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Professional Legal Training Course 2025

Practice Material

Wills

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WILLS

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Chapter 1

Wills and Intestate Succession[1]

[§1.01] Introduction to These Materials

The *Practice Material: Wills* covers topics in a roughly chronological order. The initial chapters cover succession and estate planning generally: what is an estate, what if a person dies without a will, and what is involved in making a will. The next chapters cover probate and estate administration: dealing with assets and liabilities, applying for probate, and passing accounts. The last section addresses duties of parties and claims against estates: solicitors' duties and wills variation claims. The appendices at the end include documents to assist at different stages, from opening the file to winding up an estate: a sample intake questionnaire, a sample will, sample testimonium clauses, and a sample checklist of executor duties.

[§1.02] 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 wills, intestate succession, gifts, *inter vivos* trusts (created during the donor's lifetime), and other estate planning tools. Effective estate planning involves organizing a client's affairs so as to realize the client's goals both for the client personally and for the client's heirs, during the client's lifetime and after death.

Wills and estates law has undergone a significant revision since the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 ("*WESA*") came into force on March 31, 2014. *WESA* repealed and replaced the *Estate Administration Act*, R.S.B.C. 1996, c. 122; the *Probate Recognition Act*, R.S.B.C. 1996, c. 376; the *Wills Act*, R.S.B.C. 1996, c. 489; and the *Wills Variation Act*, R.S.B.C. 1996, c. 490. Note that the former legislation referred to a person who makes a will as a "testator" while the current legislation uses the term "will-maker."

The transitional rules of *WESA* state that the intestacy rules, the estate administration rules, and the fundamental rules (including definitions, construction of instruments, and survivorship rules) apply to deaths occurring after March 31, 2014. Deaths prior to this date are governed by the now-repealed legislation that was in force at the time of the death.

Part 4 of *WESA*, which relates to wills, applies to a will, whenever made, if the will-maker died on or after March 31, 2014. However, *WESA*'s transitional provisions will not invalidate a will validly made before March 31, 2014, or revive a will validly revoked before that date.

The Lawyers Indemnity Fund cautions that wills practice and estate planning is a challenging area, with many pitfalls for the inexperienced lawyer. Lawyers who dabble in wills and estates law may expose themselves to negligence claims. Lawyers should only practice in this area when they have the necessary skill and knowledge.

[§1.03] 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 do not form part of the deceased's estate, and are distributed by the operation of law.

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. Therefore, to advise a client properly and to draft the client's will, the lawyer must understand how the client owns property and whether that property will be part of the client's estate.

See Appendix 1 for a general overview of assets that form part of the estate and those that do not.

Property that is subject to the terms of a will is said to "pass" by the will. It generally includes all assets the client owns, controls, or has a beneficial interest in. Such assets might include the following:

(a) tangible personal property (for example, furniture, artwork, jewellery and vehicles);

(b) intangible personal property (for example, stocks, bonds, investment certificates, bank accounts, and choses in action); and

(c) real estate interests (for example, fee simple or leasehold interests).

It is important to distinguish property that a client owns *directly* from property that the client owns *indirectly*. For example, a will-maker might leave a will saying that a parcel of land goes to someone, but that land might actually be held by a company the will-maker owns. In that case, the will-maker can only direct that the shares

[1] Updated by **Jamie L. Porciuncula** of McLellan Herbert Locke LLP in November 2024, 2023 and 2022. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content relating to the *Indian Act*. Previously updated by Hugh S. McLellan (2021); Denese Espeut-Post (2018 and 2019); PLTC (2006-2017); Helen Low (2005); Roger D. Lee (2002, for content relating to the *Indian Act*); Halldor Bjarnason (2002, for content relating to persons with disabilities) and Ross Tunnicliffe (1994–2001). Prepared for PLTC in 1990 by a committee consisting of Gordon B. MacRae, Mark Horne, Ross Tunnicliffe and Sandra K. Ballance, drawn in part from CLE articles.

of the company be gifted under the will. The will-maker does not directly own the land.

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 will-maker may or may not own, but is distributed by the operation of law upon death. (See Chapter 8 for more discussion). Below are some examples.

(a) Property held in joint tenancy passes to the surviving joint tenant by operation of the right of survivorship, subject to the 5-day survival rule in s. 10 of *WESA* (that is, only if the surviving joint tenant lives for at least 5 days after the deceased's death). (But be cautious in applying this principle, as the facts may give rise to a presumption of a resulting trust in favour of the estate: see §8.03.)

(b) Proceeds of life insurance pass to the beneficiary designated under the contract, due to the *Insurance Act*, R.S.B.C. 2012, c. 1. (See §5.05(1) for more on this rule, including exceptions.)

(c) A refund of premiums contributed to an 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 that is subject to contractual obligations limiting the client's right to sell that property passes under the terms of that contract. For instance, property may be subject to a separation agreement or a shareholders' buy-sell agreement.

(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, for a discussion of criteria 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 subject to an equitable claim (such as a claim of unjust enrichment or constructive trust), passes according to the finding of entitlement to the claim. (See §14.05.)

(h) Some types of investments, such as segregated funds and Tax-Free Savings Accounts, allow the investor to specify a beneficiary, so the proceeds pass to the beneficiary on the investor's death.

Note that other laws may affect the distribution of the assets of an Indigenous person upon death:

- A modern treaty, self-government agreement, or self-government legislation may affect the distribution of an Indigenous person's property.
- Sections 42–50 of the *Indian Act*, R.S.C. 1985, c. I-5 (the "*Indian Act*") may apply because jurisdiction over "matters and causes testamentary" vests in the federal minister responsible for estate services for First Nations when the deceased is an "Indian" (defined as a person who is registered or entitled to be registered in the Indian Register) who was "ordinarily resident" on reserve or Crown land at death.
- Division 3 of *WESA* deals with certain property held by Nisga'a citizens and members of Treaty First Nations. (A "Treaty First Nation" is defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238 as a First Nation that is a party to final agreement negotiated with the federal and provincial government within the BC Treaty Commission process, and does not include the Nisga'a Nation.)

[§1.04] Disposition of Property by Will

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 be entirely dependent on death for its operation;

(c) intended for the will to be revocable (and it in fact must be revocable); and

(d) executed the will in accordance with the formal 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 is going to be distributed according to the wishes set out in that will. A court could 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. Similarly, if the will fails to dispose of *all* of the will-maker's property, the rules of intestacy will determine the distribution of the omitted property. In some situations, a court may agree to vary the terms of the will. (For more on variations, see Chapter 13.)

[§1.05] Disposition of Property on Intestacy

1. Consequences of Intestacy

When a person in British Columbia dies without a will, that person is said to have died "intestate." When a person dies leaving a will that does not fully dispose of the estate, and the part that is not dealt with by the will is not otherwise the subject of a gift, that person is said to have died "partially intestate." In both cases, the statutory rules about intestacy govern who is entitled to share in that estate.

There are several consequences of dying without a will. Some of these consequences can lead to problems for the intestate successors. The following are possible consequences.

(a) Beneficiaries who are receiving assistance under the *Employment and Assistance for Persons with Disabilities Act* may become disentitled to benefits if they receive gifts from the estate that increase their assets past certain thresholds. This consequence can be avoided through estate planning (also see §4.03).

(b) If an intestate owns real property in a jurisdiction other than where they are domiciled at death, it will be distributed according to the rules of the jurisdiction where it is located. Personal property will be distributed according to the rules of the jurisdiction where the person was domiciled.

(c) If an intestate has children, a surviving spouse is not entitled to the intestate's entire estate, which may be problematic if that spouse needs significant support from the estate.

(d) If the intestate has a successor who is a minor or is mentally incompetent, the Public Guardian and Trustee must be notified and may assume responsibility of the intestate successor's distribution, resulting in a loss of control of the distribution and additional costs.

(e) Assets that can roll over to a spouse on a tax-deferred basis generally cannot roll over to children on a tax-deferred basis, which, in the case of intestacy, may result in a taxable gain and liability for estate tax.

(f) An intestate loses the ability to select a guardian for minor children (unless the intestate has done so under the *Family Law Act*). (See §4.02(9) for more on naming guardians.)

(g) An intestate will be unable to set trust conditions for minor children. (See §4.02(7)(d) for more on trust conditions for minor children.)

2. 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 intestate distribution scheme in *WESA* is called "parentelic" distribution. The deceased's relatives would inherit on intestacy in the following order, where the deceased ("D") dies leaving no will and no spouse (s. 23):

1. D's children;
2. D's grandchildren;
3. D's further lineal descendants;
4. D's parents;
5. D's parents' children (D's siblings);
6. D's nieces and nephews;
7. D's great-nieces and nephews;
8. D's grandparents;
9. D's grandparents' children (D's aunts, uncles);
10. D's cousins;
11. D's great-grandparents; and
12. D's great-grandparents' children.

This table summarizes intestacy results under *WESA*:

Section	Dies Leaving	Distribution
20	spouse and no descendants	entire estate to spouse
21(2) & 21(3)	spouse and descendants of intestate and spouse	to spouse: preferential share of $300,000; furnishings of spousal home and right to acquire spousal home from estate for 180 days after representation grant residue: half to spouse; half to intestate's descendants pursuant to s. 24 (s. 24 is discussed later this chapter).
21(2) & 21(4)	spouse and descendants of intestate but not spouse	to spouse: preferential share of $150,000; furnishings of spousal home; and right to acquire spousal home from estate for 180 days after representation grant residue: half to spouse; half to intestate's descendants pursuant to s. 24
22	more than one spouse	spousal share divided as the spouses agree or as determined by the court
23(2)(a)	descendants but no spouse	equally among the descendants, pursuant to s. 24
23(2)(b)	parents but no descendants	equally to surviving parent or parents
23(2)(c)	descendants of parents (deceased's siblings) but no parents or descendants	equally to the descendants of the intestate's parents or parent
23(2)(d)	grandparents or descendants of grandparents (deceased's aunts, uncles, cousins) but no descendants, parents, or descendants of parents	equally to surviving grandparent(s) or, if any grandparent is no longer surviving, that part to descendants of the deceased grandparent
23(2)(e)	great-grandparents or descendants of great-grandparents, but no descendants, parents, grandparents, or descendants of grandparents	equally to surviving great-grandparent(s) or, if any great-grandparent is not surviving, that part to descendants of the deceased great-grandparent

Under *WESA* s. 2, "spouse" includes persons who have lived together in a marriage-like relationship for at least two years, regardless of their sexual orientation or gender identity. The definition of a "spouse" grants common law spouses the same entitlements as 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:

> 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 such proportions as they agree to or, if they cannot agree, in the proportions determined by the court to be just.

Part 3, Division 2 (ss. 26–35), provides special devolution rules regarding a spousal home when a spouse dies intestate and the spousal home is not the subject of a gift or otherwise disposed of by a will. A surviving spouse has a right to acquire the spousal home from the estate for a period of 180 days after the representation grant is issued, unless the time period is extended by the court. The surviving spouse may acquire the spousal home to satisfy, in whole or in part, the surviving spouse's interest in the estate.

Section 24 deals with distributing to descendants in shares. "Descendant" is defined as all lineal descendants of a person through all generations, which 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.

Children born inside and outside of marriage are treated equally when determining their rights to share in an intestate's estate.

Sections 8 and 8.1 address descendants or relatives born *after* the intestate's death:

- Section 8 applies to descendants or relatives conceived but not yet born at the time of the intestate's death. Such persons inherit as if they were alive at the time of the intestate's death, provided they live for 5 days (s. 8).
- Section 8.1 applies where an intestate's descendant is conceived after the intestate's death, using the intestate's genetic material (i.e. assisted reproduction). If the s. 8.1 criteria are met, the child inherits as if they had been born before the intestate's death: the person who was married to or in a marriage-like relationship with the intestate must give notice, within 180 days of the grant of probate or administration being issued, that they intend to conceive a child using the deceased's genetic material; the child must be born within two years of the person's death and survive for five days; and the deceased person must be the child's parent under Part 3 of the *Family Law Act*.

When a person dies leaving no intestate successors, their 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.

3. Intestacy Under the *Indian Act*

When the deceased was an Indian (as defined in the *Indian Act*) who was ordinarily resident on a reserve, a separate regime governs intestate succession under the *Indian Act*, s. 48. The ministry overseeing *Indian Act* testamentary rights is Indigenous Services Canada in the provinces and Crown-Indigenous Relations and Northern Affairs Canada in the Yukon and Northwest Territories.

Note that s. 48(15) expressly provides that s. 48 applies equally to intestate men and women. The term "survivor" in the provisions means the deceased's surviving spouse or common-law partner (s. 2). A common-law partner is defined in the *Indian Act* as someone who cohabits with an individual in a conjugal relationship for at least one year. Section 48 is excerpted below.

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. […]

Note that under s. 50(1) of the *Indian Act*, a person who is not entitled to reside on a reserve cannot inherit a right to possess or occupy land on a reserve.

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

[§1.06] Further Reading

Many publications by the Continuing Legal Education Society of BC (CLE) cover wills and estates law:

Annotated Estates Practice (updated)

British Columbia Probate and Estate Administration Practice Manual (updated)

Wills and Personal Planning Precedents—An Annotated Guide (updated)

Regarding wills and estates under the *Indian Act*, see also the federal government website "Estate Services for First Nations People" (www.sac-isc.gc.ca/eng/1100100032357/1581866877231#chp6).

Chapter 2

Formal Validity of Wills and Interpreting Wills[1]

[§2.01] Formalities

WESA sets out the formal requirements that are necessary to make a valid will:

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

(2) 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) (ss. 1, 37(1) and 39).

(3) The will-maker must make or acknowledge the signature in the presence of two or more witnesses who are both present at the same time (s. 37(1)(b)).

(4) Two or more of the witnesses must sign the will in the presence of the will-maker (s. 37(1)(c)). (But exceptions exist for members of the armed forces on active service; see below.)

(5) The will-maker must be at least 16 years old (s. 36) (unless the person is a member of the armed forces on active service; see below).

Amendments to *WESA* in 2020 (in response to the COVID pandemic) broadened the meaning of "presence" and permit a will to be signed or witnessed remotely where the parties are in each other's "electronic presence" (*WESA* s. 35.1).

Effective December 1, 2021, an "electronic will," meaning a will in "electronic form," is a will for all purposes of *WESA* and any other enactment (*WESA* s. 37(4)). "Electronic form" means a form that is recorded or stored electronically, can be read by a person, and is capable of being reproduced in a visible form (s. 35.1(1)).

The requirement under s. 37(1)(a) that a will be "in writing" is satisfied if the will is in electronic form (s. 37(3)). A will can be signed with an "electronic signature," meaning "information in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record" (*WESA* ss. 35.1(1) and 35.3).

WESA contains exceptions to the formal requirements for individuals on active service as members of the Canadian Forces or the naval, land, or air force of a member of the British Commonwealth or any ally of Canada. Such individuals may make a valid will regardless of age (s. 38). They may also make a valid will signed only by themselves, with no witnesses. If another person signs their will for them, that signature must be witnessed by at least one other person, who must sign the will in the presence of the will-maker and of the other person (s. 38).

With respect to witnesses to a will, note the following:

- A signing witness to a will-maker's signature must be at least 19 years old (*WESA*, s. 40(1)).
- A will is not invalid just because a witness was incompetent at the time of execution of the will or later becomes incompetent (*WESA*, s. 40(3)).
- A will is not invalid just because a beneficiary or a beneficiary's spouse witnessed the will. However, any bequest or appointment in favour of such a beneficiary or the beneficiary's spouse will be rendered void, unless an application is successfully made to declare it not void (*WESA*, s. 40(2), 43(1)). See *Hammond v. Hammond* (1992), 72 B.C.L.R. (2d) 141 (S.C.)). Under s. 43(4), the court may, on application, declare that a bequest, appointment, or charging clause in favour of a witness to the will or a witness's 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 or a spouse of a witness. It is up to the witness to establish the testamentary intent to make a gift to the witness: *Re Bach Estate*, 2017 BCSC 548.
- A will is also not invalid just because one of the witnesses is also the executor of the will (*WESA*, s. 40(2)). However, if the will also contains a "charging clause" permitting an executor to charge professional fees on top of any remuneration to which they are entitled, and the executor or executor's spouse acts as a witness, then the charging clause will be treated like a gift and deemed to be void under s. 40(2) or 43(1) of *WESA*. As noted above, the court can declare the charging clause not void on application under s. 43(4), if the court is satisfied that the will-maker intended to make the gift to the executor even though the executor was a witness.

[1] Updated by **J. Jeffrey Locke** of McLellan Herbert Locke LLP in November 2024, 2023 and 2022. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content relating to the *Indian Act*. Previously revised by Hugh S. McLellan (2017, 2019, and 2021); PLTC (2016); Douglas Graves (2014); Sadie Wetzel (2012); Helen Low (2005); Roger D. Lee (2002, for content relating to the *Indian Act*); and Ross Tunnicliffe (1994–2002).

[§2.02] Curing Formal Deficiencies in a Will

Prior to *WESA*, a will that did not meet the formal requirements for validity was considered invalid and could not be admitted to probate. One of the most significant changes under *WESA* was the introduction of the "curative power" in s. 58. The BC courts have described this provision as one of *WESA*'s "most far-reaching provisions" and as a "marked departure from the traditional, formalistic approach to the creation of wills" (see e.g. *Re Hadley Estate*, 2017 BCCA 311).

Section 58 allows the court, on application, to declare a "record, document or writing or marking on a will or document" to be fully effective as a will, even though the document does not comply with the statutory formalities. The curative power in s. 58 can also be applied to cure formal invalidity in documents meant to revoke, alter, or revive wills or testamentary dispositions.

In order to succeed on an application under s. 58, the applicant must prove on a balance of probabilities that the document is authentic and that it represents the deceased's testamentary intentions: *Estate of Young*, 2015 BCSC 182. Extrinsic evidence of testamentary intent is admissible to assist the court, including evidence of events that occurred before or after the document was made (*Re Hadley Estate*, 2017 BCCA 311).

An unsigned will was declared valid and "cured" under s. 58 in *Bishop Estate v. Sheardown*, 2021 BCSC 1571. The will-maker had given instructions and the will was prepared before any COVID pandemic restrictions. After such restrictions were announced, the will-maker was unable to attend personally to sign it, and protocols in the will-maker's care home limited access. Although the will might have been executed remotely under the new COVID-inspired process, the will-maker died before executing the will. The court found the failure to execute was a result of COVID and not a result of the will-maker having changed their mind, and applied its curative powers under s. 58 to declare the will effective.

A similar decision was made subsequently in the case of *Gibb Estate (Re)*, 2021 BCSC 2461, although the will-maker in that case died in 2017 (i.e. well before COVID was a factor). In this case, the will-maker died in hospital while the lawyer was on the way to meet him in order for him to sign his revised will. The fact that the draft will had only been reviewed and approved over the phone was not found to be a factor that undermined the deceased's testamentary intention. The court exercised its curative power under s. 58 and declared the will effective.

Section 58 can only be used to cure formal deficiencies, and cannot be used to cure a will that is invalid for substantive reasons such as testamentary incapacity or undue influence.

For a further discussion of processes under s. 58, see Chapter 7, §7.05.

[§2.03] Conflict of Law

Part 4, Division 8 of *WESA* deals with conflict of law issues that can arise concerning wills. For instance, the deceased may have made their will in another jurisdiction than BC, or the deceased may have property in another jurisdiction.

Section 79(1) provides that, in applying the conflict of laws provisions, the British Columbia court need only consider the *internal* law of the foreign jurisdiction, not that jurisdiction's own conflict of laws rules.

Section 79(2) of *WESA* clarifies that requirements of foreign jurisdictions that "certain formalities" be observed "by will-makers of a particular description" or that witnesses have "certain qualifications" are formal requirements only and do not affect the essential validity of the will.

Section 80(1) sets out circumstances in which a will made outside British Columbia will be considered to meet the formal requirements and can admitted to probate. The will is to be considered to meet the formal requirements if it is valid according to the law of any of the jurisdictions listed in s. 80(1):

- 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.

Counsel should go through the above list to determine if any of these options applies.

Note that s. 80 only applies to the *formal validity* of a will. It does not deal with the *essential validity* of the will (for instance, questions about whether the will

properly disposes of property, or whether the will-maker had testamentary capacity). The conflicts rules governing the essential validity of wills arise from case law and depend on whether property is categorized as "moveable" (e.g. personal property) or immovable (e.g. land). A will's essential validity is determined as follows:

- for moveable property, the law of the will-maker's domicile at death applies; and
- for immovable property, the law of the situs (where the immovable is located) applies.

Conflict of laws provisions relating to probate and estate administration are discussed in Chapter 8, §8.08.

[§2.04] Wills Under the *Indian Act*

The *Indian Act* governs the requirements of wills for Indians (as defined in the *Indian Act*) who are ordinarily resident on reserve or Crown land.

These wills do not need to comply with *WESA*'s formality provisions. Under s. 45(2) of the *Indian Act*, the federal minister with jurisdiction over the administration of the estate may accept any "instrument" written by an Indian as a will if the individual's wishes or intentions about the disposition of their property at death are set out in the instrument. The execution of the will by the will-maker does not need to witnessed.

The ministry with jurisdiction over the administration of estates of members of First Nations who were ordinarily resident on reserve is Indigenous Services Canada in all provinces and Crown-Indigenous Relations and Northern Affairs Canada in the Yukon and Northwest Territories.

Note that wills of Indians who died ordinarily resident off-reserve or Crown land are governed by *WESA* and therefore must comply with the requirements under *WESA* for a valid will.

[§2.05] Revoking a Will

Section 55 of *WESA* provides that a will other than an electronic will, or part of a will other than an electronic will, may be formally revoked (i.e. cancelled and made inoperative) only by one of the following:

(1) a later will made in accordance with *WESA* (s. 55(1)(a));

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

(3) destruction of the will by the will-maker or any other person acting in the presence of the will-maker and by the will-maker's direction, with the intention to revoke it (s. 55(1)(c)); and

(4) by any other act of the will-maker, or by another person in the will-maker's presence and at their direction, if a court determines under s. 58 that the consequence of the act of burning, tearing or destroying all or part of the will is apparent on the face of the will and the act was done with the intent to revoke all or part of the will (s. 55(1)(d)).

Even if a document does not strictly comply with *WESA*'s formal requirements for a revocation, the court can use the curative provision in s. 58 to order it to be fully effective as a revocation, if the court is satisfied that the document represents the deceased's intention to revoke the will (ss. 58(2), (3)).

Section 55.1 provides that an electronic will or part of an electronic will is revoked only by one of the following:

(1) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, deleting one or more electronic versions of the will or of part of the will with the intention of revoking it;

(2) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of a paper copy of the will in some manner, in the presence of a witness, with the intention of revoking all or part of the will;

(3) the circumstances described in s. 55(1)(a) and (b) (i.e. by a later will made in accordance with *WESA* or by a writing declaring an intention to revoke the will, executed in accordance with *WESA*);

(4) by any other act of the will-maker, or another person in the presence of the will-maker and by the will-maker's direction, if the court determines under s. 58 that the consequence of the act of the will-maker or the other person is apparent and the act was done with the intent of the will-maker to revoke the will in whole or in part.

A written declaration made in accordance with s. 55(1)(b) (declaring an intent to revoke a will) may be made in electronic form and signed with an electronic signature (s. 55.1(2)). An inadvertent deletion of one or more electronic versions of a will or part of a will is not evidence of an intention to revoke the will (s. 55.1(3)).

A committee appointed under the *Patients Property Act* has no authority to revoke a will-maker's will (*Allen (Committee of) v. Bennett* (31 August 1994), Kamloops 21231 (B.C.S.C.)).

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.)).

Revocation of a will 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 may destroy a will intending to make a new valid one, then make a second will that is not valid for some reason. In these circumstances the first will has not been revoked.

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 the will-maker's estate may be liable in damages or subject to some other equitable remedy for the breach. However, the will itself is revoked.

Unlike under the former *Wills Act*, marriage does not revoke a will under *WESA*. Divorce and separation also do not revoke a will as a whole. However, *certain provisions* in the will made in favour of the will-maker's spouse are invalidated if the will-maker and the will-maker's spouse cease to be spouses under s. 2(2) of *WESA*. As noted in Chapter 1, married persons cease to be spouses under s. 2(2) when an event occurs that causes an interest in family property to arise under the *Family Law Act* (i.e. upon separation), and persons in a marriage-like relationship cease to be spouses under *WESA* when one or both of them terminate the relationship.

Section 56 of *WESA* states that, unless a contrary intention appears in a will, a gift, appointment as executor, or power of appointment to a person who is or becomes a spouse of the will-maker is revoked if, after the making of the will and prior to the will-maker's death, the will-maker and the spouse cease to be spouses under s. 2(2). In such cases, the gift, appointment, or power of appointment is revoked, and the gift must be distributed as if the former spouse had died before the will-maker. Section 56 is *not* affected by a later reconciliation of the will-maker and the former spouse, despite s. 2(2.1) of *WESA* (s. 56(3)).

[§2.06] Altering a Will

A will-maker who makes a valid will may later wish to change the will. To change an electronic will, the will-maker must make a new will (*WESA,* s. 54.1). There are three possible methods to change a will that is *not* an electronic will:

(1) executing a new will with the desired changes (the new will usually revokes the earlier will);

(2) executing a codicil (an instrument that is meant to be read with the existing will and is executed according to the same formal requirements as a will, but only refers to the provisions being altered); or

(3) making a physical alteration to the existing will, by adding or striking out words (such a change is often called an "interlineation").

Section 54 of *WESA* governs how to alter a will other than an electronic will. Section 54(1) specifies that, to be valid, an alteration to a will must be made in the same way as a valid will is made under s. 37. In other words, the alteration must be in writing, and signed by the will-maker in the presence of two or more witnesses, who each also sign the alteration.

Section 54(2) sets out the mechanics of how to properly sign these alterations. It states that an alteration to a will is effective if the will-maker and the witnesses sign either "in the margin or in some other part of the will opposite to or near to the alteration" or "at the end of or opposite to a memorandum referring to the alteration and written in some part of the will." Section 54(4) sets out two exceptions where the alteration will still be valid despite not following the s. 54(2) signing requirements:

(1) if the alteration is a change to form, style, or numbering and does not substantively alter the effect of the will; or

(2) if the evidence establishes that the alteration was made before the will was executed, even if the alteration substantively alters the effect of the will. (Note that the law presumes that any interlineations to a will were made after its execution, so the party seeking to assert this exception will need to prove it.)

If an alteration is not made in accordance with s. 54, it is ineffective (s. 54(3)). Typically, this would mean that an invalid alteration would be disregarded and the original will would stand unaltered. However, an ineffective alteration can still impact the original will in two circumstances, under s. 54(3):

(1) If an application is made to cure the deficiency in the alteration under s. 58, the court may order that the alteration is effective.

(2) If the alteration made a word or provision illegible, it can invalidate that word or provision (for example, when the will-maker blacks out a provision so that it is unreadable; see *Re Springgay Estate*, [1991] B.C.J. No. 984). Despite this, the court can use the curative provision in s. 58 to reinstate the original word or provision, with sufficient evidence.

Where possible, will-makers should avoid interlineations as their legal validity can be questioned. The better method for altering a will is to make a new will.

[§2.07] Republishing and Reviving a Will

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

Republication can occur when a will-maker re-executes their 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 part of a will, other than an electronic will, can be revived by a later will that shows the will-maker'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 still exist (that is, not have been destroyed).

The court may also apply s. 58 of *WESA* and determine that documents reflect the deceased's testamentary intentions to revive a will: see *Re Yaremkewich Estate*, 2015 BCSC 1124.

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.

[§2.08] Special Types of Wills

1. Mutual Wills

The term "mutual wills" refers to two wills which contain a covenant not to alter or revoke the provisions without the other's consent. Where the two parties make a mutual will in one document, this is called a "joint will."

Mutual wills remain revocable, despite the will-makers' agreement not to alter or revoke the provisions without each other's consent. However, that agreement itself gives rise to a constructive trust. That constructive trust is not revocable, and will be imposed on the personal representative. The court will direct that the property that is subject to the constructive trust be distributed in accordance with the agreement *originally* reached between the two will-makers, even though the surviving will-maker's will was subsequently altered. 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 not to revoke the individual will, and the first will-maker to die must have done so without having revoked or changed their own will in breach of the agreement.

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

Mutual wills are to be distinguished from "mirror wills," where wills have parallel terms but there is no covenant between the will-makers not to alter or revoke the provisions therein.

2. 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 (e.g. Alberta) without restriction. Holograph wills are recognized in British Columbia only under very limited circumstances (e.g. 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 *Re Beck Estate*, 2015 BCSC 676.

[§2.09] Testamentary Gifts—Lapse and Ademption

1. Types of Gifts

A will-maker may make a conditional gift in their will. Such a gift may be subject to a condition precedent (that is, the condition must be satisfied in order for the gift to take effect), or to a condition subsequent (that is, the gift may take effect, but will terminate on the happening of the condition).

A gift in a will may also be "specific" or "residual." A "specific gift" means a gift of identifiable property in the will, such as a car, watch, real estate, or jewellery. A residual gift refers to a gift of part or all of the residue of the estate, meaning the part of the estate that is left over after all of the other gifts have been paid out.

2. Ademption

A specific gift "adeems" when, before the will-maker's death, the will-maker disposed of the subject matter of the specific gift, the property has ceased to conform to the description in the will, or the property has been wholly or partially destroyed. When a gift "adeems" it fails and is of no effect. For example, if a will-maker leaves a particular painting to a beneficiary but sells the painting during the will-maker's lifetime, the beneficiary does not receive that painting on the will-maker's death.

In *Koski v. Koski Estate* (1994), 3 E.T.R. (2d) 314 (B.C.S.C.) the court found that closing a bank account and transferring the funds in it to another bank account did not result in an ademption of the gift of funds held in the original bank account. However, in *Trebett v. Arlotti-Wood* (2004), 134 A.C.W.S. (3d) 937 (B.C.C.A.), the Court of Appeal found that where the will-maker had transferred an investment account from one brokerage firm to another, the will-maker caused the subject matter of the gift to cease to conform to the description in the will and therefore, the gift had adeemed. Whether or not the will-maker intended the gift to adeem was irrelevant.

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.

3. Lapse

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.

Section 46 applies only where no contrary intention is indicated in the will.

Under s. 46, specific or residual 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));
- 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 named in the will, if any, in proportion to their interests (s. 46(1)(c)).

If the gift still cannot take effect after applying s. 46, then the gift passes on intestacy under s. 44.

If interpretation of the will remains uncertain after considering s. 46, it may be necessary to bring on a construction hearing. Such a hearing should generally be commenced as a petition, unless there is an existing action, in which case it can be brought as an application. Such an application should not be brought as an application for directions under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464 (see e.g. *Re Moiny Estate*, 2001 BCCA 100 at para. 3).

Chapter 3

Testamentary Capacity[1]

[§3.01] What Is Capacity

To make a valid will, in addition to following the formal requirements of *WESA* described in Chapter 2, a will-maker must be "mentally capable" of making a will (*WESA*, s. 36). This requires the will-maker to have the requisite testamentary capacity to make a will and to know and approve of the contents of the will.

The requisite mental element has two components:

(1) the will-maker must **understand** the nature of the act of making a will and should **intend** to make a disposition of property, effective on death; and

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

The intention to make a will must be genuine. That is, the will-maker must exercise free choice in making the will, without being subject to fraud, force, fear or undue influence. The requirement that the will-maker "know and approve" the contents means that the will-maker realizes what is set out in the will and agrees that this is what they want.

[§3.02] Capacity of Minors

In British Columbia, a person who has reached the age of 16 can make a valid will (*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 that individual is on active service in the armed forces.

[§3.03] Test for Mental Capacity

The leading case of *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, suggests the test is whether the will-maker is of a "sound and disposing mind and memory." The case sets out the following four criteria:

(1) The will-maker must understand they are making a will.

(2) The will-maker must know the nature and extent of their property.

(3) The will-maker must know the persons who are the object of their bounty.

(4) The will-maker must understand the manner in which their estate will be distributed.

In *Laszlo v. Lawton*, 2013 BCSC 305 at paras. 185-199, Ballance J. adopted the modern restatement of the test set out in *Re Schwartz* (1970), 10 D.L.R. (3d) 15 (Ont. C.A.) at 32 by Laskin J.A. (dissenting on other grounds):

> The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.

With respect to the requirement of knowledge of the will-maker's property, the will-maker need not recall every item of, for example, an extensive portfolio of stock or real estate which passes under the will.

The phrase "persons who are the object of their bounty" includes not only those who are actual beneficiaries in the will, but those who could have "moral claims" to the estate. The courts have generally restricted this class to spouses, children and those to whom the will-maker stood *in loco parentis*. The will-maker must understand what they are giving to each beneficiary, and the nature of the claims of those they are excluding: *Murphy v. Lamphier* (1914), 31 O.L.R. 287 (H.C.) at 317, aff'd (1914), 20 D.L.R. 906 (Ont. C.A.).

Testamentary capacity is a legal construct, not a medical diagnosis. Medical evidence of capacity is therefore important and relevant but not essential or conclusive, and it is open to the court to prefer the evidence of lay witnesses in a particular case: see *Laszlo, supra.*

As a practitioner, you should ensure that you could satisfy a court as to the presence of each of the necessary elements of testamentary capacity. Your notes should deal with those points under separate headings, so that it is clear that you canvassed the will-maker on all points.

[§3.04] Cases on Capacity

Most cases attacking a will on the ground of incapacity can be divided into two groups. The first group is comprised of cases in which it is alleged that the will-maker suffered from delusions that affected them in making the will. The second group consists of cases in which it is alleged that the will-maker suffered from dementia. In

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[1] Updated by **Parveen Karsan** of Singleton Urquhart Reynolds Vogel LLP in November 2024 and 2023. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content related to the *Indian Act*. Previously updated by Deidre J. Herbert (2021 and 2022); Denese Espeut-Post (2018 and 2019); PLTC (2012-2016); Sadie Wetzel (2011); Helen Low (2005); Genevieve N. Taylor and Gordon B. MacRae (1999); Gordon B. MacRae (1996–1999); and Professor Donovan Waters, KC, and Gordon B. MacRae with the assistance of Raquel Goncalves (1994).

the latter situation, the will-maker's mental capacity may be so reduced by advanced illness that they are 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 that no rational person could believe, and that cannot be eradicated from the will-maker's mind by reasoned argument. If the delusion, however, does not affect either the will-maker's property or the object of the will-maker's bounty, it will not prevent the will-maker from making a valid will.

There is also authority (although criticized) which supports the view that a 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 had fixed delusions that he was pursued by evil spirits. Because there was no reasonable connection between the delusions and the dispositions made by the will-maker to his niece, the English Court of Appeal upheld his 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 because the will-maker falsely believed that his brother, his nearest relative, had defrauded him of an inheritance. A thorough review of the law regarding delusions, and testamentary capacity generally, can be found in the case of *Laszlo, supra*.

2. Dementia

Lack of testamentary capacity is often alleged in situations where the will-maker suffered from dementia. At some point in the progression of some diseases, the will-maker's testamentary capacity may be affected. However, neither advanced age nor the existence of a particular disease is itself evidence of a lack of capacity. As stated in *Henderson v. Myler*, 2021 BCSC 1649 at para. 248:

> While dementia can impair a testator's mental powers to the extent they may be unable to make a will, a diagnosis of dementia — standing alone — does not automatically negate testamentary capacity.

The existence of some mental impairment is also not determinative 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 emphasized 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…
>
> 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.

A lawyer must take special care when taking instructions from clients suffering from dementia. Preferably, instructions will be taken from the client before the onset of dementia. If they are not, the lawyer should be cautious and, in particular, be alert to when the instructions are taken (that is, during lucid intervals) and in whose presence those instructions are received.

In *Oates v. Baker Estate*, 1993 CanLII 2216 (B.C.S.C.), the will-maker, who suffered from AIDS, made out a new will one month before his death. The solicitor took "exemplary" care while taking instructions and when executing the will, both of which were significant factors in ensuring proof of testamentary capacity.

[§3.05] 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 judgment. No particular type of evidence as to incapacity is likely to be conclusive, except in extreme cases. For instance, the mere fact that a will-maker has been declared "incapable of managing their affairs" in a committeeship proceeding does not preclude them 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, they should have a medical doctor, preferably the attending doctor or hospital physician, give an opinion as to capacity. In getting an opinion about capacity, is important for the solicitor to focus the physician's attention on the requisite elements for testamentary capacity. 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. 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 their 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 the requisite capacity to make a will.

It may also be advisable to obtain a mental status examination (*W.G. Estate v. T.G.*, 1998 CanLII 1365 (*sub nom G.(T.) v. G.(R.)*) (B.C.S.C.)), particularly if the will-maker has a progressive form of 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 also be accepted (*Re Schwartz*, 1970 CanLII 32 (Ont. C.A.); aff'd 1971 CanLII 17 (S.C.C.)).

Where a will-maker seeks to disinherit someone close to them, and suffers from some underlying medical condition, a psychiatrist or neurologist, or someone with similar training and expertise, can be called upon to comment on whether the medical condition might affect the will-maker's normal affections or cause a loss of empathy or understanding that is instrumental in causing the disinheritance (John E.S. Poyser, *Capacity and Undue Influence*, 2nd ed. (Toronto: Carswell, 2014) at 130).

A lawyer should keep notes recording both the will-maker's instructions and any observations the lawyer made concerning the will-maker's capacity. These notes should be kept on file after the will has been executed (and even after probate of the will). If the lawyer has not recorded observations while with the will-maker, the lawyer should do so immediately afterwards. The lawyer should also record their observations of the will-maker's state of mind on the date of execution.

The lawyer should also prepare a memorandum for the file, documenting all instances of medical advice sought and received, as well as 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 their views. Alternatively, the lawyer should have the physician endorse the patient's chart. In extreme circumstances, the lawyer may wish to electronically record the 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, 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 most can recognize signs of inebriation, loss of capacity resulting from the use of medication can be harder to recognize. Extra care must be taken where the lawyer is aware or suspects that the prospective will-maker is taking 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 the giving of instructions. In this way, the mind of the will-maker will be as free as possible of the influence of drugs during the instruction giving period. If the lawyer is medically advised that the drug treatment cannot be suspended, they 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.

It is best to meet personally with the will-maker for the execution of the will, particularly if the will-maker is ill and hospitalized when signing the will (*Slater v. Chitrenky*, [1981] 4 W.W.R. 421 (Alta. Surrogate Ct.), aff'd [1982] 3 W.W.R. 575 (Alta. C.A.)).

The lawyer may encounter an extreme situation where the will-maker had capacity at the time of giving 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 them 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 that

same lawyer 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 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 giving 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 to 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.

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

(1) The primary burden lies with the propounders of a will 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; see also *Re Singh Estate*, 2019 BCSC 272).

(2) If the will is rational on its face, there is a presumption of mental capacity (*Re Singh Estate*, citing *Vout v. Hay,* [1995] 2 S.C.R. 876). As noted in *Nassim v. Healey*, 2022 BCSC 402 at para. 44, "the 'propounder' benefits from a presumption that the testator had the necessary testamentary capacity so long as the will was prepared in accordance with the applicable statutory formalities, and was read by or to the testator who appeared to understand it."

(3) If the person attacking the will rebuts the presumption, the burden is on the propounder to establish that, notwithstanding the will-maker's 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.

(5) The burden is an evidentiary one in accordance with the civil standard of proof on a balance of probabilities.

[§3.06] Knowledge and Approval

Those propounding the will must establish that the will-maker "knew and approved" of its contents. Knowledge and approval means that the will-maker realizes what is in the will, and agrees that it is what they want.

Ordinarily, if it is proven that the will was properly executed after being read over by a will-maker who appeared to understand it, it will be presumed that the will-maker knew and approved of the contents and had capacity. However, if there is evidence of suspicious circumstances (as described in §3.07 below), the burden shifts to those propounding the will to prove the will-maker knew and approved of the contents of the will. (If the suspicious circumstances relate to testamentary capacity, the propounder will also have the burden to establish capacity.)

Testamentary capacity is not the same as knowledge and approval. Testamentary capacity includes the ability to make choices, whereas knowledge and approval only means the ability to understand and approve the choices that have already been made (*Halliday v. Halliday Estate*, 2019 BCSC 554 at para. 178, citing Poyser's *Capacity and Undue Influence*, *supra*). Testamentary capacity is necessary for knowledge and approval. In other words, a will-maker must have testamentary capacity in order to "know and approve" of the contents of the will (see *Laszlo*, *supra* at para. 240). However, testamentary capacity is not sufficient to ensure that a will-maker knows and approves of all of the contents of the will.

The lawyer will usually meet the requirement of "knowledge and approval" by reading or explaining the will to the will-maker before execution. There may be legal terms in the will that the will-maker need not fully understand in order to adopt them as conveying the will-maker's intention. Here the will-maker relies upon the skill and experience of the lawyer who explains how the terms convey the will-maker's intentions.

Even if a draft of the proposed will has been sent to the will-maker for review before the execution interview, the will-maker should have a copy of the will and follow it as the lawyer explains it. Particularly with wills involving trusts, where the will-maker establishes one or more trusts to hold and manage assets for the benefit of specific beneficiaries, it is advisable to have the will-maker actually convey their own understanding to the lawyer by describing the *effect* of the provisions, rather than simply acknowledging the provisions as the will is reviewed. In all cases, the lawyer will have carefully proofread the final typed will before the lawyer and the will-maker meet for the execution, and will have confirmed that it satisfies the client's instructions.

The lawyer should always speak clearly and at a suitable pace 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 exceptionally sensitive to the client's needs and comprehension. As for the will-maker who struggles with English, if the lawyer does not speak the client's language, the lawyer should either send the client to a lawyer who does speak that language, or employ an interpreter. If the will-maker is deaf, consider referring the client to a lawyer who is deaf

or employing an interpreter. If you need an interpreter, it is best not to have a member of the will-maker's family act as interpreter.

The lawyer should always interview the will-maker personally, particularly when execution is to take place, so that the lawyer may be satisfied 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.

When there are suspicious circumstances, the 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 that person 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 comments of Sopinka J. from *Vout v. Hay*, [1995] 2 S.C.R. 876 in §3.07(2) below.

[§3.07] Suspicious Circumstances

Practitioners must develop a "sixth sense" to alert them to any circumstances surrounding the execution or preparation of a will which cast doubt upon the will-maker's capacity to make a will or upon the will-maker's 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) beneficiaries help in preparing a will;

(e) will-maker cannot control personal affairs;

(f) drastic changes in the personal affairs or testamentary plan of the will-maker;

(g) psychological or financial dependency on the beneficiaries.

When suspicious circumstances exist, it is not enough for the lawyer to simply have the will-maker confirm their instructions. If the will-maker's mental health is deteriorating, the lawyer must ensure that the will-maker is not simply responding to leading questions about the contents of the will. The will-maker may be skilled at hiding their diminishing mental health. Consider asking the will-maker to explain the disposition scheme in their own words. Judicial determinations make it clear that how the lawyer makes 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) Are any expected beneficiaries excluded?

(c) What did the previous will provide?

(d) Why precisely are changes needed at this time?

(e) What assets comprise the overall estate?

(f) Where does the will-maker bank?

(g) Does the will-maker own any real property?

(h) What is the estimated size of the residue after the payment of debts and legacies?

(i) Can the will-maker give an outline of their family tree?

(j) Does the family tree disclose the existence of someone who would be a natural object of the will-maker's bounty?

(k) Is the will-maker taking any medication?

(l) Has anyone suggested the scheme of disposition to the will-maker?

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

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

(o) If the will-maker is making dispositions on the basis of care and assistance provided to them, is their memory sufficient to evaluate that assistance in the context of assistance previously given by others?

(p) 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 has evidence, perhaps even an unambiguous medical opinion, that the will-maker lacks testamentary capacity, and the will-maker remains anxious to make a will, the solicitor is in a difficult professional position that calls for the solicitor's own judgment. The solicitor must consider that refusing to take instructions could distress the

will-maker. Evidence of incapacity is *opinion* until a court has ruled on it, and the lawyer should give the benefit of any doubt to the will-maker.

In some circumstances, the lawyer may strongly believe that the client lacks capacity and that drafting a will for the client would only bring about a lengthy probate action at the expense of the estate. 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. The Ontario Court of Appeal has held that the relevant question to ask in deciding whether a solicitor is negligent for refusing to draw a will is whether a reasonable and prudent solicitor would have concluded that testamentary capacity was absent (*Hall v. Bennett Estate* (2003), 50 E.T.R. (2d) 72 (Ont. C.A.)).

In difficult cases it may be prudent to retain a second lawyer experienced in wills and estates to provide a second opinion. If a will is ultimately prepared, both lawyers should attend the execution of the document. It would assist the court, if it comes to that, to have 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 bear the burden of removing the suspicion by proving knowledge and approval, and, if the suspicious circumstances relate to capacity, testamentary capacity. 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 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 aware of Vout, despite their frequent contact with the deceased.

Under a will dated in 1985 (three years before Hay's death), Vout was to inherit one farm and the residue of the estate, while the respondents, Hay's relations, were to inherit another farm and some minimal cash. The relations challenged the validity of the will dated 1985, put 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 truth of Vout's testimony, as there were discrepancies in the evidence she had given in the murder trial.

Witnesses testified as to Hay's 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. 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. 26–28:

> . . . 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 ….

Suspicious circumstances must raise what has been described as a "specific and focused" suspicion. A general suspicion is not enough. Suspicions must be "well grounded" and will generally relate to circumstances surrounding the preparation and execution of the will, calling into question the capacity of the will-maker, or tending to show that the free will of the will-maker was overborne by acts of coercion or fraud (*Leung v. Chang*, 2013 BCSC 976 at para 31, aff'd 2014 BCCA 28; and *Vout* at para. 25.).

[§3.08] Undue Influence

1. Test

The intention of the will-maker to make a will includes the requirement that their 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. The BC Court of Appeal has described the concept of undue influence as "influence which overbears the will of the person influenced so that in truth what she does is not his or her own act": *Longmuir v. Holland*, 2000 BCCA 538.

The evidence necessary to successfully challenge a will for undue influence must meet "a standard of coercion" (*Royal Trust Corporation of Canada v. Huff*, 2021 BCSC 1400 at para. 11, citing *Halliday v Halliday Estate*, 2019 BCSC 554). Some of the factors to be considered in an analysis of undue influence include the following:

(a) whether moral obligations to family members existed;

(b) the closeness of the relationship between the will-maker and family members;

(c) the closeness of the relationship between the will-maker and the named beneficiaries (e.g. because of provided services, a long pattern of friendship, or any evidence of affection);

(d) any evidence of the will-maker having medical illnesses, delusions or other indications of mental instability; and

(e) a solicitor's evidence on the circumstances surrounding the will's execution.

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 should not be made lightly. If made on insufficient evidence, they may result in the attacker (and perhaps their solicitor) being penalized in costs.

[§3.09] Declaring Wills Void Under the *Indian Act*

For the estate of an Indigenous person registered or entitled to be registered under the *Indian Act* and who died ordinarily resident on reserve, the federal minister overseeing the *Indian Act* has the power to declare a will void if the minister is satisfied that the will was executed under duress or undue influence, or that the deceased lacked capacity when the will was executed (*Indian Act*, s. 46(1)(a) and (b)).

For more on this topic, see the *British Columbia Probate and Estate Administration Practice Manual* (Vancouver: CLEBC).

[§3.10] Further Reading

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

Hull, Ian M. and Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*. 4th edition. Toronto: Butterworths, 2000 (loose-leaf).

Hull, Ian M. and Suzana Popovic-Montag, *Challenging the Validity of Wills*. 2nd edition. Toronto: Carswell, 2018.

Poyser, John E.S., *Capacity and Undue Influence*. 2nd edition. Toronto: Carswell, 2019.

Barlow, Francis, *Williams on Wills*. 11th edition. London: Butterworths, 2021.

See also the British Columbia Law Institute's *Undue Influence Recognition and Prevention: A Guide for Legal Practitioners* (published January 11, 2023), available online: https://www.bcli.org/wp-content/uploads/undue-influence-recognition-prevention-guide-final-3.pdf.
BCLI developed this guide as part of a project recommending practices for lawyers drafting wills, to help protect against suspected undue influence.

Chapter 4

Preparing a Will and Planning for Incapacity[1]

[§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 to understand a broad range of legal principles. In addition, the drafting skills necessary to produce a will are tested in at least three unique ways:

- First, unlike drafting commercial contracts, will drafting does not have the benefit of two or more competing individuals carefully scrutinizing the legal wording and implications to arrive at an agreeable bargain.
- Second, will drafting must take into account contingencies that are not ordinarily apparent to non-lawyers (for example, disinheriting children, or survivorship rules).
- Third, and most significantly, difficulties arise from the fact that wills are interpreted by the court only after the will-maker has died.

Proper will planning means implementing a client's instructions and advising the client on how best to achieve their estate planning goals in practice. The unique difficulties of will drafting require close coordination between the lawyer and the client. The lawyer is not a mere scribe. The lawyer must assist the client in developing a will plan that deals with contingencies and avoids pitfalls that the client might not have foreseen.

When discussing a will with a client, lawyers should also discuss whether the client wishes to make arrangements in case of their future mental incapacity; §4.07 addresses this topic.

[1] Updated by **Emily L. Clough** and **Polly Storey** of Clark Wilson LLP in November 2024, 2023, and 2022. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content relating to the *Indian Act*. Previously updated by Allison A. Curley (2021); Nicole Garton (2018); PLTC (2012-2016); Sadie Wetzel (2011); Helen Low (2005); Roger D. Lee (2002, for content relating to the *Indian Act*); Halldor Bjarnason (2002, for content relating to persons with disabilities); Genevieve N. Taylor and Gordon B. MacRae (1999); Gordon B. MacRae (1995–1999); and Gordon B. MacRae with the assistance of Raquel Goncalves (1994).

[§4.02] Taking Instructions

1. Taking Instructions Directly

When taking instructions for the preparation of a will, the lawyer must take the instructions directly from the client. It is helpful to meet with the client in person to receive those instructions. Where possible, the lawyer should meet with the client alone. If this is not possible, the lawyer should confirm the instructions with the client directly and privately, or at least in a setting that allows the client to freely and fully describe the client's circumstances and wishes. Generally, it is not prudent to take will instructions in the presence of a beneficiary. Added care should be exercised where the lawyer is contacted by a family member, friend, or caregiver on behalf of the client.

If two people who are a couple both want to make wills at the same time and 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, not only a paralegal, should be directly involved in taking client instructions. This is important because the will preparation process involves not only the client's information and wishes but also providing legal advice as to how best to effect those wishes, and the legal consequences.

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.).

If the client and the lawyer do not communicate in the same language, an interpreter should be present when the lawyer takes the client's instructions. It is prudent to consider an independent interpreter, and not rely on a beneficiary or other interested party.

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 may depend on what potential concerns are evident when the lawyer meets with the client. If the client is elderly or ill at the time the instructions are taken, the lawyer's notes should address testamentary capacity and any potential vulnerability to undue influence. It is good practice to create or use a checklist to guide the lawyer's assessment and analysis of the will-maker's capacity and voluntariness. In appro-

priate cases, the lawyer may recommend the client obtain a current medical opinion regarding their capacity and functioning. If the dispositions contained in the will are likely to be contentious within the client's family, the lawyer's notes should record the client's intentions and rationale for the distribution scheme.

Recording the will-maker's intentions is also important in case there is subsequent litigation where evidence of the will-maker's intention is admissible. The lawyer's notes will also be important evidence of the will-maker's intention if the will-maker dies after giving instructions but before executing the will, such that an application may be brought under s. 58 of *WESA*, or if an error in the will needs to be rectified under s. 59. 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 reviving a will have not been complied with. Under s. 59 of *WESA*, the court has the power to rectify errors in a will in prescribed circumstances so as to give effect to the will-maker's intentions.

Practitioners should preserve correspondence, notes and other evidence of their client's intentions. Practitioners should also warn their clients of the risk that notes or any evidence that the will-maker was thinking about changing a will may inadvertently alter or revoke a will, and that such "musings" should be destroyed or clearly marked as "draft."

In certain circumstances, the lawyer may consider recording meetings between the lawyer and the will-maker using audio or video recordings, to preserve evidence of the will-maker's intentions. Of course, the client would need to consent to any recordings and they would need to be securely stored by the lawyer.

3. Obtaining Background Information

Lawyers should understand the family of the will-maker and the will-maker's relationships to determine which persons might have legal claims against the estate. For example, a client might not be aware that they are in a common law spousal relationship, or that there is a child who could assert a claim against the client's estate. In addition, in order to be capable to make a will at law, the will-maker must know and understand the persons who would be expected to inherit, i.e. their family.

When taking instructions, consider not only the will-maker's current family structure but also foreseeable changes, particularly if death is not imminent. This affects the provisions that might be made, such as 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.

Lawyers must also ensure they are aware of any agreements that may impact on the client's estate plan. This may include family law or separation agreements and shareholder agreements. Where such documents exist, it is important to obtain copies and to review how they may impact a client's disposition of property.

Often it is helpful to start by reviewing the client's earlier will, if it is available, to identify provisions that the client wishes to keep or to alter.

If the client is Indigenous, the lawyer should find out whether a particular asset is located on reserve. This fact could have significant repercussions for tax planning and asset distribution. Under s. 50 of the *Indian Act*, a person who does not have a right to reside on the reserve does not acquire a right to possess or occupy land on reserve by will or on intestacy. For more information about the special status of real property on reserve, see the *British Columbia Probate and Estate Administration Practice Manual*. See also the services provided by the federal government: "Estate Services for Indigenous People" (www.sac-isc.gc.ca/eng/1100100032357/1581866877231).

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 allows the lawyer to assess the testamentary capacity of the client, and 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 and values of the assets and liabilities, 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, the nature of the client's ownership interest in each asset (e.g. sole name, joint tenant, indirect through corporate ownership, etc.), and whether that asset would form part of the estate on death. To do this, the lawyer should review original documentation regarding the asset ownership (for example, brokerage statements and insurance designation forms) or conduct an investigation (for example, company or title searches). Understanding title to assets, any 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 and what passes in the will. This ensures that the lawyer creates 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 important.

Knowing the scope and ownership of assets and the extent and nature of liabilities is necessary to provide advice on how best to arrange the estate under the 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, RRSPs/RRIFs), knowing the liabilities ensures that the lawyer discusses with the client who is to bear the liability associated with an asset: does the estate cover the debt, or does the beneficiary take the asset subject to a debt or charge?

If a client is reluctant to discuss assets or finances, 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. This 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 estate planning when taking instructions for preparing a will. Areas to discuss depend on the client's sophistication, testamentary wishes, and particular circumstances, but might include these:

- probate fees (applying for probate and calculating fees);
- registering the will with the Vital Statistics Wills Registry (the effect and costs);
- storing the original will (perhaps in a safety deposit box), and the advisability of telling third parties about the will or its contents;
- legal fees for drafting the will; and
- other estate planning and personal planning tools (powers of attorney, representation agreements, inter vivos trusts, deeds of gift, or property transfer documents).

6. Naming Executors and Trustees

(a) Appointment

Clients will generally have people in mind for the roles of executor and trustee. The lawyer should explain 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 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, liquidating assets where appropriate, paying debts of the estate and distributing the estate to the beneficiaries or trustees as directed under the will. Where litigation is ongoing at the time of death or is commenced after death, the executor will also generally be the personal representative of the estate for purposes of litigation. For more details, see Appendix 6.

Because of the risk of personal liability and the onerous and time-consuming nature of the job, many people are reluctant to act as executor. The will-maker should discuss this with their intended executor(s) before the will is executed.

A typical will-maker selects an executor from among the following groups:

(i) The Residuary Beneficiaries

This will often be an appropriate choice, except possibly if there are complications:

- the residuary beneficiary is a charity, a minor, or resides outside the province;
- there is an anticipated dispute amongst beneficiaries; or
- the estate is complex, requiring an executor with special expertise.

(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 spousal trust is that the spouse has a role in exercising discretion, particularly where there is a right to encroach on capital in favour of the spouse. A possible disadvantage of appointing the spouse could be that the spouse might take actions to frustrate the other co-trustees, although that possibility could be eliminated by having 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 the will-maker's 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. Conflict may develop amongst the children, and/or amongst the children and the spouse, particularly where the children are the remainder beneficiaries of assets held in trust for the spouse for a period of time.

(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 help administer 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 their 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 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 solicitors preparing wills, are often asked by clients to be executor and trustee. Before doing so, lawyers should consider the extent of their liability coverage for performing the duties. They should also consider whether acting would place them in a conflict with the estate in the future, and the remuneration that they would be entitled to receive.

Ordinarily, the law prohibits a witness to a will from receiving a benefit under the will (absent a court order under s. 43 of *WESA*). That means a lawyer appointed as executor who also witnesses the will cannot be remunerated under a charging clause in the will. (A charging clause in the will says the lawyer receives remuneration for professional fees.) In that case, the lawyer's remuneration will be limited to the amounts set out in the *Trustee Act*, unless the court orders otherwise under s. 43 of *WESA*. 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 may be the case where:

- 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 the will. Many trust companies will provide fee agreements for consideration, which must be executed if the client proceeds with the appointment.
- 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.
- Trust companies may require that certain clauses be included in the will to ensure that they are able to fulfill their role effectively. They may provide the drafting solicitor with precedent language, and request an opportunity to review the will prior to execution to ensure that it meets their internal requirements. This can add time and complexity to the drafting and execution of the will.

(viii) Specific Executors for Foreign Assets

When the client owns assets in foreign jurisdictions that pass under a 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 disagreement 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.

(x) Residency of Executors

Caution should be exercised where the client seeks to appoint an executor who resides outside British Columbia or Canada. There may be adverse tax consequences. Further, there may be practical challenges in the ability of a non-resident to administer the estate.

(b) Compensation

It is important to advise the client that an executor/trustee is entitled to statutory compensation on the basis set out under the *Trustee Act*, even if the will is silent on compensation. The will may expressly provide for a different amount, or there may be 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 (or by court order) 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 should remind the client that compensation for acting as executor will be taxable income to the executor.

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 the client's estate, and the beneficiaries do not include the client's married or common law spouse(s) (of the same or opposite sex) or children (biological or adopted), 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* for those assets passing under the will (see Chapter 13). If the client wants to exclude a spouse or child, 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 other planning devices that are not subject to judicial variation, such as *inter vivos* trusts or gifts, or transfers of assets into joint ownership. 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. If such a memorandum is made, then the client should be cautioned that a court may later be asked to scrutinize whether the will-maker's reasons ought to be ignored on the basis that they are found by a court to be inaccurate or contrary to public policy.

(b) Separated Spouse

If there is provision in a will for a spouse, and then the will-maker and the will-maker's 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. In other words, the will should say that the benefit is conferred despite the occurrence of events under s. 56 of *WESA* that would revoke the gift.

(c) Complex Families

If the client's family is complex (perhaps with a second spouse and children from a first spouse, children from separate spouses, stepchildren, common law relationships, or married but separated spouses), the lawyer should be careful to advise 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 spouse might create practical problems. Children to whom the will-maker stood *in loco parentis*, 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, despite having been supported by the will-maker.

(d) Minors

If the client names beneficiaries who may be minors when the will takes effect or if the client may have children in the future, the lawyer should draw the implications to the client's attention. The client may wish to create a trust for any gifts to minors, such that the minor does not take the gift before reaching 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 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 the minor 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, then an application may need to be made under s. 153(3) of *WESA* or s. 179 of the *Family Law Act* for an order appointing a trustee. If no such order is made, then 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. The Public Guardian and Trustee will be entitled to claim remuneration for their administration of the assets held for the minor beneficiary.

(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 research the proper name, and if there is any uncertainty (perhaps because some charities have similar names), clarify the gift with the client. The lawyer may consider referencing the charity's registration number in the will for clarity. The lawyer should also provide for an alternate beneficiary in the event that the chosen charity is no longer in existence when 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 making payment to the charity, perhaps saying that the executor need not ensure that a particular program or division at the charitable organization receives the gift.

(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 should 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 are upheld in the event of a future challenge.

8. Tax Considerations

The lawyer drafting the will should know of the general tax issues relevant to estate administration and disposition of assets on death, and inform the client of those general tax implications. 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 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. Clients should be advised of how taxes for various assets will be paid in order to consider whether further planning is needed.

If the client is an Indigenous 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 9.

9. Naming Guardians

In British Columbia, a minor person under the age of 19 is legally considered an "infant" and requires a legal guardian.

Clients should be advised of the importance of naming an appropriate guardian and alternate guardian for their minor children. They should also be advised of the implications if they do not name a guardian for their minor children.

(a) Appointment of a Successor Guardian

Under s. 53 of the *Family Law Act* (the "*FLA*"), a guardian may appoint a successor guardian in a will or by completing a document called an "Appointment of Standby or Testamentary Guardian," attached as Form 2 of the *FLA* Regulation, s. 23. Like a will, the prescribed form for a testamentary guardian has procedural execution requirements. It must be signed by the guardian in the presence of two or more witnesses, each of whom sign in the presence of each other and the guardian. When a testamentary guardian is being appointed, the form indicates that the appointment takes effect on the death of the appointing guardian.

A guardian appointing a successor guardian must consider only the best interests of the child when making the appointment and cannot grant the successor guardian greater parenting responsibilities than the appointing guardian actually has for the child (*FLA*, s. 56).

(b) Death of a Guardian Without Successor Guardians

If a child's **joint guardian** dies without having appointed a successor guardian, and if there is a surviving guardian who is also the child's parent, that surviving parent guardian becomes the child's sole guardian. The surviving guardian will have all of the parental responsibilities for the child, unless a court orders otherwise (*FLA*, s. 53(3)).

If a child's **sole guardian** dies without having appointed a successor guardian and the surviving parent of the child is not also a guardian of that child, that surviving parent does not become the child's guardian unless appointed by a court order (*FLA*, s. 54).

If a child's sole guardian dies or a child's joint guardians die and the child has no remaining guardian, s. 51 of the *Infants Act* provides for **default guardians**. It states that where a child otherwise has no guardian, the Director under the *Child, Family and Community Service Act*

becomes the personal guardian of the child and the Public Guardian and Trustee becomes the property guardian of the child. Guardianship is always subject to the best interests of the child. If an interested party (typically a family member or friend) brings an application under s. 51 of the *FLA* to be appointed guardian of the children in place of the appointed guardian, a court will take into account the appointing guardian's wishes but will ultimately make whatever guardianship order it determines is in the best interests of the child.

See *Practice Material: Family*, for a further discussion of guardianship under the *FLA*.

10. Using a Memorandum

If there are many items the will-maker wants to gift, the lawyer should advise the client to consider using 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 legally binding and 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 of the limitations of the use of such memoranda. The assets must 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. In addition, any changes to such memoranda require an amendment to the will.

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 without the involvement of a lawyer. These memoranda can be provided to the executor to guide them in the exercise of their discretion with 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 the client's ability to alienate their 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:

- community of property;
- joint tenancies;
- limited interest, e.g. estates for life or years, partnership property;
- corporate shares with limitations on transfer;
- franchises;
- currency controls;
- laws restricting absentee ownership of property;
- rules of professional or business associations;
- agreements relating to any of the client's assets;
- property subject to a lien or charge; and
- 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.

Clients should be advised of the implications of naming their estate as beneficiary, which will result in any proceeds payable being subject to probate fees and to wills variation legislation.

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.

Clients should again be advised that if their estate is the beneficiary of any such assets, then probate fees will be payable on those funds and those funds form part of the estate for the purposes of wills variation.

5. Charitable Gifts

If the client wants to benefit a charitable organization, be sure that the organization is registered with the Canada Revenue Agency in order to maximize the tax benefits available to the estate. 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 Chapter 7 of *cy-pres* applications.

It is also prudent to include a clause that:

- exonerates the personal representative if the gift is paid to a person professing to be an authorized representative of the organization;
- relieves the personal representative of any obligation to see to the application of the gift by the charity; and
- provides that a gift to a charity may be paid to a successor organization (where the client so wishes).

6. The Rule Against Perpetuities

The common law rule against perpetuities limits the duration of certain restrictions on the transfer of property. It says that any provision in a will that creates a future interest in property is void *ab initio* if it is not absolutely certain when the interest is created (usually on the death of the will-maker) that it will vest 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." A "life in being" is a person alive at the will-maker's death who is expressly or by necessary implication mentioned in the will.

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

In a different case, 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 once they reach the age of 25 years. This provision offends the common law rule against perpetuities because, should he die before any of his children reach the age of 4, there would be no child in whom the capital would vest within the requisite time (the son's life plus 21 years).

The *Perpetuity Act*, R.S.B.C. 1996, c. 358, does not repeal the common law rule against perpetuities but contains saving provisions to modify 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 relies upon the 80-year period.

The *Perpetuity Act* 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 the estate contains out-of-province assets. However, if you are drafting provisions that may offend the common law rule, you may be well advised to ensure that the interest will vest, either 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* deed, 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 time or 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 payable to A on A's 25th birthday, with the income payable to A annually until attaining that age. In this case, assuming A is mentally competent, A could require the trustees to pay out the whole $50,000 when A reaches 19.
- Where $80,000 is payable to the children of T (the will-maker), and the capital is to be divided equally between them when the youngest attains 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, the trustees should (on request by the beneficiaries) terminate the trust. The trustees would not seek a court order, but should ensure that they are fully indemnified by those having a beneficial interest.

If there is doubt whether the rule applies, trustees should apply for construction of the will.

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

If some of the beneficiaries of a trust are minors, do not have full legal capacity, or are not identifiable (e.g. where the beneficiaries are the "issue" of a given person, and more children or grandchildren may be born before the class closes), then the trust cannot be terminated pursuant to the rule in *Saunders v. Vautier*. However, it might 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 contingent beneficiaries (generally, the contingent interests of unborn or minor children or incapable adults). Those beneficiaries who have full capacity must also consent.

The *Trust and Settlement Variation Act* gives the court the discretion to approve trust variation based on the standard of what 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 B.C.L.R. (2d) 35 (C.A.)). The court must not exercise its discretion to approve the variation unless the arrangement appears to be for the benefit of unborn beneficiaries or persons under a legal disability (i.e. children and incapable adults). 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, and the lawyer should inform the client of the possibility that the trust arrangement may not be fully carried out as the will-maker has instructed. Revocation or variation 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 Receiving Disability Assistance

The use of a testamentary trust to provide for people with disabilities is relatively common. Use of a trust in such a case ensures that assets are available for the benefit and support of the disabled person, without the person themselves controlling or managing the assets. 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, depending on the circumstances). 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. Such trusts are commonly referred to as "*Henson* trusts."

The Planned Lifetime Advocacy Network (PLAN), 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 in Phrasing

Consider whether phrasing may be capable of multiple meanings or a meaning not intended by the client. For example, the phrase "for the use of 'A' exclusively for general farm purposes" may mean that the asset is to be used by 'A' and no others or, alternatively, may mean that the asset is to be used only for farm purposes.

(c) Use Technical Words Correctly

One example will illustrate this point. "Devise" refers to a gift of real property; "bequeath" 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) Consider Ambiguity in Non-Technical Words

Consider that using the word "deliver" will likely result in shipping costs for specifically gifted chattels being paid out of the residue of the estate, whereas using the word "gift" will leave the burden of such costs on the specific legatee. Often the will-maker does intend that the cost be paid out of the estate, but this should be addressed when preparing the will.

(e) Avoid Redundancies

There is a tendency in legal drafting to use multiple words and expressions that have the same meaning. Couplets such as "have and hold" in legal documents arose for historical reasons, including uncertainty as to which English word was preferable when translating a Latin or Norman French law term. Also, the practice of paying for legal documents according to their length led to wordy wills. Where possible, avoid common legal redundancies such as the following:

(i) for and during the period;

(ii) release and discharge;

(iii) nominate, constitute and appoint;

(iv) sole and exclusive;

(v) then and in that event;

(vi) order and direct;

(vii) known and described as; and

(viii) rest, residue and remainder.

On the other hand, 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. (A client should also be cautioned not to attempt to make alterations to their will by handwritten interlineation, as such can lead to costly and complex problems after death.)

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 be ordered in a logical fashion. A typical will might be structured as follows:

(a) preamble identifying the will-maker and confirming their intention that the will is intended to be their 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/RRIF or life insurance beneficiary designations, if any;

(f) 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 their discretion in converting assets into money or investments;

  (iii) a direction to the executor and trustee to pay debts, funeral and administration expenses;

  (iv) if appropriate, a direction to pay all duties, probate fees, and estate taxes arising as a consequence of the death of the will-maker on gifts made by the will-maker during the will-maker's lifetime, on life insurance policies on the life of the will-maker, or on property held with the will-maker in joint tenancy (alternatively, if a specific beneficiary is intended to bear such costs payable relative to an asset gifted in the will, the will must specify);

  (v) payment of cash legacies;

  (vi) provision for the surviving spouse, perhaps outright, or in a trust (if desired, a trust qualifying as a "spousal trust" for the purposes of the *Income Tax Act*);

  (vii) 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 trusts should be established for their benefit; and

  (viii) 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 vested.

(g) administrative powers, which might include,

  (i) a power of sale;

  (ii) a power to compromise claims of creditors;

  (iii) a power to value and distribute property in specie;

  (iv) a power of investment;

  (v) a power to borrow, secured by mortgage or pledge;

  (vi) a power to manage real estate; and

  (vii) a power to make income tax elections and designations.

5. Drafting Dispositive Clauses

The dispositive clauses of the will must be specifically drafted to reflect the will-maker's instructions. Generally, the more complex the scheme of distribution, the more challenging the drafting, and the more likely it is that the executor or a beneficiary may apply to court after death, either for directions or to challenge the distribution. 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 dispositive provisions, identify the beneficiary by using the full legal name and the beneficiary's relationship to the deceased. For a class gift, describe the class with specificity. For example, a gift to "my nephews and nieces" may be ambiguous: does it mean only children of the will-maker's siblings, or does it include children of the will-maker's spouse's siblings?

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

(a) unusual sequences of deaths, including beneficiaries predeceasing the will-maker;

(b) marriage or marriage breakdown;

(c) adoption or birth of children, who might be minors at the time of inheritance; or

(d) incapacity or financial immaturity affecting 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 specified in wills are 10 days, 30 days or 60 days. The assumption is that a beneficiary who survives the will-maker for at least the survivorship period is unlikely to have died as a direct result of a common accident. If the survivorship period is brief, it will not cause undue inconvenience to the beneficiary nor delay the administration of the estate. It usually takes at least a month to prepare an inventory of assets and liabilities and obtain probate. A longer survivorship period would potentially inconvenience the beneficiaries, particularly if the will-maker's spouse 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 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 a will disposes of property to ongoing trusts, consider including provisions dealing with the following matters:

(a) 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) Distribution of 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 to encroach upon the capital. The power of encroachment may be unlimited, or it may be limited in various ways: limited to a specific amount, or limited to a percentage of the value of the capital, or limited to specific uses (for example, for medical or other emergencies or for education).

Whenever an ongoing trust is created, the lawyer must ensure the will has provided, to the extent reasonable, for a gift-over (to an alternate beneficiary), in case the trust property fails to vest.

6. Capital and Stirpital Distributions

Discuss with the client whether distribution is to be "per stirpes" or "per capita," and make the distribution scheme clear in the will.

(a) Per Capita Distribution

Per capita ("by the head") is a distribution scheme where the beneficiaries must be alive when the will-maker dies in order to take their shares of the estate. If any of the beneficiaries predeceases the will-maker, the share that would have gone to that deceased beneficiary passes to the other beneficiaries who are alive at the time of the will-maker's death. The share of the deceased beneficiary does not fall into the estate of that deceased beneficiary, so it does not pass to the heirs or beneficiaries of that 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 adult children.

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."

At the date of his death, Mr. Bates leaves an estate having a residue 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.

Because the distribution is per capita, each of Mr. Bates' four surviving children receives $25,000. Denise (Craig's widow) and Elizabeth and Frank (Craig's children), receive nothing.

As noted in Chapter 2, s. 46 of *WESA* contains an anti-lapse provision. It sets out a priority list of who will receive a gift under a will, if the intended beneficiary dies before the will-maker. In priority, s. 46 operates to provide a gift to (a) the alternate beneficiary, if one is named; (b) where the intended beneficiary was the brother, sister, or descendant of the will-maker, to the descendants of that beneficiary; and (c) to the surviving residuary beneficiaries in proportion to their entitlement. However, s. 46 applies subject to a "contrary intention" in a will. The inclusion of "per capita" and "children who are living at my death" in the clause in Mr. Bates' will suggests a contrary intention which means, as set out above, the share intended for Craig passes to Craig's four surviving siblings and not to Craig's children.

(b) Per Stirpes Distribution

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

Consider again the Bates fact pattern. 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 receive $10,000, being 1/2 of Craig's share. Denise, because she is not the issue of Mr. Bates, receives nothing.

If Craig had been childless when he predeceased the will-maker, then upon the will-maker's death there would have been only four shares to distribute. In that case, each of Mr. Bates' four surviving children would receive $25,000.

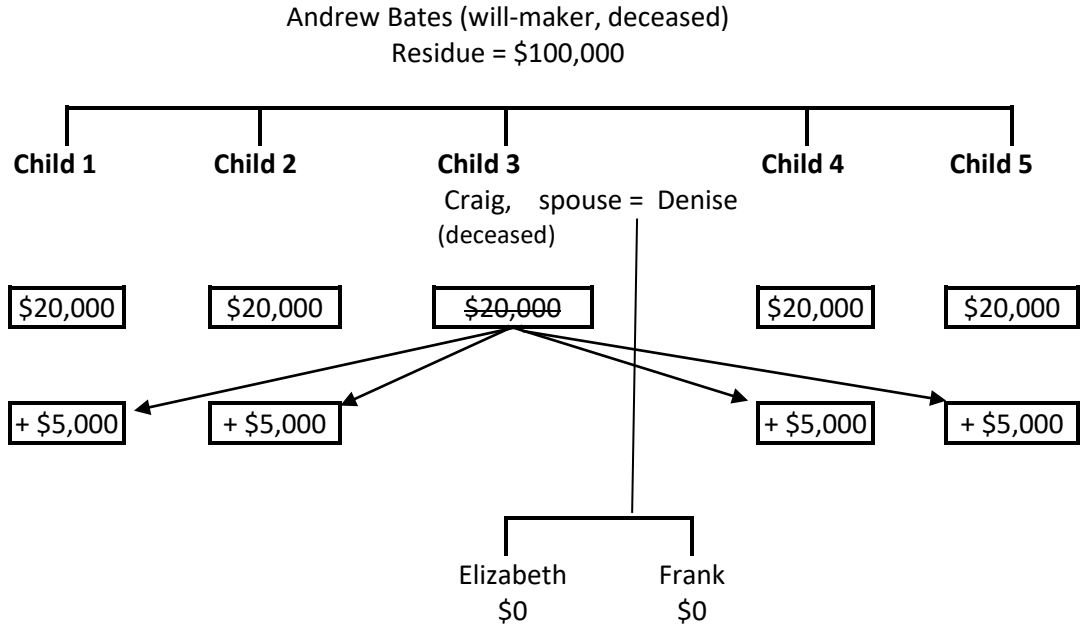
The phrase "per stirpes" does not of itself specify the generation in which the stirp (root) should commence. For example, if Mr. Bates was not survived by any of his five children, but did have eight grandchildren who survived him, then it would not be clear whether there should be five shares or eight 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.

For a discussion of case law and drafting tips on the use of the phrases "per stirpes" and "per capita," see C.S. Thériault, "*Hamel Estate v. Hamel*: Should Will Drafters Abandon the Use of 'Issue *Per Stirpes*'?" (1998) 18 Est. and Tr. Journ. 127.

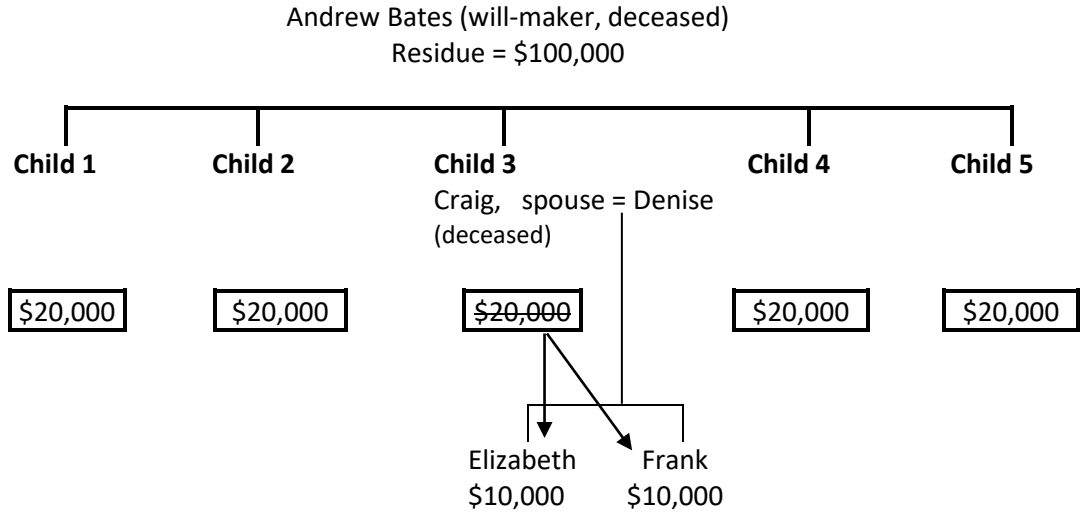
For an illustration of per stirpes and per capita distribution schemes, see the chart that follows on the next page.

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

1. Per Capita Distribution



2. Per Stirpes Distribution



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, the will-maker 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, or if approved by court order.

(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*, 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) Employing 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 conditionally upon that person acting as executor and trustee, and is to be enjoyed beneficially. In other words, it is not payment for services.

(e) Electronic Assets

Consider including a clause that confirms the executor's authority over the will-maker's electronic information, property, and accounts.

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 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 have no 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 and unless a trustee is appointed, 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 the infant 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

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

It is also important to set out what access should be permitted to property being held in trust for an infant while the infant is a minor. 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 best to personally attend on execution or have another lawyer or notary do so.

If the will is being executed by the will-maker in your absence, you should ensure that the directions to the will-maker and the witnesses are complete and clear, or you could face liability in negligence (*Ross v. Caunters*, [1980], Ch. 297 (Ch.D.)). See Appendix 3 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 should 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, that the wishes are those of the will-maker themselves (and not the product of any undue influence), and that the will-maker possesses testamentary capacity. Otherwise, you risk a claim that the will did not reflect the will-maker's intentions or is not valid. When confirming the instructions from an elderly client or a client with diminished capacity who has not given you the instructions directly, you should not ask the person to indicate agreement to the provisions—rather, ask the person to inform you what their dispositive intentions are, to ensure that they have 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 2 for examples of special testimonium clauses.

The *WESA* now allows for execution of paper wills where the will-maker and witnesses are in one another's "electronic presence" (ss. 35.1, 35.2), and for the making of "electronic wills" that are entirely created, signed, and stored electronically. This means that lawyers can now witness wills for clients via video technology while physically located in separate locations. This could be achieved in these ways:

- Clients can make traditional (paper) wills where the will-maker and witnesses sign identical copies of the will in counterpart, with all copies constituting the complete document.
- An electronic will may be made, with the will-maker and witnesses each sharing their screens to initial and sign the will.

Where the lawyer is not physically present with the will-maker, care should be taken to ensure that the client is acting voluntarily, particularly if the client is an older adult or may be experiencing diminished capacity. The lawyer may ask the client to confirm that no one else is present in the room with the client, or ask the client to turn the camera around the room. The British Columbia Law Institute has published an updated guide on undue influence, including considerations of electronic documents.

Where the client makes an electronic will, it is recommended that PDF format be used, and that the PDF file be locked immediately after execution to prevent any further changes.

[§4.06] Post-Execution Procedures

1. Wills Notices

After the will is executed, a wills notice may be filed with Vital Statistics for a nominal fee. This notice sets out the full name, 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 of probate 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 safe place, such as 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) require the filing of 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 (if the client has instructed that one be 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 (or, in the case of an electronic will, where the will file is saved). 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, and to remind the client that you are not retained to advise them of any changes to the law that may impact their estate plan.

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. (Note that there are unique provisions for how an electronic will is revoked, pursuant to s. 55.1 of *WESA*.)

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 the client's 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 where the testamentary intention of the will-maker is unclear due to concerns for the will-maker's capacity or having been unduly influenced.

If after the death of the client, you are asked to release your wills file, you should consider 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. You may also consider seeking that the requesting party first obtain a court order regarding production of your 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] Personal Planning Tools and Other Arrangements in Case of Incapacity[1]

When discussing a will with a client, it is essential to discuss whether the client would also like to plan for incapacity. Though many clients know about wills and estate planning, many are less familiar with the concept of making arrangements in case of mental incapacity, or personal planning for end-of-life and other support needs.

[1] This section was developed in 2017 with the assistance of Joanne Taylor, Executive Director of the Nidus Personal Planning Resource Centre and Registry, Vancouver, and Hugh S. McLellan, McLellan Herbert Locke LLP, Vancouver. It has been updated by subsequent authors.

It may be appropriate for the client to execute an "enduring power of attorney" and a "representation agreement" to authorize other people to make decisions about the client's financial and personal affairs in the event the client loses capacity during their lifetime.

- **Enduring powers of attorney** are the primary tool for personal planning regarding finances, property, and legal affairs.
- **Representation agreements** are used for personal planning regarding 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. 405 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 an Indian (as defined in the *Indian Act*) and ordinarily lives on a reserve or Crown land, the federal government might become involved in managing the adult's estate under s. 51 of the *Indian Act*.

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

1. Enduring Power of Attorney

Enduring powers of attorney are for planning about financial and legal matters, not health matters or personal care.

At common law, a power of attorney terminates when the principal becomes mentally incompetent or dies. However, under Part 2 of the *Power of Attorney Act*, an enduring power of attorney 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 the 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 these cautions concerning 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 the event of incapacity. An enduring power of attorney is also less costly, complex, and time-consuming than an application to court 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 *Goodrich v. British Columbia (Registrar of Land Titles)*, 2004 BCCA 100, the Court considered a "springing" power of attorney that was to be exercised if the donor became mentally infirm. It did not set out how that infirmity would be established. At issue was whether the document had the authority of a "springing" power of attorney, even though the circumstances as to when it would come into effect were unclear. The chambers judge found that it was not operative, but the Court of Appeal set aside the order and referred it for a rehearing, finding the terms amounted to a suspension of the attorney's authority (at paras. 25–26):

> The authority, in my view, is created at the moment of execution although on the words of the power of attorney the condition on which it may be exercised may not yet exist. Although the analogy with contract law is far from perfect, it is not unlike the suspension effect of the condition discussed by Dickson J. in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

> Just as a power of attorney may provide as a condition that "this power of attorney may not be exercised so long as I am resident in British Columbia," a power of attorney may provide "this power of attorney may not be exercised while I am not mentally infirm." In my view there is no conceptual difference between the latter condition and the language of the power of attorney in this case. The reservation in this power of attorney is, effectively, a restriction as to its use.

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 their affairs by reason of mental or physical incapacity.

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 of the *Power of Attorney Act* sets out the circumstances when an enduring power of attorney is suspended or terminates. This includes the death of the adult who made the enduring power of attorney (s. 30(4)(b)).

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 s. 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 an adult is declared incapable 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*.

2. 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 and for admission to health care facilities.

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).

A representative must act based on the adult's wishes, beliefs, and values, if known. For this reason, clients should be advised to discuss their wishes relating to health and personal care with their representative.

3. Adult Guardianship by Private Committee or Public Guardian and Trustee

If personal planning has not been done, or if there are concerns that the appointed attorney and/or representative are not fulfilling their obligations, then adult guardianship by means of a court-appointed committee or the involvement of the Public Guard-

ian and Trustee as statutory property guardian may be necessary. In British Columbia, management of an incapable adult's personal, health care, financial, and legal matters by these means is considered as a last resort.

(a) Committee

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

The legislation does not prescribe a particular test for determining if an adult is capable or incapable. Instead, it requires that two physicians licensed to practice medicine in British Columbia provide their opinion that the adult is incapable and the reason for that incapacity. Medical affidavits should set out the physician's qualifications and should provide opinions that are current. There should be evidence regarding the date of the physician's last assessment of the adult as well as the length of any treating relationship. The doctors should provide evidence regarding their diagnosis (or diagnoses) of the adult, clinical findings in support of such diagnosis, and prognosis for the adult's capacity.

If the court is satisfied that the adult is incapable, then the court must appoint a committee. The court may appoint a person or trust company to act as committee, may appoint multiple committees to act (and, in such case, may divide decision-making responsibility between the committees), and may impose restrictions on the exercise of the committee's authority. The adult's best interests are the paramount consideration in the appointment of a committee; these interests are assessed with reference to factors developed through the case law. An applicant for committeeship must provide an affidavit with evidence regarding the adult's family and financial circumstances as well as their own suitability to act as the adult's committee. If the incapable adult has made a "nomination of committee in writing" while capable by which they have identified a particular person to act as committee in the event of incapacity, then the court must appoint that person unless there is "good and sufficient reason" not to.

If the court appoints a committee, then upon the making of the committee order, any power of attorney in place for that adult is terminated, and unless the court orders otherwise, any representation agreement is also terminated.

A court-appointed committee is costly to obtain and to reverse. The Public Guardian and Trustee must be served with notice of the application, and given an opportunity to respond and make recommendations. Where an adult regains capacity, another application to court is required, with medical evidence establishing that the adult is no longer incapable.

(b) Public Guardian and Trustee

If an adult is not capable and has no one to assist in decisions about that adult's financial and legal affairs, the Public Guardian and Trustee may step in. The Public Guardian and Trustee may be appointed by court order under the *Patients Property Act*, or 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 as statutory property guardian under the *Adult Guardianship Act* applies only to financial and legal affairs. In contrast, under the *Patients Property Act*, the Public Guardian and Trustee may be appointed as committee of both the adult's person and estate. The appointment of the Public Guardian and Trustee as committee is, however, considered a last resort, and a family member will ordinarily be preferred.

Where a private committee has been appointed, the Public Guardian and Trustee is involved in the administration of the committeeship. The Public Guardian and Trustee reviews the actions of a court-appointed committee of the adult's estate and/or person, and the order appointing the committee may require that the committee obtain the consent of the Public Guardian and Trustee prior to undertaking certain actions for the adult.

4. Authority of the Minister Under the *Indian Act*

If an Indigenous person is registered or entitled to be registered under the *Indian Act* and is ordinarily resident on reserve, and that person becomes incompetent to manage their affairs, s. 51 of the *Indian Act* gives all jurisdiction and authority concerning their property to the minister of the governing federal department (Indigenous Services Canada in the provinces and Crown-Indigenous Relations and Northern Affairs Canada in the Yukon and Northwest Territories).

Mental health and wellness treatment services are under the jurisdiction of Indigenous Services Canada. Personal care matters are under the authority of the provincial Public Guardian and Trustee. Pro-

vincial statutes govern the process for declaring an adult to be incompetent.

A person registered under the *Indian Act* may also make a representation agreement or an enduring power of attorney in order to plan for the management of their affairs in the event of incapacity.

5. Health Care Decisions for an Incapable Adult

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.

A representative named in a representation agreement 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 to assist the representative in making decisions on behalf of the adult.

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 decision 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 health care decisions. Committeeship requires a court application and it can take weeks or months to obtain a final order, depending on the complexity of the adult's circumstances and whether the application is contested.

6. 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 consider making a representation agreement instead, and to discuss their wishes with their appointed representative or document their wishes in writing to guide the representative's decision-making.

[§4.08] Further Reading

The following publications contain more detailed information on drafting wills:

Bogardus, Peter W., Mary B. Hamilton, and Sadie L. Wetzel, *Wills and Personal Planning Precedents—An Annotated Guide.* Vancouver: CLEBC (loose-leaf and online).

Histrop, Linda Ann, *Estates Planning Precedents: A Solicitor's Manual.* Toronto: Carswell (loose-leaf).

O'Brien's Encyclopedia of Forms. 11th ed. Division V. *Wills and Trusts*. Toronto: Canada Law Book (loose-leaf and online).

Solnik, Robyn et al., *Drafting Wills in Canada: A Lawyer's Practical Guide*. 2nd ed. Toronto: LexisNexis, 2016.

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).

Chapter 5

Initial Advice to Prospective Personal Representative[1]

[§5.01] Introduction to Probate and Estate Administration

This second part of the *Practice Material: Wills* introduces practice in the area of probate and estate administration. The materials summarize the following:

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

(b) procedural rules relating to grants of probate and administration, probate proceedings, 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 surveys the initial advice that should be given to a prospective personal representative and the initial steps 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 judgment 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, that person is said to have died intestate, and the person seeking to be the personal representative of the deceased must apply to court for letters of administration. When a person in British Columbia dies with a will that only partially disposes of the estate, that person is said to have died partially intestate, and the person seeking to be the personal representative of the deceased must apply to court for a grant of probate of the will, even though part of the estate may be administered as on an intestacy. 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 issuing letters of administration to the administrator.

Note that practice in the BC Supreme Court is governed by the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "SCCR"). In these *Wills* chapters, a rule under the SCCR is referred to using the abbreviation "SCCR" (for example, Rule 25-3 under the SCCR is "SCCR 25-3").

[§5.02] Identifying the Personal Representative

Ordinarily, a will 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 the *British Columbia Probate and Estate Administration Practice Manual*).

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 administrator 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 §5.05(4) later in this chapter).

[1] Updated by **Jamie L. Porciuncula** of McLellan Herbert Locke LLP in November 2024, 2023 and 2022. Reviewed by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content relating to the *Indian Act*. Previously updated by Hugh S. McLellan (2017, 2019 and 2021); PLTC (2016); Hugh S. McLellan (2014); Kirsten H. Jenkins (2006 and 2005); Helen H. Low (2000 and 2001); and Allan P. Seckel (1997 and 1998).

[§5.03] 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. Appendix 6 provides a general checklist of the duties of a personal representative. Although the duties can be prescribed by a will, they usually include the following:

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

(b) paying debts and addressing other liabilities;

(c) notifying beneficiaries;

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

(e) ensuring that investments are authorized;

(f) insuring estate assets against risk;

(g) filing all appropriate tax returns;

(h) continuing, bringing or defending 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 the client has decided to accept the appointment. Such actions may compromise the client's 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. However, if there has been no intermeddling, the client 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, their rights in respect of the executorship terminate, unless the Court otherwise orders (*WESA*, s. 104).

[§5.04] Immediate Responsibilities of 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, then they are 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 on the person with the right to control the disposition of remains under s. 5, 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 the personal representative 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, including digital assets, and arranging for safekeeping;

(b) searching the database of the BC Unclaimed Property Society to determine if the deceased left behind unclaimed money (www.bcunclaimed.ca/);

(c) 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;

(d) 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;

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

(f) notifying financial institutions of the death;

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

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

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

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

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

(l) 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. 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 invoices, receipts and 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.

[§5.05] Preparing to Apply for Probate or Administration

1. Gathering Information

The personal representative should assemble and bring to their 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*.

Many documents and types of information may be relevant. The following 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.

Under s. 58 of *WESA*, the court may find that data recorded or stored electronically is a will, or a revocation, alteration or revival of a will, or states a testamentary intention. Searches of a deceased's electronic records need to be made looking for any such record.

A wills notice search can be ordered from the BC government Vital Statistics registry, either in person or by postal mail. Under *WESA* s. 77, a lawyer or a notary can apply in the prescribed form stating when they believe the deceased passed away. Any other person may apply using the prescribed form and including the death certificate.

The registrar advises the applicant whether or not a wills notice was filed on behalf of the deceased person by issuing a certificate of wills notice search. The certificate annexes copies of the most recent notice, if any, 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 least, include all names the deceased used in their 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.

The fee (at the time of writing) is $20 plus an additional $5 for each additional name searched. (See the BC Government's Wills Registry web page for more information: https://www2.gov.bc.ca/gov/content/life-events/death/wills-registry.)

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. The lawyer 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) Pension Plan Benefits

The lawyer should also advise the personal representative on Canada Pension Plan death benefits, surviving spouse's benefits and orphan's benefits, if applicable. The lawyer should also determine if the estate is entitled to death benefits from employment, union or private pension plans.

(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 ben-

eficiary 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. 2012, c.1, s. 61(3)).

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

See the *Probate and Estate Administration Practice Manual* on irrevocable designations.

(e) RRSPs, RRIFs and TFSAs

The lawyer should review any designation of beneficiaries made in respect of Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs) and Tax-Free Savings Accounts (TFSAs).

If a valid designation is made, the benefit does not form part of the estate. If a designation of an RRSP or RRIF has been made by will, the plan must be checked to ensure that the designation was made in accordance with the plan.

2. Reviewing the Will and Advising

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 SCCR 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 the witness's 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). See Chapter 2 for a discussion of lapsed gifts.

A gift can be made to an executor or trustee. However, the will must be clear that the executor is intended to take the gift beneficially and not just legally in their 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 personal representative must also be advised with respect to gifts that may have lapsed or adeemed. A gift in a will is said to have lapsed if the beneficiary died before the will-maker died. A gift in a will is said to have adeemed if the named item no longer existed when the will-maker died.

The provisions in *WESA* dealing with intestacy and lapse 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 (SCCR 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, in 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 SCCR 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. Normally, no security for the administration of an estate is required. However, 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 §6.06(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 may be granted administration. The Supreme Court has held that the general discretion of the court is not overridden 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 §6.06(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, and from acting as a personal representative 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).

8. Presumption of Death

If a person is missing, and reasonable grounds exist to suppose the person 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 allows the personal representative of the person presumed 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 the *Presumption of Death Act*, s. 4, any distribution of property made in reliance on such an order is deemed to be final distribution,

so the property is deemed to be the property of the person to whom it has been distributed as against the person presumed dead (s. 5(1)).

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

(a) the age and health of the missing person;

(b) the circumstances in which the person went missing;

(c) whether the person has relatives whom the person might be expected to contact;

(d) the likelihood of making such contact; and

(e) what efforts have been made to locate the missing person.

See *Re Burgess*, 2004 BCSC 62; *Re Kalinski Estate* (1990), 42 C.C.L.I. 127 (B.C.S.C.); and *Roderick v. Supreme Tent of Knights of the Maccabees* (1903), 2 O.W.R. 493.

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 from income or capital to a guardian on behalf of a minor.

(e) Defending actions in representative capacity

A personal representative may defend actions brought against them in their representative capacity. If the action did not arise out of the personal representative's wrongful act, the personal representative 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 the personal representative 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 their 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 their instructions. Is the lawyer only to obtain a grant of probate or letters of administration, or is the lawyer 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 the lawyer's duties and the lawyer's 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. The personal representative 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. Estates of Indigenous People

If the deceased was an Indigenous person who was registered or entitled to be registered under the *Indian Act* and died ordinarily resident on a reserve or Crown land, then the *Indian Act* applies to issues of succession and the administration of the deceased's estate. The federal ministry responsible for estate services for First Nations (Indigenous Services Canada for the provinces and Crown-Indigenous Relations and Northern Affairs Canada for the Yukon and Northwest Territories) then has jurisdiction to issue a grant of probate of the deceased's will or a grant of administration if the deceased died without a will. If there is no person willing to act as the deceased's personal representative, an officer appointed by the minister will administer the deceased's estate.

If the deceased was a member of a Treaty First Nation or a Nisga'a citizen, consult Division 3 of *WESA* dealing with the devolution of certain property.

[§5.06] 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 considering administrating an estate 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.

[§5.07] 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 deceased person, so the committee may obtain letters of administration of the deceased 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 their capacity as committee.

Chapter 6

Applications for Probate and Administration[1]

[§6.01] Introduction to Ordinary Procedures

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 where the validity of the will is not in issue. Contentious probate matters are discussed in the next chapter.

This chapter deals only with grants for residents whose estates are not governed by the *Indian Act*. See the *British Columbia Probate and Estate Administration Practice Manual* for procedures on grants for estates of non-residents where a foreign grant has been issued and for estates of residents which are governed by the *Indian Act*.

[§6.02] 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 is if the deceased was an Indigenous person who was registered or entitled to be registered under the *Indian Act* and who died ordinarily resident on a reserve. In this case, the administration of the estate will be governed by the *Indian Act*, and Indigenous Services Canada (in the provinces) or Crown-Indigenous Relations and Northern Affairs Canada (in the Yukon and Northwest Territories) has jurisdiction over the administration of the estate and the issuance of representation grants.

In most circumstances, probate is applied for where the deceased was domiciled. The domicile of the deceased at the date of death determines several issues, including the applicability of tax legislation, devolution of movables (typically personal property), and 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. Residence alone is not sufficient to create a domicile of choice; it must include 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.

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 is the domicile of the parent(s) with whom the infant resides.

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

[§6.03] Practice

Part 25 of the SCCR 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 SCCR to provide details and forms.

Part 25 includes amended rules and definitions to reflect changes to *WESA* that recognize wills that are signed, witnessed, or stored electronically. The new definitions include the term "physical will," meaning "a written will that is not in electronic form" (SCCR 25-1(1)). The term is used when it is necessary to distinguish a physical will from an electronic will.

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 SCCR. When *WESA*, the SCCR or other enactments do not cover a particular non-contentious matter, the court commonly refers to the practice and procedure described in *Tristram and Coote's Probate Practice*, 32nd ed., 2020, and MacDonell, Sheard and Hull on *Probate Practice*, 6th ed. Toronto: Carswell, 2023.

Students who work in this area should become familiar with the *British Columbia Probate and Estate Administration Practice Manual*. This publication includes directions for document preparation, and helps when dealing with applications where the standard documents need to be modified.

[1] Updated by **Sara Pedlow** of McLellan Herbert Locke LLP in November 2024, 2023 and 2022. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content related to the *Indian Act*. Previously updated by Hugh S. McLellan (2014, 2017, 2019 and 2021); Kirsten H. Jenkins (2005 and 2006); Roger D. Lee (2002, for content relating to the *Indian Act*); Peter W. Bogardus (2000); Peter W. Bogardus and Mary B. Hamilton (1996); and Mary B. Hamilton (1995).

[§6.04] 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). As well, unless a court transfer is requested, any related applications will generally need to be made at the same registry and heard at the same court location.

[§6.05] 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 was domiciled in British Columbia.

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

(a) Submission for Estate Grant (Form P2). This form sets 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 search are negative.

(c) Affidavit of Applicant. The affidavit is in Form P3 for straightforward situations and Form P4 or P6, for other applications. The affidavit includes statements that a diligent search for a testamentary document of the deceased was made in all places (both physical and electronic) where the deceased usually kept important documents, and the will is the last known will of the deceased.

(d) Original will

(i) If the will is a physical will made with witnesses present, then the applicant must file the originally signed version of the will (or a physical copy or PDF copy if the original is not available). If the will was signed in counterpart when witnesses were electronically present, then originals of each of the signed and witnessed counterparts (or copies if originals are not available) must be filed.

(ii) If the will is an electronic will, then the applicant must file the signed will in its original electronic form (meaning the electronic form in which it was first saved after being signed), and if that is not available, then a digital reproduction or physical copy of the will. (If the original will was not first saved in PDF, then in addition to submitting the will it its original format, the applicant must also file a physical or PDF copy of the will along with affidavits in Form P4 and P45). If the original will is stored in a third-party electronic repository, then the applicant must file a physical or PDF copy of the will and affidavits in Form P4 and P45, along with information about how to access the third-party electronic repository and view the will.

(see SCCR 25-3(3))

Note that if an order has been made that affects the validity or content of the will, a copy of that order should also be included.

(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 property of the deceased, regardless of the nature, location or value, which pass to the applicant as the deceased's personal representative (*WESA*, s. 122), and the liabilities that charge or encumber that property; 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 that assets of the deceased that do not pass to the personal representative do not need to be shown on the disclosure document. Also, although this form refers to the "Distribution" in the title, it is not necessary for the applicant to set out the proposed distribution.

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

(g) Cheque or bank draft for probate filing fees.

Additional documents may be required with certain types of applications. For example, if a beneficiary cannot be located or dies subsequent to the de-

ceased's death but prior to the application for the grant, the applicant can seek an order dispensing with notice pursuant to SCCR 25-14. An application in accordance with Part 8 of the SCCR or a requisition in Form P41, together with an affidavit in support and draft order, would be required.

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 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 (Form P4, para. 7(c));

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

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

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

(d) an affidavit of execution (Form P4, para. 6(a)), 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 these circumstances:

(i) there is no attestation clause;

(ii) the attestation clause does not adequately or clearly set out that the will 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 their name or only signed with initials);

(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 the will-maker's 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.

An Affidavit of Electronic Will in Form P45 must be submitted if an applicant is submitting a physical or PDF copy of an electronic will. It requires the applicant to explain how they verified that the electronic document was not altered before they made the copy.

3. Procedure

Pursuant to *WESA* s. 129(3) and SCCR 25-4(1), application for most grants, if unopposed and compliant with the SCCR, 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 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 their 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 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.

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 (SCCR, 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 $1,000 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) ÷ 1,000 x $6	$150.00
(b) (125,000–50,000) ÷ 1,000 x $14	$1,050.00
• Total	$1,400.00

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 SCCR. Section 121 applies to nearly every application for a grant, including a grant of probate or letters of administration. The applicant for a grant must wait at least 21 days after delivering notice before they can apply for the grant (SCCR 25-2(2.1)).

The Public Guardian and Trustee may have different requirements to provide the notice (SCCR 25-2(15)). Notice is not required if the will has been proven in solemn form in an application for that purpose and the required persons were served with the proof in solemn form application (SCCR 25-2(16)). Failure to give the notice required by s. 121 may be grounds for having a grant set aside, and may also affect the limitation period for bringing a proceeding to vary wills under *WESA* Division 6 of Part 4 (see *Desbiens v. Smith*, 2010 BCCA 394 and *Shaw v. Reinhart*, 2004 BCSC 588).

(a) Entitlement to Notice

Under SCCR 25-2(2), notice of an application for an estate grant must be given to the following persons:

(i) where there is a will, to executors and alternate executors named in the will that have a prior or equal right to make an application for a grant;

(ii) beneficiaries under the will;

(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 citizen or a member of a Treaty First Nation, the Nisga'a Lisims government 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 that person's status as a spouse. Similarly, if there is any doubt if a spouse was separated, notice should be given. (See *WESA*,

s. 2, for the definition of a "spouse" and when persons cease to be spouses.)

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 SCCR 25-10.

(b) Methods of Giving Notice

SCCR 25-2(1.1) requires that the notice required under s. 121 of *WESA* be delivered to each person entitled to it. Delivery may be by personal delivery, ordinary mail, email, 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 or other electronic means, on the date it is transmitted, but delivery by email 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, make an effort to trace the current address (*Desbiens v. Smith*, 2010 BCCA 394).

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 an 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 under the *Patients Property Act* (or a person outside British Columbia acting in a similar capacity as a committee), the notice must be given both to the committee (or the extraprovincial equivalent) where there is one, 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 ought to 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 have been 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 appears to require that notices be sent to the Public Guardian and Trustee on behalf of unborn and unascertained contingent beneficiaries,

although the authority for this practice is unclear.

When notice is delivered to the Public Guardian and Trustee, contact information for other persons 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).

(c) Formal Requirements

SCCR 25-2(3) specifies that the notice be given in Form P1. In addition to identifying information, the form of notice also provides recipients with some information on their rights in relation to challenging the grant, making spousal claims, seeking to vary the will, seeking legal advice, applying for security for administration, and obtaining an accounting, as well as statements that a grant may be made after 21 days and no further notice may be given to the person.

If there is a will or a foreign grant, a copy of the testamentary instrument and foreign grant (if there is one) must also be delivered (SCCR 25-2(1.1)(a)). If the application relates to an electronic will, then every person who receives notice is entitled to get a copy of the will in its original electronic form, if they demand it (SCCR 25-2(1.2)-(1.4)).

If a notice must be sent to the Public Guardian and Trustee (for example, whenever a minor is entitled to notice), the notice must be accompanied by copies of all documents filed with the court in respect of the application (SCCR 25-3(11)), together with a cheque for the fee to review the documents.

SCCR 25-3(2)(f) requires an Affidavit of Delivery in Form P9 be filed with the application for an estate grant. The person that actually does the delivery (e.g. a staff member of the applicant's law firm) must swear the affidavit. More than one Affidavit of Delivery can be filed if appropriate. While the Affidavit of Delivery confirms notice was sent to the named persons, it is the Submission for Estate Grant (Form P2) that sets out the names of the deceased's spouse, children, beneficiaries, intestate heirs, and citors to be provided with the notice. The Affidavit of Applicant (Form P3, P4, P5, P6, or P7) includes a statement that the affiant believes the P2 Submission to be correct and complete.

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 Grant — Executor Cannot 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, that 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, and P6) 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 con-

tinue 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 their own 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.

Where a personal representative has died, SCCR 25-14(1.2) governs the procedure to replace the personal representative. In other 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 number. 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 when filing of the application record. If the applicant was not the person to whom the original grant was issued, notice of the application must be given to that person, 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, and P6) 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 has been lost, mislaid, 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, then in order to probate the will, the executor 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) 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 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 then takes probate "caeterorum" (i.e. of the balance of the estate).

(e) Grant Limited as to Subject Matter

If the executor will only receive some of the assets passing to the personal representative, 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 situated in British Columbia, naming one person as executor, and another will in respect of property situated in another country, naming another person as executor.

[§6.06] Administration Applications

1. Documents for Typical Administration Application

For the purposes of this section, a "typical" application for letters of administration means 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 administrator without bond.

These documents are required for such an application:

(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, or Form P7 if grant is ancillary). Among other things, in the Affidavit the applicant must swear to having made a diligent search and believing that the deceased died without having left any will, codicil, or testamentary document. SCCR 25-3(14) requires the applicant to search in all places (physical and electronic) that could reasonably be considered a place where a testamentary document may be found, including where the deceased usually kept important 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. 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 or bank draft for probate fees.

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

(a) 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)).

(b) 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 another person nominated by the majority of the next of kin, then 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 their consent).

For direction on preparing documents for a grant of administration, consult the *British Columbia Probate and Estate Administration Practice Manual*. Prepare each document in accordance with the guidelines to ensure that 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 §6.05), as is the payment of probate fees.

The applicant must give notice to various persons as required by s. 121 of *WESA* and SCCR 25-2 to complete the Affidavit of Delivery (see §6.05(1)(f) and (5) earlier in this chapter).

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, serve the documents for the application on those not consenting. The usual time limits for service allowed under the SCCR for an application under SCCR 8-1 must be observed.

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. SCCR 22-3(1) allows prescribed forms to be varied as the circumstances require.

(a) 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 their consent).

(b) 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 protect the estate, the court may appoint an administrator *ad colligenda bona* and give the administrator whatever powers the court deems necessary.

(c) 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).

(d) Administration by Attorney

When a person entitled to administration resides outside British Columbia, 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).

(e) 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 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 by a person interested in the estate, requires it. If security is required, the applicant must apply to court. The court may define the required security or restrict the administrator's powers (*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 bond is filed by way of requisition.

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 7

Other Applications, Including Involving Disputes[1]

[§7.01] Overview of this Chapter

This chapter is a general review of applications other than the conventional proceedings for grants of probate or letters of administration. It includes applications arising where the executor needs direction as well as those arising from a dispute.

Refer specifically to the SCCR, Part 25 (Estates) and Rule 8-1 (Applications and setting down for hearing).

These applications are generally not available for the estate of a person who was registered or entitled to be registered under the *Indian Act* and who died ordinarily resident on a reserve, unless the federal government consents under s. 44 of the *Indian Act* to transfer the matter to the provincial superior court. If the matter is transferred to provincial jurisdiction, there may be consequences such as payment of probate fees.

For more information, see the *British Columbia Probate and Estate Practice Manual*.

[§7.02] Procedures Prior to the Grant

1. Notice of Dispute

Section 106 of *WESA* allows a person to oppose the issuance of a representation grant in accordance with the SCCR.

The purpose of the notice of dispute is to oppose the issuance of the grant by the court. For example, a notice of dispute may be filed by the disputant on the grounds that the will being submitted for probate is invalid, incomplete or the applicant for the grant is not the proper person.

A person entitled to notice of an application for an estate grant or resealing of a foreign grant under SCCR 25-2, or a person who claims an interest under a prior or subsequent will, may file a notice of dispute after death, but before the earlier of i) the issuance of an authorization to obtain estate information or resealing information and ii) the issuance of an estate grant or the resealing of a foreign grant. An estate grant includes a grant of probate, a grant of administration, and an ancillary grant of probate or administration (SCCR 25-1(1)).

A person who is not entitled to notice of an application under SCCR 25-2, or who is not a person that claims an interest under a prior or subsequent will, may file a notice of dispute if they obtain a court order permitting the filing by showing that, unless they are included in the class of persons entitled to notice, they or another person or the estate would be prejudiced (SCCR 25-2(14)). See also *Re Dow Estate*, 2015 BCSC 292 (Master).

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 25-2(6)). A disputant must give notice of an application to renew a notice of dispute to an applicant for the 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.

[1] Updated by **Janis Ko** of McLellan Herbert Locke LLP in November 2024. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content related to the *Indian Act*. Previously updated by Hugh S. McLellan (2014, 2017, 2019, 2021, 2022 and 2023); Roger D. Lee (2002, for content relating to the *Indian Act*); Kirsten H. Jenkins (2005 and 2006); and John F. Coupar (1995–2002).

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, then they should 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)). The citation must identify the testamentary document in question. Each alternate executor must also be served if an event occurs 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 been issued a grant of probate, 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 be issued 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 SCCR 25-2(1) that the cited person intends to pursue, 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 their executorship in relation to the testamentary document if they (a) serve an answer stating that they refuse to apply for a grant of probate; (b) do not comply with the service requirements set out in SCCR 25-11(4); or (c) do not obtain a grant of probate within six months after the date of service of the citation or within any longer period allowed by the court (SCCR 25-11(5)).

When there is a deemed renunciation of executorship of each person named as an executor in a testamentary document, the citor (or another person interested in the estate) may apply for a grant of probate or a grant of administration with will annexed in place of the person(s) named as executor; an order curing deficiencies in the testamentary document; an order that the testamentary document is a will proved in solemn form; or the issuance of a subpoena for the filing of the testamentary document if in the possession of the cited person (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 the following:

(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 must 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 personally served with it fails to comply, 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 who is reasonably believed to have 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 Part 8 of the SCCR or SCCR 25-14(1) may be effective.

[§7.03] Rectification and Construction of Wills

1. Probate Jurisdiction in Rectification

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 the exercise of its 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 limited power, confined to deleting words and rectifying the wording of a will to accord with 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 to a court of probate before the representation grant is issued, or to a court of construction within 180 days of a grant of probate being issued. See *Conner Estate v. Worthing*, 2020 BCSC 150.

WESA s. 59 also provides that extrinsic evidence including that of the will-maker's intentions is admissible.

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 petition in Form P43 (SCCR 25-14(2)(d) and (e) or (f)).

Rectification only applies to valid wills. A purported testamentary document that does not comply with the formalities of *WESA* would need to be addressed under an application under s. 58 for curing deficiencies, not s. 59 for rectification.

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 a court order or the consent of all named beneficiaries and all persons entitled to make a wills variation claim. 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(4) 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. However, if the rectification finds that a person is entitled to a part of the estate that was distributed to another beneficiary, the person entitled under the rectification may still recover any part of the estate that was distributed by the personal representative to other beneficiaries (*WESA*, s. 59(5)).

The section also provides that extrinsic evidence including that of the will-maker's intentions is admissible.

[§7.04] Construction Jurisdiction: Interpreting a 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. It can arise from causes such as poor use of language, clerical errors, a misunderstanding of the will-maker's instructions, a failure to carry out the will-maker's instructions and a failure by the will-maker to appreciate the effect of the words used.

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 (or, the objective approach)

In this approach, determination of the will-maker's intention is based on the words in the will itself. Extrinsic evidence of circumstances known to the will-maker at the time they 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 (or, the subjective approach)

In this approach, determination of the willmaker'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, if the personal representative is also 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. 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, which might require serving 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).

[§7.05] Curing Deficiencies

In an application for probate, the probate registrar might 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).

If a purported will does not satisfy the formal requirements under *WESA*, s. 58 gives the court the discretion to "cure" the formal deficiencies. For example, if one witness initialled 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 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 petition in probate form P43.

A court can exercise the power to cure deficiencies if it determines that a record, document, writing or marking on a will or document is authentic and represents one of these things:

(a) the deceased's testamentary intentions;

(b) the deceased's intention to revoke, alter or revive a will or testamentary disposition; or

(c) the deceased's intention to revoke, alter or revive a testamentary disposition contained in a document other than a will.

The key issue to determine is whether the record, document, etc. records the deceased's deliberate or fixed and final intention as to the disposal of their property on death. The court, if so satisfied, may order that the record or document is fully effective as the deceased's

(a) will;

(b) revocation, alteration or revival of a will; or

(c) testamentary intention.

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)).

Although the circumstances the court will consider are 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 *Estate of Young*, 2015 BCSC 182; *Re Beck Estate*, 2015 BCSC 676; *Lane Estate*, 2015 BCSC 2162; and *Re Hadley Estate*, 2017 BCCA 311.)

Section 58 of *WESA* does not mandate a minimum level of compliance with testamentary formalities. The main issue in such an application is whether the record, document, writing or marking was intended to have testamentary effect. See *Re Young Estate*, 2015 BCSC 182 for a description of factors considered in assessing testamentary intent. The burden of proof in establishing that a non-compliant document reflects the deceased's testamentary intentions is a balance of probabilities. The approach in *Re Young Estate* was cited with approval by the BC Court of Appeal in *Re Hadley Estate*, 2017 BCCA 311.

In *Re Mace Estate*, 2018 BCSC 1284, a testamentary document that did not comply with the formalities was found to embody the maker's fixed and final intention. In *Horton v. Bruce*, 2017 BCSC 712, a draft will signed by the will-maker was held to be valid for the sole purpose of admitting its revocation clause. However, in *Bishop Estate v. Sheardown*, 2021 BCSC 1571, an unsigned will was found fully valid in circumstances where the will-maker gave instructions but was prevented from attending personally to sign it due to COVID access restrictions, and the court was satisfied that failing to sign was not a result of the will-maker changing their mind about the will's contents. In *McGavin Estate (Re)*, 2023 BCSC 819, the court cured two reporting letters from the will-maker's lawyer, which set out the will-maker's instructions for the distribution of her estate.

The court may also use s. 58 to reinstate words in a will that have been made illegible, if the alteration was not made in compliance with *WESA* and there is evidence to establish what the original words were (s. 58(4)).

Section 58 cannot be used to uphold a will that is invalid for substantive reasons such as lack of testamentary capacity or undue influence.

Cases in which drafts or documents were *not* admitted include *Re Herod Estate*, 2017 BCSC 318 and *Re Bailey Estate*, 2016 BCSC 1226. See also *Re Quinn Estate*, 2018 BCSC 365, in which a "pour-over" clause which attempted to give the residue of the will-maker's estate to a revocable and amendable *inter vivos* family trust was not saved by s. 58 because this clause would have permitted the deceased's will to be amended without complying with *WESA*. This decision was upheld in *Quinn Estate v. Rydland*, 2019 BCCA 91. See also *Waslenchuk Estate*, 2020 BCSC 1929.

[§7.06] 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 their 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, although where the effect of a decision is significant, the court might provide directions (*Re Toigo Estate*, 2018 BCSC 936).

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 the personal representative properly incurred 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 their own costs and penalized with the costs of the other parties to the proceeding.

[§7.07] Dispute Resolution

1. 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. Probate in common form issues upon the application of the executor and is supported by affidavit evidence.

Proof in common form does not conclusively determine the will to be the deceased's last will.

Proof in solemn form, on the other hand, requires proof of the will in a hearing or trial, after which the court pronounces for the force and validity of the will in solemn form (SCCR 25-1(5)). Notice must be 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 and had testamentary capacity, and also 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. It might be invalid if it 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. That means 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.

2. 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, in most cases, executors 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.)).

3. Revoking 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 to complete an unadministered estate, formerly known as "administration *de bonis non*" (see Chapter 6, §6.06(4)). If the problem is that the original grant was in error, an action for revocation of grant is probably inevitable.

One relatively common contentious matter arising out of events after a grant is a beneficiary alleging 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, including the following:

(a) a later will is discovered; or

(b) the grant pronouncing for the force and validity of the will was obtained by fraud.

An action for revocation of administration could be commenced after a grant of letters of administration has issued in two situations:

(a) when it is alleged that administration was granted to a person who does not have sufficient entitlement to the grant; and

(b) on discovery of a will.

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, as follows:

(a) a grantee has disappeared leaving the estate unadministered; or

(b) 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 their 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).

4. Removing an Executor or Trustee

(a) Jurisdiction to Remove

Even the broadest privative clause, such as one empowering the trustee to make binding decisions at the trustee's absolute discretion, cannot completely oust the jurisdiction of the court to monitor the performance of a trust or the administration of an estate. In *Mardesic v. Vukovich Estate*, 1988 CanLII 3125 (B.C.S.C.) the BC Supreme Court held that it had jurisdiction to oust a trustee both under the *Trustee Act* and the inherent jurisdiction of the court. The BC Court of Appeal agreed in *Miles v. Vince*, 2014 BCCA 289.

The court's jurisdiction to remove a trustee is based on s. 30 of the *Trustee Act* 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 *WESA* and the *Trustee Act*. 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.

Similar considerations apply if a person having an interest in an estate applies under *WESA* s. 158 and SCCR 25-14(1)(f) to pass over a named executor or personal representative who has priority over others, prior to a representation grant being issued to the executor or personal representative.

Section 31 of the *Trustee Act* gives the BC Supreme Court the express power to appoint new trustees in addition to or as substitution for others.

(b) Reasons to Remove

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 BC Supreme Court removed one trustee in *Watson v. Strong*, 2012 BCSC 1274 where the dissention and friction between the trustee and a beneficiary was hampering the proper administration of the 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.

The court will grant an application for removal of a personal representative if the personal representative's duties are in conflict with their 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.

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.

In *Watson v. Strong*, 2014 BCSC 754, another decision involving parties who sought removal of trustee, the Court cited principles from *The Estate of Sally Toby Mintz*, 2007 BCSC 1922 and *Conroy v. Stokes*, 1952 CanLII 227 (B.C.C.A.) in determining that the court will remove a trustee if there is evidence the trustee has endangered trust property or shown "a want of honesty or of proper capacity to execute the duties, or a want of reasonable fidelity."

Mere disagreement between the trustee and beneficiaries will not usually result in the removal of a trustee; see *Conroy v. Stokes*, 1952 CanLII 227 (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 the personal representative's own favour.

[§7.08] 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 will-maker'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 the infant's 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 testamentary 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. By virtue of the Attorney General's *parens patriae* jurisdiction over charities, the Attorney General is a necessary party to an application to court for a *cy-près* order in which the court is asked to choose a replacement charity.

3. Distribution Under Direction of Court

Occasionally, a personal representative may not be able to determine if a beneficiary survived the deceased or if members of a class of beneficiaries survived the deceased. For example, if the intestate heirs of a deceased included all of her uncles and aunts, records to prove the date of death of all of the members of this class may not be available.

Section 39 of the *Trustee Act* allows the personal representative to apply by petition for an order that the personal representative is permitted to distribute the estate, taking into consideration only the claims that the personal representative has been able to ascertain; and that the personal representative is not liable for any claims that the personal representative had no notice of at the time of distribution.

The court may order that notice be given to persons who have an interest in the distribution. However, often the reason the s. 39 application is required is because a person who may be interested in the distribution cannot be located.

Chapter 8

Assets and Liabilities[1]

[§8.01] Preparing an Inventory

This chapter discusses assets that pass in the will and those that pass outside the will, and gives some guidelines on preparing an inventory. Preparing an inventory in administering an estate can be complicated. Please refer to the *British Columbia Probate and Estate Administration Practice Manual* for examples of a format for the inventory and for language to describe particular assets.

1. Purpose of Inventory

The personal representative makes 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 several purposes, including these:

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

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

(d) to capture potential liabilities (e.g. debts guaranteed by the deceased) that will impact the ability of the personal representative to distribute the estate;

(e) to file an income tax return to the date of death, plus subsequent income tax returns until the estate is distributed;

(f) to assist in preparing the personal representative's accounts;

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

(h) to assist in determining the solicitor's fees and the personal representative's remuneration.

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

2. Form of Inventory

The inventory is used mainly as an accounting record for the estate and the personal representative. There are many acceptable inventory formats, 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, although the final disclosure document submitted to the probate registry (in Form P10 or P11) need not include assets passing outside the will.

[§8.02] Assets Passing in the Will

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.

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*).

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, their 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 Chapter 1. Assets inside or outside the estate are illustrated in Appendix 1.

[§8.03] Assets Passing Outside the Will

1. Overview of Assets Passing Outside the Will

Types of property that do not pass to the personal representative are discussed in more detail below.

Property that does not pass to the personal representative need not be accounted for by the personal

[1] Updated by **Sara Pedlow** of McLellan Herbert Locke LLP in November 2024, 2023 and 2022. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content related to the *Indian Act*. Previously updated by Hugh S. McLellan (2014, 2017, 2019 and 2021); Kirsten H. Jenkins (2005 and 2006); Roger D. Lee (2002, for content relating to the *Indian Act*); Margaret H. Mason and Kirsten Jenkins (2001); and Diana R. Reid (1995–2000). A former version was also partly updated by Denese Espeut-Post in 2019 and 2017.

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 than the personal representative who have an interest in the property.

Note also that estate-planning vehicles may influence greatly what assets are included in the disclosure statement. Certain assets may be disposed of in a secondary will that is not submitted for probate. Most commonly, the secondary will only covers the will-maker's interest in private company shares and shareholder's loans, as s. 118 of the *Business Corporations Act*, S.B.C. 2002, c. 57, does not require a grant of probate to transfer shares. This approach will save probate fees on the value of the assets passing pursuant to the secondary will that is not submitted to probate (*Berkner (Estate)*, 2017 BCSC 619).

Sections 122, 136 and 142 of *WESA* recognize multiple wills may be made in BC. However, the executors in the two wills must be different persons, as the executor applying for probate must swear or affirm that they have disclosed all assets they are handling: *WESA*, s. 122 (1)(b) and SCCR 25-3(2).

As well, the increased use of alter ego and joint partner trusts has resulted in many assets that would traditionally form part of an estate falling outside the estate. Accordingly, these assets are not required to be included in the disclosure document, nor are probate fees payable in respect of them.

2. Joint Tenancies

In a tenancy in common, the share of the deceased tenant in common passes to the deceased's 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 in favour of an adult child (that is, the presumption the transfer was intended to be a gift). Instead, 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.

As of May 11, 2023, amendments to the *Family Law Act*, S.B.C. 2011, c. 25, have also removed the presumption of advancement and presumption of resulting trust for transfers of property between spouses (see s. 81.1). There is still a presumption of advancements for gifts from parents to minor children.

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 to sever a joint tenancy. The three main ways are by express or implied agreement, by a transfer of property from a joint tenant to themselves or to another person, and by a separation under the *Family Law Act*.

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)).

3. Life Insurance Policies and Proceeds

The proceeds of an insurance policy may pass by designation outside the will, rather than 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.

4. 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). However, the value of the benefit will usually be included in the deceased's income for year of death. In this sense, the tax liability for the benefit is borne by the estate.

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 80 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 Canada Pension Plan provides three kinds of benefits:

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

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

(c) survivor's benefits payable to children under the age of 18 (or children over 18 and under 25 attending school full-time). These benefits do not form part of the estate.

5. Imminent Death Donation

A person may, in expectation of their 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, affirmed 2002 BCCA 125.

6. Powers of Appointment

A person (the "donee") given property with the power to appoint the property to whomever the donee pleases (including to the donee themselves), 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.

7. Employment Benefits

The spouse of a deceased employee who was subject to the *Workers Compensation Act* may 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.

Death benefits are generally, however, included in the estate's assets (see §9.03).

8. 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.

9. 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.

10. 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. 2019, c.1 in fatal cases, and I.C.B.C. "no fault" death benefits, do not form part of the estate.

11. 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.

12. 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.

13. 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.

14. 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.

15. Designated Beneficiary Investments

Some types of investments, such as segregated funds and Tax-Free Savings Accounts, allow the owner of the investment product to specify a beneficiary on the death of the owner.

[§8.04] Liabilities

A personal representative may be personally liable for the debts of the deceased, so far as the assets coming into the hands of the personal representative could satisfy them. 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 for the personal representative.

[§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, in-

surance 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 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 or charities, 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 licensees.

The general rule is that the date for 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

When no personal representative has been appointed by the court, 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 SCCR address this problem by allowing a person to apply to the court registry for an Authorization to obtain estate information. The applicant submits 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 issuing this 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 production, and may make 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.

[§8.07] 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 attract death duties or probate filing fees that apply in the jurisdiction where 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 legally located in the province where their existence is documented (*Royal Trust Co. v. Attorney General of Alberta*, [1930] 1 D.L.R. 868). In this case 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 British Columbia, and
>
> (b) if the deceased was ordinarily resident in British Columbia immediately before death, the intangible personal property of the deceased, wherever situated,
>
> that passes to the personal representative.

If the deceased was a First Nations person with assets situated on First Nations reserve land at death, there may be probate fee, income tax and other implications, particularly if the asset is real property. See §4.02(3).

[§8.08] Conflict of Laws

If there is a grant of probate or letters of administration in British Columbia and some estate assets are located outside of the province, the personal representative must obtain control of and administer those foreign assets. *WESA* Part 4, Division 8 addresses conflict of laws.

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 entitlement 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 reseal 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 foreign 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. Movables

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 reseal 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.

Chapter 9

Transferring Assets and Paying Tax[1]

[§9.01] Nature of Transfer

This chapter deals with the consequences and procedures in transmitting assets. The transfer may be from the name of the deceased into the name of the personal representative or, if applicable, into the name of the surviving joint tenant, or from the personal representative to the beneficiaries or heirs.

[§9.02] Executor's Year

1. Final Return

At common law, an executor is traditionally allowed one year from the will-maker's death to gather 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 (*Re Perrin* (1925), 28 O.W.N. 173 (H.C.), affirmed (1925), 28 O.W.N. 289 (C.A.)). Further, except where specifically provided in a will, a legacy carries interest one year after 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.

The executor must file a T1 return, commonly referred to as a final or terminal T1 return, for the deceased taxpayer. The fiscal period covered by the final or terminal return extends from January 1 of the year of death up to and including the date of death. The final or terminal return includes all sources of income earned during this time, including certain accrued but unpaid amounts, plus capital gains or losses on the deemed disposition of capital property (except where the deceased has a surviving spouse or common-law partner to whom the property will pass on a tax-deferred basis). The terminal return is the ordinary T1 return for the year of death and generally must be filed by the later of six months from the date of the deceased's death and April 30 of the year after death. If the deceased or the deceased's spouse was carrying on business, the due date is June 15 of the year following death or six months after the date of death if the date of death was after December 15. Further, if the deceased's will contains a spousal trust which has become "tainted" because of the requirement to pay any testamentary debts out of the trust capital, then the due date is extended to 18 months from death, but interest on any unpaid tax accrues from the date the return would have been due had there been no such trust (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 70(7)(a)).

Payment of the tax for the year of death is due April 30 of the following year if death occurs before November 1. If, on the other hand, death occurs on or after November 1, tax is payable six months after the date of death.

2. Separate Returns

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-326R3 (Archived), Publication T4011(E) Rev. 22 and *Income Tax Act*, 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. In the case of a partnership, this election only applies if the death of the partner causes the fiscal period of the partnership to end (*Income Tax Act*, s. 150(4) and Interpretation Bulletin IT-278R2 (Archived), para. 2).

The legal representative may also elect to file a separate return if the deceased taxpayer was an income beneficiary of a kind of trust called a "graduated rate estate" that had a taxation year other than a calendar year. This return includes only income of the deceased from the trust arising after the end of the last taxation year of the trust and before the taxpayer's date of death (*Income Tax Act*, s. 104(23)(d)).

The above-noted separate returns must be filed by the later of April 30 of the year following death and six months following the date of death.

[1] Updated by **Parveen Karsan** of Singleton Urquhart Reynolds Vogel LLP in November 2024 and 2023. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content related to the *Indian Act*. Previously updated by Sara Pedlow (§9.01–9.02 and 9.04–9.05 in 2022); David Thompson (§9.03 in 2022); Hugh S. McLellan (2014, 2017, 2019, and 2021); Denese Espeut-Post (2018 and 2019); Kirsten H. Jenkins (2005 and 2006); Roger D. Lee (2002, for content relating to the *Indian Act*); Noreen Brox (1997–2001); Marie-Louise Fast (1996); and Owen Dolan, KC, and Noreen Brox (1995).

[§9.03] *Income Tax Act* Implications for Transferring Assets

When you encounter tax considerations in practice, consider whether you have the necessary skill and knowledge or ought to seek assistance, perhaps from an accountant or a lawyer who has the requisite knowledge.

The discussion below refers to provisions of the *Income Tax Act*. Different tax consequences may arise upon the death of an Indigenous person registered or entitled to be registered under the *Indian Act*; the consequences will depend upon the deceased's circumstances.

1. General Rules

The general rule for estates administered in Canada and paid to Canadian beneficiaries is that the inherited amount is not taxable in the hands of the beneficiary. This applies to assets owned by the deceased at the date of death.

(a) Testamentary Trust

The taxation of income earned by an estate can be quite complex and will be impacted by the type of testamentary trust established. A trust is a separate taxpayer and is treated as a conduit for income paid or payable to a beneficiary. All income generated by the testamentary trust will be taxed either in the trust or the hands of the beneficiary. Beneficiaries must include in their income any portion of the estate income that is paid or payable to them in the year. There are limited exceptions to this for amounts paid to a beneficiary but designated by the estate solely to permit the estate to use deductions that it could not otherwise use because of insufficient taxable income (ss. 104(13.1), (13.2) and (13.3)).

(b) Clearance Certificate

If a personal representative transfers estate assets before having received a clearance 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, then the personal representative is personally liable for any unpaid taxes, interest, and penalties (ss. 159(2) and (3)).

To avoid personal liability, the personal representative should either postpone distribution until after receiving the clearance certificate, or reserve from the distribution sufficient estate assets to cover the charges. It can take many months to obtain a tax clearance certificate from the Canada Revenue Agency. The lawyer should advise the executor client about these risks and about the possibility of seeking an indemnity from the beneficiaries if they want assets distributed on an interim basis.

(c) Depreciable Capital Property (s. 70(5)(a))

Depreciable capital property is capital property in respect of which a taxpayer is entitled to claim capital cost allowance (CCA).

Depreciable capital property is 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, as well as capital gains, or could result in a terminal loss. There are exceptions to the deemed realization rules if depreciable capital property is transferred to a spouse or spousal trust, or if depreciable farm property is transferred to a child (ss. 70(6), 70(9) and (9.1)).

(d) 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 for resale or on speculation, as opposed to land held as a rental property or as a business location. The entire gain realized on this type of property is included as business income, not a capital gain. There is no deemed disposition when such land is transferred to a spouse or spousal trust (s. 70(5.2)(c)).

(e) 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 may arise, however, if the principal residence exemption applies in respect of the entire gain (ss. 40(2)(b) and 40(4)).

(f) Personal Use Property

Personal use property, meaning property used by the deceased for personal use and enjoyment, is capital property subject to capital gains. However, a $1,000 minimum rule applies: property purchased for less than $1,000 is deemed to have cost $1,000. The proceeds of sale are deemed to have been the greater of $1,000 and the actual cost. Losses from personal use property are deemed to be nil.

(g) Joint Tenancies

The Canada Revenue Agency considers any property held in a joint tenancy to be held 50% by each joint tenant and subject to a deemed disposition on death. Probate fees can be avoided by holding property as joint tenants, but

income tax still applies, unless the property passes by a spousal rollover (in which case the property may transfer to the surviving spouse at the deceased spouse's cost base, thereby deferring the tax until the surviving spouse disposes of the property or dies).

(h) Employment Death Benefits

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. Death benefits are generally included in the estate's assets and on the final income tax return, and are taxable to the recipient (s. 56(1)(a)(iii)). There are, however, a few notable exceptions. The death benefit of an employer-paid life insurance policy is received tax-free. In addition, claims under the *Worker's Compensation Act* by a spouse of a deceased worker are received tax-free (see §8.03.) Lastly, when the surviving spouse of the employee receives death benefits valued at less than $10,000, that spouse need not declare such amounts as income (s. 248(1) – "death benefit").

(i) Farm Property

A rollover with respect to specified farm property is allowed to a farmer's child, either directly or through a spousal 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 grandchild and great-grandchild, as well as a person who, at any time before attaining the age of 19, was wholly dependent on the taxpayer for support (s. 70(10)(c)). The specified farm property rollover is also available to the parents of a taxpayer if the personal representative so elects (s. 70(9.6)). The rollover allows the child or grandchild receiving the property to defer the income tax on the accrued capital gain (and potential recapture on depreciable assets) until that child or grandchild sells the property to a third party.

2. Spouses and Spousal Trusts

(a) Result When Capital Property of Deceased Passes to a Spouse or Spousal Trust

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. The result is that tax on capital gains and recapture is deferred until the surviving spouse 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) the recipient spouse or common-law partner must have 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) the subject property must vest indefeasibly in the spouse within 36 months after the deceased taxpayer's death or, if the Minister grants an extension, within the extended period;

(v) the subject property must vest indefeasibly in the transferee spouse before their death;

(vi) 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 the trust's income during the spouse's or common-law partner's 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
- the property must vest indefeasibly in the spousal trust or common-law partner trust within 36 months of the taxpayer's death (or such longer period as the Minister considers reasonable, if a written application is made to the Minister within the three-year period).

(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 results in the deemed disposition of the property for fair market value proceeds of disposition. Making the election would be beneficial if the deceased had loss carryforwards, which could be used to offset any gains that 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)(c)). The requirements for this automatic rollover are the same as outlined with respect to capital property.

(e) Reserves

A "reserve" is a deduction allowed based on the unpaid portion of the purchase price of certain types of property (ss. 40(1)(a)(iii), 44(1)(e)(iii), 20(1)(n) and 32(1)).

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 the taxpayer survived.

[§9.04] Other Legislation Affecting Transferring Assets

1. Delay of Distribution Under *WESA*

Section 155 of *WESA* provides (in part):

> 155 (1) Subject to this section, the personal representative of a deceased person must not distribute the estate of the deceased person within the 210 days following the date of the issue of a representation grant except by order of the court.
>
> (1.1) The personal representative of a deceased person who died **with a will** may distribute the estate of the deceased person within the 210 days following the date of the issue of a representation grant with the consent of all of the following:
>
> (a) all beneficiaries who have an interest in the estate;
>
> (b) all persons who may commence a proceeding under Division 6 *[Variation of Wills]* of Part 4 *[Wills]* in relation to the estate.
>
> (1.2) The personal representative of a deceased person who died **without a will** may distribute the estate of the deceased person within the 210 days following the date of the issue of a representation grant with the consent of all intestate successors entitled to a share of the estate. [Emphasis added.]

The personal representative may distribute the estate of the deceased person without the required consents if the personal representative complies with s. 155(1.3). Section 155(1.3) allows the personal representative to distribute the estate without the consents that would otherwise be required if the personal representative sets aside the following amounts:

(a) all the specific gifts to beneficiaries who have not been located;

(b) a sum equal to the share of the residue of all beneficiaries who have an interest in the residue and have not been located;

(c) a sum equal to the share of the estate of all intestate successors who have an interest in the estate and have not been located; and

(d) a sum equal to an amount sufficient to satisfy any claim under Part 4, Division 6 of the *WESA* in relation to the estate.

If an executor makes a distribution prior to the end of the 210-day period without the necessary consents, court order, or security, the court may order any distribution made to be repaid to the estate by the executor: see *Stevens v. Wood Estate*, 2013 BCSC 2380.

2. 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 that does not adequately provide for the spouse or child's proper maintenance and support (see Chapter 13). The proceeding must be brought within 180 days from the date of the issuance of the grant of probate in respect of the will, otherwise the court has no authority to hear the proceeding (*WESA*, s. 61(1)).

Similarly, a copy of the initiating pleading must be served on the personal representative within 30 days of the expiry of the 180-day period (*WESA,* s. 61(1)(b)). The court may extend the time for service in appropriate circumstances (*Rodgers v. Rodgers Estate*, 2017 BCSC 518).

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 (*WESA*, 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 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 persons entitled to apply for a variation of the will 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 the filing of a certificate of pending litigation by a will variation claimant may preclude a sale. The sale proceeds remain, however, subject to the 210-day restriction on distribution to beneficiaries (*WESA,* s. 155).

See Chapter 13 for more on the variation of wills.

3. Intestacies

(a) Delay in Distribution

The same provision for delay when there is a will (see §9.04(1) above) applies in the case of 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 issuance of the grant, subject to the exceptions in s. 155.

(b) Advances to Children

The concept of "hotchpot" is based on the presumption against "double portions," which provides that where a will-maker leaves a gift to a child in the will, and then after the making of the will gives the child a sum of money, the will-maker does not intend to give the child's portion to them twice over. Section 53 of *WESA* abolished this presumption. However, a will-maker may express a contrary intention in the will, for instance, by using a "hotchpot" clause to expressly require advances by portion to be brought into account.

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 are married to each other, or (b) they have lived with each other in a marriage-like relationship for at least two years.

If the deceased was survived by a spouse and the estate includes a spousal home, the surviving spouse has rights with respect to the spousal home under Part 3, Division 2 of *WESA*. The personal representative must not dispose of the spousal home within the 180 days after the date on which the grant is issued, unless the personal representative has the spouse's written consent. An exception to this rule exists where the estate does not have sufficient assets to pay its debts without selling the home (*WESA*, s. 28).

If two or more persons qualify as spouses, 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)).

[§9.05] 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*.

Generally, subject to the statutory restrictions noted above, when the representation grant is issued, the process of transmission and transfer can begin, although transfers to beneficiaries may be delayed until the personal representative has obtained a clearance certificate from the Canada Revenue Agency, obtained approval of the personal representative's accounts, and published notices to creditors.

When preparing the documents for transmission and transfer, if there is any doubt as to the requirements after reviewing the governing legislation, contact

the appropriate agency, corporation, or office (for example, a transfer agent for stocks or bonds, the Land Title Office, banks, etc.) for further direction.

Transmission or transfer of assets frequently requires filing of copies of court documents. If copies have not been obtained at the time the representation grant is applied for, the procedure for obtaining them is as follows:

(a) To obtain a court-certified copy of the representation 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 additional fees apply 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 additional fees apply for each page thereafter.

For tables summarizing the necessary documents, see the *British Columbia Probate and Estate Administration Practice Manual*.

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. 1998, 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). As of 2020, the *Land Owner Transparency Act*, S.B.C. 2019, c. 23, requires the disclosure of the names, addresses and Social Insurance Numbers of all beneficiaries named in a will when real property is transmitted to an executor.

If the deceased was an Indigenous person who had real property located on reserve, there is a different process to follow, as set out in the *Indian Act* (see the *British Columbia Probate and Estate Administration Practice Manual*).

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 transfer by operation of law to the surviving joint tenant (s. 14(3)(m));
- 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
- 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 qualifying 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)).

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. (Some banks might insist on seeing a representation grant in respect of the deceased joint tenant's estate). A transfer to the personal representative is effected by providing a notarially certified copy of the representation 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 representation 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.

(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 representation grant to validate the will. Since the 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 the

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 the 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, the lawyer must get instructions from that person in order for that person to obtain payment. If the estate is the beneficiary, a notarially or court-certified copy of the representation grant will be required.

(d) Pensions

The comments regarding RRSPs and RRIFs apply to pensions as well, 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*. 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 representation grant for 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*. 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 the non-trading company as to the requirements for transfer and whether there are any restrictions on transfer. 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.

(g) Motor Vehicles

Transfers of motor vehicles are governed by *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, ss. 17 and 18 and the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

(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

The *British Columbia Probate and Estate Administration Practice Manual* outlines procedures for the transmission of various assets including mining claims, annuities, manufactured homes, vessels, aircrafts, and assets in foreign jurisdictions.

(k) Cultural Property of a Nisga'a Citizen or Member of a Treaty First Nation

If cultural property of a Nisga'a citizen or a member of a Treaty First Nation is in issue, there may be a dispute as to whether it can pass by will (see Division 3 of Part 2 of *WESA*).

Chapter 10

Remuneration and Accounts[1]

[§10.01] Final Steps

The final steps in estate administration will include paying the personal representative and the solicitor, and having the beneficiaries approve the estate accounts. This chapter provides an overview. For further discussion of these issues, refer to the *British Columbia Probate and Estate Administration Practice Manual*.

[§10.02] Remuneration of the Personal Representative

Three principal issues arise when considering the remuneration of personal representatives, trustees and solicitors: confirming the entitlement, establishing the amount, and following the proper procedure.

1. Entitlement to Remuneration

At common law, a personal representative is not allowed to profit from their 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 rebuttable 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.

When the will sets out the remuneration and the personal representative was one of the witnesses to the will, the provision is void (*WESA*, s. 43) unless the court orders otherwise. If it is void, section 88 of the *Trustee Act* will still apply.

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.

2. 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 that remuneration.

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:

(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 charges against the assets or liabilities of the estate, 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)).

Section 88 imposes a ceiling on the remuneration that can be claimed. In an estate of average complexity, the personal representative will generally be entitled to fees of 5% of the income and fees in a range of 2%-4% of the 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 (see *Re McColl Estate*, 1967 CanLII 860 (B.C.S.C.)):

(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 rep-

[1] Updated by **Hugh S. McLellan** of McLellan Herbert Locke LLP, most recently in November 2024 and also in 2021, 2022 and 2023. Previously revised by Denese Espeut-Post (2018 and 2019); PLTC (2016); Kirsten H. Jenkins and Raphael Tachie (2014 and 2006); Kirsten H. Jenkins (2005-2006); Margaret H. Mason (1996–2000); and Gary J. Wilson (1995 and 1996).

resentative. In the case of co-trustees or sequential trustees, the total remuneration will be no more than the maximum amount allowed by statute. If the two personal representatives cannot agree on the split between themselves, this can be determined by the court or registrar.

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 as follows:

  (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 the trustee's 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 12-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.

3. Expenses

In addition to remuneration, a personal representative is entitled to recover out-of-pocket expenses that were properly and reasonably incurred in the administration of the estate.

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 cannot be charged against the estate. If the estate did pay for these services, they normally would be charged back against the personal representative's remuneration.

A personal representative may retain a professional to prepare the accounts (except when the estate is small and simple or the personal representative has the experience and competence to prepare the accounts) and to prepare income tax returns.

A personal representative may be required to establish the reasonableness of the expenses they have incurred while administering the estate. If any expenses are determined not to be reasonable on a passing of accounts, the personal representative will not be indemnified for those expenses from the estate, or if already paid, be required to reimburse the estate.

If the estate is insolvent, the personal representative may still be personally liable for the costs.

4. Procedure and Payment

Remuneration of the amount claimed by the personal representative may be fixed by the approval of the estate beneficiaries. 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 SCCR 25-13.

SCCR 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 (SCCR 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, are assessed as special costs and paid from the estate (SCCR 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.)).

Personal representatives often take remuneration in advance of formally being rewarded remuneration. While the terms of a will may authorize pretaking, there is no statutory authority permitting pretaking; pretaking under s. 88 of the *Trustee Act* is improper and constitutes a breach of trust. If a personal representative pretakes remuneration, the personal representative may be required to repay that remuneration to the estate with interest. The personal representative may also enter into an agreement with the beneficiaries to allow pretaking if all beneficiaries of the estate or trust are ascertained and *sui juris*.

Remuneration is treated as a lien against the estate. If the estate is insolvent, subject to the rights of secured creditors, remuneration has priority of payment after reasonable funeral and testamentary expenses.

Remuneration paid to a personal representative or a trustee is taxable as income in their hands. The personal representative or trustee may have statutory remittance obligations in relation to the remuneration received, depending upon the quantum of remunerations as well as the relationship between the deceased and the personal representative.

[§10.03] Remuneration of the Solicitor

The following summary covers 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, and the procedures in rendering a bill and, if necessary, having that bill formally assessed.

SCCR 14-1(3) sets out the relevant criteria in charging fees for legal work in administering estates.

1. 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 themselves (i.e. work within the competence of a layperson). In this case, the lawyer's payment should be deducted from the personal representative's remuneration. 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.

The legal costs incurred by the personal representative may be approved by the residuary beneficiaries; otherwise, a determination of whether the expenses were reasonably and properly incurred will be made when the personal representative passes their accounts (*Braich Estate*, 2017 BCSC 1140 at paras. 51 and 62). If there is a shortfall between the lawyer's account and what a court determines to be appropriate legal costs to be paid by the estate, the personal representative will be personally liable for the difference (*Braich Estate* and *Feth (Estate of)*, 2014 BCSC 970 at para. 65).

When the lawyer also acts in the capacity of personal representative, the lawyer cannot be paid for legal services rendered in the administration of the estate unless a "charging clause" in the will authorizes such a payment or unless all the beneficiaries are *sui juris* and otherwise consent. This rule derives from the general rule under fiduciary law that a fiduciary, such as a personal representative, cannot personally benefit from their position as fiduciary (that is, by claiming fees for acting in the capacity of estate lawyer).

This is an example of a charging clause:

> 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 them, or by their 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, so if the lawyer is an attesting witness to the will, the charging clause is void by operation of s. 43 of *WESA*. 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. Despite this, if all beneficiaries are *sui juris*, the beneficiaries may agree to the lawyer being paid for legal services from the estate.

Note that a lawyer's ethical obligations under rule 3.4-38 of the *BC Code* prohibit a lawyer from preparing a will giving the lawyer or an associate a "gift or benefit" from the client, unless the client is a family member of the lawyer or the lawyer's

partner or associate. However, the annotations clarify that placing a charging clause in the client's will at the client's request does not constitute a prohibited "gift or benefit" within the meaning of the rule. See also *Practice Material: Ethics*.

In the absence of a charging clause, the lawyer who is a personal representative may engage the services of the lawyer's 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).

2. Lawyer's Services

A lawyer's range of services could include any or all of the following:

(a) Services Relating to Non-Estate Assets

These services could include life insurance being paid to a named beneficiary or joint property being transmitted to the surviving joint tenant. In such a 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.

A personal representative is not to be indemnified from the estate for legal costs of paying a lawyer who acts for the personal representative as a beneficiary of the estate instead of for the personal representative in their capacity as the personal representative. See *Re Wilcox Estate*, 2005 BCSC 83 where the court held the executor-beneficiary could not seek indemnity for legal costs associated with a wills variation proceeding as the legal services were rendered on behalf of the personal representative as a beneficiary rather than as a personal representative. See also *Doucette v. Clarke*, 2008 BCSC 506, for a discussion of the role of executors in wills variation proceedings.

(b) Responsibilities of the Personal Representative

Such services might include locating the will, arranging the funeral, finding the names and addresses of beneficiaries and creditors, collecting assets, paying 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, not charged against the estate as a disbursement of the personal representative.

A lawyer who is retained to do work that is typically the responsibility of the personal representative 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. The personal representative should bear the lawyer's fees for doing 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 remuneration the personal representative would be entitled to from the estate.

(c) 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.

3. Assessment of Account

In preparing their account, the lawyer should distinguish work that relates to the personal representative's responsibilities from true legal services, so the personal representative can be indemnified solely for legal costs properly incurred. Alternatively, a lawyer can prepare two separate bills.

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.

As part of a formal passing of accounts, the registrar conducting the hearing may "moderate" the legal account if it is put in issue by a beneficiary. However, even if the registrar moderates the legal account and thereby reduces the amount to be paid by the estate, a personal representative may still be personally responsible for the full amount of the legal account. A lawyer advising a personal representative should inform the personal representative that they can avoid this situation by seeking a review of the legal account under the *Legal Professions Act*. Alternatively, the lawyer may agree to reduce the account to the moderated amount.

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 SCCR 14-1. Residual beneficiaries may insist that a lawyer's bill be reviewed if the personal representative seeks to be indemnified for the bill out of the estate.

As noted earlier, the reasonableness of a lawyer's fee is determined by criteria set out in SCCR 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 (SCCR 14-1(5)).

[§10.04] Duty to Account

1. Source of the Duty

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. That includes income and capital beneficiaries (whether vested or contingent) and legatees (that is, recipients of specific bequests). It also includes unpaid creditors of the deceased, successor trustees, and other persons who have an interest in the deceased's assets.

The duty to account arises at common law, although the procedure for passing accounts is also based on statute and general custom. 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.

The personal representative must give to anyone to whom they owe a duty to account such information as that party reasonably requires. Therefore, 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 their legacy will be paid.

The personal representative has a duty to provide the estate beneficiaries with information about the estate and the progress of the estate administration. If a will contains a term which requires the personal representative to withhold information from a beneficiary, that term is likely invalid (*Spelay (Litigation Guardian of) v. Spelay*, 2007 SKQB 408; see also *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8).

However, while a court may order the disclosure of trust documents to a beneficiary as part of the court's inherent jurisdiction to supervise the administration of trusts, a beneficiary may not be entitled to disclosure of a trust document. The court must consider the particular circumstances and balance the competing interests in the trust when making orders about the disclosure of trust documents (*Schmidt v. Rosewood Trust Ltd. (Isle of Man)*, [2003] UKPC 26; see also *Barbieri Estate v. White*, 2023 BCSC 1176).

2. Statutory Requirement to Pass Accounts

The *Trustee Act*, R.S.B.C. 1996, c. 464 includes provisions requiring a personal representative to pass accounts.

(a) 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.

(b) Section 99(2)

> Any person beneficially interested in the estate may require a personal representative to pass accounts annually within one month from the anniversary of the grant or the personal representative's appointment.

(c) Section 99(3)

> If the personal representative fails to comply with ss. 99(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 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 is not available if approval is withheld or is not otherwise available (for example, if a beneficiary is unascertained, cannot be found or is suffer-

ing from a disability, or where there are infant beneficiaries).

3. Procedure for Passing Accounts

The SCCR set out a detailed procedure under which personal representatives can pass their accounts and seek compensation (*Lau v. Char*, 2015 BCSC 623). SCCR 25-13 sets out the form that a personal representative's accounts should take and the general process and SCCR 25-14 sets out the procedure for applications.

A statement of account affidavit in Form P40 must include the following:

(a) a description of the assets and liabilities of the estate as at the later of the following:

  (i) the date of the deceased's death; and

  (ii) the last day of the period covered by the most recent accounting passed or approved and consented to in writing by all beneficiaries;

(b) a description, in chronological order, of all capital transactions that occurred since the date set out in paragraph (a);

(c) a description, in chronological order, of all income transactions that occurred since the applicable date set out in paragraph (a);

(d) a description of the assets and liabilities of the estate as at the last day of the period covered by the accounts to be passed;

(e) a calculation of the remuneration, if any, claimed by the applicant for i) the applicant; and ii) any current or previous personal representative or trustee for whom a claim for remuneration has not yet been made; and

(f) a description of all distributions made and any distributions expected to be made out of the estate; and

(g) any other details or information the court may require or the applicant considers relevant.

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. Without full receipts or full explanations, the personal representative may be personally liable for expenses. 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.

4. Tax Considerations

It is important to note that accounting statements prepared for tax purposes may have significant differences from 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.

When advising personal representatives or trustees on tax matters, consider whether you have the required knowledge or whether you should recommend that they consult another advisor.

5. 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 the accounts, including any remuneration being sought by the personal representative, as well as a waiver of a formal passing of accounts before the court. In the case of specific or pecuniary legatees, acknowledgments of receipt of the gift or releases should be obtained in exchange for their legacies, but no obligation arises to provide accounts unless the legacies have not been fully satisfied.

A personal representative should provide all necessary information to a beneficiary before that beneficiary signs a release and consent, to avoid the possibility of a court requiring a formal passing of accounts because the beneficiary was not apprised of all facts before signing a release (*Leckie v. Mitchell*, 1997 CanLII 2288 (B.C.C.A.)).

If a beneficiary is incompetent and a committee has been appointed, the committee has the power to approve accounts (*Patients Property Act*, s. 15(1)).

If a beneficiary is a minor, accounts must be formally approved before the court by the personal representative. A guardian cannot approve accounts on behalf of a minor and the Public Guardian and Trustee will not do so either. However, it may be possible to have the accounts approved by the court on a summary basis.

If consent cannot be obtained and accounts must be formally approved, the personal representative or a person interested in the estate may apply under SCCR 25-13 for a formal passing of accounts. The process is initiated by filing the affidavits prescribed by that Rule, as follows:

(a) the affidavit in support of application to pass accounts (Form P38); and

(b) the statement of account affidavit (Form P40), along with a notice of application in the existing court file.

If there is no existing court proceeding, the process may be initiated by petition (SCCR 25-14(1.1)).

The personal representative is generally entitled to be indemnified by the estate for the costs of the passing of accounts (*MacLean v. MacLean*, 2009 BCSC 292; *Re Hillis Estate*, 2015 BCSC 208), unless there was some conduct on the part of the personal representative that is reprehensible and deserving of rebuke (*Bigras v. Bigras Estate*, 2011 BCSC 950 at para. 64). Beneficiaries generally obtain their costs for participating in the passing of accounts process (*Re Chute Estate*, 2014 BCSC 344 at para. 102). However, if the beneficiary's objections to the accounts are not reasonable, the beneficiary may have to pay costs (*Re Haworth Estate*, 2015 BCSC 1530).

6. Discharge of Personal Representative

A personal representative may be discharged from their duties informally or by application to court.

A personal representative is informally discharged once they have:

(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 personal 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)). In practice, many personal representatives do not seek a discharge. This would allow the undischarged personal representative to deal with assets that come to the estate in the future (such as from unexpected inheritances).

Chapter 11

Solicitors' Duties and Responsibilities[1]

[§11.01] Duty of Care in Taking Instructions

Lawyers who practise in wills and estates 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 defined in s. 8 of the Act).

The ingredients of a cause of action in negligence are well known, and were recently set out by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 at para. 3:

(1) the defendant owed the plaintiff a duty of care;

(2) the defendant's behaviour fell below the standard of care;

(3) the plaintiff sustained damage; and

(4) the damage was caused, in fact and in law, by the defendant's breach.

In the case of a disappointed beneficiary, the duty arises when the lawyer undertakes to prepare the will. The standard of care may be breached if the lawyer commits an error. The injury occurs when the will comes into force and the will-maker's wishes are not executed as intended, causing prejudice to the beneficiary. Consequently, the cause of action will arise when the disappointed beneficiary "discovers" the lawyer's error.

Consider this example showing 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 current *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 under the current *Limitation Act* may be extended under the discoverability, disability or confirmation provisions of the Act, to a maximum of 15 years from the date the cause of action arose.

Note that the predecessor *Limitation Act* had an ultimate limitation period of 30 years, and it would apply to cases where the claim arose while that Act was in force (the new Act came into force on June 1, 2013). For example, in 2014 a disappointed beneficiary discovered a claim that arose on her mother's death in 1981. She brought suit against a law firm. The Court of Appeal confirmed in 2017 that the 30-year limitation period had expired in 2011: *Byrn v. Farris, Vaughan, Wills & Murphy LLP*, 2017 BCCA 454.

Lawyers can take steps to protect themselves. In addition to carrying adequate insurance for errors and omissions, lawyers should always follow prudent procedures:

(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, liabilities, and family relationships;

(d) keep detailed notes of the advice that the lawyer has given;

(e) confirm the nature of the client's interests in 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.

Careful office procedures and good file management should be maintained to avoid problems in this area. It is prudent to think ahead and plan in case urgent situations arise. 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, with the longer office-generated will to follow later? In a busy office, what reminders are in place to ensure that will instructions do not sink to the bottom of the "to do" list? What is the office protocol when the unilingual lawyer is about to take instructions from a client who has only limited English, or has an accompanying close relative who intends to be there to translate the client's wishes and assist at execution?

In addition to understanding the laws relating to wills, trusts and estates, the lawyer will need to understand the laws concerning income tax, real property, conflict of laws, insurance and corporations. It is important for the lawyer to keep up with changes in the relevant law, and avoid dabbling in unfamiliar areas of law.

[1] Updated by **Jamie L. Porciuncula** of McLellan Herbert Locke LLP in November 2024, 2023 and 2022. Previously updated by Allison A. Curley (2021); PLTC (2016 and 2018); and Helen Low (2005). Original chapter prepared by Donovan Waters, KC.

[§11.02] Duty of Care to Beneficiaries

1. Disappointed Beneficiaries of Failed Gifts

The starting point for liability of a lawyer to a third-party beneficiary 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 and was present at the will-maker's house for the execution of the will. Unfortunately, the solicitor allowed a beneficiary's spouse to act as a witness, which rendered a gift to that beneficiary void under the then-operative statute (the *Wills Act*, R.S.B.C. 1960, c. 408, s. 12(1)). Aikins J. found the solicitor was negligent, and held the solicitor's firm liable to the disappointed beneficiary, applying principles from *Hedley Byrne & Co. Ltd. v. Heller & Partners*, [1964] A.C. 465 (H.L.):

(a) the relationship gave rise to a duty of care;

(b) the standard of care was not met, due to negligently making an implied representation;

(b) a third person foreseeably relied upon the representation; and

(c) the third person suffered injury.

In order to succeed, the third party (the disappointed beneficiary) must show that they relied on the skilled, though negligent, solicitor. Aikins J. focused on the specific facts of the case. The disappointed beneficiary was the will-maker's son; Aikins J. weighed the relative needs of the other beneficiaries, the will-maker's other children and grandchildren. 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. emphasized that the case depended on its particular facts and that he was making no pronouncement on the general issue of a solicitor's liability for negligence to a third-party 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 a 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 the 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, nor discovered the error in the two years that then passed 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 owed 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.

Megarry V.C. also decided that 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, there was none 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.

2. Disappointed Beneficiaries Not Provided For

Ross v. Caunters potentially expands the ambit of solicitors' liability to third party beneficiaries. The House of Lords in *White v. Jones*, [1995] 3 All E.R. 691 (H.L.) considered this potentially expanded liability.

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 to recover their losses.

The House of Lords divided 3:2, with the majority holding that the solicitor was liable to the would-be beneficiaries. 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 their own 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 the solicitor may never have spoken to or corresponded with the third party (as in *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 when and to whom it would apply.

Lord Nolan alone (the third member of the majority) was prepared 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*. As a result, having considered *Ross v. Caunters*, the House merely declined to apply it to the facts at hand.

The majority of the House of Lords extended the principle in *Hedley Byrne*, *supra*, so as to give a remedy. The *Hedley Byrne* principle does not strictly apply to the solicitor and the disappointed beneficiary, because the solicitor who receives instructions and fails by delaying to draft a will before the client dies has made a misrepresentation to no one, let alone the third party who is a stranger to the solicitor. 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 of Lords, the solicitor, like any other agent who receives instructions from a 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 was justifiable to "extend" the principle of tort liability in *Hedley Byrne.*

White v. Jones was subsequently cited by the BC Court of Appeal in *Esser v. Luoma*, 2004 BCCA 359. At para. 12, Newbury J.A. cited Lord Goff from *White v. Jones* in recommending a *Hedley Byrne* analysis:

> [I]n cases such as these [courts should] extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor [emphasis added by the B.C.C.A.].

In *Esser v. Luoma*, a notary who transferred land title at the request of a fraudster using a forged document was found not to have a duty of care to the actual landowner, and not to have breached the standard of care.

The BC Court of Appeal agreed with the statements by the House of Lords in *White v. Jones* that expanding the *Hedley Byrne* analysis "was not seen as likely to involve indeterminate liability," again citing Lord Goff:

> There must be boundaries to the availability of a remedy in such cases; but these will have to be worked out in the future, as practical problems come before the courts. In the present case Nicholls V-C observed that, in cases of this kind, liability is not to an indeterminate class, but to the particular beneficiary or beneficiaries whom the client intended to benefit through a particular will.

In *Smolinski v. Mitchell*, 1995 CanLII 1545 (B.C.S.C.), a solicitor took instructions and drafted a will, but the will-maker delayed finalizing the names of beneficiaries. When the will-maker decided on the beneficiaries, he divided his estate between a cousin and the lawyer. The lawyer tried to discourage the will-maker from making him a beneficiary, but the will-maker was adamant, so the lawyer insisted that the will-maker get independent legal advice. The will-maker did not, and the will was never executed. The disappointed cousin sued the lawyer who had failed to execute the will. The lawyer was a Bencher, a QC, and a member of the Law Society's disciplinary committee. The BC Supreme Court dismissed the cousin's claim, saying that it was an unusual case, but the court would not impose a duty on a lawyer to a third party that was in conflict with the lawyer's duty to the client.

3. Disappointed Beneficiaries Disinherited

Solicitors owe no duty of care to beneficiaries under a former will. The BC Court of Appeal, in *Johnston Estate v. Johnston*, 2017 BCCA 59, at para. 37, made that clear:

> [T]here is no justification for imposing a duty on solicitors taking instructions from a testator for a new will to protect the interests of beneficiaries under a former will.

The Court of Appeal went on to say that the solicitor, in discharging a duty to the client, owes a parallel duty to people the client wishes to benefit. However, the solicitor does not owe an independent fiduciary duty to the beneficiary of a will:

> In other words, any duty owed by a solicitor to a beneficiary in a will must mirror the duty owed to the testator: the duty to competently fulfill the testator's instructions. Thus, a solicitor cannot owe an independent fiduciary duty to the beneficiary of a will [at para. 38].

[§11.03] Common Errors

The Lawyers Indemnity Fund has identified some particular risks that give rise to a large number of claims in the area of wills and estates:

(a) Taking on the role of executor. Make sure you understand the duties of an executor, the time they will take, and the potential for personal liability.

(b) Undue influence. Under *WESA*, s. 52, the burden of proof has shifted so that if a beneficiary is shown to have been in a relationship of potential dependence or dominance with the will-maker, that beneficiary must then prove that the gift under the will was free of undue influence.

(c) Adult guardianship, representation agreements, enduring powers of attorney, and various tools to manage financial affairs, health care and personal planning. Lawyers should familiarize themselves with the proper tools to suit particular clients' needs.

(d) Oversights. Flawed office systems for cataloging receipt and storage of estate property, unintentional clerical errors when drafting documents, and delegation without proper supervision.

(e) Communication failures. Failure to listen, ask for instructions or consent, or explain to clients, and failing to devote enough time and attention to ensuring a client understands and provides the information the lawyer needs.

(f) Legal issue failures. Failing to sort out legal issues or strategies required to achieve a client's goal due to ignorance of the law or failure to think through all the legal issues and potential strategies to implement to achieve the client's goals.

The Law Society has identified claims and potential claims brought against lawyers for negligence in the wills and estates area. Acts of alleged malpractice include the following:

(a) failure to identify family members or potential beneficiaries 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 nature or ownership of the will-maker's assets so as to draw a will that reflected the will-maker's intentions;

(c) failure of the lawyer to proofread a revised will before execution; and

(d) failure to draft a will promptly after receiving instructions from the will-maker.

It is not only the drafting of wills, but their formal execution that has caused litigation. Lawyers should know the statutory rules for formal execution and be alert in putting them into practice, even though 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.

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;

(c) the spouse of a beneficiary or a beneficiary witnesses the will (*WESA*, s. 43);

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

(e) writing "null and void" across a will that the will-maker intends to revoke; and

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

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 jurisdiction where the land is situated demand any formalities different from those required in this province? 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.

The public has expectations of the lawyer, but the fees charged by lawyers for preparing wills rarely reflect 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 who have the necessary expertise in the area. This is to approach will preparation as one would approach conveyancing, where few solicitors are willing to "dabble" in an area that, at first glance, appears routine and repetitive, while closer examination reveals that it is an area fraught with traps and liability risks. These risks may not be 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 wills 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 12

Creditors[1]

[§12.01] What Creditors Might Claim

This chapter introduces the lawyer to advising the personal representative with respect to creditors' claims. Those claims might be for amounts owing from the estate, but they could also include claims against the personal representative.

For further discussion on this topic, see the *British Columbia Probate and Estate Administration Practice Manual*.

[§12.02] Claims and Defences

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 to deal with on behalf of the estate.

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 (SCCR 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. The judgment is not a personal liability of the personal representative (unless the personal representative represented that the estate had sufficient funds to pay the debt, which turned out to be inaccurate).

(ii) Liabilities incurred in respect of death

The personal representative likely will pay the reasonable costs of funerary and interment expenses for the deceased. The personal representative is entitled to be indemnified out of the assets of the estate for these expenses.

(iii) Liabilities incurred in administering the estate

The personal representative likely will 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 bring an action against the personal representative for the improper performance of the personal representative's 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 do so, 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 and burial expenses, and the executor fails to do so, this is a breach of trust.

[1] Updated by **Hugh S. McLellan** of McLellan Herbert Locke LLP, most recently in November 2024 and also in 2014, 2017, 2019, 2021, 2022 and 2023. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content relating to the *Indian Act*. Previously updated by PLTC (2016); Kirsten H. Jenkins (2005 and 2006); Roger D. Lee (2002, for content relating to the *Indian Act*) and Linda J. Yardley (1997–2002).

(ii) *Devastavit* (Mismanagement)

If the personal representative fails to administer the estate with due diligence, then the personal representative 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 the deceased were 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 their 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?

[§12.03] 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 the surety's 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.

In some cases, the limitation period may not end for years after the deceased's death, which could delay the administration of the estate. A personal representative can initiate a 180-day limitation period for a disputed claim by serving notice on a creditor under s. 146 of *WESA*.

3. Family Creditors

Often, a relative or household member who provides domestic services to the deceased makes a claim that they provided services by an agreement under which the deceased promised to compensate them. That creditor must prove that a contract existed. For example, the creditor may have to satisfy the court that the claim is a valid one and rebut the presumption that service was rendered out of affection or familial duty not 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 considera-

tion as to make the commitment a contract. For a case on enforceability of pledges see *Brantford General Hospital Foundation v. Marquis Estate*, [2004] O.J. No. 1705 (C.A.), affirming (2003), 67 O.R. (3d) 432 (Sup. C.J.), where a charitable organization unsuccessfully attempted to enforce payment of the balance of a one million dollar pledge that the deceased had made but only partially paid.

5. Spousal and Child Support

If the deceased was, immediately prior to death, liable for payments to an estranged spouse or child under a separation agreement or a court order, any arrears outstanding immediately prior to death will be a debt payable out of the estate. The personal representative will also have to determine whether the estate is liable for ongoing support in respect of the period following death. If so, the estranged spouse or child will rank as an ordinary creditor of the estate for the future installments, and the personal representative will be obliged to provide for that claim before distribution to beneficiaries. Failure to do so will render the personal representative personally liable to the claimant for *devastavit*.

The general rule was that liability to pay support is a personal obligation that does not survive the death of the payor, so each case was determined by interpretation of the separation agreement or court order. Pursuant to s. 171(1) of the *Family Law Act*, S.B.C. 2011, c. 25, a deceased's estate may be liable for child or spousal support.

The personal representative may also apply to suspend, terminate or change a support order (s. 171(2)).

If the original support order or agreement was silent as to what happens after the payor dies, an application may be made by a person receiving support to have the support continue and be a debt of the estate (s. 171(3)). As there does not appear to be a limitation period for a person to seek this order, the personal representative ought to consider issuing a notice under *WESA* s. 146 to start the 180-day statutory limitation period for a creditor to bring a claim against an estate (see §12.06(3) later in this chapter).

6. Creditor or Debtor a Beneficiary or Executor

(a) Creditor a Beneficiary

At common law, if a debtor bequeaths to a creditor a legacy equal to or greater than the debt, the legacy is presumed to have been intended to satisfy the debt, subject to the contrary being shown. If the legacy is less than the debt, the presumption does not apply and there is no partial satisfaction. For the presumption to apply, the debt must exist when the will is made.

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 the personal representative by the deceased.

However, if a defence exists against the creditor/personal representative that would be valid as against a creditor at arm's length, the personal representative must reject their 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.

[§12.04] 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 §5.04(1)). There is no similar provision for an administrator, but in reality, an administrator would rarely be appointed before the funeral.

The personal representative should decide which expenses are funeral expenses, then decide what is a reasonable amount for each expense in the circumstances, considering the size of the estate, the deceased's situation, and similar factors. The person instructing the funeral director is personally liable to pay all expenses in-

curred, but is entitled to recover reasonable expenses from the estate.

If conflict over funeral expenses is foreseeable, the personal representative should seek approval, however informal, from the residuary beneficiaries (and perhaps senior creditors) for the arrangements.

[§12.05] 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 that the personal representative makes to carry out the responsibilities of the position. For example, the personal representative is personally liable for the full amount of their lawyer's proper account, even if the assets of the estate are insufficient to fully repay the personal representative.

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 the personal representative was authorized (i.e. directed or empowered by instrument or law) to carry on the business.

Issues of liability and indemnity similar to those for business debts may arise in non-business situations. For example, the deceased may have been engaged in a costly personal project, such as construction of a home or a boat, that was incomplete at the time of their death. The personal representative must decide whether to pay to finish the project before selling it, or find a buyer on an as-is basis.

Lawyers advising personal representatives must be particularly careful in the advice they give in this area. It is often wise to seek the consent of the beneficiaries to such ventures.

[§12.06] 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 Chapter 8). The lawyer should ask the personal representative to bring to that meeting as much information as is then available.

2. Searches and Inquiries

The personal representative must be diligent in conducting searches and attempting to identify all of the deceased's liabilities as well as keeping track of the personal representative's own costs. There are various searches and inquiries that the personal representative and the lawyer should perform, and they should share the results of their inquiries with each other.

(a) Lawyer's Inquiries

Inquiries made by the lawyer are best handled by letter or email (so there is a "written" record), unless personal attendance is considered necessary or advisable.

(b) Searches

In certain circumstances it may be appropriate to search registries for liabilities, such as the Personal Property Registry (for vehicle loans and evidence of a company's indebtedness or personally guaranteed corporate liabilities) and the court registry (for pending lawsuits, orders, and outstanding judgments).

(c) Advertising for Creditors

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 the personal representative 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.

If the administration of the estate is governed by the *Indian Act* and an application to administer the estate has been forwarded to the responsible Minister, s. 8 of the *Indian Estates Regulation*, C.R.C., c. 954, provides that 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. In practice, the notice to creditors is prepared by the personal representative on forms provided by the responsible Ministry requiring creditors to report the claim to the personal representative, and posted by the personal representative in places like the Band office, post office and other places frequented by the deceased.

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 the personal representative 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 claimant can bring an action to enforce the claim. The personal representative gives the creditor notice (as set out under s. 146(2)) to bring an action within 180 days or the claim will be forever barred. Section 146(2) sets out the requirements for the form of notice.

The 180-day limitation period does not apply to a claim against the estate by a beneficiary or intestate successor, or to a wills 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 to the personal representative is that, on approval or passing of accounts, a beneficiary might object to the payment as being entirely unnecessary or excessive. 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. In some cases, a personal representative might try to obtain consent to the compromise from the affected beneficiaries. In other cases, it is prudent to seek a court order approving a settlement.

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. 69).

6. Distribution Under Direction of Court

Section 39 of the *Trustee Act* allows the personal representative to apply by petition for an order that the personal representative is permitted to distribute the estate, taking into consideration only the claims that the personal representative has been able to ascertain; and that the personal representative is not liable for any claims that the personal representative had no notice of at the time of distribution.

If the court makes an order under s. 39, the order protects the personal representative against claims for a share in the estate. It does not prevent creditors from pursuing the beneficiaries.

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 request of a creditor), the federal statute will apply.

Lawyers should be cautious in advising clients to undertake the administration of insolvent estates, as there is a specified hierarchy for priority of payments from the estate. Personal liability can attach to the personal representative (and perhaps pass on to the lawyer) if the hierarchy is not strictly followed.

Chapter 13

Variation of Wills[1]

[§13.01] What is Variation of a Will

This chapter deals with applications to vary a will under *WESA* Part 4, Division 6–Variation of Wills. In particular, this chapter discusses *WESA* 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 important procedural changes. The common law principles established in interpreting *WVA* provisions still apply.

Under *WESA*, a spouse or child may commence an action, within 180 days from the date of the representation grant, if the spouse or child feels that the will does not adequately provide for the spouse or child's 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 Indigenous person who was registered or entitled to be registered under the *Indian Act* and who died ordinarily resident on a reserve, a completely different regime governed by the *Indian Act* may apply. For more detail, see the *British Columbia Probate and Estate Administration Practice Manual*.

For more detailed information on wills variation claims, see the *British Columbia Probate and Estate Administration Practice Manual*.

[1] Updated by **J. Jeffrey Locke** of McLellan Herbert Locke LLP, most recently in November 2024 and also in 2021, 2022 and 2023. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content relating to the *Indian Act*. Previously updated by Denese Espeut-Post (2019); Candace Cho and Nicole Chang (2018); PLTC (2016); Kirsten H. Jenkins and Raphael Tachie (2014); Roger D. Lee (2002, for content relating to the *Indian Act*); and Lynn Waterman (annually since March 1995).

[§13.02] Jurisdiction

A number of conditions must be satisfied before the court has jurisdiction to make an order under s. 60 of *WESA*.

1. Requirements

(a) Valid Will

The first condition precedent to the court's jurisdiction is that a valid will must exist (*Hammond v. Hammond*, 1995 CanLII 1597 (B.C.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" under the Act as meaning any of the following:

(i) a will;

(ii) a testament;

(iii) a codicil;

(iv) an appointment by will or by writing in the nature of a will in exercise of a power;

(v) anything ordered to be effective as a will under s. 58 [*court order curing deficiencies*]; or

(vi) any other testamentary disposition except the following:

- a designation under *WESA* Part 5 *[Benefit Plans]*;
- a designation of a beneficiary under Part 3 [*Life Insurance*] or Part 4 [*Accident and Sickness Insurance*] of the *Insurance Act*; or
- 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 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 include property held in joint tenancy, assets held in a trust settled in the lifetime of the will-maker, pension funds, insurance policies, RRSPs declared to be payable to designated beneficiaries, and other types of "benefit plans" as defined in s. 1(1). 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, and in fixing the amount of the provision to be made (*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 14, §14.05.

(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* in respect of a will of a Nisga'a citizen if that will provides for devolution of cultural property (s. 13).

(i) Spouses

Whether an applicant in a wills variation action qualifies as a spouse depends on whether the applicant can establish they were married to or lived with the will-maker in a marriage-like relationship for at least two years, and they have not ceased to be a spouse.

Section 2 of *WESA* defines a spouse:

> (1) Two persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and they were married to each other, or they had lived with each other in a marriage-like relationship for at least two years.
>
> (2) […]
>
> (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 (s. 2(2)) under *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.

Separation is an event that causes an interest in family property to arise under the *Family Law Act*. Therefore, a separated spouse (even if not yet divorced) has ceased to be a spouse under s. 2(2) of *WESA*. Judicial interpretation will be required to assess what constitutes "termination" of a marriage-like relationship under s. 2(2)(b).

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)).

A will-maker might die leaving more than one "spouse" (within the meaning of *WESA*). For example, a person may be legally married to one person, with no intention to separate, but also live in a marriage-like relationship with another person. The existence and nature of the other relationships are factors to consider in assessing the validity of a marriage-like relationship (*Mother 1 v. Solus Trust Co*., 2019 BCSC 200).

The status of a spouse under *WESA* 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, and the existing case law definitions apply.

The case law establishes that the term "children" includes only the biological or adopted children of a will-maker (*Hope v. Raeder Estate*, 1994 CanLII 2185 (B.C.C.A.), cited in *Hyslop v. Banks*, 2024 BCSC 1848).

The following persons do not qualify as "children" under *WESA*:

- a stepchild not adopted by the will-maker;
- a child for whom the will-maker stood *in loco parentis* (in the place of a parent) but had not adopted (e.g. the child of a will-maker's common-law spouse, if the will-maker had not adopted the child); and
- a biological child of a will-maker if that child has been adopted by a third party.

Section 3(2) of *WESA* provides that an adopted child is not entitled to the estate of the person who was their 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 for the purposes of succession, such relationship must be determined in accordance with the *Adoption Act*, R.S.B.C. 1996, c. 5.

For the purposes of determining whether a claimant qualifies as a child under *WESA* and therefore has standing to seek a variation pursuant to s. 60, the court may order that the claimant submit to DNA testing to determine if they are the biological child of the will-maker (*Hyslop*).

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)). "Issued" refers to when the grant is entered in the court registry. There is no provision in *WESA* for extension or suspension 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)). In other words, once an action has been commenced in time by one claimant, the limitation period for claims by other claimants is eliminated.

[§13.03] 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 Supreme Court Civil Rules (SCCR 21-6(4)).

The executor must be a party to the proceeding. A copy of the notice of civil claim must be served on the executor not later than 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)). The role of the Public Guardian and Trustee is to ensure the party under a legal disability has a litigation guardian acting by counsel.

If the proceeding concerns the will of a Nisga'a citizen or a member of a Treaty First Nation, a copy must be served on the Nisga'a Lisims Government or the Treaty First Nation.

2. Parties

Parties to a proceeding under s. 60 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)).

If the applicant is under a legal disability, the proceeding must be commenced by the applicant's litigation guardian.

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.)).

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 pleading.

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, then the terms of the settlement will require approval from the court, often with input from the Public Guardian and Trustee's office. In this case, the parties must satisfy the court that there is a reasonable basis for the exercise of the court's discretion to make the order in accordance with the settlement (*Behnke v. Behnke Estate*, 1994 CanLII 2334 (B.C.S.C.)). A court may refuse to make an order in accordance with the settlement agreement if the court is not satisfied that this test has been met.

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)).

Such evidence may include statements made by the will-maker during the will-maker's lifetime or a memorandum that records 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.

Where the existence, execution, contents or validity of a will are at issue, the lawyer who took the instructions and prepared the will is compellable to give evidence about the instructions they received from the will-maker. When the will-maker's true intentions are at issue, there is an exception to the general rule that solicitor-client privilege continues after a client's death (*Gordon v. Gilroy*, 1994 CanLII 829 (B.C.S.C.)).

7. The Order and Costs

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). Current case law indicates that a variation order must be in final form, except possibly as to costs.

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, and 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.); *Hall v. Picketts,* 2007 BCSC 1278, affirmed 2009 BCCA 329). However, in several wills variation cases the court did not follow the general rule and 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; *Mazur v. Berg,* 2010 BCSC 109) or on the basis that the cause of the dispute stemmed from the will-maker's actions (*Griffin v. Canada Trust*, [1995] B.C.J. No. 2132 (S.C.); *Maddess v. Racz*, 2009 BCSC 1550).

Generally, an executor is entitled to receive special costs from the estate because the executor must be a party to the wills variation proceeding. However, when the executor is also a beneficiary, the person's costs as an executor must be separated from their costs as a beneficiary (*Wilcox v. Wilcox*, 2002 BCCA 574; *Lee v. Lee Estate*, 1993 CanLII 2368 (B.C.S.C.); *Doucette v. Clarke*, 2008 BCSC 506).

8. Appeal, Variation and Rescission

Appeals are provided for in *WESA* under s. 72. A person who believes they were prejudicially affected by the order may appeal to the BC Court of Appeal. On appeal, the court will exercise an independent discretion and reach its own conclusion, but will defer to the trial judge on matters that depend on an assessment of oral testimony.

Variation and rescission of orders are provided for under s. 71. If the court ordered periodic payments, or that a lump sum be invested for the benefit of a person, the court may inquire at a later date into the circumstances of the person in whose favour the order was made to determine if there is a change in circumstances. In the event of a change of circumstances, the court may cancel, vary or suspend its order or make another other order.

[§13.04] 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, the executor is prohibited from distributing the estate within the 210 days following the date of the issue of the representation grant, except by order of the court or with the consent of all beneficiaries and persons entitled to commence a wills variation claim. There is an exception if the executor sets aside required amounts under s. 155(1.3) to compensate potential claimants.

An executor is also prohibited (*WESA*, s. 155(2)) from distributing the estate *after* the expiry of the 210-day waiting period, if any of these apply:

- proceedings have been commenced as to whether a person is a beneficiary or intestate heir;
- a variation claim has been brought; or
- other proceedings have been brought which may affect distribution (s. 155(2)).

To avoid potential 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 any time thereafter if an action has been commenced, and does so without the consent of all persons who would be entitled to apply under *WESA*, the executor 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, despite 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 variation 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 the executor's counsel to ask to be excused from the trial of such a proceeding after providing such financial particulars of the estate as are required.

An executor who wants to bring an action under *WESA* must step down as executor 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; *Harrison v. Harrison* (1982), 40 B.C.L.R. 143 (S.C.)).

[§13.05] Duty to Make Adequate Provision

1. Adequate, Just and Equitable

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 will-maker's **legal obligations** to their spouse and children; and
- second, the will-maker's **moral obligations** to their 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 considering 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. Case law provides guidance.

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:

(a) The main aim of the *WVA* (*Wills Variation Act*, now part of *WESA*) is the adequate, just and equitable provision for the spouse and children of will-makers.

(b) The will-maker's testamentary autonomy should be protected and only interfered with insofar as the statute requires.

(c) The "adequate provision for the proper maintenance and support" test is an objective test.

(d) "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.

(e) Examples of circumstances which bring forth a moral duty on the part of a will-maker to recognize the claims of adult children are:

- adult child's disability;
- assured or implied expectation arising from the abundance of the estate or from the adult child's treatment during the will-maker's lifetime;
- child's present financial circumstances;
- child's probable future difficulties; and
- the size of the estate and other legitimate claims.

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. The reasoning must also be assessed using the objective standard of a reasonable will-maker in order to be considered "valid and rational" (*Tom v. Tang*, 2023 BCCA 221).

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 the plaintiff had become accustomed must be considered in light of the estate's ability to meet such a claim, as well as factors such as the size of the estate and the presence of other dependants (*Spinney v. Royal Trust Co.* (1973), 19 R.F.L. 191 (N.S.S.C.); *Walker v. McDermott*, [1931] S.C.R. 94).

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 neighbour-

hood) 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.)).

(ii) The court balanced the relative financial circumstances of an infant child applicant with that of the surviving common law spouse in determining priorities (*B. (K.D.M) v. Taylor,* 2008 BCSC 1498).

(iii) An adopted child with greater financial and health needs than the preferred child beneficiary received an award equal to the sibling (*Laing v. Jarvis Estate*, 2011 BCSC 1082).

(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.));

(ii) the will-maker had preferred one child over another (*Re Tornroos Estate*, [1976-77] B.C.D. Civ. (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 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) Disability

In *Woods (Guardian of) v. Woods Estate,* 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).

The court may consider an illness that was not known to the will-maker prior to the will-maker's death and may vary the will for the benefit of the disabled applicant (*Re Dunn Estate*, 1944 CanLII 243 (B.C.S.C.)).

The current approach of the courts confirms that a will-maker's moral obligation to provide for a mentally incompetent dependent adult is not negated by the provision of government care (*Newstead v. Newstead Estate*, 1996 CanLII 564 (B.C.S.C.). However, there have been circumstances where the courts have not made additional provision for a disabled dependent adult maintained by the state (*Champoise v. Prost*, 1998 CanLII 15099 (B.C.S.C.)).

A will may be varied to create a discretionary trust for a disabled applicant, to avoid negatively impacting the applicant's entitlement to government benefits (*A.(S.) v. Metro Vancouver Housing Corp*., 2019 SCC 4).

(e) 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 the spouse 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 had 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 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.

The court may look to moral obligations to support spouses in determining whether the will-maker made adequate provision: *Brown v. Terins Estate*, 2016 BCSC 42. Determining the moral obligation owed to a spouse, however, is not as clear as determining the legal obligation. A moral obligation to a spouse may be increased by the length of the marriage, the efforts of the spouse in caring for the will-maker, and the spouse's contribution to the will-maker's assets. Other considerations include the spouse's age, career, and income, and the will-maker's financial support of the spouse (see *Li v. Ellison*, 2014 BCSC 501).

(f) Factors Specific to Minor Children and Independent Adult Children

A will-maker owes a legal and moral obligation to provide for minor dependent children. The claim of a minor dependent child will take priority over that of a financially independent spouse (*B.(K.D.M.) v. Taylor*, 2008 BCSC 1498). However, where sufficient assets are provided to the surviving parent in the will for the proper maintenance and support of the minor child, a court will not vary the will in favor of the minor child (*Cameron v. Cameron Estate*, 1991 CanLII 263 (B.C.S.C.)).

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). See also *Nulty v. Nulty Estate*, 1989 CanLII 244 (B.C.C.A).

McBride v. Voth, 2010 BCSC 443 enumerated six considerations that inform the analysis of a testator's moral obligations to their independent adult children:

(i) Contributions to the estate and reasonably held expectations on the part of the claimant;

(ii) Misconduct or poor character of the claimant;

(iii) Estrangement or neglect in the relationship between the testator and child;

(iv) Gifts and benefits made by the testator during the testator's lifetime;

(v) Unequal treatment of children; and

(vi) Testator's reasons (if valid and rational) for disinheritance or reduced benefit.

For case law examples of how a number of these considerations have been applied to preclude relief in actions by adult children, see §13.06(3) below, and for case law examples of contributions to the estate by claimants, see §13.07(2)(r).

See also *Dunsdon v. Dunsdon*, 2012 B.C.S.C. 1274, for a discussion of further factors which a court may consider in assessing the existence and strength of a will maker's moral duty to an independent adult child.

3. Relevant Date for Determining Adequacy of Support

The adequacy of the will-maker's support for that will-maker's 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.

[§13.06] Circumstances Precluding Relief

1. Court's Discretion

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 (B.C.S.C.), affirmed [1938] 4 D.L.R. 513 (P.C.)). 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 and whether the will-maker had met their moral obligation to their spouse. 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 §13.05(2).

(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 disinheritance:

(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 CanLII 400 (B.C.S.C.);

(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); and

(v) daughters had sought restraining orders against the will-maker to block access to the grandchildren (*Persall v. Stromberg*, 2015 BCSC 1826).

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.));

(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);

(iii) a daughter hated and neglected her mother (*Re Stewart* (1961), 31 D.L.R. (2d) 601 (B.C.S.C.); and

(iv) a son was an irresponsible spendthrift (*Re Bailey Estate*, [1972] 1 W.W.R. 99 (B.C.S.C.), affirmed [1972] 3 W.W.R. 640 (B.C.C.A.).

(b) Estrangement in the Relationship or Neglect by the Will-Maker

The court may consider the relationship between the will-maker and the will-maker's 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 (B.C.S.C.), 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). An estrangement between a parent and child that was the joint responsibility of both parties is also a relevant consideration that may result in a variation if the child is disinherited or left a nominal amount of the estate (*Doucette v. Clarke*, 2007 B.C.S.C. 1021 (varied on other grounds but affirmed on this point in *Doucette v. McInnes*, 2009 BCCA 393)).

When the relationship between a will-maker and the will-maker's 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.).

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.)); *Rampling v. Nootebas* (2003), 4 E.T.R. (3d) 86).

In considering the effect of alienation, *Price v. Lypchuk Estate*, 1987 CanLII 165 (B.C.C.A.) found the will-maker was estranged from his children because his ex-wife had refused to let him see them. The court found nothing in the circumstances that gave rise to a moral duty of the will-maker to his children.

While *WESA* is not intended as a means to compensate for family abuse, where a parent has treated a child unfairly, judicious parents would recognize a moral obligation to make amends through provisions in their wills and, if it is not done, the court may vary the will to do so (*Doucette v. McInnes,* 2009 BCCA 393).

In decisions under the *WVA*, children were found to be entitled to claim in the following circumstances:

(i) the will-maker and her son were estranged because she disliked his wife (*Nulty v. Nulty Estate* (1988), 29 E.T.R. 149 (B.C.S.C.)) or 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*). "Valid" means that the reasons must be based on true facts and "rational" means that the facts must be logically connected to the act of disinheritance. The reasons need not be morally justifiable (*Kelly v. Baker*, 1996 CanLII 1596 (B.C.C.A.)).

A will-maker can disinherit a child for good cause. See *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 *Berger v. Clark*, 1999 CanLII 3239 (B.C.S.C.), aff'd. [1999] B.C.J. No. 2904 (C.A.). 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 *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.

[§13.07] Determining Quantum

1. Just and Equitable

The court in *Walker v. McDermott*, [1931] S.C.R. 94 at 96 states:

> 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 *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 *Family Law Act*

In light of *Tataryn*, the surviving spouse's entitlement under the *Family Law Act*, 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 (see e.g. *MacKinla*y *v. MacKinlay Estate*, 2008 BCSC 994).

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 *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 *Tweedale v. Tweedale Estate* (1995), 1 B.C.L.R. (3d) 167 (C.A.), where Cumming J.A. applied *Tataryn* and stated that "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 (*DeLeeuw v. DeLeeuw*, 2003 BCSC 1472; *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 disinheritance 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 their 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; see also *Grewal v. Litt*, 2019 BCSC 1154; *Lam v. Law Estate*, 2024 BCSC 1561).

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 this 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 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 the will-maker's 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).

(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.

The blended family situation results in many different factors which may impact the court's assessment of competing legal and moral claims against a will-maker's estate. The following cases discuss some of these considerations:

- A will-maker's legal obligation to his common-law wife of two years took priority over the will-maker's moral obligation to his son, who was economically independent and had had no contact with the will-maker since he was 7 years old. However, this priority did not preclude the will-maker from having an additional moral duty to make adequate, just and equitable provision for his son (*Pattie v. Standal Estate*, 1997 CanLII 2503 (B.C.S.C.)).
- A disinherited child in extreme financial need outweighed a will-maker's obligation to the will-maker's short-term surviving

spouse. As a result, the child received the entirety of a modest estate (*Hagen-Bourgeault v. Martens*, 2016 BCSC 1096).

- A will which provided the entirety of the will-maker's estate to an adult financially independent child, who also received significant gifts from the will-maker outside of the will, was varied to provide the entire estate to the second spouse who was in poor health and of modest means (*Wong v. Ghone Estate*, 2016 BCSC953).
- The moral obligation to the will-maker's children from his first marriage was satisfied with insurance benefits given to them outside of the will. As such, the court upheld the will-maker's will leaving the entirety of the will-maker's estate to a long-term second spouse (*Sim v. Sim Estate*, 2016 BCSC 1222).

(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. The court may also consider the effect of the order on the taxes payable by the estate (*Mars v. Blais*, 2011 BCSC 1714; *Waldman v. Blumes*, 2009 BCSC 1012).

(p) Whether the Applicant Has (or May Have) Dependents

The plaintiff's responsibility toward dependents may be relevant 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 her. 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 what adequate, just and equitable provision 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 the applicant's 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 CanLII 1597 (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.J. No. 1639 (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.). See also *Waldman v. Blumes*, 2009 BCSC 1012, in which a will-maker who died at the age of 91 was held to owe a strong moral obligation to his significantly younger wife based on the care she provided to him in his later years.

(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, then the will-maker's legal obligations to the claimant in a wills variation claim are also established. 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.

See also *McBride v. Voth*, 2010 BCSC 443, in which a child who lived with the will-maker, provided care and companionship to the will-maker, and contributed to household expenses was granted a larger share in the estate.

Chapter 14

Other Claims Against an Estate[1]

[§14.01] Types of Claims

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. See also Chapter 12 (Creditors) and Chapter 13 (Variation of Wills).

[§14.02] Challenges to a Will

Under *WESA*, a child or spouse of the will-maker may seek a redistribution of the will-maker's estate by establishing that "adequate provision" has not been made for their "proper maintenance and support." Part 4, Division 6 of *WESA*, which deals with variation of wills, is described in more detail in Chapter 13.

If the dispute is over the will or estate of an Indigenous person who was registered or entitled to be registered under the *Indian Act* and who died ordinarily resident on a reserve, the federal minister responsible for estate services for First Nations (the "Minister") has the ability to declare the will void in whole or in part under specified circumstances set out in s. 46 of the *Indian Act*. However, the Minister and (with the Minister's consent) the party contesting the will or estate can apply to transfer the proceedings to a provincial superior court (s. 44 of the *Indian Act*).

There are advantages to each process and the decision will depend on the nature of the dispute and the remedy being sought. For example, under s. 46 of the *Indian Act*, the Minister may declare the will void if its terms would "impose hardship on persons for whom the [will-maker] had a responsibility to provide," a class that may be broader than children and spouses entitled to seek variation of a will under *WESA*. The Minister may also declare the will void if it purports to dispose of land on a reserve, contrary to the *Indian 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 *Indian Act*.

[§14.03] Claims Against an Estate on Intestacy

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*, the term "spouse" is defined 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.

It is possible for a person to be survived by more than one spouse. 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, *WESA* s. 2(2) 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 their 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*.

Section 48 of the *Indian Act* governs intestacy for Indigenous people whose estates are subject to the *Indian Act*. The *Indian Act* defines "survivor" in relation to a deceased individual as that person's 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." For more on intestacy under the *Indian Act*, s. 48, see Chapter 1, §1.05(3).

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[1] Updated by **Janis Ko** of McLellan Herbert Locke LLP in November 2024. Updated by **Michelle Isaak** of DLA Piper (Canada) LLP in November 2024 for content related to the *Indian Act*. Previously updated by J. Jeffrey Locke (2021, 2022 and 2023); Denese Espeut-Post (2018 and 2019); PLTC (2012-2016); Sadie Wetzel (2011); Roger D. Lee (2002, for content relating to the *Indian Act*); Helen Low (2000, 2001 and 2005); and Allan P. Seckel (1997 and 1998).

[§14.04] 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 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.

In some cases, the deceased has contractually obligated themselves to devise a specific property by will. 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 (described in the next section) allows for recovery in a much broader range of circumstances than the presumption would suggest.

[§14.05] Claims for Unjust Enrichment

1. Unjust Enrichment

Unjust enrichment arises where one party is enriched to the detriment of another party, and there is no juristic reason for that enrichment (a "juristic reason" is a justification or explanation based upon the law). In cases of unjust enrichment, the benefitting party will be obligated to restore the benefit to the other party.

Unjust enrichment claims are typically brought against an estate, but may also arise in the context of wills variation actions in which courts analyze the unjust enrichment claim at the stage of assessing the legal obligation of the will-maker. See *Peterson v. Welwood*, 2018 BCSC 1379; *Lamperstorfer v. Plett*, 2018 BCSC 89; and *Scott-Polson v. Henley*, 2013 BCSC 247, affirmed 2013 BCCA 428.

A claimant must establish the following to be successful in a claim for unjust enrichment:

- an enrichment;
- a corresponding deprivation; and
- the absence of any juristic reason for the enrichment.

See *Garland v. Consumers' Gas Co*., 2004 SCC 25; *Moore v. Sweet*, 2018 SCC 52; and *Kerr v. Baranow*, 2011 SCC 10.

The remedy for a claim of unjust enrichment may be personal (a monetary remedy) or proprietary (a constructive trust). See *Pettkus v. Becker*, 1980 CanLII 22 (SCC); *Peter v. Beblow*, 1993 CanLII 126 (SCC); and *Wilson v. Fotsch*, 2010 BCCA 226. The court will consider if a monetary award is adequate or whether a proprietary interest is justified.

2. *Quantum Meruit*

A monetary remedy is frequently based on a claim of *quantum meruit*, meaning "the amount deserved." A *quantum meruit* claim is a claim that there has been unjust enrichment and that the remedy should be a monetary remedy calculated on the basis of *quantum meruit* (fee-for-services). See *Nicholson v. Brown Estate*, 2018 BCSC 141.

The constructive trust remedy is described in the next subsection.

3. Constructive Trusts

A constructive trust may be awarded to remedy unjust enrichment as well as a breach of equitable obligations generally (*Soulos v. Korkontzilas*, 1997 CanLII 346 (S.C.C.)).

Through a constructive trust, one person is deemed by operation of law to be holding certain property for the benefit of another. The imposition of a constructive trust on a property requires "a link between the contribution that founds the action and the property in which the constructive trust is claimed" (*Peter v. Beblow*, [1993] 1 SCR 980 at 988). If such a link does not exist, the claimant must establish another basis on which to impose the remedy, such as the breach of fiduciary duty (*Wilson v. Fotsch*, 2010 BCCA 226).

A constructive trust should only be imposed when a monetary judgment is inappropriate. A constructive trust may be an appropriate remedy in claims involving real property or personal property, or where a monetary judgment is difficult to enforce. See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd*., 1989 CanLII 34 (S.C.C.); *McMillan v. Johnson Estate*, 2011 BCCA 48; *Blake v. Wells Estate*, 2007 BCCA 617; *Pickard v. Knudsen*, 2013 BCSC 1091; *Thibert v. Thibert*, 1992 CanLII 282 (B.C.C.A.); and *Brundage v. Campbell*, 1992 CanLII 1095 (B.C.C.A.).

Peter v. Beblow (1993), 77 B.C.L.R. (2d) 1 (S.C.C.) is a leading case on the principles to be applied when determining if a constructive trust should be imposed. In this case, the Supreme Court of Canada held that a constructive trust may be imposed where a property owner has been unjustly enriched by a claimant's domestic services and 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.

A claim in trust may be joined with a wills variation action. If successful, the trust claim reduces the size of the estate available for redistribution. See *Guzzo v. Scarcelli* (1986), 23 E.T.R. 186 (B.C.S.C.), varied (1989), 33 E.T.R. 163 (B.C.C.A.).

4. Cases on Unjust Enrichment

See *Guzzo v. Scarcelli* (1986), 23 E.T.R. 186 (B.C.S.C.), varied (1989), 33 E.T.R. 163 (B.C.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. suggested 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. 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.

Clarkson v. McCrossen Estate (1995), 3 B.C.L.R. (3d) 80 (C.A.) deals 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 had not 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 no 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.

In contrast to the decision in *Antrobus,* one of the plaintiffs in the case of *Tang v. Tom*, 2021 BCSC 1399, was unsuccessful in making out a claim for unjust enrichment in similar circumstances. In that case, one of the plaintiffs claimed that her mother had been unjustly enriched at her expense due to that plaintiff having performed unpaid work in the family grocery store between 1971 and 1981. The court ultimately rejected the claim of unjust enrichment because the family "functioned as an economic unit during that time period, and everyone benefitted from the fruits of that labour" (at para. 20), and the plaintiff had "also benefitted from housing, food, clothing and other amenities including childcare provided by her parents" (at para. 21).

The plaintiffs in *Tang* were simultaneously seeking a variation of their mother's will as part of this litigation, which relief they were ultimately successful in obtaining. The trial judge's reasoning was upheld on appeal (*Tom v. Tang*, 2023 BCCA 221), although the Court of Appeal altered the variation granted so as to grant a percentage share of the es-

tate rather than a lump sum payment (although the dollar amounts were functionally very similar). In the wills variation context, the substantial economic contributions of the plaintiffs remained a consideration in the court's decision, despite being insufficient to support an independent claim of unjust enrichment.

In contrast to the decision in *Tang*, the plaintiff in the recent case of *Rawlins v. Rawlins*, 2023 BCSC 466, was successful in making out a case for unjust enrichment, but was not successful in his claim to vary his mother's will. In this case, the court found that the estate was unjustly enriched by the personal care services that plaintiff had provided to the will-maker and her husband without remuneration, but that the will-maker had provided adequately for the plaintiff with an equal share of her estate.