

Wills, Estates and Succession: A Modern Legal Framework

**A Report prepared for the British Columbia
Law Institute by the Members of the
Succession Law Reform Project**

British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org
WWW: <http://www.bcli.org>

The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia, which ceased operations in 1997.

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Lorne A.J. Dunn	David H. Pihl, Q.C.

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INTRODUCTORY NOTE

The British Columbia Law Institute has the honour to present:

Report on Wills, Estates and Succession: A Modern Legal Framework

The law governing wills and intestacy, the administration of estates, and non-probate transfers of wealth on death, is unusually archaic. It is an area notable for a large body of contradictory case law and, to the extent that it is governed by legislation, a bewildering array of enactments that suffer from long neglect. Nearly everyone will come into direct and personal contact with this arcane area of law at some point, however.

In 2003, the Ministry of Attorney General encouraged the British Columbia Law Institute to undertake a project involving a review of the law of succession in British Columbia for the purposes of reducing the number of separate enactments through consolidation and of simultaneously modernizing the law where reform is necessary or desirable. The Project was to be completed over a period of three years. The Succession Law Reform Project, as it was subsequently designated, has now culminated in this Final Report. The Final Report was preceded by an *Interim Report on Summary Administration of Small Estates* in December 2005. The Interim Report reflected the recommendations emerging from the Project regarding small estates, a matter to which the Ministry had requested that special attention be given.

Part One of the Final Report explains the principal changes recommended in the areas of wills, the *Wills Variation Act*, intestacy, estate administration, survivorship presumptions, and certain miscellaneous areas. Part Two consists of a draft consolidated succession statute that is intended to supplant the *Wills Act*, the *Wills Variation Act*, the *Estate Administration Act*, the *Probate Recognition Act*, and portions of the *Survivorship and Presumption of Death Act*. In bringing together the essential legislation governing the main branches of the law of succession, the draft consolidated *Wills, Estates and Succession Act* will make this important area of law much more accessible and comprehensible. The reforms that accompany the consolidation are for the most part long overdue.

The Project was conducted with the aid of a very large group of volunteers drawn from the practising Bar, the Society of Notaries Public of British Columbia, and legal academics specializing in succession law. The Institute is most grateful to them for the enormous amount of valuable time and expertise they have provided over the course of this lengthy Project. It is firmly believed that reform of the law of succession in British Columbia along the lines urged by the Final Report will provide a highly serviceable legal framework for many decades to come.

Ann McLean
Chair,
British Columbia Law Institute

June 2006

MEMBERS OF THE SUCCESSION LAW REFORM PROJECT

Succession Law Reform Project Committee

D. Peter Ramsay, Q.C.— <i>Chair</i>	<i>Ramsay Lampman Rhodes</i>
Prof. Keith Farquhar	<i>Faculty of Law, University of British Columbia</i>
Mary Hamilton	<i>Davis & Company</i>
Mark Horne	<i>Horne Coupar</i>
Gordon MacRae	<i>Legacy Tax + Trust Lawyers</i>
Prof. A.J. McClean, Q.C.	<i>Fasken Martineau DuMoulin LLP</i>
Ross D. Tunnicliffe	<i>Clark, Wilson</i>

Alternate Succession Vehicles and Miscellaneous Issues Subcommittee

Gordon MacRae— <i>Chair</i>	<i>Legacy Tax + Trust Lawyers</i>
Valli Chettiar	<i>Phillips, Hager & North Investment</i>
Prof. Keith Farquhar	<i>Faculty of Law, University of British Columbia</i>
Marilyn Kerfoot	<i>Vancouver Foundation</i>
Ross D. Tunnicliffe	<i>Clark, Wilson</i>
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Estate Administration Subcommittee

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Hugh McLellan	<i>McLellan Herbert</i>
Anita Nadziejko	<i>Ministry of Attorney General</i>
Catherine Romanko	<i>Public Guardian and Trustee of BC</i>
Margaret Sasges	<i>Clay & Co.</i>

Intestate Succession, Wills Variation Act, and Family Relations Act Subcommittee

Ross D. Tunnicliffe— <i>Chair</i>	<i>Clark, Wilson</i>
James G. Carphin, Q.C.	<i>Fasken Martineau DuMoulin LLP</i>
Jane Dardi	<i>Legacy Tax + Trust Lawyers</i>

Wills, Estates and Succession: A Modern Legal Framework

Prof. Keith Farquhar
Deidre Herbert
Mark Horne

Faculty of Law, University of British Columbia
McLellan Herbert
Horne Coupar

Small Estates Subcommittee

Mark Horne—*Chair*
Bradley Anderson
Sherry Evans
Elizabeth Glassford
Terry Hartshorne
Thomas G. Kendall, Q.C.
Andrew MacKay
Anita Nadziejko

Horne Coupar
Public Guardian and Trustee of BC
Department of Justice
Ministry of Attorney General
Royal Trust Corp. of Canada
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Ministry of Attorney General

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Rick H. Evans
Fiona Hunter
Kirsten Jenkins

Fasken Martineau DuMoulin LLP
Boughton Peterson Yang Anderson
Owen Bird
Miller Thomson LLP
Society of Notaries Public of British Columbia
Horne Coupar
RBC Dominion Securities Inc.

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Cindy Cheuk	May Lee	Nadja Rence	

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EXECUTIVE SUMMARY

The law of succession is among the most archaic areas of private law, and British Columbia legislation dealing with various aspects of succession is highly fragmented, spread throughout a forest of statutes. The British Columbia Law Institute initiated the Succession Law Reform Project in 2003 with support from the Ministry of Attorney General in order to redress the long neglect of this area. The goals of the Project are to reduce the number of separate succession-related enactments through consolidation and to modernize the statutory and common law dealing with succession on death.

The Project was conducted with the aid of a large group of volunteers drawn from the practising wills and estates Bar, the Society of Notaries Public of British Columbia, and legal academics with expertise in the law of succession. Their work has culminated in this Final Report, which contains draft reform legislation and commentary, to implement the conclusions reached by the committees formed to carry out the Project. An *Interim Report on Summary Administration of Small Estates* was issued earlier. The new small estates procedure it contained was designed for implementation as a set of amendments to existing legislation. It is incorporated into the draft reform legislation contained in this Final Report as well.

The Project included a review of the law and legislation governing alternate succession vehicles that are sometimes referred to as “will substitutes,” such as insurance and retirement savings plan beneficiary designations, as well as the more traditional subjects of succession law: wills, intestate succession, and probate procedure.

Enactments selected for consolidation were ones dealing exclusively or at least primarily with succession on death, as opposed to those dealing with aspects of the law of property that are applicable equally to decedents’ estates and the living.

The draft *Wills, Estates and Succession Act* contained in Part Two of this Report consolidates the present *Wills Act*, *Wills Variation Act*, *Estate Administration Act*, and *Probate Recognition Act*. Provisions currently found in the *Law and Equity Act* regarding the designation of pension and retirements savings plan beneficiaries are also consolidated, although the beneficiary designation provisions in the *Insurance Act* are not. Certain amendments to the *Insurance Act* beneficiary designation sections are recommended, however.

The consolidated reform legislation contains provisions on survivorship to deal with situations in which two or more persons die at the same time or in circumstances making it impossible to determine which of them died first. These provisions differ from the survivorship presumptions now contained in the present *Survivorship and Presumption of Death Act*, as explained below.

The reform legislation in Part Two contains a number of miscellaneous amendments to the *Escheat Act*, the *Power of Appointment Act*, and the beneficiary designation provisions in Parts 3 and 4 of the *Insurance Act* mentioned above. While these are not part of the consolidated enactments, they are included as elements of a comprehensive reform Bill. Significant reforms are recommended in all the areas of succession law in addition to the consolidation of enactments. A substantial number of the reforms urged in this Report were presaged by recommendations of the former Law Reform Commission of British Columbia in a series of reports published in the 1980s. The most important changes from present law are summarized below.

Reform of the *Wills Act* and the General Law of Wills

This Report recommends the following major changes to the *Wills Act* and the non-statutory law of wills:

- Introduction of a broad dispensing power to relieve against the consequences of a breach of the formal requirements for execution and attestation of a will. The provision would allow the court to admit a document to probate if it could be satisfied that the document embodies the final testamentary wishes of the document's maker. Similar provisions are found in five Canadian provinces at the present time.
- An attesting witness or the witness's spouse would not lose the benefit of a gift under the will to that witness or the spouse if the witness or other person seeking to uphold the gift is able to prove that the testator knew and approved of the gift.
- A will would no longer be automatically revoked by the subsequent marriage of the testator.
- Circumstances in which a gift under a will to a spouse of the testator is revoked by events associated with the breakdown of the spousal relationship would be harmonized with the events that give rise to a division of family assets under Part 5 (matrimonial property) of the *Family Relations Act*. Currently, section 16 of the *Wills Act* and Part 5 of the *Family Relations Act* are not fully congruent in this respect.
- The principle underlying section 16 of the *Wills Act*, namely that a testamentary gift to a spouse is revoked automatically on the breakdown of the spousal relationship and the will interpreted as if the former spouse had predeceased the testator, would be extended to non-marital spouses, i.e. persons in marriage-like relationships of at least two years' duration. This is in keeping with a general legislative policy to treat married persons and those in stable, long-term marriage-like relationships in a similar manner.
- Courts would be given the power to rectify a will if it does not coincide with the testator's intentions due to an accidental slip or omission, a misunderstanding of the

testator's instructions, or a failure to carry out those instructions. This power is aimed mainly at preventing the defeat of testamentary intentions due to errors and omissions of the will drafter. It would not be available in cases where the testator has misunderstood the legal effect of language used in the will or where there merely is a dispute over the meaning of the will. The rectification power could be used at either the probate or construction stage, and extrinsic evidence would be admissible to prove the facts justifying its exercise.

- So-called “privileged wills,” i.e. informal wills made by military personnel on active service and mariners at sea, would be abolished. Reasons for abolition are that the privilege is in disuse, the armed forces do not encourage reliance on it, and the proposed dispensation power would be available in any case to uphold a legally informal will that is demonstrated to the court's satisfaction to represent final testamentary wishes. The privilege extended to minors who are or have been married to make a valid will would be replaced by a decrease in the minimum age for will-making to 16.
- Rules concerning the admission of extrinsic evidence of testamentary intent as an aid to the interpretation of wills have been given statutory form. Extrinsic evidence of testamentary intent would be admissible where the will is meaningless or ambiguous, either on its face or when read in light of surrounding circumstances, but evidence of intent would not be admissible for the purpose of showing ambiguity. The distinction between patent and latent ambiguity would no longer be relevant to the application of these rules.
- Real property would abate together with personal property.
- The principle of section 30 of the *Wills Act* (i.e. that the mortgage debt passes together with mortgaged real property rather than being borne generally by the estate) would be extended to registered charges on both real and tangible personal property, if the charges relate to the acquisition, preservation, or improvement of the asset in question.
- The *Convention Providing a Uniform Law on the Form of an International Will* would be implemented in British Columbia, with lawyers and notaries public designated as the “authorized persons” before whom a will could be executed in the Convention form by testators wishing to make use of it.

Reform of the *Wills Variation Act*

The current *Wills Variation Act* differs from dependants relief statutes in most other provinces and territories in imposing no restrictions on the ability of adult non-spousal claimants to seek relief against a will. In most Canadian jurisdictions, an adult claimant other than a surviving spouse must demonstrate an inability to be self-supporting due to illness or

mental or physical disability in order to be eligible to bring an action to displace the terms of a will. Case authority requires that courts apply the Act with regard to a moral obligation normally resting on a parent to provide for children in the parent's will, regardless of their children's circumstances. While this approach has many defenders, the majority position that ultimately prevailed in the two committees that dealt with the matter in the Succession Law Reform Project was that the current Act and its interpretation present too great an inroad on testamentary freedom.

No change is proposed in relation to the eligibility of surviving spouses to claim relief against the terms of a will or the principles on which that relief is based, which are heavily influenced by the law of matrimonial property. In relation to adult, self-sufficient children of the deceased, however, the reforms proposed in this Report to the *Wills Variation Act* would bring the Act closer to the dependants relief legislation of other Canadian provinces and territories.

The dependants relief provisions of Part Two contain a significant new departure from other Canadian legislation, however, in distinguishing between the form of relief to surviving spouses and that available to other eligible claimants. A surviving spouse will continue to be entitled to a just and equitable provision out of the estate if the will fails to provide it. Relief to other claimants would be based on "reasonable and necessary maintenance." The maintenance would be paid periodically, but could be financed through an annuity, particularly if it is to be paid over a lengthy period.

Significant features of the recommended dependants relief legislation are:

- The dependants relief provisions apply to intestacies as well as wills, unlike the present *Wills Variation Act*. All other Canadian dependants relief statutes except one allow variation of the intestate distribution scheme.
- A child over the age of majority would have to be unable to become self-supporting due to illness, mental or physical disability, or another special circumstance ("special circumstances child") or current or prospective enrolment in an educational or vocational training program ("student claimant") to be eligible for relief.
- A stepchild who was a minor at the time of the deceased's death and who had been supported by the deceased for at least one year immediately before death, would be eligible to claim relief ("eligible stepchild"). Currently the *Wills Variation Act* does not allow any stepchild to claim relief unless adopted by the deceased during the deceased's lifetime.
- An anti-avoidance provision would make a transaction conferring a benefit on a second person voidable against an eligible claimant if it was made by the deceased for the purpose of defeating rights under the dependants relief legislation. The court

could make an order in relation to the transaction that it could have made under the *Fraudulent Conveyance Act* if the eligible claimant whose rights were defeated had been a creditor of the deceased. A transaction would not be voidable if the party who benefited provided good consideration and entered into the transaction in good faith. Currently the *Wills Variation Act* contains no anti-avoidance provisions.

Intestate Succession

The current intestacy provisions are found in Part 10 of the *Estate Administration Act*, surrounded by procedural legislation. In the reform legislation the intestacy provisions are grouped together with others dealing with substantive rights.

The rights of a surviving spouse in an intestacy would be significantly enhanced. The preferential share, applicable if the deceased left a spouse and surviving issue, would be increased from the current level of \$65,000 to \$300,000. (If the issue are not all issue of both spouses, the preferential share would be \$150,000 because the natural children of the deceased could not normally expect to inherit from the spouse and should in fairness receive some of the estate). A spouse would take 1/2 of the balance of the estate regardless of the number of issue. Currently the surviving spouse takes only 1/3 of the balance if there is more than one child or other surviving issue.

The increased spousal preferential share is intended to take account of the change in the value of money and increase in property values in British Columbia since the preferential share was set at \$65,000 several decades ago. The former Law Reform Commission recommended the preferential share be increased to \$200,000 in 1983. An increase in the ordinary spousal share from 1/3 to 1/2 where there are several issue is considered appropriate in light of current social standards emphasizing the need to secure the position of a surviving spouse who may be well advanced in years at the time of the intestate's death.

The concept of “deemed lapse,” under which a testamentary gift to a spouse is automatically revoked when the spousal relationship is dissolved or a division of family assets occurs, is extended to intestacy. On divorce or execution of a separation agreement, for example, the right to a spousal share in the intestacy of the other party to the marriage would be extinguished.

The statutory life estate of the surviving spouse in the spousal home would be abolished in favour of a right to appropriate the spousal share against the spousal home at the option of the surviving spouse. The statutory life estate has few defenders, as it is perceived to create valuation problems and to overcomplicate the administration of intestacies. This change too was recommended by the Law Reform Commission more than two decades ago.

A change from the current scheme of intestate distribution depending on degrees of consanguinity to a “parentelic” one, i.e. a system based on the line of descent from the closest common ancestor of the deceased person and the relative in question, is recommended.

The existing and proposed systems produce the same results except where remote kin are entitled to take in an intestacy. Under the existing degrees of kinship system, a closer relative and a much more remote one may take the same share if there is no surviving spouse or issue, because they are of the same degree of kinship. Under a parentelic system, the closer relative in the line of descent from the common ancestor will always take ahead of a more remote relative. The parentelic system has been adopted in Manitoba and is a feature of the *Uniform Intestate Succession Act* of the Uniform Law Conference of Canada. It has also been recommended for enactment in Alberta by the Alberta Law Reform Institute.

Small Estates

Special attention was given in the Project to improving the scheme for summary administration of small estates in British Columbia. The procedure proposed to replace the current section 20 of the *Estate Administration Act* would allow estates under a value ceiling set by regulation to be administered without a formal grant of probate or administration. The procedure would be available to the official administrator as well as the deceased's personal representative or the deceased's successors. The procedure would be initiated by the filing of a statutory declaration in the probate registry by the personal representative, if any, a person beneficially interested in the estate, a nominee with the written consent of those beneficially interested, or the official administrator. The role of the probate registry would be limited to entering a record of the filing of the small estate declaration in the civil registry database system and stamping and returning a copy of the small estate declaration.

The copy of the small estate declaration with the court stamp would function like a grant, allowing the declarant to gather the assets of the estate and deal with them as if a formal grant of probate or administration had issued. Persons dealing with the declarant on the strength of the court-stamped declaration would receive a statutory release of liability which would protect them to the same extent as if the declarant had received a formal grant.

The proposed small estate procedure would be limited to estates consisting solely of personal property, as a formal grant of probate or administration is necessary in order to transfer real estate in British Columbia. The Report urges, however, that consideration be given to an amendment to the *Land Title Act* that would relax this requirement in connection with small estates. The Report recommends that the gross value ceiling for the small estate summary administration procedure be set initially at \$50,000 and increased later if considered appropriate.

Estate Administration

The section of the Final Report dealing with estate administration consolidates much of the content of the *Estate Administration Act* and the *Probate Recognition Act*. Much of the *Estate Administration Act* is highly archaic. Most provisions that have been carried forward into the reform legislation have been redrafted in contemporary legislation language. Numerous provisions that are duplicative, covered now by rules of court, or clearly obso-

lete have been eliminated. Some new features are introduced into British Columbia probate procedure under the draft legislation:

- A notice of an application for a grant of probate or administration sent to beneficiaries or other persons interested in an estate would be required to contain prescribed text informing the recipient of the possibility that they may have rights in relation to the estate and the existence of limitation periods applicable to any proceedings for their enforcement. This was recommended by the wills and estates Bar in the 1980s.
- There would be a 21-day notice period between the sending of notice of an application for probate or administration and the filing of the application. Currently section 120 (1) of the *Estate Administration Act* allows notice to be given concurrently with the filing of the application, which may tend to defeat the purpose of the notice by depriving recipients of a realistic opportunity to take appropriate advice and act upon their rights *vis-à-vis* the application. The notice period could be abridged or eliminated by the court to enable issuance of a grant on an expedited basis when necessary.
- Administrators would no longer be required to provide a bond or obtain an order dispensing with it, unless a minor or mentally incapable person is interested in the estate. When security is required for these reasons, it could take any form acceptable to the court. This change reflects the reality that administration bonds are difficult to obtain and can be disproportionately expensive, though there is seldom a need to realize upon them.
- The resealing procedure now found under the *Probate Recognition Act* is retained, but with recommendations that it be extended to all Canadian provinces and territories, the U.K., Ireland, all Commonwealth jurisdictions having a common law legal system, Hong Kong, and all U.S. jurisdictions. Currently, British Columbia's regime for resealing is the most restrictive in Canada in terms of the jurisdictions to which it extends.

Alternate Succession Vehicles: Non-Probate Beneficiary Designations

The designation of beneficiaries under life insurance and accident and sickness policies on one hand, and under non-insurance RRSPs, RRIFs, employee benefit plans, and pensions on the other, are governed by different legislation in British Columbia. Parts 3 and 4 of the *Insurance Act* govern beneficiary designations under insurance policies, including some annuity-type retirement savings plans that fit within the broad definition of "insurance" in the Act. Beneficiary designations under the non-insurance vehicles are governed by provisions now contained in the *Law and Equity Act*.

The legislative scheme under the *Insurance Act* is more sophisticated, complete, and flexible than the *Law and Equity Act* provisions. It allows irrevocable designations (an

important security instrument in separation agreements and spousal and child maintenance orders). It also insulates life insurance proceeds and accident and sickness policy death benefits against claims of creditors of the life insured. This protection is not currently available to beneficiaries of non-insurance RRSPs and RRIFs.

The reform legislation in Part Two of the Final Report contains provisions that assimilate the regime applicable to beneficiary designations under non-insurance vehicles with that found in the *Insurance Act*. In particular:

- Proceeds of non-insurance RRSPs and RRIFs payable to a designated beneficiary on the death of a holder would be immune to claims of creditors of the planholder. (The *Insurance Act* also insulates the insured's interest in a life or accident and sickness policy from execution or seizure during the insured's lifetime while a designation in favour of a family class beneficiary is in effect. This feature is not extended by the draft legislation to non-insurance vehicles, as creditor protection during life was not considered to be a matter of succession law.)
- Plan members would be able to make irrevocable designations.
- Designations of beneficiaries could be made either by written declaration or will, and plan members could alter and revoke the designations, whether or not the terms of the plan expressly allow for it (subject to pension legislation that directs the destination of survivor benefits, where applicable).

Additional changes recommended are:

- A non-insurance plan member could appoint a trustee to receive and hold plan proceeds for a designated beneficiary, with payment to the trustee operating as a discharge to the plan administrator. This is expressly provided for in the *Insurance Act*, but authority for the interposition of a trustee is lacking in the *Law and Equity Act*, causing plan administrators to be reluctant to accept designations involving trustees.
- Legislative confirmation that an attorney may make a beneficiary designation on behalf of the donor of the power of attorney, if the power of attorney expressly authorizes this. The validity of such a designation under a power of attorney is doubtful at the present time because testamentary authority supposedly cannot be delegated.

Survivorship Presumptions

The recommendations contained in the Law Reform Commission of British Columbia *Report on Presumptions of Survivorship* in 1982 were fully endorsed by the Project Committee and the Alternate Succession Vehicles Subcommittee, and are reflected in the draft legislation in Part Two.

The current general presumption, under which the younger is deemed to survive the elder when two people die at the same time or in circumstances that make it impossible to determine which person survived the other, would be replaced by a general presumption under which the estate of each person would be distributed as if he or she had survived the other. This will generally result in property devolving to the beneficiaries or descendants of each deceased, while in cases of spouses or other persons who have left property to each other the current presumption may result in an entire estate going to benefit the relatives of the other deceased purely on the basis of deemed survival.

Joint tenants dying at the same time or in circumstances making it uncertain whether one survived the other would be deemed to have held the joint property as tenants in common, so that their respective shares would devolve to their own beneficiaries or descendants instead of benefiting those of the other joint tenant on the basis of the legal fiction of “deemed survivorship.”

A general requirement of a minimum of five days of survivorship before entitlement would arise on intestacy or under any testamentary gift, joint tenancy, joint bank account, or other disposition of property depending on death for its operation is recommended. If the beneficiary, joint tenant, or other party intended to benefit did not survive the deceased for five days, he or she would be deemed to have predeceased. This is to fulfill the usual intention of a testator to bestow a benefit on a particular beneficiary, rather than the successors of that beneficiary. Many wills specify a considerable longer period of survival, e.g. 15 or 30 days, as a prerequisite to taking a gift. The five-day survivorship rule would not apply to the appointment of an executor.

The survivorship presumptions are default rules that could be displaced by a will or other instrument containing a contrary intent.

Miscellaneous Reforms

The *Power of Appointment Act*, which deals with illusory appointments in exercise of a power of appointment, is redrafted in simpler language.

Amendments to the *Escheat Act* are proposed to remove superfluous procedural distinctions between the treatment of escheated real property and personal property passing to the Crown as *bona vacantia* and to clarify that the Act applies to both.

Conclusion

The Institute recommends enactment of the draft *Wills, Estates and Succession Act* in Part Two of the Final Report in the belief that this step will bring the law of succession in British Columbia into keeping with contemporary realities and provide a functional legal framework for the transfer of property on death for a considerable time to come.

PART ONE

I. INTRODUCTION

A. General

In this and the next decade, the largest transfer of wealth in history will take place as postwar generations begin to inherit from their parents. This transfer will have profound effects on economies and societies. One effect will be that the legal framework within which inheritance occurs will take on increased significance.

When someone dies, rights with respect to the property of the deceased person depend on the combination of common law principles and legislation comprising the law of succession. In British Columbia, legislative provisions relating to succession to property on death are spread through a forest of different Acts. Among Acts that are primarily concerned with succession are: the *Wills Act*,¹ the *Wills Variation Act*,² the *Estate Administration Act*,³ the *Survivorship and Presumption of Death Act*,⁴ the *Probate Fee Act*,⁵ the *Probate Recognition Act*⁶ and the *Escheat Act*.⁷ Numerous other statutes that are not exclusively or primarily concerned with succession contain provisions that relate to aspects of it, such as the *Law and Equity Act*,⁸ *Perpetuity Act*,⁹ the *Trustee Act*¹⁰ and the *Insurance Act*.¹¹ A multiplicity of enactments with related subject-matter makes the law less accessible and less comprehensible than it could be.

1. R.S.B.C. 1996, c. 489.

2. R.S.B.C. 1996, c. 490.

3. R.S.B.C. 1996, c. 122.

4. R.S.B.C. 1996, c. 444.

5. R.S.B.C. 1999, c. 4.

6. R.S.B.C. 1996, c. 376.

7. R.S.B.C. 1996, c. 120.

8. R.S.B.C. 1996, c. 253.

9. R.S.B.C. 1996, c. 358.

10. R.S.B.C. 1996, c. 464.

11. R.S.B.C. 1996, c. 226.

Succession is an area of law that generally receives little attention from legislatures, apart from enacting or amending fiscal measures that over the years have taken varied forms such as estate tax, succession duty, and probate fees. Much of the legislation concerning succession is unusually archaic. Amendments have been sporadic. The last major reform in this area of law in British Columbia took place in the early 1920's, but it was chiefly focused on the manner in which real property passes to the successors of a deceased owner. Much older legislation that was relatively outdated at that time was preserved and continues to remain in effect today.

It is necessary to remember too that much of the law of succession is not statutory. For example, important principles about the legal capacity to make a will are found only in case law. Some of the case law, particularly that dealing with the making or revocation of wills, or the kinds of evidence that can be considered in interpreting wills, is contradictory and inconclusive.

In the 1980's, the former Law Reform Commission of British Columbia issued a series of reports containing many detailed recommendations for the modernization of succession law.¹² The Law Reform Commission planned further work on probate procedure and estate administration. Only two of the Reports were implemented by subsequent legislation.¹³ The remainder languished, although the recommendations in them were never rejected.

Between the mid-1970's until the end of the twentieth century, other law reform bodies in Canada and other Commonwealth countries also devoted considerable attention to various aspects of succession law, particularly wills, intestacy, and the intersection of succession law and matrimonial property rights. This large body of work by the former Commission and its counterpart agencies throughout the common law world is of immense value in grappling with the deficiencies of succession law in British Columbia as it now stands and in searching for ways to improve and simplify it.

B. The Succession Law Reform Project

Since 2003, the British Columbia Law Institute (BCLI) has been engaged in the Succession Law Reform Project (the "Project"). This three-year effort was undertaken with the encouragement and financial support of the Ministry of Attorney General. The goals of the Project are to reduce the number of separate succession-related enactments through consoli-

12. Law Reform Commission of British Columbia, *The Making and Revocation of Wills* (LRC 52) (Vancouver: The Commission, 1981); *Presumptions of Survivorship* (LRC 56) (Vancouver: The Commission, 1982); *Interpretation of Wills* (LRC 58) (Vancouver: The Commission, 1982); *Statutory Succession Rights* (LRC 70) (Vancouver: The Commission, 1983); *Obsolete Remedies Against Estate Property: Estate Administration Act, Part 9* (LRC 91) (Vancouver: The Commission, 1987); *The Land (Settled Estate) Act* (LRC 99) (Vancouver: The Commission, 1988); and *Wills and Changed Circumstances* (LRC 102) (Vancouver: The Commission, 1989).

13. *Obsolete Remedies Against Estate Property* and *The Land (Settled Estate) Act*, *supra*, note 12.

dition and modernize the statutory and common law dealing with succession on death. The Project included a review of the unimplemented Law Reform Commission of British Columbia reports in this area to determine if the recommendations in them continue to be relevant and viable solutions for present deficiencies in the law after the passage of approximately twenty years since their publication.

At the Ministry's request, special attention was given to the development of a simplified procedure for the administration of small estates. Work in this area was expedited and an *Interim Report on Summary Administration of Small Estates* was published in December 2005.

The Project was conducted with the aid of 29 volunteers ("members") drawn from the practising wills and estates Bar, the Society of Notaries Public of British Columbia, and legal academics having expertise in succession law. Later this group of Project members was supplemented by two officials from the Court Services Branch of the Ministry of Attorney General.

A seven-member Project Committee was chaired by a practitioner and teacher of succession law who also serves on the BCLI Board of Directors. The Project Committee oversaw the Project and managed its drafting and statutory consolidation components. It also reviewed the recommendations made by individual subcommittees for harmony and coherence with those of other subcommittees. Five subcommittees with distinct topical mandates, each chaired by a Project Committee member, examined substantive and procedural aspects of succession and formulated recommendations for improvement of the law. The five subcommittees were:

- Testate Succession
- Intestate Succession, *Wills Variation Act* and *Family Relations Act* Issues
- Estate Administration
- Small Estates
- Alternate Succession Vehicles and Miscellaneous Issues

The BCLI legal and clerical staff provided research, legal drafting, and other support for the work of the Project Committee and subcommittees.

Liaison was maintained with the Ministry of Attorney General during the Project. From January 2005 until completion, a representative of the Civil and Family Law Policy Office was present at each subcommittee and Project Committee meeting.

The breadth of this Project forced the Project Committee and subcommittees to work steadily at a rapid pace in order to complete the Project within its allotted three-year funding timeframe. This reality did not allow BCLI to follow its preferred practice of issuing

consultative documents containing tentative reform recommendations and leaving an interval of between three to six months for responses from the public before formulating final recommendations with the benefit of responses received.

The Law Reform Commission of British Columbia reports on which a substantial number of the recommendations reflected in this Final Report are based were issued after extensive consultation, however. There has been very little change since the 1980's in the legal framework for succession in this province, and for the most part the issues addressed in those reports are still pertinent today. The large number of members serving on the various committees provides a considerable level of confidence that the recommendations made in this Report represent a cross-section of professional opinion. While the changes to the law recommended here do not represent the personal opinions of every member of the Project, they represent conclusions endorsed by the majority of the members of the subcommittees concerned, the Project Committee, and the BCLI Board.

C. Structure of this Report

Part One of this Report provides an overview of the consolidation process and the principal recommendations for reform that have emerged from the Project in each major area of the law of succession: intestacy, the law of wills, the *Wills Variation Act* (dependants relief), the administration of estates, and the so-called “will substitutes” or alternate succession vehicles.

Part Two contains a proposed consolidated succession statute for British Columbia entitled the *Wills, Estates and Succession Act*. Commentaries follow each section of the proposed Act and appear at the head of each major division. The commentaries in Part Two explain specific changes that have been recommended and the rationale for them in somewhat greater detail than is found in Part One. The proposed Act is intended as an illustration of how the several main succession law statutes now in force could be blended into a single statute that carries forward legislation which ought to be retained and also implements the recommended changes to the law.

II. INTESTATE SUCCESSION

A. General

When someone dies *intestate* (without a will), legislation directs how the estate is to be distributed. Like the majority of Canadian common-law provinces, B.C. has intestacy legislation that owes its origins to the *Model Intestate Succession Act* recommended by the Commissioners on Uniformity of Legislation in Canada in 1925.¹⁴ The scheme for intestate distribution in the 1925 Model Act was itself a modification of the 1670 *Statute of Distribution*.¹⁵

B. Distribution on Intestacy Under Part 10 of the *Estate Administration Act*

1. THE BASIC SCHEME OF INTESTATE DISTRIBUTION

British Columbia's current intestacy provisions are found in Part 10 of the *Estate Administration Act*.¹⁶ Apart from the rights of the surviving spouse, the scheme is based on degrees of "consanguinity" or "kinship" (genetic relationship) to the intestate. A relative must be alive at the intestate's death in order to inherit. "Issue" (lineal descendants) of the intestate will take ahead of living ancestors and collateral relatives such as aunts, uncles and cousins. A relative of closer degree will take ahead of a relative of more remote degree. Degrees of consanguinity are calculated in the civil law manner by counting the generations upward to the nearest common ancestor and then downward to the living relative. (See the kinship diagram on the following page.)

Part 10 of the *Estate Administration Act* reflects the standard features of this scheme:

1. If there is a surviving spouse and no issue, the surviving spouse takes the entire estate available for distribution after payment of funeral and testamentary expenses, debts, and taxes (the "net estate"), or the entire portion of it that is not disposed of by will.¹⁷

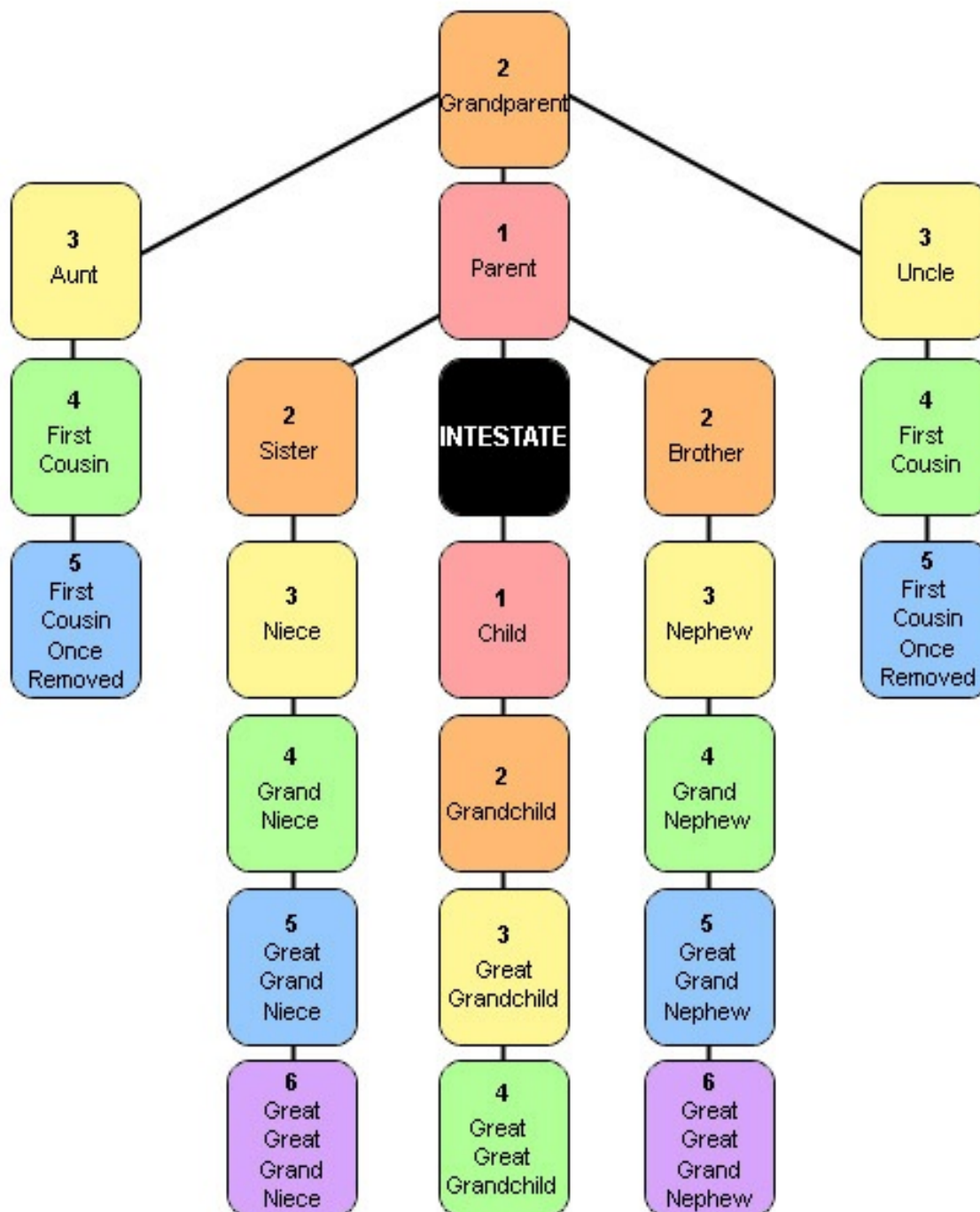
14. Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Eighth Annual Meeting* (1925) at 351 and 364 (App. C).

15. 22 & 23 Car. 2, c. 10.

16. *Supra*, note 3.

17. *Ibid.*, s. 83.

KINSHIP



The number within each rectangle denotes the degree of consanguinity (kinship) of the relative that is indicated. Cousins more remote than the fifth degree are not shown in this diagram.

2. If there is a surviving spouse and surviving issue, the surviving spouse is entitled to be paid a preferential share before the issue receive anything. If the net estate is less than the preferential share, the spouse takes it all.¹⁸ Otherwise the spouse has a charge on the net estate for the amount of the preferential share.¹⁹ After payment of the preferential share, the spouse takes half of the balance if there is only one child.²⁰ If the intestate has more than one child, the spouse takes one third of the balance remaining after deduction of the preferential share.²¹
3. The children of the intestate (i.e. the nearest issue) take the portion of the net estate that does not go to the surviving spouse.²² If there is no surviving spouse, the estate is divided among the issue.²³ The children of a deceased parent take the share (divided equally among them) that would have gone to the parent if the parent had lived to take it (*per stirpes* representation).²⁴
4. If there is no spouse or issue, the estate goes to the intestate's parents in equal shares, or to the survivor of them.²⁵
5. If the intestate is not survived by a spouse, issue, or a parent, the siblings take in equal shares.²⁶
6. If there are no surviving spouse, issue, parents, or siblings, the living nephews and nieces may inherit, but the issue of a deceased nephew or niece cannot take the share of their deceased parent by representation.²⁷

18. *Ibid.*, s. 85(3).

19. *Ibid.*, s. 85(4).

20. *Ibid.*, s. 85(5)(a).

21. *Ibid.*, s. 85(5)(b).

22. *Ibid.*, s. 84.

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*, ss. 86(1), (2).

26. *Ibid.*, s. 87(1).

27. *Ibid.*, s. 88.

7. If there are no surviving spouse, issue, parents, siblings, nephews or nieces, the estate goes in equal shares to the living next of kin of equal degree to the intestate.²⁸ For example, if there is a first cousin (4th degree relative) on one side of the intestate's family and a grand-nephew (also a 4th degree relative) on the other side, the estate would be divided between them. If there is an aunt left on one side (3rd degree relative) and a first cousin (4th degree relative) on the other, the aunt will inherit the entire estate and no one on the other side will take.

Half-blood relatives inherit as do relatives of the whole blood.²⁹ Relatives conceived in the intestate's lifetime but born after the intestate's death are treated as if they had been born before it and survived.³⁰

"Advances by portion" made to a child by an intestate during life are brought into hotchpot, so that a child who has received a portion during the intestate's lifetime will receive only so much in the intestacy as is required to equalize the shares.³¹ An advance by portion is a transfer of wealth by a parent during the parent's lifetime to a child to advance the child in life. Not all large gifts are caught by the hotchpot rule, but only this kind of transfer.

These features are common to the legislation of the provinces of British Columbia,³² Alberta,³³ Saskatchewan,³⁴ New Brunswick,³⁵ Nova Scotia,³⁶ P.E.I.,³⁷ Newfoundland,³⁸ and the

28. *Ibid.*, s. 89.

29. *Ibid.*, s. 90(2).

30. *Ibid.*, s. 91.

31. *Ibid.*, s. 92(3).

32. *Estate Administration Act*, R.S.B.C. 1996, c. 122, ss. 81-99.

33. *Intestate Succession Act*, R.S.A. 2000, c. I-10.

34. *Intestate Succession Act*, S.S. 1996, c. I-13.1.

35. *Devolution of Estates Act*, R.S.N.B. 1973, c D-9, ss. 21-38.

36. *Intestate Succession Act*, R.S.N.S. 1989, c. 236.

37. *Probate Act*, R.S.P.E.I. 1988, c. P-21, ss. 86-99.

38. *Intestate Succession Act*, R.S.N.L. 1990, c. I-21.

three territories,³⁹ apart from the fact that some of these jurisdictions do not have a spousal preferential share.

Ontario has substantially similar provisions, but the Ontario intestate distribution scheme operates somewhat differently when issue take their deceased ancestor's share by representation.⁴⁰ A further difference is that Ontario does not require that advances to a child by portions during the intestate's lifetime be brought into hotchpot.

2. STATUTORY LIFE ESTATE OF SURVIVING SPOUSE IN SPOUSAL HOME

Section 96 of the *Estate Administration Act* confers a life estate on the surviving spouse of an intestate in the "spousal home" and "household furnishings," as defined in s. 96(1). Anyone other than the surviving spouse who has a beneficial interest in the spousal home, such as other successors of the intestate who have a right to inherit part of its value, are deemed by section 96(2) to hold it in trust for the surviving spouse for his or her life or so long as the surviving spouse wishes to retain it.

When the estate is being valued for probate fee purposes and distribution, a question arises as to whether and to what extent the value of the spousal home should be reduced because of the cloud on the title that the life estate represents. As there is no ready market for a life estate, the amount of any reduction is essentially arbitrary and symbolic. The life estate makes the spousal home unmarketable in reality.

The life estate also complicates the distribution to the various successors and is conducive to conflict between the spouse and issue. The spouse will receive a preferential share, plus a one-half or one-third share of the balance. Section 96 does not provide guidance as to whether the spouse's share of the total value of an intestate estate is to be calculated exclusively or inclusively of the value of the spousal home or the intestate's interest in it.

3. RIGHTS OF A SEPARATED SPOUSE ON INTESTACY

Currently, section 98(1) of the *Estate Administration Act* disentitles a spouse from inheriting if the spouse was separated from the intestate for more than a year prior to death with the intention of living separate and apart, and did not live with the intestate during that year with the intention of resuming cohabitation, unless the court otherwise orders. In other words, a spouse separated from the intestate for more than a year prior to death can apply for a discretionary award of a portion of the estate despite being *prima facie* disentitled to inherit.

39. *Estate Administration Act*, R.S.Y. 2002, c. 77, ss. 78-95; *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10; *Intestate Succession Act* (Nunavut), R.S.N.W.T. 1988, c. I-10.

40. *Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 44-49. See, in particular, ss. 47(1) and (2) in relation to the Ontario variant of the standard *per stirpes* representation.

Section 98(3) requires the application to be made within six months after the grant of administration issues to the personal representative. This is similar to the limitation period under the *Wills Variation Act*.⁴¹ The Court of Appeal has held that similar principles are to be applied to an application by a separated spouse for a discretionary share of an intestate's estate as in an action by a surviving spouse under the *Wills Variation Act*.⁴²

Section 98(1) has been interpreted to mean that there must have been a mutual intention to live separate and apart in order for spouses to have been separated for purposes of intestate succession.⁴³ An intention on the part of one spouse to separate is insufficient. A surviving spouse may claim that despite a long period of actual separation, he or she never had the intention to live separate and apart from the intestate indefinitely.⁴⁴ If that claim were to be upheld, then of course there would be no "separation" for the purposes of s. 98(1) and the right to inherit persists. This may encourage spurious, opportunistic claims against estates by long-separated former domestic partners. While these might not often succeed, a personal representative and the intestate's family might be pressured into a settlement.

C. Changes Recommended to the Law of Intestacy

1. PARENTELIC SYSTEM TO REPLACE DEGREES OF CONSANGUINITY SYSTEM

Part 2 of the proposed *Wills, Estates and Succession Act* would replace the existing degrees of kinship system in British Columbia with a "parentelic" system under which the line of the closest common ancestor must be exhausted before other relatives will share in the estate, subject to the rights of the intestate's surviving spouse. A parentelic system is found in the 1990 Manitoba *Intestate Succession Act*⁴⁵ and the 1985 *Uniform Intestate Succession*

41. *Supra*, note 2, s. 3(a).

42. *Law v. Tretiak* (1993), 80 B.C.L.R. (2d) 1 at 9 (C.A.). In the case of a legally married spouse, this would mean that if the discretion is exercised in favour of the separated spouse, he or she would have a *prima facie* entitlement to receive the equivalent of what would have been received if a division of family assets had taken place during the lifetime of the spouses under Part 5 of the *Family Relations Act*, R.S.B.C. 1996, c. 128. Non-marital ("common law") spouses would not have this *prima facie* entitlement and the result would presumably depend on the facts.

43. *Re Schanofski* (1980), 20 B.C.L.R. 397 (S.C.); *McIntyre v. McIntyre*, [1985] B.C.J. No. 622 (S.C.). Separation for more than one year raises a rebuttable presumption that the parties had a mutual intention to live separate and apart: *Re Munro*, [1975] 1 W.W.R. 83 (S.C.). The mutual intention test has been abandoned in divorce law, but still governs in cases under s. 98(1) of the *Estate Administration Act*.

44. As in *Baragon v. Schuldes*, [1993] B.C.J. No. 2072 (S.C.).

45. C.C.S.M. c. I85.

*Act*⁴⁶ from which it is derived. The parentelic system is also a feature of the U.S. *Uniform Probate Code*.⁴⁷

Under the parentelic system, the spouse and issue of the intestate inherit first as under the present scheme. If there is no spouse and issue, the estate passes to the parents. Issue of the intestate's parents (the intestate's siblings, or if predeceasing, then their children) inherit next. If this line fails, half the estate goes to the paternal grandparents, their survivor, or their issue, and half to the maternal grandparents, their survivor, or their issue. If the intestate is not survived by issue of grandparents, the estate is divided equally between the maternal and paternal great-grandparents, or the survivor of them, or their issue. If there is only a surviving great-grandparent, or issue on one side, the entire estate goes to the kindred on that side. No inheritance rights are recognized beyond the surviving issue of a great-grandparent.

In most cases, the parentelic system will produce the same result as the degrees of consanguinity system. Differences emerge only where it is necessary to distribute among next of kin more remote than siblings of the intestate. Under the degrees of kinship system now used in B.C., it is possible for relatives closer and more remote to the intestate in terms of generations, age and ancestral lines to obtain equal shares. Under the parentelic system, relatives having a closer common ancestor with the intestate will always take before ones in more remote ancestral lines, and they are more likely to have had a closer connection with the intestate.

Example 1: Assume that the closest living relatives of an intestate are an uncle and a nephew.

Under Part 10 of the *Estate Administration Act*, an uncle (descendant of a grandparent) and a nephew (descendant of the intestate's parent) would take the same size of share because they are both relatives of the third degree.

Under a parentelic system, the nephew would take ahead of the uncle because the intestate and the nephew have a closer common ancestor (the intestate's parent) than do the uncle and the intestate. (See diagram on p. 6).

Example 2: Assume that an intestate leaves an aunt on one side of the family and a first cousin on the other. Under Part 10 of the *Estate Administration Act*, the aunt takes the entire estate because she is a relative of the third degree, while the cousin is a fourth degree relative.

46. Uniform Law Conference of Canada, *Proceedings of the Sixty-seventh Annual Meeting* (1985) at 33 and 284.

47. Nat'l Conf. of Commissioners on Unif. State Laws, *Uniform Probate Code*, 8 U.L.A. (St. Paul: West Group, 1998) ss. 2-101 - 2-108.

Under the parentelic system, the estate is divided equally between both sides of the intestate's family because the aunt and first cousin are both descended from grandparents of the intestate.

Wills generally leave property to descendants of the testator or relatives who were the testator's contemporaries, rather than to ancestors and older relatives. The result in the first example under the parentelic system of intestate distribution is more in keeping with this pattern.

The second example illustrates another desirable aspect of the parentelic system: there is less chance that a single relative of closer degree on one side will take an entire estate. Divisions between the two sides of an intestate's family will occur more frequently.

In the Manitoba Law Reform Commission report⁴⁸ that preceded the current Manitoba intestacy legislation and in a later report by the Alberta Law Reform Institute⁴⁹ urging a change to a parentelic system, the following reasons were given for preferring the parentelic over the degrees of kinship system:

- (a) an intestate is more likely to have had a stronger relationship with younger relatives than with more distant collateral relatives;⁵⁰
- (b) those closest to the intestate will receive the estate;⁵¹
- (c) it is easier and less expensive to determine heirs from a direct ancestral line than to search for collaterals;⁵²
- (d) the parentelic system produces a more even division of the estate between the maternal and paternal sides of the intestate's family, since there are more likely to be living descendants of parental lines on both sides than not.⁵³ Under the existing system, if there is a relative of closer degree on one side than on the other, that relative will take the entire estate and exclude the other side of the

48. Manitoba Law Reform Commission, *Report on Intestate Succession* (Report #61) (Winnipeg: The Commission, 1983).

49. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Final Report No. 78) (Edmonton: The Institute, 1999).

50. *Supra*, note 8 at 32.

51. *Supra*, note 49 at 155.

52. *Ibid.*

53. *Supra*, note 48 at 32; note 49 at 156.

intestate's family. While a possible criticism of it is that it could contribute to greater fragmentation of estates, the Alberta Law Reform Institute noted that this should be of less concern than it would have been formerly because the Canadian family is smaller than in former times.⁵⁴

In the 1983 *Report on Statutory Succession Rights*, the former Law Reform Commission declined to embrace the parentelic system, as it was not persuaded it was superior to the existing one.⁵⁵ The working groups concerned with the matter in the Succession Law Reform Project, however, found the above reasons persuasive. A change to a parentelic system of intestate distribution is therefore recommended. This change is reflected in section 24 of the proposed *Wills, Estate and Succession Act* contained in Part Two of this Report. The wording of section 24 is derived from the Canadian *Uniform Intestate Succession Act*.⁵⁶

2. THE SPOUSAL SHARE

(a) *The preferential share*

If the intestate has left a surviving spouse and surviving issue, the spousal preferential share is deducted from the net estate available for distribution before any other share is paid, including the spouse's "ordinary" one-half or one-third share. B.C. has maintained the spousal preferential share at \$65,000 since 1983.⁵⁷ In that year the Law Reform Commission of B.C. recommended it be increased to the first \$200,000 of the net estate, and that its amount be variable by regulation. The Commission also recommended that the "ordinary" spousal share be increased to half the net estate where there are issue.⁵⁸

Since 1983, a number of other Canadian provinces have substantially increased the spousal preferential share. In Saskatchewan it is the first \$100,000 of the net estate,⁵⁹ in the Yukon

54. *Supra*, note 46 at 156.

55. *Supra*, note 12 at 21.

56. *Supra*, note 46.

57. *Estate Administration Amendment Act*, S.B.C. 1983, c. 4, s.1.

58. *Report on Statutory Succession Rights*, *supra*, note 12 at 28 and 145. The report contained a reservation by one commissioner advancing the opinion that the spouse should take the entire estate to the exclusion of issue.

59. *Supra*, note 34, s. 6(1).

the first \$75,000,⁶⁰ and in Ontario it is \$200,000.⁶¹ In light of typical estate values in British Columbia and contemporary social standards that favour a generous provision of an estate for the surviving spouse, the conclusion reached in this Project is that the spousal preferential share should be the first \$300,000 of the net estate. This recommendation is reflected in section 23(3) of the proposed *Wills, Estates and Succession Act*.

In order to take account of the prevalence of mixed families, the full \$300,000 preferential share would be payable only where the issue are common to both the intestate and the surviving spouse. In the case of a mixed family, it may be assumed the surviving spouse's children will inherit ultimately from their own parent. If the full preferential share is paid to the spouse, there is a potential for benefiting stepchildren to a greater extent than the intestate's biological children. It was therefore considered appropriate to reduce the preferential share if the issue of the intestate are not also issue of the spouse, as the U.S. *Uniform Probate Code* does.⁶² This would provide a better chance of achieving fairness between the intestate's own issue and stepchildren.

Section 23(4) of the proposed *Wills, Estates and Succession Act* contemplates a reduction in the \$300,000 preferential share to \$150,000 if the issue of a spousal relationship are not all issue of both the intestate and the spouse.

(b) The ordinary share

The original recommendation made in 1983 by the Law Reform Commission to increase the ordinary spousal share applicable where there are issue of the intestate to half the balance of the net estate after payment of the preferential share, regardless of the number of issue, was also endorsed and is reflected in section 23(6)(b) of the proposed Act.

3. REPLACEMENT OF STATUTORY LIFE ESTATE BY RIGHT TO APPROPRIATE SPOUSAL SHARES AGAINST SPOUSAL HOME

The Law Reform Commission recommended in its 1983 report that the statutory life estate be replaced by a right to appropriate the spousal entitlements in intestacy against the spousal home.⁶³ In other words, the spouse could choose to set off the spousal preferential

60. R.S.Y. 2002, c. 77, ss. 82(3), (4).

61. *Supra*, note 40, s. 45(5); O. Reg. 54/95.

62. *Supra*, note 47, ss. 2-102(3), (4). The *Uniform Probate Code* distinguishes between two kinds of situations in relation to the amount of the surviving spouse's preferential share: one in which all of the intestate's issue are common to the intestate and the spouse, but the spouse also has issue that is not issue of the intestate, and another in which one or more of the intestate's issue are not also issue of the spouse. A distinction of this kind is not part of our recommendation. The spousal preferential share simply drops by half if the issue are not common to both parties.

63. *Report on Statutory Succession Rights*, *supra*, note 12 at 41-44.

and ordinary shares against the value of the intestate's interest in the spousal home and either be paid the balance of those shares (if the value of the home is less) or purchase the spousal home by paying the difference to the personal representative. This can greatly simplify the administration of the estate. Obtaining an appraisal of the market value of a house is far simpler and more defensible than having to place a value on an unmarketable life estate and factor it into the other calculations involved in an estate administration.

The Commission's solution was endorsed by the Intestate Succession Subcommittee and Project Committee. Sections 26-35 of the proposed Act deal with the election to appropriate the spousal shares against the spousal home and related matters, including when the election must be made, the valuation process, conflict of interest where the spouse is the personal representative, and occupancy pending the purchase of the intestate's interest in the home.

4. RIGHTS OF A SEPARATED SPOUSE ON INTESTACY

The discretion to award a share in an intestacy to a long-separated spouse who would otherwise be disentitled, coupled with the troublesome requirement of "mutual intention," was seen as creating an undesirable and unnecessary degree of uncertainty. They have not been carried forward into the proposed Act. Mutual intention to live separately is abrogated by the terms of the general definition of "spouse" in section 1(2) of the proposed Act, which makes an intention by one party to live separately sufficient to establish the required mental element for separation.

As a compromise between the extremes of cutting off inheritance rights the moment separation occurs and the current level of uncertainty produced by the possibility of a discretionary award of a share in an intestacy regardless of the length of separation, the "grace period" during which inheritance rights persist for both married spouses and common law spouses following separation would be lengthened from the current one year to two years.⁶⁴ This is provided not in the intestacy provisions but in the general definition of "spouse" in section 1(2) of the proposed Act.

After two years of separation prior to the intestate's death, spousal status would cease and the surviving party to the former marriage or marriage-like relationship would have no right to inherit.

64. The same two-year "grace period," during which spousal status persists for succession purposes despite separation, applies also in other contexts under the proposed *Wills, Estates and Succession Act*. The effect of mere separation must be distinguished from the effect on rights of intestate inheritance of signing a separation *agreement* in the case of legally married spouses and unmarried persons who have executed agreements under section 120.1 of the *Family Relations Act*, *supra*, note 42.

5. LOSS OF SPOUSAL INHERITANCE RIGHTS ON “TRIGGERING EVENT” UNDER PART 5 OF *FAMILY RELATIONS ACT*

Part 5 of the *Family Relations Act*⁶⁵ provides for the division of family assets on divorce or judicial separation, execution of a separation agreement, a decree of nullity, or a declaration under s. 57 of that Act that spouses have no reasonable prospect of reconciliation. These are known as “triggering events.” On their occurrence, a division of family assets occurs automatically. Each party acquires a statutory half-interest in all family assets as a tenant in common. Part 5 of the *Family Relations Act* applies only to legally married persons and those in marriage-like relationships who enter into an agreement under section 120.1.

Section 43 of the proposed *Wills, Estates and Succession Act* contains a provision that causes a gift to a spouse under a will to be automatically revoked on the occurrence of a “triggering event,” subject to a contrary intention on the part of the testator. The reason for this is to avoid over-compensating an ex-spouse or separated spouse who has already become entitled by virtue of the triggering event to a half-interest as a tenant in common in the family assets. If the ex-spouse or separated spouse inherits under the will after the breakdown or dissolution of the marriage as well as benefiting from the division of family assets, it will be an unjustified windfall unless the testator really intended this result.

A counterpart to section 43 applicable to intestacies is found in section 19 of the proposed Act. A triggering event during the intestate’s life (such as the signing of a separation agreement) has the result that the intestate’s spouse is deemed to have predeceased the intestate, so as not to have the right to a spousal share of the intestate’s estate.

This provision operates independently of the effect of separation on intestacy rights. A triggering event will therefore cause the surviving spouse to lose immediately the right to inherit in the intestacy of the deceased spouse, even if two years of separation had not elapsed at the time of death.

6. CUT-OFF OF INTESTATE INHERITANCE RIGHTS AT FOURTH DEGREE OF KINSHIP

The Law Reform Commission recommended that intestate inheritance rights end at the fourth degree of kinship, except for issue of the deceased.⁶⁶ This group comprises first cousins, grand-nieces and grand-nephews, great-uncles and great-aunts, and great-great grandparents. Relatives more remote than these would have no legal right to inherit. If no fourth degree relative was found, the property would simply escheat.

The arguments for barring inheritance rights of remote relatives were that relatives beyond the fourth degree very rarely take on an intestacy and in practice it is often impossible to

65. *Supra*, note 42.

66. *Report on Statutory Succession Rights, supra*, note 12 at 37.

locate them. There was a concern that the need to search for remote next of kin should not have to result in the dissipation of a modest estate. The Commission qualified this recommendation by providing that the limitation on inheritance rights of next of kin should not prejudice the right to apply under the *Escheat Act*⁶⁷ for transfer of any property on the basis of a legal or moral claim.

The Office of the Public Guardian and Trustee, which frequently administers intestacies in the role of Official Administrator, confirmed to the Intestate Succession Subcommittee that distributions to fifth degree relatives were extremely rare. The Public Guardian and Trustee has never had to distribute to a sixth degree relative. Distributions to fifth degree relatives (e.g. first cousins once removed) usually take place under a court order authorizing the disbursement of the estate to them because it is a practical impossibility to prove the great-grandparent line of descent.

The arguments in favour of terminating rights of intestate inheritance at the fourth degree were accepted in this Project. Section 25(3) of the draft intestacy legislation accordingly contains a provision deeming kindred of the fifth degree and higher to have predeceased the intestate, preventing them from taking.

Under section 5 of the *Escheat Act*, the Attorney General may transfer land to a person who had a legal or moral claim on the intestate, to carry into effect a disposition of the land that the intestate might have contemplated before death, or to reward a person who discovered the escheat or forfeiture of the land. The Attorney General has a similar authority under section 8(b) for personal property that reverts to the provincial government as *bona vacantia* (“vacant, unclaimed, or stray goods”). The amendments to the *Escheat Act* contained in the proposed *Wills, Estates and Succession Act* consolidate this authority in one section, to underscore and make clear that the *Escheat Act* applies both to ownerless land and to ownerless personal property and that, despite substantive legal difference between the two types of property, land and personal property are to be dealt with on the same procedural footing under the *Escheat Act*.

This would allow a claim by a remote relative who comes forward and is able to demonstrate kinship to the intestate to be considered and potentially satisfied. Without the intervening escheat, the property might have been exhausted by the cost of a fruitless search for successors.

In practice, however, property for which heirs cannot be located is not treated automatically as an escheat but is transferred to the Administrator under the *Unclaimed Property Act*⁶⁸ or

67. *Supra*, note 7.

68. S.B.C. 1999, c. 48.

paid into court under the current *Trustee Act*.⁶⁹ Only legal claims can be entertained under these Acts. Thus it is likely that a remote relative without a legal right of inheritance would have to arrange to have the property transferred to the Crown under the *Escheat Act* before any moral claim could be considered by the Attorney General. If the remote relative having to rely on a moral claim is in a position to prove kinship with the intestate, however, it is also likely the relative would be able to demonstrate the lack of a legal successor and that the property should therefore be handled under the *Escheat Act*.

7. HOTCHPOT RULE

The Law Reform Commission recommended in 1983 that the hotchpot rule now found in section 92 of the *Estate Administration Act* be repealed.⁷⁰ The commissioners thought that the function of intestacy was to distribute what was left of the intestate's property at death, and not to redress inequalities existing in the intestate's lifetime. An additional reason for repealing the hotchpot rule was the Commission's recommendation that the *Wills Variation Act* be extended to allow the intestate distribution scheme to be varied in appropriate cases to achieve just and equitable results.

The Intestate Succession Subcommittee endorsed the former Law Reform Commission's views on the hotchpot rule. Its members and the Project Committee also thought that if a parent seriously desired that advances made to a child during life be set off in the distribution of the parent's estate, this intention would probably be expressed through a clause in a will.

Abrogation of a similar principle in the law of wills called the "presumption against double portions" is recommended elsewhere in this Report.⁷¹ There would be an asymmetry between the law of wills and the law of intestacy if the hotchpot rule in intestacy was carried forward and the related principle concerning wills was not. The draft intestate distribution legislation therefore has no hotchpot rule corresponding to section 92 of the *Estate Administration Act*.⁷²

69. *Supra*, note 10.

70. *Report on Statutory Succession Rights*, *supra*, note 12 at 39.

71. The presumption against double portions assumes that a legacy to a child has been satisfied by a portion advanced to the child by the testator during the testator's lifetime to the extent of the amount of the advance. See p. 44.

72. The Canadian Centre for Elder Law Studies report *Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (CCELS Report No. 1 / BCLI Report No. 32, 2004) recommends enactment of a rebuttable statutory presumption that transfers of money and extensions of credit to a child, grandchild, spouse of a child or grandchild, or a corporation controlled by one or more of them ("family transfers") are non-interest-bearing demand loans which the personal representative of the transferor parent or grandparent may recover for the estate and which may be set off against any entitlement of the transferee to a benefit from the estate. The recommendation is contained in ss. 1 and

2 of the draft *Family Loans and Guarantees Act* set out at pages 27-28 of the Report. The presumption could be rebutted by the circumstances of the transfer, including the amount involved. This recommendation might appear at first glance to be inconsistent with repeal of s. 92 of the *Estate Administration Act* and abolition of the counterpart common law presumption against double portions in the interpretation of wills. In fact it is not, because it operates at a remove from s. 92 and the common law presumption. Section 92 and the presumption against double portions operate only with respect to transfers that clearly are gifts in law, while the statutory presumption concerning family transfers would operate at an earlier stage of legal analysis, assisting in the process of characterizing the transaction.

III. TESTATE SUCCESSION: THE *WILLS ACT* AND THE GENERAL LAW OF WILLS

A. General

Like other common law jurisdictions, British Columbia has a *Wills Act*⁷³ that is largely derived from the English *Wills Act 1837*.⁷⁴ Under the *Wills Act 1837*, wills had to conform with the requirements of writing, signature at the end by the testator, and attestation by two witnesses in the testator's presence.⁷⁵ Few aspects of private law are more widely known than these formalities associated with making a valid will, although the severe consequences of inadvertent failure to follow them precisely are not always grasped. The formal requirements are absolute. Non-compliance with them invalidates a will and results in intestacy.⁷⁶

The formal requirements associated with wills ("testamentary formalities") nevertheless remain an important bulwark against fraud and forgery. There is no widely-perceived need to change them, and no recommendation for changing them fundamentally has emerged from this Project. Yet it has long been recognized that the rigidity with which formal requirements have been interpreted and enforced can produce hardship and injustice. Much of the law reform effort in the Commonwealth and the United States that has taken place in the area of succession has been directed towards relaxing the overly rigid enforcement of formalities. The reasons for doing so are to render will-making a somewhat less hazardous activity and allow genuine testamentary intent to be fulfilled wherever possible.

Other features of the *Wills Act* that are a part of the framework derived from the *Wills Act 1837* are less well-known to the public, but may have equally drastic consequences. One of these is the rule that a will is revoked by the later marriage of the testator, unless the will is made in contemplation of the marriage. Another is the rule that if a beneficiary (or a beneficiary's spouse) signs the will as a witness, the beneficiary loses whatever benefit the will would have given. These rules have a purpose, but their inflexibility sometimes produces highly unjust results.

73. *Supra*, note 1.

74. 1837, c. 26. The present British Columbia *Wills Act* was passed in 1960 as S.B.C. 1960, c. 62. It was based on a Model Wills Act produced by the Conference of Commissioners on Uniformity of Legislation in Canada (Proceedings of the Thirty-fifth Annual Meeting (1953) at 17 and 38) which substantially preserved the effect of the English *Wills Act 1837*.

75. These requirements were based on ones originally prescribed by the *Statute of Frauds*, 29 Car. 2, c. 3 for wills disposing of real property. By s. 5 of the *Statute of Frauds*, a will not complying with these formalities "shall be utterly void and of none effect."

76. *Ellis v. Turner* (1997), 43 B.C.L.R. (3d) 283 (C.A.); *Bolton v. Tartaglia*, 2000 BCSC 576.

While the basic premises of the *Wills Act* and its English ancestor largely remain valid, a systematic re-examination of the statutory law concerning wills is warranted after nearly 170 years have passed since the foundations were laid.

Much of the law of wills is non-statutory. Most of the common law principles antedate the *Wills Act 1837* to a considerable degree. The continued relevance of some is doubtful.

A substantial portion of this Project has been devoted to a review of the law of wills. Major reforms are recommended, though the foundations of the structure put in place by the English *Wills Act 1837* will remain intact.

B. Testamentary Formalities And The Dispensing Power

1. IMPETUS TO REFORM

In 1975, South Australia enacted a provision giving its Supreme Court the power to admit a document to probate despite defects in execution if the court was satisfied that there was no reasonable doubt that the maker of the document intended it as a will.⁷⁷

Also in 1975, John H. Langbein's celebrated article, "Substantial Compliance with the Wills Act," was published in the *Harvard Law Review*.⁷⁸ Langbein identified four purposes of testamentary formalities which he categorized as *protective*, *cautionary*, *evidentiary* and *channeling*.

According to Langbein, the primary purpose of testamentary formalities is *evidentiary*, that is, "to provide the court with reliable evidence of testamentary intent and of the terms of the will." Writing provides reliable evidence of the terms of the will, the signature and its placement at the end provide reliable evidence of genuineness, and attestation provides reliable evidence of testamentary intent.⁷⁹

The same formalities also serve a *cautionary* purpose, that is, to impress the testator with the solemnity and legal significance of the testament;⁸⁰ a *protective* purpose, "to protect the testator against imposition or coercion or the substitution of a surreptitious will";⁸¹ and a

77. The provision is now s. 12(2) of the *Wills Act 1936*, No. 2302.

78. 88 Harv. L. R. 489.

79. *Ibid.*, p. 492.

80. *Ibid.*, p. 494.

81. John K. de Groot, "Will Execution Formalities - What Constitutes Substantial Compliance" (April, 1990) *Queensland L. Soc. Journal* 93.

channeling purpose, to standardize testation for the convenience of testators and in the interests of “efficient judicial administration.”⁸²

Langbein urged a purposive approach to the enforcement of testamentary formalities, in which courts faced with a technically defective document would focus on testamentary intent and the reasons for the existence of the formalities requirements. In Langbein’s view, if there is no question as to the authenticity of a non-complying will, then the rigorous enforcement of testamentary formalities needlessly defeats the testator’s intent without serving the purposes for which the formalities were created in the first place. Thus, he proposed that “the finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent’s testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?”⁸³

In 1981 the Law Reform Commission of British Columbia issued its *Report on the Making and Revocation of Wills*.⁸⁴ The Commission accepted the case for applying a principled approach to the enforcement of testamentary formalities, but foresaw a difficulty with the power to grant relief on the basis of the substantial compliance doctrine because of the necessity of determining what extent of formality is essential. In other words, what does “substantial” mean? The Commission recommended instead that British Columbia amend the *Wills Act* to follow the example of South Australia and a similar provision in force in Israel. Under this recommendation, the Supreme Court would have a “dispensing power” to admit a document to probate if the court was satisfied that it was intended it as a will, regardless of whether there had been any level of compliance with testamentary formalities.⁸⁵

2. SUBSTANTIAL COMPLIANCE VERSUS DISPENSING POWER

The Commission’s concern with the concept of substantial compliance as a basis for a curative provision was borne out by experience in Queensland, Australia. Queensland adopted a substantial compliance model in 1981 with the enactment of the following provision:

82. Langbein, p. 494.

83. *Ibid.*, p. 489.

84. *Supra*, note 12.

85. *Report on the Making and Revocation of Wills*, *supra*, note 12 at 54. The Commission would also have required that the document be signed by the testator as a prerequisite for exercising the dispensing power.

The Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the court is satisfied that the instrument expresses the testamentary intention of the testator.⁸⁶

In what has been referred to as a “disappointing history,” the provision was interpreted narrowly as requiring “attempted compliance with the statutory formalities.”⁸⁷ In effect, virtually full compliance was required because the Queensland courts were unable to distinguish between essential and non-essential formalities.⁸⁸ As a result, the section proved ineffective as a means of upholding formally defective documents that clearly represented testamentary wishes.

On the basis of the Queensland experience, Langbein later revised his earlier position, largely approved of the recommendation of the Law Reform Commission of British Columbia, and advocated a broad dispensing power⁸⁹ not dependent on substantial compliance with formalities. Provisions along these lines are now found in the wills statutes of all Australian states and five Canadian provinces.⁹⁰

3. REFORM IN BRITISH COLUMBIA - A RECOMMENDATION FOR A DISPENSING POWER

Recent cases have confirmed that British Columbia courts have no discretion to uphold a will or codicil where there has been less than perfect compliance with the formal requirements of execution or attestation.⁹¹ In *Ellis v. Turner*,⁹² the document was signed at the top

86. *Succession Act 1981* No. 69, s. 9(a).

87. Christopher Bevan, “Admitting to probate informal wills - an Australian success story,” p. 7. Copy of article on file at BCLI.

88. For example, the Queensland courts refused to hold there had been “substantial compliance” if there was only one witness (*Re Johnston*, [1985] 1 Q.R. 516) or when the two witnesses signed at different times (*Re Grosert*, [1985] 1 Q.R. 4513).

89. “Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law” (1987), 87 Columbia L. R. 1.

90. The Canadian curative provisions are: *Wills Act*, C.C.S.M., c. W150, s. 23; *Wills Act*, S.S. 1996, c. W-14.1, s. 37; *Wills Act*, R.S.N.B. 1973, c. W-9, s. 35.1; *Civil Code*, S.Q. art. 714; *Probate Act*, R. S.P.E.I., 1988, c. P-21, s. 70. The Australian curative provisions are: *Wills Act 1968*, s. 11A (Aus. Capital Terr.); *Wills, Probate and Administration Act 1898*, No. 13, s. 18A (N.S.W.); *Wills Act*, ss. 10(2), (3) (N.T.); *Succession Act 1981*, No 69, s. 18 (Qld.); *Wills Act 1936*, s. 12(2) (S.A.); *Wills Act 1992*, s. 26 (Tas.); *Wills Act 1997*, s. 9 (Vict.); *Wills Act 1970*, s. 34 (W.A.).

91. See *Ellis v. Turner* and *Bolton v. Tartaglia*, *supra*, note 76; *Toomey v. Davis*, 2003 BCSC 1211. Two cases that suggested the contrary, *Simkins v. Simkins Estate* (1992), 67 B.C.L.R. (2d) 289 (S.C.) and *Krause v. Toni* (28 June 1999) Penticton 17406 (B.C.S.C.) were not followed in *Bolton v. Tartaglia* and *Toomey v. Davis*.

92. *Supra*, note 76.

rather than at its end and the testatrix did not sign in the presence of the two witnesses, nor did she expressly acknowledge the signature as her own. In *Toomey v. Davis*⁹³ one of the witnesses was not present when the testator and the other witness signed the document, and affixed her own signature afterwards. In *Bolton v. Tartaglia*⁹⁴ both witnesses were present to see the testatrix sign. One of them affixed her name and address stamp, but neglected to actually sign her name. In none of these cases was there any doubt as to the authenticity of the will, but in all of them the will was held to be invalid for breach of the requirements for execution and attestation under section 4 of the *Wills Act*.

These three cases typify the kind of situation in which rigorous enforcement of formal requirements defeats the intentions of the will-maker without serving a redeeming purpose. In provinces with a dispensing power in their wills legislation, the will or codicil could have been upheld on the same facts.

A survey of cases in which curative provisions in Canadian wills legislation have been applied indicates they have not generated an excessive amount of litigation. They have allowed for testamentary wishes to be given effect where the document containing them was undoubtedly intended to be a will, but would otherwise be invalid because it did not comply with testamentary formalities.⁹⁵ Courts have declined to exercise the dispensing power where the connection between the document and the deceased was tenuous, and where the dispositive statements lacked the requisite degree of finality and certainty.⁹⁶ In short, the courts have tended to apply the curative provisions with restraint, have not brought about any revolutionary change or laxity in practice, and have permitted the fulfilment of the final wishes of testators where no room exists for doubt as to the authenticity of the document.

Lengthy discussions in the course of this Project resulted in an endorsement of the former Law Reform Commission's recommendation that British Columbia enact a curative provision conferring a broad dispensing power to relieve against the consequences of formal defects, exercisable if the court can be satisfied that a document contains the testamentary intentions of a deceased person.

93. *Supra*, note 91.

94. *Supra*, note 76.

95. See *Re Bunn Estate*, [1992] 4 W.W.R. 240 (Sask. C.A.); *Re Warren Estate* (1993), 112 Sask. R. 62 (Q.B.); *Shorrocks Estate v. Shorrocks* (1996), 109 Man. R. (2d) 104 (Q.B.); *Martineau v. Manitoba (Public Trustee)* (1993), 50 E.T.R. 87 (Man. Q.B.); *Vaillancourt Estate v. Vaillancourt* (2000), 38 E.T.R. (2d) 125 (N.B.Q.B.); *Doherty v. Doherty* (1997), 19 E.T.R. (2d) 158 (N.B.Q.B.).

96. *Re Balfour Estate* (1990), 85 Sask. R. 183 (Q.B.); *Re Mate Estate* (2000), 35 E.T.R. (2d) 256 (Sask. C.A.); affirming (1999), 28 E.T.R. (2d) 103 (Sask. Q.B.). But see *Furlotte v. McAllister*, 2005 NBQB 310, which goes further than other Canadian cases in the use of the dispensing power and is anomalous.

The original recommendation by the Commission called for signature by the testator as a prerequisite to the exercise of the dispensing power. Prince Edward Island's curative provision requires signature,⁹⁷ and the Nova Scotia Law Reform Commission recently recommended that Nova Scotia enact a similar one.⁹⁸ The Manitoba⁹⁹ and Saskatchewan¹⁰⁰ provisions do not specify signature as a minimum requirement.

While some semblance of execution would usually be necessary as a practical matter to show that the deceased was aware of and approved the contents of a will, to require signature in all cases as a prerequisite to exercising the dispensing power is very close to resurrecting the concept of "substantial compliance." The Queensland example demonstrates that substantial compliance is an inadequate principle on which to base relief from the consequences of formal defects in wills. A court will rarely be convinced that an unsigned document embodies the degree of finality and authenticity needed to treat it as a will, but should not be prevented from treating it as one when the circumstances show it to be a reliable record of testamentary intentions.

The dispensing power recommended for British Columbia is based on section 23 of the Manitoba *Wills Act*,¹⁰¹ which contains a broad dispensing power authorizing the court to order that a document or any writing be fully effective "notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act" if satisfied that it embodies the testamentary intentions of the deceased. The power could also be exercised in relation to a document evidencing an intention to revoke, alter or revive a will or testamentary intentions embodied in a document other than will.¹⁰²

It is intended that the standard of proof under the dispensing power provision would be the normal civil standard of the balance of probabilities. Section 19.1(2) of the Uniform Law Conference of Canada's *Uniform Wills Act* imposes a different standard of "clear and convincing evidence."

The dispensing power appears in section 46(1) of the proposed *Wills, Estates and Succession Act* in Part Two of this Report.

97. *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 70.

98. Law Reform Commission of Nova Scotia, *Reform of the Nova Scotia Wills Act* (Halifax: The Commission, 2003) at 28.

99. *Supra*, note 90.

100. *Supra*, note 90.

101. *Supra*, note 90.

102. C.C.S.M. c. W150.

4. HOLOGRAPH WILLS

Holograph wills are unattested wills that are entirely in the testator's handwriting and bear the testator's signature. Holograph wills are valid in all provinces and territories of Canada except British Columbia, Nova Scotia, and Prince Edward Island. The element of hand-writing substitutes for attestation by witnesses as a guarantee of authenticity.¹⁰³

The merits of extending recognition to holograph wills in British Columbia were debated at some length. It was noted that the requirements of a valid holograph will are no less formal requirements than the ones applicable to a will in standard form. The conclusion reached was that holograph wills need not be addressed specifically in legislation because an unattested will that is a reliable statement of the testator's intentions could be upheld through use of the dispensing power.

C. Abolition of Privileged Wills

1. ARMED FORCES PERSONNEL AND MARINERS

Armed forces personnel on active service of Canada, a Commonwealth country, or an ally of Canada enjoy the privilege to execute a valid will by signature alone, without attestation by witnesses.¹⁰⁴ Mariners at sea or in the course of a voyage also have this privilege.¹⁰⁵ The meaning of "active service" has proved problematic to courts. Canadian Forces have been on active service within the meaning of the *National Defence Act*¹⁰⁶ continuously since 1950 under a series of orders-in-council without the imminent danger of actual hostilities that was the original justification for the privilege.

The Canadian Forces inform their members about the standard procedure for executing valid wills and the vast majority of wills of Forces personnel are executed in standard form. Reliance on the privilege to make an informal will is discouraged.¹⁰⁷ Inquiries directed to probate registry staff in Vancouver and Victoria indicate that not more than one or two unattested military wills are probated each year, and the latest one that current staff can

103. MacKenzie and Feeney, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000) at p. 4.21, § 4.44.

104. *Wills Act*, *supra*, note 1, ss 5(1), (2). Attestation by a witness is required if the will is signed by someone other than the testator in the presence and at the direction of the testator: s. 5(3).

105. *Ibid.*

106. R.S.C. 1985, c. N-5.

107. Inquiries directed to the Judge Advocate-General's Office confirmed that the elaborate educational and facilitative programs concerning will-making by Forces personnel that are described in the Law Reform Commission of British Columbia *Report on the Making and Revocation of Wills*, *supra*, note 12 at 26-27 continue in effect with only minor variations.

remember dealing with was from the Korean War. No privileged wills by mariners have come to the attention of probate registry staff with long experience.

The former Law Reform Commission urged in 1981 that the privilege of informal will-making by military personnel and mariners be abolished on the ground that it is in disuse and would also be unnecessary if a dispensing power were enacted to validate wills that do not meet formal requirements, but are demonstrated to be authentic.¹⁰⁸ An additional ground for abolishing the privilege is that there are many other dangerous occupations besides serving in the armed forces and seafaring. As a dispensing power is among the recommendations of this Project, the recommendation by the former Commission for abolition of privileged military and marine wills was endorsed by the Testate Succession Subcommittee and Project Committee.

The proposed *Wills, Estates and Succession Act* therefore contains no provision for informal wills by military personnel and mariners. Privileged wills made validly before the effective date of the proposed Act would remain fully valid, however.¹⁰⁹

2. MINORS - REDUCTION IN MINIMUM AGE FOR WILL-MAKING

Minors who are or have been married, or who come within the scope of the privilege for military personnel on active service and mariners to make informal wills, may make¹¹⁰ and revoke a valid will under present law.

With the abolition of privileged military and mariners' wills, the capacity of minors serving in the armed forces or at sea appeared to be subsumed in the general question of the capacity of minors to make wills.

Married or formerly married minors are allowed to make valid wills in order to protect the interests of their spouses and children. An unmarried minor with a child cannot make a valid will, however. This calls the efficacy of the existing law into question.

Several alternatives to the current law were considered. The Testate Succession Subcommittee debated whether minors would be more susceptible to undue influence than even vulnerable adults, and considered the possibility of either a court process to approve wills by minors, a presumption of undue influence with the burden on the propounder of a minor's will, or a requirement that a minor's will be prepared by a lawyer or notary. All of these were rejected as unduly cumbersome.

108. *Report on the Making and Revocation of Wills*, *supra*, note 12 at 28.

109. See s. 187(3) of the proposed *Wills, Estates and Succession Act* in Part Two of this Report.

110. *Wills Act*, *supra*, note 1, s. 7(1)

It was noted in discussion that in addition to addressing the concern for protecting minors' dependants, a reduced minimum age for valid will-making would occasionally be convenient, as minors sometimes own valuable assets that are not easily dealt with on intestacy (e.g. an antique car) except through immediate sale, which may not be the most desirable solution. Notice was taken of the Manitoba Law Reform Commission's recent recommendation to reduce the age for making a valid will to 16.¹¹¹

The solution ultimately favoured was to reduce the age for valid will-making from 19 to 16, with no special status for married minors.

D. Effect of Attestation of Will by a Beneficiary or Beneficiary's Spouse - Jurisdiction to Relieve Against Forfeiture

1. GENERAL

If a beneficiary under a will or the beneficiary's wife or husband signs the will as a witness, section 11(1) of the *Wills Act* causes the beneficiary to lose the benefit of any gift or exercise of a power of appointment in the beneficiary's favour under the will. The beneficiary can take nothing under the will, although remaining competent to testify as to the execution or validity of the will.¹¹²

In the *Report on the Making and Revocation of Wills*, the Law Reform Commission showed that the original purpose of this feature of the *Wills Act* was not to prevent fraud and undue influence, but to make interested witnesses competent to prove the will.¹¹³ In earlier times a witness with an interest in the matter in question was not competent to testify. The law concerning interested witnesses later changed, but the legislation rendering gifts to attesting beneficiaries void remained in place.

While invalidation of gifts to attesting witnesses and their marital spouses does operate as a safeguard against fraud and undue influence concerning wills by ensuring that attesting witnesses are disinterested, it can be a trap for the unwary. Its rigid application, even when the testator's knowledge and approval of the gift is not in dispute, works harshly and defeats genuine testamentary intentions.

111. Manitoba Law Reform Commission, *Wills and Succession Legislation* (Rep. No. 108) (Winnipeg: The Commission, 2003) at 11.

112. Section 11(2) provides this result does not occur if the will is also attested by the minimum number of witnesses required by ss. 4 or 5 who are not beneficiaries or spouses of beneficiaries.

113. *Supra*, note 12 at 74-77.

2. REFORM

(a) *Relief against forfeiture*

The Law Reform Commission recommended against simple repeal of the provision because in cases where the attesting beneficiary has exercised undue influence, the entire will might be vulnerable and gifts to innocent beneficiaries would also fail. The current section 11(1) prevents this result by invalidating testamentary gifts only in relation to the witness who signs. The Law Reform Commission also rejected the alternative of letting the attesting beneficiary-witness take only the same benefit as that witness would have taken on intestacy because this would not be any sort of bulwark against fraud and undue influence and could perversely encourage it by reducing the risks for those who might contemplate it.¹¹⁴

Debate also took place during this Project on whether to carry forward the current section 11, to repeal it, or to allow relief against forfeiture of the benefit of the will if the party seeking to uphold the gift can prove that the testator knew of the gift and approved of it. In other words, the onus would be on that party to dispel any inference arising from suspicious circumstances or taint of undue influence. The third option, which was also the Commission's recommendation in the *Report on the Making and Revocation of Wills*, was chosen.

Under section 41 of the proposed *Wills, Estates and Succession Act*, a gift (including, by definition in section 1, exercise of a power of appointment) under a will is accordingly presumed to be void if the beneficiary who is to receive it or that beneficiary's spouse signs the will as a witness. The gift would only be avoided insofar as the attesting beneficiary is concerned, as is the case now. A court could declare the gift valid on the application of a party seeking to uphold it, however, if that party proves that the testator knew and approved of the gift.

(b) *Extension to non-marital spouses*

Another change reflected in the proposed section 41 is to extend the provision to attestation by a person not legally married to the beneficiary at the time the execution of the will was witnessed, but who comes within the definition of "spouse" at that time. This would include a person in a marriage-like relationship with the beneficiary of more than two years' duration. Spousal status, for the purpose of section 41, is to be determined at the time of the execution of the will.

E. The Requirement of Writing: The Potential Advent of the Electronic Will

1. GENERAL

The requirement of writing on paper, or at least on some tangible surface, has not been eroded. There has been no significant movement in the common law world toward allow-

¹¹⁴ *Ibid.*, at 78.

ing probate of audio or video recordings of oral wills, nor a digitalized image (avatar) of the testator announcing testamentary wishes or affirming the authenticity of a digital text as containing them.

Paper and electronic documents are increasingly being treated as equivalent in terms of legal significance, however. British Columbia, like a number of other provinces and U.S. states, has enacted e-commerce legislation providing that information or a record must not be denied legal validity merely because it is contained in electronic form.¹¹⁵ While testamentary and probate documents are typically excluded from the scope of e-commerce legislation, the Uniform Law Conference of Canada (ULCC) amended the *Uniform Wills Act* in 2003 to permit the dispensing power contained there to be exercised to allow admission to probate of electronic documents.¹¹⁶ The Law Reform Commission of Saskatchewan has stated that “full recognition will eventually be necessary and appropriate, and perhaps sooner rather than later.”¹¹⁷

2. OBJECTIONS TO THE ELECTRONIC WILL

The main arguments offered for excluding wills and other testamentary instruments from the scope of general e-commerce legislation are:

1. Will-making is a unilateral juristic act in which validity and form are closely connected.
2. Sufficient safeguards against fraudulent manipulation of electronic data are not available.

The first argument lacks cogency, as formality is a concept equally compatible with electronic and paper format. The second argument has been too readily accepted simply because of an assumption that electronic data and digital signatures are intrinsically incapable of providing the same level of authenticity and originality as paper and ink.

3. DIGITAL SIGNATURE TECHNOLOGY

According to the American Bar Association’s Section on Science and Technology Law, “the process of creating a digital signature and verifying it accomplish the essential effects

115. *Electronic Transactions Act*, R.S.B.C. 1979, c. 10, s. 3. See also: ULCC *Uniform Electronic Commerce Act*, s. 5; U.S. *Electronic Signatures in Global and National Commerce Act 2000*, Pub. L. No. 106-229, 114 Stat. 464 (ESIGN).

116. Uniform Law Conference of Canada, *Proceedings of the Eighty-fifth Annual Meeting* (2003) at 70 and 335-337.

117. *Report on Electronic Wills* (October, 2004) at 2.

desired of a signature for many legal purposes.”¹¹⁸ Recalling Langbein’s analysis, the traditional requirements of writing, signature and attestation serve to *protect* against imposition, coercion or the surreptitious substitution of a will; to *caution* the testator about the solemnity and legal significance of the testament; to provide reliable *evidence* of testamentary intent and of the terms of the will; and to *channel*, or standardize, testamentary devices for convenience and efficiency. Concerns surrounding electronic wills have centred on the protective and evidentiary purposes: the authenticity and security of electronic, or digital, documents and signatures, given the perceived ease of manipulation of electronic data. To address these concerns, it is necessary to understand the technology behind the electronic, or digital, signature.

Digital signatures commonly operate on the basis of “public key cryptography,” in which mathematical algorithms are used to create a “private key,” available only to the signer of a document, and a “public key,” available to anyone to verify the identity of the signer. Even though these two keys are mathematically related, it is not feasible to derive the private key from knowledge of the public key, and the private key cannot be forged unless the signer loses control of the private key. When a private key is used to affix a signature to a particular document, the signer’s software extracts a number known as a “hash result,” which is transformed, using the signer’s private key, into a digital signature and attached to the document. Thus, the public key not only verifies that the signer’s private key was used to digitally sign the document, but, through the hash result, that the document has not been altered since it was signed.

According to the ABA’s Science and Technology Section, the digital signature identifies the signed message “with far greater certainty and precision than paper signatures,” and provides “a high level of assurance that the digital signature is genuinely the signer’s.”¹¹⁹ Certification service providers are required in order to issue private keys and make public keys available as needed, but these services are already in place in the developed world. In British Columbia, digital signatures are accepted on Land Title Office documents, and the *Land Title Act* contains detailed provisions regarding electronic filing.¹²⁰

4. LEGAL ISSUES SURROUNDING ELECTRONIC WILLS AND THE DISPENSING POWER

Electronic wills still present a number of issues that would have to be resolved, were they to be given full statutory recognition. For example, how is revocation effected where there is no single original? Where several identical, digitally signed copies of an electronic will

118. “Digital Signatures Guidelines Tutorial.” Online. Internet. May 25, 2006. Available at: <http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html> (no pagination).

119. *Ibid.*

120. RSBC 1996 c. 250, ss. 168.1-168.91.

exist, it becomes difficult to say that an original has been destroyed.¹²¹ In Nevada, the only jurisdiction to have validated electronic wills in a prescribed form, only one authoritative copy may exist, and it must be controlled by a custodian designated by the testator.¹²² But how is the authoritative version to be identified? Other problems are rooted in the nature of the electronic medium, such as reverse compatibility (wills stored in formats that later become outmoded may not be capable of being read in the future), or in hardware (the deterioration of storage media, although archival CDs with a shelf life of 100-200 years would appear to be an adequate solution.)

These issues do not preclude, however, the application of the dispensing power to admit electronic wills to probate on a case by case basis where there is no question as to the authenticity of the electronic data. There has been one case in Canada in which an electronic text was admitted to probate. In *Rioux v. Coulombe*,¹²³ the testatrix committed suicide, leaving a note which left instructions to find an envelope containing a computer diskette. The diskette, which contained one computer file and was marked as the testatrix's last will, bore the same date as the testatrix's suicide. The file on the diskette was admitted to probate under art. 714 of the Quebec Civil Code,¹²⁴ which permits probate of an informal document if it contains the unequivocal last wishes of a deceased.

While art. 714 does not specifically require "writing," it is possible that a similar result could be reached, even in the face of a writing requirement, on the basis of a broad dispensing power to relieve against the consequences of informality. The 2003 amendments to section 19.1 of the *Uniform Wills Act* by the Uniform Law Conference of Canada permits the dispensing power to be exercised to allow admission to probate of an electronic document if it is stored in a computer system, capable of being read by a person (not merely machine-readable), and capable of reproduction in a visible form.¹²⁵

As between the three options of maintaining the status quo, extending full recognition to electronic wills, or adopting the middle ground of the 2003 amendment to the *Uniform Wills Act* and dealing with electronic wills under the dispensing power, the middle ground emerged from discussions in this Project as the preferred solution for British Columbia at the present time.

121. W. L. Hurlburt, "Electronic Wills and Powers of Attorney: Has their Day Come?" Uniform Conference of Canada, *Proceedings of the Eighty-third Annual Meeting* (2001) 176 at 190 (Background Paper).

122. Nevada NRS 133.085

123. (1996), 19 E.T.R. (2d) 201 (Que. Sup. Ct.).

124. *Supra*, note 90.

125. *Supra*, note 116.

Section 46(2) of the proposed *Wills, Estates and Succession Act* is accordingly drawn from section 19.1 of the *Uniform Wills Act* and defines “document” for the purposes of section 46 (the dispensing power) to include computer data that

- (a) is recorded or stored on any medium in or by a computer system,
- (b) can be read by a person, and
- (c) is capable of reproduction in a visible form.¹²⁶

The Testate Succession Subcommittee agreed with the Saskatchewan Law Reform Commission, however, that the approach taken in the 2003 amendment to section 19.1 of the *Uniform Wills Act* should be considered only as an interim measure that will require reassessment in the near future.¹²⁷ The Subcommittee recommended that the technological feasibility and legal implications of broader recognition of electronic wills be given further study in the not too distant future by a committee having expertise in both information technology and succession law.

F. Effect of Marriage and Dissolution of a Spousal Relationship on Wills

1. ABOLITION OF REVOCATION BY SUBSEQUENT MARRIAGE

Under present law, a will is automatically revoked if the testator marries after the will has been executed, unless the will expressly states that it is made in contemplation of the marriage.¹²⁸ There is one other exception, namely where the will contains an exercise of a power of appointment of property that would not form part of the estate of the testator if the power had not been exercised.¹²⁹

Practitioners note that it is not widely known or understood by the public that a will is revoked by later marriage. As a result, unintended intestacies occur and careful testamentary planning may be inadvertently overturned. For example, a testator may make a will containing a trust in favour of a mentally disabled child by a prior marriage or other relative

126. It should be noted that these criteria are still predicated on the concept of a will as a written text, and would not encompass an electronically recorded oral will or material that is exclusively machine-readable.

127. *Supra*, note 116 at 7.

128. *Wills Act*, *supra*, note 1, s. 15. The will must be expressed to be in contemplation of marriage to a particular person in order to come within the exception. It is insufficient if it simply purports to be in contemplation of marriage generally: *Sallis v. Jones*, [1936] P. 43; *Re Sedgwick*, [1931] 1 W.W.R. 837 (B.C.S.C.).

129. *Ibid.*

and later marry a person who is independently wealthy. The marriage would operate to disinherit the child in favour of the wealthy second spouse.

While the purpose of revocation of a will by marriage is to protect the interests of the spouse and children of the testator, a new will is not the only or even the principal means by which people secure the interests of their dependants in the present day. Life insurance and RRSP beneficiary designations may play an equally important role in estate planning, and these are not subject to revocation by later marriage. There are now other legislative mechanisms in place that protect a spouse and children that did not exist when the *Wills Act 1837* was enacted.¹³⁰ Matrimonial property law provides remedies to the spouse during the testator's lifetime. Dependants relief legislation (currently contained in the *Wills Variation Act*)¹³¹ provides a remedy against the terms of a will that does not make adequate provision for a spouse and children, although it is not urged here that litigation is an ideal substitute for the current law.

Another reason for abolishing automatic revocation by marriage is that the supposed protection it provides to spouses and children is available only when there has been a legal marriage. In today's society many long-term domestic relationships are not predicated on a legal marriage. Thus, to the extent that revocation by marriage may still be seen as protective, the umbrella of protection is uneven and unequal.

While all other provinces and territories except Quebec currently retain revocation of wills by subsequent marriage, the archaic nature and untoward effects of this feature of the *Wills Act* were considered to justify the departure from uniformity that its abolition would cause. Part 3 (Testate Succession) of the proposed *Wills, Estates and Succession Act* therefore does not preserve revocation by marriage of the testator.

2. PARTIAL REVOCATION ON DISSOLUTION OR BREAKDOWN OF A SPOUSAL RELATIONSHIP

(a) *Harmonization with Part 5 of Family Relations Act*

Section 16(2) of the *Wills Act* now provides that a gift in a will to the testator's spouse is revoked if one of the following takes place between the time the will is made and the testator's death, unless a contrary intention appears in the will:

(a) a divorce,

130. *Supra*, note 74. At common law, a woman's will was revoked by marriage and a man's will by marriage and the birth of a child. The *Wills Act 1837* made the wills of both men and woman revocable on marriage. See *Report on the Making and Revocation of Wills*, *supra*, note 12 at 71.

131. *Supra*, note 2.

- (b) a degree of judicial separation, or
- (c) a declaration of nullity or a judicial finding that the marriage is void.

The same is true of a term of a will appointing the spouse as an executor or trustee, or conferring a power of appointment on the spouse. The will takes effect as if the spouse had predeceased the testator.

The policy behind section 16(2) of the *Wills Act* is to prevent a spouse from benefiting from the estate of the other spouse once the spousal relationship has been dissolved or otherwise broken down merely because the other spouse has failed to change a will. It is presumed, as a default rule, that the testator does not intend to benefit an ex-spouse.

In particular, the provision is intended to prevent an ex-spouse from being overcompensated through a family asset division occurring as a consequence of marital breakdown and also by taking under a will that the other spouse neglected to revoke. An entire estate, plus one-half the family assets held at the time of the property division, might go to an ex-spouse in that situation.

The events described in section 16(2) of the *Wills Act* do not include all the so-called “triggering events” that will lead to a division of family assets under Part 5 of the *Family Relations Act*,¹³² however. Under section 56(1) of the *Family Relations Act*, the triggering events include the three described above as well as two others: entry into a separation agreement, and a declaratory judgment under section 57 that the parties to a marriage have no reasonable prospect of reconciliation.

Section 43 of the proposed *Wills, Estates and Succession Act* corresponds to section 16(2) of the present *Wills Act*. It harmonizes the events that will result in revocation of a gift to, or appointment of, a spouse with the triggering events under section 56(1) of the *Family Relations Act*.

(b) Extension of policy underlying section 16(2) of Wills Act to non-marital spouses

As the term “spouse” in the *Wills Act* has no extended definition encompassing unmarried persons in a marriage-like relationship with one another, section 16(2) only applies now to legally married spouses. This means that when a spousal relationship comes to an end, an ex-“common law spouse” is in a better position than a former married one. This runs counter to the general trend in legislative policy to place legally married spouses and those in stable marriage-like relationships on the same footing.

¹³². *Supra*, note 42.

The current lack of symmetry between the positions of married and non-marital spouses vis-a-vis section 16(2) of the *Wills Act* should be removed in order to further the general legislative policy of equal treatment of marriages and long-term marriage-like relationships. The difficulty in this is how to pinpoint the end of a legally informal marriage-like relationship. The fluid nature of such a relationship makes any attempt to do so by reference to a single standard a highly arbitrary exercise. Tests employing multiple indicia have been developed by the courts in family law cases to determine whether a marriage-like relationship subsists or has ended.¹³³ These are more likely to attain a just result in individual cases than an arbitrary statutory standard.

By contrast to section 16(2), section 43 of the proposed *Wills, Estates and Succession Act* will extend to anyone coming within the general extended definition of “spouse” in the Act, which includes persons living together in marriage-like relationships of at least two years’ duration.¹³⁴ In the case of these persons, revocation of a testamentary gift, of an appointment as an executor or trustee, or of a power of appointment, will take place on the termination of the marriage-like relationship. The point at which termination of the marriage-like relationship occurs would be ascertained on the basis of the same principles applied by the courts in other kinds of cases.

G. Rectification of Wills

Mistakes in wills may arise from many sources. Among these are inadvertent slips, clerical errors, miscommunication between the testator and the drafter, legal drafting errors, and misunderstanding by the testator of the legal effect of the language used in the will. Where the language of a will fails to express a testator’s actual intentions, courts have very limited jurisdiction to rectify the mistake. The equitable remedy of rectification, which enables a superior court to correct errors in contracts, deeds and other legal instruments to fulfil the intent of the parties, does not apply to wills.¹³⁵

133. See *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.); *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.). The indicia considered in determining whether parties are in a marriage-like relationship are partly subjective and partly objective. The objective indicia relate to the lifestyle and behaviour of the parties in relation to finances, residence, sexual relations, support, children, social activities, and to the attitudes of others, i.e. whether the community treated them as a couple. The cessation of marriage-like behaviour in relation to these indicia would indicate that a marriage-like relationship has come to an end.

134. In this case spousal status would be determined as of the date the will was made if a person is alleged to have been the testator’s spouse then or, if the person is alleged to have become the testator’s spouse afterwards, at any time between the making of the will and the occurrence of an event that would bring about revocation under section 43.

135. *Harter v. Harter* (1873), L.R. 3 P. & D. 11; *Alexander Estate v. Adams* (1998), 51 B.C.L.R. (3d) 333 (S.C.).

The main justifications for the general principle that a court must take a will as it finds it are:

1. A power to rectify would subvert statutory testamentary formalities, and
2. There is no reliable guide as to what the testator intended to say.¹³⁶

A court of probate can delete words included by mistake. The rationale is that such words were never intended to form part of the will, thus their deletion does no violence to the purposes of testamentary formalities.

A court of construction is bound to accept the will in the form in which it emerges from probate. Any attempt to add words or otherwise alter the will amount to remaking the will and defeating the protective purpose of statutory formalities, no matter how reliable the evidence of testamentary intention. A court of construction can, however, ignore an unnecessary or inaccurate portion of a description (*falsa demonstratio*) or infer a correction by implication from the text of the will.

Courts have been forced on many occasions to go to ridiculous lengths within these narrow rules to preserve the testator's true intent as far as possible. A notorious example is *Re Morris*,¹³⁷ where a codicil intended to revoke a gift in clause "7(iv)" of the will omitted the "iv" and erroneously revoked all the gifts in clause 7. Unable to add words to correct the mistake, the probate court deleted the numeral "7" as surplusage, saving the rest of the gifts in clause 7 but also the one that was to be revoked.

Legislation giving courts broader powers to rectify wills has been enacted in England,¹³⁸ six Australian states,¹³⁹ and the Australian Capital Territory.¹⁴⁰ It has been recommended by law reform bodies in Scotland¹⁴¹ and New Zealand.¹⁴²

136. Law Reform Commission of British Columbia, *Report on Interpretation of Wills*, *supra*, note 12 at 40.

137. [1971] P. 62.

138. *Administration of Justice Act 1982*, c. 53, s. 20 (England and Wales).

139. *Wills Act 1997*, s. 31 (Vic.); *Succession Act 1981*, s. 29A (Qld.); *Wills, Probate and Administration Act 1898*, s. 29A (N.S.W.); *Wills Act*, s. 27 (N.T.); *Wills Act 1936*, s. 25AA (S.A.); *Wills Act 1992*, s. 47 (Tas.).

140. *Wills Act 1968*, s. 12A (A.C.T.).

141. Scottish Law Commission, *Report on Succession Rights* (Scots. Law Com. No. 124) (Edinburgh: Her Majesty's Stationary Office, 1990) at 48-49.

142. New Zealand Law Commission, *A Succession (Wills) Act* (NZLC R41) (Wellington: Queen's Printer,

In 1982 the former Law Reform Commission of British Columbia recommended legislation conferring a power to rectify a will that could be used if a will failed to express the testator's intentions due to: an accidental slip or omission, a misunderstanding of the testator's intentions, failure to carry out the testator's instructions, or a failure of the testator to appreciate the effect of the words used in the will. Evidence other than the will itself ("extrinsic" evidence) would be admissible to show that a basis for rectification exists.¹⁴³ It should be noted that as broad as these grounds might appear, this was a recommendation for a limited statutory power and not for an equivalent to the equitable remedy of rectification. The Manitoba Law Reform Commission endorsed the British Columbia recommendation in 2003.¹⁴⁴

The appropriate scope of a rectification power concerning wills was revisited during this Project. The Testate Succession Subcommittee and Project Committee accepted that an error in a will should be rectifiable in order to fulfil testamentary intent, but were not willing to go as far as the former Law Reform Commission had gone. They declined to extend the power to cases in which the error stems from the testator's lack of appreciation of the legal effect of the terms of the will. The Commission had included this ground for rectification in its recommendation to take account of cases of incorrect use of legal language by testators writing their own wills. The Subcommittee considered that this would force the court into an overly subjective exercise of guessing what the testator's understanding had been. The danger of unintentionally remaking a will would be too great.

The recommendation that emerged was for a more limited rectification power aimed at allowing errors of drafters and transcribers to be corrected so that the testator's true intentions prevail. It would be closer in its dimensions to the power to rectify wills conferred on English courts by section 20 of the *Administration of Justice Act, 1982*.¹⁴⁵ As in the original recommendation by the Law Reform Commission of British Columbia, the power could be exercised at either the probate or construction stage.

Section 48(1) of the proposed *Wills, Estates and Succession Act* in Part Two permits the Supreme Court to rectify a will that does not carry out the testator's intention because of

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

1997) at 44, s. 28.

143. Law Reform Commission of British Columbia, *Report on the Interpretation of Wills*, *supra*, note 12 at 50.

144. Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report #108) (Winnipeg: The Commission, 2003) at 54-57.

145. *Supra*, note 137.

- (b) a misunderstanding of the testator's instructions, or
- (c) a failure to carry out the testator's instructions.

Section 48(2) recognizes that these circumstances can only be proven by evidence extrinsic to the will itself and makes it admissible for this purpose. The admissibility of extrinsic evidence in connection with an application for rectification under this provision is not intended to depend on the rules that govern admissibility of extrinsic evidence of testamentary intent in other contexts. (See below under the heading "Extrinsic Evidence of Testamentary Intent.")

Some features of the English will rectification legislation noted above were considered desirable to import into the proposed British Columbia provision. One such feature is a limitation period for making an application for rectification in order that the distribution of estates is not delayed unduly. An application would have to be made no later than six months from the date of probate, unless leave were obtained to bring it afterwards. A personal representative would have no liability for distributing the estate according to the will as originally written after six months have passed since the date of probate and before receiving notice of an application for leave to make a late application. This would not affect the right to recover estate property from anyone to whom it has been distributed.

H. Extrinsic Evidence of Testamentary Intent

1. GENERAL

In the *Report on the Interpretation of Wills*,¹⁴⁶ the former Law Reform Commission of British Columbia described a tension between older authorities requiring an "objective" interpretation of the language of the will and later ones calling for a "subjective" approach to interpretation in which the court tries to determine the meaning that the language of the will had for the testator. The focus of this tension was the body of principles governing the admission of extrinsic evidence (evidence other than the text of the will itself) as an aid to the interpretation of wills.

The objective approach to will interpretation is essentially exclusionary: the will is read virtually in isolation. It flows from the concern for preserving the integrity of testamentary formality as a safeguard against fraudulent or self-serving interpretations. The subjective approach exemplified by the Saskatchewan case *Haidl v. Sacher*¹⁴⁷ examines the language in light of the surrounding circumstances known to the testator at the time the will was made. This is sometimes referred to as the "armchair" rule because the court puts itself notionally in the testator's position to discern what the testator meant by the language used

146. *Supra*, note 12.

147. [1980] 1 W.W.R. 293 (Sask. C.A.).

in the will. The subjective approach places the fulfilment of actual testamentary intention uppermost, despite the faults of expression that may exist in a will. The former Commission urged adoption of the subjective approach and the admission of any evidence that is helpful in illuminating the testator's meaning.¹⁴⁸

Since the publication of the Commission's report, the so-called armchair rule, which represents a subjective approach to the interpretation of wills, has gain increasing acceptance in common law Canada and the British Columbia Court of Appeal has endorsed it.¹⁴⁹ Thus it can be said with considerable confidence that the law has developed in the direction urged by the Commission two decades ago insofar as evidence of surrounding circumstances at the time a will was made is now generally admissible. Evidence of surrounding circumstances at the time the will was made may be admitted at the outset of the process of interpretation in order to illuminate the testator's meaning. It may be used both to identify ambiguities and to resolve them, and to shed light on the meaning of apparently meaningless terms.

For example, suppose a will states "to my three daughters A, B, and C in equal shares" and at the time the will was made the testator had three daughters named A, B, and C. Between the making of the will and the death of the testator C undergoes a gender change and legally changes her name to D, a male name. At the time of death, therefore, the testator has two daughters and a son. Evidence of the circumstances known to the testator at the time the will was made would be admissible to show that the testator must have contemplated that D was included in the class of beneficiaries who would take under the gift.¹⁵⁰

2. EXTRINSIC EVIDENCE OF INTENT

The law concerning when extrinsic evidence of testamentary intent, as opposed to surrounding circumstances, may be admitted as an aid to interpretation has not been appreciably clarified in the two decades intervening since the Law Reform Commission's *Report on Interpretation of Wills*.¹⁵¹ An unwieldy exclusionary rule persists under which admissibility of evidence of the testator's intent, such as statements made by the testator when alive, depends on whether the ambiguity is classified as patent (apparent on the face of the will) or latent (apparent only in the light of surrounding circumstances).

148. *Report on Interpretation of Wills*, *supra*, note 12 at 1 and 25.

149. *Davis Estate v. Thomas* (1990), 40 E.T.R. 107 (B. C.C.A.); see also *Kordyban v. Kordyban* (2003), 13 B.C.L.R. (4th) 50 at para. 73 (C.A.).

150. It may be noted that s. 28A of the *Wills Act 1968* of the Australian Capital Territory expressly addresses questions of will interpretation that may arise from named beneficiaries undergoing sexual reassignment surgery in the interval between the execution of the will and the death of the testator.

151. *Supra*, note 12.

Evidence of the testator's intent is not admissible to identify an ambiguity in a term or to interpret one that is apparent on the face of the will (patent ambiguity). It is admissible only to resolve a "latent ambiguity," namely, one which does not appear on the face of the will but only when the terms of the will are considered in light of surrounding circumstances. An example of latent ambiguity would be a gift to "my nephew James Scott" if the testator actually had two nephews, each having James as a middle name. In such a case evidence tending to show that the testator intended to benefit one and not the other nephew could be admitted.

The former Law Reform Commission favoured eliminating these exclusionary rules and admitting all evidence in aid of interpretation that meets the normal evidentiary test of relevance, namely, being probative of a matter in issue.¹⁵² The Commission noted the fact that the text of the will must support any interpretation that is advanced and this would guard against excessive weight being attached to tenuous evidence of testamentary intent.¹⁵³

The view that has prevailed in the Succession Law Reform Project, however, is that removing all restrictions on admission of extrinsic evidence of intent would allow excessive scope for attempts to secure an interpretation contradicting the actual terms of the will. Fabrications or fantasies of the "he really meant me" or "he always said I would get the house" variety could be advanced much more easily than they can be under the present law. The Testate Succession Subcommittee and Project Committee were not as confident as the Commission had been that litigation over the meaning of wills would not increase if evidence of testamentary intent were made admissible without restriction. They were not prepared to endorse the former Commission's recommendation to abrogate entirely the exclusionary rule regarding extrinsic evidence of intent.

When genuine ambiguity is present, however, it makes little sense to exclude other evidence that could shed light on the testator's actual meaning. The distinction made between latent and patent ambiguity in the test for admissibility of extrinsic evidence is hidebound and formalistic. Attempts to distinguish between patent and latent ambiguities in wills often lead to obscurity. The present rule should be replaced by a much more practical one.

The recommendation to emerge from this Project on admissibility of evidence of testamentary intent is for a new statutory rule that dispenses with the distinction between patent and latent ambiguity. The new rule is found in section 47 of the proposed *Wills, Estates and Succession Act*. It allows extrinsic evidence of intent, which may include written or oral statements by the testator, to be admitted if a term of a will is ambiguous or meaningless, but not to identify an ambiguity. Whether the ambiguity appears on the face of the will or in light of evidence of surrounding circumstances would be irrelevant.

152. *Anderson v. Maple Ridge (District)* (1992), 71 B.C.L.R. (2d) 68 at 72, para. 17 (C.A.).

153. *Report on Interpretation of Wills*, *supra*, note 12 at 21.

Section 47(c) allows for statutory exceptions to this general rule requiring ambiguity or meaninglessness in the text of a will to be demonstrated before extrinsic evidence of testamentary intent could be introduced. Once such exception would be section 48(2), which expressly permits the admission of extrinsic evidence in relation to an application for rectification of a will.

I. Gifts to Issue

The current rule concerning gifts to “issue” (or a similar term encompassing more than one generation of beneficiaries) under a will is that they are to be distributed *per capita* unless the will indicates a contrary intention. In other words, surviving issue, whether children, grandchildren or great grandchildren, and so on, are entitled to an equal share. This result would surprise many testators, and is opposite to the rule that applies in intestacy.

In intestacies, a distribution to issue takes place *per stirpes*: the surviving members of the closest generation to the intestate to contain surviving members will take equally and the children of a deceased member of that generation take the share their parent would have taken if the parent had survived the intestate, divided equally among them. Surviving descendants in a generation nearer to the intestate will inherit a larger share than those in a more remote generation. This is in keeping with the normal and expected pattern of inheritance between generations in which children inherit from parents, grandchildren inherit from their own parents, and so on.

It is generally easier to search for next of kin under a *per stirpes* distribution system than a *per capita* one. The basic division of the estate occurs at the first generation under which there are surviving members. Even if not all takers are immediately identified, the shares of deceased issue in that generation can be ascertained. Under a *per capita* distribution system every member of issue, no matter how remote, must be searched out and identified before a division of the property can take place.

Section 49(10) of the *Wills, Estates and Succession Act* would change the current rule and require *per stirpes* distribution of a testamentary gift to “issue” of a person, as in intestacy, in the absence of a contrary intention appearing in the will.

J. Abrogation of Outdated Presumptions

1. GENERAL

Certain non-statutory presumptions relating to the interpretation of wills should be abrogated as being outdated and unhelpful. These presumptions and the grounds for abrogating them are described below.

2. PRESUMPTIONS CONCERNING GIFTS MADE AND DEBTS CONTRACTED DURING TESTATOR'S LIFETIME

(a) *General*

Where a testator makes a substantial gift during life to a child and also leaves a legacy to the child in a will, or leaves a legacy in the same amount as a debt the testator owed, is the one meant to revoke, or satisfy, the other, or did the testator intend to confer a benefit twice? Various non-statutory presumptions in the law of wills deal with this kind of situation. Circumstances have continued to change, but the presumptions, some of which are rooted in English social conventions of past centuries, have remained. The continued usefulness of the presumptions was examined in this Project.

(b) *Presumption against double portions*

The presumption against double portions assumes that parents intend to treat all of their children equally. Thus, when a will is made containing a gift to the testator's child or to someone for whom the testator stands in place of a parent, and is followed by a substantial transfer to the child, a presumption may arise that the transfer was a "portion" that is intended to reduce the child's entitlement under the will.¹⁵⁴ The presumption only applies with respect to transfers that are intended to advance the child in life.¹⁵⁵ It has been described as a weak presumption that may be easily rebutted.¹⁵⁶

The Law Reform Commission recommended in 1989 that this presumption be abrogated on the ground that it no longer conformed with prevailing attitudes to large transfers of wealth by parents to children during the parents' lifetimes. These would seldom be considered advancements intended to reduce inheritances. If this intention was present, it would be exceptional and so would usually be clearly stated. Substantial transfers of wealth might be considered loans that might possibly be forgiven later.¹⁵⁷ The Commission recommended that the presumption against double portions be replaced by a rebuttable presumption that transfers by parents to children, or to persons to whom the transferor stands in place of a parent, are intended as gifts.¹⁵⁸

154. *Lacon v. Lacon*, [1891] 2 Ch. 482 (C.A.).

155. *Ibid.* See also *Plamondon v. Czaban*, 2004 ABCA 161. But see *Wood v. Barrett*, [2003] A.J. No. 1545 (Alta. Q.B.) and *Re Pierce Estate*, [2003] N.S.J. No. 169 (S.C.), where this restriction on the operation of the presumption seems not to have been strictly adhered to.

156. *Supra*, note 47. See also *Plamondon v. Czaban*, *supra*, note 148 at para. 42.

157. Law Reform Commission of British Columbia, *Report on Wills and Changed Circumstances*, *supra*, note 12 at 23-25.

158. *Ibid.*, at 25.

When the utility of the presumption against double portions was debated by the Testate Succession Subcommittee in early 2005 in the course of this Project, arguments were advanced against it on the ground that it created uncertainty about the effect of a will. It was noted that testators do not understand that transactions during their lifetimes can affect the operation of their wills. The uncertainty created by the presumption was described as a recipe for litigation.

Between 1989 and 2005, however, concern about financial abuse of the elderly had become more prominent. Substantial transfers of wealth to children during a parent's lifetime had also become more commonplace as parents assisted their children with increased costs of housing, post-secondary education, etc. The concept of "advancements" to "establish a child in life" had begun to appear less anachronistic than when the Law Reform Commission's report was issued. A minority of the Subcommittee urged that the presumption against double portions be retained as a protection against financial abuse within families and a means of forcing the recipient to prove that a transfer of wealth did not have to be repaid.

The majority view was in favour of abrogating the presumption against double portions, however. Section 52(1) of the *Wills, Estates and Succession Act* does this, but does not replace it with any new presumption. Instead, it merely allows the gift in the will to take effect according to its terms.¹⁵⁹

(c) *Presumption of satisfaction of debt*

When a testator has incurred a debt, and makes a testamentary disposition to the creditor in an amount equal to or greater than the debt, a presumption arises that the legacy is in satisfaction of the debt.

The view of the majority of the Testate Succession Subcommittee was that this "presumption of satisfaction" merely creates uncertainty in the administration of estates and should be abrogated. If it is the testator's intention for the legacy to retire the debt, this intention should be expressed in the will. Section 52(3) of the *Wills, Estates and Succession Act* would abrogate the presumption, so that the legacy would take effect as a legacy.

159. Section 52(1) is intended to operate only on transfers that amount to gifts in law. The Canadian Centre for Elder Law Studies report *Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (CELS No. 1, BCLI No. 32) (Vancouver: The Institute, 2004) contains a recommendation at p. 28 for a statutory rebuttable presumption that a transfer by a parent to a child or grandchild is a loan repayable on demand. The loan would be recoverable by the estate and could be set off against any inheritance the debtor would receive. The recommendation is intended to reduce the potential for financial abuse within families. It reflects the concern surrounding financial abuse of the elderly that has grown more prominent since the Law Reform Commission's 1989 report urging that a presumption of gift replace the presumption against double portions.

(d) Presumption of satisfaction of legacy by gift during testator's lifetime

If a testator makes a will leaving a legacy to a particular person and then makes a gift to that person in the same amount, the gift is rebuttably presumed to revoke the legacy. This presumption too was considered by the Testate Succession Subcommittee to lead to uncertainty regarding the effect of wills. A testator wishing the gift to supplant the legacy should simply change the will.

Section 52(2) of the proposed Act would abrogate this presumption.

(e) Presumption of satisfaction of portion debts by legacies

If a parent enters into a formal obligation to advance a portion (“portion debt”) to a child, and later makes a will leaving a legacy to the child but dies before the agreement is fulfilled, a presumption arises that the portion debt is satisfied by the legacy to the child. Thus, the child is prevented from both taking under the will and enforcing the obligation. If the legacy is less than the portion debt, the portion debt is satisfied to the extent of the amount of the legacy.¹⁶⁰

The Law Reform Commission recommended that this presumption be abrogated on the same grounds as the presumption against double portions. The Testate Succession Subcommittee also believed abrogation was warranted, on the ground that an intent for a legacy to satisfy an obligation entered into during the testator's lifetime should appear from the will and not be imputed.

Accordingly, section 52(4) of the *Wills, Estates and Succession Act* abrogates this presumption.

(f) Admissibility of extrinsic evidence to prove contrary intent

The Testate Succession Subcommittee believed that abrogation of the four above presumptions should be subject in each case to a contrary intent of the testator, and that extrinsic evidence should be admissible to prove that intent. For example, extrinsic evidence could be introduced to show that the testator did intend a gift made to a child subsequent to a will to revoke a legacy to the same child. Section 52(5) of the proposed Act expressly authorizes the admission of extrinsic evidence to prove the testator's intent. This would be one of the statutory exceptions recognized by section 47(c) to the general provision confining the admission of extrinsic evidence of testamentary intent to cases of demonstrated ambiguity.¹⁶¹

160. *Lacon v. Lacon*, *supra*, note 147.

161. See, *supra*, under the heading “Extrinsic Evidence of Intent.”

3. THE DOCTRINE OF ELECTION

The doctrine of election is applied when a will contains a gift that is conditional on performance by the beneficiary of an implied obligation to give property belonging to the beneficiary to another. In order to take the benefit under the will, the beneficiary must perform the obligation. This is an example of how the doctrine operates:

A will gives beneficiary X an antique Rolls-Royce and an antique Daimler to beneficiary Y. The testator does not own a Rolls-Royce, but Y does. If Y wants the Daimler, Y must give X the Rolls-Royce or its equivalent in value.

If Y chooses to keep the Rolls-Royce, the Daimler falls into residue unless the will states otherwise.

Cases in which the doctrine is invoked usually involve a mistake by the testator, although its application does not depend on a mistake having been made. A mistake of this nature, i.e. as to what property the testator owns, cannot be rectified under the proposed rectification power, because the wording of the will would represent what the testator actually intended, though proceeding on an erroneous assumption of ownership.

The doctrine of election is an equitable one, intended to bring about a just result by preventing someone from taking the benefit of a gift with an implied condition without doing equity by complying with the condition. While it may occasionally produce a fair result, it is a confusing and anomalous feature of succession law that is applied in very rare circumstances.

The notion that testators may dispose of property they do not own goes against very fundamental principles of property law, as well as common sense. The Law Reform Commission recommended abrogation of the doctrine of election in 1989,¹⁶² and in this Project the Testate Succession Subcommittee concurred.

Section 53 of the proposed Act abolishes the doctrine of election by stating that unless an intention appears in a will that a gift is conditional on the beneficiary disposing of property the beneficiary owns, a gift in a will of property that the testator does not own is void. No obligation arises on the beneficiary from a purported disposition under the will of the beneficiary's property.

K. Gifts of Encumbered Property

Section 30(1) of the *Wills Act* creates a presumption that where there is a testamentary gift of an interest in land that is subject to a mortgage, the interest passes to the beneficiary subject to the mortgage and is primarily liable for the mortgage debt. This means that the

162. *Report on Wills and Changed Circumstances*, *supra*, note 12 at 32.

beneficiary receives only the interest net of the mortgage and the other beneficiaries' interests do not contribute to payment of the mortgage.

The operation of section 30(1) is subject to a contrary intention emerging from the will. Section 30(4) states that a general direction in the will for payment of debts out of personal estate or residue is not a sufficient indication in itself of a contrary intention.

If it were not for section 30, the mortgage debt would be part of the general debts of the estate and the interests of all the beneficiaries would contribute pro rata to paying it, although only the beneficiary receiving the land would gain the benefit. This is what happens, however, with other kinds of property in an estate that are subject to a charge.

In keeping with the objective of eliminating archaic and unwarranted differences between the treatment of real and personal property, the former Law Reform Commission recommended that the principle of section 30 be extended to both categories of property, and to any mortgages or charges that were reasonably related to the acquisition, improvement, or preservation of the property. It would be fair to let debts secured by charges not specifically relating to the particular property, such as a general security over the testator's assets, to be borne as debts of the estate with all interests contributing to their payment, however.

In this Project, the extension of section 30 to personal property was debated at length. It was noted that while the extension had a theoretical appeal from the standpoint of fairness among beneficiaries, it would require the personal representative to inquire into the origins of all debts and security on estate assets to determine how it affects various beneficial interests. This imposes a fairly onerous burden on personal representatives and those advising them. In addition, some forms of security on intangibles such as shares may be difficult to categorize.

Ultimately, a majority consensus emerged that a new provision based on the principle underlying section 30 of the *Wills Act* should extend only to *registered* charges on real and *tangible* personal property to the extent of the indebtedness relating to the acquisition, preservation or improvement of the asset.

That new provision is section 56 of the proposed *Wills, Estates and Succession Act*. It applies only to charges registered under the *Land Title Act*¹⁶³ or *Personal Property Security Act*¹⁶⁴ that secure credit extended for the purposes of acquiring, improving or preserving the land or tangible personal property in question. The property passes subject to primary liability only to the extent of the portion of the debt incurred for those purposes.

163. R.S.B.C. 1996, c. 250.

164. R.S.B.C. 1996, c. 359.

L. Lapsed Gifts

Gifts may fail because the beneficiary has predeceased the testator, does not meet a condition or qualification the testator has placed on the gift, or refuses the gift. If the testator has not named an alternate beneficiary, the gift will be distributed to statutorily defined alternate beneficiaries.

Under current law, a gift to a child or a sibling of the testator will not lapse if the predeceasing beneficiary leaves issue or a spouse alive at the testator's death. If there are issue, the gift passes to them. In the absence of issue, the gift passes to the spouse.

Otherwise, the gift will fall into the residue of the estate. If the gift is already a gift of residue, it will fall to be distributed to those entitled on intestacy instead of an alternate named beneficiary. Another problem arises when the testator has named an alternate beneficiary but the gift fails for a reason other than the reason(s) specifically contemplated by the testator. In this event, the gift passes as if the testator did not name an alternate beneficiary. This may result in unnecessary intestacies, and work to defeat genuine testamentary intentions.

The proposed legislation deals with these problems under a new section dealing with lapsed gifts. Under section 50 of the proposed Act, failed gifts, including gifts of residue, are distributed to:

- (a) the alternative beneficiary of the gift, if any, whether or not the gift fails for a reason other than one specifically contemplated by the testator,
- (b) the issue of the predeceasing beneficiary *per stirpes*, where the beneficiary is a sibling or issue of the testator, and
- (c) the surviving residuary beneficiaries, if any, in proportion to their interests.

Treating failed residuary gifts in this manner, i.e. allowing alternative beneficiaries to take, rather than letting them pass on intestacy, is a change in the law.

The spouse of a predeceasing beneficiary who leaves no issue currently may take, but has been deleted from the list of those who can take on default in the proposed provision. This is because it is unusual for in-laws to be included in a will. The sense of this among practitioners is that if in-laws are to take, they should be chosen expressly rather than being included in the statutory list of those who take by default.

Apart from the exclusion of the spouse of a predeceasing beneficiary as an alternate taker, section 50 of the proposed Act corresponds closely to the provision recommended by the

former Law Reform Commission in the 1989 *Report on Wills and Changed Circumstances*.¹⁶⁵

The provision applies whether the beneficiary died before or after the will is made, as the testator may not have a means of knowing whether a named beneficiary is alive or not at the time the will is made.

The issue of a beneficiary who predecease the testator are to be ascertained at the time of the testator's death. This is thought to be more convenient and logical, rather than ascertaining them as of the death of the beneficiary.¹⁶⁶

M. Ademption

Specific legacies are gifts of a particular item. If the testator no longer owns that item at the time of death, the law presumes that the testator intended to revoke the legacy. The gift is said to adeem, and the beneficiary has no claim against the estate. Ademption occurs whether the divestiture of the bequeathed item is voluntary or involuntary. While it can have harsh results, the Testate Succession Subcommittee declined to recommend change, except in one respect, believing that testators must have full control over their property during their lifetimes regardless of the testamentary effects.

With respect to involuntary ademption, the Subcommittee considered a provision in the Ontario *Substitute Decisions Act*¹⁶⁷ declaring that a property disposition by an adult guardian or attorney acting under an enduring power of attorney while the testator is mentally incapable does not result in ademption. This result is warranted, because under the circumstances addressed by the provision, an intention to revoke a testamentary disposition cannot be ascribed to the testator.

The Subcommittee concluded that a similar provision should be enacted in British Columbia. Section 51 of the *Wills, Estates and Succession Act* provides that where property that is the subject of a testamentary gift is disposed of by an attorney acting under an enduring power of attorney, a property guardian or statutory property guardian,¹⁶⁸ or a representative

165. *Supra*, note 12 at 46.

166. This was a recommendation of the Manitoba Law Reform Commission, *supra*, note 111 at 40. The Testate Succession Subcommittee agreed.

167. S.O. 1992, c. 30, s. 36(1).

168. Terminology used in the *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006* (Bill 32) has been retained in the proposed *Wills, Estates and Succession Act* as Bill 32 was expected to pass until shortly before this Report was issued. The term "property guardian" corresponds to the term "committee" under the current *Patients Property Act*, R.S.B.C. 1996, c. 439.

acting under section 7 or 9 of the *Representation Agreement Act*,¹⁶⁹ the beneficiary is entitled to receive from the estate an amount equivalent to the proceeds of the disposition. The provision does not apply if the disposition was to carry out instructions of the testator given when the testator had mental capacity.

N. Abatement

Abatement occurs when gifts fail because the estate is of insufficient size to meet all the gifts in a will after the testator's debts and the expenses of administration are paid.

Testamentary gifts are classified as specific, general and demonstrative. A specific gift is a gift of a particular item. A general gift is of a type of property, commonly money, but not from any particular source. A demonstrative gift is a gift of money to be paid from a specific source.

Archaic common law rules govern the order in which gifts abate. For historical reasons, a gift of land is always classified as a specific gift, even if it is included in the residue of the estate. Under current law, the residue of the estate always abates first, and land always abates last, even if it is included in the residue. Even if a testator charges real property with the payment of a debt, the will must expressly exonerate personal property or it must be exhausted first before any of the real property is applied in payment of the debt.

The order of abatement may work to defeat testators' intentions if they do not understand the principles that govern how their gifts will be distributed. A testator may intend a gift of residue to be the major gift, not realizing that it will abate before a specific legacy to an unrelated individual. The result is that more important beneficiaries are left out. A testator may intend to benefit two individuals equally, leaving a general legacy to one and a demonstrative legacy to the other. If they do not realize that the general legacy will abate first, their testamentary intent will be defeated.

Archaic distinctions made between realty and personalty should be eliminated for abatement purposes, as should a number of the groundless distinctions between the categories of legacies. A new order of abatement is set out in section 54(4) of the proposed Act:

- (a) property specifically charged with a debt or left on trust to pay a debt,
- (b) property passing on intestacy and residue,
- (c) general, demonstrative and pecuniary legacies,
- (d) specific legacies,
- (e) property over which the deceased had a general power of appointment.

169. R.S.B.C. 1996, c. 405.

Section 54(2) also abolishes the rule requiring express exoneration of personal property in order to make real property liable for debts. It states that real property charged by a testator with payment of debts or pecuniary gifts is to be primarily liable for the debts or gifts, despite the failure of the testator to expressly exonerate personal property.

O. Conflict of Laws

1. FORMAL VALIDITY

When a will is made in a form valid in one jurisdiction, but not in another, and the testator has a connection with both jurisdictions, questions of choice of law arise. Section 40 of the *Wills Act* provides that a will made outside British Columbia shall be treated as formally valid with respect to movable property if it is in accordance with the law of the place where it was made, where the testator was domiciled at the time the will was made, or the testator's domicile of origin.

In furtherance of the same policy of upholding wills wherever possible, the list of legal systems under which formal validity potentially could be upheld has been greatly expanded in section 58(1) of the *Wills, Estates and Succession Act* to include connecting factors such as the testator's domicile at the time of death, the testator's habitual residence, the country of the testator's nationality, the location (*situs*) of the property, and the law of the forum (British Columbia). These connecting factors would apply equally to the formal validity of wills of movables and immovables.

Section 58(2) of the proposed Act would allow the court to take into account a change in the foreign law occurring after the execution of the will if it would have the effect of upholding the will. This is a change from present law, which limits the court to considering the effect of foreign law at the time the will was made.

A further change is to apply the same rules regarding formal validity to wills made within or outside of British Columbia. Currently the rules in section 40 of the *Wills Act* apply only to wills made outside the province.

An instrument revoking a will would be formally valid if it conformed to the requirements of any of the legal systems by reference to which the will that it purports to revoke could be upheld.

2. ABOLITION OF RENVOI

The doctrine of *renvoi* comes into play in will-related cases because it is often necessary to refer to foreign law to determine if a will is valid. Dispositions of movables are governed by the law of the testator's domicile at death, while dispositions of immovables are governed by the law of the place where the immovable is situated. If the choice of law rules of the forum direct the court to the law of the domicile, and the choice of law rules of the domicile direct the court back to the forum, this is a *renvoi*.

If the foreign choice of law rules point to a third country's system of law, this is also a *renvoi* but sometimes referred to as a transmission. The forum may either accept the *renvoi* and apply its own law to the matter before it or reject it and put itself in the position of the court of the testator's domicile applying the entirety of its law, including its conflict of law rules. This is sometimes known as double *renvoi* or the foreign court principle.

There is no one theory of *renvoi* that is clearly applicable in Canada. The doctrine is unsettled and confusing. If the list of legal systems to which a court can look for a basis on which to uphold the formal validity of a will is simply expanded, there is no longer a need for *renvoi*, because the doctrine was employed to bring cases under a system of law where testamentary dispositions could be upheld as valid. This was the solution recommended by the former Law Reform Commission,¹⁷⁰ and it has been accepted as a recommendation of this Project.

Section 57(2) of the proposed *Wills, Estates and Succession Act* accordingly provides that a reference to foreign law required by Division 5 (Conflict of Laws) is a reference only to the internal law of the foreign jurisdiction and not its conflict of laws rules. This provision would have the effect of abolishing the doctrine of *renvoi* in the law of wills in this province.

P. Convention Providing a Uniform Law on the Form of an International Will

It is recommended that British Columbia implement the *Convention Providing a Uniform Law on the Form of an International Will*, to which Canada acceded in 1977. All Canadian provinces except British Columbia and Quebec have done so. The Convention has been signed, ratified or acceded to by approximately 20 countries.

The Convention provides an additional means by which a will may validly be made in British Columbia, and obtain recognition abroad. It does not displace or interfere with the operation of the domestic law of wills in British Columbia.

Lawyers and notaries public would be designated as "authorized persons" for the purposes of signing the certificate that must be attached to Convention wills. The dispensing power would extend to a defectively executed Convention will for the purpose of securing admission to probate here, although the exercise of the dispensing power would not validate the will for purposes of recognition outside British Columbia.

The Convention is reproduced as a schedule to the proposed *Wills, Estates and Succession Act*.

170. *Report on the Making and Revocation of Wills*, *supra*, note 12 at 101.

Q. Areas Examined In Which No Change Is Currently Recommended

1. UNDUE INFLUENCE

A transfer of property that results from undue influence will be set aside whether it takes effect on death as a gift under a will (a testamentary transfer), or during the life of the giver or transferor (an *inter vivos* transfer). For reasons that are almost purely historical, however, the law of undue influence applies differently in connection with testamentary transfers than in relation to *inter vivos* ones.¹⁷¹ When a term of a will or the entire will is challenged on the basis of undue influence, the challenger always has the onus to prove that undue influence was actually exercised. The influence exerted must amount to coercion to the extent of “overwhelming the disposing mind” and result in a will that does not represent the testator’s true wishes.¹⁷²

When undue influence is alleged in connection with an *inter vivos* transfer, the onus shifts to the defender of the transfer to rebut a presumption of undue influence once it is shown that the person benefiting from the transfer and the transferor were in a relationship in which the potential for dependence and domination of the transferor is present. Some relationships will always give rise to a presumption of undue influence, including those of parent and minor child, solicitor and client, and guardian and ward. Other kinds of relationships may do so, particularly ones involving confidence or reliance. The degree of domination or coercion that suffices to have an *inter vivos* transfer set aside is said to be less than that required to set aside a testamentary gift.

In the course of the Project an intense debate took place regarding whether the principles and presumption respecting *inter vivos* dispositions of property should be applied in cases of alleged undue influence in relation to wills. Arguments in favour of applying the *inter vivos* principles were that this would provide greater protection for genuine testamentary wishes, protect the growing proportion of older adults living in a state of dependence from exploitation, and place the onus to show that a will expresses the testator’s genuine testamentary intent on the party who is more likely to have knowledge of the actual facts surrounding the will, and thus is in the best position to discharge the onus. It would be necessary to raise a *prima facie* case for a claim based on undue influence regardless of the nature of the relationship between testator-beneficiary or donor-donee.

171. The difference between the testamentary and *inter vivos* principles of undue influence stems from the different jurisdictions of the ecclesiastical courts (and later the Court of Probate) on one hand and the Court of Chancery on the other. Different protective doctrines developed in each court at different times. The ecclesiastical courts were concerned with protecting the integrity of the will. The Court of Chancery, which originally had no jurisdiction over wills, was concerned with protecting vulnerable individuals from exploitation. The two doctrines later came to be referred to by the same term, *undue influence*. See Winder, “Undue Influence and Coercion” (1939) 3 Mod. L.R. 97 at 104.

172. *Hamilton v. Sutherland*, [1992] 5 W.W.R. 151 at 163 (B.C.C.A.).

The counter-argument raised was that the category of persons who would potentially have the onus to prove that undue influence was not exerted would be those who would normally be expected to benefit under a will, such as a child or other close relative who has cared for the testator in advanced age. The law would then encourage internecine discord and litigation in testators' families.

Ultimately the Project Committee was equally divided as to whether the recommendation from the Testate Succession Subcommittee to replace the testamentary doctrine of undue influence with the *inter vivos* principles should go forward. The Project Committee considered a compromise that would have applied the *inter vivos* rules except that no presumption of undue influence could be raised against a child or other issue of the testator. This did not find favour, because other relatives could also be natural objects of the testator's bounty. As a result of the equal division in the Project Committee, no recommendation to change the testamentary doctrine of undue influence is advanced here.

2. INCIDENCE OF TAX LIABILITY CONSEQUENT ON AN RRSP OR RRIF PAYOUT

Under current law, the estate of a deceased is liable for taxes attributable to the disposition of non-probate assets such as RRSPs and RRIFs. These assets can carry significant tax liability, but the designated beneficiary receives the proceeds, while the tax liability occasioned by the payout is a debt of the estate and the burden of it falls on the estate beneficiaries.

The Testate Succession and Alternate Succession Vehicles Subcommittees discussed this feature of present law, but decided against recommending a change. It was noted that while some testators may not realize that RRSP designations will result in tax to the estate, others deliberately arrange their affairs so that the estate will pay the tax. Inasmuch as the law as it stands is being used as a planning technique, the Subcommittees were unwilling to disturb it.

3. MUTUAL AND JOINT WILLS

The doctrine of mutual wills involves an agreement between two testators that they will each execute wills disposing of their property in a specific way. If the testator who dies first has not revoked or altered a will in breach of the terms of the agreement, the doctrine operates to provide a remedy should the surviving testator breach the agreement by revoking or altering that testator's will. The remedy takes the form of a resulting trust in favour of the agreed upon beneficiaries. The trust is enforceable against the personal representative of the second testator.

The Testate Succession Subcommittee noted that the difficulty in the area of mutual wills is usually in relation to evidence and considered the introduction of evidentiary requirements for mutual and joint wills, as well as their abolition. The Subcommittee concluded that it would not be feasible to delineate a rule that would deal adequately with all circumstances,

and abrogating the doctrine would do more harm than good. No recommendation for change in the existing law regarding mutual and joint wills emerged from the discussions.

4. REGISTRATION OF WILLS NOTICES

Under current law, the registration of wills is optional, although a wills search is mandatory prior to an application for a grant of probate. The registry records that there is a will, the date of execution, and its location. The registry does not keep a copy of the will.

The Subcommittee considered the suggestion that registration should be compulsory and free, with an increased search fee to cover the shortfall in revenue that would result from this change. Ultimately, however, no recommendation for change to the existing scheme emerged. The registration provisions in Part 2 of the current *Wills Act* have been carried forward into Part 3 (Testate Succession) of the proposed *Wills, Estates and Succession Act* essentially unchanged.

IV. DEPENDANTS RELIEF: THE *WILLS VARIATION ACT*

A. General

Since the advent of dependants relief legislation, testamentary freedom has been less than an absolute value. It is subject to a concomitant duty on the part of a testator to provide for the testator's spouse and dependants. If the testator fails in this, a court may interfere with the testator's will to the extent necessary to discharge this duty.

British Columbia's *Wills Variation Act* (WVA) was originally enacted as the *Testators' Family Maintenance Act*¹⁷³ in 1920. It provides that if a will does not make "adequate provision" for the "proper maintenance and support" of a testator's "spouse or children," the Supreme Court may order that "adequate, just and equitable" provision be made out of the estate.

The Act does not limit eligibility to minor or dependant children. Thus, the courts have had to determine what award, if any, is adequate, just and equitable in the context of a self-sufficient adult child.

When the original legislation was passed, the then Attorney General described the Act as "one of the links in the government's chain of social welfare legislation" that would "tend towards the amelioration of social conditions within the province."¹⁷⁴ This language points to economic need as the justification being advanced for interfering with testamentary freedom. Yet, since *Walker v. McDermott*¹⁷⁵ in 1931, the WVA has been interpreted in a much more expansive fashion, acting, in effect, as a means of preventing disinheritance.

In *Walker v. McDermott*, the BC Supreme Court rejected the need-based approach and laid down the principle that the court must "proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty." In *Tataryn v. Tataryn Estate*, the Supreme Court of Canada conclusively settled the proper interpretation of the Act as taking into account both legal and moral obligations of the testator.¹⁷⁶ Legal obligations are determined with reference to what the law would impose should the question of provision for the claimant arise during the life of the testator.¹⁷⁷ Moral obliga

173. S.B.C. 1920, c. 94.

174. Quoted in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 813.

175. [1931] S.C.R. 94, reversing 42 B.C.R. 184.

176. *Supra*, note 174 at pp.820–821.

177. In respect of a spousal claimant, the *Tataryn* interpretation of the Act recognizes and gives effect to the spouse's prima facie entitlement to an equal interest in family assets under Part 5 of the *Family Relations Act* had the marriage been dissolved while both spouses were alive. The spouse should receive

tions are determined with reference to what a judicious person would do in the light of contemporary community standards.

A competing but weaker line of authority focusing on the extent of the claimant's need was rejected. Thus, the ability to disinherit a self-sufficient adult child is largely precluded in British Columbia in the absence of factors negating a moral obligation on the part of the testator. This result is anomalous. In most other Canadian jurisdictions, an adult other than a spouse must demonstrate an inability to earn a living due to illness or mental or physical disability. Nevertheless, the WVA has vocal defenders, who argue the "clear need for such legislation."¹⁷⁸ Its detractors, on the other hand, have called it "a diluted and whimsical form of forced heirship."¹⁷⁹

B. Review of the *Wills Variation Act* by the Former Law Reform Commission

In 1983 the Law Reform Commission of British Columbia published its *Report on Statutory Succession Rights*,¹⁸⁰ which contained a review of the WVA. The Report discusses both the categories of eligible claimants and the factors to be considered in evaluating claims. The Commission concluded that the *Wills Variation Act* should be extended to intestacies, but that the Act was otherwise satisfactory. Fundamental reform was considered unnecessary.

The Commission's conclusions were not unanimous, however. The Report contains a strong reservation in favour of testamentary freedom.¹⁸¹ The reservation rejects moral obligation as a basis for the exercise of the court's jurisdiction in favour of an adult self-sufficient child. The moral obligation approach creates uncertainty and leads to needless litigation. The approach requires courts to pronounce on matters of individual conscience, and permits claims to be brought against a testator's estate that could not have been brought against the testator while alive.

from the estate at least what he or she would have received upon dissolution of the marriage, subject to the size of the estate and other legitimate claims on it.

178. R. Trevor Todd, "A Tribute to the *Wills Variation Act*" *The Verdict* (October 2005) at 16.

179. Leopold Amighetti, *The Law of Dependant's Relief in British Columbia* (Calgary: Thompson Professional Publishing, 1991) at 28.

180. *Supra*, note 12.

181. *Supra*, note 12 at 152.

The Supreme Court of Canada, in *Tataryn*, cited the minority reservation,¹⁸² but ironically as support for the court's conclusion upholding the interpretation of the Act that requires the court to assess the testator's moral duty towards the claimant.

The *Wills Variation Act* remains largely as it was when originally enacted in 1920, except for stylistic modifications and an extended definition of "spouse" that now includes common law and same-sex spouses. The position of the self-sufficient adult child has remained controversial.

C. Proposed Reform of the *Wills Variation Act*

1. APPLICATION TO INTESTACY

Dependants relief legislation applies to intestacies in all Canadian jurisdictions other than British Columbia and Nova Scotia. While dependants relief orders appear to be made rarely in intestacies, variation of the intestate distribution scheme in a case of need is consistent with the purposes of the legislation. It is also perverse to allow dependants relief legislation to be avoided by deliberately dying intestate, in the knowledge that the resulting distribution would be unjust and could not be varied.

Part 5 (Dependants Relief) of the proposed *Wills, Estates and Succession Act* would extend to intestacies.

2. ELIGIBILITY TO CLAIM RELIEF

(a) *Spouses and minor children*

No dispute arose in the course of the Project that surviving spouses and minor children should continue to have unrestricted rights to claim relief under the WVA or its equivalent.

(b) *Adult non-spousal claimants*

Currently there is no restriction on the eligibility of a child over the age of majority to claim relief under the WVA. This is markedly different from the position of an adult non-spousal claimant under dependants relief legislation in most other Canadian jurisdictions. Generally, an adult claimant other than a spouse must demonstrate an inability to earn a living due to illness or mental or physical disability in order to obtain relief against the terms of a will or an intestate distribution scheme.¹⁸³

Intense and lengthy debate took place in both the Intestate Succession, *Wills Variation Act* and *Family Relations Act* Subcommittee and the Project Committee on the question of

182. *Supra*, note 174 at para. 29.

183. See *Dependants Relief Act*, R.S.A. 2000, c. D-10.5, s. 1(d)(iv) "dependant"; *Dependants' Relief Act*, S.S. 1996, c. D-25.01, s. 2(1)(c); *Dependants Relief Act*, C.C.S.M. c. D37, s. 1(d)(ii) ("dependant").

whether British Columbia should harmonize its dependants relief legislation with prevailing standards in the rest of Canada by excluding self-sufficient adults other than a spouse from the class of eligible claimants. The Subcommittee was ultimately divided. A majority favoured confining eligible adult non-spousal claimants to those unable to be self-supporting because of physical or mental incapacity or special need. A minority of the Subcommittee members favoured no change in the eligibility of adult claimants.

The Project Committee unanimously favoured restricting adult non-spousal claimants to those unable to become self-supporting because of illness, mental or physical disability, or other special circumstances.¹⁸⁴ These criteria comport with those found in the dependants' relief statutes of most other Canadian jurisdictions. The Project Committee also considered that temporary inability to be self-supporting after attainment of majority due to full-time enrollment in an educational or vocational training program should be a further criterion of eligibility. This is the recommendation that has ultimately gone forward from this Project concerning adult non-spousal claimants. They are reflected in the definitions of "special circumstances child" and "student claimant" in section 83 of the proposed *Wills, Estates and Succession Act*.

(c) Minor stepchildren as eligible claimants

The current WVA does not allow stepchildren to claim under the Act. In light of the recommended shift described below in the nature of relief awarded to non-spousal claimants from an award consisting of a share of the estate to an award based on maintenance and the relief of demonstrated need, however, the Project Committee considered that it would be difficult to justify the continued exclusion of minor stepchildren who had been recently maintained by the deceased. It was also thought another reason that only stepchildren who have received support from the deceased in the recent past should be eligible for relief is so that an estate is not burdened with claims based on a tenuous link with the deceased through a prior spousal relationship between the deceased and the claimant's natural parent.

Whether stepchildren should be able to seek relief after the age of majority on the same basis as biological children was debated by the Project Committee at some length. The consensus that emerged was that the nature of the expectations in a stepparent and stepchild relationship after majority differ from those stemming from the relationship between natural parents and their biological children, and that the legislation should reflect this difference. It was not seen as discriminatory, therefore, to restrict eligibility to minor stepchildren.

184. The criterion of "other special circumstances" was inspired in part by the definition of "dependant" in s. 1 of Saskatchewan's *Dependant's Relief Act*, 1996, S.S. 1996, c. D-25.01 ("by reason of need or other circumstances, he or she ought to receive a greater share of the deceased's estate...").

It is therefore recommended that stepchildren be eligible to claim relief if they were supported by the deceased for at least one year immediately before the deceased's death and remained minors at the time of death. These criteria are reflected in the definition of "eligible stepchild" in section 83 of the proposed Act.

3. NATURE OF RELIEF

(a) *The surviving spouse*

The principles enunciated by the Supreme Court of Canada in *Tataryn v. Tataryn Estate* governing awards to surviving spouses under the *Wills Variation Act* call for the court to look first towards the legal obligations owed by the deceased during life to the spouse, which find their sources in family law, family property legislation, and the law of constructive trust, and then towards moral obligations. The minimum will normally be what the spouse would have received if the spouse and the deceased had separated while both were still alive, namely the value of maintenance and an equal share in the family assets. An "adequate, just and equitable" award will take into account the circumstances and need for financial independence of the surviving spouse and the contribution the surviving spouse has made to the accumulation of the family's wealth.¹⁸⁵

No dissatisfaction with these principles was expressed in the deliberations of the Subcommittee or the Project Committee, and therefore no recommendation for altering them is made. The basis for relief to surviving spouses under Part 5 of the proposed *Wills, Estates and Succession Act* continues to be expressed as "adequate, just and equitable" provision out of the estate.¹⁸⁶ The existing jurisdiction to award a lump sum, periodic or other payment and to secure the award or direct the creation of a trust, is carried forward.¹⁸⁷

(b) *The non-spousal claimant*

In contrast to the case of a spouse, who has an entitlement under the law of matrimonial property to an interest in family assets, and who typically will have contributed to the wealth of the family unit and indirectly to the deceased's estate, the claim of a child against the parent's estate must have another basis. In the case of minor children, a parent while alive has a statutory obligation of support.¹⁸⁸ There is no corresponding legal obligation resting on the parent to support a child after the age of majority, and the claim of an adult child against the deceased's estate can only be predicated on moral obligation.

185. *Supra*, note 174 at 824 cited to S.C.R.

186. Part Two, proposed *Wills, Estates and Succession Act*, s. 83 definition of "adequate provision."

187. *Ibid.*, s. 87.

188. *Family Relations Act*, *supra*, note 42, s. 88(1).

If an inability to be self-supporting is the eligibility criterion for the minor child and, as recommended here, also for the adult child, the form of relief available should correspond to this criterion. The “adequate provision” that is awarded should be in the form of periodic maintenance payments, rather than a share of the estate. Section 88 of the proposed Act limits the court’s jurisdiction in making an order in favour of a non-spousal claimant to maintenance in the form of periodic payments, although there is provision for the maintenance to be financed or secured by payment of a lump sum out of the estate.

Section 88(2) of the proposed Act sets out a non-exhaustive list of factors for consideration in fixing the amount and the duration of maintenance payments. The concepts of “moral obligation” and “fair share” are expressly excluded from consideration as the Project Committee considered these to be incompatible with an award based on circumstances of actual need.

4. WAIVER

Under current law, it is not possible to waive the protection of the WVA. A matrimonial or domestic contract containing a term that no claim will be made under the Act is, however, a matter that can be taken into consideration by the court in deciding whether an order granting relief should be made.¹⁸⁹ A settlement agreement between a parent and child containing such a term may also be given weight.¹⁹⁰

The reason why courts have held that rights under the WVA cannot be waived is that the WVA is legislation in the public interest, intended to prevent dependants of a deceased person from becoming a public charge.¹⁹¹ Some members of the Intestate Succession, *Wills Variation Act* and *Family Relations Act* Issues Subcommittee and the Project Committee continued to favour the existing prohibition on contracting out of the WVA for this reason.

The majority of the Subcommittee and Project Committee, however, favoured an ability to waive the benefit of dependants relief legislation as being consistent with the general movement towards the enforcement of freely negotiated arrangements between spouses. As more substantial matrimonial property rights can be surrendered, WVA rights should be capable of waiver as well. It is thought that spouses in particular should have the ability to plan their financial affairs flexibly, and freedom to contract out of the WVA is conducive to this.

Section 84 of the proposed Act accordingly allows an eligible claimant to irrevocably waive the right to claim relief under the Act, subject to the usual legal and equitable doc-

189. *Boulanger v. Singh* (1984), 59 B.C.L.R. 383 (C.A.).

190. *Comeau v. Mawer Estate* (1999), 25 E.T.R. (2d) 276, [1999] B.C.J. No. 26.

191. *Re Lewis Estate* (1935), 49 B.C.R. 386 (C.A.).

trines applicable to waivers and releases, including duress, unconscionability and fraud. An important feature of this provision is the exception it creates to the doctrine of privity of contract. It confers the ability on a beneficiary or person entitled to share on intestacy the ability to enforce a waiver of the WVA against the waiving party.

5. ANTI-AVOIDANCE PROVISIONS

In order to avoid the WVA, it is open to a testator to transfer assets during life, or to place wealth in non-probate assets, such as life insurance policies and retirement savings plans. These assets do not form a part of the estate, but pass directly to the named beneficiary. Anti-avoidance mechanisms in some Canadian dependants relief legislation include the concept of a notionally enlarged estate comprising the value of the non-probate assets,¹⁹² and some include clawback provisions under which wealth transfers effected for the purpose of disinheriting an eligible claimant may be reversed.¹⁹³

The Intestate Succession, *Wills Variation Act* and *Family Relations Act* Issues Subcommittee initially concluded that there was no need for anti-avoidance measures if a surviving spouse could elect within a limited time after the death of the other spouse to exercise the right to a division of family assets on the basis of Part 5 of the *Family Relations Act*. Consultation with the family law Bar, however, led to the conclusion that there are too many difficulties in the way of introducing such an election under British Columbia's current matrimonial property regime in Part 5 of the *Family Relations Act*.

Once the proposal for a post-mortem spousal election was abandoned, anti-avoidance provisions were revisited. Provisions similar to those in the Ontario *Succession Law Reform Act*¹⁹⁴ and other Canadian statutes involving the inclusion of the value of asset dispositions by the deceased in a notional estate and clawback powers were reviewed. These, however, were thought by the Project Committee to be overly intrusive.

Ultimately, a provision was conceived that operates by analogy to the *Fraudulent Conveyance Act*.¹⁹⁵ This provision treats transactions by the deceased conferring a benefit on a second person with the intent to defeat rights under the dependants relief provisions of Part 5 as voidable at the instance of eligible claimants whose rights are or could be diminished by them. It does not apply to transactions entered into by the second person in good faith,

192. *Succession Law Reform Act*, *supra*, note 40, s. 72. *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7, ss. 19, 20; *Dependants Relief Act*, R.S.Y. 2002, c. 44, ss. 20, 21.

193. *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7, ss. 19, 20; *Dependants Relief Act*, R.S.Y. 2002, c. 56, ss. 20, 21.

194. *Supra*, note 40.

195. R.S.B.C. 1996, c. 163.

for valuable consideration, and without notice or knowledge of the deceased's purpose at the time of the transaction.

A court could make any order in respect of a transaction voidable under this provision that it could have made under the *Fraudulent Conveyance Act*. These could include making the property involved in the transaction subject to seizure and sale to satisfy an order giving relief under the Act to an eligible claimant,¹⁹⁶ declaring the property is held in trust for the purpose of satisfying the order,¹⁹⁷ ordering that the amounts payable under the order form a charge on the property,¹⁹⁸ or directing a judicial sale.¹⁹⁹

6. PROCEDURAL REFORMS

(a) *Time for service of writ*

Currently an eligible claimant has one year from the commencement of an action under the WVA within which to serve the writ of summons on the personal representative.²⁰⁰ This places personal representatives at risk if they distribute after the six month period but before the time for service has expired. While the new automated civil registry system (CEIS) alleviates the problem to some extent by allowing a province-wide search for actions against an estate, a legal solution is still desirable inasmuch as the problem stems from a legal loophole.

It is recommended that a writ of summons in an action for relief under the dependants relief provisions replacing the WVA should have to be served on the personal representative within 30 days after the expiration of the 6 month limitation period running from the grant of probate or administration. A personal representative who has not been served and who has had no notice of any dependants relief action should be free from liability for distributing at the end of 30 days following the 6 month limitation period.

196. *Vern-View Investments Inc. v. Hale* (1991), 58 B.C.L.R. (2d) 322 at 328 (C.A.).

197. *Bernard v. Weiss* (1986), 70 B.C.L.R. 318 (S.C.).

198. *Viva Developments Inc. v. Icarus Properties Ltd.*, 2004 BCSC 1176. Retransfer should not be ordered because the transaction is only void as against the eligible claimant and not as between the original parties: Law Reform Commission of British Columbia, *Report on Fraudulent Conveyances and Preferences* (LRC 94) (Vancouver: The Commission, 1988) at 63-64; Lyman R. Robinson and R.C. Di Bella, *British Columbia Debtor-Creditor Law and Precedents*, looseleaf (Toronto: Carswell, 1993) at 10-50. Retransfer has occasionally been ordered in proceedings pursuant to the *Fraudulent Conveyance Act*, however: see *Murphy v. Barr* (1921), 61 D.L.R. 343 (B.C.C.A.); *Solar v. Kovacs* (1993), 86 B.C.L.R. (2d) 94 (S.C.).

199. See Supreme Court Rule 43(1).

200. Supreme Court Rule 9(1).

As it might be difficult to effect service in exceptional cases, for example if a personal representative is evading service, the court should have a discretion to extend the time for service. This would not affect the immunity of the personal representative if distribution takes place before the personal representative has notice of an action under Part 5 of the proposed Act having been commenced. An eligible claimant in whose favour an order for relief under Part 5 is made would be able to pursue estate assets in the hands of the persons to whom they have been distributed for the purpose of satisfying the order.

Sections 86(1)(b) and 139 of the proposed *Wills, Estates and Succession Act* implement these recommendations.

(b) Effect of second grant of probate or administration on limitation period

Section 3(1)(a) of the WVA, respecting the limitation period for the commencement of an action under the Act, does not specify whether the limitation period starts anew if a grant of probate is revoked and a new grant is issued, although there are *dicta* to this effect.²⁰¹

The Subcommittee agreed that a prior grant of probate (or administration) becomes a nullity when a second grant is made. The limitation period under the Act therefore recommences on the issuance of the second grant.

(c) Interim orders

The former Law Reform Commission recommended that courts should have the power to make interim orders where a claimant is in immediate need of financial assistance.²⁰² Dependents' relief legislation in both Manitoba²⁰³ and Ontario,²⁰⁴ as well as the *Uniform Dependents' Relief Act*,²⁰⁵ expressly allow interim orders.

The Subcommittee noted that cases in which an interim order would be called for would be quite rare. In British Columbia, courts have made interim orders in WVA cases without specific reference to statutory authority.²⁰⁶ The Subcommittee agreed that there should be

201. *Shaw v. Reinhart*, 2004 BCSC 588.

202. *Report on Statutory Succession Rights*, *supra* note 12 at p. 68.

203. *Dependents Relief Act*, *supra* note 183.

204. *Succession Law Reform Act*, *supra* note 40.

205. Uniform Law Conference of Canada, 1974, s. 19(2).

206. *Penty (Guardian ad litem of) v. Penty Estate*, [1994] B.C.J. No. 2849 (S.C.); *Hecht v. Hecht*, [1990] B.C.J. No. 1983 (S.C.).

an express power to make an interim order for relief and to review and vary an interim order. Section 85(7) of the proposed Act provides this power.

(d) Certificates of pending litigation

Section 4(2) of the WVA appears to make it mandatory to file a certificate of pending litigation in the land title office in every action under the Act. In practice, this is done only if the plaintiff is seeking to obtain the property.

The provision allowing filing of a certificate of pending litigation should be permissive, as in other forms of litigation. Section 86(4) provides a certificate of pending litigation *may* be filed by an eligible claimant.

(e) Consent to early distribution

It is recommended that a consent by an eligible claimant to the distribution of any part of an estate earlier than 6 months from the grant of probate or resealing must be in writing. Section 92(1)(a) of the proposed Act specifies that a written consent is required.

(f) Suspensory orders

The Subcommittee and Project Committee agreed that a court should have the discretion to suspend the administration of an estate, if necessary, to protect the rights of eligible claimants. In the proposed *Wills, Estates and Succession Act*, the power is found in section 89(1).

(g) Appeals

Section 15 of the WVA provides for appeals to the Court of Appeal by persons prejudicially affected by orders made under the Act. This section has been interpreted to confer a very broad standard of review, authorizing the appellate court essentially to decide the matter anew and substitute its own exercise of discretion for that of the trial court,²⁰⁷ rather than employing the narrower standard of review normally applicable on appeals from discretionary orders.²⁰⁸

207. *Swain v. Dennison*, [1967] S.C.R. 7 at 361; *Price v. Lypchuk* (1987), 11 B.C.L.R. (2d) 371 at 377-378 (S.C.).

208. The usual principles governing appeals from discretionary orders were enunciated in *E.R. v. K.H.T.*, [1996] B.C.J. No. 2208 at para. 15, citing *Pelech v. Pelech*, [1987] 4 W.W.R. 481 (S.C.C.); the appellate court should not interfere with the trial decision unless the reasons disclose material error, which would include significant misapprehension of the evidence, error in principle, or the final award being clearly wrong. In the absence of material error, the appellate court has no independent discretion to decide the issue afresh.

In the opinion of the Project Committee, the standard of review employed in WVA cases is overly broad and encourages unmeritorious appeals. If the section were repealed, there would still be a right of appeal by virtue of section 6(a) of the *Court of Appeal Act*.²⁰⁹ It is recommended that section 15 be repealed and be replaced by the general grant of appellate jurisdiction under section 6(a) of the *Court of Appeal Act*, in the expectation that this would lead to appeals in dependants relief cases being decided on the basis of the normal standard of review on appeals from discretionary orders, with an appropriate level of deference to the trial court's discretion.

209. R.S.B.C. 1996, c. 77.

V. ESTATE ADMINISTRATION

A. General

Much of the *Estate Administration Act*²¹⁰ (EAA) is very old. It comprises a large number of narrow provisions enacted piecemeal at various points over the centuries. The language of many of its provisions is unusually archaic.

Much of the substance of the EAA has been carried forward into Part 6 (Administration of Estates) of the proposed *Wills, Estates and Succession Act*, but in a form that comprises fewer sections expressed in modern legislative language. The proposed legislation has been harmonized, where possible, with the provisions of the draft *Trustee Act* contained in Part Two of the British Columbia Law Institute's *Report on a Modern Trustee Act for British Columbia*.

Part 6 of the proposed legislation removes residual unnecessary distinctions between the offices of executor and administrator, and those that remain are the logical result of the fact that an executor is chosen by the testator, while an administrator is appointed by the court.

Part 6 also combines the EAA, except for its provisions on intestacy, and the *Probate Recognition Act*.²¹¹

B. Reform of the *Estate Administration Act* and the *Probate Recognition Act*

1. SCOPE

Part 6 of the proposed *Wills, Estates and Succession Act* deals with the basis for the exercise of probate jurisdiction, the issuance and revocation of grants of probate and administration, the appointment and removal of personal representatives, the powers, duties and liabilities of personal representatives, and the role of the official administrator. It also deals with foreign grants, legal proceedings involving estates, the summary administration of small estates, and the administration of insolvent estates.

2. ORDER OF PRIORITY AMONG POTENTIAL ADMINISTRATORS

The EAA does not set out an order of priority where there is more than one potential administrator of an estate. The proposed section 101 sets out a default list. Preference is given to the spouse of the deceased, and the remainder of the list is confined to children, nominees and other intestate successors, with preference given to the consent of the majority.

210. *Supra*, note 3.

211. *Supra*, note 6.

3. NOTICE REQUIREMENTS

(a) Content of notice of application for grant and timing

The proposed Part 6 introduces a number of changes in respect of notice requirements. Section 109(1) introduces a 21-day waiting period between the transmission of the notice of an application for a grant of probate or administration and the filing of the application. This is to ensure a sufficient interval for persons interested in the estate to take appropriate advice and exercise the rights they have in regard to it. For example, a notice recipient may wish to file a caveat against issuance of the grant, be heard on the application, or make a counter-application that should be heard together with the first application. Section 112 of the EAA now allows the notice to be sent and the application to be filed at the same time. In smaller registries, where there is less probate business and grants may issue more quickly, this can defeat the purpose of the notice required by the current section 112 by denying a realistic opportunity for the recipients of the notice to respond effectively.

Section 109(3) of the proposed Act prescribes certain information that the notice to persons interested in the estate must contain. This is intended to alert those entitled to notice of the application of their potential rights and of the existence of limitation periods for asserting them.

These changes are intended to ensure that the notice is both informative and timely.

(b) Entitlement to notice

Spouses who were separated from an intestate for a period longer than one year prior to the intestate's death have been deleted from the list of those entitled to notice. This is because spousal status will lapse after two years' separation for succession purposes, and within those two years a separated spouse will be entitled to notice as a spouse and will not require an exercise of judicial discretion to obtain a share of the estate. The discretion now existing under section 98(1) of the EAA to award a share of the intestate's estate to a spouse separated from the intestate for more than one year prior to the intestate's death would be repealed by the proposed Act. Spousal status will simply be lost after two years' separation, and rights of inheritance in the other spouse's intestacy would then be extinguished.

Notice to the Public Guardian and Trustee in respect of a minor's interest will not be necessary where all of the following conditions are met: there is an executor, the minor is not eligible to claim under Part 5 (Dependants Relief), and there is a trust and a trustee to hold the minor's interest.

Under section 112(1) of EAA, the applicant or the applicant's solicitor must certify that they have mailed or delivered the notices required by the section. This is neither convenient, nor in keeping with practice in other civil matters. Under section 109(13) of the proposed Act, any person who mailed or delivered the notices can swear an affidavit to that effect.

4. CONDITIONAL RENUNCIATION OF EXECUTORSHIP

Conditional renunciation would be permitted under section 117 of the proposed legislation. This is an innovation in common law Canada. If a person named as executor wishes to renounce in favour of another person, the court may order that the person named nevertheless retains the right to take out probate if the other person is unwilling to act.

5. SECURITY REQUIREMENT FOR ADMINISTRATORS

Currently, the EAA requires all applicants for administration other than the official administrator to enter into a bond unless the court dispenses with this requirement. Bonding is a costly, complex, time-consuming and usually unnecessary step. Thus, under s. 114 of the proposed legislation, security is not required unless an unrepresented minor or mentally incapable person is interested in the estate. Even then, security can be dispensed with if the Public Guardian and Trustee agrees.

In addition, bonding will no longer be the preferred form of security. A prospective administrator may provide any form of security acceptable to the court where it is still required. Restrictions on an administrator's power, such as requiring leave of the court to sell or mortgage real property, may also be employed as an alternative to bonding.

6. ADVERTISING FOR CREDITORS

Currently, section 38 of the *Trustee Act* requires advertisements to be published in successive weeks in a newspaper circulating where the deceased last resided in addition to a notice in the Gazette. Serial advertisements are extremely expensive and time consuming. Many practitioners no longer consider them to be an effective means of notifying creditors of the deceased.

The British Columbia Law Institute recommended in its report *A Modern Trustee Act for British Columbia* that section 38 be moved to the EAA or to legislation replacing it, since it is now only used in practice by personal representatives. References to trustees and assignees under assignments for the benefit of creditors have accordingly been deleted. In addition, the new provision retains only a requirement to advertise once in the Gazette. Changes to the accessibility of Part I of the Gazette are urged, however, in order to facilitate searches by the last name of the deceased without subscription. The time for creditors to present claims would be extended from 21 to 30 days.

7. SUMMARY ADMINISTRATION OF SMALL ESTATES

Division 10 of the proposed *Wills, Estates and Succession Act* sets out a procedure for the summary administration of small estates that would supplant section 20 of the EAA. The procedure is described in detail in the *Interim Report on the Summary Administration of Small Estates*. The draft legislation in the Interim Report has been carried forward into Division 10 of the *Wills, Estates and Succession Act* in substantially identical form.

The small estate summary administration procedure does not call for issuance of a grant of probate or administration. Instead, a “small estate declaration” is filed in the probate registry by a legal personal representative or a person with a right to inherit under a will or on intestacy. This gives the declarant the same powers as a personal representative and third parties are legally justified in treating the declarant as one, receiving a statutory release from liability for turning over assets and information pertaining to the estate as if the declaration were a grant of probate or administration.

The proposed summary procedure would be available in estates consisting only of personal property with a gross value below a ceiling set by regulation. The recommendation is that the ceiling be set initially at \$50,000 (twice the current ceiling under section 20 of the EAA) and reviewed periodically.

VI. RETIREMENT PLAN BENEFICIARIES

A. Introduction

Pensions and retirement plans will often allow a planholder to designate a person to receive a benefit payable upon the planholder's death. Most types of registered retirement savings plans, registered retirement income funds, employee pensions and benefit plans, and other related financial devices designed to encourage saving for retirement have this feature.

Classifying these designations has proved to be a matter of some academic debate. Since they are intended to take effect on death, these beneficiary designations raise a fundamental theoretical question: are they testamentary dispositions? This theoretical question has practical implications. If beneficiary designations are testamentary dispositions, then it is only consistent to require that the documents that contain them meet the formalities the law requires of wills. Law reform efforts in this area have sought to avoid that conclusion, by focusing on statutory reforms that would allow beneficiaries to be designated in more informal documents.

B. What Are Retirement Plan Beneficiary Designations?

A good way to approach retirement plan beneficiary designations is by briefly considering the analogous case of life insurance beneficiary designations. Life insurance beneficiary designations bear a family resemblance to retirement plan beneficiary designations, but they have also had the advantage of developing within a more certain and well-planned legal framework. A leading textbook on life insurance law gives this account of designating a beneficiary under a life insurance policy:²¹²

The designation of a beneficiary under a life insurance policy is an arrangement made under contract during the lifetime of the person making the designation which does not actually pass the benefit of the life insurance proceeds to the beneficiary until the insured's death. This certainly contains the elements of a testamentary disposition but also the elements of a contractual disposition. If it is testamentary, it could fail as an invalid disposition under testamentary rules: if it is contractual, it could fail as unenforceable by the third-party stranger to the contract. In the last analysis, the law does not consider the designation of the life insurance beneficiary as a testamentary disposition: rather it has accepted it as a *contractual* disposition, which is rendered valid by statute.

Life insurance beneficiary designations are relatively simple to grasp. They are essentially informal contracts, which have been granted some statutory support. The most important thing accomplished by the statute is that it overcomes a common law rule that bars a third party beneficiary from enforcing the contract.²¹³ The *Insurance Act* also sets out a proce-

212. David Norwood & John P. Weir, *Norwood on Life Insurance Law in Canada*, 3d ed. (Toronto: Carswell, 2002) at 291–92 [emphasis in original; footnote omitted].

213. *Insurance Act*, R.S.B.C. 1996, c. 226, s. 53.

ture for creating and revoking beneficiary designations, allows for irrevocable designations, addresses the position of trustees of beneficiaries, and provides an exemption from the claims of creditors.

The basic elements of this statutory framework for life insurance beneficiary designations have been in place in British Columbia since at least 1927.²¹⁴ Like insurance beneficiary designations, retirement plan beneficiary designations can be traced back to the turn of the twentieth century. But unlike insurance beneficiary designations, retirement plan beneficiary designations have proved to be more resistant to analysis. From time to time, academics have published studies of them that proceed from first principles.²¹⁵ These studies have described retirement plan beneficiary designations as “mysterious juridical creatures”²¹⁶ whose “essential nature” remains “elusive.”²¹⁷ The uncertainty over whether a retirement plan designation is a testamentary or a contractual disposition remains. The weight of this debate has come down on the side of classifying these designations as testamentary dispositions. But legislatures have tried, in a halting way, to escape the consequences of this conclusion.

C. The Current Law in British Columbia

1. HOW THE LAW HAS DEVELOPED

The first significant Canadian case involving a retirement plan beneficiary designation was *MacInnes v. MacInnes*,²¹⁸ a Supreme Court of Canada decision from 1935. At issue in *MacInnes* was a company-sponsored “Employees’ Saving and Profit Sharing Fund.”²¹⁹ When he agreed to participate in the fund, Mr. MacInnes signed a form entitled “Employee’s Acceptance” that designated his wife to be his beneficiary upon his death. One other person signed the form, as a witness to Mr. MacInnes’s execution of it.²²⁰ The ques-

214. See *Life Insurance Act*, S.B.C. 1923, c. 27, s. 25 (powers of insured to deal with contract by declaration or otherwise). A limited form of the power to designate a beneficiary by a document that did not rise to the level of formality of a will appeared even earlier. See *Families Insurance Act*, 1895, S.B.C. 1895, c. 26, s. 4 (declaration on policy in favour of certain relatives since 21 February 1873).

215. See, e.g., Ralph E. Scane, “Non-Insurance Beneficiary Designations” (1993) 72 Can. Bar Rev. 178; Anne Werker, “Non-Insurance RRSP Designations—Testamentary Dispositions of Property that Do Not Form Part of the Estate?” (2003) 22 Est. & Tr. J. 103.

216. Scane, *ibid.* at 179.

217. Werker, *supra* note 215.

218. [1935] S.C.R. 200, (*sub nom. Re MacInnes Estate*), [1935] 1 D.L.R. 401 [*MacInnes* cited to S.C.R.].

219. *Ibid.* at 203.

220. *Ibid.*

tion before the court was whether this form with its designation of Mrs. MacInnes as beneficiary was “. . . a trust in her favour or a testamentary instrument.”²²¹

The court applied a test that was set out in a nineteenth-century English case,²²² and decided that “[t]he right of the beneficiary was dependent upon the death of the participating employee for its vigour and effect.”²²³ As a result, the “Employee’s Acceptance” was a testamentary document. Because the “Employee’s Acceptance” was not executed in accordance with the formalities required by legislation governing wills, the designation in favour of Mrs. MacInnes was of no effect.

MacInnes may have dealt with a specific type of plan, but its reasoning had an impact across the spectrum of retirement plans. It was widely appreciated that beneficiary designations had to meet the stringent execution requirements imposed on wills, or they would be vulnerable to being set aside. In order to ensure that the planholder’s wishes would be carried out, the types of informal documents—such as the “Employee’s Acceptance” form in *MacInnes*—would have to be abandoned.

This result did not prove to be acceptable. There were calls to enact legislation to reverse the effect of *MacInnes*. One of the leading advocates for reform was the Association of Superintendents of Insurance for the Provinces of Canada,²²⁴ which was worried about the disparity between the procedures for designating beneficiaries under insurance policies and under retirement plans. In 1957, the association formally asked the Uniform Law Conference of Canada (which at that time was called the Conference of Commissioners on Uniformity of Legislation in Canada) to study legislation that was enacted in Ontario a few years previously²²⁵ as a model for a legal framework for retirement plan beneficiary designations that could be enacted in each of the provinces.²²⁶

221. *Ibid.* at 208.

222. *Cock v. Cooke* (1866), L.R. 1 Pro. & Div. 241 at 243, Sir J.P. Wilde (“It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.”).

223. *Supra* note 218 at 211.

224. This organization exists today under the name Canadian Council of Insurance Regulators.

225. *Conveyancing and Law of Property Act*, S.O. 1954, c. 12, s. 62.

226. Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Thirty-Ninth Annual Meeting* (Ottawa: The Conference, 1957) at 145–49.

The Uniform Law Conference of Canada acceded to this request and endorsed a uniform statute at its 1957 annual meeting.²²⁷ The report of the drafter of this 1957 Uniform Act indicated that he was influenced by the procedure for designating beneficiaries under a life insurance policy and by the practice in the United States.²²⁸ The goal of the legislation was to align retirement plan beneficiary designations with contractual, rather than testamentary, principles.²²⁹

. . . what we are dealing with in the proposed uniform bill respecting appointment of beneficiaries under pension plans can quite properly be regarded as essentially a matter of contract even though a statutory provision is necessary to make the right of the beneficiary enforceable. In other words, I am suggesting that the employer and the employee should be able to agree as to the manner in which appointments may be made under the plan.

The 1957 Uniform Act was conceived as a single section that could be added to a larger statute dealing with property matters generally. In brief, its first subsection set out the defined terms used in the remainder of the legislation. The second subsection is the key provision that implements the policy quoted above. It set out the legal framework that allowed for informal beneficiary designations, where the plan permitted them. Subsections (3) and (4) dealt with defences for employers and revocation of designations. Subsections (5) to (8) addressed issues encountered by designations in wills. The drafter of the 1957 Uniform Act said that the decision to allow designations in wills was taken with some regret. Placing a designation within a will causes a number of procedural problems related to the specific rules for preparing a valid will, but by 1957 the practice had become so established in Canada that it was not possible to leave it out of the Uniform Act.²³⁰ Finally, the eighth subsection resolves potential conflicts with insurance beneficiary designations by declaring that they are governed by the provincial *Insurance Act*.

2. A SUMMARY OF THE LAW AS IT STANDS TODAY

British Columbia's governing statutory provisions are located in section 46 and sections 49–51 of the *Law and Equity Act*.²³¹ The first thing to note about them is that the 1957 Uniform Act still forms the backbone of British Columbia's legislation. But it has been supplemented by several other provisions. These provisions were added to take account of developments in the area of retirement plans generally since the 1957 Uniform Act. In

227. *Ibid.* at 148–49.

228. *Ibid.* at 146–47.

229. *Ibid.* at 147.

230. *Ibid.* at 146–47.

231. *Supra*, note 8.

essence, they extend the provisions of the 1957 Uniform Act to cover new types of retirement plans.

The most important development took place coincidentally in 1957. In that year the federal government introduced changes to the *Income Tax Act* that created registered retirement savings plans.²³² RRSPs provide tax incentives for individual saving for retirement. Prior to their arrival on the scene, retirement plans were focused on savings programs for employees. RRSPs open the door to those who are not in an employment relationship to create a retirement plan. Employees may also opt to save for retirement through an RRSP.

Every year since their introduction RRSPs have grown more and more important to the retirement planning of Canadians. It became increasingly clear that British Columbia's legislation, which was based on a Uniform Act that was developed just before the advent of RRSPs, would have to be amended to take account of RRSPs. The provincial government introduced the amendments in 1973.²³³

This pattern of adding a new provision to the *Law and Equity Act* to account for developments in the field of retirement plans repeated itself two more times. In 1981 a new section was added to deal with registered home ownership savings plans.²³⁴ The enabling legislation for these plans was repealed in 1986,²³⁵ so they are primarily of historical interest today. In 1984 another new section was added, this time to deal with registered retirement income funds.²³⁶ In its *Report on Exemption of Future Income Plans on Death*²³⁷ the Alberta Law Reform Institute has set out a helpful discussion of RRIFs:²³⁸

A RRIF is a retirement income fund registered with [the Canada Revenue Agency]. A RRIF is an arrangement whereby the carrier agrees to make payments to the annuitant and, if the annuitant so elects, to the annuitant's spouse or common-law partner after the annuitant's death, in

232. *An Act to Amend the Income Tax Act*, S.C. 1957, c. 29, s. 17. The enabling legislation for RRSPs is now *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 146.

233. *Statute Law Amendment Act, 1973*, S.B.C. 1973, c. 84, s. 9 (e).

234. *Attorney General Statutes Amendment Act, 1981*, S.B.C. 1981, c. 10, s. 29.

235. *An Act to amend the Income Tax Act and related statutes and to amend the Canada Pension Plan, the Unemployment Insurance Act, 1971, the Financial Administration Act and the Petroleum and Gas Revenue Tax Act*, S.C. 1986, c. 6, s. 82.

236. *Miscellaneous Statutes Amendment Act (No. 2), 1984*, S.B.C. 1984, c. 26, s. 11.

237. (Final Rep. No. 92) (Edmonton: The Institute, 2004).

238. *Ibid.* at 6–7 [footnotes omitted]. The enabling legislation for RRIFs is *Income Tax Act*, *supra* note 236, s. 146.3. See also M.N.R., Information Circular IC78-18R6, "Registered Retirement Income Funds" (6 March 2002).

consideration of the transfer of property to the carrier. The payments must begin in the year following the year in which the RRIF was created. Each year the owner must withdraw from the RRIF a minimum amount. . . . The minimum amount is a percentage of the value of the fund at the beginning of the year and depends on age.

An RRSP must be wound up when the planholder reaches age 69.²³⁹ The law only allows for a limited number of ways to wind up an RRSP. One permitted option is to convert the RRSP into a RRIF. Many people choose this option.

British Columbia's legislation is not a complete code. The courts have had to fill in a number of gaps. One commentator who has studied the jurisprudence has divided it into ". . . four general categories".²⁴⁰

(i) the application of common law and statutory rules in connection with testamentary dispositions; (ii) capacity to make a designation; (iii) creditor access during the lifetime of the planholder; and (iv) creditors' access subsequent to the death of the planholder.

*Re Bottcher Estate*²⁴¹ is an example of a case in category (i). In *Re Bottcher* the court was asked to determine, among other issues, if a ". . . general revocation clause [in a will] revoked the prior designation of John Bottcher as the designated beneficiary of the R.R.S.P."²⁴² The court observed that, unlike the legislation in force in other provinces,²⁴³ British Columbia's *Law and Equity Act* does not provide a rule to govern this issue.²⁴⁴ In order to resolve this impasse, the court examined the common law, focussing particularly on a case²⁴⁵ with similar facts that was decided under the *Insurance Act*.²⁴⁶ In the result, the court ruled that ". . . something more than the language of a general revocation clause in a will is necessary to revoke a designation validly made other than by will."²⁴⁷ This conclu-

239. *Income Tax Act*, *ibid.*, s. 146 (16) (a).

240. Werker, *supra* note 215 at 115.

241. (1990), 47 B.C.L.R. (2d) 359, 39 E.T.R. 19 (S.C.), Anderson J. [*Re Bottcher* cited to B.C.L.R.]. See also Werker, *ibid.*

242. *Re Bottcher*, *ibid.* at 365.

243. *Ibid.* at 366 (citing *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 52 (1) as an example).

244. *Ibid.* at 365–66.

245. *Hurzin v. Great West Life Assurance Co.* (1988), 23 B.C.L.R. (2d) 252, 29 E.T.R. 51 (S.C.), Prowse L.J.S.C.

246. R.S.B.C. 1996, c. 226.

247. *Supra* note 241 at 368.

sion is consistent with the result that would have been obtained under the *Insurance Act* or under the law governing retirement plan beneficiary designations in force in other provinces.

The jurisprudence in category (ii) is concerned with a planholder's capacity to designate a beneficiary. It has been determined that the proper test to apply here is the same test of capacity applied to the making of a will.²⁴⁸ One case has also considered the scope of authority of an attorney acting under an enduring power of attorney. In *Desharnais v. Toronto Dominion Bank*²⁴⁹ the planholder had an RRSP account with a bank. He had designated his spouse, Ms. Desharnais, as the beneficiary of this account. Prior to undergoing major surgery, the planholder granted Ms. Desharnais an enduring power of attorney. When he came out of the surgery he was mentally incapable to deal with his financial affairs. Sometime later, the bank contacted Ms. Desharnais and advised her that it would be desirable to transfer the planholder's RRSP to one of the bank's subsidiaries. Acting under the power of attorney, Ms. Desharnais purported to transfer the RRSP and to designate herself as beneficiary of the new account. After the planholder's death, the subsidiary took the position that Ms. Desharnais's actions were not valid. It paid the proceeds of the RRSP out to the beneficiaries of the planholder's estate, which did not include Ms. Desharnais. Ms. Desharnais sued the bank, alleging negligence and breach of fiduciary duty. In deciding in favour of Ms. Desharnais, the court reached three important conclusions on the scope of her authority under the power of attorney. She had the authority to transfer the RRSP.²⁵⁰ She did not have the authority to alter or revoke the planholder's designation,²⁵¹ because such an action would amount to a testamentary disposition, and an attorney does not have the authority at common law to effect a testamentary disposition for a principal, and no statute in British Columbia grants an attorney this authority.²⁵² But, although this point was not at issue here, the court did remark that Ms. Desharnais could

248. See *Stewart v. Nash* (1988), 65 O.R. (2d) 218 at 223, 30 E.T.R. 85 (H.C.J.), Steele J. (applying "[t]he classic test of testamentary capacity . . . set out in *Banks v. Goodfellow*" to a retirement plan beneficiary designation).

249. (2001), 42 E.T.R. (2d) 192, 2001 BCSC 1695, Clancy J. [*Desharnais* cited to E.T.R.], aff'd on other grounds (2002), 9 B.C.L.R. (4th) 236, 2002 BCCA 640, Prowse J.A. (for the court).

250. *Desharnais*, *ibid.* at para. 29.

251. *Ibid.* at para. 38.

252. *Ibid.* at paras. 39–40.

have “continued” the existing designation in effect.²⁵³ The reasoning that the court employed to reach the latter two conclusions has been subjected to academic criticism.²⁵⁴

Categories (iii) and (iv) deal with the rights of creditors. There is no relevant British Columbia case law on this point. There are decisions from other provinces, but they are not particularly helpful because the legislation under review differed from British Columbia’s and because the decisions are in conflict.²⁵⁵

D. Earlier Recommendations for Reform

1. UNIFORM LAW CONFERENCE OF CANADA

The Uniform Law Conference of Canada took a second look at retirement plan beneficiary designations in the early 1970s, after the Trust Companies Association of Canada pointed out that the 1957 Uniform Act “. . . did not extend to retirement savings plans where no employees were involved.”²⁵⁶ The Trust Companies Association requested an amendment that would expressly bring RRSPs within the scope of the 1957 Uniform Act. The Uniform Law Conference of Canada took the opportunity to do more than this. They used the occasion to prepare and endorse a new statute, the 1975 *Uniform Retirement Plan Beneficiaries Act*.²⁵⁷

The 1975 Uniform Act contains a broader definition of the key term “plan” than is found in the 1957 Uniform Act. The 1975 Uniform Act also provides a more detailed set of provisions that guide the mechanics of making, altering, or revoking a beneficiary designation. As the Law Reform Commission of British Columbia has noted, “[t]he effect of these

253. *Ibid.* at para. 41. The distinction between “continuing” and “altering or revoking” a beneficiary designation may be particularly difficult to draw in practice when it is recalled that the transfer of an RRSP often requires the formation of a new contract between the planholder and the plan administrator.

254. See Valorie Pawson, Case Comment (2003) 22 Est. & Tr. J. 298 at 308 (“The issues around the authority of an attorney and the nature of beneficiary designations remain as murky now as they were before this case came to the courts. In fact, it could be argued that even more uncertainty exists in this area of the law and estate planning.”).

255. See *Clark Estate v. Clark*, [1997] 3 W.W.R. 62, 115 Man. R. (2d) 48 (C.A.), Huband J.A. (for the court) (holding that *Retirement Plan Beneficiaries Act* does not insulate a benefit payable upon the death of the holder of an RRSP from the claims of the planholder’s creditors); *Amherst Crane Rentals Ltd. v. Perring* (2004), 241 D.L.R. (4th) 176, 187 O.A.C. 336 (C.A.), Feldman J.A. (for the court) (holding that the *Succession Law Reform Act* implicitly requires that the proceeds of an RRSP pass to the designated beneficiary upon the death of the planholder without being subject to the claims of the planholder’s creditors), leave to appeal to the S.C.C. refused, [2004] S.C.C.A. No. 430 (QL).

256. Uniform Law Conference of Canada, *Proceedings of the Fifty-Seventh Annual Meeting* (Ottawa: The Conference, 1975) at 165.

257. *Ibid.* at 172–73.

provisions is basically to assimilate designations covered by the [1975 Uniform Act] with designations of interests in insurance policies.”²⁵⁸

Five jurisdictions have enacted the 1975 Uniform Act and proclaimed it to be in force.²⁵⁹ British Columbia enacted the 1975 Uniform Act as an amendment to the *Law and Equity Act* in 1990,²⁶⁰ but the legislation has not been brought into force.²⁶¹ Shortly before the publication of this Report, the Legislative Assembly passed the *Supplements Repeal Act*,²⁶² which repeals a large number of legislative provisions that have been enacted but not brought into force. This Act is more in the nature of housekeeping legislation than a judgment on the merits of the provisions repealed,²⁶³ but it has repealed the unimplemented amendment to the *Law and Equity Act* that contained the 1975 Uniform Act.

2. LAW REFORM COMMISSION OF BRITISH COLUMBIA

The Law Reform Commission examined the “designation of beneficiaries of interests in funds or plans” as part of its broader 1981 *Report on the Making and Revocation of Wills*.²⁶⁴ The Commission’s major recommendation was to enact the 1975 Uniform Act in British Columbia, but with a number of modifications.²⁶⁵ These modifications were recommended to shore up what the Commission saw as “[t]he general purpose of the [1975 Uniform Act, which] is to enable participants in plans, other than those to which the *Insurance Act*

258. *Report on the Making and Revocation of Wills* (LRC 52) (Vancouver: The Commission, 1981) at 89.

259. The five jurisdictions are: Alberta: *Trustee Act*, R.S.A. 2000, c. T-8, s. 47; Manitoba: *The Retirement Plan Beneficiaries Act*, C.C.S.M. c. R138; Ontario: *Succession Law Reform Act*, *supra* note 247, ss. 50–54.1; Prince Edward Island: *Designation of Beneficiaries Under Benefit Plans Act*, R.S.P.E.I. 1988, c. D-9; Yukon: *Retirement Plans Beneficiaries Act*, R.S.Y. 2002, c. 197. See Uniform Law Conference of Canada, “Table of Uniform Statutes Enacted,” online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/us/index.cfm?sec=4>>.

260. *Attorney General Statutes Amendment Act (No. 2)*, 1990, S.B.C. 1990, c. 34, s. 9.

261. It can now be found in the supplementary volume to the 1996 Revised Statutes of British Columbia. See *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 2 (repealing current ss. 46, 49, 50, and 51, and enacting new s. 49).

262. S.B.C. 2006, c. 33.

263. See British Columbia, Legislative Assembly, *Debates* (24 April 2006) at 3891 (Hon. W. Oppal) (“Bill 26 is a technical bill to fine-tune the statute books . . .”); 3891 (L. Krog) (“ . . . it is very much house-keeping legislation in the full meaning of that term . . .”).

264. *Supra* note 258 at 81–91.

265. *Ibid.* at 88.

applies, to name beneficiaries in a convenient and consistent manner.”²⁶⁶ To that end, the Commission recommended further broadening the definitions of “plan” and “participant” to ensure that the legislation applies to RRSPs and RRIIFs, to plans wherever they are created, and to participants who may or may not have an express right under a plan to designate a beneficiary, and to give the government a convenient mechanism to add new types of plans.

The Commission had a number of other recommendations, which were primarily directed at harmonizing the law governing retirement plan beneficiary designations with that governing insurance policy beneficiary designations. For example, the Commission recommended extending the right to make an irrevocable beneficiary designation to participants in retirement plans.²⁶⁷ The Commission also recommended that a few sections be added to the *Insurance Act*, in order to bring it into harmony with the modifications to the 1975 Uniform Act. For example, the Commission recommended providing that republication of a will does not have the effect of reviving a revoked beneficiary designation in a will, unless the codicil expressly states that it will have this effect.²⁶⁸

E. A Summary of Our Recommendations for Reform

1. INTRODUCTION—THE SUBCOMMITTEE’S GENERAL APPROACH

The Alternate Succession Vehicles and Miscellaneous Issues Subcommittee had the charge of reviewing the law governing retirement plan beneficiary designations and making recommendations for its reform. The Subcommittee decided that the law did not require a fundamental revision. Rather, what was needed was fine-tuning.

The Subcommittee was able to rely on the two earlier efforts at reform—the Uniform Law Conference of Canada’s 1975 Uniform Act and the Law Reform Commission of British Columbia’s recommendations in its *Report on the Making and Revocation of Wills*. Many of the Subcommittee’s recommendations—which may be found in the draft *Wills, Estates and Succession Act* set out in Part Two of this Report—will have the effect of implementing the 1975 Uniform Act and the Law Reform Commission’s Report. The Subcommittee was able to build on these two models, adding a few refinements that respond to issues that have arisen since the early 1980s. In particular, the Subcommittee has made several recommendations that address uncertainties that have appeared in the wake of the *Desharnais* case.

One of the abiding themes in this area of the law is the importance of harmony with the *Insurance Act*. Unfortunately, British Columbia’s legislation governing retirement plan

266. *Ibid.* at 85.

267. *Ibid.* at 90–91.

268. *Ibid.* at 88.

beneficiary designations has not progressed much beyond the 1957 Uniform Act. The *Insurance Act* has not stood still over this fifty year period. As a result, insurance policy beneficiary designations can be made within a coherent, consistent, and self-supporting system. Retirement plan beneficiary designations, on the other hand, are governed by legislation that is showing the gaps, wear, and uncertainty of advanced age. The Subcommittee's recommendations, which are summarized below, were formulated to bring about a high degree of harmonization between the statutes governing retirement plan beneficiary designations and insurance policy beneficiary designations, completing a process that was inaugurated in the first law reform efforts responding to *MacInnis*.

2. REVISED AND EXPANDED DEFINITIONS

The draft legislation includes an expanded definition of “plan,” which expressly incorporates RRSPs and RRIFs.²⁶⁹ The definition also contains a mechanism for adding new plans by regulation, allowing the government to respond expeditiously to new developments in the field.

The draft legislation also draws on definitions that are familiar to readers of the *Insurance Act*. These new defined terms are “beneficiary,” “instrument,” and “declaration.” These terms will help to clarify the legislation and to promote harmonization with the *Insurance Act*.

In addition to definitions, this section of the draft legislation also contains an interpretative rule that addresses a potential problem with the 1975 Uniform Act's definition of “participant,” noted by the Law Reform Commission.²⁷⁰

3. A CLEARER AND FULLER SET OF PROVISIONS TO GOVERN THE PROCEDURE FOR CREATING, ALTERING, OR REVOKING A BENEFICIARY DESIGNATION

The *Law and Equity Act* contains relatively few provisions describing the procedure of designating a beneficiary, or altering or revoking a designation. The courts have provided some answers to issues that have generated legislation.

The draft legislation²⁷¹ does not seek to unsettle established practices in this area. Rather, it attempts to provide explicit support for them in the legislation. A particular area of concern arises as a result of the long-established policy decision to permit a beneficiary designation to be contained in a will. Wills are subject to specific rules that do not apply to other, more

269. *Wills, Estates and Succession Act*, s. 68 (1).

270. *Ibid.*, s. 68 (2); *Report on the Making and Revocation of Wills*, *supra* note 258 at 85.

271. *See Wills, Estates and Succession Act*, *ibid.*, ss. 69; 71–72.

informal instruments. The draft legislation makes it clear how these will-specific rules interact with the legal framework for retirement plan beneficiary designations.

4. AUTHORITY TO CREATE IRREVOCABLE BENEFICIARY DESIGNATIONS

The *Insurance Act* permits life insurance policyholders to make irrevocable beneficiary designations.²⁷² Similar authority is extended to retirement plan beneficiaries in the draft legislation.²⁷³ The ability to designate beneficiaries irrevocably will assist in certain types of planning transactions.

5. AUTHORITY FOR THE HOLDER OF A POWER OF ATTORNEY TO CREATE, ALTER, OR REVOKE A BENEFICIARY DESIGNATION ON BEHALF OF A PARTICIPANT

The draft legislation implements two recommendations that will overcome the “absence of statutory authority” that led to confusion about the scope of authority of a power of attorney in *Desharnais*.²⁷⁴ The first recommendation authorizes an attorney to designate a beneficiary (including designate a beneficiary irrevocably), alter a designation, or revoke a designation, if the attorney is acting under a power of attorney granted by a participant that expressly confers this authority.²⁷⁵

6. LIMITED AUTHORITY FOR THE HOLDER OF AN ENDURING POWER OF ATTORNEY OR A REPRESENTATIVE ACTING UNDER A REPRESENTATION AGREEMENT TO MAINTAIN A BENEFICIARY DESIGNATION UPON A CONVERSION OR TRANSFER OF A PLAN

The second recommendation that was inspired by the ruling in *Desharnais* addresses the situations when a plan is converted from one type to another or transferred to a new plan administrator and the participant is no longer capable to deal with his or her financial affairs. The draft legislation permits an attorney acting under an enduring power of attorney or a representative who has been duly authorized under a representation agreement to create a new beneficiary designation that names the same beneficiary as in the participant’s previous beneficiary designation.²⁷⁶

7. PROVISIONS EXPRESSLY ADDRESSING TRUSTEES OF BENEFICIARIES

The *Law and Equity Act* does not address the possibility of naming a trustee for a beneficiary in the declaration that contains a beneficiary designation. In practice, plan adminis-

272. *Insurance Act*, *supra* note 213, s. 49.

273. *Wills, Estates and Succession Act*, *supra* note 269, s. 70.

274. *Supra* note 253 at para. 40.

275. *Wills, Estates and Succession Act*, *supra* note 269, s. 73.

276. *Wills, Estates and Succession Act*, *ibid.*, s. 74.

trators have occasionally questioned the validity of these instruments. The draft legislation removes any doubts on this point by integrating the appointment of trustees for beneficiaries into the legal framework for retirement plan beneficiary designations.²⁷⁷

8. PROTECTION FROM THE CLAIMS OF CREDITORS

It is widely understood that the benefit payable pursuant to a retirement plan beneficiary designation does not pass to the participant's personal representative and does not form part of the participant's estate. But the question of whether the benefit is available to satisfy the claims of the participant's creditors is vexed. The *Law and Equity Act* is silent on this point, there is no relevant British Columbia case authority, and the decisions from other Canadian jurisdictions are in conflict.

The draft legislation adopts the position set out in the *Insurance Act*²⁷⁸ and contains an express declaration that the benefit is not subject to the claims of the participant's creditors.²⁷⁹ Unlike the *Insurance Act*, the draft legislation does not address the question of whether the benefit is available to satisfy the claims of the participant's creditors before the participant's death. This topic is outside the scope of a report on the law of succession.²⁸⁰

9. DEFAULT RULES ADAPTED FROM THE *INSURANCE ACT*

The draft legislation adapts two default rules from the *Insurance Act*.²⁸¹ The first rule applies when a beneficiary predeceases the participant.²⁸² The second applies when several beneficiaries are named in a beneficiary designation.²⁸³ In both cases the provisions operate strictly as default rules. They provide a resolution in situations where the participant has failed to act.

277. *Wills, Estates and Succession Act*, *ibid.*, s. 75.

278. *Insurance Act*, *supra* note 213, s. 54 (1).

279. *Wills, Estates and Succession Act*, *supra* note 269, s. 78.

280. This issue has been addressed in a previous British Columbia Law Institute Report. See *Report on the Uniform Civil Enforcement of Money Judgments Act* (BCLI Rep. No. 37) (Vancouver: The Institute, 2005) at 208–15; 219–26.

281. *Insurance Act*, *supra* note 213, s. 52 (1)–(2).

282. *Wills, Estates and Succession Act*, *supra* note 269, s. 79.

283. *Wills, Estates and Succession Act*, *ibid.*, s. 80.

10. AMENDMENTS TO THE *INSURANCE ACT*

As we have noted, one of the major goals of this Part of the draft legislation is to harmonize the law of retirement plan beneficiary designations with that of insurance policy beneficiary designations. In large measure, this task has required adapting provisions already found in the *Insurance Act*. But, in one or two cases, a provision we are recommending for the legislation governing retirement plan beneficiary designations will call for a corresponding amendment to the *Insurance Act*. These provisions deal with the following issues: creation, alteration, or revocation of beneficiary designations by an attorney acting under a power of attorney that expressly provides for this authority;²⁸⁴ the effect of republication of a will that contained a beneficiary designation;²⁸⁵ and execution of a beneficiary designation on the insured's behalf.²⁸⁶ In addition, the draft legislation recommends modernizing the rules of service of documents, court orders, and notices on insurance companies²⁸⁷ and extending the right to designate a beneficiary irrevocably to an insured under an accident and sickness insurance policy.²⁸⁸

284. *Wills, Estates and Succession Act, ibid.*, ss. 197; 202.

285. *Wills, Estates and Succession Act, ibid.*, ss. 197; 201 (b).

286. *Wills, Estates and Succession Act, ibid.*, ss. 196; 201 (b).

287. *Wills, Estates and Succession Act, ibid.*, ss. 199; 203.

288. *Wills, Estates and Succession Act, ibid.*, s. 202.

VII. SURVIVORSHIP

A. Introduction

Survivorship is concerned with a factual question—establishing the order of deaths in a common disaster. Determination of the order of death can affect entitlement to property for the beneficiaries or intestate successors of the persons who perished in the common disaster. This is because the factual question of order of death interacts with a rule of law called the doctrine of lapse.

B. The Legal Issues and the Development of the Law

A gift to a beneficiary lapses if the beneficiary predeceases the testator. The subject matter of the gift will pass to a contingent beneficiary, if the will provides for this possibility, or it will fall into the residue. If the gift of the residue lapses, then the estate will go to the testator's intestate successors. A gift will not lapse, however, if the beneficiary survives the testator, even if it is only for a very brief time. Litigation between contingent beneficiaries and intestate successors has driven the development of the law of survivorship.

Invariably, cases arose where the testator and a beneficiary died in a common disaster, such as a shipwreck. The common law position was that the issue of survivorship in such circumstances was “. . . always from first to last a pure question of fact. . . .”²⁸⁹ The onus of proof fell on the party who asserted that a specific person survived another.²⁹⁰

The common law position had some obvious difficulties. It was usually very difficult to prove the order of deaths in court. Potential witnesses often perished in the common disaster. Other evidence was often destroyed. As a result, the common law rules on survivorship were increasingly criticized as encouraging protracted litigation, causing many gifts to lapse, and even frustrating the wishes of testators.²⁹¹

There were calls to reform the law by enacting statutory presumptions. The United Kingdom was the first common law jurisdiction to heed these calls. In 1925, it enacted a rule that would apply whenever “two or more persons have died in circumstances rendering it uncertain which of them survived the other or others.”²⁹² In these circumstances, the law presumes that people die in order of seniority. The oldest person is presumed to die first, with the others following in sequence to the youngest.

289. *Wing v. Angrave* (1860), 8 H.L. Cas. 183 at 198, 11 E.R. 397, Lord Campbell L.C. (dissenting).

290. *Ibid.*

291. *See ibid.* at 202–03.

292. *Law of Property Act, 1925*, (U.K.), 15 & 16 Geo. V, c. 20, s. 184.

C. The Law in British Columbia

British Columbia first enacted legislation dealing generally with survivorship in 1939.²⁹³ This legislation adapted the English approach. It contained the same general presumption that a younger person survives an older person in a common disaster. It also contained a few provisions that allowed a testator to displace the general presumption in a testamentary instrument. This legislation, essentially unchanged, remains in force today as the *Survivorship and Presumption of Death Act*.²⁹⁴

The general survivorship legislation is not the only statute that touches on this question. There is a longstanding rule in the *Insurance Act* that deals with deaths in a common disaster.²⁹⁵ Like the general survivorship legislation, the *Insurance Act* also creates a presumption. Under the *Insurance Act* rule, when two or more people die in a common disaster, the beneficiary of the insurance policy is presumed to predecease the insured person. This special *Insurance Act* presumption still exists today.²⁹⁶

As may be expected, the presumptions in the *Survivorship and Presumption of Death Act* and the *Insurance Act* can sometimes be in conflict. Much of the case law on survivorship in British Columbia has involved working out conflicts between the two statutes. When an insured person and the beneficiary designated under that person's insurance policy both die in a common disaster, and the beneficiary was younger than the insured person, the question arises whether the *Survivorship and Presumption of Death Act* or the *Insurance Act* will govern.

The first British Columbia case to consider this question was *Re Law Estate*.²⁹⁷ In *Re Law* the insured and his wife died when a row-boat they were travelling in was lost in a storm. It was impossible on the facts to establish the precise order of their deaths. The wife was the named beneficiary under three of the husband's insurance policies. The wife was also younger than her husband. Both the wife and husband died intestate. The administrator of the husband's estate asked the court for directions on the disposition of the insurance proceeds. Applying the *Survivorship and Presumption of Death Act* would result in the husband (as the older person) being presumed to predecease the wife, and the proceeds being payable to the wife's intestate successor (her daughter from a previous marriage). Applying the *Insurance Act* would result in the wife (as the insurance beneficiary) being

293. *Commorientes Act*, S.B.C. 1939, c. 6.

294. R.S.B.C. 1996, c. 444.

295. See *Life Insurance Act*, S.B.C. 1923, c. 27, s. 44 (first appearance of this provision).

296. *Insurance Act*, *supra* note 213, ss. 72 (life insurance); 109 (accident and sickness insurance).

297. (1946), 62 B.C.R. 380, [1946] 2 D.L.R. 378 (S.C.), Macfarlane J. [*Re Law* cited to B.C.R.].

presumed to predecease the husband, and the proceeds being payable to the husband's intestate successor (his mother). The court decided that there was no real conflict between the two statutes.²⁹⁸ The *Survivorship and Presumption of Death Act* was expressed as being "subject to" the *Insurance Act*.²⁹⁹ So, the only real question was whether the *Insurance Act* applied on these facts.³⁰⁰ The court concluded that it did apply. As a result, the insurance proceeds never reached the husband's estate, the general presumption in the *Survivorship and Presumption of Death Act* had no application, and the husband's mother was entitled to receive the proceeds.³⁰¹

A subsequent decision of the British Columbia Supreme Court approved of *Re Law*, even though this later case was not concerned with the interaction of the *Survivorship and Presumption of Death Act* and the *Insurance Act*.³⁰² But a later decision of the Ontario Court of Appeal rejected the reasoning in *Re Law*. In *Re Topliss and Topliss*³⁰³ a husband and wife died in a common disaster. The husband was older than the wife. The wife was the beneficiary of three insurance policies on the husband's life. Both died intestate. As in *Re Law*, the court reasoned that there was no real conflict between Ontario's version of the *Survivorship and Presumption of Death Act* and the *Insurance Act*.³⁰⁴ But the court reached a conclusion that was diametrically opposed to that of *Re Law*. In fact, the Ontario court expressly rejected the reasoning of *Re Law*.³⁰⁵ In the Ontario court's view, "[t]he purpose of the *Insurance Act* is to determine to whom the proceeds of the policy[,] in the circumstances, shall be paid; the purpose of the *Survivorship Act* is to determine to whom the

298. *Ibid.* at 382 ("... the real problem is one of the construction to be placed upon section 123 of the Insurance Act rather than one of conflict between the two statutes").

299. *Ibid.* at 382–83 ("I do not think that being 'construed subject to' means that the statutes are complementary. . . . [T]he intention is that where the circumstances set out in section 123 of the Insurance Act arise, the presumption as to the order of death thereby created is to be followed for all purposes connected with that subject matter.").

300. *Ibid.* at 382.

301. *Ibid.* at 384.

302. *Re Newstead*, [1951] 2 D.L.R. 302, (*sub nom. In re Newstead Estates*), 1 W.W.R. (N.S.) 528 (B.C.S.C.), Manson J.

303. (1957), 10 D.L.R. (2d) 654, (*sub nom. Re Estates of Topliss and Topliss*), [1957] O.W.N. 513 (C.A.), Roach J.A. (for the court) [*Re Topliss* cited to D.L.R.].

304. *Ibid.* at 656.

305. *Ibid.* ("... with the utmost respect I do not think the effect of the relevant legislation is as declared by MacFarlane J.").

assets of the estate should be distributed.”³⁰⁶ In *Re Topliss* the insurance funds were required to be paid into the husband’s estate. Once they reached the estate, the presumption in the *Insurance Act* was spent, but the court concluded that it still had to apply the presumption in the *Survivorship and Presumption of Death Act*.³⁰⁷ In the result, the court directed that the insurance proceeds be paid to the wife’s intestate successor.

The reasoning of *Re Topliss* was preferred over that of *Re Law* in a subsequent decision (in 1963) of the British Columbia Supreme Court.³⁰⁸ But it has also been questioned in decisions in other provinces.³⁰⁹ The issue has not arisen in British Columbia since 1963, but the law is far from being completely settled on this point.

D. Earlier Recommendations for Reform

1. UNIFORM LAW CONFERENCE OF CANADA

These conflicting decisions on the application of the presumptions in the *Survivorship and Presumption of Death Act* and the *Insurance Act* caught the attention of the Uniform Law Conference of Canada. In 1969, the Conference received a report from the Alberta Commissioners, which recommended that the uncertainties in the law be overcome by amending the *Survivorship and Presumption of Death Act* to make it clear that its presumption does not apply to the proceeds of a life insurance policy.³¹⁰ The Alberta Commissioners made this recommendation, because, in their view, the “. . . insurance provision is based on principle while the general survivorship provision is arbitrary.”³¹¹

The matter was referred to the British Columbia Commissioners, who reported back to the Conference in 1971. This report took a different approach from that recommended by the

306. *Ibid.*

307. *Ibid.*

308. *Re Currie and Currie* (1963), 41 D.L.R. (2d) 666, (*sub nom. Re Currie Estates*), 44 W.W.R. 535 (B.C.S.C.), Verchere J.

309. See, e.g., *Prefontaine v. Co-operative Trust Co. of Canada*, [1977] 3 W.W.R. 211 at 214 (Sask. Q.B.), Sirois J. (“It seems clear beyond question that if the presumptions are to be considered as created with reference to the death of individuals as such, that the one created by The Saskatchewan Insurance Act would prevail over the other”), rev’d on other grounds, (*sub nom. Prefontaine v. Prefontaine*), [1977] 5 W.W.R. 478 (Sask. C.A.), Culliton C.J. (for the court).

310. Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Fifty-First Annual Meeting* (Ottawa: The Conference, 1969) 165 at 176. At this time the Uniform Law Conference of Canada was known by its former name, the Conference of Commissioners on Uniformity of Legislation in Canada.

311. *Ibid.* at 178.

Alberta Commissioners. Instead of simply making it clear that the general presumption of survivorship in the *Survivorship and Presumption of Death Act* does not apply to insurance proceeds, the British Columbia Commissioners recommended adopting a new *Uniform Survivorship Act* that would “. . . substitute a rule that under the circumstances set out in the Survivorship Act the property of each person be distributed as if he had survived all other persons who might otherwise have been entitled to an interest in that property.”³¹² In essence, the new *Uniform Survivorship Act* would adopt the presumption already used in the *Insurance Act* as the general presumption for all circumstances governed by the *Uniform Survivorship Act*. As the report of the British Columbia Commissioners noted, this amendment would remove the source of conflict that had created uncertainty in the case law.³¹³

This amendment to the general presumption of survivorship was the major reform introduced by the *Uniform Survivorship Act*. The draft legislation was very brief.³¹⁴ Its other provisions addressed joint tenancies and cases where a testator has named a substitute personal representative in the will. The Conference endorsed the *Uniform Survivorship Act* in 1971.³¹⁵ The *Uniform Survivorship Act* has been enacted by four provinces³¹⁶ and one territory.³¹⁷

2. LAW REFORM COMMISSION OF BRITISH COLUMBIA

In 1982, the Law Reform Commission of British Columbia published its *Report on Presumptions of Survivorship*.³¹⁸ Like the Uniform Law Conference of Canada, the Commission was focussed particularly on remedying the inconsistencies that had appeared in the case law as a result of the differing presumptions in the *Survivorship and Presumption of*

312. Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Fifty-Third Annual Meeting* (Ottawa: The Conference, 1971) 409 at 410.

313. *Ibid.* (“Whether the asset of the estate so created by payment of the insurance proceeds is then distributed under the Survivorship rule or the Insurance rule is of no consequence as they are both the same and achieve the same result.”).

314. *See ibid.* at 412–13.

315. *Ibid.* at 84.

316. Saskatchewan: *The Survivorship Act*, 1993, S.S. 1993, c. S-67.1; Manitoba: *The Survivorship Act*, C.C.S.M. c. S250; Ontario: *Succession Law Reform Act*, *supra* note 247, ss 55–56; New Brunswick: *Survivorship Act*, S.N.B. 1991, c. S-20.

317. Yukon: *Survivorship Act*, R.S.Y. 2002, c. 213.

318. (LRC 56) (Vancouver: The Commission, 1982).

Death Act and the *Insurance Act*.³¹⁹ The Commission's first recommendation was, in fact, to adopt the general presumption of survivorship in the *Uniform Survivorship Act* for British Columbia.³²⁰

Unlike the Uniform Law Conference of Canada, the Commission went on to make further recommendations. The Commission recommended retaining provisions from the *Survivorship and Presumption of Death Act* to address both a situation that can arise when a testator expresses an intention contrary to the legislation in a will³²¹ and the appointment of personal representatives.³²² It also recommended adding a provision to deal with gifts to two or more beneficiaries and their survivors.³²³ Finally, the Commission recommended adopting a provision from the American Uniform Probate Code setting a five-day survivorship rule in the legislation.³²⁴

E. A Summary of Our Recommendations for Reform

1. INTRODUCTION—THE SUBCOMMITTEE'S GENERAL APPROACH

The Alternate Succession Vehicles and Miscellaneous Issues Subcommittee examined the law of survivorship and formulated the recommendations that are implemented in the draft legislation found in Part Two of this Report.³²⁵ The Subcommittee's recommendations draw heavily on the Law Reform Commission's *Report on Presumptions of Survivorship*. In effect, the Subcommittee has decided to endorse the Commission's recommendations.

2. A GENERAL PRESUMPTION OF SURVIVORSHIP THAT IS MODELED ON THE PRESUMPTION IN THE *INSURANCE ACT*

The centrepiece of this Part of the draft legislation is a new general presumption of survivorship.³²⁶ This general presumption is the same as the specific presumption for insurance proceeds in the *Insurance Act*, as was recommended by the Law Reform Commission and the Uniform Law Conference of Canada. In a sense, any presumption will be

319. *Ibid.*, "Letter of Transmittal."

320. *Ibid.* at 17.

321. *Ibid.* at 17–19.

322. *Ibid.* at 20.

323. *Ibid.* at 19.

324. *Ibid.* at 20–22.

325. *Wills, Estates and Succession Act*, *supra* note 269.

326. *Wills, Estates and Succession Act*, *ibid.*, s. 8.

arbitrary. The Subcommittee recommends this change for three reasons: it will eliminate the inconsistencies and uncertainties in that appear in the case law when judges are asked to apply differing presumptions; it will reduce the chances that a remoter relation will inherit in the place of a closer relation; and it will lessen the odds that a complicated sequence of multiple probates or administrations will be necessary as a result of a common disaster.

3. THE GENERAL PRESUMPTION MAY BE DISPLACED BY A CONTRARY INTENTION IN AN INSTRUMENT

The draft legislation preserves the flexibility currently found in the *Survivorship and Presumption of Death Act* by re-enacting two provisions dealing with dispositions of property on death and substitute personal representatives.³²⁷ If a person records wishes in a testamentary instrument that are at odds with the general presumption of survivorship, then those wishes should prevail over the presumption. The draft legislation contains an expansive definition of “instrument,” to ensure that individual wishes are respected.³²⁸

4. RULES FOR THE SIMULTANEOUS DEATH OF JOINT TENANTS

The draft legislation includes a section from the *Uniform Survivorship Act* dealing with the simultaneous death of joint tenants, which was recommended by the Law Reform Commission. The section is designed to ensure that, if all joint tenants perish in a common disaster, their respective estates should benefit from their shares in the jointly held property. Of course, this rule would not apply if one or more of the joint tenants should survive the others.

5. A REQUIREMENT THAT A PERSON SURVIVE THE DECEASED BY FIVE DAYS IN ORDER TO INHERIT PROPERTY

The Subcommittee endorsed a Commission recommendation to legislate a five-day survivorship period for all purposes.³²⁹ This idea finds its legislative source in the American Uniform Probate Code, but, beyond that statute, it is ultimately derived from a common and longstanding practice in the drafting of wills. Most professionally prepared wills include a provision that a gift will only take effect if the beneficiary survives the testator for a predetermined period of time. Such a provision guards against the possibility of multiple probates or administrations of estates resulting from deaths occurring within a short time of one another. The Subcommittee decided that this policy is sound and should be extended to those who do not have a will or who do not seek out professional advice in the preparation of their wills. This provision does not apply to the appointment of a personal representative in a will.

327. *Wills, Estates and Succession Act*, *ibid.*, ss. 9–10.

328. *Wills, Estates and Succession Act*, *ibid.*, s. 7.

329. *Wills, Estates and Succession Act*, *ibid.*, s. 13.

6. THE PRESUMPTIONS IN THE *INSURANCE ACT* PREVAIL OVER THE GENERAL PRESUMPTION

The draft legislation expressly declares that it is subject to the specific presumptions found in the *Insurance Act*.³³⁰ This declaration should remove any doubts about the proper presumption to apply in cases involving the proceeds of an insurance policy. In practice, little should turn on which presumption is applied as the general presumption of survivorship under the draft legislation will operate in the same manner as the specific *Insurance Act* presumption.

7. PRESUMPTION OF DEATH UNAFFECTED

As its title implies, the *Survivorship and Presumption of Death Act* deals with two issues. Section 2 sets out the general presumption of survivorship in common disasters for the purposes of succession to property. Sections 3 to 7 deal with when a person who is absent or missing may be presumed to be dead. The Subcommittee did not make any recommendations with respect to sections 3 to 7. These sections have a broader application than section 2, and therefore their workings are outside the scope of a report that is focused on succession to property on death.

330. *Wills, Estates and Succession Act*, *ibid.*, s. 14 (2).

VIII. STATUTORY CONSOLIDATION

A. Why Consolidate?

In jurisdictions where consolidation of succession-related statutes has been undertaken, the reasons given for doing so have been very simple. One is that succession to property rights on death is a distinct, though multi-faceted, branch of the law.³³¹ Another is that accessibility to the law and ease of use is enhanced by gathering conceptually related enactments in a single statute.³³² A third reason for consolidation, not advanced overtly like the above two but equally arguable, is that the process of consolidation facilitates comprehensive and harmonious reform as opposed to quick fixes through piecemeal amendment. A fourth, and typically unstated, policy ground is that of legislative economy: an assumption that it is simply a good thing to reduce the number of separate Acts wherever possible.

These policy reasons for consolidation appear quite axiomatic. As with much else that appears axiomatic on the surface, the devil is in the details.

The argument for some degree of consolidation is nevertheless compelling. There are few other branches of the statutory law of British Columbia in which legislation with closely related subject-matter is as badly fragmented. It may make sense to look for the law relating to wills in the *Wills Act*,³³³ and the law relating to the procedures for administration of estates in the *Estate Administration Act*.³³⁴ Surely very little justification can be offered, however, for maintaining two separate Acts for provisions dealing with domestic grants of probate (*Estate Administration Act*) and those concerning resealing of foreign ones (*Probate Recognition Act*).³³⁵ The substantive rules governing inheritance on intestacy are buried deep within the *Estate Administration Act*, surrounded by extensive procedural provisions.

It is clear that the statutory portion of succession law is not as accessible or as logically organized as it could be. The issue is not whether any consolidation is needed. Rationalization of British Columbia's statutes in this area requires it. The issues are the appropriate extent of consolidation and the tests to apply to distinguish enactments that should be brought together from those that should be left alone.

331. *Supra*, note 47, vol. 8, p. 9, commentary preceding Article 1.

332. Alberta Law Reform Institute, *Report on a Succession Consolidation Statute* (Final Report No. 87) (Edmonton: The Institute, 2002), p. 6. Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (Toronto: The Commission, 1991) at 3.

333. *Supra*, note 1.

334. *Supra*, note 3.

335. *Supra*, note 6.

B. Some Existing Models for Consolidated Succession Legislation

Several models for consolidated or comprehensive succession legislation examined in the course of this Project are described below.

1. THE *UNIFORM PROBATE CODE*

The most comprehensive model is the U.S. *Uniform Probate Code*³³⁶ developed by the National Council of Commissioners on Uniform State Laws (NCCUSL). It covers all the traditional areas of succession law: intestacy, wills, probate jurisdiction and procedure, non-probate transfers on death such as joint tenancies and joint accounts, foreign personal representatives and ancillary grants. It also covers other matters such as enduring powers of attorney and trusts that would not, from a Canadian perspective, be considered part of the law of succession. In 2000, the NCCUSL withdrew the general law of trusts and trustees from the *Uniform Probate Code* when it approved the *Uniform Trust Code*.³³⁷

2. THE ONTARIO *SUCCESSION LAW REFORM ACT*

The Ontario *Succession Law Reform Act*³³⁸ comprises provisions on wills, intestacy, dependants relief, beneficiary designations under retirement plans and funds, and survivorship presumptions. It does not deal with estate administration. In 1991, the former Ontario Law Reform Commission recommended that three Ontario statutes dealing with various aspects of estate administration be consolidated into a single piece of legislation to promote accessibility to the law in that area.³³⁹ It did not suggest that this proposed enactment be incorporated into the *Succession Law Reform Act*, however.

The model that would emerge from implementation of the Ontario Law Reform Commission's recommendation would therefore be two comprehensive statutes, one dealing with the substantive law of succession and the other being chiefly procedural, concerned with estate administration.

3. PRINCE EDWARD ISLAND *PROBATE ACT*

The Prince Edward Island *Probate Act*³⁴⁰ is a further Canadian example of a partially consolidated succession statute. It covers wills, international wills, probate and grants of

336. *Supra*, note 47.

337. Nat'l Conf. of Commissioners on Unif. State Laws, *Uniform Trust Code* (amended 2005).

338. *Supra*, note 40.

339. Ontario Law Reform Commission, *Report on the Administration of Estates of Deceased Persons*, *supra*, note 332 at 3.

340. *Supra*, note 37.

administration, duties and liabilities of personal representatives, intestate distribution, devolution of real property, and probate fees.

The *Probate Act* excludes dependants relief, survivorship, survival of actions, and designation of beneficiaries under non-probate instruments, all of which are the subject of separate statutes.

4. ALBERTA LAW REFORM INSTITUTE PROPOSED CONSOLIDATION

In 2002, the Alberta Law Reform Institute issued its *Report on a Succession Consolidated Statute*, recommending that eight existing Alberta succession-related Acts and certain provisions of two others be consolidated into a single reform statute.³⁴¹ The reform statute would cover wills, intestate succession, dependants relief, designation of beneficiaries under pension plans and non-insurance RRSPs, devolution of real property, survivorship presumptions, the survival of actions, and the administration of estates. Beneficiary designations under insurance policies would continue to be governed by the *Insurance Act*.³⁴²

The Alberta Law Reform Institute's model is therefore a unitary one encompassing substantive and procedural aspects of succession law.

5. COMPREHENSIVE AUSTRALIAN SUCCESSION STATUTES

Several Australian states have comprehensive succession statutes. Queensland's *Succession Act 1981*³⁴³ covers wills, testamentary appointment of guardians, intestacy, survivorship presumptions, and estate administration. The *Administration and Probate Act 1929*³⁴⁴ of the Australian Capital Territories has similar content, but does not specifically address the appointment of testamentary guardians. The New South Wales *Wills, Probate and Administration Act 1898*³⁴⁵ covers wills, intestacy, estate administration, and small estates. Victoria's *Administration and Probate Act 1958*³⁴⁶ does not cover wills, which are

341. *Supra*, note 332 at 17. This report also cites Yukon's *Estate Administration Act*, *supra* note 36, c.77 as an example of partially consolidated succession legislation, but as the Yukon statute essentially comprises the same subject-matter as British Columbia's *Estate Administration Act*, *supra*, note 3, it is not discussed separately here.

342. R.S.A. 2000, c. I-3, ss. 684-701.

343. *Supra*, note 90.

344. Australian Capital Territory Consolidated Acts, A1929-18.

345. *Supra*, note 90.

346. 6191/1958 (Vict.).

dealt with in a separate Victorian statute,³⁴⁷ but covers “family provision” (dependants relief) as well as estate administration and intestacy.

C. A Consolidated Succession Law Statute for British Columbia

1. GENERAL

If legislative economy were the single or dominant goal in consolidation, the largest statute having some internal thread of coherence would signify success. Consolidation is not, however, an end in itself but only a means to more rational organization.

Pursuit of greater accessibility to the law forces an assessment of the relative strength of the connection between a provision and its present context and the connection that an identical or similar provision would have to the context of the proposed consolidated statute. To move a provision that is more closely linked conceptually to its present setting than to its destination would detract from the goal of making law more accessible, rather than promote it.

For example, it would be unhelpful to move sections dealing with the right to survivor’s benefits under pension plans from the *Pension Benefits Standards Act*³⁴⁸ to a new succession statute simply because the payment of the benefits depends on the death of the plan member. This would only make the survivor’s benefit provisions less accessible for readers of the pension legislation.

The example of survivor’s benefits under a pension plan illustrates a further point: comprehensiveness should not be pursued to the detriment of internal cohesion. Various kinds of legislative provisions relate to the transmission of some interest or conferral of some benefit as a consequence of death. They do not all relate to each other, however. There is no direct connection between provisions dealing with the transfer of automobile registration as a consequence of the owner’s death and those dealing with the designation of a beneficiary under a life insurance policy. If a consolidated succession statute is to be more than simply an eclectic compilation of legislation having something to do with death and property, the basic elements of succession law need to be separated from peripheral ones.

2. ALBERTA LAW REFORM INSTITUTE APPROACH

With similar considerations in mind, the Alberta Law Reform Institute developed three principles for selecting enactments for consolidation:

347. *Wills Act 1997* No. 88/97.

348. R.S.B.C. 1996, c. 352.

- Each selected legislative component must be relevant only to succession law, i.e., have no application to the living.³⁴⁹
- Each selected legislative component must be independent, in the sense that its legal effectiveness is not dependent on its place in a wider, comprehensive statutory scheme.³⁵⁰
- The succession statute should aim to consolidate succession law, not codify it.³⁵¹

These principles have a logical appeal. The first helps to identify a core of succession law that excludes many enactments applying both to dispositions of property between living persons as well as dispositions occurring as a result of death. Most provisions of the present³⁵² and proposed³⁵³ *Trustee Acts* fall into this category, as well as numerous ones in the *Law and Equity Act*.³⁵⁴ By contrast, enactments dealing with wills, intestacy, and estate administration concern only changes in ownership consequent on death.

The second principle distinguishes between enactments that are self-standing propositions relating to succession to property on death, such as those of the *Wills Act*,³⁵⁵ from those that are incidental to a distinct regulatory scheme that is not primarily concerned with succession. Examples of the latter category are the *Insurance Act*³⁵⁶ sections on the designation of beneficiaries of life insurance policies, and the sections of the *Workers Compensation Act*³⁵⁷ dealing with payments to the dependants of a deceased worker. Removal of provisions like these from the context of the statutory schemes into which they are integrated would impair the effectiveness of those schemes and actually detract from the goal of increasing ease of access to the law. While individual tendencies may vary, many would

349. *Supra*, note 332 at 12-13.

350. *Ibid.*, at 13-14.

351. *Ibid.*, at 14.

352. *Supra*, note 10.

353. A proposed new *Trustee Act* is set out in Part Two of the British Columbia Law Institute Report *A Modern Trustee Act for British Columbia* (No. 33) (Vancouver: The Institute, 2004).

354. *Supra*, note 8.

355. *Supra*, note 1.

356. *Supra*, note 11.

357. R.S.B.C. 1996, c. 492.

look first in the *Insurance Act* for the rules concerning beneficiary designations under a life insurance policy rather than in an Act dealing with wills and estates.

The third principle recognizes limits on what can be achieved from statutory consolidation in a common law system. Even when associated with significant legislative changes, as here, consolidation remains primarily an exercise in reorganization of the statutory portion of a particular part of the legal landscape, rather than the generation of a new and entirely self-contained source that precludes any need to refer to earlier case law.

3. THE PROJECT COMMITTEE'S APPROACH

(a) *One consolidated Act or two?*

The Project Committee gave thought initially to employing two consolidated reform statutes, one substantive and one essentially procedural. The substantive statute would have included provisions dealing with wills, dependants relief, and likely also intestacy. The procedural statute would probably have covered areas now covered by the *Estate Administration Act* except for the intestacy provisions, and the *Probate Recognition Act*. Other enactments would have been incorporated into one statute or the other, based on their characterization as substantive succession law or procedure. This approach would have been similar to that of the Ontario Law Reform Commission described above.³⁵⁸

The distinction between substantive law and procedure proved elusive, however. In an intestacy, is the standing that closer relatives of the intestate enjoy in preference to more remote ones to apply for a grant of administration a substantive right or an aspect of procedure? How are provisions concerning the rights of secured creditors of an insolvent estate to be characterized? Is a new provision dealing with admission of extrinsic evidence as an aid to the interpretation of wills substantive, because it concerns principles of interpretation, or procedural, because it relates to evidence and proof?

The majority of the Project Committee eventually came to favour the single-statute model. They saw advantages in terms of accessibility to provisions that are now widely scattered as well as ease of amendment. A further advantage was perceived in applying a single set of definitions to different aspects of succession law. There would be less chance of definitions of key terms such as “spouse,” and “will” becoming disjointed through later amendments if definitions were concentrated in one Act. Accordingly, Part Two contains a single consolidated succession statute.

(b) *Selection of the contents of the proposed Act*

The Project Committee received the benefit of advice from the Office of Legislative Counsel on its approach to tasks of consolidation and endeavoured to adhere to that advice in

358. See, *supra*, under the heading “Some Existing Models.”

selecting the content of the proposed *Wills, Estates and Succession Act*. The Project Committee also found the Alberta Law Reform Institute's three selection criteria to be helpful, but did not apply them dogmatically.

The Project Committee considered that the main branches of classic succession law, namely wills, intestacy and probate procedure, should be brought together as a starting point. Dependants relief legislation was added to this group. While dependants relief is an integral part of the contemporary law of wills, it is also applicable to intestacy in most Canadian jurisdictions and its extension to intestacy is recommended in this Report. This warranted its treatment as a distinct portion of the reform legislation, as in the Ontario *Succession Law Reform Act*³⁵⁹ and the Alberta Law Reform Institute's proposed statute.³⁶⁰

The Project Committee considered legislation concerning beneficiary designations for various forms of non-probate assets such as life insurance, pensions, retirement savings and employee benefit plans to be part of the modern law of succession. Provisions intended to replace the existing beneficiary designations applicable to non-insurance vehicles, currently located in the *Law and Equity Act*,³⁶¹ were included in the consolidation.

The sections of Parts 3 and 4 of the *Insurance Act*³⁶² dealing with beneficiary designations were not consolidated on the ground that their removal would detract from the integrity of the overall scheme of that Act and the uniformity of insurance legislation in Canada, without a corresponding benefit in greater accessibility for these provisions. Certain amendments to the *Insurance Act* beneficiary designation provisions that are recommended are included in the unconsolidated miscellaneous amendments portion of the proposed *Wills, Estates and Succession Act* in Part Two.

Survivorship presumptions replacing those now found in section 2 of the *Survivorship and Presumption of Death Act*³⁶³ are included in the general section of the proposed Act. These statutory presumptions were considered appropriate for consolidation because they concern the effect of death on the title to property in cases where the order in which two or more persons die cannot otherwise be determined.

Sections 3 to 7 of the *Survivorship and Presumption of Death Act* were not consolidated as they were not considered to relate exclusively to succession law. They concern proceed-

359. *Supra*, note 40.

360. *Supra*, note 332 at 19.

361. *Supra*, note 8.

362. *Supra*, note 11.

363. *Supra*, note 4.

ings for an order presuming a person to be dead. An order of this kind may be sought for many reasons that are not necessarily concerned with the passage of property on death, e.g. to permit re-marriage. A consequential amendment renames the Act the *Presumption of Death Act*.

In the result, the subject-matter now covered by four separate Acts, namely the *Wills Act*,³⁶⁴ the *Wills Variation Act*,³⁶⁵ the *Estate Administration Act*,³⁶⁶ and the *Probate Recognition Act*³⁶⁷ is consolidated in the proposed succession statute together with provisions replacing portions of two others, the *Survivorship and Presumption of Death Act* and the *Law and Equity Act*.³⁶⁸

D. Conclusion

The proposed *Wills, Estates and Succession Act* will accomplish several objectives simultaneously. It will rationalize an important but historically neglected part of the provincial statute law. It will make the key legislation in the area much more readily accessible to non-lawyers as well as lawyers, and it will bring the law of succession in British Columbia into keeping with contemporary realities. The Institute recommends its enactment in the belief that this step will provide a functional legal framework for succession to property on death for a considerable time to come.

364. *Supra*, note 1

365. *Supra*, note 2.

366. *Supra*, note 3.

367. *Supra*, note 6.

368. *Supra*, note 8.

PART TWO

WILLS, ESTATES AND SUCCESSION ACT

Note: Rectangles around portions of the draft legislation denote terminology derived from Bill 32, 2d Sess., 38th Parl., *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*. This Bill did not proceed to second reading in that session, but had been expected to be passed until shortly before this Report was submitted. If Bill 32 is not reintroduced and passed in substantially similar form, the text enclosed in rectangles will require amendment before implementation.

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

PART 1 — GENERAL

Division 1 — Definitions and Application

Definitions

1 (1) In this Act:

“**beneficiary**” means

- (a) a person designated in a will to receive all or part of an estate, or
- (b) a person having a beneficial interest in a trust created by a will;

“**court**” means the Supreme Court;

“**cultural property**” has the same meaning as in paragraph 115 of the Nisga’a Government Chapter of the Nisga’a Final Agreement;

“**declarant**” means a person who completes a declaration in accordance with Part 6, Division 10 [*summary administration of small estates*];

“**estate**” means, with respect to

- (a) a person who died before June 1, 1921, personal property of the deceased,
- (b) a person who died on or after June 1, 1921, both personal property and land of the deceased,
- (c) a minor or mentally incapable person who is living, both personal property and land of the minor or mentally incapable person;

“**gift**” means a disposition of property in a will and includes a beneficial devise or bequest or appointment of or affecting property, but does not include charges, directions for payment of debt or the designation of a person as executor of the will;

“gross value” means fair market value without deduction for any debt, charge or security interest;

“intestacy estate” means the portion of the estate of a deceased person that does not pass beneficially to a successor under a will;

“intestate” means a deceased person whose property passes in whole or in part as intestacy estate;

“intestate successor” means a person entitled to receive all or part of the estate of an intestate or, in the case of a partial intestacy, all or part of the estate not disposed of by will;

“issuance”, “issue” and “issued”, with reference to a representation grant, include the filing of a small estate declaration;

“Nisga’a citizen” has the same meaning as in the Nisga’a Final Agreement;

“Nisga’a Lisims Government” has the same meaning as in the Nisga’a Final Agreement;

“Nisga’a Law” has the same meaning as in the Nisga’a Final Agreement;

“nominee” includes

(a) an attorney acting under an enduring power of attorney as defined in Part 2 of the <i>Power of Attorney Act</i> , or
--

(b) a representative acting under a representation agreement made under

(i) section 7 (1) (b) of the <i>Representation Agreement Act</i> , or

(ii) section 9 (1) (g) of the <i>Representation Agreement Act</i> before the repeal of that provision;
--

“personal representative” includes an executor of a will and an administrator with or without will annexed of an estate and, if a personal representative is also a trustee of part or all of the estate, includes the personal representative and trustee;

“person interested in the estate” means a

- (a) beneficiary or intestate successor,
- (b) personal representative, or
- (c) trustee of a trust created by the will;

“representation grant” means

- (a) the grant of probate of a will in British Columbia, whether made for general, special or limited purposes,

- (b) the grant of administration of the estate of a deceased person in British Columbia, with or without will annexed, whether made for general, special or limited purposes,
- (c) the resealing in British Columbia of the probate of a will or a grant of administration of the estate of a deceased person,
- (d) an ancillary grant, or
- (e) a small estate declaration filed in the court under Part 6, Division 10 [*summary administration of small estates*];

“revocation” and **“revoke”** with reference to a representation grant, include the termination of the authority of a declarant under section 173 [*division found inapplicable after filing*] to administer an estate;

“security interest” means an interest in land or personal property that secures payment or performance of an obligation;

“testator” means a person who makes a will;

“will” includes

- (a) a testament,
 - (b) a codicil,
 - (c) an appointment by will or by writing in the nature of a will in exercise of a power,
 - (d) a document ordered to be effective under section 46 [*dispensing power*],
 - (e) a testamentary disposition not described in paragraphs (a) to (d), other than
 - (i) a designation of a beneficiary under
 - (A) Part 4 [*retirement plan beneficiaries*],
 - (B) Parts 3 [*life insurance*] and 4 [*accident and sickness insurance*] of the *Insurance Act*, or
 - (ii) a testamentary disposition provided for specifically by another enactment or law.
- (2) For the purposes of this Act, two persons are spouses of each other at a relevant time if, immediately before the relevant time, they
- (a) were married to each other, or had lived and cohabited with each other at any time for a period of at least two years in a marriage-like relationship, including a marriage-like relationship between persons of the same gender,

- (b) both were alive, and
 - (c) had not been separated from each other for more than two years with the intention on the part of one or both of them to live separate and apart from each other permanently.
- (3) For the purposes of subsection (2), the relevant time is the death of one of the persons except where a provision stipulates a different time.

Sources: *Wills Act*, R.S.B.C. 1996, c. 489 [*Wills Act*], s. 1; *Estate Administration Act*, R.S.B.C. 1996, c. 122 [EAA], s. 1; original

Comment: This section contains definitions of terms that are used repeatedly throughout the Act. The definition of “personal representative” is the same as that in the *Interpretation Act*.¹ The definition is reproduced here only for the convenience of readers of this Act because of the frequency with which the term “personal representative” appears in this draft Act, as the definition set out in the *Interpretation Act* would be incorporated by reference in any case.

“Land,” as defined in the *Interpretation Act*, is the term used in this Act in place of “real property.” The definition in the *Interpretation Act* is as follows:

“**land**” includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning.

Comments on the specific definitions in this section appear below.

“cultural property”—The Nisga’a Final Agreement contains certain provisions concerning testamentary matters relating to property of Nisga’a citizens that constitutes “cultural property” as defined in the Agreement. The phrase “cultural property” appears in section 5.

“estate”—Sections 26–29 of the *Land Registry Act*,² which took effect on June 1, 1921, changed the law previously in effect in British Columbia under which only personal property passed to a personal representative on death. Real property, in other words land and interests in land, passed directly to the heir at law or devisees by will. Following the change, both personal property and real property passed to the personal representative in estates of persons dying on or after June 1, 1921. Occasionally matters may still arise from pre-1921 wills to which the distinction is relevant. It is preserved here out of an abundance of caution to make it clear that the definition of “estate” does not imply that this legislation alters the legal effect of pre-1921 wills.

“gift”—is defined as a “disposition” of land or personal property in a will. “Dispose” and “disposition” and grammatically related terms occur frequently in this draft Act and it is important to note that section 29 of the *Interpretation Act*³ gives “dispose” an extended meaning that includes “bequeath” or “devise,” terms referring to transfers of property by will:

1. R.S.B.C. 1996, c. 238.

2. S.B.C. 1921, c. 26.

3. *Supra* note 1.

“**dispose**” means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things.

“intestacy estate”—This term has been adopted to refer to property passing on an intestacy where it is important to distinguish between it and the estate generally (which may include property gifted by will). It is used in a number of sections of this part.

“intestate”—is used to refer to a person who dies without fully disposing of the estate by will as well as one who dies without a will.

“personal representative”—The definition of “personal representative” appearing here is the same as that in the *Interpretation Act*.⁴ The definition is reproduced here only for the convenience of readers of this Act because of the frequency with which the term “personal representative” appears within it. The definition set out in the *Interpretation Act* would be incorporated by reference in any case. While the *Interpretation Act* definition is not ideal because it tends to confuse the separate roles of personal representative and trustee when the same person holds both offices, it is nevertheless employed here for the sake of consistency with use of the term in other British Columbia legislation.

“representation grant”—This term has been introduced for convenience in referring collectively to grants of probate, administration, resealings, and small estate declarations. The expression “grant of administration” is used in this Act in place of the older term “letters of administration” in keeping with current usage in British Columbia. The definition expressly extends to various special forms of grants that are issued in particular circumstances, such as cessate grants and administration *de bonis non*.

“will”—This definition is drawn from the current *Wills Act*,⁵ and is modified to cover defectively executed documents admitted to probate under the curative dispensing power in section 46. Paragraph (e) expressly excludes from the definition of “will” instruments having a testamentary character (in the sense that they depend on death for their operation), but which are governed by other Parts of this Act (see e.g. Part 4) or other legislation. This category of testamentary instruments not comprised in the definition of “will” includes beneficiary designations under insurance policies, pensions, retirement savings plans, and employee benefit plans.

Definition of “Spouse”

Subsection (2) specifies when a person has the status of “spouse” for the purposes of this Act. The definition covers married and unmarried spouses, and it is irrelevant whether they are of opposite or the same sex. For unmarried persons to qualify as spouses, they must have lived and cohabited with one another in a marriage-like relationship for at least two years immediately before the relevant time. Whether the spouses are married or not, immediately before the relevant time they must both be alive and not have been separated for more than two years with one or both of them having the intention to live apart permanently.

The requirement for a minimum of two years of living in a marriage-like relationship in order for the parties to acquire the status of “spouse” and be treated on the same basis as a legally married person is consistent with other British Columbia legislation touching on spousal relationships. The stipulation that the parties not have been separated for more than two years immediately before the

4. *Ibid.*

5. R.S.B.C. 1996, c. 489.

relevant time stems from a policy, also reflected in existing legislation, that the right to inherit based on spousal status alone should not persist indefinitely once the spousal relationship has clearly broken down. Under this definition of “spouse,” however, the period during which inheritance rights persist following separation has been lengthened to two years from one. Section 98 (1) of the *Estate Administration Act*⁶ currently disentitles a surviving spouse from a share in the intestacy of the deceased spouse after the spouses have been separated for one year prior to the deceased’s death, unless the court orders otherwise. The “grace period” of separation before spousal inheritance rights lapse has been doubled in order to meet concerns that the one year of separation now allowed is often too short a time for separating spouses to reach agreement on a division of property without resorting to court proceedings leading to a division of property, and incurring the associated expense.

While the policy behind the definition of “spouse” and many of the changes recommended in this draft statute is to treat married and unmarried spouses on the same basis, income tax consequences of these changes will not necessarily be the same for the two categories of spousal relationships due to differences between the applicable definitions in this legislation and those in the federal *Income Tax Act*.⁷

Subsection (3) specifies a default rule that the relevant time is immediately before the death of the other member of the spousal relationship, unless a provision indicates another time as being relevant. Provisions which require spousal status to be determined as of a different time are section 41 (5) in relation to attestation of a will by a spouse of a beneficiary and section 43 (5) regarding the deemed revocation of a gift to a spouse under certain circumstances.

Application of certain provisions of [proposed] *Trustee Act* to personal representative

- 2 (1) Sections 58 [*trustee may apply to court for advice or directions*], 59 [*trustee may be relieved of liability for breach of trust*] and Part IX [*trustee compensation and accounts*] of the [proposed] *Trustee Act* apply to a personal representative.
- (2) Subject to section 137 [*distribution of a minor’s interest*], section 60 [*payment into court*] of the [proposed] *Trustee Act* applies to a personal representative.
- (3) Subsections (1) and (2) apply whether or not a personal representative is also a trustee.
- (4) If a person is both a personal representative and a trustee with respect to all or part of the same estate
 - (a) subject to subsections (1) to (3), this Act applies to that person in respect of a matter relating to the office, duties, powers, appointment, discharge, removal or substitution of that person as a personal representative, and

6. R.S.B.C. 1996, c. 122 [EAA].

7. R.S.C. 1985 (5th Supp.), c. 1.

- (b) the *Trustee Act* applies to that person in respect of a matter relating to the office, duties, powers, appointment, discharge, removal or substitution of that person as a trustee.

Source: original

Comment: Certain provisions of the draft *Trustee Act* proposed by the British Columbia Law Institute in the Report *A Modern Trustee Act for British Columbia*⁸ are expressly extended to personal representatives, regardless of whether they are also testamentary trustees. Section 58 of the draft *Trustee Act* allows trustees to apply to the court for directions on questions concerning the trust, including administration of trust property. Section 59 provides that a trustee who is technically in breach of trust but who has acted honestly and reasonably, and ought fairly to be excused from liability, may be relieved from liability for a loss resulting from the breach in the discretion of the court. Section 60 allows trustees to pay trust property into court or under certain circumstances to a guardian, committee, or the Public Guardian and Trustee. (The term “committee” in use under the current *Patients Property Act*⁹ at the time of publication of this Report will be replaced by the terms “property guardian” and “statutory property guardian” if and when the amendments to the *Adult Guardianship Act*¹⁰ contained in the *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*¹¹ are enacted and brought into force.) These proposed provisions correspond broadly to sections 86, 96, and 40 of the existing *Trustee Act*,¹² respectively. Those three existing provisions extend now to personal representatives.

As section 137 requires payment to the Public Guardian and Trustee of a minor’s monetary interest in an estate, it prevails over section 60 (5) of the draft *Trustee Act*, which otherwise would permit payment of trust money or securities to which a minor is entitled to a private guardian of the minor.

Subsection (3) affirms for the sake of clarity that a personal representative need not also be a trustee for sections 58–60 and Part IX of the proposed *Trustee Act* to apply to the personal representative.

Subsection (4) clarifies the application of this Act and the proposed *Trustee Act* where the same person exercises the offices of personal representative and testamentary trustee. Considerable confusion now exists with respect to application of the EAA and the present *Trustee Act* when these offices are combined in the same person. Each Act contains provisions that apply to personal representatives and trustees. While it is generally accepted that once an estate has been administered (i.e. assets gathered and debts paid) and the balance distributed among those entitled to receive it, any continuing duties are performed as a trustee, it may still be difficult to determine whether someone is fulfilling one office or the other. The practice in will drafting of naming persons

8. (BCLI Rep. No. 33) (Vancouver: The Institute, 2004).

9. R.S.B.C. 1996, c. 349.

10. R.S.B.C. 1996, c. 6.

11. Bill 32, *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*, 2d Sess., 38th Parl., British Columbia, 2006 (1st reading 27 April 2006) [Bill 32].

12. R.S.B.C. 1996, c. 464.

as “executors and trustees” and referring to them throughout the will as “my trustees” tends to compound the confusion.

Paragraph (4) (a) delineates the scope of this Act, declaring that it governs with respect to matters relating to the office of personal representative when the same person holds both offices. Paragraph (4) (b) declares that the proposed *Trustee Act* applies to a matter relating to the office of trustee. As paragraph (4) (a) is subject to subsection (1), however, Part IX of the proposed *Trustee Act* would govern the statutory compensation and passing of accounts of personal representatives, whether or not they are also trustees. The principles relating to the statutory compensation of personal representatives and trustees are similar and so they are located in a single Act on the ground of legislative economy. This is the same pattern as in current legislation. Section 99 of the present *Trustee Act*, which concerns remuneration, applies to personal representatives and trustees alike.

These provisions create general rules. Other provisions deal specifically with the compensation of the official administrator and administrators appointed for specific purposes, such as representing a deceased person’s estate in litigation.

Procedure in matters of succession and administration of estates

- 3 The rules and practice of the court in civil matters apply to a proceeding in respect of a matter under this Act, except where otherwise provided by this Act or the rules.

Source: EAA, s. 110

Comment: This section corresponds to section 110 of the present EAA.¹³ The procedural reforms that accompanied the merger of the courts of law and equity in the late nineteenth century in both England and British Columbia did not extend fully to matters that had formerly been within the jurisdiction of the Court of Probate, and before that within the jurisdiction of the English ecclesiastical courts. It has been carried forward to put it beyond question that ordinary modern civil procedure applies to probate and succession-related matters, rather than the older practice and procedure of the former Court of Probate in England, which was based on the practice of the Prerogative Court of Canterbury.

Effect of adoption

- 4 (1) Subject to this section, if the relationship of parent and child must be established at any generation in order to determine succession under this Act, the relationship is to be determined in accordance with the provisions of the *Adoption Act* respecting the effect of adoption.
- (2) Subject to subsection (3), if a child is adopted
 - (a) the child is not entitled to succeed to the estate of his or her natural parent except through the will of the natural parent, and

13. Originally passed as s. 24 of the *Court of Probate Act, 1857*, (U.K.), 20 & 21 Vict., c. 77 and re-enacted in British Columbia as s. 3 of the *Administration Act*, R.S.B.C. 1897, c. 73.

- (b) a natural parent of the child is not entitled to succeed to the estate of the child except through the will of the child.
- (3) Adoption of a child by the spouse of a parent does not terminate the relationship of parent and child between the child and that parent for purposes of succession under this Act.

Source: *Adoption Act*, R.S.B.C. 1996, c. 5, s. 37

Comment: This section restates the policy of the *Adoption Act*¹⁴ in the context of intestate succession and reinforces section 37 of that Act. Adoption totally severs a blood relationship for intestate succession purposes (with an exception for step-parent adoptions) so neither a birth parent nor child can inherit from each other on an intestacy.

This does not affect the right of a birth parent to leave, by will, a gift to a child that has been adopted. Nor does it prevent an adopted child from providing, by will, a gift to a birth parent.

Division 2 — Nisga’a Cultural Property and Notice to Nisga’a Lisims Government

Will or cultural property of Nisga’a citizen

- 5
- (1) As provided in paragraph 118 of the Nisga’a Government Chapter of the Nisga’a Final Agreement, the Nisga’a Lisims Government may commence an action under Part 5 [*dependants relief*] in respect of the will of a Nisga’a citizen that provides for the devolution of cultural property.
 - (2) In any judicial proceeding under this Act in which the validity of a will of a Nisga’a citizen, or the devolution of the cultural property of a Nisga’a citizen, is at issue, the Nisga’a Lisims Government has standing in the proceeding as provided in paragraph 117 of the Nisga’a Government Chapter of the Nisga’a Final Agreement.
 - (3) In a proceeding to which subsection (2) applies, the court must consider, among other matters, any evidence or representations in respect of Nisga’a laws and customs dealing with the devolution of cultural property as provided in paragraph 119 of the Nisga’a Government Chapter of the Nisga’a Final Agreement.
 - (4) As provided in paragraph 120 of the Nisga’a Government Chapter of the Nisga’a Final Agreement, the participation of the Nisga’a Lisims Government in a proceeding to which subsection (2) applies must be in accordance with the applicable Rules of Court and does not affect the court’s ability to control its process.

Sources: EAA, s. 2.1; *Wills Variation Act*, R.S.B.C. 1996, c. 490 [WVA], s. 1.1

14. R.S.B.C. 1996, c. 5.

Comment: Several provisions of the Nisga'a Final Agreement protect interests of the Nisga'a Lisims Government in matters concerning wills that affect Nisga'a cultural property, as it is defined in section 115 of the Government Chapter. Among these is a general right of standing in any proceeding in which the validity of such a will is in question. This includes a proceeding for an order under the dependants relief provisions in Part 5 if the deceased left a will covering Nisga'a cultural property. The court is required to consider evidence and representations regarding Nisga'a law and custom surrounding the devolution of cultural property. Section 5 carries forward section 2.1 of the present *Estate Administration Act* and section 1.1 of the *Wills Variation Act*,¹⁵ which reflect the relevant terms of the Nisga'a Final Agreement.

Notice to Nisga'a Lisims Government

- 6 (1) If the deceased was a Nisga'a citizen, an applicant for a grant of probate or administration must, in addition to giving notice to the persons referred to in section 109 (1) (a) to (d) [*notice of application for probate or administration*],
- (a) give a notice of the application to the Nisga'a Lisims Government, and
 - (b) if there is a will and the Nisga'a Lisims Government has requested a copy of it within 30 days of receiving the notice under paragraph (a), provide a copy of the will to the Nisga'a Lisims Government.
- (2) An action in respect of the will of a Nisga'a citizen must not be heard by the court at the instance of a party claiming the benefit of this Part unless a copy of the writ of summons has been served on the Nisga'a Lisims Government.

Sources: EAA, s. 112 (1.1); WVA, s. 3

Comment: Subsection (1) corresponds to the present section 112 (1.1) of the EAA. Paragraph 117 of the Nisga'a Government Chapter of the Nisga'a Final Agreement confers a right of standing on the Nisga'a Lisims Government in any proceeding in which the validity of the will of a Nisga'a citizen or the devolution of the citizen's cultural property is at issue. The requirement for notice enables the Nisga'a Lisims Government to be in a position to exercise its right of standing.

The requirement under subsection (2) for service on the Nisga'a Lisims Government in an action under this Part concerning a Nisga'a citizen's will is intended to allow that Government in a position to effectively exercise the right of standing to intervene in such an action that is conferred by paragraph 117 of the Government Chapter of the Nisga'a Final Agreement.

Division 3 — Survivorship

Introductory Comment: When two or more people die in a common disaster, establishing their order of death is a question of fact. But it is also a question that can have important legal implications if one or more of the deceased persons has left property by will to the others or if one or more of the deceased persons is entitled to the property of the others by operation of statutory intestate

15. R.S.B.C. 1996, c. 490 [WVA].

succession rules. The factual question engages a rule of law called the doctrine of lapse. A gift to a beneficiary who predeceases a testator will lapse—it will not pass into the beneficiary's estate. A gift to a beneficiary who survives the testator—even for a brief time—will take effect and will pass into that beneficiary's estate.

Questions of survivorship, then, are often decided in litigation involving the contingent beneficiaries or intestate successors of those who perished in a common disaster. At common law, a person who claimed an entitlement to property in these circumstances had to prove that the person he or she was claiming through died after the other person or persons involved in the common disaster. This task was often quite difficult to accomplish, as the evidentiary record coming out of a common disaster was usually of little assistance in conclusively establishing the precise order of deaths. The common law approach encouraged litigation and often resulted in gifts lapsing.

The law of survivorship was reformed by the creation of statutory presumptions. The first jurisdiction to undertake reform in this area was the United Kingdom. It enacted a statutory rule in 1925 that created a general presumption that applied whenever “two or more persons have died in circumstances rendering it uncertain which of them survived the other or others.”¹⁶ In such cases, persons are presumed under the legislation to die in order of seniority, from oldest to youngest.

British Columbia adopted the English rule when it enacted legislation dealing with survivorship.¹⁷ The same general presumption of survivorship remains in place today.¹⁸ An important exception to this general rule is found in the treatment of the death benefit payable under an insurance policy. In British Columbia—as in the other common law provinces of Canada—these funds are subject to a special rule that is located in the *Insurance Act*.¹⁹ Under the *Insurance Act* rule, the beneficiary is presumed to have predeceased the person whose life is insured.

Although the law in British Columbia has remained largely unchanged for sixty-seven years, law reform bodies have continued to study this area of the law and make recommendations for its improvement. In 1971, the Uniform Law Conference of Canada (which was known at that time as the Conference of Commissioners on Uniformity of Legislation in Canada) endorsed the *Uniform Survivorship Act*.²⁰ The central provision of this uniform statute was a general presumption that is similar to the one set out in the *Insurance Act*, which has the effect of removing inconsistencies that result from having two rules. The *Uniform Survivorship Act* has been implemented in several Canadian provinces.²¹ The Law Reform Commission of British Columbia has also made recommendations in this area.²² These recommendations included implementing the general presumption from

16. *Law of Property Act, 1925*, (U.K.), 15 & 16 Geo. V, c. 20, s. 184.

17. *Commorientes Act*, S.B.C. 1939, c. 6.

18. *Survivorship and Presumption of Death Act*, R.S.B.C. 1996, c. 444, s. 2.

19. R.S.B.C. 1996, c. 226, s. 72 (life insurance); s. 109 (accident and sickness insurance).

20. See Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Fifty-Third Annual Meeting* (Ottawa: The Conference, 1971) at 409–13.

21. See, e.g., Ontario: *Succession Law Reform Act*, R.S.O. 1990, c. S.26, Part IV; Manitoba: *The Survivorship Act*, R.S.M. 1987, c. S250, C.C.S.M. c. S250.

22. *Report on Presumptions of Survivorship* (LRC 56) (Vancouver: The Commission, 1982).

the *Uniform Survivorship Act* and several other refinements to the law that would have the effect of reducing litigation and inconsistent results.

This Part implements the recommendations made by the Law Reform Commission in the *Report on Presumptions of Survivorship*.

Definition

- 7 In this Part, “**instrument**” means a will, deed, trust, insurance policy, pension, profit-sharing, retirement or similar benefit plan, a document creating or exercising a power of appointment or power of attorney, or any other dispositive, appointive or nominative document of similar type.

Source: Uniform Simultaneous Death Act § 1 “governing instrument” (1993)

Comment: Individuals should have the freedom to displace the statutory presumptions in this Part. The legislation permits them to do this by executing an instrument that contains a contrary intention. This definition sets out the class of documents that qualify as instruments for the purposes of this Part. That class is broadly defined to include all sorts of documents that are usually a part of estate and testamentary planning. The definition is based on the definition of “governing instrument” that is found in section 1 of the American Uniform Simultaneous Death Act (1993). The language of that statute, which was prepared and endorsed by the National Conference of Commissioners on Uniform State Laws, is preferred in this context to the Canadian alternatives, which tend simply to rely on an open-ended definition of “instrument” that says nothing more than an instrument “includes the *Wills Act*.”

General rule of survivorship

- 8 Except as otherwise provided in this Part, if 2 or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, rights to property must be determined as if each had survived the other or others.

Source: *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 55 (1)

Comment: This section adopts a general presumption that is identical in substance to that in the *Uniform Survivorship Act* in place of the presumption currently set out in section 2 (1) of the *Survivorship and Presumption of Death Act*. The advantage of presuming that the testator has survived the beneficiary, instead of presuming that the younger person has survived the older, is that it ensures that the estate will devolve either to the testator’s contingent beneficiaries or on an intestacy. This result is not assured under the existing British Columbia rule, which may, in certain circumstances, cause the testator’s estate to go to a stranger. This general presumption may be displaced by the specific rules that are set out in the following sections of this Part.

Provision in an instrument for disposition of property

- 9 Subject to a contrary intention appearing by the instrument, if

- (a) an instrument contains a provision for the disposition of property in any one or more of the following cases, namely, if a person designated in the instrument
 - (i) dies before another person,
 - (ii) dies at the same time as another person, or
 - (iii) dies in circumstances that make it uncertain which of them survived the other, and
 - (b) the designated person dies at the same time as the other person or in circumstances that make it uncertain which of them survived the other,
- then, for the purpose of that disposition, the case for which the instrument provides is deemed to have occurred.

Source: *Survivorship and Presumption of Death Act*, R.S.B.C. 1996, c. 444 [SPDA], s. 2 (3)

Comment: This section re-enacts section 2 (3) of the *Survivorship and Presumption of Death Act*. It gives the deceased the express authority to displace the general presumption of survivorship with respect to property by providing for a different result in an instrument.

Provision in a will for substitute personal representative

10 Subject to a contrary intention appearing by the will, if

- (a) a will contains a provision for a substitute personal representative operative in any one or more of the following cases, namely, if a personal representative designated in the will
 - (i) dies before the testator,
 - (ii) dies at the same time as the testator, or
 - (iii) dies in circumstances that make it uncertain which of them survived the other, and
 - (b) the designated personal representative dies at the same time as the testator or in circumstances that make it uncertain which of them survived the other,
- then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

Source: SPDA, s. 2 (4)

Comment: This section re-enacts section 2 (4) of the *Survivorship and Presumption of Death Act*. It gives the deceased the express authority to displace the general presumption of survivorship with respect to his or her personal representative by providing for a different result in a will. The operation of this section is similar to that of section 9.

Survival of beneficiaries

- 11 (1) Subject to section 9 [*provision in an instrument for distribution of property*], if a right of a beneficiary to receive an interest in property is conditional upon the beneficiary surviving another person, and the beneficiary and the other person die at the same time or in circumstances rendering it uncertain which of them survived the other, the beneficiary is deemed not to have survived the other person.
- (2) Subject to section 9 [*provision in an instrument for distribution of property*], if property is left to 2 or more beneficiaries or the survivors or survivor of them, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property must be divided into as many equal shares as there are beneficiaries and these shares are to be distributed respectively to those persons who would have taken in the event that each of the beneficiaries had survived.

Source: Uniform Simultaneous Death Act (1953) § 2, reproduced in LRCBC, *Report on Presumptions of Survivorship* at 27

Comment: This section addresses an issue that is not adequately covered by the general rule of survivorship in the *Uniform Survivorship Act*. An example of when it would apply is provided in the *Report on Presumptions of Survivorship*.²³

A, who is deceased, left a gift to B and C for life, and then to the survivor of them. B and C die in circumstances rendering it uncertain which of them survived the other. B is younger than C.

As the Law Reform Commission observed, the general rule of survivorship in the *Uniform Survivorship Act* is of no assistance in this case, and the existing presumption in the *Survivorship and Presumption of Death Act* would have the effect of awarding the gift to B's successors. But, since the testator did not distinguish between B and C, it is not desirable for the law to favour one over the other. This section resolves the problem by providing that the gift will be shared equally between B's and C's successors.

The language of this provision is based on a provision that appeared in an earlier iteration of the American Uniform Simultaneous Death Act.²⁴

Simultaneous death of joint tenants

- 12 Where 2 or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others,

23. *Ibid.* at 19.

24. See *Report on Presumptions of Survivorship*, *ibid.*, Appendix B at 27 (reproducing the text of the earlier version of the Uniform Simultaneous Death Act, which contains this provision as section 2).

each person is deemed, for the purposes of section 8 [*general rule of survivorship*] to have held as tenants in common with the other or with each of the others in that property.

Source: *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 55 (2)

Comment: The *Survivorship and Presumption of Death Act* does not address the issue of survivorship in connection with a common disaster involving joint tenants. This section, which is based on a provision in the *Uniform Survivorship Act*, provides a default rule for these circumstances. The section has the effect of converting the joint tenancy into a tenancy in common. This conversion will ensure that the estate of each deceased joint tenant will receive that deceased joint tenant's share in the property. If one joint tenant survives the common accident, however, the operation of the ordinary rules of joint tenancy will apply and that joint tenant take the entire property by virtue of the right of survivorship.

Requirement that person survive deceased by 5 days

- 13
- (1) A person who fails to survive the deceased person by 5 days is deemed to have predeceased the deceased for all purposes affecting the property of the deceased, or any property of which the deceased is competent to dispose.
 - (2) Where 2 or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, if
 - (a) it cannot be established that one of the 2 joint tenants survived the other joint tenant by 5 days, then one-half of the property passes as if one had survived by 5 days and one-half as if the other had survived by 5 days;
 - (b) there are more than 2 joint tenants and it cannot be established that at least one of them survived the others by 5 days, then the property must be divided into as many equal shares as there are joint tenants and these shares are to be distributed respectively to those persons who would have taken in the event that each of the joint tenants had survived.
 - (3) Unless it is established that a person has survived a deceased person by 5 days, or for a longer period if required by an applicable instrument, then for the purposes of this section that person is deemed to have predeceased the deceased.
 - (4) This section does not apply to the appointment of a personal representative in a will.

Sources: subs (1)–(3): Mont. Code Ann. § 72-2-114 (2005); Uniform Simultaneous Death Act § 4 (1993); subs. (4): original

Comment: This section implements a recommendation of the Law Reform Commission that has the effect of “extend[ing] the idea of simultaneous death.”²⁵ The section is based on a provision of the American Uniform Probate Code, but its underlying idea will be familiar to anyone who has ever made a will. Under the current law of British Columbia, if it can be established that one person has survived another, even for a moment, then that second deceased is entitled to inherit either under the first deceased’s will or as the intestate successor of the first deceased. This rule may create anomalous or unintended results, so most professionally prepared wills avoid it by providing that a gift will only take effect if the beneficiary survives the testator for some pre-determined period. This section adopts that concept into the general statutory law of the province.

The Law Reform Commission observed that this provision makes it more likely that a deceased’s wishes will be honoured. If the deceased has made a will, then chances are this provision will have the effect of ensuring that the person the deceased intended to benefit will receive the gift. Further, this provision will diminish the number of multiple administrations.²⁶

The Law Reform Commission explained that five days was chosen as the statutory period of survivorship for the following reasons:²⁷

The *Uniform Probate Code* sets a period of survivorship at 120 hours. Any period of time must be arbitrarily selected, and there is little difference between selecting a period of 120 hours (or five days), two weeks or a month. The period selected by will draftsman is often 30 or 60 days. In our opinion, a shorter period than either of those is desirable if only because it is less likely to be inconvenient with respect to administering the deceased’s estate. The period set by the *Uniform Probate Code* should be satisfactory. We do not think, however, that period should be determined in hours. Requiring a beneficiary or next-of-kin to survive the deceased by five days, rather than 120 hours, should avoid problems which may arise of establishing exactly what time the deceased died. In some cases it is clear the deceased died on, for example, a Thursday, but there is no evidence respecting what time on Thursday death occurred.

The *Interpretation Act* directs how time expressed in days is to be calculated. The Act directs that the first day is excluded and the last day included. If the deceased dies on a Tuesday, the beneficiary must survive until the end of Sunday to inherit.

As few Canadian jurisdictions have similar legislation,²⁸ conflict of laws issues may arise where a deceased has property in other provinces in addition to British Columbia. But, as the Law Reform

25. *Report on Presumptions of Survivorship*, *ibid.* at 21.

26. *Ibid.*

27. *Ibid.* at 21–22 [footnote omitted]. The statutory rules for the computation of time referred to in the quotation are now found in *Interpretation Act*, *supra* note 1, s. 25.

28. See Saskatchewan: *The Survivorship Act*, 1993, S.S. 1993, c. S-67.1, s. 4 (5-day survivorship period); New Brunswick: *Survivorship Act*, S.N.B. 1991, c. S-20, s. 6 (10-day survivorship period). These provisions are not identical in all respects to the provision in our draft legislation, but their effect is similar in nature.

Commission pointed out, these problems do not override the fact that this provision “promotes the fairest result,” and should not stand in the way of enactment.²⁹

Subsection (3) permits this rule to be displaced by an instrument. But the instrument may only substitute a period longer than the five days set out in this section. The five-day survivorship period cannot be shortened or eliminated by an instrument.

Subsection (4) does not appear in the American model. It has been added to this legislation to make it clear that this provision is not intended to apply to personal representatives. Personal representatives have duties that commence with the testator’s death. It would be undesirable to create a period of uncertainty where a personal representative’s authority is subject to a condition of surviving the testator for five days.

Application

- 14** (1) Despite any other provision in this Act, this Division does not apply if a contrary intention appears in an instrument.
- (2) This Division is subject to sections 72 [*simultaneous deaths*] and 109 [*simultaneous deaths*] of the *Insurance Act*.

Source: subs. (1): Uniform Simultaneous Death Act § 6; subs. (2): original

Comment: Subsection (1) preserves the right to oust the presumptions contained in this Part by setting out a contrary intention in a will or other instrument. Subsection (2) maintains the position of treating the proceeds of life insurance policies and accident and sickness insurance policy in accordance with the rules set out in the *Insurance Act*. This practice is well-settled and there is little reason to change it. Further, the general presumption set out in this Part resembles the general presumption in the *Insurance Act*, which will lower the chances of insurance proceeds and the decedent’s estate being treated inconsistently.

PART 2 — INTESTATE SUCCESSION

Introductory Comment: This Part corresponds to Part 10 of the current *Estate Administration Act*,³⁰ which prescribes how the estate of a person who dies intestate is to be distributed. Many provisions of the EAA have been carried forward into this Part. In doing so, an attempt has been made to impose a more logical ordering of provisions and, in some cases, to modernize the drafting.

Also carried forward are a number of common law rules which have not been the subject of legislation. In some cases they are carried forward implicitly, simply by leaving the legislation silent on them. In a few cases the common law rule has been restated for greater clarity.

This Part also embodies a number of significant changes from the existing law. The rights of a surviving spouse have been enhanced. First, the preferential share of the spouse in an intestacy has been increased, with the amount of the increase depending on whether the issue of the deceased are also issue of the spouse. The concept of giving the surviving spouse a life interest in the

29. *Report on Presumptions of Survivorship*, *supra* note 22 at 22.

30. *Supra* note 6.

spousal home has not been carried forward. Instead, a surviving spouse will have the right to compel the personal representative to appropriate the spousal home toward the total or partial satisfaction of the spouse's entitlement under this Part.

Another major change, more significant perhaps in theory than in practice, concerns distribution if the intestate left no surviving spouse or issue. The current law calls for distribution equally among the next of kin of equal degree of kinship to the intestate, subject to the rights of the deceased's spouse. As this sometimes results in close and fairly remote relatives receiving the same share, this rule would be replaced by a *parentelic* system of ranking. Under the parentelic system, the right to inherit belongs first to the spouse and issue of the deceased and then follows the line of descent from the closest common ancestor of the deceased person and the claiming relative, rather than depending on degrees of kinship.

Finally, the "deemed lapse" concept, under which a gift to a spouse is automatically revoked when the spousal relationship ends, would now be made applicable in an intestacy. This is the concept that underlies section 16 of the current *Wills Act*³¹ and is carried forward in section 43 of this Act.

A number of lesser changes have also been introduced. In all cases changes from the current law are identified and explained in greater detail in the comments to individual provisions.

Division 1 — Interpretation, Application and Validity

Interpretation

15 In this Part:

"household furnishings" means tangible personal property usually associated with the enjoyment by the spouses of the matrimonial home;

"issue" includes all lineal descendants of the ancestor;

"net value" means the value of an intestacy estate wherever located, both in and out of British Columbia, after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees but does not include the value of household furnishings passing to a spouse under section 23 (2) [*intestate leaving spouse and issue*].

Sources: EAA, ss. 83, 85, 96

Comment: It is necessary to construct a matrix of definitions that is sufficiently general to accommodate the variety of circumstances that may surround an intestacy. The deceased may have made a valid will leaving "Blackacre" to a named beneficiary, but which is silent on the disposition of the residue of the estate. The will may or may not have appointed an executor. The will may have undergone some authentication process in another jurisdiction and been "resealed" in British Columbia. These subtleties make it misleading to speak simply of "the estate" to refer to the property passing on intestacy (EAA, section 83) or the issue of letters of administration as a trigger for the running of time (EAA, section 98 (3)).

31. *Supra* note 5.

The application of the general definition provisions at the beginning of this Act must not be overlooked. In particular, section 1 (2) which defines when a spousal relationship does or does not exist is critical to the application of a number of sections in this part. Comments on specific definitions are set out below.

“household furnishings”—This definition is derived from EAA, section 96. It is used in the definition of “net value” and in section 23.

“issue”—This definition is drawn from section 83 of the EAA. It is used in sections 17, 22 to 25, 30, and 32.

“net value” is derived from EAA, section 85, and is used in section 23.

Division 2 — General Rules Concerning Intestate Succession

Dower and curtesy abolished

16 The common law estates of dower and curtesy are abolished.

Source: EAA, s. 95

Comment: This carries forward section 95 of the EAA, which abolishes certain obsolete estates.

Distribution to issue

- 17** (1) When a distribution is to be made under this Part to the issue of a person, the property that is to be so distributed must be divided into a number of equal shares equivalent to the number of
- (a) living issue, plus
 - (b) deceased issue who have left descendants surviving the testator,
- in the generation nearest to the person that contains one or more surviving members.
- (2) Subject to subsection (3), each living member of the generation nearest to the person that contains one or more surviving members is to receive one share and the share that would go to each deceased member if living is to be divided among that member’s issue in the same manner as under subsection (1) and this subsection.
- (3) Distribution to issue under subsections (1) and (2) as a result of a parent having predeceased the intestate ends with the children of a brother or sister of the intestate.

Source: EAA, s. 84

Comment: Section 17 carries forward the same policy as section 84 of the EAA. This section confirms that distribution to the issue of a deceased person is to be on a basis known as *per stirpes*

(rather than on a *per capita* basis in which each living member of the issue would receive an equal share, regardless of the generation to which each member belongs.) Under *per stirpes* distribution, the share of the estate that a deceased parent would have been entitled to receive if that parent had been living is divided among the children of the deceased parent. Each surviving child receives one of those shares and the process of division is repeated in the case of deceased children who have living descendants.

There are several methods of *per stirpes* distribution in use. The method described in subsections (1) and (2) is one that is commonly followed, in which the initial division of the estate occurs in the first generation following the deceased person in which there are living members. References to distribution to issue are found in sections 23 and 24.

Children or more remote issue who take in whole or in part the share that would have gone to a parent or other ancestor if the ancestor had been alive to receive it are said to take “by representation.” Subsection (3) carries forward a prohibition found in sections 87 (2), 88, and 89 of the EAA on taking by representation beyond the level of the children of brothers and sisters, aunts and uncles of the intestate. In other words, nephews, nieces, and first cousins may take their deceased parent’s share, but more remote relatives may not do so. Instead, what would have been the deceased parent’s share would go to increase the size of the shares taken by the other successors in the same generation as the parent or an earlier generation. This serves to limit the fragmentation of estates and avoid long and expensive searches for remotely related successors who may have had little or no connection with the intestate during the intestate’s life.

Posthumous births

- 18** Descendants and relatives of the intestate, conceived before the person’s death but born afterwards, inherit as if they had been born in the lifetime of the intestate and had survived the intestate.

Source: EAA s. 91

Comment: This provision carries forward the rule currently contained in section 91 of the EAA concerning successors who are conceived but not born at the time of the intestate’s death. These successors are treated as if they had been born at the intestate’s death and therefore are entitled to inherit.

Spouse deemed to predecease intestate

- 19** (1) A person who was a spouse of an intestate is deemed to have predeceased the intestate if, prior to the death of the intestate,
- (a) the person and the intestate were spouses to whom Part 5 [*matrimonial property*] of the *Family Relations Act* applied, and
 - (b) an event occurred during the lifetime of the intestate that would cause an interest in family assets to arise in favour of the spouse of the intestate under that Part.
- (2) The operation of subsection (1) is not affected by
- (a) a subsequent reconciliation of the intestate and the spouse, or

- (b) the fact that immediately after an event referred to in subsection (1) occurred the parties continued to be spouses within the meaning of this Act.

Source: original

Comment: This provision is the intestacy counterpart of section 43 which in turn carries forward the policy of section 16 of the *Wills Act*. That policy is to prevent over-compensation of the surviving party to a spousal relationship by causing rights of inheritance between the spouses to lapse when a division of family assets has taken place by operation of Part 5 of the *Family Relations Act*.

This proposed section must be read in conjunction with the definition of “spouse” in section 1 (2) which sets out the general rule as to when a spousal relationship exists for the purposes of this Act. In particular, a person ceases to be a spouse after a two year separation made with the requisite intent to live separate and apart on a permanent basis. This applies equally whether the spousal relationship arises through a legal marriage or a marriage-like relationship of more than two years’ duration. (Section 98 (1) of the EAA currently makes separation for more than one year a bar to intestate inheritance by a spouse.)

The deemed lapse provided in this section will, therefore, be relevant only where an event referred to in subsection (1) occurs within two years of the date of the intestate’s death.

Spousal share if 2 or more persons are entitled as spouse

- 20** For the purposes of this Part, if 2 or more persons are entitled as a spouse they share the spousal share in the intestacy estate in the portions determined by the court as the court considers just or as the parties may agree.

Source: EAA, s. 85.1

Comment: The fact that persons can be spouses for the purposes of this Act in the absence of a legal marriage raises the possibility that two or more persons could be spouses of the intestate for the purposes of succession. In such a case the determination of their respective entitlements is left to the court if the parties cannot agree. This section carries forward section 85.1 of the EAA, but also clarifies that the apportionment of the spousal share may take place by agreement as well as by court order.

Uniform construction with laws of other provinces

- 21** This Part must be so interpreted and construed as to effect the general purpose of making uniform the law of those provinces that enact identical or substantially the same provisions.

Source: EAA, s. 99

Comment: This provision is carried forward from EAA, section 99. This provision may be particularly important in the application of the parentelic scheme of distribution set out in section 24, since the Province of Manitoba has adopted somewhat similar legislation, based on the version of the

Uniform Intestate Succession Act currently promulgated by the Uniform Law Conference of Canada.³²

Division 3 — Distribution of Intestacy Estate

Introductory Comment: A feature of Division 3 that should be noted is that the “hotchpot” provision currently found in EAA, section 92 is not carried forward.³³ It is not considered tenable in light of today’s standards and practices to presume that an intestate will have intended advances made to a child during the intestate’s lifetime as gifts to be taken into account in an intestacy distribution. Where such an intent exists, it is more likely to be found in a will.

Intestate leaving spouse but no issue

- 22** If an intestate dies leaving a spouse but no issue, the intestacy estate goes to the spouse.

Source: EAA s. 83

Comment: This section carries forward the current rule found in EAA section 83. A surviving spouse takes the entire intestacy estate where the deceased leaves no surviving issue.

Intestate leaving spouse and issue

- 23** (1) This section applies if an intestate dies leaving a spouse and surviving issue.
(2) The spouse is entitled to
(a) the household furnishings, and

32. *Intestate Succession Act*, C.C.S.M. c. I85, s. 4. The Manitoba version of the parentelic scheme, however, provides for *per capita* distribution at each generation rather than *per stirpes*. This results in a difference in the size of the share taken by each member of the same generation, but not in the identity of who is entitled to take. The *Uniform Intestate Succession Act*, like the provisions recommended here, prescribes a form of *per stirpes* distribution. See the commentary to section 17 above.

33. 92 (1) If any child of a person who has died wholly intestate has been advanced by the intestate by portion, the portion must be reckoned, for the purposes of this section only, as part of the estate of the intestate distributable according to law.
(2) If the advancement is equal to or greater than the share of the estate that the child would be entitled to receive as above reckoned, the child and the child’s descendants must be excluded from any share in the estate.
(3) If the advancement is not equal to the share, the child and the child’s descendants are entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and advancement equal as nearly as can be estimated.
(4) The value of any portion advanced is deemed to be that which has been expressed by the intestate or acknowledged by the child in writing, otherwise the value is the value of the portion when advanced.
(5) The onus of proving that a child has been maintained or educated, or has been given money, with a view to a portion is on the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing.

- (b) a preferential share of the intestacy estate as provided in subsections (3) and (4).
- (3) If the issue are all issue of both the intestate and the spouse, the preferential share is \$300 000 or a greater amount as may be prescribed by regulation.
- (4) If all the issue are not common to the intestate and the spouse, the preferential share is \$150 000 or a greater amount as may be prescribed by regulation.
- (5) If the net value of the intestacy estate is less than the spouse's preferential share, the intestacy estate goes to the spouse.
- (6) If the net value of the intestacy estate is greater than the spouse's preferential share,
 - (a) the spouse has a charge on the intestacy estate for the amount of the preferential share, and
 - (b) the residue of the intestacy estate, after satisfaction of the preferential share, must be distributed:
 - (i) one half to the spouse, and
 - (ii) one half to the issue.

Source: EAA, s. 85

Comment: This section addresses the situation where the intestate is survived by both a spouse and issue. It carries forward, with significant modifications, the distribution currently mandated by section 85 of the EAA. The changes introduced in this section are described below.

The preferential share of the surviving spouse is much more generous than the current law provides. The figure for the basic share of \$65,000 would be raised to either \$150,000 or \$300,000, with the ability to increase these amounts further by regulation. This will permit periodic revisions of the figures without the necessity of formal amendments to the Act. An increase in the spousal preferential share is considered long overdue. In 1983 the Law Reform Commission of British Columbia recommended it be increased to \$200,000, and that the figure be variable by regulation.³⁴ Saskatchewan currently sets the preferential share at \$100,000³⁵ and Ontario at \$200,000.³⁶ In light of estate values typically encountered in British Columbia and contemporary standards and testamentary practices that favour generous treatment of the surviving spouse, it is thought fair to allow the surviving spouse the first \$300,000 in an intestacy.

34. Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (LRC 70) (Vancouver: The Commission, 1983) at 28.

35. *The Intestate Succession Act*, 1996, S.S. 1996, c. I-13.1, s. 6 (1).

36. *Succession Law Reform Act*, *supra* note 21, s. 45 (5); O. Reg. 54/95, s. 1.

The value of the basic share will be determined by whether all surviving issue are issue of both the intestate and the spouse (common issue). If they are, then the surviving spouse is entitled to the larger amount. This reflects an assumption that in most cases the common issue will likely succeed to the spouse's share if it is not exhausted on the spouse's death. Moreover, the spouse is much more likely to use the preferential share, at least in part, to confer benefits on common issue during his or her lifetime.

Where the issue of the intestate includes persons who are not also issue of the surviving spouse the strength of this assumption is considerably weakened, and the possibility of a competition between the surviving spouse and the non-common issue is much greater. To ensure fairness in this situation the basic share of the surviving spouse is set at the lesser amount, thus enhancing the possibility that some assets will be available to the non-common issue. This feature of the section takes account of the prevalence of blended families in Canadian society in the present day.

If any property remains after satisfying the basic share of the surviving spouse, that property is divided one half to the spouse and one half to the issue (whatever their numbers). Here again the surviving spouse is more generously treated than under the current legislation, which gives the spouse only one third of the residue if there were two or more children of the intestate, either alive at the time of the intestate's death or leaving issue.

Intestate leaving no surviving spouse

24 Subject to section 25 [*kindred and exclusion of remote kindred*], if there is no surviving spouse the intestacy estate must be distributed as follows:

- (a) to the issue of the intestate;
- (b) if there is no surviving issue, to the parents of the intestate in equal shares or to the survivor of them;
- (c) if there is no surviving issue or parent, to the issue of the parents or either of them;
- (d) if there is no surviving issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,
 - (i) one half of the intestacy estate to the paternal grandparents in equal shares or to the survivor of them, but if there is no surviving paternal grandparent, to the issue of the paternal grandparents or either of them, and
 - (ii) one half of the intestacy estate to the maternal grandparents or their issue in the same manner as provided in subparagraph (i), but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire intestacy estate to the kindred on that side in the same manner as provided in subparagraph (i);
- (e) if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent but the intestate is survived by one or more great-grandparents or issue of great-grandparents,

- (i) one half of the intestacy estate to the paternal great-grandparents or their issue in two equal shares, as follows:

- (A) one share to the parents of the paternal grandfather in equal shares or to the survivor of them, but if there is no surviving parent of the paternal grandfather, to the issue of the parents of the paternal grandfather or either of them, and

- (B) one share to the parents of the paternal grandmother or their issue in the same manner as provided in paragraph (A),

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal grandfather's or paternal grandmother's side, one half of the intestacy estate to the kindred on that side in the same manner as provided in clause (A), and

- (ii) one half of the intestacy estate to the maternal great-grandparents or their issue in the same manner as provided in subparagraph (i),

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal or maternal side, the entire intestacy estate to the kindred on that side in the same manner as provided in subparagraph (i).

Source: *Uniform Intestate Succession Act*, s. 4 (1)

Comment: This section embodies the parentelic system of intestate distribution that replaces the current scheme based on degrees of kinship (EAA, sections 86 to 89). Its drafting is based on the *Uniform Intestate Succession Act* promulgated and recommended for adoption by the Uniform Law Conference of Canada. Under the parentelic system, the line of the closest common ancestor is exhausted before other relatives will share in the estate. The spouse and issue of the intestate inherit first. If there is no spouse or issue, the estate passes to the parents. The issue of the intestate's parents inherit next. If this line fails, half the estate goes to the paternal grandparents, their survivor, or their issue, and half to the maternal grandparents, their survivor, or their issue. If the intestate is not survived by issue of grandparents, the estate is divided equally between the maternal and paternal great-grandparents, or the survivor of them, or their issue. If there is only a surviving great-grandparent, or issue on one side, the entire estate goes to the kindred on that side. No inheritance rights are recognized beyond the surviving issue of a great-grandparent.

In many cases the parentelic system will produce the same result as the degrees of kinship system. Differences emerge only where it is necessary to distribute among next of kin more remote than siblings of the intestate. Under the degrees of kinship system used in B.C., it is possible for closer and more remotely descended relatives to obtain equal shares. Under the parentelic system, descendants of the nearest common ancestor will always take before descendants of a more remote ancestor. It can be extremely expensive to search for relatives of a deceased person and the expense usually rises with the level of remoteness involved. The parentelic system also tends to

divide the estate more evenly between the two sides of the intestate's family than the degrees of kinship system.

An extensive discussion of the parentelic system may be found in the reports of the Manitoba Law Reform Commission and the Alberta Law Reform Institute dealing with intestate succession.³⁷

Kindred and exclusion of remote kindred

- 25 (1) For the purpose of this Part, degrees of kindred are to be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative.
- (2) The kindred of the half blood inherit equally with those of the whole blood in the same degree.
- (3) For the purposes of applying section 24 [*intestate leaving no surviving spouse*] all persons of the fifth, or greater, degree of kindred to the intestate are presumed to predecease the intestate and any part of the intestacy estate to which such a person would otherwise be entitled must be distributed accordingly.
- (4) Subsection (3) does not affect the right of
- (a) issue of the deceased to succeed on an intestacy, or
 - (b) a person to apply under the *Escheat Act* on the basis of a legal or moral claim upon the former owner of an estate that has escheated or passed to the government as property to which no person is entitled to succeed as the owner.

Sources: subs. (1)–(2): EAA, s. 90; subs. (3)–(4): original

Comment: This section sets out the rules for determining degrees of kinship (also called “consanguinity”) and imposes a new limit on how far the right to inherit based on kinship will extend.

Subsection (1) is substantially similar to EAA, section 90 (1). It indicates how to determine the degree of kinship between two related persons. With the adoption of the parentelic scheme for distribution to persons other than the spouse or issue of the intestate (see section 24), degrees of kinship will no longer determine who inherits, but are only a means of identifying the point at which intestate succession rights are cut off.

Subsection (2) carries forward section 90 (2) of the EAA.

Subsection (3) cuts off at the fourth degree of kinship the entitlement of persons who are not issue of an intestate to share in the intestacy. The purpose of this change is pragmatic—to prevent depletion of the estate by the expense associated with searching for remote kindred of the deceased

37. See Manitoba Law Reform Commission, *Report on Intestate Succession* (Rep. # 61) (Winnipeg: The Commission, 1985) at 29; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Rep. No. 78) (Edmonton: The Institute, 1999) at 151. See also Uniform Probate Code § 2-103 (1991).

and to reduce the burden on personal representatives. This section reflects an assumption that most people are not “close” to their remote kindred. The cut-off at the fourth degree would permit first cousins to inherit on intestacy, but more remote kindred would be excluded.

Undoubtedly there will be cases where a person has formed a special relationship with a more remote relation and may wish to benefit that person on death. This would normally be done by making a will rather than through the operation of intestacy rules which would not only benefit the person intended but also every other claimant of equal rank—most of whom would probably have been unknown to the deceased.

If there is no surviving relative of the fourth or less degree, the intestate estate would pass to the Crown under the general law of escheat (concerning real property) and *bona vacantia* (concerning personal property). Under the *Escheat Act*, as modified by recommendations in this Final Report, a person may petition the Attorney General for satisfaction of a legal or moral claim to property that has passed to the Crown as having no owner. Subsection (4) preserves the ability of a remote relative to present such a claim and have it considered by the Attorney General.

Division 4 — Spousal Home

Introductory Comment: In 1972 the EAA was amended to give the surviving spouse a life estate in the family home. This feature of the Act was severely criticized by the Law Reform Commission of British Columbia in its *Report on Statutory Succession Rights*.³⁸ The Law Reform Commission observed that the life estate created a variety of administrative problems, including issues as to the division of responsibility in relation to the property. The usual rules for its apportionment are not a good fit with this statutory life estate.

The Commission also observed that the life estate creates problems in the allocation of estate assets. What relation does the life estate bear to the preferential share of the surviving spouse? Does the burden of the life estate fall wholly on the other beneficiaries? If these beneficiaries are minors, matters are further complicated. The Commission also referred to valuation problems raised by the existence of the life estate.

The Commission concluded that the basic concern behind the statutory life estate is to ensure adequate provision for the surviving spouse, who would be better served by a more generous preferential share of the intestacy estate rather than a life interest in property that may no longer suit the needs of the spouse, given the change in circumstances that might flow from the deceased's death.

The Commission recommended that the statutory life estate for the surviving spouse be abolished but that the spouse should be entitled to require that the family home be appropriated to the spouse's preferential and ordinary share of the intestacy estate. This would give the surviving spouse a continuing right to occupy the family home for as long as he or she chose.

The recommendations of the Law Reform Commission have been adopted in this Report and the machinery for the appropriation is set out in this Division.

Interpretation

26 In this Division:

38. *Supra* note 34.

“**charter**” has the same meaning as in section 1 (1) [*definitions*] of the *Business Corporations Act*;

“**spousal home**” means

- (a) a parcel of land that is
 - (i) shown as a separate taxable parcel on a taxation roll for the current year prepared under the *Taxation (Rural Area) Act* or on an assessment roll used for the levying of taxes in a municipality, and
 - (ii) has as improvements situated on it a building assessed and taxed in the current year as an improvement, in which the deceased and his or her spouse were ordinarily resident, owned or jointly owned by the deceased, and not leased to another person, or
- (b) a share owned or jointly owned by the deceased in a corporation, the charter of which provides that a building owned or operated by the corporation must be owned and operated exclusively for the benefit of shareholders in the corporation who are occupants of the building, if the value of the share is equivalent to the capital value of a suite owned by the corporation, in which suite the deceased and his or her spouse were ordinarily resident, and which was not leased to any other person.

Source: EAA, s. 96 (1)

Comment: For the purposes of providing for the appropriation right some definition of “spousal home” is necessary and there is no reason to depart from the existing definition set out in EAA section 96 (1). It has therefore been carried forward. This definition is somewhat elaborate and presumably reflects a concern on the part of the original drafters to ensure that strata property and “apartment corporations” are covered.³⁹

EAA section 96 (1) also contains a definition of “household furnishings.” Since these now go to the surviving spouse absolutely under section 23 (2) (a) this definition has been moved to section 15, the general definition section for this Part.

Appropriation of interest in spousal home

- 27** If the intestacy estate includes an interest in a spousal home the surviving spouse may require the personal representative to appropriate that interest in the spousal home in or towards the satisfaction of the interest of the surviving spouse arising

39. See *Strata Property Act*, S.B.C. 1998, c. 43. As to apartment corporations see Law Reform Commission of British Columbia, *Report on Apartment Corporations* (LRC 120) (Vancouver: The Commission, 1991).

under section 23 [*intestate leaving spouse and issue*] in accordance with this Division.

Source: original

Comment: This section sets out the basic right of the surviving spouse to require appropriation of the spousal home to the spouse's entitlement under the intestacy.

When appropriation right may be exercised

- 28** The right conferred by section 27 [*appropriation of interest in spousal home*] must be exercised no later than 6 months from the date on which the representation grant was issued to the personal representative unless the court, before or after the expiration of that period, extends the time in which the right may be exercised.

Source: original

Comment: Self-explanatory.

Duty of personal representative

- 29** A personal representative of the intestate
- (a) must give notice to the surviving spouse of the right conferred by section 27 [*appropriation of interest in spousal home*] at the time of application for administration of the intestacy estate, and
 - (b) must not, without the written consent of the surviving spouse, dispose of the spousal home during the 6 month period referred to in section 28 [*when appropriation right may be exercised*], except in the course of administration owing to want of other assets.

Source: original

Comment: This section imposes certain duties on the personal representative to ensure that the surviving spouse has a fair opportunity to exercise the right to require appropriation. First, the spouse must be aware of the right so paragraph (a) imposes a requirement for notice to the spouse and restrains any unnecessary disposition of the spousal home during the period in which the surviving spouse has the right to require appropriation. Paragraph (b) is self-explanatory.

How appropriation right may be exercised

- 30** The right conferred by section 27 [*appropriation of interest in spousal home*] is exercised when the surviving spouse delivers a notice to the personal representative of the intestate and to all issue of the intestate entitled to share in the intestacy, stating that the surviving spouse has chosen to exercise the right.

Source: original

Comment: Self-explanatory.

Contents of notice

- 31** The notice referred to in section 30 [*how appropriation right may be exercised*] must contain
- (a) a statement that the surviving spouse requires the personal representative to appropriate the interest in the spousal home as provided in section 27 [*appropriation of interest in spousal home*], and
 - (b) the value the surviving spouse places on the intestate's interest in the spousal home.

Source: original

Comment: The spouse's preferential share of the intestacy estate is essentially a dollar value and if an appropriation is to be made, a value must also be placed on the spousal home. The legislative scheme contemplates that an initial figure for the value of the home be proposed by the spouse and set out in the notice respecting the spouse's election to require appropriation. If the personal representative agrees, this is the figure used. If the personal representative and the spouse do not agree section 32 provides that the value be set by court order.

For example, the market value of the spousal home may be \$900,000 and there is a mortgage against the home of \$600,000. The home is owned in tenancy in common by the surviving spouse, the intestate, and the surviving spouse's mother. The surviving spouse elects to appropriate the intestate's interest. To do so, the spouse would receive \$100,000 less from the remainder of the estate. The spouse's interest would, naturally, be subject to the mortgage against the intestate's interest and any other charges registered against title.

Valuation of intestate's interest in spousal home

- 32**
- (1) If the personal representative disputes the value of an intestate's interest in a spousal home stated in a notice under section 31 (b) [*contents of notice*], the personal representative must respond in writing to the notice within a reasonable time, stating the value the personal representative places on the intestate's interest.
 - (2) If the personal representative and the surviving spouse do not agree on the value of the intestate's interest in the spousal home, the surviving spouse may apply to the court for an order fixing the value of the interest.
 - (3) If a surviving spouse of an intestate elects to exercise the right conferred by section 27 [*appropriation of interest in spousal home*] and that surviving spouse is a sole personal representative, that surviving spouse must apply to the court for an order fixing the value of the intestate's interest in the spousal home unless the intestate's issue entitled to share in the intestacy

agree in writing to the value the surviving spouse places on the intestate's interest.

- (4) The value of the intestate's interest in the spousal home is to be determined as of the date of the death of the intestate.

Source: original

Comment: Section 32 deals with how the value of the intestate's interest in the spousal home is to be determined if it is in dispute. Subsection (1) requires a personal representative who disputes the value set by the surviving spouse to indicate a value. In the absence of agreement, the surviving spouse may seek a court order under subsection (2) fixing the value. Subsection (3) deals with the fairly frequent case in which the surviving spouse is the sole personal representative. In that case, the surviving spouse must seek the written agreement of all the intestate's issue who take in the intestacy to the value specified. In the absence of agreement, the surviving spouse must obtain a valuation by the court. Subsection (4) requires the valuation to be made as of the date of death.

Purchase by surviving spouse

- 33 (1) If the value of the intestate's interest in the spousal home exceeds the interest of the surviving spouse arising under section 23 [*intestate leaving spouse and issue*], the surviving spouse may elect to purchase the remaining interest from the personal representative, or from those in whom that interest beneficially vests, in accordance with its valuation.
- (2) The surviving spouse may elect to purchase the spousal home under subsection (1) whether or not the surviving spouse is a personal representative of the intestate and despite any rule of law concerning the purchase of trust property by a trustee.

Source: original

Comment: Where the value of the spouse's preferential share is not sufficient for a full appropriation of the home, the spouse has a right to purchase the home from the other successors at the valued price. Subsection (2) ensures that the spouse's right to purchase is not affected by the fact that he or she is also a personal representative of the deceased.

Occupancy by surviving spouse pending purchase of intestate's interest

- 34 If the surviving spouse continues to occupy the spousal home pending the purchase of the intestate's interest in the spousal home, the surviving spouse is liable to pay, during the period of occupancy:
- (a) the cost of keeping the spousal home covered by insurance against damage, destruction and public liability;
 - (b) all local and provincial rates and taxes assessed against the spousal home;
 - (c) all reasonable and necessary expenses of maintenance and repair;

- (d) rates and charges for electricity, gas, fuel oil and water consumed by the surviving spouse while occupying the spousal home;
- (e) all, or any part of, a periodic payment that falls due during the period under any mortgage charging the spousal home and any bonus or penalty resulting from any prepayment.

Source: original

Comment: Self-explanatory.

Surviving spouse as personal representative

- 35 If the surviving spouse is a personal representative of the intestate, nothing in this Division requires that the surviving spouse deliver any notice to himself or herself.

Source: original

Comment: Self-explanatory.

PART 3 — TESTATE SUCCESSION

Introductory Comment: This Part contains the legislative framework for succession by will. It would replace the present *Wills Act*,⁴⁰ most of which is based on the English *Wills Act, 1837*.⁴¹ By and large, the framework put in place by the *Wills Act, 1837*, has stood the test of time fairly well and this Part preserves many familiar features of the present *Wills Act* and its English ancestor. Significant reforms are contained here as well, however. A number of these coincide with recommendations made by the former Law Reform Commission of British Columbia in a series of reports on the law of wills issued during the 1980s.⁴² In other instances the changes introduced by this Part originated with the Testate Succession Subcommittee and Project Committee, or reflect modifications by them of the recommendations of the former Commission and other law reform agencies. The most significant reforms are highlighted immediately below. They are discussed in greater detail in the commentaries to the individual provisions, together with the other changes in the law that this Part would introduce.

40. *Supra* note 5.

41. (U.K.), 1 Vict., c. 26.

42. *Report on the Making and Revocation of Wills* (LRC 52) (Vancouver: The Commission, 1981); *Report on Interpretation of Wills* (LRC 58) (Vancouver: The Commission, 1982); *Report on Statutory Succession Rights*, *supra* note 34; *Report on Wills and Changed Circumstances* (LRC 102) (Vancouver: The Commission, 1989).

Dispensing Power In Relation to Formal Defects

A major reform contained here is the introduction of a judicial power to relieve against the consequences of non-compliance with formal requirements. The present formal requirements themselves, namely signature or acknowledgment of a signature by a testator in the presence of two or more witnesses who also sign (attest) the document while the testator is present, have been preserved as an important protection against fraud and forgery. Rigid enforcement of them in the absence of any dispute as to the will's authenticity has often served, however, to defeat genuine testamentary wishes. Under the "dispensing power" conferred by section 46, the probate court could uphold a will despite defects in execution and attestation if the court is satisfied that the document contains the genuine testamentary wishes of the maker. Provisions along similar lines have been passed in several Canadian provinces and Australian states, and are also found in the Uniform Probate Code published by the U.S. National Conference of Commissioners on Uniform State Laws.

The dispensing power provision contemplates the possibility that an electronic document could be admitted to probate under certain conditions. This feature reflects a 2003 amendment by the Uniform Law Conference of Canada to the *Uniform Wills Act*.

Testamentary Gifts to Attesting Witnesses

Another reform concerns the rule (currently set out in sections 11 (1) and (2) of the *Wills Act*) regarding the effect of a beneficiary or the wife or husband of a beneficiary attesting the will as a witness. That effect is to render a testamentary gift void with respect to the attesting beneficiary or spouse or someone claiming under them, unless there are at least two other attesting witnesses who have no interest under the will. This rule is a safeguard against fraud and undue influence, but it can also operate very harshly and unfairly. While this Part retains the rule, it also permits the gift to be upheld if the party seeking to uphold it proves to the court's satisfaction that the testator knew and approved of the gift. The safeguard against undue influence and fraud would still be present, but the cases in which it could operate unfairly and perversely to defeat the testator's actual intentions should be minimized.

Under the current *Wills Act* the rule invalidating testamentary gifts to attesting witnesses only applies to a legally married husband or wife of a beneficiary, but not to what is commonly called a "common law spouse." In keeping with the general public policy of treating marital and non-marital spouses alike for most purposes, this Part would extend the rule to anyone who is a "spouse" of a beneficiary for the purposes of this Act. This would include a person who is not married to a beneficiary, but who is cohabiting with a beneficiary at the time the will is signed in a marriage-like relationship, and had done so for the previous two years.

Abolition of "Privileged" Wills

The privilege accorded to mariners and military personnel on active service (including minors) to make valid informal wills without witnesses has not been carried forward in this Part for reasons mentioned in the commentary to section 40.

Another category of privileged wills, namely those made by married or previously married minors, would also be abolished in favour of reducing the age at which a person could make a valid will to 16. Reduction of the minimum age for will-making to 16 would cover almost all cases in which the existing privilege for married and formerly married minors to make valid wills would be exercised. It would also help to prevent inconvenience resulting from intestacy in cases where minors have interests in valuable assets.

The abolition of privileged wills would be prospective only. Privileged wills executed before the date on which this draft legislation becomes effective would remain valid.

Admission of Extrinsic Evidence of Testamentary Intent

This Part contains provisions that rationalize the rules governing the admission of evidence of the testator's intentions that is extrinsic to the will itself as an aid to interpretation. The "armchair rule" under which a will is to be read in light of the circumstances known to the testator at the time the will was made would remain in place, as would the principle that extrinsic evidence of *intent* is not admissible to interpret a will in the absence of ambiguity or meaninglessness. Admissibility of extrinsic evidence of intent would no longer depend on whether the ambiguity was patent or latent, however. Under the reformed principles set out in this Part, if a term of a will is meaningless or ambiguous, then extrinsic evidence of intention could be admitted to resolve the ambiguity or apparent meaninglessness. Evidence of surrounding circumstances, but not of testamentary intention, would also be admissible to identify an ambiguity.

Extrinsic evidence of testamentary intention, including statements made by the testator while alive, would be admissible to clarify the meaning only after a term had been identified as being ambiguous. It could not be admitted for the purpose of trying to show that ambiguity is present. This is to discourage spurious and self-serving attempts to have a will interpreted contrary to its terms.

Rectification Power

Another significant reform in this Part is the conferral on the court of a power to rectify a will where it is shown that the will does not reflect the testator's intention because of a clerical error or omission, a misunderstanding of the testator's instructions, or a failure to carry out those instructions. Rectification could take place at either the probate or construction stages.

Extrinsic evidence, including evidence of intention, could be introduced for the purpose of showing a need for rectification. Its admissibility in that case would not be confined by the principles described above that apply when the court is merely asked to interpret the will.

The statutory rectification power in this Part is aimed at allowing errors of drafters and transcribers to be corrected so that the testator's true intentions prevail. It is not equivalent to the non-statutory equitable remedy of rectification that applies to contractual documents and deeds, but not to wills.⁴³ A deliberate policy choice was made not to extend the rectification power to cases where the error resulted from a failure by the testator to appreciate the effect of the language used in the will. It was thought this would require the court to enter the testator's mind and speculate on what the testator's understanding actually was.

Abolition of Revocation by Subsequent Marriage

Under this Part, a will would no longer be automatically revoked if the testator marries after the will was signed and the will is not made in contemplation of the marriage in question. It is not well-known by the public that marriage can have the effect of revoking a will. As a result, this existing rule can lead to unanticipated and untoward effects. Revocation by marriage was originally a means of protecting the interests of the spouse and children of the marriage, but other legislative protections are now in place, such as matrimonial property legislation. A new will is not the only means of providing financial security to one's dependants. Life insurance and RRSP proceeds may be used for this purpose as well. Inadvertent revocation of a will can bring about a windfall to a second spouse or stepchildren and deprivation for other dependants of the testator. The view prevailing amongst the Testate Succession Subcommittee and Project Committee is that the negative effects of unexpected intestacy outweigh any residual social benefit that revocation of wills by marriage might have today.

43. *Harter v. Harter* (1873), L.R. 3 P. & D. 11; *Alexander v. Adams* (1998), 51 B.C.L.R. (3d) 333 (S.C.).

Automatic Revocation of Gift to Spouse on Termination of Spousal Relationship—Extension to “Common Law” Spouses—Harmonization of Events Producing Deemed Revocation with Triggering Events Under the Family Relations Act

Section 16 of the *Wills Act* deems a gift in a will to a spouse to be revoked (in the absence of a contrary intention appearing in the will) when the marriage is dissolved, a declaration of nullity is made, or judicial separation is ordered in respect of the testator’s marriage. An appointment of the spouse as executor or the conferral of a power of appointment on a spouse is also revoked in the same circumstances. Section 16 currently applies only to legally married husbands and wives. Thus, a former “common law” spouse who lived with the testator in a marriage-like relationship that had ended by the time of the testator’s death, but who remains named in the testator’s will due to the testator’s failure to change the will following the termination of the relationship, may be placed in a better position than an ex-husband or wife. In keeping with a general policy of treating marital and non-marital spouses alike, the equivalent of section 16 in this Part will extend to any “spouse” if the spousal relationship, whether marital or non-marital, has terminated at the time of the testator’s death.

A further change from the present section 16 is that the list of events that will cause a testamentary gift, appointment, or power of appointment to be automatically revoked in the case of legally married spouses would be expanded to coincide with the list of events (so-called “triggering events”) that produce a division of family assets between married spouses under Part 5 of the *Family Relations Act*.⁴⁴ Section 16 of the *Wills Act* does not currently produce a deemed lapse in all of the cases in which family assets would be divided. Harmonization of the triggering events under the *Family Relations Act* with those resulting in revocation of testamentary gifts is important in order to prevent potential overcompensation of an ex-spouse who might otherwise be entitled to both a share of family assets under family property legislation and a gift in the will that the testator forgot to revoke.

Order of Abatement

The rules governing the order in which testamentary gifts are considered to abate in order to allow debts to be paid have been substantially revised in this Part. The principal reform in this area is to allow real property (land or interests in land) to abate together with personal property. Existing law requires personal property to be applied to debts before real property, even if the will directs that a debt is to be charged against the real property. It will no longer be necessary for the will to expressly “exonerate” the personal property in order to make the real property chargeable with payment of debts. Other distinctions made for abatement purposes between categories of gifts have been reduced in number, so that the application of assets of the estate towards payment of debts will be substantially simpler.

Encumbered Estate Property

Section 30 of the present *Wills Act* makes mortgaged land included in a testamentary gift primarily liable for the payment of the mortgage debt. A provision in this Part extends that principle to registered charges affecting real or personal property that were created for the purpose of acquiring, improving, or preserving the assets to which they attach. The policy behind this reform is twofold: first, to remove remaining distinctions in the treatment of real and personal property that have no legal or practical justification; and second, to apportion liability for payment of estate debts fairly

44. R.S.B.C. 1996, c. 128. Under section 56 (1) of the *Family Relations Act*, the triggering events are: (a) a separation agreement, (b) a declaratory judgment under section 57 of the Act stating that the spouses have no reasonable prospect of reconciliation, (c) an order for dissolution of marriage or judicial separation, and (d) an order declaring that a marriage is null and void.

among the various beneficial interests. If a debt is directly related to a specifically bequeathed asset and is the subject of a charge on that asset, only the interest in the asset net of that debt should pass.

If, on the other hand, the debt secured by the charge is not closely connected with the particular bequeathed asset and the charge was only given by the testator as a general security, the burden of the debt should be shared pro rata among the interests of the various beneficiaries.

Conflict of Laws

Conflict of laws rules concerning wills have been simplified and rationalized in Division 5 of this Part. With respect to formal validity of wills, the policy underlying the provisions in Division 5 is that a will should be upheld if it meets the formal requirements in force at the time of execution in British Columbia or under another legal system with which it, or the testator, is connected. The list contained in section 40 of the present *Wills Act* of the legal systems under which a will could potentially be held formally valid has been expanded to include those of the testator's habitual residence, the country of the testator's nationality, and the place where the property was situated at either the time the will was made or at the time of death. Special provisions apply in relation to wills made on vessels or aircraft. In contrast to the present section 40, which applies only with respect to movable property (generally, personal property), the draft legislation would apply the same rules to dispositions of both movables and immovables (such as land and mortgages on land).

The present law concerning the formal validity of instruments revoking prior wills or portions of them is very unsettled. Under this Part, revocations would be treated as formally valid if they conform to the requirements of any legal system under which the will they revoke would be valid as to form.

Application of the confusing and incoherent doctrine of *renvoi* would be abolished in connection with wills. British Columbia courts would be required to apply only the internal law of a foreign legal system that is found to govern an issue relating to a will, in other words to disregard the choice of law rules of the foreign system.

In a further change from present law, the court would be allowed to take account of a change in the governing law subsequent to the execution of a will if it would have the effect of validating the manner in which the will was executed.

The provisions in Division 5 follow closely recommendations made by the former Law Reform Commission of British Columbia on conflict of laws in relation to wills.

Convention Providing a Uniform Law on the Form of an International Will

The *Convention Providing a Uniform Law on the Form of an International Will* prescribes a procedure for executing wills in a manner designed to secure a broad level of recognition under common law and civil law systems. It does not override or displace domestic laws on the form of wills, but coexists with them, providing an additional means by which a will executed abroad may be recognized as formally valid in states that adhere to the Convention, and those executed here recognized in other Convention states.

Canada acceded to the Convention in 1977. The Convention has been implemented in all provinces except British Columbia and Québec. This Part would allow British Columbia to join the other Canadian jurisdictions in implementing the Convention by giving it the force of law in this province. It designates members of the Law Society and notaries public as "authorized persons" for the purpose of completing the certificate that the Convention requires.

The text of the Convention is reproduced in a Schedule at the end of this draft Act.

Division 1 — Interpretation, Application and Validity

Interpretation

36 (1) In this Part:

“**chief executive officer**” means the chief executive officer under the *Vital Statistics Act*;

“**probate**” means the issuance of a grant of probate or of administration with will annexed.

(2) A reference to the signature of the testator includes a signature made by some other person in the testator’s presence and by the testator’s direction and the signature may be either the testator’s name or the name of the person signing.

(3) If the effect of a provision concerning a will is stated to be subject to a contrary intention, that contrary intention must appear in the will, interpreted in accordance with the ordinary rules of construction, unless the provision also stipulates that other sources or extrinsic evidence may be consulted or admitted.

Sources: subs. (1): *Wills Act*, s. 1; subs. (2): LRCBC, *Report on the Making and Revocation of Wills*, rec. 4 (b); subs. (3): original

Comment: Subsection (1) is self-explanatory.

The definition of “will” is found in section 1.

Subsection (2) is aimed at facilitating the execution of a will when the testator is unable to sign it personally. It allows a will to be signed on the testator’s behalf by another person, as long as this is done in the presence of the testator and at the testator’s direction. The signature may be either in the testator’s name or in the name of the person who actually signs. Subsection (3) carries forward the interpretation of section 4 of the present *Wills Act* in *Re Fiszhaut Estate*.⁴⁵ It follows a recommendation of the former Law Reform Commission of British Columbia that this interpretation should be confirmed in the *Wills Act*.

Subsection (3) clarifies the usage of the expression “contrary intention.”

Property disposable by will

37 A person may by will make a gift of property whether acquired before or after making the will, to which the person was entitled at the time of the person’s death either at law or in equity.

45. (1966), 55 W.W.R. 303 (B.C.S.C.).

Source: *Wills Act*, s. 2

Comment: This section carries forward, in modified form, section 2 of the *Wills Act*. The modifications involve the omission of references to certain kinds of property interests as being included within the section which, arguably, would not have been disposable by will at common law. The omission of these references should not lead to the revival of unwanted common law rules. Section 35 (1) (a) of the *Interpretation Act* provides that the repeal of an enactment does not revive an enactment or thing not in force immediately before the repeal.

Validity of wills

- 38 (1) A will made by a person who is under 16 years of age is not valid.
- (2) Despite the *Infants Act* or any rule at common law concerning the legal disability of a minor, a minor who
- (a) has reached the age of 16, and
- (b) would be capable of making a will if the minor had reached the age of majority,
- may make a valid will.
- (3) A will made in accordance with this Act is valid without other publication.
- (4) A will made in accordance with this Act is as to form a valid execution of a power of appointment by will, even if it has been expressly required that a will in exercise of the power be made in some form other than that in which it is made.

Sources: subs. (1)–(2): original; subs. (3)–(4): *Wills Act*, ss. 8–9

Comment: (1) The current *Wills Act* provides that a person acquires testamentary capacity at 19 (the age of majority) with an exception for minors who are or have been married. Subsection (1) would set the threshold for will-making at 16 years. The existing exception for married or previously married minors would be abolished. There are several policy reasons justifying these steps. So-called “privileged” wills executed by married minors are very rare. A slight reduction in the minimum age for making a will is capable of serving the same purpose as the present exception for minors who marry, i.e. to protect the interests of children and spouses. As unmarried minors can also have children, that policy would be better served by allowing wills to be made by minors of potentially child-bearing or child-fathering age, irrespective of whether they have married.⁴⁶ At the same time, the law would be simplified by eliminating the need for an exception to a general rule. Certain practical considerations militate in favour of this change as well. There are situations where it would be convenient to a family for a minor to be able to make a will. For example, it is not uncommon for minors to own valuable assets such as automobiles. Transfer on death would be somewhat easier if these assets passed under a will. Minors may also have interests under an elaborate estate plan which could be disrupted by the unexpected death and intestacy of a minor beneficiary.

46. Section 9 (3) of the Alberta *Wills Act*, R.S.A. 2000, c. W-12, is based on similar policy: it allows an unmarried minor who has a child to make a will disposing of property to or for the benefit of the child.

It may be noted that the Manitoba Law Reform Commission has also recommended that 16 be the minimum age for making a valid will.⁴⁷ Legislative precedent exists elsewhere: article 2229 (1) of the German Civil Code permits minors who have reached the age of 16 to make wills.

Subsection (2) is intended to reinforce subsection (1) by clarifying that a will made by a minor who has reached the age of 16 and would have testamentary capacity if he or she had attained majority is valid, despite any inconsistency with the *Infants Act*⁴⁸ and the general legal incapacity of minors.

Subsections (3) and (4) carry forward provisions of the current *Wills Act*.

Division 2 — Making, Altering and Revoking a Will

Writing required

39 Subject to section 46 [*dispensing power*], a will is valid only if it is in writing.

Source: *Wills Act*, s. 3

Comment: This section carries forward an existing provision of the *Wills Act*, but with an added reference to the curative dispensing power introduced by section 46.

Signatures required on formal will

- 40** (1) Subject to section 46 [*dispensing power*], a will is not valid unless
- (a) at its end it is signed by the testator,
 - (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time, and
 - (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.
- (2) A will is deemed to be signed at its end if the signature of the testator, made either by the testator or the person signing for the testator, is placed at or after or following or under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testator's will.
- (3) A will is not rendered invalid in any of the following circumstances:
- (a) the signature does not follow immediately the end of the will;
 - (b) a blank space intervenes between the concluding words of the will and the signature;

47. Manitoba Law Reform Commission, *Wills and Succession Legislation* (Rep. # 108) (Winnipeg: The Commission, 2003) at 11.

48. R.S.B.C. 1996, c. 223.

- (c) the signature is placed among the words of a testimonium clause or of an attestation clause or follows or is after or under an attestation clause either with or without a blank space intervening, or follows or is after or under or beside the name of a subscribing witness;
 - (d) the signature is on a side or page or other portion of the paper or papers containing the will on which no disposing part of the will is written above the signature;
 - (e) there appears to be sufficient space to contain the signature on or at the bottom of the side or page or other portion of the same paper on which the will is written and preceding that on which the signature appears.
- (4) The generality of subsection (2) is not restricted by the enumeration of circumstances set out in subsection (3), but a signature in conformity with this section does not give effect to a disposition or direction that is underneath the signature or that follows the signature or to a disposition or direction inserted after the signature was made.

Sources: *Wills Act*, ss. 4; 6

Comment: Subsection (1) sets out the formalities involved in the creation of a conventional will. These are unchanged from the present *Wills Act* (section 4). It should be noted that section 36 (2) provides that signature by a person in the testator's presence and at the testator's direction is equivalent to signature by the testator, whether the person writes the testator's name or his or her own.

Section 5 of the *Wills Act*, which allows military personnel on active service and mariners at sea to make informal wills has not been carried forward because this privilege is outmoded and almost entirely unused. The Canadian Forces instruct their members on will-making in conformity with requirements of provincial wills legislation, and also encourage and facilitate it. They discourage reliance on the privilege of making informal wills.⁴⁹ The effectiveness of the privilege to make an informal will has also been reduced to a considerable extent by uncertainty about the meaning of "active service." Use of the privilege by mariners in the present day is virtually non-existent. In place of these historical privileges for certain classes of testators, subsection (1) makes the formal requirements subject to the dispensing power in section 46.

Subsections (2) to (4) carry forward, with minor modifications, the provisions of section 6 of the *Wills Act*.

49. The Judge Advocate-General's Office confirmed to BCLI staff that the instructional practices and procedures of the Canadian Forces concerning wills and will-making described at pp. 26–27 of the Law Reform Commission of British Columbia's *Report on the Making and Revocation of Wills*, *supra* note 42, continue in effect with only minor variations.

Rules concerning witnesses

- 41** (1) No person is incompetent to act as a witness to a will by reason only of an interest in the subject matter of the will.
- (2) Subject to subsection (3), if a will is witnessed, or signed on behalf of a testator, by a person to whom, or to whose spouse, a gift is made, the gift is void so far only as it concerns the person so attesting or signing, or the person's spouse, or a person claiming under them.
- (3) If, upon application by a person seeking to uphold a gift that is void under subsection (2), the court determines that the testator knew and approved of the gift the court may declare that the gift is not void and takes effect accordingly.
- (4) If a person who has attested a will was at the time of its execution or afterward has become incompetent to prove its execution, the will is not invalid for that reason.
- (5) In this section the relevant time for determining whether one person is the spouse of another is the time of the execution of the will.

Sources: subs. (1)–(3); (5): LRCBC, *Report on the Making and Revocation of Wills*; subs. (4): *Wills Act*, s. 10

Comment: Subsection 41 (1) affirms that a will may be validly witnessed by a person who has an interest under it, such as a beneficiary or a person appointed as an executor. It carries forward the effect of sections 11 (1) (in part), 12, and 13 of the *Wills Act*. The rule that an interest under the will does not prevent a person from being a competent witness operates independently of the effect under subsection 41 (2) of that attestation on a gift to that person under the will.

Subsection (2) carries forward section 11 (1) of the *Wills Act* regarding the effect of attestation by a beneficiary or the beneficiary's spouse. The present section 11 (1) refers, however, only to the "husband or wife" of a beneficiary, while subsection (2) refers to the "spouse." As a result of the way "spouse" is defined in section 1 of this Act, subsection (2) renders void a gift in the will to a person in a marriage-like relationship with the beneficiary of more than two years' duration if the beneficiary or that domestic partner attests the will.

Subsection (3) makes a change in the law by allowing a gift to an attesting witness or the witness's spouse to take effect if the court can be persuaded that the testator knew and approved of the gift, in the sense of intending it to take effect despite the attestation.

Subsection (4) carries forward section 10 of the *Wills Act*.

Subsection (5) addresses the fact that for the purposes of section 41 the time at which the status of "spouse" is relevant is the time the will is signed.

Revocation in general

- 42** (1) Subject to section 46 [*dispensing power*], a will or part of a will is revoked only by one or more of the following:

- (a) another will made in accordance with this Act;
 - (b) a writing declaring an intention to revoke and made in accordance with the provisions of this Act governing the making of a will;
 - (c) the burning, tearing or destruction of it in some other manner by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking it;
 - (d) any other act of the testator, or of another person in the testator's presence and by the testator's direction, if, on application under section 46 [dispensing power], the court determines that
 - (i) the consequence of the act is apparent on the face of the will, and
 - (ii) the act was done with the intent of the testator to revoke all or part of the will.
- (2) A will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

Sources: *Wills Act*, s. 14 (modified); LRCBC, *Report on the Making and Revocation of Wills*, rec. 11

Comment: Section 42 carries forward the terms of section 14 of the *Wills Act*. Paragraph (1) (d) is new. It allows acts intended to signify revocation other than those mentioned in paragraph (c) to be given effect. Testators do not always destroy wills when they wish to revoke them. Practitioners find that testators sometimes mark wills, e.g. by crossing out or obliterating portions of them, in the mistaken belief that these steps amount to revocation of the entire will or particular terms of it under the present law. When the testator's intent to revoke is clear, it would be perverse to enforce the will regardless of the testator's wishes merely because the testator was mistaken about the correct formal procedure. If the court can be persuaded from the appearance of the will that the testator really intended to revoke it in whole or in part, the court should be able to give effect to that intention.

Section 15 of the present *Wills Act*, which provides for automatic revocation by marriage of the testator after the will is executed subject to two exceptions, is not carried forward by this new legislation. As a result, a will would no longer be revoked by marriage. It is recommended that section 15 of the *Wills Act* be repealed without replacement, despite the fact that revocation by subsequent marriage is still a feature of the wills legislation of most common law jurisdictions in Canada and the rest of the Commonwealth. Few members of the general public are aware that marriage revokes a will, or of the exceptions to this rule and how to take advantage of them. An unintended intestacy can disrupt careful estate planning to meet obligations the testator intended to fulfil. It can have very unfortunate consequences for beneficiaries who have no legal right apart from the will to a share of the estate. For example, the testator may have created a testamentary trust for a disabled relative in the will. Intestacy would overturn the trust and possibly benefit an independently wealthy second spouse at the expense of the disabled person. While the original purpose of revocation by subsequent marriage was to protect the testator's spouse and children, the testator's family can be protected by means other than a new will, such as by designating beneficiaries under life insurance policies or a retirement savings plan. Assets affected by such beneficiary designations pass outside the testator's estate directly to the beneficiary. Non-probate beneficiary designations were not available when the rule about revocation by marriage originated. Other protections now exist for the testator's immediate family, such as the *Wills Variation Act* (see Part 5 of this draft Act

for its equivalent). A surviving spouse may also invoke matrimonial property rights under the *Family Relations Act* against an estate if a “triggering event” under section 56 (1) of that Act took place prior to the other spouse’s death and, even if not, restitutionary remedies would ordinarily be available. Automatic revocation of a will by marriage is therefore seen as outmoded and unnecessary.

Revocation on termination of spousal relationship

43 (1) Subject to a contrary intention, if a testator

- (a) makes a gift to,
- (b) appoints as executor or trustee
- (c) confers a general or special power of appointment on

a person who,

- (d) was a spouse of the testator, or
- (e) became a spouse of the testator

and an event referred to in subsection (2) occurs after the making of the will and before the testator’s death, then the gift, appointment or power of appointment is revoked and the will takes effect as if the spouse had predeceased the testator.

(2) A gift, appointment or power of appointment is revoked by subsection (1) when:

- (a) in the case of spouses to whom Part 5 [*matrimonial property*] of the *Family Relations Act* applies, on the occurrence of an event that would cause an interest in family assets to arise in favour of a spouse under that Part, or
- (b) in any other case, on the termination of the relationship.

(3) The operation of subsection (1) is not affected by

- (a) a subsequent reconciliation of the testator and the spouse, or
- (b) the fact that immediately after an event referred to in subsection (2) the parties continued to be spouses within the meaning of this Act.

(4) Subsection (1) does not apply to a gift to a beneficiary other than the testator’s spouse if the gift consists of a limited estate based on the life of the spouse.

(5) In subsection (1) the relevant time for determining whether a person was a spouse of a testator is

- (a) in paragraph (d), at the time the will was made, and
- (b) in paragraph (e), at any time after the will was made but before the occurrence of an event referred to in subsection (2).

Source: original

Comment: Subsection (1) of section 43 carries forward the policy behind section 16 of the *Wills Act*, namely that a gift under a will to a spouse should be deemed to be revoked when the spousal relationship ends, and the estate distributed as if the spouse died before the testator. This is to fulfil a presumed intention of the testator not to benefit an ex-spouse, if no contrary intent appears from the will. Section 16 currently applies only to testamentary gifts to a legally married spouse of the testator, however. This places a former non-marital spouse of the testator in a better position than a former or separated marital spouse. Section 43 (1) goes beyond the present section 16 in extending deemed revocation to marriage-like relationships as well as legal marriages.

Subsection (2) identifies the events that will result in the revocation of a testamentary gift to the testator's spouse. Paragraph (2) (a) applies when there has been a legal marriage or an agreement between non-marital spouses under section 120.1 of the *Family Relations Act*. In those cases, the events that will result in revocation of a testamentary gift are the same ones that will cause a statutory half-interest in family assets to arise in favour of each spouse under Part 5 of the *Family Relations Act* (so-called "triggering events"), i.e. a divorce order, a declaration of irreconcilability, judicial separation, a declaration of nullity or that a marriage is void, and the making of a separation agreement. This is a slight change from section 16 (2) of the *Wills Act*, which does not fully harmonize those events. (Under section 16 (2) neither a declaration of irreconcilability nor a separation agreement leads to revocation, although the other triggering events under the *Family Relations Act* do.)

Paragraph (2) (b) applies to a person in a marriage-like relationship with the testator that is terminated prior to death. In this case the termination of the marriage-like relationship is sufficient to revoke the gift. Tests to determine if a marriage-like relationship has terminated have been developed in case law, and it is assumed these tests will apply to this section.

Income tax consequences may not follow the provincial law with respect to the termination of marriage-like relationships, because of differences between the definition of "common law partner" in the federal *Income Tax Act*⁵⁰ and this proposed Act's definition of "spouse." Under the *Income Tax Act*, common law relationships are deemed to have ended 90 days after cohabitation ceases. Parties to a relationship may still be "spouses" for succession purposes, but not for tax purposes.

Subsection (3) is a new provision. It is thought that a rule that would allow reconciliation to revive a previously revoked gift to a spouse would result in too much uncertainty. It might lead to disputes over whether the spouses had actually reconciled or whether the reconciliation persisted at death. It is open to a capacitated testator to make a new will or a codicil restoring the gift if restoration is intended following reconciliation.

Subsection (4) clarifies that a gift to a person other than the testator's spouse that is limited in duration to the spouse's life (known technically as an *estate pur autre vie*) is not revoked by this section.

Subsection (5) specifies the times at which spousal status is relevant for the purposes of section 43. See the definition of "spouse."

50. *Supra* note 7, section 248.

Altering a will

- 44** (1) Subject to section 46 [*dispensing power*], unless an alteration that is made in a will is made in accordance with the provisions of this Act governing the making of a will, the alteration has no effect, except to invalidate words or meanings that it renders no longer apparent.
- (2) An alteration that is made in a will is validly made when the signature of the testator and the subscription of the witnesses to the signature of the testator to the alteration are made
- (a) in the margin or in some other part of the will opposite or near to the alteration, or
 - (b) at the end of or opposite to a memorandum referring to the alteration and written in some part of the will.

Source: *Wills Act*, s. 17

Comment: Section 44 carries forward, in slightly modified form, section 17 of the *Wills Act*. The rules it sets out concerning alteration of a will, like other formal requirements prescribed by this Part, are subject to dispensing power under section 46.

The reference to the “signature of the testator” must be read in the light of section 36 (2), which permits another person to sign on behalf of the testator, using either the testator’s name or that of the person signing, if the other person signs in the testator’s presence and at the testator’s direction.

Revival of will

- 45** (1) Subject to section 46 [*dispensing power*] a will or part of a will that has been revoked is revived only
- (a) by a will made in accordance with this Act, or
 - (b) by a codicil made in accordance with this Act
- that shows an intention to give effect to the will or part that was revoked.
- (2) Subject to a contrary intention in the will or codicil giving rise to a revival under subsection (1), if a will that has been partly revoked and afterward wholly revoked is revived, the revival does not extend to the part that was revoked before the revocation of the whole.
- (3) If a will has been revived or re-executed by a codicil, the will is deemed to have been made at the time it was revived or re-executed.

Sources: *Wills Act*, ss. 18; 20 (1)

Comment: This provision carries forward, in slightly modified form, sections 18 and 20 (1) of the *Wills Act*.

Dispensing power

- 46 (1) If, upon application, the court determines that a document or any writing or other marking on a document embodies
- (a) the testamentary intentions of a deceased; or
 - (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,
- the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.
- (2) In this section, “document” includes data that
- (a) is recorded or stored on any medium in or by a computer system,
 - (b) can be read by a person, and
 - (c) is capable of reproduction in a visible form.

Sources: *Manitoba Wills Act*, C.C.S.M. c. W150, s. 23; *Uniform Wills Act (2003 Amendment)*

Comment: Section 46 introduces a new feature allowing the court to dispense relief from the consequences of failure to comply with all the formal requirements of a will or an alteration, revocation or revival of a will if a court is satisfied that the document in question embodies the testamentary wishes of a deceased person. Five Canadian provinces (Manitoba, Saskatchewan, New Brunswick, Quebec, P.E.I.) and all the Australian jurisdictions have curative provisions of this nature.⁵¹ The Uniform Law Conference of Canada’s *Uniform Wills Act* contains a very similar curative power.

The argument in favour of a curative power is that rigid enforcement of the formal requirements of execution and attestation is often self-defeating. The formal requirements are designed to uphold testamentary intent by ensuring authenticity and guarding against fraud. When there is no question as to authenticity of the will and the formal requirements have been breached due to ignorance or inadvertence, however, the resulting invalidity of the will merely defeats the testator’s last wishes without serving a redeeming protective purpose.⁵²

51. See *The Wills Act*, C.C.S.M. c. W150, s. 23; *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 37; *Wills Act*, R.S.N.B. 1973, c. W-9, s. 35.1; art. 714 C.C.Q.; *Probate Act*, S.P.E.I., 1988, c. P-21, s. 70. The Australian curative provisions are: *Wills Act 1968*, (A.C.T.), s. 11A; *Wills, Probate and Administration Act 1898*, (N.S.W.), s. 18A; *Wills Act*, (N.T.), s. 10 (2)–(3); *Succession Act 1981*, (Qld.), s. 18; *Wills Act 1936*, (S.A.), s. 12 (2); *Wills Act 1992*, (Tas.), s. 26; *Wills Act 1997*, (Vic.), s. 9; *Wills Act 1970*, (W.A.), s. 34.

52. See John H. Langbein, “Substantial Compliance with the Wills Act” (1975) 88 Harv. L.R. 489.

Subsection (1) does not require a minimum level of compliance with formalities in order for a document to be given effect as a will. An early curative enactment in Queensland, which required an element of “substantial compliance” with formalities, failed to achieve its purpose because the court found it could not classify formalities into essential and non-essential categories. “Substantial compliance” became elevated into a new kind of formality in itself.⁵³ This development was foreseen by the Law Reform Commission of British Columbia, which in a 1981 report recommended enactment of a curative provision in the B.C. *Wills Act* in the form of a “dispensing power” that was not dependent on substantial compliance.⁵⁴

The second generation of curative provisions in Australia and common law Canada that began to be enacted in the 1980s empower a court to give effect to a document if the court is satisfied it embodies the deceased’s genuine testamentary intent and are not dependent on “substantial compliance” with formal requirements. The cases decided under these provisions indicate they are very cautiously applied. Courts insist on a high level of proof of finality surrounding a document containing testamentary wishes before giving effect to it under the dispensing power. Just results may be achieved, however. Section 46 (1) is modelled on section 23 of the Manitoba *Wills Act*, which in its current form represents the most recent provision of this kind in Canada.

In 2003 the Uniform Law Conference of Canada amended section 19 of the *Uniform Wills Act* to set special criteria for the exercise of the dispensing power in relation to an electronic document. The requirements are that the data be capable of storage in a computer system, be reproducible, and be readable in visible form. (Thus, a videotaped oral will would not qualify.) Subsection (2) is a slightly modified version of the 2003 amendment.

Division 3 — Interpretation and Rectification

Extrinsic evidence of testamentary intent

- 47 Extrinsic evidence of testamentary intent, including statements made by the testator, is not admissible to assist in the interpretation of a will unless:
- (a) a provision of the will is meaningless;
 - (b) a provision of the will is ambiguous either
 - (i) on its face, or
 - (ii) in light of evidence, other than evidence of the testator’s intention, demonstrating that the language used in any part of the will is ambiguous having regard to surrounding circumstances; or
 - (c) its admission is expressly permitted by this Act.

53. The ineffectiveness of a curative provision depending on “substantial compliance” is analyzed in John H. Langbein, “Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law” (1987) 87 Colum. L.R. 1.

54. *Report on the Making and Revocation of Wills*, *supra* note 42 at 54.

Sources: *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 21 (England and Wales); Manitoba Law Reform Commission, draft *Wills Act*, s. 22 (in Manitoba Law Reform Commission, *Wills and Succession Legislation* (Rep. # 108, 2003) at 110)

Comment: Section 47 is a new provision that simplifies the principles governing the admission of extrinsic evidence of testamentary intent in the interpretation of wills and the type of extrinsic evidence that can be considered. “Extrinsic evidence” in this context means evidence other than the contents of the will.

The basic rule (applicable to the interpretation of other documents as well as wills) is that evidence other than the contents of the document may only be introduced as an aid to interpretation when the meaning cannot be determined from the language used. Present law permits evidence of surrounding circumstances known to the testator at the time the will was made to be introduced in order to shed light on the meaning of an ambiguous or apparently meaningless term, or to identify an ambiguity.⁵⁵ This is known as the “armchair” rule because the court puts itself notionally in the testator’s position when making the will in order to better determine the meaning of the words the testator used. Evidence of the testator’s dispositive intent is not admissible to identify an ambiguity in a term or to interpret one that is apparent on the face of the will (patent ambiguity). Evidence of intent may be introduced to aid in interpreting a “latent ambiguity,” namely ambiguity which does not appear on the face of the will but only when the terms of the will are considered in light of surrounding circumstances. An example of latent ambiguity would be a gift to “my nephew James Scott” if the testator actually had two nephews, each having James as a middle name. In such a case evidence tending to show that the testator intended to benefit one and not the other nephew could be admitted.

The view that has prevailed in the Succession Law Reform Project is that removing all restrictions on admission of extrinsic evidence of intent would allow excessive scope for attempts to secure an interpretation contradicting the actual terms of the will. Fabrications or fantasies of the “he really meant me” or “he always said I would get the house” variety could be advanced much more easily than they can be under the present law.

When genuine ambiguity is present, however, it makes little sense to exclude other evidence that could shed light on the testator’s actual meaning. The distinction made between latent and patent ambiguity in the test for admissibility of extrinsic evidence is essentially one of legal form, not one that serves a practical purpose.

Section 47 dispenses with the distinction between patent and latent ambiguity for the purpose of admission of extrinsic evidence. It allows extrinsic evidence of surrounding circumstances, but not evidence of the testator’s intention, to be admitted for the purpose of showing an ambiguity exists. Thus evidence of intent cannot be introduced to identify an ambiguity, but may be used to interpret an ambiguity once one has been identified by reading the will in light of the factual matrix in which the testator made it.

The kind of exception contemplated by paragraph (c) is found in section 48 (2), which expressly permits the admission of extrinsic evidence in relation to an application for rectification of a will.

55. *Haidl v. Sacher*, [1980] 1 W.W.R. 293 (Sask. C.A.); *Davis Estate v. Thomas* (1990), 40 E.T.R. 107 (B.C.C.A.); *Kordyban v. Kordyban*, [2003] B.C.J. No. 793 at para. 73 (C.A.) (QL).

Rectification of will

- 48** (1) A court, whether sitting as a court of construction or as a court of probate, may, on application, order that a will be rectified if it determines that the will is so expressed that it fails to carry out the testator's intentions in consequence of:
- (a) an error arising from an accidental slip or omission,
 - (b) a misunderstanding of the testator's instructions, or
 - (c) a failure to carry out the testator's instructions.
- (2) Extrinsic evidence, including evidence of the testator's intent, is admissible to prove the existence of a circumstance set out in paragraphs (a) to (c) of subsection (1).
- (3) An application for rectification of a will must be made no later than 6 months from the date of probate, unless the court grants leave to make an application after the expiration of 6 months from the date of probate.
- (4) If leave is granted under subsection (3), a personal representative who distributed any part of the estate to which entitlement is subsequently affected by rectification is not liable if, in reasonable reliance on the will, the distribution was made
- (a) after 6 months from the date of probate, and
 - (b) before the notice of the leave application was delivered to the personal representative.
- (5) Subsection (4) does not affect the right of any person to recover any part of the estate distributed in the circumstances described.

Sources: LRCBC, *Report on the Interpretation of Wills*, rec. 5(a) (i)–(ii); *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 20 (England and Wales)

Comment: Section 48 is a new provision significantly expanding the very limited powers the court now has to correct errors in a will so that the testator's genuine testamentary intention can be given effect. In the probate stage, where the court is concerned with the validity and extent of the writing that constitutes the testator's last will, a court may excise words included by mistake (unless the testator approved the error.) The probate court may not add or vary words in a will, however. When the court sits as a court of construction, i.e. is asked to interpret a will, it may ignore words that are an unnecessary and inaccurate part of a description (*falsa demonstratio*). It may also supply words so as to give effect to the testator's apparent intention, as long as the words the testator must have intended can be determined from the will with reasonable certainty (correction by implication).

Courts are forced to go to ridiculous lengths within these narrow rules to preserve the testator's true intent as far as possible. The low point was probably reached in *Re Morris*,⁵⁶ where a codicil

56. [1971] P. 62.

intended to revoke a gift in clause “7 (iv)” of the will omitted the “iv” and erroneously revoked all the gifts in clause 7. Unable to add words to correct the mistake, the probate court deleted the numeral “7” as surplusage, saving the rest of the gifts in clause 7 but also the one that was to be revoked.

In 1982 the former Law Reform Commission of British Columbia recommended a rectification power for wills.⁵⁷ Its recommendations were endorsed in 2003 by the Manitoba Law Reform Commission.⁵⁸ Legislation giving courts broader powers to rectify wills has been enacted in England,⁵⁹ five Australian states,⁶⁰ and the Australian Capital Territory.⁶¹ It has been recommended by law reform bodies in Scotland⁶² and New Zealand.⁶³

Section 48 (1) is based on a 1982 recommendation of the Law Reform Commission of British Columbia.⁶⁴

Subsection (2) recognizes that the circumstances listed in subsection (1) can only be proven by extrinsic evidence. It therefore declares that such evidence is admissible for this purpose.

Subsections (3) to (5) address procedural matters concerning applications for rectification of a will. They are aimed at ensuring that issues surrounding rectification of a will do not delay the administration of the estate unduly. Similar provisions are found in the English legislation on will rectification.⁶⁵

57. *Report on the Interpretation of Wills*, *supra* note 42 at 39–50.

58. *Wills and Succession Legislation*, *supra* note 47 at 55–57.

59. *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 20 (England and Wales).

60. *Wills Act 1997*, (Vic.), s. 31; *Succession Act 1981*, (Qld.), s. 33; *Wills, Probate and Administration Act 1898*, (N.S.W.), s. 29A; *Wills Act 1936*, (S.A.), s. 25AA; *Wills Act 1992*, (Tas.), s. 47.

61. *Wills Act 1968*, (A.C.T.), s. 12A.

62. Scottish Law Commission, *Report on Succession* (Scots. Law Com. No. 124) (Edinburgh: Her Majesty’s Stationary Office, 1990) at 48–49.

63. New Zealand Law Commission, *A Succession (Wills) Act* (NZLC 41) (Wellington: Queen’s Printer, 1997) at 44, s. 28.

64. *Report on the Interpretation of Wills*, *supra* note 42 at 50 and 52 (rec. 5(a)). In addition to the grounds for rectification in paragraphs (a) to (c) of section 48 (1), the provision recommended by the Law Reform Commission would have permitted rectification where there had been “a failure by the testator to appreciate the effect of the words used.” This was primarily directed at errors by testators writing their own wills without professional assistance and failing to understand the legal effect of the terms they used. The Testate Succession Subcommittee omitted this ground from its recommendation for a rectification power because in the Subcommittee’s view it would force the court to carry out an excessively subjective and speculative analysis. The Subcommittee thought the proper focus of the rectification power should be on errors introduced by drafters and others assisting the testator to transpose the testator’s wishes into a formal will.

65. *Supra* note 59, s. 20 (2)–(3).

Subsection (4) refers to a notice being “delivered.” This triggers the definition in section 29 of the *Interpretation Act*:

“**deliver**”, with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person’s mail box or receptacle at the person’s residence or place of business.

Division 4 — Rules of Law Concerning the Effect of a Will

Effect of a will

- 49** (1) Subsections (2) to (10) are subject to a contrary intention.
- (2) A will speaks and takes effect as if it had been made immediately before the death of the testator with respect to the property.
- (3) A gift of land
- (a) includes the leasehold estates to which the description of the land extends, as well as freehold estates, and
 - (b) subject to any qualifications in relation to the gift, passes the fee simple, or the whole of any other estate that the testator had power to dispose of by will, in the land.
- (4) A gift of property includes any property to which its description extends, that the testator has power to appoint in any manner the testator thinks proper and operates as an execution of the power.
- (5) A gift of property to the heir or next of kin of the testator or of another person, takes effect as if it had been made to the persons among whom and in the shares in which the estate of the testator or other person would have been divisible if the testator or other person had died intestate.
- (6) In a gift of property
- (a) the words
 - (i) “die without issue”,
 - (ii) “die without leaving issue”, or
 - (iii) “have no issue”, or
 - (b) other words importing either a want or failure of issue of a person in the person’s lifetime or at the time of the person’s death or an indefinite failure of the person’s issue
- are deemed to refer to a want or failure of issue in the lifetime or at the time of death of that person and not to an indefinite failure of that person’s issue, but this subsection does not extend to cases where the words defined import
- (c) if no issue described in a preceding gift be born, or

- (d) if there be no issue who live to reach the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to that issue.
- (7) A disposition of property that is the subject matter of a gift in a will that occurs after the making of the will, does not prevent operation of the will with respect to any interest in the property that the testator had power to dispose of by will at the time of the testator's death.
- (8) The beneficial interest in any residue not expressly disposed of passes:
 - (a) to the persons among whom and in the shares in which the estate would have been divisible if the testator had died intestate, or
 - (b) if there is no person who would be entitled under paragraph (a), according to the general law in relation to escheat and *bona vacantia*.
- (9) If a gift of a parcel of land is made to two or more beneficiaries in terms
 - (a) that contemplate that specific beneficiaries receive identifiable portions of the parcel, or
 - (b) that otherwise contemplate a physical division of the parceland the parcel cannot be subdivided then the gift takes effect as a gift of the parcel to the beneficiaries as tenants in common in proportion to their interests.
- (10) A gift to a class designated as "issue" of a person, or a similar term, and which encompasses more than one generation of beneficiaries, must be distributed in equal shares among the issue in the generation nearest to the person that contains one or more surviving members, and among remoter issue of the person as if in a distribution to issue in an intestacy.

Sources: subs. (1)–(8): *Wills Act*, ss 19, 20, 22–26, 31; subs. (9)–(10) original

Comment: Subsections (1) to (7) carry forward sections 19, 20 (2), and 22–26 of the *Wills Act*. The drafting of these provisions has been considerably simplified.

Subsection (8) carries forward the policy of section 31 of the *Wills Act* but with one change. If there are no persons who would have been entitled to take on an intestacy, the residue will escheat (if it is land or an interest in land) or go by *bona vacantia* (if it is personal property) to the Crown, rather than to the executor. The terms of the *Escheat Act* will permit any person having a moral claim to the residue to assert that claim.

Subsection (9) is a new provision solving a conundrum that an executor faces if a will contains a gift of land to more than one beneficiary without specifying that they are to take in some form of co-ownership and the land cannot be subdivided because the necessary approval is unobtainable. As the executor cannot transfer the title to portions of the land to individual beneficiaries, the land has to remain in the estate. Section (8) deems the beneficiaries to take the land as tenants in common in

proportion to the interests the testator specified, which allows the executor to transfer the land into the beneficiaries' names.

Subsection (10) is also new. It changes the presumption that gifts to "issue" of someone are to be distributed *per capita*, or in other words divided into as many shares as there are issue, to one of distribution *per stirpes*. For example, if a parent among the issue has predeceased the testator, the parent's share is divided among the children of that parent. This will allow gifts to issue under a will to be distributed in the same manner as a distribution to issue in an intestacy. (See section 17.) There appears to be no cogent reason for having *per capita* distribution in one case and *per stirpes* in another. In addition, the *per stirpes* distribution resembles the normal pattern of inheritance more closely, resulting in the remoter issue sharing in their ancestor's portion of the estate as if their ancestor had survived the testator and bequeathed the portion to them. It is thought this coincides to a better extent with what a testator would expect in the normal course of events.

Lapsed gifts

- 50** (1) Subject to a contrary intention, if a gift in a will, including a gift of residue, fails by reason of the death of the beneficiary in the lifetime of the testator, or for another reason is incapable of taking effect, the property that is the subject matter of the gift must be distributed according to the following priorities:
- (a) to the alternative beneficiary of the gift, if any, designated by the testator, whether the gift fails for a reason specifically contemplated by the testator or for any other reason;
 - (b) to the issue of the beneficiary in accordance with section 49 (10) [*effect of a will*], where the beneficiary is the brother, sister or issue of the testator;
 - (c) to the surviving residuary beneficiaries, if any, named in the will, in proportion to their interests.
- (2) The persons referred to in paragraph (1) (b) must be ascertained as of the date of the testator's death.
- (3) If a gift fails by reason of the death of the beneficiary in the lifetime of the testator, subsection (1) applies whether the death occurred before or after the will was made.

Sources: subs. (1): LRCBC, *Report on Wills and Changed Circumstances*, rec. 4 (2) (a), (b), (d); subs. (2): Manitoba Law Reform Commission, *Wills and Succession Legislation*, rec. 30; subs. (3): original

Comment: Section 50 deals with gifts that fail because of the beneficiary predeceasing the testator. It sets up a scheme of priorities among potential takers and replaces sections 21 and 29 (1) of the *Wills Act*. Paragraphs (b) and (c) of subsection (1) correspond to sections 29 and 21, respectively, and are intended to preserve their effect, except in relation to class gifts. These provisions of the *Wills Act* govern when the testator has not indicated an alternative beneficiary if a gift fails. Paragraph (a) of subsection (1) takes account of cases where the testator has designated an alternative beneficiary. It also assumes that if the gift fails for a reason not contemplated by the testator, the testator would have intended the gift to go to the alternative beneficiary rather than fall into residue.

This feature is a change from the present law that would call for the gift to pass under a residuary clause or else be divided as on intestacy in any contingency other than one specified by the testator. A further change from the existing law concerns the treatment of failed residuary gifts. Under the present law, a failed gift of residue passes on intestacy. Under subsection (1) of section 50, a failed gift of residue would be treated like other failed gifts and go to the alternate beneficiaries listed there. The hierarchy in subsection (1) may be displaced by a contrary intention apparent from the will.

While section 29 of the *Wills Act* currently applies whether a beneficiary is to take as an individual or as a member of a class, section 50 (1) does not apply to class gifts. This is because a class gift implies an intent that the remaining members of the class should be alternate beneficiaries, rather than a beneficiary be designated by the Act.

Section 50 (1) conforms to a recommendation of the former Law Reform Commission of British Columbia, with one exception. The provision the Law Reform Commission recommended would have preserved the effect of section 29 (2) of the *Wills Act*, which allows the spouse of a predeceasing beneficiary who was a child or other descendant or a sibling of the testator to take the gift if the beneficiary had no issue of his or her own. Section 29 (2) has not been carried forward into section 50 because it is found that testators very seldom want to benefit in-laws. Section 50 assumes that a testator would prefer that the gift go to the residuary beneficiaries instead of the spouse of the predeceasing beneficiary.

Subsection (2) addresses the fact that there are two possible times for ascertaining the class of persons entitled to take the failed gift under paragraph (1) (b): the death of the testator or the death of the deceased beneficiary. Case law in Canada holds that the relevant time is the death of the beneficiary. The Testate Succession Subcommittee agreed with the Manitoba Law Reform Commission⁶⁶ that this is less convenient and logical than if the class is ascertained as of the testator's death, and subsection (2) provides accordingly.

Subsection (3) makes it clear that the default rules in subsection (1) apply whether the primary beneficiary dies before or after the testator makes the will. This is consistent with the existing section 29.

Relief from the effect of ademption of certain gifts

51 (1) If property that is the subject of a gift in a will is disposed of by

(a) a statutory property guardian or property guardian under the *Adult Guardianship Act*,

(b) an attorney under Part 2 of the *Power of Attorney Act*, or

(c) a representative having power over the adult's financial affairs under

(i) section 7 (1) (b) of the *Representation Agreement Act*, or

(ii) section 9 (1) (g) of the *Representation Agreement Act*, granted before the repeal of that provision,

66. *Supra* note 47 at 39–40.

the beneficiary of the gift is entitled to an amount equivalent to the proceeds of the disposition which may be asserted against the testator's estate as if the will had contained a gift to the beneficiary of that amount.

- (2) Subsection (1) does not apply where the disposition is made to carry out instructions given by the testator at a time when the testator had legal capacity.

Sources: *Substitute Decisions Act*, S.O. 1992, c. 30, s. 36

Comment: Ademption occurs when a specifically bequeathed item of property is not part of the estate at the testator's death. The gift then fails, and the beneficiary to whom the item was bequeathed has no claim to an equivalent benefit under the will. The policy underlying ademption is that the testator should remain free to deal with property during life and to change testamentary plans. If a bequeathed item is not part of the estate at death, the testator is presumed to have intended to revoke the gift. Under existing law it may make no difference if it is not the testator who disposes of the item, but someone managing the testator's affairs when the testator lacks capacity. The theoretical basis for ademption is not then present, however, because the disposition is not a conscious or even inadvertent decision of the testator to revoke. Section 51 is a new provision which will prevent the intention to revoke the gift being imputed to the testator when the disposition is carried out by a property guardian, representative, or attorney acting under an enduring power of attorney at a time when the testator lacks legal capacity. The beneficiary named in the will to receive the missing item will be able to claim an amount equivalent to the proceeds of the disposition of the asset against the estate.

Legal presumptions abrogated

- 52 (1) The presumption of law that a gift by a testator made during the testator's lifetime to a child of the testator or to a person to whom the testator stands in place of a parent is an advancement of a portion that is intended to revoke a gift in the testator's will in favour of the child or person is abrogated and the gift in the will takes effect according to its terms.
- (2) The presumption of law that a legacy is revoked by a gift in the same amount as the legacy made by the testator during the testator's lifetime is abrogated and the legacy takes effect according to its terms.
- (3) The presumption of law that a debt owed by a testator is satisfied by a legacy to the creditor equal to or greater than the debt is abrogated and the debt continues to be a claim against the testator's estate.
- (4) The presumption of law that a binding promise by a person to make a gift to advance a child in life is satisfied to the extent of the benefit promised by a gift in the person's will to the child is abrogated and the promise remains binding on the person and the person's estate.
- (5) The abrogation of a presumption set out in any of subsections (1) to (4) is subject to a contrary intention of the testator and extrinsic evidence may be admitted to prove the contrary intention.

Sources: LRCBC, *Report on Wills and Changed Circumstances*, rec. 2 (in part); original

Comment: This section abolishes a number of rebuttable presumptions of law concerning the effect of gifts and transfers of property during a testator's lifetime that the Testate Succession Subcommittee considered outdated or unhelpful as aids to interpretation under contemporary conditions. Subsection (1) implements a recommendation also made by the former Law Reform Commission of British Columbia.⁶⁷ The abolition of the presumptions applicable to wills that are described in subsections (1), (2), and (4) fits well with the recommended repeal of section 92 of the *Estate Administration Act*,⁶⁸ which contains a similar hotchpot rule applicable in intestacy to advances made to successors during the intestate's lifetime.

Doctrine of election abrogated

- 53** Subject to an intention appearing in a will that a gift is conditional on the disposition by the beneficiary of property owned by that beneficiary
- (a) a gift of property that the testator does not own is void, and
 - (b) the rights of the beneficiary are not affected by the purported disposition, by the testator, of property owned by the beneficiary.

Source: LRCBC, *Report on Wills and Changed Circumstances*, rec. 3

Comment: Section 53 abolishes the doctrine of election, which in effect allows a testator to make a gift by will of property that the testator does not own. The doctrine applies where a testator makes a gift that is conditional on performance of an implied obligation on the beneficiary to give property belonging to the beneficiary to another. The beneficiary must perform the obligation in order to be able to take the testator's gift. For example, if the testator's will gives "my Picasso painting" to A and "my Rembrandt painting" to B, but the testator owns no Picasso and B does own one, then B must elect between retaining the Picasso or giving it or its equivalent in value to A in order to get the Rembrandt under the testator's will. If B opts to keep the Picasso, the testator's Rembrandt falls into residue unless the will directs otherwise.

The doctrine of election does not depend on a mistake by the testator for its operation, although in almost all cases where it would operate, a mistake would have been made. The mistake could not be rectified under section 48, however, because the wording of the will would coincide with the testator's actual intention, based on a mistaken assumption of ownership.

67. See *Report on Wills and Changed Circumstances*, *supra* note 42 at 25. Section 52 (1) does not contain a statutory rebuttable presumption that an *inter vivos* transfer from a parent to a child is a gift rather than a loan as did the former Commission's report, because since that recommendation was made in 1989 concerns have grown over financial abuse of the elderly. The Canadian Centre for Elder Law Studies report *Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees* (CCELS Rep. No. 1, BCLI Rep. No. 32) (Vancouver: The Institute, 2004) now contains a recommendation for a contrary presumption at p. 27 (proposed *Family Loans and Guarantees Act*, s. 2 (1)), aimed at curbing financial abuse within families. Section 52 (1) is intended to operate only on transfers between parent and child that truly are gifts in law.

68. *Supra* note 6.

The doctrine of election runs counter to the general legal principle that one cannot transfer title to what one does not have. While it may occasionally produce a fair result, it is a confusing and anomalous feature of succession law that is applied in very rare circumstances. Section 53 implements a recommendation also made by the former Law Reform Commission of British Columbia for abolition of the doctrine.⁶⁹

Abatement

- 54** (1) Subject to a contrary intention, if the assets of the testator's estate are not sufficient to satisfy all debts and gifts, they must be satisfied or abate as provided in this section.
- (2) Land charged by the testator with payment of debts or pecuniary gifts is primarily liable for the debts or gifts, despite the failure of the testator to expressly exonerate the personal property.
- (3) Land and personal property abate together.
- (4) Subject to subsection (2), assets abate in the following order:
- (a) property specifically charged with a debt or left on trust to pay a debt;
 - (b) property passing on intestacy and residue;
 - (c) general, demonstrative, and pecuniary legacies;
 - (d) specific legacies;
 - (e) property over which the testator had a general power of appointment.

Sources: LRCBC, *Report on Wills and Changed Circumstances*, rec. 5–6; Ontario Law Reform Commission, *Administration of Estates of Deceased Persons* (1991); Alberta Law Reform Institute, *Order of Application of Assets in Satisfaction of Debts and Liabilities* (Report for Discussion No. 19, 2001)

Comment: Section 54 prescribes new rules concerning the order of abatement of testamentary gifts. When gifts must fail in whole or in part because there is not enough left in the estate to make all the gifts contemplated by the will after the testator's debts are paid, they are said to *abate*. Currently, highly archaic common law rules specify an order in which this must occur unless the will directs differently. Personal property passing on intestacy and residue consisting of personal property abate first, then general pecuniary gifts, then specific and demonstrative⁷⁰ gifts of personal property, gifts of real property, and lastly property over which the testator held a general power of appointment. If the will charges particular property with the payment of debts, it will abate after the personal residue and before general pecuniary gifts.

An outdated rule requires a testator to expressly exonerate personal property from having to be exhausted before real property becomes available to meet debts of the estate, even if the will also

69. *Report on Wills and Changed Circumstances*, *supra* note 42 at 32.

70. A demonstrative gift is a gift of an amount out of a fund that the will identifies, e.g. "\$20,000 out of my account no. 12345 in the XYZ Credit Union."

states that a particular debt is to be charged against the real property. The Law Reform Commission of British Columbia recommended this rule be abrogated.⁷¹ Subsection (2) does this.

The reasons why real property abates after personal property, subject to a few exceptions, are purely historical. Formerly, real property did not pass to the personal representative but passed directly to those entitled by will, or directly to the heir at law in intestacy. All gifts of real property by will were therefore considered specific. Since 1921 in British Columbia, real property passes to the personal representative and is administered like personalty.⁷² While the legal foundation for the distinction made between real and personal property in the order of abatement has vanished, the distinction persists in relation to abatement. Subsection (3) abolishes it and thereby simplifies the law.

Subsection (4) sets out a new and much simpler order of abatement. It makes fewer distinctions between classes of gifts and treats realty and personalty alike. Residue and property that passes in intestacy also abate together. There is no need to rank residue and property passing on intestacy as against each other for the purposes of abatement. For almost all practical purposes they are alternatives, since only very rarely can there be residue and property passing on intestacy in the same estate. Simplification of the order of abatement along similar lines has been recommended by law reform bodies in Ontario,⁷³ Manitoba,⁷⁴ and Alberta.⁷⁵

Gifts in trust

- 55** A gift of land to a trustee or executor in a will passes the greatest interest in the land that the testator had power to dispose of by will unless an intention appears in the will that some lesser interest is to pass.

Sources: *Wills Act*, ss. 27–28

Comment: Section 55 carries forward in modified form sections 27 and 28 of the *Wills Act*. Sections 27 and 28 have the same purpose, namely to provide that a gift of real property to a trustee or executor without words of limitation passes the fee simple or the whole of the greatest interest the testator could give. At common law a transfer to an executor or trustee without words of limitation would still operate only as a transfer of a legal estate or interest limited to the extent necessary to fulfil the trust or will. It has been suggested that sections 27 and 28 originated as alternate drafts of

71. *Report on Wills and Changed Circumstances*, *supra* note 42 at 58.

72. *Estate Administration Act*, *supra* note 6, s. 78 (6)–(7). A detailed discussion of the historical roots of the distinctions made between real and personal property for abatement purposes and the policy grounds for removing them is found in the Law Reform Commission of British Columbia *Report on Wills and Changed Circumstances*, *ibid.* at 50–51 and 54–57.

73. Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (Toronto: The Commission, 1991) at 189–90.

74. *Supra* note 47 at 62–63.

75. Alberta Law Reform Institute, *Order of Application of Assets in Satisfaction of Debts and Liabilities* (Report for Discussion No. 19) (Edmonton: The Institute, 2001) 45–46 (Tentative recommendations).

the same provision in the English *Wills Act, 1837*, and both were enacted in error.⁷⁶ Section 55 combines them into a single provision.

Primary liability of encumbered property

- 56** (1) In this section, “**purchase money security interest**” means a security interest taken in land or tangible personal property that
- (a) secures credit, including interest charges, extended to the testator for the purpose of acquiring, improving or preserving the property, and
 - (b) that is registered under the *Land Title Act* or the *Personal Property Security Act*.
- (2) Subject to a contrary intention, the interest of the beneficiary of a gift of property encumbered by a purchase money security interest is, as between the different persons claiming through the testator, primarily liable for the payment or satisfaction of the debt secured by the purchase money security interest to the extent that the debt is attributable to the acquisition, improvement or preservation of the property.
- (3) A testator does not signify a contrary intention within the meaning of subsection (2) by
- (a) a general direction for the payment of debts out of the testator’s personal or residuary property, or
 - (b) a charge of debts on the estate,
- unless the testator further signifies that intention by words expressly or by necessary implication referring to all or some part of the debt secured by the purchase money security interest.
- (4) Nothing in this section affects any right of a secured party to obtain payment or satisfaction either out of the other assets of the deceased or otherwise.

Sources: *Wills Act*, s. 30; LRCBC, *Report on Wills and Changed Circumstances*, rec. 7

Comment: Section 56 carries forward and extends section 30 of the *Wills Act*. Section 30 applies now only to a mortgaged interest in freehold or leasehold land. It makes the mortgaged interest primarily liable for payment of the whole of the mortgage debt, so that the beneficiary only acquires the interest net of that debt. (Apart from section 30, the interest would be subject only to pro rata payment of the debts of the estate generally in accordance with the order of abatement. See the commentary to section 54 above.) Section 56 extends the principle of section 30 to registered security interests in personal property as well as land. The interest of the beneficiary who takes the encumbered property passes net of the debt secured on it only if the security is related to the acquisition, improvement, or preservation of the property in question. The policy here is that the size of the beneficiary’s interest that passes under the will should be reduced to the net value of the

76. *Freme v. Clement* (1881), 18 Ch.D. 499 at 514 (C.A.).

property only if the secured debt was incurred in order to acquire the property or to increase or maintain its value. If the debt was not incurred for those purposes, it should in fairness be treated as a general debt of the estate with the interests of the other beneficiaries contributing pro rata to its payment.

Division 5 — Conflict of Laws

Definitions and interpretation

57 (1) In this Division:

“an interest in an immovable” includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is land or is personal property;

“an interest in a movable” includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

(2) A reference in this Division to the law of a place other than the province is a reference to its internal law only and does not include its conflict of laws rules.

(3) A requirement of the law of a place other than the province that:

(a) special formalities must be observed by testators of a particular description, or

(b) witnesses must have certain qualifications

is a formal requirement only that does not affect the essential validity of the will.

Sources: *Wills Act*, s. 39 (1); LRCBC, *Report on The Making and Revocation of Wills*; original

Comment: Subsection (1) carries forward in slightly modified form the definitions found in section 39 (1) of the *Wills Act*. “An interest in an immovable” has been substituted for “an interest in land” because “immovable” is used in the conflict of laws to refer to interests in or connected with land.

Subsection (2) effectively abolishes the doctrine of *renvoi*, a confusing principle that requires the forum to take account of the conflict of laws rules of a legal system to which its own conflicts rules require it to refer. If the conflicts rules of the other legal system refer back to the law of the forum, this is a *renvoi*. (If the reference is to a third legal system, it is sometimes called a transmission or second degree *renvoi*.) Depending on the theory of *renvoi* which is applied, the forum may either accept the *renvoi* and apply its own domestic law or that of the third system, or reject it and put itself in the position of the foreign court applying all of the foreign law to an issue, including the foreign conflicts rules (double *renvoi*). Very paradoxical situations can arise, and the law is not settled as to what theory of *renvoi* should be applied in Canadian courts.

Renvoi typically arises in wills-related cases because reference to foreign law is often necessary to determine the validity of wills. The validity of a will with respect to movables is governed by the law of the testator’s domicile at death, and by the law of the place where the immovable is located (the

situs) with respect to immovables. *Renvoi* was employed to find a way to apply a system of law under which a will might be upheld if it did not conform to the law of the final domicile or the situs of immovable property.⁷⁷

A simpler solution is to enact rules that allow a will to be upheld if it is valid under a wider range of legal systems with which the will or the testator is connected. (See section 58 and the commentary following it.) Subsection (2) therefore requires a British Columbia court to consider only the internal law (the law apart from the conflict of laws rules) of the foreign jurisdiction if British Columbia conflicts rules point to a foreign legal system as being applicable to an issue arising in connection with a will.

Subsection (3) is aimed at preventing certain secondary formal requirements under foreign law from being elevated into matters of essential validity. A corresponding provision is found in the *Uniform Wills Act*.⁷⁸

Formal validity

- 58** (1) A will is formally valid and admissible to probate with respect to movables and immovables if it is made in accordance with the law of:
- (a) the place where the will was made;
 - (b) the testator's domicile, either at the date the will was made or at the date of the testator's death;
 - (c) the testator's habitual residence, either at the date the will was made or at the date of the testator's death;
 - (d) a country of which the testator was a national, either at the date the will was made or at the date of the testator's death;
 - (e) British Columbia;
 - (f) the place where the property was situated at the date the will was made or at the date of the testator's death;
 - (g) the place with which, having regard to the registration (if any) of a vessel or aircraft, the vessel or aircraft is most closely connected, in the case of a will made on board a vessel or aircraft of any description;
 - (h) insofar as the will exercises a power of appointment, the law governing the essential validity of the power.
- (2) In determining whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the

77. Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills*, *supra* note 42 at 94.

78. Uniform Law Conference of Canada, *Proceedings of the Forty-Eighth Annual Meeting* (Ottawa: The Conference, 1966) at 24; 140, s. 42c (1).

time of execution, but this shall not prevent account being taken of an alteration of that law, affecting wills executed at that time if the alteration enables the will to be treated as properly executed.

(3) The formal validity of a will that revokes

(a) a will that would be treated as formally valid under this Division, or

(b) a provision that would be treated under this Division as comprised in a formally valid will,

may be determined by reference to any of the laws under which the revoked will or provision would be treated as formally valid and that are relevant for that purpose under this Division.

Sources: LRCBC, *Report on The Making and Revocation of Wills*, rec. 25–26; 30; *Wills Act 1963* (U.K), s. 6 (3); *Uniform Wills Act*, s. 40 (2) (b); original

Comment: Section 58 maintains the policy underlying the present section 40 of the *Wills Act*, which it replaces: a will should not be defeated on the ground that it lacks formal validity if it would be valid under some legal system with which it, or the property it affects, or the testator, was connected. Section 58 (1) expands, however, the list of legal systems under which the formal validity of a will could potentially be upheld in a British Columbia court.

In contrast to the present section 40, subsection (2) permits a British Columbia court that is considering the formal validity of a will with reference to applicable foreign law to take account of a change in the foreign law subsequent to the execution of the will if it would have the effect of validating it under the foreign legal system in question. The policy again is to allow a will to be upheld wherever possible.

Subsection (3) extends the same policy underlying subsections (1) and (2) to terms in a will revoking a prior will. The revocation is treated as formally valid if the later will in which it is contained is formally valid under any of the legal systems under which the will that it revokes would be formally valid.

Section 58 only applies to the formal validity of a will. Matters of essential validity continue to be governed by non-statutory conflict of laws rules: by the law of the testator's last domicile with regard to movables, and the law of the situs regarding immovables. For example, if the issue arises of whether a clause in a will excluding one of the testator's two children from any share in the testator's immovable property is valid and enforceable, it would be decided according to the law of the place where the immovable property is located.

Change in domicile or habitual residence

- 59** Nothing in this Division precludes resort to the law of the place where the testator was domiciled or was habitually resident at the time of making a will in aid of its construction as regards an interest in an immovable or an interest in a movable.

Source: *Wills Act*, s. 42

Comment: Section 59 carries forward section 42 of the *Wills Act* with a modification. The modification is to include the law of the testator's habitual residence as a body of law which may be consulted as well as the law of the testator's domicile. Habitual residence has become widely used as a connecting factor in framing choice of law provisions in legislation and treaties.

Movables used in relation to immovable

- 60** If the value of a movable consists mainly or entirely in its use in connection with a particular immovable by the owner or occupier of the immovable, succession to an interest in the movable under a will is governed by the law of the place where the immovable is located.

Sources: *Wills Act*, s. 43; LRCBC, *Report on the Making and Revocation of Wills*, rec. 29

Comment: Section 60 carries forward the present section 43 of the *Wills Act*, with references to "parcels of land" replaced by the term "immovable."

Division 6 — International Form of Will

International will

- 61** (1) In this section, "**convention**" means the Convention Providing a Uniform Law on the Form of an International Will, a copy of which is set out in the Schedule to this Act.
- (2) The convention is in force in the province and applies to wills as law of the province and the rules regarding an international will set out in the Annex to the convention are law in the province.
- (3) The following persons are designated as persons authorized to act in connection with an international will:
- (a) all members of the Law Society of British Columbia, other than student members, and
 - (b) all members of the Society of Notaries Public of British Columbia.
- (4) Nothing in this section detracts from or affects the validity of a will that is valid under the laws in force in the province other than this section.
- (5) Section 46 [*dispensing power*] applies to a will purporting to be executed in accordance with the convention.
- (6) This section applies to wills made before, on or after the date it comes into force if the testator has not died before that date.

Sources: *Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 42–43

Comment: Section 61 makes the *Convention Providing a Uniform Law on the Form of an International Will* part of the law of British Columbia. Canada acceded to the Convention in 1977. All

Canadian jurisdictions except British Columbia, Québec, and the territories have passed domestic implementing legislation.

Twenty countries, including the U.K. and the U.S.A., have either signed, ratified, or acceded to the Convention, which came into force in 1978. The U.K., the U.S.A. and several other original signatories have not yet ratified the Convention. The U.S. State Department website declares that ratification by the U.S. Senate awaits the enactment of domestic implementing legislation.⁷⁹

The Convention provides an additional means by which a valid will could be made in British Columbia, and by which a will made abroad could be recognized as valid here. It would coexist with, but not displace, other rules of British Columbia law relating to wills.

Overview of the Convention

The Convention requires that a will complying with articles 2–5 of the Uniform Law appended to the Convention must be treated as formally valid, irrespective of the location of the assets of the estate or of the nationality, domicile, or residence of the testator. These articles require that a will be in writing, that the testator declare in the presence of two witnesses and an “authorized person” that the document is the testator’s will, and that the testator knows its contents. The testator must sign the will or acknowledge the signature as that of the testator in the presence of two witnesses and the authorized person. The witnesses and the authorized person must attest the will in the testator’s presence.

Additional formalities required by the Uniform Law are that the signature be at the end of the will and that each sheet be numbered and signed by the testator. The authorized person must ask whether the testator wishes to make a declaration concerning the safekeeping of the will. If so, the place where the will is to be kept must be mentioned in the certificate that article 9 requires be attached to the will.

The certificate is possibly the most distinctive feature of the Convention requirements. In it the authorized person attests that the testator identified the will in the authorized person’s presence to be the testator’s own and professed knowledge of its contents. The authorized person also attests to the facts of signature or acknowledgment by the testator, and signature by the witnesses and the authorized person. The authorized person states that he or she is satisfied as to the identity of the testator and the witnesses, and confirms that the witnesses were legally qualified to act in that behalf. The authorized person is required to keep a copy of the certificate and deliver another to the testator.

Article IV of the Convention provides that the effectiveness of the certificate signed by an authorized person shall be recognized in the territory of all contracting states.

The Convention does not apply to “testamentary dispositions made by two or more persons in one instrument,” i.e. joint wills.

Authorized Persons

The Convention requires implementing jurisdictions to designate “authorized persons” to sign the certificate to be attached to Convention wills. Subsection 61 (3) designates members of the Law Society (other than articling students) and notaries public as authorized persons in British Columbia.

79. See online: U.S. Department of State <<http://www.state.gov/s/l/c3562.htm>>.

Convention Wills and the Dispensing Power

Subsection 61 (5) extends section 46 to Convention wills, allowing for the possibility that a defectively executed Convention will might benefit from the dispensing power and be given effect for the purposes of the law of British Columbia.

Text of the Convention

The Convention is set out in the Schedule to this Act.

Division 7 — Registration of Notice of Will

Filing of notice of will with chief executive officer

- 62** If a person has executed a will, a notice may be filed with the chief executive officer in a form satisfactory to the chief executive officer.

Filing of notice of revocation

- 63** If a will has been revoked, whether or not a notice was filed under section 62 [*filing of notice of will with chief executive officer*], a notice of revocation in a form satisfactory to the chief executive officer may be filed with the chief executive officer.

Filing notice of change of place of will

- 64** If notice has been filed under section 62 [*filing of notice of will with chief executive officer*] and the will is no longer located at the place mentioned in the notice, notice of the change in a form satisfactory to the chief executive officer may be filed with the chief executive officer.

Chief executive officer's records

- 65** The chief executive officer must maintain, in a system that he or she believes facilitates access to information by those who require it, a record of every notice filed under this Act.

Search of records

- 66** (1) A solicitor of the Supreme Court of British Columbia or a member of the Society of Notaries Public of British Columbia may, on application in a form satisfactory to the chief executive officer, ascertain from the chief executive officer whether or not a notice has been filed under this Act.
- (2) Any person other than a solicitor of the Supreme Court of British Columbia or a member of the Society of Notaries Public of British Columbia may, on written application accompanied either by a certificate of the death of the person named in the application or by a statutory declaration proving to the satisfaction of the chief executive officer that the person named in the appli-

cation has died, ascertain from the director if the person has filed a notice under this Act.

- (3) The chief executive officer must
 - (a) issue to an applicant under subsection (1) or (2) a certificate in duplicate showing the contents of all notices filed and relevant to the application, and
 - (b) permit the applicant, or the agent of the applicant, to inspect the notices.
- (4) The chief executive officer may provide a solicitor or member of the Society of Notaries Public of British Columbia who is an applicant under subsection (1) with
 - (a) a copy of a notice filed under this Act, or
 - (b) access by computer or otherwise to information contained in a notice filed under this Act.
- (5) Except as provided in this section, the chief executive officer must not provide to any person information regarding notices filed under this Act or information showing whether or not a notice has been filed.

Validity of will or revocation not affected

- 67** The failure to file or the filing of a notice under this Act does not affect the validity of a will or of the revocation of a will.

Sources: *Wills Act*, ss. 32–37

Comment: Sections 62 to 67 carry forward without change the corresponding provisions of the *Wills Act* on registration of notice of a will. The Subcommittee was satisfied that the registration scheme continues to serve a useful purpose. It also considered and rejected a suggestion sometimes made that the registration of a wills notice be made compulsory.

PART 4 — RETIREMENT PLAN BENEFICIARIES

Introductory Comment: The holder of an employee pension, retirement savings, or other sort of financial plan often may designate another person to receive a benefit under the plan upon the planholder's death. The main legal issue raised by these designations involves their form. Must they comply with the formalities required for making a will? That is, must an effective designation be a document in writing, signed at its end by the testator or on the testator's behalf by another person in the testator's presence and at his or her direction, in the presence of two individuals, who also sign the document in each other's and the testator's presence as witnesses? Or, is it acceptable for these designations to be made in a more simple and informal fashion?

These questions have been of particular interest to the law of succession in Canada since 1935. In that year, the Supreme Court of Canada ruled in *MacInnes v. MacInnes*⁸⁰ that a designation under an employee savings and profit-sharing fund was a testamentary disposition, because “[t]he right of the beneficiary was dependent upon the death of the participating employee for its vigour and effect.”⁸¹ In the result, the designation was of no effect, since it failed to comply with the formalities applicable to the making of a will.

The court’s reasoning in *MacInnes* was immediately appreciated as having broader implications that would affect more than the matter at hand. All sorts of savings and retirement plans were believed to fall within its scope, unless, as was the case for life insurance policies, a statute provided for an alternative method of creating an effective beneficiary designation.⁸² The desirability of establishing an informal method of designating beneficiaries, coupled with the undesirability of the disparity between retirement plan beneficiary designations and designations under life insurance policies, led to calls for reform. The Association of Superintendents of Insurance for the Provinces of Canada, in particular, was an important advocate for reform in this area of the law. In 1957, that body asked the Uniform Law Conference of Canada (which was then called the Conference of Commissioners on Uniformity of Legislation in Canada) to develop a uniform statute based on Ontario legislation that was enacted a few years previously.⁸³ This 1957 Uniform Act still forms the basis of British Columbia’s law in this area.⁸⁴

Coincidentally in 1957, the federal Parliament enacted changes to the *Income Tax Act* that permitted the development of retirement savings plans where no employees were involved.⁸⁵ These registered retirement savings plans have become more and more important in the financial and estate planning of Canadians. In the early 1970s, the Uniform Law Conference of Canada, concerned that its 1957 Uniform Act did not explicitly include registered retirement savings plans, produced an updated Uniform Act.⁸⁶ This 1975 Uniform Act also included several advances over the scheme

80. [1935] S.C.R. 200, (*sub nom. Re MacInnes Estate*), [1935] 1 D.L.R. 401 [*MacInnes* cited to S.C.R.].

81. *Ibid.* at 211, Hughes J. (for the court).

82. See *Life Insurance Act*, S.B.C. 1923, c. 27, s. 25.

83. Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Thirty-Ninth Annual Meeting* (Ottawa: The Conference, 1957) at 145–49. The 1957 Uniform Act was based on Ontario’s *Conveyancing and Law of Property Act*, S.O. 1954, c. 12, s. 62.

84. *Law and Equity Act*, R.S.B.C. 1996, c. 253, ss. 46; 49–51. The legislation has been amended a number of times since it was first enacted in 1957. The most significant amendment occurred in 1973, when a definition of “registered plan” was added to the legislation: see *Statute Law Amendment Act, 1973*, S.B.C. 1973, c. 84, s. 9. This amendment removed any doubts about the application of British Columbia’s legislation to registered retirement savings plans.

85. *An Act to Amend the Income Tax Act*, S.C. 1957, c. 29, s. 17.

86. Uniform Law Conference of Canada, *Proceedings of the Fifty-Seventh Annual Meeting* (Ottawa: The Conference, 1975) at 164–77.

established by the 1957 Uniform Act. British Columbia has enacted this updated uniform statute,⁸⁷ but it has not been brought into force.⁸⁸

This Part is based on the 1975 Uniform Act. Its provisions are supplemented by several improvements recommended by the Law Reform Commission of British Columbia.⁸⁹ Finally, this Part and several consequential amendments are intended to complete the development that started in the wake of *MacInnes* and make the law uniform with respect to retirement plan beneficiary designations and insurance designations.

Interpretation

68 (1) In this Part:

“**beneficiary**” means a person to whom or for whose advantage a benefit has been made payable by a declaration;

“**benefit**” means a benefit payable under a plan on the death of a participant;

“**declaration**” means an instrument signed by the participant or signed on the participant’s behalf by another person in the participant’s presence and by the participant’s direction in which the participant designates, or alters or revokes the designation of, a beneficiary;

“**instrument**” includes a will;

“**participant**” means a person, other than

(a) an attorney acting under a power of attorney granted by the participant, or

(b) a representative granted power over the participant’s financial affairs under

(i) section 7 (1) (b) of the <i>Representation Agreement Act</i> , or

(ii) section 9 (1) (g) of the <i>Representation Agreement Act</i> , before the repeal of that provision,
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who designates a beneficiary;

“**plan**” means

87. See *Attorney General Statutes Amendment Act (No. 2)*, 1990, S.B.C. 1990, c. 34, s. 9, now *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 2 (not in force).

88. Shortly before the publication of this Report the Legislative Assembly enacted a housekeeping statute that repealed these provisions. See *Supplements Repeal Act*, S.B.C. 2006, c. 33, s. 2 (d).

89. *Report on the Making and Revocation of Wills*, *supra* note 42 at 81–91.

- (a) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees, former employees, agents or former agents of any employer or their dependents or beneficiaries,
- (b) a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term,
- (c) a retirement savings plan or retirement income fund registered under the *Income Tax Act* (Canada), or
- (d) any other arrangement designated by the Lieutenant Governor in Council,

created on, before or after this Part comes into force.

- (2) This Part applies whether or not the plan gives the participant the right to designate a beneficiary.

Sources: “benefit,” “participant”: original; “beneficiary”; “declaration”; “instrument”: *Insurance Act*, R.S.B.C. 1996, c. 226, s. 29; “plan”: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (1); subs. (2): original

Comment: Subsection (1) contains the definitions applicable to this Part. The key defined term is “plan.” The definition of “plan” in this Act is based on the definition of the term in the 1975 Uniform Act, but it also contains some significant differences. As it is defined in this Act, “plan” expressly includes registered retirement savings plans and registered retirement income funds. This Act’s definition also provides an expedient method for bringing new types of plans within the scope of the legislation, by allowing them to be designated by regulation. The definition of “plan” in this Act is identical to the definition contained in section 49 (1) of the *Law and Equity Act*, which has been enacted but not proclaimed in force.⁹⁰

The definitions of “beneficiary” and “declaration” are based on definitions of those terms in section 29 of the *Insurance Act*.⁹¹ Both definitions have been added to promote the harmonization of the law of retirement plan beneficiary designations and insurance policy beneficiary designations. The changes in wording relate to certain exigencies that were imposed by the logic of this Part. The definition of “declaration” in this Act is simpler than the definition found in the *Insurance Act* in order to support the underlying policy of this Part, which is to allow for a relatively informal means of designating a beneficiary of a retirement plan. The definition of “beneficiary” also differs slightly in expression. In the *Insurance Act* its operative part reads “a person . . . to whom or for whose *benefit* insurance money is made payable,” whereas in this Act the operative part of the definition reads “a person to whom or for whose *advantage* a benefit has been made payable.” No substantive difference is meant to turn on this choice of wording. “Advantage” has been favoured over “benefit” simply to avoid the awkwardness of repeating the word “benefit” in the definition.

90. *Supra* note 84. This provision was repealed upon the coming-into-force of the *Supplements Repeal Act*, *supra* note 88.

91. *Supra* note 19.

Subsection (1) also contains a definition of “benefit.” This definition is not found in the Uniform Act and has been added here simply to avoid the repeated use of wordy phrases such as “benefit made payable under a plan upon the death of a participant.” The terms “benefit” and “beneficiary” are of longstanding use in statutes dealing with designations of retirement plan beneficiaries. They are used in that specific sense in this Part of the Act and, partly for that reason, it has been necessary to define them in this section. Section 1 of this Act contains a definition of “beneficiary” that is applicable to all other Parts of this Act.

Subsection (1) does not contain a definition of “will.” The definition of “will” that is set out in section 1 applies to this Part. In order to remove any doubts on this point, the word “instrument” has been defined as including a “will.” This definition is also found in the *Insurance Act*.⁹²

Subsection (2) addresses a concern raised by the Law Reform Commission about the 1975 Uniform Act.⁹³ The Law Reform Commission observed that at least one commentator had concluded that the definition of “participant” appeared to restrict the scope of the legislation to plans that explicitly give the participant the right to designate “someone.” This result was not intended by the drafters of the 1975 Uniform Act. In order to guard against such an interpretation taking hold in this Part, the definition of “participant” does not contain the qualifier “is entitled to” and subsection (2) has been added to remove all uncertainty on this point.

Designation of beneficiaries

- 69
- (1) A participant may designate a beneficiary by a declaration.
 - (2) Subject to section 70 [*designation of beneficiary irrevocable*], the participant may alter or revoke the designation by a declaration.
 - (3) A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.
 - (4) A designation in a will is of no effect against a designation made later than the making of a will.

Sources: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (2)–(3); *Insurance Act*, R.S.B.C. 1996, c. 226, ss. 48 (1)–(2); 102 (3)

Comment: This section deals with the mechanics of designating a beneficiary. Subsection (1) provides an informal procedure for designating a beneficiary in a signed instrument. The participant may also designate a beneficiary in a will, which is implicitly contained in the defined term “declaration.” Subsection (2) provides for revoking or altering the designation by a subsequent declaration. Both subsections more closely track the language of section 48 of the *Insurance Act* than that of the 1975 Uniform Act. This point is particularly notable in the use of the defined term “declaration.” In addition to promoting harmony between retirement plan designations and insurance policy designations, this term has been preferred because it clearly identifies the document that contains a designation or an appointment of a trustee (see section 75). (The 1975 Uniform Act does not contain provisions relating to the appointment of trustees.) In the absence of this term some confusion may occur.

92. *Ibid.*, s. 29.

93. *Report on the Making and Revocation of Wills*, *supra* note 42 at 85.

Subsections (3) and (4) deal with some consequences of allowing designations in a will. Subsection (3) requires a designation in a will to relate expressly to a plan—either by specifically identifying it or by using general language to indicate that the designation in the will applies to the participant's plan or plans. This rule avoids the possibility of a mistaken or accidental designation taking effect by virtue of the residue clause in a will. No equivalent to subsection (4) appears in the 1975 Uniform Act. Instead, it is drawn from section 102 (3) of the *Insurance Act*.⁹⁴ Apart from promoting the uniformity of treatment of insurance beneficiary designations and retirement plan designations, subsection (4) also resolves potential conflicts between a designation in a will that is not expressly revoked by a later designation in a signed instrument.

Designation of beneficiary irrevocable

- 70** (1) A participant may by a declaration, other than a declaration that is part of a will, filed with the administrator of a plan at its head or principal office in Canada during the lifetime of the participant, designate a beneficiary irrevocably to receive a benefit, and in that event the participant, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary, and the benefit is not subject to the control of the participant or of the participant's creditors and does not form part of the participant's estate.
- (2) If the participant purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation is of the same effect as if the participant had not purported to make it irrevocable.

Source: *Insurance Act*, R.S.B.C. 1996, c. 226, s. 49

Comment: This section expressly allows a participant to designate a beneficiary in a declaration (other than a declaration that is contained in a will) that will be irrevocable without the beneficiary's consent. It is modelled on section 49 of the *Insurance Act*. The Law Reform Commission recommended adding such a provision to the legislation respecting designation of retirement plan beneficiaries, noting that it would be particularly useful in connection with a separation agreement: "[i]nterests in plans often constitute family assets, and on the breakdown of a marriage it may be a term of the separation agreement that one spouse appoint the other as a beneficiary. If that designation could be made irrevocable except with the consent of the spouse named in the designation, it could not be revoked in breach of the separation agreement."⁹⁵ Enacting such a provision for retirement plan beneficiary designations also promotes consistency of treatment between such designations and designations under insurance policies. A similar provision is recommended for death benefits payable under accident and sickness insurance policies (see section 202).

Elsewhere in this Report we have recommended amending the *Insurance Act* to provide that certain notices and documents, which must currently be served on the insurer's head or principal office to be effective to bind the insurer, may instead be served simply on "any office" of the insurer (see sections 199; 203). This recommendation has not been extended to irrevocable beneficiary designations.

94. *Supra* note 19.

95. *Report on the Making and Revocation of Wills*, *supra* note 42 at 90–91.

nations, whether under this section, section 49 of the *Insurance Act*, or the proposed section 102.1 of the *Insurance Act* (see section 202), because we hold the view that irrevocable beneficiary designations are documents of a different order than those referred to in the current sections 66 and 106 (1) of the *Insurance Act*. The head or principal office of the plan administrator or insurer must have notice of them in order to ensure that the intentions of the participant are carried out and that the rights of the beneficiary are protected.

Revocation of designation

- 71** (1) Subject to section 70 [*designation of beneficiary irrevocable*], a revocation in a will is effective to revoke a designation made by a declaration that is not contained in a will only if the revocation relates expressly to the designation, either generally or specifically.
- (2) Despite section 40 [*signatures required on formal will*], but subject to section 70 [*designation of beneficiary irrevocable*], a later designation, however made, revokes an earlier designation, to the extent of any inconsistency.
- (3) The revocation of a will is effective to revoke a designation in the will.
- (4) Revocation of a designation does not revive an earlier designation.

Source: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (4)–(6); (9)

Comment: Subsection (1) guards against the possibility of accidental or mistaken revocations by virtue of the rule that a later will revokes an earlier one. Subsection (2) resolves any conflicts that may exist when a later designation is made in the absence of an express revocation of an earlier one. The cross-reference in subsection (2) is to the provision that sets out the formalities that apply to the making of a will. Subsections (3) and (4) are self-explanatory.

Designation or revocation by will

- 72** (1) A designation or revocation contained in an instrument purporting to be a will is not invalid merely because the instrument is invalid as a will.
- (2) A designation in an instrument that purports to be, but is not, a valid will is revoked by an event that would have the effect of revoking the instrument if it had been a valid will.
- (3) Republication of a will by codicil is not effective to revive a revoked designation in a will unless the codicil expressly provides for revival.
- (4) Despite section 49 [*effect of a will*], but subject to section 70 [*designation of beneficiary irrevocable*], a designation or revocation in a will is effective from the time when the will is signed.

Source: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (7)–(8); (10)–(11)

Comment: This section sets out several special rules that govern the relationship between beneficiary designations contained in a will and the general law of making a will. Subsection (1) allows a designation in a document that is not valid as a will to be effective for the purposes of designating a

beneficiary under a plan. This result is consistent with the broader policy goal of permitting participants to designate beneficiaries in instruments that do not meet the formalities required of a valid will. Subsection (2) provides for the revocation of a designation contained in the defective will referred to in subsection (1).

Subsection (3) guards against the inadvertent revival of a revoked beneficiary designation contained in a will upon the execution of a codicil. In most cases a codicil will provide for the republication of the original will. The problem that this may pose for a beneficiary designation is illustrated by a fact pattern in which a person makes a will that contains a beneficiary designation, at a later time revokes the designation and makes a new one in a signed instrument, and then, still later, executes a codicil that makes unrelated changes to the will and republishes it. An argument could be made that republication of the will revives the first designation that was contained in it, even though the codicil had nothing to say about the designation. This argument was considered in *Royal Trust Co. v. Shimmin*.⁹⁶ In that case, Macdonald J. concluded that the proper test was one that gave effect to the testator's intention.⁹⁷

There is no doubt that a codicil to a will operates as a revival of the will, as if the testator had made a new will at the time. While the will was republished by the codicil and thus for many purposes the date of the original will was, as it were, shifted to the date of the codicil, still the republication did not necessarily make it operate for all purposes "as if it had originally been made at the date of the republishing instrument; a contrary intention may be shewn.

The rule is subject to the limitation that the intention of the testator is not to be defeated thereby:"

vide Halsbury's Laws of England, Vol. 28, p. 578.

Subsection (3) implements a recommendation of the Law Reform Commission and codifies the test in *Shimmin*.⁹⁸

Subsection (4) modifies the rule that a will speaks from death. It gives effect to a beneficiary designation contained in a will from the date that the will is signed.

Designation or revocation by attorney

- 73** (1) If the power of attorney expressly confers the authority to do so, an attorney may, by a declaration,
- (a) designate a beneficiary,
 - (b) subject to compliance with section 70 [*designation of beneficiary irrevocable*], irrevocably designate a beneficiary, or

96. (1932) 46 B.C.R. 273, [1932] 3 W.W.R. 447 (S.C.), Macdonald J. [*Shimmin* cited to B.C.R.], *aff'd*, (1933) 47 B.C.R. 138, [1933] 3 D.L.R. 718 (C.A.).

97. *Shimmin*, *ibid.* at 276 (the formatting of the internal quotation follows the style used in the original).

98. *Report on the Making and Revocation of Wills*, *supra* note 42 at 88.

(c) subject to section 70 [*designation of beneficiary irrevocable*], alter or revoke a designation.

(2) A power of attorney referred to in subsection (1) may be made under Part 1 [*general powers of attorney*] or Part 2 [*enduring powers of attorney*] of the *Power of Attorney Act*.

(3) The declaration may not be a declaration contained in a will.

(4) A designation by the attorney in favour of the attorney is not valid unless the power of attorney expressly authorizes it or the principal ratifies it.

Sources: subs. (1)–(3): original; subs. (4): *Property Law Act*, R.S.B.C. 1996, c. 377, s. 27

Comment: This section is intended to remedy “an absence of statutory authority” that was noticed in *Desharnais v. Toronto Dominion Bank*.⁹⁹ In that case the court found that section 49 of the *Law and Equity Act* does not grant an attorney the authority to make a beneficiary designation under a plan in accordance with the procedure set out in the *Law and Equity Act*. In the result, the court ruled that the designation at issue was invalid. Two reasons were offered for this conclusion. First, as noted, there was no explicit authority in the *Law and Equity Act*.¹⁰⁰ Second, since the beneficiary designation is a testamentary disposition, it is required, in the absence of statutory authority, to comply with the *Wills Act*.¹⁰¹ On the facts of the case, the designation at issue in *Desharnais* did not comply with the *Wills Act*.¹⁰² As a result, it was ineffective.

This new provision will make it clear that an attorney acting under a power of attorney that expressly confers the authority to make a beneficiary designation is able to do so in accordance with the procedures set out in this Part. For the sake of uniformity, a corresponding provision is proposed for death benefits under life insurance and accident and sickness insurance policies (see sections 197; 202 of this Act).

This section is not intended to limit or detract from the effect of section 9 (2) of the *Power of Attorney Act*.¹⁰³ Nor is its enactment intended to imply that the delegation of such authority in a general power of attorney set out in the Schedule to the *Power of Attorney Act* may not be possible under the present law.

99. (2001) 42 E.T.R. (2d) 192 at para. 40, 2001 BCSC 1695, Clancy J. [*Desharnais* cited to E.T.R.]. The judgment in this case was affirmed on appeal, but the ruling on designating a beneficiary by an attorney was not included in the grounds for appeal. See *Desharnais v. Toronto Dominion Bank* (2003), 9 B.C.L.R. (4th) 236 at para. 17, 2002 BCCA 640, Prowse J.A. (for the court).

100. *Desharnais*, *ibid.* at para. 38.

101. *Supra* note 5.

102. *Desharnais*, *supra* note 99 at paras. 39–41.

103. R.S.B.C. 1996, c. 370.

Subsection (4) removes any doubts that may exist about the status of a designation by an attorney in favour of the attorney. Such a designation is not valid, unless the power of attorney expressly authorizes it or the principal ratifies it.

Maintaining previous designation

74	An attorney under Part 2 of the <i>Power of Attorney Act</i> or a representative granted power over a participant's financial affairs under
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(a) section 7 (1) (b) of the <i>Representation Agreement Act</i> , or

(b) section 9 (1) (g) of the <i>Representation Agreement Act</i> , before the repeal of that provision,

may create a new beneficiary designation in an instrument other than a will if

- (c) the designation is made in an instrument that is renewing, replacing or converting a similar instrument made by the adult, while capable, and
- (d) the designated beneficiary is the same beneficiary that was designated in the similar instrument.

Sources: original; Bill 32, *Adult Guardianship and Personal Planning Amendment Act*, 2006, 2d Sess., 38th Parl., British Columbia, 2006, cl. 17 (4) (b)

Comment: In *Desharnais* the court concluded that an attorney acting under a general power of attorney (authorized by section 9 (2) of the *Power of Attorney Act* and in the form set out in the schedule to that statute) has the authority to transfer a plan from one administrator to another.¹⁰⁴ Similarly, an attorney—or a committee or representative under a representation agreement—may convert a plan from, for example, a registered retirement income plan to a registered retirement income fund. Strictly speaking, these actions may result in the formation of a new contract, and may require that a new beneficiary designation be made, in order to ensure that the participant's wishes are to be met. The issue of whether an attorney may make an effective designation that simply carries forward the participant's original designation was not expressly in dispute in *Desharnais* and was therefore not resolved. But some of the reasoning in *Desharnais* casts doubt on the authority of an attorney (and, by implication, a committee or a representative) to make an effective designation on behalf of the participant in these circumstances.¹⁰⁵ In other places, however, the court implies that such an action would be permissible.¹⁰⁶

Section 73, above, does not directly address this situation, because it requires express authorization in the power of attorney. Since the issue here would only arise when the participant has become mentally incapable, the participant as principal is in no position to give this authority or to ratify any

104. *Desharnais*, *supra* note 99 at para. 29.

105. See, e.g., *Desharnais*, *ibid.* at para. 38.

106. See, e.g., *Desharnais*, *ibid.* at para. 41 (“A valid transfer of the RSP would have required the continuation of the designation of Ms. Desharnais as beneficiary. That action would have been authorized by the power of attorney.”).

steps taken by the attorney. In order to remove any uncertainty on this point, this section grants a limited authority to attorneys acting under an enduring power of attorney and representatives acting under a representation agreement that grants power over the participant's financial affairs. The authority conferred by this section only extends to signing, on behalf of the participant, a new designation that is identical in substance to the participant's previously made designation. It does not extend to making a designation that is different from the previous designation or that in any way alters the previous designation.

Section 2 (1) (r) of the *Representation Agreement Regulation*¹⁰⁷ addresses this issue in more limited terms, as an action contained in the "routine management of the adult's financial affairs" for the purposes of section 7 (1) (b) of the *Representation Agreement Act*.¹⁰⁸ The language of this provision in the *Representation Agreement Regulation* would need to be harmonized with that of section 74 in order to implement the section insofar as section 7 (1) (b) representatives are concerned. See also the commentary to section 97 regarding implications of the policy debate at the time of publication of this Report concerning the appropriate extent of the financial authority of section 7 (1) (b) representatives.

In late April 2006, the government introduced a Bill¹⁰⁹ that contained, among other provisions, fundamental changes to the *Adult Guardianship Act*,¹¹⁰ the *Power of Attorney Act*,¹¹¹ and the *Representation Agreement Act*.¹¹² Among the changes was the replacement of committees with "property guardians." One of the statutory powers granted to these property guardians was a power to create a new beneficiary designation in the circumstances described in section 74.¹¹³ Section 74 was drafted to correspond to this provision for property guardians. Shortly before the publication of this Report, the Bill was withdrawn.¹¹⁴ But the provisions relating to the *Adult Guardianship Act*, the *Power of Attorney Act*, and the *Representation Agreement Act* effected uncontroversial and long-overdue reforms. Since there is a good chance that these provisions will reappear in the same form in the near future, we have not altered the drafting of section 74. Harmonization is of considerable importance here. If the recently withdrawn provisions for property guardians are enacted before this draft Act, then this section will be in harmony with them. But if the law for committees is not reformed, or if a different set of reforms is put in place, then this section will have to be amended to achieve harmonization.

107. B.C. Reg. 199/2001.

108. R.S.B.C. 1996, c. 405.

109. Bill 32, *supra* note 11.

110. *Supra* note 10.

111. *Supra* note 103.

112. *Supra* note 108.

113. See Bill 32, *supra* note 11, cl. 4 (enacting new Part 2 to the *Adult Guardianship Act*, which will contain this authority for property guardians in section 17 (4) (b)).

114. See British Columbia, Legislative Assembly, *Debates* (10 May 2006) at 4636 (Hon. M. de Jong).

Trustee of beneficiary

- 75 (1) A participant may by a declaration appoint a trustee for a beneficiary and, subject to section 70 [*designation of beneficiary irrevocable*], may alter or revoke the appointment by a declaration.
- (2) A payment made by an administrator of a plan to the trustee for a beneficiary discharges the administrator to the extent of the payment.

Source: *Insurance Act*, R.S.B.C. 1996, c. 226, s. 51

Comment: The current legislation on beneficiary designations contained in the *Law and Equity Act* is silent on the possibility of employing its procedures to appoint a trustee for a beneficiary. As a result, it has proved rather difficult in practice to convince plan administrators to accept a beneficiary designation that appoints a trustee. This can frustrate some estate planning strategies that individuals have adopted.

Subsection (1) contains a general grant of statutory authority to appoint a trustee for a beneficiary under a plan. Subsection (2) provides protection to plan administrators by discharging them from any further liability when they make a payment under the plan to a trustee. These provisions are modelled on equivalent provisions found in section 51 of the *Insurance Act*.

It would be desirable if sections 51 and 54 of the *Insurance Act* worked better together. Section 54 provides in subsection (1) that, when insurance money becomes payable, it is not a part of the estate of the insured and is not subject to the creditors of the insured. For life insurance policies, the insurance money is payable upon the death of the insured. This rule is an attractive one, and it should be extended to retirement plan beneficiary designations (see section 78). Section 54 (2) provides that the rights and interest of an insured in an insurance policy are exempt from execution or seizure by the creditors of the insured while a designation in favour of a spouse, child, grandchild, or parent of the person whose life is insured is in effect. Since this rule governs relations between the insured and the insured's creditors during the lifetime of the person whose life is insured, it is not a topic within the law of succession, and therefore outside the scope of the recommendations made in this Report. It would be desirable, however, to make it clear that when a trustee is designated under section 51 to receive the proceeds of an insurance policy in trust for a person named in section 54 (2), that person does not lose the protection provided by section 54 (2). Some commentators have argued that this result would follow under the legislation as it currently exists.¹¹⁵ But the *Insurance Act* should be amended to remove all doubts and to make it sufficiently clear that this result would be achieved in these circumstances.

Payment

- 76 (1) Subject to subsection (2), if a designation is in effect at the death of a participant, a beneficiary or trustee entitled to a benefit under the designation may enforce payment of the benefit.

115. See David Norwood & John P. Weir, *Norwood on Life Insurance Law in Canada*, 3d ed. (Toronto: Carswell, 2002) at 301–02.

- (2) An administrator may set up any defence that would have been available had the claim been brought by the participant or the participant's personal representative.

Sources: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (12); *Insurance Act*, R.S.B.C. 1996, c. 226, s. 53; original

Comment: A well-established common law rule of contract holds that “. . . no stranger to the consideration can take advantage of a contract, although made for his benefit.”¹¹⁶ A retirement plan beneficiary designation is a classic example of a type of contract made between two persons for the benefit of a third party, who is a “stranger to the consideration.” In the absence of some statutory rule to the contrary, this common law rule would operate to prevent a beneficiary from taking action to enforce payment of the benefit under the plan. This section, which is based on a provision in the 1975 Uniform Act, provides the necessary statutory authority by extending to the beneficiary (and a trustee of the beneficiary, if one has been appointed) the right to enforce an entitlement to the benefit.

Administrator discharged

- 77 If an administrator of a plan transfers a benefit in accordance with the plan to a beneficiary of record, the administrator is discharged in respect of that benefit even if the administrator later receives a notice of change of beneficiary.

Source: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (15)

Comment: This section provides an important level of protection for plan administrators. It allows them to rely on their records in making a payment under a plan by discharging them from any further liability in respect of such a payment. This provision is also of practical assistance to beneficiaries, who might be kept waiting if plan administrators felt that they could not rely on their records and instead had to make further investigations to locate the true beneficiary.

Benefit not part of estate

- 78 A benefit payable under a plan on the death of a participant is not part of the participant's estate and not subject to the claims of the participant's creditors.

Sources: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (13); *Insurance Act*, R.S.B.C. 1996, c. 226, s. 54 (1); original

Comment: Currently, British Columbia law provides that a benefit payable under a plan to a beneficiary upon the death of a participant does not form part of the participant's estate.¹¹⁷ But the law is not clear on whether the benefit is subject to the participant's creditors. The courts in British Columbia have not had an opportunity to consider this issue. There are conflicting decisions in other jurisdictions, involving legislation that is not identical in all respects to British Columbia's. Some courts have applied an equitable principle that holds that the claims of creditors should be preferred

116. *Tweddle v. Atkinson*, (1861) 1 B. & S. 393 at 398, 121 E.R. 762 (Q.B.), Wightman J.

117. *Law and Equity Act*, *supra* note 84, ss. 49 (2) (c) (registered retirement savings plans); 50 (2) (c) (registered home ownership savings plans); 51 (2) (c) (registered retirement income funds).

to those of a volunteer.¹¹⁸ Other courts have held that the statute clearly intends that the benefit is to pass outside the estate to the beneficiary, and is therefore not subject to a creditor's claim.¹¹⁹

This uncertainty stands in contrast to the clearer state of the law in connection with the proceeds of life insurance policies. Section 54 (1) of the *Insurance Act* resolves the issue in that context by stating expressly that the proceeds of a life insurance policy are not subject to the claims of creditors. That language is adopted in this section. In addition to resolving the uncertainty in this area of the law, it will also promote uniformity.

This Report has not addressed the issue of protection from creditors during the participant's lifetime. We have concluded that this issue is outside the scope of a Report that is focussed on the law of succession. An earlier report of the British Columbia Law Institute has dealt with this matter.¹²⁰

Beneficiary predeceasing participant

79 If a beneficiary predeceases the participant, and no disposition of the share of the deceased beneficiary in the benefit payable under a plan on the participant's death is provided in the designation, the share is payable

- (a) to the surviving beneficiary, or
- (b) if there is more than one surviving beneficiary, the surviving beneficiaries in equal shares, or
- (c) if there is no surviving beneficiary, to the participant's personal representative.

Source: *Insurance Act*, R.S.B.C. 1996, c. 226, s. 52 (1)

Comment: This section sets out default rules that govern when a beneficiary predeceases a participant. As these rules only apply in the absence of action by the participant, the participant remains free to establish an alternative scheme in the beneficiary designation. The section is based on section 52 (1) of the *Insurance Act*. As a result, it also harmonizes the law regarding insurance designations and retirement plan beneficiary designations on this point.

118. See *Clark Estate v. Clark*, [1997] 3 W.W.R. 62 at para. 29, 115 Man. R. (2d) 48 (C.A.), Huband J.A. (for the court) (“... the creditor is not prevented from claiming the funds from the recipient beneficiaries on the basis that a valid claim of a creditor takes precedence over the entitlement of a voluntary beneficiary”).

119. See *Amherst Crane Rentals Ltd. v. Perring* (2004), 241 D.L.R. (4th) 176 at para. 34, 187 O.A.C. 336 (C.A.), Feldman J.A. (for the court) (“I am also satisfied that in order to give full effect to s. 53 [of Ontario's *Succession Law Reform Act*] as an exemption from the rule that an RRSP designation is a testamentary disposition ... it would be anomalous to hold that RRSP proceeds that have devolved to the designated beneficiary remain subject to the claims of the creditors of the deceased.”), *leave to appeal to S.C.C. refused*, [2004] S.C.C.A. No. 430 (QL).

120. *Report on the Uniform Civil Enforcement of Money Judgments Act* (BCLI Rep. No. 37) (Vancouver: The Institute, 2005) at 208–15; 219–26.

Several beneficiaries

- 80** If 2 or more beneficiaries are designated otherwise than alternatively, but no division of the benefit payable under a plan on the participant's death is made, the benefit is payable to them in equal shares.

Source: *Insurance Act*, R.S.B.C. 1996, c. 226, s. 52 (2)

Comment: This section provides a default rule that will apply when a participant designates two or more beneficiaries as being entitled to take the benefit. The default rule is that these beneficiaries will share the benefit equally. This provision is based on section 52 (2) of the *Insurance Act*. It will not apply if the participant expressly provides in the designation that the beneficiaries are to take in shares that are not equal, or if the participant designates two or more beneficiaries who are to take as alternatives to one another.

Conflict between Part and plans

- 81** (1) Subject to subsection (2), if this Part is inconsistent with a plan, this Part applies.
- (2) If the amount or duration of a payment under a plan is determined having regard to the beneficiary of a plan, unless otherwise permitted under the terms of a plan, the beneficiary designation may not be changed after the payments commence.

Sources: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (14); original

Comment: The general rule that is stated in this section is that, in the event of a conflict, this Part will prevail over the terms of a plan. That general rule is qualified by one specific exception. Both the general rule and the specific exception were first articulated in the 1975 Uniform Act. The official commentary to the 1975 Uniform Act explained the purpose of the specific exception as follows:¹²¹

The problem arises where an annuity has been selected of the "joint and last survivor" type so that the amount of each periodic payment to be paid to the participant in his life is fixed having regard to age, sex and perhaps well-being of his specific beneficiary, who may not receive any payment until after the death of the participant. In these circumstances, a change of designation after some periodical payments have been made to the participant will require, at least, a recalculation of the benefit. In some cases the full benefit calculated at the beginning of the payout period may already have been paid by the time an elderly participant wishes to change his beneficiary.

A rule that a participant may not change a designation after the start of the benefit payments to him seems unduly restrictive, but a rule that permits changes in designation at any time, notwithstanding the terms of a plan, seems sure to result in disputes about the existence of an entitlement in the beneficiary and about the

121. *Supra* note 86 at 171–72.

extent of the entitlement, unless the particular plan deals adequately with these points.

The commentary goes on to explain that this specific exception is the “single exception”¹²² to the general rule that this Part prevails over the terms of a plan. This section is based on an equivalent provision in the 1975 Uniform Act, but it has been rendered in plainer language.

Insurance Act

82 This Part does not apply to a contract or to a designation of beneficiary to which the *Insurance Act* applies.

Source: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (17)

Comment: This section preserves the policy of having the *Insurance Act* govern designations involving insurance policies. There is some overlap in this area, as designations involving registered retirement savings plans administered by insurance companies have historically been governed by the *Insurance Act*. This legislation does not propose changing that arrangement.

PART 5 — DEPENDANTS RELIEF

Introductory Comment: This Part replaces the *Wills Variation Act*,¹²³ the statute that confers jurisdiction on the court to effectively override the terms of a will in order to relieve against a failure of the testator to make adequate provision for a spouse or child. This Part differs from the WVA in several ways, although in some respects it is closer to the dependants relief legislation of other Canadian jurisdictions.

First, this Part allows the court to vary the scheme of intestate distribution under Part 2 where the share of the intestacy estate that would otherwise accrue to a spouse or child of the intestate would be inadequate because of the particular circumstances of the spouse or child. The present WVA does not apply to intestacies, although the dependants relief Acts of most Canadian jurisdictions do.

Second, it restricts the eligibility of children of the deceased who have attained majority to claim relief to cases in which the adult claimant is unable to be self-supporting owing to special circumstances including mental or physical disability, illness, and enrolment in an educational or vocational training program. Unlike most other Canadian dependants relief statutes, the WVA currently imposes no restrictions of this kind. Recent case law under the WVA affirms an earlier line of authority that calls for courts to give effect to the concept of a moral obligation that will normally rest on a parent to provide for children in the parent's will, regardless of the child's circumstances. This has generated a body of opinion to the effect that the current Act creates too great an inroad on testamentary freedom. This view of the WVA prevailed among the Project Committee and a majority of the members of the subcommittee that reviewed the WVA as part of its topical mandate. A minority of the subcommittee members favoured retention of the WVA as currently interpreted and applied.

The third major difference between this Part and the WVA is the inclusion, while they are minors, of stepchildren in the class of eligible claimants, if the deceased supported them for at least one year

122. *Ibid.* at 172.

123. *Supra* note 15 [WVA].

immediately prior to death. The WVA only permits spouses and children (natural or adoptive) to claim relief against the terms of a will. The Project Committee has been persuaded that there is no cogent reason to exclude stepchildren from the class of eligible claimants if a significant degree of affinity existed with the deceased, demonstrated by the deceased having supported the stepchild for a significant length of time. Some other Canadian dependants relief statutes also allow claims by stepchildren.¹²⁴

In a further significant departure from the WVA, this Part distinguishes between the form of relief available to surviving spouses and that available to non-spousal claimants. (See the definition of “adequate provision” below.) A surviving spouse will normally be entitled to a just and equitable provision out of the estate if the will fails to provide it. This is intended as a continuation of the present law governing claims by surviving spouses. (It will also be theoretically possible to vary the intestate distribution scheme to award a spouse a larger share, but as a substantial increase in the size of the preferential and ordinary spousal shares in intestacies where there are issue is recommended in this proposed Act, a persuasive case would need to be made for additional relief.)¹²⁵

Relief to non-spousal claimants (children and stepchildren of the deceased) under this Part takes the form of periodically paid maintenance. For those unlikely ever to be self-supporting (“special circumstances child”) the maintenance could be indefinite in duration, but in all other cases the duration of the maintenance award must be limited in time. Maintenance could be financed through an annuity. The court could also provide that the estate be discharged by payment of a lump sum equal to the present value of the periodic payments if the claimant is a special circumstances child or if the maintenance is to be paid over a substantial length of time.

The distinction introduced in this Part between the rights of spousal and non-spousal claimants in regard to the form of relief is justified because it allows the court to award a surviving spouse the equivalent, at a minimum, of what the spouse would have received if a matrimonial property division had taken place under Part 5 of the *Family Relations Act*¹²⁶ during the lifetime of both spouses. While non-marital spouses do not have matrimonial property rights, it is in keeping with current social norms to allow them to claim a just and equitable share of a deceased spouse’s estate that is a tangible recognition of the spousal relationship as a partnership in which both parties contribute to mutual wealth and well-being.

This “partnership” model does not apply to non-spousal claimants, whose claims must be founded on some other basis such as need, legal obligation existing during life (in the case of minors), moral obligation, or some combination of these. Interference with testamentary freedom based on a subjective assessment of a moral obligation to leave a child a share of an estate, regardless of the child’s age or circumstances, has been rejected in this Project as a matter of policy. A legal obligation subsisting during the deceased’s life to support minor children and an adult claimant’s need (of

124. Northwest Territories and Nunavut: *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4, s. 1 (a), definition of “child.” Manitoba allows claims by persons to whom the deceased stood *in loco parentis* at death: *The Dependants Relief Act*, C.C.S.M. c. D37, s. 1, definitions of “child” and “dependant.”

125. Under subs. 23 (3)–(6), if there are issue common to both spouses, the spousal preferential share in intestacy would be increased from \$65,000 to \$300,000 and the spouse would also receive half the balance of the estate regardless of the number of issue. If there are issue that are not descendants of both spouses, the preferential share would be \$150,000 and the ordinary spousal share would still be one-half of the balance.

126. *Supra* note 44.

the kind recognized as a ground for relief) remain as factors to be weighed in the balance. A maintenance-based award providing for periodic payments is an adequate means of meeting either of these.

An anti-avoidance provision has been included in this Part to prevent the rights it confers from being defeated by a deliberate disposition of property made for the purpose of nullifying rights under the WVA. It adopts an approach similar to that found in the *Fraudulent Conveyance Act*.¹²⁷

The WVA section concerning appeals has been interpreted as creating a very wide standard of review, essentially approving a fresh exercise of discretion by the appellate court, rather than a review based on the principles that govern appeals from other discretionary orders.¹²⁸ This anomalous approach to the standard of review appears only to be based on the discretionary nature of the jurisdiction conferred by the WVA, and the fact that the WVA contains a provision (the current section 15) specifically allowing an appeal.¹²⁹ The existing appeal section has been omitted from this Part, with the intention that future appeals from orders made under it would be decided under the general appellate jurisdiction conferred by the *Court of Appeal Act*¹³⁰ and be subject to the ordinary standard of appellate review.

This Part brings British Columbia dependants relief legislation into greater harmony with similar legislation in other Canadian jurisdictions, while at the same time making it harder to avoid the effect of the legislation.

Division 1 — Interpretation and Application

Interpretation

83 In this Part:

“**adequate provision**” means

- (a) in relation to the spouse of a deceased person, provision that is adequate, just and equitable, and
- (b) in relation to an eligible claimant who is not a spouse of a deceased person, provision that constitutes reasonable and necessary maintenance;

“**child of the deceased person**” means a natural or adopted child of the deceased person;

“**eligible claimant**” means a person who at the time of death of a deceased person is

127. R.S.B.C. 1996, c. 163.

128. *Swain v. Dennison*, [1967] S.C.R. 7; *Gray v. Gray Estate* (2002), 98 B.C.L.R. (3d) 389 at 392 (C.A.).

129. *Swain v. Dennison*, *ibid.* at 12–13.

130. R.S.B.C. 1996, c. 77, s. 6 (1) (a).

- (a) a spouse of the deceased person,
- (b) a child of the deceased person who has not attained the age of majority
- (c) a special circumstances child,
- (d) a student claimant,
- (e) an eligible stepchild;

but does not include a person who has given a waiver under section 84 [*waiver by eligible claimant*];

“eligible stepchild” means a person who is not a natural or adopted child of a deceased person but who is a person

- (a) that is the natural or adopted child of a person who was, at the time of the death of the deceased person, a spouse of the deceased person,
- (b) to whom the deceased person had contributed support and maintenance for at least one year immediately before his or her death, and,
- (c) that had not reached the age of majority at the time of the death of the deceased person;

“net value” means the value of an estate wherever located, both in and out of British Columbia, after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees;

“special circumstances child” means a child of a deceased person that is not, and is not reasonably likely to become self-supporting by reason of

- (a) illness,
- (b) mental or physical disability,
- (c) any other special circumstances in respect of which the claimant is not, in the court’s opinion, disentitled to an order
 - (i) after the consideration of evidence received under section 85 (4) [*court may order provision — general principles*], or
 - (ii) under section 85 (6) [*court may order provision — general principles*];

“student claimant” means a child of the deceased person who at the time of the person’s death

- (a) had attained the age of majority, and
- (b) is unable to be self-supporting by reason of current or prospective enrolment in an educational or vocational training program;

“**suspensory order**” means an order made under section 89 (1) [*further powers of court*].

Sources: WVA, ss. 1; original

Comment: The definition of “eligible claimant” restricts the categories of those eligible to claim relief under this Part. It identifies four groups of claimants in addition to a surviving spouse. These are a “child of the deceased person,” an “eligible stepchild,” a “student claimant,” and a “special circumstances child.” These are all defined terms and distinctions are drawn among them largely for the purpose of stipulating the duration of the maintenance under section 88 (4). While this is the same range of potential claimants as under the present WVA apart from the addition of stepchildren, a distinction is made between minor children, whose eligibility is unrestricted, and those over the age of majority. Adult sons and daughters would only be able to claim under this Part if they are unable to be self-supporting for a reason mentioned in the latter two definitions. These restrictions on eligibility to claim relief approach a norm discernible from a comparison of Canadian dependants relief legislation and in one aspect are broader than the norm. While all the dependants relief statutes in Canada recognize lack of independent earning capacity by reason of mental or physical disability as a basis of eligibility, only one other province recognizes full-time educational enrolment as a potential ground of eligibility.

Waiver by eligible claimant

- 84** (1) A person who would otherwise be an eligible claimant may irrevocably waive in writing the right to claim relief under this Part, whether or not the waiver is supported by consideration.
- (2) A waiver referred to in subsection (1) is effective whether made before or after the death of the person to whose estate the waiver relates.
- (3) A waiver referred to in subsection (1) may be enforced against the claimant by
- (a) a personal representative of the deceased,
 - (b) a beneficiary under a valid will of the deceased, or
 - (c) where all or part of the deceased’s estate passes on an intestacy, a person entitled to share in its distribution.
- (4) Subject to subsection (3), a waiver referred to in subsection (1) is subject to all legal and equitable doctrines applicable to waivers and releases including those relating to capacity, fraud, duress and unconscionability.

Source: original

Comment: Subsection (1) introduces a major change in allowing claimants with the legal capacity (i.e. excluding minors) to waive the benefits of this Part. The court is not bound by a waiver or release of rights under the WVA under existing law, although it may take the existence of such an agreement into account in deciding whether to make an order in favour of a claimant. While subsection (1) would depart from the law as it now exists not only in British Columbia but across the country, it is thought to be an appropriate departure to make in order that separating or divorcing

spouses may finally settle their economic affairs and separate their property without the possibility of a later claim by one ex-spouse against the estate of another. The ability to waive is not restricted to spouses, however. For example, a waiver under subsection (1) could be part of an arrangement in which a parent makes a substantial transfer of property during life to an adult son or daughter.

Subsection (2) confirms that a waiver may be made before or after the death of the person to whose estate it relates.

Subsection (3) confirms that persons with a beneficial interest in the estate as well as the personal representative may plead and rely upon a waiver of rights under this Part.

Subsection (4) confirms, for the sake of certainty, that a waiver of rights under this Part is subject to all the usual principles applicable to waivers and releases. A waiver procured by duress or under unconscionable circumstances could be adjudged void.

Division 2 — Court Orders Generally

Court may order provision — general principles

- 85**
- (1) If a person dies leaving a will that does not, in the court's opinion, make adequate provision for one or more eligible claimants, the court may, in its discretion, in an action by or on behalf of the eligible claimants, order that adequate provision be made out of the deceased person's estate.
 - (2) If a person dies wholly or partially intestate and the resulting distribution does not, in the court's opinion, constitute adequate provision for one or more eligible claimants, the court may, in its discretion make any order that it might have made under subsection (1) if the property passing on the intestacy had been the subject of a gift made in a will.
 - (3) The following factors are not relevant to a determination of whether adequate provision has been made for an eligible claimant other than a spouse:
 - (a) whether the provision made constitutes a fair share of the deceased person's estate, and
 - (b) what, if any, moral obligation was owed by the deceased person to the eligible claimant.
 - (4) In determining whether adequate provision has been made for an eligible claimant the court may accept the evidence it considers proper of the deceased person's reasons, so far as ascertainable,
 - (a) for making the dispositions made in the will, or
 - (b) for not making adequate provision for the eligible claimant,including any written statement signed by the deceased person.
 - (5) A statement referred to in subsection (4) must be accorded significant weight unless there is good and sufficient reason for not doing so.

- (6) The court may accept the evidence it considers proper of the character and conduct of an eligible claimant and must refuse to make an order in favour of a claimant whose character or conduct, in the court's opinion, disentitles the claimant to the benefit of an order under this Part.
- (7) An order made under this section may be
 - (a) an interim order, subject to review and variation at any time, or
 - (b) a final order.

Sources: subs. (1): WVA, s. 2; subs. (2)–(3): original; subs. (4)–(6): WVA, ss. 5–6; subs. (7): original

Comment: Section 85 is the core of this Part. It confers a statutory jurisdiction on the court to alter the distribution of an estate mandated by a will or the law of intestacy if it does not make adequate provision for eligible claimants and sets out guiding principles. Subsection (1) confers this jurisdiction where the deceased left a will. It must be read in the light of the definition of “adequate provision” which distinguished between the basis for relief to spousal and non-spousal claimants. In this regard, it is significantly different from section 2 of the WVA.

In the case of a claimant spouse, the language of the definition of “adequate provision” is tracked closely and the basis on which the court will grant relief is essentially unchanged. It is intended that the principles enunciated in relation to spousal claimants in *Tataryn v. Tataryn Estate*¹³¹ with respect to section 2 of the WVA would continue to apply. In other words, a surviving spouse is *prima facie* entitled to an adequate, just and equitable share of the deceased spouse's estate equivalent to what the spouse would be entitled to receive under family law principles if the marriage had been dissolved in the lifetime of both spouses, instead of being terminated by death.

In the case of non-spousal claimants (minor children, minor stepchildren supported for at least a year by the deceased immediately before death, and children over the age of majority who cannot be self-supporting) the basis for relief under the definition of “adequate provision” is maintenance only. Maintenance in the context of dependants relief would be fixed in accordance with section 88.

Subsection (2) is a new provision which empowers the court to vary the general scheme of intestate distribution under Part 2 in favour of one or more eligible claimants. The dependants relief jurisdiction of most of the other Canadian provinces and territories extends to intestacies. While variation of intestate distribution is an innovation for British Columbia, it is thought that the problem that the WVA was originally enacted to address, namely the relief of dependants of a deceased person from economic hardship, is equally likely to be present in intestacies as in cases where there is a will.

Subsection (3) is intended as an express direction to the court to abandon the “moral obligation/fair share” approach to provision for claimants other than surviving spouses. See the Introductory Comment to this Part and the commentary to section 88.

Subsections (4) to (6) carry forward, with some modifications, sections 5 and 6 of the *Wills Variation Act*.

The power to make interim orders under subsection (7) (a) is new and is intended to address cases of urgent need pending the hearing of an action under this Part.

131. [1994] 2 S.C.R. 807.

Time limits and procedure

- 86** (1) An action must not be heard by the court at the instance of a party claiming the benefit of this Part unless
- (a) the action is commenced within 6 months from the date a representation grant is issued in relation to the estate of the deceased person,
 - (b) a copy of the writ of summons has been served on the personal representative no later than 30 days after the expiry of the 6 month period referred to in paragraph (a) unless the court otherwise orders,
 - (c) if any eligible claimant is a minor or is mentally disordered, a copy of the writ of summons has been served on the Public Guardian and Trustee, and
 - (d) if the action is in respect of a will of a Nisga'a citizen, section 6 (2) [*notice to Nisga'a Lisims Government*] has been complied with.
- (2) If the Public Guardian and Trustee is served with a copy of the writ of summons under paragraph (1) (c), the Public Guardian and Trustee is entitled to appear, to be heard and to any costs that the court orders.
- (3) If an action has been commenced on behalf of an eligible claimant, it may be treated by the court as, and so far as regards the question of limitation is deemed to be, an action on behalf of all eligible claimants.
- (4) A plaintiff in an action may register a certificate of pending litigation in the manner provided in the *Land Title Act*.
- (5) If
- (a) a representation grant other than a small estate declaration is revoked and a new representation grant is subsequently issued,
 - (b) the authority of a declarant to administer a small estate summarily is terminated by the court, and a new small estate declaration is filed or a representation grant is issued, or
 - (c) a representation grant is issued or filed, as the case may be, in respect of a will that revokes a will to which a prior representation grant relates,
- the limitation period of 6 months under paragraph (1) (a) recommences to run, whether or not the limitation period previously elapsed.
- (6) A second or subsequent representation grant that does not result from circumstances described in subsection (6) does not cause the limitation period under paragraph (1) (a) to recommence.

Sources: WVA, ss. 3–4

Comment: Subsection (1) imposes a six-month limitation period, running from the time a representation grant is made, for commencing an action for relief under this Part. Section 3 (1) (a) of the WVA currently imposes a limitation period of the same length running from issuance of probate. The limitation period is imposed so that the distribution of an estate is not unduly delayed and so that the personal representative may know when the possibility of claims coming forward under this Part has ended.

Subsection (1) (b) imposes a new requirement to serve a writ of summons issued in an action under this Part on the personal representative no later than 30 days after the end of the six-month limitation period. This is to ensure that the personal representative will be alerted to the fact that an action under this Part has been commenced so that distribution will not take place through inadvertence despite the possibility of an order being made in the action directing a different distribution, something which could leave the personal representative exposed to personal liability to satisfy the order. At the present time, a plaintiff may commence an action under the WVA on the last day of the six-month limitation period and under the Rules of Court has up to 12 months to serve the writ on the personal representative.¹³² An unproclaimed amendment to the Act passed in 1992 and recently repealed by the *Supplements Repeal Act*,¹³³ would have required the writ and a form of notice to be filed in the registry where the probate was issued.¹³⁴

Subsection (1) (b) allows the court to extend the time for service beyond 30 days after the end of the six-month limitation period. This discretion is granted in order to take account of cases in which service cannot, for good reason, be effected within this period. The operation of section 139 is not affected if the court makes an order under section 86 (1) (b) extending the time for service. A personal representative will still have no liability towards an eligible claimant in respect of a distribution of property if six months plus 30 days have elapsed since the grant and no writ of summons in an action for relief under this Part has been served prior to the time at which the distribution is made.

Subsection (2) carries forward section 3 (2) of the WVA and ensures that the Public Guardian and Trustee has standing in actions under this Part involving the interests of minors or mentally incapable persons.

Subsection (3) carries forward a procedural aspect of wills variation litigation now found in section 4 (1) of the WVA. If an action is commenced by or on behalf of one eligible claimant, the rights of action of the other eligible claimants are preserved for purposes of the limitation period under subsection (1), and the court may treat the action as if it had been brought on behalf of all the eligible claimants. Thus claims may be advanced in the action by eligible claimants other than the original plaintiff, and the court may make an order in their favour as well.

132. Rule 9 (1).

133. *Supra* note 88, s. 1 (2) (s).

134. R.S.B.C. 1996 (Supp.), c. 490, s. 3. The Law Reform Commission of British Columbia recommended in 1983 that service of the writ of summons on the personal representative should have to take place within the six-month limitation period, as well as the action having to be commenced within that time: *Report on Statutory Succession Rights*, *supra* note 34 at 94. The Intestate Succession, WVA, and *Family Relations Act* Issues Subcommittee considered that this requirement might not be possible to meet in all cases.

Subsection (4) makes the filing of a certificate of pending litigation in the Land Title Office permissive as in other litigation, instead of mandatory as it now is under section 4 (2) of the WVA.

Subsection (5) provides that the six-month limitation period under paragraph (1) (a) recommences if a new grant is issued or a new small estate declaration is filed because a prior grant has been revoked. The limitation period also recommences if a small estate declaration is filed because the court has terminated the declarant's authority. In the opinion of some practitioners, this (apart from the references to the proposed small estate summary administration procedure and the applicability of the provision to intestacies) would amount to a restatement of the effect under the present *Wills Variation Act* of revocation and issuance of a new grant, although the issue of recommencement of the limitation period under that Act appears not to have been directly decided. The limitation period will also run again (under a new grant) if a later will is proved, revoking an earlier one previously admitted to probate, or that was referenced in an earlier small estate declaration.

Subsection (6) is intended to clarify that the limitation period does not begin to run again if a second or subsequent representation grant is issued (or in the case of a small estate declaration, filed) other than for reasons set out in subsection (5). Thus, the limitation period would not recommence in the following cases:

- (a) a grant of administration *de bonis non* issues because a personal representative has died before completing the distribution of the estate;
- (b) double probate (where a grant of probate following an earlier one is made to a co-executor who did not join in proving the will initially);
- (c) a cessate grant of probate or general grant of administration is issued following a prior grant limited in duration;
- (d) a limited grant follows a general grant of probate "save and except" a portion of the estate;
- (e) a *caeterorum* grant of probate follows a limited grant;
- (f) a general grant of administration follows the appointment of an administrator *ad colligenda bona* (for the purpose of collecting assets when the appointment of an administrator is delayed);
- (g) a grant of probate or general administration follows the appointment of an administrator *pendente lite* (pending the commencement or completion of an action in which the validity of a will is challenged or probate, administration, or revocation of a grant is sought) under section 107, which corresponds to section 8 of the *Estate Administration Act*.
- (h) a grant of administration is made under section 161 (1) to a private administrator after a prior grant to the Public Guardian and Trustee acting as the official administrator.

Division 3 — Contents and Effect of Court Orders

Contents of order — spouse

- 87** In an order made under section 85 [*court may order provision — general principles*] in favour of claimant who is a spouse of the deceased person the court may
- (a) stipulate that the provision is to consist of a lump sum or a periodic or other payment or transfer of property,
 - (b) order that a payment or provision be secured by a charge on property or otherwise,
 - (c) order that a trust be created in favour of the spouse, and
 - (d) attach such conditions to an order under this Part that it thinks fit.

Sources: WVA, ss. 6–7

Comment: This section concerns the form in which provision for a spouse may be ordered. Paragraphs (a) and (b) of section 87 carry forward powers of the court that are now found in sections 6 (a) and 7 of the WVA. A general power like the one under paragraph (b) to secure an order made under this Part by a charge on property or in some other manner was recommended by the Law Reform Commission of British Columbia in a 1983 report.¹³⁵

The power to secure an order by charging property could be used, for example, in conjunction with an order calling for periodic payments that would be generated by the income from the property, or to enable the order to be enforced more effectively when a concurrent or related order is made under section 95 against a third party transferee.

The power to order the creation of a trust might be used where the spouse is under a disability.

Contents of order — claimant other than spouse

- 88** (1) In an order made under section 85 [*court may order provision — general principles*] in favour of a claimant who, at the date of death, was not a spouse of the deceased person the court may provide for the maintenance of the claimant in accordance with:
- (a) subsections (2) and (3) in fixing the value or amount of the maintenance and its form, and
 - (b) subsection (4) in fixing the duration of the maintenance.
- (2) In fixing the value or amount of maintenance in an order made under subsection (1) the court may have regard to the following factors:
- (a) the amount required to discharge the claimant's daily living expenses at a standard of living appropriate to the claimant,

135. *Supra* note 34 at 102.

- (b) the actual value of support provided to the claimant in the year immediately before the death of the deceased person,
- (c) the likelihood that support referred to in paragraph (b) would have continued if the deceased person had not died, and at what level and for how long,
- (d) provision made for the claimant by the deceased person, or any other person, apart from the estate,
- (e) the value of the estate, and
- (f) the nature and extent of competing claims to the estate,

but the following factors are not relevant in fixing the value or amount of maintenance:

- (g) any moral obligation owed by the deceased person to the claimant, and
- (h) what would constitute a fair share of the estate.

(3) An order made under subsection (1)

- (a) must provide that the maintenance take the form of periodic payments, and
- (b) may provide that the payment of the maintenance be
 - (i) secured through the purchase of an annuity,
 - (ii) secured by a charge on property or otherwise
 - (iii) discharged through the creation of such trust arrangements as the court considers appropriate
 - (iv) discharged by the payment of a lump sum equal to the present value of the periodic payments calculated as if they were future damages to which section 56 [*discount rates*] of the *Law and Equity Act* applies
 - (A) using the discount rate prescribed under section 56 (2) (b) of that Act if:
 - (1) the claimant is a special circumstances child, or
 - (2) payments are to be made over seven or more years, or
 - (B) another discount rate that the court orders if clause (A) does not apply.

(4) The duration of maintenance payments in an order under subsection (1) are governed by the following rules:

- (a) maintenance payable to a claimant that is a child of the deceased person who has not attained the age of majority must cease when the claimant attains the age of majority except where there is a reasonable likelihood that the claimant on attaining the age of majority will enroll or become enrolled in an educational or vocational training program in which case the claimant is deemed to be a student claimant and paragraph (b) applies;
- (b) maintenance payable to a claimant that is a student claimant must not extend beyond the claimant's 25th birthday;
- (c) maintenance payable to a claimant that is an eligible stepchild must cease when the claimant attains the age of majority;
- (d) maintenance payable to a claimant that is a special circumstances child is not subject to any specific time limitation and its duration is as set out in the order.

Source: original

Comment: This section is new. It stresses the character of the provision for minor children as being maintenance. This reflects the legal obligation that a parent has towards a child during minority.

Subsection (2) sets out the factors to be considered in fixing the amount of maintenance. It directs the court to consider (and not consider) certain factors in fixing the amount of maintenance. Whether the claimant was actually deriving support from the deceased in the year prior to the deceased's death is one factor that may be considered, but it is not a prerequisite to relief, except in the case of an eligible stepchild. The court is directed to ignore questions of moral obligation and whether the child's entitlement, if any, is a "fair share" of the estate. This is a significant change from the manner in which section 2 of the present *Wills Variation Act* is now applied to claims by children of a testator. The interpretation of the present section 2 endorsed by the Supreme Court of Canada in *Tataryn v. Tataryn Estate* calls for consideration not only of legal obligations resting on the testator at death, but also whether a will fulfils the testator's moral obligations towards the claimant class, including children over the age of majority. The prevailing opinion that has emerged from the Succession Law Reform Project is that the present interpretation should be rejected in favour of an analysis concentrating on actual need in the case of adult non-spousal claimants. The present approach is seen as tantamount to a regime of forced heirship based on subjective second-guessing of the testator in regard to what amounts to a "fair" distribution.¹³⁶ The Project Committee and a majority of the subcommittee charged with review of the WVA consider this *de facto* abrogation of testamentary freedom in the absence of demonstrated need to be undesirable as a matter of public policy.

Subsection (3) is a further new provision. It restates a basic family law principle that maintenance normally takes the form of periodic payments and describes the way in which a stream of periodic payments may be achieved.

136. This position was notably espoused in Leopold Amighetti, *The Law of Dependents' Relief in British Columbia* (Toronto: Thomson Professional Publishing, 1991) at 27ff.

Subsection (4) embodies a principle that maintenance must normally be of limited duration in the absence of special circumstances. “Special circumstances children” receive special treatment in two ways. First, under paragraph (d) provision for their maintenance need not be finite in duration and may extend as far as necessary into the future. Because of this feature subsection (3) (b) (iv) provides that their awards would be capitalized using the statutory discount rate in section 56 (2) (b) of the *Law and Equity Act*. This makes it easier for the court to order adequate provision even in the face of uncertain future economic events. Similar considerations apply where the payments would extend over a lengthy period of time, such as where provision is made for a very young child. Provision in relation to other children will normally be of shorter duration and it will be appropriate to capitalize the lump sum amount using a current investment interest rate.

Paragraphs (a) to (c) of subsection (4) concern the duration of maintenance payments to non-spousal claimants who are not special circumstances children.

Further powers of court

- 89
- (1) The court may make an order suspending in whole or in part the administration of the deceased person’s estate for such time and to such extent as the court thinks fit.
 - (2) The court may order that any part of the deceased’s estate be exempt from the effect of the order made under section 85 [*court may order provision — general principles*].
 - (3) The court may
 - (a) order that a periodic payment or lump sum to be paid by a beneficiary represents, or is in commutation of, the proportion of the sum ordered to be paid that falls on the portion of the estate in which the beneficiary is interested, and that the portion is released from further liability, and
 - (b) give directions concerning the security and disposition of a payment or amount ordered under paragraph (a).
 - (4) An order under subsection (1), (2) or (3) may form part of an order made under section 85 [*court may order provision — general principles*] or be made on subsequent application to the court.
 - (5) If the court has made an order for provision under section 85 [*court may order provision — general principles*], the court may
 - (a) inquire, at any subsequent date, whether a claimant has undergone a change of circumstances, resulting, in whole or in part, in the claimant’s entitlement to adequate provision apart from the order, and
 - (b) cancel, vary or suspend the order, or make another order that is just in the circumstances.

Sources: subs. (1): *Uniform Dependents’ Relief Act*, s. 3; subs. (2): WVA s. 9; subs. (3): WVA, s. 10; subs. (5): WVA, s. 14

Comment: Subsection (1) introduces a power not now found in the WVA to make a “suspensory order” to preserve the status quo in the administration of an estate pending some further step in proceedings under this Part. The purpose of this power is to allow the court to prevent distributions or transfers that might tend to defeat rights of eligible claimants.

Subsection (2) is self-explanatory.

Subsection (3) is intended to carry forward powers of the court under section 10 of the WVA. Paragraph (3) (b) is somewhat more broadly worded than section 10 (2) of the WVA to allow as much flexibility to the court as possible in directing how an order is to be secured and how amounts affected by the order are to be dealt with.

Subsection (4) allows the ancillary orders described in subsections (1) to (3) to be made at the time an order is made under section 85 for adequate provision out of an estate or in a later application.

Subsection (5) carries forward powers of the court now found in section 14 of the WVA.

Payments fall rateably on estate

- 90** (1) Unless the court otherwise determines, and subject to section 89 (2) [*further powers of court*] the incidence of the payments ordered falls rateably on the whole estate of the deceased.
- (2) If the authority of the court does not extend or cannot, directly or indirectly, be made to extend to the whole estate, subsection (1) applies to as much of the estate as is within the authority of the court.

Source: WVA, s. 8

Comment: This section carries forward section 8 of the WVA.

Effect of order

- 91** An order under this Part does not bind land unless it is registered as a charge against the land affected in the land title office in which the title to the land is registered.

Source: WVA, s. 11

Comment: This section carries forward section 11 of the WVA.

No distribution until 6 months after representation grant

- 92** (1) Until 6 months have passed from the date a representation grant is made in relation to the estate of the deceased person, the personal representative must not distribute any portion of the estate to beneficiaries except
- (a) with the written consent of all eligible claimants, or

- (b) if authorized by order of the court and subject to such conditions that the court sees fit to impose.
- (2) Until the period referred to in subsection (1) has passed, a disposition by the personal representative of land that is part of the estate may be registered in a land title office only if
 - (a) all eligible claimants consent to the disposition, or
 - (b) the disposition is authorized by order of the court and subject to such conditions that it thinks fit.

Source: WVA, s. 12

Comment: Subsection (1) carries forward the prohibition now found in section 12 (1) of the WVA on distribution of any part of the estate during the six-month limitation period in which it is possible for an eligible claimant to commence an action under this Part, unless all eligible claimants consent or the court allows it.

Subsection (2) corresponds to the current section 12 (2) of the WVA, but has been redrafted to reflect the current law on the devolution of real property. The current wording of section 12 (2) referring to “a title passing by devise to a beneficiary” dates from prior to 1925, when gifts of land under a will (devises) did not pass to the personal representative in British Columbia but vested directly in the beneficiary. Interests in land as well as personal property devolve now on the personal representative.¹³⁷ Either the personal representative must be registered as the owner before any transfer of land out of the estate to a beneficiary is registrable, or the personal representative must assent by an instrument in registrable form to registration of title in the name of the beneficiary.¹³⁸ Subsection (2) therefore refers to registration of a disposition by the personal representative of land forming part of the estate, rather than to a title passing by devise.

Subsection (2) also contains a change from the current WVA section 12 (2) in permitting registration of a disposition of land by a personal representative within the six-month limitation period under this Part if all (legally capacitated) eligible claimants consent, or if the court authorizes it.

Anticipation of provision prohibited

- 93
- (1) An eligible claimant must not anticipate provision under this Part.
 - (2) A mortgage, charge or assignment of any kind of or over that provision made before the order of the court is of no effect.
 - (3) A mortgage, charge or assignment, whenever made, of maintenance ordered under section 88 [*contents of order — claimant other than spouse*] is of no effect unless authorized by the court.

Source: WVA, s. 13

137. See s. 77 (1) of the *Estate Administration Act*, *supra* note 6.

138. See s. 79 (1) and (5) of the *Estate Administration Act*, *ibid*.

Comment: This section carries forward, with modifications, the terms of section 13 of the WVA. Subsection (3) has been revised to confine its operation to attempts to charge a stream of payments to a non-spousal claimant. Once an order for adequate provision has been made in favour of a spouse, the spouse should be free to deal with the share of the estate awarded as he or she wishes.

Division 4 — Anti-Avoidance Measures

Contract to dispose of property by will

94 Where a deceased person

- (a) has, in that person's lifetime, in good faith and for valuable consideration, entered into a contract to make a gift by will of any property, and
- (b) has, by will, made a gift of that property in accordance with the contract,

the property is not liable to the provisions of an order made under this Part except to the extent that the court determines that the value of the property at the time the contract was made exceeded the consideration received by the deceased for it.

Source: *Uniform Dependants' Relief Act*, s. 15

Comment: A contract to give property by will is one means by which the property available to meet the needs of an eligible claimant for maintenance and support could be reduced. This section is intended to bring contracts to give property by will within the scope of the anti-avoidance provisions in this Division, but only if the consideration the deceased received was less than the value of the property. If the other contracting party acted in good faith and gave consideration for the gift that is equivalent to or greater than the value of the property, it would be unfair to disturb the contractual arrangement to give priority to the interests of the eligible claimant over those of the contracting party. If the other party did not give consideration at least equal to the value of the property, however, that party will have received a benefit at the expense of the eligible claimant. Under those circumstances, it is not unjust to make the property liable to satisfy the terms of an order under this Part directing adequate provision for the eligible claimant.

Section 94 makes the property in question liable to be charged with an order under this Part only to the extent of the difference between the value of the property and the consideration received by the deceased. This is because the difference represents the extent to which the contract to make the gift by will operated to reduce the size of the estate that would otherwise have been available to satisfy an order for adequate provision to the eligible claimant.

Certain transactions voidable

- 95** (1) If a deceased person whose purpose is to defeat rights under this Part, has conferred a benefit on a second person, the transaction through which the benefit was conferred is voidable against an eligible claimant whose rights under this Part are or might be diminished by the transaction.

- (2) Subsection (1) does not apply to a transaction lawfully conferring a benefit on a person who enters into the transaction for valuable consideration and in good faith and who, at the time of the transaction, has no notice or knowledge of the purpose of the deceased person.
- (3) The value of the benefit conferred under a transaction that is shown to be voidable against an eligible claimant under subsection (1) must be included in the estate of the deceased person for the purposes of this Part.
- (4) Where a transaction is voidable under subsection (1) the court may make any order in relation to
 - (a) the benefit conferred,
 - (b) the transaction through which the benefit was conferred, and
 - (c) a party to the transaction

that the court determines is necessary to make sufficient assets available toward the satisfaction of an order under this part in favour of the eligible claimant that it might have made had an action been brought under the *Fraudulent Conveyance Act* and the eligible claimant was a creditor of the deceased person.

Sources: subs. (1): original; subs. (2): *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, s. 2; subs. (3)–(4): original

Comment: Section 95 is an anti-avoidance provision. Subsection (1) declares transactions that a deceased entered into with the intent of defeating rights of an eligible claimant under this Part to be voidable as against the eligible claimant, if they have the effect of impairing the eligible claimant's ability to obtain adequate provision from the estate, or may do so. Examples of transactions that might come within subsection (1) if made with the necessary intent could include transfers of property into joint tenancy, deposits into joint accounts in a financial institution carrying a right of survivorship, transfers of property for nominal or no consideration, and designations (or a change of designation) of a beneficiary of a life insurance policy or an RRSP.

In order to provide finality and protect settled expectations in completed dealings, subsection (2) exempts transactions in which good consideration was given and in which the party benefited had no notice or knowledge at the time of the transaction that the deceased intended to defeat or impair the rights of an eligible claimant.

Subsection (3) states what is to happen when an eligible claimant establishes that a transaction is voidable under subsection (1). The value of the benefit conferred on the transferee is still considered to form part of the estate for the purpose of quantifying "adequate provision" in the case. In order to take advantage of this section, an eligible claimant would have to plead and prove (a) the transaction, and (b) that the deceased had the intent to defeat rights to relief under this Part.

Subsection (4) deals with the remedies the court may grant to eligible claimants when a transaction is voidable under subsection (2), so that the property affected by the transaction is made available to satisfy the terms of an order under this Part in their favour. It confers a broad power on the court to review impugned transactions so as to make sufficient assets available to satisfy an order for

provision that would otherwise be defeated, but will not reverse the whole transaction unless it is necessary to achieve that goal.

The section proceeds by analogy with the *Fraudulent Conveyance Act*¹³⁹ and expressly empowers the court to make any order it could have made if the transaction had been attacked under that Act and the eligible claimant was a creditor. By analogy to the kinds of relief obtainable under that Act, this would allow for at least the following forms of relief:

- (a) a declaration that the transaction is void as against all the eligible claimants entitled to relief under this Part (not only the one who applies for the order), coupled with an order that the property in question is subject to seizure or execution to satisfy the order for adequate provision out of the estate in the eligible claimants' favour;¹⁴⁰
- (b) a declaration that the transferee or party benefited holds the property that was the subject of the transaction in trust;¹⁴¹
- (c) an order that amounts payable under the order for adequate provision constitute a charge against the property in question;¹⁴²
- (d) an order for sale under Rule 43 (1) of the Rules of Court.

In theory, the court should not order the retransfer of the property because the *Fraudulent Conveyance Act* only renders a transaction void as against creditors of the transferor and not as between the transferor and transferee.¹⁴³ Retransfer has occasionally been ordered, however.¹⁴⁴

In addition, a form of tracing is indirectly available because section 7 of the *Fraudulent Preference Act*¹⁴⁵ states that a creditor may recover the proceeds of disposition *or their value*, if a person who receives property under a fraudulent conveyance disposes of it. This has been interpreted as not limited to transactions coming within the scope of the *Fraudulent Preference Act*, but as extending to all fraudulent conveyances.¹⁴⁶ This should allow the court to make, for example, a declaration that

139. *Supra* note 127.

140. *Vern-View Investments Inc. v. Hale* (1991), 58 B.C.L.R. (2d) 322 at 328 (C.A.); *Allen v. Allen*, [1948] 2 D.L.R. 778 (B.C.S.C.).

141. *Bernard v. Weiss* (1986), 70 B.C.L.R. 318 (S.C.); *Allen v. Allen*, *ibid.*

142. *Viva Developments Inc. v. Icarus Properties Ltd.*, 2004 BCSC 1176.

143. Law Reform Commission of British Columbia, *Report on Fraudulent Conveyances and Preferences* (LRC 94) (Vancouver: The Commission, 1988) at 63–64; Lyman R. Robinson & R.C. Di Bella, *British Columbia Debtor-Creditor Law and Precedents*, looseleaf (Toronto: Carswell, 1993) at 10-50.

144. *Murphy v. Barr* (1921), 61 D.L.R. 343 (B.C.C.A.); *Solar v. Kovacs* (1993), 86 B.C.L.R. (2d) 94 (S.C.).

145. R.S.B.C. 1996, c. 164.

146. For a transfer to be rendered void under the *Fraudulent Preference Act*, it must be made when the transferor is insolvent, unable to pay his or her debts in full, or knows that he or she is on the verge of insolvency: s. 3. In *Allen v. Allen*, *supra* note 140, s. 7 of the *Fraudulent Preference Act* was held not to be

a transferee who disposes of property that was the subject of a transaction voidable under this section holds the proceeds in trust for the eligible claimants, or give personal judgment against the transferee for the lesser of the amount of the proceeds or the amount needed to satisfy an order under this Part.

The Project Committee chose this form of anti-avoidance provision over precedents found in section 72 of the Ontario *Succession Law Reform Act*¹⁴⁷ and several other provincial and territorial statutes that are modelled on sections 20 and 21 of the *Uniform Dependants Relief Act*.¹⁴⁸ Section 20 prescribes that listed categories of transactions and property dispositions completed by the deceased during life, including transfers into joint tenancy, joint bank deposits, life insurance, and revocable trusts, be treated as testamentary dispositions. Their value is deemed to be included in the estate for the purposes of making a dependants relief order. Section 21 of the *Uniform Dependants' Relief Act* is a separate provision empowering the court to order anyone to whom the deceased transferred property within a year prior to death to contribute towards a dependants relief order if the disposition of property is “unreasonably large” and was made for consideration with a value less than that of the property involved. The Project Committee considered these models as too intrusive and draconian, as the Law Reform Commission of British Columbia had previously done in 1983.¹⁴⁹ They can extend to innocent transactions and disrupt contractual relations entered into in good faith

As eligibility to claim relief against a will has been significantly curtailed in this proposed legislation, however, the Project Committee believed that there ought to be a means of preventing the rights of deserving claimants from being deliberately defeated by transfers of property during the deceased's lifetime. Section 95 is aimed directly at abusive transfers and would not catch innocent transactions. It would not interfere with settled expectations of contracting parties beyond the extent to which the law of fraudulent conveyances already does. It was chosen for these reasons.

PART 6 — ADMINISTRATION OF ESTATES

Introductory Comment: This Part is intended to supplant the *Estate Administration Act*¹⁵⁰ except for its provisions on intestacy, and the *Probate Recognition Act*.¹⁵¹ It deals with the following:

- (a) the basis for the exercise of probate jurisdiction by the Supreme Court of British Columbia,
- (b) issuance and revocation of grants of probate and administration,

restricted to this category of transfer.

147. *Supra* note 21.

148. See Uniform Law Conference of Canada, *Proceedings of the Fifty-Fifth Annual Meeting* (Ottawa: The Conference, 1973) at 25; 253.

149. *Report on Statutory Succession Rights*, *supra* note 34 at 95–97.

150. *Supra* note 6 [EAA].

151. R.S.B.C. 1996, c. 376.

- (c) discharge, removal and substitution of, and renunciation by, personal representatives,
- (d) resealing of foreign grants, ancillary grants, and recognition of foreign personal representatives,
- (e) powers, duties, and liabilities of personal representatives,
- (f) legal proceedings involving estates,
- (g) the role of the official administrator,
- (h) summary administration of small estates under a special procedure not involving a grant of probate or administration,
- (i) insolvent estates.

Much of the EAA is very old. Some of its provisions are in fact several hundred years old. While a substantial portion of the EAA has been carried forward, many provisions have been redrafted in more conventional legislative language. In many cases it has proven possible to consolidate several narrow provisions, enacted at widely different points in time, into a fewer number of provisions having broader scope. This is especially true with respect to provisions concerning the powers of personal representatives. The overall number of sections has been reduced. An effort has been made to harmonize the estate administration legislation with the proposed *Trustee Act* contained in Part Two of the BCLI Report *A Modern Trustee Act for British Columbia*.¹⁵²

Assimilation of the procedures for probate and administration and their simplification were other objectives in preparing this Part. Remaining distinctions between the offices of executor and administrator were examined critically. Most have been removed and those that remain are inherent, stemming from the fact that an executor is chosen by the deceased and can begin to act from the moment the will takes effect on death, while an administrator is appointed after death by the court. A hierarchy of potential administrators has been introduced. This is a feature of the estates legislation of some other provinces. It is thought that a statutory hierarchy of applicants for a grant of administration will reduce uncertainty for the families of intestates. There is provision for granting administration to a nominee of someone who could apply in his or her own right.

Due to the nature of the interpersonal relations that surround a death and the distribution of a deceased person's property as well as the legal implications that flow from them, the matter of notice to persons interested in the estate is central to probate procedure. One of the most significant innovations in British Columbia probate procedure that this Part would introduce is to prescribe the contents of the notice of an application for probate or grant of administration so as to make it truly informative. The notice would contain text to alert the class of persons entitled to receive the notice of potential rights they may have in relation to the estate or the probate or administration application that is being made, and the existence of limitation periods for asserting them.

Another change is to provide for a 21-day interval between the transmission of notice and the filing of an application for the grant. This is to allow adequate time for notice recipients to seek legal advice and take steps to protect their position vis-à-vis the application being made. At the present time it is possible to send the notice to interested parties required by section 112 of the EAA at

152. *Supra* note 8.

virtually the same time as the application is filed. This can make the rights of the notice recipient illusory.

Conditional renunciation of executorship, which is not possible now in common law Canada, would be permitted under this Part. This is to allow an executor or co-executor to renounce in favour of another person but re-assert the right to the executorship if the other does not assume it or does not complete the administration and distribution of an estate.

The requirement for provision of security by administrators would be significantly modified under this Part. Security would be mandatory henceforth only when a minor or a mentally incapable adult is interested in the estate, or if the court orders on application by an interested party that security be furnished. It could be in any form acceptable to the court, rather than being confined to a surety bond or a bond issued by a guarantee company, as at present.

The requirements for advertising for creditors by the personal representative have been simplified. Newspaper advertising on successive occasions, which is very expensive and no longer considered by practitioners to be effective, would no longer be mandatory. Only a single advertisement in the British Columbia Gazette would be required. It is recommended that Part I of the Gazette, where notices and advertisements of this kind are published, be made searchable electronically by reference to the name of a deceased person without a subscription fee. The cost of maintaining the search capability could be reflected in the fees charged for advertising in the Gazette. The level of the advertising fee might be ameliorated by a modest fee per search.

Part 13 of the EAA, dealing with the payment of accrued wages of deceased workers outside the administration of their estates, has not been carried forward into this Part. Instead, it is recommended that Part 13 be relocated to the *Employment Standards Act*¹⁵³ as dealing with subject-matter that is more properly characterized as employment-related legislation than a matter of succession law.

Division 1 — General

Application

96 This Part applies to

- (a) a personal representative, declarant or other person acting or intending to act in British Columbia under a will or a representation grant, wherever made or issued,
- (b) the administration of the estate of a person who was habitually resident or domiciled in British Columbia at the date of the person's death,
- (c) the estate situated in British Columbia of a deceased person who was not habitually resident or domiciled in British Columbia at the date of the person's death.

Sources: EAA, s. 2; original

153. R.S.B.C. 1996, c. 113.

Comment: Section 96 describes the subject-matter to which and the persons to whom this draft Act would apply and is based on accepted conflict of laws principles. Residence or domicile of a deceased person within the territory of the forum are broadly recognized as grounds of subject-matter jurisdiction over the administration of the deceased's estate. Authority to administer assets situated within a particular province or territory of Canada is itself territorial in nature: it must be derived from the appropriate judicial authority of that province or territory. Paragraphs (a) and (b) of subsection (1) therefore declare that the Act applies to the estate of a British Columbia resident or domiciliary, and to property of a deceased person situated in this province. Paragraph (c) indicates the Act applies to all personal representatives acting in British Columbia, including foreign ones intending to administer assets located within the boundaries here.

Representation of mentally incapable person

97 (1) If a person entitled to receive a notice under this Part is a mentally incapable person who has

(a) a statutory property guardian or property guardian under the *Adult Guardianship Act*,

(b) an attorney under Part 2 of the *Power of Attorney Act*,

(c) a representative having power over the financial affairs of the mentally incapable person under

(i) section 7 (1) (b) of the *Representation Agreement Act*, or

(ii) section 9 (1) (g) of the *Representation Agreement Act*, granted before the repeal of that provision, or

the statutory property guardian, property guardian, attorney or representative represents the mentally incapable person for the purposes of this Part.

(2) Without limiting subsection (1), a statutory property guardian, property guardian, attorney or representative referred to in subsection (1) may, on behalf of that person,

(a) receive a notice that this Part requires or permits,

(b) give a consent contemplated by this Part,

(c) make a nomination permitted by this Part, including a nomination of himself or herself.

(3) If an enactment requires notice to the Public Guardian and Trustee or to another person in addition to notice given under this section to a statutory property guardian, property guardian, attorney or representative, that enactment prevails.

Source: Draft *Trustee Act*, s. 74 (Part Two of British Columbia Law Institute, *Report on a Modern Trustee Act for British Columbia* (BCLI Rep. No. 33) (Vancouver: The Institute, 2004))

Comment: Section 97 deals with the representation of a mentally incapable adult for the purposes of this proposed legislation. In particular, it states how notices and consents under this Part may be validly given where the person entitled to receive them is mentally incapable. Subsections (1) and (2) affirm that in such cases the notice may validly be given to the property guardian or statutory property guardian of a mentally incapable person, an appropriately authorized representative of such a person acting under a representation agreement, or an attorney acting under an enduring power of attorney, i.e. a power of attorney under Part 2 of the *Power of Attorney Act*,¹⁵⁴ as it is to be amended by the *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*.¹⁵⁵ The same is true of a consent contemplated by this Part. For example, the property guardian, appropriately authorized representative, or attorney could consent to the appointment of an administrator for an estate in which the mentally incapable person had an interest as an intestate successor.

Not every representation agreement confers the kind of authority contemplated by subsection (1). Section 7 (1) (b) of the *Representation Agreement Act*¹⁵⁶ allows an adult to make a representation agreement authorizing a representative to assist the adult in making decisions or to make decisions on behalf of the adult about “routine management of the adult’s financial affairs,” subject to regulations under the Act. In order to confer the requisite authority, a representation agreement must empower the representative to make decisions to deal with “routine management of the adult’s financial affairs” and not restrict the representative from acting on behalf of a mentally incapable person in a manner contemplated by this Part.

A consequential amendment to section 2 of the *Representation Agreement Regulation*¹⁵⁷ would still be necessary before section 97 (1) (c) and (2) could be fully implemented in relation to representation agreements, however. Section 2 of the regulation lists the activities that constitute “routine management of the adult’s financial affairs.” It is arguable that giving or receiving notices or giving a consent in connection with the administration of an estate in which an adult has an interest is within some of the activities listed in the regulation or is incidental to them. It is not clear, however, that the *Representation Agreement Act* and *Representation Agreement Regulation* currently allow sufficient authority to be conferred under a section 7 (1) (b) representation agreement to enable sections 97 (1) (c) and (2) to be fully operative.

The extent of the authority that a section 7 (1) (b) representative should have in light of the low threshold of capacity to enter into a representation agreement contemplated by section 8 (1) of the *Representation Agreement Act* is debatable as a matter of legal policy. If section 97 (1) (c) and (2) were to be implemented in relation to section 7 (1) (b) representatives, the list of activities in section 2 of the *Representation Agreement Regulation* deemed to be “routine management of the adult’s financial affairs” would need to be amended to include representing the adult in a matter relating to an estate in which the adult had an interest. If the policy choice were made to confine the authority of section 7 (1) (b) representatives with respect to “routine management of the adult’s financial affairs” to a level less than what is now permitted, rather than expanding it to include representation in estate matters, consideration should be given to deleting the references to representatives in

154. *Supra* note 103.

155. *Supra* note 11

156. *Supra* note 108.

157. *Supra* note 107.

section 97, from the definition of “nominee” in section 1, and enabling sections elsewhere in this proposed Act.

Certain provisions of this Act require notice to be given to the Public Guardian and Trustee as well as to a property guardian, or a duly authorized representative or attorney. Subsection (3) indicates that section 97 does not override these additional notice requirements, where they exist.

Representation of minor

- 98** (1) If a person entitled to receive a notice under this Part is a minor, the notice is valid if given to each guardian of the minor.
- (2) If the guardian of the person of a minor referred to in subsection (1) is not also the guardian of the minor’s estate, the reference to “guardian” in subsection (1) means the guardian of the minor’s estate.
- (3) If an enactment requires notice to the Public Guardian and Trustee or to another person in addition to notice given under this section to a guardian, that enactment prevails.

Source: Draft *Trustee Act*, s. 74 (Part Two of British Columbia Law Institute, *Report on a Modern Trustee Act for British Columbia* (BCLI Rep. No. 33) (Vancouver: The Institute, 2004))

Comment: Section 98 (1) confirms that a notice under the Act to a minor is valid if given to each guardian of the minor. Normally the parents of a minor will be joint guardians of the minor’s person and estate.¹⁵⁸ Thus a notice could be addressed to both parents, although if the parents are living separately and still remain joint guardians, each of them must be given notice under subsection (1). Where the guardian is someone other than a parent, that person is usually the guardian of both the person and estate of the minor as well. In some cases there may be a separate guardian of the estate. In that case, subsection (2) specifies that it is the guardian of the estate who must receive notices to the minor.

When court may grant probate or administration

- 99** (1) The court may grant probate of a will or administration of an estate for general, special or limited purposes on proof
- (a) of the will, if any, or that the deceased died intestate, and
- (b) that the deceased resided or was domiciled
- (i) in British Columbia at the time of death,
- (ii) outside British Columbia at the time of death and left property in British Columbia, or
- (iii) outside British Columbia at the time of death and the personal representative will be a party to an action commenced in British Columbia.

158. See s. 28 of the *Family Relations Act*, *supra* note 44.

- (2) The court may, in its discretion, grant probate of a will or administration of an estate although the deceased was not resident or domiciled in British Columbia at death and left no property in British Columbia.

Sources: subs. (1): *The Administration of Estates Act*, S.S. 1998, c. A-4.1, ss. 3 (1); 4 (1); subs. (2): *Succession Act 1981*, (Qld.), s. 6 (2)

Comment: Section 99 (1) sets out the basic grounds on which a grant of probate or administration may issue from a British Columbia court. Subparagraphs (b) (i) and (ii) relate to the generally recognized grounds of subject-matter jurisdiction in relation to succession: residence or domicile of the deceased or the presence of assets requiring administration. (See section 96 and commentary.) Subparagraph (b) (iii) is added to take account of situations in which a personal representative must be appointed for the purpose of bringing or defending a legal proceeding in British Columbia.

Subsection (2) gives a residual discretion to the court to grant probate or administration even if there is no property belonging to the estate in British Columbia and the deceased was not resident or domiciled here. While such a grant might not be recognized abroad, it may be necessary for an estate to be represented for some domestic purpose. An example where the discretion conferred by subsection (2) might be exercised is where the deceased was a resident of a foreign country in which the legal system has no equivalent of a representation grant or a personal representative, yet the estate requires a representative to carry out some legal act in British Columbia like the execution of a document.

Effect of representation grant and related proceedings

- 100** (1) After the court has issued a representation grant, whether or not power is reserved to another person to apply for a subsequent representation grant, no one other than a person to whom the representation grant was made may act as executor of the will or administrator of the estate or portion of the estate to which the representation grant relates.
- (2) If an executor does not join in an application for a representation grant, the executor is not liable in respect of assets of the estate coming into the hands of a co-executor, alternate executor, administrator with will annexed or declarant named in the representation grant, whether or not power is reserved to the executor to apply for a subsequent representation grant.
- (3) In a proceeding
- (a) for probate of a will in solemn form,
 - (b) for revocation of a grant of probate or administration with will annexed, or
 - (c) in which the validity of a will is in dispute,
- the probate, judgment, order or declaration is conclusive evidence, with respect to both land and personal property, of the validity or invalidity of the will or grant, as the case may be, other than in proceedings on appeal or to revoke the probate.

Sources: subs. (1): EAA, s. 14; subs. (2): original; subs. (3): EAA, s. 56

Comment: Subsection (1) corresponds to section 14 of the present EAA. It ensures that once the court has made a representation grant to one or more persons, those persons have exclusive authority to act as the personal representatives of the deceased with respect to the property to which the grant extends. The authority conferred by the grant is exclusive even against an executor who has not proved the will (i.e. applied for probate). The policy served by the section is to avoid confusion and disputes over authority to administer an estate, especially where there are non-proving executors.

Subsection (2) is a new provision intended to remove doubt surrounding the potential liability of a non-proving executor for acts and omissions of co-executors who take out a grant or file a small estate declaration.

Subsection (3) replaces the present section 56 of the *Estate Administration Act* and is intended to carry forward the original intent of its legislative precursors. Section 56 replaced sections 66–68 of the *Administration Act*, R.S.B.C. 1960, c. 3. Those sections were nearly identical to sections 61–63 of *An Act to amend the Law relating to Probates and Letters of Administration in England*,¹⁵⁹ which changed the common law, under which solemn form probate was only conclusive as to the authenticity and validity of a will in respect of personal property. These enactments made the outcome of a proceeding for probate in solemn form, for revocation of a grant of probate, or a “contentious cause or matter” in which the validity of a will was in issue, conclusive with respect to real property (land and interests in land—see the commentary to section 1) as well as personal property, as long as the heir at law and any other person interested in the real property received notice or were joined as parties.

Today the rules of notice in probate applications and estate-related litigation are governed by other provisions in the EAA and rules of court. The present section 56 was enacted as part of an effort to modernize older legislation and make it consistent with the terminology and procedures of the 1976 Supreme Court Rules. While section 56 was aimed at encapsulating and preserving the effect of sections 66–68 of the *Administration Act*, its highly abbreviated wording conceals their original purpose. In addition, when read literally section 56 appears to be restricted to solemn form probates resulting from a contested proceeding. Solemn form probate, however, need not be contested and the precursor enactments applied to a much wider range of testamentary proceedings. The reference to a “grant of administration” at the end of section 56 is also confusing, because the section must relate to probates and grants of administration with will annexed, not to grants of administration where there is no will.

Subsection (2) has been drafted to make the intent behind the present section 56 clear and apply it to the full range of proceedings to which the precursor enactments extended.

Section 116 of the EAA is conceptually related to the present section 56. It deals with the evidentiary effect of common form probate, declaring proof of the probate of the will or a grant of administration with will annexed to be sufficient evidence of the validity and contents of the will in relation to testamentary gifts of real property. As section 116 duplicates section 37 of the *Evidence Act*,¹⁶⁰ it was not carried forward into this proposed legislation.

159. (U.K.), 20 & 21 Vict., c. 7.

160. R.S.B.C. 1996, c. 124.

Division 2 — Administration

Priority among applicants — administration

- 101** (1) If a person dies intestate, the court may grant administration of the estate to one or more of the following persons, in the following order of priority:
- (a) the spouse of the deceased or a nominee of the spouse;
 - (b) a child of the deceased having the consent of a majority of the children;
 - (c) a nominee of a child if the nominee has the consent of a majority of the children;
 - (d) a child of the deceased not having the consent of a majority of the children;
 - (e) an intestate successor other than a spouse or child of the deceased, having the consent of the intestate successors representing a majority in interest of the estate, including the applicant;
 - (f) an intestate successor other than a spouse or child of the deceased, without the consent of the intestate successors having a majority in interest of the estate, including the applicant;
 - (g) any other person whom the court may see fit to appoint, including without limitation but subject to section 157 [*court must not make order*], the official administrator.
- (2) Despite subsection (1), the court may appoint a person under paragraph (g) of subsection (1) as the administrator of all or part of an estate without regard to the order of priority if it appears necessary or convenient because of special circumstances.
- (3) An appointment of an administrator under subsection (2) may be
- (a) conditional or unconditional, and
 - (b) made for general, special or limited purposes.

Sources: subs. (1): original; subs. (2)–(3): EAA, s. 7

Comment: Unlike legislation in some other provinces and territories, B.C.'s EAA does not set out an order of priority among potential administrators. The Estate Administration Subcommittee considered there would be less scope for conflicts of interest to produce discord between administrators and intestate successors if there were an order of priority, but with the number of statutory priorities kept to a minimum. Priority should depend chiefly on the measure of consent that an applicant can obtain among the beneficiaries, instead of the degree of kinship or class of interest which the applicant represents.

Section 101 preserves the conventional preference for the spouse as administrator by giving the highest rank to an application by a surviving spouse. It is thought that the intestate's children should have equal priority among themselves, while more remote successors should have to show a substantial level of consent in order to obtain a grant.

Family members may wish a disinterested third party, such as a trust company, to act as administrator rather than acting personally, particularly if there is distrust or discord between them. Section 101 facilitates this by allowing a grant to a nominee. It is thought that the spouse should be able to designate a nominee to take out administration without having to obtain consent from other successors. An elderly surviving spouse may require assistance with the task of settling an intestate estate, and disinterested assistance should be readily procurable. Subsection (1) therefore allows the appointment of a nominee of the spouse as administrator without consent of other successors. If a nominee is put forward on behalf of children of the intestate, the nominee should have the consent of at least a majority of the children. Subsection (1) specifies this as well.

If a substantial degree of consent is not obtainable by any one successor for that successor's appointment as administrator, then there is little benefit in having further rankings of categories of applicants. The court might as well appoint anyone with evident integrity who is able and willing to get the job done. This could include a creditor, an institution such as a trust company or other corporate trustee, a professional fiduciary, or the Public Guardian and Trustee (in the capacity of official administrator). The final category of potential administrators in this scheme, therefore, is anyone "whom the court sees fit to appoint." This results in a relatively compressed, simple hierarchy.

Subsection (2) preserves the court's discretion under the existing section 7 of the EAA to appoint an administrator outside the hierarchy in subsection (1) if, in the court's opinion, special circumstances justify doing so. Subsections (2) and (3) correspond to section 7 of the EAA.

Priority among applicants — administration with will annexed

102 If a person dies leaving a will, and the executor named in the will renounces or is unable or unwilling to apply for probate, or if no executor is named in the will, the court may grant administration with will annexed to one or more of the following persons, in order of priority:

- (a) a beneficiary applying who has the consent of the beneficiaries having a majority in interest of the estate, including the applicant;
- (b) a beneficiary applying without the consent of the beneficiaries having a majority in interest of the estate;
- (c) any other person whom the court may see fit to appoint, including, without limitation, the official administrator.

Source: original

Comment: Much of the commentary to section 101 also applies with respect to the ranking in section 102 of potential administrators with will annexed. In the jurisdictions which rank applicants, distinctions are often made between classes of beneficiaries. For instance, a residuary beneficiary is often preferred to one receiving a specific legacy. Vested beneficiaries are preferred to contingent beneficiaries. A life tenant may be preferred to a specific legatee. As the interests of different

classes of beneficiaries are not identical, there may be considerable discord surrounding the role of administrator.

A criterion of unanimous consent was thought to be impractical, favouring obstructive and self-serving behaviour. The criterion proposed instead for the level of consent that should confer priority to a grant is consent of the beneficiaries who hold collectively "a majority in interest" of the estate, i.e. more than fifty per cent of the value. This would prevent an individual with a small interest in the estate from exerting disproportionate influence on the selection of the administrator.

Administration of partial intestacy

- 103** If a person dies leaving a will and the will does not dispose of all of that person's estate, the grant of probate of the will or of administration with will annexed operates as a grant of administration of the part of the estate that is not disposed of by the will.

Source: original

Comment: Self-explanatory.

Administration if sole executor a minor

- 104** (1) If a minor is the sole executor under a will,
- (a) the court must grant administration with will annexed
 - (i) to the guardian of the minor, on the application of the guardian, or
 - (ii) if the guardian fails to apply, to another person the court thinks fit until the minor reaches the age of majority, and
 - (b) when the minor reaches the age of majority, the court may revoke the grant to the guardian or other person and grant probate of the will to the former minor.
- (2) Administration granted under subsection (1) may be
- (a) general or limited, and
 - (b) on terms the court may direct.

Source: EAA, s. 12

Comment: Self-explanatory.

Vesting of estate pending grant of administration

- 105** The estate of an intestate is vested in the court from the death of the intestate until a grant of administration is made.

Source: EAA, s. 3

Comment: Section 105 extends the principle of section 3 of the EAA to real property of a person dying intestate. Pending a grant of administration, the property of the intestate vests in the court because title must reside somewhere in that interval. If it did not, the property would pass to the Crown by escheat or as *bona vacantia*. The wording of the present section 3 only refers to personal estate because it originated at a time when real property did not pass to the personal representative but instead vested in the beneficiaries to whom it was bequeathed, or to the heir at law. Since 1921, real property devolves on the personal representative in British Columbia as does personal property. See section 149. Section 3 is long overdue for amendment to reflect this change.

Grant effective back to time of death

- 106** (1) An administrator of an estate is deemed for the purposes of this Act to be the administrator as if there had been no interval of time between the death of the deceased and the grant of administration.
- (2) Despite subsection (1), an administrator is not liable for any loss or damage to the estate that occurred prior to the grant of administration unless the administrator would have been liable for the loss or damage whether or not a grant had been made.

Source: EAA, s. 5

Comment: Section 106 (1) corresponds to section 5 of the EAA. The doctrine of “relation back,” which deems a representation grant to relate back to the time of death, does not apply to grants of administration to the same extent as it applies to grants of probate. As an executor is appointed under the will in most cases, a probate is considered to relate back to the time of death and to confirm the executor’s title and authority from that point. An administrator’s title and authority stem only from appointment by the court. If this difference were extended to its logical conclusion, however, an administrator once appointed would have no ability to sue for losses to the estate arising prior to the appointment, or recover estate assets that may have been dispersed, because the administrator would have had no title or interest in the estate at the time in question. Common law gave limited effect to the relation back doctrine insofar as grants of administration were concerned to prevent the possibility of unrecoverable loss to the estate. Section 106 (1), like the present section 5, codifies this limited extension.

Subsection (2) is a new provision preventing the doctrine of “relation back” from operating unfairly. The extension of the doctrine does not operate to make the administrator personally liable for loss and damage to the estate occurring before the grant, when the administrator lacked authority. This qualification on the operation the relation back doctrine as applied to administrators is recognized in case law (see *Davis v. Auld*¹⁶¹ and *Re Phillips*¹⁶²), but is not reflected in the present section 5 of the *Estate Administration Act*. The administrator will be liable, however, if liability would have been present regardless of whether a grant had issued or not. For example, if the administrator intermeddled in the estate before the grant and dealt with assets improperly, resulting in loss, subsection (2) will not provide relief.

161. [1938] S.C.R. 304.

162. (1997), 17 E.T.R. (2d) 288 (B.C.S.C.).

One consequence of the principle that an administrator has no title or authority before the grant issues is that information about the deceased's assets needed to prepare an application for a grant of administration is routinely withheld from the applicant by financial institutions and other third parties. These third parties rely on privacy legislation in declining to release information to an applicant intending to take out a grant of administration. The *Personal Information Protection Act Regulation*¹⁶³ permits the personal representative or the nearest relative of the deceased to exercise the rights the deceased would have under the provincial *Personal Information Protection Act*¹⁶⁴ if alive to demand the deceased's financial information, but this is not of assistance in an intestacy where the applicant for the grant of administration is not yet a personal representative and may not be the nearest relative. Chartered banks operate under the federal privacy statute, the *Personal Information Protection and Electronic Documents Act*.¹⁶⁵ It and the regulations under it contain no exception for provision of personal information concerning deceased persons to personal representatives or intended administrators. It is recommended that the privacy statutes be amended or an exception created by regulation to allow compliance with a request for information about the deceased's property by a potential administrator made through a solicitor.

Administration while legal proceeding pending

- 107** (1) The court may appoint an administrator of an estate pending a proceeding
- (a) in which the validity of a will is in issue, or
 - (b) for obtaining, recalling or revoking a grant of probate or administration.
- (2) An administrator appointed under subsection (1)
- (a) has all the rights and powers of a general administrator, other than the right of distributing the estate, and
 - (b) is subject to the control of the court, and must act under its direction.

Source: EAA, s. 8

Comment: Section 107 corresponds to section 8 of the EAA and provides for the appointment of a "caretaker" administrator while a legal action in which the validity of a will or the right to represent the estate as an executor or administrator is in progress (*pendente lite*).

Section 9 of the EAA, which allows for the appointment of a person (administrator *ad litem*) to represent an estate involved in other kinds of litigation where there is no personal representative, has not been carried forward into this draft Act because the power to appoint an administrator *ad litem* is duplicated in Supreme Court Rule 5 (19).

The compensation for services rendered by an administrator *pendente lite* appointed under this section and administrators *ad litem* appointed under the Rules of Court is governed by section 108.

163. B.C. Reg. 473/2003.

164. S.B.C. 2003, c. 63.

165. S.C. 2000, c. 5.

**Compensation of administrator appointed while litigation pending
or to represent estate in proceeding**

- 108** (1) An administrator appointed under section 107 (1) [*administration while legal proceeding pending*], or a person appointed under the Rules of Court to represent an estate having an interest in a proceeding, is entitled to receive reasonable compensation as an administrator under Part IX [*trustee compensation and accounts*] of the [*proposed*] *Trustee Act*.
- (2) Despite subsection (1) and section 2 (1) [*application of certain provisions of Trustee Act to personal representative*], an order appointing an administrator under section 107 (1) [*administration while legal proceeding pending*] or the Rules of Court, or a further order, may contain terms respecting the compensation of the administrator.
- (3) A term respecting the compensation of the administrator in an order described in subsection (2) prevails over Part IX [*trustee compensation and accounts*] of the [*proposed*] *Trustee Act* and section 2 (1) [*application of certain provisions of Trustee Act to personal representative*] to the extent of any inconsistency.

Sources: EAA, s. 10; Draft *Trustee Act*, s. 61 (7)–(8) (Part Two of British Columbia Law Institute, *Report on a Modern Trustee Act for British Columbia* (BCLI Rep. No. 33) (Vancouver: The Institute, 2004))

Comment: Section 108 permits administrators *pendente lite* (appointed under section 107 (1)) and administrators *ad litem* (appointed under Supreme Court Rule 5 (19)) to receive compensation for their services like other personal representatives. Part IX of the proposed *Trustee Act* set out in the BCLI report *A Modern Trustee Act for British Columbia*¹⁶⁶ provides for the compensation of trustees, personal representatives and certain other fiduciaries. Subsections (2) and (3) of section 108 permit the court to set special terms concerning the compensation of these administrators *pendente lite* and *ad litem*, which will prevail over the general terms of Part IX. Enactment of Part IX would remove the fixed limits on the statutory remuneration of personal representatives and trustees currently found in section 99 of the present *Trustee Act*.¹⁶⁷ Part IX would substitute a compensation regime without fixed limits, as in most other provinces.

Division 3 — Procedure on Application for Probate or Administration

Notice of application for probate or administration

- 109** (1) An applicant for a grant of probate or administration must, at least 21 days before filing the application, give notice of the application to every person other than the applicant who, to the best of the applicant's knowledge is
- (a) a beneficiary entitled under the will,

166. *Supra* note 8.

167. *Supra* note 12.

- (b) an intestate successor of the deceased,
- (c) a spouse or child of the deceased, or an eligible stepchild within the meaning of Part 5 [*dependants relief*], or
- (d) if the deceased is an intestate, a creditor of the deceased whose claim is in excess of an amount prescribed by regulation.

Sources: EAA, s. 112 (1); original

Comment: Section 109 corresponds to the present section 112 of the EAA. It lists the classes of persons who are entitled to receive notice of an application for grant of probate or administration, states what the content of such a notice must include, and how the notice may be given.

Subsection (1) changes section 112 by introducing a minimum 21-day period between the transmission of notices to those entitled to receive them and the filing of an application for probate or administration. This is thought to be a reasonable period within which a notice recipient could obtain legal advice and take steps the recipient considers appropriate in relation to the application, such as filing a caveat against issuance of the grant. The change to a 21-day notice period is recommended because the present section 112 currently permits notices to be sent at the same time an application for grant is filed. It merely prevents the issuance of a grant until notice has been given. While it is not a universal practice to delay sending out notices until the time the application is filed, the lack of a realistic notice period under section 112 as it now stands can defeat the purpose of the notice and render the right of the notice recipient to oppose an application for a grant essentially illusory. While it would be unlikely for a grant to issue from the larger Supreme Court registries within a few days after the application is filed because of the volume of probate business they handle, grants may issue much more quickly from smaller registries in the province. Assets could be misappropriated by a rogue acting under the authority of the grant before others interested in the estate have a realistic opportunity to prevent the grant from being issued to the inappropriate applicant.

Subsection (1) largely preserves the categories of persons who are entitled under the present section 112 (1) of the EAA to receive notice of an application for probate or administration of an estate. These include beneficiaries entitled under a will, successors in intestacy, and persons eligible to claim relief under the equivalent to the existing *Wills Variation Act* (i.e. the spouse of the deceased as of the time of death and the deceased's children). Note that paragraph (1) (a) refers to beneficiaries "entitled" under a will, rather than merely to beneficiaries named in a will, because named beneficiaries may predecease the testator and not inherit personally, or may only be contingent beneficiaries who do not actually take because the contingency on which their entitlement depends does not occur.

One change from the present section 112 (1) of the EAA is the deletion of persons described in the present section 112 (1) (v) from the list of those entitled to notice, namely spouses (as presently defined under section 1 of the EAA) who were separated from an intestate for a period longer than one year prior to the intestate's death. This deletion was made because of the redefinition of the term "spouse" in section 1 (2) of this proposed Act. At the present time a spouse separated from an intestate for longer than one year before the intestate's death has no automatic right to a spousal share in the intestacy, but the court has a discretion to award a share. It is because of the right to seek an exercise of this discretion that the present section 112 (1) (v) requires notice to spouses separated from the intestate for longer than a year. This discretion has not been carried forward into this draft Act for reasons set out in the commentaries to the definition of "spouse" and the Introductory Comment to the dependants relief provisions in Part 5. A former cohabitant of the deceased who was separated from the deceased for more than two years prior to the deceased's death would

no longer be a “spouse” for the purposes of this proposed Act, and would have no rights against the deceased’s estate. (A former cohabitant separated from the deceased for less than two years immediately prior to the deceased’s death would still be a “spouse.” See the general definition of “spouse” in section 1 (2).)

Subsection (1) adds known creditors of an intestate with claims over a threshold amount fixed by regulation to the list appearing in the present section 112 (1) of those entitled to receive notice of an application. The recommended initial threshold amount to be fixed by regulation under section 109 (1) (d) is \$10,000. The reason for giving notice to creditors in an intestacy, but not where the deceased left a will, is that a creditor is entitled in theory to apply to be appointed an administrator of the debtor’s estate and may wish to contest the appointment of another person as administrator. If there is a will, however, it will usually contain an appointment of an executor. If an executor is appointed, the creditor has no automatic right to apply for the administration of the estate. Claims must be over the threshold amount in order to entitle creditors to notice, because it would be unreasonable to expect the personal representative to notify every small creditor who is owed only a few dollars. In reality, only creditors owed substantial amounts would consider it worthwhile to apply to administer the debtor’s estate.

- (2) The court may
 - (a) abridge the period of 21 days, or
 - (b) dispense with the requirement to give noticeunder subsection (1) if prejudice to the personal representative or to another person or to the estate would otherwise result.

Source: original

Comment: In some cases there is a need to obtain a grant of probate or administration on an expedited basis. For example, the personal representative may need to complete a transaction that was in progress at the time of the deceased’s death. Subsection (2) allows the court to waive the requirement of notice under subsection (1) in respect of any person if prejudice in the legal sense, i.e. harmful results, would otherwise occur.

- (3) A notice under subsection (1) must be in the prescribed form signed by the applicant or the applicant’s lawyer and must contain:
 - (a) the name, residential address, and date of death of the deceased;
 - (b) the name and residential address of the applicant;
 - (c) the registry of the court where the application will be filed;
 - (d) statements that a person entitled to receive the notice
 - (i) has a right to oppose the application to which it refers,
 - (ii) may be entitled to claim relief under
 - (A) the *Family Relations Act* respecting an interest in, or reapportionment of, family assets, if an event described in section 56 (1) [*equality of entitlement of family assets*]

on marriage breakup] of the *Family Relations Act* has occurred, or

(B) Part 5 [*dependants relief*], and

(iii) must, if that person chooses to take a step referred to in subparagraphs (i) or (ii), do so within the time limited by any relevant enactment or rule of court;

(e) statements that

(i) a representation grant may issue to the applicant after 21 days from the date of the notice but may also issue earlier by order of the court,

(ii) a personal representative must account to the beneficiaries or intestate successors of the deceased,

(iii) a person who is entitled to receive the notice may consult with that person's own lawyer concerning the interest in, or rights against, the estate, and

(iv) in the case of an application for a grant of administration, that a person entitled to receive the notice may apply for an order requiring the applicant to provide security unless the applicant is the official administrator.

Source: original

Comment: Subsection (3) requires a notice of an application for a grant of probate or administration to be in the prescribed form. The contents of the notice are intended to alert recipients that they may have rights against the estate which must be asserted within statutory time limits and to provide essential information about such matters as who the personal representative is (or is likely to be), where the application for grant will be made, and how to contact the personal representative. Subsection (3) would permit the notice to be signed by the applicant's lawyer, which the current section 112 does not. As it may be the applicant's lawyer who actually sends out the notices, it makes sense for the lawyer to be able to sign them.

(4) A notice under subsection (1) must be accompanied by a copy of the will, if any.

Source: EAA, s. 112 (1) (b)

Comment: Subsection (4) carries forward an existing requirement under section 112 (1) (b) of the EAA to deliver a copy of the will, if any, with the notice of the application for an order granting probate or administration with will annexed.

- (5) If a person referred to in subsection (1) is a minor, or if the applicant has reason to believe that the person may be a minor, the applicant must give the notice under subsection (1) to
- (a) a parent or the guardian of the estate of the minor, if the applicant is not the parent or guardian of the estate, and
 - (b) subject to subsection (6), to the Public Guardian and Trustee.

Sources: EAA, s. 112 (4); original

Comment: Subsection (5) specifies how a notice must be given under subsection (1) to a minor, or to someone who is possibly a minor, must be given. The Public Guardian and Trustee must receive notice as well as the parent or guardian of the minor's estate in order to be in a position to carry out certain statutory responsibilities, except in the circumstances covered by subsection (6) below. Subsection (5) continues the effect of the present section 112 (4), apart from the exception created by the proposed subsection (6).

- (6) Paragraph (5) (b) does not apply if:
- (a) the applicant is an executor;
 - (b) the minor is not a spouse or child of the deceased or an eligible step-child as defined in Part 5 [*dependants relief*]; and
 - (c) the deceased's will creates a trust for the interest of the minor in the estate and appoints a trustee for that trust.

Source: original

Comment: The present section 75 of the EAA indicates that payment of the interest of a minor in an estate to the Public Guardian and Trustee is not necessary where there is a trustee of the minor's interest, unless the will provides otherwise. This is not reflected in the present section 112 (4), which requires an applicant for grant to give notice of the application to the Public Guardian and Trustee in any event. The proposed subsection (6) confirms that notice to the Public Guardian and Trustee of an application for grant is not necessary in respect of a minor's interest if three conditions are met: first, that there be an executor, i.e. the application is not made in an intestacy. This is because the Public Guardian and Trustee must receive notice in all intestacies and applications in testate estates for administration with will annexed if a minor is interested in the estate in order to be able to provide comments to the court on the subject of security to be provided by the applicant. The second condition is that the minor is not eligible to claim under the dependants relief provisions (replacing the present *Wills Variation Act*) for a larger share, i.e. is not a spouse, child, or eligible stepchild of the deceased. This condition for relaxing the general notice requirement ensures that the Public Guardian and Trustee will be able to assert rights under the Act on behalf of the minor if the testator has not made adequate provision for the minor. The third condition is that there must be a trust and a trustee to hold the minor's interest. Otherwise, the Public Guardian and Trustee would have to hold the minor's interest until the minor reaches majority.

- (7) If a person referred to in paragraphs (a) to (d) of subsection (1)

(a) has a statutory property guardian or property guardian under the *Adult Guardianship Act*, or

(b) is believed by the applicant to be mentally incapable,
the applicant must give the notice under subsection (1) to

(c) the statutory property guardian or property guardian, if any,

(d) the Public Guardian and Trustee, and

(e) if paragraph (b) applies, to that person.

Source: EAA, s. 112 (5)

Comment: Subsection (7) is intended to carry forward the principle of the present section 112 (5) concerning the giving of a notice under subsection (1) to mentally incapable persons and those potentially mentally incapable. One difference with section 112 (5) is that if the person entitled to receive the notice is believed to be mentally incapable, but no committee has been appointed for that person, the notice must be given to that person in addition to the Public Guardian and Trustee. By tying the requirement for dual notice to the personal representative's belief, paragraph (7) (b) delineates the circumstances in which a potentially mentally incapable recipient must receive notice more specifically than the present section 112 (5), which simply refers to someone who "... may be a mentally disordered person. . . ."

(8) A notice to the Public Guardian and Trustee under subsections (5) or (7) must

(a) state the name and last known address of any person mentioned in subsections (5) or (7) other than the Public Guardian and Trustee, and

(b) be accompanied by a copy of every document to be filed with the court in respect of the application, except a document that is to be filed only as proof that notice of the application was given.

Source: EAA, s. 112 (8)

Comment: Currently section 112 (8) requires a notice of an application for grant to the Public Guardian and Trustee to contain a list of all beneficiaries and other persons entitled to inherit and their addresses and copies of all documents to be filed with the court in respect of the application. As the documents filed will include proof of notice to those entitled to notice, the effect of the present section 112 (8) is to require two complete sets of application material (the second being attached as an exhibit to the affidavit proving notice was given) to be delivered to the Public Guardian and Trustee. The proposed subsection (8) eliminates the requirement to deliver the supporting documentation twice. It also requires the applicant to list only the names and addresses of the interested persons with which the Public Guardian and Trustee is concerned, namely minors and the mentally incapable.

- (9) If a person referred to in paragraphs (a) to (d) of subsection (1) is dead, the applicant must give the notice under subsection (1) to the personal representative of the person.

Source: EAA, s. 112 (3)

Comment: The present section 112 (3) of the EAA requires an application to be made to the registrar for an order dispensing with notice requirements or other steps when a person entitled to notice of a probate or administration application is dead. The proposed subsection (9) above simplifies the procedure by allowing the applicant to merely give the notice to the deceased recipient's personal representative.

- (10) If
- (a) the identity or whereabouts of a person referred to in paragraphs (a) to (d) of subsection (1) are unknown,
 - (b) a person referred to in paragraphs (a) to (d) of subsection (1) is deceased and
 - (i) has no personal representative, or
 - (ii) the whereabouts of the person's personal representative are unknown,
- the registrar may, on application without notice,
- (c) dispense with the requirements of subsection (1) in whole or in part, or
 - (d) make another order the registrar considers advisable in the circumstances.

Source: EAA, s. 112 (3)

Comment: Subsection (10) allows the registrar to dispense with the notice requirement or make an order appropriate to the circumstances if the whereabouts of a notice recipient or the recipient's personal representative are unknown, or if a deceased notice recipient has no personal representative. Subsection (10) is intended to continue the effect of the present section 112 (3) in cases where a notice recipient cannot be found.

- (11) A notice under subsection (1) may be given
- (a) by leaving a copy of the notice with the person to whom it is addressed,
 - (b) by ordinary prepaid or registered mail, or
 - (c) by electronic means allowing for confirmation that the transmission of the notice and the accompanying copy of the will, if any, was completed.

Source: original

Comment: Subsection (11) expands the means by which notice of an application for grant of probate or letters of administration may be given to include electronic means, e.g. e-mail or fax, as long as the means used allows the applicant to show that the electronic transmission was completed.

- (12) For the purpose of this section, a notice under subsection (1) that is given by ordinary prepaid or registered mail is given on the day it was mailed.

Source: original

Comment: In the case of a mailed notice, the date of mailing is taken to be the date on which notice is given. As there is bound to be an interval of a few days between mailing and receipt, the recipient of notice by mail may be at a slight disadvantage in comparison to one who is personally served or who receives notice by e-mail or fax.

- (13) Notice under subsection (1) may be proven by the affidavit of any person having personal knowledge of the facts.

Source: original

Comment: At the present time section 112 (1) requires that the applicant or the applicant's solicitor certify that he or she personally mailed or delivered the notices. This is inconvenient and not in keeping with the usual practice in service and delivery of documents in civil matters. The proposed subsection (13) would bring the requirements for proof of delivery of a notice of an application for probate or administration into line with that usual practice by allowing anyone who sent or gave the notices, e.g. a solicitor's assistant who attends to mailing of documents, to swear an affidavit attesting to the fact that the notice was mailed.

- (14) This section does not apply to an application by the Public Guardian and Trustee, except in relation to a person described in paragraph (1) (c).

Source: EAA, s. 112 (9)

Comment: The proposed subsection (14) continues the effect of the existing section 112 (9) in regard to its exemption of the Public Guardian and Trustee from the notice requirements of this proposed section, except that the Public Guardian and Trustee would be required, when applying for probate or administration (e.g., in the capacity of official administrator), to give the notice required by subsection (1) to those persons who would be eligible to claim under the dependants relief provisions in Part 5. This coincides with the practice of the Public Guardian and Trustee to give notice to this class, although there is currently no statutory obligation resting on the Public Guardian and Trustee to do so. Subsection (14) does not carry forward the exemption under the existing section 112 (9) of creditors from having to provide notice to beneficially interested persons when applying for administration of a deceased debtor's estate. It is thought that a creditor seeking administration should be required to provide notice to the persons described in paragraphs (a) to (d) of subsection (1) in the usual manner.

- (15) If the applicant or personal representative, after having made reasonable efforts to determine the existence, identity or whereabouts of all persons described in paragraphs (1) (a) to (d), does not become aware of the existence or identity of a person who is or claims to be a person described in one or more of paragraphs (1) (a) to (d) or that the person has or claims an interest in the estate, the applicant or personal representative is not liable to that person for loss or damage arising from failure to give the notice required by subsection (1).

Source: original

Comment: Subsection (15) is a new provision directed at insulating an applicant or anyone subsequently assuming the office of personal representative in the same estate from liability to a person who would be entitled to receive a notice under subsection (1), but whose existence or identity is not discovered despite reasonable efforts having been undertaken to ascertain and locate all who are entitled to get the notice. An example of a case in which subsection (15) might come into play would be one in which the deceased had no contact with a surviving sibling for many years and the existence of the sibling is unknown to any of the deceased's associates. Another example might be a case in which the deceased and a former cohabitant had separated, but the cohabitant could still legitimately claim to be the "spouse" as at the time of death. The deceased's relatives may be unaware of the existence of the former cohabitant, and the applicant for the grant therefore may not become aware of that person's right to be notified of the application.

While serious thought was given to specifying various steps and inquiries that could be defined as amounting to "reasonable efforts" or a minimum level of due diligence on the part of an applicant for grant in searching out the class of persons entitled to notice under subsection (1), the Estate Administration Subcommittee ultimately concluded that what amounts to reasonable efforts can only be assessed by reference to the circumstances of each case. Research into the judicial interpretation of terms like "reasonable steps," "reasonable efforts," or "all reasonable steps," or "efforts," etc., indicates that they are taken to mean "logical endeavours," with the adjective "reasonable" denoting "logical," "sensible," and "fair," rather than "whimsical or unwarranted lengths." "Reasonable diligence" is interpreted in essentially the same light. "Due diligence" is no less elastic a term, but has been described as "genuine competent and reasonable efforts" and "equivalent to reasonable diligence," which raises a question as to whether there is any difference in meaning between the phrases.

- (16) If
- (a) the applicant made reasonable efforts to determine the existence, identity or whereabouts of all persons entitled to notice under subsection (1), or
 - (b) the court has made an order under subsection (2) (b) or (10) (c) dispensing with notice under subsection (1),
- the court must not revoke a grant of probate or administration on the sole ground that an applicant did not give notice under subsection (1) to a person described in paragraphs (1) (a) to (d) who could not be ascertained, identified or found, or a person to whom the order states notice need not be given.

Source: original

Comment: Current law holds that a grant of probate or administration is potentially defective if notice of the application for it was not given to a person who is entitled to receive notice.¹⁶⁸ This can be highly disadvantageous, as a new grant may have to be obtained and issues of liability may arise in connection with steps taken in good faith under the initial grant before its revocation. Subsection (16) reverses the current law to protect a grant of probate or administration issued after the applicant has made reasonable efforts to ascertain the existence or identity of a person entitled to notice and locate that person.

- (17) Subsections (15) and (16) do not affect a right or remedy at law or in equity or under an enactment that a beneficiary or intestate successor, or a person in whose favour an order is made under Part 5 [*dependants relief*], may have to recover property from, or to enforce the order against, a person to whom the estate has been distributed in whole or in part without regard to the interest or the order.

Source: original

Comment: Subsection (17) makes it clear that subsections (15) and (16) do not prevent anyone entitled to receive a share of an estate or in whose favour a dependants relief order is made from recovering the property in question, or enforcing the relief order against, a person to whom estate assets have been improperly distributed.

Caveats

- 110** A caveat against the issuance of a representation grant may be filed in any registry of the court in accordance with the Rules of Court.

Source: EAA, s. 109 (1)

Comment: Section 110 corresponds to section 109 (1) of the EAA. A caveat prevents a grant of probate or administration from issuing while the caveat is in force, although applications for one may be filed in the meantime. (A small estate declaration, however, may not be filed if a caveat is in force. See section 166 (d).) A caveat remains in force for six months, and allows the caveator an opportunity to contest an application for probate or administration, whether or not the caveator would be entitled to notice of the application under section 109. Supreme Court Rules 61 (34)–(42) deal with the form, content, and duration of caveats. The rules also contain a procedure whereby an applicant for a grant or anyone claiming an interest in the estate may obtain the cancellation of a caveat before its expiry if the caveator fails to enter an appearance to a notice, although they do not specify the consequences if the caveator does appear.

Section 109 (2) of the EAA has not been carried forward into this draft Act because the procedure it stipulates for notification of caveats to all Supreme Court registries in the province is outdated and no longer followed. Supreme Court Rule 61 (35) also duplicates section 109 (2). Instead of the

168. *Re Hoicka and Royal Trust Corporation of Canada* (1984), 59 B.C.L.R. 262 (S.C.).

procedure called for by section 109 (2) and the rule, caveats are recorded on the Civil Electronic Information System (CEIS), a province-wide computerized registry database for civil matters. It is recommended, however, that Rule 61 (35) be amended to require that a searchable entry in CEIS be made for every caveat that is filed, so that province-wide notification is accomplished.

Disclosure on application for probate or administration

- 111** (1) An applicant for a grant of probate or administration must
- (a) declare that the applicant has made a diligent search and inquiry to ascertain the assets and liabilities of the deceased, and
 - (b) disclose the assets and liabilities of the deceased, irrespective of their nature, location or value, that pass to the applicant in the capacity of the deceased's personal representative.
- (2) Despite subsection (1), an applicant for a grant of probate or administration need not disclose assets and liabilities of the deceased if
- (a) the deceased was not domiciled or habitually resident in British Columbia at the time of death,
 - (b) those assets and liabilities are situated outside British Columbia, and
 - (c) those assets and liabilities have been, are being, or are to be administered by a foreign personal representative or otherwise under the law of the foreign jurisdiction.
- (3) For the purposes of subsection (2), "foreign personal representative" has the same meaning as in section 119 [definitions], and may include the applicant.
- (4) If the applicant learns of an asset or liability of the deceased that was not disclosed under subsection (1), the applicant must disclose that asset or liability forthwith.
- (5) The content and form of the declaration and disclosure document under this section must be in accordance with the Rules of Court.

Source: EAA, s. 111

Comment: Section 111 corresponds to section 111 of the EAA. Disclosure of the assets and liabilities of the deceased is a requirement of probate procedure for a variety of reasons. It is an inducement to search diligently for assets and debts, a safeguard against concealment and misappropriation, a means to allow potential dependants relief claimants and creditors to make informed assessments of the value of their rights, a basis for fixing the amount of security, and a means of enabling probate registry staff to calculate the proper amount of probate fees.

Section 111 (1) (b) currently requires the disclosure of "assets and liabilities . . . which pass to the deceased's personal representative on the deceased's death." It is silent as to whether this refers only to the assets and liabilities passing to the personal representative in that capacity or those that pass otherwise as well. Assets may pass to a personal representative outside the will or intestacy. The personal representative and the deceased may have been joint tenants of a house, for example,

and the personal representative may acquire the house by right of survivorship. The deceased may have designated the personal representative as the beneficiary of the proceeds of an RRSP.

The extent of disclosure that should be required on a probate or administration application is a policy issue of some difficulty. There is case law holding that the existing section 111 requires an applicant to disclose only the assets that pass to the personal representative in that capacity and not otherwise.¹⁶⁹ This appears to be the norm among Canadian jurisdictions. In Saskatchewan, however, disclosure is required not only of assets that pass under the will or on intestacy, but also of insurance policies and pensions with death benefits payable to designated beneficiaries, property that was held in joint tenancy with others prior to death, and joint bank accounts, etc.¹⁷⁰ In P.E.I., disclosure of life insurance policies and their beneficiaries is required, but not joint property or other assets that pass outside the estate.¹⁷¹

Arguments can be made that without wider disclosure requirements, transfers of assets and non-probate beneficiary designations made under questionable circumstances in the final stages of the deceased's life may not come to light. Such assets and transactions may be subject to legitimate claims based on constructive or resulting trusts, or be void due to lack of capacity or undue influence.

A counter-argument against wider disclosure is that information about non-probate assets and transfers of them can be elicited through discovery in a *Wills Variation Act* or trust action, in which there are procedural mechanisms to compel the disclosure of facts and documents from third parties. The same information is not necessarily available to a personal representative when applying for a grant. Financial institutions regularly refuse to provide information to personal representatives concerning joint accounts on grounds of privacy, since the account is considered to belong to the surviving signatory. Privacy interests of insurance and registered plan beneficiaries and joint account holders should not be dismissed out of hand, since their own financial information would be a matter of public record if it had to appear in the disclosure document filed with an application for grant. There is a difference between the privacy expectations of those who take outside the estate, such as designated beneficiaries who are paid policy or plan proceeds directly from an insurer or plan administrator, or co-signatories to a joint account with the deceased, who succeed by right of survivorship, and those taking under a will or intestacy who require transparency from the personal representative, as do creditors of the deceased.

A further ground for not requiring disclosure of assets that do not pass to the personal representative is that confusion may arise as to what property is covered by the ensuing grant and for which the personal representative must account. This confusion may be particularly acute if the grant needs to be resealed in another jurisdiction.

After considering wider disclosure at length, the Estate Administration Subcommittee recommended that only assets and liabilities passing to the personal representative in that capacity should have to be disclosed on an application for grant. Section 111 (1) (b) reflects this recommendation.

169. *Re Bradford Estate* (1990), 40 E.T.R. 50 (B.C.S.C.). There are anecdotal accounts of additional oral decisions to the same effect.

170. *The Queen's Bench Rules*, R. 701 and Appendix, Form 104, Part II.

171. *Rules of Civil Procedure*, Form 65E.

It is recognized that limiting disclosure to assets that pass to the applicant leaves open the opportunity to use multiple wills to avoid the publicity and expense associated with probate in relation to classes of assets that can be transferred effectively without it. Corporate shares, for example, can be transferred through production of an original will without a need for a grant.¹⁷² While multiple wills are not necessarily to be encouraged, it is thought that they do not represent a problem sufficient to outweigh the arguments against wider disclosure outlined above.

Subsections (2) and (3) are new provisions. The present section 111 is silent as to whether assets and liabilities outside British Columbia that will not be administered under the authority of the British Columbia grant must be listed in the applicant's disclosure document. If an estate comprises such assets and liabilities, an application for a British Columbia grant will probably be made only for the purpose of gaining or confirming authority to administer the assets that are situated here. Requiring disclosure of assets and liabilities situated elsewhere that are being administered under foreign law in such a case would tend to create confusion about the assets over which the grant extends. In numerous civil law jurisdictions, there is no exact equivalent of a personal representative to whom assets pass until distribution. Subsection (2) therefore declares that such assets and liabilities need not be disclosed.

Subsection (3) defines "foreign personal representative" for the purpose of subsection (2). The foreign personal representative may be the applicant.

Subsections (4) and (5) correspond to the present sections 111 (2) and (3), respectively.

Order for production of testamentary document or attendance of witness

- 112** (1) The court may order a person to produce and bring into a registry any
- (a) testamentary document or writing,
 - (b) document relating to an estate, or
 - (c) asset belonging to an estate
- that is shown to be in the person's control or possession.
- (2) If there are reasonable grounds for believing that a person has knowledge of anything described in paragraphs (a) to (c) of subsection (1), the court may order the person to attend for examination or answer interrogatories respecting it.
- (3) The court may make an order under subsection (1) or (2) on an originating or interlocutory application or by citation.

Sources: EAA, ss. 113–14

Comment: This section combines aspects of sections 113 and 114 of the EAA. Section 113 (1) currently refers only to the court's power to compel production of testamentary writings and attendance by a witness with knowledge of the same. Section 114 (1) allows production of documents or assets relating or belonging to an estate by subpoena issued by the registrar, and covers substan-

172. *Business Corporations Act*, S.B.C. 2002, c. 57, s. 118 (c) (ii).

tially the same ground as Rule 61 (46) (c). Section 112 (1) and (2) expand the court's power under the present section 113 (1) and (2) to cover estate documents and assets as well as testamentary writings. Sections 114 (1) and (2) allowing issuance of subpoenas by the registrar for similar purposes, whether a proceeding is pending or not, are not carried forward because they are covered by Rule 61 (46).

Sections 113 (2), 113 (3), and 114 (3) emphasizing the duty of a person to answer questions and interrogatories, and liability to process for contempt in default, have not been carried forward as they are considered surplusage. They simply state consequences that would flow from the general law of contempt of court.

Public Guardian and Trustee entitled to comment and receive copy of grant in certain cases

- 113** (1) If sections 109 (5) or (7) [*notice of application for probate or administration*] apply, the court must not grant administration unless the applicant provides the written comments of the Public Guardian and Trustee in respect of the matter.
- (2) Despite subsection (1), if the court is satisfied on an application made with reasonable notice to the Public Guardian and Trustee that it is necessary or advisable to grant administration before the Public Guardian and Trustee provides the written comments referred to in subsection (1), the court may make an order that it considers advisable in the circumstances.
- (3) If sections 109 (5) or (7) [*notice of application for probate or administration*] apply and the court makes a grant of probate or administration, the personal representative must provide a copy of the grant to the Public Guardian and Trustee within 45 days after the grant is issued.

Source: EAA, s. 112 (5.1)–(5.3); (8.1)

Comment: Subsections (1) and (2) of section 113 correspond to section 112 (5.1), (5.2), and (5.3) of the EAA. Subsection (3) corresponds to section 112 (8.1) of the EAA.

Security

- 114** (1) If
- (a) a minor, or
- (b) a mentally incapable person without

(i) a statutory property guardian or property guardian under the *Adult Guardianship Act*,

(ii) an attorney under Part 2 of the *Power of Attorney Act*,

(iii) a representative having power over the adult's financial affairs under

(A) section 7 (1) (b) of the *Representation Agreement Act*, or

(B) section 9 (1) (g) of the *Representation Agreement Act*,
granted before the repeal of that provision,

is interested in the estate, or if a statutory property guardian, property guardian, attorney described in subparagraph (b) (ii) or representative described in subparagraph (b) (iii) of a mentally incapable person interested in the estate does not consent to an applicant acting as administrator without security, an applicant for a grant of administration other than the official administrator must provide security having a value not exceeding the value of the interest of the minor or mentally incapable person, for

- (c) the due and proper collection and administration of the deceased's estate, and
 - (d) the making of a true inventory and account of the estate that comes into the hands of the administrator and its disposition.
- (2) In a case to which subsection (1) does not apply, the court may order, on the application of a person interested in the estate, that an applicant for a grant of administration other than the official administrator must provide security for the purposes described in paragraphs (1) (c) and (d).
 - (3) The security referred to in subsections (1) and (2) may be in any form acceptable to the court.
 - (4) In lieu of requiring an applicant to provide security, the court may restrict the powers of the applicant that may be exercised without prior approval of the court or the Public Guardian and Trustee.
 - (5) Despite subsection (1), the court may grant administration without requiring the applicant to provide security if
 - (a) the applicant first obtains written comments from the Public Guardian and Trustee in the matter and provides them to the court, and
 - (b) after considering the written comments of the Public Guardian and Trustee, the court finds security to be unnecessary.
 - (6) If subsection (1) applies, the Public Guardian and Trustee may consent to a grant of administration without security if the Public Guardian and Trustee is satisfied that the applicant has assets of sufficient net value situated in British Columbia.

Sources: EAA, ss. 16–17; original

Comment: This section makes significant changes in the law regarding the provision of security by prospective administrators of estates. Section 16 of the EAA currently requires all applicants for

administration other than the official administrator to enter into a bond unless the court dispenses with a bond under section 17. Section 17 (1) allows the court to dispense with bonding on the written consent of all parties who are or may be beneficially interested in the estate, or on sworn evidence that there are no debts payable by the estate, that the estate is of small value, or that the administrator is the beneficiary. “Small value” is not defined in the EAA for the purpose of section 17 (1). By the combined effect of section 16 (1) and Rule 61 (27), administration bonds require two sureties unless the court orders that a bond or policy issued by a company empowered to issue guarantees or engage in fiduciary insurance business may be substituted. Most administration bonds that are actually issued are of the latter category.

Bonding is very often dispensed with because of its cost, which is payable out of the estate, and because administrators are often members of the deceased’s family and consent is obtainable. While claims on administration bonds occur, they are fairly infrequent. The requirement to either provide or dispense with bonding nevertheless injects more complexity which adds to delay and the overall cost of an administration.

Section 114 reflects this reality by reversing the situation under the present Act. Under subsections (1) and (2), security would not be required unless an unrepresented minor or mentally incapable person is interested in the estate, or the court orders it on the application of an interested party. Protection has been retained, therefore, for those who cannot protect their own interests by monitoring the administrator’s actions and challenging them when required.

Subsection (3) eliminates the preference under the present section 16 for bonding and allows a prospective administrator to provide any form of security acceptable to the court in cases where security is required. Subsection (4) provides another alternative to bonding, namely restrictions on the administrator’s powers. For example, the order appointing the administrator might dispose of certain kinds of assets, such as real property, without court approval or the consent of the Public Guardian and Trustee.

Subsection (5) allows security to be dispensed with even in cases where a minor or an unrepresented mentally incapable adult has an interest as long as the Public Guardian and Trustee does not oppose the administrator acting without it. Subsection (5) empowers the Public Guardian and Trustee to consent to dispensing with security on the strength of the prospective administrator’s solvency, as demonstrated by there being sufficient equity in the prospective administrator’s assets in British Columbia to cover a potential liability for breach of the administrator’s duties.

Court may assign security

- 115** (1) If the court is satisfied that a condition of any security of an assignable nature provided under section 114 (1) or (2) [security] has been breached, the court may order that the registrar or person to whom the security has been given assign the security to a person named in the order.
- (2) The person to whom the security is assigned under subsection (1) or the personal representative of that person
- (a) may sue in that person’s own name or as the personal representative, as the case may be, and
 - (b) is entitled to recover the amount recoverable for a breach of the condition of the security as trustee for all persons interested.

Source: EAA, s. 18

Comment: This section corresponds to the present section 18 of the EAA. It allows an administration bond or other security to be assigned to someone (typically a beneficiary or intestate successor) willing to pursue a defaulting administrator to recover losses to the estate for the benefit of all interested persons. Unlike the present section 18, which assumes that the security will be in the form of a bond, this proposed section refers to security “of an assignable nature.” This is because the expanded scope for providing security that section 114 (3) opens up means that not all the kinds of security provided by administrators would be assignable. For example, the security could take the form of restrictions on the administrator’s power to sell assets without the court’s consent. This is not something that may be assigned like a bond.

Cancellation or substitution of security

- 116** (1) The court may cancel security provided under sections 114 (1) or (2) *[security]* if, at the time the application for cancellation is made, the administrator would be entitled to be discharged under section 141 (3) *[right to apply for discharge]*.
- (2) The court may approve the substitution of other security for security provided under sections 114 (1) or (2) *[security]*
- (a) with the consent of all persons interested in the estate, if section 114 (1) *[security]* does not apply,
 - (b) with the consent of all persons with capacity interested in the estate and the Public Guardian and Trustee, if section 114 (1) *[security]* applies.

Sources: subs. (1): EAA, s. 19; subs. (2): original

Comment: Section 116 (1) corresponds to section 19 of the EAA. The existing section 19 (1) requires that the administrator’s final account have been passed and the estate coming into the administrator’s hands fully distributed before the court may order the cancellation of security. Formal passing of accounts is often avoided in the present day by consent of the interested parties. Furthermore, section 19 (1) does not take account of a situation where an administrator is discharged and another is appointed before the estate is fully distributed. Section 116 (1) allows the court to cancel security if the administrator would be entitled to be discharged on application without notice under section 141 (3). This presupposes that the accounts have either been passed or agreed to, or that the court has determined that formal passing is unnecessary.

Subsection (2) is a new provision enabling the court to substitute one form of security for another in the course of the administration.

Division 4 — Renunciation

Rights of renouncing executor

- 117** If a person renounces probate of the will of which the person is appointed executor

- (a) the right of the person in respect of the executorship wholly ceases, unless the court otherwise orders before granting probate, and
- (b) the administration of the testator's estate devolves as if the person had not been executor, except to the extent that the court otherwise orders under paragraph (a).

Source: EAA, s. 24

Comment: This section corresponds to section 24 of the EAA, but has been modified to allow the court to order that a renunciation need not result in complete cessation of the renouncing executor's rights to administer the estate. This new discretion for the court is a change from the present law, which does not permit partial or conditional renunciation. It would be an innovation in common law Canada. It is thought that conditional renunciation may be useful and justifiable in some cases. For example, a will may name the testator's spouse as the executor without an alternate. By the time the testator dies, the executor may be very elderly and find the prospect of having to administer the estate to be onerous. The executor may wish to renounce in favour of another person, e.g. a family friend or adviser, who would find it easier to discharge those duties, but does not wish to lose the right to take out probate if that person is unwilling to act. The court could order that the spouse's renunciation be conditional on the other person applying for administration with the will annexed.

Forfeiture of executorship by failure to take probate

118 If an executor appointed in a will

- (a) survives the testator and dies without having taken probate, or
- (b) is cited to take probate and does not appear,

the right of that person in respect of the executorship wholly ceases and the administration of the estate devolves without formal renunciation as if that person had not been appointed executor.

Source: EAA, s. 25

Comment: This section corresponds to section 25 of the EAA.

Division 5 — Resealing, Ancillary Grants and Foreign Personal Representatives

Definitions

119 In this Division:

“foreign grant” means a grant of probate or administration or other document purporting to be of the same nature issued by a court outside British Columbia;

“foreign personal representative” means a personal representative to whom a foreign grant has been made;

“probate” includes letters of verification issued in the province of Québec.

Sources: *Administration of Estates Act*, R.S.A. 2000, c. A-2, s. 29 (1); original

Comment: Self-explanatory.

Resealing

- 120** (1) On application by a foreign personal representative, the court may reseal a foreign grant made in a province or territory of Canada or another prescribed jurisdiction.
- (2) A foreign personal representative who applies for resealing must
- (a) give notice of the application in the prescribed form to persons who would be entitled to notice under section 109 [*notice of application for probate or administration*] if the application were for an original grant in British Columbia,
 - (b) disclose the assets and liabilities of the deceased situated in British Columbia that the foreign personal representative seeks to administer,
 - (c) if the application relates to a foreign grant of administration with or without will annexed and security is required by section 123 (2) [*certain provisions applicable*], provide security in an amount approved by the court.
- (3) On resealing with the seal of the court, the foreign grant
- (a) has the same effect in British Columbia as if it were issued by the court, and
 - (b) is, with respect to assets situated in British Columbia, subject to any order of the court to which a representation grant issued by the court with respect to the same assets would be subject.

Sources: *Administration of Estates Act*, R.S.A. 2000, c. A-2, s. 29 (2); original

Comment: Section 120 is intended as a replacement for the *Probate Recognition Act*,¹⁷³ which currently governs the resealing of grants of probate and administration from reciprocating British Commonwealth jurisdictions designated by order in council. Resealing was originally designed as an expedited process for giving effect to probates and grants of administration issued in jurisdictions within the British Commonwealth that had made similar provision for the recognition of grants issued by the home jurisdiction. Under current procedure in British Columbia, however, resealing is not simpler or faster than obtaining an original grant from a British Columbia court.

Currently, the *Probate Recognition Act* extends only to grants issued in Canadian provinces and territories, the Australian states of Victoria and New South Wales, the United Kingdom, Barbados, British Guiana (now Guyana), New Zealand, South Africa, and Hong Kong. (Legal authority for the designation of Hong Kong likely lapsed when Hong Kong ceased to be a member of the Common-

173. *Supra* note 151.

wealth.) British Columbia extends resealing to a much smaller number of jurisdictions than do other provinces. Several provinces allow resealing of grants issued in any Commonwealth country, without requiring reciprocity.¹⁷⁴ Some also extend resealing to grants issued in any U.S. state.¹⁷⁵

Resealing has been retained in this proposed Act as a distinct procedure because its original purpose remains valid: to facilitate recognition of grants emanating from neighbouring jurisdictions and ones with similar probate procedure, thus expediting the administration of a deceased person's assets in British Columbia. The alternative of extending automatic recognition to grants issued in a Canadian province or territory was considered. One means of providing automatic recognition would have been to extend the *Enforcement of Canadian Judgments and Decrees Act*,¹⁷⁶ to probates and grants of administration issued in Canada. Under the scheme of that Act, an extraprovincial grant would be given effect by a simple filing in a Supreme Court registry, without the need for an application to the court. There was a concern, however, that all persons interested in the estate should receive notice of rights available to them under the law of this province with respect to assets located here. Another public policy concern was that there be a means to ensure that sufficient security is in place to protect an interested minor or mentally incapable person resident in British Columbia and therefore under the jurisdiction of the Public Guardian and Trustee. These concerns could not be met under a system of automatic recognition.

The concerns that led to the rejection of automatic recognition are reflected in the requirement under subsection (2) to give notice of the application for resealing in a prescribed form to those persons who would be entitled to receive notice if the application were for an original grant. It is intended that the form would contain the same information as is required by section 109 (3) so that the persons interested in the estate, who may not be British Columbia residents, are made aware of rights they may have under British Columbia law with respect to assets that pass under that law. (These would mainly be immovables such as land situated in this province and interests in it and any charges on land owned by the deceased at death.) The second concern relating to security is reflected in paragraph (2) (c), which makes the general rule on provision of security by administrators under section 114 applicable to resealing if a minor or mentally incapable adult is interested in the estate and resides in British Columbia.

Section 120 differs from the *Probate Recognition Act* in two important respects. There is no requirement for reciprocity in the issuing jurisdiction. Most provinces and territories do not make reciprocity a prerequisite for resealing. Subsection (1) mandates only that resealing will be available for grants and letters of verification (the Québec equivalent) issued in Canada and permits complete latitude to the provincial government to designate other countries and territorial divisions to which resealing may extend. It is recommended, however, that in light of the norm among Canadian provinces and territories, the United Kingdom, all Commonwealth jurisdictions with common law legal systems broadly similar to that of British Columbia, Hong Kong, and all U.S. states be prescribed jurisdictions for the purpose of resealing.

The second difference is that under subsection (2), disclosure in a resealing application need only extend to assets and liabilities situated in British Columbia that are to be administered under the

174. Alberta: *Administration of Estates Act*, R.S.A. 2000, c. A-2, s. 29; Sask.: *The Administration of Estates Act*, S.S. 1998, c. A-4.1, s. 38 (1); N.B.: *Probate Court Act*, S.N.B. 1982, c. P-17.1, s. 73; P.E.I.: *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 44 (1).

175. Sask., N.B., *ibid.*; Man.: *The Court of Queen's Bench Surrogate Practice Act*, C.C.S.M. c. C290, s. 50.

176. S.B.C. 2003, c. 29.

authority of the resealed grant. Wider disclosure on resealing is thought to be unnecessary because it will probably have taken place already in the issuing court. In any case, resealing is normally sought only to obtain recognition of authority to administer the locally situated assets and liabilities, and any additional security that may be required from the foreign personal representative on resealing should logically be related to the value of the local assets. Section 120 (2) would necessitate an amendment to Supreme Court Rule 61 (52) and the Form 83 affidavit it requires an applicant for resealing to file. The Form 83 affidavit now in use contemplates disclosure of all assets and liabilities of the deceased, regardless of location.

Ancillary grant

- 121** If a foreign grant cannot be resealed under section 120 [*resealing*], the court may make an ancillary grant of probate or administration to the foreign personal representative.

Sources: Supreme Court Rule 61 (48); original

Comment: Section 121 allows an ancillary grant to be issued when a foreign grant cannot be resealed. Ancillary grants are now provided for under Supreme Court Rule 61 (48).

Limited grant to attorney of foreign personal representative

- 122** On application by an attorney of a foreign personal representative, the court may grant probate or administration to the attorney, limited to the estate of the deceased situated in British Columbia.

Sources: Supreme Court Rule 61 (48); original

Comment: This section carries forward a current jurisdiction (governed at present by Supreme Court Rule 61 (48)) to grant administration of assets located in British Columbia to a person appointed by a foreign personal representative under a power of attorney for this purpose. This is an alternative to resealing or an ancillary grant.

Certain provisions applicable

- 123** (1) Division 3 [*procedure on application for probate or administration*] applies to an application under sections 120 [*resealing*], 121 [*ancillary grant*] or 122 [*limited grant to attorney of foreign personal representative*] as if the application were an original application in British Columbia.
- (2) Despite subsection (1), sections 113 [*Public Guardian and Trustee entitled to comment and receive copy of grant in certain cases*] and 114 [*security*] apply to an application under sections 120 [*resealing*], 121 [*ancillary grant*] or 122 [*limited grant to attorney of foreign personal representative*] only if a person described in section 114 (1) (a) or (b) [*security*] is interested in the estate and resides in British Columbia at the time the application is made.

Source: original

Comment: Subsection (1) makes most of the procedure in an application for probate or administration applicable to resealings and other applications covered by this Division. These include requirements for notice in the prescribed form to persons interested in the estate and, depending on the circumstances, security. Under subsection (2), however, the requirements for security come into play in a matter covered by this Division only if there is an interested minor or mentally incapable adult who is resident in British Columbia. The policy underlying the insistence that a foreign personal representative give notice according to section 109 when applying for resealing or an ancillary grant is to preserve rights under British Columbia legislation with respect to assets affected by the application. The notice is intended to allow a realistic opportunity to assert those rights.

Dispensing power may be exercised regarding will that is subject of foreign grant

- 124** (1) The court may make an order under section 46 [*dispensing power*] in relation to a will to which an application under this Division relates.
- (2) An application for an order under section 46 [*dispensing power*] may be brought concurrently with an application under this Division.

Source: original

Comment: Section 124 affirms that the dispensing power may be used in relation to a will that is the subject of a resealing application or another application under this Division. A foreign grant may relate to a will that could not be admitted to probate in British Columbia for reasons of form, yet which purports to dispose of assets that pass (according to British Columbia's conflict of laws rules) by virtue of British Columbia law. For example, the will might be a holograph will executed in Ontario, where holograph wills are valid, and the testator's estate may include a condominium at Whistler. The condominium is immovable property, and succession to it is governed by the law of the place where it is located, namely British Columbia. Under present law, the Ontario probate could not be resealed, nor could an ancillary grant or original grant be obtained from a British Columbia court. The foreign personal representative or an attorney must apply for administration in British Columbia as if the deceased died intestate with respect to the Whistler condominium.

The introduction of the curative "dispensing power" in section 46 allows for change in this regard. That provision gives the court the discretion to admit a document to probate despite formal defects if it is shown to the court's satisfaction that the document embodies the deceased's final testamentary wishes.

This section would allow for concurrent applications under this Division and section 46 to validate a will that does not meet British Columbia's formal requirements for execution and attestation.

Division 6 — Powers, Duties and Liabilities of Personal Representatives

Introductory Comment: The EAA and similar legislation in other Canadian common-law jurisdictions contain complex provisions that confer specific and limited administrative and dispositive powers on executors and administrators to supplement the ones they have at common law. These provisions, originating with English legislation which was passed over the course of many centuries were re-enacted, largely verbatim, in British Columbia and other Canadian jurisdictions. They represent a piecemeal approach to dealing with estates and the office of personal representative. The piecemeal approach to equipping personal representatives with the powers they need to perform such tasks as gathering assets, paying debts and legacies, liquidating and realizing upon particular forms of property, and distributing the remainder, is not logically consistent with the vesting

of full title to the deceased's property on death in an executor or on appointment as an administrator. It is far simpler and more logical to deal straightforwardly with the matter and give personal representatives the same powers as an owner for the purposes only of discharging the responsibilities of their office. That is the principle underlying the draft provisions in this Division. The same approach was taken in relation to the administrative powers of trustees in the BCLI Report, *A Modern Trustee Act for British Columbia*.¹⁷⁷

This Division of the reform legislation is also intended to put administrators on the same footing as executors insofar as their authority to deal with the assets of the estate is concerned. While at common law an administrator, once appointed, had the same powers as an executor, the EAA and other present legislation that adds to or modifies those common law powers does not treat the two classes of personal representatives consistently. For example, section 65 of the EAA empowers executors to compromise debts due to or by the estate, give time to debtors, and take security, but does not mention administrators. Section 4 of the Act requires administrators to pay debts as if an executor had been appointed, but does not refer to the powers described in section 65. Distinctions of this kind are avoided here.

The approach taken in relation to administrative powers has also been applied here to provisions on legal proceedings by and against personal representatives. Numerous sections in the EAA dealing with particular kinds of proceedings and causes of action based on English enactments that accumulated over the course of several centuries have been replaced in this Division with a few simpler and much broader provisions on litigation involving estates.

Powers of personal representatives unless limited by will

- 125** (1) A personal representative may exercise the powers conferred by this Division only insofar as a contrary intention does not appear from the will, if any, of the deceased.
- (2) Subject to subsection (1), a personal representative has, for the purpose of
- (a) administering and distributing the estate,
 - (b) accounting to persons beneficially interested in the estate, creditors and others to whom the personal representative is under a duty at law to account,
 - (c) performing all other duties of a personal representative imposed by law or by will,
- the same powers in relation to the assets of the estate as the deceased would have if alive.

Sources: subs. (1): original; subs. (2): Draft *Trustee Act*, s. 39 (Part Two of British Columbia Law Institute, *Report on a Modern Trustee Act for British Columbia* (BCLI Rep. No. 33) (Vancouver: The Institute, 2004))

177. *Supra* note 8.

Comment: Subsection (1) indicates that the broad powers which this Division confers on personal representatives for the sake of efficiency are not intended to limit the ability of testators to circumscribe the authority of an executor.

Subsection (2) is a new provision conferring on personal representatives the same powers to deal with the estate as the deceased would have as an owner if the deceased were still living, for the purpose only of fulfilling the fiduciary duties of their office. These duties, in summary, are to collect the assets, pay debts, distribute the estate among those entitled to inherit and to account to the beneficiaries or intestate successors, creditors and other persons interested in the estate covered by the personal representative's duty at common law to account. The section is intended to remove the need to list highly specific administrative powers at length in legislation, as the EAA does. Some specific powers are nevertheless set out in the sections that follow only to remove any doubts as to their existence.

Powers of personal representative in relation to debts and claims

126 Without limiting section 125 [*powers of personal representatives unless limited by will*], a personal representative may

- (a) pay or allow any debt or claim on any evidence the personal representative thinks sufficient,
- (b) accept a compromise or security for a debt owing to the deceased,
- (c) allow time for payment of a debt owing to the deceased,
- (d) compromise or submit to mediation, arbitration or other form of alternate dispute resolution any debt, account, claim or other matter relating to the estate,
- (e) execute any instrument or agreement for the purpose of carrying out anything described in paragraphs (a) to (d) or any other matter relating to the estate.

Source: EAA, s. 65

Comment: Section 126 corresponds to section 65 of the EAA, but applies to both executors and administrators, while the existing section 65 only refers to executors. Section 126 makes it clear that both classes of personal representatives have the powers relating to debts owing by or to the estate and other claims described in paragraphs (a) to (e), removing the ambiguity of the present Act regarding the ability of administrators to exercise them. Section 126 also covers the present section 4 of the EAA. It is included only for the sake of certainty and is not intended to imply that the powers it lists would not be included in the general grant of administrative powers under section 125. (See the Introductory Comment at this beginning of this Division.)

Specific powers over estate property

127 (1) Without limiting section 125 [*powers of personal representatives unless limited by will*], a personal representative may:

- (a) sell, call in and convert into money all or part of the estate within a reasonable time in the manner, at the times, and on terms for cash and credit with power to give options;
 - (b) postpone conversion of all or part of the estate for a reasonable time and retain it in the form in which it is at the death of the deceased, whether or not there is a liability attached to a part of the estate;
 - (c) subject to paragraphs (a) and (b), distribute assets in kind.
- (2) A personal representative may sell all or part of the estate, including land, for the purpose of distributing the estate among the persons beneficially entitled as well as for paying debts, if any.

Source: original

Comment: Section 127 (1) declares that a personal representative has certain fundamental powers to deal with estate assets for the purpose of raising funds to pay debts, legacies, etc. These include sale. Section 127 is included only for the sake of certainty and is not intended to cut down the scope of the general grant of administrative powers in section 125.

Subsection (2) affirms that a personal representative may sell assets of the estate, including real property, for the purpose of distribution as well as paying debts. Subsection (2) would have the effect of extending the power of sale for distribution purposes to administrators as well as executors. There is some doubt as to whether administrators enjoy this power under present law.

Abolition of rule in *Allhusen v. Whittel*

- 128** (1) Unless the will contains an express direction to the contrary,
- (a) the personal representative, in paying the debts, funeral and testamentary expenses, estate, legacy, succession and inheritance taxes or duties, legacies or other similar disbursements, must not apply and must not be considered to have applied income of the estate in or toward the payment of any part of the capital of those disbursements or of any part of any interest due or accruing due on them at the date of death of the deceased, and
 - (b) until the payment of the debts, funeral and testamentary expenses, estate, legacy, succession and inheritance taxes or duties, legacies or other similar disbursements referred to in paragraph (a), the income from the property required for their payment, with the exception of any part of that income applied in the payment of any interest accruing due on them after the date of death of the deceased, must be treated and applied as income of the residuary estate,
- but if the assets of the estate are not sufficient to pay those disbursements in full, the income must be applied in making up the deficiency.

- (2) Subsection (1) is deemed always to have been part of the law of British Columbia.
- (3) Despite subsections (1) and (2), in any case in which the personal representative has, before April 1, 1966, applied a rule of law or of administration different from subsection (1), the application is valid and effective.

Source: *Trustee Act*, R.S.B.C. 1996, c. 464, s. 10

Comment: This section carries forward section 10 of the present *Trustee Act*, which has been relocated to this proposed Act because it pertains only to personal representatives. The rule in *Allhusen v. Whittel*¹⁷⁸ requires executors to apportion the income from residue between a life tenant and a remainder interest during the period while the estate is being administered and the amount of the residue is still unascertained. The apportionment is made in order that the life tenant bears a proper share of the debts of the estate, rather than the capital beneficiaries only. The part of the income not apportioned to the life tenant during the administration of the estate is treated as capital. The apportionment, correctly performed, leaves the life tenant with the income from the eventual residue earned during the “executor’s year” (i.e. the period of one year following the date of death.)¹⁷⁹ The rule assumes that all debts and legacies are to be paid at the end of the “executor’s year.” It requires intricate calculations. Section 10 of the *Trustee Act* abrogates the rule and requires income from residue to be applied as income while the estate is under administration and be used to pay debts and legacies only if the capital of the estate is insufficient. Section 10 has been carried forward here because the rule was more or less dictated by the natural assumption that the testator intended the burden of debts to be borne fairly by all the beneficiaries if no contrary intent appeared from the will. It could therefore be inferred to have revived if the section were omitted.

Executors of executors

- 129** If a deceased testator was an executor of a person who died before the deceased testator, the executor of the deceased testator has all the rights, powers, rights of action and liabilities of that deceased testator in regard to the estate of the deceased person.

Source: EAA, s. 64

Comment: This section corresponds to section 64 of the present EAA and provides for a chain of representation when an executor dies without having completed the administration and distribution of an estate. Section 64 allows the executor of the deceased executor to fulfill the deceased executor’s remaining obligations.

The chain of representation does not apply to administrators under present law and it is not proposed to extend it to them. An administrator of a deceased personal representative would not have been chosen by those interested in the estate (“first estate”) of the person (“first deceased”) which

178. (1867), L.R. 4 Eq. 295.

179. If there is no executor, the year runs from the date of the grant naming an administrator, rather than from the date of death.

the personal representative was administering at the time of the personal representative's death, nor by the personal representative during his or her life. Thus the administrator of the deceased personal representative's estate may have no personal connection whatsoever to the first estate. In such a case it could be highly objectionable to the family of the first deceased to have an administrator unknown to them automatically placed in charge of the first estate, without even a court appointment.

Limitation period for disputed claims against estate

- 130** (1) A personal representative may give notice of intention to take advantage of the limitation period provided by this section to
- (a) a
 - (i) creditor, or
 - (ii) person, other than a creditor, with a claim against the estate of which the personal representative has noticewhose claim is not the subject of a proceeding pending against the deceased at the time of death or against the personal representative in that capacity, or
 - (b) the agent of the creditor or person referred to in paragraph (a) (ii).
- (2) The notice must
- (a) be in writing,
 - (b) state that the personal representative rejects or disputes the claim,
 - (c) refer to this section and state that the personal representative intends to take advantage of the limitation period provided by subsection (3).
- (3) If the personal representative gives a notice under subsection (1) the creditor or person referred to in paragraph (1) (a) (ii) must commence a proceeding in respect of the claim within:
- (a) 6 months after the notice is given, if the claim or a part of it is due at the time the notice is given;
 - (b) within 6 months of the time the claim or a part of it falls due, if no part of it is due at the time the notice is given.
- (4) If the creditor or claimant does not commence a proceeding in respect of the claim within the time limited by subsection (3), the claim is forever barred.
- (5) This section does not apply to:
- (a) a claim against the estate by a beneficiary or intestate successor of the deceased to recover a beneficial interest to which that person claims to be entitled; or
 - (b) a claim or action under Part 5 [*dependants relief*].

Source: EAA, s. 66

Comment: This section corresponds to the present section 66 of the EAA. The purpose of the section is to provide a means of balancing the rights of creditors and claimants against the estate with the interest of the personal representative and successors of the deceased in completing the administration of the estate within a reasonable time. Apart from paragraph (5) (b), only some minor stylistic changes have been made here to simplify the wording. The exclusion in paragraph (5) (b) of claims and actions under Part 5 has been added for clarity, as Part 5 provides a different limitation period of six months running from the issuance of the grant of probate or administration.

Powers when beneficiary cannot be found or fails to claim specific bequest

- 131** (1) This section applies only if
- (a) the deceased died testate leaving a specific gift of land or personal property to a beneficiary, and
 - (b) the will does not expressly exclude the operation of this section.
- (2) If the personal representative, after making all reasonable efforts, is unable to locate the beneficiary within one year of the date of the grant of probate or administration with will annexed, the personal representative may sell the real or personal property, deduct any costs related to the storage, transportation and sale of the property and hold the net proceeds in trust.
- (3) Section 27.1 [*unclaimed money*] of the *Public Guardian and Trustee Act* applies to net proceeds under subsection (2) that are held in trust by the Public Guardian and Trustee and are not claimed by a beneficiary within the applicable period prescribed under that Act.
- (4) If net proceeds under subsection (2) are held in trust by a personal representative other than the Public Guardian and Trustee, the personal representative must promptly pay the proceeds into court after deducting the costs of doing so.
- (5) If a beneficiary under a gift described in subsection (1) has been located and notified of the gift but neglects or refuses to make arrangements to take delivery of the property within 6 months of the notification, the personal representative may sell the bequeathed property, deduct any costs related to its storage, transportation and sale and transfer the net proceeds to the beneficiary.
- (6) If a beneficiary described in subsection (5) does not accept the net proceeds, the personal representative must hold the net proceeds in trust and subsection (3) or (4) applies.
- (7) This section does not prevent an application by a personal representative to the court under section 39 [*distribution of estate under direction of court*] of the [*existing*] *Trustee Act*, section 58 (3) [*trustee may apply to court for*

advice or directions] of the *[proposed] Trustee Act* or under section 3 *[presumption of death]* of the *Presumption of Death Act*.

Source: EAA, s. 67.1

Comment: This section corresponds to the present section 67.1 of the EAA. It allows for property bequeathed to a beneficiary who cannot be found or who neglects to take delivery to be sold and the proceeds held in trust, or forwarded to the beneficiary if his or her whereabouts are known. It does not prevent the personal representative from applying to the court for an order under section 39 of the existing *Trustee Act* or section 58 (3) of the proposed *Trustee Act* for distribution among other beneficiaries entitled under the same gift, or an order presuming the missing beneficiary to be dead under the *Presumption of Death Act* (as the *Survivorship and Presumption of Death Act*,¹⁸⁰ would be consequentially renamed as a result of the enactment of this proposed Act).

Other executors may act if one executor renounces probate or rights are reserved

132 If one or more of several co-executors

- (a) renounce probate, or
- (b) do not join in an application for probate and their right to apply subsequently for probate is reserved by the terms of a representation grant,

a contract, sale, transfer, or other dealing relating to the estate by the executors who do not renounce or to whom the grant of probate is made is as valid and has the same effect as if every executor named in the will had joined in it and executed an instrument intended to give it effect.

Source: EAA, s. 57

Comment: This section corresponds to section 57 of the present EAA, but unlike section 57 it refers to non-proving executors whose rights to subsequently apply for probate are reserved in a grant that issues to the proving executors. It also extends to all real and personal property forming the estate rather than only real property given by will to executors on trust for sale. There is no reason today to restrict the provision to land devised to executors on trust for sale. The references to trusts for sale in the existing section 57 is archaic. It relates to the practice at a time when real property did not pass automatically to the personal representative. A testator who wanted to have an executor deal with the proceeds of sale of realty willed the land to an executor on trust for sale.

Liability of personal representative

133 (1) Subject to this Act and to

- (a) any applicable limitation period, and
- (b) any other enactment relieving a personal representative of liability,

180. *Supra* note 18.

a personal representative is liable, to the extent of the assets belonging to the estate which come into the personal representative's possession or control, for the wrongful acts and omissions or breaches of legal duty of the deceased.

- (2) Subsection (1) does not render liable an executor who renounces or whose rights are reserved by the terms of a representation grant and who has not intermeddled in the estate.

Source: original

Comment: Subsection (1) supplants very old provisions of the EAA that each deal with some aspect of the liability of a personal representative. It avoids the EAA's unfocused and fragmentary treatment of the issue of liability by affirming a broader principle of existing law applicable to litigation involving estates of deceased persons, namely that a personal representative is liable to creditors and other claimants in respect of valid claims enforceable against the deceased's estate, but only to the extent of estate assets actually coming into the personal representative's hands.

Subsection (2) has been added to clarify that a personal representative (an executor) who renounces the office or a non-proving executor whose rights to apply subsequently for probate are reserved in a representation grant is not liable simply because of the status of co-executor without actually having had possession and control of the assets of the estate. In order to claim the benefit of subsection (2), however, the renouncing or non-proving executor must not have intermeddled, i.e. dealt with the assets of the estate in some fashion or held himself or herself out as being authorized to represent the estate.

Proceedings by and against estates

- 134** (1) A cause of action or a proceeding does not abate because of the death of a party, subject to this section.
- (2) A personal representative may commence or continue a proceeding which the deceased could have commenced or continued and with the same rights and remedies as the deceased would have, if living, subject to this section.
- (3) Subsections (1) and (2) do not apply
- (a) to an action for libel or slander, or
 - (b) in respect of loss or damage to the person of the deceased that occurred before March 29, 1934.
- (4) Recovery in an action under subsection (2) does not extend to
- (a) damages in respect of non-pecuniary loss,
 - (b) damages for death or loss of expectation of life, unless the death occurred before February 12, 1942, or
 - (c) damages for loss of future income for a period following death.

- (5) A person may commence or continue a proceeding against the deceased which could have been commenced or continued against the deceased, if living, whether or not a personal representative has been appointed.
- (6) A proceeding under subsection (5) may be commenced within the time limited for doing so by any enactment, naming as defendant or respondent
 - (a) the personal representative, if any, or
 - (b) the deceased.
- (7) A proceeding under subsection (5) in which the deceased is named as defendant or respondent is valid despite the fact that the deceased is dead when the proceeding is commenced.
- (8) All proceedings under this section bind the estate, despite any previous or subsequent appointment of a personal representative.
- (9) This section is subject to section 10 [*limitation of actions, election and subrogation*] of the *Workers Compensation Act*.
- (10) Nothing in this section affects any rights under
 - (a) the *Family Compensation Act*, or
 - (b) section 103 [*liability of employer*] of the *Workers Compensation Act*.
- (11) In an action under subsection (2), the court may award damages to the personal representative in respect of reasonable expenses of the funeral and disposal of the remains of the deceased person, in addition to the remedies to which the deceased would have been entitled if living.

Sources: EAA, ss. 58–59; 63; 68–69; 71

Comment: This section deals with legal proceedings by and against estates. While largely reflecting existing law, it removes an ambiguity in section 59 (6) of the present Act as to whether an action may be commenced against an estate for a cause of action that is not based on tort if no personal representative has yet been appointed. It clearly permits such an action to be commenced. Section 60 of the EAA, which concerns the procedure to be followed in order to substitute the personal representative or a representative specially appointed by the court as a named defendant when an action is commenced against a deceased person, is not reflected in this proposed section. This is because the procedural detail contained in the present section 60 is considered appropriate for relocation to rules of court.

Subsections (3) and (4) contain references to the effective dates of earlier legislation which made significant changes in the law concerning actions by and against personal representatives.¹⁸¹ The

181. The *Uniform Defamation Act*, s. 3 promulgated by the Uniform Law Conference of Canada would allow an action for a declaration that defamatory matter has been published about a deceased person and an injunction restraining its further publication. Such an action would have to be brought within five years after the death of the person who was allegedly defamed. Paragraph (3) (a) of s. 134 carries forward for

date March 29, 1934 mentioned in paragraph (3) (b) was the date on which the *Administration Act Amendment Act, 1934*,¹⁸² came into force. Section 2 of that Act empowered personal representatives to bring an action to recover damages for torts or injuries to the person of the deceased. Previous to this amendment, the *Administration Act* had permitted the personal representative to sue for damage to the real or personal property of the deceased, but not for injury to the person.

Subsection (4) (b) refers to February 12, 1942, which was the date on which the *Administration Act Amendment Act, 1941-42*,¹⁸³ came into force. This amending Act clarified the source of the personal representative's ability to recover damages for wrongful death when the deceased died of injuries sustained. After this 1942 amendment, it was clear that damages for wrongful death could only be recovered under the fatal accidents statute, now the *Family Compensation Act*.¹⁸⁴

Neither the 1934 nor the 1942 amending Act affected any loss, damage, or cause of action arising before it came into force. While limitation periods have expired in respect of almost all claims arising before these dates, a few causes of action are not subject to a limitation period and might conceivably remain alive. Paragraphs (3) (b) and (4) (b) carry forward the references to the effective dates of these amending Acts now found in the present sections 59 (1) (b) and 59 (3) (b) of the EAA in order to put it beyond doubt that this section does not change the law applicable to claims arising before those dates.

Beneficiary or intestate successor may sue with leave of court

- 135** (1) Despite section 100 (1) [*effect of representation grant and related proceedings*], a beneficiary or an intestate successor may, with leave of the court, prosecute a proceeding in the name and on behalf of the personal representative
- (a) to recover an asset or to enforce a right, duty or obligation owed to the deceased that could be recovered or enforced by the personal representative, or
 - (b) to obtain damages for breach of a right, duty or obligation referred to in paragraph (a).
- (2) A beneficiary or an intestate successor may, with leave of the court, defend in the name and on behalf of the personal representative a proceeding brought against the deceased or the personal representative.

the time being the present law, which assumes that a cause of action for libel or slander from defamation abates on the death of the person defamed. It is not intended as a rejection of s. 3 of the *Uniform Defamation Act* from the standpoint of legal policy. The change in the law of defamation that the implementation of s. 3 of the Uniform Act would produce is merely considered to be outside the scope of the Succession Law Reform Project.

182. S.B.C. 1934, c. 2.

183. S.B.C. 1941-42, c. 2.

184. R.S.B.C. 1996, c. 126.

- (3) The court may give leave under subsections (1) and (2) if
 - (a) the beneficiary or intestate successor seeking leave
 - (i) has made reasonable efforts to cause the personal representative to prosecute or defend the proceeding,
 - (ii) has given notice of the application for leave to
 - (A) the personal representative,
 - (B) each person beneficially interested in the estate, and
 - (C) any additional person to whom the court directs that notice is to be given,
 - (iii) is acting in good faith, and
 - (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of one or more beneficiaries or intestate successors for the proceeding to be prosecuted or defended.
- (4) On the application of a beneficiary, an intestate successor or the personal representative, the court may authorize a person to control the conduct of a proceeding under subsections (1) and (2) or give other directions for the conduct of the proceeding.

Sources: *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 232–33

Comment: Section 135 is a new provision intended to overcome a gap in the present law which does not permit a beneficiary or an intestate successor to bring or defend proceedings on behalf of the estate if the personal representative refuses or is unable to do so. It may not be convenient or useful in all cases to remove the personal representative and substitute another under Division 7. For example, a family may be content for the personal representative to continue in all other respects except with regard to the matter in respect of which the personal representative refuses to take proceedings. This section would permit a beneficiary or an intestate successor to seek approval of the court to take proceedings in the personal representative's name to protect the interests of the estate and those beneficially interested in it if the personal representative cannot or cannot be persuaded to do so.

The procedure contemplated by this section is similar to the derivative action in company law in which a shareholder or director may be allowed to bring or defend proceedings in the name and on behalf of the company under certain circumstances. (See sections 232–33 of the *Business Corporations Act*.¹⁸⁵)

Note that any person, not only the beneficiary or intestate successor to whom leave is given under subsections (1) or (2) to take or defend a proceeding, may be given control of the conduct of the proceeding under subsection (4). Control of the conduct of a proceeding would generally extend to

185. *Supra* note 172.

the authority to give instructions to counsel, make decisions regarding litigation strategy, and to make and accept settlement offers.

Relief of personal representative from liability under contract of deceased

- 136** A personal representative ceases to be liable in respect of a contract that was not fully performed by the deceased prior to death, including a lease, if the personal representative
- (a) satisfies all liabilities that have accrued and are claimed under the contract until the time of the assignment mentioned in paragraph (b),
 - (b) validly assigns the contract to a purchaser, and
 - (c) sets aside a reserve from the assets of the estate in an amount fixed by agreement, or by the court on the application of the personal representative, to meet future claims that may be made in respect of a fixed or ascertained sum which the deceased agreed to pay or for which the deceased was liable under the contract.

Source: EAA, s. 72

Comment: This section corresponds to the present section 72, but extends not only to leases entered into by or assigned to the deceased but to any contract binding the estate that requires obligations under it to be performed in the future (“executory contract”). It provides a means by which the personal representative can free the estate from ongoing liabilities under such a contract by assigning it, paying the liabilities due under the contract up to the time of the assignment, and setting aside a reserve adequate to meet any quantified sum payable under the contract by the deceased.

Distribution of a minor’s interest

- 137** (1) Subject to subsections (2) and (3), if
- (a) a minor is a beneficiary or an intestate successor, and
 - (b) there is no trustee or no trust created for the minor’s interest in the estate,
- on distribution of the assets, the personal representative must pay or transfer the minor’s interest to the Public Guardian and Trustee in trust for the minor.
- (2) If the minor’s interest in an estate described in subsection (1) consists, in whole or in part, of an asset other than money, the Public Guardian and Trustee may
- (a) convert the minor’s interest in the estate to money,
 - (b) transfer the minor’s interest in the estate to the minor, or

- (c) decline to accept the transfer of the asset and recommend to the court that a trustee be appointed in accordance with subsection (3).
- (3) Subsection (1) does not apply if, prior to distribution of the assets of the estate, the court, on application and with notice to the Public Guardian and Trustee, appoints a trustee to hold and administer the minor's interest in the estate until the minor attains the age of majority.

Source: EAA, s. 75

Comment: This section, and particularly subsection (1), corresponds to section 75 of the EAA. The interest of a beneficiary who is a minor must be held by the Public Guardian and Trustee until the beneficiary reaches majority, unless there is a private trustee for the minor's interest. Currently, however, section 75 of the EAA only refers to an interest consisting of money. This proposed section expands the scope of section 75 to include property in which a minor has an interest other than money. The present section 75 is extended in this manner here because there is no policy reason to distinguish between monetary and non-monetary property of a minor in terms of the importance of protecting it from misappropriation.

In some cases, however, the interests of the minor beneficiary would be better served by converting property bequeathed to a minor into money, particularly if they are assets likely to deplete in value. There may also be practical limitations on the ability of the Public Guardian and Trustee to preserve and maintain some kinds of bequeathed assets for the entire period of minority. An exotic animal would be one example. For these reasons, subsection (2) gives the Public Guardian and Trustee discretionary powers to convert non-monetary assets into money or transfer them to the minor beneficiary in kind. These powers correspond to ones customarily conferred by will on executors and testamentary trustees. The Public Guardian and Trustee may also decline to accept a non-monetary asset in which a minor is interested and recommend to the court that it appoint a private trustee.

Subsection (3) relieves a personal representative from having to transfer the interest of a minor to the Public Guardian and Trustee if the court appoints a private trustee to take charge of the interest until the minor reaches majority.

Distribution of estate after notice to creditors

- 138**
- (1) In this section, “creditor” and “other claimant” do not include a person who has or may have a claim described in section 139 [*distribution of estate after 6 months if certain proceedings not commenced*].
 - (2) A personal representative may publish a notice in the Gazette to creditors and other claimants to present their claims against the estate of the deceased to the personal representative within a specified time after which the personal representative proposes to distribute the estate, having regard only to the claims of which the personal representative then has notice.
 - (3) The time specified in a notice under subsection (2) for presenting claims must not be less than 30 days after the date of the publication in the Gazette.

- (4) At the expiration of the period referred to in a notice under subsection (2) the personal representative may distribute the assets of the deceased among the persons entitled to them, having regard to the claims of which the personal representative then has notice, without liability for the assets so distributed to a creditor or other claimant of whose claim the personal representative did not then have notice.
- (5) This section does not prejudice the right of a creditor or other claimant to follow the assets of the deceased into the hands of persons who receive them.

Source: *Trustee Act*, R.S.B.C. 1996, c. 464, s. 38

Comment: This section corresponds to section 38 of the present *Trustee Act*. It allows personal representatives to publish a notice in the Gazette for creditors or other persons having claims against the estate to present their claims within a stated amount of time, which cannot be less than 30 days following the advertisement, after which the personal representative will be free to distribute the estate without liability for claims that have not been brought forward within that time. It is a useful provision that enables the estate to be administered and distributed within a reasonable amount of time. The section applies to claims of creditors and persons with non-contractual claims against the estate, such as someone claiming to have suffered personal injury as a result of the deceased's negligence, or damages for a breach of trust committed by the deceased. It does not apply to claims under Part 5, as that Part already prohibits distribution of any part of the estate sooner than six months after probate or the grant of administration without leave of the court or consent of all persons with a right to claim under it.

Section 38 of the *Trustee Act* currently requires advertisements to be published in successive weeks in a newspaper circulating where the deceased last resided in addition to a notice in the Gazette. Section 138 dispenses with newspaper advertisements because they are extremely expensive and practitioners do not consider them to be effective. Nowadays many newspapers circulate in any one place. It would be unreasonable to require advertisement in each one, while advertising in only one cannot realistically be expected to bring a death to the attention of all creditors. In addition, the intervals between newspaper advertisements required by the present section 38 give rise to several weeks' delay. For these reasons, the section retains only the requirement to advertise in the Gazette. This would simplify the procedure to the advantage of creditors as well as the personal representative, as a search for the advertisement would need be conducted in only one source. It is recommended that Part I of the Gazette be made searchable electronically by reference to the name of a deceased person without subscription, with incremental revenue needed to facilitate this search capability being raised by the fee for placing an advertisement and possibly a modest fee for search. The minimum period in which creditors must be allowed to present claims after the advertisement appears is lengthened from 21 days to 30.

The current section 38 of the *Trustee Act* allows "trustees or assignees acting under the trusts of a deed or assignment for the benefit of creditors generally" to make use of the section in addition to executors and administrators. Deeds and assignments for the benefit of creditors are archaic instruments used before the advent of modern bankruptcy and insolvency legislation. The British Columbia Law Institute recommended in its report *A Modern Trustee Act for British Columbia* that section 38 of the current *Trustee Act* be moved to the EAA or legislation replacing it because in the modern context section 38 was used only by personal representatives. The references to trustees and assignees of a deed or assignment for the benefit of creditors have been deleted for this reason,

and because trustees of such a deed or assignment could apply in any case for an order allowing distribution among known claimants under section 58 (3) of the proposed *Trustee Act* contained in that Report. By virtue of section 2 (1) of this Act, a personal representative would also have that alternative.

Distribution of net estate after 6 months if certain proceedings not commenced

139 (1) If

- (a) no process relating to a proceeding in which
 - (i) a determination is sought that a person is or is not a beneficiary or intestate successor, or
 - (ii) relief is sought under Part 5 [*dependants relief*]
- is served upon the personal representative, and

- (b) 30 days following the expiry of 6 months from the issuance of a representation grant in relation to the estate have elapsed,

the personal representative may distribute the net estate without regard to a claim that might have been raised in such a proceeding and is not liable in respect of the claim.

(2) Subsection (1) does not

- (a) affect any right or remedy at law or in equity or under an enactment against a person to whom the net estate has been distributed in whole or in part, or
- (b) extend any applicable limitation period.

Source: original

Comment: Subsection (1) of this section allows a personal representative to distribute the net estate (i.e. net of debts, funeral expenses, administration expenses and probate fees) after a period of six months plus 30 days have passed since the issuance of the grant, if the personal representative has not been served with any process in a proceeding that may alter the pattern of distribution. It also relieves the personal representative of liability for so doing. The additional 30 days is added to allow time for service of process in case a proceeding is commenced shortly before the expiration of a six-month limitation period for bringing an action for a dependants relief order in Part 5, which replace the *Wills Variation Act*.¹⁸⁶

Subsection (2) confirms, for the sake of certainty, that two specific types of claims come within subsection (1). One is a proceeding to determine a status that would entitle the claimant to inherit. For example, a former cohabitant of the deceased might claim to have been the deceased's "spouse" immediately before death and therefore entitled to a spousal share in an intestacy. The other is a claim under the dependants relief provisions.

186. *Supra* note 15.

Trustee of will trusts in default of appointment by will

- 140** An administrator with will annexed is deemed to be the trustee of a trust created by the will if the testator has not appointed another trustee in the will, unless the court otherwise orders.

Source: original

Comment: This section clarifies what is generally considered to be the effect of a grant of administration with will annexed if there are will trusts and the will does not appoint a trustee, namely that the administrator is deemed to be the trustee. This is subject to a contrary direction by the court.

Division 7 — Discharge, Removal and Substitution of Personal Representative

Right to apply for discharge

- 141** (1) A personal representative of a deceased person may apply at any time to the court to be discharged from office as personal representative.
- (2) A personal representative may make an application under subsection (1)
- (a) whether the person has been appointed executor under a will or administrator by the court,
 - (b) either alone or jointly with another person,
 - (c) either before or after a grant of probate or administration,
 - (d) whether the personal representative is a trustee of the estate or part of it or not, and
 - (e) whether the personal representative has dealt or partially dealt with the estate or a portion of it or not, or has to any extent acted in the exercise of a trust or power conferred on or vested in the personal representative or not.
- (3) A personal representative may make an application under subsection (1) without notice if
- (a) the accounts of the personal representative applying for discharge have been passed under the *[existing or proposed] Trustee Act*,
 - (b) every person having a beneficial interest in the estate
 - (i) has capacity to consent to the accounts of the personal representative, and
 - (ii) consents to the accounts without passing under the *Trustee Act*,
 - (c) all persons having a beneficial interest in the estate with capacity to consent to the accounts of the personal representative have consented

to the accounts without passing under the *Trustee Act* and the court determines that

- (i) the interest in the estate of any minor or mentally incapable person is substantially identical and not in conflict in relation to any aspect of the accounts with the interests of the persons so consenting, and
 - (ii) no reason is apparent to the court that would require a passing of accounts before the discharge of the personal representative, or
- (d) the court otherwise determines that the accounts of the personal representative need not be passed under the *Trustee Act*.
- (4) A personal representative who applies to be discharged without notice must file accounts with the court for the period during which the personal representative was in office, unless the application is made under paragraph (3) (a).
- (5) An order discharging the personal representative from that office operates to release the personal representative from all actions, claims and demands arising from or in connection with acts or omissions of the personal representative while in office, except in respect of undisclosed acts, neglects, defaults, dishonest or unlawful conduct, or breach of trust.
- (6) An order discharging a person as a personal representative does not
 - (a) discharge or remove that person as a trustee, or
 - (b) operate to release the person from liability for anything done or omitted by the person in the capacity of a trustee.

Sources: EAA, ss. 27; 29

Comment: This section corresponds to sections 27 and 29 of the EAA. This proposed Act would continue the principle that a personal representative cannot unilaterally withdraw from that office. A personal representative remains a personal representative until the grant naming the personal representative is revoked, a discharge is obtained from the court, or the rights of the personal representative to administer the estate cease in one of the other ways contemplated by the Act. This section relates to discharge by the court. In contrast, the proposed *Trustee Act* makes it easier for trustees to withdraw from office and be replaced without court intervention.

Subsections (1) and (2) correspond fairly closely to section 27 (1) and (2) of the EAA, but subsection (1) omits the reference in the present section 27 (1) to discharge “whether as personal representative alone or as personal representative and trustee.” This is to further the objective in drafting this reform legislation of achieving a better delineation of the application of estate administration legislation and the *Trustee Act* when the offices of personal representative and testamentary trustee are combined in the same individual, as is often the case. See section 2 (4) and the commentary to section 2. Relinquishing the office of trustee would have to be done under the proposed *Trustee Act*, which provides several alternative ways for a testamentary trustee to retire and be replaced.

The combined effect of section 2 (4) and subsections (1) and (6) of this section would be to reverse the effect of *Re Berg Estate*.¹⁸⁷ *Re Berg Estate* held that a person who is both an executor and testamentary trustee cannot be replaced by co-trustees without a court application under the present *Trustee Act* because sections 27–30 of the EAA apply to those who are both executors and trustees and are exclusive, even if the estate is fully administered and only trustee functions are being carried out.

Subsection (3) contains a significant new feature in allowing a personal representative to obtain a discharge on application without notice (desk order) if the personal representative's estate accounts have been formally passed before the court under the *Trustee Act*,¹⁸⁸ if all interested parties have legal capacity and have consented to the accounts without passing, or in other cases if the court finds no need for a formal passing of accounts. This will reduce the cost of obtaining a discharge when there is no need for further involvement by the personal representative and no outstanding issues that would require the persons interested in the estate to be notified of the application. If a personal representative applies for discharge by desk order, subsection (4) requires the estate accounts for the period in which the applicant held the office of personal representative to be filed unless they have already been passed, so that the court has the information on which it could make the determinations referred to in paragraphs (3) (b)–(d)) that would entitle the applicant to discharge by this route.

Subsection (5) corresponds to section 29 (3) of the EAA. An obscure and superfluous reference to “undisclosed . . . accounts” has been deleted from the subsection. The order of discharge operates as a release from liability for acts and omissions of the former personal representative while serving in that office, but only if the estate accounts have been passed or consented to. It does not operate as a release of claims arising from misfeasance, misappropriation or breaches of trust that have been concealed, however.

Subsection (6) is added for further clarification that a discharge obtained under this section only operates to discharge the applicant as a personal representative, not as a trustee.

Right to apply for removal of personal representative

- 142** (1) A person having an interest in the proper administration of an estate may apply to the court to remove or pass over a personal representative.
- (2) Subject to the terms of the will, if any, the court may remove or pass over a personal representative if the personal representative
- (a) disclaims or refuses to accept the office of, or to act as, personal representative, without formal renunciation,
 - (b) is a mentally incapable person,
 - (c) is convicted of an offence involving dishonesty,

187. (1994), 90 B.C.L.R. (2d) 237 (S.C.).

188. The existing *Trustee Act* provides for a single procedure for the passing of accounts by trustees, personal representatives, and committees of the estate of a living person appointed under the *Patients Property Act*, *supra* note 9. This feature has been retained in the proposed *Trustee Act* for reasons of legislative economy, i.e. avoidance of duplicative legislation.

- (d) is an undischarged bankrupt,
 - (e) purports to resign from the office of personal representative,
 - (f) being a corporation, is dissolved or is in liquidation, other than a voluntary liquidation for the purpose of amalgamation or reorganization,
 - (g) is
 - (i) incompetent or otherwise incapable of making decisions necessary to discharge the office of personal representative,
 - (ii) nonresponsive, or
 - (iii) otherwise unwilling, unable or unreasonably refusing to carry out the duties of a personal representative,to an extent that the conduct of the personal representative hampers the efficient administration of the estate,
- or for any other reason should not continue in office.
- (3) A personal representative who is a sole beneficiary or sole intestate successor must not be removed for the reason only that the personal representative is a person described in paragraphs (2) (c) or (2) (d), except on the application of a creditor having a claim in excess of the amount prescribed under section 109 (1) (d) [*notice of application for probate or administration*].
 - (4) An order removing a personal representative does not remove that person as a trustee.

Sources: Draft *Trustee Act*, ss. 16–17 (Part Two of British Columbia Law Institute, *Report on a Modern Trustee Act for British Columbia* (BCLI Rep. No. 33) (Vancouver: The Institute, 2004))

Comment: This is a new provision that allows persons interested in the proper administration of the estate (intended to cover all beneficiaries or intestate successors, plus creditors and co-executors or co-administrators) to apply to the court to have a personal representative removed or passed over on the grounds specifically listed or for other reasons that the court finds sufficient. (To “pass over” an executor or potential administrator means to grant probate or administration to a co- or alternate executor or to appoint someone ranking lower in the hierarchy of potential administrators.) Currently, the Supreme Court of British Columbia has a non-statutory jurisdiction to remove a personal representative on grounds that are somewhat vaguely outlined in case law. These are dishonesty, conduct endangering the estate, or acting without proper care or reasonable fidelity.¹⁸⁹ These grounds are intended to be preserved by the wording at the end of subsection (2) providing for removal or passing over on grounds other than those specifically listed.

189. *Conroy v. Stokes*, [1952] 4 D.L.R. 124 (B.C.C.A.); *Weinstein v. Weinstein* (1996), 13 E.T.R. (2d) 227 (B.C.C.A.); *Erlichman v. Erlichman Estate*, [2000] B.C.J. No. 198 (QL), 2000 BCSC 173.

In Ontario, however, a court may remove and replace a personal representative on any ground on which it could remove and replace a trustee.¹⁹⁰ This is a logical approach, because personal representatives and trustees are fiduciaries with similar, although distinct, roles. The grounds for removal listed in subsection (2) closely resemble the grounds for disqualification or removal as a trustee under the proposed *Trustee Act*.

If the personal representative is a sole beneficiary, however, it does not make sense to remove him or her because of bad character or bankruptcy unless the interests of a third party would somehow be prejudiced. That would be the case if creditors' claims are unpaid and a disreputable or bankrupt sole beneficiary remains in office. Subsection (3) provides therefore that criminal conviction and bankruptcy are not grounds for removal if the personal representative is the sole beneficiary, except on the application of a creditor with a claim large enough to entitle the creditor to receive notice of an application for a grant of administration in an intestacy.

Paragraph (b) of subsection (2) is arguably in conflict with section 17 of the *Patients Property Act*¹⁹¹ in making mental incapacity a ground for removal of a personal representative. Section 17 vests in the committee of a mentally incapable person all the powers the mentally incapable person had as a personal representative, trustee, guardian, or donee of a power of appointment. Enactment of subsection (2) would require a consequential amendment to the *Patients Property Act* permitting the committee to be displaced and a new personal representative appointed. The *Patients Property Act* is itself slated for repeal by section 58 of the *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006* (Bill 32), however.

Subsection (4) is added to make it clear that removal under this section is only removal from the office of personal representative. To also remove the same individual as a trustee, the procedures set out in the proposed *Trustee Act* must be followed.

Under current law, removal of a personal representative from office by the court is not generally considered to be a ground for revocation of a grant of probate or administration. Instead, the usual remedy is the appointment of a judicial trustee. This engenders confusion, because a grant confirms a named individual or individuals as having authority to administer an estate. Section 144 below, which provides for appointment of a replacement for a personal representative who is removed, would clarify the law by providing that the new appointment operates to revoke the prior grant.

Notice of application for discharge or removal of personal representative

- 143** (1) Subject to section 141 (3) [*right to apply for discharge*], an application under section 141 [*right to apply for discharge*] or 142 [*right to apply for removal of personal representative*] must be made on not less than 14 days' notice to
- (a) the personal representative, unless the application is made by a sole personal representative for discharge,
 - (b) in an application under section 142 [*right to apply for removal of personal representative*], each alternate executor named in a will,

190. *Trustee Act*, R.S.O. 1990, c. T.23, s. 37 (1).

191. *Supra* note 9.

- (c) each beneficiary of the estate or of a trust applying to all or part of the estate,
 - (d) in an intestacy or partial intestacy, each intestate successor, and
 - (e) creditors of the deceased having claims in excess of an amount prescribed by regulation.
- (2) An application under section 141 [*right to apply for discharge*] or 142 [*right to apply for removal of personal representative*]
- (a) may be made by way of petition or notice of motion,
 - (b) must be served on each person described in paragraphs (1) (a) and (1) (b), and
 - (c) may be made concurrently with an application under the *Trustee Act* to remove a person as a trustee.

Sources: EAA, s. 28; original

Comment: This section sets out requirements for notice and service in both an application by a personal representative for discharge and one made by an interested person for a personal representative's removal. It differs from section 28 of the EAA, which permits all applications for discharge to be made without notice, subject to directions the court may give for notice to interested parties and service of the notice. It is thought that section 28 of the EAA makes the procedure too *ad hoc* in nature and creates a possibility that interested parties may be deprived of an opportunity to raise valid concerns about the handling of the estate through inadequate disclosure to the court on the initial application without notice. The interested parties listed by category in paragraphs (a) to (e) of subsection (1) should have notice of a personal representative's intention to apply for discharge. They should also have an adequate period to assess their position and decide whether to oppose the application. A personal representative who is faced with an application for removal should also have an adequate opportunity to respond. Hence, subsection (1) requires a minimum of 14 days' notice of either kind of application. It is intended that the amount prescribed under paragraph (1) (e) would be the same as that prescribed for the purposes of section 109 (1).

Subsection (2) provides flexibility in the means of bringing the application before the court. The purpose of allowing the application to be made by petition as well as notice of motion is to allow it to be made at a registry other than the one from which the representation grant issued. (A notice of motion would have to be filed in the same registry.) Subsection (2) also requires personal service on personal representatives and alternate executors, as they are the principal respondents and it is essential that they receive actual notice of an application that affects their status and powers.

Subsection 141 (3) overrides the general requirement for notice contained in this section. No notice is required if the personal representative's accounts have been passed, or there is no need to pass them.

Appointment of a new personal representative

- 144** (1) If the court discharges or removes a personal representative, the court

- (a) must appoint another person consenting to act in place of the personal representative being discharged or removed, and
 - (b) may, if the personal representative has resigned or is being removed as a trustee, concurrently appoint that other person as a trustee under the *Trustee Act* in place of the trustee being discharged or removed.
- (2) An appointment under paragraph (1) (a) is not required if
 - (a) the administration of the estate is complete, or
 - (b) the court considers for any other reason that a new personal representative is unnecessary.
- (3) If a person other than the Public Guardian and Trustee, a trust company or a credit union is appointed under subsection (1), the court may require the person to provide security in accordance with section 114 [security].
- (4) If the court requires a person appointed under subsection (1) to provide security, the appointment does not take effect until the person gives security in accordance with the order, unless the court otherwise directs.
- (5) A person appointed under this Division in place of a personal representative who is discharged or removed
 - (a) has and may exercise the same powers and discretions in respect of the estate as the former personal representative had or could have exercised,
 - (b) must perform the same duties and is subject to the same obligations as were imposed by law on the former personal representative, and
 - (c) is entitled to receive a grant of probate or administration, as the case may be, on application without notice.
- (6) On the appointment of a person under this Division in place of a personal representative who is discharged or removed, the grant of probate or administration to the former personal representative is revoked.
- (7) A grant of probate or administration may be made under paragraph (5) (c) without the return of the previous grant to the former personal representative if the registrar is satisfied that the return of the previous grant would be impossible or impractical.

Source: EAA, s. 30

Comment: This section corresponds broadly to section 30 of the EAA, authorizing the appointment of a replacement for a personal representative who is discharged or removed. Paragraph (1)(b) makes it clear that the substitution of the newly appointed personal representative as a testamentary trustee would be carried out under the authority of the *Trustee Act*, although it could be done concurrently with the appointment as personal representative under this Act. Under subsection (3),

provision of security by the replacement personal representative would only be necessary if it would have been required under section 114 from the original personal representative. The Public Guardian and Trustee and trust companies are exempted from having to provide security in any event.

Subsection (5) is new and is intended to clarify the powers and status of the replacement personal representative. The provision in paragraph (5) (c) for a new grant is to facilitate the ability of the replacement personal representative to deal effectively with the estate and prevent confusion as to who is entitled to represent it. It is intended that the new grant would be issued on simply filing a requisition, without filing a further affidavit and disclosure document listing assets and liabilities. Subsection (6) is also new and is intended to introduce more certainty as to the authority of a grant made to a personal representative who is later discharged or removed and replaced. Currently, a new grant is not required in that situation even though the old grant names the replacement's predecessor. By the combined effect of paragraph (5) (c) and subsections (6) and (7), the prior grant is revoked and a new grant will issue to the new personal representative.

Vesting of estate

- 145**
- (1) When a person is discharged or removed as a personal representative, the estate ceases to be vested in that person without any further declaration or order.
 - (2) If a person is appointed as a personal representative, the estate vests in that person without any further declaration or order.
 - (3) This section applies whether a person is discharged or removed, or is added or substituted as a personal representative, in accordance with the terms of a will or this Act.

Source: Draft *Trustee Act*, s. 23 (Part Two of British Columbia Law Institute, *Report on a Modern Trustee Act for British Columbia* (BCLI Rep. No. 33) (Vancouver: The Institute, 2004))

Comment: This section is new. It is intended to clarify the operation of the discharge or removal, addition and substitution of personal representatives with respect to the divestiture of the estate from former personal representatives and its vesting in newly appointed ones. This section resembles similar provisions in the draft *Trustee Act* concerning vesting of property when trustees retire or are removed and new trustees are substituted. Subsection (3) indicates the section applies whether the discharge, removal, addition, or substitution takes place under the terms of a will or pursuant to this Act.

Effect of vesting

- 146**
- (1) A vesting under section 145 [*vesting of estate*] has the same effect as if the estate had been actually transferred to the person in whom it is to be vested.
 - (2) The provisions of the *Land Title Act* applicable to a transmission of land apply to a vesting under section 145 [*vesting of estate*] of land included in an estate.

Source: Draft *Trustee Act*, s. 24 (Part Two of British Columbia Law Institute, *Report on a Modern Trustee Act for British Columbia* (BCLI Rep. No. 33) (Vancouver: The Institute, 2004))

Comment: This section is also new. Subsection (1) reinforces the effect of section 145 (1) by emphasizing that vesting under section 145 is as complete as if the title to the estate had actually been transferred to the new personal representative by the former one.

Part 17 of the *Land Title Act*¹⁹² contains requirements for registration of land in the name of a personal representative by virtue of the transmission (i.e. an assignment or vesting that takes place by operation of law) that takes place on the death of the registered owner. Subsection (2) of this section affirms that these requirements also extend to vesting under section 145 of an estate that includes registered land or an interest in it. Under section 260 (2) of the *Land Title Act*, it is necessary for a personal representative to first become registered as the owner of registered land belonging to an estate before most dealings with the land by the personal representative can be registered.

Former personal representative to deliver property and documents, etc.

- 147** (1) If a personal representative is discharged or removed and another person is appointed as personal representative, within 30 days of the order making the appointment the former personal representative must provide to the new personal representative all
- (a) assets of the estate, and
 - (b) records and documents relating to the estate and its administration,
- that are in the possession or control of the former personal representative.
- (2) A former personal representative must execute any document or assurance expedient to facilitate the ability of the new personal representative to deal with the assets of the estate.
- (3) The effect of sections 145 [*vesting of estate*] and 146 [*effect of vesting*] is not dependent on compliance with subsection (2).
- (4) A former personal representative who has acted under a grant revoked under section 144 (6) [*appointment of new personal representative*] or in another proceeding may not, unless the court otherwise orders, retain or pay any expense that
- (a) the former personal representative incurred in the course of so acting, and
 - (b) might have been lawfully incurred by a personal representative to whom probate or administration of the estate is later granted.

Source: original

Comment: When personal representatives are replaced, the new personal representative sometimes encounters difficulty in obtaining custody of assets and documents relating to the estate and its administration. This may be particularly true when replacement of the personal representative

192. R.S.B.C. 1996, c. 250.

takes place in acrimonious circumstances. This section, particularly subsection (1), is aimed at inducing the proper handover of property and records to a replacement personal representative. In some cases, an effective transfer of control of the estate may require execution of various documents by the retiring or former personal representative so that the new personal representative's authority will be evident to third parties, even though the estate has vested in the new personal representative's appointment. Subsections (2) and (3) recognize this reality.

Subsection (4) reverses the position under section 22 (2) of the EAA and prevents a former personal representative, whose grant has been revoked by reason of discharge or removal, from retaining funds out of the estate to reimburse expenses incurred. This is because the present section 22 (2), which permits such retention of estate funds, is seen as facilitating misappropriation. It is open to the former personal representative to seek an order allowing retention of amounts sufficient for reimbursement of proper expenses.

Payments or transfers made before notice of defective or irregular grant valid

- 148** A person who makes a payment or transfer of property in good faith in reliance on a grant of probate or administration with or without will annexed and before having notice of revocation of the grant is, despite any defect or irregularity in the grant or revocation of it,
- (a) not liable to any person for so doing, and
 - (b) discharged as against the personal representative to the extent of the value.

Sources: EAA, s. 22 (1); 23

Comment: This section corresponds to sections 22 (1) and 23 of the EAA, but has been extended to include transfers of property as well as payments. If a third party makes a transfer of property or payment in good faith in reliance on a grant that is defective or irregular, whether or not the grant is revoked at some point, the third party is released from any liability to anyone for doing so and obtains a good discharge against the personal representative in respect of the original obligation to the extent of the value of the transfer or payment. In order to claim the benefit of the section, the payment or transfer would have to be made before the third party received notice of revocation.

Division 8 — Devolution of Land

Devolution and administration of land

- 149** (1) Land devolves to and is vested in the personal representative of the owner on the owner's death in the same manner as personal property unless another person has a right to take the land by survivorship.
- (2) Subject to this Act,
- (a) a personal representative to whom land devolves under subsection (1) holds the land as a trustee for the person beneficially entitled to it, and

- (b) a person beneficially entitled to the land has the same power as a person beneficially entitled to personal property to require a transfer from the personal representative.
- (3) Subject to this Act, land must be administered in the same manner as personal property and all enactments and rules of law respecting
 - (a) the powers, duties and liabilities of a personal representative in respect of personal property,
 - (b) the effect of probate or a grant of administration,
 - (c) dealings with personal property before probate or administration, and
 - (d) the administration of personal property of a deceased person, including the payment of debts and expenses,apply to land.
- (4) A sale, transfer or other disposition of land by only one or some of several joint personal representatives is not valid without approval by the court, unless
 - (a) section 132 [*other executors may act if one executor renounces probate or rights are reserved*] applies, or
 - (b) probate is granted to one or more of several persons named as executor with power being reserved to the others to apply for probate and the sale, transfer or other disposition is carried out by one or more of the persons to whom probate is granted.
- (5) This section applies to land over which a person exercises by will a power of appointment as if the land were vested in the person.
- (6) Subsections (1), (2), (3), (4) (b) and (5) apply if a person who owns land or in whom land is vested dies
 - (a) on or after June 1, 1921,
 - (b) before June 1, 1921, but probate or administration of the personal property of the person has not been granted, or
 - (c) before June 1, 1921 and probate or administration of the personal property of the deceased person has been granted, but the land is registered to or vested in the deceased person without a right in any other person to take by survivorship or in the predecessor in title of the deceased person.
- (7) Subsections (5) and (6) (a) apply if a person dies on or after the date on which those subsections come into force.

Sources: EAA, ss. 77–78

Comment: This section replaces sections 77 and 78 of the EAA. A number of superfluous and repetitive subsections in the present sections 77 and 78 have been eliminated, but an effort has been made to retain their essential content.

For the most part, the section preserves the existing law in British Columbia on devolution of real property on death, based on changes introduced in 1921 by the *Land Registry Act*.¹⁹³ (See the commentary to section 1 (1) of this proposed Act regarding the use of the term “land,” as compendiously defined in the *Interpretation Act*,¹⁹⁴ in place of “real property” in the draft legislation.) Prior to these changes, real property did not devolve on the personal representative but vested in those entitled to it under a will or by the operation of the law of intestacy then in effect. The 1921 changes were in turn based on the English *Land Transfer Act, 1897*.¹⁹⁵ Similar legislation based on the *Land Transfer Act, 1897*, is found in the other Canadian common law jurisdictions.

One detail of the 1897 English legislation, preserved in both the existing section 78 (2) of the EAA and subsection (2) of this proposed section, is that the personal representative holds real property as trustee for the persons beneficially entitled to it. While a personal representative does not hold personal property belonging to the estate in the capacity of a trustee unless the will creates such a trust, making the personal representative a trustee of real property belonging to an estate has a definite purpose. The consequence of doing so is to save a type of future interest known as a “contingent remainder” from failing because it may not vest (cease to be contingent) during the continuance of the legal interest preceding it. For example, a will could give a life interest in certain real property to A, followed by a “remainder” in fee simple to the children of A who reach majority. It is possible that the remainder interest might not vest while A was alive because A might die before any of the children reached majority. A might also predecease the testator and never receive the legal interest. In either case, the remainder interests would be void. These rules, however, do not apply to trusts. By interposing a trust of the real property in which the personal representative holds the legal title for ultimate transfer to the beneficiary, the contingent remainders can be kept alive.

Two significant changes in the rules governing the treatment of real property under the rules of abatement arise from the combined effect of subsection (3) (d) and section 54 in Part 3. The first is that real property and personal property would abate together in the absence of any contrary intention in a will. In other words, they would be applied concurrently towards the payment of funeral and administration expenses, debts, and legacies. Current law requires personal property to be applied in payment of debts ahead of real property, unless a will specifically charges the real property with payment of debts and exonerates personal property, or realty and personalty are bequeathed together as a mixed fund with a direction to the executor to pay debts from the mixed fund. Residuary realty cannot be liquidated to satisfy specific pecuniary gifts. All gifts of land, including residuary ones, are treated as specific devises for the purposes of abatement.¹⁹⁶

193. *Supra* note 2.

194. *Supra* note 1, s. 29.

195. (U.K.), 60 & 61 Vict., c. 65.

196. In one British Columbia decision, *Re Cook Estate*, [1986] B.C.J. No. 2636 (S.C.) (QL), real property included in a residuary gift appears to have been treated as a general rather than a specific gift, but no authority was cited. The case seems to be anomalous.

For example, an estate might consist solely of a painting worth \$100,000 and a house worth \$500,000. Assume the painting and the house are specifically bequeathed to different beneficiaries. If the testator died owing \$100,000, the beneficiary who is to receive the painting would receive nothing because the painting, as an item of personal property, must be applied towards debts ahead of the house, which is real property. The beneficiary of the house would receive the full benefit of the gift. Under subsection (3) (d) and section 54 (3), the painting and the house would abate together. This means that \$20,000 towards the payment of the debt would be contributed from the value of the painting and \$80,000 from the value of the house. Both assets could be sold simultaneously to obtain sufficient liquidity in the estate to pay the debt. Each beneficiary has the alternative of paying the pro rata portion of the debt burden that falls on the beneficiary's interest in cash, and then could receive the bequeathed property intact.

Abolition of the rule that personal property must abate before real property is recommended on the ground that the rule is anachronistic. It is rooted in the common law system of devolution of property, under which land did not pass to the personal representative but directly to those entitled to it under a will or the law of intestacy. Thus it was not available to the personal representative for payment of the deceased's debts. (Statutory provisions, now repealed, were passed to permit creditors to attach real property in the hands of beneficiaries or intestate successors.)¹⁹⁷

The privileged status given to real property in relation to abatement has survived the 1921 change making real property devolve to the personal representative in the same way as personal property. The historic significance of land as a form of wealth has not persisted to an extent that would justify continued retention of the privileged status, however. In modern times, other forms of wealth such as securities may be equally or more significant, both in value and in relative importance to the testator and the beneficiaries. The Law Reform Commission of British Columbia recommended in 1989 that residuary realty and personalty abate concurrently.¹⁹⁸ Counterpart law reform bodies in Ontario and Manitoba have also recommended abolition of the distinction in treatment between realty and personalty under the abatement rules.¹⁹⁹ The Alberta Law Reform Institute has tentatively proposed the same in a consultative document.²⁰⁰

The second change in the rules of abatement that flows from subsection 3(d) and section 54 (2) is that real property on which the testator has charged a particular debt in the will is applied first toward that debt whether or not the testator has also "exonerated" the personal property. The term "exonerate" in this context means to declare in the will that the personal property shall not be liable for the debt. The current law requires the personal property to be applied first towards payment of a debt charged on realty unless the will contains such an exoneration.

See section 54 regarding other aspects of the rules of abatement.

197. See Law Reform Commission of British Columbia, *Report on Obsolete Remedies Against Estate Property: Estate Administration Act, Part 9* (LRC 91) (Vancouver: The Commission, 1987); *Law Reform Amendment Act, 1988*, S.B.C. 1988, c. 42, ss. 1, 3, 8, 9.

198. *Report on Wills and Changed Circumstances*, *supra* note 42, Recommendation 5 at 57.

199. *Report on Administration of Estates of Deceased Persons*, *supra* note 73 at 189–90. Manitoba Law Reform Commission, *Wills and Succession Legislation*, *supra* note 47 at 62–63.

200. *Order of Application of Assets in Satisfaction of Debts and Liabilities*, *supra* note 75 at 41–42.

Subsections (6) and (7) deal with the temporal application of this section. The changes in the order of abatement of assets produced by subsection (3) (d) and section 54 apply when someone dies after this proposed legislation comes into force. The rest of the section is aimed at continuing the effect of Part 9 of the *Estate Administration Act*, and therefore applies in the same manner: to any case where death occurs after June 1, 1921; or to instances where death has occurred before that date, but transfer of the estate's real property to beneficiaries has not yet taken place.

Transfer of land by personal representative to beneficiary

- 150** (1) A transfer of land by a personal representative to a beneficiary may be made subject to a charge for payment of money that the personal representative is liable to pay.
- (2) On registration of a transfer under subsection (1) that is subject to a charge for the entire amount that the personal representative is liable to pay, the liability of the personal representative in respect of the land for a debt or obligation of the deceased ceases.

Source: EAA, s. 79 (2)–(3)

Comment: This section corresponds to the present section 79 (2) and (3) of the EAA. They permit a personal representative to transfer land to a beneficiary or intestate successor subject to debts of the estate. Thereafter the personal representative is not personally liable to pay those debts out of the value of the land, unless the personal representative has become personally liable to a creditor under a contract or in some other manner prior to the transfer. This would be a useful technique to employ when a devisee or intestate successor who inherits the entire estate is willing to accept a transfer of the land subject to a mortgage, rather than having the land sold to satisfy the mortgage debt and actually inheriting only the value of the equity.

The balance of section 79 is not carried forward. It mainly concerns “assents.” The traditional purpose of an assent is to signify that the personal representative does not need to apply the value of the devised land towards the payment of debts of the estate and the beneficial interest in the devised land could therefore pass to the devisee. The present section 79 allows a personal representative to convey real property by either a transfer or an assent in a form registrable under the *Land Title Act*. Inquiries to the Director of Land Titles indicate that assents are seldom if ever seen nowadays. Assents are therefore considered obsolete.

Division 9 — Official Administrator

Introductory Comment: This Division concerns the establishment and function of the office of official administrator. The official administrator acts as the “administrator of last resort” when no other potential administrator exists, or when none is capable and willing to act. In British Columbia, the Public Guardian and Trustee is the official administrator for the entire province. Formerly, official administrators were appointed for various regions and some of the language of Part 5 of the EAA continues to reflect the earlier system. This Division is a revision of the existing Part 5. A number of obsolete provisions have been deleted in order to reflect the current system regarding the office of official administrator. The authority to appoint regional official administrators and deputy official administrators has nevertheless been preserved so as to leave flexibility for the provincial government in its strategy for the delivery of official administrator services.

Appointment of official administrator

- 151** (1) The Lieutenant Governor in Council may appoint the Public Guardian and Trustee or another person to act as official administrator for all of British Columbia or for a part of British Columbia specified in the appointment.
- (2) The official administrator is a corporation sole with an official seal and having the rights, powers, duties and liabilities relating to an official administrator.
- (3) If necessary, the Lieutenant Governor in Council may by order make provision for the substitution of one official administrator for another and for consequent vesting of property and transfer of rights, liabilities, powers and duties.

Source: EAA, s. 34

Comment: This section carries forward section 34 of the EAA, with slight modification to reflect the system in effect in British Columbia since 1989, in which the Public Guardian and Trustee is designated as the sole official administrator for the province. The language in the current section 34 (1) empowering the Lieutenant Governor in Council to designate another person or entity to act as the official administrator or appoint regional official administrators has been retained in subsection (1) of this draft section, but could be omitted from an implementing bill if the provincial government considers this statutory authority is no longer necessary.

Deputy official administrators

- 152** (1) The official administrator may appoint one or more deputy official administrators and must specify the powers to be exercised and the duties to be performed by each deputy official administrator.
- (2) In an appointment under subsection (1), the official administrator may limit the area of British Columbia within which a deputy official administrator may exercise powers and perform duties to a smaller area than the area for which the official administrator is appointed.
- (3) In addition to the powers conferred under subsection (1), if there is a vacancy in the office of the official administrator, a deputy official administrator has the power to perform any act of the official administrator.
- (4) The exercise by a deputy official administrator of a power authorized under this section that the deputy purportedly exercises in accordance with this section is deemed in the absence of proof to the contrary to have been properly and validly exercised.

Source: EAA, s. 35

Comment: This section concerning the appointment of deputy official administrators and designation of their geographical jurisdictions carries forward section 35 of the EAA. Following the appoint-

ment of the Public Guardian and Trustee as the sole official administrator for the province in 1989, deputy official administrators were appointed for five regions in the province but as these appointments expired or were terminated, no new appointments were made. Currently there are no deputy official administrators.

Delegation by official administrator

- 153** The official administrator may delegate to any person a power, duty or function conferred or imposed on the official administrator by an enactment.

Source: EAA, s. 36

Comment: This section carries forward section 36 of the EAA. It is not strictly necessary, as section 23 (3) of the *Interpretation Act* states that words directing or empowering a public officer include a person acting for the public officer or appointed to act as the public officer's deputy. Some recent statutes do nevertheless contain express powers of delegation to subordinate officials.

Official administrator must provide security

- 154** Before entering on the duties of office, a person appointed as official administrator, other than the Public Guardian and Trustee, must provide security, in the amount, manner and form the Lieutenant Governor in Council directs, for
- (a) the due performance of the duties of office, and
 - (b) the due accounting for and payment of all money that comes into the person's possession or control by virtue of the office and employment.

Source: EAA, s. 37

Comment: This section carries forward section 37 of the EAA, but is modified to exempt the Public Guardian and Trustee from having to provide security on appointment as official administrator. This change is made here because the section is a carryover from the earlier system under which private persons were appointed as official administrators for a district. The section would provide authority for requiring security from private official administrators on appointment, if current policy were to change and similar appointments are made in the future.

Transfer of interest to new official administrator

- 155** (1) If the official administrator dies, resigns or is removed,
- (a) the person's successor in office, immediately on appointment and by virtue of it, becomes administrator of the estate of every deceased person that has been left unadministered by the former official administrator,
 - (b) all the estate vested in the former official administrator vests in the successor immediately on the successor's appointment to the office, and

- (c) immediately on appointment and by virtue of it, the successor becomes entitled to the possession of all books, accounts, letters, papers and documents of every description used by or in the possession or under the control of the former official administrator relating to an estate administered by the former official administrator or to the office of official administrator.
- (2) If a deputy official administrator dies, resigns or is removed,
 - (a) the official administrator immediately becomes administrator of the estate of every deceased person that has been left unadministered by the deputy official administrator,
 - (b) the estate vested in the former deputy official administrator vests in the official administrator immediately on the death, resignation or removal of the deputy official administrator, and
 - (c) the official administrator immediately becomes entitled to the possession of all books, accounts, letters, papers and documents of every description used by or in the possession or under the control of the deputy official administrator relating to an estate administered by the deputy or to the office of deputy official administrator.

Source: EAA, s. 38 (1)–(2)

Comment: This section carries forward section 38 (1) and (2) of the EAA. The wording of these provisions has been modified slightly to eliminate plural references to official administrators and deputy official administrators, as this no longer reflects the current reality in British Columbia. (See the Introductory Comment and the commentaries to sections 151 and 152.) Section 38 (3) of the EAA has not been carried forward because it is considered redundant in light of the statutory duties imposed by subsections (1) and (2).

Application by official administrator to administer estate

- 156** (1) This section applies if an official administrator receives information of the death of a person who
- (a) had at the time of death a fixed place of residence in British Columbia, or
 - (b) had no fixed place of residence in British Columbia, but had property in British Columbia at the time of death.
- (2) In the circumstances referred to in subsection (1), the official administrator may make an application to the court for a grant of administration of the estate of the deceased if
- (a) the person died intestate as to the whole or a portion of the person's estate, or

- (b) the person died leaving a will, but without having appointed an executor willing and able to apply for a grant of probate, or whose whereabouts are known.
- (3) A grant of administration must not be made
 - (a) except on affidavits of the same nature, as nearly as possible, as those required for a grant of letters of administration in other cases, and
 - (b) unless the court is satisfied that
 - (i) no grant of administration of the estate has been issued in British Columbia, and
 - (ii) no person in British Columbia is entitled to share in the distribution of the estate of the deceased and ready and competent to take out letters of administration.

Source: EAA, s. 40

Comment: This carries forward section 40 of the EAA with some modifications in wording to reflect the current system having a single official administrator for the province. Section 40 (2) (b), which authorized the official administrator to apply for administration if the executor named by the deceased in a will was not resident in British Columbia, has not been carried forward. The Estate Administration Subcommittee considered it archaic, in light of modern mobility and communications, to preserve an executor's non-resident status as a ground for pre-emption of the executor's role by a public authority.

Court must not make order

- 157** If the official administrator does not make an application under section 156 (2) [*application by official administrator to administer estate*], the court must not make an order appointing the official administrator as administrator of the estate, except with the prior written consent of the official administrator.

Source: EAA, s. 41.1

Comment: This section carries forward section 41.1 of the EAA. Section 41.1 was added in 2003 to require the official administrator's consent to appointment as the administrator of a particular estate.²⁰¹

Powers of official administrator

- 158** If administration of an estate is granted to the official administrator, the official administrator
- (a) is the administrator of the estate of the deceased in British Columbia,

201. S.B.C. 2003, c. 37, s. 14.

- (b) subject to this Act, has the rights, duties and liabilities of an administrator with regard to the estate of the deceased.

Source: EAA, s. 42 (1)

Comment: This section corresponds to section 42 (1) of the EAA. The content of section 42 (2) and (3) of the EAA, which confers specific administrative powers on the official administrator, is subsumed in sections 125 and 127.

Payment of probate fees and other charges

- 159** An estate dealt with by a grant of administration to an official administrator is subject to the payment of fees under the *Probate Fee Act* and other fees and charges payable in respect of a proceeding to obtain a grant of probate or administration.

Source: EAA, s. 43

Comment: This carries forward section 43 of the EAA, with its wording modernized to refer to probate fees rather than “duties . . . payable in respect of probates of wills and letters of administration. . . .”

Powers exercisable before grant of administration

- 160** (1) If, after investigation as the official administrator considers necessary, the official administrator
- (a) believes that a person has died, and
 - (b) the official administrator intends to bring an application for a grant of administration of the estate of the deceased person under section 156 [*application by official administrator to administer estate*] or file a small estate declaration under Division 10 [*summary administration of small estates*],

the official administrator may, before or after making the application or filing the small estate declaration and prior to the issuance of the grant

- (c) arrange the funeral of the deceased person,
- (d) make an inventory of the deceased person’s estate,
- (e) take possession of, safeguard and dispose of the estate of the deceased person,

as if a grant of administration of the deceased person’s estate had been issued to the official administrator.

- (2) When acting under this section, the official administrator has a right to all information and documents to which the deceased person or the deceased

person's personal representative would be entitled, and a person who has custody or control of any such information or documents must, at the official administrator's request, disclose that information or produce those documents to the official administrator.

- (3) A letter signed by an authorized signatory of the official administrator indicating that the official administrator is acting under this section is conclusive proof of the official administrator's authority to exercise the rights and powers conferred by this section.
- (4) The official administrator or an agent, attorney, employee or other person acting on behalf of the official administrator is not personally liable as an executor *de son tort* by reason of exercising the powers conferred by subsection (1).
- (5) This section does not relieve the official administrator from
 - (a) applying for a grant of administration under section 156 [*application by official administrator to administer estate*], or
 - (b) filing a small estate declaration under Division 10 [*summary administration of small estates*].

Sources: subs. (1): EAA, s. 51 (1); subs. (2)-(4): original

Comment: This section corresponds to section 51 of the EAA. Subsections (2) and (3) are new and are intended to make it clear that when acting under this section on an interim basis pending issuance of a grant or filing of a small estate declaration, the official administrator has the same authority as an administrator acting pursuant to a grant would have.

It is recommended that amendments be made to the *Personal Information Protection Act Regulation*²⁰² and the federal *Personal Information Protection and Electronic Documents Act*²⁰³ to enable provisions similar to subsections (2) and (3) to be extended to private applicants for grants of administration requesting information concerning the estates of deceased persons through a solicitor. See the commentary to section 106.

Subsection (4) is also new. It relieves the official administrator from personal liability that could arise as a result of the common law doctrine of executorship *de son tort*. When someone commits an act amounting to "intermeddling" in an estate, such as by taking possession of or dealing in some manner with the assets, holding oneself out as having authority to carry out the tasks of a personal representative, or even demanding or receiving payment of a debt owed to the deceased, that person acquires the liabilities of a personal representative and is known as an executor *de son tort*. While this principle is unobjectionable in the case of an officious intermeddler who usurps the authority of the lawful personal representative or a person with a financial interest in the administration of the estate who chooses to become involved in it before taking out a grant, it would be unjust

202. *Supra* note 163.

203. *Supra* note 165.

for personal liability to attach merely because of an authorized exercise of statutory powers by the administrator of last resort.

Subsection (5) is self-explanatory.

Probate or administration despite previous grant

- 161** (1) A grant of administration to the official administrator does not prevent the court from subsequently granting probate of the will or administration to any person entitled to it, subject to limitations or conditions as the court thinks proper.
- (2) An application for a grant of probate or administration made after a grant of administration to the official administrator must be made on not less than 4 clear days' notice in writing to the official administrator of the applicant's intention to apply for the grant.
- (3) If a subsequent grant is made under subsection (1), the rights, interests, powers and duties of the official administrator in regard to the estate cease and the portion of the estate of the deceased person left unadministered by the official administrator vests in the executor or administrator obtaining the subsequent grant of probate or administration, subject to
- (a) a limitation or condition in the subsequent grant,
 - (b) the allowance and payment of all money due for
 - (i) the fees and commissions of the official administrator, and
 - (ii) the necessary outlay, disbursements, costs, charges and expenses in relation to the estate, including all costs relating to the initial and subsequent applications for probate or administration.

Source: EAA, s. 53

Comment: This section corresponds to section 53 of the EAA, which allows a grant of administration to the official administrator to be supplanted by a subsequent grant to a private person entitled to obtain it. The wording has been revised slightly for stylistic reasons and the existing section 53 (3) and (4) have been combined in subsection (3) of this draft section.

Official administrator's compensation

- 162** An official administrator is entitled to compensation in the form of a commission according to a scale fixed by regulation of the Lieutenant Governor in Council, in addition to any other allowance for expenses actually incurred for which an administrator is entitled to reimbursement.

Source: EAA, s. 54 (1)

Comment: This section corresponds to section 54 (1) of the EAA. The present section 54(1) does not make reference to the scale on which the OA's commission is based being set by regulation, but that is the current practice. See the *Public Guardian and Trustee Fees Regulation*.²⁰⁴

Division 10 — Summary Administration of Small Estates

Introductory Comment: This Division provides a special summary procedure for the administration of small estates that would replace section 20 of the EAA. There is general agreement that the value ceiling for administration under section 20, currently set at \$25,000, is too low and that regular probate procedure is still too costly in estates that are considerably larger. In addition, there are no differences between regular probate procedure and that under section 20 except that a filing fee is not charged and letters of administration are issued by the registrar rather than by the order of a judge. The same amount of documentation and formality is required.

The summary procedure under this Division would apply to estates with a gross value below a ceiling fixed by regulation, and that consist only of personal property. It is recommended that this ceiling be set initially at \$50,000 and reviewed periodically. The procedure would not involve issuance of a grant of administration. It depends instead on a statutory declaration ("small estate declaration") that is simply filed in the probate registry by the declarant. The declarant could be a legal personal representative or a person with a right to inherit part of the estate under a will or the law of intestacy. The court-stamped copy of the declaration would serve the same purpose as a grant. Third parties releasing property and financial information or making payments to the declarant on the strength of a small estate declaration would be released statutorily from liability for doing so to the same extent as if the declarant had been granted probate or administration.

The summary procedure resembles the "affidavit collection" procedure available in most U.S. states and a similar procedure available to the Public Trustee or equivalent official in some Canadian provinces whereby the Public Trustee files a written election to administer a small estate without grant. Here the procedure would be available to both private individuals willing to take on the responsibilities of a declarant, and to the Public Guardian and Trustee acting as the official administrator. The procedure is confined to estates that consist exclusively of personal property, however, because a grant of probate or administration is required under the *Land Title Act*²⁰⁵ to register a transmission of the title to land or a land charge and transfer it out of the estate. While a relaxation of this requirement may be desirable in the case of small estates because of the cost of obtaining probate simply to transfer a real property asset, changes to the *Land Title Act* are beyond the scope of the Succession Law Reform Project.

Once a small estate is in summary administration, a normal grant would not issue unless the declarant's authority to administer the estate was terminated by order. A normal grant could then issue, or another small estate declaration could be filed. An order terminating a declarant's authority to administer a small estate would also be a necessary step if someone were to seek proof in solemn form of a will after the summary administration had begun. If assets were discovered after the filing of a small estate declaration that show the estate does not qualify for summary administra-

204. B.C. Reg. 312/2000.

205. *Supra* note 192, ss. 265; 266 (1), (4)–(5).

tion because it is too large or includes real property, however, the declarant's authority would automatically terminate except for taking steps necessary to preserve assets and a regular grant of probate or administration would have to be obtained.

The recommendations on small estates emerging from this Project were published earlier in the *Interim Report on Summary Administration of Small Estates*²⁰⁶ as they were designed for immediate implementation as an amendment to the existing EAA. The summary administration procedure and implementing legislation proposed in that report are identical to this Division except for section numbering and minor wording variations reflecting the fact that what appears below would form part of a new Act, rather than amendments to an existing one.

Definitions

163 In this Division:

“**declaration**” means a statutory declaration under section 165 [*who may file a declaration*];

“**file**” with reference to a declaration, means filing a completed declaration in a registry of the Supreme Court;

“**land**” does not include a manufactured home situated on land not owned by the owner of the manufactured home unless an agreement that the manufactured home is part of the land has been filed in accordance with section 23 (2) [*manufactured home on rented pad*] of the *Manufactured Home Act*.

Source: original

Comment: The definitions are self-explanatory.

Application of Division

- 164** (1) This Division applies where the estate of a deceased person has a gross value at the date of death of that person that is not more than an amount prescribed by regulation.
- (2) This Division does not apply
- (a) to an estate that includes land, or
 - (b) if the address or whereabouts of a person described in sections 169 (1) or (2) [*notice to beneficiaries and family of deceased*] are unknown, unless the declarant is the official administrator.

206. British Columbia Law Institute, *Interim Report on Summary Administration of Small Estates* (BCLI Rep. No. 40) (Vancouver: The Institute, 2005).

Source: original

Comment: Subsection (1) indicates that this Division applies only if the gross value of an estate is not more than an amount prescribed by regulation. The Small Estates Subcommittee recommends that this limit be set initially at \$50,000 and increased later if appropriate. The value of a small estate in which the assets typically consist of an automobile and a modest bank account would currently approximate this amount.

Subsection (2) (a) excludes estates comprising land from the scope of this Division. The reason for this exclusion is that the summary administration procedure for small estates does not call for the issuance of a grant of probate or administration. A grant is necessary in order to transfer the title to land (or a registrable interest in land, such as a mortgage or other charge) into the name of a personal representative so that it can then be transferred to a beneficiary or a purchaser. (See sections 265, 266 (1), (4), (5) of the *Land Title Act*.) The level of land values in British Columbia is such that in most cases, however, an estate that held some land would be larger in value than the limit referred to in subsection (1) and so could not be administered under this Division in any event.

Subsection (2) (b) indicates that this Division does not apply if the address or whereabouts of a person who is entitled under section 169 (1) or (2) to receive notice of the intended filing of a declaration are unknown. In such a case it would be necessary to apply for probate or administration in the regular manner and seek an order from the registrar under section 109 (10) dispensing with or varying the notice requirements in light of the circumstances. This exclusion from the scope of the Division does not apply if the declarant is the official administrator, because section 169 (5) exempts the official administrator from the requirement to give notice before filing a declaration.

Who may file a declaration

- 165** (1) If a deceased person has died leaving a will,
- (a) an executor, or
 - (b) if each executor and alternate executor has either renounced or is dead or is mentally incapable
 - (i) a beneficiary under the will,
 - (ii) any other person having the written consent of all persons entitled to a share of the estate, or
 - (iii) the official administrator
- may file a declaration in accordance with this Division.
- (2) If a deceased person has died without leaving a will,
- (a) a spouse of the deceased person,

- (b) a person entitled to a share of the estate under Part 2 [*intestate succession*],
- (c) any other person having the written consent of all persons entitled to a share of the estate under Part 2 [*intestate succession*], or
- (d) the official administrator

may file a declaration in accordance with this Division.

- (3) The official administrator is not required to obtain or file the consent of any person when filing a declaration under this Division.

Source: original

Comment: Section 165 (1) deals with who may be a declarant if the deceased left a will. Normally the declarant(s) should be the executor(s) named in a will. Not only is an executor chosen by the deceased, but an executor's authority arises legally from the will itself, which comes into effect on the testator's death. A grant of probate or a filed, court-stamped declaration under this Division only serves as the public confirmation and evidence of that authority. They are not strictly necessary for the exercise of the executor's powers. Thus, only if every named executor and named alternate has predeceased the testator, renounced the executorship, or is legally disabled from acting by reason of mental incapacity should another person acquire the ability to administer the estate. If those circumstances exist, paragraph (b) of section 165 (1) states that a beneficiary under the will may file a declaration. Alternatively, someone who does not take under the will may be the declarant if that person has the written consent of all persons entitled to a share of the estate. (In a partial intestacy, i.e. where a will does not dispose of all the testator's property, the persons entitled to a share of the intestate portion of the estate as well as the beneficiaries under the will would have to consent to a non-beneficiary acting as the declarant.)

The official administrator may also be the declarant in order to be able to act as an "administrator of last resort."

Subsection (2) states who may be a declarant in intestacies (cases where no will was left.) These are the deceased's spouse, a person entitled to share in the distribution of the estate, or someone having the written consent of all persons entitled to share in the distribution. Again, the official administrator is another potential declarant in order to ensure that someone may administer an estate even if the deceased died without a spouse or any relative ready and willing to act. The official administrator is not restricted to acting only in those circumstances, however.

Subsection (3) makes it clear that the official administrator may act as a declarant without first having to obtain the consent of any person, including any relatives of the deceased. It corresponds to the present section 20 (3.1) of the EAA, which relieves the official administrator of a need to prove that there are no relatives of the deceased ready and willing to act before the official administrator may administer the estate.

When declaration may be filed

166 If no

- (a) unrevoked grant of probate or administration of the estate of a deceased person has been issued in British Columbia,
- (b) application is pending in British Columbia for a grant of probate or administration of the estate,
- (c) declaration has been filed in respect of the estate, and
- (d) caveat opposing the issuance of a grant of probate or administration of the estate is in effect,

a person described in section 165 (1) or (2) [*who may file a declaration*] may file a declaration in a registry of the Supreme Court not less than 21 days after the date of death of the deceased person and not less than 10 days after notice is given in accordance with section 169 [*notice to beneficiaries and family of deceased*].

Source: original

Comment: Section 166 prescribes a waiting period of 21 days following death before a declaration may be filed. This is to allow an opportunity for someone to apply for probate or a grant of administration in the regular manner, or to file a caveat under Rule 61 of the Rules of Court against the issuance of a grant. If an application for grant is pending at the end of the 21-day period, no declaration may be filed. If a previous declaration has already been filed, section 166 prevents the filing of a second one because the first one would have conferred exclusive authority to administer the estate.

In addition to requiring that 21 days elapse between the date of death and the filing of a declaration, section 166 also requires that a declarant other than the official administrator must wait at least 10 days after giving the notice required by sections 169 (1) or (2) before filing.

Form of declaration

- #### 167
- (1) A declaration must be completed in the form prescribed by regulation.
 - (2) A regulation referred to in subsection (1) may prescribe different forms of declaration for use when a person dies leaving a will and when a person dies intestate.
 - (3) Two or more declarants may file a single declaration together.

Source: original

Comment: Self-explanatory.

Documents to accompany a declaration

168 The following must accompany the declaration as exhibits to it:

- (a) the original will of the deceased person, if any;
- (b) a legible photocopy of a death certificate for the deceased person;
- (c) a certificate issued under section 66 (3) (a) [*search of records*] stating the results of a search for a notice filed under that section in respect of a will of the deceased person;
- (d) if any executor or alternate executor who would have been entitled to a grant of probate in priority to the declarant has renounced probate, the original renunciation of that executor or alternate executor;
- (e) if the declarant is a person described in sections 165 (1) (b) (ii) or (2) (c) [*who may file a declaration*], every written consent required by those sections.

Source: original

Comment: This section lists the exhibits that must accompany a declaration. If there is a will, the original will must be filed with the declaration, as in a regular application for probate. While the summary administration procedure under this Division does not involve a court order confirming its validity as in probate, the requirement to file the will deters misappropriation and fraudulent concealment of testamentary dispositions.

A photocopy of a death certificate is not required as part of a regular application for grant. The section nevertheless requires it to be attached to a declaration because the summary administration procedure does not involve the making of any order by the court attesting to the fact of death and the personal representative's authority. When the release of assets in the control of a third party is sought without a grant having been obtained, the third party will insist on proof of death and production of a will, at a minimum. The search result and photocopy of a death certificate attached to a copy of a filed declaration will aid the declarant in securing the release or delivery of estate assets by third parties.

Renunciations of executors (if any) and consents to a person without an interest in the estate acting as a declarant are required in order to establish the declarant's right to file the declaration in the circumstances described in section 165 (1) (b) (ii) or (2) (c).

Notice to beneficiaries and family of deceased

- 169** (1) If a deceased person has left a will, at least 10 days before filing a declaration a declarant must mail a copy of the completed declaration to, or leave a copy with,
- (a) each beneficiary under the will other than the declarant, and
 - (b) a person who is an eligible claimant under Part 5 [*dependants relief*].
- (2) If a deceased person has left no will, at least 10 days before filing a declaration a declarant must mail a copy of the completed declaration to, or leave a copy with
- (a) the spouse of the deceased person, unless the declarant is the spouse and there is no other person who is a spouse of the deceased within the meaning of this Act, and
 - (b) any person other than a spouse who is entitled to a share of the estate of the deceased person under Part 2 [*intestate succession*].
- (3) If a person entitled under this section to receive a copy of a declaration is a minor or has been found by the court to be incapable of managing the person's affairs, a declarant must deliver the copy to
- (a) the Public Guardian and Trustee, and
 - (b) if the minor or mentally incapable person has
 - (i) in the case of a minor, a parent or a guardian of the minor's estate,
 - (ii) a statutory property guardian or property guardian under the *Adult Guardianship Act*
- to the parent, guardian, statutory property guardian or property guardian, as the case may be.
- (4) If the declarant believes that a person entitled under this section to receive a copy of the declaration is mentally incapable but to the best of the declarant's knowledge has not been found by the court to be incapable of managing the person's affairs, the declarant must deliver a copy of the small estate declaration to the person in addition to the Public Guardian and Trustee.
- (5) This section does not apply if the declarant is the official administrator, except in relation to a person described in paragraph (1) (b).

Source: original

Comment: Section 169 (1) applies where the deceased left a will. It imposes a duty on a declarant to give 10 days' notice of the declarant's intention to file a declaration and thereby invoke the summary administration procedure. Notice is given by providing a copy of a completed but unfiled declaration to the persons described in paragraphs (a) and (b) of section 169 (1) by mail or by leaving a copy with each of them. The purpose of the notice is to make persons having an interest in the estate aware of who is intending to administer the estate and that the summary procedure will be used instead of seeking a grant in the regular manner.

Subsection (2) describes who is to receive the 10 days' notice of intended filing of a declaration where the deceased died without a will. If the declarant is the spouse of the deceased, there is no requirement for notice because a spouse is considered to have a pre-eminent right to administer an intestate estate. There could be more than one person who comes within the definition of "spouse," however. For example, the deceased could have been legally married but separated for a lengthy period at the time of death and also have another, non-marital ("common law") spouse as defined in this Act. Each has an equal right under both the regular procedure for obtaining a grant of administration and the summary procedure under this Division to have authority to administer the estate conferred on him or her. In such a case the exception to the notice requirement in the case of spouses does not apply and a spouse intending to file a declaration must provide a copy of the completed, unfiled declaration to the other spouse.

Under the regular procedure for obtaining a grant of probate or administration, the Public Guardian and Trustee must receive a copy of all material filed in an application for grant if a minor or mentally incapable adult has an interest in the estate. (See section 109 (5) and (7).) Section 169 (3) imposes a requirement under the summary administration procedure to deliver a copy of the declaration to the Public Guardian and Trustee so that the Public Guardian and Trustee may carry out the statutory responsibility to protect the interests of minors and mentally incapable persons. Another person who may be responsible for managing the affairs of a minor or a mentally incapable person, such as a parent or guardian in the case of a minor, or a property guardian or statutory property guardian in the case of a mentally incapable adult, must receive a copy of the declaration as well. These requirements correspond to those in section 109 (5) and (7) relating to regular probate procedure.

If the declarant merely believes a person entitled to receive a copy of the declaration is mentally incapable, but there has been no official finding of incapacity, subsection (4) requires a copy of the declaration to be given to that person in addition to the Public Guardian and Trustee. This obligation also has a counterpart in regular probate procedure under section 109 (7).

Section 109 (14) exempts the official administrator from giving notice of an application for probate or administration, except to persons who would be eligible claimants under the dependants relief provisions so that they or their legal guardians will know when the time for asserting their rights under those provisions starts to run against them. Subsection (5) of this section confers a similar exemption under the summary administration procedure.

Effect of filing declaration

170 Upon filing a declaration in a registry, a declarant has

- (a) the same authority and powers, and
- (b) the same duty

to administer the estate of the deceased person to whom the declaration relates according to law as if the declarant had been an executor to whom probate of the will had been granted or in the case of intestacy as if appointed the administrator of the estate of the deceased person by order of the court.

Source: original

Comment: Filing a declaration confers on a declarant the powers and duties of a personal representative who has taken out a grant.

Declarant not required to furnish security

171 A declarant is not required to furnish security.

Source: original

Comment: In certain circumstances, an administrator may be required to provide security under the regular estate administration procedure. (See section 114.) Section 171 removes all requirements for any form of security when an estate is administered summarily under this Division because the cost of arranging security, such as a bond or guarantee issued by a fidelity insurance or guarantee company, would be borne ultimately by the estate. This renders it impractical to insist on security in the administration of a small estate.

Supplementary declaration

- 172** (1) Subject to subsection (2) and to section 173 [*division found inapplicable after filing of declaration*], if after filing a declaration a declarant becomes aware that the declaration is inaccurate or deficient, the declarant must file a supplementary declaration in the prescribed form, correcting the error or deficiency.
- (2) It is unnecessary to file a supplementary declaration only to list an additional asset if the asset had a value of less than \$1 000 at the date of death and the declarant was not aware of the asset when the declarant filed the initial declaration.

Source: original

Comment: A supplementary declaration is required by section 172 (1) if the information in the original declaration is inaccurate or deficient in some other manner, except in the circumstances addressed by subsection (2) of this section and section 173. Subsection (2) indicates a supplemen-

tary declaration is not needed if the only deficiency is the failure to list an asset less than \$1,000 in value if the declarant did not know of it at the time the first declaration was filed. The notice requirement under section 172 (1) or (2) does not apply to the filing of a supplementary declaration.

Division found inapplicable after filing of declaration

- 173** (1) The authority of the declarant to administer the estate terminates except for the purpose of preserving assets until a grant of probate or administration is made if, after the declarant has filed a declaration relating to that estate,
- (a) land is found to belong to an estate,
 - (b) assets are discovered to belong to the estate and their value when combined with the value of the assets disclosed in the declaration results in a gross value for the estate greater than the prescribed amount referred to in section 172 (1) *[supplementary declaration]*,
 - (c) the fair market value of the assets disclosed in the declaration is found to have been greater at the time of death than the prescribed amount referred to in section 172 (1) *[supplementary declaration]*,
- unless the court otherwise orders.
- (2) Without limiting subsection (1), the court may, on application by a person with an interest in the proper administration of the estate, including the declarant, terminate the authority of a declarant if the court is satisfied that the declarant should not continue to administer the estate.
- (3) Nothing in this section affects the validity of anything done in good faith by a declarant in relation to the administration of an estate before
- (a) the declarant became or ought to have become aware of facts referred to in paragraphs (1) (a) to (c), or
 - (b) the authority of the declarant is terminated by the court.

Source: original

Comment: Section 173 (1) addresses what happens if facts come to light after a declaration has been filed showing that the estate does not qualify for summary administration under this Division. For example, land might be discovered to belong to the estate. The deceased may have secretly severed a joint tenancy during his or her lifetime, so that the deceased's interest in the land belongs to the deceased's estate instead of automatically vesting in the land by right of survivorship. Another reason the estate might not qualify is that the value of the assets listed in the declaration may have been underestimated. Where it is discovered at any time after the declaration is filed that this Division does not actually apply to the estate, the declarant must cease acting on the basis of the

declaration, except for taking steps needed to preserve assets from loss or deterioration. A grant of probate or administration would then have to be obtained in the regular manner.

Subsection (2) empowers the court to terminate the authority of a declarant to administer the estate. While termination of a declarant's authority under subsection (1) takes place automatically because of the discovery of facts showing the estate does not qualify for summary administration, termination of authority under subsection (2) requires an application to the court and takes place only if the court is persuaded that the declarant should not continue in that role. If a declarant's authority is terminated under subsection (2), summary administration could continue under a fresh declaration completed by another person qualified under section 165 (1) or (2), or under a grant of probate or administration obtained under the regular probate procedure.

Grounds that would justify termination of a declarant's authority would be essentially the same ones on which a court will remove a personal representative. Under present law these are generally dishonesty, conduct endangering the estate, acting without proper care or without reasonable fidelity: *Conroy v. Stokes*;²⁰⁷ *Weinstein v. Weinstein*;²⁰⁸ *Erlichman v. Erlichman Estate*.²⁰⁹ Mental incapacity would presumably be another valid reason. In order to give the court sufficient discretion to respond to the circumstances of particular cases, however, subsection (2) does not restrict the grounds on which the court may act.

Anyone with an interest in the proper administration of the estate may apply to have the declarant's authority terminated. While the typical applicant would be a beneficiary or intestate successor of the deceased, the class of persons concerned to see the estate administered properly is not necessarily restricted to those having a beneficial interest under a will or intestacy. Potential applicants could include a creditor, or the Public Guardian and Trustee acting to protect a minor or mentally incapable adult with a beneficial interest. Subsection (2) also permits the declarant to apply to be relieved of the duties attaching to the role, because there may be a legitimate reason, such as illness, to relinquish it.

Subsection (3) confirms that steps taken by a declarant while acting under the belief that this Division applies to an estate before it becomes or ought to become evident to the declarant that the estate does not qualify for summary administration, or before the declarant's authority is terminated by the court under subsection (2), are not invalidated because of the subsequent termination of the declarant's authority.

Accounts

- 174** (1) A declarant must
- (a) keep a written account of all receipts and disbursements relating to the administration of the estate, and

207. *Supra* note 189.

208. *Ibid.*

209. *Ibid.*

- (b) on the request of a beneficiary or a person entitled under Part 2 [*intestate succession*] to a share of the estate, disclose the account mentioned in paragraph (a) to that person.
- (2) If a declarant fails to comply with paragraph (1) (b) a beneficiary or a person entitled under Part 2 [*intestate succession*] to a share of the estate may apply under the *Trustee Act* for an order requiring the declarant to pass accounts.

Source: original

Comment: Section 174 (1) imposes very basic accounting responsibilities on a declarant. The declarant is required merely to keep a record of receipts and disbursements and show the record on request to a person who is entitled to share in the eventual distribution of the estates.

If the declarant does not comply with the relaxed accounting and disclosure requirements of subsection (1), the remedy of those interested beneficially in the estate would be to apply for an order under the existing or proposed *Trustee Act* requiring the declarant to formally pass accounts before the court, as an executor, administrator, or trustee may be compelled to do.

Remuneration

- 175** A declarant is entitled to compensation under the *Trustee Act* as if the declarant were an executor or administrator.

Source: original

Comment: Sections 88–90 of the present *Trustee Act* provide for the remuneration of personal representatives from the estate in the form of an allowance out of the estate. This right is continued under Part IX of the proposed *Trustee Act*, which terms the allowance “compensation.” Section 175 extends this right to declarants under the small estate summary administration procedure.

Third persons dealing with declarant released from liability

- 176** Anyone who pays, transfers, delivers, releases to or otherwise provides any asset or documents or information concerning the assets of a deceased person to a declarant who has filed a declaration is discharged and released from any liability for loss or damage of any kind to any person that may result to the same extent as if the declarant were an executor who had been granted probate or an administrator appointed by the court.

Source: original

Comment: Section 176 is a key provision discharging third parties who deal with a declarant from liability if they rely on proof of the filing of a declaration (e.g. a court-stamped photocopy) in turning

over to the declarant assets of the deceased person to whose estate the declaration relates. The section allows third parties such as financial institutions to deal with the declarant exactly as if the declarant had taken out a grant of probate or administration, without fear of liability to anyone for doing so.

Offence by declarant

177 A declarant who

- (a) intentionally files a false declaration,
- (b) files a declaration for an improper purpose, or
- (c) conceals, converts or otherwise misappropriates property belonging to the estate,

commits an offence and is liable to a fine of not more than \$10 000 or to imprisonment for 12 months, or to both.

Source: original

Comment: This section concerns offences by declarants. It provides penalties for various forms of misfeasance and misuse of the summary administration procedure that are more severe than the general penalty under the *Offence Act*,²¹⁰ lest the informal nature of the procedure have unwanted effects. The ease with which a declaration may be filed, the lack of need for close scrutiny by the court registry to determine the suitability of the declarant to serve, and the extensive powers that the filing confers on the declarant could facilitate fraud, concealment and misappropriation unless these abuses are effectively deterred by strong sanctions.

Other remedies preserved

178 Nothing in sections 176 [*third persons dealing with declarant released from liability*] or 177 [*offence by declarant*] detracts from any civil or other remedy at law which a declarant may have against another person or which another person may have against a declarant.

Source: original

Comment: Self-explanatory.

Division 11 — Insolvent Estates

Introductory Comment: This Division corresponds to Part 11 of the EAA. It directs how estates that are insufficient in size to meet all the debts and liabilities of the deceased are to be adminis-

210. R.S.B.C. 1996, c. 338.

tered, provided the estate is not placed in bankruptcy. If a bankruptcy order is made in relation to the estate, the *Bankruptcy and Insolvency Act*²¹¹ supersedes the provisions of this Division.

Part 11 of the EAA was originally passed at a time when Canada did not have bankruptcy legislation.²¹² While the constitutionality of provincial legislation relating to insolvent estates of deceased persons is not in serious doubt, particularly if it coincides substantially with the scheme of priorities under the BIA,²¹³ there is in some question as to whether the BIA renders it superfluous. Repeal of Part 11 was considered in the course of the Succession Law Reform Project on this ground. Views were expressed that Part 11 provides a practical and inexpensive alternative to bankruptcy, however. As a bankruptcy order or assignment is unlikely to materialize if the estate is small in relation to the volume of claims, personal representatives and those advising them benefit from statutory guidance as to the procedure for administering an insolvent estate. A decision was therefore made to retain insolvent estate provisions in the draft reform legislation.

Some provisions of Part 11 of the EAA have not been carried forward, because they were either rendered superfluous through redrafting and consolidation of several sections, were superfluous to begin with, or like section 105 of the EAA, have been superseded by later legislation. Section 105 prohibits the creation of a lien or privilege for a judgment debt by delivery of a writ or process of execution to a sheriff if the process is executed after the death of the deceased. Section 46 of the *Creditor Assistance Act*,²¹⁴ which abolishes priority among execution creditors, renders moot any question of a lien or privilege arising from delivery of execution process to the sheriff. It is therefore unnecessary to have a counterpart to section 105 of the EAA.²¹⁵

Much of Part 11 of the EAA is preserved here nevertheless as an interim solution, as two sources of potential change in the law affecting insolvent estates are currently on the horizon. Their status and form are in flux at the time of publication of this Report. The first consists of the substantial but unproclaimed amendments to the BIA contained in the *Wage Earner Protection Program Act*.²¹⁶ According to the best available information, Bill C-55 will not come into force imminently and it is possible that the amending provisions may themselves be amended prior to proclamation. A decision was therefore taken to orient this Division towards the current BIA. This Division carries forward the historic pattern whereby the insolvent estate provisions closely reflect the priority scheme under federal bankruptcy legislation, bringing monetary amounts and other features of the provisions into harmony with section 136 of the BIA as it now stands.

211. R.S.C. 1985, c. B-3 [BIA].

212. Part 11 was originally enacted as R.S.B.C. 1897, c. 102, ss. 2–7.

213. See Peter W. Hogg, *Constitutional Law of Canada*; student ed. (Toronto: Thomson Carswell, 2005) at 436.

214. R.S.B.C. 1996, c. 83.

215. The repeal of s. 105 of the EAA was also urged in British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act*, *supra* note 120.

216. S.C. 2005, c. 47 [Bill C-55].

The second source of potential change is possible provincial implementation of the *Uniform Civil Enforcement of Money Judgments Act*. This legislation would introduce a new regime for judgment enforcement that allows a judgment creditor to file a notice of judgment in the Personal Property Registry, thereby causing an enforcement charge to come into being and giving the judgment creditor the status of a secured creditor. This scheme would alter substantially the traditional manner of dealing with unsatisfied judgments in the administration of an insolvent estate in Canadian common law jurisdictions, which does not recognize any priority for or among judgment creditors. If judgment enforcement legislation modelled on the *Uniform Civil Enforcement of Money Judgments Act* is passed in the future, consequential amendments to this Division may be needed to harmonize it with the new priority structure.

Generally speaking, unsecured creditors of an insolvent estate are paid rateably without priority under both the existing Part 11 and this Division, except for certain preferred claims. Preferred claims are described in section 180 in order of priority. The list of preferred claims found there corresponds fairly closely to that in section 136 of the BIA, except for certain categories of claims that are peculiar to the bankruptcy procedure and the priority accorded to payment of funeral, administration expenses and legal expenses incurred by the personal representative.

Definitions

179 In this Division:

“**insolvent estate**” means an estate that is insufficient for payment in full of all debts and liabilities of the deceased;

“**secured creditor**” means a creditor who holds a security interest in an asset of the estate.

Source: EAA, s. 100

Comment: Self-explanatory.

Insolvent estates

180 (1) Subject to the rights of secured creditors, a personal representative must apply the proceeds realized from an insolvent estate as follows, in order of priority:

- (a) reasonable funeral and other expenses incurred by the personal representative in administering the estate;
- (b) compensation of the personal representative under Part IX [*trustee compensation and accounts*] of the [*proposed*] *Trustee Act*, including professional fees chargeable under section 61 (4) [*compensation of trustees*] of the *Trustee Act* if applicable;
- (c) legal expenses;

- (d) wages, salaries, commissions or compensation of any clerk, servant, travelling salesperson, labourer or worker for services provided during the six months immediately preceding the death of the deceased to the extent of \$2 000 in each case, and in the case of a travelling salesperson, disbursements properly incurred by the salesperson in and about the deceased's business to the extent of an additional \$1 000 in each case, during the same period;
- (e) a claim in respect of a debt or liability for periodic amounts accrued in the year before the date of death, plus any lump sum amount, payable
 - (i) for alimony or an alimentary pension, or
 - (ii) under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child, made while the spouse, former spouse, former common-law partner or child was living apart from the deceased;
- (f) municipal taxes assessed or levied against the deceased within the 2 years immediately preceding death that do not constitute a secured claim against the land of the deceased, not exceeding the value of the interest of the deceased in the property as declared by the personal representative;
- (g) the landlord for arrears of rent for a period of 3 months immediately preceding the date of death, and accelerated rent for a period not exceeding 3 months following death if the lease provides for accelerated rent, not exceeding the value of the proceeds from the realization of property on the leased premises, and any payment on account of accelerated rent must be credited against the amount payable by the personal representative for occupation rent;
- (h) all indebtedness of the deceased under any *Workers Compensation Act*, under any Act respecting unemployment insurance or under a provision of any *Income Tax Act* (Canada) creating an obligation to pay to the government or to the government of Canada amounts that have been deducted or withheld, rateably and without preference;
- (i) claims resulting from injuries to employees of the deceased in respect of which the provisions of any *Workers Compensation Act* do not apply, but only to the extent of money received from persons guaranteeing the deceased against damages resulting from the injuries;

- (j) claims, not previously mentioned in this subsection, of the government of Canada or a province, rateably and without preference despite a statutory preference to the contrary;
 - (k) all other claims accepted by the personal representative, rateably and without preference.
- (3) A personal representative must apply the proceeds of an insolvent estate towards payment in accordance with subsection (2) as soon as funds are available for the purpose.
 - (4) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for the balance of the creditor's claim.
 - (5) For the purpose of paragraph (1) (d), commissions payable when goods are shipped, delivered or paid for within the 6 months referred to in that paragraph are deemed to have been earned during that period.

Source: EAA, s. 101

Comment: This section corresponds to section 101 of the EAA. Paragraphs 101 (1) (a) and (b) of the EAA have been revised to eliminate overlap and the confusing and unwarranted distinction they appear to make between “testamentary expenses incurred by the legal personal representative” in paragraph (a) and “costs of administration,” in paragraph (b), including “expenses . . . of the legal personal representative.” In fact these terms mean the same thing, namely expenses incidental to the performance of the office of personal representative.²¹⁷

The scheme of priorities between preferred claims against an insolvent estate that is set out in subsection (1) closely resembles the scheme under section 136 of the BIA except for certain fees and charges incidental to bankruptcy procedure, such as the Superintendent's levy. The list of preferred claims has been updated to reflect current monetary amounts and other features found in section 136 of the BIA that are not found in section 101 (1) of the EAA at the present time. For example, up to three months' accelerated rent forms part of the landlord's preferred claim under section 136 (1) (f) if it is contemplated by the lease. Accelerated rent is not currently allowed by section 101 (1) (e) of the EAA. Section 180 (1) (g) incorporates the terms of section 136 (1) (f) of the BIA concerning accelerated rent.

The purpose of harmonizing section 180 with the BIA is to insulate this Division against constitutional challenge as far as possible by preventing operational inconsistency between it and the BIA in terms of the result produced by the application of each body of legislation.

It is anticipated, however, that a scheme of civil judgment enforcement based to a large extent on the Uniform Law Conference of Canada *Uniform Civil Enforcement of Money Judgments Act* will be

217. *Re Twigg*, [1892] 1 Ch. 579; *Sharp v. Lush* (1879), 10 Ch. D. 468.

introduced in the foreseeable future in British Columbia.²¹⁸ This scheme contemplates the creation of an “enforcement charge” through the filing of a notice of judgment in the Personal Property Registry. The enforcement charge would give judgment creditors a status equivalent to that of a secured creditor who holds a perfected non-purchase-money security interest under the *Personal Property Security Act*.²¹⁹ The elevation of judgment creditors to secured creditor status would tend to erode the likelihood that a personal representative administering an insolvent estate would be able to recover expenses at the end of the day if that recovery were to continue to rank below secured claims in the scheme of priorities.

Implementation of the proposed enforcement charge for judgment creditors will call the efficacy of this Division into question unless at least the funeral expenses and a portion of the administration and legal expenses rank ahead of secured claims. Consideration may need to be given to further amendment of these provisions at that time.

Subsections (3) to (5) are self-explanatory.

Debts provable and interest

- 181** (1) A creditor may prove a debt in the administration of an insolvent estate that is
- (a) owing and payable at the time of death of the deceased, or
 - (b) owing at the time of death but not yet payable, subject to a deduction in respect of a rebate of interest computed according to subsection (2).
- (2) For the purpose of paragraph (1) (b), the rebate of interest is to be computed at a rate of 5 per cent per annum from the date the personal representative pays the debt or a prorated portion of the debt to the time when the debt would have been payable.
- (3) A personal representative administering an insolvent estate is not liable for and must not pay interest on debts of the deceased in respect of the period following the date of death of the deceased unless a surplus remains after payment of all debts and claims accepted by the personal representative.

Sources: subs. (1): EAA, s. 102 (1); subs. (2): *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BIA], ss. 121 (3); 143; subs. (3): BIA, ss. 122 (2); 143

Comment: Subsection (1) corresponds to section 102 (1) of the EAA. Paragraph (b) of subsection (1) is drafted to be more explicit than section 102 (1) of the EAA as to what is meant by the expres-

218. See British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act*, *supra* note 120.

219. R.S.B.C. 1996, c. 359.

sion “rebate of interest” and the manner in which debts that are owing but not yet payable at the time of death are to be treated. A creditor receiving payment from the personal representative in the course of administration of the estate before the time when the debt would have been payable under the terms on which it was contracted must allow credit for interest in respect of the period between the time payment is received, whether in full or in a prorated amount, and the time when payment would have been received in the normal course if the deceased had not died.

Subsection (2) resembles section 121 (3) of the BIA in stating how the rebate of interest is to be calculated in paying a debt owing but not payable at the time of death. While section 102 (1) of the EAA does not indicate the rate of interest to be used, section 121 (3) of the BIA directs that the rate be 5%. It is considered better to specify a statutory rate rather than leave the rate at large, since the rebate is occasioned by the deceased’s death and premature payment in the course of administration rather than having to do with any interest provisions in the contract between the deceased and the creditor. The same rate as in section 121 (3) of the BIA has been used for the sake of consistency between the federal and provincial legislation.

Subsection (3) provides that if the estate is insolvent, the right to recover interest ends at the date of death except in the unlikely circumstance that a surplus remains after all creditors and other claimants have been paid. Part 11 of the EAA is not clear as to whether interest is payable after the date of death if the estate is insolvent. In a bankruptcy, however, interest is not recoverable after the date of bankruptcy unless there is a surplus.²²⁰ The policy this serves is to maximize the recovery of principal for as many creditors of the bankrupt as possible. Subsection (3) is intended to serve the same policy in the insolvency of an estate when a bankruptcy proceeding does not take place.

Section 102 (2) of the EAA provides that persons who have paid debts of the deceased for which they were liable as sureties may stand in the place of the creditor and prove the debt in the administration of an insolvent estate. It has not been carried forward as it appears merely to reflect a principle of the general law surrounding suretyship.

Contingent and unliquidated claims

- 182** (1) The personal representative must, before the first distribution from an insolvent estate
- (a) fix a value for a conditional, contingent or unliquidated claim, and
 - (b) notify in writing the creditor or claimant who proved the claim of the amount at which the claim is valued.
- (2) The value fixed under subsection (1) is the value for which the claim is deemed to have been proved as if for a liquidated amount payable absolutely unless the creditor or claimant applies to the court within 14 days after the

220. BIA, s. 122 (2). See also *Re Belleville Milling Co. Ltd.* (1931), 12 C.B.R. 505; *aff’d* (1931), 12 C.B.R. 510 (Ont. S.C.); *Canadian Deposit Insurance Corporation v. Canadian Commercial Bank*, [1993] 7 W.W.R. 607 (Alta. Q.B.).

notice referred to in subsection (1) is given for a redetermination of the value of the claim.

- (3) On application under subsection (2), the court may
 - (a) redetermine the value of the claim as fixed by the personal representative under subsection (1), or
 - (b) confirm the value fixed by the personal representative.

Sources: BIA, s. 135; original

Comment: This section supplants section 103 of the EAA, which prescribes a cumbersome process for dealing with conditional and contingent claims against estates. Section 103 of the EAA requires the personal representative to set aside a reserve “until the condition or contingency is determined,” which of course may never occur. If a court is convinced that this would prolong the administration of the estate unduly, the court may direct the claim to be valued by a special referee or arbitrator. The referee’s award requires confirmation or rejection by the court. Section 135 of the BIA prescribes a more straightforward and practical approach that requires the trustee in bankruptcy to value a conditional or contingent claim. The claim is treated as proved for the amount of the valuation unless the court allows an appeal by the creditor.

The robust approach of section 135 is to be preferred. It minimizes delay and avoids the complexity and pitfalls of calculating a reserve. It is in keeping with other tasks the personal representative must perform in deciding whether to accept claims as valid or dispute them. Recourse to the court is only necessary if a creditor disputes the personal representative’s valuation. Section 182 is accordingly modelled on section 135 of the BIA. Like section 135, it extends to unliquidated claims as well as to conditional and contingent ones. An appeal from the personal representative’s valuation may be decided directly by the court without an intermediate reference. (If the court nevertheless wishes to order an inquiry by the registrar or a special referee to quantify an unliquidated, conditional, or contingent claim, the power to do so is found in Supreme Court Rule 32 (1).)

Secured creditors

- 183** (1) A secured creditor claiming against an insolvent estate must state in the claim
- (a) full particulars of the security, including its value as assessed by the creditor, and
 - (b) the value at which the secured creditor assesses the total claim, including the value of the security.
- (2) A secured creditor is entitled to prove as an unsecured creditor for the amount of the difference between the net value realized and the value of the secured creditor’s claim.

- (3) If a secured creditor surrenders the security to the personal representative, the secured creditor is entitled to prove as an unsecured creditor for the entire value of the secured creditor's claim.
- (4) A creditor having a claim based on a negotiable instrument
 - (a) on which the deceased was, and the personal representative is, only indirectly or secondarily liable, and
 - (b) that is not mature or exigible,is deemed to be a secured creditor for the purpose of this section and must comply with subsection (1), treating the liability of any person primarily liable on the negotiable instrument as the security.
- (5) If a claim described in paragraph (4) (a)
 - (a) is mature or exigible at the date of death of the deceased, and
 - (b) remains unpaid after that date, whether before or after proof,the creditor is entitled to treat the claim as unsecured for the purpose of ranking.
- (6) Despite subsection (5), for all purposes except ranking of claims, a creditor having a claim described in subsection (5)
 - (a) is deemed to be a secured creditor, and
 - (b) must comply with subsection (1), treating the liability of all parties liable on the negotiable instrument ahead of the deceased as the security.
- (7) If the deceased was liable as a member of a firm or partnership and a creditor holds security from another member of the firm or partnership, the creditor is deemed to be a secured creditor for the purpose of this section.

Sources: EAA, s. 106; BIA, ss. 127–28

Comment: This section corresponds broadly to section 106 of the EAA. Under subsections (1) and (2), a secured creditor is required to place a value on the security and the total value of the claim, being able to prove as an unsecured creditor for the balance. In the rare case that the security is surrendered and thus becomes available to the personal representative as part of the estate divisible among the general body of creditors, the creditor should be permitted to prove for the entire amount of the debt, as subsection (3) indicates. While subsection (3) does not have a direct counterpart in the present section 106, it corresponds to section 127 (2) of the BIA.

Section 106 (2) of the EAA, which empowers the court to either retain the security or order the secured creditor to assign the security at a premium of ten per cent over its declared value, despite Part 5 of the *Personal Property Security Act*, has not been carried forward. This feature of the present section 106 does not correspond to current bankruptcy law and is inconsistent with the principle implied by the opening words of subsection (1) that the rights of secured creditors should remain intact, permitting realization of security outside the administration of an insolvent estate.

Subsections (4) to (6), relating to claims based on negotiable instruments on which the deceased was not primarily liable, correspond to sections 106 (4)–(6) of the EAA. The treatment of these claims as secured by the liability of the primary party to the instrument is consistent with section 111 of the BIA. Section 111 of the BIA refers to the liability of any party “antecedently” liable on the negotiable instrument as part of the security, not only that of the party primarily liable. As this is consistent with the probable original intent of section 106 (6) of the EAA, subsection (4) requires that the liability of any party liable on the negotiable instrument ahead of the deceased (e.g., the drawer and prior endorsers) be treated as security. Subsection (7) corresponds to section 106 (7) of the EAA.

Debts contracted individually and on behalf of partnership

- 184** If a deceased dies owing debts both individually and as a member of a partnership, a claim against the deceased based on a debt is to be satisfied
- (a) first from the property or estate of the person or partnership by which the debt was contracted, and
 - (b) from the property or estate of another person, including the deceased, only after all the creditors of the other person have been paid in full.

Sources: EAA, s. 108; BIA, s. 142 (4)

Comment: This section corresponds to section 108 of the EAA. Section 142 (4) of the BIA is similar. The concept underlying both of these existing statutory provisions and the draft section above is a distinction between partnership property and the separate property of each member of the partnership. While partners are jointly and severally liable for debts contracted in relation to the partnership, in the case of insolvency certain other considerations arise. It would be unfair for creditors of the deceased in an individual capacity to have the insolvent estate diminished by the claims of partnership claimants if the deceased did not contract those debts and is liable for them only indirectly. Like the present section 108, this section allows a partnership debt for which the deceased was indirectly liable to be recovered from the insolvent estate only after exhaustion of the property of the member by whom, or the partnership on behalf of which, the debt was contracted. The unrecovered balance of the partnership debt then ranks against the separate property of the deceased only after claims against that separate property have been paid in full.

Division 12 — General

Opening of safety deposit boxes

- 185** (1) If a safety deposit box was leased or held in the name of a deceased person, solely or jointly with another person, a person in control of the premises where the box is situated must not permit the removal of the box or its contents from the premises until a representative of the deceased or a person in whose name the safety deposit box was jointly leased or held with the deceased
- (a) prepares an inventory in accordance with subsection (2), and
 - (b) leaves a copy of the inventory in the box and with the person in control of the premises.
- (2) An inventory under subsection (1) must be prepared in the presence of the person in control of the premises or that person's agent and must be dated and signed by the persons present.
- (3) The original will of the deceased, and any copies of it, may be removed from the safety deposit box by a representative of the deceased after an inventory is prepared under subsection (1).
- (4) Subject to subsection (5),
- (a) the copy of the inventory left in the safety deposit box must be kept in it for one year, and
 - (b) the copy of the inventory left with the person in control of the premises where the safety deposit box is leased or rented must be kept by that person for one year.
- (5) The copy of the inventory left in the safety deposit box may be removed when, during the one year period referred to in subsection (4) (a), the lease or rental of the safety deposit box held in the name of
- (a) the deceased or the personal representative of the deceased, or
 - (b) the deceased or the personal representative of the deceased jointly with another person,
- is terminated.

Source: EAA, s. 118

Comment: This section carries forward section 118 of the EAA. A majority of the Estate Administration Subcommittee considered the procedure to be a worthwhile protection for financial institutions, personal representatives and those beneficially interested in estates. It also assists in standardizing the practices concerning the opening of safety deposit boxes after death.

PART 7 — REGULATIONS

Regulations

- 186** (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.
- (2) The authority to make regulations under another provision of this Act does not limit subsection (1).
- (3) The Lieutenant Governor in Council may make regulations as follows:
- (a) respecting the keeping, custody, disposal, destruction and indexing of notices filed under Part 3, Division 7 [*registration of notice of will*] that have been superseded or that refer to wills that have been probated;
 - (b) respecting the use to be made of and the procedure to be followed with respect to the original and duplicate certificate issued under section 66 [*chief executive officer's records*];
 - (c) to carry into effect Part 3, Division 7 [*registration of notice of will*] according to its true intent;
 - (d) correcting deficiencies in Part 3, Division 7 [*registration of notice of will*];
 - (e) prescribing fees to be paid to file a notice under Part 3, Division 7 [*registration of notice of will*] or to search for or inspect a notice filed under Part 3, Division 7 [*registration of notice of will*];
 - (f) prescribing anything that may be prescribed under this Act.
- (4) A regulation under this section may be made as a Rule of Court.

Source: EAA, s. 119

Comment: Self-explanatory.

**PART 8 — TRANSITIONAL PROVISIONS, REPEALS AND CONSEQUENTIAL
AND MISCELLANEOUS AMENDMENTS**

Transitional Provisions

Transitional

- 187** (1) Parts 1, 2, 5 and 6 of this Act apply in respect of deaths occurring on or after the date on which this Act comes into force.
- (2) Subject to subsections (3), (4) and (5), Part 3 applies to a will, whenever executed, if the testator dies on or after the date on which this Act comes into force.
- (3) Subsection (2) does not does not invalidate a will validly made before the date on which this Act comes into force.
- (4) Subsection (2) does not revive a will validly revoked before the date on which this Act comes into force.
- (5) Section 56 [*primary liability of encumbered property*] applies only to a will made on or after the date on which this Act comes into force.
- (6) Part 4 applies to a designation of a retirement plan beneficiary, whenever made, if the participant dies on or after the date on which this Act comes into force.

Source: original

Comment: Section 187 addresses the transition from the present law to this Act. Subsection (1) expresses the basic transition rule applicable to most of this Act, namely that the Act applies if death occurs on or after the date on which it comes into force. Selecting the date of death as the determinative event for the purposes of transition produces a clear division between issues that must be resolved under the previous law from those governed by the new Act.

Subsection (2) indicates that apart from the exceptions provided in subsections (3) and (4), the same basic transition rule also applies to wills. Part 3 is therefore applicable if the testator dies after it comes into force, regardless of the date a will was made. The principal reason for applying a transition rule based on the date of death, rather than one that would apply Part 3 only to wills made after that Part comes into force, is that many of the Part 3 provisions are remedial or curative, aimed at validating and upholding wills wherever possible. Another reason is that as a will only becomes effective on death, and a testator could live for a long time after making a will, two bodies of wills legislation would otherwise have to be applied for many decades into the future.

Subsection (3) creates an exception to the application of Part 3. It preserves wills validly made under the present *Wills Act*,²²¹ despite any inconsistency that might exist between the *Wills Act* and Part 3. This would preserve the validity of a privileged military will signed without witnesses, for example, despite the abolition of privileged wills by this Act and the substitution of a broad power of the court to relieve against invalidation for breach of testamentary formalities.

Subsection (4) makes it clear that the coming into force of Part 3 does not have the effect of reviving a will that has been revoked under the present *Wills Act*. Subsection (4) is necessary because the repeal of section 15 of the *Wills Act* as a consequence of the enactment of this Act would mean that a will would no longer be revoked automatically by later marriage of the testator, as section 15 has no counterpart in Part 3. (See the Introductory Comment to Part 3.)

Subsection (5) creates another exception to the basic transition rule insofar as wills are concerned. Section 56 is made applicable only to wills executed after Part 3 comes into force. If that section were applied to wills in existence when it came into force, it would alter their effect with respect to the manner in which the burden of debts on bequeathed property is borne as between the estate and the beneficiaries to whom the property is bequeathed.

Subsection (6) extends the transition rule based on the date of death to Part 4 in relation to the designation of retirement plan beneficiaries.

Repeals

Repeals

188 The following enactments are repealed:

- (a) the *Estate Administration Act*, R.S.B.C. 1996, c. 122;
- (b) sections 46 and 49 to 51 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253;
- (c) the *Probate Recognition Act*, R.S.B.C. 1996, c. 376;
- (d) the *Wills Act*, R.S.B.C. 1996, c. 489;
- (e) the *Wills Variation Act*, R.S.B.C. 1996, c. 490.

Source: original

221. *Supra* note 5.

Consequential and Miscellaneous Amendments

Escheat Act

189 *Section 1 of the Escheat Act, R.S.B.C. 1996, c. 120, is amended by striking out “land” where it first appears and replacing it with “property of whatsoever nature” and by striking out “land” where it second appears and replacing it with “property”.*

190 *By adding the following as a new section:*

Application of Act

1.2 This Act applies to

- (a) land in British Columbia that escheats to the government or is forfeited to the government, and
- (b) any moveable property or chose in action, wherever situated, of a person domiciled in British Columbia to which the government becomes entitled because of
 - (i) the person last entitled to it having died intestate and without leaving any kin or other person entitled to succeed to it,
 - (ii) the property having become vested in the government as a thing that had no owner, or
 - (iii) the property having become forfeited to the government.

191 *Section 2 is amended by striking out “land” and replacing it with “or forfeited property”.*

192 *Section 5 is amended*

- (a) *in paragraph (a) by striking out “land which has escheated or become forfeited” and replacing it with “property that is subject to this Act”,*
- (b) *in paragraph (b) by adding “, or make an assignment of any portion of it,” after “it”, and*
- (c) *in subparagraph (b) (iii) by striking out “escheat or forfeiture” and replacing it with “the right of the government under this Act to the property”.*

193 *Section 8 is repealed.*

194 *Section 11 (a) is amended by striking out “land escheated to the government” and replacing it with “property that the government has a right to”.*

195 *Section 12 is amended by striking out “land” in the section heading and replacing it with “property”, by adding “the government becomes entitled under this Act to” after “If” and by striking out “has escheated or become forfeited to the government,”.*

Source: original

Comment: The effect of these amendments is to remove the procedural distinctions in the *Escheat Act* between escheat of land and *bona vacantia*. When a person dies without a valid will or any relations entitled to claim the person’s estate under statutory intestate succession rules, then that person’s property reverts to the provincial government. Land that reverts to the government in this manner is said to “escheat,” while personal property reverts to the government under *bona vacantia* (“vacant goods”). The differing names are a reflection of the substantive division in legal theory between land and personal property. These amendments are not intended to affect that substantive division. Instead, they are simply meant to ensure that land and personal property that revert to the government may be dealt with on the same procedural footing. The amendments also confirm that the statute applies both to ownerless land and ownerless personal property—a point that is not made entirely clear as the legislation is currently worded.

Insurance Act

196 *Section 48 of the Insurance Act, R.S.B.C. 1996, c. 226, is amended by adding the following:*

- (4) For the purposes of this section, a contract or a declaration may be signed by the insured or signed on the insured’s behalf by another person in the insured’s presence and by the insured’s direction.

Source: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (2) (a)

Comment: This amendment is meant to provide for cases in which the holder of an insurance policy is mentally competent to make a designation of the person who is to receive the proceeds of the policy but is physically unable to sign his or her name. A similar provision is recommended for retirement plan beneficiary designations (see section 68 (1) “declaration”) and designations under accident and sickness insurance policies (see section 201 (b)).

197 *The following sections are added:*

Republication of will

- 50.1** Republication of a will by codicil is not effective to revive a revoked designation in a will unless the codicil expressly provides for revival.

Source: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (10)

Comment: This amendment is the companion of section 72 (3), which sets out a similar rule for retirement plan beneficiary designations. In addition to ensuring consistency of treatment, this amendment ensures that the doctrine of republication will not operate to revive a designation in circumstances where the testator has not intended it to operate. This amendment is also recommended for designations under accident and sickness insurance policies (see section 201 (b)).

Designation or revocation by attorney

- 50.2** (1) If the power of attorney expressly confers the authority to do so, an attorney may, by a declaration,
- (a) designate a beneficiary,
 - (b) subject to compliance with section 49 [*designation of beneficiary irrevocable*], irrevocably designate a beneficiary, or
 - (c) subject to section 49 [*designation of beneficiary irrevocable*], alter or revoke a designation.

(2) A power of attorney referred to in subsection (1) may be made under Part 1 [<i>general powers of attorney</i>] or Part 2 [<i>enduring powers of attorney</i>] of the <i>Power of Attorney Act</i> .

- (3) The declaration may not be a declaration contained in a will.
- (4) A designation by an attorney named in a power of attorney referred to in subsection (1) in favour of the attorney is not valid unless the power of attorney expressly authorizes it or the principal ratifies it.

Sources: subs. (1)–(3): original; subs. (4): *Property Law Act*, R.S.B.C. 1996, c. 377, s. 27

Comment: This amendment is the counterpart of section 73. In addition to promoting consistency of treatment between insurance and retirement plan beneficiary designations, this section enhances the convenience and flexibility of estate planning in this area. A similar provision is recommended for designations under accident and sickness insurance policies (see section 202).

This section is not intended to limit or detract from the effect of section 9 (2) of the *Power of Attorney Act*.²²² Nor is its enactment intended to imply that the delegation of such authority in a general power of attorney set out in the Schedule to the *Power of Attorney Act* may not be possible under the present law.

Subsection (4) removes any doubts that may exist about the status of a designation by an attorney in favour of the attorney. Such a designation is not valid, unless the power of attorney expressly authorizes it or the principal ratifies it.

198 *Section 61 is repealed.*

Source: original

Comment: The substance of section 61 is relocated to section 77 of the *Insurance Act* in order to clarify the application of the rules respecting beneficiaries who have not reached the age of majority (see section 200 (b)).

199 *Section 66 (1) is amended by striking out “its head or principal office” and replacing it with “any of its offices”.*

Source: original

Comment: This amendment is based on a recommendation made by the Law Reform Commission of British Columbia in 1981. The Commission concluded that “[i]t seems unfair that an insurance company should be legally entitled to disregard a court order or an instrument of which it is aware merely because it has not yet received a copy of it at its head office. . . . Modern forms of communication are sufficiently expeditious that we do not think this [receiving notice at a branch office] imposes an undue or onerous burden.”²²³ Further advances in communications technology in the 25 years since that recommendation was made make it all the more apt today. This section is the companion of a proposed amendment to section 106 of the *Insurance Act* (see section 203).

Irrevocable beneficiary designations under section 49 of the *Insurance Act* are not subject to this recommendation. In this case, a copy of the document containing the designation must be delivered to the head or principal office of the insurer. This is necessary to ensure that the insured’s intentions are respected and the beneficiary’s rights are protected.

200 *Section 77 is amended*

(a) in paragraph (1) (b) by striking out “and who is capable and willing to give a discharge for the money”, and

222. *Supra* note 103.

223. *Report on the Making and Revocation of Wills*, *supra* note 42 at 82–83.

(b) by adding the following subsection:

- (4) A beneficiary who has attained the age of 18 years has the capacity of a person of the age of 21 years to receive insurance money payable to the beneficiary and to give a discharge for it.

Sources: para. (a): original; para. (b): *Insurance Act*, R.S.B.C. 1996, c. 226, s. 61

Comment: This amendment is intended to clear up any uncertainty that may exist in the current provision. Section 77—like all the *Insurance Acts* of the common law provinces of Canada—allows payment of insurance money to “a minor who has obtained the age of 18 years and who is capable and willing to give a discharge for the money.” As a general rule a “minor” (that is, a person who has not reached the legal age of majority) may not give an effective discharge. Although the age of majority in British Columbia is 19 years, in most other provinces it is 18 years. For reasons of uniformity, 18 years was selected as the relevant age in this provision, despite the rule in British Columbia (and a few other provinces). But the current sections 61 and 77 of the *Insurance Act* go further in setting out a special rule deeming a person of 18 years of age to have the capacity of someone who is 21 years old for the purpose of receiving insurance money and providing a discharge by adding a reference to the minor being “capable and willing to give a discharge.” This reference is unclear and may cause problems. Does it require the payor to make an assessment of the maturity and capacity of the minor before paying out the insurance money? Paragraph (a) removes this uncertainty by repealing this language. Paragraph (b) relocates the special rule from section 61 to section 77, in order to clarify its application in this context.

201 Section 102 is amended

- (a) in subsection (1) by striking out “Unless otherwise provided in the policy, an” and replacing it with “An”; and***

Source: original

Comment: This amendment will extend the right to designate a beneficiary to receive the death benefit under an accident and sickness insurance policy to cover all policies, not simply those that permit beneficiary designations. The amendment will bring the treatment of these policies into line with the treatment of life insurance policies (see *Insurance Act*, section 48), and with the proposed treatment of retirement plans (see sections 68 (2); 69 (1)).

(b) by adding the following as new subsections:

- (5.1) Republication of a will by codicil is not effective to revive a revoked designation in a will unless the codicil expressly provides for revival.

- (5.2) For the purposes of this section, a contract or a declaration may be signed by the insured or signed on the insured's behalf by another person in the insured's presence and by the insured's direction.

Sources: *Law and Equity Act*, R.S.B.C. 1996 (Supp.), c. 253, s. 49 (10); 49 (2) (a)

Comment: This amendment is the companion of provisions for retirement plan beneficiary designations and life insurance policy designations. Both provisions are attractive for policy reasons: subsection (5.1) ensures that the doctrine of republication will not operate to revive a designation in circumstances where the testator has not intended it to operate; subsection (5.2) provides a practical solution for cases in which the holder of an insurance policy is mentally competent to make a declaration designating the person who is to receive the proceeds of the policy but is physically unable to sign it. Similar provisions are recommended for retirement plan beneficiary designations (see sections 72 (3); 68 (1) "declaration") and designations of beneficiaries under life insurance policies (see sections 197; 196).

202 *The following sections are added:*

Designation of beneficiary irrevocable

- 102.1** (1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary, and the insurance money is not subject to the control of the insured or of the insured's creditors and does not form part of the insured's estate.
- (2) If the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

Source: *Insurance Act*, R.S.B.C. 1996, c. 226, s. 49

Comment: This amendment is the companion of section 70. The provisions extend the idea of making an irrevocable designation of a beneficiary that is currently located in section 49 of the *Insurance Act* and applicable only to holders of life insurance policies to designations of retirement plan beneficiaries and designations of beneficiaries entitled to receive a death benefit under accident and sickness insurance policies. This mechanism has intrinsic merit. In addition, extending its application promotes consistency of treatment of the various types of beneficiary designations.

Designation or revocation by attorney

- 102.2** (1) If the power of attorney expressly confers the authority to do so, an attorney may, by a declaration,
- (a) designate a beneficiary,
 - (b) subject to compliance with section 102.1 [*designation of beneficiary irrevocable*], irrevocably designate a beneficiary, or
 - (c) subject to section 102.1 [*designation of beneficiary irrevocable*], alter or revoke a designation.

(2) A power of attorney referred to in subsection (1) may be made under Part 1 [<i>general powers of attorney</i>] or Part 2 [<i>enduring powers of attorney</i>] of the <i>Power of Attorney Act</i> .

- (3) The declaration may not be a declaration contained in a will.
- (4) A designation by an attorney named in a power of attorney referred to in subsection (1) in favour of the attorney is not valid unless the power of attorney expressly authorizes it or the principal ratifies it.

Sources: subs. (1)–(3): original; subs. (4): *Property Law Act*, R.S.B.C. 1996, c. 377, s. 27

Comment: This amendment is the counterpart of section 73. In addition to promoting consistency of treatment between insurance and retirement plan beneficiary designations, this section enhances the convenience and flexibility of estate planning in this area. A similar amendment is recommended for beneficiary designations under life insurance policies (see section 197).

This section is not intended to limit or detract from the effect of section 9 (2) of the *Power of Attorney Act*.²²⁴ Nor is its enactment intended to imply that the delegation of such authority in a general power of attorney set out in the Schedule to the *Power of Attorney Act* may not be possible under the present law.

Subsection (4) removes any doubts that may exist about the status of a designation by an attorney in favour of the attorney. Such a designation is not valid, unless the power of attorney expressly authorizes it or the principal ratifies it.

203 *Section 106 is amended by striking out “its head or principal office” and replacing it with “any of its offices”.*

Source: original

224. *Supra* note 103.

Comment: This amendment is based on a recommendation made by the Law Reform Commission of British Columbia in 1981. The Commission concluded that “[i]t seems unfair that an insurance company should be legally entitled to disregard a court order or an instrument of which it is aware merely because it has not yet received a copy of it at its head office. . . . Modern forms of communication are sufficiently expeditious that we do not think this [receiving notice at a branch office] imposes an undue or onerous burden.”²²⁵ Further advances in communications technology in the 25 years since that recommendation was made make it all the more apt today. This section is the companion of a proposed amendment to section 66 (1) of the *Insurance Act* (see section 199).

Irrevocable beneficiary designations under proposed section 102.2 (see section 202) are not subject to this recommendation. In this case, a copy of the document containing the designation must be delivered to the head or principal office of the insurer. This is necessary to ensure that the insured's intentions are respected and the beneficiary's rights are protected.

Power of Appointment Act

204 *The Power of Appointment Act, R.S.B.C. 1996, c. 369, is repealed and the following substituted:*

POWER OF APPOINTMENT ACT

Definitions

1 In this Act:

“**appointment**” means an appointment made by exercising a power;

“**power**” means a power to appoint property among 2 or more objects;

“**share**” means a share in property subject to a power.

Appointments valid

2 An appointment is not invalid at law or in equity on the ground that it

- (a) excludes an object from a share, whether or not another object takes a share as a result of the exclusion or in default of appointment,
- (b) appoints an unsubstantial, illusory or nominal share, or
- (c) allows an unsubstantial, illusory or nominal share to devolve unappointed on an object.

225. *Report on the Making and Revocation of Wills*, *supra* note 42 at 82–83.

Appointments invalid on other grounds

- 3 Nothing in this Act validates an appointment that would not be valid if it
- (a) appointed a substantial share to an object, or
 - (b) left a substantial share unappointed to devolve on an object.

Act not affecting non-exclusionary power of appointment

- 4 Section 2 (a) does not affect the validity of a power under which
- (a) no object of the power, or
 - (b) none of one or more specified objects
- may be excluded from any share or a share in a specified amount.

Source: original

Comment: The *Power of Appointment Act*²²⁶ is something of a curiosity. On first reading its purposes may be obscure, and how it functions may be difficult to grasp. In order to shed some light on this obscurity it is necessary to know something of the history of the development of powers of appointment and the origins of this specific piece of legislation.

A “power” is a mandate or authority that is given by one person to another, which allows the second person to do some act on the first person’s behalf.²²⁷ The origin of powers can be traced to the fourteenth century. Powers arose in connection with a branch of the law of succession—devolution of land to an heir.²²⁸ From this origin, powers developed to have functions beyond those relevant to the law of succession, even as they have continued to be important for the law of succession.

“A power of appointment,” as Donovan Waters has defined the term, “is the authority given to a person to choose who shall be the transferee of somebody else’s property.”²²⁹ As is the case for

226. R.S.B.C. 1996, c. 369.

227. See William Holdsworth, *A History of English Law*, vol. 7 (London: Methuen / Sweet and Maxwell, 1925) at 149 (“A power, in its widest sense, is an authority or mandate given by one man to another to do some act on his behalf.”).

228. See Holdsworth, *ibid.* at 153 (“... in those few localities in which, in the Middle Ages, a custom to devise was recognized, the common law permitted a man to give to his executors by his will a power to sell his land, without giving them any estate in the land. Until such a power was exercised the estate devolved on the heir; but, on its execution, the estate passed to the purchaser. . . . But they had no estate by the will—only a bare power; and so they might, without entry, bargain and sell to the purchaser, who thereupon acquired the right to enter. . . .” [footnotes omitted]).

229. *Waters’ Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 1117.

powers generally, powers of appointment are relevant in areas of the law other than succession, but they are primarily used in the law of succession.²³⁰

Discussions of powers of appointment tend to employ specific terminology. It is helpful to define these terms before embarking on a consideration of the British Columbia legislation. The person who gives a power of appointment is called a “donor.” The person who receives the power of appointment is called a “donee.” The transferee of the property that is subject to the power of appointment—or a potential transferee—is referred to as an “object.” Finally, powers of appointment may be classed as “exclusive” or “non-exclusive.” A leading textbook on powers explains these terms as follows:²³¹

An exclusive power, or power of selection, is a power of appointment among a class which authorizes the donee to select one or more of such class to the exclusion of the others. A non-exclusive power, or power of distribution, authorizes the donee to distribute the property among the class in such shares and proportions as he pleases, but not so as to exclude any object entirely.

The *Power of Appointment Act* is based on two nineteenth-century English statutes that were intended to resolve a controversy that developed in the eighteenth century in connection with non-exclusive powers of appointment.²³² This controversy came about when the Court of Chancery began to interpret non-exclusive powers of appointment as requiring the appointment of a substantial share of the property to each of the objects.²³³ In simple terms, the court imposed a test of value on the exercise of non-exclusive powers of appointment. If an object received a share in the property that was of too low a value, then that share was considered an “unsubstantial, illusory, or nominal” share, and the exercise of the power of appointment was held to be invalid.

There was a certain logical appeal to the court’s reasoning. If the donee of a non-exclusive power of appointment could appoint a share worth, say, one penny to an object, then the non-exclusive power had, for all intents and purposes, been converted into an exclusive power. Since exclusive powers of appointment could be made, it did not seem consistent to allow non-exclusive powers to be exercised as if they were exclusive.²³⁴ But, if this position was theoretically attractive, it also caused

230. See Waters, *ibid.* (“[A power of appointment] may be found in the context of a trust, but the authority is very often given to a person under a will without any trust being present.”).

231. C.J.W. Farwell & F.K. Archer, eds., *Farwell on Powers*, 3d ed. (London: Stevens and Sons, 1916) at 414.

232. See *Gainsford v. Dunn* (1874), L.R. 17 Eq. 405 at 406–07 (Eng. Ch.), Sir George Jessel M.R. (summarizing the development of the law in the eighteenth century and the legislative response in the nineteenth century, up to 1873). This passage in the comment is derived from Sir George Jessel M.R.’s helpful summary.

233. See *Kemp v. Kemp* (1801), 5 Ves. 849 at 858–60, 31 E.R. 891 (Ch.), Sir Richard P. Arden M.R. (reviewing the leading cases that led to the development of the rule).

234. See Geraint Thomas, *Thomas on Powers*, 1st ed. (London: Sweet & Maxwell, 1998) at § 2–84 (observing that “[e]xclusive powers were not uncommon in the eighteenth century, and even earlier,” but they

a number of difficulties in practice. Two difficulties in particular led to increasing complaints about the court's interpretation of non-exclusive powers. First, the court's rulings were often at odds with the literal wording of the power of appointment under consideration. In many cases, it seemed clear that the donor had intended to allow the donee to exercise the power by appointing an unsubstantial, illusory, or nominal share to one or more objects. Second, no one could say for certain when a share was substantial and when it was unsubstantial. The only way to find out definitively where to draw the line in a specific case was to litigate that case.

When Edward Sugden (later Lord St. Leonards), the author of the leading textbook on powers, added his voice to these complaints, Parliament decided to act. In 1830, it enacted the *Illusory Appointments Act*.²³⁵ This statute declared that unsubstantial, illusory, or nominal appointments are valid exercises of a non-exclusive power of appointment. Soon, however, it was appreciated that the *Illusory Appointments Act* had not addressed the root of the problem. Under the legislation, if a non-exclusive power was exercised by appointment of a minimal share to one or more objects, it was valid, but if one or more objects received no share, then the exercise was invalid. In order to comply with the legislation, donees were required to ensure that every object received a share of some value, however slight.²³⁶ The "extreme technicality"²³⁷ of this situation led to more calls for reform. In 1874, Parliament heeded these calls by enacting the *Powers of Appointment Act*.²³⁸ This statute effectively converted non-exclusive powers of appointment into exclusive powers, unless the power displaces this rule by expressly declaring the amount of the share each object will be entitled to or by expressly declaring that each object must take a share of the property.

British Columbia re-enacted these English statutes in 1897²³⁹ and in 1911.²⁴⁰ The substance of these provisions has not been altered since their re-enactment. The *Illusory Appointments Act* remains the basis of sections 2 to 4 of the current British Columbia Act; the *Powers of Appointment Act* is still the foundation of section 5. These provisions have put an end to the old controversies

had to be expressly conferred by using very specific language).

235. (U.K.), 11 Geo. 4 and 1 Wm. 4, c. 46.

236. See, e.g., *Re Stone's Estate*, (1869) 3 I.R. 621 (L.E.C.), Lynch J., *aff'd*, (1869) 3 I.R. 627 (C.A.) (court holding that a power was validly exercised when donee appointed all lands and premises to one object, except for "one square yard of the said lands," in such part as the first object should think fit, which was appointed to the other object).

237. *Gainsford v. Dunn*, *supra* note 232 at 406 ("There never was a better illustration of the extreme technicality of our law than the case I have before me.").

238. *Powers of Appointment Act*, 1874 (U.K.) 37 & 38 Vict., c. 37 (this statute is sometimes referred to as *Lord Selborne's Act*).

239. *An Act to alter and amend the Law relating to Illusory Appointments*, R.S.B.C. 1897, c. 155 (re-enacting the provisions of the *Illusory Appointments Act*, 1830).

240. *Illusory Appointments Act*, R.S.B.C. 1911, c. 181 (re-enacting the provisions of the *Powers of Appointment Act*, 1874, and adding them to the previously re-enacted provisions of the *Illusory Appointments Act*, 1830, to form one consolidated statute).

over non-exclusive powers of appointment. As time has passed, these controversies have become a greater concern for legal historians than for practising lawyers.

The policy underlying this legislation remains sound. No one would wish to return to the days where litigation was required to establish the exact scope of a non-exclusive power of appointment.²⁴¹ This Report, therefore, does not recommend that any substantive changes be made to the *Power of Appointment Act*. The proposed amendments to the statute are intended to cast the legislation in more modern statutory terms, and to remedy grammatical infelicities, such as the double negative that exists in section 5 (3) of the current legislation.

Survivorship and Presumption of Death Act

205 *The title of the Survivorship and Presumption of Death Act, R.S.B.C. 1996, c. 444, is repealed and the following substituted:*

PRESUMPTION OF DEATH ACT .

206 *Section 1 is amended by repealing the definition of “instrument”.*

207 *Section 2 is repealed.*

Source: original

Comment: These provisions may be repealed upon the coming into force of this Act, which will deal comprehensively with survivorship issues. The provisions of the statute dealing with the presumption of death are unaffected and will remain in force. The Act should be renamed accordingly.

Commencement

208 This Act comes into force by regulation of the Lieutenant Governor in Council.

241. See Thomas, *supra* note 234 at § 2–84 (speculating that the law of commonwealth jurisdictions such as “the Cayman Islands and Jersey” that have not enacted equivalents to the *Illusory Appointments Act*, 1830, and the *Powers of Appointment*, 1874, remains subject to the old controversies over exclusive and non-exclusive powers, and illusory appointments).

SCHEDULE

**CONVENTION PROVIDING A UNIFORM LAW ON THE
FORM OF AN INTERNATIONAL WILL**

THE STATES SIGNATORY TO THE PRESENT CONVENTION,

DESIRING to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an “international will” which, if employed, would dispense to some extent with the search for the applicable law;

HAVE RESOLVED to conclude a Convention for this purpose and have agreed upon the following provisions:

Article I

- (1) Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.
- (2) Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.
- (3) Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.
- (4) Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

Article II

- (1) Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad in so far as the local law does not prohibit it.
- (2) The Party shall notify such designation, as well as any modifications thereof, to the Depositary Government.

Article III

The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV

The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

Article V

- (1) The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.
- (2) Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

Article VI

- (1) The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.
- (2) Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Article VII

The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

Article VIII

No reservation shall be admitted to this Convention or to its Annex.

Article IX

- (1) The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.
- (2) The Convention shall be subject to ratification.
- (3) Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depositary Government.

Article X

- (1) The Convention shall be open indefinitely for accession.
- (2) Instruments of accession shall be deposited with the Depositary Government.

Article XI

- (1) The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.
- (2) In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

Article XII

- (1) Any Contracting Party may denounce this Convention by written notification to the Depositary Government.
- (2) Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

Article XIII

- (1) Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.
- (2) Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.
- (3) Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

Article XIV

- (1) If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
- (2) These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

Article XV

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

Article XVI

- (1) The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of the United States of America, which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.
- (2) The Depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:
 - (a) any signature;

- (b) the deposit of any instrument of ratification or accession;
- (c) any date on which this Convention enters into force in accordance with Article XI;
- (d) any communication received in accordance with Article I, paragraph 4;
- (e) any notice received in accordance with Article II, paragraph 2;
- (f) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such declaration takes effect;
- (g) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunciation takes effect;
- (h) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

DONE at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

ANNEX

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Article 1

- (1) A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.
- (2) The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3

- (1) The will shall be made in writing.
- (2) It need not be written by the testator himself.
- (3) It may be written in any language, by hand or by any other means.

Article 4

- (1) The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.
- (2) The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5

- (1) In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.
- (2) When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.
- (3) The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Article 6

- (1) The signatures shall be placed at the end of the will.
- (2) If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7

- (1) The date of the will shall be the date of its signature by the authorized person.
- (2) This date shall be noted at the end of the will by the authorized person.

Article 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

Article 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I,, (name, address and capacity), a person authorized to act in connection with international wills
 2. Certify that on (date) at (place)
 3. (testator) (name, address, date and place of birth) in my presence and that of the witnesses
 4. (a) (name, address, date and place of birth)
(b) (name, address, date and place of birth)
- has declared that the attached document is his will and that he knows the contents thereof.
5. I furthermore certify that:
 6. (a) in my presence and in that of the witnesses
 - (1) the testator has signed the will or has acknowledged his signature previously affixed.
 - *(2) following a declaration of the testator stating that he was unable to sign his will for the following reason
— I have mentioned this declaration on the will
*— the signature has been affixed by (name, address)
 7. (b) the witnesses and I have signed the will;
 8. *(c) each page of the will has been signed by and numbered;
 9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
 10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
 11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:
12. PLACE
 13. DATE
 14. SIGNATURE and, if necessary, SEAL

*To be completed if appropriate.

Article 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

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Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Article 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

APPENDIX

Tables of Concordance

Note: The following tables correlate provisions in existing British Columbia statutes and provisions of the proposed *Wills, Estates and Succession Act* dealing with similar subject-matter. They do not indicate an exact correspondence between existing statutory provisions and those of the proposed Act in all cases. In some cases the provision of the proposed Act shown opposite an existing provision is a functional or conceptual substitute for the existing provision instead of its exact counterpart.

Legend:

BIA:	<i>Bankruptcy and Insolvency Act</i> , R.S.C. 1985, c. B-3
EAA:	<i>Estate Administration Act</i> , R.S.B.C. 1996, c. 122
LEA (Supp.):	<i>Law and Equity Act</i> , R.S.B.C. 1996 (Supp.), c. 253 [Repealed: S.B.C. 2006, c. 33, s. 1]
<i>Wills Act</i> :	<i>Wills Act</i> , R.S.B.C. 1996, c. 489
WVA:	<i>Wills Variation Act</i> , R.S.B.C. 1996, c. 490

A dash (—) indicates that the source of a proposed provision was non-statutory, e.g. a recommendation in a law reform commission report.

1. Proposed *Wills, Estates and Succession Act* and Source Enactments

Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 1	Definitions	<i>Wills Act</i> , s. 1; EAA, s. 1; Original
s. 2	Application of certain provisions of <i>Trustee Act</i> to personal representative	Original
s. 3	Procedure in matters of succession and administration of estates	EAA, s. 110
s. 4	Effect of adoption	—

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 5	Will or cultural property of Nisga'a citizen	EAA, s. 2.1; WVA, s. 1.1
s. 6	Notice to Nisga'a Lisims Government	EAA, s. 112(1.1); WVA, s. 1.1
s. 7	Definition	Uniform Simultaneous Death Act § 1 "governing instrument" (1993)
s. 8	General rule of survivorship	<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 55(1); <i>Uniform Survivorship Act</i> , s. 1(1)
s. 9	Provision in an instrument for disposition of property	<i>Survivorship and Presumption of Death Act</i> , R.S.B.C. 1996, c. 444, s. 2(3)
s. 10	Provision in a will for substitute personal representative	<i>Survivorship and Presumption of Death Act</i> , R.S.B.C. 1996, c. 444, s. 2(4)
s. 11	Survival of beneficiaries	—
s. 12	Simultaneous death of joint tenants	<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 55(2)
ss. 13(1)–(3)	Requirement that person survive deceased by 5 days	Mont. Code Ann. § 72-2-114 (2005); Uniform Simultaneous Death Act § 4 (1993)
s. 13(4)	Requirement that person survive deceased by 5 days	Original
s. 14(1)	Application	Uniform Simultaneous Death Act § 6
s. 14(2)	Application	Original
s. 15	Interpretation	EAA, ss. 83, 85, 96
s. 16	Dower and curtesy abolished	EAA, s. 95
s. 17	Distribution to issue	EAA, s. 84
s. 18	Posthumous births	EAA, s. 91
s. 19	Spouse deemed to predecease intestate	Original
s. 20	Spousal share if 2 or more persons are entitled as spouse	EAA, s. 85.1
s. 21	Uniform construction with laws of other provinces	EAA, s. 99

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 22	Intestate leaving spouse but no issue	EAA, s. 83
s. 23	Intestate leaving spouse and issue	EAA, s. 85
s. 24	Intestate leaving no surviving spouse	<i>Uniform Intestate Succession Act</i> , s. 4(1)
ss. 25(1)–(2)	Kindred and exclusion of remote kindred	EAA, s. 90
ss. 25(3)–(4)	Kindred and exclusion of remote kindred	Original
s. 26	Interpretation	EAA, s. 96(1)
s. 27	Appropriation of interest in spousal home	Original
s. 28	When appropriation right may be exercised	Original
s. 29	Duty of personal representative	Original
s. 30	How appropriation right may be exercised	Original
s. 31	Contents of notice	Original
s. 32	Valuation of intestate's interest in spousal home	Original
s. 33	Purchase by surviving spouse	Original
s. 34	Occupancy by surviving spouse pending election	Original
s. 35	Surviving spouse as personal representative	Original
s. 36(1)	Interpretation	<i>Wills Act</i> , s. 1
s. 36(2)	Interpretation	—
s. 36(3)	Interpretation	Original
s. 37	Property disposable by will	<i>Wills Act</i> , s. 2
ss. 38(1)–(2)	Validity of wills	Original
ss. 38(3)–(4)	Validity of wills	<i>Wills Act</i> , ss. 8–9
s. 39	Writing required	<i>Wills Act</i> , s. 3

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 40	Signatures required on formal will	<i>Wills Act</i> , ss. 4 and 6
ss. 41(1)–(3)	Rules concerning witnesses	<i>Wills Act</i> , ss. 11(1), 12, 13
s. 41(4)	Rules concerning witnesses	<i>Wills Act</i> , s. 10
s. 42	Revocation in general	<i>Wills Act</i> , s. 14 (modified)
s. 43	Revocation on termination of spousal relationship	<i>Wills Act</i> , s. 16; Original
s. 44	Altering a will	<i>Wills Act</i> , s. 17
s. 45	Revival of will	<i>Wills Act</i> , ss. 18, 20(1)
s. 46	Dispensing power	<i>The Wills Act</i> , C.C.S.M. c. W150, s. 23; <i>Uniform Wills Act Amendment Act</i> (2003)
s. 47	Extrinsic evidence	<i>Administration of Justice Act 1982</i> , c. 53, s. 31 (England and Wales); Manitoba Law Reform Commission draft <i>Wills Act</i> , s. 22 (MLRC <i>Wills and Succession Legislation</i> (Report #108, 2003) p. 110)
s. 48	Rectification of will	<i>Administration of Justice Act 1982</i> , c. 53, s. 20 (England and Wales)
ss. 49(1)–(8)	Effect of a will	<i>Wills Act</i> , ss. 19, 20(2), 22–26, 31
ss. 49(9)–(10)	Effect of a will	Original
s. 50(1)	Lapsed gifts	—
s. 50(2)	Lapsed gifts	—
s. 50(3)	Lapsed gifts	Original
s. 51	Relief from the effect of ademption of certain gifts	<i>Substitute Decisions Act</i> , S.O. 1992, c. 30, s. 36(1)
s. 52	Legal presumptions abrogated	Original
s. 53	Doctrine of election abrogated	—
s. 54	Abatement	—
s. 55	Gifts in trust	<i>Wills Act</i> , ss. 27–28
s. 56	Primary liability of encumbered property	<i>Wills Act</i> , s. 30
s. 57	Definitions and interpretation	<i>Wills Act</i> , s. 39(1); Original

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 58	Formal validity	<i>Wills Act 1963</i> (U.K.), s. 6(3); <i>Uniform Wills Act</i> , s. 40(2)(b); Original
s. 59	Change in domicile or habitual residence	<i>Wills Act</i> , s. 42
s. 60	Movables used in relation to immovable	<i>Wills Act</i> , s. 43
s. 61	International will	<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, ss. 42, 43
s. 62	Filing of notice of will with chief executive officer	<i>Wills Act</i> , s. 32
s. 63	Filing of notice of revocation	<i>Wills Act</i> , s. 33
s. 64	Filing notice of change of place of will	<i>Wills Act</i> , s. 34
s. 65	Chief executive officer's records	<i>Wills Act</i> , s. 35
s. 66	Search of records	<i>Wills Act</i> , s. 36
s. 67	Validity of will or revocation not affected	<i>Wills Act</i> , s. 37
s. 68(1)	Interpretation	Original ("benefit", "participant"); <i>Insurance Act</i> , R.S.B.C. 1996, c. 226, s. 29 ("beneficiary", "declaration", "instrument"); LEA (Supp.), s. 49(1) ("plan")
s. 68(2)	Interpretation	Original
s. 69	Designation of beneficiaries	LEA (Supp.), ss. 49(2)–(3); <i>Insurance Act</i> , R.S.B.C. 1996, c. 226, ss. 48(1)–(2), 102(3)
s. 70	Designation of beneficiary irrevocable	<i>Insurance Act</i> , R.S.B.C. 1996, c. 226, s. 49
s. 71	Revocation of designation	LEA (Supp.), ss. 49(4)–(6), (9)
s. 72	Designation or revocation by will	LEA (Supp.), ss. 49(7)–(8), (10)–(11)
ss. 73(1)–(3)	Designation or revocation by attorney	Original
s. 73(4)	Designation or revocation by attorney	<i>Property Law Act</i> , R.S.B.C. 1996, c. 377, s. 27

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 74	Maintaining previous designation	Original; Bill 32, <i>Adult Guardianship and Personal Planning Amendment Act</i> , 2006, 2d Sess., 38th Parl., British Columbia, 2006, cl. 17(4)(b)
s. 75	Trustee of beneficiary	<i>Insurance Act</i> , R.S.B.C. 1996, c. 226, s. 51
s. 76	Payment	LEA (Supp.), s. 49(12); <i>Insurance Act</i> , R.S.B.C. 1996, c. 226, s. 53; Original
s. 77	Administrator discharged	LEA (Supp.), s. 49(15)
s. 78	Benefit not part of estate	LEA (Supp.), s. 49(13); <i>Insurance Act</i> , R.S.B.C. 1996, c. 226, s. 54(1); Original
s. 79	Beneficiary predeceasing participant	<i>Insurance Act</i> , R.S.B.C. 1996, c. 226, s. 52(1)
s. 80	Several beneficiaries	<i>Insurance Act</i> , R.S.B.C. 1996, c. 226, s. 52(2)
s. 81	Conflict between Part and plans	LEA (Supp.), s. 49(14); Original
s. 82	<i>Insurance Act</i>	LEA (Supp.), s. 49(17)
s. 83	Interpretation	WVA, ss. 1; Original
s. 84	Waiver by eligible claimant	Original
s. 85(1)	Court may order provision — general principles	WVA, s. 2
ss. 85(2)–(3)	Court may order provision — general principles	Original
ss. 85(4)–(6)	Court may order provision — general principles	WVA, ss. 5–6
s. 85(7)	Court may order provision — general principles	Original
s. 86	Time limits and procedure	WVA, ss. 3–4
s. 87	Contents of order — spouse	WVA, ss. 6–7
s. 88	Contents of order — claimant other than spouse	Original
s. 89(1)	Further powers of court	<i>Uniform Dependents' Relief Act</i> , s. 3
s. 89(2)	Further powers of court	WVA, s. 9
s. 89(3)	Further powers of court	WVA, s. 10
s. 89(4)	Further powers of court	Original

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 89(5)	Further powers of court	WVA, s. 14
s. 90	Payments fall rateably on estate	WVA, s. 8
s. 91	Effect of order	WVA, s. 11
s. 92	No distribution until 6 months after representation grant	WVA, s. 12
s. 93	Anticipation of provision prohibited	WVA, s. 13
s. 94	Contract to dispose of property by will	<i>Uniform Dependents' Relief Act</i> , s. 15
s. 95(1)	Certain transactions voidable	Original
s. 95(2)	Certain transactions voidable	<i>Fraudulent Conveyance Act</i> , s. 2
ss. 95(3)–(4)	Certain transactions voidable	Original
s. 96	Application	EAA, s. 2; Original
s. 97	Representation of mentally incapable person	Draft <i>Trustee Act</i> , s. 74 (Part Two of BCLI <i>Report on a Modern Trustee Act for British Columbia</i>)
s. 98	Representation of minor	Draft <i>Trustee Act</i> , s. 74 (Part Two of BCLI <i>Report on a Modern Trustee Act for British Columbia</i>)
s. 99(1)	When court may grant probate or administration	<i>The Administration of Estates Act</i> , S.S. 1998, c. A-4.1, ss. 3(1), 4(1)
s. 99(2)	When court may grant probate or administration	<i>Succession Act 1981</i> (Qld.), s. 6(2)
s. 100(1)	Effect of representation grant and related proceedings	EAA, s. 14
s. 100(2)	Effect of representation grant and related proceedings	Original
s. 100(3)	Effect of representation grant and related proceedings	EAA, s. 56
s. 101(1)	Priority among applicants — administration	Original
ss. 101(2)–(3)	Priority among applicants — administration	EAA, s. 7
s. 102	Priority among applicants — administration with will annexed	Original

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 103	Administration of partial intestacy	Original
s. 104	Administration if sole executor is minor	EAA, s. 12
s. 105	Vesting of estate pending grant of administration	EAA, s. 3
s. 106	Grant effective back to time of death	EAA, s. 5
s. 107	Administration while legal proceeding pending	EAA, s. 8
s. 108	Compensation of administrator appointed while litigation pending or to represent estate in proceeding	EAA, s. 10; Draft <i>Trustee Act</i> , ss. 61(7)–(8)
s. 109(1)	Notice of application for probate or administration	EAA, s. 112; Original
s. 109(2)	Notice of application for probate or administration	Original
s. 109(3)	Notice of application for probate or administration	Original
s. 109(4)	Notice of application for probate or administration	EAA, s. 112(1)(b)
s. 109(5)	Notice of application for probate or administration	EAA, s. 112(4); Original
s. 109(6)	Notice of application for probate or administration	Original
s. 109(7)	Notice of application for probate or administration	EAA, s. 112(5)
s. 109(8)	Notice of application for probate or administration	EAA, s. 112(8)
s. 109(9)	Notice of application for probate or administration	EAA, s. 112(3)
s. 109(10)	Notice of application for probate or administration	EAA, s. 112(3)
s. 109(11)	Notice of application for probate or administration	Original

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 109(12)	Notice of application for probate or administration	Original
s. 109(13)	Notice of application for probate or administration	Original
s. 109(14)	Notice of application for probate or administration	EAA, s. 112(9)
s. 109(15)	Notice of application for probate or administration	Original
s. 109(16)	Notice of application for probate or administration	Original
s. 109(17)	Notice of application for probate or administration	Original
s. 110	Caveats	EAA, s. 109(1)
s. 111	Disclosure on application for probate or administration	EAA, s. 111
s. 112	Order for production of testamentary document or attendance of witness	EAA, s. 113
s. 113	Public Guardian and Trustee entitled to comment and receive copy of grant in certain cases	EAA, ss. 112(5.1)–(5.3), (8.1)
s. 114	Security	EAA, ss. 16–17; Original
s. 115	Court may assign security	EAA, s. 18
s. 116(1)	Cancellation or substitution of security	EAA, s. 19
s. 116(2)	Cancellation or substitution of security	Original
s. 117	Rights of renouncing executor	EAA, s. 24
s. 118	Forfeiture of executorship by failure to take probate	EAA, s. 25
s. 119	Definitions	<i>Administration of Estates Act</i> , R.S.A. 2000, c. A-2, s. 29(1) “foreign grant”; “probate”; Original
s. 120	Rescaling	<i>Administration of Estates Act</i> , R.S.A. 2000, c. A-2, s. 29(2); Original

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 121	Ancillary grant	R. 61(48); Original
s. 122	Limited grants to attorney or foreign personal representative	R. 61(48); Original
s. 123	Certain provisions applicable	Original
s. 124	Dispensing power may be exercised regarding will that is subject of foreign grant	Original
s. 125(1)	Powers of personal representatives unless limited by will	Original
ss. 125(2)	Powers of personal representatives unless limited by will	Draft <i>Trustee Act</i> , s. 39
s. 126	Powers of personal representative in relation to debts and claims	EAA, s. 65
s. 127	Specific powers over estate property	Original
s. 128	Abolition of rule in <i>Allhusen v. Whittel</i>	<i>Trustee Act</i> , R.S.B.C. 1996, c. 464, s. 10
s. 129	Executors of executors	EAA, s. 64
s. 130	Limitation period for disputed claims against estate	EAA, s. 66
s. 131	Powers when beneficiary cannot be found or fails to claim specific bequest	EAA, s. 67.1
s. 132	Other executors may act if one executor renounces probate or rights are reserved	EAA, s. 57
s. 133	Liability of personal representative	Original
s. 134	Proceedings by and against estates	EAA, ss. 58, 59, 63, 68, 69, 71
s. 135	Beneficiary or intestate successor may sue with leave of court	<i>Business Corporations Act</i> , S.B.C. 2002, c. 57, ss. 232–33; Original
s. 136	Relief of personal representative from liability under contract of deceased	EAA, s. 72
s. 137	Distribution of a minor's interest	EAA, s. 75

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 138	Distribution of estate after notice to creditors	<i>Trustee Act</i> , R.S.B.C. 1996, c. 464, s. 38
s. 139	Distribution of net estate after 6 months if certain proceedings not commenced	Original
s. 140	Trustee of will trusts in default of appointment by will	Original
s. 141	Right to apply for discharge	EAA, ss. 27, 29
s. 142	Right to apply for removal of personal representative	Draft <i>Trustee Act</i> , ss. 16–17
s. 143	Notice of application for discharge or removal of personal representative	EAA, s. 28; Original
s. 144	Appointment of a new personal representative	EAA, s. 30
s. 145	Vesting of estate	Draft <i>Trustee Act</i> , s. 23
s. 146	Effect of vesting	Draft <i>Trustee Act</i> , s. 24
s. 147	Former personal representative to deliver property and documents, etc.	Original
s. 148	Payments made before notice of revocation of grant valid	EAA, ss. 22(1), 23
s. 149	Devolution and administration of land	EAA, ss. 77–78
s. 150	Transfer of land by personal representative to beneficiary	EAA, ss. 79(2)–(3)
s. 151	Appointment of official administrator	EAA, s. 34
s. 152	Deputy official administrators	EAA, s. 35
s. 153	Delegation by official administrator	EAA, s. 36
s. 154	Official administrator must provide security	EAA, s. 37

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 155	Transfer of interest to new official administrator	EAA, ss. 38(1)–(2)
s. 156	Application by official administrator to administer estate	EAA, s. 40
s. 157	Court must not make order	EAA, s. 41.1
s. 158	Powers of official administrator	EAA, s. 42(1)
s. 159	Payment of probate fees and other charges	EAA, s. 43
s. 160(1)	Powers exercisable before grant of administration	EAA, s. 51(1)
ss. 160(2)–(4)	Powers exercisable before grant of administration	Original
s. 161	Probate or administration despite previous grant	EAA, s. 53
s. 162	Official administrator's compensation	EAA, s. 54(1)
s. 163	Definitions	Original
s. 164	Application of division	Original
s. 165	Who may file a declaration	Original
s. 166	When declaration may be filed	Original
s. 167	Form of declaration	Original
s. 168	Documents to accompany a declaration	Original
s. 169	Notice to beneficiaries and family of deceased	Original
s. 170	Effect of filing declaration	Original
s. 171	Declarant not required to furnish security	Original
s. 172	Supplementary declaration	Original
s. 173	Division found inapplicable after filing of declaration	Original
s. 174	Accounts	Original

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Proposed <i>Wills, Estates and Succession Act</i>		Source Enactment(s)
s. 175	Remuneration	Original
s. 176	Third persons dealing with declarant released from liability	Original
s. 177	Offence by declarant	Original
s. 178	Other remedies preserved	Original
s. 179	Definitions	EAA, s. 100
s. 180	Insolvent estates	EAA, s. 101
s. 181(1)	Debts provable and interest	EAA, s. 102(1)
s. 181(2)	Debts provable and interest	BIA, ss. 121(3), 143
s. 181(3)	Debts provable and interest	BIA, ss. 122(2), 143
s. 182	Contingent and unliquidated claims	BIA, s. 135; Original
s. 183	Secured creditors	EAA, s. 106; BIA, ss. 127 - 128
s. 184	Debts contracted individually and on behalf of partnership	EAA, s. 108; BIA, s. 142(4)
s. 185	Opening of safety deposit boxes	EAA, s. 118
s. 186	Regulations	EAA, s. 119; Original
s. 187	Transitional	Original
s. 188	Repeals	—

2. *Estate Administration Act*, R.S.B.C. 1996, c. 122

<i>Estate Administration Act</i> , R.S.B.C. 1996, c. 122		<i>Proposed Wills, Estates and Succession Act</i>
s. 1	Definitions	s. 1
s. 2	Application of Act	s. 96
s. 2.1	Will or cultural property of Nisga'a citizen	s. 5
s. 3	Personal estate of intestate vests in court until grant	s. 105
s. 4	Duty of administrator to pay debts	ss. 125–126
s. 5	Grant effective back to time of death	s. 106
s. 6	Persons to whom administration may be granted	s. 101(1)
s. 7	Discretionary power in appointment of administrator	ss. 101(2)–(3)
s. 8	Administration while legal proceedings pending	s. 107
s. 9	Representation for deceased persons in legal proceedings ¹	
s. 10	Remuneration to administrators and receivers appointed pending legal action	s. 108
s. 11	Special administration if executor out of jurisdiction ²	
s. 12	Administration if sole executor is a minor	s. 104
s. 13	Administration if next of kin are all minors	s. 101(2)
s. 14	Exclusive authority of administrator	s. 100(1)

1. Not carried forward, because the power to appoint an administrator *ad litem* is duplicated in *Supreme Court Rule* 5 (19).

2. Not carried forward as considered obsolete.

Wills, Estates and Succession: A Modern Legal Framework

<i>Estate Administration Act, R.S.B.C. 1996, c. 122</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 15	Subsequent grants of administration ³	
s. 16	Person granted administration must provide security	s. 114
s. 17	Court may dispense with requirement for bond	s. 114
s. 18	Court may assign bond	s. 115
s. 19	Cancellation of bond after final accounting	s. 116(1)
s. 20	Administration of estates not greater than \$25 000 in value	ss. 163–178
s. 21	Revocation of temporary grants ⁴	
s. 22	Payments made before revocation valid	ss. 147(4), 148
s. 23	Persons making payment protected	s. 148
s. 24	Rights of renouncing executor	s. 117
s. 25	Forfeiture of executorship by failure to take probate	s. 118
s. 26	Personal representative to include trustee	s. 2(4)
s. 27	Right to apply for discharge	s. 141
s. 28	Procedure on application	s. 143
s. 29	Order for discharge of personal representative	s. 141
s. 30	Duty to appoint new personal representative	s. 144
s. 31	Vesting of estate in new personal representative	ss. 145–147

3. Not carried forward as considered obsolete.

4. Not carried forward, because the subject matter is considered to be adequately covered by *Supreme Court Rule 15*.

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<i>Estate Administration Act, R.S.B.C. 1996, c. 122</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 32	Powers and duties of new personal representative	s. 144(5)
s. 33	Definition	s. 1 “estate”
s. 34	Appointment of official administrator	s. 151
s. 35	Deputy official administrators	s. 152
s. 36	Delegation by official administrator	s. 153
s. 37	Official administrator must provide security	s. 154
s. 38(1)–(2)	Transfer of interest to new official administrator	s. 155
s. 39	Application to compel performance by official administrator ⁵	
s. 40	Application by official administrator to administer estate	s. 156
s. 41	Appointment if next of kin renounce	s. 156
s. 41.1	Court must not make order	s. 157
s. 42(1)	Powers of official administrator	s. 158
s. 43	Payment of duties	s. 159
s. 44	Repealed	
s. 45	Repealed	
s. 46	Repealed	
s. 47	Repealed	
s. 48	Payments out of estate funds ⁶	

5. Not carried forward, because the section is referable to the former system of local official administrators.

6. See *supra* note 3.

Wills, Estates and Succession: A Modern Legal Framework

<i>Estate Administration Act, R.S.B.C. 1996, c. 122</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 49	Share of minor in estate ⁷	
s. 50	Insolvent estate ⁸	
s. 51(1)	Powers exercisable before grant of administration	s. 160
s. 52	Right of official administrator to release	s. 158(b)
s. 53	Probate or administration despite previous order	s. 161
s. 54(1)	Official administrator's remuneration	s. 162
s. 55	Regulations	s. 186
s. 56	Effect of proof in solemn form	s. 100(3)
s. 57	Other executors may act if one executor renounces probate	s. 132
s. 58	Power to bring or defend actions	s. 134
s. 59	Actions for wrongs done to or by deceased	s. 134
s. 60	Actions in which deceased named as defendant	ss. 134(5)–(7)
s. 61	Recovery in relation to motor vehicle insurance ⁹	
s. 62	Landlord's remedy of distress for unpaid rent	s. 134(2)
s. 63	Right of action in cases of trespass	s. 134
s. 64	Executor of executors	s. 129
s. 65	Debts relating to estate	s. 126
s. 66	Limitation period for disputed claims against estate	s. 130

7. See *supra* note 3.

8. Not carried forward as considered redundant.

9. Recommended for relocation to *Insurance (Motor Vehicle Act)*, R.S.B.C. 1996, c. 231.

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<i>Estate Administration Act, R.S.B.C. 1996, c. 122</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 67	Raising money when no express power in will	s. 125(2)
s. 67.1	Powers when legatee cannot be found or fails to claim specific bequest	s. 131
s. 68	Liability for wrong of deceased executor	s. 134
s. 69	Liability of deceased executor for waste	s. 134
s. 70	Simple contract debt actions	ss. 134(1), (5)
s. 71	Actions of account	s. 134
s. 72	Liability of executor or administrator in respect of rents	s. 136
s. 73	Fraudulent administration of intestate's goods ¹⁰	
s. 74	Time of distribution of intestate estate ¹¹	
s. 75	Payment of minor's interest	s. 137
s. 76	Repealed	
s. 77	Devolution of real estate to personal representatives	s. 149
s. 78	Administration of real estate	s. 149
ss. 79	Transfer by personal representative to beneficiary	s. 150
s. 80	Liability of real estate to duty ¹²	
s. 81	Definitions	s. 1

10. Not carried forward as considered redundant.

11. Not carried forward as the prohibition on distribution of an intestate's estate for one year from death is recommended for repeal.

12. Considered to be spent.

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<i>Estate Administration Act, R.S.B.C. 1996, c. 122</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 82	Application of Part and amendments to Part	s. 187
s. 83	Intestate leaving spouse but no issue	s. 22
s. 84	Intestate leaving issue	s. 24
s. 85	Intestate leaving spouse and issue	s. 23
s. 85.1	Spousal share if 2 or more persons are entitled as spouse	s. 20
s. 86	Estate going to parents	s. 24(b)
s. 87	Estate going to brothers and sisters	s. 24(c)
s. 88	Estate going to nieces and nephews	ss. 24(c), (d)
s. 89	Estate going to next of kin	ss. 24(d), (e)
s. 90	Kindred and half blood	ss. 25(1)–(2)
s. 91	Posthumous births	s. 18
s. 92	Advances to children ¹³	
s. 93	Land to be distributed as if intestate was Canadian citizen ¹⁴	
s. 94	Estate undisposed of by will ¹⁵	
s. 95	Abolition of dower and curtesy	s. 16
s. 96(1)	Spousal home and household furnishings to spouse	s. 26
s. 97	Contiguous land not incidental to spousal home ¹⁶	
s. 98	Separation of spouses as a bar	s. 1(2)

13. Not carried forward as hotchpot in intestacy recommended for abolition.

14. Not carried forward as considered obsolete.

15. Not carried forward, because definition of “intestacy estate” renders s. 94 surplusage.

16. Not carried forward as surplusage.

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<i>Estate Administration Act, R.S.B.C. 1996, c. 122</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 99	Uniform construction with laws of other provinces	s. 21
s. 100	Definition	s. 179
s. 101	Insolvent estates	s. 180
s. 102(1)	Ranking of debts and rights of sureties	s. 181
s. 103	Claims dependent on conditions or contingency	s. 182
s. 104	Legal priority and rights of secured creditors ¹⁷	
s. 105	Execution not executed in lifetime of deceased ¹⁸	
s. 106	Creditor holding security	s. 183
s. 107	Mortgages to be assigned to creditor, subject to encumbrances ¹⁹	
s. 108	Debts contracted in respect of different estates	s. 184
s. 109(1)	Caveats	s. 110
s. 110	Rules of Court apply to proceedings	s. 3
s. 111	Disclosure on application for probate or administration	s. 111
s. 112	Notice of application for probate or administration	s. 109(1)
s. 112(1)(b)	Notice of application for probate or administration	s. 109(4)
s. 112(1.1)	Notice of application for probate or administration	s. 6

17. Not carried forward as surplusage.

18. Not carried forward as considered spent. Subject matter also covered by *Creditor Assistance Act*, R.S.B.C. 1996, c. 83.

19. Not carried forward as surplusage.

Wills, Estates and Succession: A Modern Legal Framework

<i>Estate Administration Act, R.S.B.C. 1996, c. 122</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 112(3)	Notice of application for probate or administration	s. 109(9)–(10)
s. 112(4)	Notice of application for probate or administration	s. 109(5)
s. 112(5)	Notice of application for probate or administration	s. 109(7)
s. 112(5.1)	Notice of application for probate or administration	s. 113
s. 112(5.2)	Notice of application for probate or administration	s. 113
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s. 112(8)	Notice of application for probate or administration	s. 109(8)
s. 112(8.1)	Notice of application for probate or administration	s. 113
s. 112(9)	Notice of application for probate or administration	s. 109(14)
s. 113	Power of court to order production of testamentary document	s. 112
s. 114	Registrar may order production of documents or assets	s. 112
s. 115	Deposit of original will in Victoria ²⁰	
s. 116	Evidence of will in actions concerning real estate ²¹	
s. 117	Copy of will may be obtained from registry ²²	
s. 118	Opening of safety deposit boxes	s. 185

20. Not carried forward as obsolete.

21. Not carried forward, as section duplicates s. 37 of the *Evidence Act*, R.S.B.C. 1996, c. 124.

22. Not carried forward as covered by the Rules of Court.

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<i>Estate Administration Act, R.S.B.C. 1996, c. 122</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 119	Rules of Court and tariff of fees	s. 186(4)
s. 120	Definition ²³	
s. 121	Wages payable to surviving spouse	
s. 122	Wages not subject to administration	
s. 123	Evidence of entitlement	
s. 124	Repealed	
s. 125	Discharge of employer	
s. 126	Application to court to determine competing claims	

23. Not carried forward as ss. 120–126 recommended for relocation to *Employment Standards Act*, R.S.B.C. 1996, c. 113.

3. *Wills Act*, R.S.B.C. 1996, c. 489

<i>Wills Act</i> , R.S.B.C. 1996, c. 489		<i>Proposed Wills, Estates and Succession Act</i>
s. 1	Definitions	ss. 1, 36
s. 2	Property disposable by will	s. 37
s. 3	Writing required	s. 39
s. 4	Signatures required on formal will	s. 40
s. 5	Military forces and mariners	s. 40
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s. 7	Wills of persons under 19 years of age	ss. 38(1)–(2)
s. 8	Will exercising power of appointment	s. 38(4)
s. 9	Publication	s. 38(3)
s. 10	Incompetence of witness	s. 41(4)
s. 11	Gift to attesting witnesses	ss. 41(1)–(2)
s. 12	Creditor as witness	s. 41(1)
s. 13	Executor as witness	s. 41(1)
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s. 15	Revocation by marriage ²⁴	
s. 16	Revocation of gift on dissolution of marriage	s. 43
s. 17	Altering a will	s. 44
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s. 19	Subsequent conveyance	ss. 49(1)–(8)
s. 20	Effective time of will	ss. 49(1)–(8)
s. 20(1)	Effective time of will	s. 45
s. 21	Lapsed and void devises and bequests	ss. 49(1)–(8)

24. Not carried forward as revocation by marriage is recommended for abolition.

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<i>Wills Act, R.S.B.C. 1996, c. 489</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 22	Inclusion of leaseholds in general devise	ss. 49(1)–(8)
s. 23	Exercise of general power of appointment by general gift	ss. 49(1)–(8)
s. 24	Devise without words of limitation	ss. 49(1)–(8)
s. 25	Gifts to heirs	ss. 49(1)–(8)
s. 26	Meaning of “die without issue”	ss. 49(1)–(8)
s. 27	Devise to trustees otherwise than for term	s. 55
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s. 33	Filing of notice of revocation	s. 63
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4. *Wills Variation Act*, R.S.B.C. 1996, c. 490

<i>Wills Variation Act</i> , R.S.B.C. 1996, c. 490		<i>Proposed Wills, Estates and Succession Act</i>
s. 1	Definitions	s. 83
s. 1.1	Will or cultural property of Nisga'a citizen	ss. 5, 83
s. 2	Maintenance from estate	s. 85(1)
s. 3	Time limit and service	ss. 6, 86
s. 4	Representative Action	s. 86(3)
s. 5	Evidence	ss. 85(4)–(6)
s. 6	Court may make order subject to conditions	ss. 85(4)–(6), 88
s. 7	Lump sum or periodic payments	s. 88
s. 8	Payments fall rateably on estate	s. 90
s. 9	Power to release part of estate	s. 89(2)
s. 10	Power of court to allow commutation	s. 89(3)
s. 11	Effect of order	s. 91
s. 12	No distribution until 6 months after probate	s. 92
s. 13	Mortgage in anticipation of order invalid	s. 93
s. 14	Court may cancel or vary order	s. 89(5)
s. 15	Appeal to the Court of Appeal ²⁵	

25. Not carried forward as section is recommended for repeal in reliance upon general appellate jurisdiction under the *Court of Appeal Act*, R.S.B.C. 1996, c. 77.

5. Selected Provisions from the *Law and Equity Act*, R.S.B.C. 1996, c. 253

<i>Law and Equity Act</i> , R.S.B.C. 1996, c. 253		<i>Proposed Wills, Estates and Succession Act</i>	
s. 46(1)	Designation under employee benefit plans	s. 68(1)	
s. 46(2)(a)	Designation under employee benefit plans	ss. 68(1) “declaration”, 69(1)	
s. 46(2)(b)	Designation under employee benefits plans	ss. 69(2)–(4)	
s. 46(2)(c)	Designation under employee benefits plans	s. 77	
s. 46(2)(d)	Designation under employee benefits plans	s. 76	
s. 46(3)	Designation under employee benefit plans	ss. 69(2), 70–72	
s. 46(4)	Designation under employee benefit plans	s. 82	
s. 49(1)	Registered retirement savings plans	s. 68(1) “participant”; “plan”	
s. 49(2)(a)	Registered retirement savings plans	ss. 68(1) “declaration”, 69(1)	
s. 49(2)(b)	Registered retirement savings plans	s. 76	
s. 49(2)(c)	Registered retirement savings plan	s. 78	
s. 49(2)	(Closing flush) Registered retirement savings plan	ss. 69(4), 71(3), 72(1)	
s. 49(3)	Registered retirement savings plans	s. 69(2)	
s. 49(4)	Registered retirement savings plans	s. 82	
s. 50(1)	Registered home ownership savings plans	s. 68(1) “plan”	
s. 50(2)(a)	Registered home ownership savings plans	ss. 68(1) “declaration”, 69(1)	
s. 50(2)(b)	Registered home ownership savings plans	s. 76	

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<i>Law and Equity Act, R.S.B.C. 1996, c. 253</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 50(2)(c)	Registered home ownership savings plans	s. 78
s. 50(2)	(Closing flush) Registered home ownership savings plans	ss. 69(4), 71(3), 72(1)
s. 50(3)	Registered home ownership savings plans	s. 69(2)
s. 50(4)	Registered home ownership savings plans	s. 82
s. 51(1)	Registered retirement income funds	s. 68(1) “participant”; “plan”
s. 51(2)(a)	Registered retirement income funds	ss. 68(1) “declaration”, 69(1)
s. 51(2)(b)	Registered retirement income funds	s. 76
s. 51(2)(c)	Registered retirement income funds	s. 78
s. 51(2)	(Closing flush) Registered retirement income funds	ss. 69(4), 71(3), 72(1)
s. 51(3)	Registered retirement income funds	s. 69(2)
s. 51(4)	Registered retirement income funds	s. 82

6. *Survivorship and Presumption of Death Act, R.S.B.C. 1996, c. 444*

<i>Survivorship and Presumption of Death Act, R.S.B.C. 1996, c. 444</i>		<i>Proposed Wills, Estates and Succession Act</i>
s. 1	Definitions ²⁶	
s. 2(3)	General presumptions	s. 9
s. 2(4)	General presumptions	s. 10
s. 3	Presumption of death	
s. 4	Duty of personal representative	
s. 5	Status of property if deceased later found alive	
s. 6	Status of property if deceased in fact dead	
s. 7	Appeals	

26. Sections 1 and 3–7 are not consolidated and instead remain in the renamed *Presumption of Death Act*, R.S.B.C. 1996, c. 444.

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