CHAPTER SIXTEEN: WILLS & ESTATE ADMINISTRATION

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CHAPTER SIXTEEN: WILLS & ESTATE ADMINISTRATION

This Manual is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. Nothing herein creates a solicitor-client relationship. All information in this Manual is of a general and summary nature that is subject to exceptions, different interpretations of the law by courts, and changes to the law from time to time. LSLAP and all persons involved in writing and editing this Manual provide no representations or warranties whatsoever as to the accuracy of, and disclaim all liability and responsibility for, the contents of this Manual. **Persons reading this Manual should always seek independent legal advice particular to their circumstances.**

I. INTRODUCTION

When a person dies, the property and possessions they leave behind become known as their **estate**. Estates must be settled: debts and taxes must be paid, assets may need to be sold, and the property must be distributed. This work is done by the personal representative of the estate, who is appointed by the deceased's will or by the court if a will does not exist. This process is governed by the *Wills, Estates and Succession Act,* SCC 2009, c 13 [*WESA*]. See **XI. Estate Administration** and **XII. Duties of a Personal Representative** for more details on estate administration. See **IX. Property** and **XIII. Taxation: RRSP, RRIF & TFSA** for more details on what property forms part of the estate and what property passes outside of the estate.

If a person dies without a will, they are "intestate". *WESA* gives specific instructions for how an intestate estate should be distributed and who can do the distributing. See **VIII. Intestacy** and **XI. Estate Administration** for more information.

To ensure their estate is distributed in a way that reflects their wishes and personal circumstances, many people create a will. A will is a legal document that sets out what should happen to a person's estate and to any minor children upon their death.

WESA sets out important rules that need to be followed for a will to be valid. These include rules about the mental capacity required to make a will, the process for certifying that the contents reflect the will maker's intentions, and a system for registering the will to ensure it is located upon death (see **III. Making and Executing a Will**). There are rules for how to amend or revoke a will, and for what happens if a will does not comply with the formalities required to be valid (see **IV. Mistakes and Alterations in a Will, VI. Revocation of a Will**, and **V. Court's Powers to Cure Deficiencies and Rectify a Will**). Finally, there is an expectation that a will maker will provide for their spouse(s) and child(ren), if any, and rules that must be followed if a will maker wishes to disinherit them (see **VII. Wills Variation Claims**). There are also specific rules that may affect certain Indigenous people and people living on certain Indigenous lands (see **X. First Nations and Wills**).

The only wills and estates issues LSLAP can assist with are the drafting of certain types of simple wills for eligible clients. See **XIV. LSLAP File Administration Policy** for more details.

This chapter provides a summary of will preparation and estate administration procedure. In this chapter, any reference to a court is to the BC Supreme Court unless otherwise stated.

The *Wills, Estates and Succession Act*, SBC 2009, c 13 [*WESA*], came into force on 31 March 2014. *WESA* substantially revised wills and estates law in BC 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.

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 31 March 2014. Therefore, earlier resources may be outdated. The Continuing Legal Education Society of BC [*CLEBC*] offers the following material for a paid subscription:

1. General

Stephanie J Daniels et al, eds, *BC Estate Planning & Wealth Preservation*, (Vancouver: CLEBC) (loose-leaf updated 2023)

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

2. Drafting

Peter Bogardus, Sadie Wetzel & Mary Hamilton, *Wills and Personal Planning Precedents – An Annotated Guide* (Vancouver: CLEBC) (loose-leaf updated 2022) ("*Wills and Personal Planning Precedents*")

3. Probate

Aubrie Girou et al, eds, *Probate and Estate Administration Practice Manual* (Vancouver: CLEBC) (loose-leaf updated 2023)

C. Bureaus and Web Sites

Department of Vital Statistics

This department keeps records of all births, marriages, deaths, and name changes in British Columbia. Additionally, this department manages the wills registry.

605 Robson Street, Room 250
Vancouver, B.C., V6B 5J3

Telephone: 1 (888) 876-1633

Website: https://www2.gov.bc.ca/gov/content/family-social-supports/seniors/health-safety/health-care-programs-and-services/vital-statistics

Canadian Legal Information Institute ('CanLII')

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

Website: www.canlii.org/en/

III. MAKING AND EXECUTING A WILL

A. Assessing Will-maker Competence

To make a valid will, a person must:

- Be 16 years of age or older;
- 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 para 569 [*Goodfellow*]; for a recent application of this test, see *Nassim v Healey*, 2022 BCSC 402 at para 41 [*Nassim*].

According to the *Goodfellow* case and subsequent decisions, to have testamentary capacity a will-maker must:

- Understand the nature of the act of making a will and its effects;
- Understand the extent of the property they are disposing;
- Be able to comprehend and appreciate the claims to which they ought to give effect; and
- Form an orderly desire as to the disposition of the property.

In *Nassim*, the courts also outline a more "modern" form of the *Goodfellow* test that was quoted in *Laszlo v Lawton*, 2013 BCSC 305 at para 188 [*Laszlo*].

> The testator must be sufficiently clear in his understandings and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural object of his bounty and (3) the testamentary provisions he is making; and he must moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property…

Laszlo at para 189 sets out the relevant time for assessing capacity: when the will-maker gave instructions and when the will maker-executed the will.

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 will-maker who appeared to understand it.

Nevertheless, a student or lawyer should always assess the will-maker's capacity when taking instructions from the will-maker. 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 the will-maker direct questions about capacity, such as "are you capable?"

Some helpful lines of inquiry to assess capacity include determining whether the will-maker can understand the nature of the testamentary act (that they are making

a will), can recall the property, and can comprehend that they are 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) Presumption of Validity

The rules regarding the burden of proof in relation to testamentary capacity were set out by the Supreme Court of Canada in *Vout v Hay*, [1995] 2 SCR 876, 125 DLR (4th) 431 [*Vout*]. Essentially, if a will is duly executed in accordance with the formal statutory requirements after being read by a testator who appears to understand the will, it is presumed that the testator possessed the requisite capacity and knew and approved the contents of the will. This presumption may be rebutted where "suspicious circumstances" or undue influence exist (see below).

d) Undue Influence

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. 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. A spouse, parent, or child, etc. may put their claims before the will-maker for recognition. This does not constitute undue influence unless it amounts to coercion. If the will-maker continues to be capable of making decisions freely, the advice or persuasion does not amount to undue influence. See *Leung v Chang*, 2013 BCSC 976 for a framework for the burden of proof in litigation regarding contested wills.

To challenge a will on the grounds of undue influence, the asserting party must show that the will does not represent the will-maker's true intentions due to the coercion. If this can be shown, undue influence is presumed. The party that wishes to defend the will may rebut this presumption by showing that the will was a result of the testator's own "full, free and informed thought". See *Stewart v Mclean*, 2010 BCSC 64 at para 96. Factors that can assist with rebutting the presumption include proof that:

a) No actual influence was used or there was a lack of opportunity to influence;

b) The will-maker obtained independent legal advice or had the opportunity to do so;

c) The will-maker had the ability to resist the influence; or

d) The will-maker had knowledge and appreciation about what they were doing.

Notwithstanding section 52 of *WESA*, an individual challenging a will on the basis of undue influence should have sufficient evidence to establish actual undue influence—in challenging the validity of a will, it may be insufficient to simply point to a relationship where there was a potential for the testator's domination or dependence without more. An allegation of undue influence is a serious allegation which should not be made lightly. See *Ali v Walter Estate*, 2018 BCSC 1032; *Geffen v Goodman Estate*, [1991] 2 SCR 353, 81 DLR (4th) 211; *Cowper-Smith v Morgan*, 2017 SCC 61.

Allegations of undue influence should not be readily brought. A failed allegation of undue influence may attract severe monetary consequences against the accuser. When one alleges undue influence, they are accusing another of being a fraudster. A failed allegation of fraud more readily justifies an award of special costs against the accuser. Therefore, a party who fails to prove a case of undue influence runs the risk of having to pay the full legal costs of the defending party. As such, undue influence should be carefully considered and investigated before commencing a court action. See *Mawdsley v Meshen*, 2011 BCSC 923.

The will drafter should ensure that the will represents the will-maker's intentions and that they are not being coerced into making the will or disposition against their wishes. This is especially relevant where the aged or infirmed are concerned.

e) Suspicious Circumstances

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, [1935] 1 DLR 118; see also more recent applications in *Clark v Nash*, (1989) 61 DLR (4th) 409 (BCCA), 34 ETR 174 and *Johnson v Pelkey*, (1997) 36 BCLR (3d) 40 (SC), 17 ETR (2d) 242.

Suspicious circumstances surrounding the making of a will is not a stand-alone ground to challenge the validity of a will; however, if a challenger of a will can demonstrate that suspicious circumstances existed when the will was drafted, this may shift the burden to the propounders of the will to prove that the testator had knowledge and approved of the contents of the will when it was made. In *Vout*, the Court held that suspicious circumstance may be raised by:

a) circumstances surrounding the preparation of the will,

b) circumstances tending to call into question the capacity of the testator, or

c) circumstances tending to show that the free will of the testator was overborn by acts of coercion or fraud.

The Court in *Vout* held that where the party seeking to overturn the will can point to some evidence, that if believed would prove suspicious circumstances, the burden of proof shifts to the propounder of the will to prove on a 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, or the spouse of a beneficiary, under the will.

B. Finding and Appointing a Personal Representative

1. Duties of the Personal Representative

The Executor or Administrator is responsible for the administration of the estate, including inventorying 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 they have 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 them, and preferably living in BC. An alternative Executor should also be appointed in case the first Executor is unavailable. The Executor, if they accept the position, must carry out the duties of Executor. The Executor may renounce, under section 104 of *WESA*, if they have not already intermeddled with the estate. In this scenario, the administration of the estate passes as if they have 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 valid will). Section 130 of *WESA* provides the order of priority among applicants for the administration of an intestate estate. An Administrator cannot act until the court issues a Grant of Administration. A "Grant of 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 issuance of the Grant of Administration.

4. Personal Representative is Accountable

A personal representative is a fiduciary at law and must act to the benefit of the estate and the beneficiaries. They cannot purchase from the estate unless they are given specific power to purchase in a will. They are 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, that person could be held personally liable and could be required to replace the loss unless the court finds that they acted honestly and reasonably.

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, they are entitled to fair and reasonable remuneration, not to exceed 5 percent of the gross aggregate value of the estate under section 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(1) 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. Subsection 3 sets out that a will is deemed to be in writing if the will is in electronic from.

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: Wills Variation Claims**, to determine when this issue might arise.

Use clear and 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 when 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, chequing account, or both. John may be a son, nephew or lover.

It is well-settled that courts will allow a successful party in litigation to recover costs from an unsuccessful party. However, the rule that costs follow the event is generally modified in wills variation and interpretation actions. In the absence of misconduct, where the opinion, advice or direction of the Court is sought on a question relating to the validity or interpretation of a will, the Court may order the costs of all parties to be paid out of the estate. See *Wilson v Lougheed*, 2012 BCSC 1166.

NOTE: The sample clauses throughout this document 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. The CLEBC's *Wills and Personal Planning Precedents—An Annotated Guide* is especially useful.

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

3. Part One

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 their place of residence and may state their occupation:

SAMPLE: "This is the last will of me, [name], of [address], British Columbia." (See 2020 CLEBC *Wills and Personal Planning Precedents*, 1.5).

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 should 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." (2020 CLEBC *Wills and Personal Planning Precedents*, 1.11).

The revocation clause will not revoke other non-will testamentary dispositions such as designations made on insurance policies, RRSPs, etc. It is more effective to designate the estate as the beneficiary to such policies or RRSP if the will-maker wishes for these monies to fall into the estate.

This revocation clause may need to be modified in some situations. For example, a will-maker may have a will in another jurisdiction disposing of assets in that jurisdiction. One should be careful to not unintentionally revoke wills that deal solely with assets in another jurisdiction. Further, a will-maker may elect to create dual wills for the purpose of separating assets that require probate (e.g. real property and most bank accounts) and those that do not require probate (e.g. shares in private companies). Dual wills can help save probate fees and were given effect under section 122(1)(b) of *WESA*. See s 7.5 of the 2020 edition of the CLEBC *Wills and Personal Planning Precedents.* A will-maker who wishes to create dual-wills should seek assistance from a lawyer.

b) Appointing the Executor and Trustee

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

If [executor/trustee name] dies, is incapable, or is unwilling 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 2020 CLEBC *Wills and Personal Planning Precedents*, 3.5)

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, although 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 their 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 will-maker cannot grant a greater level of guardianship than they possess. 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 law 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 my [relationship] [full guardian name] ("[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 [preferred pronoun] will, or otherwise, to be the guardian of my minor children." (2020 CLEBC *Wills and Personal Planning Precedents*, 4.9)

For more information, see **Chapter 3: Family Law**.

4. Part Two

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 they see fit, namely, to sell assets and convert into money or postpone such conversion of the estate for such a length of time as they think best. Further, the Executor/Trustee directs payment of debts, specific bequests, cash legacies, gifts to the 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 they see 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)... [refer to the applicable "convert, keep or invest" clause] of this Will" (2020 CLEBC *Wills and Personal Planning Precedents*, 7.3)

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 2020 CLEBC *Wills and Personal Planning Precedents*, 48.2, 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 or 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, including:

A. insurance proceeds on my life payable as a consequence of my death (but excluding the proceeds of insurance upon my life owned by any corporation or owned by any partnership of which I am a partner);

B. any registered retirement savings plan, registered retirement income fund, annuity, pension, or superannuation benefits payable to any person as a result of my death;

C. any gift made by me in my lifetime; and

D. any benefit arising by survivorship,

and my Trustee may pay these taxes whether they are imposed by the law of this jurisdiction or any other, and my Trustee may prepay or delay payment of any taxes or duties,"

(2020 CLEBC *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 deliver my [article 1] to my [relationship] [article 1 recipient full name], if [they] are alive on the date that is 5 days after the date of my death, and if [they] are not alive on that date, add [article 1] to the residue of my estate.

"(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]." (2020 CLEBC *Wills and Personal Planning Precedents*, 11.8)

d) Cash Legacies

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

SAMPLE: "to pay:

(i) $ [amount] without interest to [name of recipient of cash gift] of [address], if [they] are alive on the date that is 30 days after the date of my death, and if [name of recipient of cash gift] is not alive on that date, that amount will form part of the residue of my estate;" (2020 CLEBC *Wills and Personal Planning Precedents*, 13)

If the client feels that their 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 2020 CLEBC *Wills and Personal Planning Precedents*, 13.4.

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 2012 c 1, ss 59-64.

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 deceased spouse leaves the residue to the surviving spouse is:

SAMPLE: "(a) to give the residue of my estate to [residue name], if [they] are 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]." (2020 CLEBC *Wills and Personal Planning Precedents*, 15.4)

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 those that are legally married, **a "common-law spouse" should not be referred to as "my husband" or "my wife" but should be identified by name, such as, "my partner, [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 their children. A will-maker must decide whether they wish to divide the estate between only those children alive at the will-maker's death, or if they wish to benefit the issue of any pre-deceased child as well (i.e. grandchildren).

SAMPLE: "If [spouse's name] is not alive on the date that is 30 days after the date of my death, to divide the residue of my estate in equal shares [between/among] those of my children who are alive on the date that is 30 days after the date of my death, except if [either/any] child of mine has died before that date and one or more of their children are alive on that date, that deceased child of mine will be considered

alive for the purposes of the division and the share creates for that deceased child of mine will be divided equally among those of their children who are alive on that date;" (2020 CLEBC *Wills and Personal Planning Precedents*, 15.8)

[The will should then go on to detail the terms upon 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 Three-b: 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 Three

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 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 their 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 their children if they die before reaching the age of vesting. If they have none, then the trust should direct who receives the remainder of the share.
- Give the Trustee discretion to invest outside the *Trustee Act*, only if they are acquainted with business matters.

SAMPLE: "If any person who 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 or use so much of the income and capital of that person's part of my estate as my Trustee decides for that person's benefit until that person reaches 19;

(b) add any income not paid or used in any year to the capital of that person's part of my estate;

(c) give that person what remains of that person's part of my estate when that person reaches 19, but if that person dies before reaching 19, give what remains of that person's part of my estate to that person's estate; and

(d) at any time my Trustee decides, my Trustee may give some or all of that part of my estate to that person's parent or guardian as trustee [, other than [name of person to exclude, if any,]] to receive and hold that part of my estate for that person's benefit on the same terms as set out in paragraphs (a), (b) and (c) above. When the parent or guardian receives that part of my estate, my Trustee is discharged in connection with that part of my estate and need not inquire about how it is used."

(See 2020 CLEBC *Wills and Personal Planning Precedents, 20.4.*)

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*, RSBC 1996, c 223 (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 they reach the age of 19. However, before probate will be granted, the Public Guardian and Trustee of BC 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. Factors such as the amount of the gift and its intended purpose will be considered.

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 to allocate to any share or interest in my estate (and not necessarily equally among those shares or interests) and the value of each of those assets. Whatever value my Trustee places on those assets will be final and binding on everyone interested in my estate." (2020 CLEBC *Wills and Personal Planning Precedents*, 20.8)

6. Part Four

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 **Section VI: 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 they 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." (2020 CLEBC *Wills and Personal Planning Precedents*, 21.3)

c) Execution and Attestation Clause

The execution and attestation clause should not be on a page of its own. It must follow the final clause of the will on the same page. This is required to prevent the insertion of additional clauses after the will is signed. Always have the will-maker sign it at the end of the will in the presence of two witnesses who do not have an interest in the estate (i.e. is not a beneficiary or executor) and are not the spouses of any individual who has an interest in the estate; there must be room for the two witnesses' signatures (see **Section III.D: Executing the Will and Section III.E: 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 [will-maker's name]. [Will-maker's name] seemed to thoroughly understand it and approve its contents. We remained present while [will-maker] then

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

_____
[full name of will-maker]

_____
Occupation

_____
Signature of Witness

_____
Printed Name

_____
Address (Street)

_____
City

_____
Occupation"

(2020 CLEBC *Wills and Personal Planning Precedents*, 22.35)

NOTE: Execute only the original will. Copies should not be signed by the 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.

Ability to electronically witness a will. Electronic wills are valid wills. See below for more details.

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 (*Singh Estate (Re)*, 2019 BCSC 272 paras 58-60). An attestation clause is a clause at the end of the will where the will-maker signs their name testifying to the fact that they are 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. Electronic Wills

It will be possible to satisfy the writing requirement if the will is in electronic form. Section 37(4) says that an electronic will is a will for the purposes of this act. This means that wills can be signed and stored electronically. The following are two scenarios of how an electronic will may be executed and witnessed:

The will-maker and the two witnesses are physically in the same room. They share an electronic drive that displays a PDF of the will. The will-maker signs the PDF will on the electronic device in the physical presence of the two witnesses, and then each of the witnesses sign the PDF in the physical presence of the will-maker.

Alternatively the will-maker and the two witnesses are all in different physical locations but are all in the same video conferencing "room". For example, a Zoom room or a MS Teams room. The will-maker uses the screen sharing function on the video conferencing platform to share a live display of the will on their screen with the two witnesses. The will-maker then signs the will by electronic signature. The first witnesses then does the same, and the second witness then does the same.

After the electronic will is signed, it is recommended that the will-maker immediately save a complete signed electronic copy of the will as a PDF, lock the PDF from further editing and secure it in a secure location.

If a client seeks to execute or have their electronic will witnessed, please consult with the supervising lawyer prior to taking instructions or agreeing to help the client.

3. Beneficiary's Debt to Estate

According to *Johnston Estate (Re)*, 2017 BCSC 272, the rule in *Cherry v Boultbee,* 41 ER 171 applies in Canada. This means that the beneficiary is required to bring their debts towards the estate into account, even if the debt claim would otherwise be statute-barred by the *Limitations Act*. *Johnston Estate (Re)* states that "the purpose of the rule was to prevent a beneficiary who owed money to an estate from receiving more than their 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; *Bradshaw Estate, Re,* [1988] NBJ No 709, 90 NBR (2d) 194). 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 themselves. Sections 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 their 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(2) 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] 2 All ER 150 and *Currie v Potter* [1981] 6 WWR 377, 12 Man R (2d) 396 (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.

c) Electronic Signatures

Section 35.3 of *WESA* states that a reference to a signature includes an electronic signature and a reference to a statement being signed includes the statement being signed electronically. It also states that the requirement for the signature of a person is satisfied by an electronic signature. This means that an individual may sign a will electronically and a wet ink signature is not required. Also of importance, section 39(1) of *WESA* will not apply to electronic signatures so it will be particularly important to ensure that electronic signatures are properly placed to indicate that the will-maker intended to give effect to the entire will. See **Section III.D.2: Electronic Wills**, for more information.

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 or the will-maker's spouse should never witness the will, as it may void the gift they receive through the will (*WESA*, ss 40, 43). It will be sufficient if the will-maker has made their signature in the joint presence of the witnesses. If they have 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 Shafner*, (1956) 2 DLR (2d) 593, 38 MPR 217 (NSSC)).

Both witnesses must also attest after the will-maker makes or acknowledges their 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.**

Section 35.2 of *WESA* states that individuals are allowed to be in each other's "electronic presence" to satisfy the requirement that a person take an action in the presence of another person, or while other persons are present at the same time. Electronic presence is defined as "the circumstances in which 2 or more persons in different locations communicate simultaneously to an extent that is similar to communication that would occur if all the persons were physically present in the same location" (*WESA*, s 35.1).

This means that signing parties may be physically or electronically present for the execution and witnessing of a will to satisfy the presence requirements of *WESA* sections 37(1)(b) and (c). If a will-maker and witnesses are in each other's electronic presence, the will may be made by signing complete and identical copies of the will in counterpart, and those copies of the will in counterpart are deemed to be identical even if there are slight differences in the format of the copies (*WESA*, s 35.2).

See **Section III.D.2: Electronic Wills**, for two potential scenarios of how to be in someone's "electronic presence."

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 for invalidity is that 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. In *Bach Estate, Re*, 2017 BCSC 548 at para 54, the Court held that section 43(4) of *WESA* empowers the court to declare a presumptively void gift valid if it "is satisfied that the document represents the testamentary intentions of that deceased person." The court also held that "extrinsic evidence is admissible on the question of testamentary intent, and the Court is not limited to the evidence that an inspection of the document provides." See also *Re Estate of Le Gallais*, 2017 BCSC 1699.

F. Filing a Wills Notice

After the will is complete, a Wills Notice should be filed with the Department of Vital Statistics in Victoria (*WESA*, at s 73). 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. However, it is recommended as a wills search must be undertaken by the Executor or Administrator before the Grant of Probate or Grant of Administration are issued.

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, the will-maker must have the following information:

- Legal name and date of birth;
- Place of birth;
- Date the will was signed;
- Location of the will; and
- The date the note was filed with the Vital Statistics Agency.

There are three ways of filing a Wills Notice: either online, by mail, or in person. All three methods require a $17.00 charge for filing, payable to the Minister of Finance. Forms are available at https://www2.gov.bc.ca/assets/gov/health/forms/vital-statistics/vsa531_fill.pdf. If filing by mail is preferred, then the VSA 531 form must be completed and mailed to **Vital Statistics Agency**, PO Box 9657 Stn Prov Govt, Victoria, BC V8W 9P3.

Finally, the VSA 531 form can be submitted in person to any Service BC Counter. Locations can be found at: www.servicebc.gov.bc.ca.

If a will is made with LSLAP, the forms are also on file in the LSLAP office. A copy of **the notice should be made and the original notice should be sent to the Vital Statistics Agency**. The copy should be 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.

NOTE ON ELECTRONIC WILLS: The Wills Notice Form does not provide dedicated space to indicate the electronic location of a will. If they chose to register an electronic will, a client should use the address space on the form to indicate the digital location of the will. This might be in the form of a link to a cloud storage space, the file path to a document stored on a hard drive, or something else entirely. Clients should consider potential barriers to accessing an electronic will. If it proves impossible to locate or access an electronic will after the will maker is deceased, their estate will be distributed as if the electronic will did not exist. Electronic wills are very new in BC, and there is little jurisprudence surrounding their use.

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, section 54(2) of *WESA*, 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 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 an unattested alteration appears to have been made after the 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 will-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: Court's Power to Cure Deficiencies and Rectify Wills**, above, which also discusses the power of rectification under section 59).

NOTE ON ELECTRONIC WILLS: Section 54 of *WESA* does not apply to electronic wills. Instead, a will maker seeking to make an alternation to an electronic will must make a new will in accordance with section 37; see **Section III.D.2: Electronic Wills**, for more information.

V. COURT'S POWER TO CURE DEFICIENCIES AND RECTIFY WILLS

Section 58 of *WESA* gives the court 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 with 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 the purpose of the section 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 court takes 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*, 2015 BCSC 182, "[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." See also *Levesque Estate (Re)*, 2019 BCSC 927; *Hadley Estate,(Re)*, 2017 BCCA 311; and *Dickinson-Starkey Estate (Re)*, 2022 BCSC 93.

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.

VI. REVOCATION OF A WILL

Revocation of wills is governed by sections 55 and 55.1 of *WESA*. These sections outline the only ways in which a will may be revoked. Section 56 of *WESA* provides that if a will-maker gifts, appoints as an executor, or confers power to a person who subsequently ceases to be the spouse of the will-maker under section 2(2) before the will-maker's death, only that gift, appointment, and/or conferment is revoked, not the entire will. The gift to the ex-spouse must be distributed as if they died before the will-maker. The application of section 56 of *WESA* is subject to any contrary intention in the 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 (*WESA*, 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 III.G: 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. **There is a presumption that a lost will has been destroyed and revoked, therefore, care must be taken in storing the will.**

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 their will in a safe place known by the personal representative to guard against accidental loss or destruction.

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 they lack capacity to form the requisite intention.

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, Re Estate of Horace Lee*, 2005 BCSC 1537.

NOTE ON ELECTRONIC WILLS: Section 55.1 outlines how to revoke an electronic will. To revoke an electronic will, the will-maker or a person in the presence of the will-maker and by the will-maker's direction: can delete one or more electronic versions of the will or of part of the will with the intention of revoking it, or may burn, tear or destroy all or part of a paper copy of the will in some manner, in the presence of a witness, with the intention of revoking all or part of the will. An inadvertent deletion of one or more electronic version of a will is not evidence of an intention to revoke the will, so what is important is the intention of the will-maker; see **Section III.D.2: Electronic Wills**, for more information.

C. By Subsequent Will

A will may be revoked by another will made in accordance with section 55(1)(a) of *WESA*. 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; 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 section 56(2) of *WESA*.

F. Effect of the 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 the *Family Law Act* claims can continue even past death as long as the claimant brings a suit within two years.

VII. WILLS 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.** See **VIII.B. Separated Spouses** for more information on when the spousal relationship ceases for the purposes of *WESA*. The **limitation period** for commencing an action to vary a will is **180 days** from the grant of probate, per section 61(1)(a) of *WESA*.

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 their will; and
- The size of the will-maker's estate.

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

The Supreme Court of Canada's 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*, "[t]he 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 signed pre-nuptial agreement where both parties gave up any right or interest to the other's estate was not determinative in a claim under the *Wills Variation Act*.

B. Definition of Spouse in WESA

The definition of spouse in section 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*, 2017 BCSC 978.

In *Boughton v Widner Estate*, 2021 BCSC 325, the deceased had both a legal wife as well as a common law partner at the time of his death. The court confirmed that it is possible to have two spouses who concurrently meet the definition of a spouse under *WESA* section 2. The deceased's estate was split equally between the two spouses.

In *BH v JH*, 2015 BCSC 1551, the BC Supreme Court varied the husband's will so that the wife, who was separated from but who had 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 may consider them. Therefore, the will-maker is not assured of success in their attempt to exclude or less than adequately provide for a spouse or child. For more detail, see above: **Section VI.A: Application Under the Act**.

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 their 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.

VIII. INTESTACY

A. Generally

If a person dies intestate (without a valid will), their 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's* intestacy distribution scheme.

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). See *Boughton v Widner Estate*, 2021 BC2C 325 for an example of the court dividing a deceased's estate among two spouses.

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 section 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	21(4)	Household furnishings plus preferential share of $150,000 to the spouse. One half of

whom are **NOT** descendants of the surviving spouse.		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*, RSBC 1996, c 120.

B. Separated Spouse

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

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 pursuant to section 2(2)(a) of *WESA*, **or**

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

NOTE: Married couples cease being spouses for the purposes of *WESA* if they separate or divorce, as s 81 of the *Family Law Act* indicates that an interest in family assets automatically arises on separation. See *Gosbjorn v. Hadley*, 2008 BCSC 219 and more recently *Mother 1 v Solus Trust Company*, 2019 BCSC 200 at paras 149-151 for a discussion of when a marriage-like relationship ceases.

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*, RSBC 1996, c 5, 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).

IX. PROPERTY

A. Joint Tenancy and 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, 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. The testator's interest in the property does not form a part of their estate and does not pass under the will. Instead, it passes "outside the will" to the surviving joint tenant(s).

The right of survivorship has its benefits as well as problems. Because the testator's interest in the property held under joint tenancy does not become a part of the estate, probate fees related to the property can be avoided as the interest passes outside the will. Placing assets in joint tenancy may also avoid costs and delays associated with obtaining probate. Furthermore, a beneficiary of a will who is not satisfied with their gift under the will cannot make a claim under the *Wills Variation Act* to obtain a greater share in the estate for property that passes outside of the estate. One drawback of placing assets in joint tenancy is that the surviving tenant owns the asset and does not need to respect the will-maker's wishes on how they may have wanted their asset dealt with after their death.

In contrast, where owners hold an interest in the property as tenants in common, each has a separate undivided share. Upon death, each owner's individual share forms part of their estate.

B. Joint Bank Accounts

When a joint bank account is created, many assume that when one owner dies, the survivor is automatically entitled the remaining balance in the account. However, this is not always the case. In *Pecore v Pecore*, 2007 SCC 17, the Supreme Court of Canada held that when a parent creates a joint bank account with an adult child, it is presumed that this arrangement is made out of convenience, and there was not an intent by the parent for the balance of the account to pass to their adult child by way of survivorship. Unless the intention for the account to pass to the adult child through survivorship is clear when the bank account is set up, courts will presume that the balance in the joint account is to be held by the child in a resulting trust for their parent's estate. It is then up to the child to prove that their parent intended to gift the bank account to them. If the child fails to establish such an intention, the balance of the account forms a part of their parent's estate and is distributed according to their will or the law of intestacy.

The Court will consider many factors when determining the deceased's intention in situations involving joint bank accounts. For a detailed discussion of these factors, see https://www.lerners.ca/lernx/joint-accounts-is-the-surviving-owner-really-entitled-to-the-money

X. 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 "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian." 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 [their] 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 Chapter 29 of the 2020 CLEBC *Wills and Personal Planning Precedents*.

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

XI. ESTATE ADMINISTRATION

A. Testate and Intestacy

The authority to administer the estate of a deceased individual vests with the personal representative, whose identity will depend largely on whether the deceased individual had a valid will when they died.

If the deceased individual died with a valid will, it is said that that individual died "testate." The executor named under the last valid will, if they accept the appointment, will be vested with legal authority over the estate. In theory, an executor takes authority from the will, and accordingly has authority immediately upon death. This concept is expressed through the legal adage that a will "speaks from death." In practice, although an executor has legal authority from the date of death, most third parties (e.g. banks and the Land Title and Survey Authority) will not recognize that authority without a representation grant from the court.

If the deceased individual died without a valid will, they are said to have died "intestate." In such a case, an application must be made to the court for the appointment of an administrator for the estate. As there is no valid will, the authority to deal with the estate originates from the court grant of administration. This concept is codified in section 102 of *WESA* which provides that in the case of an intestacy, or if an executor is not named in a will, the estate of the deceased person "vests in the court."

B. Representation Grants Generally

Grants of probate and grants of administration are two types of "representation grants." As a valid will grants authority to the named executor, there is theoretically no need for a named executor to obtain a representation grant from the court. As a practical matter, however, an executor may not be able to accomplish much without a representation grant.

If there is no will, all of the property of the deceased vests in the court (*WESA*, s 102), and accordingly, no person has authority unless the court issues a representation grant to that person.

Two provisions in *WESA* are particularly important to understanding the basic effect of obtaining a representation grant. First, section 136 of *WESA* provides that a representation grant, when issued by the court, gives exclusive authority to the person named in the grant to administer the estate. Second, section 137 of *WESA* provides that a person who transfers estate property or releases a document or information to a personal representative is not liable for any damage that may result. These two sections give legal assurance to third parties dealing with a personal representative.

C. Jurisdiction

An administration grant is usually applied for in the jurisdiction where the deceased was domiciled at the time of death. Where a person was last residing is a good indicator of domicile, but it is not determinative.

If the deceased had assets in multiple jurisdictions, it may be necessary to obtain a representation grant in one jurisdiction, and then to have that grant "resealed" locally in each jurisdiction where assets are located. Furthermore, in such a situation, British Columbia law, including intestacy rules for example, may not apply. These situations are governed by the rules of "conflict of laws."

D. Probate

1. Generally

A grant of probate is a form of representation grant that is issued to the executor appointed by a will. Pursuant to sections 136 and 137 of *WESA*, a grant of probate gives exclusive

authority to the named executor to deal with the estate and grants legal protection to third parties who rely upon the grant.

2. Who May Apply?

An executor appointed under a will may apply for a grant of probate. An alternate executor may apply if the conditions set out for the appointment of that alternate executor are satisfied.

3. Solemn Form versus Common Form

Where the validity of a will is uncontested, the registrar of the court may issue the grant of probate (*WESA,* s 129(3)) upon an application being made in the form and manner set out in the Supreme Court Civil Rules.

Although obtaining a grant in this manner will ordinarily be sufficient, it does not conclusively determine that a will is valid. Where a grant has been obtained this way, the will has been proven only in "common form" or "simple form." If the will is later found to have been invalid, or a later will is found, the grant of probate may be revoked. In this situation, the personal representative may be liable for having distributed the estate assets to the incorrect beneficiaries.

Obtaining proof of a will in "solemn form" (also known as "proof in form of law" or "proof *per testes*") gives a greater degree of protection to an executor. This requires a hearing in open court before a judge, with testimony from witnesses to the will. If a will is proven in solemn form, the grant cannot be revoked unless a later will shows up, or if it was obtained by fraud (see *Romans Estate v Tassone*, 2009 BCSC 194 for a discussion).

E. Administration

1. Generally

A grant of administration is a form of representation grant issued to an individual other than an executor appointed under a will. A grant of administration will be required on intestacy, or where there is a will, but the appointed executor is unwilling, incapable or dead, or where no executor is appointed. The procedure for administration is similar to probate, except that the court must appoint an administrator, and bonding may be required.

The consent of the Public Guardian and Trustee is required where a minor's property is involved. The Public Guardian and Trustee's consent is also needed on probate if any minor is a beneficiary and a trustee is not appointed in the will for such minor beneficiary. An administrator's powers and duties are indistinguishable from an executor's and are set out in *WESA.*

2. Who May Apply?

Under sections 130 and 131 of *WESA*, an individual may apply to the court to be appointed Administrator of an estate. Section 130 enumerates the order of priority for applicants of an intestate estate, favouring the spouse of the deceased, followed by a child of the deceased who obtains the consent of the majority of the children of the deceased. Section 131 enumerates the order of priority for applicants of an estate where the appointed executor is unable or unwilling to act. Priority is given to a beneficiary that applies with the consent of the beneficiaries who, along with the applicant's interest, are entitled to a majority interest in the estate.

F. Probate Fees

Before a grant is issued, probate fees must be paid on the value of the deceased's assets as at the date of death. Only secured debts (i.e. debts secured on property by a mortgage) may be subtracted from the value of assets when determining the amount of fees payable.

It should also be noted that probate fees in British Columbia are low. As stated in section 2(3) of the *Probate Fee Act*, SBC 1999, c 4:

> 2(3) If the value of the estate exceeds $25 000, whether disclosed to the court before or after the issue of the grant or before or after the resealing, as the case may be, the amount of fee payable for an estate over $25 000 up to $50 000 is
>
> (a) $6 for every $1 000 or part of $1 000 by which the value of the estate exceeds $25 000 but is not more than $50 000, plus
>
> (b) $14 for each $1 000 or part of $1 000 by which the value of the estate exceeds $50 000.

An easy way to calculate probate and application fees for estates over $50,000 is to round the value of the estate to the next $1,000, multiply it by 0.014 and subtract $350 from the result.

G. Assets Passing Outside of Estate

Not all assets of the deceased will form part of the estate. It is not necessary to obtain a representation grant to deal with these assets.

There are four primary categories of assets that fall outside of the estate:

1. Pensions and retirement plans, including Registered Retirement Savings Plans, Registered Retirement Income Funds, for which a beneficiary may be designated. If no designation has been made or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will be an asset of the estate and will vest in the personal representative.
2. Life insurance proceeds, for which a beneficiary or successor may be designated. If no designation has been made, or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will form part of the estate.
3. Assets held in joint tenancy with another will pass to the surviving joint tenant.
4. A Tax Free Savings Account for which a beneficiary has been designated will not form part of the estate. If no designation has been made, or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will pass through the estate.

H. Vehicles

A vehicle registered in the name of a deceased owner can be transferred at an Insurance Corporation of British Columbia Autoplan broker. If the motor vehicle is owned jointly, the surviving owner will need to bring the current vehicle registration and the original death certificate or a certified copy of it.

If the estate is valued at less than $25,000, the executor of the estate may transfer the vehicle without obtaining probate of the last will. The executor will need to provide the original death certificate or a certified copy of it, a statutory declaration stating that the estate is not worth more than $25,000 (which can be provided by the Autoplan dealer and must be sworn before a lawyer or notary public), and the original last will.

A summary of other situations in which a vehicle can be transferred without a grant of probate may be found at https://www.icbc.com/vehicle-registration/sell-vehicle/Documents/estate-transfers.pdf.

XII. DUTIES OF A PERSONAL REPRESENTATIVE

A. General Duties

The basic duties of an Executor/Administrator are to:

- Obtain a death certificate from the Department of Vital Statistics. Ordinarily, however, a funeral home will likely order and provide a death certificate
- Locate the last will if there is one and apply for a search of wills notices
- Arrange for the disposition of the deceased's body and the funeral
- Determine the names and addresses of the beneficiaries and intestate heirs and notify them
- Cancel subscriptions, redirecting mail and wrapping up personal matters
- Gather papers relating to assets and ascertain the value of the assets (by way of an inventory, taking into account debts and liabilities)
- Safeguard assets until they are sold or distributed, including the transfer of ownership registration and the collection of any debts
- Sell assets if it is necessary and distribute the estate
- Prepare and file tax returns
- Notify appropriate agencies (pensions, subscriptions, charge accounts, etc.)
- Consider advertising for creditors (see **Section IV-F: Payment of Debts below**)
- Pay all valid debts left to the estate (please note that an executor or administrator may be held personally liable for unsettled debts after the distribution of the estate)
- Prepare and obtain approval for the beneficiaries for distribution of estate

B. CPP Death Benefits

The Canada Pension Plan (CPP) death benefit is a one-time, lump-sum payment to the estate on behalf of a deceased CPP contributor.

If an estate exists, the executor named in the will or the administrator named by the court to administer the estate applies for the death benefit. The executor should apply for the benefit within 60 days of the date of death.

If no estate exists or if the executor has not applied for the death benefit, payment may be made to other persons who apply for the benefit in the following order of priority:

1. The person or institution that has paid for or that is responsible for paying for the funeral expenses of the deceased;
2. The surviving spouse or common-law partner of the deceased; or
3. The next-of-kin of the deceased.

To be entitled to a CPP death benefit, the deceased must have made contributions to the lesser of:

- One-third of the calendar years in their CPP contributory period, but no less than 3 calendar years; or
- 10 calendar years

The amount of the death benefit depends on how long and how much the deceased contributed to their CPP, with the maximum benefit set at $2,500.

As of January 1, 2019, the death benefit for all eligible contributors is set at a flat rate of $2,500.

To apply, complete the Application for a Canada Pension Plan Death Benefit (ISP1200), include certified true copies of the required documentation, and mail it to the closest Service Canada. Addresses are provided on the form (ISP1200).

C. Search of Wills Notice

If the deceased made a will, they may have filed a Wills Notice with the Vital Statistics Registry. Note that the Vital Statistics registry does not keep a copy of the will and will only have a record of the date the will was made.

To obtain a representation grant through the court registry, a personal representative needs to provide two copies of a Wills Notice Search, which can be obtained on application to the Vital Statistics Registry. A Wills Notice Search provides the date the person signed the will registered in the wills notice, the location of the will at that time, and the date the Vital Statistics Agency received the wills notice.

If the will-maker is alive, only the will-maker can request a Wills Notice Search. However, a person who provides the documentation and payment listed below can apply for a Wills Notice if the will-maker is deceased:

- A photocopy of the death certificate
- A completed VSA 532 form

To apply for a search, a person has to mail the requested documents to: **Vital Statistics Agency**, PO Box 9657 Stn Prov Govt, Victoria, BC V8W 9P3. Alternatively, they can deliver the requested materials to a Service BC Counter to request for a Search of Wills Notice. Please note that you cannot ask for a search online, unlike filing a Wills Notice.

The cost to conduct a Wills Notice search is $20 per will search, plus $5 for each additional name the will-maker may have used. The results are usually printed within 20 business days. If you are pressed for time, you can also request Courier Delivery. In the case of Courier Deliveries, there is an additional $33 fee for the courier, but it prints next business day.

D. Other Asset Distribution Instruments

If life insurance policies and RRSPs have pre-existing designated beneficiaries, they will not form part of the will-maker's estate and will be administered outside of the probate process.

For life insurance policies with designated beneficiaries, the proceeds do not form part of the estate. A beneficiary designation in a will is invalidated by a subsequent designation made in an insurance policy or is revoked when the will is revoked (see *Insurance Act*, s 61(2)).

Also, a will cannot revoke an earlier life insurance designation unless it complies with section 60 of the *Insurance Act.* It requires that the policyholder file a contract or declaration with the insurance company, designating the beneficiary of the policy irrevocably. If this document is filed, the beneficiary must consent to any change to the designation. However, a general revocation clause that does not specifically refer to the insurance policy or contract does not revoke the designation made prior to the will because it does not meet the definition of "declaration" under the *Insurance Act*; see *Hurzin v Great West Life Assurance Company*, (1988) 23 BCLR (2d) 252 (SC).

Those with a significant amount of money in RRSPs should consult a tax lawyer or tax accountant for estate tax planning advice, as there are several tax rules that apply solely to the final year of a person's life.

E. Time for Distributing the Estate

As a rule of thumb, an Executor has one year from the date of death (known as the "executor's year") to distribute the estate. The concept of the executor's year derives from the presumption that an executor will be capable of dealing with the estate's affairs within this period.

The concept of the executor's year has two aspects:

1. A court will ordinarily not compel an executor to make a distribution before the expiry of this period.
2. Except when specifically provided in a will, a legacy will not carry interest until a year after the death of the will-maker.

However, it should also be noted that under section 155 of *WESA*, a personal representative of a deceased person must not distribute the estate of the deceased in the **210 days following the date of the issue of a representation grant** except with the consent of all the beneficiaries and intestate successors entitled to the estate or by an order of the court. This period is to allow any individuals

who wish to make a claim against the estate to file a claim. Additionally, the personal representative must not distribute the estate after 210 days without the consent of the court if:

a) there is a commenced proceeding to determine if a person is a beneficiary or if a person is an intestate successor,

b) relief is sought under a wills variation claim, or

c) other proceedings have been commenced which may affect the distribution of the estate.

F. Payment of Debts

The personal representative is personally liable for payment of creditors if they pay the beneficiaries before the debts of the estate. Thus, a personal representative should advertise in the British Columbia Gazette under section 154 of *WESA*, wait 30 days from the last publication, pay any claims that arise, and then pay the beneficiaries. Having advertised, the personal representative will not face personal liability. But the personal representative would still be responsible for the debts, regardless whether they have advertised or not, if the personal representative has knowledge of the creditor's claim prior to distribution.

G. Income Tax Clearance Certificate

Section 159(2) of the *Income Tax Act,* RSC 1985, c 1 (5th Supp) prohibits distribution of the assets until a certificate is obtained from the Minister of Finance certifying payment of all taxes. Without such a certificate, the personal representative may be personally liable for the unpaid amount.

However, there have been changes in Canada Revenue Agency (CRA) procedure. It is now possible to review information via online terminals, and usually it is not necessary to obtain the return itself from a taxation centre. The clearance request and necessary documents are not filed with the return but are forwarded separately to CRA's district office.

The personal representative needs to file a terminal tax return, as well as an estate tax return for every year following death. Generally, the terminal tax return is due on or before the following dates:

- If the death occurred between January 1 and October 31 inclusive, the due date for the terminal tax return is April 30 of the following year; or
- If the death occurred between November 1 and December 31 inclusive, the due date for the terminal tax return is six months after the date of death.

H. Discharge of Personal Representative

When the estate is large, when litigation is involved, or when the estate is insolvent, the personal representative may wish to protect themselves before distributing the estate by obtaining a discharge per section 157 of *WESA*. This discharge is generally not necessary where a small estate is involved.

Generally, a personal administrator can consider their duties at an end once all the residuary or intestate beneficiaries have approved their accounts and signed a release, and when they have obtained clearance from the CRA.

I. Passing of Accounts

Section 99 of the *Trustee Act,* RSBC 1996, c 464 sets out the procedure for the passing of the trustee's accounts. Absent written and approved consent by all beneficiaries or a court order, an executor, administrator, and trustee under a will and judicial trustee must, within two years of the grant of probate or grant of administration or within two years from the date of appointment, pass their accounts. This is often the process by which an executor, administrator and trustee will have their fees approved.

XIII. TAXATION: RRSP & RRIF & TFSA

A. RRSP: Registered Retirement Savings Plan

In British Columbia, a person may by will gift a property which they are entitled at law or in equity at the time of their death. This means that the proceeds from a deceased's Registered Retirement Saving Plan ("RRSP") can be distributed to the beneficiary outside of the will if a valid beneficiary designation has been made. However, please note that the deceased's estate will likely need to pay taxes on the value of the RRSP as at the deceased's date of death. This will be taxed as the deceased's income for that year.

A person is "deemed" to have disposed of all assets at the moment before death and is accordingly taxed in the year of death as such. For example, if the deceased owns a rental property, then that rental property is considered to be sold at the moment of the deceased's death and as a result, the deceased may have earned capital gains from this deemed disposition. Taxes will then be paid on these capital gains.

Additionally, the value of any RRSP or RRIF will also be considered to have been earned in the year of death. This is significant because the inclusion of all these capital gains will most likely bump the deceased to the highest tax bracket. In B.C., this bump could mean that an individual is taxed close to 50% of the income.

The major exception to this rule is the "spousal rollover" rule in section 73 of the *Income Tax Act* ("*ITA*"). This rule effectively defers payment of taxes owing from the deemed disposition if the asset is given to the spouse of the deceased until the death of the spouse.

If a beneficiary has been designated to receive the proceeds of a RRSP, those proceeds will pass directly to the beneficiary. However, the deceased will be considered to have earned the entire value of the RRSP during their year of death and the estate must declare the value of the RRSP on the T1 Terminal Tax return. Accordingly, unless a roll-over provision, such as the spousal roll-over, applies, the estate will be liable to pay taxes on the value of the RRSP.

If the estate is unable to pay the taxes, the beneficiary receiving the proceeds will be liable to pay the taxes owing (s 160.2(1) of the *ITA* provides that the estate and a designated beneficiary are jointly and severally liable for tax on the value of the RRSP at the date of death).

B. RRIF: Registered Retirement Income Fund

The same rules apply to RRIFs as they apply to RRSPs.

C. TFSA: Tax-Free Savings Account

TFSAs receive specialized treatment under the *Income Tax Act*. As TFSAs came into effect in 2009, this section of the chapter will not be material to the estate of deceased taxpayers who died in 2008 or earlier.

The fair market value of the TFSA will be received by the estate of the deceased taxpayer or any gains that accumulated in the account will continue to be tax-free until the end of the year following the death of the account holder. The tax-free status of the TFSA is preserved if the deceased taxpayer named their spouse or common-law partner as the successor account holder.

It is unlikely that there will be tax liability for the income generated by the TFSA from amounts contributed to the TFSA during the taxpayer's lifetime. This is different from RRSPs or RRIFs.

XIV. LSLAP FILE ADMINISTRATION POLICY

This section is specific to LSLAP clinicians. It sets out internal LSLAP practices and policies regarding Wills & Estates.

A. LSLAP File Administration Policy – Wills and Estate Planning

The only wills and estates issues 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, the 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, no 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 their will without the consent of another party (usually the spouse). This agreement will potentially bind the will-maker even if the other party predeceases the will-maker. Thus, a mutual will has a contractual component, in theory creating a constructive trust. However, a will-maker can always change their will and testament. If a will-maker changes their last will and testament after the other party has died, the will-maker may create a right of action for beneficiaries of the preceding mutual will (which created the constructive trust) for breach of the trust.

Note that signing mutual wills are 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 should 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 $300 to $500 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 once they have passed away. 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 their wishes and that they understand what the document means (see **Section III.D: Executing the Will and Section III.E: 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 disinherits potential beneficiaries. In other words, LSLAP is unable to help with clients 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 will 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.

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. LSLAP File Administration Policy – Probate and Taxation

LSLAP does not advise clients on probate issues. Such clients should be referred to a private lawyer. The potential liability in administering estates is too great to permit greater student involvement; the client should always be referred to a lawyer.

Estate taxation is complicated. Clients should be referred to lawyers who specialize in these matters or the CRA, which has agents who specialize in estate taxation.

C. 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 their 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 the 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, Tax-Free Savings Accounts (TFSAs), Registered Retirement Savings Plans (RRSPs), and Registered Retirement Income Funds (RRIFs)). Ensure that the will-maker understands that such properties, if there are valid beneficiary designations in place, 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 them.

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

D. Undue Influence and Suspicious Circumstances

In order to ensure there is no undue influence, clinicians should follow the British Columbia Law Institute guidelines below when conducting an interview with a client looking for assistance on making a will. Refer to the British Columbia Law Institute's *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* for more details on each of the points listed below. The guide can be accessed at http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf

Interview the will-maker alone

This practice allows the interviewer to satisfy themselves that the will-maker has testamentary capacity. The exception to the practice of meeting the client alone is where one is taking joint instructions from spouses 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 from 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.

Ask non-leading, open-ended questions to determine factors operating on the will-maker's mind

Examples of this type of questions include:

- How/why did you decide to divide your estate this way?
- Why did you choose [proposed executor] as the executor of your will?
- What was important to you in making these decisions?

Again, this ensures what the will-maker tells the interviewer to include in their will what truly represents their wishes.

Explore whether the will-maker is in a relationship of dependency, domination or special confidence or trust

Examples of questions to ask include:

- Do you live alone? With family? A caregiver? A friend?
- Has anything changed in your living arrangements recently?
- Are you able to go wherever and whenever you wish?
- Does anyone help you more than others?
- Who arranged/suggested this meeting?
- Does anyone help you make decisions? Who does your banking?
- Has anyone asked you for money? A gift?

Explore whether the will-maker is a victim of abuse or neglect in other contexts

When interviewing, the interviewer should be aware of the will-maker's physical safety. If necessary and appropriate, refer the will-maker to support resources. Sample questions to consider include:

- Has anyone ever hurt you? Has anyone taken anything that was yours without asking?
- Has anyone threatened you? Are you alone a lot?
- Has anyone ever failed to help you take care of yourself when you needed help?
- Are there people you like to see? Have you seen these people or done things recently with them?
- Has anyone ever threatened to take you out of your home and put you in a care facility?

Obtain relevant information from third parties when possible and if the will-maker consents.

Obtain a medical assessment if mental capacity is also in question, but remember that mental capacity to make a will is ultimately a legal test.

Compile a list of events or circumstances indicating undue influence. See the section below for red flags.

Make and retain appropriate records whenever red flags are present.

If suspicion remains high after reasonable investigation, decline retainer to prepare the will.

E. Red Flags for Undue Influence

The British Columbia Law Institute's list of red flags below may indicate the presence of undue influence on a will-maker. The list is non-exhaustive, and the presence of some factor does not provide an affirmation of undue influence. Use the list as a cautionary guide when preparing a will. Refer to the British Columbia Law Institute's *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* for more details on each of the facts listed below. The guide can be accessed at http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf

Some examples of red flags that may indicate the presence of undue influence include:

- Will-maker invests significant trust and confidence in a person who is a beneficiary or is connected to a beneficiary (e.g. lawyer, doctor, clergy, financial advisor, accountant, formal or informal caregiver, new "suitor" or partner)
- Will-maker experiences isolation due to dependence on a beneficiary for physical, emotional, financial or other needs
- Physical, psychological and behavioural characteristics of the will-maker
- Circumstances related to the making of the will and/or the terms
- Characteristics of influencers in the will-maker's family or circle of acquaintance
- Interviewer's "gut feeling"

XV. 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 their children's full name, date of birth, place of residence (i.e. whether they live 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 they have someone dependant on them 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 the 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 serving 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 their own estate and the other to take over the executorship of the previous will.*

_____

_____

_____

_____

Part 2 – Financial Information

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

**LSAP cannot advise clients with the 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 their 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 they become 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?

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

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

8. 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.

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

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

11. 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 of why the Will-maker feels the provision made is adequate? Note: if the client wishes to inadequately provide for their spouse(s) and children, refer the client to a private lawyer.

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

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

14. 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?

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

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

17. 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 valid 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 by will to manage the estate of a person who has died leaving a valid will. The executor must ensure 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 – 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. The B.C. equivalent document is called a “Representation Agreement”.

Mirror wills – the wills of an individual and their 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 whereby each gives their 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 – either the Executor named in the will of a deceased individual or a court-appointed Administrator; charged with administering and distributing the estate.

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, 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 is signed and witnessed

Will-maker – a person who has made a will that is in effect at the time of their 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