OVERVIEW

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INTESTACY
(DISTRIBUTION OF ESTATE WHEN THERE IS NO WILL)

General

If a person dies without a legally binding Will, that person has died **intestate**. In British Columbia, Part 3 of WESA [When a person dies without a Will] governs the distribution of the estate of an intestate.

A "**partial intestacy**" occurs if the Deceased has made a Will but the Will does not dispose of the entirety of the estate. For example: if the Will divides the residue into ten shares but only nine shares are disposed of (whether by oversight or because the gift of the tenth share has failed for some reason), the remaining share is subject to the intestacy rules in Part 3 of WESA.

Transition

Two different statutes apply to intestacy, depending on when a person died:

- if the death occurred before Part 3 of WESA came into effect, Part 10 (Distribution of Intestate Estate) of the *Estate Administration Act* ("EAA") applies; and
- if the death occurred after Part 3 came into effect, Part 3 applies.

WESA and the EAA have a similar and well-defined scheme of distribution for the spouse of the intestate (if there are no lineal descendants); for the lineal descendants of the intestate (if there is no spouse); and if neither a spouse nor lineal descendants survive the intestate, then for the parents, siblings, nephews, nieces, grandnephews and grandnieces of the intestate.

The two main differences between WESA and the EAA are when:

- there is a spouse and descendants; and
- there is no spouse or descendants, but there are more remote relatives.

Per Stirpes v. Per Capita

In order to understand the changes to the scheme of intestate distribution under WESA, two terms, "per stirpes" and "per capita," must be explained. In the text that follows, these terms are used only as "shorthand" terms to explain the distribution of a Deceased's estate under various circumstances. We've done this for simplicity. However, these terms should never be used in drafting Wills because they are "terms of art" and may have an unintended effect if used incorrectly. Despite such risk of misinterpretation, you will find that many Wills still contain them.

Per Stirpes (which is Latin for "by branch, stock or stem") means that each branch of the Deceased's family receives an equal share of the estate, regardless of how many people are in that branch. Per stirpes distribution to the descendants, and the steps to determine such distribution, is set out in section 24(1) of WESA.

When a distribution is to be made per stirpes to the descendants of a person, the property that is to be so distributed must be divided into a number of shares that is equal to the number of:

- surviving descendants of either the Deceased or a deceased beneficiary who would have been entitled to a share of the estate if alive; and
- deceased descendants of either the Deceased or the deceased beneficiary who has left surviving descendants

in the generation nearest to the Deceased (Will-Maker or intestate) that contains one or more surviving members.

For example, say an intestate deceased was a widower and had two children: Bob and Jane. Jane has survived her father but Bob has predeceased him, leaving three children: Charles, Donna and Frank (the grandchildren of the Deceased). Two equal shares would be created, one for Jane and one for Bob. Jane would receive her share, being 1/2 of the residue, and each of Bob's three children would receive 1/6 of the estate (that is, Bob's share, being 1/2 of the residue, divided into three equal sub-shares).

The concept of a per stirpes distribution means that there may be unborn beneficiaries at the time of the Will-Maker's death who vest in interest at the time that the per stirpes distribution takes effect. You must take great care when interpreting a per stirpes distribution because appearances can be deceiving, even to an experienced practitioner. See *Hamel* v. *Hamel Estate* for the possibility of a new interpretation of otherwise familiar language.

Per stirpes is different from per capita, which weighs each person equally, rather than each branch equally.

Per Capita (which is Latin for "by head") means that shares are distributed to individual beneficiaries by "head," and if a beneficiary is no longer alive (and therefore not counted), there is no further "representation" (i.e. no share is created for that person and there is no distribution to the descendants of that person). In other words, if a person in a given class has predeceased the Deceased, that person's share will be divided among the survivors of that class (in the example above, no share would have been created for Bob's children and Jane would have taken the entire residue).

The concept of per capita depends on how the group (or class) of beneficiaries is identified.

For example: say the Deceased's Will specifically refers to children (rather than "issue" or "descendants"), and there are three children: Abe, Bob and Carolyn. Abe has passed away, leaving two children. If the Will states "to my children per capita," Bob and Carolyn would each inherit 1/2 of the estate and Abe's children would receive nothing.

However, say the Will-Maker left his estate to his "descendants" or "issue" (rather than "children") per capita. If all five are alive (that is, the three children and the two grandchildren), they would each inherit one-fifth of the estate. On the other hand, if Abe has predeceased the Will-Maker (still leaving two children), the estate would be divided into four equal shares, one for each of the surviving children and one for each surviving grandchild.

The concept of a per capita and/or per stirpes distribution also applies when a distribution is made to a class of beneficiaries or heirs other than lineal descendants.

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Uniform Interpretation with Laws of Other Provinces

Section 19 of WESA clarifies that the new provisions governing intestate distribution originate from the Uniform Law Conference of Canada's *Uniform Intestate Succession Act*, and have been adopted by other provinces. This will be important to future statutory interpretations of the new legislative provisions, such as the rules governing parentelic distribution.

Escheats

In the vast majority of cases, a Deceased will have heirs entitled to the estate under Part 3 of WESA. When a person dies intestate and has no heirs entitled under Part 3 of WESA, the Deceased's estate will **escheat** to the Provincial Crown, except those personal or real assets (e.g. bank accounts) that fall under federal jurisdiction and escheat to the Federal Crown.

In British Columbia, all government agencies must forward the funds or assets to the Unclaimed Property Office under the guidelines of the *Unclaimed Property Act* when the heirs are not located.

An application for the return of all or a portion of such assets may be made to the appropriate governing bodies at any given time (e.g. Unclaimed Property Office or the Bank of Canada). There are no time restrictions with respect to retrieving these assets or proving heirship for them. However, the process is very time-consuming and must be well-documented.

DISTRIBUTION UNDER PART 10 OF EAA

Many estates are only dealt with several years after a person dies. If a death occurred **before** Part 3 of WESA came into effect, Part 10 *(Distribution of Intestate Estate)* of the EAA applies, so it is very important to understand how the intestate's estate would be distributed under the EAA.

Distribution pursuant to Part 10 of the EAA is based on degrees of kinship or consanguinity. If an intestate dies leaving no spouse, issue, parents, siblings, nephews or nieces, the intestate's next of kin of equal degrees of consanguinity would share in the estate equally per capita (no representation would be admitted – i.e. no share would be created for a deceased member of the class of beneficiaries entitled to share in the estate). Closer and more remote relatives of the intestate (i.e. an uncle and a nephew) take an equal share, provided they are of equal degree of consanguinity. Under Part 10, there is no limit to the remoteness of kinship (the great-grandson of a great uncle would inherit, although only on a per-capita basis, and estates rarely escheat to the government.

If an intestate dies leaving:

a Spouse only (no issue) (s. 83): The entire estate shall go to the spouse.

> Since November 1, 2000, the definition of "**spouse**" in the EAA has included a common law spouse, and as the definition of "**common law spouse**" means either:
>
> "(a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or

(b) a person who has lived and cohabited with another person in a marriage-like relationship for a period of at least 2 years immediately before the other person's death";

this definition grants common-law spouses (including those of the same sex) the same rights as legally married spouses. .

In addition, unless the court otherwise orders, pursuant to Section 98 of the EAA, the surviving spouse takes nothing if the spouse and the Deceased had separated with the intention of living separate and apart for a period of not less than **one year** immediately before the death of one spouse and had not, during that period, lived together with the intention of resuming cohabitation.

Issue (Children) (s. 84): Subject to the rights of the spouse, if any, the residue of the estate shall be distributed per stirpes among the issue. In other words, the residue will be distributed among the children alive at the time of the death of the intestate. If the intestate is predeceased by any child but survived by any issue of that deceased child, the administrator must create an equal share for that deceased child and distribute it in equal shares among that deceased child's issue.

Spouse and Issue (s. 85):

- Where the net value of the estate does **not** exceed $65,000, the estate shall go to the spouse (s. 85 (3)).
- Where the net value of the estate exceeds $65,000, the spouse is entitled to:
  - the first $65,000, and has a charge on the estate for that sum (s. 85 (4));
  - an estate for life in the matrimonial home (s.96 (2) (a)); and
  - the household furnishings (s. 96 (2) (b)).
- Of the residue of the estate, after payment of the sum of $65,000 to the spouse, where the intestate dies leaving:
  - a spouse and **one** child, 1/2 shall go to the spouse and the remaining 1/2 to the child per stirpes (s. 85 (5) (a)); and
  - a spouse and **more than one** child, 1/3 shall go to the spouse and the remaining 2/3 to the children in equal shares per stirpes (s. 85 (5) (b)).

    For example: if the intestate was survived by a spouse, one child and the issue of a child that predeceased the intestate, the spouse shall still take 1/3 of the residue of the estate, and the remaining 2/3 will be divided equally between the surviving child (as to 1/3 of the residue) and the deceased child's issue (as to 1/3 of the residue divided equally among them).

Neither Spouse nor Issue (s. 86):

The estate shall go to the **father and mother**, in equal shares, if both are living. If either of them is dead, the estate shall go to the survivor.

No Spouse, Issue or Parent (s. 87):

The estate shall be distributed among the **brothers and sisters** of the Deceased. If a brother or sister is dead, the share that such deceased sibling would have taken, shall be

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divided equally among his or her children, per capita. In other words, no further representation shall be admitted. This means that the right to inherit stops at the nephews and nieces of the deceased and does not go on to their issue.

No Spouse, Issue, Father, Mother, Brother or Sister (s. 88):

The estate shall be divided among the **nephews and nieces** in equal shares per capita; in no case shall representation be admitted.

No Spouse, Issue, Father, Mother, Brother or Sister, Nephew or Niece (s. 89):

The estate shall be distributed in equal shares per capita among the **next of kin** of **equal degree of consanguinity** to the intestate; in no case shall representation be admitted. Degrees of consanguinity are computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative (s. 90(1)).

Half-blood Relations (s. 90(2)):

Half-blood kindred inherit equally with whole-blood kindred of the same degree.

Posthumous Births (s. 91):

Descendants and relatives of the intestate conceived before but born after his or her death inherit as if they had been born in the lifetime of the intestate and had survived him or her.

No Spouse or Living Relatives:

When a person dies intestate and has absolutely no documented heirs, the Deceased's estate passes to the government (escheats) and is subject to the *Escheat Act* (see below).

Adopted children:

Adopted children have the right to inherit only from their adoptive parents but have no right to inherit from their birth (or natural) parents and the birth parents have no right to inherit from their adopted "out" child.

Illegitimate Children:

There is no distinction between the status of a child born inside or outside marriage (s. 23(1) of the *Family Law Act*).

DISTRIBUTION UNDER PART 3 OF WESA (except spousal share when there are descendants)

Part 3 of WESA [When a person dies without a Will] applies to deaths that occurred **after** Part 3 came into effect.

Under WESA, the new scheme governing distribution to the next of kin (where there is no surviving spouse and/or lineal descendants) is called "**parentelic**". The parentelic system follows the line of descent from the closest common ancestor. The administrator divides the intestate's estate among the intestate's closest kin. The administrator determines who are the closest kin by measuring degrees of kinship, counting upward from the Deceased (No. 0) to the nearest common ancestor (e.g. parents would be Degree No. 1) and then down to their

descendants (siblings would be Degree No. 2). If the closest kin is deceased but has descendants who survive the intestate, these descendants ***may possibly*** be entitled to share in the estate.

Under the parentelic system, the descendants of the nearest common ancestor take from the Deceased's estate before descendants of a more remote ancestor. Once the administrator discovers the surviving nearest common ancestor or the descendants of same, the administrator need only check for any other survivors of the same degree of kinship. The administrator does not need to conduct a time-consuming and expensive search for survivors of the same degree of consanguinity who are descended from a more remote common ancestor.

The parentelic system allows a more even division between the two sides of an intestate's family since a descendant of a common ancestor takes an equal share, even when there is another descendant of the same common ancestor with a higher degree of consanguinity (who, under the EAA, would have taken all or shared only with those of the same degree of consanguinity).

Persons of the 5th or greater degree of relationship to the intestate (see attached chart) are conclusively deemed to have predeceased the intestate (s. 23(3)), and any part of the intestate estate to which those persons would otherwise be entitled must be distributed to other descendants entitled to the estate. In other words, beyond the fourth degree of relationship, a relative does not share in the estate. However, pursuant to s. 23(4), the limit of the fifth or greater degree of relationship to the intestate does **not** affect:

- the intestate's own **descendants**, who may still inherit even if they are further removed from the intestate than the fifth degree; or
- the right of a person to apply under the *Escheat Act* on the basis of a legal or moral claim against the former owner of an estate that has escheated to the government as property to which no person is entitled to succeed as the owner.

Notes: The definition of "**descendant**" (s. 1(1)) includes all lineal descendants and replaces what the EAA termed "issue". A lineal descendant is a person who is in direct line to an ancestor, such as a child, grandchild, great-grandchild, and so on, forever. A lineal descendant is distinguished from a "collateral" descendant, who would be from the line of a brother, sister, aunt or uncle.

Descendants and relatives **conceived before** the intestate death but **born afterwards** and living for at least five days inherit as if they had been born in the lifetime of the intestate and had survived him or her (s. 8).

Relatives of the half kinship inherit equally with those of the whole kinship of the same degree (s. 23(4)(b)).

As mentioned above, once an heir or class of heirs is identified, the determination of further potential heirs stops, since heirs of the same degree of consanguinity but descended from a more remote common ancestor do not take under WESA. For example, assume the Deceased's parents and only sibling are deceased, but the Deceased's sibling's child survives. That child, who is a relative of the third degree, takes the entire estate, and there is no need to conduct an expensive and time-consuming search for other relatives of the third degree descended from a more distant common ancestor.

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The survivorship provisions (ss. 5 to 11 of WESA – [Survivorship Rules] may affect the qualification of a person as an intestate successor.

If an **intestate** dies leaving:

- **a spouse but no surviving descendants**:
  - the entire intestate estate must be distributed to the spouse (s. 20);
- **a spouse <u>and</u> surviving descendants**
  - see **Spousal Share When there are Descendants**;
- **<u>no</u> surviving spouse <u>but</u> descendants, whether surviving or deceased** (s 23): the entire estate must be distributed equally among the Deceased's descendants **per stirpes,** or by representation (s. 24.(1) and (2));
- **no surviving spouse;** or
  descendants;
  - the estate must be distributed equally to the intestate's parents or the survivor of them (s. 23(2)(b)).
- **no surviving spouse**;
  descendants; or
  parents
  - the estate must be distributed equally to the descendants of the intestate's parents or either parent (s. 23(2)(c)) per stirpes in accordance with section 24(1).

  Note: S. 24(3) with respect to the distribution to descendants as a result of an intestate's parent having predeceased the intestate that ended with the children of a brother or sister of the intestate (the surviving nephews and nieces nieces) has been repealed.
- **no surviving spouse**;
  descendants;
  parents; or
  descendants of a parent (siblings of the intestate);

  but the intestate is survived by one or more **grandparents** or **descendants of grandparents (uncles and aunts)**(s. 23(2)(d):
  - the estate must be divided into equal parts for each surviving grandparent of the intestate, but if a grandparent is not alive, and has descendants alive at the death of the intestate, the share of the deceased grandparent must be distributed among the descendants of that deceased grandparent, in equal shares per stirpes. In this case, a part is determined by dividing the estate by the number of parents of the intestate who have:
    - a surviving parent;
    - a surviving descendant of the parent.

  If there is only one surviving grandparent or descendant of a grandparent on one side, the whole intestate estate will go to the surviving grandparent, or to the descendant on that side in equal shares per stirpes.

- **no surviving spouse;**
  descendants;
  parents;
  descendants of a parent (siblings);
  grandparents; or
  descendants of a grandparent (uncles and aunts);

  but the intestate is survived by one or more **great-grandparents** or **descendants of great-grandparents**:

  - the estate must be divided into equal parts for each surviving great-grandparent of the intestate but if a great-grandparent is not alive, and has descendants alive at the death of the intestate, the share of the deceased great-grandparent must be distributed among the descendants of that deceased great-grandparent in equal shares per stirpes. In this case, part is determined by dividing the estate by the number of parents of the intestate who have:
    - a surviving grandparent; or
    - a surviving descendant of a grandparent;

- **no surviving spouse;**
  descendants;
  parents;
  descendants of a parent (siblings);
  grandparents; or
  descendants of a grandparent (uncles and aunts);
  great-grandparents; or
  descendants of great-grandparents

  In this case, no persons of the 4th or lesser degree relationship to the Deceased survives the intestate

  - the whole intestate estate passes to the government (escheats) and is subject to the *Escheat Act*.

Half-blood Relations

Half-blood kindred inherit equally with whole-blood kindred of the same degree.

Posthumous Births

Descendants and relatives of the intestate conceived before the intestate's death but born afterwards and living for at least five days (the "**posthumous descendant(s)**"), inherit as if they had been born in the lifetime of the intestate (section 8 of WESA).

In addition, there are limited circumstances in which a posthumous descendant inherits as if he or she had been born while the Deceased was alive, even if he or she was conceived **after** the intestate's death. There conditions are:

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- a person (the parent of the posthumous descendant) must have been married to, or in a marriage-like relationship with, the Deceased at the time of the Deceased's death;
- the parent of the posthumous descendant must give written notice, within 180 days from the issue of an estate grant, to the Deceased's personal representative, beneficiaries, and intestate successors that the parent of the posthumous descendant may use the human reproductive material of the Deceased to conceive a child through assisted reproduction;
- the posthumous descendant:
    - is born within two years after the Deceased's death (which may be extended by a court if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances); and
    - lives for at least 5 days;
- the Deceased is the posthumous descendant's **parent** under Part 3 of the *Family Law Act*.

The right of a posthumous descendant to inherit from the relatives of a Deceased begins on the date the posthumous descendant is born.

Stepchildren

Under Part 7 of the *Family Law Act*, if the Deceased contributed to the support of a minor stepchild for at least one year before his or her death, that stepchild may have a claim for continued support from the estate of the Deceased if:

- the stepchild can demonstrate a significant need;
- the estate is sufficient to meet that need, taking into consideration other claims, including those of creditors and beneficiaries; and
- there is no other practical means to meet the stepchild's need.

Effect of Adoption

The effect of adoption is in line with the *Adoption Act*. An adoption (except an adoption of a child by the spouse of a pre-adoptive parent) severs a blood relationship for succession purposes.

Adopted children have no right to inherit from their pre-adoptive (birth or natural) parents and the pre-adoptive parents have no right to inherit from their adopted "out" child, unless provided for under a Will.

SPOUSAL SHARE WHEN THERE ARE DESCENDANTS

For this part, it is important to understand the following definitions:

"**household furnishings**" means personal property usually associated with the enjoyment by the spouses of the spousal home (s. 21(1)) (for example, the home theatre may qualify but the Deceased's expensive golf clubs may not);

"**net value of an intestate estate**" means the value of an intestate estate after deducting from its fair market value, both inside and outside British Columbia:

- the value of household furnishings distributed to a spouse; and

- charges, debts, funeral and administration expenses, and fees under the *Probate Fee Act*, payable from the estate (s. 21(1));

"**spouse**" (pursuant to WESA):

Two persons are spouses of each other if they were both alive immediately before the date of death of one of the persons; and

- they were married to each other; or
- they had lived with each other in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for at least two years (s. 2).

The definition of "**spouse**" is the same as under the EAA, but under WESA, it is expanded to define when two persons **cease** being spouses, which occurs if:

- in the case of a marriage:
  - they live separate and apart for at least two years **(increased from one year under the EAA)** with one or both of them having the intention, formed before or during that time, to live separate and apart permanently; or
  - an event occurs that leads to a division of assets under the *Family Law Act*. This event is the date of separation of the spouses.
- in the case of a marriage-like relationship, one or both persons terminate the relationship.

If a person dies intestate and leaves:

- a spouse; and
- surviving descendants

the following must be distributed from the intestate estate **to the spouse** (s. 21):

- the household furnishings;
- a preferential share of the intestate estate as follows:

Spouse's Preferential Share	
If all the descendants of the Deceased are also descendants of the spouse	If all the descendants are **not common** to the intestate and the spouse
⇩	⇩
$300,000 or a greater amount if prescribed	$150,000 or a greater amount if prescribed.

The residue of the intestate estate, after satisfaction of the spouse's preferential share, must be distributed as follows:

- one half to the spouse;
- one half to the intestate's descendants.

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- If the net value of an intestate estate is **less** than the spouse's **preferential share**, the entire intestate estate must be distributed to the spouse.
- If the net value of an intestate estate is the **same** as **or greater** than the spouse's **preferential share**:
  - the spouse has a charge on the intestate estate for the amount of the spouse's preferential share; and
  - the residue of the intestate estate, after satisfaction of the spouse's preferential share, must be distributed as follows:
    - 1/2 to the spouse;
    - 1/2 to the intestate's descendants per stirpes.
- If the Deceased had two or more spouses entitled, they share the spousal share in the portions to which they agree, but if they cannot reach an agreement, they may make an application to the court to determine how the spousal share will be split between them.
- If two or more persons are entitled to apply or have priority as a spouse under WESA and they do not agree on who is to apply or who is to have priority, they may make an application to the court to determine the entitlement and the priority to apply.

Note: If there is a spousal home, the surviving spouse has the right of first refusal to acquire same. The explanation for the spousal home and the procedure to deal with it is explained in a separate chapter entitled **Spousal Home**.

SURVIVORSHIP RULES

Survivorship rules deal with how the order of death and the ensuing rights to property are determined when two or more people die in circumstances where it is unclear who died first. (Such an events is referred to in this section as a "**common disaster**"). This area of law is often referred to as "survivorship and presumption of death".

When two or more people die in a common disaster (such as a plane crash), it is often impossible to establish the order in which they died. This affects:

- the entitlement to property of beneficiaries under a Will (see **Lapsed or Adeemed Gifts**); and
- the rights of intestate successors of persons who died in a common disaster.

Division 2 of Part 2 of WESA incorporates the survivorship rules previously included in the *Survivorship and Presumption of Death Act*,[1] with some important changes. Under the previous legislation, when two or more persons died in a common disaster, the younger was or were presumed to have survived the older.

General Rule ("General Presumption of Survivorship")

Under Division 2 of Part 2 of WESA, when two or more persons die in a common disaster, it is presumed that each survived the other or others. This ensures that, rather than devolving to a stranger, as was possible under the former legislation, the estate will devolve either to the Will-Maker's contingent beneficiaries or to intestate heirs. Under the old scheme, property often only passed to the heirs of the youngest victim of the common disaster and cut out the heirs of the older victims. The change in WESA attempts to address this inequality.

If an **instrument** (e.g. Will)[2] provides for the disposition of property in the event that a person named in the instrument dies in a common disaster, that instrument overrides the general presumption of survivorship. In other words, the effect of this presumption can be negated by a Will-Maker.

Five-Day Survival Rule

If a person fails to survive a deceased person:

- by five days[3]; or
- a longer period provided in an instrument;

he or she is deemed to have died before the Deceased for all purposes affecting:

- the estate of the Deceased; or
- property that the Deceased was competent to give by Will to another (e.g. an inter-vivos trust).

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(1) Which was renamed "***Presumption of Death Act***" when WESA came into effect.
(2) Instrument means: a will, deed, trust, or any document creating a power of appointment.
(3) See s. 25 of the ***Interpretation Act*** for the calculation of the five day period.

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Five days is the **minimum** default survival period, and it can only be extended. It cannot be reduced. This does not apply to the appointment of a personal representative in a will (s.10(3)).

As a result of the five-day survivorship rule, any property or accounts held in joint tenancy by two or more persons who die in a common disaster where no five day survival period can be established, will be divided among the estates of the joint holders and will be treated as if they owned the property as tenants-in-common.

The disposition of property held in joint tenancy cannot be governed by a contrary intention in a testament/instrument where one or more of the joint tenants survive the deceased by five days or more, in which case the surviving joint tenant(s) take the property by right of survivorship. However, where all the joint tenants die either in a common disaster or otherwise in circumstances that make it impossible to determine which, if any, survived the other(s) by at least five days, the applicable presumption (under s. 5(2) or s. 10(2)) will result in a share being created for each joint tenant as if he or she held an interest in the property as a tenant in common and that share is distributed to that deceased person's beneficiaries or intestate heirs. If a joint tenant survives by at least five days, the right of survivorship applies.

To enable the executor to deal with the estate without the five-day delay, the five-day survival rule does not apply to the appointment of an executor in a Will.

Nothing in this section affects the law of resulting trusts, which means that the estate of someone who claimed a beneficial interest in property owned by the Deceased would still have a claim under the law of trusts regardless of whether the deceased claimant survived the Will-Maker by five days or not. For example, having been named the beneficiary of all her of husband Bill's property should she survive him by 5 days, Judith dies only two days after her husband, thereby leaving the property to go to his brother, Earl. However, Judith had contributed to the acquisition and maintenance of Bill's property and as a result, her estate claims that she had a beneficial interest in her husband's property. In such a case, Judith's estate can advance a claim to a share of the property that would otherwise go to Earl, and Earl cannot argue that Judith's death before the five-day survival rule negates such a claim by her estate.

Simultaneous Deaths of Joint Tenants

If all the owners (whether two or more) of property held in joint tenancy die in a common disaster, they are all presumed to have survived the others, the joint tenancy is severed, and they are deemed to have held the property as tenants-in-common, unless a contrary intention appears in an **instrument**. In other words, if A, B and C hold a property as joint tenants and they have all died in a common disaster, unless a contrary intention appears in the Deceased's Will, the joint tenancy will be severed and the property will be divided among the respective estates of A, B and C, and will not pass to the youngest surviving joint tenant.

Section 10(2) clarifies that the five-day survival rule does not apply to cases in which parties died simultaneously or in circumstances in which it is not possible to establish whether or which party survived the other, whether by a moment or by five days. In both those cases, the deceased persons are deemed to survive each other and any joint tenancies are severed and devolve to the respective heirs of each deceased.

Disposition of Property on Simultaneous Deaths

The general presumption set out in section 5(2) can be overridden by a contrary intention appearing in an "instrument" (e.g. a Will), and the term "instrument" is broadly defined in order to give maximum effect to a Will-Maker's intentions.

In the case of a common disaster, any wishes recorded by the Will-Maker override the general presumption of survivorship. Thus, if the Will-Maker includes instructions in an instrument regarding the disposition of property when two or more persons have died in a common disaster, the instrument governs.

In other words, if an instrument (e.g. Will) overrides the general presumption of survivorship and provides for the disposition of property in the event that a person (A) named in the instrument:

- dies before another person (B); or
- dies at the same time as another person (B); or
- dies in a common disaster and it is uncertain which of them (A or B) survived the other; and

the named person dies at the same time as the other person or in circumstances that make it uncertain which of them survived the other, for the purpose of that disposition, the event for which the instrument provides is conclusively deemed to have occurred and the Will-Maker's instructions trump the general presumption.

Substitute Personal Representative

The general presumption of survivorship also applies to the appointment of a substitute personal representative.

If a Will-Maker (A) appoints a substitute alternate executor (C) in case the first (or subsequent) executor (B) named in the Will:

- predeceases the Will-Maker (A); or
- dies at the same time as the Will-Maker (A); or
- dies in a common disaster with the Will-Maker (A) and it is uncertain which of them survived the other; and

the first (or subsequent) executor (B) dies at the same time as the Will-Maker or in a common disaster, the appointment in the Will overrides the general presumption and, in the case of a grant of probate or a small estate declaration, the alternate executor (C) will be appointed executor.

There is no exception to a five-day survival rule (see "Five Day Survivor Rule").

Survival of Beneficiaries – When there is a Will

If, in a Will, a right of a contingent beneficiary (B) to receive property is conditional on the beneficiary surviving another person (A), and the contingent beneficiary (B) dies at the same time as the other person (A) or dies in a common disaster with (A) and it is uncertain which of them (A or B) survived the other, the contingent beneficiary (B) is conclusively deemed to have predeceased the other person (A) and the gift to B lapses, unless a contrary intention appears in the instrument.

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predeceased the other person (A) and the gift to B lapses, unless a contrary intention appears in the instrument.

On the other hand, if a property is left to two or more beneficiaries (D, E and F) or to the survivor(s) of them (of D, E and F), and both or all die at the same time or in a common disaster and it is uncertain which of them survived the other or others, unless a contrary intention appears in an instrument, the property must be divided into as many equal shares as there are beneficiaries (D, E and F), and the shares must be distributed respectively to those persons who would have been entitled to a share in the event that each of the beneficiaries (D, E and F) had survived. In other words, the share of each of D, E and F will go to the respective estates of D, E and F.

Priority of *Insurance Act* Provisions

The survivorship rules do not apply to insurance moneys payable pursuant to the ***Insurance Act***.

Pursuant to sections 83 and 130 of the *Insurance Act*, if the life insured and the beneficiary die together in a common disaster, the beneficiary is presumed to have predeceased the life insured, unless a contrary intention appears in the insurance policy, contract, or declaration.

WILLS AND WILL-MAKERS

It is important to understand that no matter when the Will was executed, if the Will-Maker died before Part 4 (Wills) of WESA came into force, Part 4 will not apply to that Will and the Will shall be governed by the former relevant statute (e.g. *Wills Act***)**[1].

Although it is not the role of the legal assistant to determine or decide what constitutes a valid Will, it is obviously important to know the requirements for a valid Will in order best to assist the supervising lawyer.

Certain statutory requirements must be fulfilled for a Will to be valid. These requirements are now governed by Part 4 WESA.

The primary requirements relate to the **ability of a person** to make a Will: the person's competency (called **testamentary capacity**) and the person's age.

The other requirements relate to the formalities for the preparation and execution of the **document** itself (the "Will").

Please note that if a Will is invalid, the Deceased is deemed to have died intestate (see **Intestacy**). However, if the **formality** that makes a Will valid is deficient, it may be cured by a court order so as to uphold the wishes and intentions of the Will-Maker rather than to comply with strict statutory requirements.

A Will comes into effect **only** upon the death of the Will-Maker.

The Will-Maker

The person who makes a Will is called the "**Will-Maker"** (formerly called the "Testator" or "Testatrix").

To make a valid Will, a person must be:

- **16** years of age or older (see **Age Requirement)**; and
- mentally capable of doing so (see **Testamentary Capacity**).

Age Requirement

Section 36(1) of WESA provides that a person who is 16 years of age or older can make a Will. This means that a Will made by a person under 16 years of age is not valid.

The age limit was reduced from 19 years (the age of majority) to 16 years when WESA came into effect.

The only exception to the age limit (s. 38 of WESA and s. 5(1) of the *Wills Act*) is when, regardless of his or her age at the time of execution, the Will-Maker is a member of the military forces on active service (see **Wills by Members of Military Forces**).

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[1] The previous statutes can be found on the Evin Ross Publications Ltd. website.

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Other exceptions to the minimum age limit under the former *Wills Act* have not been carried forward and were abolished by WESA. Such exceptions were:

- for a mariner or seaman at sea or in the course of a voyage (s. 5(1) of *Wills Act*);
- for a person who had been married at the time the Will was made (s. 7 of the *Wills Act*). Since section 29 of the *Marriage Act* requires that a person be at least 16 years of age to marry (with some exceptions), in practice a married person will have to have been at least 16 years old in order to be able to make a valid Will under section 7 of the *Wills Act*.

Pursuant to section 186 [Transition – Application of Part 4], Part 4 of WESA is applicable if the Will-Maker died on or after the date on which Part 4 came into force, except that a Will validly made or validly revoked before that date will not be invalidated or revived as a result. In other words, Wills validly made under the *Wills Act* when it was in force are still valid under WESA, even if the Will-Maker died after Part 4 of WESA came into force.

Testamentary Capacity

At the time of making a Will, a Will-Maker must be mentally capable of making a Will (i.e. be of "sound and disposing mind and memory"). This involves four elements. The Will-Maker must:

- understand the nature of the act (nature of a Will) and its effect;
- have a general idea of the extent of the property that he or she owns;
- understand and appreciate the claims of the persons who should be the natural objects of his or her bounty and the manner in which his or her property is to be divided among them; and
- have no insane delusion that would influence his will in disposing of his property and bring about a disposal of it, which, if the mind had been sound, would not have been made.

In other words, the Will-Maker must understand that, at his or her death, the Will shall be a legally binding document and that his or her assets will be distributed as set out in the Will. These are the elements of "**testamentary capacity**", or the legally recognized mental ability to make a valid Will. The leading case and the current test for capacity is *Banks v. Goodfellow* (1870), L.R. 5 QB 549).

A Will may be declared invalid if it can be shown that there was a lack of testamentary capacity when it was made. The Will-Maker did not have testamentary capacity (or is *non compos mentis*) if, for example, at the time of making the Will, the Will-Maker:

- suffered from insane delusions affecting his or her powers of reason or judgment; or
- had reduced mental ability due to senility or advanced old age (such that the Will-Maker did not understand the nature of the Will); or
- suffered from a physical or emotional illness that affected mental capacity.

Undue Influence

The Will-Maker must make and execute his or her Will voluntarily, free from undue influence. A Will may be challenged on the grounds that the Will-Maker was pressured into giving the estate to one particular individual at the expense of others. For this reason, most lawyers insist that while giving instructions, the Will-Maker be alone with the lawyer.

If a gift, a provision under a Will, or the Will itself are challenged because a person claims that such gift, provision under the Will, or the Will itself resulted from undue influence (s. 52 of WESA), the person challenging the Will must establish that the beneficiary of the gift, a provision under the Will, or the Will that is challenged was in a position in which the potential for dependence or domination was present. Once this is established, the beneficiary must prove that undue influence was not exercised at the time of the execution of the Will. In other words, it is the beneficiary, not the person making the claim, who must prove that the Will-Maker was not unduly influenced, and defend their entitlement to benefit from the Will.

Section 52 defines undue influence as another person:

- being in a position where the potential for dependence or domination of the Will-Maker was present; and
- using that position to unduly influence the Will-Maker to make the Will or the provision of it that is challenged.

The Will

Definition of Will

A Will is a document in which the Will-Maker directs the distribution of his or her property after death**.**

The Will is sometimes (and often was in the past) referred to as "the Last Will and Testament". The words "Will" and "Testament" are synonymous. According to Black's Legal Dictionary: "... strictly speaking, the term testament denotes only a Will of personal property; a Will of land not being called a **testament**...". The word "Testament" is now seldom used, except in the heading of a formal Will, which may begin with: "This is the last Will and Testament, of me... etc." (see **Wills · Documents** chapter).

Under WESA, the definition of Will has been expanded to include:

- a **Will** (as defined above);
- a **Testament** (see above);
- a **Codicil,** that is, an addendum to or amendment of an original Will that either explains, alters, or modifies the provisions of the original Will; or that adds to or subtracts from the Will by revoking certain clauses and substituting new ones in their place;
- an appointment by Will or by writing in the nature of a Will in exercise of a power. A document in the nature of a Will refers to a document that follows the formal requirements for making a Will and takes effect upon death, but is not necessarily a complete Will, such as a document only appointing guardians of children or an Executor/trustee, but not dealing with distribution of property. An example would be a situation where the Will-

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Maker is a trustee of a family or inter-vivos trust (a trust established during life rather than upon death) with a power to appoint another trustee (substitutional trustee). The Will-Maker may appoint this substitutional or "successor" trustee of the family trust;

- anything ordered by the court to cure a deficiency and declare it to be effective as a Will under section 58 of WESA (for example, an electronically scanned copy of a Will) (this provision captures documents admitted to probate under the court's new curative power); or
- any other testamentary disposition except the following:
  - benefit plan designation under Part 5 of the *Insurance Act*;
  - an insurance beneficiary designation under Part 3 or 4 of the *Insurance Act*;
  - a testamentary disposition specifically provided for under any other legislation.

Put simply, WESA's definition of Will excludes beneficiary designations under insurance policies, pensions, retirement savings plans, employee benefit plans, and/or any dispositions specifically provided for under other legislation.

Statutory Formalities to Make a Valid Will

To be valid, a Will must adhere to the statutory requirements set out below. However, if the Will is defective in regard to these requirements, it may be cured by a court order (see **Court Order Curing Deficiencies**) that upholds the Will or a portion thereof.

The courts and WESA seek to emphasize testamentary intent (the wishes and intentions of the Will-Maker) rather than demanding strict compliance with the statutory requirements regarding the formalities of the Will's execution.

Will Must be in Writing

To be valid, a Will must be in **writing** (s. 37(1)(a) of WESA). This means that a Will must be handwritten, typed, or printed. A voice recording or a movie does not constitute a valid Will.

An electronic Will does not qualify as a valid Will unless a successful application is made to the court (s. 58) to cure the deficiency (see **Court Order Curing Deficiencies**). In other words, a Will typed on a computer must be printed out in hard copy and properly signed and witnessed (see below). However, under the new curative power, a court may admit to probate an electronic Will (an example would be a scanned copy of a properly executed Will where the original cannot be located).

Will Must be Signed

To be valid, a Will must be signed **at its end** by the Will-Maker. The space provided for the Will-Maker's signature is called the **attestation** or **testimonium clause**.

However, section 39(1) provides that there are several other possible places for the Will to be signed and valid if it is apparent on the face of the Will that the Will-Maker intended to give it effect. These places include: the margin, a blank space in the body of the Will, a large blank space between the text of the Will and the signature, and/or almost any other place in the Will.

WESA provides that a Will is conclusively deemed to be signed at its end, provided it is apparent the Will-Maker intended the signature to give effect to the Will, if:

- the signature is placed under or beside the end of the Will;
- the signature does not immediately follow the end of the Will;
- a blank space intervenes between the concluding words of the Will and the Will-Maker's signature; or
- the Will-Maker's signature:
    - is placed among the words of an attestation clause or testimonium clause; or
    - follows, or is after or under, an attestation clause either with or without a blank space intervening; or
    - follows or is after, under, or beside the name of a witness who signed the Will;
    - is on a side or page or other portion of the Will on which no disposing part of the Will is written above the Will-Maker's signature;
- there appears to be sufficient space to contain the Will-Maker's signature on or at the bottom of the side or page or other portion of the same paper on which the Will is written and preceding that on which the Will-Maker's signature appears.

The location of the signature and the time it was inserted are important as, even if the Will is validly signed, a gift or direction is not valid if the gift or direction is:

- located in the Will after the Will-Maker's signature, even if it is placed there before the Will is signed (unless such gifts or directions are incorporated by reference before the signature); or
- inserted after the Will-Maker signed the Will.

There are instances where a person may not be able to read or sign in the normal way. For example, the Will-Maker may be unable to read the Will because he or she is blind or unable to read or understand English. Alternatively, the Will-Maker may be able to read the Will, but unable to sign it because of a physical handicap (for example, he or she may be paralyzed and unable to write). In these instances, special arrangements have to be made. In the case of an inability to read the Will, someone else must read or translate it to the Will-Maker. In the case of an inability to sign, someone else must sign the Will after it is read to the Will-Maker. Whatever the case, the standard attestation clause must be altered to reflect the unique circumstances of the Will's execution (see **Attestation** or **Execution Clause – Wills – Precedent Clauses**).

Although not required by WESA, a Will, especially one prepared by a lawyer, is always dated in order to ensure that the one being executed is the last Will chronologically.

A Will which is entirely hand-written by the Will-Maker and signed by him or her (but where the signature is not witnessed) is called a **holograph Will**. Most provinces and territories of Canada recognize a holograph Will in some instances. However, in British Columbia, a holograph Will is not valid unless the Will-Maker was a member of military forces on active service at the time of signing the Will (see **Wills by Members of Military Forces**) or if the Will is upheld by a court order (see **Court Order Curing Deficiencies**).

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A Will that is not in writing, is not signed by the Will-Maker at its end, and is not signed by at least two witnesses is invalid unless:

- the court orders that it is valid (s. 58) (see **Court Order Curing Deficiencies**); or
- it is recognized as validly made in accordance with laws of another jurisdiction related to the Will or the Deceased (s. 80) – WESA expands the choice of jurisdictions under which a Will may be declared valid.

Will-Maker's Signature Must be Witnessed

The signature of the Will-Maker must be witnessed by at least two witnesses who are present with the Will-Maker. Each witness must sign in the other's presence and in the presence of the Will-Maker, who must see the witnesses sign (s. 37(1)(b)) of WESA). In other words, if there are two witnesses (which is the usual number), all three people must see each other sign the Will.

The exception to this requirement for the **two** witnesses is when the Will-Maker is, at the time of the execution of the Will, a member of the military forces on active service (see below **Wills by Members of Military Forces**).

If someone else has signed the Will on the Will-Maker's behalf, the Will-Maker must acknowledge such signature in the presence of two (or more) witnesses.

The witnesses must be of the age of majority (19 years), and **cannot** be beneficiaries or spouses of beneficiaries named in the Will (including persons in a marriage-like relationship of more than two-years' duration with a beneficiary) (see **Gifts to Witnesses**). However, a court may declare a gift to a witness or spouse of a witness valid on proof that the Will-Maker knew and approved of the gift.

It is important to note that the witnesses do not need to read the Will or know its contents. All they need to do is witness the Will-Maker's signature and the declaration that the Will is the Will-Maker's last Will and Testament. Where the Will is signed and witnessed in a law office, two employees of the law firm will usually act as witnesses.

A Will is not invalid only because a witness was, at the time the Will was signed, or later became, legally incapable of proving the Will (s. 40(3) of WESA), unless the witness was under the age of 19 years of age at the time the Will was signed by the Will-Maker

If a Will is invalid, and the cause of the invalidity cannot be cured under section 58 of WESA, the Deceased is deemed to have died intestate (see **Intestacy**).

Wills by Members of Military Forces: (s. 38)

If a Will-Maker (regardless of his or her age – supposing that there is a minimum age limit to be accepted into the military) is, at the time of the execution of the Will:

- a member of the Canadian Forces while on **active service** under the *National Defence Act (Canada)*; or
- a member of the **naval, land,** or **air force** of any member of the British Commonwealth of Nations or of any ally of Canada while on **active service**;

that person can make a valid Will without two witnesses. Such a Will must be signed at its end either by:

- the Will-Maker himself; or
- another person in the presence of and by the direction of the Will-Maker.

If the Will is signed by another person on behalf of the Will-Maker, that person's signature must be witnessed by at least one other person, who must also sign the Will in the presence of the Will-Maker and his or her proxy signer. In other words, the Will-Maker, the person signing on his or her behalf, and another witness must all be present at the same time and sign in each other's presence. Presumably, this would be the case if the Will-Maker was unable to sign due to injuries and dictated the Will to someone else, whereupon that person signed it on his or her behalf.

Section 5(1) of the former *Wills Act* also included the exception for a "mariner or seaman at sea or in the course of a voyage". This exception, which covered private merchant-mariners, has not been carried forward into WESA.

Military Wills are extremely rare because members of the Canadian Forces are usually informed about and encouraged to follow the standard procedure for executing valid Wills.

Legal Effect of a Will

The main function of a Will is to:

- appoint an executor to administer the Will-Maker's estate and affairs after the Will-Maker's death;
- appoint a Guardian if there are infant children (under the age of 19);
- provide for the payment of the Will-Maker's debts;
- provide for the Will-Maker's property to be distributed according to the Will-Maker's instructions;
- provide for the care of the Will-Maker's family and/or business.

With the exception of the wording of the attestation clause, which should refer to the formal requirements for executing a valid Will and specifically state that they have been followed, there are no standard words or phrases necessary to draft a Will, provided that the intentions of the Will-Maker are clear and the Will is sufficient to dispose of the assets belonging to the Will-Maker at the time of death.

It is essential that the Will reflect the Will-Maker's intentions as accurately and clearly as possible. Intentions that are not clearly set out (and are therefore left to interpretation) can result in complications, delays, or even litigation when the time comes to rely on the Will. Accordingly, it is the responsibility of the lawyer who is drafting the Will to ensure that the Will-Maker's intentions are understood and that these intentions are reflected in the final Will.

To ensure that the Will-Maker's intentions are properly expressed, a Will should be drawn up by a lawyer after close consultation with the Will-Maker. When meeting with the lawyer, the Will-Maker should inform the lawyer of all matters that relate to the Will, the Will-Maker's family circumstances, and the manner in which the Will-Maker wants assets to be distributed.

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Meaning of Particular Words in a Will

The meanings of the words or expressions set out below are defined in section 42 of WESA, subject to a contrary intention appearing in a Will. In other words, they are "default" definitions, and if the Will-Maker intends a different meaning, that intention must be set out in the Will:

- a gift of property in a Will made to persons who are described as "heir" or "next of kin" of the Will-Maker or another person will be distributed on a per stirpes or per capita basis (depending on the class of beneficiary) as if the Will-Maker or other person died without a Will (see **Intestacy**).
- when making a gift of property, unless a contrary intention appears in the Will, if the following words are used:
  - "die without issue";
  - "die without leaving issue"; or
  - "have no issue"; or
  - other words meaning that there are no descendants, or no descendants in a person's lifetime, or at the time of the Will-Maker's death, or a complete absence of descendants are deemed to refer to no descendants or no descendants in the lifetime or at the time of death of that person and not to a complete absence of descendants of that person.

    "**Issue**" refers to descendants who were alive during the Will-Maker's lifetime, up to and including the time that s/he died. But "without issue" or "no issue" does not necessarily mean that the Will-Maker had no descendants at all. For example, if there are descendants who were **conceived before** but **born after** the Will-Maker's death, and those descendants survive for at least five days, they inherit as if they had been born within the lifetime of the Will-Maker and had survived the Will-Maker.

However, a gift of property to a class of persons who are described as a Will-Maker's "issue" or "descendants" or by a similar word, and which includes more than one generation of beneficiaries, must be distributed as if it were part of an intestate estate to be distributed to descendants – in other words, per stirpes (see **Intestacy)**.

Property that can be gifted by Will

Property includes:

- all **tangible** personal effects, such as cars, jewellery, furniture, art, etc.;
- **intangible** assets such as stocks, bonds, copyrights, patents (these may have no market value in themselves, but represent or are evidence of value); and
- **real property** interests, such as fee-simple, leasehold interests, shares in an **apartment corporation** and **manufactured homes**, as defined in the *Manufactured Home Act*, situated on land not owned by the owner of the manufactured home and in which the Deceased and his or her spouse were ordinarily residents.

Unless a contrary intention appears in it, any property included in a Will is deemed to have been owned by the Will-Maker immediately before the Will-Maker's death (although it may have been acquired before or after the Will was signed by the Will-Maker). The reason for this is that a Will-Maker may only gift property over which s/he had complete ownership (This means property to which he or she was entitled at law or in equity. Equitable ownership would include property that is legally owned or in the possession of another but in which the Will-Maker had a beneficial interest at the time of his or her death, regardless of whether it was acquired before or after the execution of the Will). For example, one of the Will-Maker's adult children has been placed on title to real property, ostensibly as a joint tenant, in order to avoid probate fees but with the intention that the adult child holds the property as a trustee and the parent retains beneficial ownership of the entire property. In such a case, legal ownership reverts to the surviving joint owner, but as a trustee only, and the Will-Maker retains beneficial ownership and can dispose of his or her beneficial interest in the property by Will. (Note: this practice is **not** encouraged or endorsed, but it is not an uncommon situation).

Unless the terms of the gift specify a partial-gift, a gift in a Will gives the beneficiary all of the Will-Maker's interest in that gift (s. 41(3)). This section creates a presumption that if the Will-Maker does not specify otherwise, the whole of his legal or equitable interest in the property passes to the beneficiary.

If the property is registered in the name of the Deceased and another person as joint-tenants, and the Deceased and that person die within five days of each other, the joint tenancy is automatically severed (see **Survivorship Rules** above).

Gifts to Witnesses

Pursuant to section 43 of WESA, a gift made in a Will to:

- a witness to the Will-Maker's signature; or
- the spouse of a witness; or
- a person signing the Will on behalf of and at the direction of the Will-Maker, or the spouse of such a person (the status of the spouse of the person signing the Will on behalf of the Will-Maker is determined at the time of the execution of the Will); or
- a witness's children or successor/heir claiming the gift if the witness predeceased the Will-Maker;

is void unless the witness seeking to uphold the gift makes a successful application to the court to declare that such gift is valid (see **Court Order Curing Deficiencies**).

The invalidity of the gift to a witness does not affect the remainder of the Will. The only thing that is voided is the gift to the witness.

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Gift of Land Contemplating Division

If land is given in a Will to two or more beneficiaries, unless a contrary intention appears in the Will, the land will be transferred to the beneficiaries **as tenants in common** in proportion to their interests.

Lapsed or Adeemed Gifts

If a gift in a Will fails for any reason, including because a beneficiary dies:

- before the Will-Maker; or
- before or after the Will is made;

the property that is the subject of the gift must be distributed according to the following priorities (s. 46 (1)) unless a contrary intention appears in the Will:

- first: to the alternative beneficiary of the gift, if any, named in the Will;
- second: if there is no alternative beneficiary named in the Will, and the deceased beneficiary was the **sibling** (brother, sister) or a **descendant** of the Will-Maker, to the descendants, if any, of such deceased beneficiary (sibling or descendant of the Will-Maker), alive at the Will-Maker's death, per stirpes;
- last: if there is no alternative beneficiary and the beneficiary was not a sibling or a descendant of the Will-Maker, to the surviving residuary beneficiaries, if any, named in the Will, in proportion to their interests – in other words, such gift would fall into and form part of the residue of the estate.

If a gift listed in the Will no longer exists, whether because it has already been transferred to the beneficiary inter-vivos (during the life of the Will-Maker), or has been disposed of prior to the Will-Maker's death, or simply cannot be located (e.g. a piece of jewellery which was lost by the Deceased or a fur coast that was eaten by moths), the gift is said to **adeem** – in other words, it fails. However, the sale of such property by the Will-Maker's nominee during the Will-Maker's lifetime and at his or her direction, if capable to give it, does not constitute an ademption (see **Relief from Disposition of Property** below).

To clarify the difference between lapsed gifts and adeemed gifts:

- gifts **lapse** when the beneficiary has predeceased the Will-Maker or refuses the gift;
- gifts **adeem** when the specific gift itself either no longer exists or is no longer owned by the Will-Maker. If the Will-Maker disposed of the specific gift himself or directed that a nominee (or agent) dispose of it on his behalf while he had the capacity to do so, then the gift adeems.

Relief from Disposition of Property

If a property that is the subject of a gift is **sold** by a **nominee** (e.g. committee, attorney or representative of the Will-Maker, and not the Will-Maker himself) during the lifetime of the Will-Maker, without the Will-Maker's knowledge or at a time when the Will-Maker lacked capacity, then the gift does not adeem. The beneficiary of such a gift is entitled to receive the equivalent of the value of such gift (in other words, the proceeds of disposition), being either non-monetary consideration or the fair market value of the gift that has been sold (although the

beneficiary cannot receive the gift itself because it no longer exists or is owned by someone else), unless:

- the disposition was made in accordance with the Will-Maker's instructions while he or she was legally capable of giving instructions; or
- a contrary intention appears in the Will.

This is different from the situation when the property was either disposed of by the Will-Maker during his or her lifetime, or simply when the gift no longer exists (see **Lapsed or Adeemed Gifts** above).

Revocation of Gifts or Appointments

A gift to or an appointment of a spouse under a Will is automatically revoked when spouses cease to be spouses, in which case the surviving spouse is deemed to have predeceased the Will-Maker, unless a contrary intention appears in the Will. So, if a Will-Maker makes a Will and in it:

- **makes a gift** to a person who was at the time of the execution of the Will or subsequently became, the **spouse** of the Will-Maker;
- **appoints as executor or trustee** a person who was at the time of the execution of the Will, or subsequently became, the **spouse** of the Will-Maker; or
- **confers a general or special power of appointment** on a person who was or becomes the spouse of the Will-Maker;

and **after the date of the execution** of the Will and **before the Will-Maker's death**, the spouses cease to be spouses, and there is no contrary intention in the Will, the **gift** to, or **appointment** of, the spouse is revoked and the gift must be distributed as if the spouse had died before the Will-Maker.

It is important to consider the fact that unless a clause to the contrary is inserted in the Will, a spouse who ceased to be a spouse is not only prevented from inheriting, but also cannot act as an executor (or trustee). For example: in the case where the Will-Maker is divorcing his or her spouse but wants the spouse to be the trustee of the trusts created for their children, the appointment of the spouse as trustee will become null and void unless a clause specifying the contrary is specifically inserted in the Will.

A subsequent reconciliation of the spouses does not reverse the revocation.

As mentioned above, the spouse does not need to be the Will-Maker's spouse at the time the Will is executed; this section also applies if a person becomes the spouse after the Will is executed and before the Will-Maker and the spouse cease to be spouses.

Property Encumbered by Security Interests

Under the previous legislation, only interests in real estate passed subject to payment of the mortgage debt and the assumption of primary responsibility for it. Consequently mortgage debt was not part of the general debts of the estate.

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Under WESA, this principle is extended to encumbered personal property. Thus, it applies to all property, whether realty or personalty, which is subject to a registered security interest that has enabled the Deceased to purchase, improve or preserve the property. The security interest must be registered under the *Land Title Act*, *Land Deferment Tax Act* or the *Personal Property Security Act*. Gifts of such property transfer the secured debt to the beneficiary unless a contrary intention specifically appears in the Will. A general direction in the Will for the payment of debts is not sufficient.

If, on the other hand, the Will states that the property is to be transferred to the beneficiary "free and clear of any financial encumbrances," the executor will have to pay out any mortgage or security interest registered against the property from the assets of the estate. This section only applies to debt incurred for the purpose of acquiring, improving, or preserving the property in question. Otherwise, in the absence of a contrary intention, the debt remains a debt of the whole estate and is deducted from the assets of the estate.

Section 47 only applies to Wills made after this section of WESA came into force.

Distribution if Assets of Estate are not Sufficient

When the assets of the estate are not sufficient to pay the debts, legacies, and other gifts in full, the rules of "**abatement**" apply. "Abatement" refers to a proportional reduction of debts and gifts, which generally fall into three categories – specific gifts (of particular items); general gifts (of a particular type of property, usually money, but not from any particular source); and demonstrative gifts (of money to be paid from a specific source, such as a particular bank account or the sale of a particular property). If, after the Deceased's debts and administrative expenses are paid, the assets of the estate are insufficient, then the estate is distributed pursuant to section 50 of WESA, which sets out the order in which the debts and gifts must be satisfied or reduced.

Previously, real property (land) would always abate last and gifts of residue would always abate first. Even if a Will-Maker specified that a particular debt was to be charged against real property, the Will-Maker would also have to specify that personal property was not to be used to pay that debt, or else the personal property would abate (have to be exhausted) first before the real property would be charged with the debt. Under WESA, land charged by the Will-Maker with payment of debts or pecuniary gifts, or both, is primarily liable for the debts and gifts, despite a failure of the Will-Maker to expressly exonerate the personal property.

In other words, there is no longer a distinction between real and personal property. Land and personal property must be reduced together in the same proportion.

Subject to section 50(3), which specifies that land charged by a Will-Maker with payment of debts and/or pecuniary gifts is primarily responsible for them, even if the personal property has not been specifically exonerated, assets are reduced in the following order:

- property specifically charged with a debt or left on trust to pay a debt;
- property passing on an intestacy and residue;
- general legacies (commonly money not from a specific source), demonstrative legacies (paid from a specific source e.g. bank account) and pecuniary legacies (gift of money);
- specific legacies (gifts of specific items, such as a piece of jewellery);

- property over which the Will-Maker had a general power of appointment.

WESA makes it easier to determine the order of payment, , which is the reverse of the order of abatement. In other words, debts are paid first, then property is distributed as follows:

- property over which the Will-Maker had a general power of appointment. For example, the proceeds of an insurance policy or an entitlement under a benefit plan; then
- specific legacies, and so on; and finally
- the residue (if there is anything left) is paid last.

Common Law Presumptions Abrogated

Presumptions against double portions, or advancement of a portion, were **abrogated** when WESA came into effect. Gifts made or debts contracted during the Will-Maker's lifetime no longer cancel a gift or legacy to the same person, in roughly the same amount, when made in the Will-Maker's Will. Such gifts and legacies now take effect according to the terms of the Will (s. 53 of WESA). For example:

- a **gift** by a Will-Maker made during his or her lifetime to a **child** (or to a person to whom the Will-Maker stands in place of a parent) doesn't revoke a gift in the Will to the same child or person. Such a gift was sometimes referred to as an "advancement of a portion";
- a **gift** to **any other person** made by the Will-Maker during his or her lifetime in the same amount as a legacy to that person in the Will does not revoke such legacy;
- a **debt owed to a creditor** by a Will-Maker during his or her lifetime is not satisfied by a legacy to the creditor equal t o or greater than the debt. If the Will-Maker owed money to the creditor, the debt is still owed to the creditor by the Will-Maker's estate, and the creditor's legacy must be paid according to the terms of the Will;
- a **binding promise** by a Will-Maker to make a gift to advance a **child** in life is not satisfied to the extent of the benefit promised by a gift to the child in the Will-Maker's Will. Rather, the promise remains binding on the Will-Maker and the Will-Maker's estate. For example, if before he died, the Will-Maker pledged to pay his daughter's university tuition of $50,00.00, but also makes a gift to her in the Will of the same or a similar amount, then both the obligation to pay the tuition and the gift in the Will stand.

The above abrogations of presumptions are always subject to contrary intentions appearing in the Will-Maker's Will. If an application is made to prove such intentions, extrinsic (or external) evidence is admissible (i.e. evidence other than the Will).

Gift Falls into Residue of Estate

If an asset, or a portion of the assets, of the Deceased's estate is not disposed of by the Will-Maker's Will, there is a partial intestacy, and that asset, or portion of the assets, falls into the residue of the estate and is distributed pursuant to intestacy rules (see section 44(3) and **Intestacy – above**).

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For example, if the Will-Maker leaves 1/3 of the residue to one beneficiary, and 1/3 to someone else, but is silent on how the last 1/3 is to be distributed, that 1/3 will be distributed pursuant to the rules of intestacy.

Abolition of Revocation of Will by Subsequent Marriage

Under section 15 of the former *Wills Act*, a Will was revoked if the Will-Maker (the "Testator" under the *Wills Act*) married after making a Will (unless a contrary intention appeared in the Will). Part 4 of WESA abolished this revocation.

If the Will-Maker married after making the Will and **before** Part 4 of WESA came into force, that marriage revokes the Will unless it states in the Will that the Will-Maker was contemplating the marriage to that specific person. A Will revoked in these circumstances was not revived when part 4 of WESA came into force (s. 186(3) of WESA).

On the other hand, if a Will was made **before** Part 4 of WESA came into force, and the Will-Maker married **after** the effective date of Part 4, the Will-Maker's subsequent marriage does not revoke the Will.

Revocation, Revival and Changes to Wills by Will-Maker

Changes and Alterations to Wills

Sometimes alterations or corrections have to be made before or at the time of execution of a Will, and it is not possible to re-print the page or pages to be changed (for example, the Will is executed at the hospital or Will-Maker's residence).

Section 54 of WESA states that an alteration to a Will is valid if the signature or initials of the Will-Maker and of the witnesses to the alteration are affixed in the margin or in some other part of the Will opposite or near the alteration. However, it is customary that each page of the Will, as well as any changes, deletions or additions made **prior** to the signature, are initialled by the Will-Maker and the witnesses.

On the other hand, sometimes months or possibly years after a Will has been executed, the Will-Maker may wish to make changes to it. Instead of drawing up an entirely new Will, the Will-Maker may execute a document called a **Codicil,** wherein the changes, deletions, or additions are detailed. However, in the interests of clarity, a new Will should be prepared if:

- numerous changes are required by the Will-Maker; or
- the changes are substantial; or
- there are already several Codicils.

The Codicil must be executed by the Will-Maker in the same manner as a Will (i.e., it must be signed at its end by the Will-Maker and at least two qualified witnesses – see **Statutory Formalities to Make a Valid Will** above).

Revocation of Will (s. 55)

A Will, or part of a Will, is only validly revoked by:

- the Will-Maker making a subsequent Will in accordance with WESA that contains wording to the effect that it revokes all previous Wills;
- making a written declaration, signed by the Will-Maker and two witnesses, that revokes all or part of a Will (see **Will Must be Signed** and **Revocation of Will – Wills · Documents**). The requirements for making such a declaration are the same as for a Will. A **Codicil** may be used to revoke a portion of a Will;
- the Will-Maker, or a person in the presence of the Will-Maker and at the Will-Maker's direction, burning, tearing, or destroying all or part of the Will with the intention of revoking all or part of it; or
- court order pursuant to section 58 [**Court Order Curing Deficiencies]**, confirming that the Will-Maker intended to revoke the Will (or a portion thereof) if the court is satisfied from the appearance of the Will that the Will-Maker intended to revoke it in whole or in part.

One of the most common reasons why a Will-Maker might formally revoke a Will and not execute a new one is because he or she believes that the estate will be distributed fairly pursuant to Part 3 of WESA [When a person dies without a Will]. If there is no Will, there is no possibility of an application to vary the Will (pursuant to Division 6 of Part 4 [Variation of Wills]).

A Will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances (for example: marriage, death of children, adoption, one child becoming estranged, etc.). However, such life changes provide an excellent reason to review one's Will.

Revival of Will (s. 57)

A revoked Will (or a revoked portion of a Will) is revived only by a **new** Will showing the intention of the Will-Maker to give effect to the revoked Will or the part that was revoked.

If a **portion** of a Will was revoked, and subsequently the entire Will was revoked, and then the Will is revived, the subsequent revival does not extend to the portion that was revoked before the entire Will was revoked. For example, say the original Will gave a diamond ring to Shannon, and later a Codicil revoked that gift, because Shannon told the Will-Maker she didn't like diamonds. If, at a later date, the entire Will is revoked and then even later, it is revived, Shannon will not get the diamond ring, and is not entitled to it, unless the new Will contains a specific contrary intention reinstating the gift.

If a Will has been revived by a Codicil or has, by a Codicil, been re-signed (for example, if it is discovered that there was some deficiency in the original witnessing a Will may be "re-signed") in the presence of two witnesses, the effective date that the Will is deemed to have been made is the time it was revived or re-signed.

In addition, if no new Will or Codicil to revive the revoked Will has been executed, a Will or part of a Will that has been revoked may only be revived:

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- by an order of the court (pursuant to section 58 of WESA) (see **Court Order Curing Deficiencies),** if the court is satisfied that the Will-Maker intended to revive a revoked Will or part thereof; or
- in accordance with any other provision of WESA that recognizes the revival of a Will.

Curing Deficiencies and Rectification of Wills by Courts

This Guide does not deal with litigation pertaining to Wills and estates, and does not include procedures or precedents for any issues relating to application for curing of deficiencies and rectifications of Wills.

Although beyond the scope of this ***Guide***, it is important to know that WESA contains two important new powers that allow the courts to:

- cure formal deficiencies; and
- rectify mistakes in a Will in appropriate circumstances.

The **curative** power allows a court of probate (a court tasked with determining that a document or group of documents is a valid Will) to admit a Will to probate even if it is not in strict compliance with the formal rules.

The power of **rectification** allows a court of probate or a court of construction (a court tasked with interpreting or construing the Will) to rectify mistakes in a Will in order to give effect to the intent of the Will-Maker.

Court Order Curing Deficiencies

Section 58 of WESA concerns a Will's **formal validity** and discusses how to cure a deficiency so as to validate a defective Will. WESA's focus is on testamentary intent rather than on the technicalities that render a Will invalid. The ability of the court to cure a deficiency is sometimes referred to as the "**dispensing power**".

In section 58, the document that purports to be a Will is referred to as the "**record**", which can include not only paper records, but data recorded electronically in any media that can be read by a human being in visual form. The record also encompasses the documents that constitute a Will, such as any other testamentary documents, codicils, and revocations (see **Definition of Will**).

Pursuant to section 58, if a court is satisfied that any record, writing, or marking on a Will or document represents:

- the testamentary intentions of the Deceased;
- the intention of a Deceased to revoke, alter, or revive a Will or testamentary disposition of the Deceased; or
- the intention of a Deceased to revoke, alter, or revive a testamentary disposition contained in a document other than a Will;

a court may, as the circumstances require, order that a record or document or writing or marking on a Will or document constitutes a valid Will (or part of a Will), revocation, alteration, revival of Will, or testamentary intention of the Deceased, even when the formal requirements for making them have not been fulfilled (for example, if the Will was not properly signed or witnessed or has not met any other requirements of Part 4 of WESA).

There is no requirement that the record being the subject of an application to cure its deficiency be signed or witnessed or comply with any statutory formality requirements.

In addition, if an alteration to a Will makes a word or provision illegible, a court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.

Rectification of Will

Section 59 deals with the power of a court (sitting as a court of construction or as a court of probate) to **rectify an error** in a **valid Will** in order to allow it to carry out the Will-Maker's intentions. Such rectification is sometimes referred to as "construction" or "interpretation" of the contents of Will.

A court may order that the Will be rectified if it determines that the Will fails to carry out the Will-Maker's intention because of:

- an error arising from an accidental slip or omission which may cover a typographical error, inadvertent insertion or omission of words, or any other drafting error or error of transcription; and
- a misunderstanding of the Will-Maker's instructions or a failure to carry out the Will-Maker's instructions generally by the drafter of the Will.

Extrinsic evidence, including evidence of the Will-Maker's intent, is admissible in such an application.

Rectification may be applied for at two different times:

- at the time the representation grant is applied for; or
- within 180 days from the date the representation grant is issued, unless the court extends the time for such an application.

If the court extends the time for such an application beyond 180 days, a personal representative who distributes any part of the estate to which entitlement is subsequently affected by rectification is not liable if, in reasonable reliance on the Will, the distribution is made:

- after 180 days from the date the representation grant is issued; and
- before notice of the application for rectification is delivered to the personal representative.

On the other hand, section 155 of WESA prohibits the distribution of an estate before **210** days have expired from the issue of a representation grant without the consent of all beneficiaries and intestate successors or leave of court (see **Variation of Wills**).

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A person held to be entitled to the distributed portion of the estate has the right to recover from other beneficiaries any part of the estate distributed in the circumstances.

In view of the possibility of an application for rectification of the Will, it is very important that solicitors keep good notes of the client's instructions, and any other notes and drafts as possible evidence of the client's testamentary intentions if an error is claimed.

Variation Of Wills

Section 60 of WESA [Division 6 – Variation of Wills] allows a spouse or a child to contest a Will and apply to the court to vary (change or alter) its terms if it can be shown that the Will-Maker has not made adequate provision for proper maintenance and support of the Will-Maker's spouse and children (the "claimants"). There are only two classes of claimant eligible to bring on such application, the Will-Maker's:

- spouse (see the definition of spouse page 12); and
- children (whether natural or adopted).

On such an application by or on behalf of the spouse or children, the court may order that adequate, just, and equitable provision in the circumstances, be made out of the Will-Maker's estate for the spouse and/or children.

Such an application must be commenced within 180 days from the date the representation grant is issued in British Columbia, by initiating pleading or petition. A copy of the initiating pleading or petition must be served on the executor of the Will within 30 days of the 180 day time limit for commencing such proceeding, unless the court, either before or after the expiration of the 30 days, extends the time for service.

In addition, if there are minor children of the Will-Maker, or if the spouse or a child of the Will-Maker is mentally incapable, a copy of the initiating pleading or petition must be served on the Public Guardian and Trustee. In such cases, the Public Guardian and Trustee may appear and is entitled to any costs ordered by the court.

A claim is treated as a claim on behalf of all eligible claimants, so that the 180-day limitation period is not a bar to another eligible claimant arguing that the Will should be varied in his or her favour, although he or she did not make an application to vary the Will within the 180-daytime limit.

And finally, a plaintiff in a proceeding to vary a Will may, within 10 days of the issue of the initiating pleading, register a certificate of pending litigation against land in a form approved under the *Land Title Act* in the land title office where the land is registered.

Because of the total of the two time limitations above (180 days plus 30 days for service of an initiating pleading or petition), pursuant to section 155 of WESA, the Deceased's personal representative must not distribute the assets of the Deceased's estate within 210 days from the date the representation grant is issued.

Note: Because an application under Part 4 is a contentious matter, it is not covered in the ***Guide***.

Conflict Of Laws and Other Laws

Section 79 of WESA repeals the doctrine of "renvoi," which was a convoluted and confusing doctrine developed to allow the court to uphold a Will by resorting to the law of a foreign jurisdiction to which the deceased had a connection.

The area of law concerning choice of jurisdiction is called "conflict of laws" or simply "conflicts". Sometimes a Will that is valid in another jurisdiction may be deemed valid in British Columbia, if the person who made the Will had some connection with that other jurisdiction. Such validity usually relates to the disposal of assets situated in British Columbia if they are "movable" (a term that generally includes various types of personal property), as opposed to "immovable" (such as real estate). Problems arise in deciding not only which foreign law applies, but also to which of the Will-Maker's assets foreign law applies. There may also be questions as to whether an asset is movable or immovable and, in the case of assets like bank accounts or stocks, whether the asset is situated in British Columbia.

For example, say a Will-Maker lived in another jurisdiction for many years and drafted a Will there (such as a holograph Will made in Saskatchewan). His Will is valid in the jurisdiction where it was made but not valid in any circumstances in British Columbia. A British Columbia court may look to the foreign jurisdiction to determine that the Will is valid where it was made and therefore decide it is valid in British Columbia with respect to the Will-Maker's movable assets. However, it may be argued that a reference to the law of a foreign jurisdiction is a reference to all its laws, including its conflicts laws. Those conflicts laws may refer the matter back to British Columbia or to some other jurisdiction. Then the court will have to decide whether to look only at the part of the foreign law dealing with the validity of Wills or whether to accept the referral, or renvoi, back to the law of its own jurisdiction or even to refer to the law of a third jurisdiction, any of which may result in a finding of invalidity! Happily, WESA settles this question squarely with section 79, which clarifies that a reference to the law of another jurisdiction is a reference to its internal law only and not its conflicts laws.

Validity of Wills Made in Accordance with Other Laws

When a Will was validly made according to the law of a jurisdiction other than British Columbia, it is treated as formally valid and admissible to probate in British Columbia as long as the Will-Maker had a connection to that jurisdiction when he or she died. Section 80(1) of WESA contains an expanded list of such connections, including:

- the place where the Will was made;
- the Will-Maker's domicile (this may differ from the Will-Maker's ordinary residence and may include the place the Will-Maker was born or the place the Will-Maker lived previously and intended to return to);
- the Will-Maker's ordinary residence;
- a country of which the Will-Maker was a citizen;
- the law of British Columbia, if the Will is made outside British Columbia according to the laws of British Columbia;
- the place (situs) where the Will-Maker's property was situated;
- the place that a vessel or aircraft is most closely connected to, such as its place of registration, when the Will was made on board;

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- the place governing the essential validity of a power of appointment exercised in the Will (in other words, if the power of appointment is permitted under the law of another jurisdiction, the court can hold it to be valid in British Columbia).

Under section 80(2) of WESA, a Will that was not valid in the foreign jurisdiction at the time it was made may be deemed valid if a subsequent amendment to the law of that foreign jurisdiction made before the Will-Maker's death validates the Will. Under the *Wills Act*, the court could only consider the law of the foreign jurisdiction at the time the Will was made.

Under section 80(3), a revocation clause is formally valid as long as it conforms to the requirements of any of the legal systems by reference to which the Will that it purports to revoke could be upheld.

Resort to Other Aids to Construction

Section 81 of WESA deals with resort to the law of a foreign jurisdiction in interpreting or construing a Will that has been admitted to probate as formally valid. On such an application, the court may consider the law of the jurisdiction where the Will-Maker was either domiciled or ordinarily resident at the time the Will was made.

Interest in an Immovable

Pursuant to section 82 of WESA, an interest in an immovable includes any estate or interest in land whether it is:

- real property (including leasehold estate); and
- personal property used in part or in its entirety in connection with an interest in an immovable by the owner or occupier thereof;

and is governed according to the jurisdiction of the place where the immovable is located (situs) at the Deceased's death.

In other words, if an immovable and any personal property used by its owner and attached to an immovable is in a location other than British Columbia, its disposition is governed by the law of that foreign jurisdiction.

International Wills

Convention Providing a Uniform Law on the Form of an International Will ("Convention")

This Convention has been adopted by several countries (including the United States, the United Kingdom and Canada) and individually by most Canadian provinces since wills and estates are matters of provincial jurisdiction. It allows lawyers and notaries in adopting jurisdictions to prepare International Wills valid in the jurisdiction of any of the signatories of the Convention, if such International Wills comply with the Convention's requirements (the full text of Articles of the Contention is attached to WESA as Schedule 2).

In this section, a Will made outside British Columbia is referred to as an "***International Will***", even if it is made outside British Columbia but according to the laws of British Columbia.

Section 83 of WESA adopts the Convention in British Columbia.[1]

Under the Convention, a signatory may designate the persons authorized to act in connection with International Wills (the "**authorized persons**"). In British Columbia, only lawyers and members of the Society of Notaries Public of British Columbia are authorized to act in connection with an International Will as **authorized persons**.

Section 83 applies to all Wills (whether made before, on, or after the date the section comes into force) only if the Will-Maker died after the date the section came into effect.

If an International Will complies with the Articles of the Annex to the Convention, it shall be formally valid regardless of where it was made, the location of the assets or the domicile or residence of the Will-Maker.

An International Will:

- need not be written by the Will-Maker himself; and
- may be written in any language or by any other means.

In addition to the basic validity requirements in British Columbia (that a Will must be in writing and signed at its end in the presence of two witnesses), the Convention also requires that for an International Will to be valid:

- it must be dated at its end by the **authorized person,** as the effective date of the Will shall be the date of its signature by the authorized person;
- it must be signed **at its end;** that is, there is no allowance for a differently placed signature, as set out in section 39 of WESA. Presumably the fact that International Wills must necessarily involve a lawyer or notary as authorized person will mean the rules are more likely to be strictly complied with and the location of the signature won't be an issue with which the court has to contend. However, given that WESA extends the court's new curative power to International Wills, an International Will could be admitted to probate even when it failed to comply with this provision.
- if the International Will consists of several sheets, each sheet must be numbered and signed by the Will-Maker; and
- the Will-Maker must declare, in the presence of **two witnesses** and an **authorized person,** that the document is his or her Will and that he or she knows the contents thereof.

The Will-Maker need not inform the witnesses or the authorized person of the contents of the Will.

The key elements to the International Will are:

- the presence of an **authorized person** to the signature of the Will-Maker *in addition* to the two witnesses. The Will-Maker, two witnesses and the authorized must be present together, and see each other sign the International Will;

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[1] The rules regarding an International Will (set out in the Annex to the Convention) will only be valid as laws in British Columbia six months after the date the Government of Canada submits to the US government a declaration that the Convention extends to British Columbia. A notice confirming the effective date of adoption of the Convention in British Columbia shall be published in the (BC) Gazette.

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- a **certificate of the authorized person**
  - the certificate must be in the form set out in Article 10 of the Annex to the Convention (see ***Certificate of Authorized Person for International Wills*** – **Wills · Documents**):
  - the certificate must be signed by the authorized person (in British Columbia, a lawyer or a notary);
  - if there is no mandatory rule for the safekeeping of the Will in the jurisdiction where the Will was made, the authorized person must make a declaration regarding the location where the Will shall be kept for safekeeping (after asking the Will-Maker whether he or she wants to make such a declaration) (note: British Columbia's wills registration system is voluntary (see below under *Wills Notices*); a record of the date and location of the last-registered Will is maintained, but a copy of the Will is not part of the record);
  - the original of the certificate must be attached to the Will;
  - the authorized person must keep a copy of the certificate.

Section 83(5) extends section 58 [Court Order Curing Deficiencies] to International Wills, giving the court jurisdiction to admit a defectively executed International Will to probate.

Wills Notices

In order to enable the personal representative to locate the original Will after the Will-Maker's death, it is recommended (although **not** mandatory) that a ***Wills Notice*** be filed with the chief executive officer under the *Vital Statistics Act* (the "Wills Registry") when a Will is executed (s. 73). A separate ***Wills Notice*** should be submitted for every event, such as:

- execution of a new Will (s. 73); or
- revocation of a Will (s. 75); or
- execution of a Codicil (s. 73 as the word Will includes a Codicil); or
- relocation of a Will or Codicil (s. 75).

A ***Wills Notice*** only records:

- that a Will has been made;
- the date of such Will (or any Codicil);
- the date of a revocation; and
- the location of the Will.

The actual Will is not kept by the Wills Registry.

Filing a ***Wills Notice*** facilitates access to such information, and requesting a search of Wills Notice will only indicate that a Wills Notice has been filed with the Wills Registry.

The act of filing or not filing such Notice does not affect the validity of a Will or codicil or the validity of a revocation.

BENEFIT PLANS

Benefit plans under Part 5 of WESA include the following, if they are **non-insurance** related, even if they were created before WESA came into force:

- any one or more of the following for the benefit of employees or former employees of an employer, agents or former agents of an employer, the dependants of any of them or a designated beneficiary:
  - a pension plan or retirement plan;
  - a welfare fund or profit-sharing fund;
  - a trust, scheme, contract or arrangement;
- a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term;
- a Registered Retirement Savings Plans, Registered Retirement Income Funds, or Tax Free Savings Accounts registered under the *Income Tax Act* (Canada; or
- a fund, trust, scheme, contract or arrangement described in the regulations made under WESA;
- a tax savings account.

Most of these plans allow beneficiary designations – that is, they allow a participant (or plan-holder) to name a beneficiary who will receive a benefit payable under the benefit plan on the death of the participant.

The designation of a beneficiary (whether in a plan described above or in an insurance policy) is one way to ensure that a benefit passes directly to a designated person or a trustee for the designated beneficiary and does not form part of the participant's estate and is not subject to the claims of the participant's creditors.

Part 5 of WESA governs beneficiary designations of such non-insurance benefit plans(1). Part 5 will **not** apply to insurance policies, be they life, accident, disability or sickness policies, or to RRSP's administered by insurance companies. These are governed by Part 3 [Life Insurance] or Part 4 [Accident and Sickness Insurance] of the *Insurance Act*.

Part 5 covers the form that such designations (or their revocations) must have to be effective. If a provision under a benefit plan is inconsistent with Part 5 of WESA, WESA prevails. However, if Part 5 conflicts or is inconsistent with a British Columbia or Canadian statute, such statute prevails.

Normally, unless specifically requested to do so, law firms do not deal with designations of or changes to beneficiaries under Registered Retirement Savings Plans, Registered Retirement Income Funds, or Tax Free Savings Accounts. Usually, the law firm will suggest to the client that they deal directly with the benefit plan holder if any changes are necessary.

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(1) Despite the fact that beneficiary designations may be considered testamentary dispositions, before WESA came into effect, if a plan was a non-insurance benefit, it was governed by the ***Law and Equity Act***. Part 5 applies to a designation, whenever made, if the participant dies on or after the date on which Part 5 comes into force.

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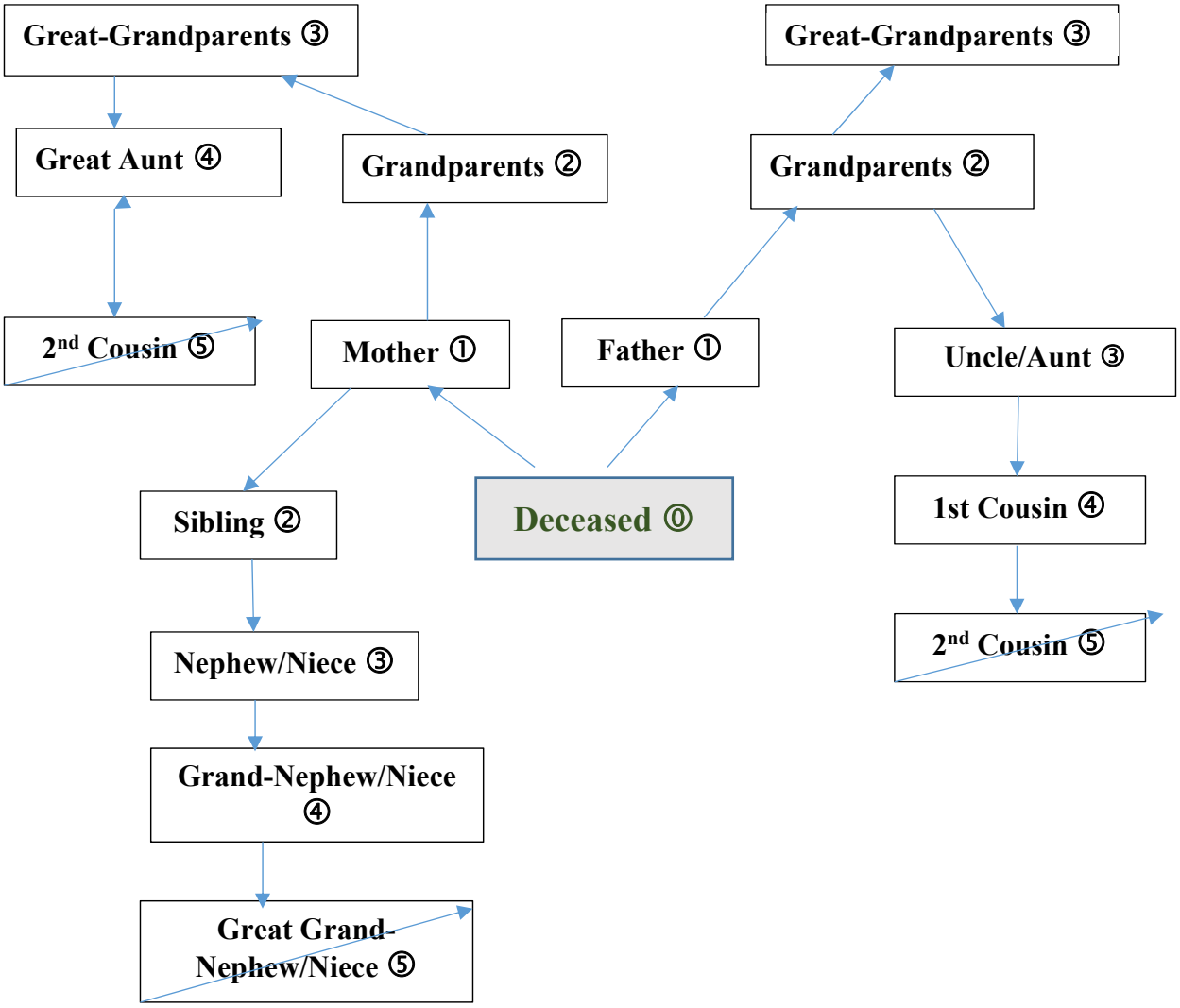
PARENTELIC DISTRIBUTION
(no spouse or descendants)



⑤ Persons of the 5th or greater degree of relationship to the intestate are conclusively deemed to have predeceased the intestate (s. 23(3)), and any part of the intestate estate to which those persons would otherwise be entitled must be distributed to other descendants entitled to the estate (see page 8 for the explanation and exceptions).

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