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LAW 582: Wills & Administration

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# Intestate Estates

* + Under the *Wills and Succession Act* ("*WSA*"), "intestate estate" means an estate, or any part of an estate, that is not disposed of by will [s. 58(1)(a)].
    - Where only *part* of an estate is not disposed of by will, it is called a "partial intestacy."
  + There are three major issues when someone dies without a will:
    - Who deals with the funeral?
    - Who is the personal representative?
    - Who inherits the estate?

## Planning the Funeral

* + The *Funeral Services Act* and the *Cemeteries Act* apply to the determination of who has the authority to control the disposition of human remains and the making of funeral arrangements [*EAA*, s. 6].
* Enacted pursuant to the *Cemeteries Act*, the *General Regulation* ("*GR*") specifies that where there is a dispute among a deceased's family or others concerning who has the right to control the disposition of their remains, then the right to control the disposition of those remains is recognized in the following order of priority [s. 11(2)]:
  + - 1. the personal representative designated in the will of the deceased;
      2. the spouse or AIP of the deceased if the spouse or AIP was living with the deceased at the time of death;
         * "Living with the deceased" includes a situation where [*GA*, s. 11(1)(a)]:

the deceased resided before death in a care facility for health reasons and the spouse or AIP continued to provide the support customarily associated with couples intending to continue a relationship, or

the deceased and the spouse or adult interdependent partner were living apart at the time of death due only to circumstances other than a breakdown of their relationship;

* + - 1. an adult child of the deceased;
      2. a parent of the deceased;
      3. a guardian of the deceased under the *Adult Guardianship and Trusteeship Act* or, if the deceased is a minor, under the C*hild, Youth and Family Enhancement Act* or *Family Law Act*;
      4. an adult grandchild of the deceased;
      5. an adult brother or sister of the deceased;
      6. an adult nephew or niece of the deceased;
      7. an adult next of kin of the deceased determined on the basis provided by ss. 67 and 68 of the *WSA*;
      8. the Public Trustee;
      9. an adult person having some relationship with the deceased not based on blood ties or affinity;
      10. the Minister of Human Services.
    - If, under subsection (2)(c)–(h), the right to control the disposition of human remains passes to persons of equal rank, in the absence of agreement between them, the order of priority begins with the eldest person in that rank and descends in order of age [*GR*, s. 11(3)].
    - If the person who, under this section, has the right to control the disposition of human remains or cremated remains is not available or is unwilling to give instructions, that right passes to the next available qualified person [*GR*, s. 11(4)].
    - When a "destitute" or "indigent" person dies, the Minister of Human Services is responsible for the cost of burial or other disposition of that person’s body [*GR*, s. 13(2)].

## Personal Representative

* When a person dies without a will, the will does not name an administrator, or the executors named in a will are not able to act, then the personal representative (called the "administrator") obtains their legal status by virtue of the *Estate Administration Act* ("EAA") and is called the "administrator.".
  + The administrator will usually need to apply for a grant of administration to administer the estate.
  + The personal representative has fiduciary obligations to the beneficiaries, they must account regularly, they must ascertain and address all estate assets and debts, and pay out the estate in accordance with the legislation.
    - Plus, if the funeral or burial for the deceased has not occurred yet, the administrator will need to arrange that.

### Priority Among Applicants

* Under the *EAA*, if no will exists then, on application for a grant and unless the Court orders otherwise, the priority to be given to an applicant for a grant is as follows, in descending order of priority [s. 13(1)(b)]:
  1. to the surviving spouse or AIP;
  2. to a child of the deceased person;
  3. to a grandchild of the deceased person;
  4. to a descendant of the deceased person other than a child or grandchild;
  5. to a parent of the deceased person;
  6. to a brother or sister of the deceased person;
  7. to a child of the deceased person’s brother or sister if the child is a beneficiary under the intestacy;
  8. to the next of kin of the deceased person determined under ss. 67 and 68 of the *WSA* who are beneficiaries under the intestacy and are not otherwise referred to in this clause;
  9. to a person who has an interest in the estate because of a relationship with the deceased person;
  10. to a claimant;
      + "Claimant" means a person with a claim against an estate, but does not include a person whose claim arises because they are (i) a beneficiary, (ii) seeking family property division, (iii) seeking maintenance and support, or (iv) seeking temporary possession of the family home [*EAA*, s. 1(c)].
        - "Beneficiary" means a person who receives or is entitled to receive a beneficial disposition of property under a will or under an intestacy [*EAA*, s. 1(b)].
  11. to the Crown in right of Alberta.
* Between applicants of equal priority, preference must be given, unless the court rules otherwise [s. 13(2)]:
  1. to a resident of Alberta, or
  2. in the case of an application for a grant referred to in subsection (1)(b)(i), to the surviving spouse or surviving AIP of the deceased person who lived with the deceased person immediately or most recently before the deceased person’s death.
* If there are 2 or more persons of equal priority under subs. (1), the Court may grant the authority to administer the estate to one or more of those persons as the Court considers appropriate [s. 13(3)].
* Persons entitled to administer the estate may nominate a person to administer the estate, or any part of it, and the right of the persons nominating passes to their nominee [s. 13(4)].

## Distribution of Intestate Estates

### Distribution Rules

* An intestate estate shall be distributed in accordance with Part 3 of the *WSA* [s. 59].
* **If an individual dies leaving a surviving spouse or AIP but no descendants**, the entirety of the intestate estate goes to the surviving spouse or AIP [s. 60].
  + An individual entitled to a share of the intestate estate as an AIP under Part 3 is not entitled to any further share of the estate in another capacity [s. 64].
* **If an individual dies leaving a surviving spouse or AIP and one or more descendants** [s. 61(1)]:
  1. *If all of the intestate’s descendants are also descendants of the surviving spouse or AIP*, the entirety of the intestate estate goes to the surviving spouse or AIP, or
  2. *if any of the intestate's descendants are not descendants of the surviving spouse or AIP*,
     1. the surviving spouse or AIP is entitled to the greater of the prescribed amount ($150,000) or 50% of the net value of the intestate estate, and
        + Under the *Preferential Share (Intestate Estates) Regulation*, the prescribed amount is $150,000.
          - If the value of the estate is worth less than $150,000, the surviving spouse or AIP is entitled to the entire estate.
        + "Net value of the intestate estate" means the value of the intestate estate after deducting any debts, including debts arising from an order or agreement under the *Family Property Act* and any charges and funeral and administration expenses payable from the estate [s. 58(1)(b)].
     2. the residue of the intestate estate shall be distributed among the intestate's descendants in accordance with s. 66 (see below).
* **If an individual dies intestate leaving both a surviving spouse and a surviving AIP** [s. 62]:
  1. *If the intestate left one or more descendants*, 1/2 of the share provided by s. 61(1)(b)(i) goes to the surviving spouse and the other 1/2 of the share goes to the surviving AIP, or
  2. *If the intestate left no descendants*, 1/2 of the intestate estate goes to the surviving spouse and the other 1/2 of the intestate estate goes to the surviving AIP.
* **If an individual dies leaving no surviving spouse or AIP**, the intestate estate shall be distributed [s. 65]:
  1. **to the descendants of the intestate in accordance with s. 66 *(per stirpes)***, or
     + Under s. 66(1), when a distribution is to be made to the descendants of an individual, the intestate estate shall be divided into as many shares as there are (a) children of that individual who survived the intestate and (b) deceased children of that individual who left descendants surviving the intestate.
       - Each surviving child shall receive one share, and the share of each deceased child shall be divided among their descendants in the manner provided in this section [s. 66(2)].
     + Under a *per stirpes* distribution, a class of distributees take the share which their deceased ancestor would have been entitled to.

Per stirpes 
1/3 
1/6 
Per capita by generation 
1/3 
Living 
219 
Deceased 
2/9 

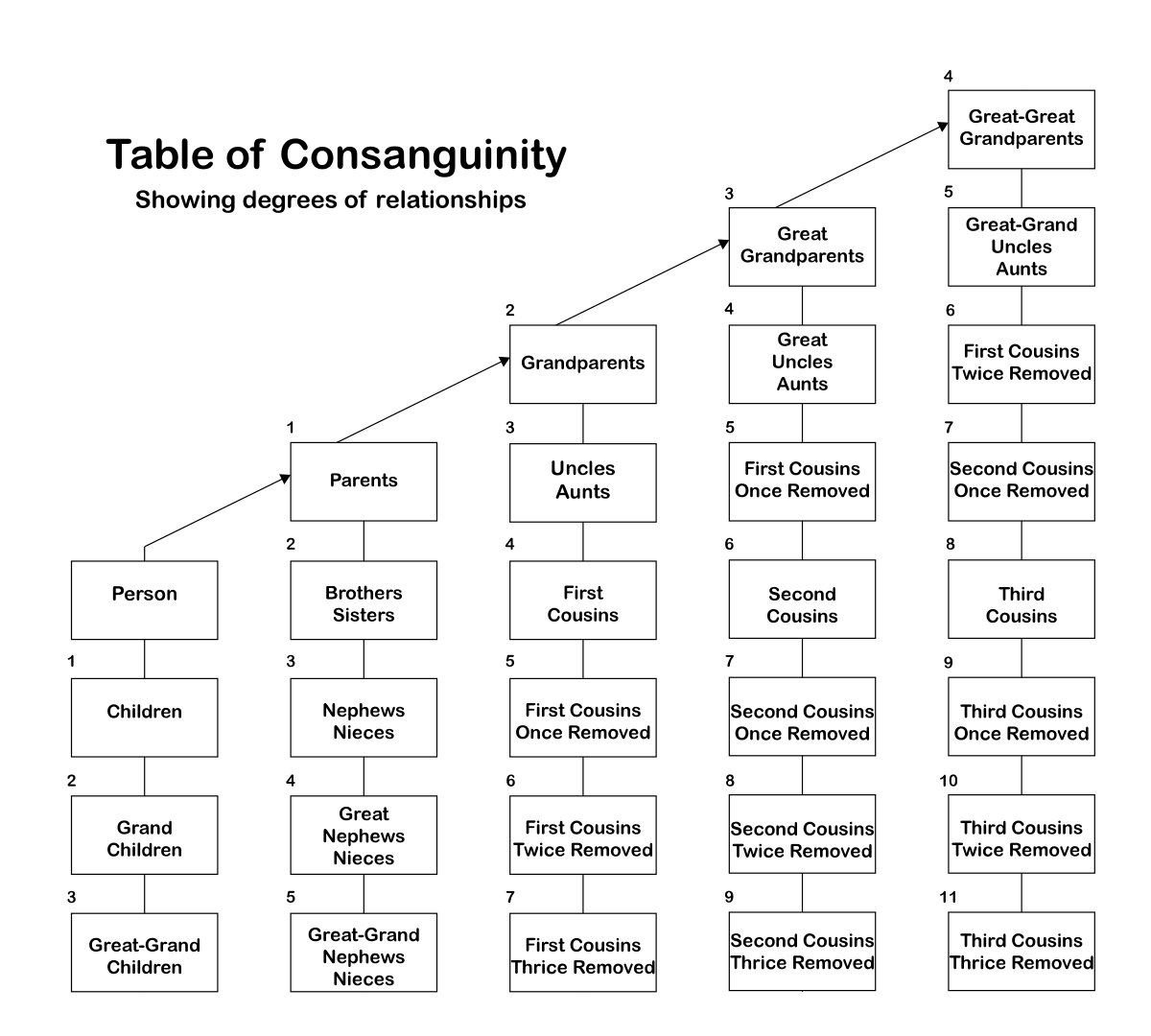
1. ***if the intestate has no descendants, in accordance with ss. 66* (see above) *and 67 (parentelic).***
   * + Under s. 67(1), if an individual dies leaving no surviving spouse, AIP, or descendants, then:
       1. the intestate estate goes to the parents of the intestate in equal shares if both survive the intestate, or to the survivor if one of them has predeceased the intestate,
       2. if there is no surviving parent, the intestate estate goes to the descendants of the parents or of either of them,
       3. if there is no surviving parent or descendant of a parent, but the intestate is survived by one or more grandparents or descendants of grandparents,
          1. 1/2 of the intestate estate goes to the surviving grandparents on one parent’s side, in equal shares, or if there is no surviving grandparent on that side, to the descendants of those grandparents, and
          2. 1/2 of the intestate estate goes to the surviving grandparents on the other parent’s side or to their descendants in the same manner provided in subclause (i),

but if there is only a surviving grandparent or descendant of a grandparent on one parent’s side, the entire intestate estate goes to the kindred on that side in the same manner as provided in subclause (i), or

1. if there is no surviving parent, descendant of a parent, grandparent or descendant of a grandparent, but the intestate is survived by one or more great‑grandparents or descendants of great‑grandparents,
   * + - 1. 1/2 of the intestate estate goes to the surviving great‑grandparents on one parent’s side, in equal shares, or if there is no surviving great‑grandparent on that side, to the descendants of those great‑grandparents, and
         2. 1/2 of the intestate estate goes to the surviving great‑grandparents on the other parent’s side or to their descendants in the same manner as provided in subclause (i),

but if there is only a surviving great‑grandparent or descendant of a great‑grandparent on one parent’s side, the entire intestate estate goes to the kindred on that side in the same manner as provided in subclause (i).

* Individuals of the 5th or greater "degree of relationship” to the intestate are deemed to have predeceased them, and any part of the intestate estate to which those individuals would otherwise be entitled must be distributed to the individuals of a closer degree of relationship to the intestate, if any, who are entitled [s. 67(2)].
* “Degrees of relationship” between an individual and the intestate are to be determined by counting upward from the intestate to the nearest common ancestor of the intestate and the individual, and then downward to the individual [*WSA*, s. 68(a)].



* Under Part 3, descendants of the half‑kinship inherit equally with those of the whole kinship in the same degree of relationship to the intestate [s. 68(b)].
* Subject to s. 11 of the *Public Trustee Act*, *if there is no individual entitled to receive an intestate estate under Part 3, the Unclaimed Personal Property and Vested Property Act applies* to the estate [s. 69].
  + Under s. 15 of that Act, property owned by an intestate in Alberta vests in the Crown.

### Terminology

* **Surviving Spouse**: an intestate is *deemed* to have predeceased the intestate (i.e., they are deemed to not be a "surviving spouse") if the intestate and the surviving spouse [*WSA*, s. 63(1)]:
  1. had been living separate and apart for more than 2 years at the time of the intestate's death,
     + This does not apply to a surviving spouse who reconciled with the intestate if the reconciliation was subsisting at the time of the intestate’s death [s. 63(2)].
     + i.e., if the deceased had a spouse that, at the time of their death, they had been separated from for more than 2 years, the spouse is not deemed to be a "surviving spouse" for the purposes of distribution under Part 3 of the *WSA*.
  2. are parties to a declaration of irreconcilability under the *Family Law Act*, or
  3. are parties to an agreement or order in respect of their property or other family issues which appears to have been intended by one or both of them to separate and finalize their affairs in recognition of their marital break‑up.
* **Adult Interdependent Partner**: defined in the *Adult Interdependent Relationships Act* ("AIRA").
  + A person is the AIP of another if [s. 3(1)]:
    1. They've lived with the other person in a relationship of interdependence for a continuous period of not less than 3 years (or if there is a child of the relationship, a period of some permanence), or
       - A "relationship of interdependence" is a relationship outside of marriage in which two persons share one another's lives, are emotionally committed to one another, and function as an economic and domestic unit [s. 1(1)(f)].
         * In determining whether 2 persons function as an economic and domestic unit, all the circumstances must be taken into account, including [s. 1(2)]:

whether or not the persons have a conjugal relationship;

the exclusivity of the relationship;

the conduct of the persons in respect of household activities and living arrangements;

the degree to which the persons hold themselves out to others as an economic and domestic unit;

the degree to which the persons formalize their legal responsibilities toward one another;

the extent to which contributions have been made by either person to the other or to their mutual well‑being;

the degree of financial dependence or interdependence;

the care and support of children;

the ownership, use and acquisition of property.

* + - * + A relationship of interdependence does not exist where one person provides the other with domestic support for consideration or on behalf of another person [s. 4(2)].
    1. The person has entered into an AIP agreement with the other person [s. 3(1)].
       - An AIP agreement is invalid if induced by fraud, duress, or undue influence, if one of the parties lacked the capacity to understand the nature of the agreement, or if the parties were not intending to live together in a relationship of interdependence when the agreement was entered into [s. 8(1)].
       - A person cannot enter an AIP agreement if they are a party to an existing one, if they are married, or if they are a minor (unless they are 16 or older and have parental consent) [s. 7(2)].
* Persons related by blood or adoption can become AIPs, but only by entering into an AIP agreement [s. 3(2)].
* Minors can become AIPs unless the other partner is related to them by blood or adoption [ss. 4(1), 6].
* A person cannot at any one time have more than one AIP [s. 5(1)], but a married person can have an AIP if they are no longer living with their spouse [s. 5(2)].
  1. One ceases to be the AIP of another person if [s. 10(1)]:
     1. The AIPs enter into a written agreement providing evidence that they intend to live separate and apart without the possibility of reconciliation.
     2. The AIPs live separate and apart for more than one year and one or both of them intend that the relationship not continue.
        + The period of living separate and apart is not considered to be interrupted if the AIPs have resumed living together for a period of 90 days or less in an attempt to reconcile [s. 10(2)].
     3. The AIPs marry each other or one of them marries a third party.
     4. The AIP enters into an AIP agreement with a third party.
     5. One or both of the AIPs have obtained a declaration of irreconcilability under the *Family Law Act*.
* **Descendants**: all lineal descendants of an individual through all generations [*WSA*, s. 1(1)(e)].
  1. *Includes children born outside of marriage* ("illegitimate" children); under s. 7(6) of the *Family Law Act*, all distinctions between the status of a child born inside or outside marriage are abolished.
  2. *Includes adopted children*; under s. 1(3) of the *WSA*, if an individual is a parent of a child within the meaning of Part 1 of the *Family Law Act*, they are a parent of the child for the purpose of determining whether the child is an ascendant or descendant of another individual.
     + Under s. 7(2)(c) of the *Family Law Act*, a person specified as a parent of the child in an adoption order is deemed to be a parent of that child.
  3. *Includes children in the womb* (*en ventre sa mere*) at the time of the deceased's death and are later born alive [*WSA*, s. 58(2)].
     + The legal status of children *conceived* after the death of one of their parents using storage of reproductive materials and assisted reproduction is uncertain.
  4. *Does not include step-children* (see *Peters Estate*, below).

#### *Peters v Peters Estate*, 2015 ABCA 301

Facts:

* Ileen Peters died intestate in 2013. Her spouse, Lester Peters, predeceased her in 2009. They had one biological child, the respondent Gordon Peters. Lester Peters also had four daughters from a previous marriage, the stepdaughters of Ileen Peters. The appellant Marette Peters is one of the four stepdaughters. She sought an equal division of the net proceeds of the estate among the four stepdaughters and the respondent.

Procedural history:

* The chambers judge dismissed the appellant's application. He held that a stepchild was not a “descendant” for the purposes of ss. 65 and 66 of the *Wills and Succession Act* ("*WSA*").

Issue and holding:

* Is a stepchild a "descendent" for the purposes of ss. 65 and 66 of the *WSA*, entitling the appellant and her siblings to a portion of Ileen's estate? **NO**

Analysis:

* Under s. 65(a) of the *WSA*, if an individual dies leaving no surviving spouse or AIP, the intestate estate shall be distributed to the *descendants* of the intestate in accordance with s. 66.
  + "Descendants" is defined in the *WSA* as "all lineal descendants of an individual through all generations" [s. 1(1)(e)].
    - While "lineal descendant" is not defined, *Black’s Law Dictionary* defines it as "a blood relative in the direct line of descent-children, grandchildren and great grandchildren."
* Under s. 66 of the *WSA*, the intestate estate shall be divided into as many shares as there are *children* of that individual who survived the intestate, and each surviving child shall receive one share.
  + While the *WSA* does not define "child," other statutes do; e.g., in the *Fatal Accidents Act*, "child" includes stepsons and stepdaughters [s. 1(a)].

Rationale: (The Court)

* Stepchildren continue to be excluded from inheriting the estate of an intestate stepparent.
  + If the legislature had intended to provide that stepchildren should have the same rights as natural and adopted children when a parent died intestate, it could have drafted the *WSA* in a similar manner to the *Fatal Accidents Act*.
  + Intestate succession legislation in Alberta has historically excluded stepchildren from inheriting the estate of an intestate stepparent.
  + According to the ALRI, the relationships between stepchildren and stepparents are too variable to support a presumption that a majority of stepparents intend their stepchildren to inherit in their estate.
    - When the *WSA* was drafted, it closely mirrored the recommendations made by the ALRI and supports the position that the*WSA* was not intended to alter the scheme as it had previously existed.

Notes:

* Step-children and blended families occur very often, and the *WSA* doesn’t address these distributions well.
  + For this reason, blended families should always consult an estate practitioner to ensure their family is taken care of per their intention.

## Issues with Intestacies

### *Coyle v Coyle (Estate of)*, 2005 ABQB 436

Facts:

* Douglas Coyle died in 2002 without a will. He left behind an estranged wife from whom he had separated in December 1997. He also left behind two sons from his first marriage, Chris and Michael Wilkinson. Ms. Coyle had commenced a matrimonial property action in 1998. Mr. Coyle failed to defend and was noted in default. The parties subsequently discussed settlement, but nothing was resolved before Mr. Coyle's death. Ms. Coyle then discontinued the action in 2004 without leave of the Court. As such, by operation of survivorship law, Ms. Coyle became the owner of the bulk of Mr. Coyle's estate. The Wilkinson sons seek to set aside the discontinuance. If that occurs and the property is divided between Ms. Coyle and their father’s estate, then Mr. Coyle’s matrimonial assets will be considered estate assets.

Issue and holding:

* Should the court set aside the discontinuance of action filed in the divorce and matrimonial property action so that the matrimonial property action can proceed? **NO**

Analysis:

* Under r. 225(1) of the old *Rules of Court*, a plaintiff may at any time *before entry for trial* discontinue their action by notice in writing, and thereupon shall pay that defendant's taxed costs of the action.
  + The purpose of this rule appears to be to ensure that the defendant is protected in respect of taxable costs incurred in defending the action.
* Under r. 225(3), a plaintiff may not discontinue any action without leave of the court.
  + Leave is required under this rule in recognition that, *once proceedings have reached an advanced stage*, the defendant may have an interest in the case proceeding.

Rationale: (Greckol J)

* The Wilkinson sons have not established any basis on which the Court could set the discontinuance aside.
  + A party who neglects to defend a matrimonial property action or to file a demand for notice and counterclaim risks a discontinuance of the action.
  + While it may be preferable if a surviving spouse cannot discontinue the action without the consent of the estate of the deceased spouse or leave of the court, legislative amendment would be required to achieve that result.
  + To resist the discontinuance, the Wilkinson sons would have to show that Mr. Coyle did not deliberately allow himself to be noted in default, that he moved promptly to set aside the noting in default after learning of it, and that there is an arguable ground of defence.
    - Given the passage of time between Mr. Coyle being noted in default and his death, there can be no valid excuse for his failure to make any attempt to set aside the noting in default.
    - In any event, there is no evidence that there is a valid defence to the matrimonial property action, in which Ms. Coyle simply sought a just and equitable distribution of the matrimonial property.

### *Estate of Johnson, Rick Allen (Re)*, 2017 ABQB 399

Facts:

* Rick Allen Johnson died intestate in February 2013. His surviving spouse, Jane Mastinggal-Johnson (the respondent), is granted a life estate in his property ("the property") under the *Dower Act*. Rick had two children of a previous marriage, Derrick Johnson and Christine Johnson (the appellants). The respondent is claiming the entire value of Rick's estate based on deducting the value of her life estate from the estate for distribution. The value of the property is estimated at $270,000, and the respondent capitalizes the value of her life estate at $190,265, making the amount of property available for distribution $79,735. As a result, less than $150,000 remains in the estate, meaning that the respondent claims an entitlement to the entirety of the estate. The appellants dispute the respondent's valuations and call on the Court to recognize the interest of the surviving spouse to half of the estate and to both of the descendants of the deceased in a 1/4 interest of the estate, subject to the life estate of the surviving spouse.

Issues and holding:

* Is the respondent entitled to deduct the capitalized value of the life estate from the net value of the property, so that the value is below the prescribed amount of $150,000? **NO**

Analysis:

* Under s. 61 of the *WSA*, a surviving spouse is entitled to the greater of the prescribed amount ($150,000) or 50% of the net value of the estate.
  + If the value of the estate exceeds $150,000, the residue of the estate is distributed among the intestate’s descendants where they are not the descendants of the surviving spouse.
* Under s. 18 of the *Dower Act*, a devolution on the death of a married person dying intestate is, as regards the homestead of the married person, subject to a life estate for the spouse of the married person.
  + On the death of the life tenant, the interest in the land will revert to the estate.
  + Under s. 2 of the *WSA*, in the event of a conflict between the legislation respecting a spouse’s rights in respect of property after the death of the other spouse, the *Dower Act* prevails.

Rationale: (Hopkins J)

* There is no method for valuing a surviving spouse's dower interest; as such, the legislature did not intend for the life estate to be valued, other than for damages for the disposition of the homestead without consent.
  + That said, this is not an appropriate case to read into legislation a means by which a surviving spouse may value her life estate to defeat the scheme of distribution of an intestacy to the other holders of the interest in remainder.
* The respondent's actuarial valuation of her dower interest is artificial and speculative.
  + Given the uncertainties in determining the life expectancy of a surviving spouse, it is doubtful that any attempt to sell a surviving spouse's dower interest in land would attract any purchaser.
* If the *Dower Act* conferred a right to capitalize a dower right then this, coupled with an entitlement to remain in the house, would mean that the respondent would effectively benefit twice from the life estate.

Notes:

* The respondent was entitled to a life estate in the property under the *Dower Act*, with a remainder interest of 1/2 granted to the respondent, 1/4 granted to Derrick Johnson, and 1/4 granted to Christine Johnson.

# Planning for Death: Wills

* A will is a testamentary document that expresses a deliberate or fixed and final intention as to the disposal of the writer's property upon his death; a will includes [*WSA*, s. 1(1)(k)]:
  1. a codicil (i.e., a document amending an existing will),
  2. a writing that
     1. alters or revokes another will,
        + A will has no legal effect until the testator dies; therefore, a testator may amend, alter, or revoke their will at any point during their life, provided they have capacity.
     2. appoints a personal representative, or
        + When a will appoints a personal representative to administer the testator's estate, that person is called the "executor."
     3. on the death of the testator, confers or exercises a power of appointment, and
  3. any other writing that is a testamentary disposition.
* A testamentary gift may be classified as a *devise*, a *bequest*, or a *legacy*.
  1. A *devise* is a testamentary gift of land, the beneficiary of which is known as a "devisee."
  2. A *bequest* is a testamentary gift of personal property, excluding money.
  3. A *legacy* is a gift of money, the beneficiary of which is known as a "legatee."
* Besides a will, there are other ways to dispose of property on death, including *inter vivos* gifts, gifts *mortis causa* (i.e., gifts made in contemplation of death), deeds and *inter vivos* trusts, joint ownership (i.e., the right of survivorship), life insurance, pensions, beneficiary designations, etc.

## Who Can Make a Will?

* + Under s. 13 of the *WSA*, the following individuals can make, alter, or revoke a will:
    - Adults (18 or older) with mental capacity.
    - Minors (under 18) in the military with mental capacity.
    - Minors (under 18) with a spouse/AIP and with mental capacity.
    - Minors (under 18) with mental capacity and with permission of the court.
      * Before granting permission, the Court must be satisfied that [*WSA*, s. 36(2)]:
        1. the individual understands the nature and effect of the proposed will and the extent of the property disposed of by it,
        2. the proposed will accurately reflects the individual’s intentions, and
        3. it is reasonable in all the circumstances that the order should be made.
      * Permission may be granted on any conditions that the Court deems appropriate [*WSA*, s. 36(3)].
      * A will made pursuant to an order under this section (a) must be made in accordance with s. 15 or as the Court may direct and (b) is invalid if it does not conform to the order [*WSA*, s. 36(4)].

## Estate vs. Non-Estate Assets

* An individual may by will dispose of all property to which they are entitled at law or in equity at the time of their death [*WSA*, s. 9(1)].

### Estate Assets

* A will can dispose of an interest in two types of property:
  1. *Solely owned property*, which occurs when someone owns 100% of property.
  2. *Co-owned property*, which is when two or more people (i.e., tenants in common) each have a separate interest in the same property.
     + Tenants in common do not have a right of survivorship; when one tenant in common dies, their interest forms part of their estate and passes in accordance with the will or intestacy rules.
* The types of property that *cannot* be distributed by will are *jointly owned property* and *beneficiary designated assets*.

### Jointly Owned Property

* Joint ownership occurs when two or more people together own the same interest in property.
* Surviving joint tenants have a right to take the interest of a pre-deceasing joint tenant (i.e., the right of survivorship).
  + Once a joint tenant dies, their interest in the property is extinguished; *it does not form part of their estate*.
    - Clients who own property jointly should be advised about the effects of the right of survivorship.
    - However, if two or more joint tenants die at the same time or in circumstances rendering it uncertain which of them survived the other(s), then they are deemed to have held the property as tenants in common [*WSA*, s. 5(2)].
  + e.g., A owns a house jointly with B. A's will says that they wish to leave their interest in the house to their children. But, when A dies, their interest in the house will be extinguished and B will become the sole owner of the property. The house will not form part of A's estate to be distributed to their children.

### Beneficiary Designated Assets

* If an asset has a designated beneficiary, it will pass to that beneficiary on the death of the testator *without forming part of the testator's estate*.
  + When a testator names their spouse or AIP as a designated beneficiary, *a divorce judgment or breakup of an adult interdependent relationship does not revoke the designation.*
    - By contrast, under s. 25(1) of the *WSA*, if a testator gets divorced or ceases to be the AIP of an individual, then any gift of property to the testator's ex-spouse/ex-AIP in their will is deemed to have been revoked.
  + Clients who own assets with designated beneficiaries should be informed about the consequences of beneficiary designations.

#### Life Insurance Beneficiaries

* Under s. 660(1) of the *Insurance Act* ("*IA*"), an insured may by contract or declaration designate their estate or a beneficiary as one to whom insurance money is payable.
  + "Declaration" means an instrument signed by the insured [s. 637(g)], *including a will*.
  + An insured may also, by contract or declaration, appoint a trustee for a beneficiary [*IA*, s. 663(1)].
    - Creating an insurance trust allows for greater flexibility in distributing insurance proceeds.
    - To make insurance trust funds creditor-proof, the testator must specify that the trust is free-standing, separate and apart from the testator's estate (see *Goldstein*).
* If a beneficiary is designated for life insurance, *any money payable to the beneficiary is not part of the estate of the insured* and is not subject to the claims of the insured's creditors [*IA*, s. 731(1)].
* If a beneficiary predeceases the person whose life is insured and no disposition of the share of that beneficiary is provided for in the insurance contract or by a declaration, the share is payable [*IA*, s. 664(1)]:
  1. to the surviving beneficiary,
  2. if there is more than one surviving beneficiary, to the surviving beneficiaries in equal shares, or
  3. *if there is no surviving beneficiary, to the insured's estate*.
  + If an insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survived the other, the insurance money is payable as if the beneficiary predeceased the insured [*IA*, s. 685].

##### *Reference re Goldstein Estate*, 1984 ABCA 67

Facts:

* Under s. 284 of the *Insurance Act*, unless a contract or declaration declares otherwise, if the person whose life is insured and a beneficiary die in circumstances rendering it uncertain which of them survived the other, the insurance is payable in accordance with s. 263(1) as if the beneficiary had predeceased the person whose life is insured. Section 263(1)(c) states that if a beneficiary predeceases the person whose life is insured, the share is payable, if there is no surviving beneficiary, to the insured's estate.
* Allen Goldstein and his wife, Paula, died in a motor accident on June 13, 1981. The circumstances were such that it is uncertain which of them survived the other. At the time of his death, Mr. Goldstein was the owner of five life insurance policies which had a total value of $1,345,000. These policies designated Paula as beneficiary. In April 1981, the deceased executed a will containing a clause (Clause VI), which states:

*I WILL AND DECLARE that all insurance policies on my life … which may be payable to my wife … shall be held … in trust for my wife and children upon the like trusts, terms and conditions and administered in the like manner as I in this Will have directed with respect to the remaining property of my estate.*

Procedural history:

* The chambers judge found that, with Clause VI, Mr. Goldstein intended to create an insurance trust separate from the remainder of his estate. The appellants dispute this. As they point out, the application of s. 284 of the *Insurance Act* in this case deems the beneficiary wife to have predeceased Mr. Goldstein. As a result, at the time of Mr. Goldstein’s death, the life insurance policies were not "payable to his wife in accordance with the terms thereof" within the meaning of Clause VI. Instead, they reverted back to Mr. Goldstein or to his personal representative under s. 263(1)(c) of the *Insurance Act*.

Issue and holding:

* Are the insurance policies in question covered by Clause VI, and are thus separate from the rest of Mr. Goldstein's estate? **YES**

Analysis:

* The court's task is to interpret the will in a manner that carries out the intentions of the testator.
  + In reading a specific clause of a will, the Court must regard not only the express written terms of the clause, but also look to indications of the intention of the testator.
  + In determining the intention of the testator as it may have been expressed in the will, one examines not only the circumstances existing at the date of his death but at the date of the making of the will.

Rationale: (Harradence J)

* The effect of Clause VI was to create a valid insurance trust for the benefit of the children.
  + Since Clause VI constitutes a valid declaration as defined under s. 240(e) of the *Insurance Act*, it may effectively change the beneficiary of the insurance policies from that which is mandated under s. 263(1).
  + The phrase “life insurance … payable to my wife in accordance with the terms thereof” is used merely for identification and is not to be taken literally, to hold otherwise would frustrate the testator's intent.
    - The phrase was not placed in the clause as a literal instruction which was to change the disposition of the proceeds in the event of circumstances which came to pass in the present case.
  + At the time of the execution of the will, Mr. Goldstein owned five insurance policies which were payable to his wife; it seems obvious that these were the policies to which Mr. Goldstein intended to place into an insurance trust.
* From the wording of Clause VI, the insurance trust was meant to be separate from the residue of the Goldstein estate.
  + In *Re MacInnes*, an analogous clause in a will stated that life insurance proceeds were to be payable to the testator's executor "in trust for the use and benefit of my said wife and mother upon the same trusts, terms and conditions as if the said proceeds had formed part of the residue of my estate."
    - The ONSC held that use of the phrase "as if" suggested that the testator was saying "These moneys are not part of the residue, but they are to be administered as if they were."

Notes:

* Drafters of wills need to be clear that an insurance trust created by a will is operating outside of the testator's estate in order to make those trust funds creditor-proof.

#### Beneficiaries Under Plans

* Under the *WSA*, participant in a plan (i.e., pension plan, RRSP, TFSA), may designate a person to receive a benefit payable under the plan on the participant's death [s. 71(2.1)]:
  1. by an instrument signed by the participant or by another individual on the participant’s behalf, at the participant’s direction, and in the participant’s presence, or
  2. by will.
     + That said, a designation in a will is effective only if it refers to the plan either generally or specifically [*WSA*, s. 71(5)].
     + A later designation revokes an earlier designation to the extent of any inconsistency [*WSA*, s. 71(7)].
       - e.g., if a plan designates a beneficiary, but a subsequently executed will designates a different beneficiary, the beneficiary who was last designated wins.
* Substitute decision-makers (i.e., trustees/attorneys) cannot designate beneficiaries for incapacitated individuals under plans, but they can renew, replace, or convert a current plan policy [*WSA*, s. 71(2.2)–(2.4)].

#### Tax Considerations

* Under the *Income Tax Act* ("*ITA*") when someone dies, they are deemed to have disposed of their capital property and received the proceeds of disposition equal to the fair market value of the property immediately before death [s. 70(5)(a)].
  + The proceeds of this deemed disposition are used to calculate capital gains, which are the difference between the original purchase price and the market value at the time of death.
    - Half of these capital gains are included in the deceased's income and taxed at the applicable rate.
  + However, this deemed disposition does not apply in two instances:
    1. Assets left to a spouse or common law partner are automatically rolled over [*ITA*, s. 70(6)].
       - i.e., the deemed disposition does not apply to property transferred to a spouse or common law partner; thus, the property being rolled over will not be taxed until the death of the surviving spouse or common law partner.
       - "Common law partner" means a person who has cohabited with the deceased in a conjugal relationship for at least 12 months [*ITA*, s. 248(1)].
    2. The capital gain on the deceased's principal residence is not taxable.

### Ademption and Abatement

* + *Ademption* occurs when a bequeathed asset ceases to become part of an estate at the time of the testator's death by reason of the destruction or extinction of that asset.
    - Where a testator purports, by will, to dispose of property that the testator does not own, (a) the disposition is void and (b) any rights that the owner of the property has as a beneficiary under the will are not affected by the testator’s purported disposition [*WSA*, s. 111(1)].
      * This does not affect the right of a testator to make a disposition of property that is conditional on a disposition by the beneficiary of property that is owned by the beneficiary (i.e., a mutual will) [*WSA*, s. 111(2)].
    - e.g., a testator makes a testamentary gift "to A, my blue truck," but then sells that truck during their lifetime. If this occurs, the gift of the blue truck fails.
  + *Abatement* refers to the reduction of a legacy, general or specific, as a result of the estate being insufficient to pay all debts and legacies.
    - e.g., a testator gifts "to A, $100,000," but there is only $60,000 in the estate.

## Formalities

### Introduction

* Formalities prescribed for making a will provide a safeguard not only against forgery and undue influence, but also against hasty or ill-considered dispositions (Feeney).
  + The formalities emphasize the importance of the act of making a will and serve as a check against improvident action, and provide evidence of a person’s testamentary intentions (Feeney).
* Traditionally, the law required strict compliance with formal requirements; if these formalities were not met, the will was declared invalid (*MacNeill Estate*).
  + This led Courts to awkward positions where they knew that the testator had a testamentary intention, but the will, on its face, was valid and had no ambiguity about it (see e.g., *Conner v Bruketa Estate*).
  + However, the *WSA* has provided the court with the power to excuse non-compliance with formalities in certain instances.

#### *Conner v Bruketa Estate*, 2010 ABQB 517

Facts:

* In 1977, John Bruketa designated his parents as the beneficiaries entitled to his pension and life insurance benefits. Bruketa met Shirley Conner in 1994. They were extremely close companions and spent considerable time together. It was Bruketa's intention to take care of Conner financially and gift her his pension and insurance benefits in the event of his death. In 2000, Bruketa attended with a Calgary lawyer, whom he written gave instructions for the disposition of his estate. The instructions specifically state: "*All pension plans, benefits and any life insurance will go to Shirley Conner as the designated beneficiary*." At the top of the page, and in the presence of Bruketa, the lawyer wrote "John Bruketa" and "Shirley Conner." The lawyer prepared the will and Bruketa signed it in the presence of witnesses. Bruketa died in 2003, predeceasing both of his parents. His last will and testament names Shirley Conner as executrix, makes three specific bequests, and designates Conner as the sole beneficiary of the estate. While the will was mostly in accordance with Bruketa's written instructions, *it did not contain a provision designating Conner as the beneficiary of either the life insurance policy or the pension plan*. The lawyer who prepared it testified that this was because Bruketa told her that Conner was already his designated beneficiary.
* Conner argued that Bruketa clearly intended that she receive the disputed assets upon his death, and that the court should strive to give effect to Bruketa's wishes. She advanced two alternate grounds. First, she argues that Bruketa's hand-written instructions to the lawyer constitute a declaration designating a pension or life insurance beneficiary. Second, she submits that the beneficiary designation was omitted from Bruketa’s will and that omission should be remedied by the Court.

Issue and holding:

1. Is Ms. Conner the designated beneficiary of Bruketa's life insurance policy and pension plan? **YES**
2. In the alternative, should Bruketa's will be interpreted so as to provide that Conner receives the pension and life insurance benefits of Bruketa? **YES**

Analysis:

* Under s. 47(2)(a) of the *Trustee Act* (which governs pension plan designations), a participant may designate a person to receive a benefit on their death by an instrument signed by the participant or signed by another person in the participant's presence and at the participant's direction.
* Under s. 574(1) (now s. 660(1)) of the *Insurance Act*, someone whose life is insured may by declaration designate a beneficiary to receive insurance money.
  + Section 554(e) (now s. 637(g)) defines "declaration" as an instrument signed by the insured in which they designate or alter or revoke the designation of a beneficiary as one to whom insurance money is to be payable.
* In interpreting a will, *the objective of the court is to determine the precise disposition of the property actually or subjectively intended by the testator*.
  + This approach requires the court to consider all the circumstances surrounding the testator's life and all the things known to them at the time they made their will and up to and until their decease.
* The Court may "complete the testator's will" by supplying words that have been omitted if it is satisfied that an omission has occurred and it is able to discover what the testator meant.

Rationale: (Clark J)

1. Conner is the designated beneficiary of Bruketa's life insurance policy and pension plan.
   * Bruketa's handwritten instructions were an instrument under s. 47(2)(a) of the *Trustee Act*.
     + The lawyer wrote "John Bruketa" on the document in Bruketa's presence.
     + While the lawyer printed Bruketa's name on the document, "signature" is broadly defined to include printing.
   * Bruketa's handwritten instructions were a declaration for the purposes of s. 574(1) of the *Insurance Act*.
     + The case law offers a variety of examples where relatively informal documents were found effective to alter a designation of beneficiary.
     + While Bruketa's instructions were not signed by him, in *Sharom v Sharom Estate*, an Ontario court held that a person may alter a beneficiary designation with even an *unsigned* document where the undisputed evidence shows that they intended to name a particular person as beneficiary.
       - That said, the evidence in this case is clear and unequivocal: Bruketa intended Conners to be the beneficiary of his life insurance and pension plan.
2. Bruketa's will should be interpreted so provide that Conner receives the pension and life insurance benefits.
   * A testator's written instructions to their lawyer is admissible proof that there has been an omission in his will with respect to the disputed benefits.
   * The initial beneficiary designated under the insurance policy and the pension plan in 1977 was Bruketa's father; however, Bruketa did not name his father as a residuary beneficiary under his will.

Notes:

* The court in this case had a problem: there was clear and convincing evidence that Bruketa wanted Conner to receive the assets, but the will does not contain that direction.
* In this case, Clark J stated that a solicitor owes a duty of care to the beneficiaries under a will as an extension of the duty of care to the solicitor’s own client.
  + It is the solicitor’s responsibilities that the intended gift is properly drafted so as to give effect to the testator’s intention.
* As this case indicates, testators do not always read the documents drafted for them to ensure that they reflect their intentions.
  + Thus, lawyers should be careful to bring the contents of a freshly drafted will to the attention of the testator.

### Requirements of a Valid Will

* To be valid, a will [*WSA*, s. 14]:
  1. must be made in writing,
     + Although the *WSA* does not define "in writing," the *Interpretation Act* says that "writing," "written," or any similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form [s. 28(1)(jjj)].
  2. must contain a signature of the testator that makes it apparent on the face of the document that the testator intended, by signing, to give effect to the writing in the document as the testator’s will, and
     + A testator may sign a will, other than a holograph will, by having another individual sign on their behalf, at the testator’s direction, and in the testator’s presence [*WSA*, s. 19(1)].
       - The person signing may either sign the testator's name or his or her own name or make a mark for the testator (Feeney).
     + Under the *Electronic Transactions Act*, an electronic signature does not suffice for a will [s. 7(1)(a)].
     + A will is not invalid because the testator’s signature is not placed at the end of the will if it appears that the testator intended by the signature to give effect to the will [*WSA*, s. 19(2)].
     + A testator is presumed not to have intended to give effect to any writing that appears below the testator’s signature [*WSA*, s. 19(3)].
     + A testator’s signature does not give effect to any disposition or direction added to the will after the will is made [*WSA*, s. 19(4)].
     + Clients should be encouraged to sign their usual signature instead of some "fancy" signature that does not accord with their other signatures.
  3. subject to any order made under s. 37 (validation), must be made in accordance with s. 15 (formal wills), s. 16 (holograph wills), or s. 17 (military wills).

#### Formal Wills

* Under s. 15 of the *WSA*, a formal will may be made by a writing signed by the testator if (a) the testator makes or acknowledges his or her signature in the presence of 2 witnesses who are both present at the same time and (b) each of the witnesses signs the will in the presence of the testator.
  + An individual may be a witness if they have mental capacity [*WSA*, s. 20(1)].
  + An individual who signs a will on behalf of a testator cannot be a witness [*WSA*, s. 20(2)].
  + An individual is not disqualified as a witness only because they are (a) an executor of the will, (b) a beneficiary under the will, or (c) the spouse or AIP of an executor or a beneficiary [*WSA*, s. 20(3)].
    - However, under s. 21(1) of the *WSA*, dispositions by will to the following people are void:
      1. an individual who acts as a witness,
      2. an individual who signs the will on behalf of the testator,
      3. an interpreter who provided translation services in respect of the making of the will, or
      4. the spouse or AIP of an individual described in clause (a), (b) or (c).
    - But, the dispositions referred to in s. 21(1) are *not* void if [*WSA*, s. 21(2)]:
      1. it is a payment of remuneration, including professional fees of a PR or of an interpreter who provided translation services in respect of the making of the will,
      2. in the case of a disposition to a witness, if the will is made under s. 16 (holograph wills) or s. 17 (military wills) or if the testator’s signature is witnessed by at least 2 other individuals, or
      3. *if the Court validates the disposition by order under s. 40*.
         * Under s. 40(1) of the *WSA*, the court may, on application, order that a disposition is not void if the Court is satisfied that:

the testator intended to make the disposition to the individual despite knowing that the individual was an individual described in s. 21(1), and

neither the individual nor the individual’s spouse or AIP exercised any improper or undue influence over the testator.

* + - * + An application under s. 40(1) must be commenced by filing Form C1 accompanied with an affidavit in Form C2 [*Surrogate Rules*, s. 70.1(1)].

An application cannot be made more than 6 months after the date the grant of probate or administration is issued [*WSA*, s. 40(2)], but the court may order an extension [*WSA*, s. 40(3)].

* + A will is not invalid only because [*WSA*, s. 20(4)]:
    1. a witness did not know at the time of witnessing the signature that the document was a will,
    2. a witness was at the time of witnessing the signature, or afterwards became, incapable of proving the making of the will, or
    3. more than 2 individuals witnessed the signature of the testator.

#### Holograph Wills

* Under s. 16 of the *WSA*, a holograph will may be made by a writing that is *wholly in the testator’s own handwriting* and signed by the testator without the presence or signature of a witness or any other formality.
  + Holograph wills are the most litigated wills because they often are not drafted properly.

##### *Re Forest* (1981), 121 DLR (3d) 552 (SKQB)

Facts:

* The deceased died leaving as his last will and testament a document that contained the following:

*I GIVE, DEVISE AND BEQUEATH all my Real and Personal Estate of which I may die possessed in the manner following, that is to say:*

*I To my niece Marie Kryzanowski of N. Battleford [$10,000.00] to assist in the education of her children.*

*II To my nephew Joseph Forest of N. Bfd $5,000.00.*

*III To my nephew Ray Forest of Saskatoon, $5,000,00 to assist in the education of his children.*

*IV To my niece at Winnipeg (my late brother Foul Henry’s daughter $5,000.00.*

*V To the retarded childrens association of Rosetown Sask. $2,000.00.*

*VI To my niece Julia in Quebec (my late brother Philippes daughter) $2,000.00.*

*VII To the senior citizens organization of Rosetown Sask. $2,000.00*

*All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto my sister Dalvina Robinson of Independence Oregon and my brother Leo Joseph of Laval P.Q. to be divided equally share and share alike.*

*AND I nominate and appoint Joseph Forest of North Battleford and K.A. Werner c/o Royal Bank Rosetown to be the executors of this my Last Will and Testament.*

The deceased used a printed will form and, in his handwriting, filled in all the blanks in the body of the form. The underlined portions represent the deceased's handwriting. The deceased signed the form at the end.

Issue and holding:

* Did the deceased create a valid holograph will? **NO**

Analysis:

* A document which is partly written and partly printed cannot by any possibility be holograph, if the printed parts are of any importance at all.
  + This is because, under the *Wills Act*, a holograph will is a will *wholly* in the handwriting of the testator and signed by him.
* Where a printed form with blanks if filled in with the handwriting of the deceased, it must be possible to find valid a testamentary document *on the written words alone* (i.e., can it be affirmed, cutting out the words in print, that there is still enough to make a good and intelligible will?).
  + e.g., in *Carmichael and Carmichael et al*, the court held a partially completed printed form to be a valid will because the handwritten portion was extensive and detailed, being enough to make a perfectly good and intelligible will.
  + Further, the handwritten words must include words of disposition; if the dispositive clauses are printed, then a complete will cannot be made out from the handwriting portions.
* If the handwritten words contain the essentials of a will, and the printed words are non-essential or superfluous, then effect will be given to the *whole* instrument as a holograph testamentary writing.
  + i.e., if one can find a testamentary intention from the handwritten words standing alone, then the document may be read as a whole to give effect to the testator’s intention.

Rationale: (Hall JA)

* Here, the handwritten portions of the document are insufficient to create a valid and intelligible will, as they do not contain the necessary words of disposition.
  + The word “to”, prefacing the names, is insufficient to indicate testamentary intention; as it may reflect an intention to give *inter vivos* or bequeath, there must be something more to indicate such intention.
  + Plus, if only the handwriting is admitted to probate in this case, the document, in addition to not appointing an executor, would not dispose of the residue of the estate (which is the most important and comprehensive part of the deceased’s intent).
* While the deceased likely intended to make a valid will, he did not carry his intention validly into effect, because he did not comply with the things required by the *Wills Act* to make a valid holograph will.

#### Codicil

* The technical requirements for a codicil are the same as those for a will, and therefore you can have formal codicils and holograph codicils, so long as they abide by the requirements of the *WSA*.
* Codicils are rarely done anymore, as we have word processing which simply allows for a new will.
* When codicils are not stored in the same place as the will, this can cause confusion.

### Alteration, Revocation, and Revival

#### Alterations

* Under s. 22(1) of the *WSA*, any writing, marking, or obliteration made on a will (a) is presumed to be made after the will is made and (b) is valid as an alteration of the will only if:
  1. in the case of a will made under s. 15 (i.e., a formal will), the alteration is made in accordance with that section,
  2. in the case of a will made under s. 16 (i.e., holograph will), the alteration is made in accordance with that section, or
  3. the court makes an order under s. 38 validating the alteration.
     + Under s. 38, the court may order that a writing, marking, or obliteration is valid as an alteration if it is satisfied on clear and convincing evidence that it reflects the testamentary intentions of the testator and was intended by the testator to be an alteration of their will (see e.g., *Smith Estate*).
* If a writing, marking, or obliteration renders part of the will illegible, and is not made in accordance with s. 22(1), the court may allow the original words of the will to be restored or determined by any means it considers appropriate [*WSA*, s. 22(2)].
* A will may be altered by another will made by the testator [*WSA*, s. 22(3)].

##### *Smith Estate*, 2012 ABQB 677

Facts:

* Thomas George Smith executed a valid formal will in 2003. At the time, he was residing with his common law spouse Loretta Joan Charpentier. The pair separated in 2008, and Smith sought to make alterations to his 2003 will. Smith made handwritten alterations which removed Charpentier as the sole residual beneficiary and instead named his four children and Charpentier’s granddaughter, Jasmine Molloy. These alterations were neither initialed by the deceased, nor signed by witnesses. The personal representative now seeks direction concerning the validity of handwritten alterations made to the will.

Issue and holding:

* Under s. 22 of the *WSA*, were Smith's alterations to his 2003 will valid? **YES**

Rationale: (Gates J)

* The altered will does not comply with s. 15; Smith did not place his signature beside the alterations as an indication of acknowledgement of the alterations, nor did two witnesses.
* However, s. 38 can save Smith's alterations; they were an expression of Smith's intention to make a deliberate and final disposition of his property upon his death.
  + Affidavit evidence indicates the alterations were made in Smith's own handwriting.
  + The alterations were made to an otherwise valid will, indicating that Smith understood the nature of the testamentary disposition as final.
  + The prior dissolution of the relationship between Smith and Charpentier makes it more reasonable that Smith would wish to make alterations to his will and had informed others of his intentions to do so.
    - Plus, prior to his death, Smith and Charpentier had a property settlement arrangement, and Charpentier did not contest this application.

Notes:

* After signing a will, and before releasing it to a testator, counsel should inform the testator about the law regarding alterations.
* Lawyers should generally not make alterations to a will, because they risk doing it wrong; they should instead complete a new, fresh will and take the time to do it properly.

#### Revocation

* A will or part of a will may be revoked only by [*WSA*, s. 23(1)]:
  1. the testator making another will,
     + This is the best way to revoke a will; it allows the testator to ensure that their intentions are carried out, avoids an intestacy, and is clear.
  2. the testator making, in accordance with the provisions of this Part governing the making of a will, a writing that declares an intention to revoke the earlier will,
     + On application, the court may order that a writing is valid as a revocation of a will, despite that the writing was not made in accordance with ss. 15, 16 or 17, if the Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be a revocation of his or her will [*WSA*, s. 37].
  3. the testator destroying the will with the intention of revoking it, or
  4. the testator having another individual destroy the will in the testator’s presence, at the direction of the testator given with the intention of revoking the will.
* The revocation of a will does not revive any earlier will [*WSA*, s. 23(3)].
  + If someone revokes their will and does not execute a new one, they will die intestate.
* No will or part of a will, regardless of when it was made, is revoked by [*WSA*, s. 23(2)]:
  1. a marriage of the testator that occurs on or after February 1, 2012,
     + If the marriage happens *before* February 1, 2012, a will is revoked by the marriage *unless* the will specifically states that it was made in contemplation of a pending marriage [*Wills Act*, s. 17].
  2. the testator entering into, on or after February 1, 2012, an AIP agreement, or
     + If the AIP agreement is executed *before* February 1, 2012, a will is revoked by the execution *unless* the will specifically stated that it was made in contemplation of entering into an AIP agreement [*Wills Act*, s. 17.1].
  3. any other change in circumstances of the testator, *except to the extent that s. 25(1) applies*.
     + Under s. 25(1), if, after a testator makes a will, their marriage is terminated by a divorce judgment or annulled, or the testator ceases to be the AIP of an individual, then unless the Court finds that the testator had a contrary intention, any provision in the will is deemed to be revoked that:
       1. gives a beneficial interest in property to the testator’s former spouse or AIP,
       2. gives a power of appointment to the testator’s former spouse or to the individual, or
       3. appoints the testator’s former spouse or AIP as an executor, a trustee, or a guardian of a child under the *Family Law Act*.

##### *Cordell v Shiels Estate*, 2016 ABQB 218

Analysis: (Macklin J)

* When a will has been shown to have been last in the custody of the testator and cannot be found at her death, a presumption arises that the testator destroyed the will with the intention of revoking it.
  + The presumption does not apply if the court is convinced that the will existed after the testator's death.
  + The presumption can be rebutted with evidence that establishes, on a balance of probabilities, that the testator did not intend to revoke the will (i.e., that the will was lost and not destroyed).
    - The burden of proof is, in most circumstances, on the party asserting that the will was in fact lost and not destroyed (but see *Goold Estate*, below).
  + The burden on the person who is trying to rebut the presumption is very heavy.
    - In *Brimicombe v Brimicombe Estate*, the NSCA suggested that "strong evidence" is required to rebut the presumption of revocation, though the burden remains a balance of probabilities.
    - From *Sorkos v Cowderoy*, the test for proving a lost will involves:
      1. Proving due execution of the will;
      2. Tracing possession of the will to the date of death, and afterwards if the will was lost after death;
      3. Rebutting the presumption that the will was destroyed by the testator with the intention of revoking it; and
      4. Proving the contents of the lost will.
  + In *Haider v Kalugin*, the BCSC set out a list of some of the factors that may be considered in determining whether the presumption of revocation has been rebutted:
    - Whether the terms of the will itself were reasonable;
    - Whether the testator continued to have good relationships with the beneficiaries up to the date of death;
    - Statements made by the testator which confirm or contradict the terms of distribution set out in the will;
    - Where personal effects of the deceased were destroyed prior to the search for the will being carried out;
    - The nature and character of the deceased in taking care of personal effects;
    - Whether there were any dispositions that support or contradict the terms of the copy sought to be probated;
    - Whether the testator was one to store valuable papers, and whether they had a safe place to store them.

##### *Goold Estate (Re)*, 2016 ABQB 303

Analysis: (Yungwirth J)

* The presumption that a lost will has been destroyed with the intention of revoking it depends upon the testator having the capacity to revoke their will at the time that they are presumed to have destroyed it.
  + i.e., a person without capacity lacks the capacity to revoke their will.
  + Where a testator becomes mentally incapable after executing the will, the burden shifts to the party alleging revocation to show that the destruction occurred while the testator was of sound mind.

Notes:

* The burden of proof is, in most circumstances, on the party asserting that the will was in fact lost and not destroyed; but, where a person becomes mentally incapable/unstable, the burden shifts to the party alleging that the testator destroyed the will to prove that the destruction occurred while the testator had capacity.

#### Revival

* A will or part of a will that has been revoked in any manner may only be revived by making a new will, whether by re‑execution or otherwise, in accordance with the provisions the making of a will and in a manner that shows an intention to give effect to the will or part that was earlier revoked [*WSA*, s. 24(1)].
  + Instead of reviving a revoked will, it is often clearer to just create a new will.

### Validation

* On application, the court may order that a writing is valid as a will, despite that the writing was not made in accordance with ss. 15, 16 or 17, if the Court is satisfied on clear and convincing evidence that the writing *sets out the testamentary intentions of the testator and was intended by the testator to be his or her will* [*WSA*, s. 37].
  + Section 37 applies to the formalities in s. 15 (witnesses), s. 16 (holograph wills), and s. 17 (military wills), but *not the formalities listed in s. 14* (i.e., the will must be in writing and signed by the testator).
  + Under s. 11 of the *Alberta Evidence Act*, in an estate action, an opposed or interested party shall not obtain a judgment on that party’s own evidence in respect of any matter occurring before the death of the deceased person, *unless the evidence is corroborated by other material evidence*.
  + An application under s. 37 must be commenced by filing Form C1 accompanied with an affidavit in Form C2 [*Surrogate Rules*, s. 70.1(1)].

#### *Bennett et al v Gray / Bennett et al v Toronto General Trusts Corporation*, [1958] SCR 392

Facts:

* On January 6, 1949, the deceased, Mary Winifred Gray, executed a formal will which left (a) a life interest in her estate to her husband, J.J. Gray, and (b) upon his death, to her four children. J.J. Gray predeceased his wife in January 1949. In August 1952, Mrs. Gray consulted her lawyer, Mr. Dysart. She expressed dissatisfaction with her will and an intention to make a new one. She informed him she would write to give him the particulars of what she wanted in her new will. In September 27, 1952, Mrs. Gray wrote Mr. Dysart the following letter, which she signed:

*When I was in your offis about a month ago I Promised to let you know how I would like my will to be made out. … the two boys are provided for and do not expect any thing from me. to Dixie … the sum of [$30,000] my house if I own a house at the time of my death Also all my furniture and my Car Also my Clothing and fur Coats.—to my daughter Jacquline Dinnia Gray … [$10,000]. and to my Grand daughter, Joyce Gray, I leave [$5,000], and I also want to leave to my dearly Beloved Grand daughter Judith Ann Bennett [$15,000] and my summer home … and also the furnitur in the cottage my watch or any Jewelery and my diamond rings—To the Reverend A. X. MacAulay [$1,000] to have holey Masses offered to God for the repose of my soul.*

*Dear Mr. Dysard I will be in Winnipeg in a few days I will call you…*

On May 29, 1953, Mrs. Gray saw Mr. Dysart. Mrs. Gray said that the guest house, which according to her letter was intended for her granddaughter Judith Ann Bennett, was to go to her daughter Dorothy. The question of residue had never been discussed and the question of the executors had yet to be settled. When Mrs. Gray and Mr. Dysart met in the future, the topic of the will was not broached. Mrs. Gray died on April 5, 1956, without a formal will other than the one of January 6, 1949.

Issue and holding:

* Is the letter written and signed by Mrs. Gray on September 27, 1952 a valid holograph will? **NO**

Analysis:

* A letter wholly written and signed by a deceased person may constitute a valid holograph will if it contains a deliberate or fixed and final expression of intention as to the disposal of the writer's property upon his death.
  + A document which is an instruction for a more formal document may be testamentary if it contains a record of the deliberate and final expression of the testator's wishes with regard to their property.
  + The burden is upon the party setting up such a paper as a will to show either by its contents or by extrinsic evidence that it is testamentary in nature.
    - *N*ote: the standard of proof is a balance of probabilities.

Rationale: (Fauteux J)

* Read as a whole and according to its ordinary and natural sense, the letter is merely preliminary to a will; it is clear that Mrs. Gray did not want that letter to operate as a will.
  + In her letter, she commits both the finality of her decisions and that of the form in which they should eventually be expressed to *future* consultation with Mr. Dysart.
* Mrs. Gray failed to pursue what she indicated in her letter she contemplated doing subject to consultation with Mr. Dysart, though there were many opportunities to do so.
  + The most reasonable explanation for this failure is the abandonment of her original intention.
* No decision was ever reached as to the choice of an executor, the disposal of the residue of the estate was never considered, and Mrs. Gray never decided to instruct Mr. Dysart to proceed with the preparation of the will, notwithstanding that both were perfectly aware that her formal will was still in existence.
* There were, intervening facts affecting the contemplated apportionment of her estate; these changes are cogent evidence of a still deliberating mind.
  + There was a change of mind as to the disposal of Mrs. Gray's guest-house, of which Mrs. Gray apprised Mr. Dysart on May 29, 1953.
  + There was also, in April 1954, a gift of $10,000 Mrs. Gray made to her daughter Dorothy.

#### *Lindblom (Estate) v Worthington*, 1999 ABQB 796

Facts:

* Lindblom met with his lawyer, Jan W. Kozina, to give him instructions to prepare a will. Those instructions were in the form of a holograph document executed by Lindblom, which read:

Text, letter

Description automatically generated

The holograph document was written in lead pencil, but Kozina also made fountain pen notations on it. Kozina then prepared a formal will, leaving Lindblom's entire estate to the same people named in the holograph document. The numbers indicated in the purported holograph document are not identical to those set out in the unsigned formal will, as most of the percentages have been doubled, and the gift to Margareta Carlson was tripled. Kozina sent Lindblom the formal will and instructed him to sign it. Kozina had no subsequent contact with Lindblom. An unexecuted formal will was found amongst his personal papers, but an executed formal will has never been found. Lindblom never notified Kozina of further instructions regarding his will. There is no evidence of any subsequent document reflecting testamentary intention on the part of Lindblom. There is nothing to indicate Lindblom ever abandoned his intentions set out in the holograph document. Lindblom died in 1997.

Issues and holding:

1. Do the fountain pen notations on the holograph will render the whole document invalid? **NO**
2. Is Lindblom's holograph will a valid testamentary instrument? **YES**

Analysis:

* If the body of the instrument contains any printed or typed matter, or words in another hand, the will may be wholly invalid if the part not written by the testator is essential to the will, because then it cannot be said that it was not intended by the testator to be part of his will.
* To be testamentary in nature, a document must reflect a deliberate or fixed and final expression of intention to dispose of property on death (*animus testandi*).
  + In making such a determination, the Court may consider *all* circumstances existing at the time the will was made, and known to the testator, to determine the intentions of the deceased as to what shall operate as, and compose his will.
  + A document which provides instruction for a more formal document may be admitted to probate if it is clear that it contains a record of the deliberate and final expression of the testator's wishes with regard to his property.

Rationale: (Lee J)

1. The offensive writing is superfluous or incidental, and that the document is capable of standing by itself without the fountain pen notations.
2. Lindblom intended that the holograph document express his wishes as to what was to be done with his property in the event of his death, and that it operate on his death.
   * Even though the percentages in the unexecuted formal will are different from those in the holograph document, the holograph document confirms Lindblom's fixed and final intention to benefit the persons listed in the holograph document *at least*to the extent indicated therein.
     + Had the formal will excluded or added certain beneficiaries, or had it substantially changed the manner of disposition, then things would be different.
   * The fact that a handwritten document was used to provide instructions for the drafting of the unexecuted formal will does not preclude it from admission to probate (see *Bennett*, above).
   * It is not determinative that Lindblom may not have thought he was writing a "will" when he drafted the holograph document.
   * While no words of disposition are contained in the holograph document, it is noteworthy that Lindblom had extreme difficulty writing English.
     + This fact distinguishes this case from many others where lack of dispositive language was fatal to a holograph document.
   * While the holograph document does not dispose of the entire estate, this is not determinative of the question of whether the holograph document expresses a fixed and final intention.

#### *Popowich Estate*, 2012 ABQB 665

Facts:

* In December 2007, Sheri Popowich moved to Italy and married Giovanni Capasso. In December 2009, Sheri made a formal will in which she gave roughly 1/2 of her estate to Giovanni and roughly 1/2 to her mother, Patricia Popowich. In January 2009, Sheri returned to Canada, and in February 2010, she added her mother as a joint holder of her chequing and savings accounts. In June 2010, Sheri sold her house in BC and directed her lawyer to deposit the proceeds of the sale into her bank account. In July 2010, Sheri committed suicide. A lengthy handwritten note to Sheri's mother was found alongside her body. In it, she explained being "stuck in a circle of pain" and repeats that her mother should not blame herself. She referred to the love and care her mother lavished on her and to the love she had for Giovanni. Over the course of the 9 pages, Sheri also says the following:

*Take my money and do things for yourself . . . . Even selling the house, money, nothing can bring me any feeling of peace . . . Thank you for dealing with the house - but the sale of the house doesn’t make any difference . . .*

Issues and holding:

* Was the letter written by Sheri a valid holograph will, with the result that it superseded her formal will? **NO**
  1. Did the letter meet the technical requirements of a holograph will? **YES**
  2. Did Sheri have testamentary capacity? **YES**
  3. Is the suicide note, in its nature, a testamentary document? **NO**

Analysis:

* To have testamentary capacity, at the moment a person purports to make a testamentary disposition, they must know who were the natural objects of their bounty and what their property was.
  + A person who is insane may have flashes of lucidity sufficient to allow for testamentary capacity.
* To be testamentary, a document must reflect a deliberate or fixed and final expression of intention to dispose of property on death.

Rationale: (Veit J)

* Although meeting all technical requirements for a holograph will, and although she herself had testamentary capacity when she wrote it, Sheri's handwritten letter was not testamentary in nature; Sheri's formal will therefore continues to be the governing testamentary document.
  1. The suicide note was entirely in Sheri’s own handwriting and signed by her and that it was written shortly before her death; this satisfies the technical requirements of a holograph will.
  2. Though Sheri was deeply troubled when she wrote the note, she understood who the natural objects of her bounty were (through references to her mother and husband) and what her property was (through references to the proceeds of her house).
  3. The suicide note does not reflect a deliberate or fixed and final expression of intention to dispose of property on death; rather, the words contained in it are “precatory” (i.e., they represent a wish that Sheri expresses about what her mother should do with her legacy from her daughter).
     + Sheri doesn’t tell her mother to take all her money, period; rather, in the context of the note, she only tells her mother that she should not feel badly about spending the money on herself rather than, for example, sharing it with Sheri’s Dad, or spending it on some program for suicidal adults.
       - A plausible paraphrase of the comment about taking the money is, “Do things for yourself with the money I left you”.
     + In the note, Sheri gave no indication of an actual or even implied revocation of her formal will; she was only trying to provide comfort to her mother in an excruciatingly painful situation.
     + The loving references to her husband rebut any argument that, in the suicide note, Sheri was trying to take away from her husband the interest which she had given to him in her formal will.

## Challenging a Will

### Introduction

#### The Burden of Proof

* Under the *Alberta Evidence Act*, in an action by or against an estate, an opposed or interested party shall not obtain a judgment on their own evidence in respect of any matter occurring before the death of the deceased person *unless* that evidence is corroborated by other material evidence [s. 11].

##### *Vout v Hay*, [1995] 2 SCR 876

Facts:

* Clarence Hay died in June 1988. He was 81 years old, unmarried, and lived alone. He left a will dated July 1985 under which Sandra Vout was the major beneficiary. Vout was 29 years old at the time of the trial and is unrelated to the deceased, but had been his friend in the last few years of his life and assisted him with various chores. The 1985 will was prepared by a legal secretary in the office of Vout's parents' lawyer. The secretary who prepared the will testified that she received her instructions from Vout. Vout then came into the law office with Clarence. As Clarence read the will, the secretary testified that he hesitated and had a "quizzical" look on his face. He then looked at Vout, who said "Yes, that's what we discussed. That's what you decided." Clarence then signed the will in Vout's presence. According to the trial judge, Vout has since not been entirely forthright about her participation in the instruction and execution of the will.
* The respondents, the surviving members of the Hay family, challenged the validity of the 1985 will. They also presented a will dated April 1966. In it, Clarence left everything to his brother Earl Hay and his sister Florence Parr, now deceased, in equal shares.

Procedural history:

* The trial judge noted the suspicious circumstances under which the 1985 will was executed: the testator went to the lawyer recommended by Vout, Vout's lies were suspicious, and Vout was present and coaching the testator during execution of the will. Nonetheless, he found that the deceased was "old and eccentric, but alert, smart, independent, determined, and most important, not easily influenced." The judge thus admitted the will into probate, concluding that Clarence had testamentary capacity, that the will was duly executed, and that there was no undue influence.
* In short reasons, the ONCA held that the trial judge focused too much on Clarence's mental competence and not enough on whether there had been suspicious circumstances surrounding the execution of the will.

Issues and holding:

* Did the trial judge err in finding that the will had been properly executed? **NO**
* Did the Court of Appeal err in overruling the trial judge's findings of fact in the absence of an overriding or palpable error on the part of the trial judge? **YES**

Analysis:

* The person propounding the will has the onus of proving due execution, knowledge and approval by the testator of the will, and that the testator had testamentary capacity at the time of making the will.
* Upon proof that a will was duly executed with the requisite formalities, after having been read over by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
  + Where suspicious circumstances regarding knowledge or approval arise out of the circumstances surrounding the preparation of the will, this presumption is spent and the propounder of the will assumes the burden of proving that knowledge and approval were present on a balance of probabilities.
    - The extent of the proof required is proportionate to the degree of the suspicion in the circumstances of each case.
  + Where suspicious circumstances tending to call into question the mental capacity of the testator are present, this presumption is spent and the propounder of the will assumes the burden of proving testamentary capacity on a balance of probabilities.
    - The extent of the proof required is proportionate to the degree of suspicion in the circumstances of each case.
  + If suspicious circumstances tend to show that the free will of the testator was overborne by acts of coercion or fraud, this presumption is spent and:
    1. The proponent of the will assumes the burden of proving knowledge and approval and testamentary capacity on a balance of probabilities, and
    2. Those attacking the will bear the burden of proving, on a balance of probabilities, that fraud or undue influence were present.
       - i.e., the onus entirely lies upon those impugning the will to affirmatively prove that its execution was procured by the practice of some undue influence or fraud upon the testator.
       - To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would too often defeat the wishes of the testator.
* Suspicious circumstances may be raised by:
  + Circumstances surrounding the preparation of the will;
  + Circumstances tending to call into question the capacity of the testator; or
  + Circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.

Rationale: (Sopinka J)

* The trial judge considered the issue of suspicious circumstances; notwithstanding them, he made a positive finding that the testator knew and approved of the contents of the 1985 will.
  + The trial judge made neither an error of law nor any palpable or overriding error with respect to facts.

Notes:

* The concept of knowledge and approval is distinct from, but related to, testamentary capacity.
  + One can have testamentary capacity but, due to undue influence or mistake, did not know of and approve of the contents of a will.
    - It is possible to know and approve of only part of a will (*Russell v Fraser*).
  + But if someone lacks testamentary capacity, they will often not know and approve of the wills contents.
* While the court presumes that the testator knows and approves of the contents of the will once the propounders prove that it was properly executed, this view may be evolving.
  + In *Conner v Bruketa*, the court seemed to suggest that the review of a will by the testator is not conclusive of knowledge and approval of its contents; it is a question of fact as to whether the disputed language, or in this case the lack thereof, was brought to the testator's attention and adopted.

#### Suspicious Circumstances

* In *Stewart v McLean*, the court said that suspicious circumstances are not circumstances that create a general suspicion that something unsavoury may have occurred, but rather circumstances which create a specific and founded suspicion that the testator may not have known and approved of the contents of the will.
* In *Kozak Estate*, Renke J cited *Royal Trust Corp of Canada v Saunders* for factors that can support an inference of suspicious circumstances:
  + The extent of physical and mental impairment of the testator around the time the will was signed;
  + Whether the will in question constituted a significant change from the former will;
  + Whether the will in question generally seems to make testamentary sense;
  + The factual circumstances surrounding the execution of the will;
  + Whether a beneficiary was instrumental in the preparation of the will.

### Capacity

#### Testamentary Capacity

##### *Re Weidenberger (Estate)*, 2002 ABQB 861

Facts:

* Louis Weidenberger was born in Hungary on in 1910. He immigrated to Canada in 1948. Beginning in June 1981, he was a resident at the Alberta Hospital, diagnosed with paranoid schizophrenia. A Certificate of Incapacity ("COI") was issued for him under the *Mental Health Act* in September 1981. The Public Trustee was granted trusteeship of Louis' estate and, in 1982, it sold his house. The COI was renewed annually until May 1987, when an order issued cancelling it. Attempts to send Louis back into the community failed, either because he would not leave the hospital or because he would exhibit behaviour not conducive to successful reintegration. He exhibited symptoms of paranoia and expressed distrust and anger towards the Public Trustee, most specifically with respect to the sale of his home. As such, the COI was reinstated in October 1987 and remained in effect until Louis' death on July 10, 1995. After his death, a handwritten document, dated December 6, 1987 and signed "Mr. Louis Weidenberger," was found amongst Louis' personal belongings. He carried it on his person from its execution until his death. It directs that all of his possessions are to be left to his family in Hungary. There is no direct evidence as to Louis' state of mind at the time that the document was made.
* By order on June 1, 2000, the beneficiaries named in the will were found to form a class with identical interests. They are the applicants in this application. The Public Trustee and Maria Weidenberger (Louis' sister) are the respondents.

Issue and holding:

* Is the will a valid holograph will? **YES**
* If yes, did the deceased have testamentary capacity to execute the will? **YES**

Analysis:

* Under s. 7 of the *Wills Act* (now s. 16 of the *WSA*), a testator may make a valid will wholly by their own handwriting and signature, without formality, and without the presence or signature of a witness.
* A consideration of a deceased's capacity must begin with the presumption that, *once the formal requirements for a will are satisfied, there is testamentary capacity, unless well-grounded suspicions are proven*.
  + This is based on the doctrine that testators must be free to dispose of their property as they wish and the courts should not frustrate those wishes without just cause.
  + A testator need not necessarily possess all their mental faculties in the highest degree, or in as great a degree as they may formerly have; instead, capacity depends on whether a testator *generally*:
    1. Understands the nature and extent of his property,
    2. Knows the persons who are the natural objects of his bounty (i.e., his family),
    3. Understands the testamentary provisions he is making (i.e., that he is making provisions to dispose of his property on death),
    4. Appreciates the above factors in relation to each other, and
    5. Has formed an orderly desire as to the disposition of his property (i.e., has a plan that helps them execute their goals).
  + Where any doubt exists, the propounders of a will have the onus of proving testamentary capacity on a balance of probabilities.
    - i.e., a person seeking to uphold the testamentary instrument must establish testamentary capacity in circumstances that cast doubt on the mental capacity of the deceased to make a will.
    - The extent of the proof required must be proportionate to the level of suspicion, which must be determined on a case by case basis.
      * Where there is evidence that the testator suffered from mental illness, the circumstances surrounding the will must be carefully scrutinized and the onus will be heavy.
    - The relevant period during which to properly assess a deceased's testamentary capacity is *at the time that the disputed will was created*.
      * What the deceased's state of mind was one year before or one year after the date of the document is not overly relevant; a deceased may only have temporary periods of rational and lucid behaviour, and in such moments, they may competently dispose of their estate.
    - Cognitive impairment or confusion alone is not grounds for declaring a person incapable of making a will.
      * If there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.
        + The Court must treat the mentally ill with dignity and respect by allowing them the right to manage their own affairs to the extent to which they are capable.
        + Capacity may suffice to dispose of property by will and yet very inadequate to manage other business, such as making contracts for the sale/purchase of property.
      * If there is cognitive impairment, it must be shown that the delusion had, or was calculated to have, an influence on testamentary dispositions.
        + The question is not whether a delusion could possibly have an influence on a disposition, but whether the delusion *did* influence the disposition *actually* made.

Rationale: (Clerk J)

* It is not in dispute that the handwritten document met the technical requirements of a holograph will under the *Wills Act*; it is agreed that the will is wholly in Louis' handwriting and signed at the bottom by him.
* Louis Weidenberger had testamentary capacity to execute the holograph Will on December 6, 1987.
  + While Louis' testamentary capacity is presumed (since the formal requirements of a holograph will are met), the fact that he was a resident at the Alberta Hospital since 1981 and was diagnosed with a mental illness has raised an issue as to his testamentary capacity.
    - Accordingly, the applicants bear the burden of proving that Louis had testamentary capacity to make a will on December 6, 1987.
  + The fact that Louis was mentally ill and suffered from confusion is not determinative as to whether Louis did or did not have the requisite testamentary capacity.
    - Similarly, the fact that Louis' estate was under the control of the Public Trustee is insufficient to establish that he lacked testamentary capacity.
  + Given the circumstances surrounding the creation of the will and the expert evidence, the applicants have established that it was not effected by any delusions under which Louis may have been labouring.
    - Louis had a general and adequate understanding of the nature and extent of his estate.
      * He knew he had owned a house and he knew that the Public Trustee had disposed of it.
      * While Louis may or may not have known the exact amount of his estate, his insight into the value of his estate is not a prerequisite for finding testamentary capacity.
    - Louis fully appreciated the persons who were the natural objects of his bounty; that being, his sister and next of kin whom he left behind in Hungary.
      * In the will, he named his aunt and uncle, all their children, his sister, and the towns where they live or lived, and he carried the will on his person for 7 years until he died.
      * There is no evidence that he included or excluded beneficiaries based on a delusional belief.
        + He believed that he was being persecuted by the government and religious organizations, and thought that the Public Trustee was stealing his money; there is no evidence that his family in Hungary was included in this delusional belief system.
    - There is agreement that Louis knew what a will was; the evidence discloses that he attended with a lawyer to discuss a will, although that lawyer never received instructions in this regard.
      * This indicates that Louis attempted to exert control over and dispose of his estate, an intent that is also demonstrated by his preparation of a holograph will.

Notes:

* In *Stiles (Estate of) v Stiles*, the ABQB set out a four-part test required to establish testamentary capacity:
  1. The testator must understand the nature of the testamentary act and its effect;
  2. The testator must understand the extent of the property of which he/she is disposing;
  3. The testator must be able to comprehend and appreciate the claims to which they ought to give effect;
  4. The testator must not be suffering from a disorder of the mind which would bring about a disposal which, if the mind had been sound, the testator would not have been made.
* The greater the complexity of one's situation, the higher level of appreciation required to avoid a finding of incapacity.
  + If an estate includes a lot of property or the testator's family dynamics are complicated, the testator's capacity may need to be greater.

##### *Christensen v Bootsman*, 2014 ABQB 94

Facts:

* Joan Christensen married Holger Christensen in 1951 and had four kids: Yvonne, Sandra, Roxanne, and Lance. Joan and Holger divorced in January 1975. In August 1976, Joan executed a formal will that divided her estate equally among her four children. In January 2008, Joan was admitted to the Glenrose Rehabilitation Hospital ("Glenrose") for a physical rehabilitation assessment. Dr. Kammerer, Dr. Schwatzberg, and Dr. Johnston examined Joan during her time at the Glenrose. While they did not conduct capacity assessments, they noted cognition issues and physical issues. However, Dr. Datar, who saw Joan once every two weeks starting in June 2008, saw no loss of cognition or impaired judgment. On June 11, 2010, Joan became a resident at the Citadel Mews Care Centre ("Citadel"). When Joan started living at Citadel, Sandra spent a lot of time with her, taking her out 4 to 7 times a week. On June 28, 2010, Joan created a holograph will. It created a drastically unequal division among the children, with the vast majority of the estate going to Sandra. Joan gave the will to Sandra, who put it in a folder in the trunk of her car where she kept Joan's other important documents.
* Sandra argues that the holograph will is Joan's last will and testament. Yvonne, Roxanne and Lance challenge its validity on the basis of lack of capacity of Joan, and on the basis of undue influence of Sandra on Joan.

Issue and holding:

* Was the document a valid holograph will? **YES**
* Have the respondents raised suspicious circumstances? **NO**
* If yes, did Joan have testamentary capacity at the time of executing the holograph will? **YES**
* If no, was Joan subject to undue influence? **NO**

Analysis:

* From *Re Weinberger (Estate)*, in order to have capacity, a testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty, and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.
  + Capacity is to be assessed both when instructions are given and when the will is executed.
  + A testator may have testamentary capacity even if she is not of entirely sound mind; e.g., even a person diagnosed with senile dementia may have testamentary capacity (*In Re Ferguson*).
    - The mind may have been in some degree debilitated, and yet there may be enough left clearly to enter into the nature of a rational, fair, and just testament.
    - The mind of the testator must be capable of carrying apprehension beyond a limited range of familiar responses and suggested topics; it must comprehend its own initiative and volition.
  + Soundness of mind is a practical question and does not depend on scientific or medical definition.
    - When given, medical evidence is not required nor necessarily conclusive.
    - While medical or scientific evidence may be of assistance, the finding of testamentary capacity is a matter of fact for the trial judge to determine.
* Undue influence occurs where the testator was fully aware of what she was doing, but had her independence overborne by the influence of another person such that there was no voluntary approval of the will.
  + To render a will void, undue influence must be an influence justly described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind.
  + The burden of establishing undue influence belongs to the party alleging it; i.e., the party challenging the will must prove, on a balance of probabilities, that the testator was in fact coerced into doing something that she did not want to do.

Rationale: (Gill J)

1. The parties agree that the will is entirely in the handwriting of the deceased and signed at the bottom by the deceased; therefore, the will meets the technical requirements of the *WSA*.
   * From *Vout v Hay*, this raises a presumption that the deceased knew and approved of the contents of the will and had the necessary testamentary capacity.
2. The respondents have *not* raised suspicious circumstances that would justify setting this presumption aside; the respondents have raised the following issues:
   * “The holograph will was prepared by Joan, whereas the 1976 will was prepared by a lawyer.”
     + But, Joan was living in the community and had easier access to a lawyer in 1976 as opposed to in 2010, when her health and mobility had worsened.
   * “The holograph will was stored in a briefcase in the trunk of Sandra's car.”
     + While the trunk of a car is an unusual place to store important documents, Sandra believed the car provided a convenient balance of security and accessibility for Joan’s documents.
   * “Joan had a dependency relationship with Sandra at the time she made the holograph will, and Sandra is the main beneficiary.”
     + Sandra had taken on primary responsibility for looking after Joan since at least 2007; all the evidence is that Sandra had a very close and loving relationship with her mother, and none of the other children complained or had issues with Sandra's relationship with Joan.
       - It is natural that Joan would want to make special provision for Sandra, who provided her with significant assistance.
     + Sandra was in very poor financial circumstances in the years before Joan's death; Joan was aware of her situation and helped her.
     + It is significant that, sometime before August 2010, Joan raised with Yvonne the idea of giving her house to Sandra; Yvonne was not concerned by it.
   * “Joan would have told each of her children about the holograph will, but only Sandra was aware of the holograph will until after Joan’s death.”
     + However, all of the respondents testified that they never spoke with their mother about her finances or her estate.
   * “Joan did not have the physical strength or mental acuity to write all of the holograph will.”
     + But there is no suggestion that Joan was unable to write in June 2010; she prepared several handwritten documents, each within a month or so of the other, during the same period.
       - The documents show that Joan was capable of writing and that she was turning her mind to the question of making a will.
   * “Doctors who saw Joan at the Glenrose claimed that she had significant cognitive impairment.”
     + However, Dr. Datar, who saw Joan on a bi-weekly basis *during the relevant time*, had no concerns regarding Joan’s cognitive ability; indeed, in July 2010, he specifically addressed his mind to the issue of capacity when he witnessed several documents for Joan.
       - The tests Joan underwent at the Glenrose were for clinical purposes, to determine appropriate treatment and appropriate placement in the community, and had not intended to have any relevance in determining a patient’s decision-making capacity.
     + Plus, the issue of Joan’s capacity to make decisions concerning her banking or other financial decisions was never raised by any family member while she was alive.
3. At the time she wrote the holograph will, Joan had a disposing mind and formed the intention to make a will.
   * Yvonne had a discussion with Joan concerning her house sometime before August 2010, which suggests that Joan was aware of owning a house and was considering making a gift of that house to Sandra.
   * The holograph will shows an approximation of Joan's assets, which consisted of cash and a house.
   * Joan understood who the natural objects of her bounty were and included her natural beneficiaries (i.e., her four children) in the holograph will.
4. The respondents have not provided any evidence to support a finding of undue influence; none of the three siblings saw Sandra do anything inappropriate.
   * While Sandra did have influence on her mother, that influence was not enough to establish coercion.
   * Sandra’s role as a caregiver increased as her mother’s health deteriorated, and no one took issue with this at the time; Sandra was very dedicated to Joan, and the other family members trusted her.

#### Insane Delusions

##### *Royal Trust Company v Ford et al*, [1971] SCR 831

Facts:

* The testator, Allan Ford, married Estelle McGee in 1908. In 1913, the couple moved to Victoria, BC. Between 1919 and 1921, Estelle made two extended trips to Australia, during which she spent 2 weeks living with another man. When she returned, Allan and Estelle resumed marital relations and on May 24, 1922, Estelle gave birth to the respondent, John Ford. Based on when Estelle left Australia, there was no possibility that John was conceived there. Allan and Estelle separated in 1927. Allan always treated John like his biological son, and in 1933, he drew up a will leaving almost his entire estate to John. However, in 1955 and 1956, Allan started to have doubts about the legitimacy of his son, though he did not state that John was illegitimate. In 1958, Allan made a new will giving most of his estate to various charities in diminution of John's interest, leaving John with a $50,000 legacy. John challenged the 1958 will on the grounds that Allan was suffering from an insane delusion as to the legitimacy of his son. However, several witnesses testified that Allan never showed mental weakness until 1965, when he entered a nursing home at the age of 92.

Procedural history:

* The trial judge rejected the contention that a delusion existed. He found that Allan really believed his son to be legitimate, even though he expressed doubt.
* The BBCA held that the evidence as to the existence of an insane or psychotic delusion was sufficient, and set aside the 1958 will as being invalid.

Issue and holding:

* Did the trial judge err in failing to find that a delusion existed? **NO**

Analysis:

* The propounder of a will must prove on a balance of probabilities that the testator was competent in every respect, and *this includes negativing the existence of any insane delusions*.

Rationale: (Judson J)

* The BCCA wrongfully substituted its opinion for that of the trial judge on the issue of a delusion; the trial judge rejected the contention that a delusion existed after considering all the evidence and in the light of dealing with an otherwise thoroughly competent testator.
  + Although the 1933 will was largely in John's favour, a separation for 31 years prior to the 1958 will and the reception of bad reports about his son were sufficient reason for a sane testator to change his will.
  + A legacy of $50,000 was inconsistent with a testator having a poisoned mind resulting in the complete rejection of his son, and consistent only with belief in his legitimacy or, at most, doubt.
  + Whether the testator’s suspicions were reasonable or not, they were such as a sane man could hold.

##### *From Estate*, 2019 ABQB 988

Facts:

* Lorne From had two children: Carla Papp and Randolph ("Randy") From. Lorne had founded a trailer business in 1987. Randy worked in the business and, through the 2000s, Lorne transferred shares in the business to Randy in consideration of his contributions. In 2001, Lorne made a will in which he gave his remaining shares to Randy and then divided the residue of the estate equally between Randy and Carla. Lorne suffered from various health concerns, including a stroke in 2007 and coronary artery bypass surgery in 2013. In 2014, his behaviour began to change. He would attend at the trailer business, pick fights with staff, verbally abuse Randy, and remove company items. In 2015, Lorne formed the opinion that Randy had stolen the "William Short Property" from him, even though Lorne did not own that land. In May 2015, Lorne suffered another stoke and was hospitalized. In September 2015, Lorne attended at the office of Randall Osgood, a lawyer, to draft a new will with Carla as the sole beneficiary. He claimed that his son did not need the money and, while he acknowledged memory issues, he felt that he had not received fair market value for his shares and that Randy benefitted greatly from the sale. The lawyer believed that Lorne was competent to sign, and they executed the will accordingly. Lorne died in January 2017, and Randy challenged the 2015 will on the basis that delusional beliefs influenced Lorne's testamentary dispositions.

Issues and holding:

* Was the 2015 document a valid will? **YES**
* Has Randy successfully raised suspicious circumstances? **YES**
* Has Carla established that Lorne had testamentary capacity? **NO**

Analysis:

* *Vout v Hay* contemplates a two-stage process to challenging a will:
  1. If the presumption of testamentary capacity is triggered, this puts an evidentiary onus on the challenger to raise the suspicious circumstances to rebut the presumption.
  2. If the challenger succeeds by establishing a genuine issue to be tried, and a trial is ordered about the issue of testamentary capacity, the onus shifts to the personal representatives to prove capacity.
     + The extent of the proof required is proportionate to the gravity and degree of suspicion.
* The test to prove testamentary capacity is a high one; the propounder of a will must prove on a balance of probabilities that *the testator's wishes were the product of a sound and disposing mind*.
  + A sound and disposing mind can comprehend, on its own, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing disposition, etc.
    - Incapacity can exist despite an ability to answer questions of ordinary and usual matters in an apparently rational way; conversely, a person could have capacity to execute a will, but not capacity to do other tasks.
    - *Memory is a critical requirement underpinning testamentary capacity*, as it is memory that affords us the materials on which to exercise judgement, and to arrive at a conclusion or resolution.
  + Testamentary capacity is time specific and task specific.
    - The relevant time period to assess capacity, from all of the circumstances, is the time of giving instruction and the time of executing the will.
    - A deceased may have only temporary periods of rational and lucid behaviour, and in such moments, an individual may competently dispose of his or her estate.
  + A testator may be unfair to the potential heirs but still have testamentary capacity.
    - However, a radical or unexplained change in beneficiaries named in a prior will may constitute a suspicious circumstance sufficient to warrant inquiry.
  + Evidence of a testator's medical condition, recent hospitalization, and clinical symptoms at a time proximate to the execution of the will can support a finding of testamentary incapacity.
  + Whether a testator has the requisite capacity to make a will is a question of fact to be determined in all of the circumstances; the assessment is a highly individualized and fact-specific inquiry.
  + Testamentary capacity is a legal construct, not a medical concept or diagnosis; accordingly, medical evidence—while important and relevant—is neither essential nor conclusive in determining its presence or absence.
    - Indeed, the evidence of lay witnesses often figures prominently in the assessment of capacity, and may even be preferred to the evidence of medical witnesses.
      * A judgment may be formed about the quality of a person's mind based on observation and deduction without any need for special skill or knowledge.
      * The question of capacity is often a practical question which may be answered by a layman of good sense with as much authority as by a doctor.
* *The test for capacity* *is not met where the deceased was suffering from delusions at the time of the execution of the will that could have affected his testamentary dispositions*.
  + Where delusions may have existed, the propounder of a will must prove that the delusions were of such a character that they did not affect the disposition of property in the will.
  + Generally, *a delusion is an irrational belief in facts which no rational person would believe*.
    - It is a false belief originating spontaneously in the imagination without foundation in fact, of the falsity of which the person affected cannot be convinced by argument or proof.
    - Insane delusions include: (1) belief in things impossible and (2) belief in things possible, but so improbable in the circumstances that no man of sound mind would give them credit.
      * Insane delusions include beliefs whose extreme improbability is apparent only when the surrounding facts are known (e.g., delusions with respect to the behaviour and attitudes of the deceased's relatives).
    - An illogical conclusion from facts is not necessarily an insane delusion.
      * To be a delusion it must have no foundation in fact; if there is some basis for the belief, it is not an insane delusion.
  + The court must be careful not to construct and substitute what the court identifies to be a reasonable and rational opinion of what the will-maker should have felt in place of what the will-maker actually felt, and then call the will-maker's view a delusion.
    - Misunderstandings between family members are common, and often give rise to a testator's unreasonably negative attitudes; *this has nothing to do with delusions*.

Rationale: (Goss J)

1. There is no allegation that the 2015 will was completed improperly; thus, the presumption that Lorne knew and approved of the contents and had the necessary capacity when he signed the 2015 will is invoked.
   * The will was made in writing, signed by the testator in the presence of two witnesses, and each of the witnesses signed in the presence of each other; plus, Lorne understood when he signed the will that he was leaving none of his estate to Randy.
2. Randy has adduced evidence that Lorne had serious memory issues; these issues raise suspicious circumstances that call into question Lorne's capacity and shift the evidentiary burden onto Carla.
   * Lorne started incorrectly believing that he was the owner of the William Short Property, and alleged that Randy stole it from him.
   * Lorne would attend at the business premises and forget where he was or why he had come there.
   * Lorne claimed he had no money, despite cash and investments of about $1,400,000.
   * Lorne began to allege that Randy owed him money for the shares Randy already purchased in 2007.
   * Lorne started calling the Elder Abuse Line and accusing someone of embezzling $1 million.
   * In 2015, when Lorne gave instructions for his new will, he told Osgood that his memory was bad.
   * Evidence from people who knew Lorne for a number of years and had frequent contact with him revealed a consistent picture: Lorne had a failing memory, confusion, and a lack of understanding and awareness of the property which he did or did not own.
   * While Osgood determined that Lorne had capacity, limited weight should be placed on this, as Osgood made no searching inquiries to address flags raised about Lorne's testamentary capacity.
3. Carla has failed to meet her burden of proving testamentary capacity on Lorne's part; Lorne may have been suffering from delusions at the time of execution that could have affected his testamentary dispositions.
   * The complete denial of any gift to Randy was based on Lorne’s stated belief that the sale of his business to Randy may have been unfair to Lorne and that Randy had benefitted greatly from the sale.
     + But, before his health deteriorated, Randy and Lorne had a good relationship, and Lorne had expressed only pride and satisfaction with the change in ownership of the business.
     + Lorne's belief that the sale of his business to Randy may have been unfair existed *absent any memory of the details of the transaction or the sale price*.

#### Solicitor's Duties

##### *Stewart v McLean*, 2003 ABQB 96

Analysis: (Belzil J)

* A solicitor taking instructions for a will has a duty to ensure that the person giving instructions has testamentary capacity and is giving instructions freely and voluntarily.
  + This duty becomes even more onerous in circumstances wherein the person giving instructions is suffering from a medical disability which may impact testamentary capacity.
  + Neither the superficial appearance of lucidity nor the ability to answer simple questions in an apparently rational way are sufficient evidence of capacity.

### Undue Influence

#### *Kozak Estate (Re)*, 2018 ABQB 185

Facts:

* Theodore ("Ted") Kozak was a 72-year-old bachelor who lived on a farm near Kingman, Alberta his whole life. He executed a will in September 2009, appointing his sister Yvonne Krezanoski as executrix and sole beneficiary of his estate. In 2011, Ted met Maryann Seafoot. The two started a relationship. Ted sold his farm for $600,000 and purchased the Daysland acreage for $444,000. Ted and Maryann moved onto the Daysland acreage together. In September 2011, Ted's solicitor James Andreassen drafted another will that appointed Maryann as the sole beneficiary. Then, to avoid the prospect of invalidity upon marriage, Ted had Andreassen draw up another will in contemplation of marriage in January 2012 that appointed Maryann as the sole beneficiary, with Maryann's son as the alternate beneficiary if Maryann predeceased Ted. Ted's health deteriorated in March 2013, and he was admitted to the Viking Extendicare Centre. Ted's account at Viking Extendicare went into arrears, and his personal property was auctioned off to defray his debts in October 2013. On October 9, 2013, Ted had Yvonne reach out to Andreassen. She was concerned that Maryann was mismanaging and misappropriating Ted's funds, and requested that she be re-introduced to Ted's estate arrangements. But, on November 1, 2013, Maryann brought Ted to see Andreassen, and Ted told him that he longer wanted to execute the new documents. Ted died on March 16, 2014.

Issue and holding:

* Was the September 2011 and January 2012 wills the result of undue influence? **YES**

Analysis:

* A testamentary disposition will not be set aside on the ground of undue influence unless *the party attacking the will* establishes on a balance of probabilities that the influence imposed by some other person on the deceased was so great that the document reflects the will of the former and not that of the deceased.
  + i.e., there is no undue influence unless the testator, if he could speak, would say "this is not my wish but I must do it" (*Scott v Cousins*).
  + Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded.
    - Appeals to the affection, gratitude for past services, or pity for future destitution may fairly be pressed on the testator.
    - Undue influence requires more than mere influence, and more than an "unexpected" or "unreasonable" testamentary disposition.
  + Although fraud is sometimes treated as a separate, "fraud and undue influence" are generally coupled.
    - Influencing a person to act in a certain manner by providing them with misinformation is mental coercion; the person receiving the information is constrained to act contrary to what their free will would normally dictate if he or she had not been subjected to the misinformation.
  + There is more than one way to cause another to do one’s will, including force or promise of force, or controlling or manipulating judgment and desire.
* An applicant seeking to set aside a will may not have direct evidence of undue influence, such as observations or recordings of coercive acts; undue influence, however, may be established by circumstantial evidence (i.e., from a set of facts that together support the inference of undue influence).
  + Evidence of facts preceding, existing at the time, and even following the alleged undue influence may be relied on to assist in establishing undue influence.
  + The types of circumstances that may be relevant to establish undue influence include:
    - The increasing isolation of the testator, including a move from his home to a new city which increased the respondent’s control over him;
    - The testator’s dependence on the respondent;
    - Substantial pre-death transfer of wealth from the testator to the respondent;
    - The testator’s expressed yet apparently unfounded concerns that he was running out of money;
    - The testator’s failure to provide a reason or an explanation for leaving his entire estate to the respondent and excluding family members who would expect to inherit;
    - Documented statements that the testator was afraid of the respondent.
  + Factors relevant to assessing undue influence include:
    - The extent of physical and mental impairment of the testator around the time the will was signed;
    - Whether the will in question constituted a significant change from the former will;
    - Whether the will in question generally seems to make testamentary sense;
    - The factual circumstances surrounding the execution of the will;
    - Whether a beneficiary was instrumental in the preparation of the will.
  + The receipt of independent legal advice may mitigate against a finding of undue influence, but it is not an inoculation against undue influence.
    - The nature and circumstances will dictate what constitutes adequate independent legal advice for purposes of a given situation.
    - The following factors may affect the character of legal advice:
      * Whether the party benefitting from the transaction is also present at the time the advice is given and/or at the time the documents are executed;
      * Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence;
      * In a situation where the proposed transaction involves the transfer of all or substantially all of a person’s assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor;
      * Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place;
      * Whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her.
  + Hearsay evidence is often significant in estate litigation, since the deceased's statements are important but they cannot be called to testify; there are two approaches to hearsay in such cases:
    1. Admit all hearsay evidence and make admissibility determinations at the end of trial, or
    2. Make hearsay rulings as the hearsay evidence comes up.
  + In assessing the credibility of witnesses, which depends on sincerity and reliability, courts should be guided by the following principles:
    - The evidence of the applicant’s witnesses and the respondent’s witnesses should be subjected to the same degree of scrutiny.
    - The weight of evidence is not decided only on the number of witnesses testifying to support a proposition.
    - Personal relationship by itself, or interest in the outcome of the case by itself, do not degrade the probative value of a witness’s evidence.
    - All, some, or none of the evidence of a particular witness may be accepted.
    - Generally, little reliance should be placed in a credibility assessment on the “demeanour” of a witness, understood as his or her manner of testifying or appearance when testifying.
      * Unless, e.g., the witness was (even allowing for the stress of testifying) significantly argumentative, evasive, or slow to answer.
    - Credibility assessment relies heavily on the assessment of:
      * The "natural probabilities" of evidence.
      * Consistencies and inconsistencies between elements of a witness’s testimony and elements of other witnesses’ testimony or other evidence.
      * Inconsistencies between prior statements of a witness and his or her testimony.
      * Factors tending to support a witness’s objectivity (e.g., lack of exaggeration and conceding limitations, admitting facts that could counter the witness’s testimony or credibility).
    - The evidence of each witness must be assessed in light of all of the evidence in the case.

Rationale: (Renke J)

* The circumstantial evidence establishes, on a balance of probabilities, that Maryann unduly influenced Ted, and the September 2011 and the January 2012 Wills were the result of her undue influence.
  + Ted was a lonely 72-year-old when he met Maryann; while his loneliness and his enthusiasm are not evidence of undue influence, but these dispositions do provide the foundation for what followed.
  + Ted was a 72-year-old bachelor who stood about 5’8” and weighed about 400 pounds; he'd gone through prostate cancer and heart attacks, he had thyroid and kidney trouble, he had high blood-pressure, he had a knee replacement, and he had difficulty moving and used a walker in his home.
    - Maryann was 56, had one or two long-term relationships, and had at least one child.
  + The evidence did not support any finding that Maryann felt any affection towards Ted.
    - There were no photos of the "happy" couple.
    - Ted and Maryann stayed in separate rooms in the Daysland acreage.
    - While Maryann claimed that she and Ted spent much of their time together doing things, there was no evidence that they ever did any of the things Ted loved to do.
      * Maryann’s evidence was that they did things that Ted had not shown a disposition to do – going shopping, eating out, going to town.
    - Maryann told someone that she was not "looking for that kind of relationship," and that they were just "really good friends."
    - The couple fought a lot during what was supposed to be their "honeymoon stage," such that Ted would ask a friend to sleep in their refurbished granary or would sleep on a cot in the garage to make the fighting stop.
    - Maryann did not know how often he’d been in hospital, how long he was there, or why he was there.
      * Plus, when he did end up in the hospital, she would visit friends rather than him.
    - Maryann seldom visited Ted at Viking Extendicare and did not bring personal items to the facility to make Ted more comfortable.
    - At the auction of Ted's personal property, Ted's niece overheard Maryann tell someone that she was going to move to BC after the acreage sold.
    - Despite offers to help, Maryann did not even inquire into pension and special needs assistance that would pay for clothing and personal items for Ted.
    - Maryann was primarily responsible for spending about $200,000 (the proceeds of the farm and the line of credit) of Ted's money; much of this time, Ted was in various health care facilities.
      * Ted had $133,235 in his account in December 2011, yet he needed to obtain a $75,000 line of credit in January 2013; when Ted was admitted to Viking Extendicare, he had less than $1,000, and his line of credit was fully drawn down by August 2013.
      * Maryann did not care for Ted; she perceived Ted as a means of financing her life.
  + While the lack of care exhibited by Maryann does not, by itself, establish undue influence, Maryann used the promise of marriage to control and manipulate Ted.
    - Very early in their relationship, Maryann agreed to marry Ted; even though the marriage never happened, she continued to hold that prospect out in front of him until his death despite having no intention to marry him.
    - The evidence shows that marriage was crucially important for Ted; he kept referring to Maryann as his fiancé, his wife, until the end of his life.
  + The only explanation for Ted’s actions after meeting Maryann is that she manipulated him into providing economic benefits to her.
    - He sold the farm, where he had lived his entire life, after meeting Maryann.
    - He bought the Daysland acreage, a purchase which only made sense because it gave Maryann a home near her friend.
      * Given Ted’s health challenges, moving from the farm to an acreage was irrational; it had more lawn, and Ted would be responsible not only for lawncare but snow removal.
      * Ted had previously talked to others about moving to a condo or nursing home where others could look after the landscaping and maintenance; that made more sense for him.
      * Ted liked the woods or the bush; the Daysland acreage was out on the prairie, not providing the vista Ted preferred.
      * The farm was revenue-generating; Ted received natural gas well royalties, and he had been renting out the land to farm alfalfa for about 10 years.
      * The farm was located near relatives and friends.
      * The house on the farm was newer, built in the 1970s.
      * The farm was free and clear; it bore no mortgage.
      * The farm had been Ted’s grandparents’ homestead; he had promised his father that he would stay on the farm to help his mother.
    - Maryann's son William was put on the will despite there being no evidence that he had any significant contact with Ted; his inclusion was baffling except as a means of pleasing Maryann.
    - In October and November 2013, despite Ted having learned the truth about Maryann’s spending, and perhaps realizing just what that spending meant, he still chose to reaffirm his estate commitments to her when Maryann attended Andreassen's office with him.
      * This was not a mark of choice; it was a mark of undue influence.
  + There is evidence of isolation from friends and family, a hallmark of undue influence.
    - Maryann did insinuate herself into family business very early on in the relationship; she took on a role in allocating familial entitlements when objectively she was not part of the family.
      * This speaks to Maryann having taken on a proprietary attitude toward assets in Ted’s control.
    - Ted had been very close to his friends and family, but Ted stopped calling and visiting them as much after he started seeing Maryann.
    - At Extendicare, Maryann's friend prepared a note purporting to bar Ted's family from visiting.
    - When Ted was admitted to the hospital in November 2013, Yvonne brought some family photos for his room; the photos were not present when Yvonne returned, likely removed by Maryann.
    - Notes from the hospital in November 2013 disclosed that "Fiancé became agitated/angry and ‘friend’ requesting from writer what paperwork writer needed to keep sister/family away."
  + Several witnesses testified to changes in Ted's personality; while Ted had always been happy go lucky, he just wasn’t the same after Maryann came into his life, and his personality was deflated.

Notes:

* To avoid undue influence: meet with the client alone, establish capacity, ensure that their instructions reflect their true wishes, ensure third parties do not interfere, and keep extremely detailed notes.
  + If you suspect undue influence, you could try to involve other family members (with the consent of the testator) or request additional documents to see what’s really going on.
  + One option for combatting undue influence is the "two will" option.
* When pleading fraud or undue influence, there are always significant risks that, if you don't succeed, there could be cost consequences for your client.
* What makes undue influence cases so difficult is that, generally speaking, the impugned acts are done secretly, and the testator is no longer alive to give evidence as to their intentions.

### Public Policy

#### *Spence v BMO Trust Company*, 2016 ONCA 196

Facts:

* Eric Spence is a Black man born in Jamaica. He had two children with a previous partner in England: Verolin Spence, born in 1963, and Donna Spence, born in 1964. In 1979, Eric immigrated from England to Canada. Verolin joined him in 1984. According to Verolin, she had a good relationship with her father for many years. But, she claimed that this changed in 2002, when she told Eric that she was pregnant and that the father was white. In 2010, Eric made a will that made no provision for Verolin, instead distributing the residue to Donna and her sons. In affidavits sworn by Verolin and Imogene Parchment, who acted as Eric's occasional caregiver, the affiants testified that Eric excluded Verolin from the will to discriminate against her because the father of her son was a white man. Thus, when Eric died in 2013, Verolin sought a declaration that the will was void as against public policy.

Procedural history:

* The applications judge held that, while the will does not, on its face, impose any conditions that offend public policy, Eric's reason for disinheriting Verolin was based on a clearly stated racist principle that offended public policy. She therefore set aside the will in its entirety and declared an intestacy in Eric’s estate.

Issue and holding:

* Did the applications judge err in going behind the testator’s expression of his clear intentions regarding the disposition of his property? **YES**

Analysis:

* The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law.
* However, testamentary freedom is not an absolute right; it may also be constrained by public policy considerations in some circumstances.
  + Public policy should be invoked only in clear cases, in which harm to the public is *substantially incontestable*, and does not depend on the idiosyncratic inferences of a few judicial minds.
  + The courts have recognized various categories of cases where public policy may be invoked to void a conditional testamentary gift, including:
    1. Conditions in restraint of marriage and those that interfere with marital relationships (e.g., conditional bequests that seek to induce celibacy or the separation of married couples).
    2. Conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent;
    3. Conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation; and
    4. Conditions that incite a beneficiary to commit a crime or do any act prohibited by law.
    - The pivotal feature of these cases is that *the conditions at issue required a beneficiary to act in a manner contrary to law or public policy in order to inherit under the will*.

Rationale:

* There was no foundation for the public policy-driven review undertaken by the application judge.
  + Eric’s residual bequest imposed no conditions; unlike other cases where public policy was invoked to void a testamentary gift, Eric's will does not require a beneficiary to act in a manner contrary to law or public policy in order to inherit under the will.
    - In contrast, in *Canada Trust*, it was the requirement for discriminatory action on the part of trust administrators that triggered the public policy-based intervention of the court.
  + In *McCorkill* (below), the implementation of the testator’s intentions would have facilitated the financing of hate crimes, contrary to Canada’s criminal and human rights laws.
    - Nothing in this case suggests that Eric’s residual beneficiaries are unworthy heirs, or that they would use their bequest for purposes contrary to law.
  + It must be remembered that the bequest at issue is of a private, rather than a public nature.
    - In *Canada Trust*, it was the public nature of the charitable trust that attracted the requirement that they conform to the public policy against discrimination.
  + Neither Ontario’s *Human Rights Code* nor the *Charter* would justify court's interference with the testator’s intentions.
    - The *Human Rights Code* ensures that every person has a right to equal treatment with respect to services, goods, and facilities without discrimination, while the *Charter* pertains to state action.

##### *McCorkill v McCorkill Estate*, 2014 NBQB 148

Facts:

* Harry McCorkill passed away in 2004, leaving his entire estate to the National Alliance, an American-based neo-Nazi organization to which McCorkill belonged. In 2010, the executor applied for, and was granted, Letters Probate. However, in 2013, McCorkill's sister challenged the validity of a will, arguing that it was against public policy. The executor and another intervener defended the bequest. They argued that only facially repugnant testamentary conditions could be set aside on public policy grounds and that the nature or quality of the intended beneficiary was irrelevant.

Issue and holding:

* Is the will invalid as alleged? **YES**

Rationale: (Grant J)

* Voiding the gift was justified on the ground of public policy, because the beneficiary’s *raison d’être* is contrary to public policy.
  + The National Alliance is an organization that advocates hate-inspired, white-supremacist racism and whose publications clearly violate criminal law prohibitions against the wilful promotion of hatred.
  + The effect of the testator’s gift to such an organization was to finance hate crimes, contrary to s. 319 of the *Criminal Code* and Canadian human rights legislation and international commitments.

Ratio:

* Public policy renders invalid gifts to groups whose activities are inimical to public policy.

Notes:

* Prior to *McCorkill*, public policy-based justification for judicial interference with a testator’s freedom to dispose of her property had been advanced only in respect of conditional testamentary gifts.
  + In *McCorkill*, the testator’s residual gift was absolute, not conditional.

## Alteration by Law

* + A person is free to transfer her property to others upon death, and any interference with a person’s wishes in this regard must be justified ("proprietary freedom").
  + A person's freedom to transfer property on death is subject to satisfying their legal and family support obligations.
    - Legal obligations can be found in the *Dower Act*, the *WSA*, the *Divorce Act*, the *Family Law Act*, the *Family Property Act*, the law of unjust enrichment and constructive trust, and in contracts.
    - Family support obligations, *which are subordinate to legal obligations*, are located mainly in the *WSA*.
  + Claims against an estate are ranked in the following order of priority:
    - Rights conferred by the *Dower Act*.
    - Rights to temporary possession of the family home.
    - A security interest (e.g., a mortgage) on estate property.
    - Funeral and estate administration expenses.
    - Unsecured debt, which is paid to creditors *pro rata*.
    - Family property claims under the *Family Property Act*, *Divorce Act*, and *Family Law Act*.
    - Family maintenance and support claims under the *WSA*.

### *Dower Act*

#### Terminology

* "Homestead" means a parcel of land on which the dwelling house occupied by the owner as their residence is situated, consisting of not more than 4 adjoining lots (if urban) or a quarter section (if rural) [s. 1(d)].
  + Land continues to be a "homestead" until it ceases to be, notwithstanding the acquisition of another homestead or a change in residence of the owner spouse [s. 3(1)]; land ceases to be a homestead when [s. 3(2)]:
    1. a transfer of the land by the owner spouse is registered in the land titles office,
    2. a release of dower rights by the dower spouse is registered in the land titles office, or
    3. when a judgment for damages against the owner spouse is obtained by the dower spouse for improperly disposing of land and the judgment is registered in the land titles office.
  + Land is not a "homestead" when the owner spouse owns it as a joint tenant, tenant in common, or owner of any other partial interest with a person or persons other than the dower spouse [s. 25(1)].

#### Dower Rights

* In the event of a conflict between the *Dower Act* and the *WSA* respecting a spouse’s rights in respect of property after the death of the other spouse, the *Dower Act* prevails [*WSA*, s. 2].
* The rights granted under the *Dower Act* (which *apply only to spouses*, not AIPs) include:
  + The right of the spouse ("dower spouse") of a married person ("owner spouse") to prevent the disposition of the owner spouse's "homestead" without the dower spouse's consent [s. 1(c)].
    - An owner spouse who wishes to dispose of their homestead and who cannot obtain the consent of their spouse may seek an order dispensing with consent when [s. 10(1)]:
      1. the married person and the married person’s spouse are living apart,
      2. the spouse has not since the marriage lived in Alberta,
      3. the whereabouts of the spouse is unknown,
      4. the married person has 2 or more homesteads,
      5. the spouse has executed an agreement the rights of the dower spouse, or
      6. the spouse is a mentally incompetent person or a person of unsound mind for whom
         1. a trustee under the *AGTA* does not have authority to make a disposition of the homestead, and
         2. a certificate of incapacity is not in effect under the *Public Trustee Act*.
      7. Where a deceased person could have made an application for to dispense with the consent of their spouse, the personal representative of their estate may apply for an order dispensing with the consent of the surviving spouse to a disposition [s. 22].
    - When spouses are joint tenants or tenants in common, a disposition by them constitutes a consent by each of them to the release of their dower rights [s. 25(2)].
    - If an owner spouse disposes of their dwelling without consent of the dower spouse, the owner spouse is liable to the dower spouse in the amount of half the consideration for the disposition or half the value of the property at the date of the disposition, whichever is greater [s. 11(2)].
      * Further, an owner spouse who makes a disposition of a homestead in contravention of the Act is liable to a fine of not more than $1000 or to imprisonment for no longer than 2 years [s. 2(3)].
  + The right of the dower spouse to a life estate in the owner spouse's homestead after the owner spouse dies [ss. 1(c), 18].
    - i.e., as regards the homestead of a married person, a disposition by a will or devolution on intestacy is subject and postponed to an estate for the life of the dower spouse [s. 18].
      * This does not prevent the dower spouse from leasing the homesteading during their life.
    - If an owner spouse dies owning 2 or more homesteads, the surviving spouse must, in writing, elect ONE homestead in which they wish to claim a life estate [s. 19(1)].
    - If an owner spouse dies owning 2 or more homesteads, no homestead belonging to the deceased shall be disposed of until the PR registers the election of the surviving spouse in the land titles office [s. 19(3)].
      * If the surviving spouse neglects or refuses to make an election, the PR may, at the expiration of 3 months after the death of the married person, apply to the court for an order designating the homestead to which the dower rights attach [s. 19(4)].
  + The right of the dower spouse to a life estate in the owner spouse's personal possessions after they die [ss. 1(c), 23(1)].
    - The dower spouse only obtains a life estate in those goods that, pursuant to Part 10 of the *Civil Enforcement Act*, would be free from seizure [s. 23(1)].
* When a married person owns a homestead, the spouse of the married person may voluntarily release their dower rights [s. 7] or agree to release their dower right in exchange for valuable consideration [s. 9].

### Temporary Possession of the Family Home

#### Right to Temporary Possession

* **Owners**: A surviving spouse or AIP who is not registered on title as an owner of the family home but who is ordinarily occupying it at the time of the death of the other spouse or AIP is entitled to possession of the family home *for a period of 90 days* commencing on the date of the death, as against [*WSA*, s. 75(1)]:
  1. *Beneficiaries*: the deceased’s estate or any person inheriting from it, other than a child described in s. 72(b)(iv) who is ordinarily occupying the home at the time of the deceased’s death,
     + Section 72(b)(iv) refers to "a child of the deceased who is 18 or older at the time of the deceased’s death and unable to earn a livelihood by reason of mental or physical disability."
  2. *Joint owners*: any person who is an owner of the home by right of survivorship on the deceased’s death,
  3. *Co-owners*: any person who, at the time of the deceased’s death, held an interest in the family home as a co‑owner with the deceased, other than a child referred to in clause (a), and
  4. *Purchasers*: any person who, during the period of temporary possession, enters into a contract to purchase the home.
  + This does not apply to a surviving spouse in whom a life estate in the family home is vested by the *Dower Act* [*WSA*, s. 75(2)].
* **Tenants**: If at the time of the deceased’s death the family home is rented under a written tenancy agreement in the name of the deceased but not in the name of the surviving spouse or partner, then during the period of temporary possession [*WSA*, s. 75(3)]:
  1. the deceased’s estate is deemed to be the tenant for matters relating to rent and security deposits, and
     + However, this does not apply to the extent that [*WSA*, s. 79(2)]:
       1. a will of the deceased provides that a person other than the estate and other than the surviving spouse or partner, or
       2. an order of the Court, an insurance policy or an agreement provides that a person other than the estate

is responsible for paying a charge, payment, cost, or tax.

* 1. the surviving spouse or partner is deemed to be the tenant for all other matters,
  + An estate or other person responsible to pay the rent during a period of temporary possession shall not terminate the tenancy without obtaining the consent of the surviving spouse or partner or an order of the Court approving the termination of the tenancy [*WSA*, s. 75(4)].
* **Household Goods**: A surviving spouse or partner who takes temporary possession of a family home is entitled to the use and enjoyment of the household goods during the period of temporary possession unless the Court orders otherwise under section 82(1) [*WSA*, s. 76].
  + On application by the surviving spouse or partner, the PR, or a person who has an interest in any property located at the home, the court may [*WSA*, s. 82(1)]:

…

1. determine whether an item is or is not an item of household goods, or exempting a specified item of household goods from the application of the *WSA*;
2. limit the period for which a surviving spouse or partner is to have the use and enjoyment of specified household goods;
3. impose terms and conditions on the use of some or all of the household goods.

* On application by a surviving spouse or partner, the PR, or a person who has an interest in the family home or any property located at the home, the Court may terminate, shorten, or extend the period of temporary possession, after considering [*WSA*, s. 82(1)(a)]:
  1. the availability of other accommodation within the means of the surviving spouse or AIP and other family members,
  2. the interests of owners of the property, including any owner who is the landlord, and
  3. in the case of a purchaser of the family home, (A) whether they are a *bona fide* purchaser for value, and (B) whether the consideration to be paid by the person for the property is adequate,
  4. any other factor the Court considers relevant;
  + A period of temporary possession *must not be ordered to exceed 6 months* if the family home is owned by a person who acquired the home by right of survivorship on the deceased’s death [*WSA*, s. 82(2)].
  + The court may limit or terminate any period of temporary possession if, and to the extent that, the court considers the limitation or termination necessary to provide for the proper maintenance and support of another family member [*WSA*, s. 88(4)].

#### Maintenance and Expenses

* **Expenses**: Generally, the estate of the deceased spouse or AIP is responsible for paying expenses in respect of the family home during the period of temporary possession [*WSA*, s. 79(1)].
  + This includes the following closed list of expenses [*WSA*, s. 79(1)]:
    1. rent or any similar charges that fall due in respect of the occupation of the family home;
    2. payments that fall due under any mortgage on the family home;
    3. payments that fall due under any lease or loan in respect of the household goods;
    4. the costs of insuring the family home and household goods against damage, destruction, and public liability;
    5. applicable taxes assessed against the family home;
    6. reasonable charges for electricity, gas, water and other utilities used at the family home;
    7. the costs of reasonable maintenance and repair of the family home and household goods.
  + However, the estate is not responsible for paying expenses in respect of the family home to the extent that [*WSA*, s. 79(2)]:
    1. a will of the deceased provides that a person other than the estate and other than the surviving spouse or partner, or
    2. an order of the Court, an insurance policy, or an agreement provides that a person other than the estate

is responsible for paying a charge, payment, cost, or tax.

* Except as otherwise provided by a will of the deceased or an agreement made between the spouses or AIPs, *expenses paid by the estate are an advance of the surviving spouse's or partner's share of the estate and may be deducted from the share* [*WSA*, s. 79(3)].
* **Maintenance**: A surviving spouse or partner who is temporarily occupying the family home shall ensure that the home and household goods are maintained and kept in a state of reasonable repair, taking into account the state of repair of that property at the time of the deceased’s death [*WSA*, s. 80].
  + The right to possession of the family home and the use of household goods is terminated if the surviving spouse or partner fails to maintain or repair the home or goods as required [*WSA*, s. 77(7)].
* On application by a surviving spouse or partner, the PR, or a person who has an interest, including as a purchaser, in the family home or any property located at the home, the Court may [*WSA*, s. 82(1)]:

…

1. direct a surviving spouse or partner or the estate to pay any cost in respect of the family home or a specified item of household goods, including a charge, payment, cost or tax referred to in section 79(1);
2. provide that, despite s. 79(1), another person who has or may have an interest in the property, including the surviving spouse or partner, is responsible for paying any charge, payment, cost, or tax respecting the family home or a specified item of household goods, whether wholly or in part;
3. direct the estate or a surviving spouse or partner to take specified steps to maintain or otherwise preserve the family home or a specified item of household goods;

#### Rights of Entry

* **Personal representative**: A surviving spouse or partner occupying a family home must permit the personal representative of the deceased's estate to enter at any reasonable time to (a) inspect the estate property, (b) conduct an inventory, (c) perform repairs, or (d) remove items of estate property that are not household goods if a written request for entry is delivered to the home or the surviving spouse or partner at least 24 hours before entry [*WSA*, s. 81(1)].
  + On application by the personal representative the court may direct the surviving spouse or partner to allow the personal representative of the estate to enter the home on any notice and for any purpose specified by the Court [*WSA*, s. 82(1)(e)].
* **Owner**: A surviving spouse or partner who is occupying a family home must permit a person who is the owner or a co‑owner to enter the home at any reasonable time for the purpose of (a) inspecting the property or (b) if the property is not household goods, removing it from the family home [*WSA*, s. 81(2)].
  + On application by a person who has an interest in the family home or any property located at the home, the Court may direct the surviving spouse or partner to allow an owner or co-owner to enter the family home for any purpose specified by the Court [*WSA*, s. 82(1)(f)].

#### Limits on Rights

* A right to a period of temporary possession of the family home and household goods [*WSA*, s. 77(1)]:
  1. gives a surviving spouse or AIP no greater interest in that property than he or she had at the time of the deceased’s death, and
  2. does not, subject to any order of the Court, affect the terms of any agreements, charges, obligations, transfers, or liabilities that existed in respect of that property at the time of the deceased’s death.
* A surviving spouse or partner does not, by virtue only of exercising a right to temporary possession, become a party to or liable under any security or similar agreement [*WSA*, s. 77(2)].
* A right of temporary possession is personal to the surviving spouse or partner, and they shall not rent the property or assign, sell, or otherwise transfer the right, whether for value or otherwise [*WSA*, s. 77(3)].
  + Any tenancy or assignment, sale or other transfer entered into in contravention of subsection (3) is of no effect [*WSA*, s. 77(4)].
* The right to possession of the family home is terminated if the surviving spouse or partner ceases to occupy the family home as his or her ordinary residence during the period of temporary possession [*WSA*, s. 77(6)].
* Spouses or AIPs may enter into a written agreement in which either or both of them agree to waive a right that ss. 75 or 76 would provide to one of them on the death of the other [*WSA*, s. 78(1)].
  + An agreement survives the death of a spouse or AIP and binds his or her estate [*WSA*, s. 78(2)].

#### Making an Application

* An application under Part 5 of the WSA (Family Maintenance and Support) must be commenced by filing Form C1 accompanied by an affidavit in Form C2 [Surrogate Rules, s. 70.1(1)].

#### Terminology

* **Family home**: "family home" means [*WSA*, s. 72(a)]:
  1. a house or part of a house that is a self‑contained dwelling unit,
  2. a part of business premises used as living accommodation,
  3. a mobile home,
  4. a residential unit as defined in the *Condominium Property Act*, or
  5. a suite

that, at the time of a deceased’s death, was ordinarily occupied by the deceased and their spouse or AIP as their home and was owned, wholly or in part, or leased by the deceased but not by their surviving spouse or partner.

* **Household goods**: "household goods" means personal property that [*WSA*, s. 72(c)]:
  1. at the time of a deceased’s death, was owned by the deceased or both the deceased and their spouse or AIP, and
  2. at the time of a deceased’s death, was needed or being ordinarily used for transportation, household, educational, recreational or health purposes by the deceased’s spouse or AIP or by any child described in s. 72(b)(iii) or (iv) who is residing in the family home.

### Support and Family Property Claims

* An award of child or spousal support or the division of family property may bind the estate of deceased persons, independent of any claim for family maintenance and support.

#### *Divorce Act*

* Under the *Divorce Act* (“*DA*”) A court can make an order requiring a spouse to pay for the support of any or all "children of the marriage" [*DA*, s. 15.1(1)] or an order for spousal support [*DA*, s. 15.2(1)].
  + A court making a child support order shall do so in accordance with the *Federal Child Support Guidelines* [*DA*, s. 15.1(3)].
  + A court making a spousal support order shall consider the condition, means, needs, and other circumstances of each spouse, including (a) the length of time the spouses cohabited, (b) the roles performed by each spouse, and (c) any agreement relating to support [*DA*, s. 15.2(4)].
    - An order for spousal support should [*DA*, s. 15.2(6)]:
      1. recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
      2. apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for child support;
      3. relieve any economic hardship of the spouses arising from marriage breakdown; and
      4. in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
* *A claim for spousal support is personal and cannot be maintained after the death of one of the spouses*, UNLESS an agreement or order specifies it is binding upon the estate (*Stalzer v Stalzer*, 2018 ABQB 191).
  + A claim for child support also continues after the death of the payor.

#### *Family Law Act*

* Under the *Family Law Act* (“*FLA*”), the court may make an order requiring a parent to provide support for his or her child [*FLA*, s. 50(1)] or spouse or AIP [*FLA*, s. 57(1)].
  + In making a child support order, the court shall do so in accordance with the *Alberta Child Support Guidelines* [*FLA*, s. 51(1).
  + In making a spousal or AIP support order, the court shall consider [*FLA*, s. 58]:
    1. the conditions, means, needs and other circumstances of each spouse or AIP, including
       1. the length of time the spouses or AIPs lived together,
       2. the functions performed by each spouse or AIP during the period they lived together, and
       3. any order or arrangement relating to the support of the spouses or AIPs,
    2. any legal obligation of the spouse or AIP having the support obligation under the order to provide support for any other person,
    3. the extent to which any other person who is living with the spouse or AIP having the support obligation contributes towards household expenses, and
    4. the extent to which any other person who is living with the spouse or AIP receiving support under the order contributes towards household expenses.
  + An order for spousal or AIP support should [*FLA*, s. 60]:
    1. recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
    2. apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for child support;
    3. relieve any economic hardship of the spouses arising from marriage breakdown; and
    4. in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
* *A support order or agreement binds the estate of the person having the support obligation* unless the order or agreement (as the case may be) provides otherwise [*FLA*, s. 80(1)–(2)].
  + Where there is a support obligation which binds the estate of a deceased payor, the court may, on application make an order varying or terminating support [*FLA*, s. 80.1(1)–(2)].
    - An application for the purposes of s. 80.1 may be commenced by filing Form C1 accompanied with an affidavit in Form C2 [*Surrogate Rules*, s. 70.1(2)].
    - The following persons may make an application [*FLA*, s. 80.1(3)]:
      1. in the case of a child support order, the child, a parent or guardian or the child, a person who has the care and control of the child, or any other person with permission of the court;
      2. in the case of a spousal or AIP support order, a spouse or AIP;
      3. the PR of the person having the support obligation.
    - In respect of a child support order, the court shall consider [*FLA*, s. 80.1(4)]:
      1. the *Alberta Child Support Guidelines*,
      2. changes in the conditions, means, needs or other circumstances of the child, the deceased person, and the other parent of the child,
      3. any obligation of the deceased or his or her estate to provide support to another person,
      4. any claims or potential claims for FMS under the *WSA*,
      5. the assets of the deceased’s estate that are available to pay for any support obligations,
      6. the value of any distribution of property, including life insurance and any property acquired by survivorship, to which any person is entitled as a result of the death, and
      7. any other factor the court considers relevant.
    - In respect of a spousal or AIP support order, the court shall consider [*FLA*, s. 80.1(5)]:
      1. changes in the conditions, means, needs, or other circumstances of either spouse or AIP,
      2. any obligation of the deceased or his or her estate to provide support to another person,
      3. any claims or potential claims for FMS under the *WSA*,
      4. the assets of the deceased’s estate that are available to pay for any support obligations,
      5. the value of any distribution of property, including life insurance and any property acquired by survivorship, to which any person is entitled as a result of the death, and
      6. any other factor the court considers relevant.

#### *Family Property Act*

* Under the *Family Property Act* (“*FPA*”), on application, the court may make a distribution between spouses or AIPs of all the property owned by both spouses or AIPs and by each of them [*FPA*, s. 7(1)].
  + The conditions for an application for a family property order are different for spouses and AIPs:
    - **Spouses**: An order in respect of *spouses* may be made if a divorce judgment has been granted or the spouses have been living separate and apart for at least one year [*FPA*, s. s. 5(1)].
    - **AIPs**: An order in respect of *AIPs* may be made if they have become former AIPs [FPA, s. 5.1(1)].
  + Property is divided into three categories for the purposes of distribution:
    1. Property that is exempt from distribution, which includes [*FPA*, s. 7(2)]:
       1. property acquired by a spouse or AIP by gift from a third party,
       2. property acquired by a spouse or AIP by inheritance,
       3. property acquired by a spouse or AIP before the relationship of interdependence or marriage,
       4. damages in tort in favour of a spouse or AIP, unless the award or settlement is compensation for a loss to *both* spouses or AIPs, or
       5. the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses or AIPs.
    2. Property that may be divided unequally *in a manner that is just and equitable*, which includes [*FPA*, s. 7(3)]:

1. Any increase in the value of exempted property.
2. Property acquired using income derived from exempt property.
3. Property acquired after separation.
4. Property that was a gift from one person to another.
   * 1. Property that is presumptively split 50/50 unless it would not be just and equitable to do so, which includes *property that was acquired by a spouse or AIP during the marriage or relationship of interdependence* [*FPA*, ss. 7(4)–(5)].

* *An application for a family property order may be made or continued by a surviving spouse or AIP after the death of the other spouse or AIP* if such an application could have been commenced immediately before the death of the other spouse or AIP [*FPA*, s. 11(1)–(2)].
  + An application by a surviving spouse or AIP for a family property order may not be commenced more than 6 months after the date of issue of a grant of probate or administration of the estate of the deceased spouse or AIP [*FPA*, s. 11(4)].
  + The court may suspend the administration of the estate of the deceased spouse or AIP until an application for a family property order has been determined [*FPA*, s. 12].
  + Money paid or property transferred to a living spouse or AIP under a family property order is deemed never to have been part of the estate of the deceased spouse or AIP [*FPA*, s. 15].

### Unjust Enrichment and Constructive Trust

#### *Kerr v Baranow*, 2011 SCC 10

Analysis: (Cromwell J)

* The law of unjust enrichment attempts to restore benefits which justice does not permit one to retain.
  + Canadian law permits recovery for unjust enrichment whenever the plaintiff can establish:
    1. An enrichment of or benefit to the defendant,
       - The plaintiff must show that he or she gave something *tangible* to the defendant which the defendant received and retained.
       - The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money.
       - The benefit may be positive or negative (i.e., the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake).
    2. A corresponding deprivation of the plaintiff, and
       - The enrichment of the defendant must correspond to a deprivation suffered by the plaintiff.
    3. The absence of a juristic reason for the enrichment, for which there is a two-step analysis:
       1. The plaintiff must show that no juristic reason from an established category exists to deny recovery.
          - The established categories that can constitute juristic reasons include a contract, a disposition of law, a donative intent, and other valid common law, equitable, or statutory obligations (i.e., as where a statute denies recovery).
          - If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason stage.

This ensures that the juristic reason analysis is not purely subjective and avoids case-by-case 'palm tree' justice.

* + - 1. If there is no established juristic reason to deny recovery, the defendant may rebut the plaintiff's *prima facie* case by showing another reason to deny recovery.
         * At this stage, the courts may consider the legitimate expectations of the parties and moral and policy-based arguments about whether particular enrichments are unjust.
  + Remedies for unjust enrichment are restitutionary in nature; i.e., their object is to require the defendant to repay or reverse the unjustified enrichment.
    - In most cases, a monetary award will be sufficient to remedy an unjust enrichment.
      * The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services approach.
    - Alternatively, a remedial constructive trust (a proprietary remedy) may be used award a beneficial entitlement in property (without reference to any intention to create a trust).
      * To obtain a proprietary remedy, the plaintiff must demonstrate a "sufficiently substantial or direct link" or a "causal connection" between their contributions and the acquisition, preservation, maintenance, or improvement of disputed property.
        + A minor or indirect contribution will not suffice; the primary focus is on whether the contributions have a "clear proprietary relationship."
        + Indirect contributions of money and direct contributions of labour may suffice.
      * Further, the plaintiff must establish that a monetary award would be insufficient.
        + *Note*: e.g., the defendant is broke, the object at issue is a family heirloom.
        + The court may consider the probability of recovery and whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights.
      * The extent of the constructive trust interest will be proportionate to their contributions (i.e., proportionate to the unjust enrichment).
        + The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions.
* Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant’s contributions.
  + To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.
  + Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to:
    1. *Mutual effort*; whether the parties worked collaboratively towards common goals.
       - Indicators like the pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may suggest a joint family venture.
       - e.g., one person takes on a greater proportion of the domestic labour, freeing the other from those responsibilities and enabling them to pursue activities in the paid workforce.
    2. *Economic integration*; the degree of economic interdependence and integration that characterized the parties’ relationship.
       - The more extensive the integration of the couple’s finances, economic interests, and economic well-being, the more likely it is that they are engaged in a joint family venture.
       - e.g., the existence of a joint bank account used as a "common purse," the operation of a farm by a family unit, the sharing of expenses, etc.
    3. *Actual intent*; the actual intentions of the parties must be given considerable weight.
       - Intentions may have been expressed by the parties or may be inferred from their conduct.
         * Courts may infer from the parties' conduct that they intended to share in the wealth they jointly created, or that they intended the domestic and professional spheres of their lives to be part of a larger, common venture.
         * The intention to engage in a joint family venture may be inferred where the parties accepted that their relationship was equivalent to marriage.
         * The stability of the relationship and length of cohabitation may be relevant factors.
         * Joint ownership of property may reflect an intent to share wealth equitably.
         * Plans for property distribution on death may indicate that the parties saw one another as domestic and economic partners.
       - The quest is for their *actual* intent, not for what in the court’s view "reasonable" parties ought to have intended in the same circumstances.
       - The parties’ actual intent may also negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently.
    4. *Priority of the family*; whether and to what extent the parties have given priority to the family in their decision-making.
       - The main focus is on the financial sacrifices made by the parties for the welfare of the collective or family unit.
         * This may occur by leaving the workforce to raise children, relocating to benefit the other party’s career (giving up employment and networks as a result), foregoing career or educational advancement to benefit the family or relationship, and accepting underemployment to balance the financial and domestic needs of the unit.

Notes:

* This case is less relevant with the *Family Property Act* coming into force on January 1, 2020; that Act allows for a distribution of property between AIPs on the breakdown of their relationship without any need to resort to the law of unjust enrichment.
* Benefits which may support a finding of unjust enrichment include benefits conferred under mistakes of fact or law, under compulsion, out of necessity, as a result of ineffective transactions, etc.
  + In *Peter v Beblow*, the SCC held that the provision of domestic services could support a claim for unjust enrichment because a spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or services for the other.

### Family Maintenance and Support

* If a person
  1. dies testate without making adequate provision in the person’s will for the proper maintenance and support of a family member, or
  2. dies either wholly or partly intestate and the share to which a family member is entitled under a will or on intestacy or both is inadequate for the proper maintenance and support of the family member,

*the Court may, on application, order that any provision the Court considers adequate be made out of the deceased’s estate for the proper maintenance and support of the family member* [*WSA*, s. 88(1)].

* i.e., there are three steps in the test for determining proper maintenance and support:
  1. Does the claimant fall under the definition of "family member" (see "Terminology," below)?
  2. If yes, does the support provided by an estate, if any, fall below the legislated standard (i.e., "adequate provision for the support and maintenance of a family member")?
  3. If yes, should the court to exercise its discretion to make an order against the estate?
* The onus is on the applicant to establish their entitlement to family maintenance and support on a balance of probabilities.
* If an order is made family for maintenance and support, the deceased’s will, if any, has effect as if it had been executed with any variations that are necessary to give effect to the order [*WSA*, s. 100(1)].

#### Matters to be Considered by the Court

* In considering an application for maintenance and support, the Court shall consider, in addition to any other matter that the court considers relevant [*WSA*, s. 93]:
  1. the nature and duration of the relationship between the family member and the deceased,
  2. the age and health of the family member,
  3. the family member’s capacity to contribute to his or her own support, including any entitlement to support from another person,
  4. any legal obligation of the deceased or the deceased’s estate to support any family member,
  5. the deceased’s reasons for making or not making dispositions of property to the family member, including any written statement signed by the deceased in regard to the matter,
  6. any relevant agreement or waiver made between the deceased and the family member,
     + However, an order for family maintenance and support may still be made despite any waiver or agreement to the contrary by a family member [*WSA*, s. 103].
  7. the size, nature and distribution of (i) the deceased’s estate and (ii) any property or benefit that a family member or other person is entitled to receive by reason of the deceased’s death,
  8. any property that the deceased, during life, placed in trust in favour of a person or transferred to a person, whether under an agreement or order or as a gift or otherwise, and
  9. any property or benefit that an individual is entitled to receive under the *Family Property Act*, the *Dower Act* or Part 5, Division 1 of the *WSA* (Temporary Possession of Family Home) by reason of the deceased’s death,
* In *Birkenbach Estate (Re)*, 2015 ABQB 3, the court considered the following non-exhaustive list of factors:
  1. The size of the estate;
  2. The presence of other family members;
  3. The age and state of health of the applicant;
  4. The station in life of the parties;
  5. The character and conduct of the applicant;
  6. The likelihood of the applicant’s needs increasing;
  7. The likelihood of inflation;
  8. Other sources of income of the applicant;
  9. The mode of life to which the applicant ought to be accustomed;
  10. The applicant's actual cost of living;
      + The use of statistical averages is not the correct method for calculating cost of living (*McKenna Estate (Re*), 2015 ABQB 37).
  11. The claims of others against the testator.
  12. The proximity and duration of the applicant’s relationship with the deceased;
  13. Any previous distribution or division of property made by the deceased in favour of the applicant by gift or agreement;
  14. The reasons of the testator for not making an adequate provision;
  15. Whether an award might build up an estate for the applicant; and
      + Family maintenance and support applications should not be used merely as a means to amass an estate for the beneficiaries of the claimant (*Birkenbach Estate (Re)*).
  16. Interest to be paid on award.
* "Proper maintenance and support" is not just limited to the bare necessities of existence (*Birkenbach Estate (Re*); *Tataryn v Tataryn Estate*).
  + The use of the term "proper maintenance and support" requires the court to consider the standard of living to which the family member is entitled and determine what is "just and equitable" in those circumstances (*Birkenbach Estate (Re)*).

##### *Tataryn v Tataryn Estate*, [1994] 2 SCR 807

Facts:

* Alex and Mary Tataryn were married for 43 years. Their estate consisted of the family home, a rental property, and about $123,000 in the bank, all of which was held in Alex's name. The Tataryns had two sons, John and Edward. From the time John was six, his father disliked him. Over the years, Alex's dislike of John grew in intensity. As such, Alex did not wish to leave anything to him. He feared that, if he left any of his estate to Mary, she would pass it on to John. Alex's will thus left Mary a life estate in the matrimonial home, with Edward taking the fee simple in remainder. It also made Mary the beneficiary of a discretionary trust of the income from the residue of the estate, with Edward as trustee. When Alex died, Mary was shocked to learn that he left everything to Edward, subject to her right to live in the house and Edward's right to provide money for her use from time to time. Mary and John claimed against the estate under the *Wills Variation Act* ("the Act").

Procedural history:

* The trial judge revoked the gift to Edward of the rental house and granted Mary a life estate in it, directed that John and Edward each receive an immediate gift of $10,000 out of the residue, and directed that, when Mary died, the residue of the estate be divided one-third to John and two-thirds to Edward.

Issues and holding:

* What distribution of Alex's property would adequately provide for the proper maintenance and support of Mary, John, and Edward? *(see below)*

Analysis:

* Under s. 2(1) of the *Wills Variation Act*, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the court may, in its discretion, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.
  + The breadth of the language suggests that the legislature intended to allow the courts broad discretion to make orders which are just in the specific circumstances.
  + The Act must be read in light of modern values and expectations; courts are not necessarily bound by the views and awards made in earlier times.
    - *Note*: the Court cites s. 7 of BC's *Interpretation Act*; this is similar to s. 9 of Alberta's *Interpretation Act*, which provides that "[a]n enactment shall be construed as always speaking and shall be applied to circumstances as they arise."
* The language and history of the Act does not suggest that the testator's wishes can only be disturbed on the basis of need (i.e., preventing spouses and children left behind from becoming charges on the state); *spouses and children are entitled to an equitable share of the estate even absent need*.
  + The wording is broad and capable of embracing changing conceptions of what is "adequate, just and equitable"; the Act does not mention need.
  + The history of the Act does not suggest that the only reason for its passage was to prevent persons becoming a charge on the state.
    - It was enacted in 1916, a time when men held most property, as a result of a push for equality by women's rights organizations; there is no reason to suppose that the concerns of these groups were confined to keeping people off the state dole.
  + While this interpretation is criticized promoting uncertainty (i.e., for failing to provide some yardstick to measure the terms "adequate, just and equitable"), much of the uncertainty disappears if two sorts of norms are used to guide what is "adequate, just and equitable":
    - **Legal obligations**: obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise.
      * Maintenance and property allocations which the law would support during the testator's life should be reflected in the court's interpretation of what is "adequate, just and equitable."
        + A person is under a legal duty to support his or her spouse and minor children; thus, charging a testator's estate with a similar duty after they die is not problematic.
      * The legal obligations on a testator during his or her lifetime reflect a clear and unequivocal social expectation, expressed through elected representatives and the courts.
        + The testator's legal obligations may be found in the *Divorce Act*, family property legislation, and the law of constructive trust.
        + In some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate.
      * Maintenance and provision for basic needs may be sufficient to meet this legal obligation; on the other hand, they may not.
        + With regard to spouses, each spouse is entitled to a share of the estate, which depends on the length of the relationship, the contribution of the claimant spouse, and the desirability of independence (*Moge v Moge*).
    - **Moral obligations**: society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards.
      * Most would agree that, although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits.
      * Most would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow.
      * While the moral claim of independent adult children may be more tenuous, if the size of the estate permits, and there are no circumstances which negate the existence of such an obligation, some provision for such children should be made.
* Where there are conflicting claims against a testator's estate, the following principles should be of guidance:
  + Claims which would have been recognized during the testator's life — i.e., claims based on legal obligations — should generally take precedence over moral claims.
  + As between moral claims, it falls to the court to assign to each its proper priority.
* There will be a number of ways of dividing the estate which are adequate, just and equitable; provided the testator has chosen an option within this range, the will should not be disturbed.
  + Only where the testator has chosen an option which falls below his or her legal or moral obligations should the court make an order which achieves the justice the testator failed to achieve.
  + It is the exercise by the testator of his freedom to dispose of his property and *is not to be interfered with lightly, and only in so far as the statute requires*.

Rationale: (McLachlin J)

* Mary's legal and moral claims entitle her to at least half the estate and arguably to additional maintenance.
  + Mary would have been legally entitled to maintenance and a share in the family assets had the parties separated; at a minimum, she must be given this much upon Alex's death.
    - The marriage was a long one, and Mary had worked hard and contributed much to the assets she and her husband acquired.
  + Mary also had a moral claim that arises from the fact that she outlived her husband, and must be provided for in the "extra years" which fate has accorded her.
    - To confine Mary to such sums as her son may see fit to give her, as the testator proposed, fails to recognize her deserved independence and constitutes inadequate recognition of her moral claim.
* The moral claim of the sons is adequately met by the immediate gift of $10,000 awarded by the trial judge to each of them and a residuary interest in a portion of the property upon Mary's death.
  + The moral claims of the testator's grown and independent sons cannot be put very high; there is no evidence that either contributed much to the estate.

Notes:

* To Mary Tataryn, the court gave (1) title to the matrimonial home, (2) a life interest in the rental property, and (3) the entire residue of the estate after payment of the immediate gifts to the sons. It also gave each son an immediate gift of $10,000. Lastly, it directed that, upon Mary's death, the rental property to be divided between John and Edward in the shares suggested by the trial judge for division of the residue (1/3 to John and 2/3 to Edward).
* The principles laid out in *Tataryn* apply to the *WSA* in Alberta (*Petrowski v Petrowski Estate*).
* In assessing competing obligations, the courts consider (*Petrowski v Petrowski Estate*):
  1. The overall size of the estate;
  2. The income and resources of the various competing potential recipients;
  3. The present and future requirements of the persons asserting a right to the estate, as dependant on age, health, lifestyle, that are required to meet an adequate standard of support and maintenance;
  4. The legitimate expectations and lifestyles of the competing potential recipients;
  5. The moral obligation that society places on a person to maintain and support persons in certain relationships and circumstances; and
  6. Other facts that may negate a right to receive a part of the estate.

#### Making an Application

* An application under Part 5 of the WSA (Family Maintenance and Support) must be commenced by filing Form C1 accompanied by an affidavit in Form C2 [*Surrogate Rules*, s. 70.1(1)].
* **Limitation date**: An application must be commenced within 6 months after the grant of probate or administration is issued [*WSA*, s. 89(1)].
  + That said, the court may allow an application to be made *at any time* respecting parts of the estate that are not yet distributed at the date of the application [*WSA*, s. 89(2)].
  + If no grant of probate or administration is ever issued for the estate, it is uncertain when the ultimate limitation date would be.
    - It might be the 2-year discoverability period in the *Limitations Act*, the 10-year ultimate limitation period under the *Limitations Act*, or it might be determined by the equitable doctrine of laches.
* **Service**: Notice of an application for family maintenance and support must be served [*WSA*, s. 91(1)]:
  1. on the personal representative of the estate and all family members,
     + A child who is under 18 years of age is to be served by serving (i) their parents or guardians, or (ii) the Public Trustee, if the child is subject to a permanent guardianship order [*WSA*, s. 91(2)(a)].
     + A represented adult is to be served by serving his or her trustee [*WSA*, s. 91(2)(b)].
     + An incapacitated person is to be served by serving the Public Trustee [*WSA*, s. 91(2)(c)].
  2. on any others who may be interested in or affected by an order for maintenance and support, and
  3. on the Public Trustee if a person who is, or who at the date of the deceased’s death was, under 18 years of age, is interested in the estate.
     + The application must not proceed until the Public Trustee is represented on the application or has expressed the intention of not being represented [*WSA*, s. 91(3)].
* **Disclosure (family member)**: Where an application is made under Part 5 of the *WSA*, a family member, on the written request of (i) another family member, (ii) a PR of the deceased’s estate, or (iii) any other person required to be served with notice of the application, shall provide the person making the request with financial information that is necessary for the determination of maintenance and support [*WSA*, s. 95(2)].
  + Under the *Surrogate Rules*, a family member who receives a request must provide the person making the request with the following financial information [s. 70.9(1)].
    1. an affidavit respecting their income, assets, and liabilities, including
       1. assets held jointly,
       2. any property or benefit that they expect or claim by reason of the deceased’s death under the *Family Property Act*, the *Dower Act*, Part 5, Division 2 of the *WSA*, or otherwise, and
       3. any interest in an estate, whether vested or contingent;
    2. a copy of every personal income tax return filed for each of the three most recent taxation years;
    3. a copy of every notice of assessment issued for each of the three most recent taxation years;
    4. if they are an employee, a copy of each of their three most recent statements of earnings;
    5. if they receive income from EI, social assistance, a pension, workers’ compensation, disability payments, dividends, or another source, the most recent statement of income;
    6. if they are a student, a statement indicating the total amount of student funding received during the current academic year, including loans, grants, bursaries, scholarships and living allowances;
    7. if they are self‑employed in an unincorporated business,
       1. particulars of every payment issued to them for the last 6 weeks from any business in which they have an interest or to which they have rendered a service,
       2. the financial statements of their businesses for the three most recent taxation years, and
       3. a statement showing a breakdown of all salaries, wages, management fees, or other payments or benefits paid to them or to non-arm's length individuals or corporations for the three most recent taxation years;
    8. if they are a partner, confirmation of their income and draw from, and capital in, the partnership for its three most recent taxation years;
    9. if they have an interest of 1% or more in a privately held corporation,
       1. the financial statements of the corporation and any subsidiaries for its 3 most recent taxation years,
       2. a statement showing a breakdown of all salaries, wages, management fees and other payments or benefits paid to them or to non-arm's length individuals or corporations for the 3 most recent taxation years, and
       3. a record showing their shareholder’s loan transactions for the past 12 months;
    10. if they are a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust’s three most recent financial statements;
    11. copies of all bank account statements solely or jointly in their name for the past 6 months;
    12. copies of credit card statements for all their credit cards for the past 3 months;
    13. copies of the most recent statements for all RRSPs, TFSAs, RRIFs, insurance policies, pensions, term deposit certificates, GICs, stock accounts, stock options, and other investments or holdings;
    14. copies of any family property agreement, minutes of settlement, judgments, or orders they had with the deceased relating to the division of property, spousal support, or child support;
    15. the family member’s monthly budget of expenses.
* **Disclosure (PR)**: Where an application is made under Part 5 of the *WSA*, a PR of the deceased’s estate, on the written request of (i) a family member, or (ii) any other person required to be served with notice of the application, shall provide the person making the request with financial information that is necessary for the determination of maintenance and support [*WSA*, s. 95(2)].
  + A PR who receives a request must provide the person making the request with the following information if it may reasonably be expected to be in their possession [*Surrogate Rules*, s. 70.9(2)]:
    1. an inventory of property and debts in Form NC 7;
    2. a description and appraisal or valuation of any property owned by the deceased or in which the deceased had an interest at the time of death;
    3. a list of all bank accounts or other property held jointly by the deceased at the time of death;
    4. a list, including a statement of value, of all RRSPs, TFSAs, RRIFs, insurance policies, pensions, term deposit certificates, guaranteed investment certificates, stock accounts, stock options, and other investments or holdings in the deceased’s name at the time of death, and the names of any designated beneficiaries in relation to them;
    5. if the deceased at the time of death was the beneficiary of a trust or held a power of appointment over property, a description of the property, its value, and the disposition of the property;
    6. copies of any family property agreement and any minutes of settlement, judgments or orders the deceased had relating to the division of property or spousal support or child support obligations;
    7. a copy of all terminal tax returns for the deceased’s estate;
    8. a description of any other property in which the deceased had an interest at the time of death.
* If a family member or PR fails to comply with a request for disclosure, the court may, on application, do one or more of the following [*WSA*, s. 95(5)]:
  1. order them to provide some or all of the required information;
  2. dismiss any application made by or on behalf of them;
  3. proceed to hear the application and, in the course of doing so, draw an adverse inference against the person who failed to comply with the request;
  4. award costs in favour of one or more other parties.

#### Terms of the Order

* The Court may, in making an order for maintenance and support, impose any conditions and restrictions that the Court considers appropriate and may [*WSA*, s. 96(1)]:
  1. direct that provision for maintenance and support be made out of and charged against the estate in the proportion and in the manner that the Court considers appropriate,
  2. direct that provision for maintenance and support be made out of income or capital, or both, in one or more of the following ways:
     1. by an amount payable annually or otherwise;
     2. by a lump sum to be paid or held in trust;
     3. by transfer or assignment of a specified property, whether absolutely or in trust and whether for life or for a term of years, to or for the benefit of the family member.
        + If a transfer or assignment of property is ordered, the court may (a) give all necessary directions for the execution of the transfer or assignment or (b) grant a vesting order [*WSA*, s. 96(2)].
* The Court may also, at any time after an order for maintenance and support is made [*WSA*, s. 99(1)]:
  1. give any directions that the Court considers necessary to give effect to the order,
  2. discharge, vary or suspend any provision of the order respecting periodic payments, or
  3. fix a periodic payment or lump sum to be paid by a beneficiary under a will or intestacy, in substitution for an amount originally ordered to be paid out to the beneficiary.
     1. If the court fixes a payment under this section, it may further direct that [*WSA*, s. 99(2)]:
        1. the periodic payment be secured in any manner the Court considers appropriate, or
        2. the lump sum be paid to a specified person and be dealt with in any manner the court deems appropriate for the benefit of that to whom the substitute payment is payable.

#### Early Distribution

* The PR of an estate shall not distribute any portion of the estate until the expiration of 6 months from the grant of probate or administration without the consent of all the family members, unless authorized by the court [*WSA*, s. 106(1)].
  + A PR that distributes any portion of an estate in contravention of this section is personally liable to pay an amount equal to any maintenance and support that is payable [*WSA*, s. 106(2)].
  + However, nothing in this section prevents a PR from making reasonable advances for the maintenance of any family members who are beneficiaries [*WSA*, s. 106(3)].
* On notice of an application for FMS, the PR of the estate shall not distribute or dispose of the estate, unless authorized to do so by a court order [*WSA*, s. 107(1)].
  + A PR that distributes or disposes of any portion of an estate in any manner in contravention of this section:
    - Is personally liable to pay the amount distributed to the extent that any provision for maintenance and support ought to be made out of the portion of the estate distributed or disposed of [*WSA*, s. 107(2)].
    - If they do so willfully, is guilty of an offence and liable [*WSA*, s. 107(3)]:
      1. in the case of an individual, to a fine of not more than $5,000 and in default of payment to a term of imprisonment of not more than 60 days, and
      2. in the case of a corporation, to a fine of not more than $25,000.

#### “Family Member”

* **Family member**: "family member," in respect of a deceased, includes [*WSA*, s. 72(b)]:
  1. a spouse of the deceased,
  2. the AIP of the deceased (see Intestate Estates, “Terminology,” above),
  3. a child of the deceased who is under 18 at the time of the deceased’s death, including a child who is in the womb at that time and is later born alive (see Intestate Estates, “Terminology,” above),
  4. a child of the deceased who is 18 or older at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability,
  5. a child of the deceased who, at the time of the deceased’s death,
     1. is at least 18 but under 22 years of age, and
     2. is unable to withdraw from his or her parents’ charge because he or she is a full‑time student as determined in accordance with the *Family Law Act*, and
  6. a grandchild or great‑grandchild of the deceased
     1. who is under 18 years of age, and
     2. in respect of whom the deceased stood in the place of a parent at the time of their death;
        1. A deceased grandparent (or great-grandparent) stood in the place of a parent to his or her grandchild if, during life, the grandparent demonstrated a settled intention to treat the grandchild as his or her own child and if, since the grandchild’s birth or for at least 2 years immediately before the grandparent’s death [*WSA*, s. 73(2)]:
           1. the grandchild’s primary home was with the grandparent, and
           2. the grandparent provided the primary financial support for the grandchild.
        2. The Court may, in an application to determine whether a grandparent or great-grandparent stood in the place of a parent, consider any of the following factors [*WSA*, s. 73(3)]:
           1. the grandchild’s age;
           2. the duration of the relationship between the grandchild and grandparent;
           3. the nature of the relationship between the grandchild and grandparent, including

the grandchild’s perception of the grandparent as a parental figure, and

whether, as between the parents and grandparent, the grandparent was the primary decision maker with respect to the grandchild’s care, discipline, education and recreational activities;

* + - * 1. whether the grandparent considered applying for guardianship of the grandchild;
        2. the nature of the grandchild’s relationship with his or her parents;
        3. any other factor the Court considers relevant.

### Resulting Trust

#### *Kerr v Baranow*, 2011 SCC 10

Analysis: (Cromwell J)

* A resulting trust is imposed to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it.
  + *Note*: remember, a trust is created when beneficial ownership (i.e., the right to use and enjoy property) is separated from legal ownership.
* Resulting trusts can arise with (1) the gratuitous transfer (i.e., a gift) of property from one person to another, and (2) the joint contribution by two people to the acquisition of property, title to which is in the name of only one of them.
  + In these cases, the law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate.
    - When such transfers are made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended.
      * This presumption rests on the principle that equity presumes bargains and not gifts.
    - The presumption of resulting trust, however, is neither universal nor irrebuttable.
      * In the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement — that is, a presumption that the grantor intended to make a gift — rather than a presumption of resulting trust applies (*Pecore*).

Notes:

* There are three requirements for a valid gift *inter vivos* (i.e., during the life of the grantor):
  1. *Intention to donate*: a desire to divest oneself of title voluntarily.
  2. *Acceptance of the gift*: an understanding of the transaction and a desire to assume title (usually presumed).
  3. *Delivery*: transfer of possession, marking the end of the donor's dominion.
     + Absent delivery, an unequivocal manifestation of intention to gift is not sufficient to pass property to the intended donee.
     + Delivery can be manual (physical transfer) or constructive (where the bulk of the goods renders manual delivery impractical).
     + Where the donee already has possession of the choses in possession, delivery can occur with the manifestation of intention.
     + For delivery of household goods to be effected between cohabitants in a common establishment, there must still be some unambiguous act of transfer.

#### *Pecore v Pecore*, 2007 SCC 17

Facts:

* In 1994, Hughes began transferring his assets into accounts held jointly with his daughter Paula. In 1996, concerned that the transfers might attract capital gains tax liability, Hughes wrote letters to the financial institutions holding the accounts and declared that he was "the 100% owner of the assets and the funds are not being gifted to Paula." Hughes' final will, executed in 1998, named Paula as his executor. The residue of the estate (the assets remaining in the estate after debts were paid and the specific bequests distributed) was to be divided equally between Paula and her husband Michael. When Hughes died in 1999, Paula did not turn the joint accounts over to the estate. In 2001, Michael moved in with another woman who he subsequently married. In his application for divorce and a division of marital property, he claimed half of the value of the accounts that Paula had held jointly with her father, arguing that on her father's death, they became part of the residue of Hughes' estate to be divided between Michael and Paula. Paula resisted, holding that the accounts became hers entirely upon Hughes' death by the right of survivorship.

Issue and holding:

* Did Hughes intend to make a gift of a beneficial interest in the accounts upon his death to his daughter alone or did he intend that his daughter hold the assets in the accounts in trust for the benefit of his estate to be distributed according to his will? **Gift**
  + If the father gave legal and equitable title to the funds to the daughter, then she alone has those funds.
  + If the father retained the sole equitable interest in the funds, they form part of his estate.

Analysis:

* Where someone makes a gratuitous transfer of property to someone else, either a presumption of resulting trust or a presumption of advancement, each of which are rebuttable, will apply.
  + The presumption of resulting trust is the general rule for gratuitous transfers.
    - Under the presumption of resulting trust, when property is gifted to someone gratuitously, the law presumes that they hold it in trust for the benefit of the original owner.
      * *Note*: this is because equity presumes bargains, not gifts.
    - To rebut the presumption of resulting trust, the recipient must prove that the transferor intended to gift a beneficial interest in the property on a balance of probabilities.
  + Alternatively, for certain types of transfers, a presumption of advancement will apply.
    - Under the presumption of advancement, when property is gifted to someone gratuitously, the law presumes that they intended to gift a beneficial interest in the accounts.
    - Advancement is presumed *in transfers from parents to their minor, dependent children*.
      * It would be problematic to presume advancement between parents and their adult independent children.
        + People are living longer, and it is common that aging parents put their children's names on bank accounts so that the child can freely manage their assets; it should not be presumed that a parent is making a gift each time they do this.
        + Given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, this presumption should not apply in respect of independent adult children.

After all, parental support obligations under provincial and federal statutes normally end when the child is no longer a minor.

Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on adult children to support their parents.

* + - * + While some agree that the presumption of advancement should be upheld for adult independent children on the basis of a parent's affection for their children, affection is not a basis upon which the apply the presumption.

Affection applies in other relationships as well, such as between siblings, but the presumption of advancement would not apply in this instances.

* + - * It would also be problematic to apply the presumption of advancement to transfers to "dependent" adult children because it would be impossible to determine what constitutes dependency, which would make the law uncertain.
    - To rebut the presumption of advancement, the person challenging the transfer must prove that the transferor did not intend to gift a beneficial interest in the property to the transferee on a balance of probabilities.
* After the court determines the proper presumption to apply, it must weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted.
  + The evidence which a court should consider in ascertaining intent will depend on the facts of each case; that said, types of evidence that are relevant in this case include:
    1. Evidence subsequent to the transfer;
       - Evidence relevant to the intention of the transferor at the time of the transfer could potentially be valuable.
       - The judge must assess the reliability of the evidence and determine what weight it should be given, guarding against evidence that is self-serving or that reflects a change in intention.
    2. Bank documents;
       - While bank documents do not necessarily set out equitable interests in joint accounts, they may be detailed enough to provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death.
         * If there is anything in the bank documents that specifically suggests the transferor’s intent regarding the beneficial interest in the account, courts can consider it.
    3. Control and use of the funds in the account;
       - The transferor’s retention of his or her exclusive beneficial interest in the account in his or her lifetime may support the finding of a resulting trust.
       - However, evidence of use and control will not be determinative for three reasons:
         1. It may be that the dynamics of the relationship are such that the transferor makes the management decisions (e.g., he or she may be more experienced with the accounts).

This does not negate the beneficial interest of the other account holder.

* + - * 1. In cases involving an aging parent and adult child, it may be that the transferee, although entitled to withdraw funds, will refrain from accessing them to ensure there are sufficient funds to care for the parent for the remainder of the parent's life.
        2. The fact that a transferor controlled and used the funds during his or her life is not necessarily inconsistent with an intention that the transferee would acquire the balance of the account on the transferor’s death through the right of survivorship.
    1. Granting of a power of attorney;
       - A power of attorney grants the attorney the power to manage the accounts of the donor, making joint ownership of the accounts unnecessary to manage the accounts unless the donor intended something more (i.e., to ensure the accounts were given to the transferor).
       - However, this evidence is not determinative; it is entirely plausible that the transferor granted a power of attorney and placed their assets in a joint account but nevertheless intended that the balance of the account be distributed according to his or her will.
         * e.g., the transferor may have granted a power of attorney to have assistance with affairs beyond the account and made the transferee a joint account holder solely for added convenience.
    2. Tax treatment of joint accounts;
       - The judge may find that the transferor intended a resulting trust on the grounds that they were the one who declared and paid income tax on the money in the joint accounts.
       - However, whether or not a transferor pays taxes on the income earned in the joint accounts should not be determinative of his or her intention in the absence of other evidence.
  + The court can consider evidence relating to the quality of the relationship between the transferor and transferee, and the degree of dependency the transferee had with the transferor to help determine whether the transferor intended to gift the property.
* In certain cases, courts have found that a transferor gratuitously placed his or her assets into a joint bank account with a transferee with the intention of retaining exclusive control of the account until his or her death, at which time the transferee alone would take the balance through survivorship.
  + There are several reasons why an individual would gratuitously transfer assets into a joint account:
    - The transferor may wish to have the assistance of the transferee with the management of his or her financial affairs, often because the transferor is aging or disabled.
    - The transferor may wish to avoid probate fees and make an after-death disposition to the transferee less cumbersome and time consuming.

Rationale: (Rothstein J)

* Since Paula is not a minor, there is no presumption of advancement.
* There is, instead, a presumption of resulting trust, but this presumption can be rebutted.
  + At the time of the transfers, Paula and her father had a very close relationship, and given Paula's financial hardships, her father preferred her over her siblings.
    - He maintained control of his accounts during his life, and was concerned with providing for Paula after his death.
  + While Hughes may have grown close to Michael, they were simply good friends.
  + While drafting his last will, the lawyer testified that Hughes was of the view that the accounts would not form part of his estate.
    - If he would have wishes for his assets devolve through the estate, they were of such magnitude that he would have at least discussed that matter with his solicitor.
  + While Hughes wrote to the financial institutions saying that the transfers were not gifts to Paula, the trial judge found that those letters were simply to avoid capital gains taxes.

Notes:

* In Alberta, the rules for transfers between spouses and AIPs have been settled by the *Family Property Act*.
  + Section 36(1) states that, when the court is making a decision under the Act, the presumption of advancement does not apply to transactions between spouses or AIPs in respect of property acquired by one or both of them either before or after the marriage or partnership began.
  + Section 36(2)(a) states that the fact that property is placed in the name of both spouses or AIPs as joint owners is proof, absent evidence to the contrary, of a joint ownership of the beneficial interest.
    - i.e., when property is placed in the joint names of spouses or AIPs, the presumption of advancement applies.
    - Money deposited in a financial institution in the name of both spouses or AIPs is deemed to be in their names as joint owners for the purposes of this clause [s. 36(2)(b)].
* Traditional presumptions were that a gratuitous transfer from a father to a child, or from a husband to a wife, were presumed to be true gifts (i.e., these transfers were not presumed to create a resulting trust).
  + Today, this presumption is gender neutral, and advancement is only presumed in parent → minor child transfers.

#### *Madsen Estate v Saylor*, 2007 SCC 18

Facts:

* In 1982, Patricia Brooks' parents made wills. They stated that, in the event there was no surviving spouse, the estate was to be divided into two halves. One half was to be divided equally between Patricia and her two siblings. The other half was to be divided equally between their eight grandchildren. In 1986, Patricia's mother died. In 1991, Patricia's father made her a joint signatory on his bank accounts, which provided for a right of survivorship. In late 1998, Patricia's father died. There is now a dispute between Patricia and her two siblings as to the ownership of the money in the joint accounts.

Issue and holding:

1. In this case, is there a presumption of (1) resulting trust or (2) advancement? **Resulting trust**
2. Has Patricia rebutted the presumption of resulting trust? **NO**

Rationale: (Rothstein J)

1. The presumption of advancement has no application because Patricia was not a minor child of her father.
   * Patricia therefore had the burden of rebutting the presumption of a resulting trust by showing that her father intended to gift the assets in the accounts to her on the balance of probabilities.
2. There was insufficient evidence to support Patricia's position that her father intended to gift the contents of his joint accounts to her.
   * While the father elected to have the joint accounts carry a right of survivorship on the relevant bank documents, these documents do not contain any express reference to beneficial entitlement to the assets in the accounts.
   * Little weight can be accorded to Patricia's evidence as to her father's intentions since, as the trial judge found, she gave "evasive and gave conflicting evidence" and "purposely misrepresented events."
   * The father retained control of the bank accounts and the funds were used solely for his benefit during his life.
   * The father declared and paid all taxes on income made from the accounts.

Notes:

* One key difference between *Pecore* and *Madsen Estate* was that, in *Pecore*, Paula's siblings supported their sister's claim for beneficial ownership, while in *Madsen Estate*, the other siblings contested their sister's claim to beneficial ownership.

#### *Popowich Estate*, 2012 ABQB 665

Facts:

* In December 2007, Sheri Popowich moved to Italy and married Giovanni Capasso. In December 2009, Sheri made a formal will in which she gave roughly 1/2 of her estate to Giovanni and roughly 1/2 to her mother, Patricia Popowich. In January 2009, Sheri returned to Canada, and in February 2010, she added her mother as a joint holder of her chequing and savings accounts. In June 2010, Sheri sold her house in BC and directed her lawyer to deposit the proceeds of the sale into her bank account. In July 2010, Sheri committed suicide. A lengthy handwritten note to Sheri's mother was found alongside her body. In it, she explained being "stuck in a circle of pain" and repeats that her mother should not blame herself. She referred to the love and care her mother lavished on her and to the love she had for Giovanni. Over the course of the 9 pages, Sheri also says the following:

*Take my money and do things for yourself . . . . Even selling the house, money, nothing can bring me any feeling of peace . . . Thank you for dealing with the house - but the sale of the house doesn’t make any difference . . .*

Issues and holding:

* Has Patricia rebutted the presumption of resulting trust created when Sheri deposited funds in a joint bank account with her? **NO**

Rationale: (Veit J)

* Patricia has not, on a balance of probabilities, established that Sheri intended to gift her the proceeds of her accounts; thus, the money in them is an asset in Sheri's estate, to be distributed according to her will.
  + At best, Sheri’s intentions were equivocal; it is as likely that Patricia was appointed to manage Sheri’s assets while she returned to Italy as it is that Sheri intended to make a present of that money to her mother.
  + While Patricia alleges that Sheri felt that Giovanni had not provided adequate support during her mental illness, the only evidence about Sheri's feelings towards Giovanni is what she wrote in her suicide note, and nothing in it suggests that Giovanni didn't adequately support her.

### Alleged Advances

* A gift or loan made to a beneficiary can be considered an advance on their inheritance.
  + A deceased may make a gratuitous transfer of property to help their loved ones make a down payment on a house, start a business, go on a vacation, etc.

#### Application Respecting Alleged Advance

* If a deceased, during life, has transferred property to a prospective beneficiary, an applicant who alleges that the transfer was intended to be an advance against, or repayable from, the prospective beneficiary’s share of the estate may make an application to the court [*WSA*, s. 109(2)].
  + "Applicant" means (i) a PR of the deceased's estate or (ii) a person having an interest as a beneficiary in the deceased’s estate [*WSA*, s. 109(1)(a)].
  + "Prospective beneficiary" means a spouse, AIP, or descendant of the deceased [*WSA*, s. 109(1)(b)].
    - See Intestate Estates, "Terminology," *above*.
  + An application under s. 109 must be commenced by filing Form C1 accompanied with an affidavit in Form C2 [*Surrogate Rules*, s. 70.1(1)].
    - An application may be made only within 6 months after a grant of probate or administration is issued in respect of the deceased’s estate [*WSA*, s. 109(8)].
* In considering the application, the court may consider the deceased’s intention respecting the transfer [*WSA*, s. 109(3)]:
  1. as determined in the course of interpreting the will, if any, or
  2. as evidenced by
     1. any oral statement made by the deceased respecting the transfer at the time the transfer was made,
     2. any written statement made by the deceased respecting the transfer, or
     3. any oral or written statement made by the prospective beneficiary.

#### Powers of the Court

* On hearing the application, the court has a lot of discretion to [*WSA*, s. 109(4)]:
  1. determine the nature of the transfer,
  2. determine the value of the transferred property,
     + The value of the transferred property is its value at the time of the transfer, unless the deceased had a contrary intention [*WSA*, s. 109(7)].
  3. order that the value of the transferred property be deducted from the prospective beneficiary’s share of the estate,
  4. order that the prospective beneficiary’s share of the estate be held on trust for the estate, and
  5. make any other order or give any other direction it considers appropriate.
* If the court determines that the transfer was intended to be an advance against the prospective beneficiary’s share of the estate, then unless the deceased had a contrary intention [*WSA*, s. 109(5)]:
  1. the shares of all the beneficiaries shall be determined as if the transferred property were part of the estate available for distribution,
  2. if the value of the transferred property equals or exceeds the prospective beneficiary’s share of the estate, the prospective beneficiary is to be excluded from any share of the estate, and
  3. if the value of the transferred property is less than the prospective beneficiary's share of the estate, the beneficiary is to receive only so much of the estate as is required, when added to the value of the transferred property, to make up the prospective beneficiary’s share of the estate.
  + e.g., a testator dies leaving three children (A, B, and C), who are to share in his $900,000 estate in equal shares. The court finds that Child A was given an advance on his inheritance during the life of the testator in the amount of $100,000. To calculate the children's respective shares, the $100,000 is added to the $900,000 estate. The resulting sum, $1,000,000, is divided in accordance with the will, resulting in $333,333 for each beneficiary. Then, the amount of the advance is deducted from Child A's share, leaving $233,000 for Child A and $333,000 for Child B and Child C.
* Where the application is made in respect of an intestate estate and the prospective beneficiary has predeceased the intestate, it is presumed that the intestate did not intend the transfer to be an advance repayable by the descendants of the prospective beneficiary [*WSA*, s. 109(6)].

#### Abolition of Common Law Rules

* Under s. 110 of the *WSA*, there is no longer any presumption at law that:
  1. If a testator makes a substantial transfer to their child during their life but after making a will that provides for a beneficial disposition to that child, the testator intends the transfer as an advance of the child’s share of the testator’s estate.
  2. If a deceased makes a substantial transfer to their child during their lifetime and then dies intestate, the value of the transfer must be deducted from the child’s share of the estate.
  3. If a testator, by will, makes a disposition of money to a creditor in an amount equal to or greater than the debt, the testator intends the disposition to satisfy the debt.
  4. If a testator, during his or her life and after making a will that provides for a disposition of money to a person, makes a transfer to that person in an amount equal to or greater than the disposition, the testator intends the transfer to revoke the disposition in the will.

## Construction & Interpretation

### Introduction

* A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the Court may admit the following evidence [*WSA*, s. 26]:
  1. evidence as to the meaning, in either an ordinary (i.e., dictionary) or a specialized sense, of the words or phrases used in the will,
  2. evidence as to the meaning of the provisions of the will in the context of the testator’s circumstances at the time of the making of the will, and
  3. evidence of the testator’s intent with regard to the matters referred to in the will.

#### *Hicklin Estate v Hicklin*, 2019 ABCA 136

Facts:

* Lorne Hicklin had two daughters, Deanna Hicklin and Sherri Burdick, with whom he had a close relationship. He also had a younger brother, James Hicklin. While Lorne and his brother were business partners, they did not socialize together. In February 2004, Lorne executed a will that was drafted by his solicitor. It gifted Lorne's "home" to his two daughters and the residue of the estate to James. Lorne did not specify to the solicitor what he meant by the term "home." Lorne died in January 2014. A dispute arose between Lorne's daughters and James as to who inherited some of Lorne's personal property found either in Lorne's residence. Deanna Hicklin applied to the court seeking resolution of this controversy. Phil Dennis, a close personal friend of Lorne's, testified that Lorne had informed him that his daughters would inherit his residence and all his personal property upon his death.

Procedural history:

* Yamauchi J adjudged that the testator’s daughters inherited the testator’s home and garage, the land to which they were attached, and the personal property located in the home and the garage.

Issue and holding:

* Did the testator intend that his daughters would inherit both his real property and the personal property located therein? **YES**

Analysis:

* Section 64(1) of the *Surrogate Rules* provides that the court, on hearing a contested application, may:
  1. receive evidence by affidavit or orally;
  2. dispose of the issues arising out of the application as it considers appropriate.
* There are four fundamental principles that govern the interpretation of wills:
  1. Most importantly, a will must be interpreted to give effect to the intention of the testator.
     + This is enshrined in s. 26 of the *WSA*, which provides that "[a] will must be interpreted in a manner that gives effect to the intent of the testator."
     + This is because a will, unlike a contract, is a unilateral act; it is solely the product of the testator's intentions, and no one else's approval is required to give it legal effect.
     + This is a subjective undertaking, not an objective one.
  2. A court must read the entire will, just the same way an adjudicator interpreting a contract or a statute must read the whole contract or statute.
     + This may disclose whether a contested term bears more than one plausible meaning.
     + This exercise ensures that the court has a good grasp of the structure of the instrument and the method of communication used throughout.
  3. A court must assume that the testator intended the words in the will to have their ordinary meaning in the absence of a compelling reason not to do so.
     + i.e., every word is to be given its natural and ordinary meaning unless, from a construction of the whole will, it is evident that the testator intended otherwise (*Re Tyhurst Estate*).
       - This assumption is made because most people express themselves in language to which others in the community attach the same sense as the speaker.
     + As a related principle, words must not be given meanings they cannot possibly bear.
     + If the text discloses more than one plausible meaning, the court must select the one that best promotes the testator’s intention.
  4. A court may canvas extrinsic evidence to ascertain the testator's intention.
     + Section 26 of the WSA provides that, in determining the intentions of a testator, a court may admit the following evidence:
       1. evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
       2. evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and
       3. evidence of the testator's intent with regard to the matters referred to in the will.
     + The admissibility of extrinsic evidence is not dependent on a finding that a word or phrase is capable of more than one meaning.
       - While some judges believe that a court may not consider extrinsic evidence unless they have identified an ambiguity in meaning, such onerous preconditions *do not* exist to the admissibility of extrinsic evidence.
       - This approach best promotes the object of s. 26 of the *WSA* (i.e., ascertaining the testator's true intentions when they made their will).
         * It is also inherently practical, because there will be few contests as to whether proferred extrinsic evidence is admissible.
       - The probative value of extrinsic evidence will be a function of many factors.

Rationale: (The Court)

* "Home" has a number of potential meanings; while it could just be restricted to real property, it could also include personal property that makes the home habitual and enjoyable as a principle place of residence.
  + The existence of two plausible meanings of "home" requires us to adopt the meaning that best promotes the testator's intention.
* There is ample evidence to support the conclusion that Lorne intended "home" to be interpreted broadly.
  + First, the beneficiaries are Lorne's daughters, and parents want to take care of their children.
    - It is reasonable to assume that Lorne would wish to provide for his daughters in a generous fashion; there is no such assumption with regard to Lorne's independent adult siblings.
  + Second, the will provides that the daughters would inherit the *entire* estate if Lorne's brother and sister predeceased him.
  + Third, extrinsic evidence supports the finding that Lorne had his daughters’ welfare uppermost in his mind when he signed his will.
    - Lorne had no other children.
    - Mr. Dennis, a close personal friend of Lorne, swore that the testator "always" told him that he had given his daughters his personal property.
    - Lorne had given one of his daughters $20,000 in 2012 and purchased a motorcycle for one of them for her 40th birthday.
      * It is not unreasonable to conclude that a father who makes generous gifts to his daughters intended to provide for them in his will in an equally generous manner.
  + Fourth, the extrinsic evidence discloses that Lorne and James had a business relationship as opposed to a close, personal relationship.
    - This confirms the conclusion that Lorne is much more likely to have intended to provide for the welfare of his daughters as opposed to his brother.

Notes:

* Since *Sattva Capital* in 2014, an appeal court may only set aside the determination as to the meaning of a term in a will where it is the product of a palpable and overriding error (i.e., an error that is obvious) that is determinative of the outcome of the case.
* Under s. 11 of the *Alberta Evidence Act*, in an estate action, an opposed or interested party shall not obtain a judgment on that party’s own evidence in respect of any matter occurring before the death of the deceased person, *unless the evidence is corroborated by other material evidence*.
  + This is because the testator cannot speak for themselves, and oral testimony from a party in an estate action is self-serving.

### Rules of Construction

* A rule of construction provides that, where certain words or expressions are used, which may mean either X or Y, they shall *prima facie* be taken to mean X absent evidence of a contrary intention.

#### Statutory Rules

* The *WSA* supplies a number of rules of construction which, according to s. 8(1)(a), apply only to wills made on or after February 1, 2012.

##### Will Speaks from Time of Death

* A will is to be interpreted as if it had been made immediately before the death of the testator unless the court, in interpreting the will, finds that the testator had a contrary intention [s. 27].
  + e.g., if a will gifts "to A, my residence," the house is presumed to be the house in which the testator resided at their time of death.

##### References to Children

* Unless the court finds that the testator had a contrary intention, references in the will to the children, descendants, or issue of any individual, including the testator, must be interpreted as including [s. 28]:
  1. any child for whom that individual is a parent within the meaning of Part 1 of the *Family Law Act*, and
     + Under s. 7(2) of the *Family Law Act*, a person is the parent of a child if they are their birth mother or biological father or if they are specified as a parent of the child in an adoption order.
  2. any child who is in the womb at the time of the testator’s death and is later born alive.

##### References to Having No Issue

* Unless the court finds that the testator had a contrary intention:
  1. the words “die without issue”,
  2. the words “die without leaving issue”,
  3. the words “have no issue”,
  4. words referring to a complete absence of descendants, or
  5. any words conveying any similar meaning,

when used in the will in respect of a disposition to an individual, are deemed to refer to the individual having no descendants surviving at the time of their death, and *not to a complete absence of descendants* [s. 29].

##### Disposition to "Heir" or "Next of Kin"

* Unless the court finds that the testator had a contrary intention, a disposition of property by will to one or more individuals described in the will as the "heir," "heirs," "next of kin," or "kin" of the testator or of another individual must be distributed as if the testator or other individual had died intestate [s. 30].

##### Disposition to "Issue" or "Descendants"

* Unless the court finds that the testator had a contrary intention, a disposition of property by will to a class of individuals that:
  1. is described in the will as the "issue" or "descendants" of the testator or of another individual, or by any similar term, and
  2. includes more than one generation of individuals,

must be distributed to the descendants of the testator or other individual in the same manner as if the testator or other individual had died intestate leaving only descendants and no spouse or AIP [s. 31(1)].

##### Where Beneficiary Dies Before Testator (Lapse)

* If a disposition in a will cannot take effect because the intended beneficiary has predeceased the testator, then unless the court finds that the testator had a contrary intention, the property that is the subject of the disposition must be distributed [*WSA*, s. 32(1)]:
  1. to the alternate beneficiary, if any, of the disposition,
     + e.g., if the will gifts "to A, and if not A, then to B," and A predeceases the testator, then the property in question will flow to B.
  2. if clause (a) does not apply and *the deceased beneficiary was a descendant of the testator*, to the deceased beneficiary’s descendants who survive the testator, in the same manner as if the deceased beneficiary had died intestate without leaving a surviving spouse or AIP,
     + e.g., if the testator makes a bequest "to A," no alternate beneficiary is named, A is a descendant of the testator, and A predeceases the testator, then the property in question flows to A's descendants.
     + For the definition of "descendant," "surviving spouse," or "adult interdependent partner," see Intestate Estates, "Terminology," *above*.
  3. if neither clause (a) nor (b) applies, to the *surviving residuary beneficiaries* of the testator, if any, named in the will, in proportion to their interests, or
  4. if none of clauses (a), (b) or (c) applies, in accordance with Part 3 as if the testator had died intestate.

##### Void Gifts

* If a beneficial disposition of property in a will cannot take effect *by reason of the disposition to the intended beneficiary being void, contrary to law, or disclaimed, or for any other reason*, then unless the court finds that the testator had a contrary intention, the property must be distributed [*WSA*, s. 33(1)]:
  1. to the alternate beneficiary, if any, of the disposition, regardless of whether the will provides for the alternate beneficiary to take in the specific circumstances,
  2. if clause (a) does not apply and the intended beneficiary was a descendant of the testator, to the intended beneficiary’s descendants who survive the testator, in the same manner as if the intended beneficiary had died intestate without leaving a surviving spouse or AIP,
  3. if neither clause (a) nor clause (b) applies, to the surviving residuary beneficiaries of the testator, if any, named in the will, in proportion to their interests, or
  4. if none of clauses (a), (b) or (c) applies, in accordance with Part 3 as if the testator had died intestate.
* *Disclaimer* (or avoidance) refers to a refusal by a beneficiary to accept an interest which has either been bequeathed to them or to which they are entitled on intestacy.
  + An intended beneficiary may disclaim property orally, in writing, or through conduct.
  + A disclaimer can be retracted so long as no one has altered his or her position in reliance on it.
  + Distinct from disclaimer, a beneficiary may accept a testamentary gift, but then convey it to another person (i.e., "assignment").

##### Property Not Disposed of by Will

* Unless the court finds that the testator had a contrary intention, an executor appointed by the will [s. 34]:
  1. is a trustee of any property not disposed of by the will, and
  2. holds that property in trust for the person or persons, if any, who would be entitled to receive it if the testator had died intestate.

##### Gifts for a Charitable Purpose

* If a testator disposes of property, whether by way of a trust or by outright gift, for a charitable purpose that is linked conjunctively or disjunctively in the will with a non‑charitable purpose, the trust or gift [s. 35]:
  1. is not rendered void only because the non‑charitable purpose is void for uncertainty or for some other reason, but in that case the gift is effective only for the benefit of the charitable purpose, and
  2. is effective for the benefit of both purposes if the non‑charitable purpose is not void, and must be divided among the charitable and non‑charitable purposes according to the trustee’s or executor’s discretion unless the will directs otherwise.

##### Gifts of Land to 2+ People

* Under the Law of Property Act, when an interest in land is granted to 2 or more persons by will, other than as executors or trustees, those persons take as tenants in common and not as joint tenants unless an intention sufficiently appears on the face of the will that they should take as joint tenants [s. 8].

#### Common Law Rules

* Since the primary aim of interpretation is to ascertain the intention of the testator, common law principles of construction are not often resorted to, as many testators would have no idea that these principles exist.

##### Whole Will Read in Context

* The testator's intention is to be determined from a consideration of the will as a whole; an unclear clause shall be interpreted in a manner which permits it to conform with the rest of the will.
  + i.e., if an unclear clause is capable of two reasonable constructions, one of which is in harmony with the rest of the will, the other being at variance with it, the court should assume that the correct construction is the one conforming with the rest of the will.
  + e.g., in *Gichuru v Deichmann Estate*, 2010 NBQB 174, the testator had 3 sons and 3 parcels of land. In her will, she gave 1 parcel of land to each of her sons and split the residue of the estate equally among them. Before her death, she transferred one parcel to one son. The court found that son’s pre-transferred property should be taken into account for his share of the residue due to testator's desire for equality evidenced in the will as a whole.

##### Identical Words

* If a word is clearly defined in one instance in a will, the same definition applies across the will, unless the court finds that the testator had a contrary intention.
  + i.e., when a testator repeats an expression which he had already used to convey a particular idea, he may be presumed to intend again to express the same idea.
  + e.g., in *Middlebro v Ryan*, [1925] SCR 10, the testator operated a business and used the phrase "book value" twice in his will. In one instance, it was clear the book value was to be ascertained at the time of death. In the second instance, it wasn’t clear. The court held that since the first instance referred to time of death, the same interpretation should apply to the second instance.

##### Effect Given to All Words

* It is presumed that all of the words that the testator included in a will were included for a reason.
  + i.e., the court should endeavour to give effect to all of the words to be found in a will.
    - it is not to be assumed that the testator has used additional words without some additional purpose or without any purpose at all.
  + In *Re Stark*, [1969] 2 OR 881 (CA), the will directed that the residue be divided "equally among my nephews." The testator had two full siblings and two half-brothers. Therefore, the court had to assess whether the "nephews" referenced in the will included full-blood nephews and/or half-blood nephews. At the of drafting, the testator only had 1 full-blood nephew, and it was unlikely he would have more full-blood nephews, but *he used the plural intentionally*. Therefore, the court found that "nephews" applied to both full- and half-blooded nephews.

##### *Ejusdem Generis*

* When general words follow an enumeration of persons or things with a specific meaning, the general words are not to be construed in their broadest sense but are to be viewed as applying only to persons or things of the same general kind, class, or genus as those specified in the enumeration (*Claus v Claus*, 2008 BCSC 1523).
  + The effect of the rule is to interpret general words narrowly in order to accord with the meaning of more specific words preceding the general words.
  + The rationale for the rule is a presumption that parties may use general words to guard against an accidental omission without intending to extend the contract to different objects.
  + e.g., *Re Resch’s Will Trusts* (1967), a bequest to the testator's 2-year-old grandson read: "my watches (other than my calendar watch), chains, studs, and other personal jewelry." The clause was held to be restricted to articles of masculine jewelry of small value and did not pass to other valuable jewelry.

##### General vs. Particular Intention

* If the testator expresses both a general and a particular intention with respect to a certain gift and the two are inconsistent, the court will give effect to the paramount general intention by disregarding, modifying, or restricting the particular intention.
  + i.e., if necessary, a court may give effect to the testator's clear general intention by disregarding, modifying, or restricting a conflicting clause, in order to avoid a total inconsistency.
  + e.g., in *Kilby et al v Meyers et al* (1964), [1965] SCR 24, the testatrix’s will had two scenarios: (a) if she died before her husband or (b) if they both died in circumstances where it was unclear who died first. However, husband died before the testatrix, which was not contemplated by the will. The will expressed two intentions: (a) the particular desire to give her assets in a particular way, and (b) the general desire to avoid an intestacy – these are in conflict. The court preferred the general intention to the particular one and distributed the estate as if the testatrix had died first.

##### Presumption Against Intestacy

* The court will prefer a construction of a will which avoids an intestacy, unless the testator clearly intended otherwise.
  + The court must assume that a testator did not intend to die intestate when he has gone through the process of making a will (*Re Harrison*).

##### Presumption of Rationality

* Unless the court finds that the testator had a contrary intention, it is assumed that a testator did not intend capricious, arbitrary, unjust or irrational consequences to flow from his/her dispositions.
  + The court will not give effect to an unjust or absurd construction, if it is possible to arrive at a reasonable and fair construction.
  + e.g., in *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children*, [1915] AC 207, the testator lived his entire life in Scotland and gave gifts to Scottish organizations. He left funds to "The National Society for the Prevention of Cruelty to Children." As it turned out, there are two of such organizations, one in Scotland and one not. Since there was no evidence to suggest the testator had any idea about the non-Scottish version, the English House of Lords concluded that the testator meant the Scottish version.

##### Presumption of Legality

* If there is an ambiguity, and one interpretation is allowable by law and another interpretation is not, the legal interpretation will prevail unless the court finds that the testator had a contrary intention.
  + That said, when you are initially reading a will, read for the testator's intention without taking the law into account, because people do not usually draft their wills with a full understanding of all legalities.

##### Presumption Against Disinheritance

* In the event of an ambiguity, the court will prefer an interpretation that benefits closer relatives as opposed to farther away relatives.
  + i.e., if the will is not clear as to whether the testator's next of kin, or more distant relatives are to receive a part of his estate, the construction which favors the heirs or next of kin will be preferred.
  + e.g., in *Re Gregory’s Settlement and Will* (1865), 55 ER 767, the testator's will gave $10,000 to "Charles Francis." The testator knew two people of that name – a nephew and a work colleague. The court applies the presumption against disinheritance and awarded the gift to the nephew.

##### Irreconcilable Dispositions

* The court will try to construe a disposition to avoid an inconsistency wherever possible.
  + i.e., a court will make every effort to reconcile two apparently conflicting provisions of a will, rather than absolutely ignore one or the other of them, or call either or both of them void.
  + e.g., a testator gifts "My house to my wife, for her own use *absolutely*. When she dies, my house to my nephew."
* If two inconsistent clauses appear in the same will and it is impossible to reconcile them, the last one prevails (e.g., "one hundred dollars ($500.00)").
* If the same property goes to two different beneficiaries in different clauses, the beneficiaries will take as tenants-in-common, or in succession, depending on the nature of the property.

##### Other Rules

* When a testator gifts property to multiple beneficiaries, the law presumes that the beneficiaries take the property *per capita* and not *per stirpes* (*Re Boudreault (Estate)*, 2001 ABQB 196).
  + e.g., if a testator gifts "to A and the children of B," the *prima facie* rule is that the division should be *per capita*, unless the court finds a contrary intention.
* Multiple gifts of property in a will or codicil are presumed to be cumulative, not substitutionary (*Henderson v Fraser*, [1923] SCR 23).
  + e.g., the testator gifts "to A, $200," and later in the will gifts "to A, $300." The presumption is that A will get $500, not $300.
* If a will was drafted by a lawyer, the technical terms used will usually be interpreted in their technical, legal sense; if it was not drafted by a lawyer, the words used will often be given their popular, non-technical meaning (*Lindblom (Estate) v Worthington*).

## Rectification

* Under s. 39(1) of the *WSA*, the Court may, on application, order that a will be rectified by adding or deleting characters, words, or provisions specified if the Court is satisfied, *on clear and convincing evidence*, that the will does not reflect the testator’s intentions because of:
  1. an accidental slip, omission, or misdescription, or
     + Section 39(1) applies to the omission of the testator’s *signature* only if the Court is satisfied on clear and convincing evidence that the testator [*WSA*, s. 39(2)]:
       1. intended to sign the document but omitted to do so by pure mistake or inadvertence, and
       2. intended to give effect to the writing in the document as the testator’s will.
  2. a misunderstanding of, or a failure to give effect to, the testator’s instructions by a person who prepared the will.
  3. The burden of proof is on the person propounding the will, and the standard is proof on a balance of probabilities (*Edmunds Estate*).
* An application under s. 39(1) must be commenced by filing Form C1 accompanied with an affidavit in Form C2 [*Surrogate Rules*, s. 70.1(1)].
  1. An application may not be made more than 6 months after the date the grant of probate or administration is issued [*WSA*, s. 39(3)], but the court may order an extension [*WSA*, s. 39(4)].

### *Edmunds Estate*, 2017 ABQB 754, aff'd 2019 ABCA 34

Facts:

* In 2008, Dolores Edmunds executed a valid will giving a life interest in her estate to her husband with the remainder passing to the respondent charities. The will appointed Dolores' brother-in-law as executor. In July 2016, Ms. Edmunds had Christine Herrington, a paralegal, amend her will to appoint her nephew, Richard Hood, as her executor. According to Mr. Hood, he and Ms. Edmunds had become quite close towards the end of her life. In September 2016, Ms. Edmunds told Ms. Herrington that she wanted to amend her will again to leave the residue of her estate to Mr. Hood. Ms. Herrington prepared a draft will, and in December 2016, she went to Ms. Edmund's house to obtain further instructions about it. Having received these instructions, she completed a draft of the new will and sent it to Mr. Hood on January 30, 2017. However, Ms. Edmunds died unexpectedly on March 9, 2017 having neither seen nor signed the final draft of the will. Mr. Hood applied to have the court rectify the unsigned will by adding Ms. Edmunds' signature.

Issue and holding:

* Can the court rectify the unsigned will by adding Ms. Edmund's signature? **NO**

Analysis:

* Sections 37 and 39 of the *WSA* allow the court to deal with deficiencies in a purported will.
  + Section 37 is a dispensing provision that allows the Court to validate wills that do not comply with formal requirements.
    - It allows the Court to dispense with formalities relating to witnesses and to the specific requirements of holograph and military wills, but does not apply to the primary requirements that a will be in writing and be signed in such a way as to demonstrate intentionality.
      * Therefore, signature formality issues are addressed by rectification rather than s. 37.
  + Section 39 is a rectification provision that allows the Court to add to or subtract from a will to make it accord with a testator’s evidenced intentions.

Rationale: (Jones J)

* This is not an appropriate circumstance in which to add a testator’s signature to an unsigned will.
  + The unsigned will does not represent a failure by Ms. Herrington to give effect to Ms. Edmunds' instructions within the meaning of s. 39(1)(b).
  + Ms. Edmunds' failure to sign the will was not an accidental omission within the meaning of s. 39(2)(a); her death cannot be characterized as an "accident" that resulted in the omission of her signature.
    - Had she attended a meeting to execute the will but failed to do so, things might be different.
  + There is not clear evidence that the unsigned will reflects Ms. Edmunds' testamentary intentions within the meaning of s. 39(2)(b).
    - Seven weeks passed between Ms. Edmunds’ meeting with Ms. Herrington and her death, and wills are frequently revised at the very meeting convened to deal with execution.

Notes:

* The failure to finalize the will because it was inconvenient to do so and the failure to anticipate Edmunds' imminent death did not amount to inadvertence on the facts of this case.
* As Jones J notes, s. 39 was meant to act as a middle ground between jurisdictions like Manitoba, which permit a writing to be recognized as a will notwithstanding the lack of the deceased's signature, and PEI, which requires a signature in all cases.

### *Fuchs v Fuchs*, 2013 ABQB 78

Facts:

* Hans Fuchs and Barbara Lippka met in Germany in March 1998. In October 1998, Mr. Fuchs proposed to Ms. Lippka and she accepted his proposal, but he was not yet able to marry because the divorce from his previous marriage had not been completed. Starting in December 1998, Mr. Fuchs and Ms. Lippka began cohabiting in Star, Alberta. In June 1999, Mr. Fuchs executed a will prepared by his solicitor, which gave the residue of his estate to "my friend, Barbara Lippka, if she survives me." He told her at the time that if something was to happen to him that everything would be in Ms. Lippka’s name. There is no declaration in the document that it is in contemplation of marriage. In January 2000, the divorce between Mr. Fuchs and his previous wife was granted. Mr. Fuchs and Ms. Lippka then married in April 2001. Mr. Fuchs died on February 8, 2012.

Issue and holding:

* Is Mr. Fuchs' 1999 will valid as being in contemplation of marriage to Ms. Lippka, notwithstanding that the will fails to indicate that it is in contemplation of marriage.? **YES**

Analysis:

* Section 8 of the *WSA* provided that the old *Wills Act* continues to apply as if unrepealed in respect of wills made before February 1, 2012, subject to exceptions not applicable here.
  + Section 17(a) of the *Wills Act* provides that a will is revoked by the marriage of the testator except when there is a declaration in the will that it is made in contemplation of the marriage.
* However, s. 8(2) of the *WSA* holds that ss. 26 and 37–40 apply to a will if the testator died after the *WSA* came into force on February 1, 2012.
  + Under s. 39(1)(b) of the *WSA*, the court may order that a will be rectified by adding words or provisions if it is satisfied, on clear and convincing evidence, that the will does not reflect the testator’s intentions because of a misunderstanding of, or a failure to give effect to, the testator’s instructions by a person who prepared the will.
  + Section 26 of the *WSA* provides that in determining the testator’s intent, the court may admit evidence as to:
    1. the meaning of the words or phrases used in the will,
    2. the meaning of the provisions of the will in the context of the testator’s circumstances at the time of the making of the will, and
    3. the testator’s intent with regard to the matters referred to in the will.

Rationale: (Rooke ACJ)

* It is clear that the will does not contain a declaration as required by s. 17 of the *Wills Act*.
  + As a result, the will was *prima facie* revoked by Mr. Fuchs marriage to Ms. Lippka in April 2001.
* However, pursuant to s. 39(1) of the *WSA*, a clause stating that the will is in contemplation of marriage to Ms. Lippka shall be added, thereby giving effect to Mr. Fuchs intentions by allowing Mr. Lippka to inherit under the will.
  + The circumstances surrounding the execution of the will make it clear that Mr. Fuchs wanted Ms. Lippka to inherit his estate, and that his solicitor either misunderstood those instructions or failed to give effect to them.

### *Ryrie v Ryrie*, 2013 ABQB 370

Facts:

* Bruce Ryrie ("the Testator") died in February 2012 at the age of 93. In May 2011, he had his solicitor, Alysa Tams, draft a will signed on May 25, 2011, which said:

4. I give all my property … to my Trustee upon the following trusts:

(a) To divide and distribute the residue of my estate among my children, Brian Martin Ryrie, Lynette Fern Ryrie, Wallace Bruce Ryrie, Lionel Gary Ryrie, Diane B. Howard and Barry David Ryrie ["the Respondents"], in equal shares, provided that if any child of mine has predeceased me leaving issue alive at my death, then I direct that such issue shall receive in equal shares, *per stirpes*, that share in my estate to which such deceased child of mine would have been entitled, had he or she survived me.

When the Testator died, the children listed in clause 4(a) survived him. He also had two children that predeceased him. Leonard Ryrie died in September 1987, without issue. Leslie Ryrie died in May 2003 leaving two children, Brenton and Michael Ryrie ("the Applicants").

* The Applicants argue that, since Leslie Ryrie predeceased the Testator, they are entitled, as her children, to receive that share in the estate to which Leslie would be entitled if she were alive. The Respondents argue that the estate should be split among the children named in clause 4(a) to the exclusion of the Applicants.

Issues and holding:

1. Did the Testator intend to include the Applicants as beneficiaries of his estate? **YES**
   1. Does clause 4(a) reflect an unambiguous intention to deprive the Applicants of a share of the estate? **NO**
   2. Does extrinsic evidence disclose that there are prospective beneficiaries who are not apparent by reading the words of the will? **YES**
2. If yes, can the will be rectified under s. 39 of the *WSA* to reflect the Testator's intentions? **YES**

Analysis:

* Section 39(1) of the *WSA* allows a court to add or delete words from a will if it is satisfied, on clear and convincing evidence, that it does not reflect the testator's intentions because of:
  1. an accidental slip, omission or misdescription, or
  2. a misunderstanding of, or a failure to give effect to, the testator's instructions by a person who prepared the will.
* Section 26 of the *WSA* provides that in determining the testator’s intent, the court may admit evidence as to:
  1. the meaning of the words or phrases used in the will,
  2. the meaning of the provisions of the will in the context of the testator’s circumstances at the time of the making of the will, and
     + This section requires extrinsic evidence to put meaning to "the testator's circumstances at the time of the making of the will."
     + There is no precondition that the wording of the will must show ambiguity before the investigation as to the testator's circumstances at the time of the making of the will is triggered.
  3. the testator’s intent with regard to the matters referred to in the will.
     + This is very broad and does not require an apparent ambiguity before extrinsic evidence is considered.
* Section 11 of the *Alberta Evidence Act* states that, in an estate action, a party shall not obtain a judgment on their own evidence in respect of any matter occurring before the death of the testator unless it is corroborated by other material evidence.

Rationale: (Sisson J)

1. The evidence is clear that the Testator intended to include the Applicants as beneficiaries of his estate.
   1. It is not clear whether 'the issue of children who predeceased the Testator' (described in the latter part of the clause) was limited to the issue of the six children named in clause 4(a) who predeceased the Testator, or whether it included the issue of Leonard and Leslie Ryrie, who predeceased the Testator but were not named in the clause.
      * Wording such as "provided that if any of my children listed previously has predeceased me leaving issue" would have removed the ambiguity.
   2. Ms. Tams, who gave credible and reliable evidence, testified that the Testator wanted to provide for his grandchildren in the event that their parent predeceased him, and this is corroborated by the notes she made at the time (as required by s. 11 of the *AEA*).
      * She also testified that the names of the surviving children were inserted after "among my children" by mistake, and that only later did she realize the possibility for ambiguity in clause 4(a).
2. Section 39(1) of the *WSA* can be invoked to rectify the wording of the will, as the evidence is clear that there was an "accidental slip, omission, or misdescription," together with a "failure to give effect to the Testator's instructions by a person who prepared the will."
   1. Clause 4(a) shall be rectified by removing the names of the six children, with the result being that the Applicants will each share 1/2 of the 1/7 share of the estate that Leslie Ryrie would have been entitled to had she not deceased the Testator.

## Vested & Contingent Gifts

* Property interests are either *vested* or *contingent*.

### Vested Gifts

* A gift is vested if it (1) is given to a person or persons who is/are in existence and ascertainable and (2) is not subject to any unsatisfied conditions precedent.
  + i.e., a gift is vested when no condition or limitation stands in the way of enjoyment; it is an interest that is *guaranteed but for the passage of time*; it is a present right to future enjoyment.

### Contingent Gifts

* A contingent gift is defined as any gift that is not vested.
* An interest is contingent if vesting is delayed pending the occurrence of some condition precedent, the happening of which is not inevitable.
  + e.g., X: to A on her 25th birthday.
  + e.g., X: to A's first daughter.
  + e.g., X: to A so long as it is used as a horse ranch.

#### Types of Conditions

1. Conditions subsequent (a condition of retention)
   * They do not delay vesting, but they do grant the testator's estate *right of re-entry* (the option to end the beneficiary's estate) upon the happening of some stipulated eventuality.
   * e.g., O: "to B, on condition that the property be used for school purposes," or "to B, but if B enlists in the army, my estate may enter."
     + In this example, B acquires a qualified fee simple in possession, but if the stipulated eventuality ever materializes, the grantor may *elect* to enter the land and cut short B's title.
2. Conditions precedent (a condition of acquisition)
   * A condition precedent is an event that must occur if a contingent interest is to vest; it serves as a bridge that the grantee must cross to get the gift.
   * e.g., O: "to B on her marriage."
   * e.g., O: "to W for life, then to C at age 21."
   * e.g., O: "$1 million to the first graduate of class of 2023 appointed to the Alberta Court of Appeal."

#### Void Conditions

* Proprietary freedom in Canada is not absolute; not all conditional dispositions will be enforced.
* The effect of invalidity depends on the manner of qualification and whether the subject of the gift is real or personal property.
  + A void condition subsequent results in the condition being struck and the gift vesting absolutely.
    - i.e., an invalid condition subsequent is severed from the grant, destroying the grantor's right of re-entry and rendering the gift absolute.
    - e.g., O: "to A provided she never votes in a provincial election." If the condition is invalid, A takes a fee simple absolute.
  + A void condition precedent:
    - If it relates to real property, will render the entire disposition void.
      * e.g., O: "to Harry if he divorces Meghan." If this condition is invalid, Harry takes nothing.
    - If it relates to personal property, there are two approaches to the problem.
      * Invalidity will usually render the disposition void, but there are some legal exceptions which keep the gift alive and just strike the condition.
* There are several grounds on which a condition will be invalidated:
  1. Public policy;
     + Courts can refuse to enforce terms in contract in transfers of land that offend public policy.
       - Courts have recognized various categories of cases where public policy may be invoked to void a conditional testamentary gift, including (*Spence v BMO Trust Company*):
         * Conditions in restraint of marriage and those that interfere with marital relationships;
         * Conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent;
         * Conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation; and
         * Conditions that incite a beneficiary to commit a crime or do any act prohibited by law.
       - Courts may also refuse to enforce provisions in a will that would prohibit an heir from carrying out public duties (e.g., serving in the military) or voting in an election.
       - Conditions *in terrorem* intended to deter a legatee from contesting the will are unenforceable.
  2. Uncertainty;
     + Stipulations cannot be enforced if they cannot be interpreted with certainty (e.g. "to B, so long as he's loyal" or "to B, so long as he continues to reside in Canada”).
     + What degree of certainty is required depends on the nature of the stipulation.
       - With a condition subsequent, the court must be able to see from the beginning, *precisely and distinctly*, what events must happen to cut the estate short (*Sifton v Sifton*).
       - In interpreting a condition precedent, the court only has to be able to see whether the recipient falls within a reasonable or plausible or sensible meaning of the terms used (Ziff).
  3. Impossibility;
     + Conditions which a beneficiary can prove are impossible to perform are void in law, meaning that the beneficiary will take the gift absolute.
       - This is a very high standard; it the condition cannot just be hard or improbable.
  4. Restraint; and
     + Courts will declare invalid any condition attached to a freehold estate that deprives the holder *substantially* of the right of alienation.
  5. Perpetuities. (*discussion omitted*)

##### *In Re Estate of Charles Millar, Deceased*, [1938] SCR 1

Facts:

* Charles Millar of Toronto died leaving a will with the following clause:

*9. [The residue] I give, devise and bequeath unto my Executors and Trustees … to convert into money … and invest … and at the expiration of ten years from my death to give it and its accumulations to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the Registrations under the Vital Statistics Act…*

The appellants argue that this provision is against public policy because it tends to give rise to a competition between married couples to bring about successive births in rapid sequence to the injury of the mothers’ health, to the injury of the moral and physical injury of the children, and to the degradation of motherhood and family life.

Issue and holding:

1. Does the word "children" in clause 9 include "illegitimate" children? **NO**
2. Is clause 9 void as against public policy? **NO**

Analysis:

* The word "children" in a will *prima facie* means legitimate children unless there is an expression of intention by the testator to use the word "children" as including illegitimate children.
* It is the generally the duty of the courts to give effect to testamentary dispositions; that said, sometimes public policy considerations may justify overriding a testator's proprietary freedom.
  + Generally, testamentary dispositions must only be limited on grounds of public policy where they are against the principle of the established law.
    - If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, then it may be void by analogy to them.
    - It is not open to the courts to hold dispositions of property void simply because, in their own judgment, it is against the public good that they should be enforced.
      * A court has no jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy.
        + This would make for a very unstable foundation on which to make judicial decisions.
      * It is for the legislature, and not the judiciary, to determine what is the best for the public good, and to provide for it by proper enactments.
  + Absent a rule of law justifying a refusal to enforce a testamentary disposition, two conditions must be met to give effect to a new one:
    1. The refusal must be in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole.
       - Thus, it is necessary to ascertain the existence and limits of the principle of public policy contended for, and then to consider whether the will falls within those limits.
    2. The refusal must be done only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.
       - It is the evil tendency of such dispositions in respect of some interest of the state, or of some interest of the people as a whole, with which we are concerned.

Rationale: (Duff CJ)

1. In the present case, there was no expression of intention by the testator as would justify the Court in holding that "children" included illegitimate children.
2. Public policy cannot be successfully invoked against its validity in the circumstances of this case.
   * It has not been argued that the disposition in question is void upon any particular rule or principle established by judicial decision.
   * Further, there are no grounds for recognizing a new rule of law to justify a refusal to enforce dispositions that incentivize child-bearing.
     + First, there is no indication that a policy of encouraging large families by rewards to the parents would have a tendency injurious to the state or to the people as a whole.
       - It is not sufficient to say that some people may be tempted by the hope of obtaining this legacy to conduct themselves in a manner injurious to wife and children.
       - If the possibility of promoting harmful or improper behaviour were used as a basis for voiding terms in a testamentary document, few would withstand scrutiny.
         * There are few wills in which one cannot find some tendency to produce evil.
         * e.g., the gift of a life estate may be void as against public policy for the possibility that the person holding the fee simple in remainder may try to kill the life tenant.
         * e.g., if an estate is left to someone on the condition that they become a doctor, it might be void as against public policy for inducing him to obtain that distinction by fraudulent or improper means.
     + Second, in any event, any harm that the disposition in this case may create for the public is not substantially incontestable.
       - One could imagine that a similar risk of harm to mother and child might be caused by a large bequest to the grandchildren of the testator, which would invite each of the children to have a numerous offspring to secure for his family a proportion of the inheritance.

Concurring: (Crocket J)

* The rule against dispositions against public policy is not limited to those which contravene heads of policy already recognized by past decisions or to cases which clearly fall within the purview of those decisions.
  + It is the courts’ right and duty to bring their own judgment to bear upon the question of whether the purpose of a particular disposition of property contravenes the public good.
  + Substantial incontestability as regards harm to the public is not a necessary condition for the courts to hold dispositions of property invalid.

Notes:

* In *Canada Trust*, a Reuben Wells Leonard established a trust to fund university scholarships. The trust document explained that only white, Protestant, British subjects could receive the scholarship. Robins JA ordered that all discriminatory restrictions should be struck from the trust document, as it was at variance with the democratic principles governing our pluralistic society.
  + Tarnopolsky JA agreed, but clarified that the decision would not mean that any charitable trust which restricts the class of beneficiaries would also be void as against public policy (e.g., private, family trusts, or trusts established to lift up disadvantaged groups).

## Practice Notes

* + In drafting a will, lawyers need to understand *and verify*:
    - The client's family dynamics,
    - The nature and extent of the client's property (sole ownership, co-ownership, joint ownership, beneficiary designations), and
    - The existence of any agreements (pre- and post-nuptial agreements, cohabitation agreements, unanimous shareholder agreements, and contracts to make a will).
  + Common mistakes that people make when they draft a will include:
    - Failing to distribute all of the property in the will (partial intestacy).
    - Failure to verify ownership of assets (e.g., *Meier v Rose*).
    - Failure to properly implement instructions.
    - Failure to properly address capacity and undue influence.
    - Failure to ask "What if…" (i.e., address contingencies).
    - Failure to instruct to change constitution of assets.
  + If you are reviewing a will, things to look out for include:
    - Whether the testator was over 18 when the will was signed (or falls into one of the exceptions in the *WSA* for minors).
    - The will was properly executed (in accordance with the formalities).
    - The will was not revoked.
    - The testator knew and understood the contents of the will.
    - The will was not affected by mistake.
    - The testator had testamentary capacity.
    - The will was not procured by undue influence/fraud.
  + With respect to gratuitous transfers, lawyers should ask about whether the donor intended a *gift* to the *donee*, a *resulting trust* on behalf of the estate, or an *advance* on their inheritance.
    - Ideally, transferees should record their intentions, whether in a will, in a lawyer's notes, or in a letter or some other document made by the testator.

# Planning for Incapacity

* Alberta's *Adult Guardianship and Trusteeship Act* ("*AGTA*") provides a variety of ways for an adult to get help making decisions; the right choice depends on (1) the adult's *capacity* and (2) the decisions being made.
  + "Capacity" means, in respect of the making of a decision, the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of (i) a decision, and (ii) a failure to make a decision [*AGTA*, s. 1(d)].
    - An adult is presumed to have capacity until the contrary is determined [*AGTA*, s. 2(a)].
  + There are two types of decisions covered by the *AGTA*:
    1. *Personal decisions*: any issue, except a financial matter, relating to health care, where, with whom, and under what conditions to live, with whom to associate, participation in social activities, participation in educational activities, employment, and any legal proceedings that do not relate primarily to financial matters [*AGTA*, s. 1(bb)].
    2. *Financial decisions*: any matter relating to buying, selling, managing, or protecting property [*AGTA*, s. 1(o)].
* When someone drafts a will, it is often advisable to draft an Enduring Power of Attorney ("EPA") and a Personal Directive ("PD") to ensure that, should they lose capacity, someone can easily step in and make personal and financial decisions for them.
  + When people do not complete an EPA and a PD, and the subsequently lose capacity, the family must obtain a guardianship order (personal matters) or a trusteeship order (financial matters) to administer that family member’s affairs.

Diagram

Description automatically generated

## Powers of Attorney

* An Enduring Power of Attorney "EPA" is a legal document which allows someone to be appointed (an "attorney") to manage the financial affairs of another person (a "donor") during the donor's lifetime.
  + Distinguishable from a will, which appoints someone to manage the testator's affairs *after* their death.
    - In contrast, an EPA only applies while the donor is still alive and comes to an end when they die.
  + Distinguishable from a PD, which appoints someone to manage another person's *personal* affairs.
* Without an EPA, a family member or another interested party of someone with mental incapacity or infirmity will need to apply to the court under the *AGTA* to become their trustee.
  + This can take months, is complex, and can be very expensive; it may also result in someone managing the finances of the represented adult that they would not have chosen.
* EPAs are ripe for abuse and commonly cause significant family strife if they are misused.

### Technical Requirements

* Under the *Powers of Attorney Act* ("*PAA*"), the requirements of a valid EPA are as follows:
  + The donor must be an individual who is an adult at the time of execution [*PAA*, s. 2(1)(a)] and who is mentally capable of understanding the nature and effect of the EPA (see *Pirie v Pirie*, below) [*PAA*, s. 3].
  + The attorney must be an adult at the time of execution [*PAA*, s. 2(2)].
  + The EPA must be in writing, dated, and signed [*PAA*, s. 2(1)(b)(i)]:
    1. by the donor in the presence of a witness, or
    2. if the donor is physically unable to sign an enduring power of attorney, by another person on behalf of the donor, at the donor’s direction and in the presence of both the donor and a witness;
       - Neither an attorney nor their spouse or AIP can sign on behalf of the donor [*PAA*, s. 2(3)].
    - Under the *Electronic Transactions Act*, electronic signatures do not suffice for an EPA [s. 7(1)(c)].
  + The EPA must by signed by the witness in the presence of the donor [*PAA*, s. 2(1)(b)(ii)].
    - The following persons may not witness the signing of an EPA [*PAA*, s. 2(4)]:
      1. a person designated in the EPA as the attorney;
      2. the spouse or AIP of a person designated in the EPA as the attorney;
      3. the spouse or AIP of the donor;
      4. a person who signs the EPA on behalf of the donor;
      5. the spouse or AIP of a person who signs the EPA on behalf of the donor.
  + The EPA must contain a statement indicating that it either [*PAA*, s. 2(1)(b)(iii)]:
    1. is to continue notwithstanding any mental incapacity or infirmity of the donor that occurs after execution ("immediate"), or
    2. is to take effect on the mental incapacity or infirmity of the donor ("springing").
* An EPA may contain any instructions respecting the designation of attorneys and their authority:
  + It must ensure that an attorney is appointed.
    - The donor may appoint multiple attorneys, but this can create problems if the attorneys disagree about how to exercise their authority.
    - If the donor does want to appoint multiple attorneys, they may specify that they can act jointly *and* severally.
    - If the donor appoints a single attorney, they may want to appoint alternate attorneys should their initial choice be unable to fulfill their duties.
  + It should contain a provision clearly specifying when it comes into effect (see "Coming Into Effect," below).
  + It should ensure that the attorney is given a general power to manage financial affairs.
  + If they want, a donor may grant the attorney specific powers that they would not otherwise have (e.g., the power to deal with land, the power to provide support or make gifts to non-family members, etc.).
  + To reduce the risk of conflict, it may include provisions requiring mandatory reporting to family members, accounting at intervals, etc.
* Although the *PAA* does not expressly require it, most EPAs come with an Affidavit of Execution behind them where the witness to the EPA swears an Affidavit.
  + It is good practice to prepare and have the Affidavit of Execution signed at the same time the EPA is signed and witnessed; the Land Titles office, banks, etc. may require one.

### Coming Into Effect

* **Immediate EPA**: An EPA may provide that it comes into effect immediately.
  + Donors remain able to manage their own affairs when such an EPA is executed, unless they no longer have the mental capacity to do so.
* **Springing EPA**: an EPA may provide that is comes into effect at a specified future time or on the occurrence of a specified event, including, but not limited to, the mental incapacity or infirmity of the donor [*PAA*, s. 5(1)].
  + The EPA may name one or more persons on whose written declaration the specified event is conclusively deemed to have occurred [*PAA*, s. 5(2)].
    - e.g., the EPA may specify that it comes into effect upon the declaration of two physicians and the agreement of the attorney(s).
  + Where the specified contingency relates to the mental incapacity or infirmity of the donor and
    1. the EPA does not name a person for the purpose of bringing the EPA into effect, or
    2. the person named for the purpose of bringing the EPA into effect
       1. dies before the EPA comes into effect, or
       2. is unable or is incapable of determining whether the specified contingency has occurred,

the specified contingency shall be conclusively deemed to have occurred when 2 medical practitioners declare in writing that the specified contingency has occurred [*PAA*, s. 5(4)].

* Where an EPA is to come into effect on the mental incapacity or infirmity of the donor, information concerning the donor’s mental and physical health may be disclosed to the extent necessary for the purposes of confirming whether the specified contingency has occurred [*PAA*, s. 6].
  + This exists notwithstanding any restriction, statutory or otherwise, relating to the disclosure of confidential health care information.
  + This can be useful if the attorney believes that the donor has lost capacity but the donor doesn't.

### Authority of an Attorney

* *Subject to the PAA and any terms contained in an EPA*, an attorney (a) has authority to do anything on behalf of the donor that the donor may lawfully do by an attorney and (b) may exercise their authority for the maintenance, education, benefit, and advancement of the donor's spouse, AIP, and dependent children [s. 8].
  + If a donor wants their attorney to be able to gift funds (to a charity, to family members, etc.), this must be included in the EPA expressly.
* An attorney may apply for the advice or direction of the Court on any matter respecting the management or administration of the donor’s property [*PAA*, s. 9(1)].
  + An attorney acting on the advice or direction of the Court is deemed to have discharged their duty in respect of the matter that was the subject of the advice or direction [*PAA*, s. 9(2)], *unless* the attorney's actions constituted fraud, wilful concealment or misrepresentation in obtaining the advice or opinion [*PAA*, s. 9(3)].

### Limits and Duties

* Where (a) an attorney has acted in pursuance of an EPA or has otherwise indicated acceptance of the appointment and (b) the EPA has not been terminated, *the attorney has, unless the EPA provides otherwise, a positive duty to exercise their powers to protect the donor's interests* [*PAA*, s. 8].
  + i.e., an attorney has the right to refuse an appointment, but if they act in some way as to indicate acceptance of the appointment, they are bound by a duty to act in the donor's interests.
  + Similarly, under s. 7.1 of the *PAA*, ss. 2 to 8 of the *Trustee Act* ("*TA*") apply to an attorney exercising a power of investment under an EPA.
    - Under the *TA*, an attorney may invest funds in any kind of property [s. 3(1)], but must do so with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances [s. 3(2)].
      * The attorney must review the investments at reasonable intervals to determine that the investments continue to be appropriate [*TA*, s. 3(3)].
* There are several common law restrictions on an attorney's power; for instance, an attorney cannot:
  + Make a new will for the donor.
  + Change beneficiary designations, unless they are given that power expressly.
  + Exercise a discretionary power given to the donor personally.
  + Delegate their authority unless given that power expressly.
  + Waive or release the donor's dower rights.
  + Sell or deal with land unless the EPA allows that expressly.
  + Gift funds (e.g., to charity, grandchildren, etc.) unless they are given that power expressly.
  + Change or make a new EPA or PD for the donor.
* An attorney must keep detailed records of the activities done on behalf of the donor (i.e., bank statements, receipts, evidence of all transactions, etc.).
  + If the attorney fails to account for the transactions entered into in pursuance of the EPA, an application may be made for an order directing them to do so [*PAA*, s. 10(1)].
    - The right to demand an accounting exists even if the EPA purports to abrogate it [*PAA*, s. 10(5)].
    - This application may be made by the donor or, if the donor is unable to make reasonable judgments in respect of matters relating to their estate, by any interested person [*PAA*, s. 10(2)].

### Attorney Liability

* Under s. 4(1) of the *Trustee Act*, an attorney is not liable for a loss in connection with the investment of the donor's funds that arises from a course of action that a trustee exercising reasonable skill and prudence could reasonably have adopted.
* Under s. 41 of the *Trustee Act*, if an attorney is liable for breach of their fiduciary obligations, but they have acted honestly and reasonably, then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

### Termination

* Under s. 13(1) of the *PAA*, except in the case of an irrevocable power of attorney, and notwithstanding any agreement to the contrary, an EPA terminates:
  1. if it is revoked in writing by the donor at a time when the donor is mentally capable of understanding the nature and effect of the revocation;
     + e.g., the donor may make a new EPA that clearly states that it revokes all previous EPAs.
  2. subject to s. 12, if the attorney renounces the appointment and gives notice to the donor;
     + Under s. 12(1), an attorney cannot, during any period in which they are under a duty to act under s. 8, renounce their appointment *except with the court's permission*.
       - A court may grant an application for permission to renounce if it (a) considers that this would be in the donor's best interests and (b) is satisfied that any remaining attorney is prepared to carry out the attorney’s duties [*PAA*, s. 12(5)].
  3. on the granting of a termination order pursuant to s. 11;
     + Any interested person may apply to the Court for an order terminating an EPA [*PAA*, s. 11(1)], which the court may grant if it considers this to be in the donor's best interests [*PAA*, s. 11(2)].
     + On granting an order terminating an EPA, the Court shall not appoint a substitute attorney but may do one or both of the following [*PAA*, s. 11(4)]:
       1. direct that the applicant bring an application for a trusteeship order in respect of the donor's estate;
       2. pending the application for a trusteeship order, appoint an interim trustee of the donor’s estate with such powers as the Court considers appropriate.
  4. on the granting of a trusteeship order under the *AGTA* in respect of the donor;
  5. on the death of the donor or the attorney;
     + Where an EPA appoints more than one attorney or provides for alternate attorneys, the EPA only terminates when the last remaining attorney dies [*PAA*, s. 13(2)].
  6. on the granting of a trusteeship order in respect of the attorney.
* An EPA is "enduring" because it is not terminated by any mental incapacity or infirmity of the donor that occurs after execution [*PAA*, s. 4].

#### *Pirie v Pirie*, 2017 ABQB 104

Facts:

* In 2008, Jack Pirie executed an Enduring Power of Attorney ("EPA"), appointing his three children and his wife jointly as his attorneys. It was to take effect only when, through Jack's mental incapacity or infirmity, he could no longer make reasonable judgements in respect of his estate. Jack separated from his wife in 2014 and hired a matchmaker to help him find a new wife. She introduced Jack to Leslie. After three weekends with Leslie, Jack made a proposition that she live with him with a view towards marriage, but if it did not work out, he would pay her $100,000. When Jack's attorneys became aware of this arrangement, they became concerned about Jack's mental abilities. At the request of the children, Jack agreed to see Dr. Pachet. Dr. Pachet's report stated that Jack had medium level dementia but that he possessed adequate understanding and appreciation regarding the nature and purpose of an EPA. Jack was unhappy with this assessment and had himself assessed by Dr. Woodruff. Dr. Woodruff believed that Jack suffered from mild cognitive impairment, but was still capable of making decisions. The children became aware of the results but were not convinced. In May 2016, Jack's attorneys activated the 2008 EPA. In July 2016, Jack executed a revocation of his 2008 EPA and appointed his brother as his new attorney.

Issue and holding:

* Is Jack's revocation of his 2008 EPA and his appointment of new attorneys in 2016 valid? **YES**

Analysis:

* The *Powers of Attorney Act* permits the use of an EPA, which becomes effective upon the mental incapacity or infirmity of the donor; "mental capacity" and "infirmity" are undefined.
  + Section 3 holds that an EPA is void if, at the date of its execution, the donor is mentally incapable of understanding the nature and effect of the enduring power of attorney.
  + Section 13(1) provides that an EPA terminates if it is revoked in writing by the donor at a time they are mentally capable of understanding the nature and effect of the revocation.
    - Following the reasoning in *Re K; Re F*, the ABQB in *Midtdal v Pohl* held that capacity to execute an EPA would be established if the donor understood that:
      1. the attorney would be able to assume complete authority over the donor’s affairs;
      2. the attorney could do anything with the donor’s property that the donor could have done;
      3. that the authority would continue if the donor became mentally incapable; and
      4. would in that event become irrevocable without confirmation by the court.
    - It is not necessary for the donor to be capable of managing their affairs on a regular basis (*Midtdal*).
    - A person should be able to execute or revoke an EPA for any reason so long as he understands the nature and effect of what he is doing.
      * The Court would start down a slippery slope, if, in performing this analysis, it attempted to determine the extent to which a decision was rational or appropriate.

Rationale: (Hall J)

* The July 2016 revocation of the 2008 EPA and the execution of a new EPA in July 2016 are valid, as they were both competently executed and meet the test set out in *Midtdal*.
  + It was clear from the evidence given by Jack that he fully understood the four elements of the test from *Midtdal*, and this is confirmed by expert evidence.
  + Even if the court were to consider the reasons for the 2016 revocation, Jack has expressed ample reasons for his decision to change his attorney from his estranged wife and children to his brother.
    - He says his children are treating him like a child, that he should be entitled to his own money, that decisions as to his financial affairs should not be controlled by his estranged wife nor his children (who owe him and his wife not less than $7 million), and that his brother is loyal and is a businessman whom he trusts.

## Personal Directives

* A Personal Directive ("PD"), also called a "Living Will," is a legal document which allows someone who is appointed (an "agent") to make personal decisions for someone else (the "maker").
  + The *Personal Directives Act* ("*PDA*") defines "personal decision" as a decision that relates to a personal matter and includes, without limitation, the giving of consent, the refusal to give consent or the withdrawal of consent to health care [s. 1(j)].
    - The *PDA* defines "personal matter" as any matter of a non‑financial nature that relates to an individual’s person and, without limitation, includes [s. 1(l)]:
      1. health care;
      2. accommodation;
      3. with whom the person may live and associate;
      4. participation in social, educational and employment activities;
      5. legal matters;
  + Choosing the right agent is imperative, because they are tasked with making decisions that engage the maker's most intimate values, wishes, and beliefs.
    - Thus, a maker should have lengthy and detailed conversations with the agent about their wishes.
  + A maker can have more than one PD active at one; they may have different PDs for different purposes.
* Without a PD, a family member or another interested party of someone lacking capacity will need to apply to the court under the *AGTA* to become their guardian.
  + This can take months, is complex, and can be very expensive; it may also result in someone managing the personal matters of the represented adult that they would not have chosen.

### Technical Requirements

* Under the *PDA*, the requirements of a valid PD are as follows:
  + The maker must be 18 or older and understand the nature and effect of a PD [s. 3(1)].
    - That said, a person who is 18 or older is presumed to understand the nature and effect of a PD [s. 3(2)].
  + The PD must be in writing, dated, and signed at the end [s. 5(1)(a)–(c)].
    1. by the maker in the presence of a witness, or
       - Under the *Electronic Transactions Act*, electronic signatures are no good for a PD [s. 7(1)(d)].
    2. if the maker is physically unable to sign the directive, by another person on behalf of the maker, at the maker’s direction and in the presence of both the maker and a witness.
       - Neither an agent nor their spouse or AIP can sign on behalf of the maker [s. 5(2)].
  + The PD must be signed by the witness in the presence of the maker [s. 5(1)(d)].
    - The following persons may not witness the signing of a PD [s. 5(3)]:
      1. a person designated in the directive as an agent;
      2. the spouse or AIP of a person designated in the directive as an agent;
      3. the spouse or AIP of the maker;
      4. a person who signs the directive on behalf of the maker;
      5. the spouse or AIP of a person who signs the directive on behalf of the maker.
  + The designated agent must be 18 or older and possess the capacity to make personal decisions on behalf of the maker [s. 12].
* A PD may contain information and instructions respecting any personal matter, including, without limitation, the following [s. 7(1)]:
  1. respecting the designation of agents and their authority;
     + A maker may grant authority to multiple agents and require them to act together (jointly) or enable them to act separately as well as together (severally and jointly).
     + A maker may name one agent to make personal decisions for them and appoint an alternate agent who can act if the original agent dies, becomes incapacitated, or otherwise cannot act.
     + A maker may designate the agent by naming the individual or by naming an office or position, the holder of which is to act as agent [s. 7(3)].
       - A PD may designate the Public Guardian as agent if (a) it is the only agent designated in the PD, (b) the maker satisfies the Public Guardian that no other person is able and willing to act as agent, and (c) the Public Guardian consents to being designated as agent [s. 7(4)].
     + It is common for PDs to include end of life requests of the maker, including whether they wish to be kept on life support in certain circumstances, what will occur if they are in a vegetative state, etc.
  2. designating one or more persons to determine the maker’s capacity under s. 9;
  3. naming the persons who are and are not to be notified of the coming into effect of the PD;
  4. providing instructions with respect to access to confidential information about the maker;
  5. if the maker is a guardian of a minor, designating an agent to take over the care of the minor.
* Although the *PDA* does not expressly require it, it is a good practice to have the witness sweat an Affidavit of Execution at the same time the PD is signed and witnessed.
  + An Affidavit may be requested by hospitals, care facilities, or nursing homes.
* The maker may register their PD in accordance with the regulations [s. 7.2(1)].
  + Under the *Personal Directives Regulation*, the maker pay provide for registration (a) the date they signed the PD, (b) the maker's contact information, date of birth, and personal health number, and (c) the contact information of any agent designated in the PD [s. 4(1)].

### Coming Into Effect

* A PD comes into effect *only when the maker lacks capacity with respect to that matter* [s. 9(1)].
  + i.e., unlike an EPA, which can be immediate in nature, a PD can only be "springing."
  + "Capacity" means the ability to understand the information relevant to making a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision [s. 1(b)].
  + For the purposes of s. 9(1), a maker lacks capacity [s. 9(2)]:
    1. when the person(s) designated in the PD to determine the maker's capacity make, after consulting with a physician or psychologist, a written declaration that the maker lacks capacity, or
       - e.g., the PD may specify that it comes into effect upon the written declaration of a psychologist and the agreement of the agent.
    2. If
       1. the PD does not designate a person to determine the maker’s capacity, or
       2. the person designated to determine the maker’s capacity is unable or unwilling to do so or cannot be contacted after every reasonable effort has been made,

when 2 service providers, at least one of whom is a physician or a psychologist, make a written declaration that the maker lacks capacity.

* When a determination of a lack of capacity has been made, the person making the determination must provide a copy of the declaration to the maker and any other person designated in the maker’s PD [s. 9(4)].
  + On application by the maker or any other interested person, the court may make a determination of capacity of the maker [s. 27(1)(a)].

### Authority of an Agent

* Unless a PD provides otherwise, an agent has authority to make decisions on all personal matters of the maker [s. 14(1)], and such decisions have the same effect as if the maker had made the decision while they had capacity [s. 11].
  + Subject to any limitation set out in a PD, an agent who has authority to make decisions with respect to a personal matter has the same right as the maker to access, obtain, or collect personal information respecting the maker that is relevant to the personal decision to be made [s. 30(1)].
* If more than one person is designated as an agent and (a) each agent has the same authority, (b) the agents do not agree on a decision, and (c) the PD contains no directions for resolving the disagreement, the decision of the majority of the agents is deemed to be the decision [s. 16(2)].

### Limits and Duties

* Within a reasonable time after a PD takes effect, the agent must, subject to the PD, make every reasonable effort to notify the nearest relative and legal representative of the maker that it is in effect [s. 9(5)].
  + "Nearest relative” means the relative of the maker first listed in the following: (i) spouse or AIP, (ii) son or daughter, (iii) father or mother, (iv) brother or sister, (v) grandfather or grandmother, (vi) grandson or granddaughter, (vii) uncle or aunt, and (viii) nephew or niece [s. 1(i)].
    - Whole blood relatives are preferred to half-blood relatives of the same description [s. 1(i)].
    - The eldest of 2 or more relatives described in any subclause are preferred to the other of those relatives, regardless of gender [s. 1(i)].
  + "Legal representative" means attorney under the *PAA* or guardian or trustee under the *AGTA* [s. 1(g)].
* *An agent must follow any* *clear instructions provided in the PD that are relevant to the decision being made* [s. 14(2)], and if the PD *does not* contain clear instructions, the agent must [s. 14(3)]:
  1. make the decision that the agent believes the maker would have made in the circumstances, based on the agent’s knowledge of the wishes, beliefs, and values of the maker, or
  2. if the agent does not know what the maker’s wishes, beliefs, and values are, make the decision that the agent believes in the circumstances is in the best interests of the maker.
* Before making a decision pursuant to a PD, an agent must consult with the maker [s. 13].
* An agent is *not* entitled to receive remuneration for exercising any authority under the PD unless the PD so provides [s. 18].
* An agent has *no* authority to make personal decisions relating to the following matters unless the maker’s PD contains *clear* instructions that enable the agent to do so [s. 15]:
  1. psychosurgery as defined in the *Mental Health Act*;
  2. sterilization that is not medically necessary to protect the maker’s health;
  3. removal of tissue from the maker’s living body
     1. for implantation in the body of another living person pursuant to the *Human Tissue and Organ Donation Act*, or
     2. for medical education or research purposes;
  4. participation by the maker in research or experimental activities, if the participation offers little or no potential benefit to the maker;
  5. any other matter prescribed in the regulations.
* An agent must (a) keep a record of decisions they make under a PD and (b) keep the record during the period that the maker lacks capacity and for at least 2 years after the agent's authority ceases [s. 17(1)].
  + During any period that an agent is required to retain such records, the agent, on request [s. 17(2)]:
    1. must, subject to a PD, provide a copy of the record to the following:
       1. the maker;
       2. the maker’s lawyer;
       3. the maker’s legal representative who has authority with respect to a matter addressed in the record, but only that portion of the record that is relevant to that person’s authority;
          - "Legal representative" means an attorney under the *PAA* or a guardian or trustee under the *AGTA* [s. 1(g)].
       4. any other agent who has decision‑making authority with respect to a matter addressed in the record, but only that portion of the record that is relevant to that person’s authority;
    2. may, subject to a PD, provide a copy of the record or any portion of it to any person if the agent considers that it is in the interests of the maker to do so.
* An interested person may complain in writing to the Public Guardian if a PD is in effect and there is reason to believe that (a) an agent is failing to comply with the PD or the duties of an agent and (b) the failure is likely to cause harm to the physical or mental health of the maker [s. 24.2].
  + The Public Guardian may investigate the complaint, interview any person who may assist in the investigation, and access all relevant records held by the agent or a service provider [s. 24.3(3)].
* On application by the maker, the Public Guardian, or any other interested person, the court may:
  + Based on instructions contained in a PD, vary, confirm, or rescind a personal decision, in whole or in part, made by an agent [s. 27(1)(c)] or stay a personal decision [s. 27(1)(g)].
  + Determine the authority of an agent [s. 27(1)(d)] or revoke the authority of an agent, in whole or in part, if they are failing to comply with their duties and the failure is likely to cause serious harm to the physical or mental health of the maker [s. 27(1)(d.1)].
  + Provide advice and directions [s. 27(1)(e)], including by making a decision where a majority of agent cannot agree under s. 16(2) [s. 27(1)(f)].
  + Make any other order that the court deems appropriate that is not inconsistent with a PD [s. 27(1)(h)].
  + In making a decision, the court may not add to or alter the intent of an instruction contained in a PD [s. 27(3)].

### Agent Liability

* No action lies against an agent for anything done or omitted to be done in good faith while carrying out the authority of the agent in accordance with the *PDA* [s. 28(1)].
* If an agent has acted in good faith, a personal decision made by them does not affect their entitlement or that of their spouse or AIP, or anyone claiming through either of them, to the following [s. 29]:
  1. a disposition under the will of the maker;
  2. the proceeds of an insurance policy on the life of the maker;
  3. a share of the estate of the maker under Part 3 of the *WSA*;
  4. an order under Division 2 of Part 5 of the *WSA* (i.e., family maintenance and support).

### Termination

* Under s. 10 of the *PDA*, a personal directive ceases to have effect in the following circumstances:
  1. with respect to a personal matter, when a determination that the maker has regained capacity to make decisions with respect to that matter is made under s. 10.1;
     + Under s. 10.1(1), if it appears to an agent that there has been a *significant change* in the maker’s capacity, the agent must (a) assess the maker’s capacity with a health care service provider and (b) if they agree that the maker has regained capacity, make a determination.
       - "Significant change" means an observable and sustained improvement that does not appear to be temporary [s. 1(o)].
       - "Service provider" means a person who carries on a business that provides a personal service to an individual and when providing the service requires a personal decision from the individual before providing the service [s. 1(n)].
     + Under s. 10.1(2), if it appears to a service provider who provides health care services to the maker that there has been a *significant change* in their capacity, the service provider must [s. 10.1(2)]:
       1. consult with any agent and assess the maker’s capacity, and
       2. if the service provider believes, or if there is an agent, the service provider and the agent agree, that the maker has regained capacity, make a determination.
     + Under s. 10.1(4) and (5), if an assessment has been done under subs. (1) or (2), and the agent and the service provider do not agree about capacity, 2 service providers, at least one of whom is a physician or a psychologist, may assess a maker’s capacity and make a determination in the prescribed form.
  2. on the maker’s death;
  3. on revocation of the PD in accordance with s. 8, to the extent of the revocation;
     + If the maker understands the nature and effect of revoking a PD, they may revoke the directive in whole or in part [s. 8(1)].
     + A personal directive is revoked, in whole or in part:
       - On the occurrence of a date or event stated in the PD to be the date or event that determines when the PD, or part of it, is revoked [s. 8(2)(a)].
       - By the making of a subsequent PD that contradicts an earlier directive, to the extent of the contradiction [s. 8(2)(b)].
       - By the making of any document, including a subsequent PD, that expresses an intention to revoke an earlier PD or a part of it [s. 8(2)(c)].
         * A document that revokes a PD must meet the formal requirements in s. 5 of the *PDA* [s. 8(3)].
       - When the maker destroys the original PD with the intention of revoking it [s. 8(4)].
  4. on a determination by the Court pursuant to s. 27 that the PD ceases to have effect.
     + Under the *PDA*, on application by the maker or any other interested person, the court may determine the validity of a PD or any part of it [s. 27(1)(b)].

# Estate Administration

* + Subject to any will and the *WSA* or any other enactment, a personal representative ("PR") has the following authority in regard to the property included in the estate of the deceased person [*EAA*, s. 20(1)]:
    1. to take possession and control of the property;
    2. to do anything in relation to the property that the deceased person could do if he or she were alive and of full legal capacity;
    3. to do all things concerning the property that are necessary to give effect to any authority or powers vested in the PR.
  + Any action taken, decision made, consent given, or thing done by a PR with respect to a matter within their authority has the same effect for all purposes as if the deceased person had taken the action, made the decision, given the consent, or done the thing while they were alive and of full legal capacity [*EAA*, s. 20(2)].

## Duties of a Personal Representative

* Under the *Estate Administration Act* ("*EAA*"), a PR is subject to all the duties and liabilities imposed by the *EAA* and any other enactment [*EAA*, s. 23].

### Disposition of Human Remains

* Under the *General Regulation*, passed pursuant to the *Cemeteries Act*, a PR designated in the will of a deceased has priority to control the disposition of the deceased's remains [s. 13(2)].
* The *Surrogate Rules*, Schedule 1, Part 1, Table, s. 1 states that it is the duty of the PR to make arrangements for the disposition of the body and for funeral, memorial, or other similar services.
  + It is the duty of the PR to make appropriate funeral arrangements and to keep expenses reasonable.
    - Disposition of remains must be "determined in light of the deceased’s station in life and circumstances" (*Tzedeck v Royal Trust Co*, [1953] 1 SCR 31), but particular regard should be made to ensure it does not diminish the estate too much for beneficiaries.
    - It is a criminal offence not to dispose of a body.
  + Financial institutions will generally allow a PR to pay for funeral expenses and ongoing debts of the deceased from the deceased’s bank accounts.
    - If the financial institution will not allow this, the PR may need to pay funeral costs out of pocket and reimburse themselves from the estate.

### General Duties (*EAA*, s. 5(1))

* A PR must [*EAA*, s. 5(1)]:
  1. perform the role of PR
     1. honestly and in good faith,
     2. in accordance with the testator’s intentions and with the will, if a valid will exists, and
     3. with the care, diligence, and skill that a person of ordinary prudence would exercise in comparable circumstances where a fiduciary relationship exists, and
        + If, because of a PR's profession or occupation, they ought to possess a degree of skill that is relevant to the performance of the role of a PR and that is greater than that which an ordinary person would have, the PR must exercise that greater degree of skill [*EAA*, s. 5(3)].
  2. distribute the estate as soon as practicable.

### Core Tasks (*EAA*, s. 7(1))

1. Identify the estate assets and liabilities, which may include [*EAA*, Schedule, s. 1]:
   1. arranging with a financial institution for a list of the contents of a safety deposit box,
   2. determining the full nature and value of property and debts of the deceased person and compiling a list, and
      * Assets that usually form part of an estate include:
        + Real property (e.g., houses, cabins, vacation properties, farms)
        + Bank accounts (e.g., chequing, savings, US accounts)
        + Investments (RRSPs, RRIFs, investment account, GICs, stocks)
        + Other assets (pensions, refunds, life insurance, household items, valuable collections, vehicles, livestock, crops)
      * Assets which usually *do not* form part of the estate include:
        + Life insurance policies with a designated beneficiary.
          - Check with the life insurance company or the will to see who is listed as the beneficiary.
        + RRSPs or TFSAs or investment accounts with a designated beneficiary.
          - Check with financial institution or the will to see who is listed as the beneficiary.
        + Real property or bank accounts held jointly.
   3. applying for any pensions, annuities, death benefits, life insurance, or other benefits payable to the estate.
      * e.g., the CPP Death Benefit, which is a one-time payment payable to the estate of a deceased person who has made CPP contributions.
   4. Further, a PR must ensure that accounts are cancelled to limit the risks of identity theft or credit card fraud.
      * They must advise all credit card companies, debtors, accounts of any kind (e.g., Netflix, gym memberships, etc.), and banks that the person has died and, if required, provide a Funeral Director's Statement of Death as proof.
        + In addition, you will need to cancel the other cards of the deceased, including their Alberta Health card, their driver's license or other identification, their passport and SIN cards, their club memberships, and any other cards or memberships belonging to the deceased.
      * For every account cancelled, seek a letter outlining the amount in an account or balance owing as of death.
2. Administer and manage the estate, which may include [*EAA*, Schedule, s. 2]:
   1. creating and maintaining records,
      * All PRs should keep a detailed and careful accounting of:
        + All of the assets of the deceased as of the date of death and all changes to each asset as the estate progresses.
        + All of the liabilities of the deceased and how they were each paid off.
        + All of the work done as PR, including an hourly summary of work if the estate is complex.
      * Failure to keep adequate records can result in liability to the PR, lower PR fees, or disgorgement of improperly held funds (see *Middlestadt Estate*, 2002 ABQB 656).
   2. regularly communicating with beneficiaries concerning the administration and management of the estate,
   3. examining existing insurance policies (for real property, vehicles, etc.), advising insurance companies of the death, and placing additional insurance, if necessary,
      * Insurance companies need to know if property is vacant, as they can void a policy if you fail to advise of a material change.
   4. protecting or securing the safety of the estate property, which may include:
      * Obtaining all keys to real property from anyone who has one.
      * If there are concerns about family members attending on the property, changing the locks.
   5. providing for the protection and supervision of vacant land and buildings,
      * May involve hiring a property manager.
   6. arranging for the proper management of the estate property, including continuing business operations, taking control of property, and selling property,
      * May involve putting in place a manager if there is an ongoing business or farming operation.
   7. retaining a lawyer to advise about the administration of the estate,
   8. applying for a grant or to bring any matter or question before the Court if appropriate or necessary for the administration of the estate,
   9. commencing or defending a claim on behalf of the estate,
   10. preparing and providing financial statements, and
   11. performing any other duties required by law.
3. Satisfy the debts and obligations of the estate, which may include [*EAA*, Schedule, s. 3]:
   1. determining the tax liability of the deceased person and of the estate, filing the necessary returns, paying any tax owing, and obtaining tax certificates before distributing the estate property,
      * A PR should hire an accountant who specializes in the area of estates to assist in reducing taxes payable and in filing the appropriate tax returns, including:
        + The final tax return (January 1 – date of death).
        + The terminal tax return (Date of death – December 31).
        + Any corporate tax returns required.
        + Apply for the Final Clearance Certificate from the CRA.
      * Although there are currently no provincial estate taxes in Alberta, there are fees for land transfers (paid at the Land Titles Office) and for applying for probate.
   2. arranging for the payment of debts and expenses owed by the deceased person and the estate,
      * Debts could include:
        + Estate debts (funeral expenses, legal fees for estate).
        + Secured debts (mortgages, lines of credit, financing of vehicles).
        + Unsecured debts (credit card debts, membership cards like Costco or Sears cards, utilities payments or living expenses, invoices payable by deceased).
        + Unusual debts (debts owed to family members, debts owed to a former spouse, obligations for child support).
      * Debts in an estate have priority over the gifts to all beneficiaries.
        + Thus, in estates with significant debts, people will attempt to keep their assets out of the estate to try to keep funds away from creditors.
      * If there is a deficiency of assets to satisfy the money claims against the estate (i.e., the estate is "insolvent"), the claims must be paid *proportionately and without priority* [*EAA*, s. 27(1)].
        + However, this does not prejudice [*EAA*, s. 27(2)]:
          1. a mortgage existing during the lifetime of the deceased person on the deceased person’s property, or
          2. a priority given to the payment of funeral and estate administration expenses.
      * Marshalling rules specify the order in which property is applied toward the payment of funeral and estate administration expenses and unsecured debts [*EAA*, s. 28(1)]:
        1. property specifically charged with the payment of debts;
        2. property passing by way of intestacy and by way of residue;
        3. general gifts of property;
        4. specific gifts of property;
        5. property over which the deceased person had a general power of appointment.
   3. determining whether to advertise for claimants, checking all claims, and making payments as funds become available, and
      * PRs have a duty to creditors to ensure they get paid, so long as it’s a valid debt and there are funds to do so.
      * Advertising for potential claimants does not happen in every estate, but it is a very good idea to protect the PR if they are unsure of what claims exist against the deceased.
        + If a PR publishes a notice to claimants, they may use Form NC 34 and may file proof of publication in Form NC 34.1 [*Surrogate Rules*, s. 38(1)].
        + A notice to claimants must be published in a newspaper [*Surrogate Rules*, s. 38(2)]:
          1. that is published or circulated in the area where the deceased usually lived, or
          2. if the deceased did not usually live in Alberta, that is published or circulated in the area where a significant amount of the deceased’s property is situated.
        + A notice to claimants must be published [*Surrogate Rules*, s. 38(3)]:
          1. in the case of an estate with a gross value of $100,000 or less, at least once, or
          2. in the case of an estate with a gross value of more than $100,000, at least twice with 5 days or more between the publications.
        + The rough cost of advertising in the Edmonton Journal is $280 per day.
   4. taking the steps necessary to finalize the amount payable if the legitimacy or amount of a debt is in issue.
4. to distribute and account for the administration of the estate, which may include [*EAA*, Schedule, s. 4]:
   1. determining the names and addresses of those beneficially entitled to the estate property and notifying them of their interests,
   2. informing any joint tenancy beneficiaries of the death of the deceased person,
   3. informing any designated beneficiaries of their interests under life insurance or other property passing outside the will,
   4. administering any continuing testamentary trusts or trusts for minors,
   5. preparing the PR's financial statements, a proposed compensation schedule and a proposed final distribution schedule, and
   6. distributing the estate property in accordance with the will or intestate succession provisions.
      * On complying with their duties, the PR may distribute the estate property among the entitled persons, having regard *only* to the claims of which they have notice at the time [*EAA*, s. 31(1)].
        + A PR who complies with their duties is *not liable in respect of any claim in respect of any property distributed of which the PR does not have notice at distribution* [*EAA*, s. 31(2)].
      * Before releasing funds, the PR must account to all residual beneficiaries in an 'Interim Accounting'.
        + An Interim Accounting is generally done to distribute most of the estate, less a holdback for final expenses and taxes.
          - Consult with an accountant to ascertain the holdback.
        + Once satisfied with the accounting, the beneficiaries sign releases approving the accounts (see "Releases," below).
        + Once all beneficiaries have submitted Interim Releases, the PR can pay out the interim bequests per the Schedule of Distribution.
      * We then wait for a 'Final Clearance Certificate' from the CRA.
        + Once obtained, the PR completes a Final Accounting and Final Release (very similar to Interim Release) to pay out the remainder of the estate.

### Advice and Direction

* A PR may apply to the court for advice or direction regarding the management and administration of an estate [*EAA*, s. 49(1)] in Form C1 [*Surrogate Rules*, s. 4(1)].
* A PR acting at the advice or direction of the court is deemed to have discharged their duty as PR in respect of the subject‑matter of the direction [*EAA*, s. 49(2)].
  + However, this does not indemnify a PR if they have been guilty of any fraud, willful concealment, or misrepresentation in obtaining the direction of the Court [*EAA*, s. 49(3)].

### Non-Performance of Duties (s. 8)

* If, on application, the court is satisfied that a PR has refused or failed to perform a duty or core task for which they are responsible, the court may [*EAA*, s. 8]:
  1. order the PR to perform the duty or core task;
  2. impose conditions on the PR;
  3. remove the PR;
  4. revoke a grant;
  5. make any other order that the court considers appropriate.

## Personal Representatives’ Compensation

* The *Surrogate Rules*, Schedule 1, Part 1 contain the fundamental rules for PR compensation in Alberta.
* PRs may receive fair and reasonable compensation for their responsibility in administering an estate by performing their duties [*Surrogate Rules*, s. 1(1)].
  + Compensation paid to a PR is for all the services performed by them to complete the administration of the estate [*Surrogate Rules*, s. 1(2)].
  + The following factors are relevant when determining the compensation charged by or allowed to PR [*Surrogate Rules*, s. 2]:
    1. the gross value of the estate;
    2. the amount of revenue receipts and disbursements;
    3. the complexity of the work involved and whether any difficult or unusual questions were raised;
    4. the amount of skill, labour, responsibility, technological support, and specialized knowledge required;
    5. the time expended;
    6. the number and complexity of tasks delegated to others;
    7. the number of PRs appointed in the will, if any.
  + Under the *Trustee Act*, a trustee is entitled to any fair and reasonable allowance for the trustee’s care, pains, and trouble and the trustee’s time expended in and about the trust estate [s. 44(1)].
  + Additional compensation may be allowed when PRs [*Surrogate Rules*, s. 3]:
    1. are called upon to perform additional roles to administer the estate, such as exercising the powers of a manager or director of a company or business,
    2. encounter unusual difficulties or situations, or
    3. must instruct on litigation.
* If the compensation payable to the PR is fixed in a will, no greater amount can be charged or allowed unless the fixed amount is varied by agreement among the affected beneficiaries or by order of the court [*Surrogate Rules*, s. 4].
* Once determined, the compensation must be shared among the PRs in proportions agreed to among the PRs or as ordered by the court [*Surrogate Rules*, s. 5].
* PRs may be paid compensation before completing the administration of the estate if (a) the will provides for it, (b) all the affected beneficiaries agree to it, or (c) the court orders it [*Surrogate Rules*, s. 6(1)].
  + If all or any part of the amount of compensation paid to a PR is later reduced by the court, the PR must repay the disallowed amount immediately to the estate with interest [*Surrogate Rules*, s. 6(2)].
* PRs are entitled to reimbursement for expenses properly incurred by them in the administration of the estate, including the following [*Surrogate Rules*, s. 9]:
  1. expenses reasonably incurred by the PRs in carrying out their duties;
  2. fees or commissions to agents, including lawyers, accountants, real estate agents, securities brokers, investment advisors, appraisers, auctioneers and other professionals, engaged to perform estate administration services or to buy or sell estate property.
* The usual process for calculating PR compensation is:
  + The PR keeps a record of their actions in the estate;
  + Lawyer for PR reviews *Surrogate Rules* to estimate complexity of estate;
  + Lawyer for PR prepares a range of fees that would be reasonable (often using guidelines);
  + The PR then chooses a fee to propose to beneficiaries;
  + The fee is contained in the Interim Accounting for approval by all affected beneficiaries; and
  + If approved by all, is paid to PR when Interim Distribution is made.

### *Berry (Re)*, 2017 ABQB 77

Facts:

* Ms. Berry died testate in 2010, naming one of her daughters, Donna Burniston, as her executor. The will does not address compensation for her executor. The estate had a value of almost $2 million. In 2011, John Berry and Linde Lee ("the Applicants"), Ms. Burniston's siblings, successfully moved to replace Ms. Burniston as personal representatives. She was awarded a $10,000 fee based on an assessment of the relatively minor tasks she actually completed. They applied for total compensation as trustees of their mother’s estate in the amount of $64,000. Ms. Burniston objects to these amounts.

Issue and holding:

* Is the compensation claimed by the Applicants fair and reasonable? **YES**

Analysis:

* Section 3(c) of Schedule 1 of the *Surrogate Rules* provides that additional compensation may be allowed when PRs must instruct on litigation.
  + When a PR instructs a lawyer, the cost of performance by the lawyer of certain tasks should not be also claimed by the PR.
    - Nonetheless, the PR is also entitled to compensation for having the responsibility of instructing the lawyer.
* Section 44(1) of the *Trustee Act* stated that a trustee is entitled to any fair and reasonable allowance for the trustee’s care, pains, and trouble and the trustee’s time expended in and about the trust.
  + Section 5(2) of the *ESA* provides that a PR is a "trustee."
  + Compensation for "case, pains and troubles" is based not only on the work performed by a PR, but also on the responsibility they assume for decision-making in the affairs of an estate to resolve problems arising over and above the usual procedures attendant upon administration.
* A practice has developed of fixing executor's compensation by the application of percentages to the value of the estate under consideration.
  + e.g., in *Boje*, Graesser J reproduced the guidelines on executor compensation endorsed by the LESA, even though they were not sanctioned by statute or regulation.
  + The use of guidelines as a way of standardizing approaches to the resolution of compensation claims has the benefit of predictability.
  + However *courts should not slavishly adhere to percentage guidelines*.
    - After all, a small, complex estate may make more demands upon the trustee than a much larger estate of a simpler nature.
    - Conversely, in a large estate, assessment of the compensation by the adoption of what might be said to be "the usual" percentages would result in a grossly excessive allowance.
  + Standardized percentages should only be used as a rough guide to assist in the computation of what may be considered fair and reasonable, which is the ultimate duty of the court.
    - The court should "cross-check" any percentage guideline amount against the following considerations:
      1. The magnitude of the estate;
      2. The care and responsibility springing therefrom;
      3. The time occupied in performing its duties;
      4. The skill and ability displayed;
      5. The success which has attended its administration.
    - This approach ensures an appropriate balance between the need to provide predictability while, at the same time, tailoring compensation to the circumstances of each case.

Rationale: (Veit J)

* While the amount claimed may be at the high end of what is permissible in the circumstances, that compensation is nevertheless fair and reasonable.
  + A large estate with a value of $2 million deserves care and attention.
  + Although this estate was relatively liquid from the outset, the will itself caused difficulties and exacerbated the hostility amongst the parties.
  + The Applicants assumed their responsibilities in February 2013 and were ready to wind up the estate in January 2017; that is a long time.
  + The Applicants displayed skill and ability in the administration of the estate.
    - By making judicious choices in the deployment of professionals, the Applicants reduced the costs to the estate and improved some of its revenue.
  + The Applicants have wound up the administration of the estate successfully.
  + The Applicants had to deal with unusual difficulties in their administration of the estate.
    - Ms. Burniston feels aggrieved by the way the Applicants treated her, and the Applicants feel that they have been treated badly by her.
  + The Applicants were required to give instructions both to lawyers and to accountants; having to work in these conditions is stressful.
* While Ms. Burniston argues that the Applicants should receive the same amount that she did when she was the PR (i.e., $10,000), Ms. Burniston's situation is not like that of the Applicants.
  + First, the Applicants have dealt with the estate for twice as long as Ms. Burniston.
  + Second, the Applicants have done more to wind up the estate than had Ms. Burniston.
    - Proper tax returns were filed, adequate records were kept, estate property was managed prudently, and the estate was effectively wound up.

## Personal Representative Liability

* PRs owe fiduciary duties to the beneficiaries of an estate (*Tatum v Tatum*, 2011 ABQB 253).
  + A PR is a trustee within the meaning of the *Trustee Act* ("TA") [*EAA*, s. 5(2)], and must therefore invest funds with a view to obtaining a reasonable return while avoiding undue risk [*TA*, s. 3(2)].
  + However, if in any proceeding affecting trustees or trust property it appears to the court:
    1. that a trustee is or might be personally liable for any breach, but
    2. that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach,

then *the court may relieve the trustee from personal liability* for the breach [*TA*, s. 41].

* Executors are only liable to do their best and if they honestly do their best, they are not liable for errors in judgement (*Lopushinsky Estate (Re)*).
  + They must abide by the terms of the will, act impartially, exercise ordinary care and prudence in dealing with estate assets, and properly account for such assets.
  + The standard expected of them is purposely not made too onerous by the law, so as to encourage persons to accept a position as executor.
  + In cases of a non-professional executor, the courts have been especially slow to find an executor responsible for errors made honestly and in good faith.
  + Executors may not be liable in case of mistake.
    - But, if they leave money around uninvested, they must personally make up the income it would have earned if it had been invested.
* Executors are liable both for willful default and acting with reckless carelessness (*Lopushinsky Estate (Re)*).

### Risk Management

* The most common areas where PRs are sued are:
  + Improperly interpreting or not following the will.
  + Paying the wrong amounts to the wrong beneficiaries or missing a beneficiary, or delays in payments.
  + Taking PR compensation without beneficiary approval.
  + Improper payment of debts (preferring creditors improperly).
  + Failing to prudently invest estate assets.
  + Failing to properly protect or secure estate assets.
  + Not selling assets in a timely or beneficiary way such that the estate takes a loss when the sale does occur.
  + Failing to invest excess cash.
  + Unreasonably prosecuting or defending legitimate claims against the estate.
  + Improper delegation of duties.
  + Improvident settlements.
  + Failure to keep accurate records of the administration.
* To decrease their chances of liability as a PR can:
  + Step away (renounce) from the job before undertaking any tasks and let another person step forward.
  + You can only renounce if you have not intermeddled.
  + Follow the advice of lawyers, accountants and investment experts.
  + Ensure that you are transparent, fair, and communicate often with all interested parties.
  + Consider executor’s insurance (e.g., ESAssure).

## Removal of Personal Representative

* If, on application, the court is satisfied that a PR has refused or failed to perform a duty or core task for which they are responsible, it may remove the PR [*EAA*, s. 8(c)].
  + It is notoriously hard to remove a PR, especially an executor (since the court does not want to lightly interfere with the written direction of the testator).

### *Warren Estate (Re)*, 2015 ABQB 420

Facts:

* In May 2014, Margaret Warren executed a will appointing Karolyn Lister as executor of the estate and, in the alternative, Linda Herrle. In June 2014, Mrs. Warren passed away. The residual beneficiaries ("the Applicants") apply to remove Ms. Lister as executor and to appoint Ms. Herrle. They submit that Ms. Lister is in a conflict of interest in that she is the AIP of a residual beneficiary of the estate, Donald Warren, and thus has an incentive to give Mr. Warren preferential treatment. They also argue that Ms. Lister has misconducted herself in administering the estate, creating an extremely rancorous relationship between them. They allege that Ms. Lister's counsel failed to respond to their inquiries after several attempts at communication. They allege that Ms. Lister valued all personal items taken by one residuary beneficiary, and took the position that the value of the items should be counted against her portion of the estate, contrary to the terms of the will. They allege that Ms. Lister gave them an ultimatum to attend at their mother's home at specific, limited times to remove her personal items, failing which she threatened to begin selling or disposing of them contrary to the terms of the will. Ms. Lister said that she felt she needed to be present at the testator's house when the Applicants attended to sort through the contents to ensure there were no misunderstandings. Lastly, they allege that Ms. Lister had ransacked their mother's house, that valuable jewellery and other items were missing from it, and that she mixed together jewellery that was originally separated for each of the rightful beneficiaries. Ms. Lister responds that she tried to organize the testator's belongings to make it easier to sort through, and that she took nothing from the house.

Issues and holding:

* Should Ms. Lister be removed as executor? **NO**

Analysis:

* *Widdifields on Executors and Trustees* summarizes the "canons of trusteeship," which include:
  1. The trustee shall obey the directions of the settlement or trust instrument unless the court authorizes changes or the beneficiaries consent to them.
  2. The trustee shall act impartially between beneficiaries.
  3. The trustee must exercise ordinary care and prudence.
  4. The trustee shall be loyal to her trust by not trafficking with her trust and shall not profit by her administration or permit her interest to conflict with that of the trust.
  5. The trustee shall be ready with her accounts.
* The ABQB has both an inherent jurisdiction and a statutory jurisdiction under the *ESA* and the *Trustee Act* to remove executors.
  + The standard of proof in a proceeding to remove an executor is a balance of probabilities, but a court should not act too readily to remove an executor.
    - An executor should only be removed where absolutely necessary and only on the clearest evidence of serious maladministration; mere allegations are insufficient.
  + The court must consider whether the continuance of the trustee would jeopardize the assets of the trust or the welfare of the beneficiaries or prevent the trust from being properly executed.
    - Alleged acts and omissions must endanger the trust property or show dishonesty, a lack of proper capacity to execute the duties of a PR, or a lack of reasonable fidelity.
      * e.g., failure to provide an accounting or the destruction of records.
    - A trustee should not be in a conflict of interest where he/she must weigh his personal interests against the interests of the beneficiaries.
      * e.g., where the executor will be both a plaintiff and a defendant in litigation with the estate.
      * However, the fact that an executor is also a beneficiary is not in and of itself a disqualifying conflict of interest.
    - While an executor cannot seek to "punish" beneficiaries, they are under no obligation to act in the best interests of beneficiaries if those best interests are not consistent with the will.
    - Friction or hostility may provide grounds where it has affected the manner in which the trust has been administered.
      * However, where a rancorous relationship is alleged, it must actually impair the welfare of either the trust property or the beneficiaries of the estate.
      * Some level of friction between an executor and one or more of the beneficiaries may be quite normal, and even anticipated.
        + The question is whether it would be difficult for the trustee to act in an impartial and objective manner.

Rationale: (Goss J)

* Ms. Lister is not in a conflict of interest merely by virtue of the fact that she is the AIP of Reid.
* The friction, however caused, has not reached a level or degree that renders Ms. Lister incapable of exercising her duties in a completely impartial and objective manner.
  + The Applicants have shown some level of unfairness by Ms. Lister in the administration of the estate.
    - e.g., Ms. Lister was certainly insensitive to the needs of the Applicants to take their time in sifting through their mother's belonging, reliving memories and saying goodbye.
    - However, the facts do not rise to the level of seriousness which would lead to removal.
  + There is no evidence of significance that Ms. Lister has jeopardized the estate assets, put the welfare of the beneficiaries at risk, or prevented the trust from being properly executed.
    - There has been misunderstanding, miscommunication, and overzealousness, but not misconduct.

# Grants

* "Grant" means the court’s grant of authority to administer an estate, and includes (i) a grant of probate, (ii) a grant of administration, and (iii) a resealed or ancillary grant of probate or administration [*EAA*, s. 1(f)].

## Probate Court

* A probate court decides whether a document is entitled to probate as a valid testamentary paper, and to determine who is entitled to be the PR of the deceased, whether testate or intestate.
  + "Probate" refers to proof that there is a will, proof of its contents, and proof of the righteousness of the process of its execution (Feeney).
    - Probate may raise issues of testamentary capacity, knowledge and approval of contents of the will, fraud, and undue influence.
  + The role of a court of probate is distinct from that of a court of construction, which seeks to ascertain the intentions of the will-maker with respect to his or her property (Feeney).
    - "Construction" is the job of ascribing the meaning of the words of the will-maker that mot likely approximates with his or her intention (Feeney).
  + That said, a probate court may need to interpret a will to some extent.
    - It may need to determine whether several documents or parts of a document are reconcilable in order to be able to admit only those parts truly representing the final intentions of the testator.
    - Interpretation of a will by a court of probate that are incidental to the proper exercise of its function does not bind another court that subsequently has to construe the will.
* The functions of a court of probate are exercised in Alberta by the ABQB [*Judicature Act*, s. 2; *EAA*, s. 1(d)].
  + The functions of a court of constructions are also exercised by the ABQB.
  + A grant application must be heard by a judge of the ABQB, not a Master [*EAA*, s. 3(2)].

### Jurisdiction

* The court has jurisdiction over the estate of a deceased person if [*EAA*, s. 2(1)]:
  1. on the date of death the deceased person was a resident of Alberta,
  2. on the date of death the deceased person owned property in Alberta, or
  3. the court, on application, is satisfied that a grant is necessary.
* The powers of a probate court includes (Oosterhoff):
  1. Issuing grants, and in doing so:
     + Deciding whether the will was properly executed and attested;
     + Deciding whether the testator had the necessary capacity;
     + Deciding whether there was fraud or undue influence;
     + Determining if the testator knew and approved of contents;
     + Confirming that there were no mistakes on the face of the will and if necessary, expunging the mistakes;
     + Confirming that alterations were properly executed and attested;
     + Addressing void gifts;
     + Addressing incorporation by reference;
     + Addressing ademption, abatement, and lapsed gifts;
     + NOT interpreting the will.
  2. Revoking grants;
  3. Appointing executors and administrators;
  4. Passing accounts and awarding compensation; and
  5. Considering applications for maintenance and support.

## Executors and Administrators

* "Personal representative" ("PR") means an executor or an administrator of an estate of a deceased person and includes a PR named in the will, whether or not a grant is issued [*EAA*, s. 1(g)].
  + An "executor" is a person named by a testator to carry out the provisions in the testator’s will.
  + An "administrator" is the person who administers the property of a person dying intestate and whose duties and responsibilities correspond with those of an executor.
* A person named in a will is disqualified from being a PR if they:
  + Are under the age of 18 or otherwise lack capacity; or
    - The Public Trustee has the same priority to a grant of administration that they would have if he or she were an adult of full legal capacity [*Public Trustee Act*, s. 14(2)(a)].
  + Are criminally responsible for the testator's death.
* Unless the will says otherwise, if there are two or more PRs, they must act unanimously [*EAA*, s. 37].
  + But, some wills contain a clause providing that the majority rules.
* If there are 2 or more PRs and one or more of them die, their authority and powers vest in the surviving PR(s) [*EAA*, s. 42].
* If the PR named in a will survives the testator but dies without obtaining a grant, the authority of that PR with respect to the administration of the estate will cease, and any application for a grant must be made and dealt with as if that PR had never been named as a PR [*EAA*, s. 41].

### Priority Rules

* On application for a grant, the priority to be given to an applicant is [*EAA*, s. 13(1)]:

1. *if a will exists*, as follows, in descending order of priority:
   1. to a PR named in the will, unless that person is incapable of acting or unwilling to act;
   2. to a PR appointed by the person expressly authorized in the will to appoint a PR;
   3. to a residuary beneficiary named in the will;
   4. to a life tenant of the residue in the will;
   5. to a beneficiary under an intestacy if the residue is not completely disposed of in the will;
   6. to a beneficiary receiving a specific gift in the will;
   7. to a contingent beneficiary of the residue in the will;
   8. to a contingent beneficiary of a specific gift in the will;
   9. to the Crown in right of Alberta;
2. *if no will exists*, as follows, in descending order of priority:
   1. to the surviving spouse or surviving AIP;
   2. to a child of the deceased person;
   3. to a grandchild of the deceased person;
   4. to a descendant of the deceased person other than a child or grandchild;
   5. to a parent of the deceased person;
   6. to a brother or sister of the deceased person;
   7. to a child of the deceased person’s brother or sister if the child is a beneficiary under the intestacy;
   8. to the next of kin of the deceased person determined in accordance with ss. 67 and 68 of the *WSA* who are beneficiaries under the intestacy and who are not otherwise referred to in this clause;
   9. to a person who has an interest in the estate because of a relationship with the deceased person;
   10. to a claimant;
   11. to the Crown in right of Alberta.

* Between applicants of equal priority, preference must be given, unless the court rules otherwise [*EAA*, s. 13(2)]:
  1. to a resident of Alberta, or
  2. in the case of an application for a grant referred to in subsection (1)(b)(i), to the surviving spouse or AIP of the deceased who lived with the deceased person immediately or most recently before their death.
* If there are 2 or more applicants of equal priority, the court may grant the authority to administer the estate to one or more of those persons as it considers appropriate [*EAA*, s. 13(3)].
  + The grant of administration must not be given to more than three persons at the same time.
* If the sole executor named in a will is a minor [EAA, s. 13(5)]:
  1. the court must, subject to the right of the Public Trustee to apply for a grant under s. 14 of the *Public Trustee Act*, grant the authority to administer the estate to another person as the court considers appropriate, and
  2. on becoming an adult, the executor named in the will may be granted the authority to administer the remainder of the estate.
* Where a person dies anywhere leaving property in Alberta and a person under legal disability has an interest in the estate, the Public Trustee has the same priority to a grant of administration of the estate that the person would have if he or she were an adult of full legal capacity [*Public Trustee Act*, s. 14(2)(a)].
  + “Person under legal disability” means (a) a minor, or (b) a represented adult for whom the Public Trustee is trustee [*Public Trustee Act*, s. 14(1)].

### Renunciation and Nomination

#### Renunciation

* If a PR named in a will does not wish to or cannot apply for a grant of probate, they must renounce in Form NC 12 [*Surrogate Rules*, s. 32(1)].
  + The reasons for renunciation include:
    - Liability risk;
    - The executor lacks the time, ability, or temperament;
    - The executor resides outside of Alberta or Canada;
    - Tension between executors or executor and beneficiaries;
    - The executor is in a conflict of interest.
      * e.g., the spouse is the named executor and has a family maintenance and support claim.
  + However, once someone has *intermeddled* in the estate, she is no longer able to renounce and must be discharged by court order.
    - "Intermeddling" refers to actions in relation to the property of a deceased that show an intention to assume the responsibilities of an executor.
    - The payment of reasonable funeral expenses, acts of necessity, and inquiries into deceased’s property and debts *do not* constitute intermeddling.
    - Taking possession of estate property and holding oneself out as an executor *do* constitute intermeddling.

#### Nomination

* If:
  1. the deceased person died intestate,
  2. the deceased person died leaving a will but without having appointed a PR, or
  3. the PR named in the will is incapable of acting or unwilling to act,

a person with priority to apply for a grant of administration or a grant of administration with will annexed may nominate, in Form NC 16, a person to be the PR applying for the grant [*EAA*, s. 13(4); *Surrogate Rules*, s. 33(1)].

* On nominating this person, the right of the persons nominating passes to their nominee [*EAA*, s. 13(4)].
* A person expressly authorized in a will to appoint a PR may nominate, in Form NC 16, a person to be the PR for the purpose of applying for a grant [*Surrogate Rules*, s. 33(2)].

## When is a Grant Needed?

### Executors

* If the deceased leaves a will naming an executor, that executor receives their authority from the will and not from the grant of probate; therefore, a grant is not strictly required to administer the deceased's property.
* However, an executor will need a grant to administer the deceased's property if:
  + If there is a dispute as to the validity of the will.
  + To bring or defend actions on behalf of the estate.
  + If the deceased owns real property solely or as a tenant-in-common.
    - A grant of probate is always required to transfer title to land.
  + If the deceased has money deposited in a financial institution that that requires a grant to release assets to the PR.
    - In the past, simply having a will signed by the deceased was sufficient for a bank to transfer assets to the PR for distribution.
    - With increasing complexity of estates, banks usually require a grant if the deceased owned accounts worth over $20,000 to $30,000, depending on the bank.

### Administrators

* If a deceased dies wholly or partially intestate, or dies testate but names no executors who are willing and able to act, the deceased's property vests in the court and is delegated to a court-appointed administrator.
  + Therefore, since the administrator receives their authority from the court, a grant is required to administer the property of the deceased.

## Types of Grants

### General vs. Limited Grants

* The Court may, on application, and subject to any conditions the court considers appropriate, make a grant of any kind, including the following [*EAA*, s. 14(1)]:

1. a general grant (i.e., a grant without restrictions);
2. a limited grant,
   1. for all or a specific part of the personal property of the deceased,
   2. for all or a specific part of the real property of the deceased,
   3. for a limited time, or
   4. for a limited purpose or matter.

### General Grants

* Grants that are unlimited and unrestricted include [*Surrogate Rules*, s. 10(1)(a)]:
  1. a grant of probate;
  2. a grant of administration with will annexed;
  3. a grant of administration;
  4. a supplemental grant;
  5. a grant of double probate;

#### Grant of Probate

* A grant of probate is a court order that confirms the validity of the will and appoints the PR named in it; it gives assurances to third parties.
* Where a will exists, the executor named in the will, if any, must apply for a grant of probate.
  + To obtain a grant of probate, there are a series of legislated forms which must be completed by the executor and submitted to the ABQB.
  + Before a grant of probate has been issued (which can take 6-8 weeks or longer), the PR can work to:
    - Transfer assets where no grant is required.
    - Clean up and prepare a property for sale.
    - Ensure that all property is insured and secured.
    - Distribute household items as per the directions in the will.
    - Report to beneficiaries on the progress in the estate.
    - Pay any urgent or problematic debts that arise.
  + After the grant of probate has been issued, the PR can:
    - Consolidate all bank accounts and investments into an estate account, which can either be held at a bank or in a lawyer’s trust account as you direct.
    - Sell real property or vehicles, boats, etc. to a third party and deposit the proceeds of sale into the estate account.
    - Pay any urgent debts that are valid and need to be paid.

#### Grant of Administration With Will Annexed

* A grant of administration with will annexed is a court order that appoints an administrator to manage the estate according to the will.
  + It is necessary where there is a valid will, but the will:
    - Does not name a PR;
    - Names a PR, but the PR is not willing or able to act and there is no other PR that is named or willing or able to act;
    - Does not deal with all of the deceased's estate.
      * In this case, a grant of probate is needed for the estate property dealt with in the will and a grant of administration with will annexed is needed for the property that is not dealt with by the will.

#### Grant of Administration

* A grant of administration is a court order that appoints an administrator and confirms the estate can be distributed to the beneficiaries.
  + This type of grant is necessary where there is no will or the will does not satisfy the legal requirements in Alberta.

#### Supplemental Grant

* This type of application is made when an original grant of probate is issued for a limited time.
  + They are often granted during the period where the named executor is a minor and, when the child turns 18, she can apply for probate.

#### Grant of Double Probate

* If a named executor does not apply for a grant of probate, they may reserve the right to apply later; the later grant is the double probate.
  + If all the PRs named in a will do not apply for a grant of probate at the same time, the PRs who do not apply [*Surrogate Rules*, s. 34(1)]:
    1. must reserve their right to apply later by filing Form NC 13 at the time the initial grant of probate is applied for, and
    2. may apply by filing Forms NC 30 and NC 31 for a grant of double probate at any time after filing Form NC 13.
* An alternate PR named in a will may apply if it is necessary for the alternate PR to complete the administration of the estate [*Surrogate Rules*, s. 34(3)].

### Grants Limited for Part of the Deceased's Property

* Grants that are limited to part of the deceased’s property include [*Surrogate Rules*, s. 10(1)(b)]:
  1. a grant of administration of unadministered property;
  2. a grant of re-sealed probate with respect to property in Alberta;
  3. a grant of re-sealed administration with respect to property in Alberta;
  4. a grant of administration limited to specific property;
  5. a grant of administration of property not included in another grant;
  6. an ancillary grant;

#### Grant of Administration of Unadministered Property

* If a deceased was the PR of an intestate person, another person may apply for a grant of administration of the unadministered property of the intestate person [*Surrogate Rules*, s. 37(1)].
  + Similarly, if a deceased was the PR of a testate person and the deceased did not appoint a PR for the deceased’s estate, another person may apply for a grant of administration with will annexed of the unadministered property of the testate person [*Surrogate Rules*, s. 37(2)].
* If the PR of a testate person resigns and there is no alternate PR named in the will, another person may apply for a grant of administration with will annexed of the unadministered property of the testate person [*Surrogate Rules*, s. 37(3)].

#### Grant of Re-Sealed Probate or Administration With Respect to Property in Alberta

* The court may, on application, direct that a foreign grant be resealed [*EAA*, s. 18(2)].
  + "Foreign grant" means a grant of probate or administration that has been granted by a court in [*EAA*, s. 18(1)(a)]:
    1. a province or territory of Canada other than Alberta,
    2. the UK or any British possession, colony or dependency, or
    3. a member nation of the British Commonwealth;
  + "Reseal" means the sealing of a foreign grant with the seal of the ABQB [EAA, s. 1(k)].
  + A foreign grant is proof of the death of the deceased person whose estate is dealt with in the grant and [*EAA*, s. 18(3)(b)]:
    1. that the signing formalities of the foreign jurisdiction were observed and the will is the last will of the deceased person, or
    2. that the deceased person left no will.
* On being resealed, the foreign grant [*EAA*, s. 18(2)]:
  1. has the same effect in Alberta as a grant issued by the court, and
  2. is, with respect to property in Alberta, subject to any order to which any grant issued by the court is subject.

#### Ancillary Grant

* An "ancillary grant" is the same as a resealed grant, but for non-Commonwealth countries.
  + An applicant may apply for an ancillary grant if [*EAA*, s. 19(1)]:
    1. part of the deceased person’s property is in Alberta but the deceased person was not resident in Alberta on the date of death, and
    2. the deceased person was resident in a non-Commonwealth jurisdiction (i.e., a jurisdiction not referred to in s. 18(1), above).
  + In an application for an ancillary grant, a foreign grant is proof of the death of the deceased person whose estate is dealt with in the grant and [*EAA*, s. 19(3)]:
    1. that the signing formalities of the foreign jurisdiction were observed and the will is the last will of the deceased person, or
    2. that the deceased person left no will.
  + An applicant for an ancillary grant must file Form NC 32, Form NC 33, and [*Surrogate Rules*, s. 13(5)]:

…

1. a copy, duplicate or exemplification of the foreign grant;
2. a certificate from the foreign court or some other proof satisfactory to the court that the foreign grant is unrevoked and fully effective;
3. proof that the signing formalities of any will comply with the law of Alberta if the deceased owned an interest in land in Alberta.

#### Grant of Administration of Property Not Included in Another Grant

* If a will appoints general executors and executors for a specific purpose (e.g., a literary executor), and the latter applies first for a grant, then the general executors would then receive a grant for the rest of the estate.

### Time-Limited Grants

* Grants that are for a limited time include [*Surrogate Rules*, s. 10(1)(c)]:
  1. a grant of administration until a will is found;
  2. a grant of administration during the minority, absence, or mental incompetence of the PR.

### Grants for a Limited Purpose

* Grants that are for a limited purpose only include [*Surrogate Rules*, s. 10(1)(d)]:
  1. a grant of administration when the validity of a will is in question;
  2. a grant of administration for the purpose of litigation;
     + Before or after the commencement of an action involving the validity of the will of a deceased person, an application for a grant, or an application to revoke a grant, the court may appoint a PR, and the PR so appointed [*EAA*, s. 17]:
       1. has all the powers of a PR, other than the authority to distribute the property, and
       2. is subject to the direction of the court.
  3. a grant of administration for the preservation of property;
     + e.g., can enable an administrator to obtain insurance coverage.
  4. a grant of administration limited to a specified matter.

## Grant Applications

### Forms Required

* An application for a grant must be filed at the judicial centre that is closest by road to the location where the deceased resided on the date of death unless the court permits otherwise [*Surrogate Rules*, s. 6(1)].
* At any time before the issue of a grant a person may apply for an order restraining any person from dealing or intermeddling with the property of a deceased person [*EAA*, s. 34].

#### Grant of Probate or Grant of Administration with Will Annexed

* An applicant for a grant of probate or a grant of administration with will annexed [*Surrogate Rules*, s. 13(1)]:
  1. must file Forms NC 1, NC 2, NC 3, NC 4, NC 8, NC 5, NC 6, NC 7, NC 19, and NC 27;
  2. if the circumstances require, must file Forms NC 20, NC 17, NC 22, NC 23, NC 24, NC 12, NC 14, NC 24.1, NC 25, and NC 20.1.
* The original will and any original codicils must be included in the application [*Surrogate Rules*, s. 15].
  + If an original will is lost or destroyed, but a copy or other evidence of it exists, the court may admit the copy or other evidence to probate if [*Surrogate Rules*, s. 24]:
    1. the will is proved formally under Division 3 of Part 2 of the *Surrogate Rules*, or
    2. in the opinion of the court, the will can be adequately identified under Part 1 of the *Surrogate Rules*.
  1. As well, if a will refers to a document or the applicant knows of a document that may form part of a will, the applicant must give the document to the court [*Surrogate Rules*, s. 22(1)].
* A witness to a will must prove that the signing formalities were observed by providing an affidavit in Form NC 8 and the original will must be an exhibit to the affidavit [*Surrogate Rules*, s. 16(3)].
  1. An affidavit sworn by a witness to a will at the time that a will is signed is acceptable as proof that the formalities were observed [*Surrogate Rules*, s. 16(5)].
  2. If both witnesses to a will are dead or neither witness can give an affidavit for any reason, the applicant may establish proof that the formalities were observed by an affidavit [*Surrogate Rules*, s. 19]:
     1. in Form NC 9 attesting to the authenticity of the signature of the deceased, or
     2. from any person (i) who did not sign as a witness, (ii) who was present during the signing of the will, and (iii) who can attest to the circumstances.
* If a will is a holograph will, a person other than the applicant, unless otherwise ordered by the court, must prove the deceased’s handwriting by providing an affidavit in Form NC 9 [*Surrogate Rules*, s. 16(4)].
* If a will is written in a language other than English, the applicant must give an affidavit in Form NC 10 verifying the will’s translation into English [*Surrogate Rules*, s. 18].
* If the court is alerted to the fact that there is something wrong with the will, then the will must be proven *in solemn form*.
  1. The court may require proof of a will in solemn form under Part 2 (Contentious Matters) if [*Surrogate Rules*, s. 23]:
     1. no witness is available to swear the necessary affidavit,
     2. the appearance of the will indicates an attempt to cancel it by burning, tearing, or any other act of destruction,
     3. words in the will that might be important have been erased or obliterated, or
     4. in the opinion of the court, circumstances require formal proof of the will.
  2. This means the will must be proven in open court, on notice to all interested parties, and it will not be permitted to probate unless the court is satisfied of the due execution of the will, the testator’s knowledge and approval of contents, his or her capacity, and non-revocation (Oosterhoff).

#### Grant of Administration or Limited Grant of Administration

* An applicant for a grant of administration or a limited grant of administration [*Surrogate Rules*, s. 13(2)]:
  1. must file Forms NC 1, NC 2, NC 3, NC 5, NC 6, NC 7, and NC 27;
  2. if the circumstances require, must file Forms NC 17, NC 22, NC 23, NC 24, NC 15, NC 16, NC 24.1, NC 25, and NC 21.

#### Grant of Double Probate

* In addition to any relevant forms under s. 13(1), an applicant for a grant of double probate must file the following forms [Surrogate Rules, s. 13(4)]:
  1. Form NC 30;
  2. Form NC 31.

#### Grant of Re-Sealed Probate or Administration

* In addition to any relevant forms under ss. 13(1) or (2), an applicant for an order to re-seal a foreign grant of probate or administration must file Form NC 32, Form NC 33, and [*Surrogate Rules*, s. 13(5)]:
  1. Form NC 32 application;
  2. Form NC 33 affidavit;
  3. a copy, duplicate or exemplification of the foreign grant;
  4. a certificate from the foreign court or some other proof satisfactory to the court that the foreign grant is unrevoked and fully effective;
  5. proof that the signing formalities of any will comply with the law of Alberta if the deceased owned an interest in land in Alberta.

### Bonds

* A PR who is not a resident of Alberta must provide a bond or other security approved by the court [*Surrogate Rules*, s. 28(1)].
  + If a non-resident PR must provide a bond, the bond must be from an insurer licensed under the *Insurance Act* to undertake fidelity insurance [*Surrogate Rules*, s. 28(3)].
  + By filing an affidavit in Form NC 17, a non‑resident PR may apply [*Surrogate Rules*, s. 29(1)]:
    1. to dispense with a requirement to provide a bond or other security,
    2. for approval of security other than a bond, or
    3. to reduce the amount of a bond or other security.
    4. In support of their application, an applicant may file a beneficiary’s consent to dispensing with a bond or other security in Form NC 18 [*Surrogate Rules*, s. 29(2)].
* A PR is not required to provide a bond or other security if (a) the PR is resident in Alberta or (b) there are 2 or more PRs and one of them is resident in Alberta [*Surrogate Rules*, s. 28(2)].
  + However, any beneficiary in an estate may apply for an order that a bond or other security be required from a resident PR if they are not named as executor in the will [*Surrogate Rules*, s. 30(1)].
* A bond or other security must be for an amount equal to [*Surrogate Rules*, s. 28(4)]:
  1. the gross value of the deceased’s property in Alberta,
  2. less, if the court so orders, any amount distributable to the PR as a beneficiary.
* The court, on application, may [*Surrogate Rules*, s. 31(1)]:
  1. require a bond or other security;
  2. reduce the amount of a bond or other security;
  3. *dispense with the requirements for a bond or other security*;
     + This may occur where the beneficiaries consent to the bond being dispensed with.
  4. impose conditions on the applicant or any other person interested in the estate;
  5. require more information;
  6. do any other thing that the circumstances require.

### Notice

* An applicant must serve notice of any application for a grant [*Surrogate Rules*, s. 26(1)]:
  1. in Form NC 19, Form NC 20 or Form NC 21 to the persons listed in Form NC 6 as filed,

a.1) in Form NC 20.1 to the appropriate persons, if any, and

1. in Form NC 22, Form NC 23, Form NC 24 or Form NC 24.1 to the appropriate persons, if any.

* Unless otherwise ordered, an applicant for a grant must serve a copy of the application and a notice pertaining to the rights of family members under Part 5 of the *WSA* on the following as applicable [*EAA*, s. 11(1)]:
  1. the spouse of the deceased person, if the spouse is not the sole beneficiary under the will or under Part 3 of the *WSA*;
     + Under s. 11(2), the applicant for a grant must also serve a notice pertaining to the rights of a spouse under the *Family Property Act* on any spouse of the deceased person, if the spouse is not the sole beneficiary under the will or under Part 3 of the *WSA*.
  2. the AIP of the deceased person, if the AIP is not the sole beneficiary under the will or under Part 3 of the *WSA*;
     + Under s. 11(2.1), the applicant for a grant must also serve a notice pertaining to the rights of an AIP under the *Family Property Act* on any AIP of the deceased person, if the AIP is not the sole beneficiary under the will or under Part 3 of the *WSA*.
  3. each child of the deceased person who, on the date of the deceased person’s death, was an adult who was unable by reason of a physical disability to earn a livelihood;
  4. a child of the deceased person who
     1. was, on the date of the deceased person’s death, at least 18 but less than 22 years of age, and
     2. was unable to withdraw from his or her parents’ charge because he or she was a full‑time student;
  5. the attorney of an adult
     1. who is a child of the deceased person,
     2. who was an adult on the date of the deceased person’s death, and
     3. who is unable to earn a livelihood by reason of mental disability;
  6. the trustee of a represented adult
     1. who is a child of the deceased person,
     2. who was an adult on the date of the deceased person’s death, and
     3. who is unable to earn a livelihood by reason of mental disability;
  7. the Public Trustee, if the deceased person is survived by
     1. a child who was a minor on the date of the deceased person’s death, or
     2. a grandchild or great‑grandchild who was a minor on the date of the deceased person’s death and in respect of whom the deceased person stood in the place of a parent on the date of the deceased person’s death;
  8. the guardian of a child, grandchild, or great‑grandchild referred to in clause (g).
* Unless otherwise ordered, an applicant for a grant must serve a notice on the following, as applicable [*EAA*, s. 12(1)]:
  1. an attorney acting for a person who is interested in the estate;
  2. the trustee of a represented adult who is interested in the estate;
  3. the Public Trustee, if any of the following are interested in the estate:
     1. a minor;
     2. a person who was a minor on the date of the deceased person’s death;
     3. a missing person as defined in the *Public Trustee Act*;
  4. the guardian of a minor referred to in clause (c)(i).
* If an applicant knows of a particular beneficiary but does not know the identity or address of the beneficiary, the applicant must file an affidavit in Form NC 25 to that effect with the application [*Surrogate Rules*, s. 27].

### Probate Fees

|  |  |
| --- | --- |
| Net Value of Property in the Estate | Fee |
| $10,000 or under | $35 |
| >$10,000 but ≤$25,000 | $135 |
| >$25,000 but ≤$125,000 | $275 |
| >$125,000 but ≤$250,000 | $400 |
| >$250,000 | $525 |

## Acting Without a Grant

* + If a PR named in a will administers the estate without applying for a grant, they must provide [*EAA*, s. 10(1)]:
    1. to the beneficiaries of the deceased person, the PR's notice to beneficiaries in Form NGA 1,
       - The PR's notice to beneficiaries must [*EAA*, s. 10(2)]:
         1. identify the deceased person,
         2. provide the name and contact information of the PR,
         3. describe the gift left to the beneficiary in the will or refer to the applicable provisions of the *WSA*,
         4. state that all gifts are subject to the prior payment of the deceased person’s debts and other claims against the estate, and
         5. include any other information or documents required by the *Surrogate Rules*.
    2. to any family members of the deceased person, an attorney, a trustee, the *Public Trustee,* or a guardian, on whom a notice is required to be served under s. 11(1), a PR's notice to family members in Form NGA 2,
       - Under s. 11(1), notice pertaining to the rights of family members under Part 5 of the *WSA* must be served on the following as applicable:
         1. the spouse of the deceased person, if the spouse is not the sole beneficiary under the will or under Part 3 of the *WSA*;
         2. the AIP of the deceased person, if the AIP is not the sole beneficiary under the will or under Part 3 of the *WSA*;
         3. each child of the deceased person who, on the date of the deceased person’s death, was an adult who was unable by reason of a physical disability to earn a livelihood;
         4. a child of the deceased person who

was, on the date of the deceased person’s death, at least 18 but less than 22 years of age, and

was unable to withdraw from his or her parents’ charge because he or she was a full‑time student;

* + - * 1. the attorney of an adult

who is a child of the deceased person,

who was an adult on the date of the deceased person’s death, and

who is unable to earn a livelihood by reason of mental disability;

* + - * 1. the trustee of a represented adult

who is a child of the deceased person,

who was an adult on the date of the deceased person’s death, and

who is unable to earn a livelihood by reason of mental disability;

* + - * 1. the Public Trustee, if the deceased person is survived by

a child who was a minor on the date of the deceased person’s death, or

a grandchild or great‑grandchild who was a minor on the date of the deceased person’s death and in respect of whom the deceased person stood in the place of a parent on the date of the deceased person’s death;

* + - * 1. the guardian of a child, grandchild, or great‑grandchild referred to in clause (g).
    1. to a spouse of the deceased person on whom a notice is required to be served under s. 11(2), a PR's notice to a spouse in Form NGA 3,
       - Under s. 11(2), notice pertaining to the rights of a spouse under the *Family Property Act* must be served on any spouse of the deceased person, if the spouse is not the sole beneficiary under the will or under Part 3 of the *WSA*.

c.1) to an AIP of the deceased person on whom a notice is required to be served under s 11(2.1), a PR's notice to an AIP in Form NGA 3, and

* + Under s. 11(2.1), notice pertaining to the rights of an AIP under the *Family Property Act* must be served on any AIP of the deceased person, if the AIP is not the sole beneficiary under the will or under Part 3 of the *WSA*.
  1. to the *Public Trustee* and to the other persons referred to in s. 12, as applicable, a PR's notice in Form NGA 4.
     1. Under s. 12, an applicant for a grant must serve a notice on the following, as applicable:
        1. an attorney acting for a person who is interested in the estate;
        2. the trustee of a represented adult who is interested in the estate;
        3. the Public Trustee, if any of the following are interested in the estate:
           1. a minor;
           2. a person who was a minor on the date of the deceased person’s death;
           3. a missing person as defined in the *Public Trustee Act*;
        4. the guardian of a minor referred to in clause (c)(i).

# Estate Litigation

* Every lawyer who acts on behalf of a party in a contested application under the *WSA* has a duty [*WSA*, s. 4]:
  1. to discuss with the party alternative methods of resolving the matters that are the subject of the application, and
  2. to inform the party of collaborative processes, mediation facilities and other justice services known to the lawyer that might assist the parties in resolving those matters.

## Procedure

* The *Surrogate Rules* apply to any application or matter that arises in the administration of an estate [*EAA*, s. 4].
  + The *Alberta Rules of Court* apply to an application to the surrogate court if the matter is not otherwise dealt with under the *Surrogate Rules* or the context indicates otherwise [*Surrogate Rules*, s. 2(1)].
  + If a procedure is dealt with in neither the *Surrogate Rules* nor the *Rules of Court*, the court may make any order concerning it that is necessary or appropriate in the circumstances [*Surrogate Rules*, s. 2(4)].
* An application may be made respecting any contentious matter [*Surrogate Rules*, s. 55(1)] by filing (a) an application in Form C1 and (b) an affidavit in Form C2 [*Surrogate Rules*, s. 58].
  + The same procedure applies to making an application under the *WSA* (ss. 37–40, Part 5, and s. 109) or s. 80.1 of the *FLA* [*Surrogate Rules*, s. 70.1(1)].
  + An applicant must serve copies of the documents required to be filed on persons who are interested in the estate, if any [*Surrogate Rules*, s. 59(1)].
    - Service may be made on a person [*Surrogate Rules*, s. 60(1)]:
      1. personally or by recorded mail in the case of a commencement document,
      2. by ordinary mail delivery or electronic transmission in the case of documents other than commencement documents,
      3. if documents filed in the matter give an address for service, at that address, or
      4. by serving a lawyer who is authorized to accept service on behalf of a person.
      5. Proof in Form NC 27 that a person has been served must be filed [*Surrogate Rules*, s. 60(2)].
    - The persons who may be interested in a particular estate are the following [*Surrogate Rules*, s. 57]:
      1. personal representatives;
      2. residuary beneficiaries;
      3. life tenants;
      4. specific beneficiaries who have not received their entitlement under the will;
      5. heirs on intestacy;
      6. trustees of represented adults under the *Adult Guardianship and Trusteeship Act*;
      7. attorneys appointed under the *Powers of Attorney Act*;
      8. minors;
      9. missing persons;

…

1. unpaid claimants;
2. bonding companies;
3. a group of persons with identical interests ordered to be a class by the court;
4. family members as defined in s. 72(b) of the *WSA*;
5. any person who has filed a Form C1 for a matter relating to the estate.

* Notice of an application must be given [*Surrogate Rules*, s. 61]:
  1. to the PR, one month or more before the hearing;

…

1. to other persons interested in the estate, if they are residents of Alberta, 10 days or more before the hearing;
2. to other persons interested in the estate, if they are not residents of Alberta, one month or more before the hearing.

* Where an application has been filed, any person required to be served with the application may file a reply in Form C2.1, accompanied with an affidavit in Form C2 if evidence is submitted, or a demand for notice in Form C2.2 [*Surrogate Rules*, s. 58.1(1)].
* All proceedings must be before a justice in chambers unless the court or the *Surrogate Rules* require otherwise [*Surrogate Rules*, s. 63].
  + The court, on hearing an application, may [*Surrogate Rules*, s. 64(1)]:
    1. receive evidence by affidavit or orally;
    2. dispose of the issues arising out of the application as it considers appropriate;

b.1) direct a person to file a reply, accompanied with an affidavit, if evidence is to be submitted, or a demand for notice;

1. direct a trial of issues arising out of the application;
2. grant any relief to which the applicant is entitled because of a breach of trust, willful default or other misconduct of a respondent;
3. direct that notice of the court’s judgment or order be given to a particular person;
4. dispense with service of notice on any person if, in the opinion of the court, service is impractical;
5. dispense with service of an order and order that a person is bound by the court’s order as if the person had received notice of it;
6. order costs to be paid from the estate or by any person who is a party to the application;
7. make any order that the court considers necessary in the circumstances.

* If the court orders the trial of an issue, it must order the procedure to be followed and the terms and conditions under which the trial is to take place [*Surrogate Rules*, s. 66].

## Proceeding on Caveats

* Before or after an application for a grant is made a person may file a caveat against the issue of a grant [*EAA*, s. 46(1)] in Form C3 [*Surrogate Rules*, s. 71(1)].
  + After a caveat is filed, no further proceedings may be taken under the grant application [*EAA*, s. 46(3)]; this allows the caveator time to commence litigation.
* Unless it is discharged or withdrawn, a caveat remains in force for 3 months from the date it is filed, unless the court orders otherwise [*EAA*, s. 47(1)].
* An applicant for a grant may file and serve on a caveator a warning in Form C4 [*Surrogate Rules*, s. 72] requesting that the caveator be required to show why the caveat should not be discharged [*EAA*, s. 48].
  + Within 10 days after the caveator is served with the warning, the caveator may file a notice of objection in Form C9 to a grant being issued and serve it on the applicant [*Surrogate Rules*, s. 73(1)].
    - If a caveator files and serves a notice of objection within the time allowed, the application must be continued as a contentious matter [*Surrogate Rules*, s. 73(3)].
    - If a caveator does *not* file and serve a notice of objection within the time allowed, the caveat must be discharged [*Surrogate Rules*, s. 73(4)].
  + If a caveator files and serves a notice of objection, the applicant may apply for an order that the caveat is frivolous or vexatious and that the caveat be discharged [*Surrogate Rules*, s. 74(1)].
    - If the court determines that a caveat is frivolous or vexatious, it may order that the caveat be discharged and award costs against the caveator [*Surrogate Rules*, s. 74(2)].
      * Even if the caveat is not frivolous or vexatious, the court may still order that it be discharged in the circumstances of the estate [*Surrogate Rules*, s. 74(4)].
    - If the court determines that a caveat is not frivolous or vexatious, the application for a grant must be continued as a contentious matter [*Surrogate Rules*, s. 74(3)].
* If a caveat has expired or has been discharged or withdrawn, no further caveat in respect of the same estate may be filed by the same caveator without leave [*Surrogate Rules*, s. 47(2)].

## Formal Proof of Will

### Making an Application

* A PR or a person interested in an estate may apply to the court [*Surrogate Rules*, s. 75(1)]:
  1. to obtain formal proof of a will, whether or not an application for a grant has been made;
     + This means that it must be proven, on notice to all interested parties, that the will was duly executed, the testator knew and approved its contents, they had capacity, and they did not revoke it (Oosterhoff).
  2. to set aside a grant issued under Part 1 and require formal proof of the will;
  3. to prevent the issue of a grant under Part 1 and require formal proof of a will;
  4. to obtain an order that the deceased died intestate;
  5. to request the appointment of a PR;
  6. to request the appointment of a PR other than the one appointed by a grant;
  7. to restrain a PR from exercising any powers during an application under this subrule;
  8. to appoint a special PR to conduct an application under this subrule.
* A person may commence such an application by filing and serving the following on the persons interested in the estate [*Surrogate Rules*, s. 77(1)]:
  1. if the application is made by a PR, (i) Form C5, (ii) Form C6, and (iii) Form C8;
  2. if the application is made by a person interested in the estate, a notice of objection in Form C9;
     + The persons interested in an estate who may apply for an order are [*Surrogate Rules*, s. 78]:
       1. surviving spouse or surviving AIP;
       2. adult children;
       3. Public Trustee or any other person representing minors;
       4. trustees of represented adults under the *Adult Guardianship and Trusteeship Act*;
       5. attorneys appointed under the *Powers of Attorney Act*;
       6. Public Trustee when representing missing persons;
       7. heirs on intestacy;
       8. PR and beneficiaries in any will in respect of which an application is made;
       9. PRs appointed under a prior grant issued in respect of the will;
       10. the alleged deceased if the fact of death is an issue.
  3. if the application is ordered by the court, direction by the court that the will be formally proved.

### Effect of an Application

* An application under s. 75 stays proceedings under a grant application [*Surrogate Rules*, s. 75(3)].
* If an application is made under rule 75 for formal proof of a will, a PR who has been appointed by a grant must return the grant to the court unless the court orders otherwise [*Surrogate Rules*, s. 93(1)].
  + The PR then must not distribute any estate property unless (a) the court approves or (b) all persons interested in the estate consent [*Surrogate Rules*, s. 75(4)].
  + If an application is filed to appoint a PR and restrain a PR appointed by a grant from acting, the PR appointed by the grant must not exercise any of the powers of a PR during the application for formal proof of the will without the consent of the court [*Surrogate Rules*, s. 75(5)].

### Hearing of the Application

* The hearing in an application for formal proof of a will *must be in the form of a trial* and must not be held in chambers (a) if several witnesses are necessary or (b) if the court orders a trial [*Surrogate Rules*, s. 83(1)].
  + However, the hearing of an application for formal proof of a will must be *in chambers* if the only issue is proof of the death of the testator or proving the signing of the will or both [*Surrogate Rules*, s. 84(1)].
    - "Proving the signing of the will" means [*Surrogate Rules*, s. 84(2)]:
      1. proving the fact of the testator’s signature and handwriting,
      2. proving the fact of the witnesses’ signatures, presence and qualifications, or
      3. proving that the signing of the will complied with the *WSA*.
  + If the hearing is a trial, the applicant must apply to the court for directions on the procedure to be followed at the trial [*Surrogate Rules*, s. 83(2)], upon which the court may [*Surrogate Rules*, s. 83(3)]:
    1. set the procedure to be followed at the trial, including
       1. giving directions on pre‑trial disclosure of documents and questioning,
       2. ordering the production of documents,
       3. stating the parties and their roles,
       4. ordering the representation of parties, or
       5. dispensing with pre-trial procedures and sending the matter straight to trial, or
    2. order a hearing in chambers on affidavit or oral evidence or both respecting certain issues.
  + In an application for formal proof of a will [*Surrogate Rules*, s. 87]:
  1. the proponent of the will must be heard first and must present evidence concerning the proof of death, proof of the signing of the will, and the capacity of the deceased, and
  2. the contestant must be heard next.
* The court must do the following on an application for formal proof of a will [*Surrogate Rules*, s. 86]:
  1. if several wills of the deceased are in issue, consider each will in turn in the order in which they were made, beginning with the most recent;
  2. as soon as the court admits to probate one or more wills that dispose of all of the property of the deceased, consider no further wills;
  3. if the wills admitted to probate do not dispose of all of the property of the deceased, consider whether an intestacy exists;
  4. if a will is opposed and an application for a declaration of intestacy is made, decide whether the will should be admitted to probate.

### Evidence

* Evidence at a hearing in chambers may be given by affidavit or orally or both [*Surrogate Rules*, s. 85(1)].
* Any person who took instructions for the preparation of the will is compellable as a witness and subject to pre‑trial disclosure and production of documents and oral questioning respecting [*Surrogate Rules*, s. 85(2)]:
  1. the circumstances of that person’s involvement in the preparation of the will and of any lawyer’s retainer,
  2. the instructions given by the testator,
  3. the preparation of the will or the circumstances of its signing, or
  4. any steps taken to ascertain or record by any means the testator’s capacity or the witness’s or lawyer’s opinion concerning that capacity.

### Powers of the Court

* On an application for formal proof of the will, the court may [*Surrogate Rules*, s. 90]:
  1. determine the fact of death;
  2. determine whether the deceased died testate or intestate;
  3. determine which will of the deceased, if any, to admit to probate;
  4. determine the heirs of a deceased on intestacy;
  5. terminate any grant issued under Part 1 appointing a PR;
  6. terminate the appointment of a PR who was appointed to make an application for formal proof of a will;
  7. issue any grant;
  8. direct the payment of costs, including penalizing any person who required formal proof of the will if (i) the application was frivolous or vexatious, (ii) the person caused undue delay, or (iii) the person had no substantial basis for requiring the scrutiny of the court;
  9. determine any other matter that the court considers relevant or that is incidental to the application.

#### *Beimler v Kendall*, 2017 ABCA 117

Facts:

* Gene Beimler testator had a common law relationship with Shirley Beimler from 1957 until about 1977 and stood *in loco parentis* to Timothy Beimler. The testator had made several wills over the years which benefited the Shirley and Timothy ("the Appellants"). However, in June 2013, Gene made a new will in which his sister Betty Kendall ("the Respondent") was the sole beneficiary. The testator died in March 2014. The appellants applied to set aside a grant of probate, to prove a will in solemn form and to have the will declared invalid by reason of the testator’s incapacity or because of undue influence. The Appellants deposed that Gene lacked capacity to make his own decisions when he executed the 2013 will, and that the Respondent was manipulating him. They adduced medical records created in 2012 that speak to the testator suffering anxiety and some cognition problems. Conversely, the Respondent adduced evidence from Mr. Pollock, Gene's former lawyer, who testified that Gene had capacity and that they did not see any indication of undue influence.

Procedural history:

* The chambers judge summarily dismissed the Appellants’ application. They found that the Appellant's evidence consisted mainly of their subjective assessments, opinions, and self-centred evidence. While there was some medical evidence that the testator’s cognitive abilities were diminishing, there was no evidence he was delusional or suffered impairment to his general understanding of the world.

Issue and holding:

* Did the trial judge err in summarily dismissing the Appellant's application? **NO**

Analysis:

* The Appellants were required to establish on a balance of probabilities that there were suspicious circumstances surrounding the preparation of the will (*Vout v Hay*).
* The test for summary judgment is to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.
  + In determining whether to grant summary judgment, the court must decide whether there is an evidentiary basis for a suspicion that the will does not represent the true wishes of the testator.

Rationale: (Rowbotham JA)

* The chambers judge did not misapprehend the evidence.
  + He was entitled to weigh the subjective views of the Appellants, together with the observations of doctors several years ago, against the evidence of Mr. Pollock who knew the testator and was satisfied as to his capacity.
* The suspicion necessary to force a trial putting an entire will into question requires more than the belief of the disappointed potential beneficiaries.

## Claims on an Estate

* If a PR does not agree with all or part of the claim of a claimant against the estate, they must serve the claimant with a notice of contestation in Form C11 [*Surrogate Rules*, s. 95].
* A claimant whose claim is contested may apply for an order allowing the claim and setting the amount by filing a notice of claim with affidavit in Form C12 and serving it on the PR [*Surrogate Rules*, s. 96(1)].
  + A claimant must make an application within 2 months of receiving the notice of contestation [*Surrogate Rules*, s. 96(1)].

## Costs

* Costs are typically paid in one of the following ways:
  + Payable by the estate;
  + Payable by a beneficiary;
  + Payable by the executor and not reimbursable by the estate;
* Historically, it was common practice in estate matters for courts to award costs of all parties out of the estate; this approach, however, has been out of favour for several years.

### *Foote Estate (Re)*, 2010 ABQB 197

Facts:

* The widow and children of the deceased Eldon Foote ("the Applicants") brought an application to determine where Mr. Foote's domicile was located for the purposes of determining the law applicable to an FMS claim. Graesser J determined that Mr. Foote was domiciled on Australian territory at the date of his death. The successful Respondents, the executor and two residual beneficiaries, now apply for costs of the proceedings on a solicitor client basis against the Applicants. Alternatively, they seek party and party costs on a multiple of Column 5 of Schedule C of the *Rules of Court*. The Applicants want their costs to be paid on a solicitor and client basis out of the estate.

Issue and holding:

1. Are the Respondents entitled to solicitor and client costs? **NO**
2. Are the Respondent residual beneficiaries entitled to party and party costs? **NO**
3. Are the Respondent executor and estate entitled to party and party costs? **NO**
4. Can the Applicants recover their costs from the estate on a solicitor and client basis? **YES**

Analysis:

* The court has a discretion with respect to costs, but that discretion must be exercised judicially.
* Estate litigation is no longer treated as an exception to the basic rule that costs follow the event; i.e., in most cases, costs in estate litigation will be paid by the unsuccessful party, not from the estate.
  + Costs in estate litigation require careful scrutiny to balance competing interests:
    - On the one hand, society has an interest in reasonable challenges which ensure that only valid wills are probated, and that property is distributed in accordance with their terms.
      * Parties who seek the court’s assistance in these matters should not be deterred by costs.
    - On the other hand, courts should seek to discourage unwarranted litigation which depletes estate funds otherwise available to beneficiaries.
* The unsuccessful party will normally pay the successful party's costs except in limited circumstances where policy considerations permit the costs of all parties to be ordered paid out of the estate.
  + Payment of an unsuccessful party’s costs out of the estate requires analysis of several factors:
    1. Did the testator cause the litigation?
       - *Note*: If the testator or a beneficiary caused the litigation through their conduct or the manner in which they she left the will, the costs are properly paid out of the estate (*Babchuk v Kutz*, 2007 ABQB 88).
         * There must be a substantial link between the testator or beneficiary's actions and the actual need for litigation.
         * The issues to be dealt with under this factor include whether the testator has left an ambiguous will, whether he had testamentary capacity when he executed the will and whether his behaviour when signing the will gave rise to questions about its validity.
    2. Was the challenge reasonable?
       - *Note*: If there is a sufficient and reasonable ground for a challenge, the losing party may properly be relieved from the costs of his or her successful opponent (*Babchuk*).
         * e.g., it is reasonable to make such a challenge where there are suspicious circumstances, such as a will made by a testator with deteriorating mental health.
    3. Was the conduct of the parties reasonable?
       - *Note*: Arbitrary conduct, bad faith, or pursuing a position without any substantive basis can be a basis for being ordered to pay costs to the other party (*Babchuk*).
       - *Note*: The challengers’ conduct could disentitle them from receiving any costs from the estate, notwithstanding that there may initially have been a good reason to investigate the will (*Babchuk*).
    4. Was there an allegation of undue influence?
       - *Note*: If an allegation of undue influence or fraud is made without adequate grounds, it may be appropriate to order the unsuccessful party to pay costs (*Babchuk*).
    5. Were there different issues or periods of time in which costs should differ?
       - *Note*: The court may make separate and distinct decisions regarding costs with respect to individual issues related to the litigation (*Babchuk*).
         * If an unsuccessful challenger makes one allegation that is reasonable while another allegation is completely unfounded, a different award of costs could be made for the costs incurred with respect to each allegation.
       - *Note*: it is possible to make different cost orders with respect to different periods of time (*Babchuk*).
         * If a challenge was reasonable up to a certain date, and unreasonable thereafter, a challenger could be awarded costs or merely bear his or her own costs before that date and be required to pay costs to the other side after that date
    6. Were there offers to settle?
       - *Note*: A party, even in surrogate litigation, who is served with a formal offer, is in greater peril as regards to disposition of costs (*Babchuk*).
       - *Note*: If the unsuccessful plaintiff made an offer to settle and it has been rejected, this may count in its favour; if the defendant made an offer to settle and it has been rejected, this may count against the plaintiff (*Petrowski v Petrowski Estate*, 2009 ABQB 753).
    - Factors such as who initiated the proceedings and the size of the estate may also be relevant.
* Solicitor and client costs are exceptional; generally, they are to be awarded only to express a court’s disapproval of egregious conduct by a party to the litigation.
  + *Note*: such costs provide full indemnity for all legal costs contracted for between solicitor and client which are necessary for the proper presentation of the case (*Boje v Boje (Estate of)*).
  + e.g., in *Re Serdahety Estate*, 2005 ABQB 861, Johnstone J granted the executors solicitor and client costs against the claimants. In that case, the executor and estate had bettered an offer, and Johnstone J held that it was unreasonable for them to proceed with challenging the will after they received full disclosure. Further, the claimants alleged undue influence. Johnstone J chastised the claimants for their "obstructionist conduct and motivation of greed."
* Costs for a successful FMS claimant are generally awarded on a solicitor and client basis, while costs for an unsuccessful FMS claimant are an exception to the basic rule that costs follow the event.

Rationale: (Graesser J)

1. The two residual beneficiaries are not entitled to recover any costs against the Applicants or the estate.
   * The only necessary parties to this litigation were the Applicants and the executor; the residual beneficiaries did not need separate representation.
     + Throughout the proceedings, the executor took no position contrary to their interests, nor was there any suggestion that the executor was inclined to take a position adverse to their interests.
     + That said, persons who are only participating to protect their inheritances, and who have no position adverse to the executor, should normally be responsible for their own costs.
   * The status of the residual beneficiaries was like the role of intervenors; they have a legitimate interest in the outcome, but have no position adverse to that of the executor.
     + That said, intervenors generally participate in litigation at their own cost; they bear no risk of paying costs to the parties and have no expectation of recovering their costs.
2. The request for solicitor and client costs from the Applicants is inappropriate; the Applicants’ position was not frivolous, and document production and discovery did not make the result at trial a foregone conclusion.
   * There was nothing in the conduct of the litigation for which Anne or the children should be criticized.
3. The estate and the executor should not recover costs from the Applicants, despite the fact that the estate was successful in arguing the location of Mr. Foote’s domicile.
   * The testator caused the litigation; determining where Mr. Foote was domiciled at the date of his death for the purpose of seeking family maintenance and support and, having regard to the magnitude of Mr. Foote's estate (about $120 million) and the fact that his will left very little of it for the Applicants, it is not surprising that they would seek such support.
   * The challenge was reasonable; the questions as to domicile and interpretation were invited by the terms of the wills and the uncertainty as to Mr. Foote’s domicile.
   * All parties conducted themselves reasonably in the litigation, there were no allegations of undue influence, and no offers were put in evidence.
4. It is appropriate for the Applicants to recover their costs, on a solicitor and client basis, from the estate.
   * The litigation was necessitated because of Mr. Foote's conduct, the Applicants have conducted themselves properly, and their pursuit of this litigation was reasonable.

## Releases and Passing Accounts

* Unless the court orders a longer or shorter period, a PR must give an accounting of the estate every 2 years from the death by preparing financial statements for the beneficiaries [*Surrogate Rules*, s. 97(1)–(2)].
  + The financial statements may be in any format [*Surrogate Rules*, s. 98(3)].
  + The financial statements respecting an estate must include the following [*Surrogate Rules*, s. 98(1)]:
    1. an inventory of property and debts at the beginning and end of the accounting period;
    2. a statement of all property and money received during the accounting period showing whether it is capital or income;
    3. a statement of all property distributed and money paid out during the accounting period showing whether it is capital or income;
    4. a statement of all changes to property made and all debts of the estate paid or incurred by the PR during the accounting period;
    5. a statement of all expenses incurred or paid during the accounting period;
    6. in the case of a final passing of accounts, a statement of anticipated receipts and disbursements;
    7. a reconciliation, where necessary, showing the items required to balance the opening net value of the estate with the closing net value of the estate;
    8. a distribution schedule, including interim distributions and the proposed final distribution, if appropriate;
    9. a proposed compensation schedule for the PR showing the basis on which it is calculated and its allocation to income or capital.

### Releases

* A PR may, on the presentation of accounts to the residuary beneficiaries, obtain releases in Form ACC 12 [*Surrogate Rules*, s. 100(1)], which the PR may rely on for confirmation that [*Surrogate Rules*, s. 101]:
  1. the accounting in respect of the estate presented to the beneficiary is satisfactory;
  2. the PR may be compensated as set out in the statement of compensation in the financial statements;
  3. the PR may distribute the estate according to the statement of distribution in the financial statements.

### Informal Passing of Accounts

* A PR may apply for an order passing the accounts informally by filing and serving copies of the following on the persons interested in the estate who have not given releases: Form ACC 10, Form ACC 11, and the financial statements [*Surrogate Rules*, s. 103(1)].
  + If any person interested in the estate objects to the application, they must file and serve a notice of objection in Form ACC 3, in which case the court must hold a hearing to formally pass the accounts [*Surrogate Rules*, s. 106].

### Formal Passing of Accounts

* A PR may apply for an order formally passing accounts by filing and serving copies of the following documents on persons interested in the estate who have not given releases: Form ACC 1, Form ACC 2, the financial statements, and any notice of objection in Form ACC 3 [*Surrogate Rules*, s. 107(1)].
* A person interested in an estate may apply for an order requiring the formal passing of accounts by filing and serving copies of the following on the PR: (a) Form ACC 6 and (b) Form ACC 7 [*Surrogate Rules*, s. 108(1)].
  + A PR who is served with notice must file and serve a reply in Form ACC 8 10 days or more before any scheduled hearing on the applicant and all persons interested in the estate who have not given releases [*Surrogate Rules*, s. 109(1)].
* The court may [*Surrogate Rules*, s. 113(1)]:
  1. set a date for a hearing and direct that notice of the hearing be served on specified persons;
  2. direct a formal passing of one or more or all entries;
  3. reject the application;
  4. dispense with a formal passing and pass the accounts on an informal basis;
  5. make any other determination that the court considers appropriate.
* At a hearing to pass interim or final accounts, the court may [*Surrogate Rules*, s. 113(2)]:
  1. pass the accounts;
     + On a final passing of accounts, the court may [*Surrogate Rules*, s. 113(4)]:
       1. discharge a PR who is an administrator;
       2. determine whether a PR who is an executor has fully and satisfactorily accounted to a date to be stated in the order;
       3. make any other order that the court considers appropriate.
  2. vary or amend the financial statements;
  3. set the compensation for the PR and give any directions in that respect;
  4. decide any matters in dispute summarily;
  5. order the trial of any matter in dispute, set the procedure the parties must follow and set time limits if it is appropriate;
  6. appoint a person to assist the court in determining any matters on which the court requires further clarification or explanation;
  7. direct the payment of debts or charges;
  8. confirm the beneficiaries and their several interests and direct distribution of the estate to them;
  9. direct the substitution for or the reduction or cancellation of any bond;
  10. direct payment to the Public Trustee or any other trustee of any money to which a minor or missing person is entitled;
  11. allow and direct payment of costs;
  12. generally dispose of all matters incidental to the administration of the estate to a date to be stated in the order.