse is entitled to half of the family property and family debt.

An analysis of the will-maker’s legal obligations to the spouse should be considered at the time of a “notional separation” immediately prior to the testator’s death: *Ciarniello v. James*, 2016 BCSC 1699; *Saugestad v. Saugestad*, 2006 BCSC 1839.

In *Philp v. Philp Estate*, 2017 BCSC 625, the court found the will-maker satisfied her legal obligations to her spouse because the estate was worth approximately $667,000 while the plaintiff spouse’s assets at the time of the will-maker’s death totaled $600,000. In other words, the plaintiff spouse had close to half of the family assets.

In *Kish v. Sobchak Estate*, 2016 BCCA 65, the Court considered the plaintiff’s argument that variation should be calculated with reference to a “notional spousal support award” based on the Spousal Support Advisory Guidelines. The Court made clear at para. 49:

> . . . the analysis of legal obligation need not be a detailed or exact one, given the difficulty of drawing a direct analogy between the consequences of a marriage breakdown—which leaves both spouses with needs and obligations—and the death of a spouse…the *WVA* should not normally become a proxy for divorce proceedings, complete with the elaborate features and special rules applicable to a family law trial.

Rather, the legislation respecting the breakdown of spousal relationships provides guidance in assessing a will-maker’s legal obligations to his or her spouse. A similar conclusion was reached in *Brown v. Terins Estate*, 2016 BCSC 42.

(g) Factors Specific to Independent Adult Children

The testator’s moral obligation to provide for independent adult children is more tenuous. Nonetheless, *Tataryn* states that “if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made” (*Tataryn* at 823). *McBride v. Voth*, 2010 BCSC 443 enumerated six considerations that inform the analysis of a testator’s moral obligations to his or her independent adult children. The six considerations are as follows:

1. Contributions to the estate and reasonably held expectations on the part of the claimant;
2. Misconduct or poor character of the claimant;
3. Estrangement or neglect in the relationship between the testator and child;
4. Gifts and benefits made by the testator during the testator’s lifetime;
5. Unequal treatment of children; and
6. The testator’s reasons for disinheritance or subordinate benefit, which must be valid and rational.

For case law examples of how a number of these considerations have been applied to preclude relief in actions by adult children, see §19.06.3, and for case law examples of contributions to the estate by claimants, see §19.07.2(r).

3. Relevant Date for Determining Adequacy of Support

The adequacy of the will-maker’s support for his or her spouse or children is determined based on the circumstances of the plaintiff at the date of the will-maker’s death, including any reasonably foreseeable changes in the circumstances of the spouse or children as at the date of death of the will-maker.

[§19.06] Circumstances Precluding Relief

1. General

The court has discretion to refuse relief under *WESA*. Section 63 provides:

The court may

(a) attach to an order under this Division any conditions that it thinks appropriate, or

(b) refuse to make an order in favour of a person whose character or conduct, in the court’s opinion, disentitles the person to the benefit of an order under this Division.

“Character or conduct” refers to the character and conduct of the plaintiff before the will-maker’s death (*Burns v. Burns*, [1937] 2 W.W.R. 673.
The plaintiff’s conduct after the death of the will-maker is immaterial (Dale v. Crosby, [1981] B.C.D. Civ. 4223-08 (S.C.)).

Once the plaintiff shows that adequate provision has not been made in the will, the onus of proving disentitling conduct is on the person alleging it (Re Suddaby, [1958] O.W.N. 391 (C.A.)).

2. Actions by Spouses

A number of principles have emerged in case law and statute as to bars to relief in actions by spouses.

(a) Duration of Spousal Relationship

The fact that a spousal relationship is of very limited duration does not bar a claim under WESA. Rather, it is a circumstance going to the quantum of the award.

(b) Marriage of Convenience

The fact that the marriage was one of convenience does not disentitle the plaintiff spouse. However, in such cases the obligation of the will-maker may be minimal (Montgomery v. Flood (1979), 5 E.T.R. 16 (B.C.S.C.)).

(c) Adultery

Adultery is not a bar to relief but may be a factor taken into consideration.

(d) Separation

A person who ceases to be a spouse under s. 2(2) of WESA cannot vary a will under the wills variation provisions.

Marriage and prenuptial agreements often include provisions that one or both parties agree to forego rights under WESA or the former WVA. Absent separation, an agreement cannot remove the court’s jurisdiction under WESA. However, the court may consider the terms of the marriage or prenuptial agreement to determine if adequate, just and equitable provisions have been made by the will-maker (Steernberg v. Steernberg, 2006 BCSC 1672).

In Steernberg, the court considered the significance of a prenuptial agreement in a wills variation action. The court noted that a prenuptial agreement generally contemplates arrangements on the breakdown of the relationship, while the scope of a wills variation claim is broader as it contemplates the circumstances of the relationship that would have sustained but for the death of the will-maker.

This is consistent with the two-part test in Tataryn, which contemplates both the legal obligations (such as property division on the breakdown of a spousal relationship), as well as the moral obligations of the will-maker (which could take into account the circumstances of the spousal relationship, including the spouses’ standard of living).

Accordingly, a prenuptial agreement cannot bar a spouse from making a wills variation claim. However, the terms of the prenuptial agreement could be considered in assessing whether adequate, just and equitable provisions have been made. The prenuptial agreement could also be used as evidence of the will-maker’s reasons for making the dispositions made in the will.


(e) Desertion

Desertion by the plaintiff was generally considered to be conduct disentitling the plaintiff from relief under the WVA and will likely continue to be so under WESA.

3. Actions by Children

The following factors are relevant to the court’s determination as to whether the child is disentitled to the benefits of WESA. See also the summary of McBride v. Voth, supra, in §19.05.2(g).

(a) Misconduct

Only the most severe misconduct on the part of a child will disentitle that child from the benefits of WESA. The character or conduct subject to review is the character or conduct of the child at the time of the will-maker’s death (McBride v. Voth, 2010 BCSC 443).

The following circumstances constituted such misconduct under the WVA and warranted disinherition:

(i) a son provided no explanation of his inability to save money (Dech v. Ewan Estate, 2003 BCSC 1585);

(ii) a son became belligerent towards the parents, culminating in the father punching the son in the mouth and the son having no subsequent contact with his parents (Kelly v. Baker (1996), 15 E.T.R. 2(d) (B.C.C.A));
(iii) a daughter had sued the will-maker after the death of her father in an attempt to deny the will-maker’s inheritance of her husband’s estate (Gieni v. Richardson Estate, [1995] B.C.J. No. 1227); and

(iv) a daughter was verbally abusive, and had effectively prevented her two siblings from inheriting anything from their father’s estate by using substantially all of the father’s estate to purchase a property in her sole name (LeVierge v. Whieldon Estate, 2010 BCSC 1462).

The following circumstances did not constitute such misconduct under the WVA to warrant disinheritance:

(i) a daughter had separated from her husband and was living in a common law relationship (Re Fornataro Estate, [1976-77] B.C.D. Civ.-Test. Main. (S.C.)); and

(ii) a daughter was a disappointment and allegedly took objects from the home of the will-maker (Sawchuk v. MacKenzie Estate (1998), 24 E.T.R. 2(d) 66 (B.C.S.C.), appeal allowed as to quantum, 2000 BCCA 10).

(b) Estrangement in the Relationship or Neglect by the Will-Maker

The court may consider the relationship between the will-maker and his or her children when determining the moral obligation.

Adult children are not generally disentitled to relief under WESA by reason of the fact that they have been estranged from the will-maker for an extended period of time and have never been financially dependent on the will-maker. In Pattie v. Standal Estate (1997), 20 E.T.R. (2d) 192, the son had been three years old when his parents separated, his mother had the right to apply for maintenance but never did, the son had no contact with the will-maker, his father, from the age of seven when mother and son moved to Alberta, he later changed his name, and he was an independent adult at the time of the application to vary. The Supreme Court held that no special circumstances existed to displace the parent’s moral obligation to provide for his child. However, in Hall v. Hall, 2011 BCCA 354, the court found that a lengthy and serial estrangement that was not the fault of the will-maker did not give rise to a moral obligation to provide for the estranged adult child.

The will-maker’s neglect of a child may be relevant in determining whether a moral duty is owed to the child (Gray v. Nantel, 2002 BCCA 94).

When the relationship between a will-maker and his or her children is an unhappy one, the children may be disentitled to relief if their conduct has been the cause of the breakdown in relations: see e.g. Bell v. Roy, supra. But see Re Harding, [1973] 6 W.W.R. 229 (B.C.S.C.) and Re Schurman (1965), 54 D.L.R. (2d) 77 (N.S.S.C.).

Even when the children are shown to have neglected the will-maker for a number of years, such treatment must be considered in the light of the will-maker’s previous neglect of the children, and it may not disentitle them to an award (Re Osland (1977), 1 E.T.R. 128 (B.C.S.C.); Re Magdell Estate, [1978] B.C.D. Civ. (S.C.)); and Rampling v. Nootebas (2003), 4 E.T.R. (3d) 86).

While WESA is not intended as a means to compensate for family abuse, where a parent has treated a child unfairly, a judicious parent would recognize a moral obligation to make amends through provisions in his or her will and if not so done, the court may vary the will to do so (Doucette v. McInnes, 2009 BCCA 393).

In decisions under the WVA, children have been entitled to claim in the following circumstances:

(i) the will-maker and her son were estranged because she disapproved of his wife’s ethnic background (Lowres v. Lowres (1984), 17 E.T.R. 281 (B.C.S.C.));

(ii) a will-maker transferred his animosity toward his first wife to a daughter of that marriage (Re Holt (1978), 85 D.L.R. (3d) 543 (B.C.S.C.));

(iii) a will-maker disinherited her son as a result of unfounded suspicions as to his handling of his father’s estate in his capacity as executor (Re Preston Estate, [1974] B.C.D. Civ.); and

(iv) an alcoholic mother terminated relations with her daughter when she refused to drink with her (Re Cater Estate, [1976-77] B.C.D. Civ. (S.C.)).

(c) The Will-Maker’s Reason for Disinheritance

The will-maker’s reason for disinheritance must be “valid and rational” (Clucas, supra).
A will-maker can disinherit a child for good cause. See \textit{Bell v. Roy, supra}, in which the will-maker left her estate to only one of three adult children. One of the disinherited children challenged the will, although she was in no apparent financial need. On the other hand, the son who was the beneficiary had a history of unemployment. The Court of Appeal unanimously upheld the trial judge’s ruling that the daughter’s claim be dismissed.

See also \textit{Berger v. Clark, [1999] B.C.J. No 2904}. The Court of Appeal, in dismissing the appeal, held that the stated reasons for the deceased having disinherited the daughter were solidly based on the facts and were not unreasonable or irrational. Furthermore, the estate was small and there was no evidence that either the daughter or the beneficiary was in need. It was appropriate and within the discretion of a judicious parent for the deceased to have left his estate to a companion, who had provided him with companionship and comfort.

However, for a case in which the will-maker’s reasons for disinheritance were found to not be valid or rational, see \textit{Ryan v. Delahaye Estate (2003), 2 E.T.R. (3d) 107}. The will-maker mother in this case set out clear reasons for providing unequally for her adult children, stating that the son had been of great assistance to her, while the daughter seldom visited. She also stated that the daughter had received a legacy from the grandmother, who had raised the daughter and for whom the daughter had cared until she died. Smith J. held that while the mother had given reasons for the unequal distribution the reasons were inaccurate and therefore were not valid and rational at the time of the mother’s death. The parents had provided some compensation to the son for his devotion during their lives. Both children were of great assistance to the parents. It was not possible to quantify each of their contributions. Given the size of the estate, the daughter was not adequately provided for. The unequal distribution did not provide for the proper maintenance and support of the daughter. An adequate, just and equitable distribution was to give the daughter an equal share of the residue of the estate.

\textbf{[§19.07] Determination of Quantum}

1. General


If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also.

This underscores an important feature of \textit{WESA}—the requirement that the provision be just and equitable. Statements from other jurisdictions must be treated with caution, as the role of the courts in each jurisdiction depends on the wording of the relevant legislation.

Regardless of the particular jurisdiction, however, the task of fixing an appropriate amount is a highly discretionary matter involving consideration of a variety of circumstances.

2. Relevant Factors to Consider

(a) Application of \textit{Family Law Act}

In light of Tataryn, the surviving spouse’s entitlement under the \textit{FLA}, had there been a separation rather than a death, is relevant in considering the will-maker’s legal obligations to the surviving spouse.

(b) The Size of the Will-Maker’s Estate

This factor takes on greatest significance when the plaintiff is unable to show financial need.

There are a number of “small estate” cases involving the competing claims of the will-maker’s widow and the adult children of that marriage or of a previous marriage of the will-maker. The tendency in such cases is to award the whole of the estate to the widow.

A second category of “small estate” cases involves the competing claims of a widow and a beneficiary who has an apparent moral claim on the will-maker but who was not a dependent within the meaning of the former \textit{WVA}. When the widow is in financial need, she is generally awarded the whole of a small estate. This principle was extended to widowers in \textit{Tweedale v. Tweedale Estate} (1995), 1 B.C.L.R. (3d) 167 (C.A.), where Cumming J.A. applied Tataryn and stated “an adult independent child is entitled to less consideration where the size of the estate is modest. And indeed, the estate in the case at bar is extremely modest” (at 173). Cumming J.A. concluded that the wife did not make “adequate, just and equitable” provision for her husband; consequently, the will should be varied to pass the entire estate to the husband.

(c) The Size of the Will-Maker’s Family

When there are a large number of claimants, the question of what constitutes a “just and equitable” provision must be viewed in light of reality. Unless the estate is very large, it is clear that each claimant would likely receive a
smaller award than if the will-maker had left just one or two dependents.

(d) The Station in Life of the Will-Maker and the Applicants

The will-maker’s station in life (including such factors as profession, social standing, and standard of living) may be relevant to quantum. The station in life of the applicants may also be relevant to quantum.

In the case of a widow, the Court in Re Lawther Estate, [1947] 1 W.W.R. 577 at 587 (Man. K.B.) held that quantum may be affected by “the kind of maintenance to which she had been accustomed during the life of the testator, or to which she would have been accustomed if her husband had then done his duty to her.”

(e) Gifts by the Will-Maker Outside the Will

In determining quantum, the court may consider inter vivos benefits that the will-maker has made to an applicant and other beneficiaries or those that pass by the operation of law at the time of death outside of the will, including assets held in joint tenancy and assets for which there is a beneficiary designated to receive them upon death of the will-maker (See DeLeeuw v. DeLeeuw, 2003 BCSC 1472 and Wilson v. Lougheed Estate, 2010 BCSC 1868).

(f) Character and Views of the Will-Maker

The two-part test in Tataryn is an objective test regardless of whether the will-maker subjectively believed that adequate, just and equitable provisions have been made. Accordingly, in Re Serra Estate, [1978] B.C.D. Civ. (S.C.), the court accorded little significance to the views of the will-maker who was “European in his outlook,” felt that “land ownership was for men,” and wanted the property to remain in his family.

The will-maker’s subjective reasons for disinherition may only be considered provided that the reasons are valid and rational.

(g) Cultural Practices

The wishes of the will-maker with respect to the distribution of his or her estate must not fall short of the moral standards of Canadian society. For example, “a tradition of leaving the lion’s share to the sons [of a will-maker] may work agreeably in other societies with other value systems that legitimize it, but in our society, such a disparity has no legitimate context. It is bound to be unfair, and it runs afoul of the statute of this province” (Prakash v. Singh, 2006 BCSC 1545 at para. 59).

The courts have also found that “homosexuality is not a factor in today’s society justifying a judicious parent disinheriting or limiting benefits to his child.” (Peden v. Peden Estate, 2006 BCSC 1713 at para. 55).

(h) Omission or Oversight of the Will-Maker

Evidence may show how the will-maker wished to provide for the plaintiff but failed to perform his or her duty because of an omission or oversight, and this evidence may affect quantum.

In Hancock v. Hancock, 2014 BCSC 2398, the will-maker made a will in the year 2002, which provided that her estate be distributed to her daughter Marnie and disinherited the other four children.

At the time the will was made, the will-maker had provided various inter vivos gifts of monies and real property to her children. However, the will-maker believed that the real property gifted to the daughter was not as valuable as the real property given to the other children due to problems associated with mould, ants, and a challenging sewage system. As such, the will-maker provided that her estate would be given to the daughter only so that all five children would be provided for fairly.

In 2007, the daughter’s property was sold for $1.4 million. The will-maker communicated to her two sons and her daughter-in-law that she was surprised and embarrassed that the daughter received more than the two sons, and expressed her desire to provide more for the two sons. However, she did not change her will.

The Court found that the statements made by the will-maker to the two sons and daughter-in-law showed that the will-maker recognized her moral obligations to her sons, which were not discharged by the provisions under the will. Accordingly, the court varied the will to provide a bequest of $125,000 to one son (who cared for the will-maker and was in financial need) and $75,000 to the other son.

(i) Inter Vivos Gifts by the Will-Maker to Applicants

In determining quantum, the court will consider benefits that the will-maker had bestowed on the plaintiff and other beneficiaries in his or her lifetime, or at least within a few years of death (Re Worts (1977), 3 B.C.L.R. 55 (S.C.)).

By dissipating the estate during the will-maker’s lifetime, a will-maker may limit the assets subject to WESA. However, the courts may set aside inter vivos transfers (including to a trust) if the transfer constituted a fraudulent
conveyance. Whether a transfer can be set aside depends on whether a person falls within the class of people contemplated by the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163. It is clear that if the only basis for setting aside a transfer is the right of a child to commence a proceeding to vary a will under WESA, that is not sufficient to void the transfer (See Hossay v. Newman, 5 C.B.R. (4th) 198, 1998 CanLII 15139 (B.C.S.C.)). When it comes to a spouse attacking an inter vivos transfer, there are more considerations involved and such a transfer could be potentially set aside (see Mawdsley v. Meshen, 2012 BCCA 91 for a more detailed discussion, as well as Easingwood v. Cockroft, 2011 BCSC 1154, affirmed 2013 BCCA 182).

(j) Competing Moral Claims on the Bounty of the Will-Maker

The Court in Tataryn at 823 stated that where the size of the estate permits, all conflicting claims should be met. However, where priorities must be considered, claims that would have been recognized as legal obligations during a testator’s lifetime should generally take precedence over claims based on moral obligations. As between claims based on moral obligations, the court must rank the claims based on their strength.

As only spouses and children may apply to vary the will under s. 60 of WESA, the moral claims of persons other than spouses and children are not considered in the wills variation analysis. However, if the will-maker provides for such persons in the will, the court would balance testamentary autonomy and the competing moral claims in determining the proper quantum in a wills variation action.

(k) Relative Needs of the Applicants

In considering what provision would be adequate, just and equitable, “the situation of the others having claims upon the will-maker must be taken into account” (Walker v. McDermott at 96). The relative needs of the various claimants are most significant when the estate is a small one, incapable of providing adequately for the needs of all of the will-maker’s dependents. In the case of a small estate, the burden is on the plaintiff to demonstrate “comparative need” (Re Oxbury Estate, [1978] B.C.D. Civ. (S.C.)).

(l) Personal Income of the Applicants

The property and income of the applicants may be relevant to quantum.

(m) Financial Circumstances of Beneficiaries’ Spouses

The financial circumstances of beneficiaries and their spouses are relevant (Jones v. Jones, [1985] B.C.D. Civ. 4223-05 (C.A.)).

(n) Change in Existing Circumstances

Substantial changes in circumstances of a claimant under WESA or a beneficiary under the will between the will-maker’s date of death and the date of the trial may be taken into account when determining quantum (Landy v. Landy (1991), 44 E.T.R 1 (B.C.C.A)).

See also Frinskie v. Frinskie, [1979] B.C.J. No. 51 (S.C.) and Re Berger (1978) 2 E.T.R. 275 (B.C.S.C) for cases in which the claimant was not in present need, but the court considered the client’s future needs in determining the will did not make adequate provision for proper maintenance and support.

(o) Future Value of Money and Interest Rates

Factors in the economy, such as the future value of money and interest rates, may be relevant to quantum.

(p) Whether the Applicant Has or May Have Dependents

The plaintiff’s responsibility toward dependents may be a relevant factor in determining quantum.

(q) Health and Mental Capacity of the Applicant

The health and mental capacity of the applicant is only considered to the extent that they were reasonably foreseeable at the time of the will-maker’s death.

In Eckford v. Vanderwood, 2014 BCCA 261, the plaintiff argued that her deterioration in health between the date of the will-maker’s death and the date of trial should be considered in determining whether the will-maker made adequate, just, and equitable provision for the plaintiff. The Court considered Landy v. Landy Estate (1991), 60 B.C.L.R. (2d) 282 and Hall v. Hall Estate, 2011 BCCA 354, and determined that whether the will made adequate, just, and equitable provisions is based on what was reasonably foreseeable at the time of the will-maker’s death. If the will-maker did not provide adequate, just and equitable provisions, then the court may look to changes in the circumstances of the plaintiff between the date of death and the date of trial in determining the adequate, just and equitable provision that should be made.
However, the Court found that while the will-maker was aware of the plaintiff’s ailments, these conditions were not impairing the plaintiff’s ability to work and function at the time of the will-maker’s death. It was not reasonably foreseeable at the date of the will-maker’s death that the plaintiff’s health would decline. Accordingly, the plaintiff’s wills variation claim was dismissed.

In Hall, the will-maker’s estranged son sought to vary the will, which left the estate to the other son. The will noted that the estranged son was a skilled electrician and capable of supporting himself and his family. However, subsequent to the will-maker’s death, the estranged son suffered an injury which resulted in the amputation of his right leg and various medical problems which left him unable to work. The Court declined to consider the estranged son’s injury and medical problems in determining if the will-maker made adequate, just and equitable provisions as the injury and medical problems were not reasonably foreseeable at the date of the will-maker’s death.

(r) Contributions by the Applicant

In Tataryn the Supreme Court of Canada held that the applicant’s contribution to the estate goes to his or her legal claim to the estate. An applicant’s contribution to the estate may also affect the moral obligations owed by the will-maker (Dunsdon v. Dunsdon, 2012 BCSC 1274 at para. 134, and Hammond v. Hammond (1995), 7 E.T.R. (2d) 280 (B.C.S.C) at para. 29).

(i) Contribution by the Surviving Spouse

In Brown v. Terins, 2016 BCSC 42, the Court assessed the spouse’s contribution in determining the will-maker’s legal obligations under the Tataryn framework. The Court noted that s. 95(1) of the FLA provides for an unequal division of family property if equal division would be significantly unfair. The Court found that on a hypothetical separation of the spouses, an equal division of property would be unfair as the surviving spouse did not contribute to the acquisition or upkeep of the family property. Accordingly, the Court found that the will-maker’s legal obligation to the surviving spouse was limited to approximately $300,000.

When a wife had contributed substantially to the estate of the will-maker and had at times been the family “breadwinner”, she was held to be entitled to the whole of the estate (Gieni v. Romaniuk, [1980] B.C.D Civ. 4223-04 (S.C.)).

Even in the absence of a financial contribution, courts have considered work as a homemaker “a contribution that far exceeded the value of the estate” in Davidson v. Allen (1976), 28 R.F.L. 74 at 76 (N.B.S.C.), and considered “care and attention” to a will-maker over a 12-year marriage in Re Ferster Estate, [1974] B.C.D Civ. (S.C.)).

(ii) Contribution by the Will-Maker’s Children

In Dunsdon v. Dunsdon, 2012 BCSC 1274, the Court considered the contribution made by the will-maker’s adult children to the will-maker’s business in assessing the will-maker’s moral obligations to the children.

Significantly, Dunsdon distinguished the assessment of contribution in a wills variation context from that in an unjust enrichment claim.

In its analysis, the Court noted that in an unjust enrichment claim, the claimant must fulfill the three-step test to establish unjust enrichment (that is, there must be an enrichment, a corresponding deprivation, and no juristic reason for enrichment). If the claimant establishes unjust enrichment, that also establishes the will-maker’s legal obligations to the claimant in a wills variation claim. However, if no unjust enrichment claim is established, the claimant’s contribution may nonetheless be considered in assessing the will-maker’s moral obligations to the claimant.

Applying this analysis, the Court held that though the claimant could not establish a legal claim based on unjust enrichment, she had established that the will-maker had a stronger moral obligation to her than to the will-maker’s other children because she had contributed significantly to the will-maker’s business. Accordingly, the court varied the will with a preference shown to the claimant.

Contribution also played a role in a successful counterclaim by one of three adult child beneficiaries in Bellinger v. Nuyetten Estate (2002), 45 E.T.R. (2d) 10, maintaining, in her favour, an unequal division.