SUCCESSION

LAW 452 - WICKSTROM & LOW // FALL 2013 // ANDREA FRASER

THE INTRODUCTORY STUFF

WESA

- new legislation comes into force MARCH 31, 2014 -- will apply to all deaths occurring after that date
- WESA will not invalidate a will validly made before it came into force // nor will it revive a will validly revoked

ESTATE ADMINISTRATION

EXECUTORS & ADMINISTRATORS

- executor (individual named in a will) OR administrator (individual appointed by court if no will exists) is the "personal representative" of the deceased
- LT of deceased's property vests immediately where there's an executor
- where intestate, there's a "gap" where LT is not vested - lasts until administrator is appointed - then LT vests with that individual
- job of personal representative is to **(1)** gather up the estate **(2)** settle debts, taxes, legal actions etc **(3)** distribute remainder of estate
- remuneration -- may be provided for in the will // otherwise, can apply under the *Trustee Act*
- formal discharge -- upon completion of duties, apply to court for order -- protection from future liability

APPLICATION FOR ADMINISTRATION

- if no named executor, heirs with an interest in the estate can apply to be administrator
- if named executor can't/won't act -- a B or a creditor with an interest in the estate may apply (grant of administration w/ will annexed)
- if executor begins, but can't complete job -- B may apply (grant of administration *de bonis non*)
- disputed will or ongoing dispute as to who is the admin? --> court may appoint independent 3rd party or B (grant of admin *pendente lite*)

PROBATE

- during probate, will is approved (submit original & proof that it's the last known will) and executor is approved by court or administrator appointed
- probate may be essential to establish legal recognition of executor -- enable them to deal with the deceased's property
- notices of will & probate must be sent to B's and potential claimants against the estate -- give opportunity to make claims // apply for variation
- under WESA -- if there are 2 WILLS -- you can only probate the will that needs probating -- ie/ don't need to waste money doing both
- PRO -- alerts potential claimants to the existence of the will // start of limitation to vary will doesn't begin till probate
- CON -- probate fees for estates > $25k (based on gross value of estate) // avoid expense of probate application // public record //

ORDER OF DEATH & THE BODY

PRESUMPTION OF DEATH ACT

- **s.3** -- no reason to believe a person is living + reasonable grounds to suppose person dead -> can apply for order presuming death
- **s.4** -- if personal rep has reasonable grounds to believe person is not dead, they must cease dealing with the estate
- **s.5** -- if person later found alive, any distribution of their property deemed to be final -- unless by order of the court

SURVIVORSHIP

- **WESA 5(1)** - if 2 or more people die at the same time (or in circumstances where it can't be said who died first) rights of property will be determined as if each had survived the other, absent a contrary intention
  - purpose = avoid unnecessary double probate & administration of two estates
- **WESA 5(2)** - if 2 JT's die together, each person presumed to have held their interest as tenants in common --> each person disposes of their 1/2 interest through their own estate -- ordinary survivorship rule doesn't apply
- **WESA 6** - if property passes to C upon the happening of an event -- the event is presumed to have occurred (A's will leaves property to C if B dies 1st)
- **WESA 8** - anyone conceived before the intestate's death, but born after, inherit as if born during intestate's lifetime (provided they live for 5 days)
- **WESA 9** - if gift is conditional on death of person & the order of death of the WM and the person is unknown, presume person died
  - ex/ "To B if he survives A" -- A & B die together -- RESULT: B loses gift, as B is presumed to have died first
- **WESA 10** - if a person doesn't like for at least **5 days** longer than a deceased person, they're deemed to have died before the deceased for all purposes affecting the estate of the deceased person, or property they were able to give by will to another

INSURANCE ACT PRESUMPTIONS

- B always presumed to die before the insured
- if no other B named, proceeds go to the insured's estate
- if insured has a will, proceeds go to residue // if intestate, proceeds form part of general estate

DEALING WITH BODIES

- it's a criminal offence to neglect to deal with lawful duties wrt burial or to improperly / indecently interfere with remains **s.182 CC**
- right to decide in order: personal rep named in will // spouse // adult child // adult grandchild // legal guardian if minor // parent // adult sibling // adult nice or nephew // etc etc

NATURE OF A WILL

TESTAMENTARY OR INTER-VIVOS

- documents are testamentary if they depend upon death for their **vigor & effect** (*Hutton*)
- document may not be testamentary if it takes effect immediately, even though enjoyment of benefits postponed until death of person (*Bird, Mordo*)
- if a document is testamentary it MUST comply with wills formalities (or be cured by the court)

Bird v Perpetual Executors, 1946 AusHC • **substance over form**	couple lived with Bird - didn't pay rent while alive // man executes document under seal - instructs exec's to pay Bird rent after his death // valid? // COURT - NO // substance & effect of document made it testamentary -- but it didn't comply w/ will formalities so Bird doesn't get her money
Hutton v Lapka Estate, 1991 BCCA • **vigor & effect upon death**	WM loaned her son $295k before her death // administrators found a note (bill of exchange) where son promised to pay WM back - but in the event of WM's death, the K was null & void // testamentary? // COURT - NO // K had immediate effect - WM received benefit in form of agreement to pay

CONDITIONAL WILLS

- some wills contain conditions - ex/ "in the event of my death on this trip to Russia, I leave my property to X"
- will is only valid later if the condition was in fact the **motivation** to make the will - ie/ the WM contemplated his death (*Re Heubner*)
- can use extrinsic E to resolve ambiguity as to whether words in a will make will conditional upon a happening (*Re Green Estate*)

Re Heubner, 1974 MNCA • **condition must be reason for will**	WM made will before going on a trip // "in the event of my death (on this trip) ..." // WM returns safe & sound // dies years later leaving no will // ISSUE - is this will valid? // COURT - YES // WM regarded the trip as reason to make the will, not as condition to be fulfilled for its operation
Re Green Estate, 2001 NLTD • **ambiguity of condition - use ex E**	WM left entire fishing biz to son in letter that included condition "In the event something should happen to both of us" // at WM's death, wife was still alive // daughter challenges validity // COURT - wording unclear - allowed to use extrinsic E in this case // b/c no provisions made for the wife, will found to be INVALID as it clearly didn't intend to apply to scenario where only the WM died

MULTIPLE WILLS

- so long as wills don't conflict, all testamentary documents can be combined to form WM's will (*Douglas-Menzies*)

Douglas-Menzies v Umphelby, 1907 • **2 wills read together - no conflict**	WM died in Scotland // left $$ property in UK & Australia // Scottish will disposed of UK property + NSW will disposed of Australian property // valid? // COURT - YES // WM simply wanted to facilitate administration of the estate -- wills to be read together
Rondel v Robinson Estate, 2011 ONCA • **2 wills - conflict** • **wording clear, so no ex E admissible** • **case has been criticized**	WM disposed of european property in Spanish will // years later, WM Canadian will that didn't leave anything to her 2nd sister // the lawyer who drew up Canadian will didn't ask about any others (bad, bad) & Canadian will purported to revoke all earlier wills // ISSUE - can Spanish will still stand? // COURT - NO // despite the fact that the WM's family and lawyer both testified that the WM didn't intend to revoke the Spanish will, the court found **no ambiguity in the words** - therefore no extrinsic E could be admitted

DELEGATION OF WILL-MAKING POWER

- general rule = can't delegate will-making power -- BUT -- can delegate power to distribute property (*Tassone*)
- **general power of appointment** -- allows the donee to make appointments in favor of anyone in the world (including themselves)

Tassone v Pearson, 2012 BCSC • **general POA valid in a will**	WM uses commercial form will // appoints son, R, as executor - gives general power of appointment - residue "to be distributed as seen appropriate by my executor" // but -- R also named as B // valid? // COURT - YES // general PoA valid in a will // only void if uncertain // policy = testamentary autonomy

SOLICITOR'S RESPONSIBILITIES

GENERAL

1. **effective** - must ensure that the will achieves the intentions of the WM - includes proper execution (*Whittingram*)
2. **instructions** - best to receive instructions directly from WM // need to deal with client directly at some point (*Re Worrell*)
3. **knowledge** - extent of the WM's estate // ownership of particular assets (*Wilhelm*) // existence of another will
4. **capacity** - satisfy yourself as to the capacity of the WM
5. **execution** - have the WM sign the document in your presence WITHOUT the B's in the room
6. **records** - keep accurate and detailed notes // key if will is contested, or WM's capacity is questioned (*Re Worrell*)
7. **timeliness** - often dealing w/ clients who are elderly or sick -- get the stuff done quickly (*Wright and Jones*)

LIABILITY (*Wilhelm*)

- lawyer owes duty of care to client and intended B's -- tort liability for negligence will attach
- solicitor will likely bear total liability -- WM won't be found contributorily negligent
- nor would a 3rd party proceeding against the residuary B's succeed on the basis of unjust enrichment

Re Worrell, 1968 OnCt • **laundry list of stuff lawyer screwed up - don't be that guy**	lawyer drew up a will for an elderly WM he'd never met // no knowledge of the WM's assets or size or estate // left substantial portion to the B who consulted him on the WM's "behalf" // didn't follow original letter of instruction & didn't consult WM about changes // gave will to B to have executed // kept no records of the transactions
Whittingram v Crease, 1978 BCSC • **proper execution** • **compliance w/ legislation** • **damages**	WM tires to leave entire estate to the P // lawyer has the P's wife witness the will // gift fails under the legislation -- estate split intestate b/w all 5 children // P sues lawyer in negligence // COURT - lawyer liable - failed to exercise reasonable care // *damages took into account the fact that some of the children would have sought (and got) variation of the will*
Wilhelm v Hickson, 2000 SKCA • **solicitor liable to intended B's**	farmer with incorporated company that owned land // same lawyer acted for the company and drew up will // farmer tried to leave land to various B's -- failed // the company owned the land, not farmer's to give // COURT - lawyer liable - didn't give competent legal advice

INTESTATE SUCCESSION

no will // will invalid // WM lacked capacity when will executed // property not included // gift to B lapses & no statutory anti-lapse provision applies
NOTE -- to get your intestate share you have to be alive for at least 5 days longer than the deceased

INTESTACY RULES -- PART 3, WESA

- SPOUSE, NO DESCENDANTS -- estate distributed to the spouse - **WESA s.20**
- SPOUSE & DESCENDANTS
  - household furnishings + preferential share of estate to spouse - **WESA s.21(2)**
  - preferential share = $300k (if descendants are common to intestate & spouse) or $150k (if descendants not common) - **WESA s.21(3)&(4)**
  - if net value of estate less than preferential share --> estate to spouse - **WESA s.21(5)**
  - residue to be divided 1/2 to spouse and 1/2 to descendants (see **s.24**) - **WESA s.21(6)(b)**
- TWO OR MORE SPOUSES -- two or more people entitled to spousal share, they can split in agreed portions or apply to court - **WESA s.22(1)**
- NO SPOUSE, DESCENDANTS OR RELATIVES
  - descendants -- surviving parents -- siblings -- grandparents -- aunts/uncles - **WESA s.23(2)**
  - persons of 5th or greater degree of relationship are conclusively deemed to have predeceased the intestate - **WESA s.23(3)**
  - unless the estate is to go to the intestate's *direct* descendants -- then the 5th degree limit does not apply - **WESA s.23(4)**
- DISTRIBUTION TO DESCENDANTS
  - where property goes to descendants, it's divided in equal shares - **WESA s.24(1)**
  - if descendant is deceased, their share is divided equally amongst their descendants - **WESA s.24(2)**
  - **NOTE** - quirk in system - if estate goes to siblings, it can then go no farther than their children - **WESA s.24(3)**

SPOUSES

- **WESA 2(1)** - married OR lived in a marriage-like relationship for at least 2 years (regardless of gender)
- **WESA 2(2)(a)** - marriage ceases if living separate & apart for at least 2 years - with the intention (formed before or during) to do so permanently
- **WESA 2(2)(b)** - marriage-like relations cease when one or both persons terminate the relationship
  - either party regards relationship to be at end, and by **conduct** demonstrates in **convincing manner** that their mind is **settled** (*Gosbjorn*)
- onus on the potential spouse to prove the relationship
- **TEST** (*Souraya v Kinch*)
  1. first look at **subjective** component - intention of parties
  2. then at **objective** indicators - shelter // sexual & personal behavior // services - ex/ cooking // social // societal // children
  3. objective factors are relevant, but will rarely be determinative in & of themselves
  4. approach is **holistic** - look at all factors, no one is determinative

Gosbjorn v Hadley, 2008 BCSC • **end of marriage-like relationship**	deceased had 12 year CL relationship // shortly before his suicide, G moved into basement suite w/ her daughter // G claimed spousal share // ISSUE - had the relationship ended? // COURT - NO // though deceased took steps to end relationship, he failed to do so in a convincing manner - E was conflicting

CHILDREN & KINSHIP

- **WESA 3(2)** - **adopted children** are not entitled to the estate of their natural parent (except through will) & visa versa -- includes intestate share
- **WESA 23(5)** - **half-kinship** inherit equally as those of full blood

Re Kishen Singh, 1957 BCSC • **half-siblings take as if full blood**	KS dies intestate - 3 full blood siblings & 1 half-blood sibling, who herself had 4 daughters // ISSUE - do the daughters take as if their mom was full blood sibling? // COURT - all take equally
Re Forgie, 1948 MNKB • **can't bequeath intestate share**	F died intestate - 2 surviving siblings & 1 surviving sister-in-law who had 4 children // ISSUE - can the deceased brother's intestate share pass to his kids (F's nieces & nephews)? // COURT - NO // intestate shares do not form part of the estate of the descendant & spouse can't take

SPOUSAL HOME

- if deceased's interest in home (based on FMV) **<** $300k (or $150k as the case may be), spouse can take home as part of preferential share
- **WESA s.31(1)** -- if deceased's interest in home **>** than spouse's preferential share, spouse can purchase the remainder of interest from estate
- **WESA s.33** -- NEW (and sure to be controversial) provision gives court very wide powers to deal with the spousal home
- **WESA s.33(2)** -- where intestate estate includes a spousal home, the court can:
  a. vest deceased's interest in the surviving spouse
  b. specify amount spouse must pay to descendants for their interest (this could be nothing!)
  c. convert descendant's unpaid interest into charge against title
  d. if money owing, court can determine interest rate on the loan
- REQUIREMENTS
  1. spouse must be ordinarily resident in home at time of death
  2. insufficient assets to give all the descendants what they're entitled
  3. significant financial hardship would result if spouse had to purchase home under **s.31**
  4. prejudice to spouse if forced to leave GREATER than prejudice to D's if forced to wait **indeterminate period of time**

EXECUTION OF WILLS

our system looks on gifts (especially by the sick or elderly) with great suspicion, hence all the fuss about formalities

FORMALITIES

1. **WESA 37(1)(a) -- will must be in writing**
2. **WESA 37(1)(b) -- signed at the end by the WM** (or acknowledged by WM as his/her signature in front of 2 W's at same time)
3. **WESA 37(1)(c) -- signed by 2 or more W's in the presence of the WM**

NOTE: *for active service members, the formality req's pretty much go out the window -- no min age // will good if signed by WM, or by someone on behalf of the WM (so long as there is one other W)*

DW's "BEST PRACTICES"

- multiple pages should be fastened securely and numbered "X of Y"
- **execution ceremony** -- take place in private // ask aloud if WM understands contents of will // everyone should be able to see others sign
- all 3 signatures at the bottom of each page // in margins next to number values (harder to manipulate)
- witness attestation clause -- indicate that the W's knew what they were signing
- even though you can have 2 W's attest to the fact that the signature of the WM is valid, best to have the WM sign in front of you

CURING DEFICIENCIES

- court traditionally had no power to fix execution problem -- some jurisdictions went with "substantial compliance" -- but not BC
- **WESA 58(3)** - court can deem a document valid (make, revoke, alter, revive a will) "as the circumstances require" -- very broad
- limits of dispensation power -- document must've been intended to have testamentary effect (***George v Daly***)
- instructions can be a good will if E that the WM intended it to operate provisionally until formal will executed (***George v Daly***)

George v Daly, 1997 MNCA • **testamentary intention required** • **instructions for will**	WM gives verbal instructions to his accountant, who passes them onto solicitor in letter // solicitor want to get medical clearance first for competency reasons // WM dies before will executed // ISSUE - is letter valid as will? // COURT - here, instructions not enough - no E that the WM even saw the letter, let alone intended it to act provisionally

SIGNATURE ISSUES

- **WESA 39(1)** -- signature deemed to be at end if "apparent on the face of the will that the WM intended to give effect to the will"
- **WESA 1(2)** -- signature can be made by another on behalf of the WM, in their presence AND at their direction (either name ok)
- requirements for an "acknowledged signature" (***Re Shafner***)
  - gestures acceptable if WM is speechless - thumbs up!
  - W's must see the signature, but need not know that the document is a will

SIGNATURE OKAY	SIGNATURE INVALID
Re Wagner, 1959 - name of WM on first page, but not signed // **envelope** signed instead // OK - envelopes have a "dependent and secondary existence" - different than another sheet paper	***Hsia v Yen-Zimmerman, 2012 BCSC*** - WM's sig okay, sig of lawyer okay, but sig of 2nd W not proven // COURT - will on its face was properly executed, so compliance inferred - will VALID
Re Bradshaw Estate, 1980 NB - on deathbed, WM "signs" with **two diagonal strokes** // OK - best of ability given physical circ's	***Peden v Abraham, 1912 BCSC*** - WM on deathbed // **unable** to grasp pen // Dr traced name, no E that WM knew he was signing
Re white, 1948 NSSC - WM had stroke // tried to sign, unable on own & so **assisted** by a W // OK - happened in front of W's	

PRESUMPTION OF DUE EXECUTION

- where a testamentary doc appears to be properly executed, E of defect must be "clear, positive, and reliable" (***Re Laxer***)
- actual observance of formalities may be inferred as a matter of probability (***Hsia v Yen-Zimmerman***)
- POLICY - without the presumption, the validity of wills would depend upon the memory of W's

HOLOGRAPHIC / ELECTRONIC WILLS

- electronic "stylized cursive signature" affixed to will on computer valid as affixed in the presence of two W's (***Taylor v Holt***)
- holographic wills are not valid in BC, but may be deemed valid under **s.58** if testamentary intentions prove to be very clear
- electronic wills present special challenges -- validity & form closely related // sufficient safeguards against fraudulent manipulation

WITNESSES

- **WESA 40(1)** – W's must be 19 years or older
- **WESA 40(2)** – B's may W the will, but the gift may be void under **s.43** – *DW says if you W a will, it's almost 100% you won't take*

SIGNATURES

- W's must sign in the presence of the WM, though not necessarily in the presence of the other W
- but -- if W does not see the WM sign, the WM must attest to their signature in front of 2 W's at the same time
- lawyers can W the will -- although some won't do this, DW will

Re Brown, 1954 Ont Surr Ct • **W's did not see the other sign**	WM signed in the presence of W1 // went to find W2 -- both the WM and W1 attested to their sig's and W2 signed the will // **INVALID** // to be a valid attestation of WM's sig, two W's must sign at same time
Re Wozciechowiecz, 1931 Alta Appeal Div • **WM couldn't see W's sign**	WM signed while in hospital bed // W1 signed at a nearby table & W2 signed in his own hospital bed // WM physically unable to turn to see W's sign // **INVALID** // didn't matter that they were all in the same room

WITNESSES AS BENEFICIARIES

- **WESA 43(1)** – unless otherwise decided by a court, gifts in a will are void if made to:
  - **(a)** – W to the WM's signature, or the spouse of that W
  - **(b)** – person signing the will at the direction of the WM, or the spouse of that person
  - **(c)** – a person claiming under a person referred to in (a) or (b)
- **WESA 43(2)** – relevant time is the time that the will was made
- **WESA 43(4)** – court can declare gift valid if satisfied the WM intended the gift, even though person was a W

GIFT VALID	GIFT INVALID
Re Ray's Will Trusts, 1936 – WM (a nun) left property to the Abbess // by the time WM died, one of the W's had that role // gift saved b/c it was held in trust for the convent (and W only had small beneficial interest)	***Re Cumming, 1963 Ont*** – will offered house for sale for a nominal amount // held to be a gift (inadequate consideration) // wife of buyer W'd
Re Royce's Will Trusts, 1959 – trust est. under will provided remuneration to trustees // after WM's death, one of the W's appointed trustee	***Jones v Public Trustee, 1982 BCSC*** – WM left specific gifts to husband & wife, and the residue to be divided b/w the wife and others // wife was a W to will • specific gift to wife void • residue also void -- court can (a) give wife's share to the other B's or (b) let share fall into intestacy • court picks later -- don't want to impute meaning to will that the WM did not intend
Gurney v Gurney, 1855 – property left to two B's who were not W's to the will, but were to a codicil // court says this is OK // DW says this case is an anomaly -- don't rely on it	
Anderson v Anderson, 1869 – will was initially W'd by a B // codicil later made that was not W'd by the B // OK – have to be able to fix errors!!	

OTHER ISSUES

INCORPORATION BY REFERENCE

- can dispose property by referencing the existence of another document that lays out the gifts -- not a great way to do this
- REQUIREMENTS (***Re Jackson***)
  - document must exist at time of execution // document must be described // ascertainable // not explicitly excluded by the will

CODICILS & ALTERATIONS

- under WESA, a codicil is a will -- subject to all the same formalities
- **WESA 54(2)** – alteration is valid if initialed by the WM and the W's in the margin near the alteration
- **WESA 58(4)** – if an alteration is invalid, court can reinstate the original word/provision if there's E as to what it was
- alterations are presumed to have been made after the will was executed, until contrary E is adduced (***Oates***)

CONFLICT OF LAWS

- wills valid if made in accordance w/ the laws where they were made or with BC law – **WESA 80(1)(a)&(e)**
- immovables are governed by the law of the place that the immovable is located – **WESA 82(1)**

REVOCATION & REVIVAL

REVOCATION

LEGISLATION

- WILL REVOCATION -- **WESA 55(1)** -- will or part of a will is revoked only in one or more of the following circumstances
  a. **another will** made by the WM in accordance with the act
  b. **written declaration** by WM that revokes all or part of earlier will
  c. **burning, tearing, or destroying** all or part of the will, with the intention to revoke (WM can do this, or another at the WM's direction)
  d. **court order** under s.58 - curing deficiencies -- ex/ revocation ineffective on its fact -- court can deem will or part of will revoked
- NOTE - marriage of the WM no longer revokes WM's earlier wills (changed by WESA)
- GIFT REVOCATION -- **WESA 56(2)** -- if WM & spouse cease to be spouses, any gift / appointment / power of appointment to that person is revoked

GENERAL

- formality and capacity requirements are the same for revocation as they are for execution
- intention of WM paramount - mere existence of a revocation clause OR some degree of mutilation of the will may be insufficient to revoke whole will
- if 2 wills can be read in harmony (ex/ cover different property) & makes sense to do so, 2nd will's revocation clause will be read out (*Re Lawer*)
- destruction of material parts of will revokes will in its entirety (*Re Adams*)

Re Lawer, 1986 SKCT • **two complementary wills**	WM had 2 wills - 1st handwritten - 2nd on commercial form (which included standard revocation clause) // probate sought for both // COURT - clause not enough - must also be intention to revoke // also, the two wills do not contradict one another // both stand
Re Norris, 1946 BCSC • **torn will - not revoked**	WM suffered delusions // after WM's death, his mistress found his will torn up into pieces in an envelope - signature not torn // will left everything to mistress // COURT - looked at totality of circumstance - found no intention to revoke // long-term relationship w/ mistress; she passed as his wife; cared for him; house was in her name; WM refused English family financial assistance
Re Adams, 1992 UK • **destruction of material parts**	WM's will discovered after death with heavy markings // cannot tell what's under the marks // ISSUE - was will revoked? // COURT - destruction occurs when you can no longer read underlying words // parts of will can be destroyed without revoking will, so long as those parts are not material

LOST WILLS

- where WM has control of will & will disappears, it's presumed destroyed for the purpose of revocation -- presumption is rebuttable (*Sugden*)

Sugden v Lord St Leonards, 1876 • **presumption rebutted**	WM's will couldn't be found - 8 codicils were registered though // COURT - no revocation // WM couldn't have possibly meant to die intestate (he was a wills & estate lawyer!) // WM's daughter able to re-write the will from memory //
Lefebvre v Major, 1930 SCC • **presumption rebutted**	WM found long time after death - his body was badly decomposing // understandably, no one thought to search for his will in the haste to burn contents of room // search for will in rest of house turned up nothing // COURT - WM valued will very much & probably had it close to him + had confirmed gifts only a few weeks prior // destruction accidental - no revocation

DEPENDANT RELATIVE REVOCATION - AKA/ CONDITIONAL REVOCATION

- where a condition is attached to a revocation, if the condition is unfulfilled, no revocation occurs
- destroyed will? **(1)** did WM destroy w/ intention to revoke? **(2)** was revocation conditional? **(3)** if so, was the condition fulfilled?

In Re Jones, Decd, 1976 UK • **revocation NOT conditional**	1st will left land to 2 nieces - WM had contacted lawyers about making 2nd will that instead left land to nephew // never done // after death, top half of 1st will discovered (page had been torn in 2) // **(1)** did WM intend to revoke will by destruction **(2)** was revocation conditional upon new will being executed // COURT - WM intended to revoke 1st will, regardless if new will made // revocation not conditional
Re Sorenson, 1981 BCSC • **mistake of fact/law**	WM left gifts to 2 sister-in-laws // thinking they were both dead, she instead gifted to a friend // ISSUE - was revocation conditional on sister-in-law being dead? // COURT - YES // revocations made on a mistake of fact or law are inoperative

JOINT & MUTUAL WILLS

- JOINT - one document that contains the testamentary wishes of two parties - stands as their will (*Gillespie*)
- MUTUAL - 2 parties have separate wills + agreement that neither will change their will (*U of M v Sanderson*)
  - **potential issue --** is this a K b/w the two parties? **wills can be unilaterally revoked, but right to revocation under K more restricted**
  - other issues -- what interest does surviving spouse hold // what if circumstances change // does mutual will apply to property later acquired
  - if you don't want

U of M v Sanderson Estate, 1998 BCCA • **cautionary tale of mutual wills**	S1 & S2 executed mutual wills + agreement under seal – survivor promised not to revoke will after death of the other // will left estate of deceased in trust for survivor + residue after death of both to go to UofM // S1 dies and S2 executes new will – terms inconsistent with mutual will // UofM sues – claims CT over entire estate // COURT – there was mutual agreement not to revoke wills & S1 did not breach that agreement while alive // CT imposed on the estate

SPOUSAL TRUST

- better option than mutual wills -- spousal trust -- security of knowing property available for spouse, with the ability to set some terms on use
- tax implication -- no deemed disposition if property passes to spouse + income payable to spouse + spouse only one w/ access to capital

REVIVAL

LEGISLATION

- **WESA 57(1)** -- a revoked will can only be revived by a will that shows an intention to do so
- **WESA 57(2)** -- revival does not include any portion of will that was revoked prior to whole revocation -- unless by court order
- **WESA 57(3)** -- revival by codicil – revived will deemed to have been made at the time the codicil was signed
- **WESA 58** -- curing deficiencies -- ineffective revival can be "cured" by court if intention of WM established

Re McKay, 1953 BCSC • **intention to revive must be clear**	WM had 1st and then 2nd will // she executed a codicil to the 2nd will (changing the management company to be in charge of the estate) BUT the codicil referred to the date of the 1st will // did this revive the 1st will? // COURT – NO // intention not sufficiently clear – nothing beyond the date, which could've been mistake

REPUBLICATION / LAPSE / ADEMPTION

doctrines that deal with events that happen in the interim between execution of a will and WM's death

REPUBLICATION

GENERAL

- will deemed to be executed on date of most recent codicil – **WESA 57(3)** – whether or not codicil expressly states so & absent contrary intention
- effect is to bring forward <u>everything</u> in the will -- but lots may have changed in the interim -- ex/ "to B's wife" – B could have remarried
- effect of republication is without prejudice to original effect of will or any intermediate codicils
  - republication cannot <u>invalidate</u> what was previously valid (***Re Heath's***)
  - codicils executed when WM lacked capacity do <u>not</u> republish will (***Ruth Smith***)

Re Hardyman, 1925 UK • **codicil republished**	WM created trust in favor of cousins and "his children and his wife" // cousin's wife dies – WM is aware of this // WM later executes codicil – no mention of cousin or family // COURT – codicil republishes will // BUT – this is not a rigid formula, but an interpretive tool // E here that WM intended benefit to "wife" to endure
Re Reeves, 1928 • **codicil republished**	WM gave daughter interest in "my present lease" // after execution, WM enters into a new will // then – executes codicil w/ no mention of any lease // republished? // COURT – YES // wording broad enough to encompass the situation that existed at the time codicil executed
Re Heath's Will's Trusts, 1949 UK • **no republication – WM intent**	at time of will, law at time allowed restriction women's property rights // law no longer in effect at time of codicil // after death – daughter seeks to have restraint declared void // was there republication? // COURT – NO // WM wouldn't have contemplated change in law + republication won't invalidate previously valid gift
Estate of Ruth Smith, 2010 ONSC • **no republication – capacity**	WM had will + 4 codicils // validity of all were attacked on capacity, K&A, and UI // COURT – will & 2 codicils admitted to probate // WM lacked capacity for last 2 codicils – these found NOT to republish will //

LAPSE

LEGISLATION

- **WESA 44** -- **property not disposed** of by will distributed to those who would take as if intestate
- **WESA 46(1)** -- if **gift doesn't take** for whatever reason it's to be distributed according to the following priorities (absent contrary intention)
  a. to alternate B's of the gift
  b. if the B was the brother / sister / descendant of the WM -- to <u>their</u> descendants
  c. to the surviving residuary B's in proportion to their interests
- ~~WESA 21 -- property or interests in property compromised during the life of the WM fall into residue~~
- ~~WESA 29 -- if B dies w/in lifetime of WM, their gift lapses – unless B was brother or sister of WM – in that case, it goes to their descendants~~
- lapse does not apply to class gifts (see ***Milthorp*** & ***Re Hutton***)

Re Stuart Estate, 1964 BCSC	will divides residue equally b/w 13 people // one B predeceased WM // COURT – B's share goes into intestacy b/c gift of residue is not specific gift
Re Wudel, 1982 ABQB	WM had 8 children – one predeceased leaving 4 kids // will made 17 years after daughter's death // *Wills Act* said that if gift was to descendant, it didn't lapse, but rather went to that person's descendants – subject, of course to contrary intention // COURT – found contrary intention
Estate of Stella West, 1999 BC	WM left gifts to 4 gkids – split residue b/w her two children // one child predeceases WM // ISSUE – what happens to her share? // under *Wills Act*, share would go to dead child's own children – absent contrary intention // COURT – found contrary intention // will said "in equal shares per capita for **their sole use and benefit absolutely**" // share to the other child

ANTI-LAPSE PROVISION

- anti-lapse provisions can be the "contrary intention" required to keep a gift from lapsing should B predecease WM
- ex/ " "In the case of the death of any of my B's having left issue, before or after this will, I direct that the issue shall take their parent's share…"
- WM's can't completely exclude the application of lapse, but they can avoid its consequences by providing substitute B's (***Re Greenwood***)

Re Davison, 1979 NSTD • **anti-lapse provision**	WM had 14 kids – left residue to be divided "among my children" – but if any had died leaving issue, they're to receive parent's share // 4 dead at time will made – 2 of which had children // ISSUE – is residue divided by 10 or 12? ie/ what does "my children" mean // COURT – general rule is that B has to survive WM to take – but here there was a more specific clause that said what to do in event that child predeceased

Re Cousen's Will Trusts, 1937 • **anti-lapse provision gifted to another pre-deceased**	WM left share of residue to B if living - or to her issue, if any - to be held in trust by her personal rep // WM dies - B has predeceased - so has her personal rep!! // does B's daughter still take or has gift lapsed? // COURT - lapse // the contrary intention (anti-lapse clause) only applied to the gift to the B // no contrary intention for the gift to the personal representative
Re Greenwood, 1912 • **anti-lapse language**	WM specifies what should happen to gifts if B's die before her without issue & what happens if they predecease with issue -- "gift shall not lapse but shall take effect as if his/her death had happened immediately after mine" // COURT - can't deem deaths to have occurred before you! - no escape from doctrine of lapse, but WM's can avoid consequences // provide substitutionary gift

ADEMPTION

GENERAL

- property subject that's ceased to exist as part of the WM's property OR has ceased to conform to the description in the will
- doctrine applies regardless of the WM's intentions (***Trebett***)
- does NOT apply to specific gifts that've been changed in name or form only, but remain substantially the same (***Trebett***) -- residue NOT a specific gift!
- ***Lawes v Bennett*** -- real property converted to personal property if option to purchase property is exercised - conversion occurs when option exercised
- DW Pro Tip -- strongly discourage clients from gifting proceeds from a specific account -- risky, risky -- ideal way is to split residue into %'s
- oddly, if will bequeaths an item (ex/ gold watch) to X, but the item never existed, executors may be enabled to go and purchase the item to give

RELIEF FROM DISPOSITION OF PROPERTY

- **WESA 48(2)** -- where will makes gift of specific property & that property is sold by a nominee (not WM - someone acting for them after loss of capacity) -- B is entitled to receive an amount from the estate equivalent to the property that was disposed
- **WESA 48(3)** -- override provision - (2) doesn't apply if disposition made to facilitate WM's instructions made while capable, absent contrary intention

Church v Hill, 1923 SCC • **property adeemed**	WM left daughter piece of land & residue to be divided among other kids // WM entered agreement for sale of land // only partial payment made when WM dies // COURT - purchaser has equitable interest in land // property adeemed // and.....payments go to the estate - daughter gets nothing
Trebett v Arlotti-Wood, 2004 BCCA • **specific gifts**	WM left contents of RBC account to B // few weeks later, contents transferred to account at MW // adeemed? // COURT - specific gifts NOT adeemed if they've changed "in name or form only" - but remain substantially the same thing // unless the B can identify the particular property in the new account via tracing, they won't take
Re Clement Estate, 2007 NSSC • **cottage case**	WM left daughter cottage // WM died in fire in the cottage - which was destroyed // ISSUE - who gets the insurance payments? // COURT - strict approach (from *Church & Hill*) would be for policy to fall into residue // but - court finds that WM died before cottage burnt down entirely - beneficial title already passed to her
Re Sweeting, 1988 UK • **property adeemed**	will gave 2 pieces of property to B1 - personal property to B2 // prior to death, WM entered into option-to-buy agreement with 3rd party - not completed // executors then complete K // COURT - b/c K already started by WM, rule in L&B applies - property adeemed // proceeds from sale go to those entitled to the WM's personal estate //
Re Dearden, 1987 MNQB • **non-enforceable K**	WM left land + business + equipment to nephew // then, entered into sale agreement with 3rd party - subject to long list of conditions // sale never completed // COURT - K for sale not enforceable - no ademption as condition precedent left unfulfilled
Re Pyle, 1895 UK • **WM's intention wrt L&B rule**	WM left property to sons // then - one the same day executed codicil AND granted lease to property w/ option to purchase // ISSUE - ademption? // COURT - rule in L&B still subject to WM's intention // here - clear that WM intended befit to go to the sons - based on timing

ABORIGINAL ESTATES

LEGISLATION (INDIAN ACT)

- **s.42** – jurisdiction & authority over testamentary matters vests with the Minister
- **s.43** – Minister may: appoint or remove execs // authorize admins or execs // carry out terms & administer property
- **s.44** – court may exercise jurisdiction in place of the Minister w/ consent or direction of Minister
- **s.45** – property can be devised through will, but must Minister must approve OR court give probate for legal force and effect
- **s.46** – will may be declared void in whole or part if: duress or UI // WM lacked capacity // will imposes hardship on those the WM had responsibility to provide for // terms are vague or against public policy // ***will purports to dispose of land in manner contrary to the interests of the band or the Act***
- **s.48** – rules on intestacy
- **s.49** – possession / occupation of reserve land must be approved
- **s.50** – right to possession / occupation cannot be acquired through devise OR descent unless B entitled to live on reserve
- **WESA** – Part 2, Division 3 – deals with wills & cultural property of Nisga'a citizens

REAL PROPERTY

- right to real property is unique -- lasts for life, but is also to an extent subject to testamentary transfer (***Provonost***)
- no fee simple ownership // eligible individuals (registered band members) can get the property by certificate

INDIAN ACT vs REGULAR SYSTEM?

TEST

1. is the document testamentary
2. was the WM ordinarily resident on the reserve? WM either registered OR can be a matter of intention

MINISTER

- no probate fees // type of E is restricted
- anything that's in writing & testamentary is nature is considered a will
- very little power to alter a will -- Minister can basically only void the will

ROLE OF THE PUBLIC GUARDIAN & TRUSTEE

there were no readings for this topic as we had a guest speaker – unlikely to come up on exam in any substantive way

ROLE OF THE PGT

- acts for minors / adults without capacity / estates of adults who don't otherwise have a representative
- PGT can act in a fiduciary role (direct representation) or in a protective/oversight role -- both roles in estate matters
- wills variation claims: PGT reviews adequacy of provision made for minors
- will not usually step in where no provision is made for a minot child, if the estate passes to the child's surviving parent (***Cameron***)
- can act as the Litigation Guardian, or can seek a private LG to act for the minor child – costs from the estate
- if share of estate is gifted to a minor / incapable adult, the pGT will confirm there's someone w/ legal authority to manage

LEGISLATION

- **WESA 153** – minor entitled to share of estate & no appointed trustee --> share to be transferred to the PGT
- **INSURANCE ACT 88** – minor as designated B & no trustee --> payment directed to the PGT

ESTATE ADMINISTRATION

- deceased is: intestate // no relatives in BC willing to act // named executor unable or unwilling // other qualified individuals refuse
- will NOT act where: estate less than $5000 // insolvent estates // 3rd party intermeddled & assets can't be ascertained or recovered

RECTIFICATION

this doctrine deals with cases where there's a question as to whether the WM knew of and approved the language in the will

GENERAL

- rectification does not change the intended legal relations -- "realigns" document with underlying intention (restorative)
- KEY -- neither WM's mind (*Rondel*) nor the mind of solicitor (*Clark*) was turned to the "mistake" -- if it was, probably out of luck
- **WESA 59(1)** court can rectify will if it fails to carry out WM's intentions due to
  - **(a) error** arising from an accidental slip or omission
  - **(b) misunderstanding** of the WM's instructions
  - **(c) failure** to carry out the WM's instructions [*HL says this is the saving grace for lawyers & negligence claims*]
- historically, courts of probate & construction had different rules for what could be fixed -- distinction eliminated under WESA
- **WESA 59(2)** -- extrinsic E, including E of the WM's intent, will be admissible at any stage
- rectification will only be granted where the intention of the WM is sufficiently specific -- court isn't rewriting will (*McPeake*)

PROBATE vs CONSTRUCTION

- PROBATE:
  - if WM didn't know of and approve language, words could be deleted but not added
  - all relevant E admissible (extrinsic direct E of WM's intention & statements by WM) to determine if WM knew of & approved
  - if WM read the will, or it was read to him, **rebuttable presumption** that WM knew & approved of the language
- CONSTRUCTION: more flexible - add or delete words to give effect to intention // no direct extrinsic E of WM's intention allowed // interpretation based on language & surrounding circumstances to infer meaning & intention (*Rondel*)
- sometimes though, lines blurred by court - ex/ substitution of words @ probate stage (*Clark v Brothwood*)

Re Morris, 1971 PDA • **probate struck words & construction "read in"**	WM wanted to revoke gift to housekeeper // codicil eliminated clause that contained the gift, but in doing so also wiped out a ton of other gifts // probate struck words an left a blank spot that the court of construction could then interpret
Clark v Brothwood, 2006 EWHC • **words substituted at probate** • **presumption against intestacy**	WM left 1/20 of her estate to each godson -- this left 60% estate intestate // but ... if each were left **20%** of estate, whole estate would be distributed // COURT -- was not WM's intention to die intestate, and error must've been clerical since solicitor did not turn their mind to the issue - KEY
Re Verity, 2012 BCSC • **presumption of knowledge & approval**	will left residue in 2 equal shares -- one divided equally b/w 10 nieces & nephews & other b/w kids of a predeceased niece // did WM intend to favor that niece? // earlier will had shares distributed equally among all 11 // COURT - presumption of knowledge & approval rebutted
Rondel v Robinson, 2011 ONCA • **direct E of WM's intention inadmissible at construction stage**	WM had 2 wills - one Canadian & one Spanish // solicitor didn't know about Spanish will when he drafted will w/ a revocation clause // attempt to have revocation clause struck // COURT - didn't strike clause -- based on admissible E // ***case has been criticized***
Balaz v Balaz, 2009 ONSC • **intention of WM sufficiently specific**	Ws will set up a spousal trust for tax purposes // however, lawyer inadvertently gave the H power provisions that "tainted" the trust -- heavy tax implications // H applies to have will rectified by deletion of the offending clause // COURT - granted rectification - W's intention was to avoid tax consequences, thus language that defeated that purpose wouldn't have had her approval
McPeake v Canada (AG), 2012 BCSC • **intention of NOT sufficiently specific** • **can infer specific intention from the E**	application for rectification of an inter vivos trust to avoid tax implications // COURT - refused // the tax implications that the rectification sought to address were not contemplated at the time the trust was formed

TESTATORS SIGNING EACH OTHER'S WILLS

- happens with some frequency -- pre-WESA, cases split on whether "mirror wills" would be granted probate
- WESA will likely be able to use both **s.59** and **s.58** to address this type of situation

Re McDermid Estate, 1994 SKQB • **spouses sign the wrong will**	2 (store-bought) wills - identical except for designated B and personal rep - but each spouse W'd their own will // COURT - document clearly embodied the testamentary intentions of the deceased & but for the signature mess, it fully complied with required formalities
Estate of Daly, 2012 NSWSC • **mirror wills - signed by the wrong spouse**	each will named the same executors & had same disposition of estate // instead of rectification, court admitted the document the wife thought was her will, despite its lack of proper execution

CONSTRUCTION

this doctrine deals with cases where there's ambiguity in the language of a will, and the testator's intentions are unclear
goal = ascertain the WM's true intentions

AMBIGUITY IN INTENTION

LEGISLATION -- WESA 4(2)

- doctrine of interpretation is based on the language used in the will - extrinsic E of testamentary intent is inadmissible except where
  a. provision of a will is meaningless
  b. provision of a testamentary instrument is ambiguous on its face OR in light of other E is ambiguous given surrounding circumstances

GENERAL PRINCIPLES

- goal of construction is to ascertain the WM's true intentions - ONLY proceed if WM's intention can't be discerned from the language
- **ordinary meaning rule** - words to be given their ordinary meaning in light of the circumstances in which the will was made (***Perrin v Morgan***)
- **armchair rule** - in construction, court must place itself in WM's position at the time the will was made (***Laws v Rabbitt***)
- WM's knowledge/training will also inform interpretation - technical words more likely to be given technical meaning if used by professional (***Tottrup***)
- court won't intervene unless there's an ambiguity -- if ambiguity said to arise from omission, have to establish omission unintended! (***McEwan***)

PROCESS

1. apply ordinary meaning rule in light of contents of whole will or surrounding circumstances (***Haidl***)
2. look at indirect extrinsic E only -- ex/ character & occupation of WM // amount, extent, condition of assets // general relationships of people (***Haidl***)
3. extrinsic E can be admitted at the start of the hearing (***Wilson v Shankoff***)
4. only proceed with construction if intention can't be determined from the plain meaning of the words
5. apply armchair approach -- look at circumstances that might reasonably have influenced the WM at the time will was made (***Laws v Rabbitt***)
6. then construe will (using ordinary meaning rule) in light of those surrounding circumstances (***Wilson v Shankoff***)

DIRECT EXTRINSIC E

- direct extrinsic E of WM's intention is inadmissible, with only 2 exceptions

1. where identity of B is ambiguous (Doctrine of Equivocation)
2. where identification of property being gifted is ambiguous (Doctrine of *Falsa Demonstratio)*

Perrin v Morgan, 1943 HL UK • **words given ordinary meaning in light of surrounding circ's**	homemade will bequeathed "all my moneys of which I die possessed" // at death, WM had land + shares + cash + dividends + rents + household goods // no residue clause // COURT - gave "money" its ordinary meaning, read in light of the circumstances in which the will was made // held that "moneys" included investments // circumstances --> large part of assets, if not included the numerous B's would've had very small shares, no residue clause, WM drafted the will herself
Haidl v Sacher, 1980 SKCA • **indirect extrinsic E admitted at start of hearing**	WM gave to list of people "in equal shares" -- but one entry on list included multiple people // ISSUE - did WM intend that each of *those* people also get an equal share, or were they to get stirpital share // COURT - indirect extrinsic E can be brought in at the outset of construction
Re Estate of Murray, 2007 BCSC • **direct extrinsic E disallowed**	WM only disposed of 90% of estate // ISSUE - does other 10% go to charity as a gift that failed to vest (as per a clause of the will) or does it fall into intestacy? // COURT - ambiguity exists b/c will said "all my property" but only gave away 90% // indirect extrinsic E admissible to determine WM's intention // 10% to go to the Salvation Army based on -- clause that gave SA failed gifts + fact WM didn't have much contact with those who'd take under intestacy + earlier wills made no provisions for those people either
Re Davidson, 1979 Aus HC • **falsa demonstratio**	WM had two lots, one of which had a house on it // leaves lot to B1 and lot + house to B2 // problem - part of the house is on the other lot // COURT - uses doctrine to give effect to what WM intended - that the B who gets the house also gets the land on which it's built // direct extrinsic E of intention allowed
Re McEwan Estate, 1967 BCCA • **omission - not ambiguity**	WM's will failed to make a provision for where residue of estate would go if wife predeceased daughter // is this an ambiguity? // COURT - no way to know if WM intended this - seems like he should've thought of this scenario, especially given the relative age of the women // gift lapses // daughter takes on intestacy anyways

AMBIGUITY IN GIFTING PROPERTY

- WM can ONLY gift property he/she is legally or equitably entitled to at the time of death -- **WESA 41(1)**
- any of WM's property not disposed of in the will will be distributed as if property were intestate -- **WESA 44(a)**

Re Meier, 2004 ABQB • **failed gift**	WM left brother farmland that was actually owned by a company of which the WM was the sole shareholder and director // COURT - can't give what you don't own // to try & determine what WM would've done had he been aware of the true nature of the ownership would be pure speculation // gift fails NOTE: B who lost out succeeded in a negligence claim against the solicitor

Ireland v Retallack, 2011 NSWSC • **successful gift**	WM owned 99% of shares in company – daughter owned 1% // will left daughter property owned by the company // valid? // COURT – gift can be saved // WM's executors now controlled the company, therefore it was in their power to convey the land to the daughter (this seems to turn into an indirect gift)

AMBIGUITY IN GIVING TO PEOPLE

NON-SPECIFIC LANGUAGE

- at CL, words in a will that refer to people are assumed to be specific to the time at which the will was made (***Amyot v Dwarris***)
- under WESA, if you use the words "heir" or "next of kin" you're assumed to be making distribution that would occur on intestacy -- **WESA 42(2)**
- **child** – includes natural & adopted children, but not step-children
  - although in some cases, non-biological kids may be able to take upon construction (***Re Simpson***)
- **niece / nephew** – includes children of WM's siblings AND the children of the WM's spouse's siblings -- both sides of family (***Estate of Holmes***)

Amyot v Dwarris, 1904 • **words taken as specific**	WM left gift to the "eldest son of my sister" // at time will made, there were 2 sons alive // at death, only the younger son was surviving // COURT – gift fails // "eldest" found to be specific – referenced the older, now-dead, son
Re Simpson Estate, 1969 BCSC • **step-children called "son"**	WM left estate to be shared "equally between my six children" // one of six not his natural child // ISSUE – is the gift invalid? // COURT – allowed the gift as a matter of **interpretation** // "6 children" would have to include son // also, E of WM's relationship with son was admitted

GIFTS PER STIRPES

- proper drafting = "to my issue per stirpes" OR "to my children in equal shares but if any child predeceases my spouse, the share of my predeceased child to be paid equally to those children of such predeceased child then surviving my spouse" ----> worst ever is "per stirpes, in equal shares"
- easy to see why people are tempted to use the phrase, but you're really playing with fire // DW Pro Tip – forget you ever heard this phrase
- "per stirpes" implies the possibility of an inter-generational gift -- but again, in construction it all comes down to the intentions of the WM

Re Karkalatos Estate, 1962 SCC • **per stirpes**	WM left residue of estate to 2 daughters – and if one was to die, "to among and between my grandchildren, per stirpes, in equal shares" // 2 daughters alive at time will was made – at time of death, one dead, leaving one child // ISSUE – at what level does the *per stirpes* apply? – if it applies at level of daughters, then the dead D's kid gets 1/2 // COURT – applied to level of daughters – this is the only construction that can give effect to both phrases and supports the overall scheme of the will
Re Clark Estate, 1993 BCSC	S left 1/2 residue in trust for grandson – upon his death, to go to other son's kids "per stirpes" // T's want to make deal to wind up the trust // PGT opposed the move as it could prejudice as yet unborn great gkids // COURT – construction doesn't indicate that WM intended to prefer great gkids – only grandkids
Dice v Dice Estate, 2012 ONCA • **another per stirpes nightmare** • **for proper drafting of a *Dice* scenario see the long-winded version above ^^^**	residue of estate to be split "equally b/w son and daughter, per stirpes" // son dies after WM but before mom (the estate's LT) // son's will named spouse as sole B // COURT – 3 options // **(1)** sister takes all, if interest does not vest until LT's death **(2)** interest vests at WM's death – no meaning given to *per stirpes* – son's estate takes **(3)** interest vested at WM's death – *per stirpes* applies – son's children take // law presumes early vesting + words "per stirpes" had to have some meaning + WM's intention to benefit both kids (and gkids if one child died before the LT) --> son's share passes to the children

CLASS GIFTS

- class = gift to number of persons united/connected by a common tie + WM was looking to the group as a whole vs making gifts to individuals
- with class gifts, if a member of the class dies during the WM's life, gift doe NOT lapse ---> the survivors take the gift equally amongst themselves
- intention to create a class gift must be clear (***Milthorp***)

Milthorp v Milthorp, 2000 SCC • **clear intention to create class**	WM leaves estate "to my daughter X and son Y and to my husband's kids A, B, C, D, E, and F, *in equal shares per stirpes*" // D predeceases (no kids) + E&F predecease (kids & gkids) // ISSUE – is residue equally divided b/w surviving kids as a class gift or do issue of E&F take their share? // COURT – no class gift – wording not clear
Re Hutton, 1983 ONHC •	WM left residue in equal shares "amongst my brothers & sisters...but if any not living, but with a child living, their share to the child" // at death, one brother & brother's kid dead – BUT, brother gkids alive // ISSUE – does that share get shared amongst the other 3 siblings or go to the dead brother's gkids // COURT – no gift to gkids – WM made careful provisions to ensure gift didn't lapse in certain instances, but not for death of niece

CLASS CLOSING RULES

- class closes when interest of first member of class vests, if gift is conditional upon happening of an event (ex/ turn 21)
- class closes at the earliest opportunity -- subject, of course, to a contrary intention of sufficient clarity in the will
- class *prima facie* determined at WM's death - BUT - if there's a conditional gift to a class, the class is ascertained when the 1st member's interest vests
- rules apply to gifts of capital, but probably not to gifts of income

EXAMPLES OF CLASS CLOSING

- **"To all the children of A" (vested gift, no prior interest)**
  - when WM dies, any children alive can call for the class - future unborn children of A lose out
  - at death - no kids - the first child of A born will take - class closes
  - to avoid the rule -- "to the children of A, whether born before or after my death"

- **"To B for life, remainder to the children of A" (no contingency, prior interest)**
  - class consists of all children born during the life of B
  - if no kids alive at death of both WM and B, probable that subsequently-born kid will take

- **"To the children of A if they reach 21 years of age" (contingent gift, no prior interest)**
  - if at least on child is over 21 when WM dies, the class closes in favor of existing children
  - when class closes, those over 21 take their share - those under 21 take if they reach 21 - if they don't, their share goes to others in class
  - if no child is 21, class stay open until one child meets condition - any kids born before that time (but after WM's death) join class

- **"To B for life, remainder to those of A's children who reach the age of 21" (contingent gift, prior interest)**
  - earliest date for class closing is the death of B -- prior interest must end before class closes - members can be added up until that point
  - no interest can be distributed until B's death anyways
  - if B dies, and no kids have met condition, class remains open until the first child reaches 21 years
  - if child reaches 21 years (vested interest) while B is still alive, but then dies before B -- that child's share goes to their estate

Milthorp v Milthorp, 2000 SCC • **clear intention to create class**	WM leaves estate "to my daughter X and son Y and to my husband's kids A, B, C, D, E, and F, *in equal shares per stirpes*" // D predeceases (no kids) + E&F predecease (kids & gkids) // ISSUE - is residue equally divided b/w surviving kids as a class gift or do issue of E&F take their share? // COURT - no class gift - wording not clear
Re Hutton, 1983 ONHC •	WM left residue in equal shares "amongst my brothers & sisters...but if any not living, but with a child living, their share to the child" // at death, one brother & brother's kid dead - BUT, brother gkids alive // ISSUE - does that share get shared amongst the other 3 siblings or go to the dead brother's gkids // COURT - no gift to gkids - WM made careful provisions to ensure gift didn't lapse in certain instances, but not for death of niece
In Re Bleckley, 1951 • **class closing**	estate held on trust - income to LT - and on LT's death, to be held for all gkids who reach the age of 21 // one child reaches 21 - claims interest - even though LT still alive // ISSUE - does class close? // COURT - NO // no interest can vest until the LT dies, and class doesn't close until interest vests

DISCLAIMER & ABATEMENT

unrelated issues that may need to be dealt with in the course of administering a will

DISCLAIMER

- B's cannot be forced to take a benefit -- it can instead be disclaimed, which is exactly what it sounds like -- often see in **trusts**
- if a B disclaims their interest it may accelerate the remainder interests -- could also impact, or even eliminate, contingent interests
- acceleration is a matter of intention (***Brannan***) provided it's not precluded by a contrary intention (***De la Giraudias***)

SIGNS OF CONTRARY INTENTION (*De la Giraudias*)

- no encroachment of capital allowed by the life B // no ability of B to unilaterally terminate the trust (ex/ a marriage clause)
- language that indicates a desire to benefit successive generations - ex/ "wife, children, and others"
- larger estates indicate "dynastic concerns" [I don't agree with this one]
- if rule against perpetuities is included, shows intention that future B's may get vested estates

In the Estate of Brannan, 1991 BCCA • **acceleration a matter of intention** • **acceleration allowed**	trust in will, H named as B of income from WM's estate - capital to pass to sons on H's death (and to GK's if sons predecease H) // also, if H remarries, trust ends & capital goes to sons // H disclaims his interest // ISSUE: does son's interest accelerate, or subject to divestment until H dies? // COURT - acceleration applies // WM didn't absolutely require H's death for the interest to pass to sons (as per the marriage clause) // no contrary intention found in the will!
De la Giraudias v LDG Trust, 1998 BCSC • **acceleration disallowed** • **contrary intention of settlor**	income from trust to be paid to GM for her lifetime // on her death, property to settlor's children over 25 // if C dies before 25, leaving their own kids, gk's get income from deceased C's share // ISSUE - can interest accelerate on disclaimer by GM? // COURT - no - trust showed contrary intentions
Re Estate of Creighton, 2006 BCSC • **disclaimer causes class closing** • **encroachment of capital**	trust -- life interests in residue of estate to 2 kids; ability to encroach on capital; on death of both kids, divide remaining residue equally among all gk's // kids want to divest // this would close the class - any gk's born later would lose the chance to become B's // COURT - no contrary intention found - settlor didn't intend to create a dynasty, only to guard against intestacy // acceleration allowed
Re Grund Estate, 1998 BCSC	WM left house to K1 and K2, w/ condition that they each pay a half share of the value to K3 and K4 // residue to be split equally among all 4 kids // very unfair to K1 and K2 - they want to disclaim their interest // ISSUE - will value of house then fall into residue, to be split 4 ways? // COURT - payment of 1/2 share conditional on acceptance of transfer of home - K1 & K2 entitled to disclaim & claim through share of residue

ABATEMENT

situation where there isn't enough property to cover all of the dispositions in a will

LEGISLATION

- **WESA 50(2)** -- if estate is insufficient to satisfy all gifts and debts they will be reduced
- **WESA 50(4)** -- land & personal property must be reduced together
- **WESA 50(5)** -- assets will be reduced in the following order
  - **(a)** property specifically charged w/ debt or left on trust to pay a debt
  - **(b)** property distributed as an intestate estate and residue
  - **(c)** general (ex/ 100 shares), demonstrative (ex/ $25k from my BMO account), and pecuniary (ex/ $25k) legacies
  - **(d)** specific legacies (ex/ my car, the funds in my BMO account #1234, my house located at 1234 Easy St)
  - **(e)** property the WM had power of appointment over

INCAPACITY PLANNING

this amount of legislation in this section was a nightmare – in the interests of time, I elected to omit large chunks – when in doubt, rules likely same as for EPOA

GENERAL

- tools have developed to help individuals pre-plan how their financial & health affairs are to be managed in the event that they lose capacity
  - **power of attorney** – attorney can make decisions in relation to the **financial affairs** of an adult
  - **s.7 representation agreement** – personal, health care, and "limited" financial matters
  - **s.9 representation agreement** – personal and health care only
  - **advance directives** – health care instructions – including consent to or refusal of specific health care
  - **committees** – appointed by the court if adult becomes a patient

ENDURING POWER OF ATTORNEY

CAPACITY TO MAKE AN EPOA

- only capable adults can make an EPOA -- "capable" is the power to understand the **nature & consequences** of making an EPOA -- **POAA 12(1)**
- adult must be able to understand -- **POAA 12(2)**
  a. extent of property & its approximate value
  b. obligations adult owes to their dependants
  c. that attorney can do anything the adult could do if legally capable (except make a will) – subject to restrictions in the EPOA
  d. if the attorney mismanages the adult's business & property, that their value may decline
  e. and that, if capable, the adult can revoke the EPOA

MAKING AN EPOA

- individuals who provide personal/health care for compensation cannot be named an attorney unless person is spouse, child, or parent -- **POAA 18**
- EPOA's must be in writing // signed and *dated* by adult + 2 W's // all must sign in each other's presence -- **POAA 16(1)**
- attorneys and their spouses, children, parents, employees or agents cannot W – nor can minors -- **POAA 16(6)**
- only one W required if the W is a lawyer or notary public -- **POAA 16(4)**

THE 'ENDURING' PART

- at CL, individuals can designate a POA to conduct inter vivos dealing with their property -- but POA becomes <u>invalid</u> if donor becomes incapable
- mandatory provision – EPOA must say if attorney continues to exercise power even if the adult is capable OR continues if adult incapable -- **POAA 14**
- adults can change EPOA subject to its terms -- must notify each attorney upon change -- change not effective until notice given

POWERS OF AN ATTORNEY

- CANNOT -- act contrary to law // omit something required by law // make a will
- CAN -- request delivery of property // request info or records from 3rd party (disclose only as necessary)// retain qualified persons to assist them
  1. make decisions on behalf of the adult
  2. do anything that the adult may lawfully do by an agent
  3. in relation to financial affairs -- adult may grant attorney general or specific powers
- but attorney can't delegate decision-making authority <u>except</u> wrt investments if made in accordance with legislation
- attorney can make gift, loan, charitable gift
  - if expressly authorized
  - or if adult made the type of gift/loan while capable + sufficient property + amount not above prescribed amount ($5000 or 10% taxable income)
- POA must be exercised according to donor's instructions, unless the donor is incapable – at which point the attorney takes on fiduciary role (*McMullen*)

DUTIES OF AN ATTORNEY -- POAA 19 & 33

- act honestly & in good faith -- using care, skill & diligence of a **reasonably prudent person**
- keep records & produce them at request of adult -- including list of assets & liabilities and records of receipt/disposition of property
- act in adult's **best interests** – bearing in mind the adult's current wishes, known values, and beliefs
- to extent reasonable, give <u>priority</u> to adult's **personal & health care needs**
- foster adult independence & involve adult in decision-making
- property -- keep adult's property separate // at the disposal of adult // don't dispose property known to be subject of testamentary gift

PRIVILEGES & LIABILITY

- no payment unless specified by EPOA -- but will be reimbursed for reasonable expenses properly incurred
- resignation -- by written notice to adult (or spouse, relative, near friend if incapable) -- effective from date given or date specified
- attorney not liable for loss or damage if they complied w/ **s.19** duties OR was acting under order of the court

REVOCATION / SUSPENSION / TERMINATION

- subject to terms, attorney can revoke POA – must give written notice to each attorney – revocation not effective until this done
- authority ENDS -- **POAA 29** -- EPOA is terminated // attorney becomes incapable, bankrupt, or convicted or prescribed offence // if corporation, where ceases to do business or dissolves // at termination of marriage or marriage-like relationship if attorney is a spouse
- execution of a later POA does not automatically revoke earlier POA's (*Houston*)
- revocation can be implied, but it must be clear and unambiguous (*Houston*)

McMullin v Weber, 2006 BCSC • **must exercise POA in accordance w/ donor's wishes unless donor incapable**	Parents give 3 kids EPOA // wife dies, husband depressed – strikes up affair w/ younger woman // 2 kids, concerned about debts getting racked up, transfers title of dad's condo // dad finds out when he tries to borrow money against condo // goes to court to have transfer set aside // COURT – sets aside transfer // dad is entitled to his autonomy until he's found incompetent
Easingwood v Cockroft, 2013 BCCA • **EPOA can create inter vivos trust under certain circumstances**	using EPOA, children transfer dad's assets into alter ego trust – trust had same distribution of assets upon death as did his will // dad dies – widow claims trust invalid & applies for will variation // COURT – attorneys can create inter vivos trust -- when used as a legitimate planning tool + consistent with wishes of the donor + no reduction or adverse effect to donor's interest + no conflict of interest
Houston v Houston, 2012 BCCA • **later POA does not automatically revoke an earlier POA** • **implied revocation must be clear**	1st POA allowed either wife or son to act – 2nd POA appointed wife, son to act only if wife unable or unwilling // son terminated JT of couple's home under 1st POA // COURT – no doctrine of implied revocation // revocation is a matter of fact – depends on intention of donor // severance of JT not found to be a testamentary act – valid

REPRESENTATION AGREEMENTS

GENERAL

- **SECTION 7 RA** – covers personal care, health care, and limited financial matters
- **SECTION 9 RA** – personal and health care only
- scope or each is slightly different and while both RA's require a capable adult, but the test for capacity is slightly different
- presumption of capacity – unless otherwise proven

SECTION 7

- CAPACITY – no easy test – -- **RA s.8(1)&(2)** – should take into account:
  - communicates desire to have representative make, help, or stop making decisions
  - whether adult demonstrates choices and preferences & can communicate displeasure or approval of others
- but adult need not be capable of -- making K // managing heath, personal, or legal matters // routine financial management to make a s.7 RA
- SCOPE -- **RA s.7 & s.11**
  1. personal care decisions – including admission to care facility
  2. "routine management" of financial affairs -- ex/ bill payment, food purchase, etc
  3. major + minor health care -- but NOT refusal or life support or non-therapeutic sterilization
  4. legal matters -- except divorce proceedings

SECTION 9

- CAPACITY -- simpler test -- **RA s.10** – incapable of understanding the **nature & consequences** of the proposed agreement
- SCOPE -- **RA s.9(1)&(2)**
  - CAN -- decide where & with whom adult to live // whether adult should work & if so doing what & for whom // educational, social, vocational activity // contact or associate w/ another person // day-to-day decisions including diet and dress // give or refuse health care // physically restrain, move, manage the adult if necessary to provide personal or health care -- can authorize another person to do these things
  - CAN'T **--** make arrangements for temporary care & education of adult's minor children or people cared for by adult // interfere w/ religion

EXECUTION

- RA's must be in writing // signed by adult + 2 W's // all must sign in each other's presence -- **RA s.13**
- only one W required if the W is a lawyer or notary public
- attorneys and their spouses, children, parents, employees or agents cannot W – nor can minors
- at least one representative must also sign the RA
- capable adult may continue to do anything the RA is authorized to do -- **RA s.36**

WHO CAN BE A REPRESENTATIVE? -- **RA s.5**

- adult or PGT – but unless a spouse, parent, or child, no one who provides personal or health care services for compensation
- credit union or trust company can be an RA -- but only if the RA does not include personal & health care
- multiple representatives can be assigned different area -- but if authorized to act in same area, decisions must be unanimous

MONITORS -- RA s.12

- adult making RA can appoint monitor if desired -- mandatory for s.7 RA's that include financial management, unless representative is spouse, PGT, credit union or trust company, or if 2 or more rep's required to act unanimously
- monitor must be at least 19 & willing and able to carry out duties and exercise powers
- if monitor resigns, power of representatives is suspended until new monitor is appointed or court determines monitor not required
- PGT can appoint replacement monitor if requested by representative or other interested party if monitor is unsuitable or no longer able to act
- POWERS -- visit adult, access must not be blocked // require rep to produce accounts or report to monitor
- LIABILITY -- monitor not liable for rep's default if monitor acted in **good faith** and with the care, diligence, and skill of a **reasonably prudent person**

ADVANCE DIRECTIVES

GENERAL

- governed by the *Health Care (Consent) and Care Facility (Admission) Act*
- representatives can provide for consent/refusal of health care - doesn't apply to certain sections of *Mental Health Act* or sterilization (non-therapeutic)
- CAPACITY - adult must understand **nature & consequences** of the proposed advance directive AND **scope & effect** of health care instructions AND that the AD will not apply under certain circumstances -- **HCCFA s.19.1**
- AD does NOT APPLY
  - where instructions don't address the health issue at hand
  - directions so unclear as to make it uncertain if consent has been given or refused
  - adult's wishes have changed significantly since AD made (but while adult was still capable)
  - significant changes in medical knowledge since AD made

COMMITTEES

PATIENTS

- 2 ways to become a patient who is declared incapable of managing their own affairs or themselves
  1. via certificate signed by director of mental health facility / psychiatric unit under *Mental Health Act*
  2. upon application to court with affidavits from 2 medical practitioners

COMMITTEES

- court can appoint person(s) to be committee -- until appointment, it's the PGT
- POWER - committee has all the rights & powers wrt patient's estate that the patient would have, if capable
- powers must be exercised for the **benefit of the patient & patient's family** w/ regard to nature & value of the property and the circumstances & need of the patient and patient's family
- court can make order it deems **necessary** for, or in the interests of, proper honest and prudent administration of the estate -- **PPA s.28**

TEST FOR "NECESSARY"

- court has not interpreted necessity on a strict basis
- gift / transfer / diminution of assets should only happen for **compelling reason** and for the benefit of patient & family (***O'Hagan***)
- TEST -- would reasonable & prudent businessperson (of advanced years, if patient is of advanced years) think the transaction in question would be beneficial to patient & family, given known circumstances & future possibilities? (***O'Hagan***)
  - patient's own interests - present and future - must be given paramount importance - including that they may recover!

O'Hagan v O'Hagan, 2000 BCCA • **compelling reasons** • **for benefit of patient & family**	son committee of patient's (rather large) estate // main asset is shares in company // to avoid major tax implications, company needs to reorganize // shares would be transferred to a trust for patient's benefit during life + right to encroach on capital // but reorganization would benefit son upon patient's death // PGT refuses consent // son applies to court // COURT - approves reorganization - compelling reasons exist 1. reorganization gives clear advantage to estate - avoid huge taxes 2. plan posed no real disadvantage to patient during lifetime
BC (Public Trustee) v Bradley Estate, 2000 BCCA • **compelling reasons**	B was in process of making large gifts to her sons prior to incapacitation // committee plan to continue to gift patient's estate to husband and sons to save significant US estate tax on patient's death // PGT opposed plan - argued "necessity" in the traditional sense - plan would change estate & affect testamentary dispositions // COURT - reorganization NOT allowed 1. patient's prognosis not clear 2. plan would involve significant diminution 3. gifts would skew estate distribution

CAPACITY & RELATED TOPICS

ATTACKING A WILL

1. for a duly executed will – testamentary capacity and knowledge & approval are presumed (*Vout*)
2. suspicious circumstances can "spend" this presumption – but they don't raise the standard of proof required
3. if will is challenged, burden is on person propounding the will to establish capacity and k&a on balance of probabilities (*Re Henry*)
4. allegations of UI or fraud must be proved by the person making them

MENTAL CAPACITY

AGE OF CAPACITY

- people 16+ and mentally capable may make a will – **s.36(1) WESA** // under 16, will is invalid – **s.36(2) WESA**
- age irrelevant if member of Canadian Forces on active duty – **s.38(1) WESA** // will only needs W if signed for WM by a 3rd party
- old age of capacity was 19 -- new provisions apply if WM dies after legislation comes into force – **s.186 WESA**

TEST FOR CAPACITY (*Banks*)

1. WM must understand nature & appreciate the nature of making a will – that it disposes of property after death
2. understand the extent of the property being disposed – approximate values are okay, also "lots" and "little" may suffice
3. appreciate claims that society expects they make – ie/ understand import of disinheriting children

OTHER GENERAL POINTS

- WM may suffer from diminished faculties (ex/ memory loss) yet still possess capacity to execute a valid will / codicil (*Rampone*)
- eccentricities don't preclude execution of valid will unless they interfere with the elements of capacity (*Bohrmann*)
- **partial invalidity** – court can sever provisions clearly influenced by delusion while leaving instrument as a whole intact (*Bohrmann*)
- courts may also take into account impairment of decision-making powers due to bereavement, etc (*Key & Anor*)
- for **inter vivos** gifts, test for capacity is arguable more stringent -- taking from giver while they may still need the property -- see test from EPOA

GOLDEN RULE

- where WM aged or recently seriously ill, medical practitioner should assess & understanding & record findings (*Key & Anor*)
- DW Pro Tip -- WM doesn't need to remember what they put in will, but should remember they have children

Banks v Goodfellow, 1870 QB UK • **delusions**	WM changed will to disinherit relation in favor of another person // while WM had two particular delusions, neither influenced his disposition of property // E indicated he was of sound mind in that regard // disposition stands – delusions didn't go to the heart of capacity req's
Royal Trust Co v Rampone, 1974 BCSC • **valid will under diminished faculties**	WM voluntarily gave up running of business to estate committee b/c he was experiencing memory loss // WM later made codicil to will -- gave equal share of residuary to all 6 children (up from 4) // valid? // COURT – YES // E from lawyer & doctor wrt WM's lucidness at time of codicil **+** circumstances **+** rational reason for changes **=** presumption of incapacity rebutted
Re Estate of Bohrmann, 1938 UK • **eccentricities + delusions**	WM suffered from mental illness // had an apparent inability to form "normal" rel's along with a specific delusion about the London City Council // court found that WM's ability to form personal bonds had no bearing on his capacity to make dispositions // but -- struck the provisions in the WM's final codicil that referenced the LCC
Key & Anor v Key & Ors, 2010 EWHC • **more stringent req's for capacity**	89 year old WM -- wife recently dead -- changed will to give 2 of 4 children more benefit // lawyer did nothing to satisfy himself wrt WM's capacity // although WM able to understand, court found **decision-making powers** lacking due to bereavement
Sharp & Bryson v Adam, 2006 EWHC • **determination of cognitive function is finding of fact up to TJ** • **opinion of medical pros won out**	WM had MS -- progressive degeneration // will from '97 left residue to 2 daughters // will in '01 left residue to business partners and nothing to the daughters // at time of 2nd will, those closest to WM testified to his competence -- at trial, experts testified to the decline of his cognitive functions due to the disease // borderline case -- turns on the findings of fact of the TJ

INSTRUCTIONS TO EXECUTION (*Parker v Felgate*)

- full testamentary capacity may not be required at the time of execution under the following circumstances
    1. WM had capacity at the time instructions given to solicitor
    2. those instructions are incorporated into a will
    3. WM listens to summary of the will and affirms that that will matches their earlier intentions

Parker v Felgate, 1883 • **capacity at time of instruction**	WM gave instructions to lawyer to prepare will prior to illness // at time of execution, WM was only having intervals of lucidity // during one, the Dr asked if WM would like nurse to sign for her – she said yes // valid? // COURT – YES // instructions given w/ capacity + will affirmed as embodying those instructions
Perrins v Holland, 2010 EWCA • **P&F still good law**	WM had degenerative MS // gave instruction for will and POA in favor of his new 3rd wife // at time, WM found to have capacity // will stands

LAWYER'S DUTY TO PREPARE A WILL

- lawyer should execute will unless unable to obtain coherent instructions OR client is so obviously incapacitated that instructions meaningless (***Perrins***)
- if lawyer has doubts they should raise the issue of capacity with the client -- advise them of the effect it may have on the will (***Perrins***)
- DW Pro Tip -- once you see the client, you're roped in -- make the will, take detailed notes of encounter, and then it's up to courts

Hall v Bennett Estate, 2003 ONCA • **negligence action against lawyer**	lawyer called to hospital to draw up will for very sick man // during interview, lawyer not satisfied man had appreciation of his estate & couldn't stay alert // lawyer declines to make will // later sued by H, the person who the man had wanted to leave his business to // COURT – lawyer failed in duty of care to client – but let him off the hook b/c there'd been no retainer NOTE: do NOT rely on that – in Ontario, lawyer can decline representation under limited circumstances
Perrins v Holland, 2010 EWCA • **obligation to draft will**	law firm drew up 2 wills for WM // WM found to have lacked capacity for both // the PGT sued firm to recover costs of litigation over the wills // COURT – lawyers had obligation to proceed // lawyers are not trained to assess capacity – but if reasonable suspicions exist, client should be advised

KNOWLEDGE & APPROVAL

GENERAL

1. propounder of will has burden of establishing that the WM knew of & approved the contents
2. if will was read by WM or its contents otherwise brought to WM's attention -- rebuttable presumption that WM knew & approved
3. suspicious circumstances doctrine can rebut presumption -- propounder then must establish K&A on the BOP (***Vout***)

MISCELLANEOUS

- WM must know & appreciate value of estate – including the residue – as well as its approximate magnitude (***Russell***) -- general knowledge ok (***Laszlo***)
- if propounder of will also participated in its drawing (as lawyer) AND will take benefit, must satisfy court that WM had knowledge & approval of the portion of the will under which the propounder takes – ie/ ensure court you didn't slip a clause in giving something to yourself (***Wintle***)
- DW Pro Tip -- some people are cagey & they don't want to tell you what they own – "*The right thing to do is to do what you can.*"

Wintle v Nye, 1959 UKHL	solicitor prepared complex will & codicil for WM // bulk of estate left to the solicitor // intestate heir challenged on basis of k&a of contents // COURT – circumstances were suspicious – court must jealously guard
Russell v Fraser, 1980 BCCA • **knowledge of magnitude / value of the residue at time of will**	WM didn't get out much – asked employee at credit union to be her executor & take her instructions to lawyer to have will drawn // WM made specific bequests – but didn't give away whole estate – left residue to employee // after death, discovered that residue was LARGE // valid? // COURT – NO // no indication that WM knew & approved of just how much she was leaving to the employee
Maddess v Gidney Estate, 2009 BCCA • **what are suspicious circ's**	WM's K&A challenged // WM had trouble with english + unequal treatment of kids + lack of business sophistication -- way gifts were set out left 2 daughters with significant tax burden // COURT – mere fact that some B's will experience negative tax consequences not enough to constitute suspicious circumstances

UNDUE INFLUENCE

GENERAL

- at CL, UI = potential for exercise of power over another + actual use of that power ---> coercion, of whatever sort (***Wingrove***)
- burden of proof at CL -- lies with the person alleging UI where the will is otherwise validly executed (***Craig v Lamoureaux***)
- **burden for undue influence -- s.52 WESA**
  - challenger has onus to est that person was in position with "potential for dependence or domination of the WM" present
  - onus then on supporter to est that the person did not exercise their advantage
- gifts to paid caretakers are automatically void unless approved by the PGT

FRAUD

GIFT WILL BE VALID

- immoral / illegal conduct by a B not connected to the making of a bequest will not defeat the bequest
- POLICY --
  - criteria is too subjective - floodgates - may would start challenging bequests
  - would remove certainty in wills and lead to increased delay & expense

GIFT WILL FAIL

1. there's a false assumption of character by a legatee AND
2. that false character motivated the gift by the WM
3. the purpose of the fraud had to have been to obtain the legacy

Bolianatz Estate v Simon, 2006 SKCA • **fraud must go the the heart of the reason for making the gift**	S named beneficiary & executor by the WM // at the time, S was stealing from WM // COURT - link not established - no reason to think gift was given b/c WM thought S was honest - could as easily have been b/c of the WM's relationship w/ S's mother // **bequest valid** (NOTE: S withdrew as executor) // DISSENT - unconscionable to award the legacy b/c the theft was too closely related to legacy in time, effect, and substance

TRANSFERS OUTSIDE OF A WILL

GENERAL

- probate process is costly, slower, and more complicated -- ex/ to transfer jointly-owned real property all you need is death certificate
- avoid wills variation claims & preserve privacy (probated wills are public documents)
- METHODS: inter vivos gifts // gifts mortis causa // inter vivos trusts

JOINT TENANCIES

GENERAL

- JT with right of survivorship (ROS) is a type of non-will testamentary disposition - on death, property passes to the surviving JT
- true JT is one where both parties contribute -- where one party has given no consideration can lead to question about whether a RT has arisen
- transferor's **intention** determines is beneficial interest passes immediately to the other JT upon death
    1. no intention to pass interest --> resulting trust
    2. intention to make gift effective only upon death --> testamentary & must then meet formalities
    3. intended immediate gift of the interest --> inter vivos gift

JOINT BANK ACCOUNTS (*Peacore*)

- in a JBA where A intends to retain exclusive control until death & only then transfer the remaining amount to B, the right of survivorship - both legal AND eq - vests immediately when the JBA is opened & is therefore *inter vivos* in nature despite the ability of A to drain the account during their life
- bank documents may be used to determine intention of transferor if they're sufficiently detailed

RESULTING TRUSTS

- rebuttable presumption of law that applies to gratuitous transfers -- regardless of who holds LT, the ET is retained by the transferor (or their estate)
- onus of proof to rebut the RT, on the BOP, is on transferee -- relevant intention is intention of contributor at time of contribution (*Peacore*)

PRESUMPTION OF ADVANCEMENT

- in the context of certain relationships, the POA will apply instead -- ET presumed to have passed with LT - onus then on transferor to rebut
- POA applies to transfers from husband to wife (though largely removed by legislation) AND from parent to minor child (*Peacore*)

Peacore v Peacore, 2007 SCC • **joint bank account - ROS gifted** • **intention of transferor is KEY** • **POA does not apply to adult children**	F gratuitously transferred bulk of his estate into joint accounts with D // residue of the F's estate was to be shared by D&H // marriage breaks up -- H claims JA's form part of the estate on the basis of RT // COURT: NO - intention of F was clear - JBA was to go to D alone // E = solicitor's testimony that F believed the JBA's had been dealt with; bank docs said "right of survivorship"; F had history of supporting D
Madsen Estate v Saylor, 2007 SCC • **RT not rebutted**	F made D joint signatory on bank accounts, with right of survivorship + gave her POA // as executor, D doesn't include contents of JBA in estate // siblings sue // COURT - RT not rebutted // E included: F paid all taxes & retained control - bank docs didn't reference beneficial ownership - D's evidence unreliable - POA

INTER VIVOS TRUSTS

GENERAL

- asset transfer to trusts triggers disposition that costs money - usually scares people off - but there are exceptions
- **ALTER EGO TRUST** - persons 65+ can transfer assets without paying capital gains tax until death of the settlor
- **JOINT SPOUSAL TRUST** - persons 65+ avoid payment of capital gains tax until the later of the death of the settlor & surviving spouse
- if a trust takes immediate effect it is not held to be testamentary even if it's only to be performed after the death of the settlor (*Mordo*)

Mordo v Nitting, 2006 BCSC • **alter ego trust** • **immediate effect** • **intention of settlor KEY**	family biz // mom wants to conclusively disinherit bad son // to avoid wills variation assets (including warehouse) placed in trust - herself & D named as B's - mom retained power to call for transfer of LT // after her death, as expected, son tries to get his hands on $$ by claiming that the transfers were testamentary & invalid // COURT - mom intended the trust to have immediate effect - nor is trust void on policy grounds - alter ego trusts valid estate planning tool 1. language was present-tense; clause that trust was irrevocable by settlor 2. mom was B presently entitled to income from trust property until her death 3. mom had filled out Form A for the warehouse -- ie/ did everything in her power needed to effect transfer

INSURANCE & RETIREMENT PLAN DESIGNATIONS

LIFE INSURANCE PLANS

- life insurance plans -- holder can designate B -- upon death, benefits accrue to the named individual
- ISSUES -- **(1)** as a testamentary disposition, lack of compliance w/ formalities **(2)** contractual privity - B (as 3rd party) can't enforce K
- SOLUTION -- legislation supports informal plan designations AND allows B's to enforce the K

- **INSURANCE ACT**
  - **59(1)** -- insured can designate B through K or by declaration
  - **61(1)** -- designation in a document purporting to be a will is not invalid just b/c instrument is invalid
  - **63** -- if B predeceases insured, share payable to surviving B's or if none, to the estate of the insured

RETIREMENT PLANS

- designations under retirement plans are testamentary in nature (***MacInnes***) -- confirmed by definition of "testamentary instrument" in **WESA 1(1)**
- however, where retirement plan is set up by way of trust (RRSP) full vigor & effect not entirely dependent upon death
- designations to spouses are not automatically revoked upon divorce – so don't forget to cut out the ex! (***Roberts***)
- **WESA 85(1)** -- can designate another person to take advantage of plan benefits
- **WESA 85(2)** -- designation must be in writing & signed by person making it (or by another in the presence of the person making it, at their direction)

National Trust v Robertshaw, 1986 BCSC • **plan in trust not testamentary**	WM designated wife as B of his RRSP // couple divorces – wife remains on as the designate B // WM's will says nothing about the RRSP – but it does have revocation clause // WM's kids claim the RRSP designation was testamentary & therefore revoked under current will // COURT – NO // RRSP designation was revocable inter vivos trust – full vigor & effect of the trust <u>not</u> entirely dependent upon WM's death
Roberts v Martindale, 1998 BCCA	WM appointed husband B of life insurance plan // separation agreement – spouses gave up all claims on the estate of the other // WM thought she'd revoked the designation // after death – money paid out to ex // WM's sister brought action to claim monies // TJ imposed CT of funds // upheld on appeal

CLAIMS AGAINST ESTATES

HL taught this lecture. We barely covered any of the readings though, since we had a judge speak to class about an unrelated topic.

LEGISLATION

- **WESA 60** -- court can make order for spouse and children it thinks adequate, just and equitable in the circumstances if adequate provision not made
- **WESA 61(1)(a)** -- action must be commenced within 180 days
- **WESA 62** -- court can accept E regarding WM's making of gifts OR for <u>not making</u> adequate provisions including written statements of WM -- weight must be assessed in light of all the circumstances
- **WESA 63** -- court can attach conditions to an order made under **60** -- can refuse order in favor of person based on their shitty character or conduct
- **WESA 64** -- provision can be a lump-sum // periodic or other payment // transfer of property
- **WESA 65** -- payments ordered under **60** fall ratably on the WM's estate

WILLS VARIATION

- only **spouses** and **children** (biological & adoptive) can bring an action for variation -- <u>not</u> step-children (***McRea v Barrett***)
- GOAL wills variation legislation = "adequate, just, and equitable" provision for spouses and children VS testamentary autonomy
- the test for wills variation in BC is <u>not</u> needs based -- though may still be relevant (***Tataryn***)

LEGAL TEST (*Tataryn*)

1. test is OBJECTIVE - to be assessed in light of current societal norms
2. first, **LEGAL OBLIGATIONS** will be considered -- both statutory (*Family Relations Act*, *Divorce Act*) and CL (ex/ unjust enrichment)
3. then, **MORAL OBLIGATIONS** -- no clear test -- society's reasonable expectations -- assessed in light of testamentary autonomy
4. if estate is big enough, <u>both</u> legal and moral claims should be met -- size of estate relevant to what's adequate & proper
5. competing moral duties -- spouses & dependent children rank above adult independent children
6. many ways to do this -- so long as WM has selected an option that meets moral & legal duties, WM given <u>deference</u>

Tataryn v Tataryn, 1994 SCC • **test = legal / moral duties** • **traditional marriage** • **variation - 100%**	traditional marriage, two sons -- assets amassed over 43 years // T sought to disinherit one son // to ensure wife didn't give him money, T set up a spousal trust // favorite son made executor // wife given LE and B of the trust // wife applied for will variation // COURT - wife given **100%** of estate (with each son getting a gift of $10k) **LEGAL**: wife entitled to at least 1/2 + maintenance -- *Divorce Act* and *Family Relations Act* **MORAL**: wife outlived husband & their estate was meant to support them in their later years
Bridger v Bridger Estate, 2006 BCCA • **second marriage** • **spouse not in need** • **spouse VS adult independent kids** • **will entirely preferred kids**	second marriage lasting 38 years // each spouse had their own children // each brought assets to the marriage, kept separate finances, and had wills that did <u>not</u> provide for the other // COURT: even though legal duties met, moral were not -- variation **25%** of estate to Mrs. B **LEGAL:** no maintenance needed, but would've been entitled to 1/2 assets (which she had) **MORAL:** Mrs B's knowledge contributed to Mr. B's estate; he accumulated assets secretly; she cared for him at home (which saved his estate money)
Saugestad v Saugestad, 2008 BCCA • **spouse VS adult (sort of) dependent children** • **legitimate expectation**	second wife of 11 years given JT in home, pension of the WM, RRSP's and bank account but <u>no provision</u> made for her in the will // brought $225k into marriage and was left with $950k // entire residue to be split b/w WM's two sons // wife applies for variation // COURT: gives small variation -- outright interest in condo **MORAL:** SONS = 100% of their mother's estate went to the WM; the WM's support during his lifetime created a legitimate expectation that they'd receive bulk of estate
Picketts v Hall Estate, 2009 BCCA • **spouse VS adult independent kids** • **will substantially preferred kids** • **competing moral duties** • **moral duty > legal duty**	21 year marriage-like relationship // very large estate // P left family home, monthly stipend, use of condo in Hawaii -- residue split 40/60 b/w two adult independent sons // TJ gave variation, but found no legal duties were owed to P, so award was relatively small // appealed // COURT - $5 million outright award based on moral duties owed // P entitled to her own estate & testamentary autonomy **MORAL**: long-term relationship; H had initially said he was going to marry P, then promised to take care of her; P quit her job; P contributed financially to household expenses & provided care to H; no legal duties owed to the adult sons; size of estate enabled large award

Waldman v Blumes, 2009 BCSC • **spouse VS adult & minor children** • **will entirely preferred spouse** • **moral oblg minors > moral oblg to adult children** • **growth of estate may influence if moral duty has been satisfied**	20 year 2nd marriage // WM leaves entire estate to spouse // variation claim brought by <u>all</u> the kids -- 2 teenage sons from 2nd wife & 4 adult kids from 1st wife // two of the adults kids had financial need **LEGAL**: WIFE: lengthy marriage; encouraged to work part-time; contributed financially; managed biz for less than market-value; added inheritance to estate // SONS: as minors, maintenance owed **MORAL**: WIFE: estate was for <u>both</u> their old age; had sons together although B was much older // SONS: financial assistance while pursuing education & getting start in life; sons assisted in caring for father // KIDS: many assets accumulated during their mom's life; estate grew in size since the last time they received financial help; two had financial need; estate large enough to make a gift
McBride v Voth, 2010 BCSC • **3 adult children** • **"practical disinheritance"**	3 adult children - K1 lives at home w/ mother // in will, mom leaves home to that child to live in for as long as she payed taxes, insurance & maintenance // after -- sale w/ proceeds split 3 ways // essentially left the 2 kids with nothing // COURT - variation - home to be sold on 3rd anniversary of death - also varied the %'s that the kids were to receive: 45% (K1); 30% (K2); 25%(K3) **MORAL:** K1 contributed financially and cared for her mother; K2 had financial need

MORAL CLAIMS OF ADULT INDEPENDENT CHILDREN (*McBride*)

1. contribution & expectation -- strengthens moral claim; may also found claim in UE or quantum meruit
2. misconduct / poor character -- judged up to date of death, not after - court can refuse variation under **s.6(b)**
3. estrangement / neglect -- court will look at role WM played; HL says sexual assault can also found legal duty to child
4. gifts / benefits made during WM's lifetime -- may diminish or negate a WM's moral duty
5. unequal treatment of children - equal treatment is *prima facie* fair - may take into account inter vivos gifts
6. WM's reasons for disinheritance - moral duties can be negated by <u>valid and rational reasons</u> for disinheritance -- based on true facts & logically connected

PROPERTY AVAILABLE TO SATISFY CLAIMS

- essentially, if property isn't disposed of via will, the court doesn't have the power to order variation
- transfers outside a will can include alter ego trusts -- wills variation isn't meant to enable family members to attack valid inter vivos transfers -- transfers will stand if done without fraudulent intention to defeat spousal claims (*Meshen*)

Mawdsley v Meshen, 2012 BCCA • **alter ego trust - inter vivos transfer**	CL couple - agreement that "what each had was their own" // WM was wealthy - set up alter ego trust with her children & brother as B's // M knew that she was doing this & that the assets wouldn't form part of estate // after death, M starts variation action - claims fraudulent transaction // COURT - no variation, no fraudulent intent to defeat spousal claim

CONTRACTUAL RESTRAINTS (*Harvey*)

- often in a corporate context, articles of incorporation may specify that shares can't be transferred to someone not already shareholder -- this may impact dispositions of shares