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Background

Report no. 45—Wills, Estates and Succession: A Modern Legal Framework

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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 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 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 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 obsolete 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 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 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.