

CHAPTER SIXTEEN: WILLS AND ESTATES

TABLE OF CONTENTS

I. INTRODUCTION.....	1
A. TYPES OF WILLS LSLAP ASSISTS WITH	1
II. GOVERNING LEGISLATION AND RESOURCES.....	1
A. LEGISLATION	1
B. TEXTS	1
1. <i>General</i>	2
2. <i>Drafting</i>	2
3. <i>Probate</i>	2
C. BUREAUS AND WEB SITES.....	2
III. MAKING AND EXECUTING A WILL.....	2
A. PROCEDURE FOR TAKING INSTRUCTIONS.....	2
B. FORMALITIES: EXECUTION AND ATTESTATION	3
1. <i>Writing</i>	3
2. <i>Signature of Testator</i>	3
a) Meaning of Signature.....	3
b) Position of Signature.....	3
C. WITNESSES: COMPETENCE AND ATTESTATION	3
1. <i>Witnesses</i>	3
a) Signature of Witnesses	4
b) Competence of Witnesses	4
2. <i>Attestation Clauses</i>	4
3. <i>Members of the Armed Forces' and Mariners' Wills</i>	4
4. <i>Holograph Wills Invalid in B.C.</i>	4
D. TESTATOR COMPETENCE.....	5
1. <i>Age</i>	5
2. <i>Capacity</i>	5
a) Mental Capacity.....	5
(1) Generally.....	5
(2) Capacity Test.....	5
(3) Undue Influence and Suspicious Circumstances.....	6
E. THE PERSONAL REPRESENTATIVE.....	6
1. <i>Duties of the Personal Representative</i>	6
2. <i>Executor</i>	7
3. <i>Administrator</i>	7
4. <i>Personal Representative is Accountable</i>	7
5. <i>Remuneration and Benefits</i>	7
F. GENERAL RULES OF DRAFTING	8
1. <i>Intention and Precision</i>	8
2. <i>Actual Drafting</i>	8
a) Part I	8
(1) Opening and Revocation Clauses.....	8
(2) Appointing the Executor and Trustee	9
(3) Appointing a Guardian.....	9
b) Part II	10
(1) Vesting Clause.....	10
(2) Payment of Debts.....	10
(3) Items in Kind	10
(4) Cash Legacies	10
(5) Gifts to Spouse	11
(6) Gifts to Children	11
c) Part III: Administrative Provisions	12
(1) Implied and Express Powers of Executor.....	12

(2) Gifts to Children	12
(3) Valuation of Estate.....	13
d) Part IV.....	13
(1) Eliminating Potential Beneficiaries.....	13
(2) Funeral Directions.....	13
(3) Execution and Attestation Clause.....	14
G. REVOCATION.....	14
1. <i>By Subsequent Will</i>	14
2. <i>By Subsequent Writing</i>	14
3. <i>By Destruction or Loss</i>	15
4. <i>Effect of Marriage</i>	15
5. <i>Effect of Divorce, Separation, and Change in Circumstances</i>	15
H. FILING A WILLS NOTICE	16
I. MISTAKES AND ALTERATIONS	17
IV. CODICILS	17
A. GENERALLY	17
B. INSTRUCTIONS FOR CODICIL – BASIC QUESTIONNAIRE	18
V. WILLS VARIATION ACT	18
A. APPLICATION UNDER THE ACT.....	18
B. DEFINITION OF SPOUSE IN THE <u>WVA</u>	19
C. EXCLUSION OF POTENTIAL BENEFICIARIES	19
VI. INTESTACY.....	19
A. GENERALLY	19
B. DISTRIBUTION	20
C. SEPARATED SPOUSE.....	20
D. MISCELLANEOUS PROVISIONS.....	20
VII. PROBATE AND ADMINISTRATION.....	21
A. GENERAL.....	21
B. PROBATE	21
1. <i>Why Apply for Probate?</i>	21
2. <i>Probate May Be Necessary Where Estate Assets Exceed \$25,000</i>	22
3. <i>How to Obtain Probate if it is Required</i>	22
4. <i>Requirements Where Probate is Not Necessary</i>	23
C. ADMINISTRATION	23
1. <i>Generally</i>	23
2. <i>Who May Apply for Administration?</i>	24
3. <i>Procedure: Is Administration Required?</i>	24
4. <i>Application for Grant of Administration Where Required for Estates Under \$25,000</i>	24
5. <i>Requirements where Administration is not Necessary</i>	24
D. DISTRIBUTION OF ESTATE.....	24
1. <i>Letters Probate/Letters of Administration</i>	24
2. <i>Income Tax Release</i>	25
3. <i>Impact of the Harmonized Sales Tax (HST)</i>	25
4. <i>Beneficiary Designations</i>	25
5. <i>Time for Distributing the Estate</i>	26
6. <i>Payment of Debts</i>	26
7. <i>Discharge of the Personal Representatives</i>	26
VIII. FIRST NATIONS AND WILLS.....	26
IX. LIVING WILLS	27
X. WORDING IN WILLS	27
XI. PENDING CHANGES	27

XII. APPENDIX INDEX	29
APPENDIX A: WILL INSTRUCTIONS.....	30
APPENDIX B: CHECKLIST.....	32
APPENDIX C: STANDARD WILL WORKSHEET.....	33
APPENDIX D: MIRROR WILL WORKSHEET.....	36
APPENDIX E: PRECEDENTS.....	40

CHAPTER SIXTEEN: WILLS AND ESTATES

I. INTRODUCTION

This chapter provides a brief summary of will preparation and estate administration procedure. Students should read these introductory remarks before interviewing a client. In this chapter, any reference to a court is to the B.C. Supreme Court. Students should also review the Pending Changes section at the end of the chapter as **Wills, Estates and Succession Act (WESA) is expected to come into force in late 2011 or early 2012.**

LSLAP policy is that anyone who can afford a lawyer should be referred to one. A practitioner's fee might vary from \$200 to \$400 for a relatively simple will. However, this material has been prepared for appropriate cases where the client meets LSLAP's income criteria. A student should only prepare a will for persons whose estates are small (under \$15,000) and whose assets consist entirely of personal property, not real property (the future as well as present situation must be considered). **Because the law of wills is strictly applied, precedents should be used to provide certainty.** Any lack of clarity may defeat the intention of the Testator, who will not, of course, be available to clarify contentious points. Also, students should not take instructions from a person on behalf of someone else; they can prepare a will only for the client. The final will must then be reviewed with the client to ensure that it reflects his or her wishes and that he or she understands what the document means. A will should be signed in the student's presence (see **Section III.B: Formalities: Execution and Attestation**).

If you are advising on an existing will, remember that except for ss. 16, 25 30 and 44(3), the Wills Act, R.S.B.C. 1996, c. 489 [Wills Act], applies only to wills made after March 31, 1960 (s. 44(1)).

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

A. Types of Wills LSLAP Assists With

LSLAP is able to prepare "mirror wills" for clients. A mirror will is one of two wills in which the bequests "mirror" each other. By contrast, a mutual will also includes a statement that the Testator agrees not to change or revoke his or her will without the consent of another party (usually spouse). This agreement will bind the Testator even if the other party predeceases the Testator. Thus, a mutual will has a contractual component, creating a constructive trust. However, a Testator can always change his or her last will and testament. In the case of a mutual will, if a Testator changes his last will and testament after the other party has died, the Testator may create a right of action of beneficiaries under the trust for breach of the trust. Note that signing mutual wills is not a wide-spread practice. If a client is seeking LSLAP's assistance in preparing a mutual will, the client must be directed to a qualified practitioner. It can be suggested that the client discuss with a qualified practitioner the possibility of creating an *inter vivos* trust instead of preparing a mutual will.

II. GOVERNING LEGISLATION AND RESOURCES

A. Legislation

Estate Administration Act, R.S.B.C. 1996 c. 122 [EAA].

Wills Act, R.S.B.C. 1996, c. 489.

Wills Variation Act, R.S.B.C. 1996 c. 490 [WVA].

B. Texts

Many texts are available that provide more information on this area of the law (in order of usefulness):

1. General

CLEBC, Annotated Estates Practice (2010-2011)

Feeney, Canadian Law of Wills (2000)

Mellows, The Law of Succession (1993)

2. Drafting

Bogardus, Wills Precedents: An Annotated Guide

Sheard, Canadian Form of Wills (1982)

Rintoul, Canadian Forms & Precedents: Wills & Estates (2007)

Scott Butler, Tax Planned Will Precedents (2007)

3. Probate

CLEBC, Probate and Estate Administration Practice Manual (2000) (Vols. 1 and 2)

C. *Bureaus and Web Sites*

Department of Vital Statistics

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

Telephone: (604) 660-2937

Fax: (604) 660-2645

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

III. MAKING AND EXECUTING A WILL

A. *Procedure for Taking Instructions*

1. Speak directly with the Testator, never an intermediary.
2. Interview the Testator alone, not in the presence of the beneficiaries or spouses, except where taking joint instructions from spouses for mutual or mirror wills.
3. Inquire into the nature and extent of the Testator's property. Inquire about any prior wills (to ensure that all property and prior wills are satisfactorily dealt with, and to ensure that the Testator knows of all the property being disposed of). Ask the Testator about property that may not form part of the estate (i.e. real estate in joint tenancy, joint bank accounts with survivorship rights, insurance policies, pension plans, Registered Retirement Savings Plans (RRSPs), and Registered Retirement Income Funds (RRIFs)). Ensure that the Testator understands the nature of dispositions of property that do not form part of the estate.
4. Have the Testator read the will over, clause by clause, or read it aloud to him or her.
5. The will should not be given to a beneficiary to be executed. This would invalidate the will (see *Re Worrell* (1970), 8 D.L.R. (3d) 36 (Ont. Sum. Ct.) and *Russell v. Fraser* (1980), 118 D.L.R. (3d) 733, 8 E.T.R. 245 (B.C.C.A.)). If the Will is being provided to the Testator for execution, ensure that clear instructions are provided. See **Appendix F: Cover Letter**.

See **Appendix A: Will Instructions** and **Appendix B: Checklist**.

B. *Formalities: Execution and Attestation*

1. Writing

The Wills Act, s. 3, requires that a will be in writing. It may be typed or handwritten, or both, as in the case of printed will forms.

2. Signature of Testator

a) *Meaning of Signature*

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

The Testator need not sign the will him or herself. The Wills Act, s. 4(a), provides that the will may be signed "by some other person in their presence and by his direction". Where someone else signs on behalf of the Testator, there must be some act or word by the Testator constituting a direction or request. When someone else signs, that person may sign in either the Testator's name or his or her own name, but this circumstance should be noted in the attestation clause (Wills Act, s. 4(a), *Re: Fitzbaut Estate* (1966), 55 W.W.R. 303 (B.C.S.C.)). If the matter should arise, there must be further review to ensure the signature's legal validity. See **Appendix E: Precedents**, for attestation clauses for a will read to the Testator and signed with the name of the Testator (e.g. if the Testator is illiterate).

b) *Position of Signature*

The Wills Act, s. 4(a), requires the signature be at the end of the will. Section 6 defines when a will is deemed to be signed at the end and provides that a disposition made below or after the signature is of no effect. Case law has taken a liberal view of these requirements, finding a signature not at the end to have been intended to be at the end (*In the Goods of Henry Hornby*, [1946] All E.R. 150 and *Currie v. Potter*, [1981] 6 W.W.R. 377 (Man. Q.B.)) and finding a disposition after the signature to have been intended to precede the signature (*Palin v. Ponting*, [1930] P. 185, considered in *Beniston Estate v. Shepherd* (1996), 16 E.T.R. (2d) 71 (B.C.S.C.)). However, to ensure the validity of the will and all dispositions, the will should be signed at its end, after all dispositions. When a will is more than one page, it should be signed at the end of the last page and there should be a portion of the will on the last page. The last page of the will should indicate the Testator is signing this page as the last of all the pages constituting the will (see **Appendix B**). Although not required, the Testator and witnesses should initial the other pages of the will.

C. *Witnesses: Competence and Attestation*

1. Witnesses

The Testator must make or acknowledge the signature in the joint presence of **two attesting witnesses** present at the same time (Wills Act, s. 4(b)). If the Testator has made his or her

signature in the joint presence of the witnesses, that will be sufficient. If he or she has not, the Testator must acknowledge the signature in the witnesses' presence, as it becomes a question of fact that witnesses must have actually seen or been able to see the signature when the Testator acknowledged it (see *Re Schafner* (1956), 2 D.L.R. (2d) 593 (N.S.S.C.)). Whenever possible, have the Testator sign the will in the presence of the two witnesses.

a) Signature of Witnesses

Both witnesses must attest after the Testator makes or acknowledges his or her signature in their joint presence. Though they need not sign in each other's presence, they must each sign in the presence of the Testator who must actually see or be able to see the witnesses sign (Wills Act, s. 4(c)). Attesting witnesses must be able to confirm the Testator's execution of the Will; they do not need to be aware of the contents of the Will.

b) Competence of Witnesses

Any person 19 years of age or older may be a witness. A person under 19 may be a witness so long as he or she is competent to swear an oath (this requires an appreciation of the moral duty to speak the truth), though it is clearly preferable to have a witness who is 19 or over. An Executor may attest a will (Wills Act s. 13). A beneficiary or a spouse of a beneficiary must not be an attesting witness or the gift will fail, though the witness's attestation is otherwise valid (Wills Act s. 11). Although s.43(4) of WESA allows the court, if it is satisfied that the will-maker intended to make the gift to the witness, to declare the gift to be valid, client should be advised to have people other than the beneficiaries to be witnesses whenever possible.

2. Attestation Clauses

Inclusion of a signed attestation clause will raise a presumption that the will is properly executed (*Re Gardner*, [1935] O.R. 71 (Ont. C.A.)). An attestation clause is a clause at the end of the will where the Testator signs his or her name testifying to the fact that he or she is signing the approved will. This is also the place where the two witnesses must sign to show that they have witnessed the Testator approving of the will. Where probate is sought in a non-contentious estate, an attestation clause will generally be sufficient for probate in common form (see Supreme Court Rules, 61(6), (7) and (8), and **Section III.F.2.c.3: Execution and Attestation Clause**, below). If special circumstances exist, e.g. the Testator is blind or illiterate, consult a wills form manual or the precedents page (**Appendix E**) at the end of this chapter.

3. Members of the Armed Forces' and Mariners' Wills

Members of the armed forces on active service and mariners at sea need not comply with the requirements of execution in the presence of witnesses and attestation by witnesses, per Wills Act, s. 5. If the problem should arise, consult a more complete work on wills.

4. Holograph Wills Invalid in B.C.

A holograph will is a will wholly in the handwriting of the Testator and signed by that person, but without complying with the formalities of the presence, attestation, or signature of witnesses. Such wills are not recognized in B.C. and will be invalid. Compliance with execution and attestation formalities is essential. However, where a Testator makes a holograph will in a jurisdiction that permits such wills, and then moves to B.C., and dies, the

will can be probated here. If a client who now resides in B.C. seeks advice as to the validity of the client's own will made in a jurisdiction that permits holograph wills, one should suggest that the client prepare a new will, if only to ensure compliance with the Wills Act.

D. *Testator Competence*

To make a valid will a person must be 19 years of age or older (or be within a recognized exception), must have testamentary capacity, must intend to make a will, and must comply with the formalities in the Wills Act.

1. Age

A will made by a person under the age of majority (19 in B.C.) is invalid. The three exceptions to this rule are (Wills Act, s. 7):

- a) persons under the age of 19 who are or have been married;
- b) members of the armed forces on active service; and
- c) mariners at sea or in the course of a voyage.

NOTE: See **Section XI Pending Changes No. 2.**

2. Capacity

a) *Mental Capacity*

(1) Generally

The Testator must be possessed of the requisite testamentary capacity. No person of unsound mind, who lacks testamentary capacity, is capable of making a valid will. The basic test is found in *Banks v. Goodfellow* (1870), L.R. 5 B. 549 (Q.B.) at p. 569; for a recent application of this test, see *Kennedy v. Young (Committee of)* (1992), 82 B.C.L.R. (2d) 354, 15 B.C.A.C. 253 (C.A.). According to the test, a Testator must understand the nature of the act of making a will and its effects, the extent of the property he or she is disposing of, and be able to comprehend and appreciate the claims to which he or she ought to give effect.

(2) Capacity Test

The law presumes that a Testator has the requisite capacity. A student or lawyer taking instructions from the Testator makes a decision about the Testator's capacity based on the Testator's instructions. One should not ask Testators direct questions about capacity, such as "Are you capable?"

The capacity test provides a guideline to follow for the determination of whether a Testator has the requisite testamentary capacity. Inquiry should be directed to: whether the Testator can understand the nature of the testamentary act (that he or she is making a will), can recall the property, and can comprehend that he or she is excluding possible claimants under intestacy or under the WVA. Delusions or partial insanity will not destroy testamentary capacity unless they directly affect testamentary capacity or influence the dispositions in the will. If there is any doubt as to a person's capacity, consult LSLAP's Supervising Lawyer.

(3) Undue Influence and Suspicious Circumstances

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

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

Suspicious circumstances may arise where a person who prepares a will also takes a benefit under it, though this is not exhaustive of all circumstances that raise a suspicion. The suspicion is that the Testator did not know or approve of the contents of the will, and this suspicion must be removed before probate will be granted (see *Riach v. Ferris*, [1934] S.C.R. 725; see also more recent applications in *Clark v. Nash* (1989), 61 D.L.R. (4th) 409 (B.C.C.A.) and *Johnson v. Pelkey* (1997) 36 B.C.L.R. (3d) 40 (S.C.)). The Supreme Court held in *Vout v. Hay* [1995] 2 S.C.R. 876, that where suspicious circumstances are proven, the burden of proof shifts to the person benefiting under the will to prove the Testator knew and approved of the will's contents and had the necessary testamentary capacity. This problem is best avoided by ensuring the will is prepared by the Testator or some independent party (e.g., a student or lawyer) and not by a beneficiary under the will or the spouse of a beneficiary.

E. The Personal Representative

1. Duties of the Personal Representative

The personal representative (Executor or Administrator) winds up the estate and distributes assets (see **Section VII: Probate and Administration**).

2. Executor

An Executor is appointed by the Testator in the will to handle all aspects of the estate after the Testator's death. Any person, trust company or financial institution may be an Executor depending on the size of the estate. Although not recommended, a minor may be appointed, however if he or she has not reached the age of majority on the Testator's death, probate may be delayed. The Testator should appoint a person willing to act, familiar with the estate, young enough to outlive him or her, and preferably living in B.C. An alternative Executor should be appointed in case the first Executor is unavailable. The Executor, if he or she accepts the position, must carry out the duties of Executor. The Executor may renounce under s. 24 of the EAA, if he or she has not already intermeddled with the estate. The Executor must apply for probate on the death of the Testator, but since the title is derived from the will itself, if the Executor is of full age at the date of the Testator's death he or she may, before proving the will, do all acts except those requiring formal proof. However, the Land Title Office will not register a transfer of an interest in land before the grant of Letters Probate is obtained.

3. Administrator

An Administrator is appointed by the court to administer the estate of a person who dies intestate (without a will). The EAA, s. 6 governs who may apply to be an Administrator. An Administrator cannot act until the court grants Letters of Administration. An "administration with will annexed" may be granted where there is a will but the Executor named in the will cannot or will not act (e.g. due to refusal to act, incapacity, or death of the Executor). The Administrator's legal capacity to act starts from the date the grant is issued.

4. Personal Representative is Accountable

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

5. Remuneration and Benefits

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

A trust company can be appointed Executor but will usually not consent unless the assets are \$25,000 or over (approximately).

F. *General Rules of Drafting*

1. **Intention and Precision**

A fundamental rule of drafting is to ascertain the Testator's intent regarding how the estate will be divided. Have the Testator consider present desires as well as future possibilities. A beneficiary may predecease the Testator and the Testator may want the deceased's share to go to someone else. Potential WVA claims must be anticipated. The student should refer the client to a lawyer if a WVA claim may occur.

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

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

NOTE: The LSLAP office has a precedent file, which may be consulted for the structure of various clauses. See also the Legal Support Staff Desk Reference, the Continuing Legal Education will precedent book, or any book on will precedents. Finally, the clauses given below are merely examples. You should ensure that the clauses you use are appropriate and that the will is internally consistent. For example, if specific bequests are given to various persons, another clause in the will should not dispose of the entire estate, but may dispose of the residue.

2. **Actual Drafting**

A will contains instructions about what should happen after the Testator's death. As a result, keep in mind the importance of precision and consistency when drafting a will. Generally, there are several paragraphs common to all wills. See **Appendix C: Standard Will Worksheet**; **Appendix D: Mirror Will Worksheet**, and **Appendix E: Precedents**.

a) *Part I*

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

(1) Opening and Revocation Clauses

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

SAMPLE: “This is the Last Will and Testament of me, <full name>, <occupation>, of <address>, in the City of <city name> in the Province of British Columbia, Canada.”

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

SAMPLE: “I hereby revoke all wills and codicils heretofore made by me and declare this to be and contain my Last Will and Testament”.

The revocation clause should not revoke other testamentary dispositions as this would revoke designations made on insurance policies, RRSPs, etc. This would cause these monies to fall into the estate. Should the Testator wish this, it is more effective to designate the estate as the beneficiary to such policy or RRSP.

(2) Appointing the Executor and Trustee

SAMPLE: “I appoint <name/address> to be my Executor/Executrix and Trustee. If he/she is unwilling or unable to act as my Trustee, then I appoint <name/address> in his/her place.”

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

A bank or trust company may be appointed. Their expertise and trustworthiness make them an excellent choice, though the cost may be prohibitive, especially with small and simple estates. If a Trustee is required, the client should be referred to a private lawyer.

(3) Appointing a Guardian

A Testator may wish to appoint a guardian for his or her children during their age of minority (see Infants Act, R.S.B.C. 1996, c. 223, s. 50). Financial assistance should be provided to the guardian to cover the costs of raising the children. This arrangement is made with the Trustee. The guardian must be prepared to accept the position and should be consulted beforehand.

NOTE: The student should advise the client that the decision to appoint a certain person as guardian can be reviewed by the court. As well, members of the family can apply to have a decision in the will set aside. However, it must be strictly proven that the guardian appointed by the Testator is unsuitable for the position.

SAMPLE: “If my wife/husband shall predecease me then on my death I appoint <name/address> to be the guardian of my infant children.”

See **Chapter 5: Children and the Law** and **Chapter 3: Family Law**.

b) Part II

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

(1) Vesting Clause

SAMPLE: “I give my Trustee all my property of every kind and wherever located to administer as I direct in this Will. In administering my estate, my Trustee may convert or retain my estate as set out in paragraph(s)...”

(2) Payment of Debts

SAMPLE: “to pay my just debts and funeral expenses and all income taxes, estate, inheritance and succession duties or taxes wheresoever payable.”

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

(3) Items in Kind

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

SAMPLE: “to transfer and deliver absolutely my <article> to <beneficiary>.”

(4) Cash Legacies

SAMPLE: “to pay the following cash legacies without interest and as soon after my death as practicable to such of the following named beneficiaries as are alive at my death:

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

to my daughter, <name>, the sum of ONE THOUSAND (\$1,000.00) DOLLARS.”

An extensive list of specific bequests can be found in any wills precedent book.

(5) Gifts to Spouse

In the event of a common accident where both spouses die and it cannot be determined who died at what particular time, then under the Survivorship and Presumption of Death Act, R.S.B.C. 1996 c. 444, s. 2(1) [SPDA], the legal presumption is that the younger survived the elder. For example, if a husband aged 50 and a wife aged 49 are killed simultaneously or in circumstances rendering uncertain who died first, the presumption is that the husband died first. Therefore, the husband's estate is dealt with first. Thus, whatever portion of the husband's estate passes to the wife will ultimately be distributed as part of the wife's estate. Disposition of life insurance is dealt with differently under the Insurance Act, R.S.B.C. 1996 c. 226, s. 52 and 72. Note that the presumptions under the SPDA will change once the Wills, Estate & Succession Act is in force (See **Section XI – Pending Changes**).

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

SAMPLE: "to my wife <name> if she survives me for thirty (30) clear days, I give, devise and bequeath the residue of my estate as her absolute property; if my said wife predeceases me, or surviving me dies within a period of thirty days following my decease, I give, devise and bequeath the residue of my estate to <name>."

If the Testator is not giving a residue but the entire estate, the appropriate words would be "give, devise, and bequeath all my assets, both real and personal, of whatsoever kind and wheresoever situate, to...."

Because of the presumption that a reference in a will to a relationship is presumed to refer to legitimate relationships, a "common law spouse" should not be referred to as "my husband" or "my wife" but should be identified by name. This is important where there is also an existing legal spouse. Even a separated spouse, however long the separation, is still a legal spouse until divorced and therefore has the rights of legal spouses under the EAA and the WVA. However, on intestacy, a surviving spouse who had been separated for more than one year **might** only have a claim to the estate at the court's discretion: see s. 98(1) of the EAA for details.

(6) Gifts to Children

If the Testator's spouse does not survive the Testator, often the Testator will want to leave the estate to his or her children. A Testator must decide whether he or she wishes to divide the estate between only those children alive at the Testator's death or if he or she wishes to benefit the issue of any pre-deceased child (i.e. grandchildren). Set out whether a share will be created for a pre-deceased child, to be distributed to that child's children.

SAMPLE: "If <name> does not survive me for 30 days, to divide the residue of my estate into as many equal shares as there are of my children who are alive at my death, except if any child of mine has died before me and one or more of his or her children are alive at my death, that deceased child will be considered alive for the purposes of the division.

With respect to the share created for any child of mine who died before me and left one or more his or her children alive at my death, divide that share equally among those children of that deceased child.”

If the children are under 19, usually a trust should be created for them until they reach majority age. See **Section III.F.c.2**, immediately below.

c) Part III: Administrative Provisions

(1) Implied and Express Powers of Executor

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

(2) Gifts to Children

If the children are under 19, a trust should be created for them until they attain the age of majority. The beneficiaries need not be alive at the time of execution to be included if a general term such as “children” is used. The clause should:

- create a trust for the benefit of the children;
- set out a discretionary schedule of payments;
- grant a power of encroachment and/or a direction to pay income;
- leave a deceased beneficiary’s share to his or her children if he or she dies before reaching the age of vesting, or if he or she has none, then the trust should direct who receives this bequest.

SAMPLE: “to divide the residue of my estate equally among such of my children as shall be living at my death, provided that if any child of mine shall predecease me leaving issue living at my death, then such issue shall take in equal shares the share in the residue of my estate that such deceased child would have taken if living at my death.”

- give the Trustee discretion to invest outside the Trustee Act, only if he or she is acquainted with business matters.

If a Testator wants a clause to limit investment powers, the student must consult a wills precedent book. If any of the persons the Testator wishes to benefit are stepchildren, the will should clearly identify that person by name rather than merely by relationship (i.e. “children”). There are no legislative provisions with regards to stepchildren, and therefore the clause must clearly refer to such children by name. Adopted children, however, are for all purposes the children of the adopting parents, and not the legal

children of the natural birth parents, per s. 37(1) of the Adoption Act, R.S.B.C. 1996, c. 5.

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

SAMPLE: "I DIRECT that the gift to my son/daughter, <name>, is effective even if he/she has not attained the age of nineteen (19) years at the date of my death."

If a Testator does not wish to create a trust for his or her minor children, a clause that clearly states this wish should be inserted. See EAA, s. 75.

(3) Valuation of Estate

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

SAMPLE: "I direct that my Trustee may in his/her absolute discretion, fix the value of my estate or any part of it for the purpose of dividing my estate into shares, or for the purpose of carrying out any of his/her duties or powers, and his/her decision shall be final and binding upon all persons concerned."

d) *Part IV*

The following clauses concern the elimination of potential beneficiaries, funeral directions, and finally, execution and attestation.

(1) Eliminating Potential Beneficiaries

Where a Testator does **not** wish to leave a share of the estate to a certain individual, that person can be named in the will and reasons for the decision given (see **Section V: WVA**).

NOTE: However, the student should advise the client that a legal spouse or child may commence an action to vary the will under the WVA. Thus, if the Testator wishes to eliminate a beneficiary, he or she should put the reasons for doing so in the will. For example, "I do not leave anything to my son John David Smith as I have generously provided for him during my lifetime".

(2) Funeral Directions

SAMPLE: "I direct that my remains be cremated," or "I direct that I be buried in a simple manner and without undue expense."

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

should be filed with the Department of Vital Statistics to record the revocation of the will (see **Section III.H: Filing a Wills Notice** below).

3. **By Destruction or Loss**

A will may be revoked by destruction, per s. 14(d) of the Wills Act. There must be some physical act of destruction: “burning, tearing, or destruction of it in some other manner **by the Testator**”. Though copies need not be destroyed, it would be safer to do so to ensure revocation. There are presumptions that if a will is in the Testator’s custody and is found destroyed, or if a lost will was last known to be in the Testator’s custody, that the Testator destroyed it. This emphasizes that it is very important for a Testator to keep safe custody of a will. If it is accidentally or otherwise lost or destroyed it may be taken to have been destroyed by the Testator, and thereby revoked, even though this may not have been the Testator’s wish.

For a Testator to revoke a will by destruction also requires that the will be destroyed with the intention of revoking it. Though there is a presumption that a Testator who destroys a will does so with the intention of revoking it, this does not apply where he or she lacks capacity, since the Testator must be capable of forming the necessary intent to revoke. Revocation does not apply where there is accidental loss or destruction, but to prevent subsequent litigation, if a will is accidentally lost or destroyed, the Testator should make a new one even though a copy of the lost or destroyed one survives. The Testator should maintain clear custody of his or her will in a safe place known by the personal representative to guard against accidental loss or destruction.

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

4. **Effect of Marriage**

An existing will is revoked by subsequent marriage except where there is a declaration in the will that it is made in contemplation of the marriage (Wills Act, ss. 14-15). A general contemplation of marriage, such as “this will is made in contemplation of marriage” is insufficient. The will must be in contemplation of a specific marriage, such as “to my future wife, Jane” or “to my fiancée, Jane”. An implied declaration would have to contemplate a future marriage rather than an existing marriage.

It was held in *Re: Pluto Estate* (1969), 69 W.W.R. 765 (B.C.S.C.) that there must be an express declaration. Therefore, to avoid the possibility of subsequent litigation, there should be an express declaration that the Will itself is made in contemplation of a specific marriage with a named individual.

NOTE: See Section XI Pending Changes No. 3.

5. **Effect of Divorce, Separation, and Change in Circumstances**

Section 16 of the Wills Act provides for the revocation of a gift, appointment or power given to a spouse in a will on divorce, judicial separation, or declaration of a nullity, unless a contrary intention appears in the will. If there is no contrary intention, the will is interpreted as if the Testator’s spouse has predeceased him or her. Section 16 applies to wills made **after** August 1, 1981. Section 16 does not affect a gift to or appointment of a spouse divorced **before** s. 16 came into effect on August 1, 1981.

Note that although s. 16 of the Wills Act refers to “judicial separation”, family practitioners in British Columbia would claim that judicial separation cannot be obtained in British Columbia since the advent of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). A client should be advised that a separated spouse is still a spouse until divorced. But WESA removes a spouse’s ability to make a WVA claim after the couple have separated for 2 years.

A change in circumstances of a separated spouse will not revoke a will, but may lead to a variation under the WVA. This is so even if a separation agreement contains provisions that the separated spouses forego their rights under the WVA because such provisions cannot remove the court’s jurisdiction under the Act to protect the public interest (i.e. a moral claim to maintenance of spouses). To strengthen the evidential value of such a separation agreement it should state that “the parties have both discharged their moral obligations to each other”, but clients should be warned in writing that the terms of the separation agreement may be challenged upon either party’s death. See *Wagner v. Wagner* (1991), 44 E.T.R. 24 (B.C.C.A). The easiest way for a client to avoid this problem is to seek a divorce.

NOTE: In regard to mutual wills and agreements **not** to revoke, there must be clear and indisputable evidence of such an agreement: see *Huculak v. Smetaniuk Estate*, (2005) BCSC 239.

H. *Filing a Wills Notice*

After the will is complete, a Wills Notice should be filed with the Department of Vital Statistics in Victoria (s. 32, Wills Act). The purpose of the notice is to record the existence and location of the will and make it easier to find the will after the Testator’s death. A Testator is not required by law to file a Wills Notice, but it is recommended, as a wills search must be undertaken by the Executor or Administrator before Letters Probate or Letters of Administration are granted.

A Wills Notice should be filed whenever a will is made, revised, revoked or moved or whenever a codicil is executed. There is a \$18.50 charge for filing, payable to the Minister of Finance. Forms are available from:

Vital Statistics Agency

Web site: www.vs.gov.bc.ca/forms/index.html

Victoria

818 Fort Street

Telephone: (250) 952-2681

Fax: (250) 952-2527

Vancouver

605 Robson Street, Room 250

Telephone: (604) 660-2937

Kelowna

1475 Ellis Street, Room 101

Fax: (250) 712-7598

Prince George

433 Queensway Street

Completed forms should be mailed to:

Vital Statistics Agency

PO Box 9657 Stn Prov Govt

818 Fort Street

Victoria BC V8W 9P3

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

I. Mistakes and Alterations

A will may be changed by executing a new will, executing a codicil, or altering the will before it is executed. Where a Testator wants to alter a will, the Wills Act, s. 17(2) requires that the Testator sign and the witnesses attest the signature in the margin or near to the alteration, or at or near to a memorandum written in the will and referring to the alteration. An alteration should be so attested even if made before the will itself is executed. This will avoid subsequent litigation, which may arise if it is thought that an unattested alteration was made after execution of the will. Where a mistake is made when drafting a will, the safest course is to draw up a new, corrected will.

An unattested alteration made after the will is executed is invalid, and may also invalidate any existing part of the will the alteration obliterated or made impossible to decipher.

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

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

IV. CODICILS

A. Generally

A codicil is another type of testamentary document. Where one or two clauses in a will require changing, a codicil may be executed. This may occur where, for example, a beneficiary dies or marries and the Testator wishes to change the beneficiary or the disposition. A codicil is simply a supplement or an addition to a will that may modify and update the will, but does not totally revoke it. For major changes, a new will should be executed. A codicil is prepared in the same manner as the will and must be executed in the same manner as the will. The codicil should be in similar form to a will, identify the Testator, identify itself as the codicil to the Last Will and Testament of <name>, <date>, <location>, identify any previous codicils, specify any deletions and additions, declare that in all other respects the Testator confirms his or her will, and should include an attestation clause. If numerous changes are required then a new will should be drawn up.

SAMPLE: "This is the FIRST CODICIL to the last will of me <name>, which last will bears the date <date of will>.

1. I direct that clause two be deleted and the following clause be substituted therefore: ...
2. I revoke clause (b) of my said last will
3. In all other respects I confirm my said last will"

An attestation clause should follow, and should be identical to that used in the original will, but add the words "first codicil to my" before the words "Last Will and Testament" and add the words "this

first codicil to” before the words “his/her Last Will and Testament”. See **Section III.F.d.2: Execution and Attestation Clause** above.

B. *Instructions for Codicil – Basic Questionnaire*

- Name of Testator:
- Address:
- Telephone:
- Last Will and Testament dated:
- Located at:
- This is the ___ Codicil to the Last Will and Testament of (name) (date) (location)
- Other Codicils dated:
- Has name or address of Testator changed since last testamentary paper?
- Instructions:
- In all other respects Testator confirms his or her Will? (e.g. any deceased beneficiaries?)
- Wills Notice (Department of Vital Statistics) to be filed

V. WILLS VARIATION ACT

A. *Application Under the Act*

The WVA gives the court the power to vary a will. The **limitation period** for commencing a WVA action is **six months** from the grant of probate, per s. 3(1)(a). Only a spouse or child of the testator can make a WVA claim.

The WVA covers property passing under a will only. Therefore, any property passing pursuant to contract, right of survivorship, *inter vivos* gift, or under intestacy is not affected by the WVA.

A WVA action is commenced by a Writ of Summons and Statement of Claim. The ground an action is that the Testator “failed to make adequate provision for the proper maintenance and support of the Testator’s spouse or children” (WVA, s. 2).

When determining what constitutes adequate provision in a will, courts have considered the following: actual need, which varies with age and dependency; justifiable expectation based upon a dependency upon the Testator or an actual contribution made by the claimant to the Testator’s estate; Testator’s intention and reasons for making his or her will; and the size of the Testator’s estate (see *Lukie v. Helgason & Lukie* (1976), 26 R.F.L. 164 (questioned), and *Newstead v. Newstead Estate* (1996), 11 E.T.R. (2d) 236 (B.C.S.C.)).

However, the Supreme Court of Canada decision in *Tataryn v. Tataryn Estate* (1994), 93 B.C.L.R. (2d) 145 to provide a different focus for the determination of s. 2 claims. The court considered the following in deciding what constitutes an “adequate, just, and equitable” provision in a will:

- the Testator’s **legal obligations** – maintenance and property allocations which the law would support during the Testator’s lifetime; and

- the Testator’s **moral obligations** – society’s reasonable expectations, based on community standards, of what a judicious person would do in the circumstances.

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

The court may consider the applicant’s character or conduct, and variation may be refused on this basis (WVA, s. 6(b)). If the estate is large and the spouse or children were not mentioned in the will, or they think they were inadequately or unfairly provided for, they should consult a lawyer.

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

B. Definition of Spouse in the WVA

The definition of spouse in s. 1 of the WVA reads:

“spouse” means a person who:

- a) is married to another person; or
- b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years.

Thus, common law and same-sex partners have statutory authority to file suit under the WVA.

NOTE: See **Section XI Pending Changes No. 4** for changes to definitions.

C. Exclusion of Potential Beneficiaries

A Testator who wishes to exclude a spouse or child should state precisely why the person is being “disinherited,” or why they are less than “adequately” provided for. The court is not bound by the Testator’s decision and reasons, but will consider them. Therefore, the Testator is not assured of success in his or her attempt to exclude or less than adequately provide for a spouse or child. The chances of the Testator’s Will being upheld will be greater if the Testator provides reasonable and rational reasons for the exclusion. For example, where the Testator has already given the person substantial benefits during her or his lifetime, where the reason is based upon the person’s character, or on the relationship between the Testator and the potential claimant, the court will be more likely to uphold the Testator’s wishes.

A “wills variation” statement is usually inserted in the Testator’s will. However, it can be made as a separate document, so that it is not known to others until after the Testator’s passing. The separate document must be addressed to the Supreme Court of B.C. and should be signed by the Testator in front of two witnesses. The document should be kept with the will.

VI. INTESTACY

A. Generally

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

B. *Distribution*

Situation	Section	Distribution
Intestate dies leaving no issue but a surviving spouse.	s. 83 <u>EAA</u>	Estate passes to surviving spouse.
Intestate dies leaving a child and a surviving spouse.	s. 85 <u>EAA</u>	First \$65,000 and ½ of residue to surviving spouse. Remaining ½ goes to the child.
Intestate dies leaving two or more children and a surviving spouse. Pursuant to s. 96 of the <u>EAA</u> , the surviving spouse is entitled to a life estate in the matrimonial home if the spouse does not receive the home as above. Further, household furnishings also go to the surviving spouse.	s. 85 <u>EAA</u>	First \$65,000 and one-third of residue to spouse and the remainder divided between the children.

NOTE: See **Section XI Pending Changes No. 5** for upcoming changes in intestate distribution.

If the Testator has no surviving spouse or issue, the order of priority is: parents, siblings, nieces and nephews, and next of kin. Finally, if there are no relatives, the estate “escheats” back to the provincial government under the Escheat Act, R.S.B.C. 1996, c. 120. This means that the ownership of the property reverts to the provincial government because there are no beneficiaries.

NOTE: WVA issues of dependency and moral or legal Testator obligations are generally not relevant to distribution under the EAA. It was held in *Law v. Tretiak*, above, however, that principles that have evolved under the WVA, such as relief of need, have some application to the exercise of judicial discretion conferred upon the court by s. 98 of the EAA, regarding spouses.

C. *Separated Spouse*

Under s. 98 of the EAA, separation for one year with the common intention of living separate and apart and not having during that period lived together with the intention of resuming cohabitation, is a bar to a claim by a separated legal spouse unless the court in its discretion orders otherwise. Courts have restricted the application of s. 98 by finding that there was no common intent: see *Re Murray*, Vancouver No. 124692, 14 February 1974 (B.C.S.C.) (unreported), and *Law v. Tretiak* (1993), 80 B.C.L.R. (2d) 1 (C.A.) (questioned).

D. *Miscellaneous Provisions*

- Children conceived but not born before the intestate’s death are treated as if born before the intestate’s death, (EAA, s. 91).
- Half-blood is treated as whole blood, (EAA, s. 90(2)).
- Adopted children are the children of the adopting parent (Adoption Act, s. 37).
- The court may consider any major advancement to a child during the intestate’s life in determination of the share to which the child may be entitled on intestacy (EAA s. 92).

VII. PROBATE AND ADMINISTRATION

A. *General*

Applications to the Supreme Court of British Columbia for Grants of Letters Probate or Letters of Administration require the applicant to complete a large number of forms. If the proper documents are not filed at the Probate Registry, which has its Vancouver office at 800 Smithe Street (or Begbie Square in New Westminster), the application will be rejected. The process is time consuming for the Executor/Administrator, who will be expected to complete a substantial amount of work on behalf of the estate.

The role of an LSLAP student is generally to summarily advise the Executor/Administrator. The potential liability in administering estates is too great to permit greater student involvement; **the client should always be referred to a lawyer.**

The basic duties of an Executor/Administrator are to:

- obtain a death certificate from the Department of Vital Statistics;
- locate the last will if there is one and apply for a search of wills notices;
- arrange for the disposition of the deceased's body and the funeral;
- determine the names and addresses of the beneficiaries and intestate heirs and notify them;
- gather papers relating to assets and ascertain the value of the assets (by way of an inventory, taking into account debts and liabilities);
- safeguard assets until they are sold or distributed;
- prepare and file tax returns;
- notify appropriate agencies (pensions, subscriptions, charge accounts, etc.); and
- in cases for which an Application for Probate or Administration will be made, send out a notice of application for a Grant of Letters Probate or Letters of Administration to persons mentioned in s. 112 of the EAA. The Executor must also notify a parent/guardian when dealing with minor beneficiaries.

Copies of the required forms may be found in the Legal Support Staff Desk Reference or the Probate and Estate Administration Practice Manual, which is published by The Continuing Legal Education Society of B.C.

B. *Probate*

1. **Why Apply for Probate?**

An Executor applies for probate to prove the will, so the assets of the estate can be transmitted to the Executor/Administrator and then transferred to the beneficiaries. The court issues a Grant of Letters Probate after the Executor proves the will by filing the appropriate documents. An Administrator (i.e. where there is no will) makes a similar court application for Letters of Administration. In some cases (see below) application for probate will not have to be made because the assets can be transferred without Letters Probate.

On a practical level, a formal Probate or Administration Application is necessary where the institutions holding assets of the deceased (e.g. banks) insist on seeing Letters of Probate or Administration before releasing the assets to the Executor/Administrator. If the estate has any real property, the Land Title Office will require that a Grant of Probate/Administration be obtained. The effect of a formal grant of Probate or Administration is to cloak the Executor/Administrator with the legal authority to deal with the estate.

2. Probate May Be Necessary Where Estate Assets Exceed \$25,000

The first step is to direct the client to assemble a complete list of the deceased's assets and liabilities and their value. Property owned in joint tenancy passes outside a will or intestacy and is excluded from this calculation, as are certain insurance policies, annuities, etc. that have a designated beneficiary. Where the gross value of the estate, excluding property owned in joint tenancy, and less monies owing under a registered mortgage (but not other debts) is over \$25,000, probate will usually be required. But, there is no actual legislated amount requiring probate. The Executor should investigate if the institutions holding the assets require probate.

Where the estate is under \$25,000, the nature of the asset determines whether probate is required (see the list of assets and requirements in "Transmission and Transfer of Assets" in the Legal Support Staff Desk Reference, Vol. 2, pp. 693-698). When the following assets are involved, probate may be required either as a matter of law or of the transfer policy of the institution involved:

- a) real property or mortgages held in the name of the deceased;
- b) bank accounts held in the name of the deceased;
- c) safety deposit boxes held in the name of the deceased;
- d) share certificates held in the name of the deceased;
- e) bonds, other than Canada Savings Bonds, held in the name of the deceased;
- f) life insurance policies payable to the estate; or
- g) traveller's cheques issued in the name of the deceased.

Most of these assets likely require a Grant of Probate (or Administration) as a matter of practice only. It may be possible that a bank manager, for example, will transfer an account with only a death certificate, which saves the additional expense and delay of filing for a Grant of Probate or Administration for a small estate. Often the bank will require the Executor (or beneficiaries) to execute an indemnity, thereby protecting the bank should that person not be legally entitled to receive the asset. An Executor should inquire with the institutions involved. Upon presentation of the bill, the bank may pay funeral expenses directly from the deceased's account.

The anticipated Wills, Estate and Succession Act will set out a new regime for "small" estates. See **Section IX –Pending Changes No. 7.**

3. How to Obtain Probate if it is Required

The documents the Executor must file in duplicate (in addition, one copy should be kept by the Executor) at the Probate Registry are:

- a) a requisition – (a “*praecipe*”), a request to the Court for a Grant of Probate per Supreme Court Rule 61(3);
- b) an Executor’s Affidavit sworn in the presence of a Commissioner for taking affidavits per Supreme Court Rule 61(3);
- c) the original will must be filed with the Executor’s Affidavit per Supreme Court Rule 61(3);

NOTE: **NEVER REMOVE THE STAPLES OR BACKING SHEET FROM AN ORIGINAL WILL.**

- d) any documentation disclosing the assets and liabilities of the deceased, irrespective of their nature, location or value, which pass to the deceased's personal representative on the deceased's death (EAA s.111);
- e) a declaration that a diligent search and inquiry has been made to ascertain the assets and liabilities of the deceased, per s. 111 of the EAA;

NOTE: The Rules of Court require that the declaration be made by way of an affidavit (see form 69, 70 or 71, and Rule 61(3) of the B.C. Supreme Court Rules of Court).

- f) the Wills Notice Search Results per s. 36, Wills Act;
- g) an affidavit confirmation notice of the application that has been given to each person who is: a beneficiary under the will, entitled to apply under the Wills Variation Act with respect to the will, a common law spouse, or a surviving spouse who has been separated from a deceased spouse for not less than one year immediately before the death of the deceased, (s. 112 of the EAA). Sufficient copies of documents should be obtained for later transmission and transfer of assets (e.g. death certificates).

NOTE: To file for Probate/Administration, there is no fee for the first \$25,000 of estate and \$6 per \$1000 (or part thereof) above that, up to but not more than \$50,000 in probate fees. The balance of estate value over \$50,000 attracts a fee of \$14 per \$1,000 or part thereof. See the Probate Fee Act, S.B.C. 1999, c.4.

4. Requirements Where Probate is Not Necessary

The transfer requirements for the assets involved may be determined by reference to the “Transmission and Transfer of Assets” section in the Legal Support Staff Desk Reference, and by consultation with any institutions holding assets, such as banks, insurance companies, etc. Also, see **Section VII.D: Distribution of Estate**.

C. Administration

1. Generally

Letters of Administration may be required on intestacy, or where there is a will but the appointed Executor is unwilling, incapable or dead, or where no Executor is appointed. The procedure for administration is similar to probate, except that the Court must appoint an Administrator, and bonding may be required. The consent of the Public Guardian and Trustee’s office is required where a minor’s property is involved. Public Guardian and Trustee’s consent is also needed on probate if any minor is involved. The Administrator’s powers and duties are similar to an Executor’s and set out in the EAA.

2. Who May Apply for Administration?

Under ss. 6 and 7 of the EAA, an individual may apply to the Court to be appointed Administrator of an estate. Priority is given to the surviving spouse or next of kin. The applicant must show his or her entitlement by renouncing those with a prior or equal right. If no person wishes to be Administrator, the Public Trustee may have to be appointed.

3. Procedure: Is Administration Required?

The first step is to have the client prepare a list of assets and liabilities with values attached. Whether administration is required may be determined by reference to the **Section VII: Probate**, above, (“Is Probate Necessary?”), substituting the words “Grant of Administration” for “Grant of Probate”.

Where the estate is over \$25,000, bonding may be required under s. 16 of the EAA, though this requirement may be waived under s. 17(1). Students should send a client to a lawyer if the client has an estate over \$25,000. Where the estate is under \$25,000, a Grant of Administration may or may not be necessary depending on the type of assets.

4. Application for Grant of Administration Where Required for Estates Under \$25,000

Where a Grant of Administration is required for an estate with assets under \$25,000 the following documents should be filed with the Probate Registrar:

- a) an affidavit that the applicant is competent to take out administration of the estate and that the value of the estate does not exceed \$25,000. The affidavit should include a list of assets similar to that in the disclosure document. Bonding will be required unless waived by the Registrar under s. 20(6) of the EAA;
- b) a requisition (“*praecipe*”) for a Grant from the Registrar (this ensures that the application does not go before the court and avoids the filing fees);
- c) the Wills Notice Search Results;
- d) an affidavit giving notice to anyone entitled on intestacy, per s. 112 of the EAA; and
- e) a renunciation from persons having a prior or equal right to administration.

5. Requirements where Administration is not Necessary

Transfer requirements for the assets involved may be determined by reference to the “Transmission and Transfer of Assets” section in the Legal Support Staff Desk Reference, and by consultation with any institutions holding assets, such as banks, insurance companies, etc. Also see **Section: VII.D: Distribution of Estate**, below.

D. Distribution of Estate

1. Letters Probate/Letters of Administration

These will not be granted by the Probate Registry until the filing fee has been paid (see **Section VII.B.3: How to Obtain Probate if it is Required**).

2. Income Tax Release

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

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

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

3. Impact of the Harmonized Sales Tax (HST)

The majority of inheritances are received by beneficiaries in cash payments and are not subject to HST. There is **no HST** on: money, bank accounts, traveller's cheques; stocks, bonds and debentures; shares; insurance policies and annuities; RRSPs; residential real property; trust or partnership interests; mobile homes; mortgages on personal property such as automobiles, jewellery, household effects, antiques not used in the course of commercial activity, and recreational real property. HST is designed to apply to all goods and services.

No HST is paid for the transfer of assets from the deceased to his or her Executor. However, where an Executor sells estate assets that are otherwise taxable, e.g. commercial buildings, then he or she must collect the taxes in the normal fashion. As stated above, cash gifts to beneficiaries are not taxable.

4. Beneficiary Designations

For life insurance policies with **designated beneficiaries**, the proceeds do not form part of the estate. A beneficiary designation in a will is invalidated by a subsequent designation made in an insurance policy or is revoked when the will is revoked (see Insurance Acts, 50(2)). Also, a will cannot revoke an earlier life insurance designation unless it complies with s. 49 of the Insurance Act, which requires that the policyholder file a contract or declaration with the insurance company, designating the beneficiary of the policy irrevocably. If this document is filed, the beneficiary must consent to any change to the designation. However, a general revocation clause that does not specifically refer to the insurance policy or contract does not revoke the designation made prior to the will, because it does not meet the definition of "declaration" under the Insurance Act; see *Hurzin v. Great West Life Assurance Company* (1988), 23 B.C.L.R. (2d) 252 (S.C.).

For RRSPs, the holder of the RRSP can designate someone to be a beneficiary of the plan on his or her death (s. 49 Law and Equity Act). The plan should be reviewed to ensure the designation is made according to its requirements because some plans do not allow designation by will. The benefit would not form part of the estate where a valid designation has been made (s. 49). Section 49 of the Law and Equity Act also allows a person to alter or revoke the designation, but note that a general revocation clause in a will does not revoke a valid prior designation made outside the will, unless the language of the clause evidences a clear intention to do so: see *Re Bottcher* (1990), 47 B.C.L.R. (2d) 359 (S.C.).

NOTE: Section 49 does not apply to a designation of a beneficiary to whom the Insurance Act applies.

For clients with a significant amount of money in RRSPs, it would be best to refer the client to a tax lawyer or tax accountant for estate tax planning advice, as there are several tax rules that apply solely to the final year of a person's life.

5. Time for Distributing the Estate

Generally, an Executor has **one year**, the “Executor’s year”, to distribute the estate. Under s. 12 of the WVA, no distribution is permissible until six months after the Grant of Probate, unless the Executor or Administrator has the consent of all the persons who would be entitled to apply, or is authorized by an order of the court.

On intestacy, s. 74 of the EAA provides that no distribution is permissible until one year after the death of the intestate, unless a dependency upon the intestate is established. Further, s. 74 of the EAA provides that the whole or part of the prospective share of “the surplus of the personal estate” can be distributed to a dependent under a court order, or at the discretion of the Public Guardian and Trustee when the Public Guardian and Trustee is acting as Administrator.

6. Payment of Debts

The personal representative is personally liable for payment of creditors if he or she pays the beneficiaries before the debts of the estate. Thus, a personal representative should advertise under s. 38 of the Trustee Act, wait 21 days from the last publication, pay any claims that arise, and then pay the beneficiaries. Having advertised, the personal representative will not face personal liability. But the personal representative would still be responsible for the debts, regardless whether he/she has advertised or not, if the personal representative has knowledge of the creditor's claim prior to distribution.

7. Discharge of the Personal Representatives

When the estate is large, when litigation is involved, or when the estate is insolvent, the personal representative may wish to protect him or herself when the estate is distributed by obtaining a discharge per ss. 26 – 32 of the EAA. This discharge is not generally necessary where a small estate is involved.

VIII. FIRST NATIONS AND WILLS

A student must decide whether or not the client comes within the scope of the Indian Act, R.S.C. 1985, c. I-5. Section 45(3) is the relevant section of the Act; it provides that a will executed by an Indian, as defined by the Act, is of no legal force and effect as a disposition of property until the Minister has approved the will or a court has granted probate pursuant to the Indian Act (Law Society of British Columbia Practice Checklists Manual 3/95).

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

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

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

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

IX. LIVING WILLS

Living wills were never legally valid, although there is a tendency to use them and respect their terms. However, since September 2001, they have been superseded by the Representation Agreement Act, R.S.B.C. 1996, c. 405. If a client's goal is to authorize a third party to make healthcare decisions for the client when the client is mentally incapable, LSLAP students can draft a Representation Agreement. Please see the section on Representation Agreements in **Chapter 15: Guardianship**.

X. WORDING IN WILLS

Students should make an effort to use fewer technical legal terms and more common language. The concepts of Latin maxims may be difficult for some to comprehend and cause unnecessary frustration. Using simple language will reassure clients that what they are attempting to convey will be understood by those who read it.

XI. PENDING CHANGES

The Wills, Estates and Succession Act ("WESA") received Royal Assent on October 29th, 2009. WESA will come into force by regulation. It is expected to be proclaimed in force in late 2011 or early 2012. When proclaimed in force, WESA will repeal and replace the Estate Administration Act, the Probate Recognition Act, the Wills Act, and the Wills Variation Act, as well as amend dozens of other provincial statutes (See Annotated Estates Practice 2011 Edition, Continuing Legal Education Society of BC. Clinician can refer to the "Table of Concordance From Current Statutes to the WESA" in this book.). Important changes have been highlighted below.

1. Applicability

WESA will apply if the deceased dies on or after the effective date of the relevant portion of the Act (ss. 185, 186(1), and 187)

2. Who can make a will

To make a valid will a person must **16 years** of age or older (changed from 19 years). But witness to a will must be 19 years old.

3. Validity of a will

Valid pre-WESA will will not be invalidated by part 4 of WESA. A subsequent marriage will no longer revoke a prior will, but if a will is revoked before part 4 of WESA comes into force, it will not be revived by WESA.

4. Definition of Spouse

The definition of spouse is similar to the current definition applicable under the EAA and the WVA, but there is no longer express reference to "co-habiting" in the definition.

An important change is that two persons cease being spouses of each other for the purposes of making a Wills Variation Act claim if they live separate and apart for at least **2 years** (changed from 1 year) **OR** if a triggering event under Part 5 of the Family Relations Act occurs.

This definition governs a spouse's ability to claim under WVA and will also result in a lapsed gift to a spouse if by definition the beneficiary is no longer a spouse.

5. Intestacy

There are also changes pending to intestate distribution:

- a) There is no longer a life interest for the surviving spouse in the matrimonial home. If a person dies without a will leaving a spouse and surviving descendants, the household furnishings and a preferential share of the intestate estate must go to the spouse.
- b) If all descendants are descendants of both the intestate and the spouse, the preferential share of the spouse is \$300,000, or a greater amount if prescribed.
- c) If all descendants are not common to the intestate and the spouse, the preferential share of the spouse is \$150,000, or a greater share if prescribed.
- d) The residue is divided one-half to spouse and one-half to descendants regardless of the number of descendants.

6. Survivorship Rules

The survivorship rules currently in the Survivorship and Presumption of Death Act will be changed by WESA. Instead of the present presumption that the younger has survived the older in the case of a simultaneous death, the presumption in WESA will be that each person is considered to have survived the other. In the case of a joint tenancy, the property is treated as if it were held as tenants in common. These presumptions will be subject to a contrary intention made in a Will or other applicable instrument. Also if a person does not survive a deceased person by 5 days, that person is deemed to have predeceased the deceased person.

7. Small Estates

WESA will set out a new procedure for dealing with small estates. Small Estates will consist entirely of personal property and will not exceed a prescribed amount. The prescribed amount is anticipated to be \$50,000.00. The prescribed amount and the procedural details will be set out in revisions to the Rules of Court and in the regulations to WESA. An applicant from a prescribed class of applicants will be obliged to provide notice to interested parties and file a small estate declaration with the Court after which the applicant will become the personal representative. No further court order is required and no security need be posted.

Authority under the small estate declaration is terminated where it is determined that the estate no longer qualifies as a small estate (e.g. land is discovered, or the value of the estate is found to exceed the prescribed limit.)

XII. APPENDIX INDEX

- A. WILL INSTRUCTIONS
- B. CHECKLIST
- C. STANDARD WILL WORKSHEET
- D. MUTUAL WILL WORKSHEET
- E. PRECEDENTS

APPENDIX A: WILL INSTRUCTIONS

1. Testator's Name:

Address:
Phone:
Occupation:
Birth date:
Place of birth:

2. Executor's Name:

Relationship:
Address:
Alternate Executor/trix's Name:
Address:

3. Spouse (Together / separated / divorced / deceased / common-law)

Name:
Address:

4. Children

Name:
Birth date:
Address:
Name:
Birth date:
Address:
Name:
Birth date:
Address:

5. Nature of Estate (Approximate Value)

Own home?
Joint tenancy/tenancy in common?
Second home/cottage?
Car?
Savings, RRSPs, etc.?
Institution/broker:
Stocks, bonds?
Business?
Tools of trade?
Household effects?
Personal effects and jewellery?
Insurance (beneficiary):
Pensions (beneficiary):
Other:
TOTAL:

6. Specific Bequests

- a) item
to <name and address>:
- b) item
to <name and address>:
- c) item
to <name and address>:
- d) item
to <name and address>:
- e) Are these gifts dependent on beneficiary surviving the Testator? If yes, state terms: survive 30 days, or survive to age ----- years. If beneficiary fails to survive, is gift to become part of residue, or go to alternate beneficiary (attach list of alternate beneficiaries for 6(a) etc, if necessary)?

7. Cash Legacies

- a) amount
to <name and address>:

8. Residue

How to be divided:

- a) to <name and address>:
- b) to <name and address>:
- c) to <name and address>:

9. If minors receive a gift:

- a) Who is to be Trustee? (name and address)
Relationship to child:
- b) At what age is child to receive gift?
- c) Can money be used for the benefit of the child before he or she becomes entitled absolutely?
Limits:
- d) Re: Investments by Trustee
Is Trustee to be limited to Trustee Act investments/given discretion?
- e) If a child fails to survive to above age, what is to be done with his or her share? Will it be shared by surviving children; be inherited by his or her heirs; or be given to:

APPENDIX B: CHECKLIST

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

1. Is there a competent Testator (testamentary capacity, age)?
2. Were instructions properly taken? Do directions received represent the Testator's true wishes?
3. Are there any previous subsisting wills or codicils?
4. Is a codicil sufficient, or is a new will appropriate? The student should not recommend altering an existing will without a codicil.
5. Is all property adequately dealt with? Have the Testator make a list of assets and any obligations that may bind the estate (agreements, guarantees, etc.).
6. Is there a proper revocation clause in the case of a will, or a clause confirming the last will in the case of a codicil?
7. Have a suitable Executor and alternative Executor been appointed?
8. Has a 30-day survivorship clause with alternate beneficiaries been included?
9. If minor children are or may be involved, is a proper trust created with a Trustee and a guardian appointed?
10. Are all beneficiaries properly identified with proper name, whether adopted, etc? Is a common law spouse, or stepchild properly described (see Section III.F.c.1: Gifts to Children and Section VII: Common Law Spouses and Illegitimate Children)?
11. Does the will properly deal with an existing separated legal spouse or a divorced spouse?
12. Is there any provision made for possible WVA claimants? Is it adequate? If not adequate, is there a statement of the Testator's reasons for not making adequate provisions or an explanation why the Testator feels the provision made is adequate?
13. Is the will, as a whole, internally consistent? Are mistakes and alterations properly dealt with?
14. Is marriage imminent, or has marriage occurred since the Testator's last will?
15. Has there been proper execution followed by proper attestation by disinterested witnesses (see **Section III.B: Formalities: Execution and Attestation**)? Has the will been dated and have the Testator and witnesses initialled the bottom of each page? Is each page identified as the X page of the Testator's will?
16. Has the client been advised to keep his or her will in a safe place known to the personal representative, and to review and possibly update his or her will as circumstances change (death of Executor or beneficiary, marriage or separation, etc., acquisition of property not adequately dealt with in the will)?
17. Has a Wills Notice been filed (or delivered to Testator with completed will)?
18. Is the Testator satisfied with the present beneficiary designations made with respect to any insurance policies, RRSPs, or pensions?

APPENDIX C: STANDARD WILL WORKSHEET

LAST WILL

1. This is the last Will of me, *[name]*, of *[address]*, *[city]*, British Columbia.
2. I revoke all my prior wills and codicils.
3. In this Will:
 - a) “Articles” means all items of personal, domestic, and household use or ornament, and includes automobiles and boats, and accessories to them, that I own when I die;
 - b) “decide” or “decides” means, when referring to a decision of any person, a decision made in that person’s discretion;
 - c) “discretion” means sole and uncontrolled discretion to the extent permitted by law; and
 - d) “Trustee” means both the executor of this Will and the Trustee of my estate and any reference to my Trustee includes all genders and the singular or the plural as the context requires.
4. Headings are inserted for convenience only and do not affect how this Will is interpreted.

EXECUTOR AND TRUSTEE

Appointment

5.
 - a) I appoint *[relationship, i.e. my wife, my brother]*, *[name]*, to be my Trustee.
 - b) If *[name from 5(a)]* is unwilling or unable to act or to continue to act as my Trustee, I appoint *[name]*, of *[address]*, *[city]*, British Columbia, to be my Trustee.

ADMINISTRATION OF MY ESTATE

Trustee to Administer My Estate

6. I give my Trustee all my property of every kind and wherever located to administer as I direct in this Will. In administering my estate, my Trustee may convert or retain my estate as set out in paragraph 12 of this Will.
7. I direct my Trustee to;
 - a) to pay out of my estate:
 - i. my debts, including income taxes payable up to and including the date of my death;
 - ii. my funeral and other expenses related to this Will and my death; and
 - iii. all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing upon my death;

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

Gift of Articles

- b) If *[name of beneficiary]* does not survive me for 30 days:
 - i. to distribute those items of the Articles that remain as equally as is reasonably practicable to/among *[relationship and name, i.e. my son Harry]*;
 - ii. to pay all necessary packing, freight, and insurance costs for delivering any items of the Articles as required by this Will.

RESIDUE OF ESTATE

- 8. I direct my Trustee to give the residue of my estate to *[name]*, if she survives me for 30 days;
- 9. If *[name]* does not survive me for 30 days, to divide the residue of my estate into as many equal shares as there are of my children who are alive at my death, except if any child of mine has died before me and one or more of his or her children are alive at my death, that deceased child will be considered alive for the purposes of the division, and:
 - a) with respect to the share created for any child of mine who died before me and left one or more his or her children alive at my death, divide that share equally among those children of that deceased child.

POWERS OF TRUSTEE

Trust Terms for Those Who Are Under 19

- 10. If anyone becomes entitled to any part of my estate, is under 19, and I have not specified terms in this Will on which my Trustee is to hold that part, I direct my Trustee to hold that part, and:
 - a) pay as much of the income and capital as my Trustee decides for that person's benefit until that person reaches 19;
 - b) add any unused income to the capital of that person's part of my estate and then pay the capital to that person when he or she reaches 19, but if that person dies before reaching 19, I direct my Trustee to pay that person's part of my estate to that person's estate; and
 - c) regardless of paragraph 10(a), and at any time my Trustee decides, pay some or all of that part of my estate to that person's parent or guardian for that person's benefit.

Payment to Parent or Guardian

- 11. When my Trustee makes any payment for the benefit of any person under 19, my Trustee may make that payment to that person's parent or guardian. When the parent or guardian receives that payment, my Trustee is discharged for that payment and need not inquire about how it is used.

Convert, Keep, or Invest

- 12. When my Trustee administers my estate:
 - a) my Trustee may convert my estate or any part of my estate into money or other form of property or security, and decide how, when, and on what terms;

- b) my Trustee may keep my estate, or any part of it, in the form it is in at my death and for as long as my Trustee decides, even for the duration of the trusts in this Will. This power applies even if:
 - i. the property if not an investment authorized under this Will;
 - ii. a debt is owing on the property; or
 - iii. the property does not produce an income; and
- c) my Trustee may invest my estate or any part of my estate in any form of property or security in which a prudent investor might invest.

Allocate Assets of My Estate

- 13. When my Trustee divides or distributes my estate, my Trustee may decide which assets of my estate (including, without limitation, money, or other property, real or personal) to allocate to any share or interest in my estate and the value of each of those assets. Whatever value my Trustee attributes to those assets will be final and binding on everyone interested in my estate.

Receipts

- 14. When my Trustee makes any payment to any organization, society, foundation, association, or corporation, my Trustee may accept the receipt of any person purporting to be the secretary or treasurer or other officer or officers, as the case may be, of that beneficiary. The receipt will discharge my Trustee for that payment and my Trustee need not inquire about how that payment is used.

FUNERAL WISHES

- 15. I want my remains to be *[buried or cremated]* and *[specific requests, i.e. my ashes disposed of as my trustee decides]*.
- 16. I have signed this Will on *[date]*.

We were both present, at the)
 request of *[Testator's name]*,)
 when he/she signed this Will.)
 We then signed as witnesses)
 in his presence and in the)
 presence of each other.)

 Signature of Witness
 Printed Name
 Address
 City
 Occupation

 Signature of Testator

 Signature of Witness
 Printed Name
 Address
 City
 Occupation

APPENDIX D: MIRROR WILL WORKSHEET

LAST WILL

This is the last Will of me, *[name]*, of *[address]*, *[city]*, British Columbia.

1. I revoke all my prior wills and codicils.
2. In this Will:
 - a) “Articles” means all items of personal, domestic, and household use or ornament, and includes automobiles and boats, and accessories to them, that I own when I die;
 - b) “decide” or “decides” means, when referring to a decision of any person, a decision made in that person’s discretion;
 - c) “discretion” means sole and uncontrolled discretion to the extent permitted by law; and
 - d) “Trustee” means both the executor of this Will and the Trustee of my estate and any reference to my Trustee includes all genders and the singular or the plural as the context requires.
3. Headings are inserted for convenience only and do not affect how this Will is interpreted.

EXECUTOR AND TRUSTEE

4. IN THE EVENT that my *[husband/wife]* shall survive me for a period of thirty (30) days, I appoint my said *[husband/wife]* sole Executor/trix and Trustee of this last Will and Testament. After payment of just debts, funeral and testamentary expenses, I give all my estate, both real and personal of every nature and kind and wheresoever situate, including any property over which I may have any power of appointment to my said *[husband/wife]* for his/her sole use absolutely.
5. If my *[husband/wife]* does not survive me for a period of thirty (30) days, or is unable or unwilling to act, I appoint *[relationship, i.e. my son, my brother]*, *[name]*, to be my Executor/trix and Trustee (hereinafter referred to as my “Trustee”).

ADMINISTRATION OF MY ESTATE

Trustee to Administer My Estate

6. I give my Trustee all my property of every kind and wherever located to administer as I direct in this Will. In administering my estate, my Trustee may convert or retain my estate as set out in paragraph *[#]* of this Will.
7. I direct my Trustee to hold that property on the following trusts:

Debts to Be Paid from My Estate

- a) to pay out of my estate:
 - i. my debts, including income taxes payable up to and including the date of my death;

- ii. my funeral and other expenses related to this Will and my death; and
- iii. all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing upon my death, including:
 - A. insurance proceeds on my life payable as a consequence of my death;
 - B. any annuity, registered retirement savings plan, registered retirement income fund, pension, or superannuation benefits payable to any person as a result of my death;
 - C. and gift made by me in my lifetime; and
 - D. any benefit arising by survivorship,

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

Gift of Articles

- b) If *[name of beneficiary]* does not survive me for 30 days:
 - i. to distribute those items of the Articles that remain as equally as is reasonably practicable to/among *[relationship and name, i.e. my son Harry]*;
 - ii. to pay all necessary packing, freight, and insurance costs for delivering any items of the Articles as required by this Will.

RESIDUE OF ESTATE

- 8. I direct my Trustee to give the residue of my estate to *[name]*, if she survives me for 30 days;
- 9. If *[name]* does not survive me for 30 days, to divide the residue of my estate into as many equal shares as there are of my children who are alive at my death, except if any child of mine has died before me and one or more of his or her children are alive at my death, that deceased child will be considered alive for the purposes of the division, and:
 - a) with respect to the share created for any child of mine who died before me and left one or more his or her children alive at my death, divide that share equally among those children of that deceased child.

POWERS OF TRUSTEE

Trust Terms for Those Who Are Under 19

- 10. If anyone becomes entitled to any part of my estate, is under 19, and I have not specified terms in this Will on which my Trustee is to hold that part, I direct my Trustee to hold that part, and:
 - a) pay as much of the income and capital as my Trustee decides for that person's benefit until that person reaches 19;

- b) add any unused income to the capital of that person's part of my estate and then pay the capital to that person when he or she reaches 19, but if that person dies before reaching 19, I direct my Trustee to pay that person's part of my estate to that person's estate; and
- c) regardless of paragraph 10(a), and at any time my Trustee decides, pay some or all of that part of my estate to that person's parent or guardian for that person's benefit.

Payment to Parent or Guardian

11. When my Trustee makes any payment for the benefit of any person under 19, my Trustee may make that payment to that person's parent or guardian. When the parent or guardian receives that payment, my Trustee is discharged for that payment and need not inquire about how it is used.

Convert, Keep, or Invest

12. When my Trustee administers my estate:
- a) my Trustee may convert my estate or any part of my estate into money or other form of property or security, and decide how, when, and on what terms;
 - b) my Trustee may keep my estate, or any part of it, in the form it is in at my death and for as long as my Trustee decides, even for the duration of the trusts in this Will. This power applies even if:
 - i. the property is not an investment authorized under this Will;
 - ii. a debt is owing on the property; or
 - iii. the property does not produce an income; and
 - c) my Trustee may invest my estate or any part of my estate in any form of property or security in which a prudent investor might invest.

Allocate Assets of My Estate

13. When my Trustee divides or distributes my estate, my Trustee may decide which assets of my estate (including, without limitation, money, or other property, real or personal) to allocate to any share or interest in my estate and the value of each of those assets. Whatever value my Trustee attributes to those assets will be final and binding on everyone interested in my estate.

Receipts

14. When my Trustee makes any payment to any organization, society, foundation, association, or corporation, my Trustee may accept the receipt of any person purporting to be the secretary or treasurer or other officer or officers, as the case may be, of that beneficiary. The receipt will discharge my Trustee for that payment and my Trustee need not inquire about how that payment is used.

FUNERAL WISHES

15. I want my remains to be *[buried or cremated]* and *[specific requests, i.e. my ashes disposed of as my trustee decides]*.

16. I have signed this Will on *[date]*.

We were both present, at the)
request of *[Testator's name]*,)
when he/she signed this Will.)
We then signed as witnesses)
in his presence and in the)
presence of each other.)

Signature of Witness

Printed Name

Address

City

Occupation

Signature of Testator

Signature of Witness

Printed Name

Address

City

Occupation

APPENDIX E: PRECEDENTS

Appointing One Guardian

I APPOINT _____ to be the guardian of my infant children upon the death of my _____.

Appointing Two or More Guardians

I APPOINT _____ jointly, or the survivor of them, to be the guardians or guardian, of my infant children upon the death of my _____.

Payment to Guardian

I AUTHORIZE MY TRUSTEE to make any payment, transfer, or delivery of any part of my estate passing to a beneficiary during his or her minority, to the guardian of such beneficiary, AND I DECLARE that the receipt of such payment, transfer or delivery by the guardian shall be a sufficient discharge to my Trustee notwithstanding the minority of the recipient or that the recipient may not be bonded or may be insufficiently bonded.

Specific Disposition of Personal Effects to Spouse

TO DELIVER to my husband/wife, _____, all Articles of personal, domestic and household use or ornament belonging to me at my death including consumable stores and all automobiles, boats and accessories thereto then owned by me.

Cash Legacies to Individuals or Charities, etc.

TO PAY A CASH LEGACY without interest to my mother for her own use absolutely in the amount of \$____, and as soon after my death as my Trustee at his/her discretion considers convenient and practicable, to such of the following named legatees who being individual persons are living (or which being organizations, societies, associations, corporations, or the like, are in existence) at my death (at the expiration of a period of ten (10) days from my death):

- a) to _____ the sum of \$____;
- b) to _____ of _____ the sum of \$____ but in case _____ does not survive me, then the same is to be divided equally among those of _____'s children that survive me;
- c) to _____ of _____ the sum of \$____.

Division of Residue between Children or Their Children (Grandchildren)

to divide the residue of my estate into as many equal shares as there are of my children who are alive at my death, except if any child of mine has died before me and one or more of his or her children are alive at my death, that deceased child will be considered alive for the purposes of the division, and;

with respect to the share created for any child of mine who died before me and left one or more of his or her children alive at my death, divide that share equally among those children of that deceased child.

Distribution of Residue when Youngest Child Attains a Specific Age

so long as any child of mine shall be living and under the age of ____ to keep invested the residue of my estate and to pay the whole of such part of the net income derived therefrom and any amount or amounts out of capital that my Trustee may deem advisable to or for the maintenance, education and benefit of my children or someone or more of them, in such proportions and in such manner as my Trustee in their absolute discretion consider advisable from time to time. Any income not so used in any year shall be added to the residue of my estate and dealt with as part thereof. When there shall no longer be any child of mine living and under the age of ____ or at my death, whichever event last occurs, to divide the said residue of my estate or the amount thereof remaining among my issue then alive in equal shares.

Contemplation of Marriage

This Will is made in contemplation of my marriage to [name specific person]. If, however, the said marriage is not solemnized within three (3) months from the date hereof, then this Will shall take effect as though he/she had predeceased me.

(Check with the client as to applicability of three months and whether a longer period is appropriate.)

Will Read to Testator

1. I have signed this Will on [date].

We were both present, at the)
request of [Testator's name],)
when he/she signed this Will.)
We then signed as witnesses)
in his presence and in the)
presence of each other.)

Signature of Witness

Printed Name

Address

City

Occupation

Signature of Testator

Signature of Witness

Printed Name

Address

City

Occupation