**Succession Summary Fall 2014**

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Does the wording of the trust refer to the succeeding generations showing an intention to benefit those generations? – **if yes intention to benefit later generations**. IE to my children and if any died then to their children 60

Is the value of the trust large? – **if yes then probably NO A**, if small trust then probably yes A 60

Is there a provision for premature vesting in order to protect against the rule against perp **if yes then no A (but note this is a standard clause)** 60

Here: executor can encroach on the capital of trust for the benefit of the grandchildren (sig factor here). T didn’t provide a clause which would allow the children to terminate their own interests. NO clause for immediate distribution to grandchildren + estate not large= T intended to **allow A** 60

RECTIFICATION – Court of Probate - fixing a mistake in a will 60

NOW we have BC SC- just have 1 court deals w/ it all S. 59 RECTIFY a will at time of probate or at time of construction 60

(1) On application for rectification of a will, the court, sitting as a court of construction OR as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the T’s intentions b/c of 60

(a) an error arising from an accidental slip or omission, (b) a misunderstanding of the T's instructions, or (c) a failure to carry out the T's instructions. (2) **Extrinsic evidence,** including evidence of the T’s intent, is admissible to prove the existence of a circumstance described above ( in (1)) 60

S. 4 = construction 61

WESA s.4 codifies the common law rule that **extrinsic evidence of intention**, including statements made by the will-maker of intention, is NOT admissible to aid in the CONSTRUCTION of a will unless: 61

a)provision is meaningless b)provision is ambiguous on its face or in light of other evidence is ambiguous having regard to surrounding circumstances, or c)extrinsic evidence is expressly permitted by WESA ( s.59) 61

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### BASICS:

* executor and administrator =personal representative (act as trustee), executor can sell/rent/lease, while admin not
* So in CDN title to assets go to personal representative then they distribute the title to the listed B
* Personal rep has to pay debts, deal w/ court and distribute assets and once everything is dealt w/ they get discharged by the court and have no more personal responsibility
* Probate is imp b/c need grant of probate to be able to go to banks, land title ect. deal w/ assets
* Keep in mind: personal rep has title to ALL THE ASSETS- they can easily run off w/ them and not distribute them according to will so personal rep has to be trustworthy
* If you want to vary the will- have 180 days from the date grant of probate is issued by the court
* Personal Representative is entitled to remuneration, if not specified by WM, then *Trustee Act* s. 88 applies

**HOW TO APPLY FOR PROBATE**

* Grant of probate (if die w/ will)/ grant of administration (die intestate), individual can apply to be apptd administrator
* Process of getting grant of probate or grant of administration
1. Give notice to beneficiaries & potential claimants
2. Inventory of assets/liabilities and value
3. Have to give court will or proof there is no will
4. Give affidavit that sets out who the ppl are under the will
5. Give notice to intestate heirs (ppl who would get the will if Indiv died w/o a will)
6. Consent of heirs and creditors to appointment of applicant seeking grant (administration only)
7. Posting of bond by admin applicant
* Document gets filed in court and grant is issued by chambers

**PROBATE FEES:**

* When application made =probate fees payable
* Fees: 1.4% gross value of the estate

**Types of Grants of Probate**

•**Common form** grant – administrative issuance of probate upon submission of the will and related documents
•**Solemn form** grant – court confirmation, after a review of evidence, that the will is both formally valid and substantively valid
•A common form grant of probate can always be set aside with a solemn form grant of probate
**WHO CAN APPLY FOR GRANT OF ADMINISTRATION:**
Heir (next of kin) who has an interest in the intestate estate may apply (Grant of Administration)
•Where an executor appointed in a Will cannot act or refuses to act, a beneficiary/creditor who has an interest in the estate may apply (Grant of Administration with Will Annexed)
Where an executor has acted but resigns, dies or is incapable of completing the administration, a beneficiary may apply (Grant of Administration de bonis Non)
•Where a will is in dispute and there is ongoing litigation as to who is the proper personal representative, an independent third party or a beneficiary under one of the competing wills may apply (Grant of Administration Pendente Lite)
**Why a Will May Not be Valid?**•Not the final last instrument – later will is discovered
•Not validly executed/witnessed – need to comply with the formal validity provisions under WESA
•Not executed with testamentary capacity, knowledge and approval or free will (lack of undue influence) – this would require litigation and a court order finding
**MAIN FEATURES OF A WILL**It is completely revocable until your dead or lose capacity to make a will
A document that has no effect at time its made effect only at time of death
Make designations outside of a will eg. RRSPs, insurance policies, operate regardless of will
Residue what is left over after all gifts paid
All wills include standard revocation clause of any previous wills

|  |
| --- |
| INTESTATE SUCCESSION – WHEN A PERSON DIES W/O A WILL  |

* When intestacy kicks in:
	+ Person has no will
	+ If will doesn’t provide for all the property
	+ Will isnt comprehensive – will fails
	+ B has died and no successor B specified
	+ Failed gift falls into residue and the person in residue is dead 🡪 intestacy

 **WESA**

* If a person dies w/o a will and has a spouse not no surviving descendants (kids, grandkids, great grandchildren) the intestate estate goes to spouse – (s. 20)
* **S. 21(2)**- If a person **dies w/o will leaving a spouse and surviving descendants**, the **spouse gets**:
1. The household furnishings **AND**
2. A preferential share of the intestate estate in accordance w/ (3) or (4)

(3) if all the descendants are descendants of both the deceased and the spouse (children they had together) the preferential share of the spouse is $300,000 or a greater amount if prescribed

(4) if all the descendants aren’t the kids of the deceased and spouse (so stepkids) the preferential share of the spouse is $150,000 or a greater amount if prescribed.

* If the net value of the intestate estate is **less** than the spouse’s preferential share (either $300,000 or $150,000) the intestate estate must be distributed to the spouse- 21(5)\*
* If the net value of the intestate estate **is the same as or greater than** the spouse’s preferential share ($300,000 or $150,000) then the spouse has a charge on the intestate estate for the amount of the spouse’s preferential share and the residue of the intestate estate after the satisfaction of the spouse’s preferential share must be distributed like this (i) one half to the spouse and (ii) one half to the intestate’s descendants (s. 21(6))
* If theres 2 or more persons entitled to a **spousal share** they share the spousal share in the portions to which they agree and if they can’t agree the court determines the shares – (22(1))

#### SPOUSAL HOME – Section 26

* Spousal home: land where deceased person and his/her spouse were ordinarily resident – s. 1
* **the provisions in WESA applying to a spousal home only apply if the intestate estate includes a spousal home and a spousal home isnt the subject of a gift or otherwise disposed of** (eg. joint tenancy/ten in common)- s. 26
* **if the value of a spouse’s interest in the estate is equal to or greater than the value of the spousal home**, the spouse may elect to take the home to satisfy in whole or in party the spouse’s share of the estate- s. 26(2) – **so if SH worth less than $150 or $300 spouse can have the house**
* If value of the spousal home exceeds the value of the surviving spouse’s interest under s. 21 (either $150,000 or $300,000) = the surviving spouse may purchase the remainder of the deceased persons interest from the personal rep (s.31 (1))- **spouse has option to buy spousal home from estate**
* surviving spouse can purchase the deceased’s interest in the spousal home even if spouse is personal rep of estate or trustee **(s. 31 (2))**

**Retention of Spousal Home: Section 33:** allows for use of spousal home as a life estate by the spouse until they die, but never have control of it, will go to beneficiaries

**S. 33(1):** surviving spouse may apply, then court may make an order under (2) if **[have to meet these all to qualify for a court order under s. 33(2)]:**

* + - the surviving spouse is ordinarily resident in the spousal home at the time of the deceased persons death
		- assets in the estate aren’t sufficient to satisfy the interests of all descendants entitled to share in the estate- not enough $ to give spouse home + D estate
		- court is satisfied that purchasing the spousal home under s. 33 would impose a sig financial hardship on the surviving spouse
		- the court is satisfied that, in all the circumstances, a greater prejudice would be imposed on the surviving spouse by being unable to continue to reside in the spousal home than would be imposed on the descendants entitled to share in the intestate estate or that part of the estate that is to be treated as an intestate estate by having to wait an indeterminate period of time to receive all or part of their share of the intestate estate, and
		- the surviving spouse has resided in the spousal home for a sufficient period of time to have establis
		- had a connection to the spousal home OR the surviving spouse has a sufficient connection w/ the community/members of community in the vicinity of the spousal home to warrant an order under (2)
* **court** may subject to any terms or conditions **the court considers appop** make an **order** doing one or more of the following – **s. 33(2)**
1. vesting the same interest in the spousal home in the surviving spouse that D had
2. specifying the amount of $ the surviving spouse must pay to the Desc. to get house share
3. converting the remaining unpaid interest of the desc in the intestate estate into a registrable charge against the title to the surviving spouse’s interest in the spousal home
4. determining an interest rate
5. determining the value of the registrable charge
* S. 34 talks about when registrable charge becomes due and payable- first look at prevailing residential lending practices in CDN and if none are specified then payable on the earliest of the following (a) 12 mths after the date of death of surviving spouse (b) 12 mths after the date the surviving spouse ceases residing in the spousal home (c) the completion date of the sale of the spousal house
* If don’t pay charge then can take any action a mortgagee under LTA could take (34(2))
* The personal rep when applying for a grant, must notify the spouse of the right of a surviving spouse to acquire the spousal home- section 27 (1).
* The surviving spouse, within 180 days of the issuing of a grant, or within such further time as a court may allow, must notify the representative and those intestate successors who will be affected of his or her intent to acquire the home- sections 27 (2), (3); 29.
* The representative must not dispose of the home within 180 days, or any extension allowed by the court- section 28.
* A surviving spouse who occupies the spousal home pending its purchase must pay insurance, taxes, maintenance, utilities and any mortgage payments that fall due-s.32

#### Die w/o Spouse, distribution per stirpes to descendants s. 23/24 see table of consanguinity

* + Distribute the intestate estate to the intestate’s descendants (children, grandchildren, great grandchildren) **23(2)(a) per stirpes**
	+ if no surviving descendants then to the intestates parents in equal shares or to the intestates surviving parent **23(2)(b) not per stirpes**
	+ if no surviving descendant or parent to the descendants of the intestates parent(s)**23(2)(c)**
	+ if no surviving descendant, parent, or descendant of a parent then to grandparents or descendants of grandparents **23(2)(d) not per stirpes**
	+ if no surviving descendant, parent, descendant of a parent (sibling), grandparent or descendant of a grandparent (uncles, aunts) but the then surviving great-grandparents or descendants of great-grandparents **23 (2)(e) not per stirpes**
* 23 (3)- limits to the 5th degree of relationship- can’t distribute further than that. But this limitation doesn’t affect the right of an intestate’s descendants to inherit the estate even though they are more than 5th degree of relationship (4)- IF PAST 5TH GOVT GETS IT
* Half relatives have same rights as those full relatives (IE stepkids ect.) (23(5)(b))
* **Section 24 requires per stirpes distribution:** When distributing to descendants the property must be divided into a number of equal shares equivalent to the number of surviving descendants and deceased descendants who have left descendants surviving the person (s. 24)- in the generation nearest to the intestate that contains one or more surviving members. 🡪 IE: I has 3 Descendants (A B and C) each of same generation so each get 1/3 share. IE: 3 Descendants (A B C)- C is dead and has 2 kids then A and B get one share each. C share goes to both gets who get 50/50
* NB: if one of the descendants is dead and left NO kids, then the per stirpes share is consumed by the other descendants eg. A,B,C kids, B is dead with no kids, A + B’s share is now one half rather than one third
* **Per stirpes distribution**: distribution by the branch. So first generation gets equal shares but if someone dead from 1st generation and has kids then kids take parents share and split it
* **Per capita distribution**: 2 Descendants, 1 dead, both descendants have 2 kids each. Estate divided equally b/w all the generations and it counts the number of heads involved so it would be 5 ppl

**Right of Representation:**

-no right of representation on per stirpies or per capita, so children cannot fill in shoes of deceased descendant eg. “to my nice/nephew, won’t go to the kids of niece/nephew, MUST use word “issue or descendant”, do not use word “children”

### Specific Issues: SPOUSES- WESA s. 2(1)

2 ppl are spouses if they were both alive immediately before a relevant time [relevant time is the date of death of one of the persons] AND **2(1)(a)** they were married to each other OR **2(1)(b)**they had lived with one another in a marriage like relationship including a marriage-like relationship b/w persons of the same gender, for at least 2 yrs [this includes common law/ gf]

2(2) 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](http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01), to arise,(divorce) or
(b) in the case of a marriage-like relationship, one or both persons terminate the relationship (one or both have intention formed before or during that time to live separate and apart *permanently*).

(2.1) 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, totaling at least 90 days.

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| SOURAYA V KINCH (2012)(BCSC) – determining if someone is a spouse  |

When determining if someone comes within the definition of a spouse these are the steps:

 **How do they view themselves?- Whether the parties subjectively intended to live together in a marriage like relationship** which is a relationship of psychological and emotional union that one associates w/ marriage.

1. Whether someone is in a marriage like relationship depends in part on how that person views the relationship (subjective)

2. Can look at objective intentions such as: live together/apart, share finances/ did they refer to themselves as spouses/did they share their finances and bank accts/share vacations

Generally accepted characteristics of a marriage like relationship are:

* + Shelter- live together? Sleeping arrangements? Anyone else live with them?
	+ Sexual and personal behaviour?- sexual relations? Attitude of fidelity? Feelings towards each other? Communicate on a personal level?
	+ Services: conduct and habit in regards to prep of meals/ washing clothes
	+ Social: participate together or separately in neighbourhood/community activities? Relationship and conduct of them towards their family members?
	+ Societal- attitude + conduct of the community towards each/couple
	+ Support (economic): financial arrangements towards the necessaries of life/ arrangements concerning the acquisition and ownership of property
	+ Children: what was the attitude and conduct of the parties concerning children

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| GOSBJORN V HADLEY (2008)(BCSC)- Whether Cml relationship terminated @ time of death |

F: cml law partners recently separated. **Court found D and G were common law spouses at time of D’s death** Here, there was continued uncertainty about the future of the relationship (still common law spouses).

Husband did not have settled intention to end his relationship.

* Fact that D committed suicide within days of the separation and following his visit to the emergency room= D had an unsettled state of mind

### Specific Issue: ADOPTION

* + Once child is adopted the adoptive parents become the parent of the child (adoption act s. 37(1))
	+ If child is adopted the child isnt entitled to the estate of his natural parents except through the will of the natural parent (WESA s.3)

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| RE KISHEN SINGH (BCSC) (1957) – half siblings deemed as full siblings – children of half siblings take as though full nieces/nephews of the intestate  |

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| RE FORGIE (1948)(MAN) – the right of a descendant or their child to inherent under an intestacy can’t be given to descendant’s spouse**The share goes to kids directly not their parent’s estate through which it could end up to spouse** |

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| INCAPACITY PLANNING  |

* Key planning documents
1. **Enduring POA**- a person while CAPABLE could make an enduring POA conferring on an attorney powers to handle **legal and financial affairs** should the person become incapable (**POA Act s. 8)**
2. **Representation agreement**- a person while capable could make a RA conferring on a representative powers to deal w/ financial or personal affairs or both should that person become incapable – ***Representation Act***
3. **Advance directive**- a doc in which the person gives express directions about how health care is to be given or not given if that person becomes incapable – ***Health Care (Consent) and Care Facility (Admission) Act***
4. **Committee**- court appoints a committee to handle financial or personal affairs or both of a person found to be incapable and w/o EPOA- ***Patients Property Act***
* **Unless POA says otherwise, cant use that power to benefit the attorney but the committee can benefit the patient and his family**

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| POA – dealing w/ POA Act  |

##### What an EPOA allows:

* an adult may in an EPOA confer on an attorney in relation to the adults financial affairs the power to make decisions on behalf of the adult or do anything an adult may lawfully do by an agent. EPOA may grant general or specified powers (s. 13)- essentially can do w/e w/ estate + assets
* **Can designate beneficiaries s.** 20(5)

##### Limits on what EPOA can authorize: EPOA CANNOT authorize:

Attorney **cannot make or change a will for the adult** **(s. 21)** cant profit from your position (4) cant sell or transfer to yourself or your spouse(5) can **only deal with financial and legal** (5) have to abide by the terms in the doc

* **Only adults (19 or +) can make a EPOA and be attorney**- s. 11 (a minor cannot act as an attorney until becomes an adult)
* **Adults aren’t capable of making an EPOA if they are incapable of understanding the nature and conseq of making it (s. 12)**
* **An attorney can be** an indiv, PGT or financial inst (s. 18)
* **Restrictions:** an indiv or an employee of a facility in which the adult resides which provides personal or health care to the adult for compensation = cannot be named an attorney unless that person is a child, spouse or parent of the adult.
* **Can have more than one attorney, if 2+ attorneys** they maybe assigned diff or the same areas of authority. If same area then presumed to be co-attorneys unless power says differently. If co-attorneys they must act unanimously unless power says don’t act unanimously. (s. 18(4)(5))

##### Req’s for EPOA

* + be in writing, signed and dated by the adult in the presence of 2 W, signed by both W in the presence of the adult- only 1 W req if the W is a lawyer or NP(s. 16)
	+ **when attorney signs has to be in front of 2 W** but adult doesn’t need to be there. Another person may sign for the attorney. Those ppl who cant act as W for the adult’s sig also prohibited from acting as W for attorneys sig (s. 17)
	+ Cannot transfer property to yourself Land Title Registry office won’t allow it. Must abide by LTA
* **EPOA effect on the latest of:**
(i) the date by which the adult and an attorney has signed
(ii) the date state in the power to be the effective date
(iii) the occurrence of an event specified in the power as bringing the power into effect (s. 26) (“springing event”)

##### How to change an EPOA:

* a capable adult can change an EPOA using the same procedure req to make it- subject to the terms of the EPOA. After making the changes to EPOA adult has to give written notice to each attorney and change isnt effective till notice is given + effective date specified. Any change binding on the attorney **(s. 28)-** side note: if attorney isnt happy can always resign
* **Termination of EPOA:** according to its terms, adult revokes it, adult dies, court terminates it
* **If EPOA covers land:** then s. 57 of LTA provides that a POA filed in the LTO may be revoked by the donor filing a notice of revocation
* **Attorneys delegating decisions –** S. 23 prohibits an attorney from delegating decision making authority given by an EPOA except w/ respect to investments

##### Attorney may make a gift, loan or charitable gift in these cirum: s. 20

* (1) gift is expressly authorized by the EPOA
(2) if not authorized in EPOA then if sufficient property will remain to meet the needs of the adult + the adults dependents and satisfy the adults other legal obligations + the adult when capable made gifts or loans of the type to be made + the total annual value isnt more than the prescribed amount (s. 20)

##### Duties of an attorney:

* an Attorney must act honestly and in good faith, exercise the care, diligence and skill of a reasonably prudent person, act within the authority given in the EPOA and under any enactment, and keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult...**(s. 19)**
* **Attorney acting under an EPOA must make a reasonable effort to determine the adults assets and liability and keep list of them and accounts and records (s. 2)**
* **Payment to attorney:** not entitled to payment unless the EPOA authorises it + Attorney is entitled to be reimbursed from the adult’s property for reasonable expenses properly incurred (s. 24)
* **Resignation of an attorney:** attorney may resign by giving written notice **(s. 25)**
* **Authority of the attorney ends when (s.** 29): EPOA is terminated, provisions of the EPOA that give authority to attorney are revoke, if attorney becomes incapable, is bankrupt, dies or is convicted or a offence including offence in which adult is the victim; if attorney is a corp and dissolves, if attorney is the spouse of the adult and marriage ends subject to provision in EPOA saying authority will cont’d after the relationship ends
* **Attorney not liable for loss/damage if duties are met (s.** 22)

##### Improper exercise of authority by the attorney-

* is binding on the adult w/ respect to persons who didn’t know and had no reason to believe that the exercise of authority was improper **(s. 31)**

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| MCLULLEN (2006)(BCSC)- POA unauthorized to transfer assets while adult capable + not their wish = court set transfer aside  |

Kids get worried try to protect dad they use their POA to transfer title of land to someone else. Court orders this transfer to be set aside b/c dad didn’t authorize it

* **Capable donor= attorney is agent- can only take steps if instructed. Incapable donor= attorney is fid**

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| EASINGWOOD V COCKROFT - attorney can make inter vivos trust as long as the post death distribution of the trust assets mirrors the asset distribution in the will + the inter vivos trust cannot be making a will for the adult |

Attorneys set up trust and transferred most of Dad’s property into the trust. Made trust to avoid probate and taxes.

* Court said attorney can make a trust a**s long as the post death distribution of the trust assets mirrors the asset distribution in the will** + the inter vivos trust cannot be making a will for the adult
* Trust was ok here b/c didn’t diverge from Dad’s known intentions as reflected in his will + marriage agreement, **business prudence**, trust secured the dad’s assets for adult’s use during his lifetime
* **Use standard of a reasonable business person to provide guidance by which to measure the attorney’s actions**
* Its ok if attorney is advantaged by decision as long as both adult and attorney are both advantaged
* NB: this also prevented 2nd wife from making wills variation claim, took assets outside of will + kids could not apply for variation upon wife’s death b/c they were NOT her kids had assets fallen to her

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| HOUSTON V HOUSTON - if 2 POA’s look to intention to see if 1st one is revoked + execution of a later POA does NOT automatically revoke earlier POA. |

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| REPRESENTATION AGREEMENTS – dealing w/ adults personal and/or health care and/or limited financial affairs  |

**"health care"** has the same meaning as in the [Health Care (Consent) and Care Facility (Admission) Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96181_01);

**"personal care"** includes matters respecting

(a) the shelter, employment, diet and dress of an adult,

(b) participation by an adult in social, educational, vocational and other activities,

(c) contact or association by an adult with other persons, and

(d) licences, permits, approvals or other authorizations of an adult to do something;

* **While capable an adult could appoint a representative to deal w/ the adults personal/health care affairs and/or financial affairs should the adult become incapable**
* Have to act in the best interest of the person who granted you the status (fid relationship)
* RAA provides for 2 types of representation agreements(RA)

#### S. 7 RA’s which may provide for personal care, health care, and limited financial matters

S. (7,11): Scope of s. 7 RA:
“(1)adults personal care
(2) routine management of the adults financial affairs
(3) w/ some exceptions major and minor health care but rep IS NOT authorized
(i) to make or help the adult to make, decisions on the refusal of life supporting treatment
(ii) to refuse consent in respect of matters under the mental health act

(iii) to consent to sterilization for non-therapeutic purposes
(4) legal matters except divorce proceedings

S. 7 RA’s req each rep to complete a cert’f in the prescribed – if it isnt done RA is invalid- s. 5(4)

#### S. 9 RA’s which may provide only for personal and health care of more complex nature + possibly against wish of adult

#### Executing a RA:

has to be in writing, signed by the adult, the sig witnessed by 2 W, signed by both W in the presence of the adult – only need 1 W if the W is a lawyer or notary (s. 13) **(Rep’s signature need not be witnessed) \* in contrast with EPOA where attorney’s signature must be witnessed by 2 W.**

* s. 15: a **RA becomes effective** on the date it is executed or on the date of a later event specified in the RA.
* A capable adult may cont’d to do anything a rep has been authorized to do (s.36)
* A RA isnt terminated solely b/c the adult later becomes incapable of making a RA
* **Who can be a rep:** an adult or PGT (s. 5) + can have multiple assign same area (must act unanimously unless otherwise state or separate areas
* **Who can’t be a rep**: (a) Any person who provides personal or health care services to the adult for compensation (b) An employee of facility in which the adult resides and through which the adult receives personal or health care**- if the person is child, parent or spouse of the adult then this rule doesn’t apply** (s. 5)- (c) A credit union or trust company may be appointed rep but only if the RA doesn’t include health or personal care
* **Duties of a rep (s.16)**: a rep must: act honestly + good faith/ exercise the care, diligence and skill of a reasonably prudent person/ act within the authority given in the RA
* **If 1+ rep is appointed** = may be assigned the same or diff areas of authority. If they are assigned the same area of authority they must act unanimously unless the RA says otherwise. RA can provide for alternative reps- if it does it must specify the circum in which the alternate is to act ect.
* **a rep may resign by** giving written notice to the adult, the other rep (including alternatives) and the monitor- if there is one. (s. 19)
* **rep must not make or change a will for the adult (s. 19)**
* Rep has to keep accounts and produce them at the request of the adult, monitor, PGT (s. 16(8))

#### Remuneration + Monitor of rep- s. 26:

* rep entitled to be reimbursed from the adults assets for reasonable expenses properly incurred in acting as a rep. Rep NOT entitled to remuneration unless the agreement authorises it.
Monitors (s. 12) ensures rep complies with their duties
* an adult has a choice of whether or not to name a monitor. **Appointment of monitor is MANDATORY in a s. 7 RA if the rep is entrusted w/ the routine management of the adults financial affairs**.
* Changing and revoking and terminating a RA:
	+ **a capable adult may** (a) change a RA by amendment executed in the same way manner as a RA (b) revoke a RA, written notice to be given to all reps and any M, and the revocation to be effective as soon as notice is given or on such later date as may be specified in the notice (s. 27)
	+ **A RA terminates** (i) if the adult dies (ii) if a court cancels the RA pursuant to its power under s. 32(1) (iii) on the effective date of a revocation (iv) in the circum provided for in s. 19 of the patients property act …. Also terminates if the rep is the spouse of the adult and the marriage or common law ends, unless the RA provides it is to continue or the rep becomes incapable, resigns or dies. - last 2 don’t apply if the RA provides that any remaining or alternate reps may act

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| ADVANCE DIRECTIVES – sets out decisions in a doc that bind medical caregivers  |

**"advance directive"** means a written instruction made by a capable adult that

(a) gives or refuses consent to **health care** for the adult in the event that the adult is not capable of giving the instruction at the time the health care is required, and
(b) complies with the requirements of Part 2.1;

**"personal guardian"** means a committee of a person who is declared under the [Patients Property Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96349_01) to be

(a) incapable of managing himself or herself, or

(b) incapable of managing himself or herself and his or her affairs;

The directive must indicate that the adult knows that health care may not be provided where the directive refuses consent, and that another person may not be chosen in respect of health care for which the directive gives or refuses consent (s. 19)

#### Req for an advance directive (s.19):

* be in writing + signed + dated+ signed by the adult in the presence of 2 W and by both W in the presence of the adult
	+ Only 1 W req if the W is a lawyer or NP
	+ If adult is physically incapable of signing, another person may sign on behalf of the adult if (i) the adult is present and directs that the directive be signed and (ii) the sig of the person signing is witnessed as if the sig were that of the adult
	+ A W to the signing can’t sign on behalf of adult
	+ CANT BE W: persons who provide personal or health care or financial services to the adult for compensation other than lawyer or NP, the spouse/child/parent/employee/agent of any of the above noted persons, a minor, a person who doesn’t understand the mode of communication of the adult, unless there is an interpreter.
* An instruction to do anything that is illegal or to omit to do anything req by law is invalid (s. 19)

#### Who can make an advance directive s. 19.1:

an adult unless the adult is incapable of understanding the nature of the directive and the conseq of making it. An adult is incapable if the adult cannot understand (a) the scope and effect of the instructions in the directive (b) that substitute decision makers will not make decisions on the matters covered in the directive

#### Changing a directive:

* an adult who appreciates the nature and conseq of the change may change it and the change is to be executed in the same way as the directive was made (s.19.6)
* **Revoking a directive(s.** 19.6)- by: (a) making another doc (including another directive) expressing an intention to revoke (b) destroying the directive w/ the intention of revoking it
* **When a directive may be used (s. 19.7)-**

a health care provider may give health care to an adult if a directive gives consent to the care, and must not provide care if the directive refuses consent, if:

* + In the opinion of the health care provider the care is needed
	+ The adult is incapable of giving or refusing consent
	+ The health care provider is aware of the directive, and doesn’t know of any personal guardian or rep who has authority in respect of the proposed care
		- The health care provider only has to make reasonable efforts to determine if there is a directive, guardian, or representative

#### When directive may not be used- health care provider seeks substitute consent

* a health care provider must obtain substitute consent for an incapable adult if the provider reasonably believes:
	+ The directive doesn’t address/ unclear as to whether it addresses the health care in qst
	+ The adults wishes, values or beliefs in relation to the health care have sig changed since the directive was made and the changes aren’t reflected in the directive
	+ Since the directive was made, there have been sig changed in medical practice that might substantially benefit the adult, unless the directive expressly states it is to be applied regardless of changes in medical practice

#### If there is both a directive and RA:

(1) the RA may provide that a health care provider may act in accordance w/ the directive w/o the reps consent (2) if (1) isnt applicable the directive **DOES NOT APPLY** as far as it relates to any matter within the authority of the rep, but the instructions in the directive shall be treated as the wishes of the adult for the purposes of the RA Act for s. 16 of that Act that stipulates that representative must act on the wishes of adult to best extent possible

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| Bentley v. Maplewood Seniors Care Society 2014 BCSC - An adult’s advance directive would need to be express on refusal of personal care by non-artificial means of nourishment (spoon feeding) |

**Facts:** women capable wrote document that she would want to be euthanized in case of illness where she had no chance of recovery, specified that nourishment be withheld. Husband/friend/daughter seek declaration to cease feeding. She has Alzheimers, bed ridden, still moves & opens/close mouth/**actively swallows**

Court concludes:

* Spoon feeding (diet) constitutes **personal care** and NOT health care (definitions under HCCCFA/RA)
* A health care representative or a committee of person does not have authority to discontinue nourishment and liquids administered to the incapable adult by spoon (as opposed to artificial feeding by tube)
* An adult’s advance directive would need to be express on refusal of personal care by non-artificial means of nourishment (spoon feeding)

 Additional factors found: expressed preference for flavours and eats more/less depending on time of day

When adult incapable of consenting and their document is unclear/defects in execution, need to find substitute dsn maker who will give/refuse consent

Substitute consent found 4 ways in this order:

1. from court appointed personal guardian (committee) here she didn’t have one and none app’d for
2. Rep from RA: unclear if wanted s. 7 or s. 9 RA
3. Advance Directive (more narrow in scope than RA):she erroneously made directive but still chose others who could consent for her -> invalid as per 19.8(1)(b)
4. Temp sub dsn maker (wn AD fails)

Where the above fails and doctor cannot seek consent of family/friends, they are best positioned to make decision.

Ultimately, our law does not allow for sub dsn mker to make such a decision and it is akin to euthanization, unsettled law in Canada.

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| COMMITTEESHIP – PATIENTS PROPERTY ACT (PPA) + PGT must be notified in a committeeship application |

* Committee of estate= deals w/ persons legal and financial matters (like a POA)
* Committee of person= deals w/ health and personal care (like RA)

Often fighting in family over EPOA/RA so one goes to apply for C, which will override EPOA/RA

* **PGT must be notified in a committeeship application, costly/lengthily**
* **Court supervises committee (unlike POA who isnt supervised)**
* The **act provides for the appointment by a court of a committee to act on behalf of a person who falls under the definition of patient.** A person can be declared a patient in 2 ways (s. 1):
1. If he is declared to be incapable of managing his affairs in a cert signed by the director of a mental health facility or psychiatric unit under the mental health act (**paragraph A patient)**
	* Scope of C power: all rights + powers regarding estate that the P would have if capable
2. Declared by a judge to be incapable of managing his affairs, himself or both his affairs and himself **(para. B patient)**
* If application made to court the court may appoint any person to be the committee of a patient – including PGT
* Must exercise power to benefit of Patient AND the patient’s family having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient’s family, contrast with EPOA where cannot give gifts to others
* **Until an appointment is made the PGT is the committee**
* S. 18: **committee must exercise the committee’s powers for the benefit of the patient** + **Patients family**,

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| O’HAGAN (BC)(2000)- test of reasonable and prudent person of business, ok for committee to take tax-planning steps + plan mirror plan under adult’s will |

* F is committee of his fathers person + estate. P (dad) 89, his main asset is shares in his company. b/c of tax implications (estate worth $10 mill) F is told to reorganize shares so when P dies not as much tax conseq. Existing shares exchanged for new shares went into a trust of which the dad was sole B during his lifetime and after dies sons were the B.
* court allowed this estate plan
* Looks at s. 18 of PPA which says a committee must exercise his “powers for the benefit of the patient and patient’s family…”= **don’t limit this to orders considered necessary for well-being of patient or his family**
* Factors court took into consideration: dad really old- 89 + really incapacitated+ **no recovery+** he could call the trust if he regained capacity + **huge estate** + transaction wasn’t necessary but clear benefit to P family + passed prudent person of business test + value of estate not reduced + **plan mirrors plan under the will**

In making decision take into account P own interests, present and future-

* + Consider possibility of P recovering from disease/illness- if very small chance don’t consider too much
	+ Consider likelihood the P condition will change for the worse in the future- req more money for personal care

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| BC V BRADLEY ESTATE (2000) (BCCA)- where gift by C will reduce value of estate, may not be allowed  |

* Husband is the committee. P suffering brain hemorrhage and stroke. 63 yrs. Serious injury probably wont regain her mental function, but don’t know her prospects fully. Cost of her care very cheap right now. P will says when she dies 1/3 to H and 2/3 to kids. Estate is large. H is US citizen- many tax implications upon death. H got tax advice that to reduce tax liability he should start making gifts to himself and kids from P $ b4 she dies.
* **Court didn’t approve a gifts from P to H and P’s kids – rejected!**
* Court affirms O’Hagan- transactions not prohibited on the part of the C merely b/c they aren’t necessary. C held to the standard of care of a reasonable and prudent person of business
* Comparison b/w this case and O’Hagan
	+ P is 65, O’Hagan P was 89
	+ Here: P may live for many yrs even though docs say probably wont. If condition worsens might need more expensive care. O’Hagen- dad totally gone
	+ Here: C will be diminishing P estate from 2.6 mill to under a mill – huge decrease. In O’Hagen the shares would go into a trust help for him the value of trust property remains the same and only dad benefited from the trust while alive
	+ Here: if she recovered from medical problems would find her estate is HUGELY decreased. Taking $ away from her. In O’Hagen putting $ in trust not taking away not making inaccesible

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| NATURE OF A WILL  |

### TESTAMENTARY OR INTER VIVOS

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| BIRD V PERPETUAL EXECUTORS (1946) (AUST)- Doc made to depend upon event of death for its vigor & effect, death necessary = testamentary document |

* Doc executed under seal from D saying that he is indebted to the B for rent and board and I direct **my executors** to pay B $X per week to the date of my death
* This IS a testamentary doc b/c depended on death for effect, but it failed to conform w/ formalities of the Wills Act
* Where a doc is made to depend on the event of death for its effect = testamentary doc
* **Not testamentary** if the doc takes effect immediately upon its execution even though the enjoyment of the benefits are postponed till the death of the person

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| HUTTON V LAPKA ESTATE (1991) (BCCA)- K to take effect immediately NOT testamentary  |

* Note in which son promised to pay his mom $X and note said if son dies, son’s wife will pay it from son’s estate and if mom dies first then no debt is owed by son to mom.
* This was not a testamentary doc when read as a whole, no need to comply with will formalities– note had immediate effect from date of execution – stated account of indebtedness; mother made her bargain, son discharged of debt, not subject to wills variation proceedings

### CONDITIONAL WILLS

If will made upon condition (aside from death, eg. Death at same time with someone else), and condition is met, then it is enforceable, if condition NOT met, then will is not enforceable, cannot admit it to probate.

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| RE HUEBNER (1974) (MAN) – in the event of my death ON THIS TRIP = NOT condition  |

* Holograph will made saying “in the event of my death on this trip…” 2.5 yrs after trip dies
* Valid will. It wasn’t conditional. “**on this trip”- refers to the occasion for the making of the will not a condition for its operation**
* **Rule**: if the language used in the will can by any reasonable interpretation be construed to mean that the testator is referring to the disaster and the period of time during which it may happen as the reason for making a will = not conditional

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| RE GREEN ESTATE (2001)(NFLD)- “in the event something should happen to both of us” = a condition |

* Holograph will says “in the event something should happen to both of us”
* There was a condition on this doc which is the death of both husband and wife, which was not met, so will invalid.
* Don’t look at extrinsic evidence in construing whether a will is conditional on happening of something if words used in the doc are clear. If words used in doc don’t clearly express a condition then extrinsic evidence including evidence of surrounding circum + intent of T can be considered
* Here, dad had some assets in his own will which were not included in this joint will with his wife = evi for conditionality

### 2 OR MORE TESTAMENTARY DOCS

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| DOUGLAS V UMPHELBY (1907) (NEW SOUTH WALES)- only 1 applicable will rule |

* Testamentary doc governed by Scottish law which disposed of his British property. Another testamentary doc governed by New South Wales law for Australian property.
* This case says can have multiple docs but can only have 1 will through doctrine of A & R
* As Beneficiary you cannot accept part of the will as it relates to you and then reject the effect of its other terms in favour of another will = doctrine of approbate and reprobate

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| RONDEL V ROBINSON ESTATE (ONCA) (2011)- court must determine the T intention from the words used in the will and not from direct extrinsic evidence of intent  |

* Will in Spain for European property/ D makes new will in CDN revoking other wills but doesn’t tell Lawyer about property in Europe or Spanish Will
* CDN will drafted in accordance w/ the D instructions and lawyer went through clause by clause and explained to T he was revoking all other wills
* General rule at common law: in construing a will, the court must determine the T intention from the words used in the will and not from direct extrinsic evidence of intent
* Even lots of extrinsic evi that she did not intend to revoke Spanish will
* Always ask client do you have assets and will in another juris

#### Probate Fees

If you seek probate, will becomes public document, fees payable in ref to **gross value of estate,** payable **if value is over $25K, person rep to disclose everything**, but not property outside of BC where deceased not domiciled in BC, and that prop administered by foreign law. So you can have valid wills in diff juris.

NB: consider 2 diff executors 2 diff wills, one for probate assets and one for non-probate assets eg. Of no need for grant of probate for shares in privately held company, if all under one will it would be captured and you would get taxed on these non-probate assets.

Fees: 1.4% gross value of the estate

***Probate Fee Act***2(3) If the value of the estate exceeds $25 000, whether disclosed to the court before or after the issue of the grant or before or after the resealing, as the case may be, the amount of fee payable is

(a) $6 for every $1 000 or part of $1 000 by which the value of the estate exceeds $25 000 but is not more than $50 000, plus

(b) $14 for every $1 000 or part of $1 000 by which the value of the estate exceeds $50 000

## DELEGATION OF WILL MAKING POWER

* Common law: person cannot delegate will making power to anyone else – T has to do everything
* Central problem w/ delegation of will making powers is it no longer shows T intention

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| TASSONE V PEARSON (2012)(BCSC) general power of appointment is valid in will if ascertainable |

* Gave power in will to distribute assets as seen appropriate by executor her son, but he predeceased mom, she said then went to his daughter
* Power can be given in trust or w/o trust- if no trust then bare power and gift receiver doesn’t have to exercise it
* 3 diff types of power
1. General- can appoint in favour of anyone in the world
2. Special- power to appoint from a specified generally small group
3. Hybrid – power to appoint in favour of anyone in the world w/ a few exceptions.

NB: delegation to give property is NOT recommended, could be looked as with suspicion + presumption of invalidity, general rule is that WM must decide where prop goes!

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| SOLICITOR’S RESPONSIBILITIES AND LIABILITIES  |

* Lawyers are liable to will makers and B = owe them a duty of care
* There is only one original Will signed- whoever keeps it better keep it safe and make copies of it

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| RE WORRELL (ONT) (1969) – Duties of lawyer in drafting a will  |

L prepares will for someone he’s never acted for and never met/ old T/drew will w/o knowledge of size of estate/ large portion of estate going to person consulting L/made changes from initial instructions w/o consulting about changes/ no record kept of matter = **L found negligent**

Law as to L duty in drafting a will:

1. Receive instructions immediately from T himself rather than 3rd party esp if 3rd party is interested in assets
2. L should attend personally when the will is executed – don’t give to 3rd person to get executed
3. Competent lawyer finds out extent of assets, in any other country, any other wills?
4. Be alerted if taking instructions from major beneficiary instead of T and satisfy himself thoroughly that the instrument expressed the real testamentary intentions of a capable testator prior to its being executed de facto as a will at all (undue influence?)
5. Can’t ignore T written instructions
6. Can’t have Beneficiary get will executed in these circum (ie where haven’t met T or got instructions from him)
7. Any lawyer drawing a will should make full docket entries in regards to all the details esp when dealing w/ a elderly testator.

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| WHITTINGRAM V CREASE & CO (1978)(BCSC)- Beneficiaries nor Beneficiaries’s Spouse can be a Witness to a will, or else gift void, L could be liable to 3rd pty beneficiaries |

* + L negligent in asking the B wife to witness the will and as a conseq of that negligence the Pl has suffered loss which was a reasonably foreseeable conseq of his negligence. L knew about potential loss the Pl would suffer since Pl was suppose to get a large portion of the estate.

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| WILHELM V HICKSON (2000) (SKCA)- L negligent b/c made gift of land that WM did not own |

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| EXECUTION OF WILLS  |

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| THE MAKING AND ALTERNATION OF WILLS  |

* **req for a valid will – WESA s. 37 [have to meet all these req]**
	+ in writing
	+ signed at the end by the will maker, **in the presence of 2 or more witnesses present at the same time**
		- will maker’s signature includes a signature made by another person in the will maker’s presence and by the will maker’s direction and the signature may be either the will maker’s name or the name of the person signing (s.1)
	+ signed by 2 or more of the witnesses in the presence of the will maker
	+ have to be 16+ and mentally capable of making a will (s. 36)
	+ member of the CDN forces while placed on active service = doesn’t matter what age you are when will made and it does not need to be witnessed (s. 38)

BC doesn’t allow holograph wills- but we have s. 58 that could support them

**Curing Deficiencies: 58**  (1) In this section, **"record"** includes data that

(a) is recorded or stored electronically,

(b) can be read by a person, **and**

(c) is capable of reproduction in a visible form.

(2) On application, the court may make an order under subsection (3) if the court determines that **a record, document or writing or marking on a will or document** represents

(a) the testamentary intentions of a deceased person,

(b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, **or**

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

(3) Even though the making, revocation, alteration or revival of a will does NOT comply with this Act, the court may, as the circumstances **require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made**

(a) as the will or part of the will of the deceased person,

(b) as a revocation, alteration or revival of a will of the deceased person, or

(c) as the testamentary intention of the deceased person.

(4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate **the original word or provision if there is evidence to establish what the original word or provision was.**

Electronic Record

* **There has been 1 case in CDN in which an electronic text was admitted to probate – Rioux v Coulombe**
* T committed suicide leaving a note which left instructions to find an envelope containing a computer diskette which contained a fill named the T last will
* It was admitted into probate under QBC civil law which permits probate of an informal doc if it contains the unequivocal last wishes of the deceased
* Recall…

Court order curing deficiencies

**58**  (1) In this section, **"record"** includes data that

(a) is recorded or **stored electronically**,

(b) can be read by a person, and

(c) is capable of reproduction in a visible form.

##### The cases below will give us direction on how BC might interpret s. 58

### Will Maker’s Signature or Acknowledgment

* Witnesses have to be 19 yrs or + (s. 40(1) WESA)

If a witness to the will receives a gift under it the gift may be void under s. 43 (s. 40(2))

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| GEORGE V DAILY (1997) (MAN) – look at this for how BC might interpret s. 58- reasons why we have formality req for wills  |

* WM’s letter to lawyer didn’t embody testamentary intention – don’t even know if WM knew what was in the letter or if they ever saw it – were merely instructions w/o final intention + WM did not get back to lawyers, unexplained hiatus

Courts ability to cure deficiencies - this provision cannot make a will out of a doc which was never intended by the deceased to have testamentary effect.

* **Testamentary intention means there must be an deliberate or fixed and final expression of intention as to the disposal of his property on death**

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| RE NERSTINE ESTATE (2012) (SASK) – look at this for how BC might interpret s. 58- signature- at least attempt to execute formal will + if not even attempt cannot turn to s. 58 |

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| RE WAGNER (SASK) (1959) –signature on envelope signed instead of will  |

* instead of signing will WM signed envelope sealed it and wrote “last will and testament.
* Found that the signature of the T on the envelope intended by the T to be his signature to the will – court found it was to authenticate his will

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| RE BRADSHAW ESTATE (1980) (NB)- signature- 2 diagonal strokes enough to= signature  |

* when tried to sign T made only 2 diagonal strokes and a further mark, marks = signature
* Test: were those marks by the T placed there as a personal act or acknowledgment as such by him to verify the making of the will as his own act

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| RE WHITE (NS) (1948)- signature- assistance with signature- ok if someone helps  |

T signed and was assisted by someone in front of all the witnesses

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| TAYLOR v HOLT (TENN CA) (2003)- signature- USA case on will signed on comp  |

* T prepared a will on a computer and each witness swore an affid stating that the T used his comp affixed his stylized cursive sign in my sight and presence. Court held this was a valid signature
* The testator printed a copy of the will w/ the comp sig and that doc was then validly witnessed

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| PEDEN V ABRAHAM (1912) (BCSC)- signature- assistance w/ signature- “Help” with signature not ok if testator was not able to consent/object at the time  |

* Doc helped T trace his name/ T didn’t ask doc to do this and said nothing to him/ after signing he said nothing. Doc physical condition at the moment was that he could neither accept or reject = Will not valid

**What constitutes sufficient acknowledgment of WM’s signature?**

1. A testator may acknowledge his signature by gestures.
2. Witnesses must either saw or might have seen the signature
3. When the witnesses either saw or might have seen the signature, an express acknowledgment of the WM’s signature itself is not necessary
4. When the signature is seen or expressly acknowledged, it is not material that the witnesses are

not told that the instrument is a will.

### WITNESSES – Capacity

**Witnesses to wills**

**WESA 40** (1) Signing witnesses to a will-maker’s signature must be **19 years of age or**

**older.**

(2) A person may witness a will even though he or she may receive a gift under it, but

the gift may be void under section 43 *[gifts to witnesses]*.

(3) A will is not invalid only because a witness was, at the time the will was signed

by the will-maker, or afterwards became, legally incapable of proving the will.

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| RE BROWN (ONT) (1954)- Witnesses- T has to sign in front of both W’s at the same time  |

T sign must be made/acknowledged in front of both Ws at the same time, **then both Ws have to attest and sign (after T sig/acknowledgment) in the presence of the T**. But W’s don’t have to sign in the presence of each other

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| RE WOZCIECHOWIECZ (1931) (ALTA)- witnesses- T has to be able to see the W sign |

* T signed will in hospital bed, one of the W signed in same room but far away/ T sick so couldn’t turn body w/o help to see the W sign/ didn’t witness signatures -🡪 will not valid
* **Court says: doesn’t matter if in same room or not have to ask could the T by looking have seen the W sign? – in this case couldn’t b/c of physical disability**

### Presumption of Due Execution

#### Yen Estate - 2013 BCCA – where no proof of formality met or not, presumption of due execution

Presumption may be rebutted
Witness no longer available to provide evidence of whether formalities complied with. Policy reason to allow presumption b/c cannot make WM’s will is dependant on availability and longevity of the witness.

### Incorporation by Reference, Secret Trusts and “Pour Over” Clauses

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| RE JACKSON (BCSC) (1985)- requirements of incorporating a memo to a will  |

* Will #1 made; then memorandum; then will2. Will1 did not mention the memo; will2 referenced a memo – memo admitted b/c T reviewed contents of memo at time of execution of will and didn’t change anything, except updated date.
* **Req to permit the incorporation of memos into a will, the doc to be incorporated:**
1. Must be in **existence at time** of execution of the will
2. Must be described **as then existing**
3. And in such terms that it is capable of being **ascertained**, and
4. The will must **not state that the doc isn’t to form** part of it

#### Secret Trusts

**What WM do to safeguard privacy of will b/c public doc upon grant of probate?**

**Fully secret trust:** the will-maker makes what on the face of the will is an absolute disposition

in favour of a beneficiary. However, the will-maker informs the beneficiary, and the

beneficiary agrees, that the property is to be held on trust for the person or persons the

will-maker really wants to benefit. Communication/agreement must be done BEFORE death of will maker.

**A half secret trust** arises when a will disposes of property to a person as a trustee, but

the terms of the trust are communicated outside the will. The same rules apply for

communication and acceptance as apply to fully secret trusts, but with one very

significant exception. The communication and acceptance must take place **before the execution of the will.**

**Rationale for Validity of Secret trusts:** danger that on paper ben may claim will invalidly executed therefore they take fully under the trust.

Equity will ask its usual question - the person named in the will may have legal title, but for whom in good conscience should that title be held? A promise was made to the will-maker and the will-maker has relied on that promise. In good conscience, the person taking legal title by the will should hold in accordance with the promise made and relied on.

### Pour Over Wills

#### Re Kellogg Estate 2013 BCSC – pour over clause: 1) non-test doc in existence at time of execution of will AND 2) WM cannot reserve right to make future unattested dispositions of trust property w/o complying w/ WESA formalities

Wm’s will said prop to be distributed as per trust set up by him, in whatever form w/ amendments at time of death.

Incorp by ref any future amendments to the trust into the will, but these amendments when made on paper must follow the formalities of will execution

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| CODICILS + ALTERATIONS OF WILLS  |

**WHEN SOMEONE WANTS TO CHANGE PROVISION IN WILL THE OPTIONS THEY HAVE ARE:**

1. **DO A NEW WILL**
2. **CODICILS – new doc to amend**
* Codicils fall within the def of will in WESA so have to follow same formal executions reqs as a will

 **(3) ALTERATION on FACE OF will**

#### How to alter will

**54**  (1) To make a valid alteration to a will the alteration must be made in the same way that a valid will is made under section 37 [how to make a valid will].

**ON THE FACE OF WILL**: (2) Subject to subsection (4), an alteration to a will is valid if the signature of the will-maker to the alteration, and the witnesses to that signature of the will-maker, are made

(a) **in the margin or in some other part of the will opposite to or near to the alteration**, or

(b) **at the end of or opposite to a memorandum referring to the alteration and written in some part of the will.**

(3) An alteration to a will that is not made by the will-maker in accordance with this section is ineffective

(a) except to invalidate a word or provision that the alteration makes illegible, unless the court reinstates the original word or provision under section 58 (4) [court order curing deficiencies], or

(b) unless the court orders the alteration to be effective under section 58.

(4) An alteration to a will that does not comply with subsection (2) is valid if

(a) the alteration

(i)   does not substantively alter the effect of the will, and

(ii)   is in respect of form, style or numbering or is a typographical error, or
**eg. Crossing out a grammatically incorrect word**

(b) there is evidence to establish that the alteration was made before the will was executed, if the alteration substantively alters the effect of the will.

* 58(4) **If an alteration to a will makes a word or provision illegible** and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.

#### IN THE ESTATE OF OATES (1946) - Alterations apparent on the face of a will are to be presumed to have been made after the will was executed until evidence to the contrary is adducedIn the Goods of Itter (1950) – if alteration invalid, does the original stand? YES

**F:** testator glued slips of paper over some bequests in a codicil. Slips of paper had new amts on them. Testator had initialed the slips of paper but not attested, so they are invalid. Pl’s argued that if the slips are invalid, then the original writing should stand.

### WITNESSES AS BENEFICIARIES

* Gift in a will is void if its to a W to the will-makers signature or the spouse of that witness (s. 43 (1))
* Keep in mind if W is B this invalidates their gift NOT THE WILL then the gift would have to be distributed according to **s. 46 (lapse provision)**
* The relevant time for determining whether one person is the spouse of another is the time when the will was made (43(2))
* If gift is void under (1) then remainder of the will isnt affected (43(3))
* The court may declare that a gift to a W or W spouse isnt void and is valid if the court is satisfied that the will maker intended to make the gift to the person even though the person was a W to the will (43(4)) – can use extrinsic evidence to establish T intention here (5)

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| RE CUMMING (ONT)(1963)- Wife of B was W to will= gift invalid  |

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| RE RAY’S WILL TRUST – if gift is for the benefit of a community, if member of community W will🡪 gift still valid  |
| RE ROYCE’S WILL TRUSTS (1959)- when determining if W has beneficial interest look at time of attestation not after |

* Attesting witness isn’t disqualified b/c after attestation (and sometimes after death) he became interested by virtue of the appointment made of him as a executor/trustee

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| GURNEY v GURNEY (1855)- witness to later codicil became ben under the will, found valid, but prof disagrees  |

* Will left estate to F and T- who didn’t witness the will. F and T were witnesses to 2 later codicils Deceased made. Codicil had effect of revoking gifts and increasing value of estate F and T get.
* Court found the gifts to be valid b/c the original gift was made under will not the codicil
* **Prof: this is a wrong decision the codicil republishes the will as of the date of the codicil**

#### ANDERSON V ANDERSON (1869) – B W original will, but remedied by properly executed codicil w/o ben as wit

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| JONES V PUBLIC TRUSTEE (BCSC) (1982)- the voided gift (apportioned first then) falls into intestacy s. 46 lapse provision |

* By his will T left specific gifts to D and S and they witnessed the will.
* In such a case the assets should first be apportioned and then the provision applies
* So then the will would first be applied so that D S and V would be allocated one third each and then the wills act would be applied and the one third allocated to D passes as on intestacy

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| TRANSFERS OUTSIDE OF A WILL  |

Always ask what assets exists at the date of death?

Joint tenancies, insurance, pension plans, trusts etc.

3 types of inter vivos gifts:

Gift inter vivos

Gifts Mortis Causa (gifts made in contemplation of death)

Inter vivos Trusts

Types of Non-will dispositions that operate on death:

•Joint Tenancy - right of survivorship

•Direct Beneficiary Designation

–Insurance Policies - *Insurance Act,* s. 48

–RRSP/RRIF/Pensions – *WESA, s.85*

Legal Presumption that arises upon transfer of property/assets:

•**Presumption of Advancement** (Gift to the recipient)

•**Presumption of Resulting Trust** (in favour of the Donor/Donor’s estate, pty must give it back to donor)

### Joint Tenancies

•Joint ownership with right of survivorship to the surviving joint tenant

•Jointly acquired asset versus the **addition of a joint tenant** to an asset acquired entirely by one owner

•Transferor’s **intention** dictates whether the **beneficial interest** passes immediately to other joint tenant

#### PECORE V PECORE (2007)(SCC)- Rebut Presumption of Resulting Trust

•Bank accounts/investments put joint with daughter

–All monies contributed by father before and after jointure

–Father declares all income, pays all income taxes (unhelpful)

–Father claims “no gift” to advisors to avoid capital gains tax (unhelpful)

–Father manages assets after jointure; daughter’s use is only with father’s permission

–Banking documentation stated “right of survivorship” (helpful)

•Will made post-jointure does not refer to the joint assets

•Father had history of providing financial support to daughter

•Joint assets comprised bulk of Father’s assets on death
🡪so fact that he did not deal with jointure assets in his will: possibly support idea that wanted to go to daughter

* Presumption of resulting trust- applies to gratuitous transfers- When transfer made for no consideration the onus is placed on the transferee to demonstrate that a gift was intended (this is the case **here)**
* **Presumption of advancement-** presumption that there was a outright gift- applies to: husband to wife and father or mother to **MINOR child** (N/A in this case)
* joint account in which A hasn’t put anything to and only B has and now B died and A has right of survivorship- in these situations the presumption of RT (unless dealing w/ minor child and parent) applies but **it will fall on the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to the assets left in the bank account-** **if unable to do this the assets will be treated as part of the transferors estate \*\*\* (comes within variation claims)**

 **Admissible evidence to show intent of transferor**:

1. Acts or statements of either party, whether before or after the transfer
2. The fact that the transferor had granted power of attorney to the transferee.
3. The fact that the transferor had continued to control the property after the transfer.
4. The extent to which the transferor paid capital gains tax on a transfer, or paid taxes that became due after the transfer.
5. Bank docs signed by the parties when opening joint bank acct
6. Statements of transferor when drafting will (drafting lawyer here gave evi of intention to gift Rt of Surv.)
7. Love & affection (father was very close to daughter)
8. Evi of dependency of adult child can help (father did financially support daughter a bit)

🡪SCC this was not a testamentary intention, it was contingent interest on survivorship (unnecessary to follow formalities)

NB: court wanted result to eventually benefit his **daughter not his (non blood relation**): ex- son in law, contrast case with...

#### MADSEN ESTATE V SAYLOR (2007)(SCC)- Presumption of RT not rebutted by daughter

•Daughter added to father’s accounts after mother’s death

•Daughter also granted enduring power of attorney by father

•Father was sole contributor and user of funds in joint account both before and after jointure with Daughter

•Father paid all taxes on income earned from joint account funds

•Father’s Will provided

–½ to 3 children equally

–½ to grandchildren equally

•Joint account funds totaled $185,000

* **RESULT**: not enough evidence to rebut the P of RT \*similar facts to Pecore but diff outcome\*
* In a dispute over a gratuitous transfer focus on the actual intention of the transferor at the time of the transfer – have rebuttable presumptions to help w/ this
* Signed bank docs saying right of survivorship applies
* Trial judge: P testimony wasn’t credible and she gave conflicting evidence + misrepresented events

### TRUSTS

Inter vivos Trusts:

•Alter ego trusts – available for persons over 65 years of age; can transfer assets into trust without payment of capital gains tax until death of the settlor

•Joint spousal trust – available for persons over 65 years of age; can avoid payment of capital gains tax until death of surviving spouse

=NOT testamentary dispositions, have immediate effect even though performed upon death of settlor

#### MORDO V NITTING (2006)(BCSC)- trusts are a valid way to disinherit kids

•Transfer by mother of property into alter ego trust to avoid WVA claim by son and the payment of probate fees on death

•Son challenged validity of alter ego trust to bring trust assets back into estate and then seek variation

**1. Alter Ego Trust was NOT a sham**

**2. Assets DID NOT “result back” to Settlor as held in trust**- evidence established mom intended to transfer property to the trustee for no $ found that it was not a resulting trust so the assets did not ‘jump back’ to settlor.

**3. Trust not a testamentary disposition.**

**4. Trust NOT void for public policy reasons as to defeat WVA claims and payment of probate fees**

**5. was the trust agreement in fact an agency agreement**- No🡪trustee (her lawyer) undertook to deal w/ the trust property in accordance w/ the trust doc – trustee only bound by directions in trust doc not S

### INSURANCE AND PLAN DESIGNATIONS

* **Designations are testamentary** but statute allows you to do direct B designations and not have to comply w/ WESA + doesn’t fall within your estate – **even if you make the designation under your will**

🡪 **the general revocation clause found in wills will NOT revoke insurance/benefit plan designations, you would need to use more specific language to revoke these**

🡪with employment plans, pension plans, RRSPs, etc., the designation can be made outside of the Will.  If NOT made in a Will, the pension plan is not revoked with a revoked will (as the will does not contain any reference to a designation).  It is possible to revoke a prior designation made outside of a Will through a provision in a will but the provision has to be very clear (WESA, s. 97(1))

#### Insurance Act – Relevant Provisions

**s.59**  (1)  … an insured may in a contract or by a declaration designate the insured, the insured's personal representative or a beneficiary to receive insurance money.

(2)  Subject to section 60, the insured may alter or revoke the designation by a declaration.

(3)  A designation in favour of the "heirs", "next of kin" or "estate" of a person, or the use of words of like import in a designation, is deemed to be a designation of the personal representative of the person

**Irrevocable Designation of Beneficiary (outside of will)**

**s.60**  (1)  An insured **MAY** in a contract or by a declaration, **other than a declaration that is part of a will**, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, **designate a beneficiary irrevocably**, and in that event the insured, while the beneficiary is living, **may not alter or revoke the designation without the consent of the beneficiary**, and the insurance money is not subject to the control of the insured or of the insured's creditors and does not form part of the insured's estate. = if irrevocable out of reach of estate + creditors

(2)  If the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

**Designation in Will**

**s.61**  (1)  A designation in an instrument purporting to be a will **is not ineffective** by reason **only of the fact that the instrument is invalid as a will,** or that the designation is invalid as a bequest under the will.

(2)  Despite the *Wills, Estates and Succession Act*, a designation in a will is of no effect against a designation **made later** than the making of the will. ( later designation overrides the earlier one in the will)

(3)  If a designation is contained in a will and subsequently the will is **revoked** by operation of law or otherwise, **the designation is revoked.**

(4)  If a designation is contained in an instrument that purports to be a will and subsequently the instrument if valid as a will would be **revoked** by operation of law or otherwise, **the designation is revoked.**

**Trustee for Beneficiary**

**s.62**  (1)  An insured may **in a contract or by a declaration** appoint a trustee for a beneficiary and may alter or revoke the appointment by a declaration.

(2)  A payment made by an insurer to the trustee for a beneficiary discharges the insurer to the extent of the payment.

**s.63**  (1)  **If a beneficiary predeceases the person whose life is insured**, and no disposition of the share of the deceased beneficiary in the insurance money is provided in the contract or by a declaration, the share is payable

(a) to the surviving beneficiary, or

(b) if there is more than one surviving beneficiary, to the surviving beneficiaries in equal shares, or

(c) if there is no surviving beneficiary, to the insured or the insured's personal representative.

(2)  If 2 or more beneficiaries are designated otherwise than alternatively, but no division of the insurance money is made, the insurance money is payable to them in equal shares.

**s.105**  An insured may **in a contract or by a declaration** appoint a trustee for a beneficiary, and may alter or revoke the appointment by a declaration.

#### WESA Designated in Plans – Relevant Provisions: Pension, RRSPs, TFSA, RRIFs

(This part does not apply to life insurance plans)

**Beneficiary Designations**

**s.85** (1) A person entitled to a benefit under a benefit plan may

(a) designate another person or persons to whom or for whose advantage the benefit is payable as a designated beneficiary, and

(b) unless the designation is irrevocable under section 87, alter or revoke the designation.

(2) A designation under this section

(a) **is only effective**, and if the designation can be altered or revoked is only effective to alter or revoke the designation, if the designation

(i) **is in writing**, and

(ii) **is signed by the person making it**, or by another person in the presence of the person making it and by his or her direction, and the signature may be in the name of the person making it or the person signing,

(b) **may be made in a will**, but if it is,

(i) the designation is only effective if it relates **expressly to a benefit plan**, either generally or specifically, and

(ii) Division 3 *[Designated Beneficiaries in a Will]* of this Part applies to the designation, and

(c) is subject to section 89 [when designations may not be changed].

(3) A person granted power over financial affairs under

(a) section 8 [**enduring power of attorney**] of the Power of Attorney Act, or

(b) **a committee acting under the Patients Property Act**

may make a designation under this section only if expressly authorized to.

**Irrevocable Designations**

**s.87** (1) A participant may make an irrevocable designation.

(2) An irrevocable designation has effect as an irrevocable designation only if, during the lifetime of the participant, it is filed with an office in Canada specified for that purpose by the benefit plan administrator.

(3) If a person

(a) makes an irrevocable designation by will, or

(b) makes an irrevocable designation that is not filed in accordance with subsection (2),

the designation takes effect as a revocable designation.

**Effect of Irrevocable Designation (mirrors provision in *Insurance Act*, s. 60)**

**s.88** (1) While a designated beneficiary of an irrevocable designation is living, the participant may not alter or revoke the designation **without the consent of the designated beneficiary**.

(2) A benefit that is the subject of an irrevocable designation \*\*\*\*

(a) is not subject to the control of the participant or the participant's creditors, and

(b) does not form part of the participant's estate.

**s.90** A committee, attorney, representative or person appointed under the Indian Act can make a new designation of the designated beneficiary in order to renew, replace or convert a designation made by the participant wile capable.

**s.91** If a beneficiary dies before the participant and no disposition of that share is provided for in the designation, then it goes equally to the other beneficiaries designated or if none, then to the personal representative of the deceased participant. (mirrors *Insurance Act* provision, s. 63)

**Trustee for Designated Beneficiary**

**s.92** (1) A participant may, in the same manner as a designation, appoint or alter or revoke the appointment of a trustee for a designated beneficiary.

(2) A payment made by a benefit plan to the trustee for a designated beneficiary discharges the benefit plan administrator to the extent of the payment.

**s.95** A benefit payable to a designated beneficiary or to a trustee appointed under section 92 under a benefit plan on the death of a participant does not form part of the participant's estate and is not subject to the claims of the participant's creditors.\*\*\*\*\*

**Alteration or Revocation of Designation in Will**

**s.96** A designation in a will may be altered or revoked by a later designation that is NOT in a will (mirror provision in *Insurance Act,* s. 62(2).

**s.97** (1) A revocation in a will of a designation revokes a designation that is not in a will **only if the revocation in the will relates to the designation, either generally or specifically**, and the designation is not irrevocable. = will revokes prior designation specifically

(2) The revocation of a will revokes a designation in the will (mirror s. 61(3) *Insurance Act*).

(3) Revocation of a designation does not revive an earlier designation.

**Effect of Revival of Will on Designation**

**s.98** Designation made in a purported will is valid even if the instrument is invalid as a will (mirror provision 61(1) in *Insurance Act*)

**s.99** Revival of a will by codicil does not revive a revoked designation in a will unless the codicil expressly provides for revival.

**Effective Date of Designation and Revocation**

**s.100** Unless a designation is irrevocable, a designation or revocation of a designation in a will is effective from the time the will is made.

#### National Trust v. Robertshaw (1986 BCSC) RRSP deemed intervivos gift not revoked

•Husband designated wife as beneficiary of RRSP

•After divorce, husband consolidated all RRSPs and designated children as beneficiaries

•Husband’s Will contained general revocation clause: “I … hereby revoke all former **testamentary dispositions** made by me …”

•Husband’s estate argued RRSP designation to ex-wife was a testamentary disposition and revoked by the revocation clause in Will

•Found ***inter vivos* trust** relationship in the designation of the RRSP such that it was **not testamentary** in nature

•**General revocation clause in husband’s Will not sufficient to revoke the designation**

 NB: Prof thinks this analysis is strained, it was balancing of equities.

🡪wife entitled to the funds

#### Roberts v. Martindale failure to revoke insurance designation, but rescued by constructive trust

•Wife mistakenly thought she had revoked ex-husband as beneficiary of life insurance

•Separation agreement between spouses said: “full and final settlement of all rights of each against the other with respect to the other’s property and estate”

•BCCA required spouse to return to estate based on a constructive trust arising on the principle of “good conscience”

#### Wilson v. Wysoski (2014 BCSC) contrast with Martindale, consent order did not prevent pension claim by wife

•Common law spouses entered into property division consent order and gave up pension claims against the other

•Husband dies without revoking designation of “wife” for death benefit payable under pension

•Husband’s executor claimed death benefit for estate

•Wife claimed benefit as the designated beneficiary

•Ex-wife designated as beneficiary is permitted to retain the death benefit by operation of law

•Distinguished *Roberts v. Martindale* on basis consent order between spouses did not specifically relinquish the death benefit

•Did not impose a constructive trust based on good conscience approach

## Claims Against Estates – WESA provisions

* In BC - WVA is not narrow - financial dependence is NOT a necessary requirement for variation
	+ Creates a lot of uncertainty & litigation
* Some ways to avoid variation claims:
	+ Joint property (never falls into estate);
	+ Beneficiary designations (these are testamentary in nature but do not fall into the estate);
	+ *Inter vivos* trust (not part of the estate)

**Maintenance from estate (very broad provision)**

 **60**  Despite any law or statute 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 its discretion, in an action 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

**Time limit and service 180 days to initiate legal proceedings since time of grant of probate.**

**Evidence** : any evidence (hearsay) to show reasons for why gifts made and why gifts NOT made.
🡪 there must be a logical connection btw the act of disinheriting and the reasons

WESA s. 65: If a claim succeeds, **then the other Bs gifts decrease pro rata**- usually will affect residue

**WHO MAY APPLY FOR A VARIATION OF THE WILL**?

•Spouse – married, common law, same or opposite sex

•Child – biological or adopted, minor or adult; financially independent.

#### McCREA v. BARRETT 2004 BCSC 2008 – step child cannot make variation claim

#### TATARYN v. TATARYN, [1994] 2 S.C.R. 807 – moral/legal obligations under variation claims

•43 year marriage with husband having title to assets, 2 children

•Will provides for a spousal trust for wife, with one son as the trustee and on her death, estate to the one son

•Wife wanted to benefit both sons and did not want to be subjected to a trust

•Not necessary to establish financial need in order to secure an award

🡪positive duty on WM to make adequate provision for the proper maintenance and support of child/spouse

•Discretion of court guided by two considerations:

–Moral obligation

–Legal obligation

**Legal Obligation**

•The legal obligation is assessed by considering the rights of the claimant against the will-maker in law

•In the case of a spouse claimant, consider rights **immediately prior to death if separated**:

–*Family Relations Act (now replaced with FLA)*

–*Divorce Act*

–Unjust enrichment and other common law claims

**Moral obligation**

•The moral obligation is based on what a judicious spouse or parent would provide for a surviving spouse or child under contemporary societal standards

•Moral obligation may increase the award in favour of the claimant beyond the amount of the legal obligation or may be the foundation of the award in favour of the claimant where no legal obligation is owed

*•*claimants owed a legal obligation take precedence over claimants owed only a moral obligation

•Adult children are generally owed only moral obligations, unless they assist with the amassing of the parent’s wealth (unjust enrichment)

#### BRIDGER v. BRIDGER ESTATE - moral oblig to give a spouse who has enough even more = care of WM gives rise to moral obligation

•Possibility that a surviving spouse will provide the benefit of award to the surviving spouse’s own children (who are not the will-maker’s children) is **irrelevant**

#### HELEN’S CASE: SAUGESTAD v. SAUGESTAD moral oblig to kids from 1st marriage trumps that of 2nd spouse: 1ST wife left entire estate to WM in hopes that it would go to their children, she did not intend it to go to his 2nd wife

Testator had 2 sons by his first wife. After her death, remarried – 2nd marriage lasted 13 yrs before he died.He held accounts offshore (result of a retirement allowance & inheritance from his mother). Also had some properties – matrimonial residence, another condo, & 2 properties held in joint tenancy with spouse. Left her the matrimonial residence, pension, RRSPs. WM left entire estate to 2 sons.

•**Assessment of Legal obligation to spouse**

–Reapportionment of assets under the FRA (fam relations act) due to testator’s ownership prior to the marriage and the length of marriage

–Exclusion of non-family assets from calculation (including overseas account and inheritance from testator’s mother)

-she was adequately provided for through other means outside of will\*\*\*

•**Moral obligation owed to sons ranked ahead of those to the spouse**

🡪Wife entered marriage w/ assets worth $225,000 and leaving w/ assets worth over $900,000= not fair. Sons had a strong competing moral entitlement: presumed 1st wife would have wanted her efforts to benefit her sons not T new wife

🡪 T support for sons throughout his lifetime created a legitimate expectation they would receive bulk of estate = moral obligation owed to sons ranked ahead of those to the spouse

### THE ASSESSMENT OF SPOUSAL CLAIMS

•Any differences between the entitlement of a married spouse and a common law spouse:NO

•Marriage agreements and the waiver of wills variation rights: CANNOT waive right to bring wills variation claim

•How are spousal claims weighed against the competing claims of adult children from another relationship or from **non-variation application claimants**

#### PICKETTS v. HALL ESTATE - Large award to cml spouse on moral oblig grounds, cml spouse entitled to property + spousal support under Family Law Act

Estate worth 18million. WM and cml spouse cohabited in a marriage like relationship for 21 yrs prior to his death (20 yr diff btw them). Will leaves to cml sp the family home, a condo in Vancouver, all personal effects; $2000 a mth…WM’s son M gets 40% of residue and other son B gets 60% of residue. WM was always rich, cml spouse struggled financially until meeting WM. Evidence going to get married WM gave ring but never got married. WM got sick and cml spouse assisted in his care.

**Court of Appeal Decision**

–$5 million outright award ($18 million estate) based on the moral obligation owed to spouse

–moral obligation determined to be substantial because:

1. no legal obligation to adult sons

2. length of relationship (21 years)

3. deprivation of income earning potential (told her not to work)

4. plaintiff contributed to household expenses

5. plaintiff provided care to testator

6. promise by the testator (reasonable expectation)

7. size and liquidity of the estate amenable to award

#### WESA AND FLA

•***Family Law Act*** brought into force on March 18, 2013 (“FLA”)

•FLA provides family **property division rights** to both married spouses and spouses living in a marriage-like relationship (“common law”)

eg. Whistler condo appreciates in price by $800K, 50-50 whether spouse or cml

🡪even if separation agreement states that you waived your rights to bring claim you still can bring claim cannot oust juris of court

#### WALDMAN v. BLUMES– Adult children moral obligation: if estate is big enough, adult kids expectations, disability, 1st wife contribution to estate of WM, financial depen by adult child

**Facts**: 20 year second marriage between 70 year old testator and 37 year old spouse. Testator was 91 at date of death. Two **teenage** children from second marriage. First wife of 48 years left entire estate to testator at her death. Four children from first marriage, all adult and financially independent. **Will leaves entire estate to second wife.**

•**Claim**: All 6 children, adult and minor, bring a variation claim. Two adult children had financial need from first marriage.

•**Assets**: Estate has net value of $1.26 million. Wife has $2.6 million including matrimonial home of $1 million by gift from testator

**Legal Obligation to wife + 2 boys:** WIFE: lengthy marriage + T encouraged her to work part time + she contributed to the household + cared for T when he got sick + she didn’t pursue law full time b/c T said she would get all his assets. T had legal obligation to E of the highest order.

🡪 SONS: 2 sons were minors at time of his death so he owed legal oblig to provide maintenance for them.

 **Moral Obligation:** to wife, to dependent sons, and adult children

* + **WIFE:** T encouraged her to have kids even though he knew she would be widowed while their sons still required significant parental support + Both she and T regarded their estate as being there for their old age so it cannot be just and equitable to deprive her of the estate b/c he died first + she cared for T as his health started to fail = **Strong moral obligation to E**
	+ **Minor children:** financial assistance, to the extent approp in the context of the family’s lifestyle and the size of the estate, during the period of time that they are pursuing their education and getting a start in life, even when the children are no longer minors. Minors assisted dad when he was elderly- cleaned up after him gave him showers. **T didn’t discharge his legal and moral obligations to his sons by not providing them in his wil**l.
	+ The claim of an adult independent child is always more weak than the claim of a spouse or dependent child
* **Ex of circum which bring forth a moral duty on the part of the T to recognize in his will the claims of adult children are:** disability on part of adult child; assured expectation on part of adult child; implied expectation on part of adult child, arising from the abundance of the estate or from the adult childs treatment during the T lifetime; the present financial circum of the child; the probable future difficulties of the child; the size of the estate and other legitimate claims
* Having considered the size of the estate + amount of T earlier gifts to his daughters + circum of the various B + contribution 1st wife made to the acquisition of the assets that make up the estate= some provision for adult children should have been made in the will
* will is varied - $75,000 fixed sum paid to adult children – Minors try to reach settlement w/ mom

NB: same argument made by Prof in Saugestad made in this case, but diff b/c 2nd wife put more into relationship than Saug case

#### MCBRIDE V VOTH (2010)(BCSC)- Moral Obligation to Adult Independent children: contribution, care & expectation, misconduct/poor character, estrangement & neglect, gifts & benefits made by WM during life, WM’s reasons for disinheritance or subordinate benefit (valid + rational)

Facts: Margot is 58 years old and intended to live in house indefinitely; actuarial evidence was that she could live another 27 years and other two siblings would be in their 80s before they could get their share of the home

* M never married+ M was the child most involved w/ the T care in the hospital. Other kids apply to vary.
* Practical disinheritance of J and D since they won’t get house till M dies and they will be so old and wont even get to enjoy it.
* J in her 50s now left home in early 20s+ she is single parent+Son has disorder+ J financially struggling+ didn’t go see T much and rarely went to the house.
* D left home at 18 moved to AB he is married now w/ kids in uni. + makes a lot of money+ D generally visited his mom every yr and called her regularly.

 **Court ordered variation**:

•Margot : 45%
•Jennifer: 30%
•Daniel: 25%

* **Circum that might support or negate a T moral duty to independent children (Clucas)**
	+ **Contribution and expectation**- Contributions by the claimant to the accumulation of T assets with little in exchange, or providing other types of contribution or care to a T will generally serve to strengthen the moral obligation, other things being equal.
	+ **Misconduct/ poor character**- court can refuse variation to a person whose character or conduct in the opinion of the court disentitles him to relief. Such misconduct is measured at the date of death, not after and must be directed at the T. conduct has to be severe
	+ **Estrangement/neglect-** court will enquire into the role played by the T in the estrangement or relationship breakdown and where it is seen to be largely the fault of or at the insistence of the T it will likely not negate a T moral duty
	+ **Gifts and benefits made by the T during lifetime**- Depending on the circumstances, a testator’s moral duty may be diminished or negated entirely where he or she has made inter vivos gifts to the claimant, or the claimant has received assets on the testator’s death outside the framework of the will IE through trusts, JT
	+ **Unequal treatment of children-** one child isnt given same gifts as other isnt of itself enough to establish a moral claim. equal treatment among independent adult children is prima facie fair from a moral duty standpoint
	+ **T reasons for disinheritance/subordinate benefit:** Act allows the court to accept evidence of the T ascertainable reasons for making or not making the dispositions in the will for the spouse or child. The weight to be given to evidence of the T reasons is affected by its accuracy and not by morally acceptable or unacceptable content.
	Where T’s reasons purporting to explain a disinheritance are **valid and rational=** T moral duty in respect of that child is negated. burden then shifts to the plaintiff to show that the reasons acted upon by his or her parent were false or unwarranted.

#### MAWDSLEY (2012)(BCCA)- using fraudulent conveyance act to set aside inter vivos trust fails

•**Facts**: Will maker (on her 4th marriage) made an alter ego trust and transferred her assets to the trust for the benefit of her children after her death (from previous marriage). Will-maker also put assets into joint tenancy and made inter vivos gifts. No provision was made for her common law spouse; however he was present at the meetings she had with lawyers. He sought variation, and failed b/c no fraudulent intention found, also spouse not a creditor to try and escape creditor claims.

#### HARVEY v. HARVEY, [1979] 2 W.W.R. 661 (B.C.C.A.) share can be gifted to non registered shareholder

•**Facts**: Testatrix and two sons were shareholders in business. Company articles permitted shares to be transferred only by right of first refusal. Testatrix left shares to one grandson, the son of one of her two sons, being Richard. Testatrix’s other son, Francis, wanted to buy the shares and obtain majority ownership.

•**Trial ruling**: Shares from testatrix could be registered to the grandson.**Court of Appeal Ruling**: Upheld trial ruling. Company articles could not preclude the testatrix shareholder from gifting shares that she owned to grandson as Richard was already a shareholder and she could effectively give to grandson through registration of the shares into Richard’s name.

## Capacity & Related Topics

* S. 36 wesa- person who can make will= **16+ age + mentally capable of making a will**
* **Capacity is an absolute req for a valid will- this is a common law req not in statute – capacity is built on the case law – test for capacity in Banks v Goodfellas**

**FIVE Things you need for a valid will:**(a) capacity
(b) have knowledge and approval
(c) cant have fraud
(d) cant have undue influence
(e) have formal req of will execution under WESA

* **General rule for capacity**: It is presumed (rebuttable presumption) that a T has capacity it doesn’t have to be proven where will duly executed and WESA formalities followed unless someone takes issue w/ it. if questioned **then burden lies on executor** to prove that the T had capacity and had knowledge and approval or disprove fraud/undue influence.

**General rule for undue influence and fraud:** if bringing forth UI or fraud argument then onus on the person attacking the will to raise the issue and then onus on executor to prove that no UI (s. 52 codifies this) or fraud

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| **CAPACITY-** cases below discuss it  |
| **KNOWLEDGE AND APPROVAL-** this has no relevance if the person is found not to have capacity. If found to not have capacity then you don’t have knowledge and approval. Once found person has capacity then turn to knowledge and approval req. will cannot be probated if T doesn’t know its content.  |
| **UNDUE INFLUENCE (UI)-** doctrine of equity. Due influence- can to some extent influence what someone puts in their will (this isnt UI). UI will invalidate a will.  |
| VOUT V HAY (1995)(SCC)- Rebuttable Presumption of due execution, knowledge/approval, and test capacity, if put in issue, propounder of will has the burden to prove will is valid |

**The person propounding the will (saying its valid) has the legal burden of proof w/ respect to due execution, knowledge and approval + testamentary capacity**

* + - * These are presumed if the will was properly executed after having been read over to or by the T who appeared to understand it then it will be presumed T knew and approved of it + had testamentary capacity – **this is a rebuttable presumption**
		- If evidence of **suspicious circum** brought forth then legal burden reverts to the propounder generally.
* Suspic circum: generally evidence if accepted would tend to negative knowledge and approval OR testamentary capacity.
* Suspicious circum may be raised by: circum surrounding the prep of the will/ circum tending to call into qst the capacity of the T/ circum tending to show that the free will of the T was overborne by acts of coercion or fraud

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| BANKS V GOODFELLOW (1870) (ENG)- Capacity test: 1.T must understand the nature of the act of making a will- eg. disposes of persons property after death2. The T needs to understand the extent of the property of which he is disposing- needs to know value of the estate approx. (not exact)3. Need to be able to understand and appreciate the claims that society expects them to give – are they thinking about family and friends- normal ppl you would gift to |

T managed his own money affairs and was careful w/ his money + read will carefully 2-3 times before execution

🡪can have situations where mind is overpowered by delusions but leave the indiv in all other respects rational and capable of transacting the ordinary affairs

#### Lazlo v. Lawton 2013 BCSC 305 – Refined Capacity Test: need rational thinking both at time of taking instructions and execution + scientific/med evid not conclusive, + use witnesses

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| ROYAL TRUST COMPANY V RAMPONE (BCSC)(1974)- unable to manage their affairs (ie day to day affairs or financial affairs) DOESN’T MEAN they are incompetent to make a will |

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| RE THE ESTATE OF BOHRMANN (1938)- found to lack capacity and one provision of codicil struck down  |

* T paranoid psychopath –he thought govt was going to expropriate some of his property. made codicil changing the B from charities in England to charities in the USA= court said this is evidence he doesn’t have capacity
* **His delusion affected his disposition, no rational basis at all for the change**

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| KEY & ANOR V KEYS & ORG (2010)(ENG)- “golden rule” for making will for someone old and/or ill + impact of depression on capacity |

* Result: will found to be invalid b/c of lack of capacity
* 89 yr old when made will and his wife of **65 yrs** had been dead for only a week when he made the will + Lwyr didn’t take proper steps to satisfy himself of T testamentary capacity + didn’t make notes
* **Golden rule**: when a solicitor is instructed to prepare a will for an aged T or for one who has been seriously ill, he s**hould arrange for T to meet w/a doc to make a report on** capacity and understanding of the T
* Depression can affect powers of decision making– a person in that condition may have the capacity to understand what his property is and even who relatives/dependents of his are w/o having the mental energy to make any decisions of his own about whom to benefit

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| SHARP AND BRYSON V ADAMN AND ADAM (EWCA)- Irrational basis for disposition = incapacity  |

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| PARKER V FELGAT (1883)- capacity at execution stage not as imp as capacity at time of giving instructions given you fall into 1 of the state of minds  |

* **3 stages of capacity that a T may be able to answer:**
* 1st state of mind: Do you believe that T was so far capable of understanding what was going on? Did she at that time know and recollect all that she had done w/ L?
* 2nd SOM= if you come to the conclusion that she didn’t at that time recollect in every detail all that had passed b/w them, do you think that she was in a condition, if each clause of this will had been put to her, and she had been asked “do you wish to leave X so much” she would be able to answer intelligently “yes” to each qst
* 3rd SOM: I gave my lawyer 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 doc which is put before me as carrying it out” (3rd SOM)

#### Knowledge & Approval (here you have capacity)

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| WINTLE V NYE (1959) (ENG)- knowledge and approval of the will’s contents |

* WM elderly lady doesn’t know business well, no one to rely on except Lwyr, makes will giving a lot to L
* Is the will valid?- NO
* **She must have known and approved of its contents, here it was questionable whether she did**

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| RUSSEL V FRASER (1980)(BCCA)- WM must know general amount of residue to have knowledge and approval  |

* T made will when 79, uneducated, little knowledge of business and real estate. On T request F took instructions for her will. F asked what are going to do w/ residue and told her she could leave it to him. T replied that was a bit much after further discussion she eventually agreed. On death almost 50% of estate ended up in residue.($60k) **Gift of residue clause is invalid**
* **where there is a gift of residue: T doesn’t need to know the precise amount but know approx. value of the residue.**

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| MADDESS V ESTATE OF JOHANNE GIDNEY(BCCA)(2009)- language difficulties alone doesn’t mean don’t have knowledge  |

#### Undue Influence

* **S. 52 WESA**: In an action, if a person claims that a will or any provision of it resulted from another person

(a) being in a **position where the potential for dependence or domination of the T was present**, **and**

(b) using that **position to unduly influence the T to make the will** or the provision of it that is challenged,

**and establishes that** the other person was in a position where the **potential** for dependence or domination of the T was present, **the party seeking to defend the will has the onus of establishing that the person did not exercise UI over the T with respect to the will or the provision of it that is challenged.**

* **Community care and assisted living act s.** 3: a licensee (hospital/facility) cannot or attempt to persuade/induce a person in care to make or alter a will, provide a benefit for the licensee or their spouse, friend…
* **Hospital act s.** 2 and 3: an employee cannot or attempt to persuade or induce a patient to make or change their will or provide a benefit for an employee or to employee’s spouse, relative ect. –

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| WINGROVE V WINGROVE (1885)- UI= coercion  |

* In **order for there to be undue influence there must be coercion** – only when T is coerced into doing that which he doesn’t desire to do is it UI, not a voluntary act, feel compelled to do it.

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| CRAIG V LAMOUREAUX (1920)(SCC)- case of UI |

* H and W , one very sick and plea made to survivor to leave it to the other person. Will isnt valid
* once it is proved that a will has been duly executed by a person of competent understanding, **the burden of proving that it was executed under UI rests on the party who alleges this.**
* spouses and kids can ask for their recognition in their will – that is ok and not UI.

Some indicators from BCLI: ISOLATION, EMOTIONAL MANIPULATION, KINDNESS BY INFLUENCER, POWERLESS

#### FRAUD

#### Coffey Estate Case 2014 Daughter defrauded mom, but does not lead to complete disentitlement under will

WM had given EPOA to her daughter, WM inherited $2.43 million from cousin. Under EPOA, daughter begins defrauding mother’s estate. Mom later becomes incapable of independent living.

1) Daughter’s share under mother’s will to be deducted by amount she defrauded
2)Given daughter’s actions, she is not disentitled from receiving under will (we do not know what her mother’s reaction would be)

#### Is lawyer duty bound to prepare a will when requested?

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| HALL V BENNETT ESTATE (2003)(ONT CA)- lawyer not making will b/c thinks T doesn’t have capacity |

* 12 hrs b4 T died L asked to come make a will. Few hrs b4 death the L met T and she gave him instructions. L didn’t draw up the will in the hospital room **b/c he didn’t think T had capacity**. Friend who was suppose to get a gift now suing L for negligence- L found not negligent b/c he **didn’t have a retainer from the T**
* Generally if no retainer given then L owes **no duty of care** – in the absence of a retainer to prepare a will the L owed no duty to 3rd parties – Prof thinks this is questionable, spent sufficient time w/ client it was implicit he was retained.
* Judge mentions that he thinks it is at least questionable whether the lawyer regardless of his opinion on T capacity (eg. T had capacity but bed ridden), could be found to be under any legal obligation to accept the retainer to prepare T will, he outright refused despite the urgency of matter
* Need to make your decision ASAP wn confronted.

##### PGT v. Gill case: what to do

* Unless coherent instructions cannot be obtained, do the best you can to establish they have capacity (call med assistance + make good notes, talk to relatives)

## REVOCATION OF WILL

We require same formality and capacity requirements for revocation. **INTENTION is paramount**.

**How to revoke a will under WESA go to s. 55 which says a will is revoked ONLY in one or more of the following circum:**

 (a) by another will made by the will-maker in accordance with this Act;

(b) by a written declaration of the will-maker that revokes all or part of a will made in accordance with **formalities**

(c) 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 the will in some manner with the INTENTION of revoking all or part of it**;

(d) by an order of the court under section 58, if the court determines that the consequence of the act of burning, tearing or destroying all or part of the will in some manner is apparent on the face of the will, and the will-maker intended to revoke all or part of the will.

**NB:** **Marriage will NOT revoke previous will.**

**CEASING TO BE A SPOUSE:**

* **REVOCATION OF GIFTS (WESA S. 56):** if T makes a gift to a person (or makes executor or trustee) who was or becomes the spouse of the T and after the will is made and before the T death they stop being spouses then the gift must be distributed **as if the spouse had died before the T**. This provision is subject to a contrary intention appearing in a will.
* This rule isn’t affected be a subsequent reconciliation of the will maker and the spouse. The relevant time for determining whether a person was the spouse of the will maker is at the time the will was made and if after will is made they become spouses then relevant time is anytime after will is made and b4 spouses ceased to be spouses.

#### RE LAWER (SASK)(1986)- 2 wills read in harmony together no intention for revo

-Deceased left 2 wills, 1st in 1962 and 2nd in 1978. 2nd will had revocation clause “I revoke all former wills

-No intention to revoke the 1st will when T made 2nd will + **both wills disposed of diff property** + kept 1st will w/ the 2nd will + wills aren’t contradictory- can both stand 2gether+ read both wills and having regard to surrounding circum

|  |
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| RE NORRIS (BCSC)(1946)- tearing of the will- no intention to revoke found  |
| * T made will told H where it is/ H finds will and it is in envelope but torn into a # of pieces/ once pieces placed together it was easy to read. Court finds: the will WASN’T revoked by the act of tearing
* Court: only ppl in house T and H so either T unintentionally or when suffering from mental delusions he tore the will and placed it back in the box
* No change in relationship b/w T and wife, circumstances did not evince intention
 |

#### RE ADAMS (1992)- altering material part of will by pen found to revoke will

Court: **will is invalid b/c of alteration made w/ pen on it b/c signature no longer apparent so material part of the will has been destroyed so the whole of the will has been revoked by the T** (key thing is that a material part of the will is destroyed w/ the pen)

#### LOST WILLS

##### presumption that if an original will cannot be found it has been revoked by the T- this is a presumption that can be rebutted (heavy burden to rebut)🡪 use detailed affid explaining why presumption should be revoked

Once you overcome presumption, you need to confir what it said, use variety of evi to prove contents, if you have a COPY that is MUCH easier!

#### Polischuk estate v. Perry 2014 BCSC: WM became unstable after execution of will, therefore lacked capacity to revoke will. Rev must occur when person of sound mind. Court found that he didn’t destroy it (presumption was rebutted), it was simply lost.

WM’s will lost, sought probate on unexecuted copy of will.

Was presumption rebutted? Was it simply lost?

Some factors to look at:

🡪whether the terms of the Will itself were reasonable
• whether the testator continued to have good relationships with the

beneficiaries in the copy of the Will up to the date of death

• where personal effects of the deceased were destroyed prior to the

search for the Will being carried out

• the nature and character of the deceased in taking care of personal

effects

 • whether there were any dispositions of property that support or

contradict the terms of the copy sought to be probated

• statements made by the testator which confirm or contradict the

terms of distribution set out in the will
• whether the testator was of the character to store valuable papers,

and whether the testator had a safe place to store the papers
whether there is evidence that the testator understood the

consequences of not having a Will, and the effects of intestacy:

• whether the testator made statements to the effect that he had a will

🡪whether terms/intention consistent with previous wills?

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| LEFEBVRE V MAJOR (1930)(SCC)- Lost Will – no revocation found (no extra copy) |
| Will left everything to sister. Friend present when will was made. He lost the will. Will may have been burned accidently when burning other content in the T house. **Will valid** Friend who witnessed will stated contents, stated in T letter to sister•Few weeks before death T told 2 trustworthy Witnesses that he wanted to give everything to sis •presumption rebutted  |

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| CONDITIONAL REVOCATION: Conditional revocation: was there something conditional about the revocation if so then the will only has effect if the condition of the REVOCATION is met, if not, then no revocation of will. |

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| IN RE JONES DEC. (1976)(CA)- what to ask when faced w/ a destroyed will  |
| * T had will/ told L intended to make new will/ before able to make new will dies/ Will cut into 2 parts. Was revocation conditional on new will being made? – No. She intended to revoke will but intention wasn’t conditional or contingent on making a new will
* **Where a T mutilates or destroys a will the qsts which arise are these**:
* Did T do this w/ the intention of revoking it – if no then will not revoked
* If yes, then ask if his intention was **absolute or qualified** subject to some condition or contingency? If absolute= revocation. If qualified= what was the condition? Has it occurred?
* Concerned w/ the subjective state of mind of the T
 |

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| RE SORENSON: MONTREAL TRUST V HAWLEY (1981)(BCSC)- mistaken fact can invalidate revocation if court decides revocation was conditional on that mistaken fact  |
| * Makes will gifts to S and C. T thinks S and C died so makes a codicil to take out their names. But S is still alive and T didn’t know this. court: condition in new will and it is that ppl she thinks dead r dead = not valid revo
 |

#### JOINT AND MUTUAL WILLS

* **JOINT WILL (ONE DOC):** doc that 2 T sign, **both signature will be on the bottom of the same doc**- testamentary wishes of 2 ppl in one will –have same terms
* **MUTUAL WILL:** where 2 ppl make wills on **identical terms** and agree they **aren’t going to change** their wills - mirror images
* **There can be an
(i) implied K stating that can’t change the will w/o the consent of the other person OR
(ii) express K- which sets out exactly the terms you’ve agreed not to change**

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| UNIVERSITY OF MANITOBA V SANDERSON ESTATE (1998)(BCCA)- mutual wills – included an express K not to change wills |
| * Had mutual wills and **an agreement** states that after death of either H or W the said will of the survivor will not be revoked or altered.
* Wife dies H made a new will w/ terms inconsistent w/ terms of the mutual will. When W died almost all her assets were
* held jointly w/ H so most of the assets transferred over. Will wasn’t probated b/c nothing under will.
* Court finds that **although rec’d property through JT but had a K of how property was going to be dealt w/ under the wills.**
* Obligation of the survivor not to revoke his mutual will DOES NOT depend on him getting $ through estate
* Court said receipt of benefit under the will is not required for the court to enforce the terms of the K
* Court imposed a **constructive trust** - compels the survivor to hold it for the B (the Uni)
* 2 conditions which must be met before the court will impose a trust as a consequence of joint/mutual wills:
* (1) mutual agreement not to revoke the joint/mutual wills AND (2) *the* ***first*** *to die must have died w/o revoking* or changing his will in breach of the agreement
 |

## REVIVAL OF A WILL

#### By a will or codicil that shows intention to give effect to the revoked will or part of it

* S. 57 of WESA: revoked will is brought back to life by a subsequent will or codicil
* A will or a part of it that has been revoked is **revived only by a will that shows an intention to give effect to the revoked will or part** (s. 57)
* If a will has been revived by a codicil the will is deemed to have been made at the time it was revived or re-signed (s. 57(3) of WESA) = **republished**
* A will or a part of it that has been revoked may not be revived except:
 (A) by an order of the court under s. 58 if the court is satisfied that the T intended to give effect to the will or part that was revoked
OR (B) in accordance w/ any other provision in Act that recog revival of a will (s. 57(4) WESA)

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| RE MCKAY (BCSC)(1953)- revival requires intention, mistake insufficient to revive old will  |
| * Made 1st will (husband alive) then made 2nd will (husband dead now) stating “revoking all earlier wills…” (changes will takes out H gifts) prepared codicil after 2nd will and put in the date of the 1st will as the last will. – so referenced wrong will in codicil
* The 1st will was not revived – codicil otherwise valid court will just omit reference to 1st will
* S. 57 of WESA “showing intention to revive”- has to be clear beyond doubt the intent to revive. Codicil lacked these kinds of words- here no facts indicating intention to revive **just shows mistake**
 |
| ABORIGINAL ESTATES  |

* **Reserve land: it belongs to the bands not indivs. When you die get a cer’f of possession (right to live on reserve land)and this can’t be given to a non registered AB of that band- not even to child of the T**
* **Here we are dealing w/ the Indian Act**
* **AB DIES WHAT TO DO NOW?**
	+ - 1. **Which regime do I fall under?**
	+ Provincial regime- apply probate at the local court
	+ Indian Act- Minister of Indian and Northern Development has to deal w/ it
		- 1. **Test to determine what regime you fall under is:**
1. **Is the matter in cause testamentary? (testamentary means after death)**
	* Have to be dealing w/ an estate not a personal right of T that they owe someone (no K, trusts)
	* Examine if dealing w/ validity of will or that aspect of testamentary causes
2. **Is the deceased person ordinarily resident on the reserve?**
	* Ordinarily resident is linked to the intention of the Indian = so if registered status Indian and ordinarily resident on reserve= Indian Act applies
	* If off reserve when AB passed away- then court looks at intention
	* If off reserve but intended to return to reserve then arguably ordinarily resident (temp work)
	* If had no choice to be off reserve (care home) = still ordinarily resident
		+ 1. **Indian Act applies if person dealing w/ matter in cause testamentary + T ordinarily resident on reserve – but if fall under Indian Act have option of whether want to go under Indian Act or under Provincial regime**
	* Indian Act: 2-3 weeks Minister decides everything; one pg form that Minister needs to approve; ministry has sig experience dealing w/ AB; no probate fees. Negatives: don’t have pretrial remedies if going to be contested- these available under prov regime.
	* Can argue Indian Act is a complete code so provincial legislation doesn’t apply or can argue provincial leg can complement and add to IA provisions. We have conflicting case law on this topic
	* Req for validity of will under IA so much more relaxed than under WESA
	* Under s. 46(1)(c) IA: Minister has limited powers to change the will. By change all minister can do is void that portion of the will (no remedies)
* The act says that all jurisdiction and authority in relation to testamentary matters relating to deceased AB is vested exclusively in the Minister (s. 42)
* The governor in council may say that a deceased AB who at the time of his death was in possession of land in a reserve shall be deemed at the time of his death lawfully in possession of that land (42)
* **The minister has power to (s. 43):**
	+ appoint executors of wills of AB, remove them and appoint others;
	+ authorize executors to carry out the terms of the wills of AB;
	+ authorize administrators to administer the property of Indians who die intestate;
	+ carry out the terms of wills of AB and administer the property of AB who die intestate;
	+ make another order, direction, finding…
* The SC can w/ the consent of the minister exercise jurisdiction and authority over the AB (s. 44)
* **Minister can direct that the SC deal w/ this AB estate** and **the Minister can refer to the SC any qst arising out of any will of admin of estate** (s. 44)-
* **🡪You can request matter to be transferred to prov ct, Dept normally authorizes this, and once there you can argue what law you want applied.**

Eg. formalities of will easier under IA, wills variation for hardship explicitly set out under IA (needs based test), intestacy rules diff under WESA

* Side note: what legislation applies in this situation?
	+ **Johnson case:** common law principles apply in a referral of qst situation. Left open qst of whether WVA would apply. So not looking at IA in isolation its informed by common law
* The SC can’t enforce any order relating to real property on **a reserve** w/o the consent in writing of the Minister (44)
* **Req for a will under the Indian Act:**
	+ Any written instrument signed by an AB in which he indicates his wishes or intentions w/ respect to the disposition of his property on his death (45)
	+ A will of a AB isnt of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate (45)
* **Reasons why the minister may declare the will of an AB void in whole or in part (any of these reasons are sufficient) (s. 46):**
* The will was executed under duress and undue hardship
* T at the time of execution of the will lacked testamentary capacity
* Terms of the will would impose hardship on persons for whom the T had a responsibility to provide
* The will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this act
* Terms of the will are so vague, uncertain, or capricious that proper admin and equitable distribution of the estate of the T would be difficult or impossible to carry out in accordance w/ this Act
* The terms of the will are against public interest
* **Where minister declares will of AB to be wholly void- then as if he died intestate. If will is declared void in part only then that gift lapses unless contrary intention appears in the will** (s. 46)
* **Appeals:** decision of Minister can be appealed within 2 mths to the FC if the amount in controversy in the appeal exceeds $500,000 or if the Minister consents to the appeal (47)
* **Distribution of AB property on intestate (48):**
* Where net value of estate doesn’t exceed $75,000 or any other amount fixed by order of the governor in council= estate shall go to the survivor
* If minister thinks net value of estate exceeds $75,000 or any other amount fixed by order of the governor in council. That amount shall go to the survivor and
	+ If intestate left no issue= remainder go to survivor
	+ If intestate left 1 child= ½ remainder shall go to survivor
	+ If intestate left 1+ kids= 1/3 of the remainder goes to the survivor
	+ Where a child has died leaving kids alive at the date of the T death, the survivor shall take the same share of the estate as if the child had been living at that date
* But if **minister is satisfied that the children of T wont be adequately provided for he may direct that all or part of the estate that would’ve gone to the survivor shall go to the children** + minister may direct that the survivor shall have the right to occupy any lands in a reserve occupied by T
* **If T dies w/ kids his estate** shall be distributed subject to the rights of the survivor, **per stirpes among the kids**
* **If no survivor or kids**= estate to parents of T in equal shares if both alive but if either dead then to the surviving parent
* **If no survivor, kids or parents**= goes to brothers and sisters in equal shares. If bro/sis dead then children of dead bro/sis take the share their parents would have taken. Where the only persons entitled are children of deceased bro/sis they shall take per capita
* **If no survivor, issue, father, mother, brother, sister and no children of bro/sis his estate will go to next-of-kin** – 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 sibling

**RESERVE LAND**

* **49**. A **person who claims to be entitled to possession or occupation of lands in a reserve** by devise or descent shall be deemed not to be in lawful possession or occupation of those **lands until the possession is approved by the Minister**.
* **50**. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.
* (2) **Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve**, that right shall be offered for SALE by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and **the proceeds of the sale shall be paid to the devisee/descendant**
* (3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.
* (4) The purchaser of a right under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

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| PROVONOST V CANADA (1985) (FCA)- AB able to leave life estate to wife |

-Indian died while legally in possession of a lot on a Indian reserve. Will property given to 2 daughters and he gave a life estate to his wife shall have the right of occupancy as long as she lives. He deprived his wife right to leave the property upon her death. Minister said he disposed of the land on a reserve in a manner contrary to the interest of the Band and contrary to this Act.

- Minister was wrong- didn’t dispose of land on a reserve in a manner contrary to interest of band or act

•Looked at s. 45(1) of Indian Act - AB enjoy same testamentary freedom as other indivs so AB have to be recognized as having the same right as others to make gifts accompanied by a substitution

• Even if it is a substitution then probably not contrary to the interests of the Band or Indian Act – bands interests can still be protected by the Minister who can refuse to legitimize the possession of the person asking for it under the will and of the substitute who will claim it later

## Presumption and Order of Death

*Presumption of Death Act*

*•Can obtain a declaration of presumed death where no body is located*

*•Can appoint a curator to manage missing person’s property in meantime*

#### Survivorship Rules: General rule, if order unknown, presumed that they survived each other

*s. 5(1)
 •If 2 or more persons die and order of death uncertain, rights to property determined as if each had survived the other,*

*•Purpose is to avoid the unnecessary double probate and administration of two estates*

EXAMPLE:

*A and B die together and order of death is unknown*

*•For A’s estate it is presumed that B died first*

*•For B’s estate it is presumed that A died first*

*•B would not inherit from A + A would not inherit from B*

#### WESA S. 5(2) JT severed into TICommon if both die at same time

*•If 2 joint tenants die together, each person is presumed to have held their interest in the jointly owned property as tenants-in-common*

*•Result is that each deceased person would dispose of their half interest in their own estate and the ordinary survivorship rule would not apply*

*A and B hold property as joint tenants*

*A and B die together and order of death is unknown*

*•A’s estate includes a one-half interest in property*

*•B’s estate includes a one-half interest in property*

***WESA s. 6***

*•If property passes in the event that a beneficiary dies before or at same time as another person, or in circumstances where the order of death is not known, the event (which then triggers the operation of the disposition of the property) is presumed to have occurred*

*Facts: A and B die together and order of death is unknown*

*A’s Will: My estate to C (my son) if B (my spouse) fails to survive A (me)*

*Result: C takes gift, B is presumed to have died before A*

***WESA S. 9***

*•If gift is conditional on the death of person and the order of death of the will-maker and that person is unknown, it is presumed that the person has died before the will-maker*

*•Provisions ensure that the condition for the gift to be effective is met when order of death is unknown*

*Facts: A and B die together and order of death is unknown*

*A’s Will: To B (my son) if B (my son) survives A (me)*

*Result: B is presumed to have died first, before A, and B loses the gift made by A (can go to others now)*

#### WESA S. 10: 5 DAY minimum SURVIVAL RULE

*•A beneficiary must survive 5 days to take the benefit*

*•This presumption only operates if will is otherwise silent and there is no contrary intention to this survivorship rule applying*

*•The Will can provide for a longer survivorship period*

*•Will-maker dies on January 1*

*•Beneficiary dies on January 3*

*•Result: Beneficiary loses gift as presumed to have died before Will-maker due to failure to survive Will-maker by 5 days*

#### WESA S. 8 POST DEATH BIRTHS

##### •Child conceived before death of Will-maker but born after the death of the Will-maker and who survives at least 5 days after the death of the Will-maker inherits

*•Example: Equally amongst my children (includes the pre-death conceived and post-death born child)*

#### WESA S. 8.1 POST DEATH CONCEPTIONS AND BIRTHS (use of frozen sperm)

*•Descendants of a deceased person conceived and born after the deceased’s death inherits as if descendant was born and alive at deceased’s death if 3 conditions met*

*Spouse of deceased gives notice of intention to use human reproductive material of deceased*

*Descendant is born within 2 years of deceased’s death*

*Deceased is descendant’s parent under Part 3 of Family Law Act*

***INSURANCE ACT PRESUMPTION***

*•Insurance Act* ***trumps*** *WESA Part I Division 2*

*•Beneficiary is always presumed to have died before the insured person (policy owner) where order of death unknown*

*•If no alternate or other named beneficiary to the policy who survives,* ***then the insurance proceeds fall to the insured’s estate (will or intestate estate)***

### ABATEMENT DISCLAIMER AND ACCELERATION

### Abatement

Occurs when gifts fail because the estate is of insufficient size to meet all of the gifts made in the Will after debts and expenses of administration are paid
🡪eg. you have debts to pay before make dispositions or you simply do not have enough to meet the gifts, so **who will be paid out first and whose gift may be reduced**?

•Rule of abatement is that there is a **pro rata reduction of the amount / quantity of the gifts made in the Will**

•Order of abatement sets out what types of gifts are to be subject to pro rata reduction prior to other types of gifts

**Example of A General Gift**

•Gift of a type of property, commonly money, but not from any particular source eg. $25K to X, or 10% of residue to X

**Example of Specific Gift**

**•**Gift of a particular item, which can be either personal property or real property eg. my car/my house to X

**Example of Demonstrative Gift**

Gift of money to be paid from **a specific source** eg. $10K from BMO account, proceeds of sale from car

##### Example of PRO RATA reduction of estate

Net estate is worth $50.

Cash gifts total $100.

Will gives cash gift of $80 to A and $20 to B.  **Residue** to C.

Out of the $50 remaining in the estate, A gets $40 (80% of $50) and B gets $10 (%20 of $50).

C gets nothing (residue will abate BEFORE general gifts wesa. **S. 50**)

#### Celantano v. Ross 2014 BCSC 27 demonstrative gifts under old rule (NOT good law)

So here you have case where not enough money, so pay out gifts in order, may not have enough to pay out the rest

•Provisions in Will: Left a number of cash gifts to a number of named beneficiaries totalling Cdn $130,000 (general gift)
In addition: “To pay or transfer the sum of $40,000 each in US funds (to be taken from my US accounts) to the following (2) Shriners’ Hospitals …,”

•Estate at Death: Will-maker had total of US $200,000 at date of death, which was insufficient to pay all the gifts in the Will

Legal Issue: What was the proper characterization of the legacies to Shriners’ Hospital?

1.General – Abatement by pro rata reduction of the gift to Shriners’ Hospital and the Canadian legacies together

2.Specific or Demonstrative – Gift to Shriners’ Hospital would be paid in FULL FIRST before the Canadian legacies (general), result would be that the Canadian legacies abate only.

Result: Bequest to Shriners’ Hospital is a demonstrative gift

•Gift of a specified amount which is directed to be satisfied primarily out of a particular fund, “my” US accounts
•Consider language of bequest and context in the entire will for Will-maker’s intention

#### Order of Abatement under WESA s. 50 (reverse is who gets paid first, and if left over, then go to next level)

•Property charged with a debt or left in trust to pay a debt (eg. house charged w/ debt to city, pay that 1st)
•Property distributed on intestacy and in **residue**
•General, demonstrative and pecuniary gifts
•Specific gifts (real/personal)
•Power of appointment property

*Celantano v. Ross* Decided under WESA, s. 50: Demonstrative gifts abate together with general gifts + Shriners’ Hospital gifts abate together with cash gifts made to Canadian beneficiaries

#### DISCLAIMER AND ACCELERATION

•Beneficiary is never forced to take a benefit
•**Beneficiary can disclaim before taking the benefit but generally not after taking some of the benefit**
•Disclaimer can be used as a device to wind up a trust
•Question is whether disclaimer results in acceleration of remainder interests

**Example of Life Interest Provision**

“I give to my husband, a life interest in our matrimonial home. On his death, the property is to be sold and divided equally amongst my children then living. If any of my children has then predeceased, leaving children, the children of my deceased child shall take their parent’s share equally.”

Issue on Disclaimer

•Does a disclaimer by the husband accelerate the interests of the children so that they take the house immediately without having to wait until the husband’s death?

•What happens to the contingent interest of the grandchildren – are their interest eliminated by the disclaimer?

#### Estate of Brannan acceleration is a matter of WM’s intention

•Will gives income of residue to husband in trust, capital to children on his death and grandchildren would take if child predeceased the husband

•Also, if husband remarries, trust ends and capital goes to children then living and grandchildren would take if child predeceased the remarriage

•**Husband disclaims the life interest in the residue**

•At time of disclaimer, **3 sons, all of whom had infant children**

•What is the effect of a disclaimer?

•Option A: sons to take equally now (Acceleration applies)

•Option B: assets held until father’s death or remarriage before division amongst sons then alive and grandchildren if any son is then deceased (Acceleration does not apply)

•Ruling: Acceleration Applies

•Will-Maker’s Intention to permit Acceleration found on following considerations:

•Sons young and no grandchildren born at date of execution of the will

•Small Estate (not suggestive of legacy)

•Grandchildren born over Will-maker’s lifetime without any change to the will

•Husband’s unilateral ability to terminate the trust through remarriage

•Power to encroach for benefit of sons but not remoter issue (suggest sons were primarily to benefit)

#### De la Giraudias v. Giroday acceleration not allowed, no intention

•Income from Trust to Ruth for her lifetime

•On Ruth’s death, trust property to settlor’s children if aged 25 or over

•If any child dies before reaching 25 leaving children, grandchild gets income from deceased child’s share

•Ruth is 82 years of age and wants to disclaim. Court asked to give ruling on result on disclaimer

•Court Ruling

•No acceleration occurs on disclaimer by Ruth as settlor did NOT intend the Trust to be prematurely terminated

•**Beneficiaries must wait until Ruth’s death to determine the proper distribution amongst those beneficiaries alive at that time**

Will-maker’s intention to preclude operation of acceleration found on:

•No encroachment on capital during term of trust and no unilateral ability by Ruth to terminate the trust

•Recital language in trust expressed desire to benefit “wife, children and others” suggesting successive generations

•Large value of estate indicates “dynastic concerns”

•Trust included a rule against perpetuities which indicates an intention that grandchildren might get a vested estate

#### Re the Estate of Creighton acceleration allowed

•Will leaves residue (2 million) in a trust for benefit of son (69 years) and daughter (68 years) and grandchildren. On death of last surviving child, residue **divided equally amongst grandchildren then living.** **If any grandchild predeceased, great-grandchildren would share equally the deceased grandchild’s portion**

* + •Son and daughter wished to disclaim in favour of their own children
	Effect of disclaimer would be to CLOSE the Class of Beneficiaries to include **only the grandchildren of the T**

•Nine (9) great-grandchildren alive at time will was made. Ten (10) great-grandchildren alive at time of petition with more expected

#### Factors the Court considers as to whether acceleration was intended by will-maker in the event of disclaimer

##### Remarriage clauses or other specific clauses enabling the life tenant to terminate his own interest

##### Does the trust deed provide for an encroachment upon the capital?- **if yes then intention to allow A**

##### Does the wording of the trust refer to the succeeding generations showing an intention to benefit those generations? – **if yes intention to benefit later generations**. IE to my children and if any died then to their children

##### Is the value of the trust large? – **if yes then probably NO A**, if small trust then probably yes A

##### Is there a provision for premature vesting in order to protect against the rule against perp **if yes then no A (but note this is a standard clause)**

##### Here: executor can encroach on the capital of trust for the benefit of the grandchildren (sig factor here). T didn’t provide a clause which would allow the children to terminate their own interests. NO clause for immediate distribution to grandchildren + estate not large= T intended to **allow A**

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| RECTIFICATION – Court of Probate - fixing a mistake in a will  |

* Fixing b4 probate (rectification) mistake on face VS fixing after probate (construction) eg. unsure how to administer will, used to have two courts to deal with this, court of probate, or court of construction

##### NOW we have BC SC- just have 1 court deals w/ it all S. 59 RECTIFY a will at time of probate or at time of construction

##### (1) On application for rectification of a will, the court, sitting as a court of construction OR as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the T’s intentions b/c of

##### (a) an error arising from an accidental slip or omission,(b) a misunderstanding of the T's instructions, or (c) a failure to carry out the T's instructions.(2) **Extrinsic evidence,** including evidence of the T’s intent, is admissible to prove the existence of a circumstance described above ( in (1))

🡪must make rectification application with 180 days after grant of representation

- General rule: can’t admit parole evidence in for **construction**- have to look at the words in the will to interpret it.

Go here when s. 59 rectification does not apply.

#### S. 4 = construction

##### WESA s.4 codifies the common law rule that **extrinsic evidence of intention**, including statements made by the will-maker of intention, is NOT admissible to aid in the CONSTRUCTION of a will unless:

##### a)provision is meaninglessb)provision is ambiguous on its face or in light of other evidence is ambiguous having regard to surrounding circumstances, orc)extrinsic evidence is expressly permitted by WESA ( s.59)

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| CLARKE V BROTHWOOD (2006) (ENG)- rectification of a clerical error + court deleted word |

* Will only disposed of 40% of the residue leaving 60% to be disposed of on intestacy/ Application made to rectify the will/ Argument: T meant to say 20% to each of the 4 godsons but lawyer accidently recorded 1/20. What happens if you don’t dispose of all residue= goes into intestacy
* **Clerical error**: an error made in the process of recording the intended words of the T in the drafting or transcription of his will.
* Compare/Contrast with what mistake results to with what you think was intended by T.
* **Intention appears to be she wanted to leave 20% to each of the 4 godsons**. She didn’t want to leave anything to intestacy
* **Here the court deleted words**  (act as court of probate)

#### Marley v. Rawlings 2012 UKSC – clerical error to have broader meaning

Wife/husband have identical wills, leave estate to each other, but if one does not survive the other for at least a month, then estate is left to a Marley, whom they regarded as their son. Mistake was that lawyer gave the husbands will to the wife to sign and vice versa for wife, so did not sign their own wills. Wife dies first, her estate passes to husband (no one notices mistake). Husband dies, mistake comes to light. Home in JT with Marley, to pass to him on survivorship + 70K pounds left in Husband’s estate. If will valid, 70K to Marley, if not, money goes on intestacy to husband’s sons.

Clerical error need not have a narrow meaning, it can included wider meanings that encompass mistakes that effectively cover the whole will, as in this case, giving wrong will to WM to sign.

#### PRE WESA CASES

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| RE MORRIS (1971)- court of probate & court of construction working together to fix an error |

* Clause 7(iv) was to be revoked. Codicil revoked clauses 7 – it revoked all gifts but should have said clause 7(iv). Solicitor made a mistake – draft has (iv) but got omitted in final draft
* Court found T glanced through the codicil before she signed it but didn’t read it in conjunction w/ the will- **she didn’t know and approve of the codicil in regards to it revoking all of clause 7 – not T intention to revoke all the gifts**
* Court **deleted \_7\_ and admitted into probate**. Then clause would be dealt w/ by the court of construction who read in “7(iv)” in interpreting the codicil

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| RONDEL (2011)(ONCA)- evidence of intention at construction stage NO extrinsic evi allowed – very narrow |

* Application at **construction stage to rectify a will** to delete a revocation clause revoking prior wills
* Made will in Spain that was intended to deal w/ all her European property –After made new CDN will. Lawyer didn’t know anything about out of CDN assets or wills. New will had revocation clause.
* Evidence of T intention is clear = no intention to revoke Spanish will w/ revocation clause in CDN will
* **At construction stage intention can only be determined from the words used in the will – so evidence of T intention inadmissible**
* The aff evidence of friend and lawyer re testamentary intentions of T wasn’t admissible
* dealing here w/ a court of construction – so it was to give effect to the T testamentary intentions
* **Final result:** no ambiguity on the face of the will- clearly says it revokes all prior wills, no drafting error, will reviewed by T before executed = no rectification

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| BALAZ V BALAZ (2009) (ON SC)- Court rectifies neither as ct of probate or construction, evi of WM’s intention admissible This is how s. 59 may be applied today |

* T instructed that a spousal trust be created for tax reasons. Lawyer included power provisions in trust that would taint the spousal trust and eliminate tax advantage.
* T husband applies for rectification of will wants deletion of clauses which taint the trust= successful
* L admits he accidently put in those words and w/o T knowledge or approval
* Will valid only to the extent the T knew and approved its contents – so **courts may strike out passages words in a will which have been inserted by mistake** where it can be demonstrated that the T didn’t intend or approve of those words
* **Court sits only as a single court, not one of probate or construction (can look at surrounding evi/circum)**
* **Where a court seeks to ascertain whether the T knew and approved of certain language in her will it can take account of** evidence about the circum surrounding the making of the will including referring to earlier wills or drafts of the particular will + direct evidence of T intention = admissible
* Words put in the will were a mistake and are deleted by the court- Here B consent to application + CRA

## CONSTRUCTION

#### Construction of instruments

**4**  (1) If this Act provides that a provision of this Act is subject to a contrary intention appearing in an instrument, that contrary intention must appear in the instrument or arise from a necessary implication of the instrument.

(2) Extrinsic evidence of testamentary intent, including a statement made by the will-maker, is not admissible to assist in the construction of a testamentary instrument unless

(a) a provision of the will is meaningless,

(b) a provision of the testamentary instrument is ambiguous

(i)   on its face, or

(ii)   in light of evidence, other than evidence of the will-maker's intention, demonstrating that the language used in the testamentary instrument is ambiguous having regard to surrounding circumstances, or

(c) extrinsic evidence is expressly permitted by this Act.

2 Additional exceptions:

(1) doctrine of equivocation – where you don’t know who the B of the will are
(2) doctrine of falsa demonstration- the identification of the property being gifted – so don’t know what property is being gifted

FRAMEWORK:

**59 – WESA- saying we can rectify a will at time of probate or at time of construction (after probate)**

(1) On application for rectification of a will, the court, **sitting as a court of construction OR as a court of probate**, may order that the will be rectified **if the court determines that the will fails to carry out the T’s intentions b/c of**

(a) an error arising from an accidental slip or omission,

(b) a misunderstanding of the T's instructions, or (IE say want to give to D and L thinks you said L)

(c) a failure to carry out the T's instructions.

(2) **Extrinsic evidence**, including evidence of the T’s intent**, is admissible to prove the existence of a circumstance described above ( in (1))**

**- for construction go to s. 4 and 59 and see if extrinsic evidence would be admitted, if you don’t fall under those provisions then go to CL case law and see what you can do.

We have 2 analyses under the case law:**

1. If you can interpret the will using the plain meaning of the words then do that (Laws v Rabbit)

2. At the outset look at the language in the will + surrounding circum to determine if the ordinary meaning produces ambiguity (Haidl)

#### RE THEIMER ESTATE 2012 BCSC 629 use of ejusdem generis maxim

WM left $20 million in estate, one of his dispositions was to cml spouse, of his “shares” but did this encompass his shares in private companies and/or shareholder loans, in which case A LOT would be going to her $14 million at least.
🡪look to intention of wm in light of whole circumstances with properly admissible evidence (here ambiguity we can introduce extrinsic evi)

🡪The ***ejusdem generis*** maxim operates to restrict the meaning of a general word included with words having a particular meaning to a meaning similar to the latter. Each of the other assets enumerated in the definition of “money” in the Money Bequest (i.e. savings and current accounts, savings certificates and

bonds) constitute cash or cash equivalent assets which are readily liquidated.
🡪 shares were meant to mean publicly traded shares that could easily be converted to cash, where as shares in private co could not; therefore, ‘shares’ could not mean his shares in private companies.

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| HAIDL V SACHER (1980)(SASK)- when using “ordinary meaning” rule of construction, look at ordinary meaning in light of surrounding circum \*one approach to interpretation\* |

* Will lists “the following persons in equal shares, share the estate”- goes on to list by number 7 ppl and 8th person is “the children of H”- H has 4 kids. **Ambiguity b/c don’t know if H kids get 1 share b/w all 4 or each kid gets own share**
	+ **first apply the ordinary meaning rule of construction in light of contents of whole will or surrounding circumstances \*\*so look at surrounding circum at in the beginning to determine if ambiguity\***
	+ **Surrounding circum is indirect extrinsic evidence** which consists of (not direct evidence eg. T instructions to lawyer): Character and occupation of the T/ Amount, extent and condition of his property/ #,identity and general relationship to T of the immediate family +other relatives/The persons who comprised his circle of friends/ Any other natural objects of his bounty
	+ Evidence of relationship of the B to the T + manner in which the overall bequest is framed in that clause = indicates that the T was considering these B not as indiv but as households, must share 1 share btw 4

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| LAWS V RABBIT (2006)(BCSC)- only proceed w/ construction if intention can’t be determined from the plain meaning of the words used in the will- armchair approach discussed \*one approach to interpretation\* |

* **Approach in Perrin has developed into the armchair rule** – court put itself in the position of the T at the point when he made the will and construe the language from this vantage point in order to determine the actual or subjective intent of the T
* **Don’t go to the rules of construction if the intention of the T can be determined on the plain meaning of the words** in the will
1. Look at plain meaning of the words in the will- if that resolves it go no further, if it doesn’t
2. Armchair approach – this encompasses the surrounding cirum approach b/c go to armchair to figure out surrounding circum

Eg. stock, no residual clause, what does stock include? Start with plain meaning, then apply ‘armchair aproach’ b/c cannot admit direct evi, looking at indirect evi, look at surrounding circumstances eg. WM had low education, she did not mean to give them this or that! = synonmous with surrounding circumstances

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| WILSON V SHANKOFF (2007)(BCSC)- application of Haidl v Sacher  |

* **When applying the armchair rule** the court should put itself in the position of the deceased at the point when he made the will, and construe the language from this vantage point in order to determine his intent. Court may look to extrinsic evidence to identify the surrounding circum that existed which might reasonably have influenced the deceased
* The proper approach involves the **admitting of evidence of surrounding circum at the start of the hearing and then construing the will in light of those surrounding circum** (applied Haidl approach)

#### MISTAKEN INCLUSION & OMISSION

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| RE DAVIDSON (1979)(ON HC)- Exception: direct extrinsic evidence is admitted – principle of falsa demonstratio |

* Case where the description of the property given is partially accurate and partially inaccurate
* Principle of common law of falsa demonstratrio applied here so direct evidence of intention was admissible to determine the proper property to be given

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| RE MCEWAN ESTATE (BCCA) (1967)- strict approach used, courts cant fix errors by speculation  |

* S. 4 problem! Ambiguity on the face of the will
* Residue to be given monthly sums to wife and daughter during her lifetime and when wife dies divide residue amongst daughters issues
* T didn’t make provision for disposition of residue of estate if his wife dies before the daughter
* Here the residue falls into intestacy – court said not going to fix will to say if D survives wife then D gets it all – but w/ lapse the daughter ends up getting the estate anyways
* Context of will doesn’t help figure out what T intentions are in regards to this
* **presumption against intestacy** doesn’t apply here – it can’t be used to speculate
* if court is told there is an omission (clause missing need to fill in) =court has to be able to say as a matter of necessary implication that there was an omission + **what the omission was** – court can’t speculate

#### Property

#### Property that can be gifted by will

**41**  (1) A person may, by will, make a gift of property to which he or she is entitled at law or in equity at the time of his or her death, including property acquired before, on or after the date the will is made.

(2) Unless a contrary intention appears in a will, when a will refers to property, the will, with respect to the property, is to be interpreted as if it had been made immediately before the death of the will-maker.

(3) A gift in a will

(a) takes effect according to its terms, and

(b) subject to the terms of the gift, gives to the recipient of the gift every legal or equitable interest in the property that the will-maker had the legal capacity to give.

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| RE MERIER (AB)(2004)- T gives land in will he doesn’t own  |

* In will devises land he doesn’t own but owned by a corp – T sole shareholder + director of company

•testator gave brother his farmland that was in fact owned by a company of which the testator was the sole shareholder and director, rather than the shares of the company

•evidence that the testator treated corporate property as his own

•court held testator could not gift what he did not own and the farmland was owned by the company

Would rectification under WESA s. 59 now be a solution? Yes possibly where he is effectively the sole shareholder, so if you, as executor, have controlling shares, then you can transfer the property to beneficiaries, see *Ireland* case

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| IRELAND V RETALLACK (2011) (AUST)- if T doesn’t own asset can still gift it  |

* T owned 989/990 shares in corp- other share owned by his daughter. The company owned property, G. T in will gave gift of G to daughter. **Gift of G DOESN’T fail** b/c executors controlled company and could convey the property to the daughter
	+ This case is saying **if T has shares in a company of which he had the whole B interest and whose actions he could control and direct then he owns and has an interest in the premises and the shares and could dispose of them or control their disposition** as it willed
	+ Basically this case allows T who owned and controlled a corp to dispose of corp property- main thing owned 99.9% of shares here and .1% owned by daughter whose getting the gift

#### PEOPLE

**Meaning of particular words in a will- s. 42 WESA**

**-** This section is subject to a contrary intention appearing in a will.

-If gifting property in a will to a person described as “heir” or “next of kin” of the T or someone else- this takes effect as if the T had died w/o a will= if you use words heir or next of kin mean T successors

- in a gift of property in a will the words “die w/o issue” or “die w/o leaving issue” or “have no issue” or any other words meaning either no descendants= are deemed to refer to no descendants or no descendants in the lifetime or at the time of death of that person and not to a complete absence of descendants of that person.

- A gift of property to a class of persons that are described as T “issue” or “descendants” or similar word and encompass more than one generation of B = must be distributed as if it were part of an intestate estate to be distributed to descendants

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| AMYOT V DWARRIS (1904)- eldest son means first born son  |

* Gift to “to the eldest son of my sister F and his heirs for ever”. At time T made his will sister had 2 sons. Oldest son now dead. What does eldest refer to?- oldest son
* doesn’t matter if eldest is dead now = passes on intestacy

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| CHILDREN AND NIECES  |

* Child means natural child or adopted child (law and equity act s. 61)
* Natural child= born inside or outside of marriage
* Natural child DOESN’T include step child
* Nieces/nephews: includes the children of the T siblings and the children of the T spouse’s siblings

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| RE SIMPSON ESTATE (1969)(BC)- non natural son gifted in the will |

* “equally b/w my six children”. R isnt the natural son of T- wife’s child w/ another man. In will T refers to R as his son in 2 diff clauses – in one clause saying “my son R to be the sole executor and trustee” and then referring to him in the clause giving six children gifts. **Court: T intended for R to take as a son**

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| CONSTRUCTION- PER STIRPES  |

In per stirpes CANNOT SAY “to my kids in equal shares per stirpes” must say to my issue per stirpes

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| RE KARKALATOS ESTATE (1962)(SCC)- applied per stirpes division  |

* will says life estate for wife and on her death his estate shall be paid between his 2 daughters and if one dies then estate is to divided/w my grandchildren “per stirpes, in equal shares”
* T daughter E died leaving one child MG (E dead now). M other daughter who is living and has 3 kids- J, L, Marina
* “to among and between my grandchildren per stirpes in equal shares” the T intended to refer to the stocks represented by his 2 daughters so **that ½ of the portion of the estate would go to MG and other half to 3 kids of M (rather than split 4 ways)**
	+ supports view that equality of division b/w the 2 daughters during their lifetimes and their respective families after their deaths was a part of the testamentary scheme

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| CLASS GIFTS  |

* the gift would be to a class of persons included under a general description and bearing a certain relation to the T or another person
* if it is a class gift and 1 or more persons in the class died in T lifetime, the survivors in the class take the gift equally amongst them. So if someone dies in class gift then gift DOESN’T fail

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| MILTHORP V MILTHORP (2000)(BCSC)- can’t have per stirpes division and class gift simultaneously  |

* “to my husband’s children, J, R, E, R,R,G **in equal shares per stirpes**”. FOUND: No class gift to husbands kids – T specified by name indiv who got the gift + nothing in will showing intention for class gift + if it said “to all our children”= probably class gift
* Per stirpes language indicated an intention to benefit the issue of predeceased husbands children so husbands children who predeceased T their issues take their parents share \*this isnt a class gift\*
* **If a gift to an indiv fails** as a general rule a **gift lapses and devolves on intestacy** (when no per stirpes language)
* If **a gift to a member of a group/ class fails** then that gift doesn’t lapse **but is shared by the remaining members of the class who survive the T**
* **Kingsbury-test for class gifts**: when there is a gift to a number of persons who are united or connected by some common tie and you can see that the T was looking to the body as a whole rather than to the members constituting the body as indivs, and also you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift b/w them= give effect to T wishes
* Gifts to several persons designated by name or number or by reference = likely not class gift

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| RE HUTTON (HC)(1983)- found to be class gift  |

* “estate in equal shares among my brothers and sisters ABCD… provided if any of bros/sis die and have kids then kids shall take parents share - court: residue divided amongst siblings alive at T death
* One bro died and his kid died but had living grandchildren – **court: no gift to grandchildren (would be if per stirpes)**
* At time executed codicil presumed T knew brother had died. And knowing this he didn’t change the will and left portion of estate to A daughter + language just talks about child predeceased sibling nothing about grandchildren

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| CONSTRUCTION- CLASS CLOSING  |

* When the doc comes into effect it may be possible to immediately identify all possible members of the class – IE if it says to all my kids 🡪 then closed and everyone identified b/c after T dies no more kids
* General principle: class closes in favour of all existing members when 1 member of the class has a vested interest and is in a position to call his share- when class is closed can determine the minimum amount that person is entitled to and distribute it immediately and as ppl start qualifying start distributing
* If there is a condition that something must happen b4 you can take then until that thing happens ppl can keep joining the group **\*once first persons interest vests the class CLOSES\***
* Essentially once the first persons interest vests (IE hits 21) the group closes and everyone else in the group who is yet to hit that thing (IE turning 21) can benefit but no one else, so if baby born after group closes it wont benefit but if baby born b4 group closes then it’s a part of the group
* The class closing rules are subject to a contrary intention in the doc creating the gift
* Class closes at the earliest opportunity essentially when a member of class can call on the gift

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| IN RE BLECKLEY (1951)(CA)- summarizes diff categories of class gifts  |

* trust fund was to held “for all or any children of my son H… who shall attain the age of 21 yrs +”
* H remarried- H has 2 kids, 1 died shortly after birth, daughter T who attained age of 21 – she is claiming pay trust funds to her.
* **Rule of convenience**: where there is a **gift of an aggregate fund to children as a class**, and the share of each child is made payable on attaining a given age or married the period of distribution is the time when the 1st child becomes entitled to receive his share and children coming into existence after that period are excluded \*we have rule is we don’t want to make ppl wait too long to enjoy gifts\*
* 4 types of cases
1. **Vested gift no prior interest**- gift to a class w/o any life interest or qualifications (ex: age, marriage) ect. IE: gift to all the children of A
	* Class of persons entitled is limited to those members of the class alive at the death of the T… cant let in children born after
	* If no kids born when T dies gift fails unless it is possible for A to still have kids in the future
2. **No contingency, prior interest**- “to B for life and remainder to the children of A”
	* Earliest date in which class can close is the date of termination of B’s life interest (can’t close until B life interest ends)
	* If child alive at the date of the T death the class will consist of that child + any children born during B’s life estate. If any of those children die during life estate of B their estate gets their share
	* If no children alive at date of T death= class consist of the children born during the life estate
	* If no children alive at date of T death and no kids born during life estate of B= law probably is that all children born to A after the date of the termination of B’s life estate will take
3. **Contingent gift, no prior interest-** gift to the children of A if they reach 21 yrs old
	* At date of T death A has child aged 21+ but none younger= class closes in favour of existing children
	* At T death A has atleast 1 child over 21 and some younger than 21 = class will close in favour of those alive children at that point. A distribution can be made immediately to the children who are 21+. The kids under 21 if they hit 21 get a share if they don’t hit 21 their share will be shared by the other members of the class
	* At the date of T death A has children all are under 21= Class remains open until a child of A reaches 21 and then it closes. Any child born to A in that period falls into class
	* A has no children at date of T death= Class remains open until 1st kid hits 21 and will incorporate all children born b4 the 1st kid reaches 21.
4. **Contingent gift, prior interest-** To B for life remainder to those children of A who attain 21 yrs old
	* Earliest date for closing the class is the date of the termination of the life estate (death of B)
	* If a child reaches the age of 21 while B is alive the class closes at B’s death in favour of all children who were alive at the date of the T death or who were born during the period of the life estate and who have reached or eventually reaches 21. If child is 21 at the date of T death or reaches 21 during the life estate but dies before the termination of the life estate = the child having died w/ a vested interest will pass its share to its estate
	* Children alive at termination of life estate but none are 21= class closes when 1st kid hits 21. All kids alive at that point are part of class and will take if reach 21.
	* If no kids alive when life estate ends (B dies)= class closes when any child born to A reaches 21 and closes in favour of that child + any child alive when that kid hits 21
	* It would seem if a child is born to A it reaches the age of 21 and no other child has been born = class close in favour of that child alone

# Republication, Lapse, and Ademption

* These 3 doctrines are concerned w/ the conseq of events that generally take place after the making of the will but BEFORE the death of the T
* Lapse: the effect of the death of a B
* Republication: the effect of the making of a codicil
* Ademption: the effect of the disposition inter vivos of property disposed of in a will

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| REPUBLICATION – if codicil made 🡪 republishes will at time codicil made |

* R: helping a court determine what a will means when faced w/ changing circum
* R: a will is treated as if it were executed when its most recent codicil is executed unless to do so would be inconsistent w/ T intent. It deals mostly exclusively w/ codicils.
* R pretty much makes it as if the will was made on the date the codicil was executed
* When using republication to see if wills new date is date of last codicil then have to look at T intentions
* If the will has been revived by a codicil or by a codicil it has been re-signed in the presence of 2 W= will is deemed to have been made at the time it was revived or re-signed (57(3) WESA)

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| RE HARDYMAN (1925)- republication by a codicil is used to give effect to T intentions  |
| * T gives to M his children and wife. M’s wife dies and T knows this. few mths after her death T made a codicil doesn’t mention anyone in M’s family. T died. M remarried.
* Whether M 2nd wife took any interest under the will?- yes – T knew 1st wife died when made codicil and no change made to will so must have been T intention that rights would apply to the next wife
* Where a T gifts to the wife of a named person and there is a wife living at the date of the will then that wife only takes under the gift.
* **Effect of the codicil is to republish the will as of the date of the codicil**. Republication makes the will speak as if it had been re-executed at the date of the codicil
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| RE REEVES (1928)- court find republication – present lease in original will- republished in codicil  |
| - left “all my interest in the present lease” to daughter. Made new lease after will. Made new codicil after new lease. Codicil didn’t reference lease. •If the will stated the date of the lease then the republication of his will by the codicil wouldn’t have given her any benefit since the old lease had expired • But in this case will stated “my interest in my present lease” – and this fits the circum that existed at the date of the codicil |

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| RE HEATH’S WILLS TRUST (1949)- no republication where it would defeat intention, new law invalidated will if R found  |
| * In b/w time will made and the subsequent codicils made there was a change in the legislation and the restrictions they placed in their will aren’t allowed anymore.
* Exceptions to republication rule:**The T intended for the restriction to continue to be legal + apply so not going to republish the will to the current date of the last codicil which would defeat T’s intention**
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| RE ESTATE OF RUTH SMITH: SMITH V ROTSTEIN (2010)(ONSC)- republication while lacking capacity doesn’t invalidate a will  |
| * T makes will, makes 2 codicils while incapacitated. Is the original will still valid? – Yes – **Don’t republish the will to bring it forward to a time when T didn’t have capacity.** T had capacity when made the will. Left date of will to the date when T had capacity
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| LAPSE  |

* This applies where the person getting the gift doesn’t exist anymore
* Rule: if a B in a will ISNT ALIVE then he wont get the gift = can’t opt out of this rule but can work around it
* If a will doesn’t **dispose of all of the T property** then the property that isnt disposed of in the will must be distributed to the persons who would be entitled to if that property were an intestate estate and if that doesn’t work goes to gov’t **(WESA s. 44)**
* If **a gift** can’t take effect for any reason, including b/c B died before the T, then gift must, **subject to a contrary intention appearing in the will**, be distributed accordingly **(s. 46 WESA):**
1. To the alternate B of the gift if there is anyone named in the will (IE to B but if B dead to C)
2. If the B was the brother, sister or a descendant (child, grandchild) of the WM then to that B’s descendants determined at the date of the T death
3. To the surviving **residuary B** if any are named in the will in proportion to their interests eg. two residuary Bs, A + B, if B dies and his share was %50, then A gets that share, but if more than 1 residuary b left, then split the deceased B’s share proportionally
* Above rules apply regardless of whether B death occurs before or after the will is made (WESA s. 46)
* Lapse doesn’t apply to class gifts:
	+ Class gift: where you give something to a group of unnamed persons and if they constitute a class of ppl then the gift will be shared amongst the **living members** of the class alive at the time of the T death

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| RE WUDEL (1928)(QB)- Didn’t pass to descendant b/c court found “a contrary intention”  |
| * T died her daughter died 15 yrs before her. Made will 10 yrs after daughter’s death. Will said if any of my children die **after the date of this will** but b4 my death then their child should get their portion.
* Should dead daughters portion go to her kids? – No -intention of T to oust s. 46 (b) of WESA
* **General rule at common law: gift fails where a B has predeceased the T but now follow statute**
* WESA uses“except when a contrary intention appears by the will”🡪 court must go back to the date of the execution of the will to ascertain the intentions of the T. only evidence before the court is the will itself and the court must determine the meaning of the words used by the T. courts should determine the subjective intent of the T to determine the disposition of the property + look at the whole not just isolated parts
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| RE: THE ESTATE OF STELLA WEST, DECEASED (1999) (BC)- “per capita”- showed contrary intention to create joint tenancy  |
| - T had a son and daughter (who predeceased her). 3 grandchildren. Will said “the balance of my estate to my daughter and son in equal shares per capita for their sole use and benefit absolutely” - What happens w/ Daughter’s share who predeceased the T- does s. 46 apply? – D share goes to son -if s. 46 applied b/c T giving to descendant then it should go to D kids – **court finds contrary intention** • court found words “per capita” and “for their sole use and benefit absolutely” show contrary intention which is to create joint tenancy – so brings this out of s. 46• To discover T intention have to look at whole will and every word is to be given its natural and ordinary meaning and if technical words are used they are to be construed in their technical sense • Key words were “in equal shares per capita for their sole use and benefit absolutely”- these words only capable of 1 meaning which is T intended the residue of her estate to go to her 2 children w/ the right of survivorship to be enjoyed by each of the other should one of them predecease her • **Per capital means “equal sharing by the heads”-** so according to the # of indiv w/o reference to their issue or right of such issue to take the share of an estate  |

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| ANTI-LAPSE PROVISIONS IN A WILL  |

* Can add in as many anti-lapse provisions in a will (if B dies to C if C dies to D…) but once they run out and all those ppl are dead then go into s. 46 b/c have a lapse

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| RE DAVIDSON (1979)(NS)- anti-lapse provision in a will  |
| - T will says residue divided among my children and if one of my kids dead then to that kids children. T had 14 kids. 4 dead at the time will was made. 2/4 had married and had kids. - Found: The dead children’s kids get the dead parent’s estate • General rule is that a B must survive the T in order to take any benefit under a will of the T * What does “**my children**” mean?- may mean a child dying after date of will and b4 time of T death or may mean a child who was already dead at the date of the will
* to determine which one he intended look at the language he used in directing such representation/substitution. If restrictive language maybe child had to be living at date of will but if he uses language so wide and general then maybe can be dead at time of will
* here it meant to both dead and living children
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| RE COUSEN’S WILLS TRUST (1937)- if all your substitutes are dead, then look to statute!  |
| - So basically estate said estate goes to A if shes dead and has a kid(s) then give to personal rep. In this case A is dead has a kid and personal rep is dead**. This gift lapses**  |

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| RE GREENWOOD (1912)- language used to avoid a lapse  |
| -Will says: if my bros, sis, nieces, nephews die leaving kids then the gift “shall not lapse but shall take effect as if his death had happened immediately after mine”. No intestacy/ good substitutionary gift• Conseq of a lapse can be avoided by the substitution of some other B • A T can provide that if a legacy to A shall lapse it shall go to persons who would have taken the benefit of it on the hypothesis that the B survived the T and died immediately afterwards -Here he doesn’t list the heirs who get the gift but court said that’s ok DOES THIS MEAN THE GIFT WOULD GO INTO THE ESTATE OF THE BEN? |

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| ADEMPTION  |

* Ademption= what happens under a will when property doesn’t exist anymore or exist in the same form
* Simplest solution for ademption: no gift
* Eg. I give my gold rolex to H. At date of death there is no gold rolex. Then H doesn’t get anything
* What happens when the property has changed in form somewhat = ademption deals w/ this
* Once real estate is sold then the money rec’d from it doesn’t go to B who would have got the land but rather it falls into the residue

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| CHURCH V HILL (1923)(SCC) |
| - will said daughter got a property lot 15. Residue divided amongst other kids.T sold lot 15 and the balance was payable in monthly instalments. So have monthly payments coming in from property but no property- Flow of payments is **a personal deed and falls into the residue of the estate**.  |

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| TREBETT VV ARLOTTI- WOOD (2004)(BCCA)- ademption of specific/general legacies  |
| -will disposed of “any cash or any stocks and bonds held in account no. 861 located in RBC”. This was a specific legacy-- After will was made he transferred RBC acct to new bank - Gift is adeemed b/c he transferred accounts which caused the subject matter of the gift to cease to conform to the description in the will * + **The doctrine of ademption applied irrespective of the T intentions**
	+ Where the proceeds which form the subject matter of the gift have been commingled in a manner that is more than de minimis or momentary = usually the assets lose their identity and the gift is adeemed – IE proceeds of sale are placed in a bank account
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| RE CLEMENT ESTATE (2007) (NSSC)- when gift gets destroyed before T death  |
| -T devised in his will that his cottage go to his daughter. T died in a fire at the cottage. **The money under fire insurance policy taken by T goes to the daughter** • If the T had died before the destruction of the cottage then = goes to residuary Ben• Substantial damage to the cottage occurred following the death of T and after legal title had passed to his personal reps to be held in trust for the B • If chattels are damaged but not destroyed the bequest did not adeem – the bequest passed to the designated B and they are entitled to insurance proceeds |

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| RE SWEETING (1988)- when real property is adeemed & becomes personal property  |
| - T gift this property. T enters into K of sale for the properties. Before the completion date the T died. Is the property adeemed? -The sale of A was conditional upon the completion of B’s sale and vice versa. Also the K for sale of B included a clause where the sale was conditional upon the T wife agreeing to be sign releases. -If the sale had been completed, then property would be clearly adeemed. Even though this K had conditions that hadn’t been fulfilled the sale still went ahead (K were waived or already fulfilled)-**Applied the rule in Lawes v Bennett to conditional Ks:** (1) if a person grants an option over a parcel of land; (2) he later makes a general bequest of his land; (3) the T dies; and (4) the option is exercised, then (executor action) (5) the proceeds of the sale of the land pass to those entitled to the testator’s personal estate- **so goes to the residue not the designated B for the gift of the land.** -Note: if will said if exercises option then proceeds go to my son – then that’s ok but if doesn’t specify where the proceeds go then they go to the residuary B -Note: rule still applies if option is granted after the will is made * Common ground that ademption of a specific gift of property is brought about where a K of sale of that property is entered into by the T before his death and that K is one which is binding on both the T and the P so as to be specifically enforceable at the suit of either of them
* The executor’s actions led to close purchase of sale.
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| RE DEARDEN ESTATE (1987)(MAN)- K unenforceable either by or against T= no ademption |
| -T left the land to his nephew in will. Later T entered into a K to sell the land and business. K subject to a lot of conditions. T died before the completion date of K. Had the disposition for the nephew been adeemed? – No – nephew still gets the land • If agreement b/w T and purchaser is an actual agreement for sale and is enforceable = ademption •If after a specific devise of property the T by a valid and enforceable K for sale and purchase agrees to sell the lands to another the T has done 2 things (1) has manifested an intention that the devisee shouldn’t receive the lands (2) has converted his interest in the realty to a claim for the price •Rule from Lawes v Bennett (see above) says that real property is converted to personal property if someone exercises an option to purchase the property. the conversion happens when the option is exercised not when the option is given by the T. for a K the property is only converted if the T/executors are capable of enforcing the K • **Principle: that a K for sale and purchase which isnt enforceable either by or against the T doesn’t effect an ademption, here the K here was unenforceable both by and against T= no ademption** |

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| RE PYLE (1985)- Evidence that proceeds of land to named ben |
| - left certain lands to J. Granted 5 yr lease of the lands. Lease contained an option to purchase- same day of making lease he made codicil confirming his will. T dies. A few yrs later the lessee exercised the option to purchase the lands and the lands were conveyed to him. - whether the proceeds of the sale were to be paid to the J or fell into the residue of the T estate? **– given to J** – it is clear the T intended for the B’s to get benefit of the lease b/c of timing of lease and codicil – T must have been thinking about lease and will •General principle from Lawes v Bennett **is a general rule the T may on the face of the will indicate an intention to exclude the operation of the rule** • When a will is made AFTER the K giving the option of purchase and the will devises of the specific property which is the subject of the K and the will doesn’t refer to the K entered into = consider if there is sufficient indication of an intention to pass that property and give to the B all the interest • To rule out Lawes general principle: need specific devise in the will, optional nature of the K+ republication of the will by the codicil = brings this case out of the rule from Lawes. |

Eg. WM is incapacity, PoA good sells prop, WM cannot change their will, and the action of attorney is depriving Beneficiaries under will!

**Relief from disposition of property**

**48** (1) In this section, "proceeds" means the proceeds at the time of disposition, and includes

(a) non-monetary consideration, and

(b) in the case of a gift, the fair market value of the gift.

(2) If property that is the subject of a gift in a will is disposed of by a **nominee (committee, enduring POA, a rep under a RA- def doesn’t include executor)** the beneficiary of the gift is entitled to receive from the T's estate an amount equivalent **to the proceeds of the gift** as if the will had contained a specific gift to the beneficiary of that amount. *[contemplated period of time when T doesn’t have capacity and his POA or committee sells a piece of property]*

(3) Subsection (2) **does not apply if**

(a) the disposition is made to carry out instructions given by the will-maker at a time when the will-maker was legally capable of giving instructions, or- so when T is capable

(b) a contrary intention appears in the will.