CHAPTER SIXTEEN A: WILLS & ESTATE PLANNING

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CHAPTER SIXTEEN A: WILLS AND ESTATES

I. INTRODUCTION

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.

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.

WESA now applies to **all** wills in BC if the deceased dies on or after 31 March 2014, except where:

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- The will was revoked before *WESA* comes into force (i.e. *WESA* will not revive validly revoked wills);

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

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

II. GOVERNING LEGISLATION AND RESOURCES

A. Legislation

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

Trustee Act, RSBC 1996, c 464

B. Texts

Many texts are available that provide more information on this area of the law. Be aware that the law on wills & estates has significantly changed since *WESA* came into force on 31 March 2014. Therefore, earlier resources may be outdated. CLEBC offers the following material for a paid subscription:

1. General

Kate Bake-Paterson et al, *BC Estate Planning & Wealth Preservation*, (Vancouver: CLEBC, 2019)

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, 2019) ("*Wills and Personal Planning Precedents*")

3. Probate

Shelley Bentley et al, *Probate and Estate Administration Practice Manual* (Vancouver: CLEBC, 2018)

C. Bureaus and Web Sites

Department of Vital Statistics

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')

Website: www.canlii.org/en/

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

III. MAKING AND EXECUTING A WILL

A. Assessing Will-maker Competence

To make a valid will, a person must be:

- 16 years of age 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; for a recent application of this test, see *Halliday v Halliday Estate*, (2019) BCSC 554 at para 26.

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.

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.

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

Some helpful lines of inquiry to assess capacity include: whether the will-maker can understand the nature of the testamentary act (that 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*

At common law, 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" 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. 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, *Cowper-Smith v Morgan*, 2016 BCCA 200.

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; see also more recent applications in *Clark v Nash*, (1989) 61 DLR (4th) 409 (BCCA) and *Johnson v Pelkey*, (1997) 36 BCLR (3d) 40 (SC)).

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 v Hay*, [1995] 2 SCR 876 at para 25 [*Vout*], the Court held that suspicious circumstance may be raised by:

(1) circumstances surrounding the preparation of the will,

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

(3) 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 suspicious circumstances are proven, 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, unless the court finds that they acted honestly and reasonably, that person could be held personally liable and could be required to replace the loss.

5. Remuneration and Benefits

A personal representative may be entitled to remuneration under a remuneration contract or pursuant to an express authority under the will. Otherwise, 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 of *WESA* requires that a will be in writing. The will-maker and two or more witnesses in the presence of the will-maker must sign the will. It may be typed or handwritten, or both, as in the case of printed will forms.

1. Intention and Precision

A fundamental rule of drafting is to ascertain the **will-maker's intent** regarding how the estate will be divided. Have the will-maker consider present desires as well as future possibilities. A beneficiary may predecease the will-maker and the will-maker may want the deceased's share to go to someone else. Potential will variation claims must be anticipated. **A qualified lawyer should be consulted if a wills variation claim may occur.** See Section VI: 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: T**he clauses given below are merely examples. You should ensure that the clauses you use are appropriate and that the will is internally consistent.** For example, if specific bequests are given to various persons, another clause in the will should not dispose of the entire estate but may dispose of the residue. Consult a qualified lawyer, the CLEBC *Wills and Personal Planning Precedents* resource or any other books on will precedents for additional assistance with the structure of various clauses.

2. Actual Drafting

A will contains instructions about what should happen after the will-maker's death. As a result, keep in mind the importance of precision and consistency when drafting a will. Generally, there are several paragraphs common to all wills. 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 2019 CLE *Wills 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." (2019 CLE *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 2019 edition of the CLE *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 my [relationship] [executor/trustee name] is unwilling or unable to act or continue to act as my Trustee, I appoint my [relationship] [full name of alternative executor/trustee] of [alternative executor/trustee's address] to be my Trustee." (See 2019 CLE *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 [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." (2019 CLE *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)...[referring to the "convert, keep or invest" clause]" (2019 CLE *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 2019 CLE *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,

E. 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;"

(2019 CLE *Wills and Personal Planning Precedents*, 8.4)

c) Items-in-Kind

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

SAMPLE: "(a) to deliver my [article 1] to my [relationship] [article 1 recipient 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]." (2019 CLE *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;"

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 2019 CLE *Wills and Personal Planning Precedents*, 14.2.

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]." (2019 CLE *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;" (2019 CLE *Wills Precedents 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 III-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 anyone becomes entitled to any part of my estate, is under the age of majority, and I have not specified terms in this will on which my Trustee is to hold that part, I direct my Trustee to hold that part, and:

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

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

(c) Regardless of paragraph X (a) and (b) above, and at any time my Trustee decides, pay some or all of that part of my estate to that person's parent or guardian, to hold, and if that parent or guardian decides, apply some or all for that person's benefit." (See 2019 CLE *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." (2019 CLE *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." (2019 CLE *Wills and Personal Planning Precedents*, 21.2)

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

_____
Occupation

_____
Signature of Witness

_____
Printed Name

_____
Address (Street)

_____
City

_____
Occupation"

_____
<full name of will-maker>

(2019 CLE *Wills 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.

Temporary Ability to Electronically Witness. In the event that the Will was witnessed electronically (see commentary in Section D. 2.(a) below regarding electronic

witnessing during a declared state of emergency), then to be valid, the attestation clause must be revised to include a statement that it was signed and witnessed in accordance with Ministerial Order No. M161.

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. Beneficiary's Debt to Estate

According to *Re Johnston Estate*, 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*. *Re Johnston Estate* states that "the purpose of the rule was to prevent a beneficiary who owed money to an estate from receiving more than 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). 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] All ER 150 and *Currie v Potter* [1981] 6 WWR 377 (Man QB)) and finding a disposition after the signature to have been intended to precede the signature (*Palin v Ponting,* [1930] para 185, considered in *Beniston Estate v Shepherd*, (1996) 16 ETR (2d) 71 (BCSC)). However, to ensure the validity of the will and all dispositions, the will should be signed at its end, after all dispositions. When

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

2. Signatures of Witnesses

a) Generally

The will-maker must make or acknowledge the signature in the joint presence of two attesting witnesses present when the will is signed (*WESA*, s 37) A beneficiary of the will 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 Schafner,* (1956) 2 DLR (2d) 593 (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.**

Please note that if, at the time of execution, BC is declared to be in a "state of emergency", as defined by the *Emergency Program Act*, RSBC 1996, c. 11, and if Ministerial Order No. M161 is still in force, then the witness requirements may also be satisfied if witnesses are electronically present at the same time (i.e. using videoconference technologies such as FaceTime, Zoom, or Skype) and one of the witnesses is a lawyer. These changes were brought in during the COVID-19 state of emergency to reflect the challenge of witnesses being together while at the same time social distancing.

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 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. 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, and *Hadley Estate, Re*, 2017 BCCA 311.

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

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

Revocation of wills is governed by section 55 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 die before the will-maker. The application of section 56 of *WESA* is subjected to any contrary intention in the will.

G. 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 from **BC Government Forms Finder,** website: https://www2.gov.bc.ca/gov/content/home/forms-a-z**.** 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.

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).

V. REVOCATION OF A WILL

A. By Subsequent Writing

A subsequent instrument in writing that is **not** a subsequent will but is in compliance with the provisions of *WESA* (e.g. signed by two witnesses, etc.) may have the effect of revoking the will (*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 v Lee Estate*, 2005 BCSC 1537.

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.

VI. 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.** However, it should be noted that in the situation of common-law spouses, one spouse can unilaterally terminate a relationship and thereby remove the will from the variation provisions in *WESA*. On the other hand, for married spouses, the spousal relationship can only be terminated by divorce. Please see **Chapter Three: Family Law** for more information regarding divorces. The **limitation period** for commencing an action to vary a will is **180 days** from the grant of probate, per 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 and more recently in *Lamperstorfer v. Plett*, 2018 BCSC 89, 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 s 2 of *WESA* reads:

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

(a) they were married to each other, or

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

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

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

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

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

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

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

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

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

NOTE: In *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.

VII. 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).

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

B. Separated Spouse

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

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

NOTE: 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*, s 37).
- Adopted children are not entitled to the estate of their natural parent except through the will of the natural parent (*WESA*, s 3).

VIII. PROPERTY

A. *Joint Tenancy 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

IX. FIRST NATIONS AND WILLS

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

The definition of "Indian" in the Act means "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 "Wills for First Nations Persons" in Practice Points: Aboriginal Law, available on the BC Continuing Legal Education website at www.cle.bc.ca/PracticePoints/ABOR/wills.html.

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

X. HEALTH CARE DECISIONS

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

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

XI. LSLAP FILE ADMINISTRATION POLICY

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 Estates

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.

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

B. Taking Instructions During the Initial Interview

The purpose of the initial interview is for the LSLAP student to complete the Will Instructions Questionnaire (**Appendix A**) with the client in order to later actually draft the will. **Students should never draft a will for a client during the initial interview. All wills must be approved by the supervising lawyer before they can be mailed or delivered to clients.** At the end of the interview, the student should have a clear and full understanding of the client's personal circumstances, assets, and desired distribution of 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.

C. 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

1. 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.

2. **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.

3. **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?

4. **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?

5. **Obtain relevant information from third parties when possible and if the will-maker consents**
6. **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**
7. **Compile a list of events or circumstances indicating undue influence. See the section below for red flags.**
8. **Make and retain appropriate records whenever red flags are present**
9. **If suspicion remains high after reasonable investigation, decline retainer to prepare the will.**

D. 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"

XII. APPENDIX INDEX

A. WILL INSTRUCTIONS QUESTIONNAIRE

Part I – Client Information

Information about the Will-maker:

Name (full):_____ Alias:_____

Address:

_____

_____

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

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

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

_____

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

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

Information about the Spouse or Partner:

Name (full):_____ Alias:_____

Address:

_____

_____

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

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

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

_____

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

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

Will-maker's Current Marital Status:

Date of marriage:_____ Place of marriage:_____

Place of residence when will-maker was married:_____

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

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

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

Prior Marriages:

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

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

Other Personal Relations:

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

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

Name of the cohabitant:_____

Has the Will-maker signed a cohabitation agreement?_____

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

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

Children:

Ask the Will-maker about 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

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

**LSLAP cannot 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