CHAPTER SIXTEEN A: WILLS & ESTATE PLANNING

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CHAPTER SIXTEEN: WILLS AND ESTATES

I. INTRODUCTION

This chapter provides a brief summary of will preparation and estate administration procedure. In this chapter, any reference to a court is to the B.C. Supreme Court.

The *Wills, Estates and Succession Act*, SBC 2009, c 13 ['WESA'], came into force on March 31, 2014. WESA substantially revised wills and estates law in B.C. by repealing and consolidating the *Estate Administration Act*, RSBC 1996, c 122; the *Probate Recognition Act*, RSBC 1996, c 376; the *Wills Act*, RSBC 1996, c 489; and the *Wills Variation Act*, RSBC 1996, c 490.

WESA now applies to **all** wills in B.C. if the deceased dies after March 31, 2014, except where:

- The will was validly made before WESA comes into force, but would be invalid under WESA; or
- The will was revoked before the Act comes into force (i.e. WESA will not revive validly revoked wills);

If you are seeking legal advice on an existing will, remember that except for s 16, 25 30 and 44(3), the *Wills Act* applies only to wills made after March 31, 1960 (s 44(1)).

WESA also applies to estates where there is no will, known as an "intestacy".

II. GOVERNING LEGISLATION AND RESOURCES

A. Legislation

Wills, Estates and Succession Act, SBC 2009, c 13 ['WESA'].

Trustee Act, RSBC 1996, c 464

B. Texts

Many texts are available that provide more information on this area of the law. Be aware that the law on wills & estates has significantly changed since WESA came into force on March 31, 2014. Therefore, earlier resources may be outdated.

1. General

Bake-Paterson et al, *BC Estate Planning & Wealth Preservation*, (Vancouver: CLEBC, 2016)

Baird et al, *Wills, Estates, and Succession Act Transition Guide* (Vancouver: CLEBC, 2014)

2. Drafting

Bogardus & Hamilton, *Wills and Personal Planning Precedents – An Annotated Guide*

(Vancouver: CLEBC, 2016)

3. Probate

Bentley et al, *Probate and Estate Administration Practice Manual* (Vancouver: CLEBC, 2016)

C. Bureaus and Web Sites

Department of Vital Statistics

605 Robson Street, Room 250
Vancouver, B.C.

Telephone: (604) 660-2937

Fax: (604) 660-2645

Website: www.vs.gov.bc.ca/forms/index.html

Canadian Legal Information Institute ('CanLII')

Website: www.canlii.org

CanLII is a non-profit organization that provides access to court judgments, tribunal decisions, statutes and regulations from all Canadian Jurisdictions.

III. MAKING AND EXECUTING A WILL

A. Assessing Will-maker Competence

To make a valid will, a person must be:

- 16 years of age;
- Have testamentary capacity;
- Intend to make a will; and
- Comply with the formalities in WESA.

1. Testamentary Capacity

a) Generally

The will-maker must have the requisite testamentary capacity. No person of unsound mind, who lacks testamentary capacity, is capable of making a valid will. Testamentary capacity is defined through the common law, not statute. The basic test is found in *Banks v Goodfellow,* (1870) LR 5 B 549 (QB) at p. 569; for a recent application of this test, see *Serbina v Frejd,* (2016) BCSC 33 (CanLII), para 81.

According to the *Goodfellow* test, to have testamentary capacity a will-maker must understand:

- The nature of the act of making a will and its effects;
- The extent of the property he or she is disposing; and
- Be able to comprehend and appreciate the claims to which he or she ought to give effect.

b) Presumption of Requisite Capacity

The law presumes that a will-maker has the requisite capacity, if a will was duly executed in accordance with the formal statutory requirements after being read over to a testator who appeared to understand it.

However, a student or lawyer taking instructions from the will-maker should nevertheless always assess the will-maker 's capacity. This decision should be based on the will-maker's instructions, not any assertion from the will-maker that they are capable. To this end, avoid asking will-maker direct questions about capacity, such as "Are you capable?"

Some helpful lines of inquiry to assess capacity include: whether the will-maker can understand the nature of the testamentary act (that he or she is making a will), can recall the property, and can comprehend that he or she is excluding possible claimants under intestacy or through a wills variation claim. Delusions or partial insanity will not destroy testamentary capacity unless they directly affect testamentary capacity or influence the dispositions in the will.

c) Undue Influence and Suspicious Circumstances

A will or a portion of it that is made as a result of undue influence is not valid. Undue influence is not mere persuasion, but is physical or psychological **coercion**. There must be capacity to influence and the influence must have produced a will that does not represent the will-maker's intent. A spouse, parent, or child, etc. may put his or her claims before the will-maker for recognition. This does not constitute undue influence unless it amounts to coercion. The will drafter should ensure that the will represents the will-maker's intentions and that he or she is not being coerced into making the will or disposition against his or her wishes. This is especially relevant where the aged or infirm are concerned. (see *Wingrove v Wingrove,* (1885) 11 PD 81 (PD)); see also for more recent applications in *Ashdown v Milburn,* (1920) 50 DLR 523 (Sask CA) and *Re Marsh Estate,* (1991) 104 NSR (2d) 266 (NSCA).

d) Presumption of Validity

Under the common law, if a will was duly executed in accordance with the formal statutory requirements after being read over to a testator who appeared to understand it, it is presumed that the testator possessed the requisite capacity and knew and approved its contents.

This presumption is rebutted where "suspicious circumstances" exist. Suspicious circumstances may arise where a person who prepares a will also takes a benefit under it, though this is not exhaustive of all circumstances that raise a suspicion. The suspicion is that the will-maker did not know or approve of the contents of the will, and this suspicion must be removed before probate will be granted (see *Riach v Ferris,* [1934] SCR 725; see also more recent applications in *Clark v Nash,* (1989) 61 DLR (4th) 409 (BCCA) and *Johnson v Pelkey,* (1997) 36 BCLR (3d) 40 (SC)).

The Supreme Court held in *Vout v Hay,* [1995] 2 SCR 876, that where suspicious circumstances are proven, the burden of proof shifts to the propounder of the will to prove on balance of probabilities that the will-maker knew and approved of the will's contents and had the necessary testamentary capacity. This problem is best avoided by ensuring the will is prepared by the will-maker or some independent party (e.g., a student or lawyer) and not by a beneficiary under the will or the spouse of a beneficiary.

The doctrine of "suspicious circumstances" does not apply to undue influence. Under common law, the challenger must always prove undue influence. However, section 52 of ***WESA*** now provides that, if it is shown that the will-maker was in a position where the potential for domination or dependence was present, the burden shifts to the party seeking to defend the will to show that the will was not procured through undue influence.

B. Finding and Appointing a Personal Representative

1. Duties of the Personal Representative

The Executor or Administrator are responsible for the administration of the Estate, including calling and realizing assets, distributing assets, and winding up the Estate.

2. Executor

An Executor is appointed by the will-maker in the will to handle all aspects of the estate after the will-maker's death. Any person, trust company or financial institution may be an Executor depending on the size of the estate. Although not recommended, a minor may be appointed; however, if he or she has not reached the age of majority on the will-maker's death, probate may be delayed.

The will-maker should appoint a person that is willing to act, familiar with the estate, young enough to outlive him or her, and preferably living in B.C. An alternative Executor should also be appointed in case the first Executor is unavailable. The Executor, if he or she accepts

the position, must carry out the duties of Executor. The Executor may renounce under s 104 of WESA, if he or she has not already intermeddled with the estate. In this scenario, the administration of the estate passes as if he or she had never been appointed Executor.

3. Administrator

An Administrator is appointed by the court to administer the estate of a person who dies intestate (without a will). Section 130 of WESA provides the order of priority among applicants for administration of an intestate estate. An Administrator cannot act until the court grants Letters of Administration. An "administration with will annexed" may be granted where there is a will but the Executor named in the will cannot or will not act (e.g. due to refusal to act, incapacity, or death of the Executor). The order of priority for administration with will annexed is provided in section 131 of WESA. The Administrator's legal capacity to act starts from the date of the granting of the Letters of Administration.

4. Personal Representative is Accountable

A personal representative is at a law a fiduciary and must act to the benefit of the estate and the beneficiaries. He or she cannot purchase from the estate unless he or she is given specific power to purchase in a will. He or she is accountable to the estate for any profit made while acting as Executor or Administrator. If the personal representative makes mistakes and causes loss to the estate, unless the court finds that he or she acted honestly and reasonably, that person could be held personally liable and could be required to replace the loss.

5. Remuneration and Benefits

A personal representative may be entitled to remuneration under a remuneration contract or pursuant to an express authority under the will. Otherwise, he or she is entitled to a fair and reasonable remuneration, not to exceed 5 percent of the gross aggregate value of the estate under s 88 of the *Trustee Act*, RSBC 1996, c 464, and an annual care and management fee not exceeding 0.4 percent of the average market value of the assets. A personal representative may be a beneficiary under the will, though it is a rebuttable presumption that any benefit other than a residuary bequest under the will is in lieu of compensation: see *Canada Permanent Trust Co v Guinn,* (1981) 32 BCLR 288 (SC).

A trust company can be appointed Executor but usually will not consent unless the assets are substantial.

If the client requires a trust company to be appointed as the Executor, the client should be referred to a private lawyer.

C. Drafting the Will

Section 37 of WESA requires that a will be in writing. The will-maker and two or more witnesses in the presence of the will-maker must sign the will. It may be typed or handwritten, or both, as in the case of printed will forms.

1. Intention and Precision

A fundamental rule of drafting is to ascertain the **will-maker's intent** regarding how the estate will be divided. Have the will-maker consider present desires as well as future possibilities. A beneficiary may predecease the will-maker and the will-maker may want the deceased's share to go to someone else. Potential will variation claims must be anticipated. **A qualified lawyer should be consulted if a wills variation claim may occur.** See Section VI: Will Variation Claims, to determine when this issue might arise.

Use clear, precise language. Those drafting a will should make an effort to use fewer technical legal terms and more common language. The concepts of Latin maxims may be difficult for some to comprehend and cause unnecessary frustration. Using simple language will reassure clients that those who read it will understand what is being conveyed.

Do not use words and phrases that are open to more than one interpretation. Be clear in describing property and time periods. Remember that certain terms used to describe property or relationships have precise legal meanings. Do not use them casually. Be careful describing property and beneficiaries. For example, the clause "I give the assets in my bank account to John" is poorly drafted. It may mean a savings account, checking account, or both. John may be a son, nephew or lover.

If the will is contested, the estate may be ordered to pay the legal fees and the beneficiaries will receive a reduced amount. However, where Executors are also beneficiaries and have a personal interest in the outcome of the litigation, courts may be reluctant to order costs be paid out of the estate: see *Re Lapka Estate,* (2005) 15 ETR (3d) 234 (BCSC) and *Re Wilcox Estate,* (2005) 13 ETR (3d) 120 (BCSC).

NOTE: T**he clauses given below are merely examples. You should ensure that the clauses you use are appropriate and that the will is internally consistent.** For example, if specific bequests are given to various persons, another clause in the will should not dispose of the entire estate, but may dispose of the residue. Consult a qualified lawyer, the CLEBC *Wills and Personal Planning Precedents* resource or any other books on will precedents for additional assistance with the structure of various clauses.

2. Actual Drafting

A will contains instructions about what should happen after the will-maker's death. As a result, keep in mind the importance of precision and consistency when drafting a will. Generally, there are several paragraphs common to all wills. To see full will templates, consult the sources on page 4. The CLEBC's *Wills Precedents* is especially useful.

In addition, the top of each page of the will should identify the page by number and say "the Last Will and Testament of <will-maker's name>" and should be initialled by the will-maker and witnesses.

3. Part I

The first part of the will deals with initial matters. The opening clause of a will is called the "domicile clause" and identifies the will-maker and the place where the will was made. The first paragraph is known as the revocation clause, which cancels any wills previously made. The next paragraph appoints the Executor and Trustee and an alternate Executor and Trustee of the will. Following this paragraph is the guardian clause, which appoints someone to look after any minor children. This is important in cases where the death of both parents occurs at the same time.

a) Opening and Revocation Clauses

The opening clause is fairly standard. It identifies the will-maker, gives his or her place of residence and may state his or her occupation:

SAMPLE: "This is the last will of me, [name], of [address], British Columbia." (See 2016 CLE *Wills Personal Planning Precedents*, 1-2).

Though the last testamentary disposition of property is generally the effective one, it is standard practice to insert a general revocation clause that revokes all previous wills and codicils. This clause may be included even though the will-maker has never before made a will. It follows the opening clause.

SAMPLE: "I revoke all my prior wills and codicils." (2016 CLE *Wills and Personal Planning Precedents*, 1-7).

The revocation clause should not revoke other non-will testamentary dispositions as this would revoke designations made on insurance policies, RRSPs, etc. This would

cause these monies to fall into the estate. Should the will-maker wish this, it is more effective to designate the estate as the beneficiary to such policy or RRSP.

Also note that this clause may need modification in some situations (e.g. if the client has a will in another jurisdiction disposing of assets in that jurisdiction). See page 1-7 of the 2016 edition of the CLE *Wills and Personal Planning Precedents*. If such a situation applies to a client, please refer them to a private lawyer.

b) Appointing the Executor and Trustee

SAMPLE: "(a) I appoint my [relationship] [full name of executor/trustee] ("[executor/trustee name]") of [executor/trustee's address] to be my Trustee.

(b) If my [relationship] [executor/trustee name] is unwilling or unable to act or continue to act as my Trustee, I appoint my [relationship] [full name of alternative executor/trustee] of [alternative executor/trustee's address] to be my Trustee." (See 2016 CLE *Wills and Personal Planning Precedents*, 3-4)

The Executor also takes the role of a Trustee during the administration of the estate. However, the will-maker may wish to establish a continuing trust and thus appoint different people to be Executor and Trustee of a specific trust. A Trustee is appointed where the will-maker wishes to prevent the beneficiaries from squandering all or part of the estate and to provide for more capable management funds or property, or to provide for infant children until they attain the age of majority. A trustworthy and competent person should be chosen to be the Trustee. This person will have legal title to the property.

A bank or trust company may also be appointed. Their expertise and trustworthiness make them an excellent choice, though the cost may be prohibitive, especially with small and simple estates.

c) Appointing a Guardian

A will-maker may wish to appoint a guardian for his or her children during their age of minority (see *Family Law Act*, SBC 2011, c 25 s 53 (1) (a)) Financial assistance should be provided to the guardian to cover the costs of raising the children. This arrangement is made with the Trustee. The guardian must be prepared to accept the position and should be consulted beforehand.

A testator cannot grant a greater level of guardianship than he or she possesses. Also note that under section 176 of the *Family Law Act*, a child's guardian does not automatically become a trustee of the child's property. If there is any uncertainty regarding what type of guardianship the client has, or whether the client even has guardianship, the client should be referred to a family lawyer, as LSLAP cannot deal with questions of family law.

Those appointing a guardian should be aware that the court could review such a decision. As well, members of the family can apply to have a decision in the will set aside. However, it must be strictly proven that the guardian appointed by the will-maker is unsuitable for the position.

SAMPLE: "I appoint [guardian name] to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, [guardian name] will appoint a guardian in [his/her] will, or otherwise, to be the guardian of my minor children." (2016 CLE *Wills and Personal Planning Precedents*, 4-2)

For more information, see **Chapter 5: Children and the Law** and **Chapter 3: Family Law**.

4. Part II

The second part of the will addresses the disposition of the estate. The Executor/Trustee is given the power to deal with the estate as he or she sees fit, namely, to sell assets and convert into money or postpone such conversion of the estate for such a length of time as he or she thinks best. Further, the Executor/Trustee directs payment of debts, specific bequests, cash legacies, gifts to spouse, and gifts to children (gifts of the residue of the estate).

a) Vesting Clause

This clause gives the Executor/Trustee the power to deal with the estate as he or she sees fit, in keeping with the will-maker's wishes under the will and the Trustee's fiduciary duties.

SAMPLE: "I give my Trustee all my property of every kind and wherever located to administer as I direct in this Will. In administering my estate, my Trustee may convert or retain my estate as set out in paragraph(s)..." (2016 CLE *Wills and Personal Planning Precedents*, 7-2)

Immediately after this clause, the student should insert the clause "I direct my Trustee to hold that property on the following trusts:" See the sample will template in 2016 CLE *Wills and Personal Planning Precedents*, 50-2, to better understand how this would look.

b) Payment of Debts

This clause is usually inserted even though the Executor/Trustee is legally required to pay debts outstanding at death, reasonable funeral expenses, taxes, and legal fees out of the estate.

SAMPLE: "(a) to pay out of my estate:

(i) my debts, including income taxes payable up to and including the date of my death [and any financial charges with respect to any property which, pursuant to this will, is transferred free and clear to a beneficiary of beneficiaries];

(ii) my funeral and other expenses related to this will and my death; and

(iii) all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing on my death in any foreign jurisdiction in order to obtain any property forming part of my estate which, in the opinion of my Trustee, has value greater than the taxes and other costs that must be paid in order to obtain it, and my Trustee may repay or delay payment of any taxes or duties" (2016 CLE *Wills and Personal Planning Precedents*, 8-4)

c) Items-in-Kind

The will-maker may wish to make a specific bequest of a personal article. The appropriate item must be listed.

SAMPLE:

"(a) to transfer and deliver absolutely my [article 1] to my [relationship] [article 1 name], if [he/she] is alive on the date that is 5 days after the date of my death.

(b) [to pay [all/a specified portion] of the packing, freight, and insurance costs my Trustee decides [are/is] appropriate for delivering any items of the Articles as required by this will]." (2016 CLE *Wills and Personal Planning Precedents*, 10-2)

d) Cash Legacies

The will-maker may wish to make a specific bequest of cash legacies.

SAMPLE: "to pay the following cash legacies without interest and as soon after my death as practicable to such of the following named beneficiaries who are alive on the date that is 30 days after the date of my death:

to my son, <name>, the sum of ONE THOUSAND ($1,000.00) DOLLARS;

to my daughter, <name>, the sum of ONE THOUSAND ($1,000.00) DOLLARS." (See 2016 CLE *Wills and Personal Planning Precedents*, 12-5.)

If the client feels that his or her estate may not be large enough to pay all desired legacies, the client may wish to express an order of priority for the legacies. See 2016 CLE *Wills and Personal Planning Precedents*, 12-15.

e) Gifts to Spouse

In the event of a common accident where both spouses die and it cannot be determined who died at what particular time, then each spouse's estate passes as if they had outlived the other spouse (WESA s 5). In the case of a joint tenancy, the property is treated as if it were held as a tenancy in common (WESA s 5). These presumptions will be subject to contrary intention made in a will or other applicable instrument. Also, if a spouse does not survive the deceased spouse by five days, that person is deemed to have predeceased the deceased spouse (WESA s 10). Disposition of life insurance is dealt with differently under the *Insurance Act*, RSBC 1996 c 226, s 52 and 72.

To ensure that property passes according to the will-maker's intention, a 30-day survivorship clause should be added, which requires the surviving spouse to survive the will-maker by 30 days (or such period as the will-maker wishes). A sample clause when the husband leaves the residue to the wife is:

SAMPLE:

"(a) to give the residue of my estate to [residue name], if [he/she] is alive on the date that is 30 days after the date of my death;

(b) if [residue name] is not alive on the date that is 30 days after the date of my death, [specify what to do with residue]." (2016 CLE *Wills and Personal Planning Precedents*, 14-2)

If the will-maker is not giving a residue but the entire estate, the appropriate words would be "to give all my assets, both real and personal, of whatsoever kind and wheresoever situate, to…"

Because of the presumption that a reference in a will to a relationship is presumed to refer to legitimate relationships, **a "common law spouse" should not be referred to as "my husband" or "my wife" but should be identified by name**.

f) Gifts to Children

If the will-maker's spouse does not survive the will-maker, often the will-maker will want to leave the estate to his or her children. A will-maker must decide whether he or she wishes to divide the estate between only those children alive at the will-maker's death, or if he or she wishes to benefit the issue of any pre-deceased child as well (i.e. grandchildren).

SAMPLE: "If <name> is not alive on the date that is 30 days after the date of my death, to divide the residue of my estate into as many equal shares as there are of my children who are alive on the date that is 30 days after the date of my death, except that if any child of mine has died before that date and one or more of his or her children are alive on that date, that deceased child will be considered alive for the purposes of the division." (2014 CLE *Wills Precedents – An Annotated Guide*, 16-26. For updated samples, see also 2016 CLE *Wills and Personal Planning Precedents – An Annotated Guide, 16-26*)

[The will should then go on to detail the terms on which the shares will be distributed to the beneficiaries: e.g. the age at which the trustee should pay out the shares.]

If the children are under 19, usually a trust should be created for them until they reach majority age. See part k, Gifts to Children, immediately below. **If a trust needs to be created for a minor child, the student should refer the client to a private lawyer.**

5. Part III

a) Implied and Express Powers of Executor

The third part of a will deals with the administration of the estate. This section outlines the Trustee's general powers and responsibilities: trusts for minors, payments for minors, and valuation of the estate. The only implied power of an Executor to deal with assets is a power to "call in" and sell the assets which are not specifically gifted in the will. Therefore, a well drafted will should involve several express powers so that the Executor can efficiently deal with the assets of the estate.

NOTE: There is an important distinction that must be made between the duties and powers of the Executor. On the one hand, duties are non-discretionary. They dictate a course of action that the Executor must take according to the intentions of the will-maker as set out in the will. On the other hand, powers are discretionary. They allow the executor to make decisions within a range of possibilities according to the intentions of the will-maker.

b) Gifts to Children

As a general rule, anyone named in a will can inherit under that will. However, minors cannot sign a valid receipt for their share in an estate. In practical terms, this means that minors must wait until they reach the age of majority to inherit under a will. The parent, guardian, or other trustee for the benefit of the child would hold title to any real property until the child reaches age 19. When property is held by a trustee in trust for a child under the age of 19, the trustee is deemed to have the power to encroach and may, at his or her discretion, apply all or part of the income to which the child may be entitled towards the maintenance and/or education of the child (*Trustee Act*, RSBC 1996, c 464, s 24).

The clause creating the trust should:

- Create the trust for the benefit of the children;
- Set out a discretionary schedule of payments;
- Grant a power of encroachment and/or a direction to pay income;
- Leave a deceased beneficiary's share to his or her children if he or she dies before reaching the age of vesting. If he or she has none, then the trust should direct who receives this bequest.
- Give the Trustee discretion to invest outside the *Trustee Act*, only if he or she is acquainted with business matters.

SAMPLE: "If anyone becomes entitled to any part of my estate, is under the age of majority, and I have not specified terms in this will on which my Trustee is to hold that part, I direct my Trustee to hold that part, and:

(a) Pay as much of the income and capital as my Trustee decides for that person's benefit until that person reaches the age of majority;

(b) Add any unused income to the capital of that person's part of my estate and then pay the capital to that person when he or she reaches the age of majority, but if that person dies before reaching the age of majority, I direct my Trustee to pay that person's part of my estate to that person's estate; and

(c) Regardless of paragraph X (a) and (b) above, and at any time my Trustee decides, pay some or all of that part of my estate to that person's parent or guardian, to

hold, and if that parent or guardian decides, apply some or all for that person's benefit." (See 2014 CLE *Wills Precedents – An Annotated Guide*, 19-4. For updated samples, see also 2016 CLE *Wills and Personal Planning Precedents – An Annotated Guide, 19-4*.)

The intended beneficiaries (i.e. the children) need not be alive at the time of execution to be included if a general term such as "children" is used.

Section 153 of WESA provides that where there is no trustee in the estate, money bequeathed to a minor is paid to the Public Guardian in trust for that minor. The *Infants Act* (s 14(1)) states that, subject to the terms of a trust set up in a will, the Public Guardian may authorize payment of all or part of the trust for the maintenance, education or benefit of the infant.

If part of an estate is distributed to a minor, the Executor or Administrator of an estate is left open to an action by the minor (upon reaching the age of majority) to repay all the monies distributed in a manner not in accordance with the terms of the will.

If a will-maker wants a clause to limit the Trustee's investment powers, a wills precedent book must be consulted. If any of the persons the will-maker wishes to benefit are stepchildren, the will should clearly identify that person by name rather than merely by relationship (i.e. "children"). **Stepchildren are not considered children under WESA, and should be referred to by name.** Adopted children, however, are for all purposes the children of the adopting parents, and not the legal children of the natural birth parents, per section 3 of WESA.

It is possible for a minor to receive monetary gifts before he or she reaches the age of 19. However, before probate will be granted, the Public Guardian and Trustee of B.C. must be notified. The Trustee's foremost concern is protecting the child, and it is in the Trustee's discretion whether or not a gift will be given. They will consider factors such as the amount of the gift and its intended purpose.

c) Valuation of Estate

This section of a will outlines the Trustee's general power and discretion to fix the value of the estate.

NOTE: While the Trustee has a general discretion to fix the value of the estate, there must be some factual basis to support this valuation. The Trustee has a fiduciary responsibility to act to the benefit of the estate and the beneficiaries.

SAMPLE: "When my Trustee divides or distributes my estate, my Trustee may decide which assets of my estate (including, without limitation, money, publicly traded securities or other property, real or personal) to allocate to any share or interest in my estate (and not necessarily equally among any shares or interests) and the value of each of those assets. Whatever value my Trustee attributes to those assets will be final and binding on everyone interested in my estate." (2016 CLE *Wills and Personal Planning Precedents – An Annotated Guide*, 19-7)

6. Part IV

The fourth part of a will is concerned with the elimination of potential beneficiaries, funeral directions, and finally, execution and attestation.

a) Eliminating Potential Beneficiaries

See Part VI-A, *Wills variation claims* for more information regarding why eliminating potential beneficiaries can be problematic.

b) Funeral Directions

These directions are not binding, but the Executor must arrange for a funeral that is fitting having regard to the will-maker's position and manner of life. Prudent practice is to advise the will-maker that he or she should make these wishes known to the Executor.

SAMPLE: "I want my remains to be [buried/cremated]. I hope that if any funeral or memorial service is held as a result of my death it will be conducted with unostentatious simplicity." (See 2016 CLE *Wills and Personal Planning Precedents*, Chapter 20.)

c) Execution and Attestation Clause

The execution and attestation clause must be on a page with a portion of the will. Never put it on a separate page and always have the will-maker sign it at the end of the will in the presence of two disinterested witnesses; there must be room for the two witnesses' signatures (see **Section III.E: Executing and Attesting the Will**).

SAMPLE: "I have signed this Will on <month, day, year>.

We were both present, at the request of [will-maker's name], and we were both 19 years of age or older, when this will was read to [him/her] by [signor]. [will-maker name] appeared to thoroughly understand it and approve its contents. We remained present while [signor], also in the presence of [will-maker name], and at [his/her] direction, signed this will with the name of [will-maker name]. We then signed as witnesses in the presence of both [will-maker name] and [signor] and in the presence of each other.

_____
Signature of Witness

_____
Printed Name

_____
Address (Street)

_____
City

_____
Occupation

_____
Signature of Witness

_____
Printed Name

_____
Address (Street)

_____
City

_____
Occupation

_____
<full name of will-maker>"

NOTE: **Execute only the original will.** Copies should not be signed by will-maker and witnesses, but can be photocopied or have facsimile signatures and dates inserted. Students should write or stamp the word "copy" on all photocopies.

D. Executing the Will

1. Presumption of Proper Execution

Inclusion of a signed attestation clause will raise a presumption that the will is properly executed (*Re Gardner*, [1935] OR 71 (Ont CA)). An attestation clause is a clause at the end of the will where the will-maker signs his or her name testifying to the fact that he or she is signing the approved will. This is also the place where the two witnesses must sign to show that they have witnessed the will-maker approving of the will.

If special circumstances exist, e.g. the Will-maker is blind or illiterate, a wills form manual should be consulted in order to draft the appropriate attestation clause.

2. Beneficiary's debt to Estate

According to *Re Johnston Estate*, 2017 BCSC 272, the rule in *Cherry v Boultbee* applies in Canada. This means that the beneficiary is required to bring his or her debts towards the estate into account, even if the debt claim would otherwise be statute barred by the limitations act. *Re Johnston Estate* states that "the purpose of the rule was to prevent a beneficiary who owed money to an estate from receiving more than his or her fair share of the estate."

E. Attesting the Will

1. Signature of Will-maker

a) Meaning of Signature

There must be a signature or a mark on the will intended to be a signature. Thus, something less than a signature, e.g. initials, will be sufficient where it is intended to represent the name and to be a signature (*In the Goods of Chalcraft,* [1948] 1 All ER 700; *Re Schultz Estate,* [1984] 4 WWR 278 (Sask Surr Ct)). Where necessary, the will-maker's hand may be guided by another person; however, this requires the will-maker's clear direction or consent (*Re: White,* (1948) 1 DLR 572 (NS App Div)).

The will-maker need not sign the will him or herself. Section 1(1) and (2) of WESA provides that the will-maker's signature includes "a signature made by another person in the will-maker's presence and by the will-maker's direction." Where someone else signs on behalf of the will-maker, there must be some act or word by the will-maker constituting a direction or request. When someone else signs, that person may sign in either the will-maker's name or his or her own name, but this circumstance should be noted in the attestation clause (*Re: Fiszhaut Estate,* (1966) 55 WWR 303 (BCSC)). If this issue should arise, there must be further review to ensure the signature's legal validity.

b) Position of Signature

Section 37(1)(b) of WESA requires the signature be at the end of the will. Section 39 defines when a will is deemed to be signed at the end and provides that a disposition made below or after the signature is of no effect. Case law has taken a liberal view of these requirements, finding a signature not at the end to have been intended to be at the end (*In the Goods of Henry Hornby,* [1946] All ER 150 and *Currie v Potter* [1981] 6 WWR 377 (Man QB)) and finding a disposition after the signature to have been intended to precede the signature (*Palin v Ponting,* [1930] para 185, considered in *Beniston Estate v Shepherd*, (1996) 16 ETR (2d) 71 (BCSC)). However, to ensure the validity of the will and all

dispositions, the will should be signed at its end, after all dispositions. When a will is more than one page, it should be signed at the end of the last page and there should be a portion of the will on the last page. The last page of the will should indicate the will-maker is signing this page as the last of all the pages constituting the will. Although not required, the will-maker and witnesses should initial the other pages of the will.

2. Signatures of Witnesses

a) Generally

The will-maker must make or acknowledge the signature in the joint presence of two attesting witnesses present when the will is signed (WESA, s 37) A beneficiary of the will should never witness the will, as it may void the gift they receive through the will (WESA, s 40 & s 43). It will be sufficient if the will-maker has made his or her signature in the joint presence of the witnesses. If he or she has not, the will-maker must acknowledge the signature in the witnesses' presence, as it becomes a question of fact that witnesses must have actually seen or been able to see the signature when the Will-maker acknowledged it (see *Re Schafner,* (1956) 2 DLR (2d) 593 (NSSC)).

Both witnesses must also attest after the will-maker makes or acknowledges his or her signature in their joint presence. Though they need not sign in each other's presence, they must each sign in the presence of the will-maker who must actually see or be able to see the witnesses sign (WESA, s 37(1)(c)). **Attesting witnesses must be able to confirm the will-maker's execution of the will; they do not need to be aware of the contents of the will.**

b) Competence of Witnesses

Any person 19 years of age or older may be a witness (WESA s 40(1)).

A will is not invalid if the only reason is a witness is legally incapable of proving the will either at the time the will was signed by the will-maker or afterwards. However, if the witness is not 19 years old or older at the time the will was signed by the will-maker, then the will is invalid.

c) Gifts to Witnesses

Section 43 of WESA provides that a gift to a witness, or the spouse of a witness, to a testamentary document is void. Section 43(3) of WESA explicitly provides that, even if such a gift is void, this has no effect on the validity of the remainder of the Will.

There is one exception to this rule. Section 43(4) of WESA provides that, if the court is satisfied that the will-maker intended to make the gift to the person, the gift to the witness will not be void.

F. Court's Power to Cure Deficiencies and Rectify Wills

Section 58 of WESA gives the courts the power to recognize any "record" that gives effect to the testamentary disposition of the deceased, even if it does not comply with the formalities of WESA and/or the common law. This means that the court can give effect to a document or other record that contains a testamentary disposition. As such, individuals should be cautious about drafting documents that may be construed as a testamentary disposition.

The leading case on section 58 is *Estate of Young,* (2015) BCSC 182, in which the court considers case law from Manitoba considering a similar provision (section 22 of *The Wills Act*, CCSM W150) in order to interpret section 58.

The court observes that the curative power of section 58 is very fact-sensitive and that section 58's purpose is to cure formal invalidities and not to be used to uphold a will that is invalid for any substantive reasons. For example, the court can uphold a will that does not adhere to the format that a

will should take under **WESA**, however, it cannot uphold a will that is deemed invalid because of testamentary incapacity or undue influence.

There are two principal issues for consideration that the courts take into account when assessing whether an impugned document should be recognized:

1. Whether the document is authentic.
2. Whether the non-compliant document represents the deceased's testamentary intentions. The court then goes on to specify: "The key question is whether the document records a deliberate or **fixed and final expression of intention** as to the disposal of the deceased's property on death."

   The court includes a non-exhaustive list of factors that may be taken into consideration when assessing a document:

   - the presence of the deceased's handwriting;
   - witness signatures;
   - revocation of previous wills;
   - funeral arrangements;
   - specific bequests; and
   - the title of the document.

Although section 58 gives the court broad powers to give effect to the intentions of the will-maker, this power does have limitations. **Therefore, every effort should be made to follow the proper procedure when drafting a will in order to avoid future complications.** As the court notes in *Estate of Young*, "[w]hile imperfect or even non compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention."

Section 59 of WESA gives the courts the power to rectify an error or omission in a will in order to give effect to the intentions of the will-maker. Extrinsic evidence is permissible to determine the intent of the Will-maker.

This is a significant provision, as it allows the courts to consider evidence that would otherwise not be admissible in order to determine the intent of the will-maker.

Revocation of wills is governed by s 55 of WESA. These sections outline the only ways in which a will may be revoked.

a) Meaning of Record

According to WESA section 58, "record" means all data that is (a) recorded or stored electronically, (b) can be read by a person, and (c) is capable of reproduction in a visible form.

G. Filing a Wills Notice

After the will is complete, a Wills Notice should be filed with the Department of Vital Statistics in Victoria (s 73, WESA). The purpose of the notice is to record the existence and location of the will and make it easier to find the will after the will-maker's death. A will-maker is not required by law to file a Wills Notice, but it is recommended, as a wills search must be undertaken by the Executor or Administrator before the Letters of Probate or Letters of Administration are granted.

A Wills Notice should be filed whenever a will is made, revised, revoked or moved or whenever a codicil is executed. In order to file a Wills Notice, you must have the following information:

- Your legal name and date of birth

- Your place of birth
- The date you signed the will
- The location of your will; and
- The date you filed the note with the Vital Statitstics Agency

There are three ways of filing a Wills Notice, either online, by mail, or in person. But for all three of these methods there is a $17.00 charge for filing, payable to the Minister of Finance. Forms are available from: **Vital Statistics Agency**, Web site: www.vs.gov.bc.ca/forms/index.html. If you want to file it by mail, then you will have to fill out a VSA 531 form and mail the completed form to: **Vital Statistics Agency**, PO Box 9657 Stn Prov Govt, 818 Fort Street, Victoria, BC V8W 9P3.

Finally, you can submit your VSA 531 in person to any service BC locations. You can find a list of them at http://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/ministries/technology-innovation-and-citizens-services/servicebc

If a will is made with LSLAP, the forms are also on file in the LSLAP office. **The notice should be made in duplicate and the original notice sent to the Vital Statistics Agency**, the copy either kept with the will or with the personal representative. Do not send a copy of the will. Students may not sign the notice as the client's solicitor. The client must sign the form.

IV. MISTAKES AND ALTERATIONS IN A WILL

A will may be changed by executing a new will, executing a codicil, or altering the will before it is executed. Where a will-maker wants to alter a will, WESA, s 54(2) requires that the will-maker sign and the witnesses attest the signature in the margin or near to the alteration, or at or near to a memorandum written in the will and referring to the alteration. An alteration should be so attested even if made before the will itself is executed. This will avoid subsequent litigation, which may arise if it is thought that an unattested alteration was made after execution of the will. **Where a mistake is made when drafting a will, the safest course is to draw up a new, corrected will.**

There are three reasons why executing a new will may be a preferable course of action:

1. A new will avoids any danger of a codicil not adequately referring to the correct will;
2. When only one document exists (i.e. the new will) there is less likelihood of misinterpretation; and
3. If a codicil is used to revoke a gift made in the will, the party who would have received the gift will be informed of the change made by the v-maker, which could cause personal discord in the will-maker's relationship with that person.

An unattested alteration made after the will is executed is invalid, and may also invalidate any existing part of the will that the alteration obliterated or made impossible to decipher. However, it is important to note that section 58 of WESA allows a court to recognize any document that gives effect to the testamentary disposition of the deceased, even if it does not comply with the formalities of WESA. (See Section III.F, above, which also discusses the power of rectification under s 59).

V. REVOCATION OF A WILL

A. By Subsequent Writing

A subsequent instrument in writing that is **not** a subsequent will but is in compliance with the provisions of WESA (e.g. signed by two witnesses, etc.) may have the effect of revoking the will (s 55(1)(b)).

Where a will is revoked in this way, a wills notice should be filed with the Department of Vital Statistics to record the revocation of the will (see **Section V: Filing a Wills Notice**).

B. By Destruction or Loss

A will may be revoked by destruction, per section 55(1)(c) of WESA. There must be some physical act of destruction: "burning, tearing, or destruction of it in some other manner **by the will-maker**." Though copies need not be destroyed, it would be safer to do so to ensure revocation. If a will is in the will-maker's custody and is found destroyed, or if a lost will was last known to be in the will-maker's custody, it will be presumed that the Will-maker destroyed it. This emphasizes that it is very important for a will -maker to keep safe custody of a will: if it is accidentally or otherwise lost or destroyed it may be taken to have been destroyed by the will-maker, and thereby revoked, even though this may not have been the will-maker's wish.

Furthermore, for a will-maker to revoke a will by destruction, the will-maker must have the intention of revoking the will. Though there is a presumption that a will-maker who destroys a will does so with the intention of revoking it, this does not apply where he or she lacks capacity to form the requisite intention.

Revocation does not apply where there is accidental loss or destruction, but to prevent subsequent litigation, if a will is accidentally lost or destroyed, the will-maker should make a new one even though a copy of the lost or destroyed one survives. The will-maker should maintain clear custody of his or her will in a safe place known by the personal representative to guard against accidental loss or destruction. **There is a presumption that a lost will has been destroyed and revoked, so care must be taken in storing the will.**

Also, there is the question of whether the intention to revoke the will was absolute or conditional. If it was absolute, revocation is complete. However, if the intent depended on the condition of reviving an old will, or writing a new one and the condition or contingency has not been satisfied, the revocation is ineffective. This is known as the doctrine of dependent relative revocation: see *Jung v Lee Estate*, 2005 BCSC 1537.

C. By Subsequent Will

A will may be revoked by another will made in accordance with WESA s 55(1)(a). Nevertheless, it is common practice to clearly provide for such by the inclusion of a revocation clause at the beginning of a will. **Notwithstanding an express revocation clause, a second will does not necessarily absolutely revoke a former will.** There may be partial revocation only, as where the second will does not completely dispose of the estate both documents may be admitted to probate. The will-maker should therefore ensure that the second will disposes of the entire estate, which may be accomplished through the use of an effective residuary clause.

D. Effect of Marriage on Will Revocation

Under WESA, a subsequent marriage will no longer revoke a prior will.

E. Effect of Divorce, Separation, and Change in Circumstances on Will Revocation

Neither marriage nor divorce of the will-maker will revoke a will. However, a change in circumstances may lead to an individual no longer being considered a spouse. This will bar the former spouse from a claim to vary a will.

Additionally, if a will-maker wishes to leave anything in a will to a former spouse, wishes to appoint a former spouse as executor, or wishes to confer any powers of appointment on a former spouse, the will-maker should explicitly state that this is being done contrary to WESA s 56(2).

F. Effect of Family Law Act

According to *Howland Estate v. Sikora*, 2015 BCSC 2248: "The death of the claimant, prior to the coming into force of the (*Family Law Act*), does not override the respondent's right to commence an action against the claimant's estate so long as it occurs within the two year period contemplated in s. 198 (of

the *Family Law Act*), as happened here." In summary, this means that Family Law Act claims can continue even past death as long as the claimant brings suit within two years.

VI. WILL VARIATION CLAIMS

A. Application Under the Act

WESA gives the court the power to vary a will. **Only the spouse of the will -maker or the will -maker's children can commence an action to vary a will.** However, it should be noted that in the situation of a common law spouses, one spouse can unilaterally terminate a relationship and thereby remove the will from the variation provisions in WESA. On the other hand, for married spouses, the spousal relationship can only be terminated by divorce. Please see **Chapter Three: Family Law** for more information regarding divorces. The **limitation period** for commencing an action to vary a will is **180 days** from the grant of probate, per s 61(1)(a).

A wills variation action is commenced by a claim that the will-maker failed to "make adequate provision for the proper maintenance and support of the will-maker's spouse or children" (WESA, s 60).

When determining what constitutes adequate provision in a will, courts have considered the following:

- Actual need, which varies with age and dependency;
- Justifiable expectation based upon a dependency upon the will-maker or an actual contribution made by the claimant to the will-maker's estate;
- Will-maker's intention and reasons for making his or her will; and
- The size of the will-maker's estate.

See *Lukie v Helgason & Lukie,* (1976) 26 RFL 164 (questioned) and *Newstead v Newstead Estat,e* (1996) 11 ETR (2d) 236 (BCSC) for detailed discussions of the above factors.

The Supreme Court of Canada decision in *Tataryn v Tataryn Estate,* (1994) 93 BCLR (2d) 145 provides a different focus for the determination of a wills variation claim. This is the leading authority in British Columbia on wills variation. The court considered the following factors in deciding what constitutes an "adequate, just, and equitable" provision in a will:

a) **The will-maker's legal obligations** – maintenance and property allocations which the law would support during the will-maker's lifetime; and

b) **The will-maker's moral obligations** – society's reasonable expectations, based on community standards, of what a judicious person would do in the circumstances.

In the more recent case of *Dunsdon v Dunsdon,* (2012) BCSC 1274 (CanLII) [*Dunsdon*], the court provides a list of overlapping considerations that "have been accepted as informing the existence and strength of a testator's moral duty to independent children:

- Relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other
- Size of the estate
- Contributions by the claimant
- Reasonably held expectations of the claimant
- Standard of living of the testator and claimant
- Gifts and benefits made by the testator outside the will
- Testator's reasons for disinheriting
- Financial need and other personal circumstances, including disability, of the claimant
- Competing claimants and other beneficiaries"

As the court notes in *Dunsdon*, "The concept of adequate provisions is a flexible notion and is highly dependent upon the individual circumstances of the case. The adequacy of a provision is measured by asking whether a testator has acted as a judicious parent or spouse, using an objective standard informed by current legal and moral norms. The considerations to be weighed in determining whether a testator has made adequate provisions are also relevant to the determination of what would constitute adequate, just and equitable provisions in the particular circumstances."

Where the size of the estate allows, surviving spouses and children are entitled to an equitable share under WESA **even in the absence of need**.

The court may consider the applicant's character or conduct, and variation may be refused on this basis (WESA, s 63(b)). If the estate is large and the spouse or children were not mentioned in the will, or they think they were inadequately or unfairly provided for, they should consult a lawyer. LSLAP cannot assist clients with wills variation claims.

NOTE: In a decision of the BC Supreme Court, *Ward v Ward Estate*, 2006 BCSC 448, it was held that a marriage agreement that purported to bar claims under the Wills Variation Act was not determinative of the issue.

B. Definition of Spouse in WESA

The definition of spouse in s 2 of WESA reads:

(1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and

(a) they were married to each other, or

(b) they had lived with each other in a marriage-like relationship for at least 2 years.

(2) Two persons cease being spouses of each other for the purposes of this Act if,

(a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 *[Property Division]* of the *Family Law Act*, to arise, or

(b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

(2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,

(a) they begin to live together again and the primary purpose for doing so is to reconcile, and

(b) they continue to live together for one or more periods, totalling at least 90 days.

(3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.

NOTE: See *Gosbjorn v Hadley,* 2008 BCSC 219 for a list of factors used by the courts to determine if there is a marriage-like relationship. More recently, see the discussion in *Connor Estate*, 2016 BCSC 1934.

NOTE: In *B.H. v J.H.*, 2015 BCSC 1551, the BC Supreme Court varied the husband's will so that the wife, who was separated from but who has not divorced the husband, was entitled to part of the husband's estate. This significantly deviated from what the wife would have received if they had divorced immediately before the husband's death.

C. Exclusion of Potential Beneficiaries

A will-maker who wishes to exclude a spouse or child should state precisely why the person is being "disinherited," or why they are less than "adequately" provided for. LSLAP's policy is not to draft a will where the will-maker wishes to exclude a spouse or child, or unevenly divide the assets between children. Such clients should be referred to a private lawyer, unless the supervising lawyer gives approval.

As per section 60 of WESA, the court is not bound by the will-maker's decision and reasons, but will consider them. Therefore, the will-maker is not assured of success in his or her attempt to exclude or less than adequately provide for a spouse or child. For more detail, see above – Part A.

The chances of the will-maker's will being upheld will be greater if the will-maker provides **reasonable and rational reasons for the exclusion**. For example, where the Will-maker has already given the person substantial benefits during her or his lifetime, where the reason is based upon the person's character, or on the relationship between the will-maker and the potential claimant, the court will be more likely to uphold the will-maker's wishes.

VII. INTESTACY

A. Generally

If a person dies intestate (without a valid will), his or her assets are distributed to intestate successors in accordance with WESA. Where a will exists but does not cover all assets, there will be a partial intestacy and those assets outside the will that do not pass by contract or survivorship will pass according to WESA distribution.

1. Spouses

Under WESA, it is possible to have more than one spouse by having a spouse by marriage in addition to a common law spouse. It is also possible to have multiple common law spouses. However, it is not possible to have more than one spouse by marriage.

The spouse of the deceased is always entitled to a preferential share of the estate, as well as the "household furnishings" defined as the personal property usually associated with the enjoyment by the spouses of the spousal home (WESA s 21(1)).

If there are two or more spouses, they must agree as to how to divide the preferential share, otherwise it will be determined by the courts (WESA s 22).

2. Spousal Home

In intestacy, the surviving spouse no longer has a right to the spousal home, but has a right to acquire it under s 31 of WESA. Section 33 allows the surviving spouse to make an application to retain the spousal home, considering factors such as whether requiring the surviving spouse to purchase the spousal home would be a significant hardship, and whether a greater prejudice would be imposed on the surviving spouse by being unable to continue to reside in the spousal home than would be imposed on the descendants entitled to share in the intestate estate.

3. Preferential Share

If all the descendants of the will-maker are also the descendants of the surviving spouse, the preferential share of the spouse is $300,000 (WESA s 21(3)). If all the descendants of the will-maker are **not** also those of the surviving spouse, the preferential share of the surviving spouse is $150,000 (WESA s 21(4)).

Situation	WESA Section	Distribution
Intestate dies leaving a spouse but no descendants.	20	Entire estate passes to surviving spouse.
Intestate dies leaving one or more descendants, all of whom are descendants of the surviving spouse.	21(3)	Household furnishings plus preferential share of $300,000 to the spouse. One half of remainder distributed to the

		spouse, the other half distributed equally to the descendants.
Intestate dies leaving one or more descendants, some of whom are **NOT** descendants of the surviving spouse.	21(4)	Household furnishings plus preferential share of $150,000 to the spouse. One half of remainder distributed to the spouse, the other half distributed equally to the descendants.
Intestate dies, leaving descendants but no spouse.	23(2)(a)	Estate distributed equally to descendants.
Intestate dies leaving no spouse or descendants.	23(2)	Order of Priority: Parents, siblings, nieces/nephews, grandparents, aunts/uncles, etc. See section 23(2) for complete order of priority. If there are no beneficiaries entitled to the estate, the estate passes to the government subject to the escheat act.

B. Separated Spouse

Under WESA**,** two persons cease being spouses if:

a) In the case of a marriage, they live separate and apart for at least two years, with **one or both of them** having formed the intention during that time to live separate and apart **permanently**, or an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the *Family Law Act*, to arise pursuant to WESA s 2(2)(a)**.**

b) In the case of a marriage-like relationship, one or both persons terminate the relationship.

NOTE: See *Goshjorn v. Hadley,* 2008 BCSC 219 for a list of factors used to determine if a relationship has ended.

C. Miscellaneous Provisions

- Children conceived before the intestate's death but born after the intestate's death and living for at least 5 days, inherit as if they had been born in the lifetime of the intestate and had survived the intestate., (WESA, s 8).
- Adopted children are the children of the adopting parent (*Adoption Act*, s 37).
- Adopted children are not entitled to the estate of their natural parent except through the will of the natural parent (WESA, s 3).

VIII. PROPERTY

A. JOINT TENANCY/TENANCY IN COMMON

Where property is owned by more than one individual, it may be held in "joint tenancy" or "tenancy in common". The main difference between a joint tenancy and a tenancy in common is that, in the case of a true joint tenancy, the each joint tenant receives the right of survivorship. The result is that, upon the death of one joint tenant, the other becomes entitled to the whole of the property. In contrast, where owners hold an interest in the property as tenants in common, each has a separate undivided share. Upon death, each other's individual share forms part of his or her estate.

IX. FIRST NATIONS AND WILLS

A student must decide whether or not the client comes within the scope of the *Indian Act*, RSC 1985, c I-5. Section 45(3) is the relevant section of the Act; it provides that a will executed by an Indian, as defined by the Act, is of no legal force and effect as a disposition of property until the Minister has approved the will or a court has granted probate pursuant to the *Indian Act*.

The definition of "Indian" in the Act means "registered Indian ordinarily resident on a reserve". The *Indian Act* states that "[t]he Minister may accept as a will any written instrument signed by an Indian in which they indicate their wishes or intention with respect to the disposition of their property upon his death". "Instrument" in this context does not mean anything special: letters, wills, and notes are all "instruments".

The student must be aware of the on-reserve/off-reserve Indian dichotomy. A First Nations person living off-reserve is essentially under the same rules and constraints as any other Testator who isn't classified as an "on-reserve Indian".

Finally, if a registered First Nations person "living on reserve dies intestate, or their will is not clear or not valid, the Department of Indian Affairs will apply to the estate the rules set out in the *Indian Act* and the *Indian Estates Regulations*, CRC 1978, c 954".

For further information on wills for First Nations persons, consult "Wills for First Nations persons" in Practice Points: Aboriginal Law, available on the BC Continuing Legal Education website at www.cle.bc.ca/PracticePoints/ABOR/wills.html.

NOTE: It is important to determine whether there exist any applicable treaties that may affect a First Nation client's will. For example, the Nisga'a Treaty provides that Nisga'a citizen's cultural property devolves according to Nisga'a law.

X. HEALTH CARE DECISIONS

British Columbia law provides for three formal instruments by which direction for health care and personal care decisions may be made in advance:

1. Representation Agreements, which allow a donor to appoint representatives to make decisions regarding health and personal care. These are discussed further in in **Chapter 15: Guardianship**.
2. Advance Directives, which contain specific directions regarding health care, that are binding on health care providers.
3. Nominations of Committees permit an individual to express their preferences regarding who may be appointed as a person's committee in case of incapacity.

XI. LSLAP FILE ADMINISTRATION POLICY - WILLS & ESTATES

This chapter is specific to LSLAP clinicians. It sets out internal LSLAP practice and policy regarding Wills & Estates.

A. LSLAP File Administration Policy – Wills and Estates

The only wills and estates issue LSLAP can responsibly provide assistance to the public is the drafting of certain types of simple wills. Students should refer clients to qualified wills and estates lawyers for all other issues. In addition, student should only prepare a will for persons meeting our income criteria **and** whose estates are:

- Small (under $25,000); and
- Consist entirely of personal property, not real property (the future as well as present situation must be considered), with all of the estate located in British Columbia.

In addition to simple wills for individuals, LSLAP is only able to prepare "mirror wills" for clients, not "mutual wills". A mirror will is designed for couples with similar wishes. The wills of the couple "mirror" each other: each leaves the same gifts to the other and each names the other as Executor.

By contrast, a mutual will includes a statement that the Will-maker agrees not to change or revoke his or her will without the consent of another party (usually spouse). This agreement will bind the will-maker even if the other party predeceases the Will-maker. Thus, a mutual will has a contractual component, creating a constructive trust. However, a Will-maker can always change his or her last will and testament. If a will-maker changes his last will and testament after the other party has died, the will -maker may create a right of action for beneficiaries under the trust for breach of the trust.

Note that signing mutual wills is not a widespread practice. **If a client is seeking LSLAP's assistance in preparing a mutual will, the client must be directed to a qualified practitioner.** It can be suggested that the client discuss with a qualified practitioner the possibility of creating an *inter vivos* trust instead of preparing a mutual will.

Note that if you are assisting two clients to make mirror wills (or any time you are jointly representing clients), you should provide both clients with a joint representation agreement. This agreement must contain the information required by the Law Society of British Columbia.

LSLAP's policy is that anyone who can afford a lawyer should be referred to one. A practitioner's fee might vary from $200 to $400 for a relatively simple will. However, this material has been prepared for appropriate cases where the client meets LSLAP's income criteria.

Because the law on wills is strictly applied, precedents should be used to provide certainty. Any lack of clarity may defeat the intention of the will-maker, who will not, of course, be available to clarify contentious points. Also, students should not take instructions from a person on behalf of someone else; they can prepare a will only for the client. The final will must then be reviewed with the client to ensure that it reflects his or her wishes and that he or she understands what the document means (see **Section III.E: Executing and Attesting the Will**).

Important changes to wills and estates law due to WESA have been highlighted in this chapter. However, students should refer clients to private lawyers if they are unsure how certain WESA provisions should be interpreted.

Finally, LSLAP will not draft a will that eliminates potential beneficiaries. In other words, LSLAP is unable to help with Client wishing to eliminate spouses and children. Clients wishing to disinherit potential beneficiaries should be referred to a private lawyer.

NOTE: Before drafting a will for a First Nations person, please consult with the supervising lawyers. The client should most likely have to be referred to an outside lawyer. There are many complexities with First Nations wills, and LSLAP will likely not be able to assist.

NOTE: LSLAP's Supervising Lawyer must be consulted on every will and must review the final product before it is sent to the client to be executed.

B. Taking Instructions During the Initial Interview

The purpose of the initial interview is for the LSLAP student to complete the Will Instructions Questionnaire (**Appendix A**) with the client in order to later actually draft the will. **Students should never draft a will for a client during the initial interview. All wills must be approved by the supervising lawyer before they can be mailed or delivered to clients.** At the end of the interview, the student should have a clear and full understanding of the client's personal circumstances, assets, and desired distribution of his or her estate. The student should also have sufficient information to later assess the client's testamentary capacity with the supervising lawyer. **If there is any doubt as to a person's capacity, consult LSLAP's Supervising Lawyer.**

The student should keep the following things in mind during the initial interview:

1. Speak directly with the will-maker, never an intermediary.
2. Interview the will-maker alone, not in the presence of the beneficiaries or spouses, except where taking joint instructions from spouses for mirror wills.
3. Inquire into the nature and extent of the will-maker's property. Ask about any prior wills (to ensure that all property and prior wills are satisfactorily dealt with, and to ensure that the will-maker knows of all the property being disposed of). Ask the will-maker about existence of property that may not

form part of the estate (e.g. real estate in joint tenancy, joint bank accounts with survivorship rights, insurance policies and pension plans with named beneficiaries, Registered Retirement Savings Plans (RRSPs), and Registered Retirement Income Funds (RRIFs)). Ensure that the will-maker understands that such properties do not form part of the estate and their dispositions are independent of the will and its effects.

4. Have the will-maker read the Will Instructions Questionnaire over, section by section, or read it aloud to him or her.

NOTE: The LSLAP office has a precedent file, which may be consulted for the structure of various clauses. Clinicians may also see also the Legal Support Staff Desk Reference, the Continuing Legal Education wills precedent book, or any book on will precedents.

C. Undue Influence and Suspicious Circumstances

In order to ensure there is no undue influence, client interviews must be conducted alone with the client.

The exception to the practice of meeting the client alone is where one is taking joint instructions from husband and wife for mirror wills. Should it appear that the instructions are not reciprocal, other than differing specific bequest of personal items (e.g. jewellery to daughter, tools to son) one should not take further instructions. Some lawyers will not take instructions for a new will for one of the parties if that lawyer had previously taken mirror or mutual wills instructions for both. Some lawyers will take unilateral instructions that conflict with the earlier mirror will, provided they are also given express instructions to inform the client's spouse that new will instructions have been received.

XII. APPENDIX INDEX

A. WILL INSTRUCTIONS QUESTIONNAIRE

Part I – Client Information

Information about the Will-maker:

Name (full):_____ Alias:_____

Address:

_____

_____

Occupation (if retired, ask for former occupations):_____

Date of birth:_____ Place of birth (city/province/country):_____

Relationship status – single, engaged, married, separated, divorced, widowed, cohabiting (including plans to marry):

_____

Citizenship – Canadian or registered Indian as defined in the *Indian Act*:_____

Telephone no:_____ Fax no:_____ E-mail address:_____

Information about the Spouse or Partner:

Name (full):_____ Alias:_____

Address:

_____

_____

Occupation (if retired, ask for former occupations):_____

Date of birth:_____ Place of birth (city/province/country):_____

Relationship status – single, engaged, married, separated, divorced, widowed, cohabiting (including plans to marry):

_____

Citizenship – Canadian or registered Indian as defined in the *Indian Act*:_____

Telephone no:_____ Fax no:_____ E-mail address:_____

Will-maker's Current Marital Status:

Date of marriage:_____ Place of marriage:_____

Place of residence when will-maker was married:_____

_____

Has a marriage agreement been signed?_____ Has the Will-maker provided LSLAP with a copy?_____

Has a separation agreement been signed?_____ Has the Will-maker provided LSLAP with a copy?_____

Has any family law proceeding taken place or been commenced?_____

Prior Marriages:

Has the Will-maker been previously married?_____ If so, name(s) of former spouse(s):_____

Is the Will-maker required to pay maintenance to children or former spouse?_____

_____

Other Personal Relations:

Is the Will-maker currently cohabiting with someone and is unmarried?_____

Is the Will-maker currently cohabiting with someone other than spouse named above? _____

_____

Name of the cohabitant:_____

Has the Will-maker signed a cohabitation agreement?_____

Has the Will-maker provided LSLAP with a copy of the cohabitation agreement?_____

Has the Will-maker ceased cohabiting with someone with whom s/he cohabited for two years or more?_____

_____

Children:

Ask the Will-maker about his/her children's full name, date of birth, place of residence (i.e. whether s/he lives with the Will-maker), birth status (i.e. biological child? born outside of wedlock? adopted? from which partner? born with a disability?), and current status (i.e. living or deceased?):

_____

_____

_____

Next-of-Kin:

If the Will-maker does not have a spouse or child, ask about the Will-maker's closest relatives – parents, siblings, nieces or nephews, etc. – and their full name, age, and address:

_____

_____

_____

Other Dependants:

Ask the Will-maker if s/he has someone dependant on him/her for financial support for whom the Will-maker wish to provide – such as an elderly parent – and their full name, age, and address:

_____

_____

_____

Other Responsibilities:

Ask if the Will-maker is currently:

- serving as the legal guardian for a person under age of 19 (other than the Will-maker's own children);
- serving as the committee or other legal guardian for a disabled or incapacitated adult; and
- serving as Executor of an estate of a deceased.

**If the Will-maker is service as an Executor for another, the terms of the will may provide for an alternative Executor on the death of the Will-maker or provide no alternate. In the latter case, the Will-maker's appointed Executor of the Will-maker's will would take over the Will-maker's role as Executor of the other deceased. The Will-maker may therefore wish to appoint two Executors: one as Executor of his/her own estate and the other to take over the executorship of the previous will.*

_____

Part 2 – Financial Information

**LSLAP can only assist clients whose estate consists of personal properties and does not include real properties and business interests such as proprietorships and partnerships.*

**LSLAP cannot advice clients with disposition of foreign assets.*

Financial and Personal Assets:

Bank accounts & term deposits:

Securities/bonds/shares:

Life insurance:

Pension plans & annuities:

RRSPs & RRIFs:

TFSAs:

Collectibles & other valuables:

Personal effects (e.g. furniture, automobiles, boats, etc.):

Other substantial assets (e.g. promissory notes, valuable club memberships, etc.):

Liabilities:

Inquire about the details of the Will-maker's loans payable, guarantees, indemnities, and other debts:

Estimated Net Value of Estate:

	Will-maker's name	Partner's name	Joint names
Total assets			
Less – total debts			
Total value of estate, before tax			

Part 3 – Will Instructions

Information about the Primary Executor:

Name (full): Alias:

Address:

Occupation (if retired, ask for former occupations):

Relationship to Will-maker:

Information about the Alternate Executor:

Name (full): Alias:

Address:

Occupation (if retired, ask for former occupations):

Relationship to Will-maker:

Appointment of Guardian(s) for Infant Children (i.e. under 19):

Primary Guardian:

Name (full): Alias:

Address:

Occupation (if retired, ask for former occupations):

Relationship to Will-maker:

Alternate Guardian:

Name (full): Alias:

Address:

Occupation (if retired, ask for former occupations):

Relationship to Will-maker:

Specific Bequests of Personal Effects:

Full name of the beneficiary	Address	Relationship to Will-maker	Descrip. Of item

Specific Bequests of Cash Legacies:

Full name of the beneficiary	Address	Relationship to Will-maker	Amount

Charitable Gifts:

Name of charity	Address	Cash amount/ specific assets

Residue of Will-maker's Estate:

Full name of the beneficiary	Address	Relationship to Will-maker	Amount/ Portion of residue

"Clean-up" Clauses:

If the Executor needs to invest the estate, the restriction the Will-maker would like to place on the Executor is:

- Unrestricted (any investment the Executor thinks is appropriate):_____
- Restricted, the restrictions being:_____

_____

If minors are to receive gifts, the trustee and his/her name, address, and relationship to child are:

_____

_____

_____

The age the child can receive the gift absolutely is:_____

Can money be used for the benefit of the child (e.g. education) before he or she becomes entitled absolutely?_____

Other limitations:

_____

_____

_____

If a child fails to survive to above age, the gift/share is to be:

_____

_____

_____

What is to be done with the Will-maker's remains?

B. WILL DRAFTING AND EXECUTION CHECKLIST

This checklist will help ensure students have considered and dealt with all relevant factors when drafting a will. The checklist is **not** a substitute for a thorough reading of appropriate sections of the Manual.

1. Is there a competent Will-maker (testamentary capacity, age)?

2. Were instructions properly taken? Do directions received represent the Will-maker's true wishes?

3. Are there any previous subsisting wills or codicils?

4. Is all property adequately dealt with? Have the Will-maker make a list of assets and any obligations that may bind the estate (agreements, guarantees, etc.).

5. Is there a proper revocation clause, and a clause confirming that this is the last will?

7. Have a suitable Executor and alternative Executor been appointed?

8. Has a 30-day survivorship clause with alternate beneficiaries been included?

9. If minor children are or may be involved, is a proper trust created with a Trustee and a guardian appointed? Note: if the client wants to create a trust for a child, refer the client to a private lawyer.

10. Are all beneficiaries properly identified with proper name, whether adopted, etc? Is a common law spouse or stepchild properly described?

11. Does the will properly deal with an existing separated legal spouse or a divorced spouse?

12. Is there any provision made for the client's spouse(s) and children? Is it adequate? If not adequate, is there a statement of the Will-maker's reasons for not making adequate provisions or an explanation why the Will-maker feels the provision made is adequate? Note: if the client wishes to inadequately provide for his/her spouse(s) and children, refer the client to a private lawyer.

13. Is the will, as a whole, internally consistent? Are mistakes and alterations properly dealt with?

14. Is marriage imminent, or has marriage occurred since the Will-maker's last will?

15. Has there been proper execution followed by proper attestation by disinterested witnesses? Has the will been dated and have the Will-maker and witnesses initialled the bottom of each page? Is each page identified as the X page of the Will-maker's will?

16. Has the client been advised to keep his or her will in a safe place known to the personal representative, and to review and possibly update his or her will as circumstances change (death of Executor or beneficiary, marriage or separation, acquisition of property not adequately dealt with in the will, etc.)?

17. Has a Wills Notice been filed (or delivered to the Will-maker with the completed will)?

18. Is the Will-maker satisfied with the present beneficiary designations made with respect to any insurance policies, RRSPs, or pensions?

C. GLOSSARY

Administrator – a person appointed by the court to manage the estate of a person who dies intestate (without a will)

Attestation – an act of authenticating, affirming to be true, genuine, or correct, in an official capacity of a legal document

Beneficiary – (a) a person named 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

Cash legacy – a grant by will of money

Codicil – an addition to a will that changes, explains, revokes, or adds provisions

Equitable title – a title to property in which a party has a beneficial interest and will eventually acquire legal title. For example, the beneficiary of a trust has an equitable title in assets held in the trust

Estate –properties of a deceased person

Exclusion clause – a provision in a will that leaves something or someone out of the will

Execution – an act of signing and otherwise completing a testamentary document, such as acknowledging the signature if required to make the document valid

Executor – a person appointed to manage the estate of a person who has died leaving a will which nominates that person. The executor must insure that the person's desires expressed in the will are carried out. Practical responsibilities include gathering up and protecting the assets of the estate, obtaining information in regard to all beneficiaries named in the will and any other potential heirs, collecting and arranging for payment of debts of the estate, approving or disapproving creditor's claims, making sure estate taxes are calculated, forms filed and tax payments made, and in all ways assisting the lawyer for the estate (which the executor can select)

Express powers – stated rights, authorities and abilities in a will of the Executor to take some action or accomplish something, including demanding action, executing documents, contracting, taking title, transferring, exercising legal rights and other acts

Indemnify – to guarantee against any loss that another might suffer

Intestacy – a situation where a person dies without a legally valid will

Joint tenancy – an ownership of real property in which each party owns an undivided interest in the entire property, with both having the right to use all of it and the right of survivorship

Legal title – the ownership of real property, which stands against the right of anyone else to claim the property. In real property, legal title is evidenced by a deed, judgment of distribution from an estate, or other appropriate document recorded in the public records

Living will – a document in which a person appoints another as his/her proxy or representative to make decisions on maintaining extraordinary life-support if the person becomes too ill, is in a coma or is certain to die. Living wills are not legally valid in B.C.

Mirror wills – the wills of an individual and his/her spouse that are identical except that each leaves the same gifts to the other, and each names the other as executor

Mutual wills – the wills made by two partners in whereby each gives his/her estate to the other, or with dispositions they both agree upon. A later change by either is not invalid unless it can be proved that there was a contract in which each makes the will in the consideration for the other person making the will

Personal representative – the individual that winds up the estate and distributes the assets

Probate – the process of proving a will is valid and thereafter administering the estate of a dead person according to the terms of the will

Revocation clause – a provision in a will that cancels any wills previously made

Survivorship – the right to receive full legal title or ownership of a property due to having survived another person in a joint tenancy

Tenancy in common – the title to real property held by two or more persons, in which each has an "undivided interest" in the property and all have an equal right to use the property, even if the percentage of interests are not equal or the living spaces are different sizes. Unlike "joint tenancy," there is no "right of survivorship" so that if one of the tenants in common dies, and each interest may be separately sold, mortgaged or willed to another

Testamentary capacity – having the mental competency to execute a will at the time the will was signed and witnessed

Will-maker – a person who has made a will that is in effect at the time of his/her death.

Trust – an entity created to hold assets for the benefit of certain persons or entities, with a trustee managing the trust (and often holding title on behalf of the trust)

Trustee – a person or entity who holds the assets (corpus) of a trustee for the benefit of the beneficiaries and manages the trust and its assets under the terms of the trust stated in the declaration of trust which created it

Wind up – to liquidate (sell or dispose of) assets of an entity