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14. Filing deadline for T3 Trust Return - 90 days (not 3 months) following end of testamentary trust fiscal period as selected by estate trustee - easier if December 31st year end

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 Multiple testamentary trusts generally all taxed separately; eg. residue divided among five children under 25 with clause setting up discretionary trust for any beneficiary under 25 --- tax advantage of this will be lost because they are probably not eligible for designation as GREs.

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 Principal residence: capital disposition but no gains or losses up to date of death (assuming used continually as principal residence during lifetime of deceased); sale of principal residence following death must be reported in T3 Return and increase from date of death will be taxed as a capital gain

E.g.: if it wasn’t lived in but rented out, then it is a capital property.

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# HISTORY OF THE LAW OF SUCCESSION & THE LAW OF WILLS

## The Law of Succession in Canada (8)

* The provinces were settled at different times, when an area was settled, the settlers brought the English law to which they were accustomed, including the law of succession. Therefore, history differs in the provinces as they were settled on different dates.

### 

## The Law of Succession in Ontario (9):

* Our SLRA (1978) is derived to some considerable extent from the English *Wills Act* of 1837
  + Adopted English Act in 1837 and codified *Wills Act* of 1873

#### List of Disabilities (circumstances preventing an individual from making a will)

1. **Alienation** – a person not a citizen (“an alien”), was not allowed to own real estate. This is not the case anymore. Non-citizens are allowed to own property and make wills.
2. **Coverture** – married women 🡪 at one point they were not allowed to own property or make wills, but by 1884 they were emancipated.
3. **Criminality** – criminal = intestable b/c there was nothing to dispose of – a person who committed a crime forfeited their assets to the Crown.

* Now – right to seize profits of crime, but not non-crime related assets.
* If the person inheriting the property caused the death of the testator, then cannot inherit (still continues)
* “Escheat” is the term where property goes to Crown 🡪 where person dies w/o a will and no relatives whatsoever.

1. **Minority** – Only people of a certain age can make a will. In Ontario - must be 18 years of age. There is an exemption if you are married or have been married, sailor on course of a voyage or military service. Different rules for powers of attorney.

* Age 16 – can make POA for personal care under SDA
* Age 18 – can make POA for property under SDA

1. **Unsoundness of mind** – “lack of testamentary capacity” (defined by case law) 🡪 this continues today.

* SDA has definitions of capacity for both types of POAs
* No statutory definition for wills

***Succession Law Reform Act* – Effective March 31 1978**

Divided into 5 parts:

1) Wills

2) Intestate succession – complete codification

3) Beneficiaries in Funds or Plans

4) Survivorship – what happens when two people die at the same time

5) Codification of law on support of dependants

**Major changes** in the Act (13)

1) Children or people born outside of marriage are treated the same as people born inside marriage **s. 1(3)**

* “to all my grandchildren” 🡪 make sure you make sure client understands above – better to specify

2) **Holograph Wills** permitted– “*wholly in the handwriting of the deceased*” **s. 6**

* No witnesses required

3) Rules of Survivorship changes

4) Distributive shares of spouses on intestacy equalized. Spouses were allowed to take to the exclusion of next of kin if the deceased left no issue **Part 4**

5) Dependants’ relief -- extended to intestacy **Part 5**

* prior to 1978 supporting dependants was only if NO WILL
* **now** whether a person dies testate or intestate an application for support can be granted

6) Expanded the definition of dependent – a common law spouse, grandparent, child

7) \*\* As a result of **s. 72**, assets that would not normally be part of the estate can be brought back into the estate for support purposes.

* “Sweeping-In Provisions”
* Ex. Married and want to leave spouse as little as possible. Prior to 1978, H put all assets in joint ownership with third party, so when H dies, goes to third party rather than through will to spouse.
* NOW – dependants have access to assets that the deceased put in joint ownership

***The Children’s Law Reform Act, 1977***

* Abolished status of illegitimacy. Children born inside and outside marriage are to be treated equally **s.1**
  + NOW next of Kin includes children born outside of marriage
* **S. 61** 🡪 Appointment of a **Guardian** by a will. Broadly, we are permitted in Ontario to appoint guardians for infant children under wills – these are not necessarily binding, “**Parens Patria**” they can overturn appointments if they are not in the best interests of their children.

***Family Law Reform Act 🡪 Reformed into Family Law Act, 1986***

* Provides for deferred equalization claim of spouses’ NFPs 🡪 both on marriage breakdown and on death
* ON DEATH – surviving spouse may elect to take ½ the difference btw the NFPs if the NFP of the deceased is **greater** than that of the surviving spouse
  + In lieu of the survivor’s rights under the deceased spouse’s will or intestacy
* Enacted a scheme for equalization for NFPs where one spouse has died and has left greater NFP then the surviving spouse

**Estate Administration Law Reform (15)**

* *Courts of Justice Act* gives authority to the **rules of civil procedure**
* Rules **74 and 75**, deal with estates
  + Non-contentious proceedings (74)
  + If a will is going to be litigated (75)
    - Passing of accounts: executor has to set out what they did in terms of the estate
  + Probate a Will
  + Contest a Will
  + Court order for an administrator
* **Rule 74.01** contains the new ON definitions (page 28)
* **“certificate of appointment of estate trustee”** means letters probate, letters of administration or letters of administration with the will annexed
* **“estate trustee”** means an executor, administrator, or administrator with the will annexed
* **“estate trustee during litigation”** means an administrator appointed pending an action
* **“estate trustee with a will”** means an executor or an administrator with the will annexed
* **“estate trustee without a will”** means an administrator
* **“objecting to issuing of certificate of appointment”** means a caveat
* **“will”** includes any testamentary instrument of which probate or administration may be granted

## Constitutional Issues (16)

* Income benefits under *Insurance Act* must include common law spouses (***Miron v Trudell*** [1995] SCC)
* Pension / support benefits (not succession) under the *Family Law Act* must include same-sex couples (***M v H*** [1999] SCC)
* Definition of “spouse” as married couple only in *Matrimonial Property Act* is **not unconstitutional** (and so CL spouse **cannot** apply for equal division of family assets upon relationship breakdown) (***Walsh v Bona*** [2002] SCC)
  + ON *FLA* and Part II of *SLRA* follow
* Definition of “dependent” in *Family Relief Act* must include party to CL relationship so CL spouse can apply for support from deceased’s estate (***Re Woycenko Estate*** (2002) ABQB)
* CL definition of “marriage” must include same-sex couples (***Halpern v Canada*** (2003) ONCA).
  + Parliament enacted the *Civil Marriage Act*
    - “the lawful union of two persons to the exclusion of all others” **s. 1**
* Ontario’s *Spousal Relationships Statute Law Amendment Act* (2005) allowed same-sex marriages and so all the same succession rights to a same-sex spouse as any other spouse.
  + Right to support and intestacy

## Terminology (22):

**“*Law of Succession*”** – all transfers of property from one generation to another.

* Can also refer to will-like dispositions, sometimes referred to as will substitutes (*inter vivos* gifts and trusts, joint tenancy arrangements, pensions, life insurance…)

**“*Testament*”** – Passed on all personalty (Personal Property) of the Testator

* That’s why it says: “Will and Testament”, i.e. Will was for real property and Testament was for personal property

**“*Law of Probate*”** – the validity of testamentary instruments and the administration of estates

**“*Law of Wills*”** – the validity of dispositions that take effect on a person’s death and are contained in his or her will

**“*Will*”** – Written, typed, or printed document made by the person to dispose of his or her property on death and is executed in the manner prescribed by statute

* During the person’s lifetime, the will is revocable
* Ambulatory 🡪 It is inoperative until the person dies and by statute, it passes property acquired by the person making the will between its date and the date of death

**“*Codicil*”** – testamentary document which supplements, explains, or modifies a will bearing an earlier date

* minor amendment to a will

**“*Testator*”** – person making the will

***“Testate”*** – dies with a will

***“Intestate”*** – dies without a will

**“*Devise*”** – testamentary disposition of real property

**“*Bequest*”** – testamentary disposition of personal property

**“*Legacy*”** – gift of money under a will

***“Probate”*** – old term coming from ‘to prove’

* A process by which a court gives an order stating that a certain document or set of documents constitute a will of a deceased person. Must swear oath and give sworn affidavit that it is the will of the person.
* Now “**certificate of appointment** of estate trustee” is synonymous with that term

“***Personal Representative***” – is either the executor, or the administrator (terms are synonymous in course)

* both terms abolished in Ontario, now called an **Estate Trustee**
* Executor - Person named in will to execute or carry out the terms of the will, who is willing and able to act as such
* Administrator – appointed by court

**“*Descendants*”** - fundamental to understand the distinction b/w children and issue

* **“*Children*”** – descendants of the first degree
* **“*Issue*”** – generic term meaning descendants of any degree including children 🡪 all lineal descendants

***“Per Stirpes”*** – ‘by the stock’ – divides equally among the stock

***“Per Capita”*** – ‘by the head’ – divides equally among all living descendants

***“Children’s Lawyer”*** – appointed under the *Courts of Justice Act*

* Role is to supervise the interests of infants in estates. Also referred to as the Official Guardian

**“*Public Guardian and Trustee*” (“PGT”)—** oversee charities, absentees, mentally incompetent people without power of attorney

***“Application”*** – a document by which a legal process is started in the Province of Ontario

* In terms of wills and estates, applications are usually used ‘to interpret the terms of a will’
* **Rule 14.05** allows a party to make an application to a court to construe a will (or any instrument). It is a prescribed form and sets out view of the matter and supported by an affidavit (sworn statement) by the party and results in a judgment being issued by a court as to the interpretation of the will.

***“Residue”*** - In a will, if certain objects are bequeathed and legacies, then at the end of the will there is a provision that says “this is how *everything else* is divided” is the ‘**residue’**.

**“*Life Interest*”** – this means that someone has an interest in an asset for a lifetime. When creating a life interest, one must also state what happens when the life interest dies = “**the remainder**” and goes to the “**remainderperson**”.

***“Attestation”*** – act of signing a testamentary instrument

***“Dispositive Clauses”*** – all the clauses that dispose of certain property or assets.

***“Sui juris”*** – having the capacity to act legally, not under a legal disability. E.g. person over 18 with testamentary capacity

“***Animo testandi***” – intending to make a will

**NOTE ABOUT CHILDREN**

Prior to January 1st, 2017, the parent of a child, for the purposes of succession, was the father or mother of a child.  The terms “father and “mother” have been **deleted** in the Succession Law Reform Act (the “SLRA”) by the *All Families are Equal Act* (“AFAEA”)and **parentage is now determined in accordance with a set of rules in Part II of the Children’s Law Reform Act(the “CLRA”).**

*CLRA*Section 8(5) addresses situations where a child is conceived using a person’s genetic material after that person’s death. In order for the deceased person to be considered a parent of the child there must be written consent from the deceased person to use their genetic material after their death and there must also be written consent from the deceased person to be the parent of such a child conceived and born after their death.

These **new definitions will apply to a person’s Will**, unless a contrary intention is reflected in the Will.  It appears that this change is not retroactive, and therefore **only Wills drafted after January 1st, 2017, will be subject to the new definitions.**

Clients will need to advise their lawyer if they, their children or other beneficiaries under their Will, have stored or intend to store any reproductive material (eggs, sperm, embryos).  If so, clients will need to decide whether they want posthumously conceived children and issue to inherit under the Will.

The AFAEA also **expanded the definitions of “child” and “issue” in the SLRA** **to include children and descendants conceived and born after the death of a parent**, provided a number of conditions are met:

1. **Notice:** The spouse of the deceased must give **written notice** to the Estate Registrar for Ontario that the spouse may use reproductive material (sperm, eggs) or an embryo to attempt to conceive a child in relation to which the deceased person intended to be a parent.  The notice must be in a **prescribed form and given no later than six months after the deceased person’s death**.  Where an estate representative files an application for probate, it appears that the Estate Registrar will notify the estate representative that a notice of intention to conceive has been filed.
2. **Birth of child:**The posthumously-conceived child **must be born no later than the third anniversary of the deceased person’s death, or such later time as may be specified by the court,** in appropriate circumstances.
3. **Declaration of Parentage:**A court has made a declaration establishing the deceased person’s parentage of the posthumously conceived child.  In order to obtain a declaration of parentage with respect to the deceased person, the spouse must establish that the **deceased provided written consent** to parentage of a posthumously conceived child, and that said consent was not withdrawn.

### Intestate Estates

Where an individual does not have a valid Will, the definitions of “child” and “issue” under the CLRA will apply to the distribution of the estate, and a posthumously conceived child of the deceased parent will be entitled to share in the distribution of the parent’s estate, provided the conditions set out above are satisfied.  Posthumously conceived children may also be entitled to inherit from the estates of their relatives and antecedents, e.g. grandparents, uncles, etc.

### Dependant Support

Under the new definitions, posthumously conceived children may be entitled to dependant support from the estates of deceased parents.  The conditions discussed above will need to be satisfied, and a claim will need to be commenced, on behalf of the posthumously conceived child, within six months of the deceased’s parent’s death.  This claim will be stayed until the birth of the child.

## Per Stirpes/Per capita

**Per Stirpes [“STOCK”]**

* + Divides the estate equally among the children
  + If a child is deceased, then the remaining children will split the deceased’s portion

**Per Capita [“HEAD”]**

* In **Per Capita** distribution they all share equally including the grandchildren
* Child[ren] of T 🡪 A, B, C, D
* **Issue** – all of the lineal descendants of the testator or the deceased individual
  + (A-L) = the issue of T
* **To divide my estate equally among my issue surviving me, per stirpes** (assume B and D still alive)
  + 4 children, 4 stocks. E
  + qual distribution to the 4 children
* **To divide my estate equally among my issue surviving me, per stirpes** (B and D Predeceased T)
  + 4 stocks (because there were 4 children)
  + If B were deceased, then G, H, I would step up to divide the ¼ share of B (per stirpes)
    - A gets ¼, Alive
    - B is dead so B’s ¼ is divided amongst each child and so they would get 1/12
    - C is alive and gets ¼
    - D is dead and so his share is divided between his children and they would get 1/8
* **To divide my estate among my issue surviving me** 🡪 case law says that that means a **“per capita”** distribution
  + Count the amount of lineal descendants alive 🡪 each person gets a 1/10 share of the estate
* **I want my entire estate divided equally among my lineal descendants**
  + to divide the residue of my estate equally among my issue surviving me, per capita

**NOTE: Do not use the terms children and per stirpes in the same sentence**

* + Instead “Divide estate among my issue per stirpes”
    - Dividing the estate equally among all living issue

### Public Guardian/Trustee – (“PGT”)

* A corporation sole that is established by ON statute
* To represent incapacitated individuals (without POA), absentees (cannot locate beneficiary) and the interests of charities
* If someone has a Will and wants it to be probated and there is a charity named in the Will, then have to send it to PGT

### Office of the Children’s Lawyer (“OCL”)

* Used to be called the Official Guardian
* Children’s lawyer represents the interests of people under age 18.
  + If a trust is set up for GHI and they are under 18, then have to **serve notice on OCL** and they would be responsible to ensure that trust fund is being managed in accordance with law.
  + OCL replies and asks for report as to what happened to child’s interest in the estate

**A will provides considerable flexibility in planning for an orderly administration of the estate:**

* Determination of beneficiaries and the allocation of property to them
* Can provide for the continuing management of property on behalf of beneficiaries (both adult and minors)
* Allows for contingencies
* Permits property to be retained and managed for multiple generations
  + Allows for discretion
* Allows for the appointment of an estate trustee(s) and trustee(s) under any continuing trusts
* Without a will an application for a grant of probate or letters of administration must be made before any of the property of the estate can be dealt with
  + Process that has to be done
  + Need some level of authority to take over the money
    - Bank (third party) will require proof of authority

# CHAPTER 2 – PROBATE AND ADMINISTRATION

Read all except 2.4.4, 2.4.5 and 2.10 for background info.

1. Flow chart of estate administration – found on OWL
2. Distribution of assets on death – found on OWL

* **Caveats** are objections to the issuing of a certificate of appointment 🡪 keep the person from getting the certificate
* However, if the person will **not need a certificate** then caveat is NO GOOD, so you get **citation** to require the person to deposit the original will to the court (this is a court order so if they do not comply then they are in contempt of court)
* The purpose of a **grant** is to invest a person with **lawful authority** to deal with the estate

## Role of the Ontario Superior Court of Justice Regarding Wills (30-31)

### ONSCJ – jurisdiction for probate AND interpretation

**Interpretation** – by virtue of **s. 11(2)** of the *Courts of Justice Act*

### Probate Jurisdiction:

* Granting letters probate or letters of administration (Certificates of Appointment of Estate Trustee) and related issues
* **S. 7(1) of the *Estates Act* (which defines the probate jurisdiction of the ON Court) (p. 30)** – where an application for grant of probate or letters of administration should be brought
  + Includes:
    - whether the will was properly executed and attested,
    - whether the T had the necessary capacity and that there was no influence or fraud,
    - that the T knew and approved contents of will,
    - that there are no mistakes on the face of the will, and if necessary, expunging the mistakes,
    - that any alterations were properly executed and attested,
    - that a testamentary gift is void b/c the will was attested by beneficiary or his or her spouse, **SLRA s. 12**
    - whether any document has been incorporated by reference,
    - whether the will or any part has been revoked,
    - proof of death, including survivorship.
  + Wills are normally kept at lawyer’s office or with client, but *can* deposit at local court house (***EA* s 2**)
* Revoking letters probate or letters of administration (CAET) (e.g. a later will was established)
* Appointing executors and administrators
* Passing of accounts of PRs and awarded compensation on the passing of accounts
* Applications by dependents of a deceased person for support under Part 5 of the *SLRA*

### Common Law/Equity Jurisdiction (CAET have been issued already):

* Applications to construe wills, including the determination of the validity of testamentary gifts **Rules 14.05(3)(a), (d)**
* Actions to try the validity of wills **CJA s.11(2)**
* Actions for legacies or the distribution of residues
* Proceedings regarding the disposition of a minor’s property **CLRA s.59**; **Rule 67**
* Declaring a person to be an absentee and appointing a committee of the estate ***Absentees Act***
* Applications for declarations of sufficiency of proof of death and of presumption of death for insurance purposes ***Insurance Act***
* Removal of PRs and appointment of replacements ***Trustee Act* s. 37**; **Rule 14.05(3)(c)**
* Applications for the opinion, advice and direction of the court on questions concerning the management or administration of the estate ***Trustee Act* s. 60**; **Rule 14.05(3)(a)**

### Office of the Estate Registrar for Ontario

* Local registrars send monthly list
  + Grants of probate and administration, revocations of grants, applications, caveats
* Purpose: clearinghouse and prevent concurrent grants from being issued
* Go to estate registrar in the county the deceased resided
* Reference with the provincial office to check if there has already been an order
* If acting for a married spouse who is going to file an FLA election for equalization on death, election must be filed with the Registrar
* **NOT every will has to be probated** as it depends on the nature of the assets and their value
  + If small and uncomplicated, no dispute as to the validity of the will, if members of the family can agree to the division of property, may not need probate
  + Assets held in JT do not have to be probated/with right of survivorship
  + Insurance proceeds to a named beneficiary do not have to be probated
  + Land must get probate (though not technically)
* BUT it would be impossible to deal with many other types of property without an estate trustee: real property other than that in joint tenancy, registered securities, bank accounts, choses in action in respect of which action must be brought or for which a receipt must be given

## FLOW CHART ON OWL

**Prepare documents** or homemade (Will, POA)

* No obligation to have a lawyer prepare
* Lawyer can keep original
* Can deposit at courthouse (EA S.2)
* If give will original to client, make sure as lawyer you keep acknowledgment of receipt
  + BUT if client dies and will cannot be found = extensive process
  + To probate court needs original or court order

**Incapacity**

* Use POA for Property
* Use POA for personal care
* If no POA and client becomes incapacitated cannot make changes or new will
* Litigation:
  + Could be questions about whether the grantor had the legal capacity to create the POA at the time
  + Q about how the A is handling the affairs of the incapacitated person
  + Management about the personal care of the person
  + No litigation regarding the will until the testator has died

**Death**

**s.2(1) *Estates Administration Act*** (35)

**All real and personal property** that is vested in a person (except joint property) without a right in any other person to take by survivorship, on the person’s death, whether testate or intestate devolves to his or her **personal representative** as trustee for the persons by law beneficially entitled, subject to payment of the person’s debts and in so far as the property isn’t dealt with by contract or other disposition is to be administered and distributed as if it were personal property not so disposed of.

Note that this section does not apply to personal property, except chattels real, of a person who at the time of his death is domiciled outside Ontario

* Litigation regarding the will can arise
* Ownership of assets transfers to estate trustee – held in trust for the named beneficiaries in will

*One major exclusion*: “without right of any other person to take by survivorship”

**Distribution of Assets on Death** – Flow Chart

* where you have assets that are in name of deceased then they flow into estate of deceased through **s.2 of EEA**
  + May own house in own name, stocks, bonds, bank accounts 🡪 pass directly to estate trustee.

Life insurance policy/RRSP/RRIF//Lump Sum Pension

– have a right to name a beneficiary

* Those **assets flow through to the beneficiary**
* Where there is **no named beneficiary or the named beneficiary is the estate, then the assets flow through to the executor**
  + Become part of the assets encompassed by **s. 2 of the EAA**

JTWRS – **joint tenants with right of survivorship** = joint assets

* + At the moment of my death, my interest in that asset automatically transfers to the surviving joint owner
  + Does not flow through **s.2 EAA**

**Funeral (58)**

* Duty of the estate trustee
* No property in remains of deceased person.
* However, **personal representative** has **duty to deal with remains and has legal custody of those remains**
  + BUT no ownership of body (ENG case law)
* Can put in Will all details about funeral, but law is that ***executor is not bound* to follow deceased instructions.**
* If no instructions – obligation to have a funeral of a “reasonable” amount
* If there is a client with details about funeral, then have to make sure estate trustee is on board.
* Where we see estate trustee not following instructions of funeral, is when at the time Will was written deceased was wealthy but at time of death estate has depleted and assets are small. **So as to not upset beneficiaries the executor has legal right to not follow funeral instructions.** 
  + Can you trust executor explicitly?
    - No obligation for them to follow the wishes of the deceased, but can do so if the funeral is not extravagant or unreasonable
  + **Beneficiaries are entitled to an accounting by the estate trustee**
* [Footnote 213] When court is appointing estate trustee to person without a Will the court may not follow religious practices with regards to the remains

**Burial expenses and executor fees are regarded as priority.**

* **Generally, burial expenses (provided that they are reasonable) have priority over other debts of the estate.**
* If Executor’s fees weren’t a priority, then no one would act as an executor.
* Every executor is entitled to fees.

**Testate or Intestate**

**Determine assets & liabilities**

* Write to third party financial institutions
* File an Estate Information Return

**Application for Certificate of Appointment?**

**If Testate:**

Common form/Solemn Form

Will dispute?

Will interpretation?

**If Intestate:**

Follow Part II SLRA

**Liquidate Assets or Distribute as per Will**

**Advertise for Creditors**

**Pay Debts (NB income tax)**

**Interim Distribution of Residue – Set up Trusts**

**Obtain Releases or Pass Accounts**

**Clearance Certificate**

**Final Distribution of Residue**

## Person dies intestate

* Administration Problems immediately – no one to sign for the funeral, for the burial
  + Funeral director usually first asks for will
* No personal representative for the assets to transfer to
* *Administrator [Estate Trustee without a Will]* 🡪 is appointed.
* 1. Has to do a **diligent search** for the Will.
  + An effort made as to determine whether deceased left a Will or not.
  + Can be expensive
    - Advertisement in Middlesex law newsletter, ON Reports
* 2. Assuming no Will is produced, then proceed into **process of applying for a certificate of appointment for estate trustee without a Will (letters of appointment)** 
  + **Application includes:**
    - * Details about deceased (residence, marital status, the persons entitled to a share in an intestacy and the value of the estate + applicant’s affidavit

**Must also file:**

* + - * An affidavit attesting that notice has been sent to all persons entitled to share in the distribution
      * A renunciation from everyone entitled to be appointed in priority to the applicant and who did not join in the application
      * A consent to the appointment by persons who together are entitled to a majority interest in the value
      * Administrative **bond R.74.05**
        + Once true inventory, administration, accounting and payment duties are complete, the bond is **cancelled**.
* 3. In process of doing this, either the lawyer or Client/applicant, by agreement, has to **ascertain assets of the estate**, and in some cases appraisals Will have to be obtained.
  + Detail of assets and liabilities isn’t just for applying for appointment of an estate trustee without a Will it also has to be done where the client has a Will.
  + Assuming there are assets
  + Has to determine the assets and the liabilities 🡪 can take time
  + Write to third party financial institutions – with no will, they are loathe to furnish information
  + PR has to file an estate information return – substantial detail about the value of assets of the estate
    - Appraisals have to be obtained for expensive things (house, furnishings, jewelry, shares in a non-offering corporation, partnership interest)

### Who is going to apply to be estate trustee without the Will?

[Pg. 37] **S. 29 of Estates** **Act** sets this out

Paraphrase: Where there is an intestacy then the administration is granted either to the person to whom the deceased was married and immediately before death, or the person with whom they were living with in conjugal relationship outside marriage, immediately before death.

* ***Conjugal relationship*** 🡪 (subject to interpretation) generally means that **“married spouse” and “common law spouse” have equivalent right to apply.**

**S. 29** leaves decision to the **discretion of the court**. Also allows for next of kin.

* What is in the best interest of the estate?
* Each of the applicants would have to file affidavit evidence, and say I am the best/appropriate person to administer the estate.
  + Ex. Married spouse and deceased are separated for 15 years and CL relationship for 14 years then court would favour CL spouse
* Statute is also clear, where people are applying in **equal degree of kindred** then court decides who would be the right person to be the estate trustee.

**The usual order of priority for entitlement of letters of administration** (38) **S. 29(1)(a)(b)(c)**

1. The surviving spouse or the common law spouse;

2. Children;

3. Grandchildren;

4. Great-grandchildren or other lineal descendants;

5. Father or Mother;

6. Siblings;

7. Other next of kin in same order as entitlement to an interest in the estate

***Succession Law Reform Act*,** R.S.O. 1190, c. 26 **(Part II Intestate Succession)** includes a series of rules to distribute property:

* + Between the testator’s spouse and issue.
    - Issue – your descendants
  + If the testator has no living spouse or issue between his or her parents
  + If the testator has no living spouse, issue or parents among his or her brothers and sisters. If a brother or sister predeceases the testator, their share is equally divided among any of their children (if any).
  + If the testator has no living spouse, issue, parent or brother/sister among his or her nephews and nieces without representation
  + If the testator has no living spouse, issue, parent, brother/sister or nephew/niece equally among his or her next of kin of equal degree of consanguinity to the intestate without representation
  + If the testator has no surviving spouse, issue, parent, brother/ sister, nephew/niece or next of kin, the property becomes the property of the Crown
    - Government only gets your money if you have NO family
    - BUT what if you wanted to leave to really good friend – need to have a will in place
* Ex. Neighbour dies, they searched for a Will, but no Will found.
* Under SLRA – he has no spouse, no children, no common law partner
  + - His mother Will get his estate under SLRA, she is 87 and distraught.
    - She is in no position to do this.
    - Mother said she has a retired son-in-law to do this
    - Have mother **sign renunciation of administration** and **nomination** of her son-in-law as estate trustee.
      * she had **right** to be applicant but is *renouncing right* and has *nominated* her son-in-law.
      * Renouncing 🡪 **s. 34 of EA**
    - It is possible that one or more of her other children could object, however lawyer goes and polls informally other children and make sure they were okay for son-in-law to be nominated for legal reasons but also for practical family dynamics.
    - In intestacy have to go through process in determining who has right to apply.
    - If mother was not alive, and father died (no parents) *under SLRA it would have been his siblings* and would have to have ***agreement***from siblings about who they want to be *estate trustee* and would need their *renunciation and nomination for person they choose*.

Where applying for appointment of estate trustee for someone without a Will **must file an application** which includes details of deceased, including general details about his assets

If a person with an **inferior claim** to a grant applies, those who have a superior claim to a grant of administration must ***renounce***, or they ***must be ordered to show cause*** why the application should not be granted. **EA s. 13; R.74.05**

**Shall not be granted to a person who does not reside in Ontario s. 5 EA**

* Read with **s. 29** 🡪 unless with next of kin consent and posted bond

In an application appointment without a Will, the law requires that administrator/applicant **give a bond when it is intestate** – [pg. 39 footnote 71]. **S. 35 of EA**

* Added expense – insurance company to get bond
* Or apply for an order of the court, reducing amount or waiving the requirement to file a bond 🡪 **s. 37(2) of EA**

If it is a matter of filing a bond, then Applicant has to go to insurance company that provides fidelity bonds. Has to pay insurance premium and the last time prof got a bond, the cost was $15/ thousand/year. Estate of $100 000 then paying $1500 per year for that bond and cannot get bond released until everyone has signed off and all the income tax process is completed.

***Re Henderson*** – judge expressed anger about how he was seeing different information in applications for waver of bond. Expressed what SHOULD BE included – and *this* judgment has been accepted as practice.

**Steps:**

* + File a notice of motion
  + File a supporting affidavit that has all information outlined in *Re Henderson* decision
  + Wait and see if judge agrees in terms of waiver of bond.
  + Prof likes to also ***qualify* the person who is applying**
    - How old applicant is, what they did for a living, reputation, what his net estate is.
  + Application **has to** layout the *assets, the debts, it has to say the deceased was not involved in a business & has to talk about tax returns and whether they had been filed.*
  + Assemble this information, and then file with court and at some point, get a call from court that says have order waving the bond in the “XY” estate and your certificate is available to be picked up.
  + Have to pay (with or without a Will) **probate fees** 🡪 technically Estate administration tax at time of application.
    - Gross assets
    - No debts cannot be deducted except a mortgage for real estate
    - Excluded from the definition of assets – assets that have a named beneficiary (example life insurance) and **true** joint assets
      * Vs joint account for convenience

**Consent of the beneficiaries needs to be filed with the waiver of the bond**

* If beneficiary is under 18 cannot sign legal document
* If beneficiary is incapacitated, with no litigation guardian, then cannot sign legal document
* Costly and timely

$1500-$2000 easily to file for the waiving of the bond

* \*\*\*a will and two POAs = $800-900
* Better to make a will then to pay all the expenses of intestacy

**“Administrator with the will Annexed”** [ET w/will] – a person appointed by the court to administer the estate of a person who has left a valid will but ***neglected to appoint an executor***, or when the executor named has ***renounced***, or is ***unable or unwilling to act***, or has ***predeceased*** the testator.

“**Succeeding ET w/o will**” – if administrator dies or is removed from office before duties are completed, the court will appoint a new administrator of the property. **R.74.07**

“**Succeeding ET with a will**” – the person appointed by the court to complete the administration of an estate when the sole or surviving executor dies intestate, or when the administrator with the will annexed dies leaving part of the estate unadministered.

If he dies testate, then if he appointed an executor who is able and willing to act, the executorship under the original will devolves to the latter when he or she proves the will, unless the will provides otherwise, or unless the deceased executor appointed a separate executor for the original estate. **R.74.06**

**Estate Trustee During Litigation** – a person whom the court appoints to represent the estate when an action respecting the validity of the will or the right to representation is pending. **S. 28EA.**

* Court won’t appoint someone with an interest in the outcome of the litigation
* Limitation: not entitled to distribute (*Cameron v Twinn*)
* Entitled to compensation – ***Trustee Act* s.61**

“**Litigation Administrator**” – PR may maintain an action for any tort committed against the deceased during his/her life (except libel and slander), ***Trustee Act* s.38(1)** a person wronged by the deceased may maintain an action for any tort against the deceased’s PR (except libel and slander). However, in the latter case, if no personal rep has been appointed, the court may appoint a litigation administrator to defend the action. **R 9.02**.

“**Executor de Son Tort**” – a person who does not have the authority of a PR but meddles in the estate in such a way as to take upon himself the functions of the Executor. Obligation of a lawful PR.

**PROBATE**

* A will may be proved in either common form or solemn form
* The general way is **probate in common form** (proof in common form), involving an *ex parte* application of the executor if no one contests the validity and appears to be proper
* Common form probate (application for certificate of appointment of estate trustee with a will) - the applicant must file with the local registrar an application for probate which, as in the case of the application for letters of administration, gives details about the deceased and the value of the estate, together with details of the will and any codicils, including details of gifts to beneficiaries and their spouse **R. 74.04**
* Certain things must be filed with it, notice must given, etc. see (45)
* For Solemn Form probate see “CONTESTING THE WILL”

**Probate Taxes/Fees (\*CAN\*)**

A fee based on the value of your estate – a relatively small percentage

If small estate, not worth the fee of planning around it

BUT if large estate, put planning in place to avoid the probate tax

• Fee charged to obtain a grant of probate or letters of administration

* Probate is a Legal process which:
  + Confirms the validity of a will
  + Confirms the appointment of the executor/estate trustee

• Fee varies by province

***Estate Administration Tax Act*, 1998, S.O. 1998, c. 34**

**2(1)** A tax determined in accordance with this section is payable to Her Majesty in right of Ontario by the estate of a deceased person immediately upon the issuance of an estate certificate. 1998, c. 34, Sched ., s. 2 (1).

…

(6) The amount of tax payable upon the issuance of an estate certificate for which application is made after June 7, 1992 is,

(a) five dollars for each $1,000 or part thereof of the first $50,000 of the value of the estate; and

(b) fifteen dollars for each $1,000 or part thereof by which the value of the estate exceeds $50,000. 1998, c. 34, Sched ., s. 2 (6).

**Usually 🡪 .5% - 1.5%**

Estates under $1,000 are exempt. Tax is 0.5% on first $50k the 1.5% on everything thereafter.

***Estate Administration Tax Act*, 1998, S.O. 1998, c. 34**

**1. (1)** In this Act,

**"value of the estate"** means the value which is required to be disclosed under ***section 32 of the Estates Act*** (or a predecessor thereof) of all the property that belonged to the deceased person at the time of his or her death less the actual value of any encumbrance on real property that is included in the property of the deceased person. ("valeur de la succession") 1998, c. 34, Sched., s. 1; 2001, c. 23, s. 86.

**4.1** Applicants for probate must supply all information prescribed under the statute and the value of each asset. **O. Reg. 310/14**

**5.1** The penalty for providing false or misleading information in this regard is a fine and/or imprisonment of up to two years.

***Estates Act*, R.S.O. 1990, c. E.21**

**32 (1)** The person applying for a grant of probate or administration shall before it is granted make or cause to be made and delivered to the registrar a true statement of the total value, verified by the oath or affirmation of the applicant, of all the property that belonged to the deceased at the time of his or her death . R . S . O . 1990 , c . E . 21, s . 32 ( 1 ) .

**Only pay Estate Administration Tax if you have to probate a will**

***Estates Act*, R.S.O. 1990, c. E.21**

**32 (3)** Where the application or grant is limited to part only of the property of the deceased, it is sufficient to set forth in the statement of value only the property and value thereof intended to be affected by such application or grant. R.S.O. 1990, c. E21, s. 32 (3).

**Only have to list the property that you want probate over**

* Can have dual wills – one with property that needs probate over, one without
  + Example: corporate properties will 🡪 does not need to be probated
* Only pay estate administration act on the one that needs probate

**Probate Planning**

• Ultimate plan – give everything away before you die

• Dual wills

• *Inter vivos* gifts

• Transfers to *inter vivos* trusts

• Designations in life insurance policies, RRSP’s

* Beneficiary owns

• Joint property ownership

* Joint owner simply owns the property upon your death

**DUAL WILLS**

* situation where a client has assets which do not require probate
  + Shares in a non-offering corporation
  + Valuable art
  + Valuable jewelry
* Purpose - Avoid the payment of probate fees (roughly 1.5% of the gross value of the estate)
  + Will with the “probabtable” assets
    - AND
* Will (same dispositive terms) but with “secondary estate” 🡪 the shares in the non-offering corporation, art, jewelry
* Saves the probate fees on the second will

## Children born outside of marriage

* Major change in SLRA – was people born outside of marriage are **treated equally** with people who are inside of marriage.
* Before necessary documents can be filed – **need to do a search for the next of kin**
* Searches for those born outside of marriage to determine beneficiaries **s. 24** of EAA (page 410)
* Personal representative must make **reasonable inquiries** for person who might be born outside of marriage.
* PR is not liable, where a) person makes those reasonable inquiries and did not know of any entitlement to person born outside of marriage and b) where makes a search through registrar’s office in Ontario
* If applicant/client knew that deceased fathered a child and wasn't going to tell anyone and then a year from now child finds out about father’s death and they say I am a child of the deceased (assuming person can prove that the deceased is the father) then that person is entitled to estate and that person would be *entitled to sue* the estate trustee for recovery, particularly if that person can establish the estate trustee knew of that person.
  + Limitation Act applies based on the rule of discovery
  + **S.24** relieves estate trustee from personal liabilities if estate trustee truly did not know and the person would have to chase the beneficiary.

Distinction between making recommendations and making decisions

* Advise children in writing that they **HAVE to make reasonable inquiries** (talk to H and I)
  + Client refuses to let lawyer talk to H and I
  + Child P shows up – client tries to place blame on lawyer
  + Look at the letter I wrote to you about recommendation
  + Client assumed the risk by refusing lawyer’s recommendation
  + Business decision not to talk to them (not a legal decision)
  + **Lawyers do not make business decisions for clients**
  + **Lawyers make legal decisions and recommendations**

## Death of a Client with a Will

* *Executor [Estate Trustee with a Will]* 🡪 is appointed
* When a lawyer is acting for an Estate, the client is the Estate Trustee, lots of Beneficiaries may say, “you are my lawyer, give me information about what is happening with these assets, I am beneficiary, and you are estate lawyer and therefore you are my lawyer”. The lawyer is retained by Estate Trustee and they are the clients, not the beneficiary.
* If beneficiary wants information about Estate, then it cannot be given without consent of Estate Trustee (client).
* Ex. Testator dies, and client coming to lawyer says something weird is happening. Uncle died last week, and at funeral heard of new will done a week before he died, but he was not in the right mind. So, in that case the beneficiary or potential beneficiary is the client and would have to **file an** **objection or an intervention** [pg. 46].
  + **Objection or an intervention** (filed with court) prevents the person named as the estate trustee under that potentially invalid Will from proceeding further with application process to get a certificate of appointment for estate trustee.
  + **Filing of an objection – stops an application for probate going through without notice to lawyer and client** 
    - * There is a cost, but not a real cost because it gives you some time
  + File objection on behalf of the client. It **has to be filed in the county where that deceased’s home located**, in Ontario, because under **s. 7 of EAA** the law is that the *application for probate (synonymous with certificate of appointment of estate trustee) has to be* ***filed with county where deceased had fixed place of abode***.
    - * file that objection
      * when person who is propounding that Will is the right Will files an application at court house then court \ knows there is an objection in estate of “ABC”
      * **court sends *a notice*** that application has been filed
      * either ***withdraw objection or proceed*** to next step of disputing the Will
    - An objection is a caveat “let so and so be warned”
    - Beneficiary and trustee can be the same person.
    - Estate trustee only comes into play on death.

## WHEN THERE IS NO DISPUTE ON THE WILL:

### Do I have to obtain a certificate of appointment of Estate Trustee? – [pg. 33]

* Answer: Executors derive their authority from the will rather than from the probate process. And by virtue of **s.2 of EAA** we know law says the assets devolve on estate trustee to be dealt with accordance of law.
  + Depends upon the nature and value of assets
  + Indemnity agreement
  + Institution can deal with the assets
  + LIMITATION PERIOD begins after certificate of appointment
    - If someone is thinking of applying under part 5 🡪 instruct client to file an application to get the limitation period running
    - Ball passes to client to decide whether or not to file application (recommendation vs instruction)
* Courts have jurisdiction over wills regardless of whether they are submitted for probate (***Re Silver Estate; Carmichael v Carmichael Estate*)**
* **Whether or not we have to** **apply for *probate*/*certificate of appointment of estate trustee* depends on nature of assets and size of assets.** B/c when dealing with past financial assets, such as bank accounts, stocks and bonds the financial institution permits estate trustee named in Will to deal with assets up to a discretionary amount (this is by policy, each institution has its own internal policy).
  + The policy of TD is that anything over $25,000 requires a certificate of appointment of estate trustee.
* What ***certificate of appointment of estate trustee*** does, is it **verifies**:
  + Authenticate to third parties that the persons presenting themselves as the executors with authority to deal with estate property are indeed the **only persons** with that authority **s. 30 of the EA**
  + Provides comfort to the financial institution.
* Example. Let’s say deceased had bank account of $200,000. Estate trustee goes to bank and says here is a Notarized copy of this Will and here is an original death certificate. And according to **s.2 of EAA** I own this asset and you have to pay it to me. The bank’s risk is that if the bank pays out $200,000 to Estate trustee, and someone else comes with later will, there is nothing left to pay the proper trustee. Now we have a claimant going after TD bank. When TD bank says to estate trustee “produce certificate of appointment” there is a court order, *then when person comes forward and someone says here’s the real Will, the bank can say he produced us the court order so now you have to deal with the other guy.*
* Where you have a property registered under the ***Land Titles Act*** you have to do a **transmission application** to sell that property and it is **only done with certificate of appointment**.
  + BUT can register unprobated will on title - ***Registry Act* s.53**
* Where you have a property that is **not** under Land Titles then there is some leeway dealing with property by only producing the Will and proof of death.
* Executor has to file an indemnification agreement in province of Ontario.
* Not every estate has to be probated and if person can convince financial institute that estate is very limited, then going to try to do this without going through probate process.
  + Why do this?
    - * Because have to pay probate fees (estate administration tax)
      * roughly 1.5% of estate
* Where you get a certificate of appointment (probate order) under Estate Administration tax act now have to **file an estate administration return** within 90 days of date of death.
  + This has very detailed information about assets of estate and any deductions made.
* Each financial institution has an indemnification agreement
* Executor has to **sign indemnification agreement** which includes, this is the Will, person died, we are executor named in the Will and we indemnify the bank if someone comes to bank with another Will.
  + Want to see net worth statement and make sure they are good for what they are signing for.
* **Indemnification** – means if someone is indemnifying someone in respect to something, then person Will cover expenses or losses that you might incur.
  + Indemnification is an agreement to make another party whole.
* With real estate property the executors are indemnifying the director of land titles.
* **Forms that have to be filed:** an application, an affidavit execution of the Will to verify that the Will has been signed.
* Where there is more than one beneficiary, other than the estate trustee, we have to send each beneficiary a document called **notice to beneficiary** that tells him/her title under Will, file an affidavit that verifies notice has been sent to each beneficiary, file original Will (not a copy), and any codicil and any documents legally incorporated by reference, and then have to file probate fees.
  + If we have two executors and one has renounced or died, have to file **proof of death or renunciation** if they do not want to be an executor.
* In London now, in 4-6 weeks later you get a call from court house saying certificate is ready and then role into administration of estate.
* Where we just file paperwork with court as described above and get call 4 weeks later that probate is ready come pick it up we call it **“proof in common form”** (45)
  + *Ex parte* application of the named executor

## The Role of an Estate Trustee (33)

### Authority vested at moment of death (s. 2(1) EAA)

* + Determines assets of the estate and administers them
    - **s. 30** of *EAA* provides sole authority to deal with assets of the estate.
  + Brings and defends actions involving the estate
  + Advertises for creditors and pays debts
  + Files tax returns (important!)
  + Sets up and administers trusts set up by the will
  + Distributes the residue in accordance with the will or on an intestacy

**S. 2 of the *EAA*** establishes that **all assets of the deceased vest in the PR** the **minute the testator dies** save for the above exceptions (estates tail, or personal property except chattels real of a person, at the time of death, who is domiciled out of Ontario.

* **(33) says that all such property that is *not* disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of**
* This section applies to property over which a person executes by will a general power of appointment as if it were property vested in the person
* When a person dies, what about the **time lapse** before an estate trustee is appointed? There is no hiatus since an executor (estate trustee) gets his authority not from the grant but from the will and thus from the testator himself (the probate is merely evidence of this for the court, thus though he can do many things in relation to the estate before getting a grant, he can’t obtain judgment before this time although he can commence an action)
* **Administrator** derives title solely from the grant and has no powers except under **“relation back”** 🡪 only permits the person who is in due course appointed administrator to bring actions or otherwise **to protect or preserve the estate from wrongful injury**, and thus is said to relate back to the death of the deceased for this limited purpose
  + Property must have **vested** in the deceased first.
    - Eg: life insurance comes under K so not vested in that person first.
    - Eg: if entitled to receive income from trust fund with a gift over, -- doesn’t vest.
  + “Property w/o a right in any other person to take in **survivorship**” – on death if you own jointly – the ownership doesn’t go to trustee. Survivor automatically becomes owner as “joint tenant with rights of survivorship” (JTWRS).
  + Other asset excluded – other property given **through deed, will**
    - Eg: partnership with buy/sell agreement to buy shares at a fixed price – this asset doesn’t go to the executor b/c it is made through contract, but executor has authority to sign over shares, but not part of estate distribution.
* Where an executor is **not resident in Ontario** or elsewhere in the CW, must normally **give security (post a bond) to get probate (like an administrator) EA s.6; *Re Dibblee Estate*; *Re Armstrong Estate*** 
  + Court on motion can waive a bond
    - Where the assets are straightforward, limited debts, beneficiaries consent
  + Bond is posted after death when the CAET is being applied for
* Where there is a will but no executor capable or willing to administer the estate, beneficiaries named under the will are entitled to apply for letters of administration with will annexed (certificates of appointment of estate trustee with a will). Hence, the right to administer follows the right to the property. See page 36.
* **S. 34** of the *EA* says that an executor can **renounce probate** of the will
* **s. 24** says that the beneficiary has the **right to require the executor to accept or refuse probate**
* If no executor or the executor is DQ, the beneficiaries can apply for letters of administration

#### Who *cannot* be an Estate Trustee (Executor passed over) (36):

* The mentally incapacitated / of unsound mind
* Someone criminally responsible for the testator’s death (*Re Crippen*)
  + Not negligence
* An undischarged bankrupt (unless the testator knew he was bankrupt when he appointed him as trustee)
* Someone who is in prison for a lengthy term
* Someone who has an interest adverse to the beneficiaries of the estate
  + (i.e. a gift *mortis causa*)
  + e.g. a spouse who will be making an election under the FLA 🡪 suspend right to act as executor until FLA claim is resolved
  + or anybody else who will be making a claim against the estate, b/c this would mean that if they become executor then they will be making claim against himself and cannot be impartial
* Infants – **s. 26** of the *EA* says where minor is an executor the guardian of the minor does it until minor reaches 18
* The person is unwilling – note that there is no obligation on a person to act

But, important to remember that the passing over of an executor is an unusual and extreme course. ***Re Leguia***

## Contesting the Will

**Grounds for invalidity:**

* Formal invalidity – did not follow rules of SLRA
* T lacked testamentary capacity
* Someone asserted undue influence on the T

**Process:**

* Party supporting the Will, makes a motion for **direction to court.**
* Court makes decision on who has to be **notified of legal proceedings.**
* Party propounding Will is plaintiff
* Party objecting the Will is defendant
* Where we just file paperwork with court and get a call 4 weeks later that probate is ready, come pick it up = **proof in common form [pg. 45] 🡪 will is not contested**
* Where there is a dispute (not about the interpretation – but about validity), a caveat filed or there are issues as to incapacity, knowledge and disapproval, or undue influence then we are moving to **proof in solemn form (proof *per tests*)**
  + Then needs to be proved in court
    - notice to all interested parties
    - examination of witnesses
    - discovery of evidence
  + will not be admitted to probate unless the court is satisfied of the due execution of the will, the testator’s knowledge and approval of the contents, his or her capacity, and non-revocation.

### 

### Method of Proceeding (47): 🡪

### Can have an appointment of an estate trustee during litigation (40) 🡪 cannot distribute estate, but can cash assets (unless court orders you not to)

* Most proceedings in estate matters are by motion or by application, but there are also other ways:
  + **By Caveat** (Notice of Objection) – if a person is interested in a particular estate and is concerned that the estate may be administered contrary to his or her interest or if a person desires to contest the will and receive notice of all proceedings. *The caveat is a notice to the court and all other interested parties that nothing be done in the estate without notice to the caveator*. **EA s. 23; R. 75.06**
  + **Intervention** (Request for Notice) – notice filed with a court that notice of all proceedings is given to the intervener **R. 74.03**
  + **Citation** (Order for Assistance, Summons) – an order of a judge upon the affidavit of the person extracting it (the citation). **R. 74.15**
    - It is addressed to another interested party in the proceedings and requires that person to enter an appearance or do such other things as may be specified.
    - They are also issued against PR to bring in a grant for revocation. **R.75.05**
    - If the validity of the will is disputed, all persons having an interest in the property, including those entitled on an intestacy are cited to see the proceedings. **EA s. 23; R. 75.06**
* The concept of **summary judgment** (47) **R. 20**
  + Ex. someone is pushing an issue about testamentary capacity and produced medical information, but no evidence that there was incapacity, then counsel for party propounding the Will, may consider applying for summary judgment because there is no triable issue.

### Estate Trustee During Litigation (40)

**S.28 of EAA**

Estate trustee during litigation can do anything related to estate, except distribute

* cannot distribute because do not know which will is correct
  + Have to consider the costs of fighting a Will – it is expensive? (48)
  + **S.131.1 CJA** [footnote 132] reference point for costs is **Rule 57**

### COSTS (48)

* Like most other proceedings, in estate matters, the costs are entirely up to the discretion of the courts **CJA s. 131(1)**
* Persons who **oppose a will** are often **denied** their costs if they have acted **unreasonably**.
* The **solicitor** for a party **challenging** a will may also be required to *pay costs* if the solicitor was responsible for the ***unjustified litigation***. Also condemned with costs if solicitor was cause of ***lengthy*** proceeding.
* **Rule 57.01** and **57.02** for awarding costs 🡪 **costs usually follow successful party**
  + + proportionality **R. 1.04(1.1)**
* **Two exceptions where costs are paid from estate**: (1) **Reasonable grounds** for questioning execution of will or testator’s capacity; (2) Testator was (in whole or in part) responsible for ambiguities in will that gave rise to litigation (***McDougald Estate v Gooderham*).**
  + - Because of (1) 🡪 where testamentary capacity is questioned – the party supporting the will needs to show the medical evidence asap in the litigation – if the medical evidence does not show any reasonable reading of testamentary capacity then it shows that the other side, despite no evidence, pushed on in the litigation
      * Speeds up the process
    - Ex. When testator makes a complicated homemade will, dispute on what it means, then testator has caused the problem, and, in this case, **cost should be paid by estate**
    - Have to figure out where the **a) onus** is and **b) where the costs are.**
* In rare circumstances solicitor will be ordered to pay costs if he is **responsible for unjustified litigation** (***Re Foote Estate***) or his (poor) preparation of will caused the **lengthy proceeding (*Johnson v Pelkey***)
* Executors may be condemned to pay costs personally in appropriate circumstances (***Eady v Waring***)

**Different levels of costs**

* + - * Partial indemnity **R.1.03(1)**
      * Full indemnity
        + Complete reimbursement of all amounts a client has had to pay to his or her lawyer in relation to the litigation (***Davies v Clarington***)
      * Substantial indemnity **R.1.03(1)**
        + 1.5x the amount of the partial indemnity amount
        + Depends on issues involved and conduct of other side.

## Interpretation of Phraseology in the Will (32)

* Where we have a disagreement about interpretation of a Will then we look to **R. 14.05(3)**, which gives a party the right to ask for opinion, advice, or direction of the court.
  + Done by application
  + Want everyone served who could be affected by litigation because if they have been served and haven’t responded they are bound by that order.
  + Through questions to the court – capable of being answered in yes or no
    - Q’s you put before the court are very important
* ET submits his or her rights to the court
  + No personal stake in whatever way the will is interpreted
  + Does whatever the court tells the ET to do
* Ex. Where we have a Will and it names executor, but the executor has died or become legally incapacitated
* **Estate trustee with Will annexed [**Letter C on pg. 39**]** (sometimes happens with homemade wills) there is a will and no dispute about Will but no executor and so majority of beneficiaries have right to appoint executor.
* *Bond has to be produced to court or order dispensing with the bond.*
* To divide my estate among my children, per stirpes 🡪 the will is valid because it met the formalities, but there is an issue as to interpretation

## Liquidating assets & beginning distribution of process: Pay Debts of Estate

* Where you have a cash payment to be made 🡪 “legacy”
* Where you have a gift of a particular item 🡪 “bequest”
* Where you have a piece of real estate that is being gifted under a will 🡪 “devise”

## The Notion of Advertising for Creditors (52)

* + Sample notice to creditors on OWL
* Does not have to be done in every estate 🡪 decision of the executor
  + If the same people who are executors are also the beneficiaries, then may not be reason to advertise
    - Issue: 2 siblings are beneficiaries. If one sibling spends everything and there was a debt, then the other sibling would be liable for the debt
* **Advertisement for creditors protects the personal representatives from future claims by a creditor** **(*Omiciuolo v Pasco****)*
* If the PR has no assets in the estate to satisfy a debt upon which an action is brought, they may rely on the doctrine of *plene administravit* to defend the action – means they have no assets and not held personally liable.
* Notice to creditors published three times (in London costs about $1000), distribution one month after the first publication
  + If you publish, as estate trustee, no personal liability
  + If you don’t publish, a claim comes up within the limitation period and the beneficiaries have depleted the assets, the claimant can claim that the estate trustee didn’t publish the notice to creditors and pursue you personally
  + Limitation period for filing objection is 6 months after the application is issued **(s 61(1)).**
  + The estate bears the cost
  + Trust companies will always publish this
* Myth that when you apply to be an executor you assume debts of deceased person. Not true. Not a guarantor. You become **legally responsible to administer estate in accordance with law**.

### Contestation of Claims (52)

* To facilitate the winding up of an estate, the ***EA* ss 44-47** permit the summary contestation of claims if their validity is in doubt.
  + The advertisement for creditors protects the PR against future claims by creditors. The PR is not responsible for an unliquidated claim for damages, but if PR is negligent in obtaining relevant reports, PR will be liable to the creditor.
* Once an estate trustee receives a claim, must serve a notice of contestation on the claimant; the claimant must then issue a formal statement of claim and litigation proceeds in the normal course
* Claim by common law spouse for dependency support is not a claim in this sense, it’s a claim for support and proceeds by application (support of dependants)

## Distribution of Assets (53)

## What if you have beneficiary who disagrees with the Will? Or Minors/Incapacitated

* Go through legal process called **Passing of Accounts** [ pg. 53]
* PR = fiduciaries, so must keep proper **books of account**
  + Can do voluntarily ***Trustee Act* s. 2**
  + Usually done on regular basis for paid compensation
  + May be cited (ordered) to account **EA s. 28; R 74.15(1)(h)**
  + Executor prepares accounts (money in, money out, whether any original assets disposed of)
  + Has to show proposed estates trustee compensation, those accounts are served on all beneficiaries entitled. And usually only residuary beneficiaries.
* **Procedure:** PR files an application (see 53 for details); passed before a judge in chambers – judge can require a full inquiry and accounting of all property the deceased was entitled to and its administration and disbursement. **EA S. 49(2)**
* Under **Rules** **74.16-74.18** executor must pass accounts.
  + Can still pass the accounts of an estate where the will had not been probated.
* These statements are sent out to all interested parties and have an **opportunity to file an objection** within a certain date. Must substantiate the objection 🡪 if can’t be sorted out they go to judge.
  + Usually only issues regarding the amount of ET compensation and decisions of ET
  + There must be a real objection otherwise risk paying the costs.
  + Has to set out the issues with the accounts
  + May allege misconduct, default, over-compensation by the estate trustee
  + Sold business to quickly – didn’t have proper appraisal
  + Issues are dealt with and the estate can be paid out, estate administration ends
  + Can change loss out of the ET compensation

Ex. An executor is being castigated for selling a property at too low a price, then this may be a case where a hearing would be held in front of the superior court of justice. They would hear evidence about the value of the property. Eventually judge would adjudicate on particular issue

* + When order of the court is issued and approving the accounts, the accounts stands as the approved account
  + **Order is the final resolution of the estate, and then the estate is paid out in accordance with the account**
  + Costs follow the event, if beneficiary has raised a number of complaints and has been successful then judge will award beneficiary substantial indemnity or full indemnity costs.

### Compensation of PR (54)

|  |
| --- |
| S. 61 of the Trustees Act – entitled to be compensated and fixed on the passing of accounts.  A PR is entitled to such fair and reasonable allowance for the care, pains and trouble and time expended in taking care of the estate |

* ET gets a % of the estate, in Ontario, the usual practice has been to **allow 4% as capital compensation** 🡪 2% of money received (receipts) and 2% of money paid out (disbursements)
* **5% as income compensation** (that is 2.5% each on receipts and disbursements in the income account), and 2/5 of 1% per annum on the gross value of the assets as a management fee
  + A special fee may be allowed in exceptional cases in addition to the foregoing (***Re Cohen***)
* Outright distribution: 5-6%; continuing trust: care and management fee
* In ***Re Atkinson***, the court opined that these should only be used as a rough guide.
  + Need to justify claims by providing sufficient particulars of the magnitude of the estate, the diversity of assets and the actual duties required of and performed by them
* PR will not be denied their care and management fee when they hold on to an asset during litigation and the value has dropped in the meantime
  + Where there is a trust, the ET has a responsibility to invest the funds and ensure they are invested properly.
* **What about very large accounts?**
  + The case law is that in these types of situations, and few assets, cannot claim the 5%
  + Example: if one asset was a piece of real estate worth $1mil and 2 beneficiaries
    - One wants the house
    - One wants $1mil in cash
    - Can’t charge the 5%
    - All I had to do was a deed transfer
  + Example: 2 bank accounts of $500k 🡪 can’t charge the 5%
  + If the only asset was a business and the executor had to go in and run the business and market the business, negotiate the sale, might be entitled to the full 5%

***Toronto General Trust Corp*** – ET’s must keep time dockets. **Five factors to be considered for compensation**:

* + 1. Magnitude of the trust
    2. Care and responsibility
    3. Care and time spent (time occupied)
    4. Skill and ability displayed
    5. Success that has attended their administration
* Lawyers doing estates on a regular basis will have **2 dockets** – one for **solicitors work** and one for **ET work** so that the lawyer can calculate how much time was spent.
  + If contested accounts, court will want to see the time dockets

**Trio of Cases (55)**

* ONCA endorsed the percentage approach to quantifying executor compensation and referred back to the criteria above.
* **S 61(5)** of *Trustee Act* limits the authority of the court if T and ET have reached a **compensation agreement**. This is filed with the will. The court may only intervene if the T and the proposed executor came into an agreement before the will was written.
* If will contains an express provision for compensation (and its reasonable), provision is an absolute limitation upon the allowance that may be made
* If not filed or incorporated with will, then agreement not binding on court/beneficiaries 🡪 can claim compensation under **s. 61**
  + This is the reason why all the major financial institutions that act as ET the institution will know in advance how much % they will get.
  + **Claim will be reduced if many of the duties were performed by others**, or if there is express amount listed for compensation – statute is the upwards limit, unless it was a separate contract where the beneficiaries are not parties.
* PRs can pre-estimate compensation and retain it in trust but cannot pre-take unless pre-arranged that way until court has fixed amount (***Re Welbourn***).
* **When personal reps fee Will be reduced or denied:**
  + Where their actions were sufficiently egregious
  + Estate trustee has engaged in misconduct
  + Personal reps have paid legal fees without the approval of the beneficiaries or the court (even if the legal costs were driven up by the beneficiaries’ unreasonable demands)
  + Executors cannot charge separately for preparing income tax returns (***Re Campin Estate***)

### Where there is a Continuing Trust, how does Percentage work?

* ***Re William George King Trust***
  + **Pre-taking of compensation is not objectionable in a continuing trust if the compensation is for services rendered and does not exceed the fair value of the services.**
  + It is appropriate in those circumstances b/c it avoids the expense of frequent passing of account
* **Example:**
  + Hold the residue my estate for the life of X, and pay to X, and on the death of X, pay to Y and Z
  + In this case, the executor does not get the 2.5% on the amount paid out (except on debts, legacies, bequests), until the life interest is terminated
  + Where there is a continuing trust then executor gets 2/5 of 1% per year on the average market value of assets under administration
  + If trust is worth 1 million dollars, the executor would be entitled to 2/5 of the 1% for the year.

## 

## SOLICITOR’S FEES:

* A solicitor who acts as both the executor and solicitor to an estate, is NOT entitled to be paid for his work as a solicitor and claim executors’ fees for the SAME work (***Re Henry Estate***)
  + If the estates solicitor (also estate trustee) submits a bill which includes some of the executor’s work associated with the passing of accounts, the amount for the executor’s work must be deducted from the estate trustee’s compensation.
* Fees payable to estate solicitor are normally determined on passing of accounts
  + Judge has authority to vary the bill of costs or to refer it for taxation **R. 74.18(13)**
  + May reduce an amount that is excessive or when the solicitor has breached his fiduciary duties (***Simone v Cheifetz***)
* Estate trustee can challenge the solicitor’s account and apply to have it assessed, since it is the executor and not the estate that is the solicitor’s client
* Can charge fees on the normal *quantum meruit* basis and not by reference to a percentage of the estate (unless solicitor and estate trustee agree to do so)

## Duties of PR (58)

1. Get in the assets

2. Pay the debts and legacies, transfer the bequests and devises and set up any trusts required by the Will

3. Distribute the residue

* Once these are done the duties are over, but the office remains so that they can deal with things that might come up in the future.
  + Bring/defend actions on behalf of the estate (cannot continue an action brought by the deceased where relief was claimed under the Charter – are persona and end with the plaintiff) – (***Hislop v Canada (AG)***)

#### Disposition of the Body

* A person having control of a body is required to give it a decent burial or cremate the remains (not a property right b/c can’t hold property in a corpse). PR has custody over body though (***Hunter; Williams***).
* PR not bound to follow the deceased’s funeral instructions but may do so if not extravagant or unreasonable (***Schara Tzedeck***), deceased’s family cannot prevent the PR from cremation even if it is contrary to the families’ religious beliefs (***Saleh v Reichert***).

### 

### Income Tax Liability (60)

* PR responsible for unpaid IT unless the PR gets a **clearance certificate** – **s. 159(2)** of the *ITA*, must also file a terminal return dealing with capital gains, including deemed realizations.
  + AT EVERY INTERIM DISTRIBUTION – ET should make sure that there is enough money to pay the tax
  + In complex estate – never pay out until check with tax accountant
* If the executor distributes the estate and there is unpaid tax, the executor can be held personally liable
* ***ITA* s 159(3)** imposes personal liability on the estate trustee for any unpaid tax of the deceased person
  + Once clearance certificate in place, (1) know executor released from personal liability, (2) can proceed with distributing the estate.

### Payment of Debts (60)

Duty of the PR to pay the debts of the estate as soon as possible “**within the executor’s year**”, secured debts have priority.

**Priority of Debts**

1. Secured debts incurred during the deceased’s lifetime

2. Funeral expenses

3. Testamentary expenses

4. Costs of administration (including PR’s compensation)

After this there is **no priority** among different *classes* of debts.

* Personalty is the primary fund for creditor (**Personalty = personal property**)
  + Therefore, where a testator left all his personal property by general bequest to his widow and died intestate of his real estate, and the Will contained no direction about payment of the debts, the court held that the debts should be paid out of the personalty.

(EA **s. 4, 5** – no difference b/c real and personal property).

* + **General rule is personal property is primary fund for paying creditors** first (***Re McGarry***).

|  |
| --- |
| S. 32 of SLRA -- devising real estate subject to a mortgage 🡪 this mortgage is not a debt of the estate but goes to the person taking the property. |

### Insolvent State:

* If have an estate where there are more debts than assets the unsecured debts of the deceased are payable *pari passu* (equal footing) **Trustee Act s.50**
* If you have a creditor with priority, such as her Majesty the queen for taxes, must be paid first.
* Generally, the law [pg. 60-61] follows bankruptcy law. So, if you have a creditor with super priority the government has the main priority then there may be priority in secure creditors, unsecured creditors take cents on the dollar.

### Distribution of the Estate (67)

* Once everything has been paid, distributed, any trusts set up, now the ET distributes the residue of the estate.
* See **passing of accounts** above
* ET converts **assets to cash** and distributes as residue. Assets (incl. stocks) can also be delivered *in specie* (same form they existed at date of death), but only with **consent of *all* beneficiaries** (***Re Gunn Estate***)
  + An instruction in the Will directing executors to take advantage of Income Tax Act election does not amount to a contrary direction to override the executors’ duty to convert (***Re Gunn Estate***)
* If a **minor** is a beneficiary and no trust is established, then **s. 36** of *Trustee* permits the **payment in** **court** of the minor’s money.
  + If paid in court and parents want the money, then must use Children’s Lawyer and go through the whole process and **must get approval** for money going out.
  + Put in an “**Infant’s Clause**” – enables the ET to hold money, invest and pay out at the ET’s discretion. Here you don’t have to go through court or go through OCL every time you want money.
* Taxes must be taken care of before the estate is distributed
* Winding up the estate: Legacies first, bequests, delivery of the articles to the people (transfers the legal responsibility for those articles out of the hands of the executor and into the hands of the beneficiaries)
* **Want to get releases from all beneficiaries**
  + If they are all of age and of mental capacity, then no court process to approve
  + If not, passing of accounts
  + All of the money paid in, all of the money paid out, their compensation, what is going to be paid out, etc.
    - I’m satisfied with the admin of the estate as you explained it to me and I have no further claims against you

**Creditors** don’t have to wait until the end of the life estate to get the money – a trust should be liquidated to pay creditors – or put a mortgage on the house to get rid of the creditors. This authority can be given in a provision in a will.

## Minor Beneficiary:

* Either:

1. Will directs personal rep to establish a trust for a minor

2. Money paid to the minor’s parent or guardian

3. (If neither above), money must be paid into court to the credit of the minor (same for mental incapacity or Public Guardian and Trustee, ***Trustee Act* s 36(9)),** with notice to the Children’s Lawyer

* Note:
  + If no guardian of the child’s property is appointed, can pay an amount not exceeding 10K to the child if the child has a legal obligation to support another person, or to the parent or the person who has lawful custody of the child **(*CLRA*, s 51)**
* Court has jurisdiction to order the payment of all or any money belonging to a minor, or the income from property belonging to a minor to a person, if satisfied that it is necessary or proper for the support or education of the minor, or will substantially benefit the minor.

# CHAPTER 3 – INTESTATE SUCCESSION

NOT TESTABLE: 3.3.4(c), 3.5, 3.6

* In Ontario, intestacy has been codified in **Part II of the *SLRA*** 🡪 “statutory will” for those who die without leaving a valid will
* Section 49 – **only applies to death on or after March 31, 1978.**

### EAA, Section 2:

* When a person dies, all the deceased’s property, except that held in joint tenancy, vests in the person’s personal rep in trust to pay debts and funeral expenses and then to distribute what remains among the persons beneficially entitled.
  + Whether testate or intestate, administration of personal property passes onto PR
  + Beneficiaries = those named in valid will AND/OR those entitled under Part II of the SLRA

## Types of Intestacy:

* **Intestate** – a person who dies without leaving a valid will that disposes of the deceased’s estate.
  + Statute directs who is entitled to the estate of the intestate
* **Full Intestacy** – when a person dies without a will
* **Partial Intestacy** – if a person leaves a valid will but fails to dispose of the entire estate, whether intentionally or through inadvertence, or because residuary gifts in the Will are void.
  + The will governs the distribution of the deceased’s estate to the extent that it is valid and effective – the statute governs the remaining portion of the estate.
  + Ex. Half the residue is given to an organization and that organization does not exist on the date of death
    - Gift lapses
    - Where you have a lapse of residue – that share of residue is distributed via the rules of intestacy
  + Lawyer should have put it a standard clause – if organization does not exist at the time of my death then I give my trustee authorization to pay to \_\_\_ in my trustee’s absolute and sole discretion
    - Distinguished from when organization changed name or amalgamated
      * Corp still exists within the assets of the amalgamated organization
  + Ex. Where the client tells the lawyer she wants the estate divided into 10 equal parts, only give 9 names.
    - 1/10th is an intestacy
  + OR may have a partial intestacy if a gift lapses – ex. to divide the residue of my estate 1/3 to A, 1/3 to B, 1/3 to C, and C has predeceased. Those entitled to the intestacy Will argue that C having died, that gift lapsed, and the lapsed gift of residue goes under intestacy. In contrast, A and B would argue it was a class gift and A would get ½ and B would get ½.
* **Will or Parts of Will May be Void:**
  + Because of improper execution, undue influence, lack of capacity, etc.
  + Testamentary gift may be void, inter alia, because it is made to a person who, or whose spouse, has attested the will, offends a rule of public policy, is uncertain, or has lapsed.
    - Absent contrary intention in the Will, **a failed gift**, other than a residuary gift, **falls into residue** (whereas a residuary gift that fails goes out on intestacy)

## Distribution on Intestacy (73)

* Best to divide into: spouse, issue, lineal ascendants and collaterals.
* Personal reps may have to engage in detailed searches for heirs and usually have to make an application for directions on the proper distribution of the estate from the court.
* **Benjamin Order**: made by the court if a PR cannot determine whether a beneficiary has died and, if the beneficiary died, whether he or she predeceased the deceased. May declare presumed dead before deceased. PR can proceed and distribute and is protected by the court order. BUT if living, beneficiary can potentially trace the property.

First determination: Is there a spouse?

### Surviving Spouse or Partner:

* Spouse is defined in **s. 1(1) *SLRA*** (same meaning as in FLA) - To qualify, must have been **married to the deceased** or **entered into a marriage in good faith** that is **voidable** or **void** **on the part of the person asserting the right under the statute**.
* **SLRA, section 1(2)**
  + In the definition of “spouse” a reference to marriage includes a marriage that is actually or potentially **polygamous**, if it was celebrate in a jurisdiction whose system of law recognizes it as valid.
* In Ontario, common law spouse has no intestacy rights

Spouse + NO descendants = S. 44 – when the intestate’s spouse survives, but no issue, the surviving spouse is entitled to the property absolutely. Otherwise, spouse gets preferential share + distributive share

* Pre-1978: spouse would have had to split with the siblings

***Surviving Spouse + Descendants* (76-77)**

**(a) Preferential Share** (**SLRA, s 45**) – when the intestate is survived by a spouse and descendants, the spouse is entitled to a preferential share, or to the entire estate if its net value is less than the preferential share.

* On a **partial intestacy**, the preferential share is reduced by the amount, if any, the surviving spouse received under the deceased’s Will
  + interest to which spouse is entitled valued as of the **date of testator’s death** (***Re Oswell***)
* The **current preferential share in Ontario is** **$200,000** (O Reg 54/95)
  + If administration is delayed and the property increases in value, those entitled to the residue are entitled to a greater share than if administration was completed soon after death (***Fray v Evans***)

***Intestacy – Spouse + Issue:***

* **S.45(1)** where the preferential share is **less than** $200,000, where there is a spouse and issue, the **spouse gets everything**.
* **S.45(2)** Where the estate is **more than** preferential share, the spouse gets preferential share
* **S.45(3)** Where spouse has received **less than** $200K under the will and there is partial intestacy, then the spouse gets **topped up** to $200K.
  + Where the spouse has received **$200K or more** under will then there is no preferential share. But spouse will still have a right in distributive share.
  + Depends on value of what the spouse gets under the will
    - calculated as of **date of death** (77, note 3)
* If spouse is getting a share of the residue (whatever is left after all the debts are paid)
  + Cannot be determined until all the tax is worked out
* In Ontario, there is no provision, **no statutory or other provision for spousal disentitlement**. If have a client and the person has never made another Will and says they have been separated for 30 years, need to know that if that person dies intestate, absent a separation agreement, that clearly and unequivocally gives up her right in Part II, then spouse stands to benefit.
  + Separation Agreement may disentitle spouse to estate though (***Watkin v Smith***).
  + Conduct of spouse irrelevant.
  + If you are a family law practitioner – let client know that **will needs to be changed if separated** – still entitled
  + Marriage contracts – section called a release
    - Release one another from Part II entitlement under the statute

**(b) Distributive Share (77)** – After the preferential share, the surviving spouse is entitled to a distributive share which **varies with the number of children or issue surviving.**

* The distributive share is **not reduced by any amount the surviving spouse received under the will** if there is a partial intestacy.
* **SLRA, section 46(1)** Spouse and 1 Child – spouse entitled to one half of the residue of the property after payment of preferential share (spouse ½, child ½)
* **S. 46(2),** Spouse and 2+ Children – spouse is entitled to 1/3 of the residue of the property after payment of the preferential share
  + Children alive receive the remaining 2/3rds, divided equally
* **S. 46(3),** Spouse and 1+ Deceased Children – if deceased child left issue at the date of the intestate’s death, spouse’s share shall be the same as if the child had been living at that date
  + spouse get 1/3, 2/3 will be split among the children and the issue of deceased child equally
* The value of determining these amounts is the **value at the intestate’s death**.

***Family Law*** ***Act*** – a surviving can elect an **equalization payment of one-half the difference** b/w the **net family property** of each spouse if the net family property is **larger** than the net family property of the **surviving spouse**.

* Must elect to do so

## 3.3.3 DESCENDANTS (85)

* Now deal with concept of issue = lineal descendants
* Children are just first line down.
* ABC are children
* ABCDEFGH – issue
* People born inside of marriage are treated same as people born outside of marriage

After the surviving spouse’s shares have been paid, the intestate’s descendants (or issue) are entitled to the balance of the estate.

(1) Division *Per Stirpes* among the Descendants

(2) Divisions *Per Capita*

* + - Thought to be more fair and in accord with the presumed wishes of the intestate
    - Ex. If only grandchildren survived, the intestate would probably prefer that they each take an equal share
      * A *per stirpes* distribution may have the effect of giving some grandchildren more than others

**SLRA s.47(1)** [pg. 86]

Subject to subsection (2), where a person dies intestate in respect of property and leaves issue surviving him or her, the property shall be distributed, subject to the rights of the spouse, if any, **equally among his or her issue who are of the nearest degree** in which there are issue surviving him or her.

* subject to spouse, divided equally of the issue to the nearest degree surviving the deceased

**SLRA S.47(2)**

Where any issue has **predeceased** the testator, **the share of such issue shall be distributed among his or her issue per stirpes** and the share devolving upon any issue of that and subsequent degrees who predecease the intestate shall be similarly distributed.

* if any issue predeceased then issue’s portion is divided equally among his issue
  + If B is deceased then his share is distributed equally between D and E
  + If E were also deceased and had children JKL, then E’s share would go down.

**Process:**

* + identify the issue to the **nearest degree** who survive the deceased
  + **divide the estate** into as many shares as there are living issue in the nearest degree and issue of the nearest degree who pre-deceased the intestate but left issue who survived him or her;
  + Give a share to **each of the living** **issue of the nearest degree** and **divide a share** among the issue of those that degree who predeceased the deceased as if the latter had died intestate

**A descendant can share in an intestate’s estate ONLY if the descendant’s ancestor did not survive the deceased**

* FGH would get nothing because C survived.
* Ex. If an intestate was survived by a child, A, and A’s child B, B is not entitled to share in the estate, because B’s ancestor is alive
* This is so even if A is barred from inheriting (e.g. for feloniously killing the intestate) (***Re DWS***, 87 fn 72)

**Casebook Examples (87-89)**

Example 1

Method 2 - ON

1 child alive, 2 deceased – law says that the division is among people of the nearest degree who survive

* Because there is someone alive, we do the stocks at the level of the children (3 stocks)
* A receives 1/3
* Because B is deceased – B’s 2 children receive a 1/3 divided equally (1/6 each)
* Because C is deceased – C’s 3 children receive a 1/3 divided equally (1/9 each)

Example 2

* A, B, and C are all deceased
* All grandchildren are same level of kindred for the deceased – 5 alive in the generation
* So, D, E, F, G, and H share the estate equally
* Remember: Have to search for people born outside of marriage

Example 3

* A is alive, B is deceased, C is deceased, G is deceased (child of C)
* B’s children, D and E, each get 1/6 (B’s 1/3 divided)
* C’s child F gets 1/6, and because G is dead, G’s children H and J each get 1/12

Example 4

* A, B, and C are all dead – drop down to next generation – have 4 stocks, but G is dead
* Nearest degree is grandchildren, each gets ¼ (because A has no children, so B and C divided equally)
* But since one grandchild, G, is deceased, G’s share is divided into his children equally, H and J, 1/8 each.

## 3.3.4 ASCENDANTS AND COLLATERALS (89)

* If the intestate is not survived by a spouse or descendants, other blood relatives of the intestate become entitled to inherit the estate
  + Ascendants – direct ancestors of the intestate
  + Collaterals – descendants of the ascendants other than the intestate and his descendants
* Entitlement depends on how close the relationship between the intestate and the claimant is
  + **Table of Consanguinity** [90]

### 

### Gradual Scheme of Distribution (91) – NO SPOUSE, NO ISSUE

* + **s. 47(3)** – to parents or surviving parent of the deceased, not step-parent (if no spouse or issue)
  + **s. 47(4)** – (if no spouse or issue or parents) brothers and sisters equally and if bro or sis has predeceased the intestate, then goes to their children equally
  + **s. 47(5)** – (no spouse, issue, brother, sister, parents) – goes to nephews and nieces equally
    - *Without representation 🡪*  means if niece or nephew predeceased then great niece or nephew do not take
  + **s. 47(6)** – (no spouse, issue, bro, sis, parent, nephew or niece) distributed among the next of kin of equal degree of consanguinity to the intestate without representation
    - Go to table of consanguinity on pg. 90
  + **s. 47(7)** – pretty much no one, then and only then, does the property of an intestate go to the Crown.
    - *Escheats Act* applies
  + **s. 47(8)** – legislates the method of determining the degrees of kindred.
    - Kindred of the half-blood share with the whole blood
    - If two siblings are half siblings (same father, different mothers, but father is issue)
  + **s. 47(9)** – descendants and relatives of the deceased conceived before and born alive after the death of the deceased shall inherit as if they had been born in the lifetime of the deceased and had survived him or her

Summary:

* + - 1. If no spouse nor issue survive, the surviving parents take all equally or, if only one survives, he or she takes all s.47(3)
      2. If no parents survive, the brothers and sisters share the estate equally, with representation being permitted among brothers’ and sisters’ children s.47(4)
      3. If no brothers or sisters survive, the nephews and nieces take *per capita* s.47(5)
      4. If no nephews or nieces survive, any other next of kin of equal degree will take *per capita* s.47(6)
      5. If no next of kin survive, the property becomes the property of the Crown s.47(7)

If G is a father, and G’s wife at the time of I’s death was pregnant and G predeceases I and H is born after I’s death, H may not have been born at the time of I’s death, but was in the womb and is therefore entitled

* Would say H at time of I’s death was ***En ventre sa mere*.**
* **s. 47(10) – when a child is defined as** 
  + Child conceived and born alive after the parent’s death if the conditions of 1.1(1) – posthumous conception
  + Birth of a person through assisted human reproduction
  + The person who is the spouse of the person in question – have to give notice to the registrar
    - No later than 6 months after date of death
    - Child has to be born no later than the 3rd anniversary of death
    - Court has to make declaration under **s. 9 of CLRA** of parentage
* If no spouse and infant child – that money is paid into court under **s. 36** of *Trustee Act*.

**NOTE:** The right to share on intestacy, subject to rules of adoption, depend upon a blood relationship.

* + **Stepchildren do not share.**
  + **Distinguish between stepchildren and half children**

***Questions (96-97)***

1. (c) Have an intestate in ON survived by wife and one child

* + Wife first gets $200,000 (preferential share) and then one-half of the residue
  + Child receives one-half of the residue

(d) Intestate survived by husband and three children

* + Husband gets $200,000 (preferential share) and then husband gets 1/3 of the distributor share and the three children split 2/3 of the residue

(e) Children by two wives (half-siblings)

* + Each child splits equally

(f) Wife, one child and two children of deceased child

* + Wife gets a preferential share and 1/3 of the residue
  + Child gets 1/3 of the residue
  + 1/6 to each of the children of the deceased

(g) Husband, one child, two children of deceased child, A, one child of another deceased child, B, and two children of a deceased grandchild, C, a child of B.

* + Husband gets the preferential share
  + Husband’s share of residue is 1/3 🡪 where there is a spouse survived by two or more children, then surviving spouse only gets 1/3 of distributing share **(s. 46(1) – (3))**
    - If only one child, then spouse receives ½
      * 46(1), 46(2), 46(3) of SLRA
  + Then split by three, (three children) start with this line because there is a person alive in this generation – so 2/9, 2/9, 2/9 (a third of 2/3)
    - Two children are dead
      * Child A – two children - each gets 1/9
      * Child B – two children – each gets 1/9
        + But one of those children is deceased, C, – two children – each gets 1/18

(l) Sister and four children of a deceased brother.

* + **S.47(4)**
  + Sister gets 1/2, children of brother equally receive 1/8 each.

(m) Four brothers and sisters, three of the whole blood and one of the half blood.

* + Each get ¼ - share equally

(q) Two uncles and 6 nephews

* + **47(5)**
  + Nephews split equally, uncle gets nothing.

(r) Uncle, three nieces, 6 first cousins

* + 1/3 each for the nieces **47(5)**

(s) Great nephew and 5 first cousins

* + **47(6)** – table of consanguinity
  + (pg 90) – all #4 so share equally

## 3.3.5 ILLEGITIMACY AND ADOPTION (97)

* **CLRA, s. 4(2)** – an adopted person is deemed to be the natural child of the adoptive parents
* Persons born outside of marriage and adopted persons have equal rights of inheritance with persons born within marriage in all Canadian jurisdictions.
* Persons who have been given up for adoption lose the right to share on the intestacy of their former parents and relatives (***Tromblay Estate v Rachow***)
  + Ceases to have legal connection with biological parents
  + The exclusion of an adopted person from inheriting from her birth parents does not infringe the Charter of Rights and Freedoms (***Re Marshall***)
* Biological parent can ask lawyer to include child given up for adoption in estate – for all purposes of my will, I declare that XY shall be deemed to be a child of mine, notwithstanding that XY was adopted by AB

With a will – client can decide whether or not to include children born outside of marriage

* No choice in intestacy

## 3.4 PARTIAL INTESTACY

* *A partial intestacy is dealt with in the same fashion as a full intestacy other than* ***s. 45(3)***
  + Topped up to receive full preferential share

### Inheritance Right of Persons Born Outside of Marriage – See page 19 of summary

### “Laughing heir” PR has to make ‘reasonable inquiries’ for children born outside marriage (EAA s 24(1)); searches in the Registrar General’s office to see if births are registered, etc. If you can’t find them, pay share into court

* **S. 24** ***Estates Admin Act*** requires a **PR to make ‘reasonable inquiries’** for those born inside and outside marriage.
* **S. 23(2)** **exempts the PR from liability** where **(a)** the PR makes the inquiries and the entitlement of the person was not known at the time at the distribution. (This is done by asking family members), and **(b)** searches the records of the Registrar General – if both are fulfilled and in (a) if the identity cannot be known to the PR, then the PR is exempted from liability in making the distribution.
  + Both these subsections need to be filled.
* **S. 23(3)** clarifies that even though the PR may be exonerated from liability, the person entitled in the relationship can trace the property and can go after the beneficiaries for the property except in the case where there is a *purchaser for good faith and value*.

***If a beneficiary didn't show up after a few years of death, would limitations act come into play?***

A: Limitations act in Ontario has the discoverability element, so beneficiary who comes 5 years after death and says I didn't not know till 6 months ago that X died, the **limitation period starts to run when that person discovers their legal claim**.

* Breach of fiduciary or trust claims have no limitation period.
* Ex. A victim of sexual abuse sues someone 40 years later, limitation period doesn't expire

# SPOUSAL RIGHTS – CHAPTER 21 (809-847)

## All except 21.4 and 21.5.3. Do problems (a)-(c) & (g)-(i) on pg. 841-842

## 

## Family Law Act (811)

* **Spouse s.1(1):** either of two persons who

a) are married to each other or

b) have entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

* Does **not** include common law spouses
  + **BUT under FLA part 5 – common law spouse is a dependant.**
* **Part I** – gives spouses a right to make an **equalization** claim on a **breakdown of marriage** and gives a surviving spouse the right to make a similar claim on the **death** of the other spouse
* Basic rule on death is set out in **S. 5.2**, **when a spouse dies, if the *net family property* (NFP) of the deceased spouse exceeds NFP of surviving spouse, the surviving spouse is entitled to half of the difference between the two NFPs**
  + If the estate of the deceased spouse is less, there is no right on the estate for an equalization.
  + The right is only for the surviving spouse – estate cannot request equalization (***Rondberg Estate v Rondberg Estate***)
  + NFP of the estate has to be higher than NFP of the survivor!
  + Ex. NFP of deceased spouse is $200,000, surviving spouse NFP is $100,000 then the equalization is 200K – 100k
    - surviving spouse gets half difference i.e. $50,000
* **s. 6** has a code of the **rights and obligations** of the spouses and other interested parties when one spouse has died.
  + The *primary rights are the succession rights*, but the spouse is given the *right to elect* within **6 months** to make an *equalization* claim.
    - To do so must file the election and bring an application against the estate to claim an equalization payment
  + If successful, the claimant’s rights under the deceased’s will cease, unless the will says otherwise
  + If the deceased spouse **died intestate** the claimant loses the right to share on the intestacy.
  + **S.6(11)** says that if the election is not **filed within 6 months** than the spouse is deemed to have taken under the will or the SLRA or both as the case may be, unless the court orders otherwise

Summary of scheme of Ontario FLA in ***McNamee Case 2011 ONCA 533 para 56-71***Justice Blair

* + Court provides a readable summary of how FLA works and the application of the rules of constructive trust as they apply to the concept of NFP
  + Important: Ontario FLA provides a right to a payment, a mathematical calculation, and if there is an equalization then estate of deceased spouse owes surviving spouse **a dollar amount**, it is not a right to division of property.
    - Myth: that if spouses separate or on a death situation, the surviving spouse (with lower NFP) gets half the other persons property, not true – it is a money claim.
    - Estate of deceased spouse can satisfy money claim in any way possible for the estate.
* Because right of NFP is a money right, effectively the surviving spouse **becomes a creditor** of estate of deceased spouse (***Berdette v Berdette; Balyk v Balyk***)
  + Equalization under FLA does not divide property
* Spouses as between themselves have an **inchoate right** that imposes no obligations and confers no rights until a triggering event (separation, death) and that only at that time the inchoate right becomes crystalized into a specific right.
* **S 5.3 FLA** – if a spouse believes that his or her spouse is improvidently depleting assets then spouse can apply to court for order prohibiting this, but it is not applicable to death, because 5.3 is referring to when spouses are cohabiting.
  + See **6(14)** below
* Spouse cannot attack gifts made my other spouse during marriage (no debtor-creditor relationship) (***Stone v Stone***).
* Entitlement to equalization can be frustrated by the bankruptcy of the other spouse (***Schreyer v Schreyer***)
* Marriage can be challenged on issue of capacity.

**The FLA overrides the Will!**

* **Part 5 of SLRA,** “dependant’s relief” also overrides the Will.
  + So, can leave entire estate to foundation Western, but if spouse has lower NFP then other spouse on death, she is entitled to that equalization right.
    - In this case Will is amended.

### Meaning of spouse (822)

* **s.1(1):** either of two persons who

a) are married to each other or

b) have entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

### under part 5 of SLRA and Section 29 of FLA

### “spouse” means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited,

### (a) continuously for a period of not less than three years, or

### (b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the Children’s Law Reform Act. (“conjoint”)

## Property (822)

**S 4(1)**: any interest, present or future, vested or contingent, in real or personal property and includes:

* + - * 1. Property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself
        2. Property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property
        3. In case of spouse’s rights under a pension plan, the imputed value, for family law purposes, of the spouse’s interest in the plan, as determined in accordance with **section 10.1**, for the period beginning with the date of the marriage and ending on the valuation date

Ex. **Client** **wants to defeat spouse’s rights under FLA, what can they do?** The client wants to set up an ***inter vivos* trust**, so when the trust is created it is no longer that person’s property, and the property is disposed to a trustee for a beneficiary. Also, can retain right to have an interest under that trust, have the right under trust instrument to ask for **capital encroachments on the trust.**

* BUT FLA says you have power to revoke disposition or power to consume or dispose of property so that trust is still property.

**Pension plan that has been vested:**

* In case of spouse’s rights under pension plan, the imputed value, for family law purposes, of the spouse’s interest in the plan, as determined in accordance with section 10.1, for the period beginning with the date of the marriage and ending on the valuation date. [Pg. 812 (c)]
  + Ex. University professors have pension plan. So, if one marries law professor who had been teaching for 20 years there would be an imputed value of that plan, and if spouse dies after 10 years then there is another imputed value. So according to FLA is that it is an increase to value of assets from date of marriage.

Where someone has a will that says ex. “to hold estate in trust for son and pay 1/3 to son when he reaches 25 and 1/3 when he reaches 30 and 1/3 when he reaches 35” these are called **postponed payments** and considered property.

* + Subject to divestment if does not reach age
  + Case law – that delayed interest comes within the definition of property
* The courts have held that **an interest under a trust payment of which is postponed**, **or which is contingent upon a future event, is property** and, if owned at the date of a person’s marriage, forms part of that person’s NFP. It is not excluded as property acquired by inheritance after the marriage under **s.4(2).1 (*Black v Black*)**. A contingency and/or delayed vesting in possession does not disqualify something as “property”, though it clearly impacts on the value of that property [Pg. 823 – note 1].

**Income interest under a trust is property** even though it is inalienable. To the extent the interest is held on the date of the marriage, it is therefore deducted from the spouse’s NFP. To the extent that it is acquired by gift or inheritance after the marriage, it is excluded under **s. 4(2).1**. [***Brinkos* *v. Brinkos,*** *Ont C.A*. / note 2 pg. 823]

* + Example trust of 500k, interest rate of 4% 🡪 produces aprox. 20k per year. Grandson has entitlement to the net income (minus the tax) each year. How would that be valuated? Actuary would be brought in.
  + Income interest under a trust is a right to receive income based on investment made by trustee.
  + Capital interest under a trust – access to asset itself that is in trust.
    - Money transferred into trust is capital of trust 🡪 financial assets that earn income
  + So, income flow from trust and whoever gets income has income interest and if someone has access to capital and maybe fixed access and so someone may get 2% of capital per year OR discretion where trustee can encroach on capital to any amount that trustee deems appropriate.
  + With trusts must distinguish between income interest & capital interests

The interest of a beneficiary under an estate that has not yet been fully administered is not property (***Gennaro v Gennaro***). Neither are jobs (***Linton v Linton***) and professional licenses (***Caratun v Caratun***).

## Discretionary Trust (823)

trustee can choose to dispose of property but doesn't have to. Either by income or capital

* “To my trustees in trust to distribute the annual income in such amounts and to such of my children as they shall in their absolute discretion think fit”
* A degree of uncertainty 🡪 can receive nothing or potentially EVERYTHING, so how to value?
* Beneficiary has no right to the income flow or the capital flow
* Where a parent comes in and says that sadly one of my children has a substance abuse issue/gambling issue/ect. Cannot give money to that person.
* Key when adult child is developmentally challenged and in receipt of ODSP:
  + Make sure to appoint appropriate trustee!!

HENSON TRUST

* A fully discretionary trust that permits the trustee to pay or not to pay any part of the income or the capital in any year.
* Vehicle that we most often see where our client has a beneficiary who is receiving ODSP and whose income and assets are strictly regulated under the ODSP legislation.
* Nothing in the trust is counted against the person’s income and assets.
* Child has developmental disability. Age 45. Then create.
* Called a Henson trust because in the Henson Estate case, there was a fully discretionary trust and the government of ON took the position that that didn’t matter and that the value of that trust should be counted as part of that person’s assets (disentitle them to further ODSP). Court ruled against the government. Since then those types of trusts have been called Henson trusts.

## Net Family Property: S.4.1 [pg. 811] – PART 1 OF FLA

* The value of all property except the property in **s 4.(2)** (called exclusions) that a spouse owns on the valuation date after deducting the spouse’s debts and liabilities, as of the valuation date, and after deducting the value of property other than a matrimonial home that the spouse owned on the date of marriage, after deducting the debts and liabilities, as of the date of marriage.
  + It's the assets on death (valuation date - debts) **less** assets on marriage (other than matrimonial home and exclusions) **less** the debts on marriage.
    - Increase in value from the date of marriage.

**Deductions from NFP**

* Able to deduct the value of property held on the date of marriage
* Able to deduct debts and liabilities (on both date of marriage and valuation date)
* Exception = the matrimonial home
* Issue: **capital gains tax 🡪** Growth in the value of the property is only taxed upon the disposition of the property
  + If no deduction is permitted then titled spouse’s NFP is arguably overstated
* **Contingent tax liabilities** – cases as to whether contingent tax liabilities could be deducted.
  + In certain circumstances tax liabilities on death can be significant. Ex. Someone dies with no spouse. Only assets are an RRSP worth $500,000. This RRSP will be taxed on death and estate pays $250,000 on income tax. Because RRSP is deemed to be cashed out the day the person dies.
* Courts have recognized some of these issues. If expense is to be deductible, HAS to be incurred in foreseeable future (but not supported by statute 🡪 only contingent tax liability deduction allowed by statute)

**Valuation Date (829)**

* For live spouses the valuation date is date of separation, maybe litigation as to when separation actually occurred
* **S.4(1) FLA,** for death purposes, valuation date is not date of death but day before date of death. [Pg. 812]
  + Because it is the day before date of death, certain assets are going to be included in definition of property and NFP (that wouldn’t be if it were the date of death)
    - * **True joint asset** – the essence is that upon the death of one of the joint owners, the survivor automatically owns the asset
      * Ex. If own a joint interest in a financial investment account, with someone else, and worth $100,000 on the day before death, if valued on the date of death, the other person would have acquired title by survivorship and the deceased spouse’s interest would no longer exist.
* Another asset is **life insurance policy**
  + Ex. Pays out 100k on date of death
  + Ex. The day before date of death this policy may or may not have **cash surrender value** (depends on type of policy).
* The day before date of death for purposes of NFP have to get from insurance company document that indicates cash surrender value, but on date of death value of asset is $0 and this is because the value is not a cash surrender value since the death benefit has all passed to the named beneficiaries.
* Because the valuation date is date before date of death, **certain other expenses related to death cannot be deducted.** Ex. Funeral expenses, probate fees (estate administration tax), lawyer fees, tax accounting fees.
* **Close of business as of the valuation date 4(4)** 
  + **S. 4(4),** if have an investment portfolio with investments that rise and fall with the market, any given day the value of asset could be high beginning of day and low end of day, this section clarifies that valuation is as of close of business on a particular date. Very little litigation about the value of traded stocks.
* **26(1)** - when deceased spouse held title to the matrimonial home as a joint tenant with a third person, the joint tenancy is deemed to have been severed immediately before the spouse’s death. Half interest included in NFP and accessible by the estate.

## Exclusions for NFP – PART 1 of FLA s. 4(2) (827)

* Awards of (or rights to) damages, life insurance proceeds and pensionable earnings (under Canada Pension Plan)
* Property, other than the matrimonial home, that was a gift or inheritance after marriage
* **S.4(2).1 FLA** gifts and inheritances received **after** the marriage are exemptions. Those received **before** the marriage are deductible from NFP under **s.4(1)** as property held on the date of the marriage.
* A gift or inheritance is not excluded if the gift or inheritance is the matrimonial home.
* A gift to spouses JOINTLY enables BOTH to deduct their respective interests from their NFP (***Gognavec v Gognavec***)
* Whatever a spouse has inherited or been gifted from a third party is deducted from NFP.
* INCOME on gifts or inheritances MUST be included in spouse’s NFP **s.4(2).2** unless the donor/testator provided otherwise. If did not provide otherwise, then the recipient spouse must apportion the value of the gift/inheritance between income and capital on the valuation date (***Amaral v Amaral***)
* If property is acquired for consideration, then not gift/inheritance and does not fall within exemption.
* Issue = **“estate freeze”** 🡪 tax planning transaction
  + Parent transfers common shares in corporation to child for FMV consideration. Future growth accrues to shares only. Child cannot argue gift.
* Proof of inheritance is by a will, but in the case of an intestacy there would be a certified statutory declaration as to what a certain person inherited on the intestacy of an individual.
* **MacNamee v. MacNamee 2011 ONCA** 
  + Excellent summary of law of gifts in para 23-53 (not testable)

**Exclusion 1:** **Inheritance OR gift received after the marriage**

**Exclusion 2:** **Income from property acquired by gift or inheritance, if the donor or testator has expressly stated, income from gifts/inheritance are to be excluded from NFP under FLA then income is excluded.**

* Ex. 100k legacy – capital is excluded (because gift/inheritance). If invested for 10 years, what happens to the income on that investment? It’s property. Scooped in by the broad definition of property. But will be an exclusion if the will of the grandparent stipulates that income from inheritances are to be excluded from the NFP
* If you can point to a provision in a will or in a deed of gift where the donor or testator has said that the income is to be excluded from NFP under the FLA it is excluded. So as result of exclusion when drawing wills in Ontario, in any instance where there is an individual beneficiary (as opposed to organization or corporation) than the will must have an FLA clause. This clause states that the income from benefits under the will are to be excluded from NFP.
* Lawyer who draws will with individual beneficiary and does not address above issue is negligent. (known as FLA clause)
  + Income of the inheritance is not to be part of the beneficiary’s NFP
* By contrast if the will names foundation Western, they are organizations and do not need an FLA clause
* If you are acting for someone who comes into money and says found in estate $200,000 and planning to give $50,000 to each kid. Then have to think about if child dies or separate and so we have to make a document called **deed of gift**.
  + **Deed of Gift,** clarifies that the cheque that has been given is in fact intended to be a gift. Absent that deed of gift, there will be litigation on this point.
  + Deed of gift explains that it is also exempt from income from the gift.

**Exclusion 3:** **damages or right to damages for personal injuries, nervous shock, mental distress, or loss of guidance, care and companionship or the part of the settlement or judgement that represents those damages**

* Not every settlement or judgment is excluded from calculation of NFP.
* Ex. If A sues B for wrongful dismissal. A worked for B for 20 years and was fired. A gets judgment against B for $30,000 is this under the exemption? No, because you are suing under breach of contract.
  + By contrast if B fires A and humiliated A in front of staff and then A suffers anxiety and sues for mental distress and the settlement from this would be excluded under NFP.

**Exclusion 4: Proceeds or a right to proceeds of a policy of life insurance.**

* + Ex. Mother dies and you get $50,000 from life insurance, this can be excluded
  + But why is this not covered under exclusion 1 (property acquired by gift or inheritance)?
  + Right to proceeds is not a gift, legally it was a contract.

**Exclusion 5: Property other than a matrimonial home into which property in paragraphs 1-4 can be traced.**

* + Ex. Mother names you beneficiary on insurance policy and you have invested this money in investment account in your name that is traceable. So, this is now excluded.
  + If comingle $50,000 with assets that belong to you and married spouse, then it loses the protection.
  + If put this $50 000 in investment account in name of you and spouse then loses protection OR if you use it as a down payment on house, or if you use it for remodeling in house then lose protection.
  + So, when acting for two executors that are sole beneficiaries in estate, have to discuss the exclusions under FLA.

**Exclusion 6: Property spouses have agreed on in domestic contract**

* + Can contract out of FLA
  + Release clause uploaded on OWL that include release of claims under FLA for part 2 and 5 of SLRA.

**Exclusion 7: Unadjustable pension earnings under CPP**

* + Because this is an adjustment done by Canada Pension Plan so not part of Ontario FLA.

**S.4(3)** – onus of proving a deduction or exclusion is on person claiming and it is on a balance of reasonable probabilities

**S.4(4)** – if NFP is calculated to be less than zero, then deemed to be zero.

**Is there any relief from these rules?**

* Yes
* **Unequal division 🡪 S. 5(6)** (820)
  + Basic premise is court may award an amount that is more or less than half the NFP if the court is of the opinion that equalization would be unconscionable having regard to certain statutory criteria.
  + Has to meet threshold of unconscionable. Not a discretionary power to do what is fair (***Berdette v Berdette***)
  + Unconscionability is something that shocks the conscious of the court. It is different than inequitable. (***Skrlj v Skrlj***)
  + For cases see **page 821**
  + Good reference point for the definition of unconscionability: ***Serra v Serra*** (821)
    - Para 47 & 48
      * Court says threshold of unconscionability is exceptionally high and jurisprudence is clear that circumstances that are unfair, harsh, or unjust do not meet this threshold. To cross the threshold “the equal division has to shock the conscious of the court.
      * Para 48, “where it gets to unconscionability the courts only have minimal discretion to order anything other than equal division.”
  + Failure to disclose debts or liabilities that were incurred recklessly in bad faith (not negligent); a spouses intentional or reckless depletion of assets.
  + Even though a spouse may have intentionally depleted those assets, s. 5(6) does not allow for claw backs of those assets. [Note 5 pg. 822]
* **S. 5(6)(d)** – spouses **intentional or reckless depletion** of his or her net family property.
  + This subsection is equally applicable to family law – not used extensively.
  + An estate freeze is an intentional depletion of assets, but (d) would have to be read in the context of 5(6) – if a CA had recommended this to save tax (the main purpose) then it wouldn’t be unconscionable b/c there is an established business purpose.

## Procedure [Pg. 832]

* **S. 6(1)** – when spouse dies testate, they are put to an ***election*** – take under the **will** or **take *FLA* equalization** entitlement.
* **S. 6(2)** when dies intestate, the surviving spouse must ***elect*** to take either the **part 2 *SLRA* entitlement**, or **equalization**.
* **S. 6(3)** where there is a *will* and a *partial* intestacy, the surviving spouse is put to an election of taking under the will *and* part 2 entitlement *or* s. 5 equalization entitlement.
* **S. 6(4)** Where the spouse elects to take under the will (or part 2 entitlement) then the **spouse is entitled to the property also**
  + Joint interests, life insurance as named beneficiary, RRIF as named beneficiary, RRSP as named beneficiary, pension fund payments as named beneficiary.
* **S. 6(5)** they are able to get both (both equalization and will) if the will says so (but never see this).
* **S. 6(6)** where the surviving spouse is a **beneficiary** of a **life insurance** K or a lump sum payment under a **pension plan** – where the spouse elects equalization, the amount the spouse receives from the insurance or pension is ***credited*** against the entitlement, unless the deceased spouse has made a written statement that the surviving spouse is to get both
* **S. 6(7)** Where the spouse elects equalization under s 5 and insurance/pension is greater than the entitlement, then Personal Rep of the deceased spouse has a ***right to recover*** the excess
* **S. 6(8)** where elects equalization under **s 6(5),** then **gifts are revoked** and treated as if surviving spouse ***predeceased*** the deceased, unless will provides otherwise
* **S. 6(9)** where the surviving spouse elects equalization under s 5, then spouse deemed to ***give up entitlement*** under intestacy.

**How does a person elect? [**pg.834, document on OWL**]**

* + **S.6(10)** election has to be filed with Estate Registrar in Toronto within 6 months of spouse’s death.
    - Limitation period.
* **S. 6(11)** if no election is filed within 6-month period, the surviving spouse **is deemed to have taken under the will** **or the part 2 entitlement.**
  + **S. 2(8)** can get a time extension, essentially the person asking for extension has to satisfy the court that there are apparent grounds for relief, and delay is as a result of conduct in good faith and no one will experience prejudice

**Priorities**

* **S. 6(12)** confers a right under the Act has **priority** over

**all gifts in the will,** unless the will was made pursuant to a k for valuable consideration;

a person’s **right to share on the deceased’s intestacy**; and

**an order for dependants’ support**, unless the order was in favour of a child of the deceased

* + Spouses entitlement has priority over part 2 SLRA entitlement.
  + Spouses entitlement has priority over part 5 SLRA order, except an order in favour of the deceased spouse.
  + Generally, equalization right, once the election is made, effectively changes the scheme of distribution in the Will, because of this priority.
* **S.6(13)** – Gift in accordance with a contract, in good faith and with valuable consideration, gift has priority over a s. 5 right, except where the value of the gift exceeds consideration.
* **Dependent child’s right** priority over than that of spouse (***Gaudet v Young Estate***)
* Because the debts of the spouse on the valuation day are deducted in net family property, then the FLA right is inferior to rights of creditors. Creditors get to be paid first. [Pg. 837]

**Duties of Personal Representatives**

**S. 6(14)** – prohibits distribution within 6 months of spouse’s death unless the surviving spouse consents in writing or court authorizes.

* + Key word is **distribution**
  + What it means is executor can carry on with administration of estate, can liquidate assets, but cannot distribute assets, because filing of election could change distribution of assets under the will.
* **S 6(14)** – does not prohibit the cashing of the assets/liquidation of the estate and doesn't prevent the payments of debts because that is not part of distribution
* **S. 6(15)** once a PR has received **notice** of an application for equalization, then there is no distribution, unless the applicant consents or the court authorizes. (notice must be *received* by executor for s 6(15) to apply – ***Paola***).
* **PRs are personally liable to the extent prescribed by the Act if they contravene these provisions 6(19)**

**What does it mean to receive notice in writing?**

***Paola v Paola Estate🡪*** For S. 6(15) to be engaged, the estate trustee has to receive **actual** notice of an application. And application is a statutory form that is prescribed

This is to be contrasted with what we will see in part 5 of SLRA and particularly in the case of ***Re******Dentinger*:**

* Judge Carter held that for similar prohibition under part 5 to be in play all that the solicitor for the applicant dependant had to do was **send a letter to other side** – either to estate trustee or estate trustee’s lawyer. And doesn't even have to be a letter. [pg. 880 note 5]

**Remember: Rule under FLA: can’t distribute if under 6 months**

* Under Part 5, if past limitation period and want to distribute, **have to stop if there is notice of a claim**
* If the 6-month period goes by, *then* the spouse reappears for an extension but in good faith the executor has started distributing, the values of these assets don’t count in NFP (**6(16)**)

**When can extension be granted under S. 2(8)?**

* Party seeking extension has to satisfy court of three things:

1) there are apparent grounds for relief

* Nature of assets for both parties – clear that there would be an equalization available

2) Establish that delay has been incurred in **good faith**

* Person will have to explain why he/she didn't file in 6-month period

3) No person will suffer **substantial** prejudice because of the delay.

* **S. 6(17) (18)** – even though prohibition against distribution, nothing prohibits **reasonable advances** (difficult to determine) to dependants of the deceased spouse. This may open you up to personal liability. May also get consent from surviving spouse but if there’s no way this will happen apply for the court’s approval to avoid personal liability
  + - Ex. Acting for estate trustee and no dispute as to whether person is a dependant. What’s your concern going to be when giving advice to client?
    - Concern: What is considered reasonable?
      * If client pays out $300 a month an spouse argues this is unreasonable
      * How can this be sorted out? What steps as lawyer can we take for estate trustee client who wants to make this payment? (assume we have an unreasonable spouse)
        + **Attempt to get court approval because under S. 7(1) court has authority to determine any matter related to spouse entitlement.**

Also, authority under the **Rules** for an application to be made for the **interpretation of statute**.

* + - As a matter of practice, these applications (even an undefended application) could cost $3,000-$5,000 and if opposed costs are higher.
* **S. 6(19)** imposes **personal liability** for ET if estate is distributed in contravention of **ss 6(14) or (15).**
  + - If estate assets are not sufficient to satisfy liability imposed because of the bridge of the FLA then the estate trustee’s personal assets (house, investments) could be liable to be attached.
    - have to vigilant when acting for estate trustee about these prohibitions.
* **S. 6(20)** court has power to **suspend the *administration* of the estate** (i.e. ET cannot deal with assets *in any way*). E.g. If spouse were concerned that ET was selling assets for much less than their market value.
  + - Different from prohibition on distribution, because prohibition on distribution means estate trustee can still deal with estate assets, so where we are acting for claimant spouse and we have reason to believe estate trustee may be liquidating estate assets on sweet heart deals to friends (person will sell deceased house to family friend at a value lower than fair market) and client needs this to stop.
    - 🡪 get a suspension order under **s. 6(20)** of the statute. And when suspension order is issued the estate trustee can do nothing further with respect to administration of estate without consent of court.
* **Note:** the spouse’s entitlement is inferior to that of creditors.

## Power of the Court

* **s. 7(1)** court has full authority to determine **any matter respecting a spouse’s entitlement** under section 5
* s. 7(2) the entitlement under **s 5(2)** is **personal** b/w the spouses – spouse’s executor cannot make election
  + If surviving spouse dies before 6 months w/o making the election, the ET cannot make it (***Rondberg***)
  + But a guardian (***Ward***) or POA (***Anderson***)can do it (e.g. mental/physical incapacity) 🡪 spouse still alive

**Revoking/pulling back the election**

* An election once filed **cannot be revoked** (***Re Bolfan***) unless conditional election (***Re Van der Wyngaard Estate***). However, court has residual jurisdiction to revoke to serve interests of justice and if warranted to balance interests of parties (***Iasenza***).
* A person who has lost the right to take under the will cannot make an election under s.5 (e.g. spouse kills his spouse), but this is a grey area when the death occurs through negligence or recklessness (***Maljkovich***). SEE NEXT SECTION
* Ex. We are meeting with spouse who is dealing with another lawyer and filed election three months after death of spouse and client now comes to us and says I don't think I got good advice in terms of my FLA rights. We analyze situation and say… you are right, we do not think you should have made an election here. Lawyer did not take into account those provisions that make you accountable for life insurance you receive, pension you receive, and RRSP.
  + client asks what to do now?
    - * ***Iasenza***
        + Where revocation was permitted the court talked about the following criteria:

1) **Interests of justice**

Need to balance interests between surviving spouse and deceased spouse.

Remember in spousal situation it is not same as *inter vivos* dispute between spouses as to support.

2) **Material misunderstanding of certain facts**.

Be careful, because if spouse hired lawyer of experience, is the spouse going to be tagged with that material understanding or is court going to let spouse off the hook and say lawyer should have understood but didn't.

No guarantee that spouse didn't know, other side will say you retained a lawyer with experience so that lawyer should have known. So that is your problem and go sue lawyer for negligence.

3) **Lack of knowledge**

* + - * + Therefore, no guarantee of revocability
        + Take the view that once an election is filed you cannot revoke it.

## Individual Spouses Who Have Lost Right to Take Under a Will

* Where surviving spouse is criminally responsible for death of deceased spouse
* ***Maljkovich***🡪 a person who has **lost right to take under will cannot make a section 5 election**. [pg. 837 note 10]
* **S. 5 election** is **inferior to creditors** of the estate and this is based on/is an assumption, logic is debts of deceased person can be deducted in calculation of NFP so it makes sense that estate trustee can continue to pay debts, but if debts are excessive may resort to **S.5(6)(b)** where the court can order something other than half the difference between the NFPs.
* To come under **S. 5(6)** conduct has to be **unconscionable** and under **S.5(6)(b)** talks about debts or liabilities that were incurred **recklessly or in bad faith.**
* Spouse seeking to come under **s.5(6)** will bear onus of proving reckless or bad faith for incurring debts.
  + High bar
* If spouse comes to lawyer and explains that deceased spouse has high debts, then lawyer may consider making an order suspending administration of the estate **s. 6(20)**
* Draw this distinction in practice about lawyers making recommendations and clients making business decisions. Say to client “there is a huge amount of debt, I think we can apply to an order suspending administration until we can confirm”.

**Payment of Entitlement**

* Section 9 gives the court the power to order a spouse to pay the other spouse the amount of the entitlement or give security for an obligation imposed by the order.
* May direct that property be transferred to the other spouse in satisfaction of the equalization obligation.
  + But should not do if able to make payment in cash (***Heon v Heon***)
* **S.9** Court has authority to order an estate to pay an amount to give security for payment of an amount.
  + The court has authority to tell executor not to sell a certain property until an amount has been paid.
  + The court has authority to order an estate to make payments and installments over 10 years.
  + Authority to vest property in a spouse (***Serra***)
  + Authority to order a sale or partition.
  + A partition is a legal process under ***Partition Act*** and it arises where two people own property and one does not want to own that property with the other.
    - In partition, court orders property to be sold and proceeds divided.

## Burden of equalization (837)

* Problem is that at law there is a very defined order through common law of what assets are liable to pay the debts. [Pg.837]
* Ex. Million dollar’s estate. Simple will is set up. Two children. Client says pay son $500,000 and pay residue of estate to son #2. On paper this is equal. Let’s say Client has huge income tax bill, it is the residue under the common law principles that pay the debts. And **under CL principles legacies (cash amounts get paid first).**
* Because residue bears debts first, by statute, the residue would bear the burden of the equalization payment. So. we just changed our dynamics. If we kept with same will but instead of $400,000 tax bill it is a $400,000 equalization payment, then son #1 gets $500,000 and brother would bear equalization. No provision in statute for a prorate bearing of the burden of equalization.
* Even though surviving spouse files an election for equalization the filing of that election **does not preclude spouse from filing for application for support as a dependant under part 5.**
* Notion of situation in which I leave my married spouse less than my entire estate which leads her in a position where she can elect an equalization and then I appoint her to be the executor of my estate (she is clearly in a conflict of interest).
* Then the question is **whether she can still be executor of my estate and still be entitled to equalization?** 
  + Shares or bank accounts or investment accounts – there are not much doubt about value of those debts, day before date of death (valuation date).
  + But if own a business or a series of income properties there may be disputes about value of properties.
  + So, in this case it is not appropriate for spouse to accept appointment as estate trustee.
    - This is not a definitive opinion.

## Equalization and the Matrimonial Home (839-842)

Definition**, 18(1):** Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

* Special treatment under the Act 🡪 **cannot be treated as excluded** property Part 2 also confers substantial rights of possession to the MH on the spouse who does not have title.
* **S. 26(1)** ensures that the **surviving spouse** will be able to receive credit for the **partial-interest** in the property owned by the deceased
  + - if a spouse dies owning an interest in matrimonial home as joint tenant with a third person not the other spouse, joint tenancy will have deemed to have been severed immediately before time of death.
    - Deceased spouse’s half of the property now passes through the estate and that half becomes part of NFP.
  + Otherwise surviving JT would take this by right of survivorship. The JT is still a co-owner, but for the deceased’s NFP the property goes in, this means that the JT becomes TIC with deceased’s spouse.
* **S. 26(1)** **S. 26(2)** – a spouse who has no interest in matrimonial home but is occupying it when other spouse dies has **rent free possession of property 60 days after death.**

**Value** – if dealing with assets such as land (e.g. in a complicated will), **value of assets** is subject to debate, might take more than 6 months to resolve, therefore application to court.

Q: MH burns down, insurance gives cheque, deceased takes cheque and dies. This cheque makes it not a MH but cash. The *land* is the MH but the cash is cash.

* if partial intestacy, if spouse chooses under FLA, then under **part 2**, she’s deemed to have predeceased H so the one child that’s left will get everything of the residue
* **Residue is primary fund for payment of debts**, including equalization; unless the will happened to say that an equalization made the estate pay proportionately
* Can make an equalization claim *and* file an application concurrently **under part 5 of *SLRA*.**
* **Spouse as estate trustee**: inappropriate for a spouse making an equalization claim to continue to act as estate trustee (conflict of interest, since ET has obligation to maximize payments to beneficiaries, which is diametrically opposed to equalization maximization).

**Problems**

A) H died, survived by W and D, a daughter by a prior marriage. H left $800000 nfp; W had $200,000 nfp. H and W’s respective non-nfp’s were negligible. H left $150,000 absolutely to W by his will and the rest to D.

* + - Under will she receives $150,000. And equalization is $300,000 – advice to W is to elect under FLA.
    - Remember client may say for personal reasons they would not want to elect to take under FLA.

B) As in problem (a) but H left $550,000 to D and the residue of his estate to a charity which had ceased to exist before his death and the rest to D. The gift to W was the same. The gift to charity lapsed, resulting in a partial intestacy.

* + - What happens to the money that would go to the charity? It is intestacy now have to go back to part **2 of SLRA**.
      * Whatever she gets under the will that is $150,000 she gets topped up to $200,000 – **s.45(3)**
      * What happens to the other 50% of the $100,000? She would get half.
      * What is FLA right? $300,000
      * so would recommend election because now she is only getting $250,000.

C) As in problem (a) but H died intestate.

* + - Preferential share – W gets $200,000
    - $600,000 left. D is a daughter of H by prior marriage.
    - What is W distributive share?
      * Half. $200,000 plus $300,000, so intestacy = $500,000.

G) As in problem (a) but H left his estate to W for life, with remainder to D. Assume that present value of the life interest is $80,000 (Actuarial calculation that is based on an assumed interest rate and is based on age of W - if W is 45 and average age is 85 so 40 years left).

* + - Under the will, life interest is worth $80,000, daughter gets $720,000
    - FLA is $300,000

H) As in problem (a), but H received an inheritance of $200,000 after the marriage and bought the matrimonial home with it. This amount is comprehended in H’s nfp as stated in problem 1. W received a gift of $100,000 from her parents after marriage. She invested this money in high income bearing securities and spent the income annually on family vacations.

* + - Inheritance is deductible, but he used it to buy matrimonial home so it is no longer deductible.
    - W’s nfp, would include matrimonial home?

I) As in problem (a), but W’s nfp consists of the MH which she inherited from her parents, while H’s $800k is not in nfp, but consists of $400k obtained in a personal injury settlement and $400k inherited money. He invested the former in non-income producing shares of a potentially lucrative business, while he used the income from the latter to set D up in business.

# SUPPORT OF DEPENDANTS – PART 5 OF SLRA: CHAPTER 22 (849-912)

#### Part V SLRA – Must make adequate provisions for support of dependents

* **S. 58** where deceased (T or I) has not made *adequate provision for the proper support of dependents*, the court on application may order such provision as it considers adequate out of the estate
* **S. 79** says only applied to deaths on or after April 1, 1978
* **S. 57** says Ontario Superior Court of Justice is to deal with this – by application, service etc.

### S.57(1) – Dependent definition

“dependant” means,

(a) the spouse of the deceased,

(b) a parent of the deceased,

(c) a child of the deceased, or

(d) a brother or sister of the deceased,

to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death; (“personne à charge”)

**Testamentary Freedom**

* “a testator’s freedom to distribute her property as she chooses is a deeply entrenched common law principle”
  + - * 1. Builds respect for individual autonomy
        2. Builds system of property law such that legal doctrine should be predictable (make transactions with confidence)
* BUT nature of property rights + public policy limit the application of the freedom

## Rights Under Part V

**Procedure**

* Lawyer prepares documents and supporting affidavit, respondent is the ET
  + All other **beneficiaries are named as respondent’s** b/c the effect of the application is to deduct what they would otherwise be entitled to.
* Motion for directions: ask judge who has to be served.
* ET generally files a responding affidavit and other parties may also file affidavits
  + These would be cross-examined and before there could be a motion to determine who is to be crossed.
* After application is filed and before served, could also be a motion
* After this cross, proceeds to trial process where it is dealt with as live evidence

**Forum & Parties**

* Formally invoked by **notice of application** **s. 60(1)** to the **Superior Court of Justice** (supported by affidavit).
  + **S 34(4) of *FLA***: order for support **binds estate** of person having support application unless order provides otherwise.
    - **Under s. 37 of the FLA the court may discharge, vary or suspend any term of an order for support for a material change in circumstances (death)**
  + A court may deal with an application by any dependant as an application on behalf of all dependants, so that the matter can be settled in one hearing **SLRA s. 60**
  + Application can be brought on behalf of an incapable dependant, but not by the executor (***Goldverk-Berger***).
    - Parent can bring application for incapable dependent **SLRA S.58(2)**
    - **Rule 7** allows a litigation guardian to bring application for minor or incapable adult
  + Notice of application filed in the jurisdiction where the deceased was **ordinarily resident** (i.e. where the certificate for appointment of estate trustee was filed) (**Estates Act s.7**)

**Pleadings & Notice**

* **S.63(5)** court has to be satisfied that **all interested parties have been served and have the opportunity to respond**, including the deceased’s personal representative **(s 67(1))** (and public guardian or trustee if application is made on behalf of a psychiatric patient or incapable resident of a facility (see p. 854) – **s 74(2))**
  + If will – serve everything with an interest (beneficiaries, dependants…)
    - Can bring motion for directions from court on who to serve
  + infant (under 18) serve – office of the children’s lawyer
  + someone who cannot be located - serve public guardian/trustee
  + an intestacy - search for people born outside of marriage.
* **S.74(1)** where applicant is a person in a facility where the ***Mental Health Act*** and/or the ***Developmental Services Act*** apply:
  + **has to be served on the PGT**
  + limitation period starts when the PGT is served
* Failure to give notice means the application will be **set aside** (***Re Weir***), but the court has power to dispense with notice where appropriate (**s 63(6)**).
* Application may be dealt with by affidavit evidence alone (***Czajkowski***), but usually requires a trial with *viva voce* evidence as there are often serious disputes about the facts.

**Limitation Periods (868)**

**s.61(1)** - **6 months after probate** [pg. 868]

* **S. 61(1)** (limitation period – 6 months after the grant of letters probate) 🡪 *different than intestacy and FLA which will be 6 months from the date of death* 
  + Recall, that there are many cases in which probate or administration may not be required because of nature of assets and so no application is ever filed, and limitation period carries on forever.
  + Lawyer’s job to recommend the filing of an application so that it starts 6-month period running.
* **S 60(2)** Application by / for a dependant deemed to be on behalf of *all* dependants for purpose of limitation period.
* **S. 61(2)** court has right to **extend the time** under a discretionary basis to a portion of the estate that is undistributed at that point
  + Unlike ***FLA*** that prohibits distribution for 6 months, there is no prohibition or time limit on prohibition.
  + Estate is undistributed as long as executor retains possession and controls of assets (***Zaplotinksy***).
  + **Note**: Courts often readily grant such extensions, even long after expiry (e.g. ***Zenyk***; ***Re Bourne*** – 10 years after). But **extension must be equitable, having regard to all parties** (***Re Deis***).
* At CL, joint property is vested in the survivor. By virtue of ***SLRA* s 72** though, **the capital value of that property is brought back to the estate** for purposes of **s 61(1),** but *only* if within limitation period (***Re Dolan***).
* E.g. T owned life insurance policy with 3rd party beneficiary. 3rd party is entitled to $ by right of the contract. But under **s 72** that insurance policy is deemed to be part of deceased’s estate, if a dependant makes an application. Thus, dependant must make a **s 52** order which would stop life insurance company from making payment to 3rd party.
* **Note**: Limitations periods of *SLRA* must be read subject to the ***Limitations Act*****(*B(JDD)*).** Thus e.g. does not run for unrepresented minors.

**Preservation of the Estate during Litigation/Restrictions on PR**

* **S.67(1)** PR of the deceased **shall not proceed with the distribution** (*not* administration) of the estate **upon receiving notice** of a **s.5** application unless the court makes an order or all involved consent of application is disposed of.
* **67(2)** Nothing in (1) prevents PR from making **reasonable advances** to dependants who are beneficiaries
  + What is “reasonable advance”? Most likely to be circumstantial 🡪 depends on size of the estate
  + The law is that if an estate trustee does decide to make reasonable advances for the support of a dependent that includes a spouse/child **than those advances are charged against whatever that beneficiary ultimately gets in administration of the estate**.
  + Not a debt.
  + **Beneficiary has to account for those payments**. Case supports this proposition is ***Re Dentinger***:
    - Interprets **S.67(2)**
    - Unforeseen future events can now be made the subject of a further order under **S. 65.**
    - However, those that are foreseeable should probably be taken into account at the outset, since any order made in the future can only affect assets then remaining undistributed.
* **67(3)** PR will be personally liable if he’s in violation
* **S.59** Gives the court on application the discretion to **suspend in whole or in part the administration of the estate**.
  + **[**Note 7 pg. 871**] Presumably debts can be paid** if administration is stayed (creditors take priority over beneficiaries)

Dentinger Decided that when the solicitor for the applicant sent a letter to the ET, it constituted notice under s. 67(1).

For the purposes of part 5, notice of the application should be given in writing from the applicant’s lawyer to the PR; applicant sent letter to the PR’s solicitor—that was notice; can’t make any further distribution, but can still administer

* **Note**: can stop administration of estate with a suspensory order under **s. 59.**

Here the PR were two of the decd’s daughter from a previous marriage. Applicant was his 2nd wife. PR knew about the letter from the other lawyer and yet quickly distributed the estate. Carter found this contrary to **s. 67(1)** and found PR jointly and severely liable.

This shows the difference b/w notice in *FLA* and *SLRA* – notice means can’t distribute estate, but in *FLA* need formal application.

### When is an estate distributed?

***Zapnotinsky*** [note 5 pg.870]

* + - When the assets are out of the hands of the executor.
    - Ex. In an estate where lawyer is concerned that there may be a part 5 claim and client agreed to make application, as soon as get grant lawyer would recommend distribution of estate ASAP after 6 months.
    - This case involved transfers of real estate and transferees of property. Transferees had received documents but had not yet registered the transfer. You do not have to register a deed to still be owner of property. The registration provides notice to world of transfer. Once the lawyer had delivered the transfers, the state was distributed, even though not yet registered.
* By contrast in ***Harvey v. Estate of Powell*** *[ft*. 102 pg. 870] – assets are undistributed if the executors retain possession and control of them.

**Definitions under PART V:**

**Who can apply?**

* S 58(2): “An application for support may be made by a dependant of a testator or intestate, or by a parent on his or her behalf”
* **S. 57:** **“dependant”** means, (a) the spouse of the deceased, (b) a parent of the deceased, (c) a child of the deceased, or (d) a brother or sister of the deceased, to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.”

“**Dependant**” – 2 levels under Part V: 1) factual relationship & 2) providing or legal obligation to provide support.

* There must be a **relationship with the deceased** that can be established factually.

**“Cohabit”** means to live together in a conjugal relationship, whether within or outside marriage.

**Spouse** (page 883)

**1(1)** means either of two persons who

Are married to each other, or

Have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

**57** – in addition includes either of two persons who,

1. Were married to each other by a marriage that was terminated or declared a nullity, or
2. Are not married to each other and have cohabitated,

Continuously for a period of not less than three years, or

In a relationship of some permanence, if they are the natural or adoptive parents of a child

* includes **common law** – this is where a common law spouse who feels wronged can apply; also same-sex partner **(s. 29) FLA**
* Spouses are under a legal obligation to provide support for each other (***FLA* s 30**; ***Cooper***).
* If decide on support for x amount of years, and payor dies within x amount of years, then the support continues out of the estate as if payor were still alive – continuing charge against the estate (***Brubacher***)
  + Once obligation has terminated no longer a “legal obligation” to pay regardless of ex-spouse is in potential class of “dependants”
* **A married spouse can still obtain a part 5 order even if there is an election for equalization.**

***Quinn v Carrigan***: (page 886)

* Court acknowledged the difficulty of establishing the proper quantum of an award and terms of payment.
* Turning to touchstones or guidelines such as SSGs are helpful, but are just “one measure of an obligation the deceased owed to his or her spouse prior to death something to be taken into account in determining what provision should be made for the spouse after death”

***Morassut v Jaczynski Estate***:

* $17M estate. Made no provision for spouse other than MH worth $485k + $40k cash
* Judge ordered $1.2M cottage, $100k/year + $50k every 5 years for a new car
* No obligation to become self-sufficient imposed under SLRA
  + S. 30 of FLA (self-sufficiency) is unique to separation and the FLA – no similar provision in SLRA
  + Here the payor no longer requires funds to live on (payor = dead)
* **Divorced spouse** (“were married”) If deceased was making legal support payment to ex-spouse, she is a dependent under s 57.
* 3-year cohabitation does not have to occur immediately proper death (as long as deceased was supporting CL spouse prior to death – ***Romero v Naglic Estate***).
* If living as husband and wife, need not have romantic / sexual relationship too (***Amatnieks v Benkis Estate***)

**Parent** –**s.1(1)** the father or mother of a child + **s.57** incl grandparent, or someone who has demonstrated a settled intention to treat the deceased as a child (except foster care).

* Adult children under legal obligation to support parents **(s 32).**
* Parents have legal obligation to support unmarried minor children **(s 31).**
* ***Brash Estate***: deceased was survived by widow and 6 children from previous relationship. W elected for equalization + dependant’s support. Three of her children were added to claim as they also had to support her.

**Child** (pg. 889)– **S 57** extends child from **s.1(1)** (“includes a child conceived before and born alive after the parent’s death) to grandchild and person who the decd has shown a settled intention to treat as a child of his family. Unless child placed in foster care.

* However, ***Piggott*** says grandfather with no settled intention to treat grandchildren as children is not liable to support them.
* Unless statute limits age, parents have moral obligation to support adult children (does not automatically entail an award though – legal obligations take precedence) (***Tataryn***).
* Courts will take into account reasons for excluding a child though – e.g. child’s abandonment of family or immoral lifestyle (***Kelly v Baker***). Estrangement will often be considered irrelevant too though, especially if the estate is large (***Walker*).**
* In terms of priority to assets in the estate**, a minor child’s entitlement to support has priority over an equalization payment to the deceased’s surviving spouse**, which in turn ranks above dependants’ support obligations to non-minors. **FLA s.6(12)**

Re Cooper p.872 – for a finding of dependant status, does not have to be ACTUAL dependence if there is a legal obligation

**Facts**: D was survived by respondent former wife, 4 adult children (1 mentally handicapped) and applicant common law wife. This is an application by the common law wife who didn’t get enough.

* The fact that the applicant has contributed to the welfare of the deceased to his or her own detriment is a factor which presumably should be taken into account in increasing the amount adequate for proper support under **s. 65(1).**
* **The definition of ‘dependant’ in the Act does not require that the applicant be actually dependent on the deceased, rather it is a defined term with its own special meaning.** Thus, financial need is not a determinate factor**.**

Definition requires two things:

1. the person be in a certain relationship to the deceased (set out in items. **64(d)** **(i)** and **(iv)**)
2. the deceased was either providing support or under a legal obligation to provide support to the person claiming to be a dependant immediately before death. (Usually both spouses are supporting each other).

* In addition, it is an error in principle for a judge to award an applicant less because she is a second wife. The second wife has every right to be adequately provided for and this principle should also apply to second common law wives. (***Re Duncan***)

**Held**: CL wife qualifies as dependant, D did not necessarily intend not to make a provision for her.

Note: *Substitute Decisions Act* – gives the attorney the right to make gifts or loans if it is authorized in the POA. **Ask if they are supporting anyone at time of drafting.**

* **S.58(3)** establishes the right of public service agencies to apply, people on Ontario works or family welfare. The theory being that state should not have to support individuals where there is money in an estate to help them.
* **An application under part 5 does not survive the death of the applicant.**

## Inadequate Provision for Proper Support

**SLRA s. 62(1)** [pg. 876-877]

In determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including:

(a) the dependant’s **current assets and means**;

(b) the assets and means that the dependant is **likely to have in the future**;

(c) the dependant’s **capacity to contribute** to his or her own support;

(d) the dependant’s **age and physical and mental health**;

(e) the dependant’s needs, in determining which the court shall have regard to the dependant’s **accustomed standard of living**;

(f) the measures available for the dependant to **become able to provide for his or her own support** and the length of time and cost involved to enable the dependant to take those measures;

(g) the **proximity and duration of the dependant’s relationship with the deceased**;

(h) the **contributions made by the dependant to the deceased’s welfare**, including indirect and non-financial contributions;

(i) the contributions made by the dependant to the **acquisition, maintenance and improvement of the deceased’s property or business;**

(j) a contribution by the dependant to the **realization of the deceased’s career potential**;

(k) whether the dependant has a **legal obligation** to provide support for another person;

(l) the **circumstances of the deceased at the time of death**;

(m) **any agreement between the deceased and the dependant**;

(n**) any previous distribution or division of property** made by the deceased in favour of the dependant by gift or agreement or under court order;

(o) **the claims that any other person may have as a dependant**;

(p) if the dependant is a **child**,

(i) the child’s aptitude for and reasonable prospects of **obtaining an education**, and

(ii) the child’s **need for a stable environment**;

(q) if the dependant is a child of the age of sixteen years or more, whether the child has **withdrawn from parental control**;

(r) if the dependant is a **spouse**,

(i) a **course of conduct** by the spouse during the deceased’s lifetime that is **so unconscionable** as to constitute an **obvious and gross repudiation of the relationship**,

(ii) the length of time the spouses **cohabited**,

(iii) **the effect on the spouse’s earning capacity** of the responsibilities assumed during cohabitation,

(iv) whether the spouse has **undertaken the care of a child** who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(v) whether the spouse has **undertaken to assist in the continuation of a program of education** for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(vi) **any housekeeping, child care or other domestic service performed by the spouse** for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family’s support,

(vi.1) Repealed:  2005, c. 5, s. 66 (10).

(vii) **the effect on the spouse’s earnings and career development of the responsibility of caring for a child**,

(viii) **the desirability of the spouse remaining at home to care for a child**; and

(s) **any other legal right of the dependant to support, other than out of public money.**

* This is not an all-inclusive list (under rules of statutory interpretation)

\*\*starts out very broadly

* Arguably any fact that is relevant to the application can be submitted to the court
* The items that are listed are really examples of items that the court should be looking at
* Consideration of the circumstances that will ultimately able a court to decide whether the dependant is entitled to monetary support AND the extent of that support
* While legislation doesn’t say **moral or ethical responsibilities**, there are areas that move into this. Eg: **61(1)(g)** proximity of relationship, **(k)** legal obligation to provide support to another person, **(r)(i)** unconscionable, **(r)(vii)** effect on spouses earning capacity to take care of kids.

**S.62(2) In addition to the evidence presented by the parties, the court may direct other evidence to be given as the court considers necessary or proper.**

* expands the power of the court in the context of litigation dynamic, allows them to say they want certain evidence
* Also important to keep track of **documentary evidence** (lawyer for T) where someone has been **cut out** or reduced amount, put it in specifically to avoid anyone saying there was a mistake **– s. 62(2)(3)(4).**

**S.62(3)** **The court may accept such evidence as it considers proper of the deceased’s reasons, so far as ascertainable, for making the dispositions in his or her will, or for not making adequate provision for a dependant, as the case may be, including *any statement in writing signed by the deceased* (*Matthews Estate*)**

* Another statutory expansion🡪 allowing hearsay, can’t be cross-examined
* Example: who he designated as beneficiaries under his life insurance
* ORAL and WRITTEN statements are admissible
* Gives court authority to accept documents relating to this intention included document signed by the deceased.
* Good to document a statement as to facts of why dependant is cut out can minimize chance of will being amended under Part 5 (1 – solicitors notes, 2 – document signed, 3 – statutory declaration). 3 is equivalent to giving evidence in a witness box – this means it was verified to be true.
* Can put such a statement in the will too (but as will is public doc, a bit unseemly to make will spiteful)
* General law is that in a civil case cannot simply tender something into evidence, you need the maker of the statement
* Ex. Where we have potential **part 5** issue and we say to the client this person seems to be a dependant and you may have a part 5 issue if you don't leave this person money, we might hear the person say I have given this child $50k for the last 15 years and it has been wasted away.
  + So now because of **s.62(3)** we prepare a statement and a statutory declaration (a sworn statement) in which client attests to the fact that client has given child $50k and show evidence of this.
  + “I have not made any provision in my Will for my son “x” which I have disclosed to my solicitor and put in statutory declaration which is not to be part of the Will”, my reason for wanting it in the Will is so that “x” does not suggest that client lacked testamentary capacity & lawyer acted negligently.

**6.62(4) In estimating the weight to be given to a statement referred to in subsection (3), the court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement.**

* + There is an issue as to the weight to be given.
  + Example: if the statement is made by a man that is under the influence of a commandeering partner, then it has less probative value

**SLRA s. 58(4)**

* Makes it clear that the date as of which adequate provision for support has to be determined as of **the date of the hearing**.
* BUT remember that court can now vary earlier orders to take into account changed circumstances (**s. 65**)

## DETERMINING ADEQUATE PROVISION FOR PROPER Support (875)

* Discretionary – part II is subject to part V
* **s. 58(1):** application for– “**adequate provision for proper support**”. Here, there’s a broad range of monetary amounts
* It is important to know that Part V came into effect on March 31, 1978 – before under *Dependant’s Relief Act* – that Act said “adequate provision for *maintenance*.” Courts have determined they are no longer bound to provide “regular periodic payments”
  + Statute is one of relief and should have a liberal interpretation (broader than types of orders, not just period payments, and broader amounts)
* **58(3)** entitles social assistance agencies to apply
* **S. 58(4)** adequacy is determined as of the **date of the hearing** of the applicant.
* ***Re Dentinger*** 
  + Could not under the statute quantify the probability of future contingencies, because the matters under **s.62** have to be considered as of date of the hearing.
  + Take the present potentiality of such events occurring into consideration, bearing in mind the applicant’s age.
    - Think carefully because any future order is only dealing with what remains undistributed
  + Unforeseen future events can now be made the subject of a further order under **s.65**
  + **Adequate support is not restricted to subsistence**

|  |
| --- |
| Re Davies – Support inc. physical or moral, and non-essentials & luxuries (879 + OWL)  Facts: husband applies after second wife dies leaving everything to her son. He wants to stay in the house.  Held: he got to remain in the house 🡪 support includes physical or moral support, new legislation extends it to non-essentials/luxuries   * + Courts are prepared to take this broadly but strove to maintain the scheme of the will by only taking house away from son.   + *Oosteroff*: courts appear to be restricted by financial circumstances and not permitted to consider moral or ethical issues. * “These definitions lead me to the conclusion that ‘support’ as used in the SLRA includes not only furnishing food and sustenance and supplying the necessaries of life, but also the secondary meaning of giving, physical or moral support. […] I am inclined to the view that the word “support” in the SLRA extends that meaning to include what might by some be considered as non-essentials or luxuries. For example, if a living husband had been accustomed to reading aloud to his wife whose sight had failed, it may well be that for her support, sufficient money should be provided to pay for a reader to substitute for that husband.”   + - Accustomed to be vacationing together 🡪 court will give amount for yearly vacation |

Tataryn v. Tataryn SCC 1994 Legal and Moral Obligations (pg. 854-857)

**Issue:** BC provision said court had jurisdiction to order what is **adequate, just & equitable** in the circumstances out of estate to dependants. Is this acceptable?

**Facts:**

* Testator = estate of 315k
* Widow = life estate in MH, beneficiary of discretionary trust of the income of the residue of the estate (limits her access to the property)
* Son#1 = remainder interest in the MH and residue, + rental property
* Son#2 = left NOTHING

**Held:** SCC – a just distribution would be one that was symmetrical to the widow’s position had there been martial breakdown (rather than death).

* W was awarded title to MH + residue after specific gifts were made to son#1

**Reasons:** Must consider both legal obligations AND moral obligations

* Consider the legal obligations that would exist if the testator were alive (must support spouse and minor children)
* Moral obligations = society’s reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards
* Moral principles inform the nature of the entitlement as well as the calculation of the award
* How to balance – if estate permits, all can be met. If priorities must be considered, then legal obligations (i.e. claims which would have been recognized during T’s life) should generally take precedence.
* Moral duty should be assessed in light of the deceased’s wishes
* As long as T’s will is in the range of adequate, just & equitable, then court will not interfere 🡪 deference to the T
* The Act is not designed to ensure maintenance for dependants who are in financial need but rather allows redistribution of the capital of the estate if that is required to give effect to the testator’s moral duty toward the dependants

***Cummings******v. Cummings* ONCA 2004** [pg.857-864] **(33-47\*\*) 34 + 50 very important**

**In Part V Application, Court must consider ALL circumstances**

**Facts:** Decd had 2 children from 1st wife, son with physical disability. Divorce agreement was $2000/month support payments to survive death of both parties. But decd lost job and so had no income at time of death. Estate $650k. Son made application for himself and daughter, but neither 1st nor 2nd wife claimed any support (they were gainfully employed). TJ ordered 250k lump sum to wife#1 in trust for children. Arrears of support payments to wife #1. BUT no continued support after death.

**Held:** The **SLRA has a moral dimension which must be taken into account**. I.e. both legal and moral obligations must be considered. The factors to be considered by the court on an application are set out in **s.62(1)** of the Act.

**Reasons:**

* Ontario courts are not restricted into an inquiry into financial circumstances and are permitted to move into moral/ethical issues.
* Moral obligations of the deceased person to a dependant that is not asserting needs at this time
* Measure what you give to the applicant by the moral obligations the deceased has to dependants that are not asserting needs
* Para 34 – The legislation permits the court to treat the app as one brought on behalf of ALL DEPENDANTS (**s.60(2)(a))**
* TEST – **when examining ALL of the circumstances of an application for dependants relief the court MUST consider:**

1. **what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and**
2. **what moral obligations arise between the deceased and his or her dependants as a result of society’s expectations of what a judicious person would do in the circumstances** (common law + **ss. 57-62 of Act**)

* Up until this case, in ON, a court in a Part V app was not entitled to look at moral obligations except certain subclauses of 62 had moral dimensions to them, e.g**. 62(1)(g)-(k)** & especially **(r)** (unconscionability of actions toward a spouse).
* This case opened floodgates to Part V apps
* The key paras: the court adopted the reasoning in a BC case (***Tataryn***) that says must consider all circumstances, not just needs-based economic analysis (the BC statute allows a judge on an application to look at moral claims that can be made against the deceased).
* Para 47: “I conclude therefore, that the disparities between the BC and Ontario statutes are not sufficiently telling to preclude the application of ***Tataryn***in this province.”

## Contracts to Leave Property by Will

**Section 71** [pg.892]. ---- **6(13) of FLA**

* If a person agrees to leave their property to another by will and carries out the agreement, the question might arise whether such property should be subject to an order for support. It is arguable that it should be to the extent that the disposition is made without consideration.

Where a deceased,

(a) has, in his or her lifetime, in good faith and for valuable consideration entered into a contract to devise or bequeathed any property; and

(b) has by his or her Will devised or bequeathed that property in accordance with the provisions of the contract,

the property is not liable to the provisions of an order made under this Part except to the **extent that the value of the property in the opinion of the court exceeds the consideration therefor**.

* Example: old farmer, says to young person – I will leave you all of my farm equipment if you work for me until I retire or die. Young person agrees. Promise is made in Feb 2018. Old farmer tells lawyer to amend the will. Valued at 500k. Thinks they will live for another 5-6 years. BUT dies in April 2018. Now the beneficiary picks up 500k worth of equipment. BUT dependants have not been left a proper amount of money. Dependants argue to bring the farm equipment back into the estate. Beneficiary says we have a contract that is evidenced by the will. Dependant – but the consideration you gave was less than the value

***Cowderoy v. Sorkos Estate*** [pg. 893] good example for **s.71 litigation**

* Key paragraphs: 40, 44, 45, 46, 47, 48, 49
* **Facts:** Nephews had been promised deceased’s farm & cottage in exchange for their services running the farm. Surviving widow brought a dependants’ support application.
* Para 44: **s. 71** of the SLRA occupies a halfway house between two more extreme outcomes of the contest between the dependants’ relief applicant and the intended recipient of the bequest.
  + The first is that the dependants’ relief legislation should entirely override any contrary contractual obligations; this was the outcome in ***Dillion v. Public Trustee of New Zealand***
  + The second is that valid contract cannot be overridden by the dependant’s relief legislation; this was the outcome in ***Schaeffer v. Schuhmann***
* Para 45: The halfway house reached by **s.71** of the SLRA is that when a contract results in the transfer of property by Will, **dependant’s relief claims can attach to any value of the property in excess of the consideration given under the contract.**
* Para 47: Given **s.71**, TJ should have considered whether there was an excess in value in the farm and cottage properties over the consideration provided.

**Section 72** [897-898] **PROPERTY FALLING INTO THE ESTATE FOR THE SUPPORT OF DEPENDANTS (Deemed Assets)**

* **S.72** of **SLRA** brings back into estate assets that would normally not be part of the estate
  + Ex: Life insurance policy
* Where we know that there is a **S.72** asset then try for **s.59 order suspending administration**
  + Ex: serve **s.59** order on life insurance company, to stop them from paying proceeds to beneficiary named in policy
* This is set out in **s.72(5)** of the statute. [pg. 904]
* Recall that under **FLA** an actual application has to be served for prohibition of distribution to be effective. But under *SLRA part 5 from* ***Dentinger*** *Case* it seems to be a more relaxed proposition, that if you get a letter from another lawyer that says acting for AB under Part 5; ***Dentinger***tells lawyer to tell client stop distributing.

**S. 72** – **Brings back into the estate assets that aren’t even owned by the deceased or assets that pass by operation of law:**

* **(a)** Gifts by *Mortis causa* (*not* regular gifts),**(b)** deposited in trust, **(c)** joint accounts, **(d)** joint property (real estate, stocks, royalty rights), **(e)** any disposition where the T has given it away – life insurance, pensions etc., **(f)** insurance.
* **S. 72(3)(4)** burden of proof.
  + Once you know about these assets, get a **s 59** order and serve it on the financial institution, the surviving joint tenant or insurance co (**s 72(5)** – says bank can give $, the joint tenant can take property or insurance can give out *unless* get an order).
  + Service here means formal, personal service (not just a letter) (see **s 72(6)** – service is defense).

**Example:** I have made a will out of spiteful determination to exclude my dependants. One of my assets is a life insurance policy and I have left that to my favourite charity (500k value). In my lifetime I set up a trust fund for an individual with whom I’m involved in a romantic relationship. I die. Nothing is left for my proper dependants. They hear about the life insurance and trust.

* **Problem for the dependants** = life insurance is a k. No right to death benefit proceeds. No property in the money that is deposited into the trust. Pre SLRA – estate trustee would say sorry there is no property for a Part 5 claim. No assets of the estate vested in the estate trustee.
* Enacted s. 72 to remedy that injustice
  + Lists a group of assets – life insurance, trusts, joint accounts
* Where you have the circumstances… those assets are pulled back into the value of the estate for the purposes of fashioning a part 5 order
  + Fit yourself within the wording of the statute
* Beneficiary under the policy: immediately cash in the policy – straight forward. File a claim form. Prove that the person died (need a death certificate). But funeral homes now just giving to estate trustee. Likely paid within 8-12 days that documents are submitted to insurance company.

**S. 72** For the purposes of part 5, the capital value of the listed transactions in **s.72(1)** shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause **63(2)(*f).***

\*\*\*\*Listed transactions\*\*\*\* page 897

**S.72(1)(b)** “money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased”

* assets that if we were looking at the probate value of the estate, applying for certificate of appointment of estate trustee, they would not be included because they are not in the name of the deceased
* So, A takes $100k in one bank account and move to another bank and put it in name “in trust for x”
  + S.72(1)(b) brings it back in.

**S.72(1)(d)** “any disposition of property made by deceased whereby property is held at the date of his death by the deceased and another as joint tenants”.

* If own property at death and held with friend as joint tenants, by common law, friend owns asset out right.
* S.72(1)(d) brings it back in. But the wording of s.72(1)(d) isn’t specific it says any “disposition” made by deceased...
* So if at date of death A does own property with B as joint tenants and this is how we acquired the property then s. 72 (1)(d) doesn't apply because there hasn't been a disposition by A (i.e. The property was bought in joint tenancy together). By contrast, at some point A owns cottage and A enters into relationship with other person while married and say going to protect cottage by signing deed that puts cottage in A and B jointly, then now we have a **disposition** and brings into play s.72(1)(d).
* **S 72(1)(d)** only applies if deceased owned property transferred *alone*, (*not* joint to joint transfers) (***Caughell***).
* Also doesn’t apply to joint property acquired by deceased and another person (no disposition involved) (***Modopoulos***).

**S.72(1)(f)** “any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her”.

* Again, simply change beneficiary of life insurance to a friend and then on death the friend has sole right to apply to get the death benefit. Under probate law it is not an asset of estate.

**S. 72(1)(f.1)** any amount payable on the death of the deceased under a policy of group insurance

* **Note: S. 72(1)(f.1)** codified ***Moores*** by extending **(f)** to expressly include group policies.
* Non-group policies not owned by deceased (***Goodis***) or joint policies in which the other payor paid most of the premiums (***Madore-Ogilvie***) are still excluded.

**S.72(1)(g)** “any amount payable under a designation of beneficiary under Part III”

* If pension beneficiaries were *not* within deceased`s control, it does *not* come within **s 72(1)(g)** (***Smallman Estate***).

**S. 72(2)** allows the court to examine where we are talking about funds on deposit, whose money has gone into a deposit account.

* **Ex**. New relationship and A wants to defeat rights of dependants
* If on death all money is A’s then it all goes back in on death.
* But if other partner can show he or she also puts 50% then only half of money goes back in to estate for purposes of application.

**S. 72(3)** deals with burden of proof and puts **proof on dependants to establish the funds or property belong to the deceased**.

* Where someone is alleging a contribution by **s.72(4),** onus of proof is on the party alleging the contribution.

**S. 72(5)** **& (6) 🡪 Ex.** Life insurance policy payable to the third party. And Lawyer A is acting for defendant, and lawyer finds out about life insurance policy.

* **S.72(5)** says that the section doesn't prohibit the life insurance company from paying the death benefit to the life insurance beneficiary **UNLESS** there has been personally served on life insurance company a certified copy of a suspensory order made under **section 59** enjoining such payment or transfer.
* **Suspensory Orders** can be obtained on an *ex parte basis*, process where other side doesn’t have to be served with papers, in certain cases of emergency, court will allow an order to be issued where only one party is applying. And when party is making an *ex parte application*, counsel must disclose all relevant facts. Court has to rely on integrity of counsel to do this.
* So, in these situations where we find out about joint account, joint property, pension going to third party ect. try to get suspensory order and serve and this stops the party from taking it.

**S. 72(6)** “personal service upon the corporation or person holding any such fund or property of a certified copy of a suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period the order is in force.”

Since an order can only be made in respect of property that remains **undistributed** it is important for a dependant to ensure that those persons liable to pay third parties under insurance policies, pension plans and similar obligations which are deemed to be testamentary dispositions under **s. 72** **do not make such payments until the application for support has been disposed of.**

* **Section 59** of the Act, which enables the court to make a suspensory order, would not by itself achieve this result, since it is directed to the suspension of the probate estate.
* However, **s.72(5)** appears to have the effect of preventing payment if such a suspensory order is served upon the payor.
* Presumably, therefore, it is necessary to obtain a suspensory order to prevent payment of obligations under insurance policies, pension plans and similar obligations. Notice of an application for support would not be sufficient.
* On the other hand, as ***Moores v. Hughes***makes clear, **the dependant can still reach the proceeds in the hands of the payee, provided that money not spent or taken to a jurisdiction not reachable by the ON courts**. [Note 4, Pg 904] 897.

**S 72(7):** S 72 does not affect the rights of any creditors (e.g. bank still has right to collect mortgage, and Part 5 applicant would have to take assets subject to that debt).

|  |
| --- |
| Moores v Hughes (1981) Ont SC  **Facts:** Testator left nothing to mentally ill ex-wife. Estate small ($40k), but $365k in insurance, pension and joint bank account went to 2nd wife. Ex-wife applies for support against estate, testator’s brother-in-law, and 2nd wife.  **Held: Included in estate:** Insurance under **s 72(1)(f),** pension under **(g),** joint account under **(c).** While technically group policy and pension were owned by company, they are within *intent* of **s 72(1)(f)** (because *deceased* chose beneficiaries and they were employment benefits paid for by service to the company). **S 72(5)** relieves insurance co of liability for disbursing payments, but does *not* mean funds are unavailable to P. Such funds can be traced back to, and collected from, beneficiaries. $1300/month support to ex-wife granted.   * Payable in (f) and (g) includes paid for purposes of the legislation * The monthly support similar to that agreed to in separation agreement – continuation after death (during her lifetime or until remarriage) |

If A lost race to insurance company and insurance company pays money, that dependant client **still has ability to trace money** into hand of beneficiary, BUT if beneficiary has spent money then it is gone.

* **no longer good law on life insurance or group life insurance**, but good law on tracing money.
  + ***Re Urquhart Estate*** - held that group life insurance policy is owned by employer
* Added (f.1) to s. 72(1) to rectify

**Joint Ownership** – see page 904

Note: in joint tenancy it could be forced to be sold and the amount paid out.

* E.g. T owned life insurance policy with 3rd party beneficiary. 3rd party is entitled to $ by right of the contract. But under **s 72** that insurance policy is deemed to be part of deceased’s estate if a dependant makes a successful application. Thus, dependant must make a **s 52** order which would stop life insurance company from making payment to 3rd party.
  + **72(5)** = effect of preventing payment if **s.52** order is served upon the payor

***Donatio Mortis Causa*** --- terminal cancer – can give away all assets via absolute gift (no covered within **s. 72**)

* BUT one cannot gift real estate *mortis causa* as a matter of law

**Joint bank account** – the dependant says I want the money under the bank account (**s.72**). I say you cannot have 100% of the money because I contributed over 50% of the money to that bank account.

* Valid position to take as joint owner. BUT **s.72(3)** and **(4)** 🡪 burden of proof is on the person taking that position

## Contracting out of Legislation/WAVIER [pg.882]

* **S.63(4)** enables court to make an order despite any agreement or waiver to the contrary.
  + Standard release provision form from a separation agreement, and this will include release of all rights under part 5 of SLRA. As is the case with separation agreements in family law, the validity and enforceability of agreements depends on the context. Ex. No force or duress and had independent legal counsel.
* **S. 62(1)(m)** one of the circumstances court must consider is any agreement between the deceased and the dependant.
  + For example: if in separation agreement husband was to provide no support to wife. Then H dies. No legal obligation for support, so cannot apply under Part V because not a dependant
* ***Butts Estate v Butts***: court’s jurisdiction to override a domestic contract
  + H to pay W $500/month for life. H dies. Estate = $700k.
  + Court held that she was a dependant and that the current support was inadequate. Entitled to $1.5k per month.

## 

## The Scope of Orders that a Court Can Make (905)

* **Suspensory** order under **s. 59** - page 906
  + gives the court on application the **discretion to suspend the administration** of the probate estate. Prevents payors from making payments to the payee until the support application has been heard.
  + Same as suspensory order under **FLA**
  + Critical if dealing with **s. 72** assets (such as pension benefits & insurance proceeds)
  + Cannot be made if the k of insurance was made and the payment is payable in another jurisdiction to a beneficiary who resides out of the jurisdiction (***Re Urquhart Estate***)
  + When in effect, court may still release parts of the estate to particular beneficiaries if the property is not needed to satisfy a support order (***Hecht***)
  + Examples:
    - A dependant wants a stock portfolio - might discuss attempting to get a suspense order which prohibits the sale of the portfolio (situation must show that there are debts to be paid, or amounts paid to a broker etc).
    - **Family Cottage** - There is an emotional attachment to the cottage and usually gives rise to disputes. If it looks like they will have to sell it, you would seek this order.
* The **Main Order** making an Award **s.58(1)**
* **Further directions** as are necessary to give effect to an order **s.69**
* **Interim** order under **s. 64**
  + ***Re Pulver*** – fair and liberal interpretation consonant with its purpose
  + discretionary and applicant must be **in need of** **and entitled to support.**
  + Need to know “in need of” (means test) and “entitled” to support (responding party having a knowledge of those parties having a right to a Part 5 order).
  + Essentially asking the court to amend the rules of intestacy or the will

**MAIN ORDERS**

**2 general rules**: 1) the courts will strive to give effect to the testator’s scheme of distribution,

2) the courts don’t want to provide the applicant with an estate (i.e. prefer periodic payment to a very large lump sum) (see ***Mannion***), but these rules are also in a state of flux given ***Cummings***.

|  |
| --- |
| Mannion Case – A court in a Part V application will strive to give effect to T’s scheme distribution of the estate   * Here spouse gave spouse life interest – the will made remarriage a condition of other gifts given by T to the dependant. * The **role of the court** is to *provide proper support* – court is *not* obliged to provide the dependant with an estate that dependant could give to other people / transfer to his dependants. |

* When a trial has been completed, the court will make the **main order** and determine as to what the dependant is going to get from the estate.
* **The General principle:** Court will strive to give effect to the testator’s scheme of distribution as set forth in the will: ***Re Mannion***
* Under the former legislation it was the practice of the courts to disturb the provisions of the will as little as possible.
* In other words, they strove to give effect to the testator’s scheme and intention as disclosed but the Will
* This meant that not all of the estate would be changed with the award, but typically those parts of the estate which were not specifically disposed of and were not given to other dependants, such as the **residue**. (***Re McCaffery***)
* It would appear that cases under the new legislation continue to adhere to this policy. (***Re Davies***; ***Re Detinger***, ***Re Mannion***)
* Thus, in ***Re Mannion*** the court directed that the widow be permitted to live in the matrimonial home until death or remarriage, the latter being a condition imposed by the testator on other benefits provided for her.
* Court knows that it is rewriting an individuals’ will 🡪 do with as little damage as possible. **Respect testamentary freedom**
* **Example:** Will of deceased individual (second marriage). Will sets up a life interest in a specific dollar value and says the wife is to be paid the net income with no access to capital for life and on wife’s death the residue is divided equally among children from first marriage. If acting for estate trustee and facing a situation in which it was clear the individual is dependant and required support then would be making submissions along the lines of “your honour this should not be an order of a lump sum, because deceased did not provide an order of a lump sum”.
  + Court should follow the scheme of the will as opposed to court order giving wife ½ residue of estate, because other principle is that the courts do not want to provide the applicant with an estate. [pg.910 ft 288]
  + So, if other side got up and said your honour the correct order here is to amend the Will, the response is No! half the estate is $500k and if applicant dies after $500k is paid then we have provided an estate for the individual and the **purposes of legislation is to provide support**.

**Residue** – if the deceased has given away favorite rings and art, the court will endeavor not to interfere with those requests – but if residue is only $50 then the court will need to interfere with the gifts

**The courts do not want to provide the applicant with an estate**. Object is to provide support. The object is not to provide a big lump sum of money to pass on to the next generation. BUT allowed to provide lump sum under the legislation.

* ***Cummings*** para 50 – consider both legal AND moral obligations

## Variation order

* **S.65 SLRA** [pg.910] where an order has been made under this part, the court at any subsequent date may,

(a) inquire whether the dependant benefited by the order has become entitled to the benefit of any other provision for his or her support;

(b) inquire into the adequacy of the provision ordered; and

(c) discharge, vary or suspend the order, or make such other order as the court considers appropriate in the circumstances.

* Only possible to increase at a later date if part of the estate remains undistributed
* ***Maldaver v. Canada Permanent Trust Co.*** [pg. 911]
  + Court held that **court cannot *increase* an order for support**, since the adequacy of the provisions made by the testator should be determined on the basis of circumstances existing and reasonably foreseeable **at the testator’s death.**
* Example: Court gave dependant daughter $500/month for three years. Cannot come back to court to request $1k per month
* Assuming that the court awarded the $500/month for three years, the court would have to had rewritten the will – residue, evidence on rate of return…residue not divisible until the third anniversary of the date of death --- so money is still available in trust (the residue) – court could still make a variation because money is still in the hands of the trustee
* Example – 1/5 of estate was not enough. Court amends to give daughter 2/5. Daughter goes to court to request more money… but the 3/5 has already been paid out to the other beneficiaries. Practical problem that no money even though legal option for variation
* Let’s say court agreed with submissions and said will give life estate, and 1/3 of estate, and net income, and instead of giving her 2% of capital court says will give her 5%. Then she comes back for more money, but no estate left. By contrast, if another trust fund was established then spouse comes back and says need more money, might have a pitch and leaving some kind of incursion form.

# NATURE OF TESTAMENTARY DISPOSITION – CHAPTER 4 (107-163)

* Following parts are not examinable: 4.2, 4.3, 4.6, 4.7, 4.8

## nature of a Will (107)

“**Will**” isn’t defined in the *SLRA* – **s. 1(1)** states what it *includes*. Will falls under generic term of “instrument” to dispose of property. The essence relies on a few aspects:

1. It **disposes of T’s property** (more than land) (***Ram v Prasad***). Possible to exercise power of appointment by will (i.e. dispose of another’s property) (***Barnes v Vincent***) or simply appoints an executor too though (***Brownrigg v Pike***). *Only* the disposition of property in the will is binding (e.g. directions concerning body are not binding – ***Hunter***).
2. **Takes effect on T’s death**, neither before nor after (***Re Berger***). If it directs to dispose property at a time after death, it is not a will and cannot take effect as such (***Kavanagh***).
3. A will **is revocable** until the testator’s death (thus it is ambulatory, meaning revocable). Revocable as long as the testator has capacity.
4. **T must *intend* to make it** **the testamentary instrument** (i.e. cannot be obtained by fraud, duress or undue influence; testator must be capable; must be made *anima testandi* – with the spirit that you are trying to give effect to your testamentary wishes).
   * It *cannot be entirely conditional* 🡪 e.g. this is my will if I am discharged or if I get into law school. But it can be conditional if it is made in contemplation of marriage. Under *SLRA*, marriage automatically revokes a will.
   * It is *imperative* – uses the words “shall” so it is an order from T to the ET. A document with “I would like you to”, “I hope you can” will go against proving it a will (***Johnson v Farley***). BUT there *can* be words of request within a will.
     + Usually this happens with parents of infant children – leave house to named trusted individual with the request that they make contents available to children if need and appropriate.
     + Also occurs if person getting ODSP –give contents to another person with the request 🡪 this is not a trust and not legally binding.
   * Will is invalid unless *properly executed* (e.g. **must be written, signed**, etc.). It must be more than an outline (***Bennett***), can’t be notes or statement of intent to make a future will or just instructions to lawyer (***Re Moir***).
     + Can make a valid will and ALSO make a video
     + Instruction appointment and signing appointed videoed to ensure testamentary capacity holds up
   * Signed in accordance with specified formality
     + Will not signed with specific statutory formality in Ontario fails, no provisions to correct an error.
   * A Will can consist of several documents.
     + **Codicil:** an amending document.
     + No limitations on number of codicils
   * Wish to incorporate certain unsigned documents in Will
     + Ex. 3 documents and 2 codicils incorporated by reference.

* If k’ually bound to dispose of property in a certain way – still not prevented from giving the property to someone else by will. May give rise to action for breach of k , but it does not affect the validity of the gift itself (***Frye v Frye Estate***)

## Fundamental Formal Essentials

#### s. 3 of *SLRA* – a will must be *in writing*

* *SLRA* hasn’t kept up with technology – can’t videotape and can’t store electronically. But if you sign a real paper and lose it, then you can use the one in the hard drive.
* When there is a large amount of money at stake and question of testamentary capacity, will videotape it for evidence of capacity – not evidence of dispositions.

#### A will must be signed with specific formalities s. 4, 7, 19.

* There must be 2 witnesses present at the same time and both see T sign.
* If these are not followed, then will is invalid – don’t have anything that says “close is good enough”. Wills and POA are the last documents in Ontario that require signing *with specified formalities*, and last document that would be invalid on this basis.

#### Can consist of several documents

* 1) main will, 2) *codicils* for amendment of will, 3) documents that are *incorporated by reference*
* There is no limitation on number of codicils.
  + Particularly where someone is being cut out – better to run a new will b/c that will be the only thing that needs to be probated, also submit both for litigation.

## The fundamentals of a Will are two-fold

1. Appoint a personal representative/executor/estate trustee

2. To dispose of some property

## What is the position of any beneficiary named under a will? [pg.113]

* Latin term: ***Spes successionis*** *“the hope of an expectancy”*
* only has a hope of an expectancy: “***spes successionis***” (***Del Grande v Sebastian***). Beneficiary has no legal interest he can enforce because of principle of revocability that testator can always change will up to the point of death.
* Likewise, if beneficiary dies before testator, property does not go to beneficiary’s estate, it goes to others.
  + “Even if a person is **inarticular mortis** (at the point of death) the heir has no interest in the person’s property” (***Lord Dursley v Fitzhardinge Berkeley***)
    - Point of death or lost capacity and never will regain, beneficiary still has nothing more than expectancy
  + Ex. a will that gives a ring to a child, and the child has no interest in will till moment of death, assuming will is valid. Feature of a will is the testator can change will at any point in time 🡪 it is said that a will is **ambulatory**.
* All that a beneficiary has, aside from a contract, is a hope of *an expectancy* and that person has **no** legal interest in property.
  + Ontario Case affirming this is ***Del grande v. Sebastian*** [footnote 58 pg. 114]

## Formal Lawyer Drawn Will

(Sample Will of Mary)

* First clause: is revocation clause.
* Next clause: is the appointment of an executor.
* Then discusses the executor’s compensation.
  + Recall **Trustee Act** **s.61(5)**  🡪 rules regarding compensation are not applicable where there has been a compensation agreement reached.
  + Compensation agreement is *incorporated by reference* into the document.
* Clause three: *General devise and bequeath* 🡪 T: whatever I own at date of death I transfer to my executors in trust. Gives executor’s full power and authority to deal with assets in such manner that executor thinks is appropriate in their discretion. Also gives them power to hold onto assets for a period of time. However, under CL executor is legally bound to dispose to person’s property ASAP.
* At some point beneficiary is entitled to ask for money, as long as Estate Trustee can give a reasonable explanation as to why not, then court will not find them as negligent.
* Then deals with debts.
* Part of our job as lawyers is to get the description of items.
  + Ex. Cannot just say locket – may be more than one locket. Then there would be a dispute about the locket.
* Lawyers should get specific description of items that are to be disposed of to avoid dispute.
* Clause about the locket and a **substitutionary gift or a gift over** *– wording that says if beneficiary doesn't survive what is to happen* to the locket.
  + Ex. Want it to go to beneficiary’s executor or the spouse
* Clause about general use of remaining articles.
  + Remember, when dealing with someone having the use of personal articles that things deteriorate or diminish in value.
* When drawing Wills must consider “the fist fight”
  + Ex. Two marriages and husband in second marriage gets use of things in the house and when they go to a retirement home and then the kids say well these assets are now diminished in value and you must replace it. This is where you put in the Will that the children take the articles “*as they are*”.
* Also, must clarify who takes care of insurance premiums on these articles
* Paragraph H – where a loan is being forgiven.
* Paragraph I – individual sets up legacies 🡪 amounts of money to go to specific people.
* T: I want X to have $5000. L: what happens if X predeceases you?
  + Legal decision we know that is if you die *gift lapses* and then the client can decide if they want it to go to anyone else.
* Paragraph J – A *life interest clause* where person sets up trust of $200 000 for husband.
  + Whenever you set up a trust, whether it is a share of residue or a specific amount you must consider that there is a capital amount (in this case it is $200 000) and that money Will be invested and there will be an income flow from this money. L: must ask client what happens to the income flow? In this case, the net income is to be paid to husband during his lifetime.
    - Lawyer drawing Will should have said to client do you want husband to have access to the capital in the $200, 000? Could designate a payment of capital or could designate a percentage of the capital.
* What happens to the residue of the estate?
* Clause 4 is known as **the infant’s clause.** 
  + So, where you have a Will where there is someone *under 18 years inheriting money* must say to ask testator what is happening to that person’s money? If don't say what happens then must be paid into court under **Trustee Act.** The parent of infant child has to apply to office of childrens lawyer and explain what the money is for.
  + Say to client do you want a functionary in office making decisions about money, or executor holds all money in trust and then executor is vested with decision about whether to pay out money?
  + In the example the money is to be held until age 25. There is nothing wrong with this client can select any age 18 or over.
  + In standard infants clause executor has discretion in respect to income and capital. Will has to say what happens when person reaches age 25.
* Clause 5 is a *general clause* where you would normally insert in charitable organizations.
  + The treasurer of the organization can sign the release.
  + If the business of charity named in Will changes (*ceases to operate*) then vest with executor **authority** to give money to that charity otherwise money Will lapse and Will have a partial intestacy.
* Clause 6 gives executor a broader range of making investments greater then what the act provides.
* Clause 8 is the *FLA clause* that gifts and inheritances are **excluded property** and **income** from those gifts and inheritances are **excluded if** the document establishing the gift or inheritances says so.
* Clause 9 is the one that clarifies that the term child or children does not include step child or step children and doesn't include anyone in a step relationship.
  + Included this because some cases where judges started to interpret child as people in step relationships.
* Testimonial clause: where people sign
* Attestation: signed, declared ect.
* **Incorporate what are referred to as unattested documents.**
* I want to leave my Life insurance to X, RRIF to Y, RRSP to Z.
  + Best option is go to insurance company or financial institution and have them change the beneficiary of those things. We can change beneficiaries by Will.
  + In terms of the sample Will, this wording would go in as paragraph 3 after appointment of executor and before general devise and bequest clause.

## Mutual Wills (126)

Important to distinguish from a *reciprocal will*, although mutual wills often arise from such a situation.

* When acting for a couple, they usually have reversed wills 🡪 these are *reciprocal* or *mirror wills*.
* A *joint will* is like reciprocal wills, but only one document signed by the 2 people. A joint will does not equate to an agreement to a mutual will, but makes such an agreement easier to find (***Re Gillespie***).
* Mutual will = 2 or more persons make wills, which are similar in terms, in accordance with an agreement to make the wills and not to revoke them.
* Danger with mutual wills is that the assets are impressed with irrevocable trust, so the **surviving partner can’t change the will** (***Dufour v Pereira***). (Technically the wills remain revocable, but agreement against revocation can be enforced in equity – ***Harvey v Powell Estate***).
* Mutual wills doctrine usually arises when spouses leave property to each other in wills and residue to 3rd party with **agreement not to revoke** – court will raise constructive trust that spouse does not revoke will w/o other’s consent or after his death. In other words, the agreement is a contract btn the parties and so must satisfy all the requirements of a binding contract (***Re Goodchild***).
* Agreement not to revoke cannot be assumed, it must be *proved* either from will itself or extrinsic evidence (***Patamis Estate***).
* Mutual will agreement converts **joint property subject to it into TIC** (***Re Gillespie***).
* Mutual will doctrine also applies if parties have already made wills, *then* agree not to revoke them (***Re Fox***).
* Can be an **anticipatory breach** while both are still alive
  + If one party gives notice to the other that no longer wish to be bound or revokes with knowledge of the other, the latter can sue for breach of k (***Synge***)
  + Can only recover damages – court cannot order someone to make a will (***Synge***; ***Birmingham v Renfrew***)
  + Damages will be discounted by likelihood of not being surviving spouse
* The survivor does not need to benefit from the will of the deceased for the (mutual will) trust to be binding (***Sanderson***).
* ***Birmingham v Renfrew***:
  + If she died without altering her will, then he was bound after her death not to revoke his will at all
  + The **doctrine of equity** attaches the obligation to the property
  + The survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will
  + Normally will allow parties to deal freely with the property while both are alive and to enable the survivor to deal with the property as an absolute owner (unless restricted to life estate)
* Best practice: do you want to have a situation where the other partner to the mutual will dies or is incapacitated you can’t revoke? What is your intention? Make a clear written agreement under the *FLA* (contract to create a mutual will).

***University of Manitoba v Sanderson Estate*** (1998) BCCA

* Wills left the estate of the first spouse to die in trust for the survivor for life or until remarriage
* Trustees given discretion to use income and capital for the benefit of the survivor
* Residue was left to University of MB in trust to establish a perpetual bursary fund
* W dies, H makes new will
  + Leaves part of residue to named persons, rather than all to UMB
  + University brought an action
* Trial: action dismissed. He acquired properties through right of survivorship
* COA:
  + taking the benefit of the will = **evidence** to support survivor’s acceptance of joint will and its binding nature (***Dufour v Pereira* but not necessary**
  + agreement = essential (***Gray v Perpetual Trustee Co***)
  + Imposition of the trust successful in this case

## DOCTRINE OF MUTUAL WILLS

**Problem Example**

* A and B are both married for second time.
  + A has 3 children.
  + B has 3 children.

Go to lawyer and say they want to leave estates to each other and if we are both dead we want our estates divided equally among 6 children who survived, but if something happened to one or more of their children then it goes to their children’s children.

* Lawyer being ignorant of mutual wills doctrine makes the will.
* Four years later A dies and a month after B goes to lawyer and says have had to make a difficult decision, I never told you this but A’s children treated me badly, and so I want to make a new will and leave everything to my children.

***Edell v Sitzer 2001 CanLii (decision upheld by CA 2004 CanLii 654).***

**Facts:** Life interest in their respective estates and capital equally to the children. Trust created for each child. Shares in family business transferred to each trust. W dies. H eventually makes new will disinheriting daughter. Exercises the power of encroachment to take family business shares out of her trust. Daughter sues.

**Held: Mutual Will not present here.** No binding agreement between the testators. Daughter did not prove agreement.

* [57] J Culloty: The doctrine of mutual Wills has traditionally been applied in cases where individuals have made *separate wills pursuant to an agreement with respect to their terms*. Most commonly, they have agreed that each will obtain a benefit under the other's will and that other specified individuals will receive the property of each of them on the death of the survivor. In some cases of this sort, the benefit obtained by the survivor under the other's will has been a life interest; in other cases, it has taken the form of an outright gift. Where the requirements for the application of the doctrine are satisfied, *the survivor will not be permitted to defeat the agreement by revoking his or her will after the death of the other.* This result is achieved by ***the imposition of a constructive trust on the survivor's estate for the benefit of those who were intended to benefit under the agreement.***
* [58] The most fundamental prerequisite for an application of the doctrine is that there be **an agreement** between the individuals who made the wills (doesn’t say written agreement). It has been repeatedly insisted in the cases that: **(a) the agreement must satisfy the requirements for a binding contract and not be** **"just some loose understanding or sense of moral obligation"** (***Re Goodchild***). **It must be proven by clear and satisfactory evidence; and (c) it must include an agreement not to revoke the wills.**
* [64] … ***it has been held unnecessary for the survivor actually to obtain a benefit under the other's will***(***University of Manitoba v. Sanderson Estate***) or even for that will to purport to confer such a benefit: ***Re Dale***
* Just because B does not receive any benefit from a Mutual Will it **does not mean it is void**. Mutual Will doctrine still stands. There is no exception.
* In a Mutual Will once a beneficiary is named it cannot be changed even if it is the testator’s own children unless changed before both party’s pass.
  + **Crystalized when party to a mutual will dies or is incapacitated.**
* [58] It must be proven by **clear and satisfactory evidence**;
  + It comes down to evidence.
  + What sort of evidence might there be?
    - This evidence may be that A & B tell their children we’ve made our wills and leaving everything to each other and when survivor dies leaving everything to 6 of you.
    - Or B with her friends saying that A & B made Wills and left everything to each other and left everything to 6 kids.
    - In example given, children of B who want constructive trust imposed. Say to court A & B told us that it was going to 6 of us.

***Brynelsen Estate v Verdeck* 2002 BCCA**

**Facts:** Deceased was married 3 times. Second marriage – H2 had 2 daughters. Made wills in which they gave their respective estates to the other and provided that on the death of the survivor all would pass to H2’s daughters.

* H2 dies. W marries H3.
* W dies without a will. Next of kin were second cousins.
* Found envelope with shares – note in her handwriting that to go to H2’s daughters

**Held:** critical time for determining if an agreement was made is when the wills were made

* She had only known the daughters for a couple of months
* If questioned at that time would have said that did not intend to be bound to leave everything to them
* Passed to estate, not to H2’s daughters.

***Hall v. McLaughlin Estate* 2006 ONSC** [Pg. 135 footnote 162]

**Facts:** H and W each married before with 2 children. Made reciprocal wills that provided that survivor would benefit the families of both spouses.

* 1997 W loses testamentary capacity
* H makes 2 further wills (differed from the reciprocal wills)
* W dies – estate passes to H. Then H dies.
* W’s daughters brought an action for a declaration that ½ of his estate was held in trust for them

**Held:** enforceable agreement found. Evidence – statements H made to family.

**Practice Tips**

Because of ***Edell v. Sitzer* & *Hall v. McLaughlin*,** where a judge hears evidence about whether it is a mutual will, **the standard of practice is that the lawyer would enter a specific discussion with A & B about the *Doctrine of Mutual Wills.***

* Specific statement signed by parties that confirms wills are not Mutual Wills if that is not what parties want
* When parties want to have Mutual Wills then draw a **domestic agreement that stipulates that these are Mutual Wills and cannot be changed without consent of both parties.**

## DOCTRINE OF INCORPORATION BY REFERENCE [pg. 136]

Permits unattested/unwitnessed documents to be incorporated into will

Three requirements, ***In The Goods of Smart*** [pg. 136]:

1. Document must **exist** at the time will is **signed**

* **Onus** falls on the party seeking incorporation to prove pre-existence of doc (***Singleton v Tomlinson***)

1. Will must refer to it as an existing document.

* Can’t exist in the future (***In the Goods of Smart***) or be subject to change (***Re Mihalopoulos***: “to such charities as will find in my paper” – no incorporation as could change) or revocation (***Re Jones***)
* Safe practice is to attach document to the will

1. The Will must describe document in sufficient certainty so that it can be identified.

* If refers to existing doc only, parol evidence is admissible (***Allen v Maddock***).
* See this often for either a compensation agreement or an extensive list of dispositions of certain personable effects.
* Must *sign the memo first* and *will second* – otherwise they are reserving the right to make an unattested future codicil to the will.
* If it is a holograph will, the document to be incorporated must be wholly in T’s handwriting too (if typed or other person’s writing – bad) – reverse is okay.

#### Why put it in a different document?

* Now where we have things saved electronically, it doesn’t clutter the will with different documents, but before it would complicate the paper.
* There can be legal problems if dealing with a holograph will. (below)

**Example:** What you have in the Will of Mary is a typed-up will and compensation agreement is typed up.

* There is an issue where you have holographic will and seek to incorporate a typed document, not in hand writing of testator, and problem is that for a holograph will to be valid it must be **wholly in hand writing of deceased** and so don't have a statement from CA about this point.
* If T signs a will today which seeks or endeavours to incorporate a document by reference that doesn't meet the 3 provisions
  + If sign a codicil and refer to document in codicil then it can be incorporated by reference and this is because there is a legal principle that a codicil republishes the initial Will. Because last clause of properly drawn codicil will always say in all other respects I confer my will dated Feb 28, 2017. [Note 1 – 5 on pg.140 expand on this].

## Disposition of Parts of the Body [pg. 142]

* Executor has custody of remains of deceased and has authority to determine place and manner of burial (***Hunter***)
  + Directions in will wrt T’s remains are not legally binding (***Williams***)
* Now have statute called ***Trillium Gift of Life Network Act*** and this permits people to direct donation of parts of their body.

# WILL SUBSTITUTE – CHAPTER 5 (165-188)

Techniques for succession to assets other than by will.

Why? Minimization of taxes, avoidance of probate fees or taxes and attempts to evade obligations to one’s dependants.

BUT major disadvantage = disposition of property which the grantor CANNOT reverse unless he retains a power to that effect

## 1) *Inter Vivos* gifts [pg. 165]

* For there to be a valid gift donor must have parted with property **absolutely** while living and donor must have the intent to give (“***Animus Donandi***”).
* donor must have capacity to form intent to give.
* Lawyer will have client sign a deed of gift, and that deed is generally good evidence of intent.
  + Legal capacity of donor can still be questioned.
* Manual delivery is normally essential however constructive delivery is permissible.
* Personal property may be given by deed.
* Gifts of land must be made by deed.
* Forgiveness of debt is considered a gift.
* ***McNamee* 2011 ONCA 533 para 23-53 (not examinable but good to look at)**

## 2) Gifts *Mortis Causa* (Gifts in Contemplation of death)

* *Inter vivos* gift of personalty
* Made in **contemplation** but not necessarily expectation of death.
* Conditions: **must be delivered** to donee but in limited circumstances constructive delivery is permitted.
* It is dependent on death of donor and therefore is revocable while donor is living.
* e.g. a client going in for cardiac surgery: “I’m going in for surgery. If I die, take my pen!” Dependent on death of donor, thus he can revoke the gift while living, but revoked absolutely if he recovers from the feared peril.

## 3) Deeds

* A person may transfer his property to another absolutely by deed or may retain an interest while also giving interests to others.
* Where we have a deed of property for children that reserves a life interest with transferor
  + Ex. Person wants to go to cottage until they die and when they die their children have it
  + The donor gave a vested gift immediately upon signing.
* Where property is given away, will see a situation where it is given away on certain conditions.
  + Ex. Cottage property is deeded to someone as long as they let all family use it. If this is broken, then the donor can resume ownership.
* Legality of a condition may come into question.
  + Ex. Giving away a property on condition of a clause that is discriminatory. And if clause is found to be illegal then person could return.
* Problem: It prevents the door from recalling the property should he change his mind.
* In older cases, there were issues about delivery of land deeds.

***Carson v. Wilson***

**Facts:** the individual signed deeds of land but left with lawyer to hold until death – the grantees thought it was theirs, but bc they were never delivered while living, were construed as testamentary, and bc the appropriate formalities were not executed, the will was invalid and thus did not go to the intended beneficiaries.

**Held:** Court found hadn’t been delivered. Probably different if transferees had their own lawyer and it was delivered to them and not registered.

* + They were not effective as *inter vivos* gifts since there was no delivery of the documents and they were in any event, intended to take effect only on death.
  + Hence the gifts were testamentary in nature and since the documents were not executed with the formalities required of wills, they failed.
  + Also argued that the gifts could take effect as *inter vivos* trusts. This failed because Wilson retained complete control over the properties and he had no intention to prepare this.
* In real estate transactions there is no legal obligation on grantee to register the deed to complete the transaction, the registration is a safety precaution to let world know they own a specific property.

## Inter-vivos Trust

Interests of the beneficiaries under the deed take effect presently and are not dependent on the settlor’s death, although they may not fall into possession until that time.

* A transfers shares to B in trust.
* B is to hold shares and pay income to A during A’s life time and then on A’s death shares are to be divided equally among C, D and E.
* In trust law, we refer to A as the **settlor** (person who settles or transfers property into trust) and so A has given up legal title to property.
* Refer to B (person holding assets in trust) as **trustee** this is person who now has legal ownership of assets.
* C is the beneficiary
* In some circumstances, A will reserve a right to revoke the trust.
* Recall provisions of FLA that bring back into property, property in respect of which A has made a disposition in trust, over which A has power of revocation or right to consume or revoke the trust.
  + The trust assets for purpose of FLA are property.
  + **72(e) & 74(1)** can be brought back in
* The fact that *inter vivos* trust is revocable does not mean that it remains subject to the control of the settlor so as to make the trust testamentary.
* Does revocability mean it is not a valid trust?
  + *No*
  + As long as legal ownership has passed from settlor to trustee then it doesn't matter if creating a revocable trust.
* A revocable trust creates serious problems under Income Tax Act.
* The person who is giving away asset must give up control.

***Anderson v. Patton***

**Facts:** Deceased gave $5000 to defendant and requested that he pass $4000 to Patton and $1000 to Kreiver if he should die. Costello died and plaintiff, Costello’s administrator claimed the money because the transaction was testamentary and failed for want of compliance with necessary formalities.

**Held**: the transaction created a **valid *inter vivos***trust under which **defendant held the money in trust for deceased for life, with remainder for the two named beneficiaries.**

* The reason why a **power to revoke** does not make an *inter vivos* trusttestamentary is that, although the title may be recalled under the power, it passed to the trustee when the trust was created. It follows that the beneficial interests also took effect at that time.

## JOINT INTERESTS/Ownership

When you have a true joint interest, the surviving tenant has the right of survivorship automatically. The ownership of the deceased person does not pass through the estate or PR, hence it does not form part of the probate estate (***Estates Admin Act* s 2**).

* Ex. Investment account worth $1 million and don't want to pay probate fees so you transfer ownership from your name into name of you and son and daughter jointly.
* The concept of joint ownership means *surviving joint tenant has ownership accrue to them automatically.*
* Be sure to state expressly in the deed that what is intended is a joint tenancy, otherwise **tenancy in common** is created **(S. 13 *Conveyancing Law and Property Act***).
* A transaction which creates a JT in which one of the parties does not pay any consideration is not regarded as testamentary b/c the **title vests in the donee immediately** – there is a presumption that the transferor or the person who supplied the consideration did not intend to make a gift, but to retain the beneficial interest in the property, to give effect to this intention, since title has vested in the transferee, equity deems the latter to hold the legal title upon a resulting trust for the transferor or the person who made the consideration.

Someone wants to put everything in joint ownership

* Lawyer will say you are giving up control of your assets.
* Ex. Want to sell house and your children don't want you to then you must have their consent to sell.
  + Daughter becomes disabled in car accident and now want to sell house and now need son-in-laws signature because he is your daughter’s power of attorney.
  + Son is in construction business, well if he goes bust and gets sued, the execution creditors could seize interest in property.
    - It would only be a 1/3 undivided interest, but creditors could push you to sell and pay the 1/3.
* Disposing of asset 🡪 and if dispose of investment account that has substantial financial gains it is a taxable event and CRA can come back and tax you on those dispositions.
* Will substitute of creating joint assets seems simple but has consequences that flow from it.
* NOTE: only true joint assets are not subject to probate fees.

#### *Pecore v. Pecore* & *Saylor v. Madsen* [pg. 169 ft. 21]

Two Key principles regarding joint assets:

1) When dealing with transactions between parent and minor child there is a ***presumption of advancement*** *(advancement is term for gift).*

* + Rebuttable presumption that parent is intending to make a gift

2) By contrast where parent transfers asset in joint ownership with adult child the **rebuttable presumption is resulting trust**.

* + The trust is that the brother is the sole owner of account legally because nature of joint ownership is that asset passes to surviving joint ownership. But in this case the brother was holding the asset in trust for the estate (in this case it was simple because estate was going to be divided equally between two siblings).

***Pecore* & *Madsen*** have been helpful in situations where confronted with a client having transferred those assets. They provide rebuttable presumptions but require evidence.

* In contrast we have to have details of client’s assets and liabilities
* Ex. When client says I have $100k bank account joint with daughter then it falls on us as lawyer to say client is this simply an account of convenience (i.e. Childs name is on account because if you are physically limited that your child can go to bank and withdraw money) OR do you truly intend that child will own entirety of account on your death. Where client says, “I intend account to go to child completely” then not only are we making a note to that affect but also having client sign a specific document so on client’s death, counsel for the hospital says this joint account is to be part of estate, the lawyer has proof and can show clients intention.

***Edwards v. Bradley*** [pg. 169 ft. 22] **Above presumptions do not apply to joint accounts**

**Facts:** mom had a joint bank account with her daughter. When she died, she left a farm to her son and said the residue was to be split equally bw the rest of her kids, thus her intention was not to leave the balance in her account to her daughter – but if on the facts it shows her intent otherwise, **then the case says that a joint account is thus a valid method whereby a person my effectively pass money to another on his death without making a will, and the gift is revocable simply by the expedient withdrawing of the money**

* + It's a matter of evidence, what is intention of parties when they established that joint account?
* Thus it follows then that transfers into joint bank accounts are *inter vivos* transactions and not testamentary, thus so are other will substitutes like life insurance and pension benefits
* **Section 14 of FLA** [pg. 169 ft. 20, pg. 817]

**14.** The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

* + There are potential legal complications when legal assets are held in the names of 2 people – rely on **s. 14** **of *FLA*** (p. 77): **where spouses own assets together, there is a statutory (rebuttable) presumption that they are owned jointly**. Where assets are owned together, not with spouse, there is a question of whether it is a **true JT** or owned for the sake of convenience.
    - Ppl want JO b/c it avoids probate fees – must figure out if they just want to save the fees or really want the JO.
* Recent matrimonial reform legislation abolished advancement as bw husband and wife and instead there is a rebuttable presumption of resulting trus

## LIFE INSURANCE [pg. 172]

* Life insurance is a method of moving assets to the next generation.
* Life insurance is a contract.
* Owner of policy enters a contract with life insurer that says provided that owner pays premiums then on death, the insurance company will pay a specified amount.

A contract under which an insurer agrees to pay insurance moneys on death or a specified event. This includes an annuity contract.

🡪 in life insurance there are individual policies and group policies for employers

* There must be a ***beneficiary designation*** – you can designate in 3 documents:
  + Within the **contract** of insurance (***Insurance Act* (*IA*) s 190**);
  + A **declaration** (separate from policy). Write to the insurance co to have it changed (***IA* s 190**)
  + A type of declaration located in the **will** (must refer to policy by company name and policy number) (***IA* s 192**)
* The capacity requirement to sign a beneficiary designation for a life insurance policy is same as testamentary capacity
* Most recent legal designation is the one that stands!
* A beneficiary designation is **revocable** (presumption) but can be irrevocable if says so expressly (***IA* s 191**).
* Can set up an insurance trust for a minor.
* **If the will is revoked, any designated beneficiary in the will is also revoked** (***IA* s 192(3)**).
* The proceeds payable to a named beneficiary (not your estate) are ***creditor proof*.** (***IA* s.196(1))**
  + This is a main estate planning factor.
  + Must assess how risky a business is and how likely will the business be subject to litigation.
  + May be an individual or a corporation
* **If beneficiary is your estate**: Claim must be made by PR, **no longer creditor proof**, also included in probate fees.
* If designation in favour of spouse, child, or parent are in effect, the rights of insured in the contract are **exempt from seizure** (***IA* s196(2))**
  + “**Term insurance**” has very little cash surrender value, but if he has a policy since 1970, it has cash surrender value – with these beneficiaries, no creditor can get at it.
  + Overridden by **s. 196(2)** is the ***ITA*** – **if you owe tax, life insurance policies can be seized** (***MNR v Moss***)
  + Also overridden by **s 72(1)(f) of *SLRA*** (i.e. **available for equalization claim** – *value back to the estate*).
    - Cash surrender value on day before death
* Usually more beneficial to name an individual or organization as a beneficiary b/c of rights of seizure and b/c they are able to get the money in 7-10 days by showing a claim form and a death certificate.
* **S. 207** *Insurance Act* – where a party has made an agreement and one party owns a life insurance K and agrees to irrevocably designate a beneficiary, **it isn’t binding until the insurance Co has notice of the irrevocability**.

**Example:** Two kids and $100k in assets, one kid is mentally challenged, and they get a pension from government, so person cannot have more than $5.5k in assets or their ODSP will be cut off. So, looking at creating a **Henson Trust** for person. But if you name 3 kids then all will get money and child who gets pension will get 1/3 of insurance money and won’t be subject to Henson Trust because we must create it in the Will. So, sometimes person will want to pay probate fees so that terms of Henson Trust can attach to it.

* If you are acting on behalf of spouse and part of separation agreement is that other client will name your spouse as beneficiary, it is your role as lawyer to make sure it has been filed to insurance company.

## 7) PENSIONS AND BENEFICIARY DESIGNATION [pg. 175]

* RRSP is an income tax vehicle allows you to put certain amount of earned income each year into a savings plan. You can deduct from your income in that year the amount that you contributed and so long as money stays in plan then **none of the income is taxed**. Money is not taxed until it comes out. The theory is that when you reach retirement years and no income flow then the person can draw money out of RRSP on most tax advantageous basis.
* RRIF is the fund into which RRSP morphs if person is holding the RRSP as of December 31st in year that they reach age 71 it must be taken out and buy an annuity or covert money into a RRIF, then by statute you must take out a minimum amount each year. What remains while living is not taxed. You are taxed on RRIF withdrawals. Whatever is left in RRSP or RRIF as date of death, unless given to a spouse it is taxed in full in year of death.
  + RRIF has mandatory minimum withdraws, but still earning income on amount.

Part 3 of *SLRA* authorizes designations of beneficiaries for pensions and retirement plans (not RRSPs) (by **s. 51(1)(a)** instrument or **(b)** will).

***Amherst Crane Rentals ltd. v. Perring* 2004 ONCA**[Para 25-33 pg. 181-182]

* **RRSPs to designated *named beneficiaries* do not form part of the estate** and go directly to the beneficiaries (by virtue of ***SLRA* s 53**), and so are **safe from creditors**. If unnamed, default is the estate.
  + Also applies to RRIFs and most likely lump sum pension benefits and retirement plans.
* Day of reckoning when you die and you have an RRSP or RRIF unless it “rolls-over” to spouse.
* Spouse for income tax includes **both** married and unmarried spouses.
* Where it is CL there are certain forms to be filled out to establish identity as a Common-Law spouse.
* **SLRA part 3** does not cover Insurance Act contracts - **s.50(2) of SLRA**
* Used to say RRSPs / pensions were not life insurance and so available to creditors.
  + When client has a pension fund and if acting for a teacher, motor car plant, worked for province/municipality and pre-retirement, know that pension is big money and a lot is at stake. There is a distinction b/w unretired employee and retired employee – either taken joint life pension or pension with guarantee. These are different types of assets.
* Pension plans are less protected from claims of creditors unless they are issued under the ***Insurance Act*.**
* **Capacity** for designating an insurance beneficiary is same as required for testamentary capacity (***Stewart v Nash***).

\*Will substitutes can be used to reduce probate fees – these are payable on the gross assets (not net worth) owned by the person – in Ontario the only deduction is the mortgage.

## 8) USE OF WILL SUBSTITUTES TO AVOID PROBATE FEES (185)

* If you make gifts to minors or to a spouse, the income can be attributed back to you.
* Ex. Client has $30k of investments and art/jewelry worth $300k. What to do to reduce probate fees?
  + MULTIPLE WILLS
  + First will for $300k and second will for art and jewelry. **Law of Ontario permits Jewelry and Art to flow to 3 adult children under secondary will.**

#### 

#### a) Multiple Will

Technique used where client has a large asset that doesn’t need probate to deal with it. Eg: shares in a non-offering corporation where the net worth is large or real estate or expensive jewelry or art. I.e. primary will deals with probate assets and secondary will deals with non-probate assets (multiple wills to avoid probate upheld by ***Granovsky Estate – not necessary to submit second will for probate***).

* In multiple wills, the wills refer to one another.
* A testator makes a **primary will of property** in respect of which **probate is desired or necessary**, such as real property, publicly-traded shares, or life insurance [Pg. 187 ft. 115] and a **secondary will of property in respect of which probate is unnecessary**, such as shares in private companies.
* Law in Ontario permits jewelry and art to flow to adult children under secondary will. So, executors of that will simply sign the documents to formally transfer ownership without paying probate fees for assets passing under secondary will.
* **Note:** Must be assets that don't require a certificate of appointment of an estate trustee!!

#### b) Alter Ego Trust and Joint Trust (defined in s 248(1) of *Income Tax Act*)

As long as set up properly, the property has left the hands of the settlor and gone to beneficiary like an *inter vivos*.

* In situations like ***Saylor v Madsen*** case (where person had joint bank account with one kid and the other kids say it wasn’t truly meant to be joint), that situation presents an interesting ethical point for us bc if there is an asset in joint ownership and it’s not a true joint asset then it’s part of the probatable estate and we have to pay fees on this (joint bank accounts don’t have to be declared), when a client signs a probate application he is making a sworn statement and then we go and sign.
* Assets exempt from probate fees:
  + True joint assets
  + Life insurance paid to a named beneficiary
  + Lump sum pension benefits paid to named beneficiary
  + RRSP & RRIF paid to a named beneficiary.

# SUBSTITUTE DECISIONS – CHAPTER 19

* Use chapter 19 from old book for readings.

## Incapacity and Substitute Decision-Making

* The Ontario ***Substitute Decisions Act***and the ***Consent to Treatment Act***introduced the concept of “capacity”.
  + The scheme accommodates varying degrees of capacity.
  + Fosters a person’s participation in DM to the extent of his ability
  + Capacity = task and time specific
  + Does the person understand the info that is relevant to making the decision?
  + Does the person appreciate the reasonably foreseeable consequences of the decision being made?

The legislation allows:

(a) individuals to name who they want to make decisions for them should they become incapable of making decisions themselves

(b) individuals to express their wishes about how they want their property and themselves taken care of when they can no longer make those decisions; and

(c) created a legal structure that governs almost all matters relating to SDM, including capacity assessments and the ability to oversee the actions of the named SDMs when the person is no longer capable of supervising the attorney’s actions.

## Capacity to Grant and be Named in a Power of Attorney

***Substitute Decisions Act*** specifies **the information that must be understood by the grantor** in order to be considered capable of granting a continuing power of attorney for property:

* **S. 8(1)** A person is capable of giving a continuing power of attorney if he or she,

**(a)** knows what kind of property he or she has and its approximate value;

**(b)** is aware of obligations owed to his or her dependants;

**(c)** knows that the attorney Will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a Will, subject to the conditions and restrictions set out in the power of attorney;

**(d)** knows that the attorney must account for his or her dealings with the person’s property;

**(e)** knows that he or she may, if capable, revoke the continuing power of attorney;

**(f)** appreciates that unless the attorney manages the property prudently its value may decline; and

**(g)** appreciates the possibility that the attorney could misuse the authority given to him or her.

* The SDA requires that a person be **18 years of age** to grant a legally binding power of attorney **s.4.**
* The attorney (i.e. The donee of the power) must also be 18 years of age **s.5.** and capable of managing property **s. 12(1)(a)**
* In contrast to power of attorney for property, a grantor of a power of attorney for personal care in Ontario only has to be **16 years of age**. **S.43** & the attorney named in POA for personal care must also be 16 years of age or older and capable of making personal care decisions.
* In addition to age requirement **s. 47(1)** 
  + A person is capable of giving a power of attorney for personal care if the person,

**(a)** has the ability to understand whether the proposed attorney has a **genuine concern** for the person’s welfare; and

**(b)** appreciates that the person may need to have the proposed attorney **make decisions** for the person.

Documents called ***power of attorney*** (“POA”)

* **A POA** is a document that confers upon another (the attorney) an authority or power to act on behalf of the person granting the authority (the grantor or donor).
* **Serves as a document that attorney can produce to verify his authority to act with 3rd parties on behalf and in the anme of the grantor of the power**
* ***Substitute Decisions Act*** works that if you sign power of attorney for property in the morning that **does not** preclude person from signing something else. Person still has capacity. If do not have capacity, then only power of attorney can sign.
  + Financial power of attorney -- both people can keep working together.
* With a medical power of attorney **cannot sign someone into nursing home if they still have capacity.**
* A bank generally will not act on a Will so also a financial institution will want to see original copy of power of attorney.
* There is a structure for individual to make power of attorney for property and property doesn’t mean just land.

SDA:

* **S. 2-14**
* **S. 15-21** provides a structure for what is called **statutory guardianship.** 
  + A certificate of **incompetence** is issued by attending physician.
* **S. 22-30** establish structure for court to **appoint a guardian of property.**
* **S. 46-53** authority to make **power of attorney** **for personal care.**
* **S. 55-65** structure for court to appoint a **guardian of the person**
  + When someone is not properly taking care of the person under their care.
* Other than certain conditions and restrictions a power of attorney is able to make decisions on behalf of the person.
* By contrast, if guardian of property is ordered it is too late for POA because the person is already incapacitated and so the court had to determine the guardian.
  + Court chooses who is going to look after decisions.
* Have to file **management plan**.
* When you do POA for personal care you can say I do not want to be accommodated at ABC nursing home and POA has to follow this. These terms are called **advanced directives.**

## Determining Incapacity for the Purpose of Invoking a Power of Attorney

* Determining loss of mental capacity to make **property** decisions can be determined according to **instructions that the grantor specifies in his/her continuing POA**. If not specified then an assessor trained by the Public Guardian and Trustee’s (“PGT”) office or a physician must determine mental capacity to manage property.

**Capacity** to make certain decisions will always be based on **2 questions**:

1. Does the person *understand* *the info* that is relevant to making the decision?
2. Does the person *appreciate the reasonably foreseeable consequences* of the decision being made?

# POWERS OF ATTORNEY FOR PROPERTY

* Format for POA for property [pg. 970 edition 7]
* To grant a POA for property the grantor has to be 18 **s.4**
* Grantor also has to be capable.
* **S.2(1)** there is a presumption of capacity and third parties are entitled to rely on that presumption unless there are reasonable grounds to believe otherwise.
* **S. 8** the criteria for giving of POA of property [pg.950]
  + Person must know the **kind of property** they have, **the value** of the property, must know the attorney can do anything on donor’s behalf **except** make a Will.
  + Person must know attorney must account for his or her dealings – this is what I have done with money.
  + The donor must know that he or she can **revoke** the continuing POA.
  + The donor must **appreciate** that the value of property may decline unless the attorney take care of it prudently.
  + The attorney may misuse authority granted.
    - These criteria must be satisfied.
* When there is doubt about whether the person has capacity to give POA for property or personal care, then an assessor Will be called in.
* Assessors are quasi-government officials. The list of assessors is maintained by the Public Guardian of Trustees.
* The grantee, the person who is the attorney, **must be 18** and **must be capable of managing property** (**S.5)**
* **S.6** describes when a person is incapacitated as to property (i.e. *capacity questions above*).
* Under *SDA* it is the **grantor who specifies *who* *determines* who assesses his capacity** for property. Could be any person(s). If there is no process for certification, then default is to an assessor appointed by Public Trustee Office or a physician (**s 9(3)**).
  + We also have to speak with ppl who say they want a specific doctor to be the assessor, but if the named person is unavailable then there is a delay and expense issue.

### 

### Creation

* The requirement for a valid continuing power of attorney is that a grantor capable of granting the power, a named attorney or attorneys, a statement that the attorney has the power to make property decisions on the grantor’s behalf, the grantor’s signature, the date, and the signature of two qualifying witnesses.

### Conditions and Restrictions

* If POA does not say otherwise, an attorney is entitled to take annual compensation from the grantor’s property at a prescribed rate.

### Exercise

* A valid POA for property is considered to be in effect when the original, signed document is in the hands of the attorney and the attorney, in accordance with any conditions or restrictions in the document, is acting on behalf of the grantor.

### Termination

* POA ends with grantor’s death

## Alternative Methods for Making Decisions About Another Person’s Property (974)

### Statutory Guardian for Property

* Where a person in Ontario is *admitted* to a ***psychiatric facility*** **(s 15)** or is *assessed* ***incapable*** *and* ***no POA*** or person likely to apply is found (**ss 16 & 22),** Public Guardian and Trustee becomes the statutory guardian of property.
* Public Guardian will step aside if there’s a valid POA, unless some evidence of a money crime (less clear for non-money crime).
* **S 16.1** discusses termination of statutory guardianship and **s 17** who can apply / process for replacement POA (see pp. 975-76).
* Most people put in an OPGT clause as do not want the government making decisions automatically on their behalf if become incapacitated (which is the default unless valid POA)
  + If valid POA and OPGT is satisfied, it’s all good, if not and no family wants to apply for it, the OPGT takes over

### Court appointed Guardian for Property (under s 22)

* This is a last resort when all other substitute decision-making options have failed or are unavailable (e.g. ***Re Hammond Estate***).
* **S. 24** (p. 977): Restrictions on who can be a guardian – usually conflict of interest issues.
* Difference b/c AFP and GFP – once GFP the signature of the donor has no validity, but with AFP both are valid.
  + Eg: Apply to the court for a GFP (committee of an estate) when gambling it all away.
* A GFP means that you don’t know who will be appointed and more expensive so better to have a AFP.
* If the event triggering the transfer of power is not clear, the POA cannot act until grantor is found incapable of making a property decision – **s. 9 of the *SDA***

**POA for Property (AFP)** (p. 956) – **valid** and **effective** from moment ***signed***.

* A **general or bank power of attorney** under the *Powers of Attorney Act*, does not survive incapacity.
* A **continuing power of attorney** is one that survives the incapacity of the grantor **(s 9(2)).**
* **S.7(1)** of the *SDA* says grantor must express state POA **is to be continuing** / survive incapacity and then any other POAs are revoked unless there is a provision for multiple continuing POAs **(s 12).**
* As flexible or as restrictive as the grantor directs. If no restriction, POA can do anything the grantor can except make will (**s 7(2)).**
* No restriction on number of **Attorneys in Fact (AIF)**
  + As a matter of practice, the AIF at the *time of making* the POA doesn’t have to sign anything (differs in other provinces).
  + B/c the AIF doesn’t have to sign, it is important to know that the client has discussed the appointment with the AIF and the AIF is agreeable to the appointment.
  + Just as an executor named in a will has the authority to renounce, so does the AIF.
    - Should have a back-up to deal with things if the AIF isn’t there or renounces it.

### Creation – legal requirements:

1. Grantor capable of granting power (need not be capable of managing property though) **(s 9(1)),**
2. Named attorney(s),
3. A statement that the attorney has the power to make property decisions on the grantor’s behalf,
4. Grantor’s signature, the date, and the signature of 2 qualifying witnesses **(s 10(1)).**

So how is this POA created? Have grantor and one or more grantee

* + One named, one as back up
  + The client must know the different b/w ***joint*** (must act together) and ***joint and several*** (means any one of the named people can act). If more than one person is named and this is not specified then they must act jointly **(s 7(4)).**
  + If there is a **joint appointment** and if one dies or disabled, then the others take over (not ineffective document) **(s 7(5)).**
  + Grantor can specify the POA come into effect upon a specified date or contingency **(s 7(7)).**
  + When you want one to be the POA and the other to be the backup then you do two separate POAs, releasing the first to A, thus you shouldn’t have 2 out at the same time.
  + If **consecutive** – if not A then B, then if B went to financial institution, they didn’t know the meaning of “failing A then B”. Now 2 POA – in first A will appoint B, and in the second A will appoint C and then the client signs a separate document that says want POA released first to B and only to C if B isn’t available. This means lawyer gets direction.
* **S 10(2) *SDA*** restricts who can be a witness – main restriction is that the **donee** or **AIF** cannot be a witness (see p. 957). Note that even if POA doesn’t comply with **s 10(1)** or **(2),** court still has discretion to uphold POA if it is in the interests of the grantor or his dependants **(s 10(4)).**
* Does document carry on **after incapacity?** – not effective if doesn’t survive incapacity **(s 7(1)).**
* Do we put in clause that says if client in psychiatric facility then is it the Public Guardian or the AIF who decides?

## How does POA for property become activated?

* Set up POA for property
* POA becomes effective when signed
  + RISK if in hands of donor 🡪 can go to bank the minute it is signed
  + Better for donor to leave document to lawyer and give specific instructions for when can be released
  + Lawyer = gatekeeper of the document
  + When can release:
    - Report for capacity assessor saying that the individual can no longer manager property
    - If the donor authorizes me to release– it is not uncommon for them to call and say that I’m fine, but I am just tired of handling my money, paying bills, ect. I now want my daughter to handle my finances. Daughter comes in and signs.
    - Third party takes to bank to activate

When client is making the POA for property the client has a choice:

* Option 1: the POA document (for property) becomes valid the moment that it is signed. On that document, there will be no statement along the lines of “this POA becomes affective when …” because POA for property is valid from the moment it is signed.
  + If it fell into hands of attorney and if attorney unknown to grantor were a crook then the attorney could take original document to donors bank and could close persons bank account.
* Option 2: Alternative is that the grantee specifies who determines capacity and it doesn't have to be an assessor or a doctor, but if there is no process for determining capacity then **s.9(3)** comes into play and the incapacity is determined by the PGT capacity assessor or by the physician in psychiatric facility who issues a certificate of incapacity under the ***Mental Health Act.***
  + What are the risks of selecting this option?

1) The problem is that PGT assessors are not cheap it is about $1200

2) Also if someone has a stroke without notice, there is a delay involved. If in a coma but there is a POA that says can only be active when third party declares incapacity this could take a matter of days, and the problem is if owner of business then someone must make business decisions.

* Clients will often leave document with lawyer, and lawyer will take from client a clear direction (written document) as to events that will enable lawyer to release document.
* To protect lawyers, the document should include wording such as “in any other circumstance the lawyer acting in good faith and in the best interest of client determines it is appropriate to release the POA”.
* In this dynamic the lawyer becomes gate keeper of document and attorney has to come to lawyer and explain circumstances and lawyer looks at direction and see if this is appropriate to release document.
* Note 2 pg.957 – good discussion \*\*\*\*
* Lawyer’s make recommendations, clients make decisions

General theme that client can choose, but if they don’t, there is a statutory default position

* Expense for capacity assessor
* But doctor assessor = OHIP
* Expense + delay

Can be acted on the minute it is signed, not so for POA for personal care

## Powers of Attorney for Property. Example on page 970

[pg. 955]

* Talking about **POA for property under SDA** which are **continuing powers of attorney** and are continuing because the authority given continues past my incapacity. The document can be used at a point when person is still capable and can also still be used beyond when person is incapable.
* Key piece of POA for property: ***the grantor so long as he/she remains capacitated can continue to run their business.***
* Myth: if give someone POA for property than you have to give up authority 🡪 not true
* Still have a statute called ***POA Act.* Under this Act those documents become invalid when person becomes incapacitated.** 
  + Ex. client building house and they had to make selection of floors and wall coverings and they were called to England on emergency and these selections have to be made and if you don't make them by a specified date then builder makes selection for you. So they set up a POA under POA Act that gave daughter authority to sign any documents and take any acts that may be necessary under an agreement of purchase and sale. It was not a general continuing POA.
* When we create these continuing POA then we have grantor that have to decide who is going to make the decisions and if they could name only one person lawyer should encourage them to have a back-up.

2 or more people appointed

* **S.7(4) of SDA** that says if more than one attorney and not specified then they **must act jointly** which means must act together.
  + If signed cheque is needed, then BOTH need to sign
  + Opposite of the legal concept of a joint account
* **Contrast, if client wants either to be able to act then we appoint X and Y jointly and severally.** 
  + Either or situation
* Appointment of X and Y jointly may not be a good idea because it sets up possibility of dead lock.
* Possible it says want all 3 kids involved jointly or could be any 2 of the 3.
* Next: When setting up POA for property have to **establish scope of authority.**
* It is possible to set up POA that is restricted to particular assets, but probably not advisable.
* **Restriction:**
  + **Type of asset**
  + **The Institution**
* If wants restriction, need a file record that discussed the risks with the client
  + POA is going to blame you, not client
* Maybe instructions with particular assets, may say don't ever close CIBC account always maintain at least $15,000 in bank.
* Is it effective on another contingency or on a particular date and this is provided on **s.7(7)**
  + Provide a date or a contingency like upon admittance to the hospital POA becomes effective
* Often insert a clause that if admitted into psychiatric attorney then want attorney named in this document to be attorney and not the Public Guardian and Trustee.
  + Most clients do NOT want the government involved in their financial affairs
* Grantor must sign document, there must be two witnesses.
* **Process for signing POA is not the same for signing a Will.**
* SDA says need 2 witnesses. Certain people cannot be witnesses **s.10(2)** 
  + S. 10(2) The following persons **shall not be witnesses:**

1. The attorney or the attorney’s spouse or partner.

2. The grantor’s spouse or partner.

3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.

4. A person whose property is under guardianship or who has a guardian of the person.

5. A person who is less than eighteen years old

* One of the prohibited parties is the spouse of grantor and partner of grantor.

### 

### Someone mistakenly witnesses document

* **S. 48(2)** restriction on who can be witnesses – refers back to **s 10(2)** with saving provision of **s 10(4) if we make a mistake.**
* **Court has to be satisfied that no harm done**
* If by mistake someone in prohibited section witnesses document then there is a non-compliance in **s.10(4)** where there is an application to court, court can declare the document to be effective if they are satisfied it is in the interest of the grantor.
* **Consecutive POA** – if not Lyn then Keith if not Keith then Lyn
* **S. 7(2) SDA -** The continuing POA may authorize the person named as attorney to do on the grantor’s behalf anything in respect of property (not just real estate) that the grantor could do if capable, **except make a will.**
  + **Will has been interpreted by the ON courts as including quasi-testamentary acts such as designating a beneficiary under an insurance policy,** changing the ownership of an account (including adding a joint owner)
  + If Attorney was using his authority to do something that was not in good faith (contrary to fiduciary duty), the expansion of the word will to a quasi-testamentary act makes sense
  + BUT if for example the donor has a will that leaves everything to his married spouse and in the taking of the instructions it becomes clear that the donor has a $200k bank account and an insurance policy payable to the estate. Lawyer says to the donor – everything is going to your spouse. If you want to save probate fees, make her joint owner of the account and beneficiary of the insurance policy. 4 weeks go by. The client has a stroke before he goes to bank and becomes incapacitated. In good faith circumstances, shouldn’t attorney be able to take those acts?
* POA for property can give gifts that are authorized in POA

***Richardson Estate v. Mew 2009 ONCA*** [pg. 403 para 42 & 31]

* + **Para 31:** Trial J, I agree with the submission of counsel for [Ms. Mew] that the designation of a beneficiary under a life insurance policy is akin to a testamentary disposition.
  + **Para 42:** In this regard, it will be recalled, the motion judge doubted that Ms. Ferguson had the right to take these actions because he was of the view that they would constitute breaches of her fiduciary obligations as attorney. I agree.
    - **Confirming the correctness**
* Another quasi-testamentary disposition is if the donor owns property in his/her own name and attorney attempts to transfer the property.
* Ex. Let’s say client appoints X & Y jointly then next question is what happens if X dies or becomes incapacitated.
  + **S. 7(5)** the other party carries on.
* Lawyer often work with clients in terms of who they appoint as executor.

### When is a Person incapable of managing property?

* **S. 6** of statute.
* Fundamentals for granting POA for personal care – form can be seen at pg. 989.
* **S. 43** the grantor has to be 16 and the grantor has to be capable and we can rely on this presumption of capacity under **s.2**
* Criteria for capacity for POA for personal care is under **S.47**
  + Different then POA for property in terms of capacity
  + *Person can give away POA for personal care if the person has ability to understand whether proposed attorney has genuine concern for donor’s welfare & appreciates attorney can make decisions for the donor.*
* Generally, sometimes can be a POA for personal care but not for property because they don't meet the high criteria of POA for property.
* *Grantee of POA for personal care must be 16 and capable of making decisions* **S.44**

### Whether attorney has right to make gifts or loans?

* Limited authorization for gifts in *SDA* **(s 37(3))** and but grantor’s needs always take priority **(s 37(4)1),** and there is a limit on how much can be given out as gifts / charity **(s 37(4)6).**
* Unless POA says otherwise, these can *only* be made if there is **reason to believe based on intentions** that the person expressed words when capable that **they would authorize such gifts or loans to friends / relatives if capable**. **s. 37(4)2.**
* Likewise charitable gifts only allowed if grantor made such expenditures when capable (or authorizes in POA) **(s 37(4)3).**
* However, gifts / charity shall *not* be given if grantor, *even while incapable*, expresses a wish to the contrary **(s 37(4)5).**
* Raise the issue with the client to see if they want to include the authority to make gifts.
  + Usually this relates to helping out adult child on a regular basis.
  + Still this could be theoretical b/c bills are paid before gifts.
* Under *FLA* parents have obligation to support minor children, but not over 18, so concerned about parents having children in University with no provision to make gifts or loans to these children in the POA.
  + Could also be a situation where they are raising a child not their own – e.g.: niece or nephew.
* **Charitable Donations** client can make those decisions but cannot be made unless in the document and even if in document they are limited by amounts set forth in document.
* **Lawyer cannot make recommendations**
* Do you want the attorney to have the RIGHT but not the OBLIGATION to make charitable donations?
* Some lawyers ask client if attorney has right to invest in mutual funds, they ask this because mutual funds involve delegation of authority.
  + If attorney is going out and client has direct stock portfolio and client is making direct decisions about those stocks then not an issue but where the money is invested in mutual funds the person who owns mutual funds is delegating responsibility for management of assets in the fund to manager of the funds.
  + Old English rule: A delegate may not delegate further. An attorney is a delegate and by investing in mutual funds attorney is delegating further.

**Investments in Mutual Funds** – AIF doesn’t have this right (unless POA says otherwise, which is common): CL prohibits delegating authority for fiduciary (AIF is a fiduciary – **ss 32(1)** & **38(1)),** and mutual funds involve such delegation (***Halsam***).

* Courts have said investment is allowed if AIF makes the investment decisions (***Canada Trust v Rutherford*).** Some delegation of authority is allowed (i.e. investment advice) as long as the ultimate responsibility for decision remains with AIF (*Re Miller Estate*)

Right to consent to dealing with matrimonial home.

### Conditions and Restrictions (958)

* **General Unrestricted** in *SDA*: POA can do any act of finance **except make or amend a will** **(s 7(2)) (**only has a right to *see* the will) – **Note**: a will is not restricted to a testamentary instrument. This restriction likely applies to other things testamentary in nature such as changing the beneficiary designation for life insurance, RRSP, RIF or pension plan (***Descharnais v TDB***).
  + **Transfer of Assets into** **JO** – this is a situation in which these will-like acts occur after the donor of POA is incapacitated. There is a benefit to having assets in JO b/c they pass by survivorship and don’t have probate fees.
  + Less clear if not incapacitated
* It is critical that we explain to the client that AFP have **full and unrestricted access** to the individual’s **assets**. This tells them the amount of trust they have to have in the person they appoint.

**Compensation & Standard of Care** – **S. 40**: Unless POA says otherwise, AFP is **entitled to annual compensation** from grantor’s property **at the prescribed rate** – although grantor can also specify a rate of compensation **(s 40(4)).**

* If **no compensation** is taken, standard of care is what a “person of ordinary prudence would exercise in the conduct of his” own affairs **(s 32(7)).**
* If **compensation** is taken, standard of care is of “a person in the business of managing the property of others” **(s 32(8)).** All financial institutions have branches to manage assets for wealthy people, so this is generally held to be the standard.
  + **Note**: ***Garonsky*** claims that taking **s 40(1)’s** permissive rate does *not* impose higher standard unless AIF has business acumen.
* If **no incapacity with grantor**, lower CL fiduciary standard of care of an *agent* (***Banton***).

## How is POA exercised? (960)

* Original document - In hands of attorney and **any conditions or restrictions as to its activation has been fulfilled** and if became valid when signed then it must be in hands of attorney. Attorney takes it down to financial institution and files it.
* Financial institutions will not be satisfied with a photocopy.
* If document contains a triggering event it must be clear.
* Where we have people being appointed as back-ups the commonly accepted practice is there is one power of attorney that appoints A and a second separate document that appoints B.
* Lawyer is instructed to give document first to A and if A is dead then give document to B.
* “I appoint Sam, failing whom Wayne” 🡪 banks started getting sticky – asking what does that mean? Specify the triggering event that gives Wayne the authority

## Duties of POA for Property (962)

* **S. 38(1) -** says that **S.32** apply with necessary modifications with an attorney acting under a continuing power of attorney.
* Key point for **S.32:** a guardian of property is a **fiduciary** whose powers are to be exercised and performed diligently with honesty, integrity and good faith for the incapable person’s benefit
  + Fiduciary is one of highest standards in British-Canadian law
    - Highest amount of responsibility
  + Beneficiary can attack attorneys for not acting in good faith
    - Guardian of Property includes POA of property
  + Person must act in utmost good faith for individual who has appointed him or her and cannot allow interests of others to interfere with that.
* Gather in and martial the details of the assets and liabilities as lawyer to be able to give POA the information 🡪 not a breach of confidentiality – still acting for the client
* Under **S.31(1)** anyone that has personal information about incapable person it has to be disclosed to guardian or attorney of property.
* **S. 33(2)** when a person (not the attorney) has custody or control of property of an incapable person has to provide guardian of property or attorney with information and has to deliver that property.
  + PGT has a standard letter
* **S. 33(2.2)** property includes a Will
* **S. 33(1)** attorney has to make reasonable efforts to locate the person’s will.
  + Because depending on contents of Will they have an effect on what attorney can do.
* Under **35.1** guardian or attorney **shall not dispose of property that guardian knows is subject to specific testamentary gift.** 
  + Donor delivered set of rings to second neighbour – they deliver to the attorney. The attorney says to the lawyer --- what can I do with things rings? Can I sell them? Lawyer: you have to look at the donor’s will. Includes standard clause to deliver my personal effects to…
  + Unless necessary to sell the assets in order for attorney to carry out his or her duties
* **S.35(1.2)** says **S.35(1)** doesn’t apply in respect of specific testamentary gift of money.
* When we begin to act as attorney under POA and have will you have to look in will to see if specific assets have been given away.
  + Ex. Ring, watch, land.
    - When you see this, you know **s. 35(1)** comes into play and attorney cannot dispose of them.
    - Gifts of money don't apply
* **Attorney has the duty to account to the donor**
* **S. 35.3.3** gives attorney authority to dispose of property in will if disposition is necessary to comply with duties.
  + **Ex.** Attorney, run out of money and only asset left is land, then to comply with duties have to sell the land.
* Now grantor dies and the person who was to receive the land devisee, asks where is the land? And if executor then answer is had to sell it to pay debts. And beneficiary says what’s going to happen?

Doctrine of Ademption

* If give away something in will and not there when person dies because lost or given away by grantor then the gift **adeems.**
  + Consequence of ademption: The person who would have received the gift under the will gets nothing.
* **S.36** the doctrine of ademption does not apply in these circumstances:
  + **The person who would have received the item is entitled to receive from residue of estate the equivalent of a corresponding right in the proceeds of disposition of property.**
  + Important: cannot sell specific items, unless it is necessary to carry out duties, and if do sell them then person who would have otherwise received them isn’t closed out because of ademption, **S. 36** preserves a right.
* **S. 36 (2)** – where the **residue is insufficient** for value then people are paid a portion of the persons estate.
  + **(2)** If the residue of the incapable person’s estate is not sufficient to pay all entitlements under **subsection (1)** in full, the persons entitled under **subsection (1)** shall share the residue in amounts proportional to the amounts to which they would otherwise have been entitled.
* **S. 36(3)** – subsection (1) and (2) are **subject to a contrary intention to the Will**. Ex. Could make a will that says, “I leave property to so and so but if attorney has to sell before I die to carry out duties, then beneficiary gets nothing”.
* Other important duty of an attorney is to **maintain accounts,** the accounts that attorney has to maintain are set out in **Ontario regulation 100/96** (uploaded to OWL)
* The attorney has to account; sometimes attorney Will pass accounts through a court process, similar to executor passing accounts. More often than not, attorney will wait till person has died.

MacDougall Estate v Gooderman – discussion of s. 36(1) (OntCA) – trial judge stated and CA agreed that “SDA and s 36 should be given a large robust interpretation”

* Here they sold the condo that was owned by the corporation – said the corp sold the condo not them.
* CA said no – it was as if the incapacitated person sold the asset.

WRT Costs – (para 77) CA reiterates that costs are paid out of the estate where there is litigation, this is changed: costs now follow the success or failure of the litigation.

Estate trustee is going to have POA of property account to them. The POA for property does not account to the beneficiary.

Authority of attorney under POA immediately ends upon the death of the donor 🡪 s**. 2 of the EAA** 🡪 all of the assets of the deceased person pass to the executor upon trust

* I regret to inform you that engagement ring had to be sold during \_\_\_’s lifetime because of lack of funds. Under **35.1 of SDA**, you are entitled to the dollar value of the gift (if sufficient money in the residue). Need to obtain proof from the attorney of the proceeds of sale.
* Beneficiary can question what the attorney got for the ring. That dispute might bring the attorney back into the loop about the issue. BUT primarily the issue is about the executor and the beneficiary.
  + Attorney is technically NOT answerable to the beneficiaries 🡪 only to the executor

### Termination of POA – s 12(1) (966)

1. Death of grantor **(f)**
2. Revocation by grantor (if capable) **(e)** – must be in writing **s 12(2)**
3. Resignation, incapacity or death of AIF (unless there’s a backup AIF) **(a).** **S 11(1):** Resignation not effective unless AIF delivers copy of resignation to **(a)** grantor, **(b)** other AIFs, **(c)** backup AIF, **(d)** non-divorced spouse / family.
4. By operation of law – namely where grantor signs new POA (revokes old POAs – **(d))** or guardian is appointed
5. Removal of attorney by the court **(c)** – e.g.: breach of duty.
   * Family member and Public Guardian and Trustee then have the right to apply for termination
   * There is a duty to pass accounts before compensation is taken – may need to from time to time anyway **(s 42)**

Regulation on OWL – accounts that an attorney for property has to maintain.

# POA for personal care

## POWERS OF ATTORNEY FOR PERSONAL CARE

* POA for personal care allows the grantor to name the person he or she chooses to make personal care decisions on his or her behalf when the grantor is no longer capable of making those decisions.
  + Grantor can also include directions
* POA for personal care will name who is to act as substitute decision-maker, specify how the attorney or attorneys are to act and how capacity of the grantor will be assessed when the time comes, and give clear directions on how the power of substitute decision-making is to be used.
* Requirements: a grantor capable of granting the power, a named attorney, a statement that the attorney has the power to make personal care decisions on the grantor’s behalf should she be incapable of doing so, the grantor’s signature, the date, and the signature of two qualifying witnesses.

### Capacity for POA for personal care:

Grantor must be 16 **(s 43),** capable (**s 47** sets out low threshold criteria: **(a)** ability to understand POA has general concern for his welfare, **(b)** appreciates he may need POA to make decisions for him). Grantee must also be 16 and capable of making personal care decisions.

* I.e. grantor only need be capable of understanding **s 47** to grant a POA PC, *not* to be capable of making personal care decisions. However, if POA contains particular instructions, grantor must be capable of making those decisions.
* Assessment of capacity to make healthcare decisions is governed by ***Health Care Consent Act* (“**treatment” defined in **s 2(1))** & CL – physicians can assess capacity.
* Attorney is authorized to assess capacity for *non-healthcare* personal care (unless POA says otherwise) **(s 49).**

### When is a person incapable of making Personal Care decisions?

* **S. 45** is important because 1) it describes incapacity for personal care and 2) it gives insight into the scope of personal care.
  + No definition of personal care as such
  + *“A person is incapable of personal care**if a person is not able to make decisions that are relevant concerning his or her own* ***health care, nutrition, shelter, clothing, hygiene, or safety****, or is not able to appreciate the reasonable foreseeable consequences of a decision or lack of decision.”*
  + Ex. Possible for person to have capacity for personal care with respect to clothing, but may lack capacity with respect to health care.
* When assessor of personal care is done assessment then they check off the decisions that the person is determined to have legal ability to do or not.

### Creation

* Names who acts **(s 46(1)),** how they are to act and how capacity of the grantor will be **assessed** and give clear directions on how the power of substitute decision making will be used **(s 46(7)).**

#### Legal requirements:

* + grantor capable of granting the power,
  + a named attorney,
  + a statement that the attorney has the power to make personal care decisions,
  + the signature, the date, and signature of 2 qualifying witnesses **(s 48(1)).**
* **Restrictions** in **s. 46(3)** – generally revolves around a **conflict of interest**: cannot be grantor’s caregiver unless a spouse / relative
  + Broadly precludes situation in nursing home where donor wants to appoint nurse.
* APC may set out the **scope of authority** **(s 46(7))** – giving the attorney authority over all personal care decisions – giving and refusal of consent, hygiene, clothing, issues of hydration, issues of residence. You can split these up, but we don’t normally see this.
* Again, if 2 or more APC are named, *jointly* is assumed (unless specify otherwise) **(s 46(4))** & can name Public Trustee **(46(2)).**
* **S. 48(2)** restriction on who can be witnesses – refers back to **s 10(2)** with saving provision of **s 10(4) if we make a mistake.**

***Ulysses Agreement*** (p. 980): document that I would put into place if I found that I were experiencing episodic psychiatric disorders that required me to be admitted to hospital from time to time, particularly if I had potential to injure myself or someone else.

UA is a type of POA Personal Care, which permits my APC to **take me by force to a psychiatric facility** (**S 50(2)**). Generally, the difference between a standard POA PC and a UA: Under **s 50(1)1** grantor has to sign a form understanding the powers given to the attorney and ALSO under **s 50(1)2** at the time I sign or within 30 days there has to be a statement made by an assessor from the list qualified under the *SDA*. Similarly on the **revocation** of a UA, I have to sign saying that I revoke AND I need an assessor again **(s 50(4)).**

### Advance Directives (982):

What clients might call “living will” or “endurable POA” – these are not obligatory to include, but *they are binding whether expressed orally or in another manner* (***HCCA* s 5**). Doesn’t have to be part of the POA, but usually is. Grantor signs and you need 2 witnesses. Rules for incorporation by reference relate to wills, but do not apply to advanced directives (i.e. advance directives do *not* have to exist when POA is made). E.g. you can video your advanced directives 6 months *after* making your POA.

You’re not bound by particular wording …. you can create your own language to capture thoughts.

* Used to provide instructions or guidelines to the attorney in caring for the donor – does not replace communication between caregiver and substitute decision-maker.
* The introductory terminology is important.
* Differentiate b/w **“I prefer” v. “I direct”** – consider pain medication, extraordinary measures (life support). Prefer = moderation injection of pain medication.
* When it comes to Euthanasia, organ donation – usually a direction one way or the other. E.g. “I am opposed to direct euthanasia”, or “I am in favour of direct euthanasia if it’s legal.”
* Usually comes up when there is a religious direction – must call in a rabbi or imam.

**Advanced directives** do not have to be in same document of POA for personal care, but they are generally.

* Because advanced directive issues often carry some detail and intense thought, there is an argument to be made that the capacity required **to give advanced directives is higher than capacity level to make a POA for personal care** [pg.950].
* There are different verbs used: **know** & **appreciate** are used and **s. 47** “ability to understand”
  + Differences in verbs are discussed in [note 3 & 4 on pg. 949].
* So, for attorney’s and executors in Ontario it is critical that we ask our clients whether or not they have spoken to the person that they are naming. Because, if A becomes incapacitated there is no obligation that their attorney accepts that appointment.
  + No legality to do so, but practically important. If does not accept:
    - Guardianship application
    - Or bond that needs to be applied for on behalf of the estate

### Exercise (984)

* APC: can only be exercised if the **grantor is *incapable*** of making a personal care decision – this is contrasted with AFP: when unrestricted can be acted upon right away **(s 49).** **Valid** **from the moment signed, but only effective when you reach** **incapacity**.
* Decision maker doesn’t need to act, an APC has a right to renounce an appointment
* Ppl usually believe that it is only for when they are incapacitated. Once a POA is signed, as long as it is legally effective, then it is for absence as well in a general unrestricted POA.
* The method of **determining the incapacity** depends upon the decision to be made and the legislation that addresses that particular decision, ie: ***Health Care Consent Act*.**

**Duties** **of APC** **(s 66)** (985) - There is a **fiduciary** relationship b/w the APC and donor

* **(1)** Powers and duties must be carried out by guardian of person diligently and in good faith.
  + **Note:** APC has no duty of care toward the donor’s *caregiver* though (***Smorag v Nadeau Estate***).
* **S. 67** says s. 66 applies with necessary modifications to an APC (everything applies to APC but **(15)** and **(16)).**
* Obligations in **s 66**: generally to consult with an incapacitated person **(5);** act in best interests **(3);** in doing so, decide, in so far as that is possible, to consider values and beliefs, to consider risks and benefits **(4);** obligation to keep records of decision **(4.1);** obligation to consult with supportive family and friends **(7),** etc. Guardian shall choose least restrictive action appropriate **(9)** etc.

### Termination of POA PC (987)

* Grantor’s death
* Death, incapacity or resignation of APC **(s 53(1)(a))** – written and delivered **(s 52(1)),** notice **(s 52(2)).**
* Revocation by grantor **(ss 47(3), 53(1)(d)** – written & in same manner as executed **s 53(2)).**
* Operation of law – eg: guardian of a person is appointed by court **(s 53(1)(b))**
* Consent and Capacity Review Board determines grantor is not incapacitated.

## Alternative Methods for Making Decisions About Another Person’s Personal care (992)

***Health Care Consent Act* s 20:**

* If person is assessed incapable but no POA PC, **s 20(1)** has a **prioritized list of substitute decision-makers**:
* Guardian -> POA PC -> court-appointed representative -> spouse / partner (**s 20(7)** - incl. CL spouse) -> child / parent / Children’s Aid -> parent w right of access only -> sibling -> other relative (**s 20(10)** – by blood, marriage or adoption).
* **Restrictions s 20(2):** (a) Capable, (b) 16, (c) no court prohibition, (d) available, (e) willing.
* (5) If no DM can be found, or (6) 2 or more DMs of equal rank can’t agree, Public Guardian and Trustee decides. Public Guardian will ONLY act if there’s no one left or appropriate
* **S 33** (p. 994): If incapable donor is dissatisfied, can apply to the Board for appointment of a **representative**.

### Guardian for Person (995)

**S 55(1):** If incapable person, or anyone concerned with him, is dissatisfied with POA PC or a representative, he can apply to the court to have a guardian appointed (formal procedure with affidavits, set out in **ss 69-77**). **(2):** Court will only do so if there is not a less restrictive means of substitute decision-making.

* **S 70(2)** guardian of the person has to file a **guardianship plan**. The more complex the individual’s medical situation is, the more complex the guardianship plan.
* **S.57** sets out **restrictions** on who can be appointed – generally conflict of interest.
* One complication of guardianship for property or person is that the guardian is required to file a management plan with the court – **Public Trustee’s office has the right to review and comment on this plan**; **judge also reviews**. Usually when acting under POA there is a management plan, but where person has not exercised to name a POA then the government requires those people to write down the management plan, file it and answer for it.
* The **duties** of a guardian of person or property are more complex b/c more government red tape.
  + Much easier to do these documents when they are well.
  + Keep donees informed of the medical situation and A should consult with BCD about major decisions.
* People are making medical decisions; again people generally want an **unrestricted** one, but can add contingencies too: e.g. limited by **time** or upon admission to a hospital etc. If on incapacity, can define how to determine – scope is up to the client

## Restrictions & Conditions on POA (958)

* Issue arises: Whether or not Attorney is to be paid?
* **S.32(7) & 32(8)** if the person is not being paid then the person must show at time of accounting the diligence and skill of **a person of ordinary prudence**, however if attorney is to be paid then attorney must show diligence & skill of **a person in business of managing property for others**
  + **Has to account for his or her stewardship of the donor’s assets**
  + A lawyer who is asked to be an attorney for POA has a higher standard than the above

## Difference between attorney who is acting while donor still has capacity and an attorney who is acting after donor has lost capacity

* Remember discussing a continued power of attorney, not talking about whether attorney continues to have authority, but the level of accountability.
* While under the SDA, an attorney for property is always acting as a fiduciary, distinction between level of fiduciary responsibility when donor has capacity vs when donor does not have capacity
* **Capacity = attorney as agent for the principal (donor)**
* **Loses capacity = attorney status is closer to that of a trustee than that of an agent**
* ***Banton v Banton*** [note 9 pg. 969]
  + Clear that when person is incapacitated then there is a high fiduciary responsibility comes into play.
  + Acting more as an agent because if don't carry out wishes and show copy of checks, she can rip up power of attorney and revoke it and do a new one. But then she became incapacitated and so responsibility increased because no longer have someone to get instructions from.
  + Cited with approval by ONCA --- para 48
* **Example:** POA includes clause to make gifts as attorney thinks appropriate. If still has capacity, want to hear from attorney that NOT going to run out of money. Donor can say to attorney – I want you to write cheque to charity for 5k… as long as attorney thinks donor is not being influenced, then will go forward with cheque. BUT the minute donor loses the capacity, donor can no longer dictate to attorney what to do. Now attorney needs to look at the document and the SDA --- make semi-independent decisions.

**Confidentiality of an Attorney**

**\*\* look on OWL**

**Regulation 100/96** not only discusses accounts that have to be kept by attorney for property and not only the decisions for when you are acting for POA its not only monetary accounts it is the decisions that you have made. And what has gone into making those decisions.

* + Also has provisions for confidentiality of personal care & property.
* **S. 32(1.2)** attorney have to manage someone’s property consistent with decisions of personal care
  + Envisages cooperation between POA for property and POA for personal care. As lawyers, we should be endeavouring to be satisfied that POA for property and personal care are able to work with one another.
* **S. 32(3)** encourage incapable person to participate to best of her abilities in the guardians decisions.
* **S. 32(4)** shall seek to foster regular personal contact between a capable person and supportive family members.
* **S. 32(5)** attorney shall consult from time to time with supportive family members and people who are in regular personal contact.
* Attorney also has to consult with persons whom incapable persons receive personal care, and that’s not the attorney for personal care but person who is actually providing personal care.
* **S. 33** attorney/ guardian of property is liable for damages resulting from breach of duty.
* But, **33(2)** not liable if court satisfied person did breach but acted honestly, reasonably, and diligently, and court has authority (discretion) to relieve person from liability

**There are very bad people out in the world that will take advantage of people financially**

**FEB 2012 –** Globe & Mail Excerpt on OWL

As lawyers we need to be cautious that not being duped by these crooks

## Statutory Guardianship OF PROPERTY

* pg. 974 – reference to 7th edition
* The set up for statutory guardianship is for an individual who is admitted to a psychiatric facility under the ***Mental Health Act*** and the person is found incapable of managing property and a certificate of incapacity is issued to you by the attending physician.
* Pg. 961 – **s. 54 of MHA** – authority to issue the certificate of incapacity
* If there is a power of attorney for property that person has had the wisdom to **get POA for property** and if the POA for property covers **all the individual’s property** than there is not really a problem.
* If no POA for property, then the PGT becomes statutory guardian of property. If no one wants to take over for PGT, then they will continue to be.
* Gathers in all assets and deals with them
* PGT will want to see the will\*\*\* (sample of letter on OWL)
  + Problem is if the Public Guardian and Trustee becomes the statutory guardian and remains as statutory guardian, then the individual’s affairs are being managed by a government office.
* If someone has POA and then they no longer have capacity that person would contact the PGT letting them know they will look after that person’s affairs and the authority is transferred to the attorney named under POA – **S. 16(1)**
* **S.16(1)** statutory guardianship IS terminated if there is a POA for property and if the POA for property covers ALL the incapable person’s property (unrestricted) provided that attorney follows the process set out in 16.1(c)
  + **MUST** cover ALL of the donor’s property
  + Then person files a notarized copy of POA to PGT and an undertaking to comply with POA and proof of identity.
    - Undertake in writing to act in accordance with POA
  + At this point PGT transfers the management of that person’s affair to person named under POA.
* If **S.16.1** is in play then the attorney does not have to file with PGT what is called a **management plan.**
* **S.17 – the right to request that the PGT defer to the applicant to take over the affairs of the incapacitated person** 
  + **More expensive if admitted and relative has to apply**
  + If 16.1 cannot apply because POA is restricted
  + Prescribed form to fill out
    - This is what I plan to do with all the assets
  + **S.17** says that certain people may apply to replace the PGT. POA does not cover all incapacitated person’s assets
    - **Ex.** The person/patients spouse or partner, relative, attorney under restricted POA… etc.
      * **Defined terms**
  + **S.17(3)** applying person has to submit a **management plan,** a prescribed form that involves the applicant going through all of the patient’s assets and describing how the statutory guardian intends to manage those assets.
* **Note:** when you have a restricted power of attorney **S.16.1** doesn’t come into play, because the PGT would have control.
* **S.17** the applicant becomes statutory guardian
  + **S.17(4)** - PGT must be satisfied that the applicant can manage the property and that the management plan is appropriate.
  + **17(5)** PGT shall consider the person’s wishes if they can be obtained and the closeness of the applicant’s relationship
  + In **S.17(6)** requirement of applicant to provide security i.e. An administration bond -- not unlike an insurance bond that has to be provided in case where person doesn’t have a will.
    - Roughly $10 per thousand
  + **S. 17(7)** provision that the court can wave/dispense with this security.
* With a statutory guardianship – this may last for years so the insurance bond is a lot to be paid in the years that the person is alive.
* Where you have statutory guardianship under **s.17** then that person is continuing to have to report to the public trustee and then to the court on a continuing basis and may perhaps have to account every 3 years.

## Court Appointed Guardian

[Pg. 976]

* **A person becomes incapacitated, is not in a psychiatric facility and the person has chosen NOT to do a POA for property, or has appointed A and A has either died or is also incapacitated and has not appointed anyone else**
* Someone has to make decisions about property, so family member goes to court to get an appointment.
* Like custody – what is in the best interests of the incapacitated person
* 22(3) \*\*
* **24(1)** a person who provides care for compensation shall not be appointed
* Restrictions under **s. 24** about who can be appointed.
  + **S.24** – restrictions in handout.
  + **Conflict of interest** issues (pg. 977)
    - Ex. Someone buys health care for person who is incapacitated cannot be appointed unless person is spouse, partner, or relative or POA for person or property.
    - Someone who does not reside in Ontario cannot be appointed.
    - Power under **s.24(4)** where the court can wave the filing of insurance criteria.
* **S. 25 – may be required to post security**
* **Proposed guardian MUST file a management plan**
* A guardianship order can be subject to conditions imposed by court. Ex. Individual owns a house and at the time of the application for guardianship, the plans for dealing with the house are not fully in shape then court may say guardian has to come back to court and get approval for sale of house.
* Court may prohibit the guardian from disposing of certain assets, **s.35(1)** that are disposed of in will but there may be other assets.
* Court will generally require the guardian to pass his or her accounts every 3 years. At the time of application, a management plan will be required.
  + The guardians must keep accounts (we are referring to property), so court may say every 3 years we want you to file an application to pass your accounts, this would mean the guardian (POA for property) would have to prepare his/her accounts, serve the accounts on various parties (generally family members), then will have to give family members opportunity to object. And if objection cannot be settled then it will go to a hearing and judge will either approve accounts as filed or approve them as amended & then deals with costs.
* Ex. IF you have child A and child B want to be guardian and they both think that the other is a criminal, so they Will disagree 🡪 **guardianship fight**
* **S. 32 & S.38** on property that the fiduciary has to act diligently and in good faith.
* Without making a $200 power of attorney document, there Will be these disputes that is very costly.
* The statutory guardianship comes into play when person has been admitted into
  + 1) psychiatric facility and
  + 2) certificate of incapacity is produced.
* First question PGT asks is there a power of attorney?
  + Because when a person is admitted to long-term care in Ontario it is standard policy for nursing home to say to family we want to see that person’s Will and POA for personal care so that they know who to call when the person dies.

# POA for Personal Care

Pg. 979

* The old *power of attorney act* is **not** applicable to POA of personal care. They stand on their own under the SDA.

### How are they created?

* We have a **grantor/donor** and then have an attorney.
* Restrictions on who can be appointed, **s.46(3)** 
  + Based on conflict of interest issues, so someone who **provides healthcare** **for pay cannot** be POA for personal care unless they are person’s spouse, partner or relative.
  + Physiotherapist could order 14x per week
* If there is more than one attorney for POA personal care? The same result as under POA for property
  + **S.46(4)** if two or more persons are appointed they act jointly unless indicated otherwise
  + **S.46(5)** IF joint appointment and one dies the remaining attorney is authorized to act.
  + **Example:** 2 people appointed jointly. Lawyer should tell client that in terms of property, it is okay to appoint both. BUT in terms of personal care, if appointed jointly that now if you have a stroke and taken to the hospital at 2AM – daughter in London goes with you. You are now incapacitated. Physicians want to do a treatment that is outside the scope of an emergency. Ask to see the POA for personal care. Son is on an airplane in Bangkok. Won’t arrive for 12 hours. DR. says while I only have A here and it says A and B jointly. B is not accessible for hours. With assets, there generally is no emergency.
    - **Explain the risk to the client** 
      * Then your duty is done and the client holds the responsibility
      * Mostly see joint and several
      * OR A and if incapacitated or dead, then B

### Scope of authority?

* + **S.46(6)** POA is subject to conditions and restrictions that are contained in the document and are consistent with the act.
  + There is no definition of personal care in statute, but the insight is in **S.45.**
  + **S. 45** describes incapacity for personal care and this section refers to health care, nutrition, shelter, clothing, hygiene and safety.
    - Generally accepted headings for personal care
* In POAs that are unrestricted there is no reference to the above sections because it is a general authorization in respect to grantor’s personal care.
* As part of POA document then we have the **advanced directives** – they are not obligatory.
* DO not need to be in POA for it to be valid
  + Can be separate
  + BUT then which one is most recent…
* Ex. One of the advanced directives often discussed is whether person wants physician assisted death.
* Grantor then signs PAO and there are two witnesses.
* **S.48(1)** set out restriction on who can be witnesses and it references back to **s.10(2)**.
  + People who are prohibited under **s.10(2)** cannot be witnesses under **s. 48(1).**
    - Generally conflict of interest issues.
    - Saving provision in 48(4)

**SDA S.50** (in the form of a POA) colloquially referred to as a **Ulysses Agreement** because the statute allows client to sign POA that says in certain circumstances my attorney can use force that is necessary and reasonable to take me to a place for treatment to admit me to that place and restrain and detain me during that treatment. [pg.980]

* Donor knows that suffers from episodic psychiatric disorder
* During episode, better for someone to assault and take for treatment
* Affords to the attorney the right to take donor for treatment against donor’s will
* Differences:
  + Within 30 days of signing, donor has to sign a statement that he or she understands that have given this right AND a capacity assessor signs a statement that confirms that he or she has assessed donor and donor knew what he or she was doing when they signed the document
  + Prof has never done in his practice
  + If you sign a general POA then POA for personal care does not have the authority to do this. But **s.50** allows client to do this. These provisions would be available to an individual who suffers episodic psychiatric disorders.
  + If you do not include this then the attorney does not have power to do this.
* Key of **S. 50(1):** is that when POA is signed and within 30 days after the grantor has to make a statement in prescribed form indicating that he or she understands the prescribed document and the assessor has to file a statement stating that the assessor did an assessment and person was capable of personal care and this was not done by force.
* Let’s assume work with client and get everything required going in. Three months’ later client shows up to office and says I want to revoke this. The legislation **s.50(4)** cannot revoke unless within 30 days after revocation an assessor has assessed client and states that grantor was capable of personal care.
  + Specialized process to avoid a situation where client signs one of these and comes back in midst of psychiatric disorder and wants to revoke this.
  + Assessment costs $1200 if not more.

## Advanced Directives

Pg. 982

* **S.46(7)** says POA may contain instructions with respect to the decisions that the attorney is authorized to make.
* Advanced directives - Also called **a living will** or durable POA
* Advisable to have advanced directives in writing – no legal requirement
* Also, can be in separate document or in one document.
* They can be **oral or video recording.**
* When you have a separate document, you might wonder what the rules for this document are and whether the rules on incorporation by reference are applicable. They are not applicable because rules for incorporation by reference in **Re Smart** deal with testamentary documents, this is not a testamentary document.
  + Doctrine of incorporation by reference DOES NOT APPLY to advanced directives, because not a will
* Advanced directives can be directions or statements of preference (guidelines).
  + How the attorney has to act depends on which of the above
* Make sure the lawyer knows where the document is

I do not want any medical treatment that would not offer any hope or benefit to me (aritificial treatment)

## When does POA for personal care be used?

How is it exercised?

Effective only if the grantor is incapable of making a decision (s. 49)

While valid on signing, cannot be used on signing

* Unlike POA for property that can be used from moment it is signed, POA for personal care can only be used if the person is incapable of making decision in questions, **S.49.** 
  + Differentiates between decisions under *health care act* and those that are not under the act.
* Ex. Where a person will live. In real life where we have an individual that does not have POA for personal care and is incapacitated and barely able to stay at home, you have to have a court order and an assessment and person has to consent to assessment.

## What are duties for POA of personal care?

* **S. 66** sets out powers and duties of guardian
* **S. 67** says **S.66** applies with necessary modifications to Personal Care for POA.

### How is a POA for personal care by statute required to make decisions under s.66?

What process an attorney has to follow to make a decision on behalf of the donor

Health Care Consent Act covers treatment (narrow definition)

Try to find out if wishes or instructions

Search for advanced directives

* + **S.66 (2.1)** if decision is under ***health care consent act*** then follow process under this
  + **S.66 (3)** if health care consent act doesn't apply then these are the principles.
    - Ex. hoping to decide as POA for personal care for where a person should live.
    - Principles that guide POA:
      * If know of wish or instruction, must make decision in accordance with that wish.
      * A later wish or instruction, while capable, is over earlier instruction or wish
      * The wish does not necessarily have to be in writing.
      * If guardian doesn't know of wish or instruction or impossible to make decision then make decision in person’s *best interest.*
  + **S.66(4)** guidelines to determine what the best interests are
  + **4.1 – records of decisions**
  + **6 – has to seek to foster regular personal contact**
  + **8 – the guardian shall as far as**
  + **9 – least intrusive**
  + **10 – confinement**
  + **12 – prohibits the use of electric shock unless consent given**
  + **14 – sterilization**
  + must take into consideration certain factors:
    - The values and beliefs of the individual.
    - The person’s current wishes if they can be ascertained.
    - Whether the attorney is likely to:
      * improve quality of person’s life,
      * prevent quality of person’s life from deteriorating,
      * or reduce extent to which quality of person’s life is likely to deteriorate.
    - Whether benefit person is expected to retain from decision outweighs the harm.
  + Ex. bring someone to clip fingernails or toe nails.
  + Ex. whether to authorize diagnostic procedure such as an MRI.
  + Ex. Client who had serious bowel issues and surgeons wanted to do another resection.

O REG 100/96 – confidentiality provisions!

## How is POA for Personal Care terminated?

[Pg. 987]

* **S.53** terminated when:
  + grantor dies,
  + when the attorney becomes incapacitated or resigns,
  + if court appoints guardian of person, where the grantor signs new power of attorney (unless situation where grantor wants multiple POA),
  + Or consent and capacity review board declared grantor is not capable,
  + Or assessor says person now has capacity for personal care after a stroke.
* Where an attorney for Personal care resigns, there is a process under **S.52** 
  + POA for personal care has to deliver copy of resignation.
  + Notifying persons with whom authority was asserted

## Concept of Guardian of Person

pg. 995

* Like guardianship for property it is a similar structure.
* Restrictions under **s.57**
  + “parent” includes a grandparent and a person who has demonstrated a settled intention to treat the deceased as a child of his or her family, except under an arrangement where the deceased was placed for valuable consideration in a foster home by a person having lawful custody; (“père ou mère”)

#### Order for support

* + **58.** (1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.  R.S.O. 1990, c. S.26, s. 58 (1).

#### Applicants

* + (2) An application for an order for the support of a dependant may be made by the dependant or the dependant’s parent.
* IT is a court process, application has to be served on various people and those people may contest application.
* Like guardianship of property an applicant has to file a management plan – prescribed form and involves going through all personal care headings.
* So, when it comes to health care listing all the medication of individual and going through medical circumstances and what you intend to do in respect of all medical matters.

**What happens if no POA for Personal Care?**

Pg.992

* If treatment and in facility:
* If we are under the *Health Care Consent Act* then this statute **s.20** is a specified order as to who can consent to treatment under the statute.
* If the personal care issue is not covered by *health care consent act*, and person is outside of health care facility, now we have a real problem.
* \*\*remember that treatment is defined
* By 994 – can be an application made for the appointment of a representative of the consent and capacity board – would only cover the scope of treatments, not of guardianship

Pg 995

If need guardianship and not about treatment:

* A guardian of the person, appointed by the court
* S. 55 court’s authority
* Must be a guardianship plan

POA - $250-300 each

Vs cost of the guardianship of the person – close to $3000

### How are costs in POA disputes dealt with?

* In the same way as costs in estate litigation.
* ***McDougall Estate v. Gooderham 2005 CanLii 21091 (ONCA)***
  + [para 74-91]
  + Concept of costs in estate litigation are now changed and costs will follow the event.
  + Exceptions:
    - Where the testator caused the problem
    - Live question about capacity

Section 39

Court has the authority to give directions

Restricted when to when there is a guardian of property or an attorney under a continuing power of attorney

# Testamentary Capacity, Undue Influence, and Fraud (189-241)

* **Propounder:** party or parties who are propounding the will are supporting the will and maintaining that it is valid.
* **Improper influence** is the presumption that arises under **s.12(1)** when **a person who attested the will is a beneficiary under the will. The will is not void, only this gift is void.** The presumption **can be rebutted** under **s.12(3)** if court can be satisfied that there is no improper influence**.**

### Four Requirements / The Test

* **Fundamental rule** is that the party who makes an application for probate, usually the executor, has to prove **four requirements**:
  1. That T has satisfied the **statutory age requirements** to make a will which are set out in the *SLRA* **s. 8**
  2. That the will was executed (signed) in **accordance with the statutory requirements** in the SLRA and it was **not revoked**
  3. That the T **knew and understood** the contents of the document and that the will is not affected by any mistake
  4. That T had **testamentary capacity** [pg. 189]
* **Dispute has to come within one of those 4 elements**
  + **Usually it’s testamentary capacity**
* ***Barry v. Butlin*** [pg.212 ft. 111]
  + **Onus Probandi** onus of proof is on the propounder.
* Presumption of capacity absent evidence to the contrary (***Re Nelson Estate***)
* ***Robins v. National Trust*** [pg.213 ft. 119]
  + Any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called into question then at once onus lies on those propounding the will to affirm positively the testamentary capacity.
* Party challenging the Will, will generally raise one of those four issues
* Sometimes the issue is undue influence or fraud
* In Ontario party alleging undue influence or fraud has **the onus of proving that**.
  + Onus switches after probate has been obtained

### What is the role of the lawyer in this?

* Where a will has been drawn by a lawyer, the cases say that the **lawyer is in a position of observing** T’s **mental capacity** and the lawyer can discern and observe **evidence of undue influence**.
  + As lawyers you will have observed the party making the will.
    - at the time of taking the instructions and 2-3 weeks later at the time of signing
  + Ask client details about family, assets, liabilities and as client responds, you get a sense of the person’s testamentary capacity.
  + Can observe if there was any evidence of *undue influence (exerting coercion).*
  + Ask open ended questions, NOT leading questions
  + Where you see the client is relevant – walk in on their own account VS go to see in hospital
* ***Hall v. Bennett*** (2003) in examining solicitor negligence in refusing to draft will due to T incapacity, question is not whether T was capable, it is **whether a reasonable and prudent solicitor in that solicitor’s position would have concluded that T was incapable.**

### Warning signs in practice if someone is being unduly influenced?

* Lawyer is called to hospital or long-term care facility, then there is likely something seriously wrong with the client.
* Consulted by a brand-new client, out-of-the-blue, who is elderly
* Undue influence: when a third party insists on being at the meeting.
  + If asking question about assets and client turns to daughter and daughter responds to every question.
* If called by *someone other than T*.
* *The day the will is challenged the lawyer will be a material witness.* 
  + Will be asked by court to show your notes.
* What if after first meeting there is no capacity but a will has not been made?
  + As a lawyer, you would have to tell the client they do not have testamentary capacity.

## Age Requirements

* **S. 8 SLRA** [pg. 190]
* In Ontario a testator has to be 18 years of age unless at the time of making the will the person,

(a) is or has been married;

(b) is contemplating marriage and the will states that it is made in contemplation of marriage to a named person except that such a will is not valid unless and until the marriage to the named person takes place;

(c) is a member of the Canadian Forces; (see note 2 on page 191 if on exam)

(d) is sailor at sea or in the course of a voyage.

* Recall: 18 to make POA for property but only 16 to make POA for personal care.
* Have to get photo ID for all clients: Passport, driver’s license ect: needs photo and date of birth.
* Example: Woman who is 17 with a baby cannot make a will under Ontario law
  + Remember that old provisions, law isn’t current with what is happening in society

## 

## Knowledge and Approval/ Undue Influence

[Pg. 192]

* To help prepounders of the will the law, by common law, has established **a rebuttable presumption that the document has been signed with the client’s knowledge and approval**, once the prepounders prove the will was properly executed and T appeared to understand the contents of the will (***Vout v Hay***)
  + Knew of the contents and understood the contents
  + Lawyer can say for the entirety of my practice I often precis will or make sure T reads the will over – this would satisfy rebuttable presumption.
  + Make sure to use plain English to explain the concepts to the client
  + Cannot be a witness if you are beneficiary
* The presumption is rebutted if shown that T really didn’t understand the will, even if it was read to him (***Fulton v Andrew***).
* Note that if testator only did not understand *part of* the will, the rest of the will may still be probated (rare) (***Russell v Fraser***).
  + ***Russell v Fraser*** pg. 192, footnote 25
  + **Facts:** Elderly woman WITH T Capacity. Bank manager suggested to her to leave residue to him. BM knew residue was substantial, but was unable to show that the T knew or that lawyer discussed size of residue with T.
  + **Held:** T did not know the size of residue so probate granted without the residue clause.
* **What happens in execution meeting?** 
  + Lawyer offers client opportunity to sit alone and read document by themselves. OR Lawyer will precis the document for them.
* Where we have suspicious circumstances then the propounders must prove***knowledge and approval of the testator*** and if they cannot, then will fails.
* “**Suspicious circumstances**” are “circumstances which create a specific and founded suspicion that the testator may not have known and approved of the contents of the will” (***Clark v Nash*).**
  + Ex. Beneficiary has prepared the will or it is clear that the beneficiary was instrumental in having the will made.
* Where we have **suspicious circumstances** the propounders of the will have to prove **knowledge and approval affirmatively** (***Tyrell v Painton***).
  + They bear onus of adducing evidence before court that dispel suspicious circumstances, and if evidence does not dispel suspicious circumstances then they have not proven knowledge and approval

**Note: suspicious circumstances ARE NOT undue influence.** Suspicious circumstances are that T may not have known or heard of the document.

Where the propounders **fail to establish testamentary capacity**, they will also be **unable** to show **knowledge and approval**.

* Ex. Have testator who is perfectly okay mentally and comes in and gives lawyer instructions and lawyer does the will and discerns no evidence of undue influence but when will is tested in court and court finds undue influence, the will is invalid because it was made subject to undue influence.
  + So, in this case you had knowledge and approval, but the undue influence test is not passed.
* Where there is undue influence **document is not admitted into probate** because it is **not truly** what the person wanted and it was procured through coercion.
  + Part of will that reflects the undue influence will be declared invalid, but the remainder of the will, will remain valid
* **Example:** aunt knows she has made a will and that she is giving everything to Nephew. BUT still might not have knowledge and approval because it is not HER will. She was subject to undue influence.

## Testamentary/Mental Capacity

[Pg. 193]

* Person of unsound mind cannot make a valid will.
* No statutory definition of testamentary capacity
* In **SDA** – defined criteria for capacity (for property and personal care)
* Definition come from 19th century British cases

### What Constitutes Sound-Mind/ Testamentary Capacity?

Recall: piece in casebook that says to make RRIF or RRSP and making a designation in one of those vehicles requires testamentary capacity

### Test for testamentary capacity: Banks v. Goodfellow [pg. 194] – Hall v Bennett confirms

**1. Person must understand the nature of the testamentary acts and its effects**

* Must be made “*animo testamdi*”
* That he or she is making a will and effect of will is going to dispose of property upon death
* If signs, but does not understand that it is a will 🡪 then no testamentary capacity
* For the most part there’s no issue here. If I’m meeting someone for the first time (particularly out of office) and I ask them if they know why I’m here and they say “my son said I have to sign some sort of paper” then a huge warning that they do NOT understand they are making a will.

**2. T must understand the extent of the property of which s/he is disposing of**

* This is why lawyers taking instructions ask client about assets and liabilities
* Ask for an overview of the assets so that you have the same knowledge base as client, and it ensures that the client knows what they are disposing of – they need to understand the value of their property.
* Lawyer should not ask leading questions
* Family may not know all of the assets – practical piece – lawyer knows

**3. Person making the will must be able to *comprehend and appreciate* the claims to which he *ought* to give effect**

* This refers to moral claims – from the English philosophy that children have a moral claim on what the parents leave behind.
  + Ex. Where lawyer has a client with 5 kids and says going to leave all money to charity and then later comes and says going to give everything to one kid. Lawyer has to make sure that they are not being coerced.
  + This is at odds with ***Mitchell v. Mitchell*** case which says T is entitled to leave their property to whomever they want. No duty to explain dispositions, but if they can give an explanation it goes into notes and helps if challenged.
* E.g.: person who mumbled about leaving stuff to housekeeper, had previous wills to determine past intent.

**4. No appreciation if disorder of the mind shall “poison his affections, pervert his sense of right” or natural faculties. No appreciation if insane delusion shall influence his will and bring about a disposal of property which would not have been made if the mind was sound.**

* May require a test for testamentary capacity.
* Incapacity can be found for other reasons, such as being heavily under the influence of drugs or alcohol (***Re Bradbury Estate***).
* If person dies shortly after making will, propounder must prove cause of death and state of mind of deceased before death (because court must determine if deceased had capacity at time of will) (***Arkley v Nestoruk***).

**5. No insane delusion shall influence his will and bring about a disposal of property which would have not been made had the mind been sound.**

* Justice Cockburn, if therefore though mental disease may exist, it prevents itself in such degree and form as not to interfere with the capacity to make a rational disposal of property. [pg. 195]
  + Upholding that right to make a will and essentially saying it has to be mental disease in such degree or form that it would **interfere with making rational disposal**
  + “A testator has want of intelligence occasioned by defective organization or supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases is it admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.”
    - Not just person has physical infirmity, or decay of age – the people can still make a will.

Recognized **testamentary freedom** (page 195)

* “…if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains”
* Cases on testamentary capacity will be very fact driven
* Court will want to hear from doctor, lawyer, ect.
* “If it be conceded, as we think it must be, that the only legitimate or rational ground for denying T capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which OUGHT to be present to the mind of a T in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right”

### 

### TWO TYPES OF UNSOUND MIND

1. A general insanity whether caused by a disease of the mind, congenital defect or advance age, and
2. Insane delusions

#### 1) General Insanity/Lack of Capacity [PG.195]

***Harwood v. Baker 1840***

* Precursor to ***Banks v. Goodfellow***
* “Understanding that a person by his will is giving the whole of his property to one object of his regard, but he **must also have capacity to comprehend the extent of his property, and the nature of the claims of others**, whom by his will he is excluding from all participation in that property.”
* Doesn’t have to be expressed in the will WHY something is NOT being left to child
  + Not unusual to have those references in the lawyer’s notes

**Test for capacity from *Harwood v. Baker*:**

* + 1. Understand that he is by his will giving the **whole of his property** to one object of his regard.
    2. Must also have the capacity to comprehend the **extent** of his property
    3. Understand **the nature of the claims of others** whom by his will he is excluding from all participation in that property
    4. Understand that the law protects those who have enfeebled minds
    5. It matters not if the T is frivolous or seemingly unjust
  + The test to be met is high and onus falls on propounder of the will to prove capacity, including negativing the existence of an insane delusion (***Royal Trust Co v Ford***)
  + The test was applied in ***Leger v. Poirier* SCC 1944**
* Jurisprudence that shows the **capacity to communicate the testamentary wishes is insufficient** – wishes must be shown to **be of a sound mind** as described above (***Marsh v Tyrrell and Harding***).

“The competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.”

***Boughton v. Knight* 1873** [pg. 196 ft 38]

*important point: T may make a will moved by capricious, frivolous, mean or bad motives and T can make a will to gratify spite or pride and all of this is irrelevant if T has testamentary capacity.* *Those characteristics in and of themselves do not make T of unsound mind.*

* “T may disinherit, either wholly or partially, his children and leave his property to strangers to **gratify his spite**, or to charities to **gratify his pride**.”
  + Those wills, will still be valid
  + BUT just ensure that no undue influence

***Leger v. Poirier* 1944 SCC** [pg.196]

* ***Rand confirms the obligation of lawyer to inquire about relatives, property and an existing will***
* See an existing will to note the **extent of the change** being made. If it is a **large change**, then inquire as to why this change is coming about and consider if the other will is fairly recent.
* We may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary or usual matters.
  + This is mostly geared to those suffering from the early stages of dementia or Alzheimer’s.
* Case involves people keeping the T confined
  + Elderly person is kept from people, except people whom the bad party wants to let person see. Elderly T is kept locked up from world.
* Important: J Rand, “although the solicitor view of her relevance, he made no inquiries of any sort regarding them or her property or an existing will. Opportunity to judge memory was of most limited kind”. [pg. 197]
  + Example: client has never told anyone about his assets. Explain to them why it is essential for a lawyer to have that knowledge
    - Make sure assets match the structure of your will
    - Example does not make sense to make 10 trusts of 10k each
* J Rand confirms the **onus on propounder.**
* If existing will best practice is to see original existing will – this is a negligence issue to make sure that in new will or codicil that lawyer doesn’t put something that is inconsistent with what is in the existing will.
* “There is no doubt that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matter.” [pg.198]
  + Seems like responding to questions, but if you push further, clear that they just gave you their pat answer
* “A “**disposing mind and memory**” is one able to comprehend, of its own initiative and violation, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like.”

***Menzies v. White*** *[ft.45]*

Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms, there must be a power to hold the essential field of the mind in some degree of appreciation as a whole.”

***Re Davis* ONCA 1963** [Note 1 pg. 199]

J Shroeder “**Whether a person has Testamentary capacity, i.e. Where he has a sound and disposing mind, raises a practical question which, so far as evidence based on observation and expertise is concerned, as contrasted with evidence based on pathological findings, may be answered by lay people of good sense and by doctors.”**

* So, where we have T capacity being challenged J Shroeder is saying, it is not just what the doctor said, particularly in case where no doctor saw person and doctor giving evidence is person who has never met the person.
* Helpful to look at a doctor’s report, but that is not conclusive. Also need to hear from lay people who were in regular contact with the testator
* *Warning sign*: where a will is contrary or regardless to natural duty, or a marked departure from prior dispositions, a change in character or where there’s a history of incapacity… the burden of proof is considerably increased.
* Compare existing will with what they want drafted – see if there is a marked departure

**Practice points:**

1) Lawyer should make notes when making a will in case it is challenged

2) If drafted will then lawyer will be a material witness in any litigation in regard to validity of that will and requires lawyer to produce notes. If notes are not good, will look like a fool.

* Other practical piece is if material witness in litigation then firm cannot be council in the litigation, independent council has to be retained for executor.

|  |
| --- |
| Sharp v Adam – Step 4 of Goodfellow test concerned with mood as well as cognition.   * Deceased suffered from ALS, which affected his mind, but lawyer drafting will took care to establish capacity. TJ found deceased had satisfied steps 1-3 of the ***Goodfellow*** test, but that there was a temporary poisoning of his affection for his daughters (left out of final will), so step 4 failed. * CA confirmed that **moral responsibility was a relevant factor**, but not determinative. Said **4th step is as concerned with mood as cognition**, and since relationship with daughters was a happy one so leaving nothing to them was not sensible. Step 4 failed. |

* Disinterested physician testimony on capacity has substantial weight (***Re Davies***). So does evidence of will’s solicitor if he took care in determining capacity (i.e. by probing questions and notes) (***Stevens v Crawford***).
* A person who suffers from a disease of the mind is not necessarily intestable for that reason (***Stevens v Crawford***).
* A person who suffers from manic depression has capacity while not affected by those symptoms (***Hamilton v Sutherland***).

KEEP DETAILED NOTES OF MEETINGS WITH OUR CLIENTS. WE MAY BE MATERIAL WITNESSES IN LITIGATION

**Note 6 on page 203**

If declared incapable of managing property, doesn’t follow as a manner of course that does not have testamentary capacity. Still follow the principles from ***Banks v Goodfellow*** to see if there is testamentary capacity (***O’Neil v Royal Trust Co***)

**SOLICITORS DUTIES**

* Reference to ***Harwood v. Baker*** – restating the fundamentals of testamentary capacity: para 22 – a solicitor who undertakes to prepare a will has a **duty to inquire** into the client’s testamentary capacity.
* Reference to ***Murphy v. Lemphier*** – the solicitor is brought in to ascertain the mind of the testator …
  + Suspicious circumstances are numerous and cannot be listed
  + Serious illness that affects mental state is one of the most common circumstances.
  + The onus is there to assess testamentary capacity

***Hall v Bennett*** (Uploaded to OWL)

Key paras: 14-27

ONCA repeats with approval the criteria from ***Banks v Goodfellow.***

Para 26: Justice Sheron – a range of wrong things – solicitor’s common errors

* Failure to obtain a mental status examination
* Failure to interview the client in sufficient depth
* Failure to properly record or maintain notes
* Failure to ascertain the suspicious circumstances
* Failure to react properly to the existence to suspicious circumstances
* Failure to provide proper interview conditions
* Existence of improper relationship between solicitor and client
* Failing to take steps to test for capacity
  + Uploaded on OWL – the Montreal Cognitive Assessment – standard test used by physicians
  + Establish a baseline – apply the test every few months
  + Lawyer can use varying parts with client rather than send out for full capacity assessment
    - Draw a clock
    - Count change
    - Count backwards from 100, going down by 7

#### 2) Insane Delusions [pg. 204]

* + - Definition: An irrational belief in a state of facts that are not true.

***Banks v. Goodfellow***

* + - * The testator suffered from insane delusions, but those insane delusions did not affect or have any influence on the provisions of the will. In this instance, the will can be found to be valid.
      * Note though that this case also made it clear that if the delusion was one that could influence the disposition of the will, the will *might* be invalid even if it was not manifest at the time the will was made, but was latent. So not simply that the person is *experiencing* the delusions; those delusions MUST have an effect on the will. This is confirmed in ***O’Neil*.**

***O’Neil v. Royal Trust 1946*** *SCC [pg. 205]*

* + - * T suffered from hallucinations and delusions, but they were not connected with motives/reasons for making the will.
      * SCC said the proved hallucinations were not connected with the motives and reasons that led to changing the will in question, so the changes were valid.
      * Court also noted, though, that it is possible for a person to conduct herself in a rational manner, and make a rational will, but for it to still be invalid for being motivated by insane delusions.
      * **Test of whether delusion motivates the will is delusion’s nature and subject matter, and its relation in the mind of the testator to the matters material to testamentary disposition.**
  + Note that even if will is reasonable, it can still be invalid if delusions motivated dispositions (***Montreal Trust v McKay***).

***Skinner v. Farquharson*** [Note 1 pg. 208]

* Deceased left less to 2nd wife and son in second will.
* They contested his delusion that they were having an incestuous relationship clouded his judgment.
* However, solicitor had dealt with the client over a number of years and had an opportunity to observe over a period of time.
* Based on this, fact that will was not unjust, and that large amounts were still left to wife / son and wife named co-executrix suggested that the delusion did *not* influence the will and so will was valid.

**Wills that have been struck down for the following delusions which resulted in partial or total disinheritance of family:**

* A belief that T was the illegitimate son of George IV (***Smee***)
* A belief that relative was stealing T’s property (***Re Wilcinsky***; ***Schulze v Ruzas***)
* That T’s daughter had wired his chair and was shocking him (***Re Barter***)
* Delusions that children opposed T’s connection with church (***Fuller Estate***)
* Delusion that wife (age 70) entertaining men for immoral purposes (***Ouderkirk***)
* Delusion that brothers alienating her from mother (***Re Fawson Estate***)
* A will cannot be set aside if the alleged delusion can be explained (***Re Schwartz*** and ***Beal v Henri***).
* Example: business disputes
* **Practice Tip:** A new elderly client is a danger sign for drawing a will (over 65, never met this person before … get previous wills).
* Order assessment if you think it is necessary.

If it is merely a suspicion or doubt (not delusion) then SHOULD be admitted to probate (***Royal Trust Co v Ford***)

* Suspicious of paternity, not a delusion

ONUS is on propounder to prove capacity, including the onus of negativing the alleged existence of an insane delusion

* If there is a delusion, then must be shown that the delusion did not affect the dispositions in the will
* If there is doubt about the matter, then the onus is not met (***Smee***; ***Ouderkirk***)
* Will itself may show that there was no delusion (***Skinner v. Farquharson)***

## Onus of Proof [pg. 214 note 1]

* Onus lies on propounder to prove the last will was from **a free and capable** testator (***Barry v Butlin***).
* Probate of a will in common form [i.e. without trial] in Ontario is *prima facie* evidence of testamentary capacity. After probate is obtained, all the **onus shifts to those attacking the will** to displace the presumption and show lack of capacity (***Badenach v Inglis***)(usually try to get probate as quickly as possible and any concerns about the validity of the will should be filed as soon as possible to stop the process so that onus stays in the original position). [*Could be challenged: this differs from the rest of country and England*]
* If a party raises a *genuine* issue of capacity (may be **cost consequences** if there is no reasonable basis for proceedings – ***Royal Trust v Ritchie*)**, or will suggests a possible lack of capacity, a trial is required and capacity must then be proved on BOP (***Re Barter*).**
* Basically, onus lies with propounder to prove capacity and knowledge / approval of will; onus lies with one attacking will to prove undue influence / fraud (***Vout v Hay***).

Example: I have a client that dies. I have the will. I will fill out the application for probate and file with the court. The application contains NO STATEMENT about testamentary capacity. Get call from courthouse to pick up the probate when ready (enables you to deal with 3rd parties).

* Once a certificate of appointment of estate trustee is obtained, it establishes that all the above criteria have been proven by the party propounding the will and party seeking to challenge will after certificate of appointment has been given, then that party has the onus to establishing whatever the issue is.

So, if we are acting for party challenging the will what steps can we take to ensure that we do not get to the point where the onus is on our client?

* **File an objection.**
* Once this happens then certificate of appointment *cannot be issued except on notice to party objecting*. Once notice is received, our client has to decide whether to pursue litigation.
  + - In cases like ***O’Neil* & *Skinner***, what we see is a lawyer who had acted for a client over a number of years and therefore had opportunity to observe the client and tease out these issues about testamentary capacity.
    - The party propounding Will has onus to establish the age requirements, statutory requirements, knowledge and approval, testamentary capacity

## Suspicious Circumstances [pg.215]

“**Suspicious circumstances**” are “circumstances which create a specific and founded suspicion that the testator may not have known and approved of the contents of the will” (***Clark v Nash***).

***Eady v Waring*** [Note 6 pg. 225]

Definition of suspicious circumstances in the Will context

*Suspicious Circumstances arise in cases where:*

*1) beneficiary prepares a Will or*

*2) is instrumental in preparing a Will or*

*3) under circumstances which raise a well-grounded suspicion that the Will does not represent that mind of a testator.*

* Where we have suspicious circumstances as defined by ***Eady v. Waring*** then **party propounding the Will bears the onus of removing the suspicion** & **bears the onus of tendering evidence** to establish court that Will expresses true wishes of testator.
* Ought not pronounce in favour of the will unless the suspicion is removed (***Barry v Butlin***)
* Direct proof that the testator KNEW and UNDERSTOOD the contents of the will to remove suspicion

##### Four Potentially Suspicious Circumstances:

1. **Beneficiary has involvement in the preparation** of the document - notes made in beneficiary handwriting and it is proven that T took the notes to the lawyer’s office - or any other circumstances suggesting the doc doesn’t express T’s mind (***Eady v Waring***)

* This could only mean that they are physically incapable of writing themselves though.

1. **Beneficiary is present** when instructions are given to the lawyer.

* Could just be nervous, needs beneficiary to translate, etc. But might show undue influence…

1. **Beneficiary’s lawyer drafted the will**.

* T could just be a demanding person and wanted it done right away.

1. The **lawyer is a beneficiary** (not a relative’s will).

* There could be a legitimate explanation for any of these, but party propounding the will has the opportunity to explain.
* ***Barry v Butlin***: Where there are suspicious circumstances, court should not accept will until suspicion is removed or explained. This will vary with the facts though – e.g. will leaves $100k to family, $50 to lawyer who drafted will – no weight to suspicion.
* The extent of proof required to remove the suspicion varies with the gravity of the suspicion and circumstances (*Clark v Nash*).

### What is proof? How much proof?

***Vout v. Hay*** [para 24 & 25 pg. 219, 220]

***The extent of proof required varies with gravity of suspicion and circumstances****.*

* How much proof? No determination
* In a Will case, all evidence should come out through discovery or live examination of witnesses and Will be apparent.

Ex. Meeting with testator, and testator brought notes to lawyer that were made by third-party that happens to be major beneficiary of the Will. Proof: could show that testator suffered from severe arthritis.

Ex. Testator retained lawyer for 20 years and then had a Will drawn at another lawyer’s office. Proof: the first lawyer was away for a week and person was demanding service immediately

Ex. Lawyer is beneficiary. Lawyer is related to T or they are good friends. If the size of estate is $600k and painting being given to lawyer is $500 not so much of an issue but if lawyer is receiving 20% then this could be an issue. Generally, best practice is if T wants to leave something for lawyer then they should go to a lawyer outside the firm.

#### *Vout v. Hay* SCC [pg.217]

**Facts:** T was murdered. Here the will was drawn by the secretary over the phone from whom she thought was Vout (i.e. the main beneficiary). Secretary also said Vout was also with the T when he read and signed the will. Vout denied both accusations. TJ held even if there were suspicious circumstances, the T did exactly what he intended and there was no undue influence. CA called for new trial to properly consider the suspicious circumstances.

J sopinka: Once the propounders prove the will was properly executed and T appeared to understand the contents of the will, there is a ***rebuttable presumption*** of T’s knowledge and approval of the will.

* Precedes ***Hall v. Bennett***, settles where the onus lies: **propounder must prove knowledge & capacity on BOP with degree of scrutiny in accordance with gravity of suspicion. Those attacking will must prove undue influence / fraud** .

SCC: **Three categories of suspicious circumstances**:

*1) surrounding preparation of will;*

*2) tending to call into question capacity of T;*

*3) tending to show that the free will of T was overborne by acts of coercion or fraud.*

* For 1) & 2) there is a presumption of knowledge / capacity (upon proof that the will was duly executed with the requisite formalities, after having been read over or by a T who appeared to understand it), **but** if suspicious circumstances surround them, the presumption is spent and the burden is on propounder to prove knowledge and approval (or testamentary capacity) on BOP. The presumption is removed by the attackers of the will presenting some evidence which, if accepted, would tend to negative knowledge / capacity (then it is up to the propounder to prove).
* 3) is an affirmative defence that must be raised and proved by the attackers on BOP, even if the circumstances give rise to a suspicion of fraud or undue influence (i.e. it is *not* the propounder’s onus to disprove). There is overlap btn 1)-3) (proving 1) & 2) might go a long way toward disproving 3)). Nonetheless they are distinct concepts.

The Court upheld the TJ decision: **CA erred to putting burden for undue influence on propounder**. TJ *did* consider circumstances suspicious (and didn’t believe Vout) but found that facts showed T had not been unduly influenced.

**Note**: First the propounder must prove 1) & 2), *then* it is up to attackers to prove 3) (***Riach v Ferris***).

**Suspicious circumstances around the creation of the will**. Examples:

* Beneficiary prepared the will
* Beneficiary has been instrumental in having the will prepared
  + Then the rebuttable presumption does NOT come into play
  + Propounder has the onus to prove
  + Lawyer would be a material witness

***Scott v. Cousins*** [Note 2 pg. 221]

*Summarizes* ***Vout v. Hay*** *principle*

J Cullity:

1. The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity.
2. A person opposing probate has the legal burden of proving undue influence.
3. The standard of proof on each of the above issues is the civil standard of proof on a balance of probabilities.
4. In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the will is aided by a rebuttable presumption.
   1. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or 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.
5. This presumption “simply casts an evidential burden on those attacking the will.”
6. The evidential burden can be satisfied by introducing evidence of suspicious circumstances – namely, “evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.”
7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a BOP. However, the extent of the proof required is proportionate to the gravity of the suspicion.
8. A well-grounded suspicion of undue influence will not, per se, discharge the burden of proving undue influence on those challenging the will:
   1. It has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect and fraud and undue influence remains with those attacking the will.

#### *Banton v. Banton* [Note 9 pg. 226]

**Facts:** Elderly man moves into nursing home and forms relationship with a staff member (much younger) in restaurant who takes advantage of him – has solicitor prepare will and POA in private -- question of capacity – capacity to marry but not to make will

**Held:** Court finds he lacked T capacity so **will was invalid.**

* Also discussed his capacity to marry and found that he had capacity to marry (less stringent capacity required to marry than required to draft a will) – this means that any previous will is revoked, so **she is entitled to intestacy**.
* No longer had the ability to understand and appreciate the moral claims of his children because of a delusion
* Court also found ample evidence of **undue influence** exerted against T by the woman. Case is instructive on issue of testamentary capacity.
  + Also instructive on law related to capacity to marry.
  + In Canada, the capacity to marry is substantially lower than testamentary capacity.
* ***Barry v. Butlin*** *–* court should not pronounce in favour of the will until suspicion removed
* ***Fuller v Strum*** – Court should not refuse a probate simply because they morally disapprove of the will as long as knowledge / capacity are satisfied. (In this case will contained derogatory language about son).
* ***Eady v. Waring*** *–* Suspicious circumstances doctrine also arises when the will is prepared in circumstances raising a well-grounded suspicion that it does not express the mind of the testator (i.e. not *only* when beneficiary was involved in its preparation).

**Example:**

If I were meeting with client alone, and they are 84 who in response to one of my initial questions (can you give me an email address) the person says ughh I don’t know anything about email and I don’t have a computer but as I look across the desk, I can see that he is reading from typed notes. Could be evidence of suspicious circumstances because **highly unlikely that he prepared**. Party propounding would have to submit evidence explaining away those notes.

* Could have severe arthritis and he dictated to someone to type

**Example:**

The beneficiary was present when the instructions are given.

Golden rule (or rule of perfection) = meet ONLY with the client. No one else is in the room.

Danger in having someone else in the room is that it raises suspicious circumstances – especially if that person is getting a substantial part of the estate

If brand new client (and sr citizen) – be much less willing to allow someone in the meeting room vs a client who you have known for 25 years (because have a baseline for capacity and a sense of the family + series of wills that shows patterns)

Make sure to get clear consent from client for breach of confidentiality if there is someone else in room

**Example:**

New elderly client calls – ask how they came to call them? Son says that should call. Have you had a will before? Yes, about 5-6. Well why see me now? Make sure to get a valid answer

**Example:**

Client wants to leave lawyer something from the estate. Initial answer is NO. Thank you very much. But that would be inappropriate because I’m your lawyer and I need to have a degree of independence from you. If insistent – then needs independent legal representation.

***Wintle v Nye***

* It is not the law that in no circumstances can a solicitor or other person who has prepared a will for the T take a benefit under it.
* BUT creates suspicion that must be removed by the person propounding the will
* Court must be vigilant and jealous

## At What Date Is Testamentary Capacity to Be Determined? [pg.229]

Example: Dad had a stroke, but from time to time he has a good day.

***Parker v. Felgate*** *(Re Bradshaw Estate* is the Canadian example of this principle)

* If T had **capacity when the instructions were given**, then the fact that T has diminished capacity at the date of signing does not nullify the will.
* Court has to be satisfied that testator “should be able to think thus far”. [ft. 198 pg. 229]
  + If client is in coma on second day this is an issue.
* Later, **as long as he understands he is now *executing* his previously-instructed will, and shows approval, the will is valid**.
* The capacity for execution is lower: need only know that it is the lawyer who is coming to attend and has his will to sign.

***Re Bradshaw Estate***

Capacity at execution only need go to the extent that the T understands what he is doing (executing his will) and that he is completing that which he had previously instructed. That is enough to submit for probate. This is NOT T capacity though.

* This rule should be applied with caution though if the instructions were communicated through an **intermediary** (***Calderaro v Meyer)*** or to two persons whose testimony differs (***Re Fergusson***).

**LUCID INTERVAL**

* A will drawn and signed during a **lucid interval** may be admitted to probate, but remember that propounder needs to prove.
* Possible that person who generally does not have mental capacity to make a Will because of mental illness recovers sufficiently during lucid intervals to enable her to make a Will. (***AG v. Parnther***).
* **The Will itself, if rational, may afford string proof of capacity during a lucid interval**. [pg.232 note 5]

**Intermediary** – take instructions directly from the client and if at some times you get a sense that the intermediary who is communicating the instructions doesn’t want you to go to client, then just say Law Society wants you to meet with the person. If 2 people giving instructions for same person and there is a difference, then see person actually giving instructions.

* If getting Will instructions from an intermediary lawyer should be cautious. *(****Calderaro v. Meyer****)* [pg.232 note 4]
* If getting instructions from two different people be cautious and see the client. Need to make the instructions from both people are the same. [Note 5 pg. 232]

## Undue Influence

**Undue Influence** is **not related to T capacity**, for a person may have the necessary capacity to make a will, but, b/c his or her **volition was overborne by another**, the will must be refused probate. There are no statutes on this – comes from common law beginning with ***Hall v Hall***. The onus with respect to undue influence always rests on those who allege it (***Wingrove*).**

***Hall v. Hall 1868*** *[ft. 213 pg. 232]*

**“Not all influences are unlawful. A testator *may be led but cannot be driven* and the testators Will must be the offspring of his own volition, and not the record of someone else’s.”**

* There are many influences that are not unlawful - usually clients ask the lawyer for advice as to what to do (tell them to make a decision and sign it to have something in place) – persuasion and appeals to affections or ties of kindred – these types of influence are legitimate.
* However, pressure (working on hope or fears) exerted to overpower the volition, threats the T does not have the courage to resist, moral command carried to the degree to by which T’s mind is overborne, are all undue influence and invalidate the will.

***Wingrove v. Wingrove 1885*** *[pg. 233]*

**To be undue influence in eye of law there must be coercion.**

* Discussed confinement – elderly person who has difficulty getting around and is kept as a prisoner in house by person exerting undue influence.
* Actual violence – person is physically abused to point of making a new Will
* **At a late stage** in T’s life **the mere talking** to individual **can be undue influence**.
* **This is more than inducement.** That a person has been persuaded or induced by immoral considerations does not constitute undue influence as long as the T intended it. There are varying degrees depending on the T (e.g. from violence or confinement to pressing a weak and feeble person until he gives in from fatigue), but must be such that **“this is not my wish, but I must do it”.**
* Testator must: 1) not be driven 2) not coerced.
* Ex. Person comes to office as widow. Brings in husbands Will and her Will. Wills are 25 years old and need to be updated. So, in first meeting lawyer Will encourage to update Will, the lawyer Will have influenced the individual but has not coerced her or driven her.
* **Party alleging UI has to prove that power was exercised and the exercise of the power produced the will**
  + Hard to prove because happens behind the scenes by manipulators

***Craig v Lamoureux***

* Husband or parent can ask for their recognition, provided that the person making the will knows what is being done.

***Re Marsh Estate; Fryer v Harris*** *[pg. 235]*

**Coercion depends on the circumstances – undue influence can include threat to withdraw assistance**

* **Facts**: The brother-in-law of T who had POA to manage her business and banking.
* **Held**: **Coercion depends on the circumstances**; When he found she was leaving her house to someone else, he told her to get those beneficiaries a POA to manage her business affairs. Thus, **he implicitly, if not expressly, threatened to withdraw assistance form T if the will was not changed**. Although she was capable, in her poor physical situation resulting in her complete dependence on him for business affairs and her minimal contact with other support systems, **the influence was undue.**
* The case also illustrates that **undue influence can be found even if the influencer does not personally benefit from it.**
* Court: “Had he only spoken against the bequest to the Reverend Harris I would have had more difficulty in finding undue influence. On the facts before me, however, Mr. Fryer […] implicitly if not expressly threatened to withdraw assistance. Mrs. March poor physical situation resulted in her complete dependence on Mr. Fryer and had no other contact, the influence from Mr. Fryer was undue. [pg.236]

**It is insufficient to prove that a person has the power to influence. The party alleging undue influence has to prove that the power was exercised and that the exercise of the power produced the Will**. [***Wingrove v. Wingrove*** *pg. 233*]

* In Ontario, the *party alleging undue influence has to prove it.*

Further, if friends or family members will benefit from the undue influence even though they themselves were not party to the undue influence, **the gift will be set aside**: these principles seem to be adhered to at least by implication in ***Keljanovic Estate v Sanseverino***

* **Undue influence** is a species of **fraud** and *failure to prove* it can lead to *costs* *awarded against* the party alleging it (***Re Cutliffe***).
* The fact that the T was operating under an **inaccurate understanding of relevant facts** reported by the beneficiary **does not entail undue influence** (***Keller v Luzzi Estate***).
* However, the principles of undue influence apply if a person has **poisoned the T’s mind against a potential beneficiary** – it must be proved the T believed the accusations and relied on them though (***Pocock***).
* If persons unduly influence the T *not* to change his valid will against his wishes, the will stands but those beneficiaries in question will be held to take their legacies on a resulting trust for the estate (for however the will would have read had undue influence not occurred) (***Betts v Doughty***).
* Must prove both that person had authority to unduly influence and used it to bring about terms of the will (***Johnson v Hutchquitch***).

**COSTS**

Because undue influence is seen by courts as **type of fraud, there are cost implications where a party alleges UI and cannot prove it** – general rule in litigation. (***Re Cutliffe***) [Note 7 pg. 237]

* + Serious accusation and need the goods to prove
  + OP can ask for substantial indemnity or full indemnity costs
  + In this case it may be better for lawyer to say that testator **lacked capacity**

T can be under undue influence to make or to change a Will [Note 10 pg. 238]

* Where you have UI NOT to change a will, then beneficiary holds in trust for the benefit of the estate (***Betts v Doughty***)
* Attempting to influence someone NOT to change a will
  + Example: Aunt has left me all jewelry in her will. She comes to me and says that she’s thinking of changing so grandchildren get certain pieces. NOW I start exercising UI
* Ex. When lawyer is asked to be an executor and so will say to client that your primary role here is your lawyer, so if situation arises about you changing mind about lawyer being executor, don't want the testator to be concerned about the lawyer getting upset.

**A person poisoning the mind of the testator against the potential beneficiary.**

***Mayrand v. Dussault*** testator is suffering from wasting disease and influencer suggests that disease was caused by testator’s wife in failing to properly prepare his food. [Note 9 pg. 238]

***Banton v. Banton,*** *J Cullity, overwhelming and irresistible influence and weak and vulnerable mental condition combined to find undue influence.* [Note 12 pg. 239]

If client asks lawyer for advice as to what to do --- then ask open-ended questions rather than make suggestions. Have you supported charities in the past? Would you consider any of them?

**Lawyer has the power to influence the client, so needs to be very careful.**

Or when client wants to appoint the lawyer as the executor. Be clear with the client that you are grateful for their confidence, but that you are the lawyer and your job is to draw the person’s will. If they no longer want you to be the executor then they need to be free to call you up and tell you that. Client cannot be afraid of the lawyer.

***Hubley v Cox Estate –* UI found**

**Facts:** earlier will split evenly between D and P. P was HIV positive and lived and looked-after the T. T made a new will and left entire estate to P. D found out and told his mother it was illegal and wrote VOID all over her will. Then he made his mother sign a revocation.

**Held:** Revocation void. UI found.

UI is a species of fraud, although fraud is a wider concept. ***(Allcard v Skinner***)

Can contest a will on both basis. (***Re Crompton***)

***Re Crompton* (239-240)**

UI proved. Lawyer asserted UI over clients. Had them leave him gifts in will, transfer bonds, etc.

* Lawyer fired from his firm
* + fraud – told them to keep it a secret, kept her from consulting an advisor + made representations

**FRAUD (240)**

* If I’ve committed fraud and as a result have become a beneficiary under a will, then that will is invalid.
* Cases are few and far between.
* Fraud = a lie by which the liar persuades the T to believe in “facts” that are false. If T acts on the lie by making a will or T gift that he would otherwise not have made, then will/gift will be set aside.
* If T is induced to make a will or disposition b/c of fraud it **cannot stand** (***Mayrand v Dussault***)**, but must be shown that the will would not have been made apart from the fraud** (***Kennell v Abbott***).
* E.g.: Beneficiary marries husband (marriage invalid as she’s already married), gift to beneficiary will be set aside (***Kennell v Abbott***), but gift to her child will be upheld (as he’s not a party to the fraud) (***Wilkinson v Joughin***). If beneficiary thought marriage was valid though, gift stands (***In the Estate of Posner***).
* If fraud was performed by beneficiary on T but the fraud was unrelated to the will (e.g. stealing from him), the legacy to her will stand (***Bolianatz v Simon***).

# Law of Mistake in Wills (243-261)

* Since the propounder of the will must prove that the testator knew and approved its contents (***Cleare***), it follows that any part of the will may be refused probate if it was inserted by mistake.
* Court has power to strike out passages, but not insert words (i.e. that the T intended to use) (***Re Schott***).

**JURISDICTION**

* Probate court and court of construction are separate courts with separate evidentiary rules
* Role of probate court: (***Neuberger v York***)
* Inquisitorial – not simply to adjudicate disputes
* Ascertain and pronounce what documents constitute the T’s last will and are entitled to be admitted to probate
* Special responsibility to T who cannot be present to give voice to his true intentions (hearsay evidence allowed, evidence of surrounding circumstances, direct evidence of T’s intention)
* Under **Rule 75**, an interested person must meet some minimal evidentiary threshold before the court will accede to a request for proof in solemn form
* Judgement operates *in rem* (can affect the rights of other persons)

## Three circumstances where court Will rectify mistake:

**1) Patent Mistake**

The will itself (or evidence of surrounding circumstances) shows that T made an **error about an existing fact**.

* In this situation the will (or disposition) is ineffective and denied probate, provided that it can be shown that the will or gift was made *in reliance* upon the mistaken belief (***Re Wright***).
* Eg: “Since my brother is dead, the $10,000 should be divided among his children” and the brother is not actually dead. This is inoperative if T believed him to be dead and would have benefited him had known he was alive (***Re Wright***)
* Likely happens in a homemade Will 🡪 will not see often in practice

**2) Drafting Error (“engrossing errors”)** pg. 250

* This is when something gets put in inadvertently – e.g. a lawyer has a series of precedents and has an assistant use them as a template but forgets to take out a line from the template.
* The problem here is that T has read the will and signed it.
* In ***Guardhouse v Blackburn***, the court said that the fact that the will had been duly read over and executed by the T is conclusive proof that the T approved of its contents.
* Later cases (e.g. ***Fulton v Andrew***) have said this is only a rule of evidence, not of law though – **it always remains a question of fact whether or not the disputed language was actually brought to the T’s attention and adopted by him**.
* Law: **if the drafter (lawyer) of the document inserted words which neither the drafter nor testator intended, then fact that the Will was read over by T is irrelevant. In certain circumstances, error can be corrected.**
* Ex. Where a Will is being done quickly and using a precedent would put in a “born outside of marriage” clause and when meeting with client lawyer forgets to discuss this clause.
  + Person dies and has said leaving $200k to grand-children, so all grandchildren would not get the money.
  + Because lawyer did not discuss the clause it would be considered that it was **inserted by inadvertence.**
* A lot of the evidence would surround the conversation between lawyer and client.
* **Limitation: The court does not have power to add words to the instrument, has to deal with Will as it is.** 
  + No legislation in Ontario to rectify Wills.

***General Rule*:** If the court can be convinced that the **mistaken words were inserted by inadvertence**, and not brought to T’s attention, then despite the fact that it was read to, or read over by, T, the court can remove them. The court cannot *add* words though (***Re Morris***).

* A mistaken insertion can be deleted even if it leaves part of the will meaningless (***Re Boehm***), unless the correction cuts down or alters what remains (***Re Horrocks***).
* *Mortimer’s Probate Practice*, quoted by ***Re Morris*** and consistent with ***Re Horrocks***, suggests there are **two main rules**:
  + - 1. If mistake was due to misunderstanding or misuse of language by solicitor to give effect to T’s instructions (i.e. a mistake but drafter turned attention to it), **court cannot remove the words**.
      2. If mistake was inserted by clerical error or slip, court *can* remove the words.
* It is not impossible that a court might remove words even in the case of 1) today though – *Re Morris* simply declined to decide on this because 2) was applicable to that case.
* What if the error is that words were *left out* of the will by inadvertence? In ***Re Reynette-James***the court would not add the words, but did omit some of the codicil from codicil since that had the effect of curing the problem.
* Note that the court of probate may strike out certain mistakes, and thus leave ambiguities to be figured out by the court of construction. However, if that court is unable to make sense of the provision as corrected, **it will fail for uncertainty**.
* Now b/c we have liability for lawyers who draft wills, in addition to beneficiaries bringing for action to correct will, more likely to bring proceeding against the lawyer for negligence.
  + Homemade wills – there is a window to correct these.

**3) Where the Wrong Instrument is Signed**

* + If T signs a completely different instrument (e.g. a mortgage) or someone else’s will entirely, no problem because it can obviously not be probated. But this is trickier in certain other situations: e.g. Lawyer is drawing reciprocal wills for a couple (both wills in the same form) 🡪 hands the wrong one to each spouse to sign.
  + ***Re Brander*** *–* The court has authority to correct such mistakes. In this case the court replaced the word “John” for executor with “Margaret” to correct it (both had signed other’s will). This is probably a mistake in law though – the court has authority to strike out works (i.e. “John”) but almost all case law says you cannot *add* words.

# Solicitor’s Duties (915-941)

## 1) Duty that solicitors owe in taking instruction for a will

* Advising the client, taking instructions, ensuring will is drafted in accordance with T’s wishes
* Ensure that the T knows and understands the T act, has capacity and is not subjected to UI

**2) DUTY THAT SOLICITORS OWE TO BENEFICIARIES**

* Can be held tortuously liable by disappointed beneficiary

## Duty Owed to testator in Taking Instructions for a Will (915)

* Does T have capacity? (*Propounder proves*)
* Does T know and approve of the content of the will? (*Propounder proves*)
* Is T subject to any undue influence or fraud? (*One claiming proves*)

#### As the circumstances change, the duties increase: 5 factors:

* + - * 1. **Age** **of T** - Over 65 get a bit worried.
  + Observations of potential incapacity or delusions
  + These can be what he observed or made by others – e.g.: child calls
    - * 1. **Where** **he sees the client** - His office, client’s home, care facility, nursing home, acute care
        2. Seeking to find out if hisclient’s instructions are **radically different from a previous will**.
* This is a subjective view of what the lawyer interprets – e.g.: less concerned with changing amount of legacies than deleting child from estate.

1. Instructions **aren’t received directly** from T – e.g.: housekeeper.
2. Who is **living** **with T** – especially if T is elderly.

## Responsibilities When Taking Instructions for A Will

***Murphy v. Lamphier* Solicitor must try to find out the real situation, not just draft will**

1) Business of solicitor is to see that the Will represents **the intelligent act of a free and competent person**

2) The lawyer’s job is to **seek to touch the testator’s mind, meaning and memory**. (asking details about family and assets/liabilities)

3) To learn of the property to be dealt with and that of the usual objects to the testator’s regard.

* + - Tests from ***Banks v. Goodfellow***.
      * Know assets and usual claims to be made on property

4) To satisfy himself that lawyer has **done or tried to do all that was in his power to find out real situation.**

* + Invite the client to put his or her life story in front of us
  + Is there knowledge and approval?
  + Any tinge of influence that might be UI?

***Re Worrell [pg. 916]***

**Facts**: The beneficiary took a signed letter to his solicitor to make T’s will leaving all the assets to himself and his family. The solicitor prepared the will.

**Held:** Suspicious circumstances had not been dispelled. Probate denied.

Mistakes that a lawyer can make

**(a)** never saw T yet knew T was 82 and confined to home for the aged;

**(b)** did not know size or nature of the assets;

**(c)** left substantial portion to person who consulted him;

**(d)** drew the will with changes from the original letter of instructions w/o consultation;

**(e)** handed the will to the beneficiary who was the one to request the will;

**(f)** kept no full docket entries.

* **Avoid asking leading questions** with T (esp if he’s elderly).
* Any lawyer drawing a Will should make full docket entries regarding all the details especially with an elderly testate and even more so in this case (beneficiary contacted him and he knew nothing of the testate). [Pg. 919]
* Cited ***Re Dingwall*:** “it is the most elementary of teaching in regard to the drafting of wills that **the draftsman should preserve his notes of the testator’s intentions**.”
* Asking leading questions by lawyer obtaining instructions from elderly person is a practice to be avoided. [Pg. 918]
* ***Jarman on Wills*** 
  + “Few of the duties which falls on the solicitor more imperatively calls for the *exercise of the sound, discriminating and well-informed judgment* then taking instructions for wills”

***Hall v Bennett* (919, note 1)**

**Facts:** Solicitor attended hospital to prepare a will for a terminally ill client. Drifted in and out of consciousness. While lucid gave instructions to lawyer but excluded daughter and grandchildren. Because of client’s condition, lawyer declined to draft will. Client died later that day. P sued the solicitor for negligence.

**ONCA:** solicitor acted appropriately in refusing to draft the will.

***Orleski v Reid* Page 920 – note 2**

If the will is litigated and it is found that we should have known that the person was incapacitated, especially if prepares will without instructions from client, then we as lawyers could be exposed to costs

***Piasta v St. Johns***

* A solicitor taking instructions must obtain from the T info about the T’s relatives and persons who have a moral claim on the T’s bounty.
* Need to know nature of the estate, but not the exact value of the property

If T is substantially changing will & disinheriting family, should have assessment done & assessor interview family too (***Banton***).

Should be particularly vigilant with a (semi-)illiterate T (***Re Gislason Estate***).

## What Is Our Duty of Care To Beneficiaries? [pg. 922]

* Recovery used to be denied to beneficiaries for solicitor’s negligence due to privity of contract, solicitor was only liable to his client. (***Re Fitzpatrick***)
* ***Whittingham v. Crease*** *–*Early BC case.Lawyer had beneficiary’s spouse attest (witness) the will – stupid mistake. Beneficiary allowed recovery on *Hedley Byrne*’s principle:
  + ***Hedley* Byrne** (*pure economic loss*)**:** Where a person seeks out another who possesses special skills and trusts that person to exercise due care, if that person voluntarily answers, **knowing (or ought to have) that reliance was being placed on his skill and judgment**, then he **owes a duty of care** to the other person. Absent an express disclaimer of responsibility, the first person can recover damages for financial loss caused by negligent misrepresentation, whether oral or written, of the skilled person.
    - ***Unavailable when beneficiary unaware of will and not reliant on solicitor 🡪 then use D v S***

***Ross v. Caunters*** *–* Had beneficiary’s husband act as witness – will invalid – beneficiaries sue solicitor.

**Held**: Duty of care resulted from close proximity of P to D, foreseeable harm (***Donoghue v Stevenson***)– allowed beneficiary recovery for lost benefits they would have received from will.

* Duty is to **use proper care** in carrying out client’s instructions for conferring the benefit on the 3rd party. This is far from diluting the solicitor’s duty to his client but in fact strengthens it.

|  |
| --- |
| White v Jones (924) [1995] 2 AC 207 – Hedley Byrnes covers intended beneficiaries under a will.  **Facts**: T cut daughters out of will, then wanted to put them back in. Law firm delayed, had a clerk do it (who waited until after vacation) until the T finally died w/o the will be updated. Disinherited daughters sue law firm for negligence.  **Held**: Solicitors generally owe a duty of care in contract and tort only to their clients, not to 3rd parties. Further, there is no recovery for loss of *expectations* in tort (only in contract).  However, ***Hedley Byrne*** principles (in tort) can extend to cover duty of care to T’s intended beneficiaries, **even if unaware of the making of the will** (as solicitor can foresee risk of harm to them if he is negligent). This covers negligent omissions and commissions.  “By accepting instructions to draw a will, a solicitor does come into a special relationship with those intended to benefit under it in consequence of which the law imposes a duty to the intended beneficiary to act with due expectation and care in relation to the task on which he has entered”  **Such liability will not apply of course if the defect becomes known during the T’s lifetime and he chooses not to remedy it or if there is an express term in contract btn the solicitor and the T limiting such liability.**   * ***Note***: some American case law suggests a solicitor is *not* be liable just for delay in executing a will (***Radovich v Locke-Paddon***). * Ratio **upheld in Canada** in ***Hall v Bennett* ONCA** * **Time:** Unless the circumstances reveal a need for urgency, a lawyer cannot be expected to act immediately on every file (***McCullough v Riffert***) |

***Hall v. Bennett 2003*** confirmed that a lawyer can be sued for negligence in the negligent preparation of a will

* If lawyer writes Will for client and makes mistake, then lawyer has duty of care to beneficiary and beneficiary who suffers monetary damage as a result of lawyer’s negligence has the right to sue lawyer for negligence.

Key: Para 22 -27 – found on OWL Para 49-61

***Earl v Wilhelm*** note 14 page 938

Applied ***White v Jones***

* T gifts (of farm) failed because owned by corporation, not T personally (tax avoidance)
* Solicitor was held liable to the disappointed beneficiaries because he ought to have realized that T no longer beneficially owned the farm by setting it up like this

***Carr-Glynn v Frearsons***

**Facts:** T owned parcel of land as joint tenant with nephew. Asked lawyer to devise the farm to another nephew and niece. He advised her that the joint tenancy should be severed and that she should check the deeds. T neglected to do so and signed the will. T dies, co-owner receives whole farm as right of survivorship. Niece sues

**COA:** Lawyer negligent. Should have sent a notice of severance out when will was signed.

***Hatch v Cooper***

**Facts:** Will failed to provide what would happen to remainder if W never remarried. Solicitor told wife of the “deficiency” in the will. Had her sign a remedial agreement. Did not inform her of her dependant’s relief or matrimonial property if she did not sign. Failed to inform her of COI. W sues lawyer for negligence.

**Held:** Solicitor breached his duty of care. He negligently misrepresented the terms of the will and counselled W to sign. Also a reasonably prudent estates lawyer would be aware of rollovers and capital gains tax.

***Calvert v Badenach***

**Facts**: T and P shared ownership of a property under a co-tenancy.In will T left his share to P. BUT when T died, T’s daughter brought a dependant’s relief claim and was awarded 200k. The judgement was satisfied out of the property. P argued that the solicitor negligently failed to advise the T to arrange his affairs so as to preclude daughter’s claim. (T would have had to transfer the property to P during his lifetime OR switched to joint tenancy)

* Court found negligence.

***Wakeford v Arnold***

The solicitor is only liable to named intended beneficiaries to ensure T’s intentions to them are carried out, *not* to improve the beneficiary’s position and is *not* liable to other 3rd parties (in this case, a beneficiary’s corporation)

***Graham v Bonnycastle***

The solicitor does *not* owe a duty of care to beneficiaries under a previous will.

**LSUC Rules of Professional Conduct**

**Joint-Retainers**

* LSUC now says that a solicitor should get a joint retainer agreement when in a relationship people come in together (e.g. spouses) and know what’s in each other’s documents.
* **Rules for Joint Retainer:**

1) *Clients are treated as one client* – Only one file, contents of which are provided to either party – either can receive copies. 2) The firm cannot change the document of one person without letting the other person know.

3)Each party is entitled to a copy of the other person’s document at any point in the future

# Signing Wills & Powers of Attorney

* Lawyer gives client opportunity to read will or precis’s will to client
* Lawyer asks client if ready to sign. When signing taking place all 3 people in room.
  + Two witnesses and testator
* Traditionally, Client initial each page of the Will except the last page
  + If there is a change that needs to be made in the Will then strike out the change and put the change and have the client initial the change opposite to where that change has been made.
* On the last page sign normal signature.
* Lawyer then hands document to two witness and witness puts initials on every page and then sign on last page.
* At this point the Will signing sequence is finished.
* Note: Signing of each page it is not required by statute but it is an accepted tradition.
  + Power of Attorney Signing for Property and personal care the sequence is the same, except for initialing of the pages. Nothing wrong with initialing pages but it is not done.
  + Any changes made in POA document then they would be initialed
  + Client signs, then witness signs, then lawyer signs.

# Formal Validity of Wills – Chapter 9 (279-323)

## Attested (formal) Wills (279)

* This is a document which is signed by T at the end and attested by two witnesses.
* The *SLRA* explicitly recognizes that minor defects ought not to invalidate execution of a will (e.g. **s 7(2)).**

## LEGISLATIVE REQUIREMENTS (280)

### 1 - In Writing

In Ontario, a Will is valid only **when it is in writing** **SLRA s.3**

* **Electronic**: Someone who types Will and stores it on computer and signs the document it is **not a valid Will**.
* **Foreign**: A Will that is written in foreign language and correctly executed with **s. 4 and 7** can be probated, however court has to be presented with authenticated translation of the document. (***Re Berger***)
* **Symbols not letters**: ***Murray v. Haylow*** *[pg.285]*
  + Testator used ditto marks and the court held that the ditto marks constituted writing.
* **Type of “Paper”**: Act doesn’t stipulate what the will needs to be written *on*: okay if on egg shell (***Hodson v Barnes***) or etched into a tractor fender (***Re Harris***).

### 2 - Signed and Witnesses

#### S. 4(1) A will is not valid unless:

**a) Signed** at the **end** by **T** or it can be signed by **some other person** in his **presence** and by his **direction**. 4(1)(a)

b) T makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; S.4(1)b

* Two witnesses technically do not have to sign at the same time.
  + Statute says they each **individually** must sign in T’s presence.
  + The safe practice is that nobody leaves the room until all three signatures are on the document.

c) two or more of the attesting witnesses subscribe the will in the presence of the T

#### Amanuensis

* When you have a situation where a Will is signed by another person we call that person **Amanuensis**.
  + This situation may occur if client suffers from a disease that makes them unable to write.
  + Lawyer wants Amanuensis to sign in front of T.
  + Lawyer would want client to specifically direct **Amanuensis** to sign and special **attestation clause** that would be used.

**Need an attestation clause when amaneunsis**

If client getting will signed with two witnesses and brought in an **amanuensis** then there would be a **specific attestation Clause** for this process.

* + **Attestation Clause** would say that **Amanuensis** was signed in client’s presence and by client’s direction.
* Blind person can make a Will and sign it or Amanuensis signs it. (***Brewster v. Brewster****)* [Note 9 pg. 289]
  + Where Will is being signed by blind person there is special Attestation clause and Will should be read in its entirety not precis.
* ***Calderaro v Meyer:*** T could not communicate instructions for someone to sign on his behalf. Someone signed anyway. Will invalid.

**Amanuensis as witness/beneficiary**

* **Amanuensis** can also act as a witness. ***Re Bailey’s Goods***
  + The witnesses, spouses of witnesses, **Amanuensis** and spouse of **Amanuensis** cannot be/should not be beneficiaries.
  + The Will is still valid if beneficiaries, but the gifts are invalid. [Note 3 pg. 288]

#### What Counts As Signature

* **Blind/Illiterate**: If a person cannot read or write or is blind they can make a mark [see pg. 289]
* **Amanuensis**: A signature of the amanuensis’ name rather than the testator’s name appears to be sufficient. *Re Fiszhaut*:
* **Other name**: Likewise, a signature other than T’s formal name is also sufficient (e.g. “your loving mother” – *Re Cook*).
* **Initials**: If a person only signs with **their initials** or with printed words, it is okay if that is their *usual signature*. *Re Clarke*
* **Line or mark**: If T is unable to sign in a normal hand, a line or other mark is sufficient.*Re Bradshaw Estate*:
* **T’s own signature can be made with assistance -** *Re White SCC*

**Facts**: Testator was having physical difficulty writing his name and one of the witnesses put his/her hand on hand of testator to stabilize and enable testator to make the mark.

**Issue:** Whether T has signed the Will?

**Held:** The Will was valid

* “I think that the testator himself signed and none the less if he were assisted by Binet even to a considerable extent” [pg.288]

**Rule:** If T is unable to sign their name and some 3rd person assists them in doing so this is a valid signature.

#### Location of signature

Basically, it needs to be clear the will was signed after it had been completed and that T’s signature was witnessed.

(s7): In so far as position of the signature is concerned, a Will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the Will so that it is apparent on the face of the Will that the testator intended to give effect by the signature to the writing signed as his or her Will. **S. 7(1)**

* + Don’t want any dispositive provisions or administrative provisions following the signature.

**A will is not rendered in invalid because**: (s7(2))

* **Blank Space**: A Will is not invalid because there is a **blank space** that intervenes between the concluding words of the Will and the signature. **S. 7(2)(b)**
* **Separate Page:** A signature on a page on which no clause, paragraph or closing part of the Will is written above the signature is valid **S.7(2)(d)**
  + Ex. Clause takes up entire page and no room to sign at bottom so sign on next page.
    - S.7(2)(d) says this is okay.
  + In practice DON’T have dispositive provision end at page 3 and at top of next page put the witness.
    - Cut the last page and have some words of the Will on last page.
    - Not required but good practice.

**Signature does not give effect to 7(3):**

* **S. 7(3)** “The generality of subsection (**1)** is not restricted by the enumeration of circumstances set out in subsection **(2),** but a signature in conformity with sections (4), (5), (6), or this section does not give effect to,

**(a)** a disposition or direction that is underneath the signature or that follows the signature; or

**(b**) a disposition or direction inserted after the signature was made.

* + Ex. If after client signs Will and two witnesses sign and client wants to add something and the lawyer adds it after the signature this clause is not valid. This should be done by codicil or sign a brand-new document.

## Must be Compliance with SLRA Execution Requirement

* It is the party propounding the Will that has to **establish due execution.**

**Difficulties in proving due execution *Yen Estate v Yen-Zimmerman***

* To prove a will must show T capacity as well as that the will was properly executed and the T knew and approved of the contents (***Maliwat v Gagne***)
* No reason why not to have the presumption of due execution – can be rebutted by direct evidence or suspicious circumstances
  + Reasons why to have affidavit: dishonest or forgetful witnesses, dead or MIA witnesses

***Re Bean***

* T did not sign will itself but signed the envelope that it was contained in
* Will could not be probated
* Followed in ***Re Beadle***

#### No Saving Provision to allow Mere Substantial Compliance

* People who do home-made Wills must follow these sections or the Will is invalid. Other provinces have provisions which enable court to correct.

***Sills v. Daley***

**“Substantial compliance” with Act is not enough in Ontario. This would be ignoring the clear provisions of statute and would create discretion in the court not intended by statute.**

* Confirms that the above provisions have to be followed because there is no CL principle that enables court to wave provisions of statute.

##### But there is Presumption of Compliance

* There is a presumption of due execution if the will contains a proper attestation clause (***Kirpalani v Hathiramani*).**

|  |
| --- |
| Re Riva (1978), Ont Sup Ct – Will presumed to be executed properly if there is not proof either way  **Facts**: There was a will document with the signature placed on the 4th page of the document even though there was a small space for the signature on the 3rd page – neither witness could be located to attest to will so there was no way that they could prove the *Wills Act* was complied with.  **Held**: “*Omnia praesumuntur rite esse acta*” – If an intention to carry out some formal act (such as the making of a will) is established, then an inference may be drawn that on reasonable probability the actor (T) did what he intended to do in the way in which the law prescribes it should be done - all things are presumed to have been done correctly until it is proven to be done to the contrary. **Thus this maxim only applies if there is no proof one way or another – then it gives effect to the testator’s intention.**   * Based on 2 main principles from ***Re Peverett*:**   1) Court is extremely anxious to give effect to T’s wishes;  2) Court will not allow a matter of form to stand in the way if the essentials of execution have been fulfilled.   * This case illustrates the problems that happen if court can’t find witnesses. Surrounding circumstances and facts suggested that the signature was meant to endorse the writing as her last will and testament. * Also, no one could *dis*prove that it wasn’t in accordance with the statute. **B/c they couldn’t prove one way or another then the maxim comes into play.**    + Do not need to rely on presumption if compliance can be proven, so if one of witnesses could be found and give affidavit execution that established compliance with SLRA this is okay and it cannot be used if compliance is disproved. * Case also shows benefit of having will drawn professionally – litigation could cost $10,000 but getting will drawn is $250. |

##### Presumption is Now Commonly Supported by Affidavit of Execution

**Affidavit of Execution** – prescribed form signed by the witness that says the will was executed according to the *SLRA*. This was unusual to do years ago but now it is usually signed when the will is signed.

## What the Witness Must See/be able to see

Witnesses are **not attesting the document, but the signature made in their presence** or acknowledged in their presence.

* Wills and POA are the last documents in Ontario that have this regulation for signatures. More technical for wills then POA.

- **A signature on the will** (without knowledge it is a will at the time):

- The requirement that witnesses sign doesn't require witnesses to see what is written or that it is a Will, so long as they see T write something, and assume they cannot be located then *Omnia Praesumuntur* comes into play [Note 1 pg. 297].

|  |
| --- |
| Chesline v. Hermiston – “A request to sign a paper not declared to be a will, when witnesses see the signature is sufficient”   * **They don’t need to know it is a will**, what they are attesting is the signature, not the will. (***Keigwin***) The witnesses do not need to know the contents of the will as long as they see the signature (***Hudson v. Parker***). * “A mere request of them to attest to an instrument, the nature of which they are not aware of and the signature they do not see, is NOT sufficient” (***In Bonis Ashton***)  1. Witnesses must *see* T’s signature. 2. However, if witnesses see T write something on the document, it will be presumed they witnessed the signature, even if they do not actually see it themselves (***Smith v Smith***).  * “The signature of T must be written or acknowledged by T in the presence of both witnesses together before either attest or subscribes the will.” * Here will was invalid because T signed after 1st witness |

**- Must have been able to see the signing:**

|  |
| --- |
| Re Wozciechowiecz – T must see witnesses sign or at least be able to see them sign had T cared to look.  If the testator unable to turn around because of physical condition and W sign behind the testator, attestation is invalid. Really this just speaks to sending the wills out to be signed. |

**- W must also sign in presence of T**

|  |
| --- |
| Jenner v. Finch – if the W signs after T but in an adjoining room and out of the testator’s line of sight (door open) they do not sign in T presence and attestation is invalid. |

### T may also Acknowledge Signature infront of 2 Witnesses [pg. 298]

**S. 4(b)** To be valid, T has to either make the signature, or **acknowledge** the signature in the presence of 2 or more attesting witnesses **present at the same time** (who must then sign the will *in T’s presence*).

* **Must be acknowledged before 2 at same time:** held that the acknowledgment was not made in the presence of both witnesses bc the 2 store employees were witnesses and one was at another counter when the other was signing.*Brown v. Skirrow*,
* **Witness must have Opportunity to see Signature:** doesn’t have to actually see the signature, so long as they have *the opportunity* tosee it. Here they didn’t, so invalid. *Re Gunstan*
* The fact of T saying “here is my will” but the witnesses do not see the signature is not enough. Maybe it’s a will that hasn’t been signed yet (not valid until signed).
  + “There is no sufficient acknowledgement unless witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his Will.” (Jerman on Wills)
  + Even saying “this is my will and I have signed it” is not enough if the witnesses are unable to see the signature. They would then only being acknowledging that the T said she had signed, not ***acknowledging*** the ***actual*** signature.

#### Perfect acknowledgement:

***Hudson v. Parker*** [pg. 299]

**Court:** (counsel of perfection) “for T to say here is my name written, I acknowledge my name so written to have been written by me and bears witness to my signature.”

* There is only ONE original Will.
* Can make notarized copies of document after death.
* Do make multiple copies of POA.

## Attestation by Witnesses/Amenusis Who May Be Beneficiaries

B/c the formal requirements of wills are designed to prevent fraud, if a witness is a beneficiary under a will, as a **general rule, the gift to the witness is therefore void**. Same if a spouse of a beneficiary is a witness. But this does not mean that the will itself is invalid

s. 11 -14 – found on OWL

* **S. 11** Where a person who attested a Will, who was at the time of its execution or afterward has become **incompetent** as a witness to prove its execution, the ***Will*** is not on that account invalid.
* **S. 12** Where a Will is **attested** by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,

(a) the person so attesting;

(b) the spouse; or

(c) a person claiming under either of them, but the person so attesting is a competent witness to prove the execution of the Will or its validity or invalidity.

* **S. 12(2)** Where a Will is **signed for the testator by** another person in accordance with **section 4**, to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest, or other disposition is void so far only as it concerns,

(a) the person so signing;

(b) the spouse; or

(c) a person claiming under either of them, but the Will is not invalid for that reason.

* Where no undue influence (allows court discretion to uphold testamentary disposition)
  + **S. 12(3)** Despite anything in this section, where the Superior Court of Justice is satisfied that neither the person so attesting or signing for the testator nor the spouse exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.
* **Exception:**
  + **S.12(4)** Where a Will is attested by at least two persons who are not within **subsection (1)** or where no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection.
* **S. 13.** Where property is charged by a Will with a debt and a creditor or the spouse of a creditor whose debt is so charged attests a Will, the person so attesting, despite the charge, is a competent witness to prove the execution of the Will or its validity or invalidity.
* **MYTH**: executor cannot witness the Will:
  + **S. 14**. A person is not incompetent as a witness to prove the execution of a Will or its validity or invalidity solely because he or she is an executor.
* Note: SDA executor cannot be a witness to POA for property or POA for personal care if executor is asked to be the POA.

## Holograph Wills (303)

Permitted by **s.6 of SLRA**

* **S. 6.** A testator may make a valid Will **wholly** by his or her **own handwriting and signature**, **without formality, and without the presence, attestation or signature of a witness.**
  + Another person cannot sign for the testator
  + If lawyer is dictating holograph will to client – knows the magic words
  + The problem is when people try without a lawyer

Common issues:

* **S. 7(1)**: formalities regarding signature placement (at the end) apply to holograph wills too (***Re Clarke***).
* **Problems with holograph wills**: expressing correct intention, right words, *animo testandi*, signature placement, etc.

### “Deliberate or fixed and final expression of intention re disposal of property upon death”

***Bennett v. Gray*** - NO WILL

* **Facts**: Gray wrote letter to lawyer, letter was signed and she says “I will try to outline the way I would like to leave what little I have”. Could not decide on executor and disposition of the residue. She dies.
* **Issue:** is this letter a valid holograph Will?
* **A holographic paper is not testamentary unless it contains a *deliberate or fixed and final expression of* *intention* as to disposal of property upon death** [Pg. 305 middle]
  + B/c it is being set up as a will, the propounder must prove it contains this deliberate expression.
* **Held:** Not written *animo testandi*

\*ONUS: Burden is on party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of the “FINAL…” character and nature. (***Whyte et al v Pollok***)

***Canada Permanent Trust v. Bowman***  - YES WILL

* Court found was a **valid will**, that when she wrote the document she had the deliberate or fixed final intention.
* *“I would like Laura to have this property house and lots” with a list of gifts, but w/o a named executor. She also intended to see lawyer after.*
* Look at difference between the wording in this case & wording of letter to lawyer in ***Bennett v. Gray****.*

\*As long as T had a deliberate and fixed and final intention to make a will, the document will be admitted to probate. The fact that T intended to see a lawyer about her T dispositions afterwards does not mean that the document is not final (***Janicki***)

***Popowich v Capasso* – NO WILL**

* T = young with bipolar disorder, hospitalized several times. Married H in Italy. Returned to Canada. In 2009 made formal will – split between H and M. Planned to return to Italy. Did not. Committed suicide.
* Suicide note to M: “take my money and do things for yourself”
* **Court:** had T capacity, BUT did not reflect a deliberate or fixed and final expression of an intention to dispose of her property on death.
* Note = explanation of illness, love for her mother

## Use of Standard form Wills (308)

|  |
| --- |
| Re Forest (SKCA)– Look only at words handwritten by T: if you have a valid testamentary doc on them alone, it’s a valid will.  - If a form of a printed will is used and the testator just fills it in (not attested), then it is not wholly in his handwriting. While it may be possible to admit only the handwritten parts to probate, they must include words of disposition to be valid. Fails! |

* + **Use of language**: By contrast, ***Sunrise Gospel Hour*** was found to be valid will. The only difference there was that the word **“**bequeath**”** was used before a list of beneficiaries, but this was enough that the handwritten parts, alone, formed a complete expression of T’s intentions.
  + In ***Sunrise*** the court also refused appointment of executor to probate since T merely filled in a blank to name her.
* Person can’t write 4 dispositions, sign, and then add something else as a Post Script 🡪 s **7(3)** says signature does not give effect to something underneath or follows
  + ***Re Clarke***: T inserted name only at *top* of otherwise valid holograph will.
  + Court recognized that strict formalities do not apply to holograph wills **(s 6)** but had to refuse probate because **s 7** of *SLRA* explicitly referred to holograph wills.
    - **S.7** says signature has to be at bottom and signature in holograph will cannot give effect to anything that is underneath the signature
* ***Re Schultz*** – Court found that **initials at end of doc were sufficient** as a signature if intended to represent the T’s name.

## Holograph Codicil to Formal Will (sample on page 284)

**T can make a holograph codicil to formal** **Will** but the question is whether the words used manifest a present intention to change the will. ***Bennett v. Gray***

* Last clause – in all other respects I confirm my previous will. Effect of republishing the original will.
* Expression of a future intention is insufficient (***Re Kinahan***).

Tell client to come to you for changes.

### Timing of Statute and Codicil:

* A holograph codicil can amend a formal Will even if holograph codicil predates the statutory recognition of holograph Will, provided that T dies after the statutory recognition - March 31, 1978
  + A holograph codicil can amend either a **formal will** *or* a **holograph will** (**s 6:** must still be *wholly* in T’s handwriting). This can be so even if the holograph codicil predates statutory recognition of the will, provided the T dies after such recognition (***Re Chapman***).

### Language

* Best to use phrase like “**this is a codicil to my will of [date] – I substitute <> for <>. In all other respects I confirm my will. Signed as codicil to my will.”** Makes it crystal clear it is intended to be a codicil.
* Whether a document is found to be a holograph codicil it will **depend on the wording** that T chose. ***Examples*:**
  + “**Want**”: “Instead of leaving Roy $5000 in my will, I want to leave him $15,000” – the word ‘**wants’** indicates a future amendment. Note this is arguable however – using word “will” indicates contemplation of present will too.
  + “**think**”: “I think I’ll make Roy’s share $15,000” – this is not a fixed but a future intention: the word ‘**think’** implies future (*weaker*).
  + “**Maybe’**: “After thinking it over, maybe Roy should get $15,000” – ‘maybe’ is hard to interpret – but still shows the person **has made a decision** and “maybe” may have been used in a colloquial sense. Might not be deliberate enough… Arguable.

## Incorporation by reference of Non-holograph documents

[pg. 313]

* The doctrine of incorporation by reference permits an existing doc to be incorporated into a will if it is properly identified in the will

**Incorporation by Reference:** Doc must be

i) in **existence at the time** of making the will – must be signed first;

ii) **the will must refer to it as an existing document**; and

iii) **the will must describe the document with sufficient certainty** so that it can be identified.

* Ex. Write a Will and it says to divide my personal possessions in order of the list I made earlier today to be attached to my Will.
  + This is a valid Will and holograph document can be incorporated by reference because it meets 3 conditions from ***Re Smart.***
* What is the situation if give nephew handwritten list and at time making Will T has a typed list and use same words and it meets qualifications but the question is does it satisfy **s. 6** of SLRA.

Typed words cannot be incorporated in holograph will: ***Re Dixon-Marsden Estate 1985***

* ***Issue is still open!***
* Court decided not wholly in handwriting of deceased so typewritten words **cannot** be incorporated.
  + **Can a non-holograph doc be incorporated into a holograph will? NO!**
  + Trial decision that a typed memo (initialed and dated on each page in his writing with a signature at end) did not meet the proper criteria and had to be ***wholly* in his writing** (held it was one doc, not two). Judge said the handwritten words “the above-mentioned are in short those to whom my estate is left” to be T’s declaration of what he believed to be fact, *not* a testamentary intention by itself and since typed part could not be a T instrument alone (not as witnessed or wholly handwritten as per *SLRA*), it could not be incorp by ref.
* Prof says this flies against the notion that documents can be incorporated by reference without adhering to the rules of attestation.
  + [Note 1] Dixon-Marsden refused to follow ***Re Chamberlain*** – no appellate decision on this issue but rather conflicting decisions at trial level.
* But ***Re Chamberlain Estate*** (***not* followed by *Dixon***) said that although the initial will was not valid, a valid holograph codicil which specifically referred to the “printed will” was found which made both docs valid by incorporation by reference.

## ELECTRONIC WILLS (320)

* An instrument that is created, recorded, transmitted, or stored electronically, and which purports to be the expression of a person’s testamentary wishes
* **Does not include** the oral expression by the T of her T wishes that are **filmed** (that would be an oral will)

# Revocation of Wills– Chapter 10 (331-366)

* **10.3.2 (e)** small section on power of appointment – 10.6 and 10.7 not on exam.

Two types of revocation and they must meet the statutory requirements for revocation:

1) Those that arise by **operation of law** (marriage and its dissolution), **s. 15**;

2) Those that arise by **acts of the testator**

## Testamentary Act

**Revocation of will = Testamentary Act (must have Capacity and Intent) so *same* tests for testamentary capacity as to make a will.**

* have the same level of testamentary capacity from ***Banks v. Goodfellow*** and ***Hall v. Bennett*** in order to revoke the will.
  + Intoxication: A Will revoked when under the *influence of intoxicants* is **not** valid revocation
  + Undue Influence: Will revoked when under **undue influence** is **not a valid revocation.** (***Hubley v Cox Estates) [****pg. 332 ft. 6****]***
  + Mistake: A Will destroyed through inadvertence isn’t revoked. (***Eaton v. Heyman***).
* **Sum of Vitiating Factors:** A revocation may fail if it does not conform to the statute, mistake, lack of capacity (destroys while drunk – e.g. ***Re Brassington’s Goods***), undue influence, fraud and inadvertence.

## Revocation by operation of law

### Marriage

* **S.15(a) of SLRA -** A will is revoked by entering marriage, subject to **section 16**. (automatic)
  + Not revoked by common law: Entering a CL relationship does not revoke the Will. (***Corrigal v Buckley Estate****).*
* Alberta & BC which substantially reviewed and revised Wills and estate legislation, they have abolished revocation by marriage provision. [Pg. 336 note 1]
* A pre-nuptial agreement doesn’t change this (***Spence v Spence***).

#### Exceptions:

Contemplation of marriage**: s. 16(a):** a will is revoked by marriage **except** where there is declaration in the will that the WHOLE will is made in contemplation of marriage and it is T’s intention the will stands.

* If person has will, and then gets married but will is not made in contemplation of marriage. The will is revoked, and if a new will is not made then the person dies intestate and go back to preferential share and distributive share **in part 2 of SLRA**.
* In ON, **Must name a particular person** (***Sallis v Jones***).
  + A simple expression of “to my wife, X” is insufficient (no indication of intention to marry CL partner by calling her wife) 🡪 will is revoked by the marriage to CL Partner (***Re Pluto Estate***).
  + An expression of “to my fiancé X” is sufficient if there is real contemplation of marriage b/c fiancé connotes an intention of marriage 🡪 will is not revoked by marriage to Fiance ***Re Coleman***
  + Nonetheless, some courts have been more lenient in applying the statute (e.g. ***Owers v Hayes***).
* The will can be contingent upon solemnization of the marriage.
* There is ***no time limitation*** (could draft will years before actual marriage and still be valid)
  + ***If she married x, he was entitled to live in T’s home*** (found to be a valid holograph codicil)

Practice points:

* unmarried person – good idea to state at signing or instructions meeting and in report letter that the will is invalid once the client marries
  + Tell them to come back in when they are contemplating marriage

***Re Pluto Estate*** *[Note* 8 pg. 341]

**Must name a particular**

* He was unmarried at the time but married a person who satisfied the description in the will, except for the term “wife” and the last name (used his last name), the day after he executed the will.
* The court held that **the marriage revoked the will**.
* The relevant statute requires “a declaration in the will that it is made in contemplation of marriage”.

### Re Coleman For provision to apply, the whole will must be expressed to have been made in contemplation of marriage to a particular person.

* Wills of “*general contemplation*” of *a* marriage do *not* satisfy provision, especially without naming intended spouse (***Sallis v Jones***)
* But to “my fiancee” does, unless curtailed by context (***Re Langston***)
* However, it is the *will as a whole*, not just part of it like simply a gift, that must be made in contemplation of the marriage.
* It is likely that an overt expression that the will itself is made in “contemplation of my marriage to X” is required for that to be satisfied.
* This case has been partially reversed in England (not Canada) by amendments to *Wills Act* s 18 (see p.334).

“Surviving Spouse” **S 16(b) Election**

* It is possible that a will makes provisions for an unnamed surviving spouse even though will *not* made in contemplation of marriage to that spouse. **Provision will stand if the spouse is prepared to accept it.** This can save a will that would otherwise be revoked (only available in Ont & NS).
* **S. 16(b) *SLRA***: Spouse of T must elect to take the provision by filing with Estate Registrar for ON within 1 year of T’s death.
* Election held valid where filed within 30 days but to wrong office: not against substance of legislation (***Re Browne and Dobrotinic***).

Power of Appointment **S 16(c)–** If a will is made pursuant to a POA given to the T, and if will were to be revoked by marriage, the property which is the subject matter of the POA does not go to T’s estate or intestacy but to others named in the will. Thus 16(c) allows POA to nonetheless stand in such circumstances.

#### Powers of Appointment (16(c))

* **S 16(c):** A right given by the owner of property to another person to dispose of, or appoint the donor’s property. It delays the disposition of the property and permits the donee to determine at a later time who should have the property.
* Provision only applies to the part of the will that is subject to the POA (i.e. only that part is not revoked upon marriage).
  + *General power*: permits the donee to appoint anyone (incl the donee)
  + *Special power*: appoint among a special class of people
  + *Hybrid power*: appoint among a specified class of persons, but the class is defined to exclude one or more persons who would otherwise form part of that class.

### Dissolution of Marriage

Applies to Void marriages and voidable marriages

#### Void (lacks capacity to consent/Mistaken Identity)

* **Void:** A marriage is **void** if one of the marrying parties lacks capacity to consent.
  + *Test for capacity to marry that is lower than test for Testamentary capacity.*
  + If a party lacked the capacity to consent to marriage or is mistaken about identity of other party (***Thompson v Thompson***).
* **Challenged:** by any anyone with a financial interest in validity of marriage & after death of a party (***Calvert v Calvert***).
* **Consequence:** Being void doesn’t revoke a will b/c in law the marriage *never existed*

#### Voidable (Coercion/not following formality/no consumation)

* **Voidable:** A marriage that is **voidable** is voidable if one of three conditions are met:

1) Formal requirements aren’t complied with.

* + - If go to front lawn of law school and go through words/ motions this is not a valid marriage.

2) If a party is ***coerced*** into a marriage.

3) Inability to ***consummate*** the marriage.

* **Challenged by:** ONLY by the parties and ONLY while they are living(***Re Roberts***).
* **Consequence:** Being voidable revokes will b/c marriage existed.
  + unless there is a legal decree of annulment, then the relevant part of will is revoked – this relates back to time of marriage and marriage is treated as never having existed.

#### Predatory marriage *Banton v. Banton* 🡪 Capacity for marriage is low. Marriage valid, will revoked.

* **Facts**: Elderly man moves into a care facility & marries.
  + Instance where others could claim marriage is void, and there is no revocation of existing will, because they had a financial interest in the matter. And could challenge after death because taking position that marriage is void.
* **Held**: The threshold for finding capacity to marry is low. Banton had capacity to enter into marriage, and although tried to resist marriage, in November he consented and was not coerced into marriage [pg. 335].
  + So, the server gets the preferential share because marriage was valid and distributive share of estate.

|  |
| --- |
| * Illustrates the principle that a party can lack the capacity to create a will, but have capacity to marry (lower threshold).   + He was in nursing home and married one of the dietary staff – left everything to her in new will   + Court found lacked testamentary capacity to make will, but court also found that he had enough capacity to marry, so the **marriage was valid** which revoked the previous will. He died intestate so she got $200,000 and 1/3. |

### Partial Revocation arises frlom Dissolution of Marriage

Since it may be supposed that T does not normally want to benefit his former spouse, statutes have reversed the common law presumption that a will is not revoked by change in circumstances (i.e. if divorce but didn’t change will, original gifts to ex-wife would stand at CL).

* **Note**: This means other changes in circumstances (e.g. big inheritance, lottery win) do not affect the will – no statutory exceptions.

**S. 17(1)** -- Subject to **(2)** a will is not revoked by presumption of an intention to revoke on ground of change in circumstances.

* **S. 17(2)** where the testator’s marriage is terminated by divorce or annulment (civil law annulment not religious) unless a *contrary intention* appears by the Will then **a beneficial** devise or bequest to spouse or appointment of T’s spouse as executor or Trustee are revoked. And Will is to be construed as if former spouse pre-deceased testator.
  + **Marriage, divorce, annulment do not affect the validity of any POA.**
  + **S. 17(2):** only affects a divorce and annulment ***for the spouse of T*** – if you leave a cash legacy that goes to “my son John’s wife”, the fact that they have since gotten divorced is irrelevant, the legacy still stands.
    - In contrast to s15 which revokes entire will upon marriage
* Provision only applies after divorce / nullity becomes *effective* – which for divorce is 31 days after it is granted (***Divorce Act***)

#### Unless Contrary Intention in Will

|  |
| --- |
| Billard Estate (1986), 22 E.T.R. 150– contrary intentions must come from the will itself and not from extrinsic evidence.  (In this case T made will before divorce but *after* separation agreement) |

## Revocation of Will by Act of Testator –pg. 351

### Revocation by Subsequent document

**S. 15** A Will or part of a Will is revoked only by

* **(b)** **another Will** made in accordance with the provisions of this Part; (**incl a codicil or holograph will**)
  + **(c) writing:**

**(i)** declaring an intention to revoke, and

**(ii)** made in accordance with the provisions of this Part governing making of a Will.

* + - * Ex. Existing Will and want to revoke the Will. Would say “I hereby revoke the Will made on March 17 2017 in its entirety” and has to be signed and attested in accordance with formalities.
      * If **holograph codicil** is being drawn state specifically “I revoke Para 2 and put \_\_ in its place”.

#### Express Revocation Clause:

* If no revocation clause, former will be revoked only if T’s intention to revoke can be inferred (***Bates v Oryshchuk***).
  + If no intention inferred, *both* wills admitted to probate but 1st will is revoked **to the extent** it is **inconsistent** with the 2nd will (***Re Davies***).
  + Evidence of **surrounding circumstances *is*** **admissible** at to T’s intention (***Cottrell v Cottrell***).
* Note that if a will contains a revocation clause but makes reference to specific devises in the previous will, as long they do not contradict but can stand together, both will also be admitted to probate with deletion of the revocation clause (***Re Johnson Estate***)
* If **part of a will** is expressly revoked, it remains so even if the subsequent gift replacing it fails (***Re Davies***).
* Practise tip: Always see previous will/codicil before making codicil: otherwise you can be caught in a negligence situation

Re Davies ***[pg. 353]*** shows **risk for lawyer drawing codicil w/o seeing the original will and inconsistency arises**

* Do not want to have documents that are inconsistent with one another.
  + Safest to just insert a revocation clause.
* Once a Will or part has been expressed to be revoked, it remains revoked even though subsequent gift fails,
  + However, if there is merely inconsistency between the documents, and it is the gift in last document that fails then go back to previous Will as unrevoked. [Note 2 pg. 355]. Citing ***Ward v Van der Loeff***
* Starting a Will with the words “this is my last Will” doesn't revoke the Will unless this is T’s intention.
  + This is why we use the words “I revoke” [Note 5 pg. 355].

***Re McLean Estate*:** An **oral declaration** is **insufficient to revoke** a Will [Note 8 pg. 356].

### Revocation by Physical Act S. 15(d) SLRA

(pg. 356)

* A Will or part of Will is revoked **only** **by burning, tearing, or otherwise destroying** it by the testator or by some person in his or her presence, and by his or her direction with intention of revoking it.
* **NOTE: When a will is destroyed, you are intestate** 🡪 DOES NOT go back to earlier version.
  + Never destroy the previous will until the new will has a signature.

#### Burning, tearing or otherwise destroying 🡪 *ejusdem generis* (the same class or nature)

* Same class /nature:
  + - Drawing a line through, does not suffice.
* Ejusdem Generis means a generic term at the end of the list is modified by the words that proceed it in the list.

#### Intention to revoke = *animo revocandi* – at time of revocation.

* T **cannot ratify** a prior destruction.
  + T cannot subsequently ratify a prior destruction – the **action and intention must** **coincide**. *Also*: **destruction** **must** **be** **actual**, not just symbolic (e.g. can’t just draw a line through the dispositions and write on back of will: “all is revoked”) (***Cheese v Lovejoy***).
* Where a Will is destroyed by T under a mistake of fact or law, or by mistake or by accident is **not revoked**. (***Re Thornton***) [Note 11 pg. 360]
  + Ex. If X is sole beneficiary and for some reason T believes X is dead and so throws out Will. This is not a valid revocation.
  + Ex. Mistakenly stuffed will in national post and throw post in bin – this is an accident and not a revocation.
* If a will is destroyed outside of T’s control: they die in a house fire and will burns in the same fire then it might be possible to get probate on a photocopy.

#### Where document not entirely destroyed

* The **burden of proof** of intent to revoke is **on party alleging revocation.** (***Re Cowling***).
* If only part of the Will is destroyed, then the **Will is not revoked unless** the rest of the Will **cannot stand without the parts cut out.** 
  + **Destroying part of will** only revokes the destroyed sections (***Re Shafner***). But ifremaining sections cannot stand on own w/o those parts (i.e. will makes no sense), the entire will is revoked (***Leonard v Leonard***).
* Taking person’s name out of a will does not revoke a Will because rest of will can still stand.
* **Cutting off T’s signature** or witnesses signature **does revoke the Will** (***Evans v. Dallow***) [ft. 125 pg. 357]

#### Document destroyed by another at T’s direction

* Second part of s. **15(b)** discusses some other person burning, tearing, or otherwise destroying has to be:
  + **In his or her presences AND** (T must be *ABLE* to see it) ***Delack, Hickey and Camp v Newton***
  + **By his or her direction (with intention of revoking it) *Delack, Hickey and Camp v Newton***
* **SLRA s. 4/5 -** amanuenses signed by direction of testator – these cases would be applicable if there were some issue as to where or not T had directed burning or otherwise destroying.
* Note: **All of this includes codicils too (see *SLRA*’s definition of “will” – *not* exclusive).**

***Delack, Hickey and Camp v Newton if another person destroys the will, it must be down in the presence of T & at his direction***

* **Facts**: Sent will to sister. Marked “not to be opened until my death”. Then made a subsequent will (only change was executor). Sent second will to sister. Instructed her to destroy the first (in a letter). She did so. Second will was found to be not validly executed and was not admitted into probate, so siblings sought to establish the contents of the first will.
* **Issue:** Was the first will lawfully revoked?
* T was not present during destruction. So will was not revoked. **S.15(d)**

### Lost Will:

**Presumption of revocation if it was delivered to T**: Will cannot be located after death, but last possession traced to T, presumption of revocation (***Kennedy v Peikoff***).

* + However, this assumption can be rebutted by showing unlikely the T destroyed the will (e.g. by circumstantial evidence) (***Re Perry***).
  + This is not the presumption **after T** **loses capacity to revoke** (***Re Broome***) and in that instance party alleging revocation has to establish destruction while T had capacity. [Note 9 pg. 359]
    - Onus is on the party alleging revocation to establish destruction while T had capacity.
* Practice Tip: Lawyer should make client sign for original will – keep a receipt and a photocopy
* If a client demands the Will, then the client is entitled to the Will.

***Re Jorsvick Estate***

T made will in 2005 and died 5 years later. Thought it was kept in filing cabinet at home but it was not there. Found later in room of husband in senior care centre, torn into several pieces. Day before she died she discussed making a new will with her lawyer. Never mentioned destroying her old will. Referred to it as if it existed. Will was admitted into probate.

## Alterations in a Will Pg. 362

**Presumption** is that any apparent changes in a will were **made *after* execution** **(*Law v Law***)– **onus** on those who allege the changes existed when will was executed to prove by evidence, including evidence of **testator intent** (***Re East***)

### Direct evidence of T’s intention allowed (Re Adamson)

Note: Alterations on a photocopy mean nothing

* You only sign ONE COPY of the will
  + But sign multiple copies of POAs

### Alterations made at time Will is signed

Affix initials opposite where change is made and get affidavit of condition(***Re Pattulla***).

* Whenever there is a change on face of Will and it is being submitted for certificate of appointment have to submit a document called an **affidavit of condition –** Rule of civ pro **74.04 (1)(e).** 
  + The affidavit of condition is signed by one of the witnesses.
    - It confirms that changes on face of Will were made before Will was signed and that the Will is still in same state it was as of date of signing. Because once Will is signed there are different rules that apply.

### Changes made after Will is signed

**s. 19(1) Wills Act & S.18(1) of SLRA–** needs to be made in accordance with **s.1** of SLR:

- T’s signature, subscription of witnesses to the signature.

#### s18(1):If no compliance with s18(2) 🡪 Only words no longer apparent are impacted

* **S. 18(1)** “Subject to **subsection (2)** unless an alteration that is made in a Will **after the Will** has been made is made in accordance with the provisions of this Act governing making of a Will, the alteration has been made in accordance with the provisions of this Act governing making of a Will, the alteration has **no effect except** to invalidate words or meanings that it renders **no longer apparent.**”
* **Apparent:** words must be optically apparent on the face of the will and decipherable by natural means (e.g. holding it up to light, but not removing tape or white out) ***Douglas Estate* 1986**

##### S18(2):

* **S. 18(2**) For An alteration that is made in a Will after the Will has been made, signature of T and signatures of W have to be affixed OR in case of holograph will just the signature of T has to be made and has to be made either in margin near the alteration or made at the end of a memorandum referring to the alteration and is written in some part of the will.
  + **Does not need to be the original witnesses to witness the alteration**
  + **Line through and can still see the words = alteration has no effect**
  + **Opaque tape over part to be altered – is that apparent?**
* In practice: should not really see **s.18** come into play – more often than not just make a new Will or a Codicil.
  + First option should be a codicil --- with witnesses or a holograph codicil
  + Ex. At clients residence and client is seriously ill. Client wants to up 3 legacies by $5000 each and lawyer is there alone and has original Will can use **s.18** OR can have client make a holograph codicil.
  + Must be done strictly in accordance with the statute. No remedial legislation for a clerical error in Ontario

***Re Douglas Estate* 1986** pg. 363

* Court looks at the word **“apparent”** under **section 18(1)**
* Testator had covered certain words in the Will with whiteout and didn't sign or initial the alliteration and court had to determine whether words remained in the Will.
* If words are optically apparent on the face of the Will itself or decipherable through natural means then meets standard of section 18. It is not permissible to ascertain the words by use of extrinsic evidence or using chemicals that would remove the pen marks. [pg. 364]
* Law: **if the words in question are apparent then they are not taken out of the Will, they are admitted to probate; if *not* apparent, no evidence allowed to show what they were** (***Finch v Combe***).
* ***Re Itter*** [Note 1 pg. 365]
  + Party brought in hand writing expert and they were only able to discern words through **infra-red photograph**. Court said this is not allowed.

A codicil made after a will has been altered without the necessary formalities makes the alterations valid, because the will has been republished by the codicil. (***Re Sykes***)

# Income Tax

1. **Creation of two taxpayers**, deceased taxpayer and estate of deceased taxpayer

Date of death

* New taxpayer is created – the estate of the deceased taxpayer
* At some point, the executor has to apply for a new tax number (a trust number)
* Usually done at the time of filing the first return covering the income after death

1. **Legal responsibility of personal representatives** - final T1 Return; T3 Trust return (if required); Income Tax Guide Preparing Returns for Deceased Persons T4011

* In first assumption Jan 1, 2017 to June 30, 2017 – broken year return.
* Beginning of the year up til date of death = final T1 Return
* T3 Trust Return – covers the income earned after the date of death up until end of first reporting period
* If deceased did not file ITR for a number of years, then executor is responsible for doing so (and gathering all the info)
* Voluntary disclosure program 🡪 communicate with the tax authorities that man has died and I need to file for 7 years. Can you look at your records and confirm that I’m correct that its these years. I want to take part in this program – helps out with interest and penalties.
* If CRA has sent a demand file return then cannot qualify for the program. Have to get to the CRA first.

1. **CCRA clearance certificate** - personal liability of estate trustees if not obtained; Income Tax Information Circular IC82-6

* Goal for estate trustee
* Critical because once issued then the executor has no personal liability for the tax
* Filing ALL returns. Getting those returns assessed
* Can take a long time for the certificate
* Get certificate then make distributions. Then CRA finds an issue. Revenue Canada has the right to go to the beneficiaries for the proportionate part of the residue

1. **Final T1 Return to date of death** from January 1st of year of death to date of death

When we file T1 Return up to date of death we have to include:

* 1. **Income actually received during that period**
  2. **And Periodic payments**
* In fact situation deceased owns $100k in guaranteed investment certificates and they are all at 5% interest and all payable may 15th annually.
* Whether dealing with person who died June 30th or November 30th we know that tax payer will receive a check for $5000 on may 15th 2016 and when person dies this does not stop the interest running and doesn't stop dividends being issued by corporations in which deceased are shareholder and in case of income property doesn't stop rent from being paid. Financial products keep generating.
* In final tax return for person who died June 30th have to show actual amount received on May 15th then have to do an accrual of the interest from May 15th up to June 30th. So if interest is $5000 a year your accrual.
  + ET must calculate interest up to day of death (e.g. got $5000 income payout on March 15, died June 30. Calculate imputed interest from March 15 – June 30 (interest rate x 5000 x (46/365))
* **Must be calculated separately for every investment.**
* Accrued interest calculation only applies to definite periodic payments – e.g. *not* dividends (which are discretionary).
* When doing return for estate – T3 return have to remember that the $5000 paid may 15th 2017 that a certain portion has been accrued in last payment date… if forget this then paying tax on same income.

### significant differences between the T1 income tax return for a living person and the final T1 for a deceased person

1. File T1 return up to date of death
   1. Income actually received during that period
   2. And periodic payments
2. Do not include income earned after date of death
3. RRSP and RRIF value at date of death must be included in the final T1
4. Living taxpayer report actual disposition; Deceased tax payers are deemed to have disposed of all capital properties on death
5. Living T/Ps have limitation of maximum credit that can be claimed; in the year of death the limited is raised to the total income – this encourages the donations to be made b/c the whole thing can be written off in year of death.
6. Donations: special rules applicable that do not apply to living taxpayers that make donations to registered Canadian charities by will tax beneficial – donation limit for living taxpayers not in effect; carryback to year preceding death or carry forward to tax years following death
7. **Periodic payments**: for example, accrual of interest, rentals in final T1 to date of death

* We report our income as received.
* Major difference with final T1 – executor is required to report accruals of income (+actual income)
* Example: GICs – will have received 5k prior to death, then someone has to calculate what the interest would be from May 15th to June 30th (from date received to date of death). Report the proportionate amount.
* Example: the rent on the income property. Received rent for 6 months but then 15 days have to be prorated (to meet date of death)
* Dividends can be paid like clockwork BUT not guaranteed! So not periodic.

1. **Deemed disposition of capital assets on death**: capital gains, recapture of depreciation; capital losses

* Every taxpayer is deemed to have disposed of all capital assets on the date of death
* Calculate capital gains and losses on all assets – difference between the fair market value and adjusted cost base
* Taxable gain/loss is 50%
* Estate doesn’t actually have that amount of money on the date of death – it is a deemed transaction
* Required to report capital dispositions that have occurred in preceding calendar year, but required to report only actual capital dispositions.
* **Capital disposition**: is sale of or transfer or disposal of capital property.
* For our purposes: stocks, bonds, real property are most common examples of capital property.
* If bought stock on Feb 1st 2016 and sold it for profit on June 15th 2016 – this has to be shown in 2016 return because it is actual disposition
* In Canada our capital gains are taxed by we have proceeds of disposition or fair market value and entitled to deduct cost of capital asset – **adjustment cost base**
* **Capital Gain (or loss)** = Fair Market Value - Adjusted Cost Base. Half of Capital Gain is taxable
  + Note: Never a gain or loss on Canada Savings Bonds.
  + Note: GICs do not have gains/losses b/c always redeemable at same value although they are considered capital property.
* Ex. Above D owned bell shares and H shares and on July 15th 2016 15 days after death those shares are still owned by estate but for tax purposes the tax payer is deemed to have disposed of shares at fair market value as of date of death. (Second major difference between living and deceased tax payer.)
* Ex. Tax payer who owns 10 000 shares of BCE worth $430k fair market value and says to lawyer will leave bell shares to one nephew and residue of estate to second nephew.
  + **Who is going to pay the tax?** 
    - The residue
* Deduct adjusted cost base from proceeds of disposition at fair market value. You have a capital gain of $425k, this is not the amount that goes into tax return but rather taxable capital gain which is divided by two so the deemed income will be $212,500.
* Point: if lawyer draws will the way he wanted the estate in this instance is going to have a tax bill of $106k and someone is going to have to prepare tax return and show tax bill and residuary beneficiary pays this.
* **Adjusted Cost base** – the amount paid for the capital gain.

1. Capital loss carry back against capital gains in year of death - 3 years before death

* If loss exceeds the gain then can use the losses to carry back
* Ex of gains or losses: in terms of income property, the value of property at date of death is $250k is proceeds of disposition (if you sold it) adjusted cost based is what tax payer paid which was $100k. In this case person put in $30k of capital additions. So person may have done renovations. Capital expenses are added to adjusted cost base. So deducting $13k from fair market value. So capital gain of $120k and divide it by two to get $60k.
* Important: the purposes of this course, whenever a person owns mutual funds, shares, bonds, anything that rises and falls with stock market that they are capital property and as soon as client tells you have to consider capital gains and capital losses.

1. **RRSP’s and RRIF’s** included in final T1 Return unless spousal rollover - can be substantial income tax liability: [RC 4177 (RRSP) and RC 4178 (RRIF)] - problem where named beneficiary other than spouse or charity.

* Where a person dies and has a RRSP or RRIF then that asset is deemed to have been cashed out by the deceased person on the date of death
* Because entitled to deduct contributions against my income in the years that I made contribution then when it comes out, I have to pay tax on it
* Treated differently than the capital assets
* Full amount is taxed (not 50%)
* 2 exceptions:
  + If married spouse (or common law from ITA) who survives and they transfer that RRIF or RRSP into his or her own RRIF or RRSP, then technically estate reports the amount but also reports the transfer – results in 0 tax (at this time).
  + Where you have a RRSP or RRIF that goes to a registered Canadian charitable organization – estate can claim a charitable deduction for the amount that goes to the charity

1. **T3 Return:** income earned after date of death, e.g. interest, dividends, capital gains

* Included in the income are taxable capital gains after death.
* BCE shares sold after death for 500k. Estate acquires the assets for the FMV on the date of death. FMV becomes the ACB. Gain = 70k but only 50% has to be reported.
* Hollinger sold for 3k. Capital gain = 3k – 1k /2 = 1.5k

1. **Testamentary trust fiscal year and other testamentary trust issues:**

Effective the 2016 taxation year, existing and future testamentary trusts, other than graduated rate estates (GREs), will be subject to the rules application to *inter vivos* trusts, including: (1) maximum highest tax rates (probably 50%); calendar year end (December 31) mandatory; less flexibility in claiming charitable donation tax credits

*Inter vivos* trust - always December 31st year end

Stand-alone trusts CANNOT be GREs. Conflict between income tax rules and what the testator wants

Executor can make estate GRE. Taxed at a graduated rate. Plus permitted more liberal use of charitable donations arising from a person’s will (can also use in the years following death)

If not GRE, then can only use charitable donations in the year of death and the year preceding death. Taxed at the highest marginal rate.

GRE – can only be in effect for 3 years.

Can have a year end that ends anytime between date of death and 1st anniversary of death

Graduated rate estate (GRE) – (1) only an estate and not, for example, a trust established under a will or an insurance testamentary trust; (2) maximum 36 months from date of death; (3) estate designates itself as a GRE in first tax return; (4) a GRE that qualifies as such has benefits that non-GRE’s do not have, e.g. carryback or carryforward of charitable donations made in the will..

Even with maximum individual rates, possible conflict between T’s wishes (or legal obligation, e.g. domestic agreement) and best income tax consequences.

1. **Exceptions to deemed disposition rules** - spousal rollovers to spouse or qualifying spousal trust (QST) - these exceptions defer, don’t avoid, tax
   * QST: spouse resident in Canada immediately before death
     + spouse must be entitled to receive all income of trust during spouse’s lifetime
     + no person except spouse may obtain use of income or capital of trust during spouse’s lifetime
     + Assets vest in spouse or spousal trust no later than 36 months following death
     + Sometimes conflict between T’s wishes and best tax consequences - will provisions allowing estate trustees to designate assets for “tainted” and “untainted” qualifying spousal trusts.

THEN tax deferred until spouse dies --- no deemed dispositions at this point

BUT if wants half to go to children, then cannot have a QST

Client has to make that decision

1. **Substantial exemptions**: Intergenerational transfers of farm property (IT-349R3) and active small business corporations.

* Generous deductions allowed

1. **Filing deadline** for year of death T1 Return - generally, April 30th in year following death; 6 months from date of death if death occurs between November 1st and December 31st
2. **Filing deadline** for T3 Trust Return – not later than 90 days (not 3 months) following end of testamentary trust fiscal period as selected by estate trustee - easier if December 31st year end
3. **“Rights and Things” return**: eligible amounts include ex-dividends, accrued and unpaid salary, vacation pay or retroactive salary adjustments; separate set of deductions (IT-212R3)

* Separate return with a separate set of deductions
* Dividend from BCE
* Useful to save estate income tax. **S.72 of ITA** gives option to file a separate return to report the “rights and things” amount

1. **Multiple testamentary trusts** generally all taxed separately; eg. residue divided among five children under 25 with clause setting up discretionary trust for any beneficiary under 25 --- tax advantage of this will be lost because they are probably not eligible for designation as GREs.
2. **Principal residence** capital disposition but no gains or losses up to date of death (assuming used continually as principal residence during lifetime of deceased); sale of principal residence following death must be reported in T3 Return and increase from date of death will be taxed as a capital gain
3. **Charitable Donations:**

special rules applicable that do not apply to living taxpayers that make donations to registered Canadian charities by will tax beneficial – donation limit for living taxpayers not in effect; carryback to year preceding death or carry forward to tax years following death

Enhancement to leave money to charity in the year of death

rules for GREs different than rules for non-GREs

For GRE can be used in years following death

Can be legacies under the will, share of residue or by direct donation of publically traded shares

Availability of deductions against income for charitable donations made in will, direct distribution of an RRSP, a RRIF or a life insurance policy by beneficiary designation or charitable donation of publicly traded securities

1. **Life insurance** generally non-taxable except for interest on death benefit following date of death (taxable to beneficiary/estate)

* In example the 100k is NOT taxable, but the interest on the benefit it taxable ($400 is taxable)

1. Flow through to beneficiaries of character of dividends from taxable Canadian corporation, taxable capital gains and foreign source income

* Estate wants to hold onto the shares

Dividends can be taxed and attributed to the beneficiary if held in trust for them (if beneficiary has low income then generally the tax will be less than if it went through the trust)

Estate cannot make the personal deductions that alive taxpayers do

1. **Section 69 ITA - inadequate consideration and non-arm’s length**

* Transaction between taxpayer and his spouse or children
* Specific rules that say that where you give away assets for inadequate consideration then there are certain deeming rules that could have adverse effect on the taypayer

**FACT SCENARIO**

**T's date of death:** First assumption June 30th, 2017. Second assumption November 30th, 2017

**Marital status**: First assumption married spouse survives. Second assumption no spouse survives only adult children

**Assets**

Guaranteed Investment Certificates (GIC's) $100,000, all at 5% payable May 15th annually (term deposit receipts)

* Receives $5k (5%) annually
* Sold by financial institutions
* When they mature, you get back exactly what you paid (plus the interest in between)

10,000 shares of BCE Inc. Adjusted Cost Base (ACB) $5000 Fair Market Value (FMV) $430,000 Sold January 2018 for $500,000

* Capital gain = 425k
* 50% of gain = 212.5k

2000 shares of Hollinger International ACB $10,000 FMV $1,000 Sold January 2018 for $3,000

* Lost 9k on this investment
* Capital loss – 9k
* 50% of loss = 4.5k

5,000 shares of CIBC ACB $50,000 FMV $150,000

principal residence ACB $150,000 FMV on date of death $400,000; sold November 2017 for $450,000

* FMV 400k
* ACB 150k
* Special rules – no capital gains

income property ACB $100,000 Capital additions $30,000 FMV $250,000 Rents $1,000 per month. Tenant pays rent on the 15th of each month (1k)

* FMV 250k
* ACB (100k + 30k) = 130k
* Capital gain 120k /2
* Taxable capital gain = 60k

Life Insurance death benefit $100,000 payable to spouse as named beneficiary. Cash surrender value of policy day before death $20,000 - paid out to beneficiary February 2018 plus $400.00 interest. NOTE: if estate beneficiary, then estate claims interest paid on payout

* Remember interest at the rate that is prescribed
* If beneficiary is spouse then receives $100,400 and spouse puts on tax return
* If estate receives, then the executor includes on estate’s tax return

Equipment used in business ACB $50,000 Undepreciated Capital Cost (UCC) $20,000 FMV $60,000

* UCC – under ITA equipment + vehicles – taxpayer can deduct from income each year a certain percentage of the value of the cost of the asset. At some point will need to be replaced
* Example 50k cost of equipment. Prescribed percentage = 10%. 5k depreciation is taken off the cost in year 1. Then UCC becomes 45k. Next year – take off 4.5k, UCC becomes 40.5k.

Retired from public service May 1st, 2012, received retroactive pay adjustment lump sum $12,000 on July 31st, 2017

* Unionized employee

Ex-dividend on BCE shares $5,000 Record date June 20/17 Payment date July 20/17

* What are paid out to shareholders of a corporation out of the profits
* 2 relative dates (record date for payment) and the actual dividend payment date

**Portions of will**

* Leaves four legacies of $50,000 to registered charitable organizations
* Leaves CIBC shares specifically to a specific registered charity
* Deemed disposition of all of the taxpayer’s capital property on the taxpayer’s date of death
* Income tax circulars --- do not need to know the contents

# Capacity of Beneficiaries (407- 436)

12.4 12.5 not examinable

## Illegitimacy is abolished

*Children’s Law Reform Act* (*CLRA*) ss 1-2 (p. 409) (& *SLRA* s 1(3)-(4) for *kindred* relationships) abolish status of illegitimacy and state that those born outside marriage *are* able to inherit from both parents / next of kin, by will or intestacy, unless will provides otherwise.

* Date effective:
  + Applies to all legislation from *any* date; and (retroactive)
    - ***CLRA*** - **with respect to statutes and regulations, where there is a generic reference to people related to one person through blood or marriage, it is irrelevant when that statute or regulation is enacted, no distinction between children born inside or outside of marriage.**
  + any “instrument” *only* on or after March 31, 1978 (*CLRA* s **2(1)-(2)**). (proactive)
    - For instruments signed after March 31st 1978 (when ***CLRA*** was enacted) and up to day that ***All Families are Equal Act*** (January 1st 2017)came into effect, this generic reference there is no distinction between people born inside and outside of marriage.
      * Instrument = deed, will, trust document, contract, POA
        + Not fair to change wills retroactively
        + But for Acts/Regulations okay to be retroactive
* People in Ontario now have the option to decide whether ‘**children’** or ‘**issue’** includes those born inside and outside marriage.
  + Must explain this to client, if client doesn't want statutory interpretation then have to put into will a specific provision called “**BOOM” = Born Outside of Marriage Clause**
    - “In this my will any reference to a person related to me by blood shall mean only people born within marriage”.
    - “it is my intention that that definition is restricted to those born inside of marriage”

**Example:** 1k to each of my nephews and cousins (includes outside of marriage by default because uses generic term 🡪 but remember difference between your nephew and your spouse’s nephew / your aunt and your aunt’s husband)

**Example:** 1k to each of my issue (includes outside of marriage by default)

* Abolishes the status of illegitimacy
* Case for testate and intestate succession

**Not every will requires the discussion about the default clause**

* Example: If being divided between 10 charities, no individuals, so do not need to discuss the rule in ON

### Assistive Reproduction

* ***CLRA* s 8** contains a statutory **presumption of paternity for children born to a parent with a spouse through assistive reproduction**.
  + DNA test is possible if there is a plausible basis for the order (***Miller v Staples Estate***), but generally not if father is dead (***Turner v Irwin Estate***) or child is entitled to rely on presumption of paternity (***Vidal***)

#### All Families Are Equal Act

This legislation amended parts of the ***SLRA*** and the ***CLRA.***

* *AFAEA* – added expanded definitions of parents and children to deal with **assisted human reproduction matters.**
* For instruments on or after January 1st 2017 we have expanded definition of parent and child to include **children born through assisted human reproduction.** 
  + **Conceived after death provided that certain conditions are met**
  + **SLRA 1(3) page 410**
* **Where does this come into play?** 
  + Where you have a will that makes generic reference OR in case of an intestacy where we know that there might be children and so where you have a will to divide my estate equally amongst cousins who survive me, then our role as a lawyer make sure that executor avoids a situation where the executor thinks there are maybe 6 cousins but a year and a half after death, cousin born outside of marriage, and I am a cousin and I am entitled to part of the estate.
  + Executor sets out to make reasonable inquiries
    - Have to be guided by **s.24 of EAA (below)**

#### 

### Estate Trustee’s Obligations and Legal Advice (EAA s 24)

#### Reasonable inquiry – when required

* **S. 24** ***Estates Admin Act*** requires a **PR to make ‘reasonable inquiries’** for those in a relationship born inside and outside marriage.
  + **Required**: This isn’t for every PR, but only for **appropriate wills** – where there is a **generic term** and there is no exclusion for those born outside marriage in the will.
    - E.g.: not using word “children” but names them each by name.
  + **Not required**:
    - T is survived by spouse with no children. Based on rules of **intestacy**.
    - Everyone is named specifically
    - Exclusion in will preventing those born outside of marriage from inheriting.
  + Probably the rule that if you are dealing with a **situation other than these above** then the PR would **have to make the searches**.

#### Process Where Reasonable Inquiry Required:

You would insert the clause excluding children born outside marriage and add an introduction referencing them by name and their relationship to avoid this onerous process.

* **S. 23(2)** **exempts the PR from liability** in distribution where in:
  + **(a)** the PR makes the inquiries and the entitlement of the person was not known at the time at the distribution. (This is done by asking family members), and
  + **(b)** searches the records of the Registrar General –
  + \*\*\*if both are fulfilled and in (a) if the identity cannot be known to the PR, then the PR is exempted from liability in making the distribution.
  + Both these subsections need to be filled.

#### Tracing Property Into Hands of Beneficiary

* **S. 23(3)** clarifies that even though the PR may be exonerated from liability, the person entitled in the relationship can trace the property and can go after the beneficiaries for the property except in the case where there is a *purchaser for good faith and for value*.
  + This phrase appears through Ontario legislation – means someone who does not have knowledge about where it came from but has value in the asset and the person receiving the ownership can’t have knowledge of the true situation.
  + Liability of the beneficiaries is only for the proportionate amount – not jointly and severable liable

***Re Darischuk Estate*** [Pg. 412 note 8]

* + Leave to my grandson X, problem was X was not technically a grandson. And in this case the gift failed.
  + T’s son stood in loco parentis of the child, but not biological father
  + Would the lawyer who drew the will be negligent?

**Example: Intestacy.**

* Want to be sure that assisted estate trustee in locating anyone who might be an issue
  + Want to be able to distribute estate correctly – don’t want a letter after distribution has occurred
* ET has to go through a process to determine who the heirs are

**Example: client wants to leave a share of residue to “grandchildren” including those born later**

* His children could have more children so wants to use the term grandchildren not names.
  + Explain the BOOM exclusion clause to client and the searches
* Considers ONE grandchild born outside of marriage that should be included (but doesn’t want anyone else included)
  + add an inclusion clause “except in respect of, A, the child of my son, G.”
  + Can add codicil to add additional BOOM children

**Where you have a clause: Named group of grandchildren – want to inherit at age 25**

* Create an **infants clause** “where there is a beneficiary under age 25, then the executor shall hold that person’s share and up to the age of 25, the executor can pay any amount of income or capital out of that fund and when the person reaches age 25, then he or she gets the share that is left in trust”
* If dies before age 25 – that share goes to the beneficiaries’ children or issue
* \*\*\*\*\* ISSUE: used the generic term so have to include BOOM clause again

## Adoption Pg. 412

***Child and Family Services Act* S.158** Adopted children in Ontario are treated as if they are the natural children of the adopted parents from date of adoption order.

* As if the child was the biological child and can inherit from adoptive parents and their kindred (*Barnes Estate v Wilson*) and former biological parents legally cease to be parents of the child (*Re Marshall*), so the child loses right to inherit from them (*Chauvin v Rachow*).
  + So, lose right to inherit from biological parents or relatives, unless they are specifically mentioned in the will.
  + Also applies other way around (adoptive parents can inherit from child, former biological parents cannot).
* *CFSA* allows court to accept a **foreign adoption order** as ***prima facie* valid**, but court can still make further adoption order (***Re R and G***)
* You could also leave children money who **have been adopted** to another family – for the purpose of this clause ‘children’ shall include\_\_”, just watch the **residue clause**, so if you want it for the purpose of the clause or the purpose of the will.

### Timing

Relevant date is date of adoption order.

* Once an adoption order is made, the biological parents cease to have a relationship, *what would happen if you had a child placed with you for adoption and you die intestate before the adoption is complete?* 
  + Probably cut along facts and it would be a consideration of whether they are a child or not – if not gone through adoption then don’t get anything.
  + Theoretically, they could have made the will include the child.
  + Siblings could get the money and parcel it out to them. If siblings aren’t 18 they can’t sign off on it, would have to go to Children’s Lawyer (probably) and still probably couldn’t sign off. If they were over 18 they could decide.
    - **Intestacy can change by agreement** as long as they are *sui juris* (age of majority and of capacity).
    - There is also the ability to **disclaim the inheritance** – if don’t want people to know that there is a hidden child etc.

At one point, adopted children were not included in ‘children’, but now changed by ss 1-2 of *CLRA*

* By virtue of ***Child and Family Services Act* s 158(4)** (p. 422), whether the will or adoption happened before the *CLRA* is irrelevant to inheritance rights

### Distinction Between Adoption & Step Children

* **Stepchildren = not *legally* adopted can*not* inherit from step-parents** unless will specifies otherwise (***Marcy v Young***). However, ***Montgomery Estate v Miller*** (2006) SCJ held that the will *did* include people in step-relationships and the judge accepted affidavit evidence as to the closeness of the relationships. ***This area is in a state of flux!***But probably step-children are *not* included*.*
* Can be hard to adopt step children unless both of the child’s birth parents consent
* **Step child cannot automatically inherit from step parent or relative from step parent unless will document is specific.**
* Neither term “children” or “issue” includes step relations

***Montgomery Estate v Miller*** – Step Relations must be explicitly included

* Step-nephew and step-niece came within the terms of the will
* Lawyers – started asking clients if step-relationships should be included

## Homicide Pg. 415

* **A person cannot benefit from his/her crime.** 
  + Just know that we have a rule that a person **can’t benefit from his crim**e 🡪 if an individual *intentionally* caused the death of another person they can’t get the benefits from it (***Re Charlton***– this includes voluntary manslaughter as well as murder 🡪 but maybe not manslaughter if caused by drunk driving where accused isheavily intoxicated and deceased knowingly got into car with them).
  + If not responsible for the crime (e.g. insane), is *not* disentitled to benefits (***Pub Trustee of Man. v Leclerc*).**
* Criminal proceedings delay probate: Eg: ***Bucksbaum*** – accused of murdering his wife and he was removed as an executor of her estate and would have lost life insurance benefits, assets accruing by virtue of JT, CPP.
  + The estate could be liquidated but held in suspension until proceedings were over. Not allowed to probate. If he wasn’t guilty, he would be able to make the estate trustee accountable for their actions.

## 

## Witnesses Pg. 429

**General rule:**

If witness is a beneficiary does *not* invalidate the will nor affect their status as a competent witness, but may void the gift given to the witness or spouse:

* ***SLRA* s 12(1)** – a beneficial bequest to a witness (**(2)** or amanuensis) or to his spouse **is void**, but **(3)** court can validate if no improper or undue influence. **(4)** But, if will is attested by at least 2 non-beneficiaries or no attestation is necessary, the gift is *not* void.
  + **Spouse = married spouse**
  + If beneficiary becomes part of prohibited class only *after* attesting will, gift is valid (question of fraud irrelevant) (***Thorpe v Bestwick***)

**Influence**: Undue influence is tantamount to coercion, but here it is ‘***improper* or undue influence’** so it is still vague what this means, although it is clearly something less stringent than full undue influence.

* Improper influence is inappropriate conduct but short of coercion or “driving” of undue influence.

**Beneficial**:

Offending bequests must be **beneficial** – a bequest to a witness that would *not* be beneficial would still be valid – if you left something to them in trust (except for their benefit) it would be okay. Also not the whole will is invalid, just the one bequest.

* ***Re Cumming*** – discusses word “beneficial”.Here because the value of the gifted cost was ~ 5 times greater than the cost of the rent that the witness / beneficiary has to pay, court found it was a “benefit” and so the gift was void.
  + “to deliver my jewelry to X in trust for X to hold until her daughter is 18 years and at this time deliver jewelry to daughter and X is a witness”
    - **This is not a beneficial bequest to X, because X is holding it in trust**
  + By contrast, if simply used precatory words “to deliver my jewelry to X with request that X hold jewelry until daughter is 18”, the words with the request have been consistently interpreted as precatory and bequest words and not legally binding on X. So, in this gift if X were a witness then it is a **beneficial bequest** to X. Have to be alert to this as lawyers.
* **Appointment to become a Personal Representative** b/c it isn’t a beneficial devise bequest or other disposition, it is an appointment.

**Person’s Claiming under Witness**

**S. 12(1)(i)(c)**– the devise is void only so far as it concerns the person so appointing and **anyone claiming under them** 🡪 this refers “pay $5k to X (witness), and if X predeceases, divide among his children” –children claiming through X are denied because would it be an invalid bequest. Same applies to X’s creditors or trustees in bankruptcy.

### Impact of Codicil’s on Gifts Void due to Witness Issue

***Re Trotter***  (431) –Witness is given a bequest, and there is a *codicil* to the will. 4 examples given of rules:

1) A will **invalid in itself** may operate as a valid instrument when referred to and incorporated in or with a subsequent and **validly-executed codicil**

2) A valid gift by will to a legatee is **not rendered invalid** by reason of his subsequently **attesting** **a** **codicil**, although the codicil has the effect of republishing and incorporating the will.

3) Although a gift by a valid will to an attesting witness is utterly null and void, such gift may be rendered **effectual** if the will is **republished by a codicil** referring to the will but not attested by the legatee.

4) Legatee must be able to point to an instrument giving him his legacy **not attested by himself** before he can establish right to the legacy.

* E.g.: If there is a gift of 5000 to X and X has witnessed the will, then if there is a codicil and X does not witness the codicil b/c the codicil confirms or republishes the will, then X’s bequest is valid.
* Lawyer drawn codicil last clause will say “in all other respects I confirm my will” – this is a **republication of the first will**.

### Other Types of Witnesses

#### Gift to Witness in Representative Capacity (of corporation) [pg. 433]

* In a situation where there is a gift made to a witness, if the **witness can establish that the gift is made to this person in a representative capacity and not beneficially then it doesn't offend statute.**
* ***Re Rays’ Will Trust*** – there was a gift to a person who at the time of death should be the abbess (head of nuns) of a particular place (that person ended up being one of the witnesses) 🡪 this is not a named person, but an ***office*** e.g.: president of an association.
  + The gift wasn't intended to be given to abbess personally but to abbess on behalf of religious organization
  + Not beneficial gift
  + Noted that there are three types of gifts that can be made in this situation:

1) a beneficial gift

2) a gift to be used for the purposes of the society

3) a gift to be divided equally among the members of the society

* Where a person wants to make a gift to an **unincorporated association**, if will said to pay $5k to the president to the London Stamp Association, the president would have to argue the gift was made to him/her not personally but as a representative of association.
  + **The signature of the president of association will constitute valid release and discharge of the gift.**
  + Need to find whether the office is **incorporated** – then leave it to the association with correct name.
  + If **unincorporated** – then leave the gift to the ‘unincorporated association known and called \_\_\_” but it is important to specify who can **sign** for the organization – the receipt of the president should be a good and valid receipt of the PR.

#### Super Numery Witnesses (i.e. more than 2) Pg. 435

* **S.12(4)** – where you have a beneficiary who mistakenly witnesses will, but you have two acceptable witnesses and no breach of statute, **then gift made is still valid.** 
  + Leave a bequest to X of $5k and if X witnesses then it is void 🡪 but if attested by 2 people *not* within the prohibited class, then it is *valid*. (This doesn’t really happen in practice).

## 

### Bequests to Executors (and compensation) [Pg. 432]

**S. 61 of Trustee Act.**, right of estate trustee to compensate for care, pain, time, and troubles in and about the execution of estate.

* There is a (rebuttable) presumption that such a gift to the attesting Executor is given in lieu of compensation (***Re Stanley Estate***).
* Best way to deal with a **gift and compensation** is to leave gift to Estate Trustee in the will, but in clause where you appoint executor, “I appoint X to be my executor and direct that X shall be entitled to his compensation as an executor not withstanding fact that he may also be a beneficiary under my will”. [pg. 54]
* **Amount:** 
  + **S. 61(5) of Trustee Act** – if there is an agreement fixing compensation, then that is what compensation is.
    - It is permissible for the amount of the compensation to be stipulated at the time of the will and if that is the case then **s. 61(5)** says it is a limit at the amount of compensation.
  + **S. 61**– does not state an amount to be paid (when there is no agreement) but lists factors
    - Court in Ontario has general rule **of 2.5% of money received and 2.5% on money paid out so 5% of the estate roughly**
* **When to collect compensation**: “The compensation may be charged against the estate from time to time as the ET feels appropriate”
  + This means there can be **interim compensation** – there is no right at law w/o consent of beneficiaries or court order 🡪 ET must wait until estate is administered, if some beneficiaries are infants or disabled and held in a trust, then ET would have to wait.
  + With a fee agreement they can take the money when they want and nothing they can do about it.

**S.61 of the Trustee Act – page 54 of text**

# Testamentary Gifts (513-558, 568-572)

* T can only dispose of an interest in *property* that he **owns** (but not jointly) – that interest must exist at the time of the T’s death but **it may be either a vested or contingent** (but continuing) **interest**; however T **may not dispose of an expectancy** (*spes successionis*)
* Can say if my mother has died and I have inherited in her will then I give such inheritance…
  + BUT can’t co-mingle inheritance with other assets because need to be able to segregate on death

## Dispositive provisions – What Can be Disposed Of?

Fundamental Principle – T has the right to dispose of any asset that he owns (and no more), subject to some exceptions.

#### Exceptions:

* **Joint tenancy -** Testator cannot dispose of interest in joint tenancy.
  + Asset passes immediately to survivor – **right of survivorship**
* **Life Interest** - T cannot dispose of an asset in which T has a life interest only for his life.
  + As soon as life is ended T’s interest is ended.
* **Contingent Interest** -T cannot dispose of an asset in which she has a contingent interest that is personal to T.
  + Ex. $15k left for X conditional on reaching age 25 and person dies at 23 then person has no interest.
* **Interest in Expectancy** – beneficiary does not hold *any* interest on what they *hope* to inherit (***Del Grande v Sebastian***)
  + T cannot dispose of an interest in expectancy – the hope of succession, because if T’s parents are alive, T only has hope of succession. Clients who have parents who are going to give them a lot of money and they want provisions to prevail if parent survives and to pass to someone else when T passes.
    - To overcome this hurtle can have one set of distributive provisions if parent survives T or a different dispositive provisions if parent deceased before child.
* **Life Insurance** – if you own policy on your life and name beneficiary, then nothing to give in the will – the death benefit passes to the beneficiary outside of the will by virtue of the K with the insurer. It’s outside the will.
  + If you name A in the policy as beneficiary and name B in the will – this is a real mess – issue is whether you intended to make a declaration under the *Insurance Act* (usually would refer to policy and be clear it is changing the exact policy).
  + The **exception** to this is if you can purchase a life insurance policy on the life of another person – parents buy life insurance for their kids. If you die and own a **policy for *someone else***, you can give this in a will.

## Types of Testamentary Gifts:

Devises – gifts of real estate (real property)

Bequest – gifts of personalty (personal items)

Legacies – gifts of money

* + ***General*** **legacy**: e.g. transfer 15 shares of Bank of Montreal to each child (**not specifically defined property**)
  + ***Pecuniary*** **legacy**: e.g. To pay to X $1000 🡪 a simple gift of **cash** payable out of the general assets of the estate

## Classes of Gifts

**There are 4 classes of gifts:** 1) General; 2) Specific; 3) Demonstrative; 4) Residuary

* Whether a gift is general, specific, demonstrative or residuary comes into play primarily when there isn’t enough assets in the estate to carry out all of T’s wishes.
  + Then you have to classify the gift. This is where litigation arises.

#### Wording for Leaving Money

* Distinguish between a gift of **money in a named account**:
  + “to give account at bank of Montreal” is a general legacy (***Re Heilbronner***)
    - Funds can come from anywhere.
    - Subject to abatement.
  + “to give account #123456 at bank of Montreal”, that is a **specific legacy** (***Re Ashdown***)
    - Funds can ONLY come from this account.
    - Subject to ademption where all money is withdrawn from account, unless redeposited in another (non-joint) account (***Re Ashdown***)
  + “I give X **from** Y account” i.e. gift is *money* from the particular account, it is **demonstrative** (***Re Atkins***).

## 

### General (rare): Payable out of general assets (whether in estate or not) - abates

* **General Legacy:** Is a direction to personal representative to pay or transfer assets into hands of beneficiary.
  + **Doesn’t necessarily need to own those assets *re Millar***
* A bequest of **stocks / shares** is ***prima facie* general**, even if T owned the exact amount of shares specified (***Re Willcocks***).
  + Note however that **context of will** and **admissible evidence** may show bequest was intended to take a ***specific***form (***Re McLean***).
* A direction to executors to purchase an annuity for a beneficiary is normally a general bequest and beneficiary is entitled to demand payment of its value instead (even if T specified could *not* have value) (***Lotzkar v McLean***),
  + *unless* it is a Gov’t of Canada annuity (in which case the beneficiary must take the annuity, not its value) (***Re Boxall***).

#### *Re Millar* [pg. 517]

Facts:

* He directed that his executors were to give a share of a brewing stock to each Orange lodge in Toronto. The joke was members of Orange lodge were opposed to drinking.
* He didn't actually own shares in brewing stock, he directed executors to buy shares.
* Since the shares weren’t for sale though, the *value* of the shares (i.e. their market price – if not on market, actual value must be ascertained) must be given to the legatees instead.
* J Middleton, gives another example of a general legacy “T directs his executor to give a watch to each of 20 grandchildren”, he may have a watch or may have none, but the duty is on Executor to purchase a watch for each grandchild
* Direction to the executors to buy the shares or other property designated
  + Usual case is to transfer, not to buy

### Demonstrative gift [pg. 519] – no ademption or abatement (becomes general)

Gift of a specified amount, or a specified quantity that is to be paid primarily out of a particular fund or asset. (If it is to be paid *solely* out of a particular fund or asset, it is a specific gift) (***Culbertson***).

* Indication of intent that the gift doesn’t fail even where insufficiency of the name fund:demonstrative. If it intent is for gift to fail on insufficiency of named fund then it is specific. (***Re Webster***).
  + Example: “to pay X $1000 out of bank account #123456”
* Demonstrative gift has priority to the general pecuniary gift: “to pay X $1000” fails before “to pay X $1000 out of account #123456” would fail.
* Lawyers like demonstrative gifts.
  + Lawyers are liable to beneficiaries for negligence. Consider if there’s not enough $$ to pay the specific gift?
  + Deal with all cautions to client in reporting letter.
* I**f the fund is not there (or not completely) they become general gifts** (***Walford***).
  + If fund is insufficient, the legatee ranks with general legatees for the balance (***Re Tomlin***).
* A devise (i.e. of real property) *cannot* be demonstrative.
* The principle with respect to demonstrative gift: **is that if the fund out of which it is payable ceases to exist, it doesn't adeem but treated as a general legacy.** 
  + - Not a loss to beneficiary but beneficiary goes down the ladder as a general beneficiary.
* Don’t recommend to client
  + Might change banks
  + Amount may not be in the account

### Specific Gifts Pg. 523 subject to ademption

Gifts of particularly identifiable property or objects. Ex. My piano.

* Have to describe the asset correctly. [Note 4 pg. 525]
* Specific gift is **identifiable property that T has described sufficiently to distinguish it from the rest of T’s estate**. Ask client to describe item and make sure there isn’t more than one.
  + This is really important for jewels, paintings etc. (“my farm” vs. shares in farming corporation).
* Before death if been sold, destroyed, or given away, **the gift adeems.**
* The risk with a specific gift is that it’s **subject to ademption** if before T’s death it is sold, destroyed, or given away.
  + If the asset doesn’t exist at the date of T’s death, then in the absence of wording to the contrary in the will, the beneficiary gets nothing (***Mountain***).
  + McNamara: “executor liability insurance” is becoming more common now.
* The specific gift has a **higher priority than general and demonstrative gifts** for abatement (***Lindsay v Waldbrook***)
  + Example: if there is a legacy of $1000 and specific gift of watch, residue of estate – if debts eat up all residue and more money is required to pay debts, the legacy of $1000 will reduce before the specific gift goes

Language:

* When looking at wills, use of word “**my**” is interpreted by the courts that the gift is to be **specific** and NOT general (***Re McLean; Re Skies***):
  + To transfer *my* piano to X – because “my” is used = specific gift
  + To transfer *the* piano to X = general gift (could be specific but isn’t as clear as the pronoun ‘my’)
  + To transfer *a* piano to X = arguably a general gift
    - The effect of using “a” brings us back to ***Re Millar*** – if no piano at date of death, arguable T intended estate trustees to go out and buy a piano (i.e. general gift)
* Direction to sell a specific property and use the assets to pay legacies is specific (only not solely from that fund) (***Leapingwell***)
* Subject to **s. 35.1 of the SDA** and **s.20 of SLRA**

### Gift of Residue

Pg. 526

**Residue:** What is left over after the general legacies have been satisfied, devises have been satisfied, general gifts, specific gifts.

* All property that is otherwise undisposed of.
  + Sometimes see phrases such as “the balance of my estate” or “the rest of my estate”.
* If more than one residuary clause, effect will be given to T’s intention if possible (e.g. one refers to residue of specific gifts, one is general residual gift) (***Re Iverson***), but if such construction is impossible, last clause will be preferred (***Re Nolan***).
* **Doctrine of lapse**: In the absence of a contrary intention, all **specific gifts that fail** by reason of lapse, rule of law, restraint of alienation or any other reason **fall into the residue of the estate** (***Re Smith***) – ***Exception s 31***.
  + Can avoid lapse by including a substitutional gift (or gift-over) in the will
    - Ex. $5000 to x if he survives but if he doesn't survive then pay to son AB – **substitutionary, alternative gift or gift over.**
  + Example: leave a will that says “to deliver piano to X and pay residue to Y” – if X predeceases T, that gift falls into residue of the estate.
  + Example: “to deliver piano to X, but if I predecease Y, to deliver my piano to Y, to transfer residue of estate to Z”. If X is dead, gift of piano doesn’t lapse, it goes to Y
* If **gift of residue fails** (or part of a gift), it will fall into **intestacy** (***Re Archer***).
  + But courts will apply a presumption against intestacy if the will permits it to prevent this though – e.g. residue equally to 18 charities and 1 ceases to exist, will divide equally amongst the 17 charities remaining (***Bank of Nova Scotia Trust v Common Ground Women’s Centre*)**.

## oRDER OF CREDITORS:

* 1. The Queen
  2. Secured creditors
  3. Unsecured Creditors
  4. Preferred Creditors
  5. General Creditors
  6. Beneficiaries

## Abatement Pg. 528

If there are sufficient assets to pay creditors, but insufficient assets to pay all of the gifts

* The straightforward example is one in which there are total assets net of $25k, after paying debts, and we have four legacies for a total of $54k:
  + $10000
  + $12000
  + $15000
  + $17000
  + After paying debts only have assets of $25000, not $54,000
  + NO RESIDUE, but also no bankruptcy. Just insufficient assets to pay all gifts.
* **s. 5 EAA** page 529 – Residue is the primary fund to pay the debts
  + The gifts need to be reduced to be paid out – abatement

**Doctrine of Abatement says: the legatees get cents on a dollar (a proportionate amount)**

* Ex. 10/54 x $25000.
* **Concept of abatement is that if abatement occurs everyone’s gift abates rateably, provided the gifts are in the same category.** 
  + If you have general gifts, gifts of personalty, and devise of real estate make abatement more complicated.

**Abatement Priority** (to pay debts from, first to last) (p. 529) (***Re Smith Estate***).:

* + Residuary personalty(i.e. give away unspecified rings and china first)
    - Residuary real property
      * General legacies (incl pecuniary personalty) <to give X a watch>
        + demonstrative legacies <to give X $5,000 from my watch collection>

specific bequests of personalty <to give X my rolex>

specific devises of real property <to give x my cottage>

* **General rule** is legacies in each category **abate rateably** (i.e. in proportion to relative amounts original specified in will), but T can specify that a certain legacy takes priority (or even put primary burden on realty) (e.g. ***Re Jost***).
  + But T’s intention to do so must be *clear* (e.g. directing a legacy be paid “immediately” or “in the first place” is insufficient) (***Lindsay v Waldbrook***).
  + Compensation to ET: General rule is that **where a legacy is given to an executor “for their trouble” (by way of compensation), this legacy has priority over other legacies.** 
    - If this wasn’t the case, no one would act as the executor – so general principle is Executor gets paid first [Note 6 pg. 533] (***Boy’s Home of Hamilton***)
    - Residual real and personal property is liable ***rateably*** (i.e. creditors get in proportion to amounts of relative debts) (***SLRA* s 5**)
    - Unsecured debts payable on the administration of the estate rank proportionately and without any preference of priority of debts of one rank or nature over those of another (**S. 50 Trustee Act**)

## When do beneficiaries get interest under the will?

### Income producing assets:

**Specific Bequests and legacies of income producing assets carry with them the income earned on them from the date of death**

* Income of shares goes to beneficiary from date of death.
  + Ex. Will to Transfer all shares of BCE to X, income of shares go to beneficiary from date of death and executor would have to account for dividends.

### Executor’s Year for non-income producing assets:

**Beneficiaries are generally entitled to interest** on their gifts if they are not paid within a year of T’s death.

* The interest begins to run **from 1 year after T’s death** (“executor’s year”) (***Re Lord’s Estate***) at current yield on authorized trust investments (***Re Stekl***).
* **Exceptions**: interest on **specific gifts** & general legacy on land run from **time of T’s death**. T can specify no interest too.

## Doctrine of Ademption (for specific gifts) PG. 538

**Rule**: If subject matter of a **specific gift** is in existence at the date of the will but ***not* in T’s estate at the date of death**, in the absence of a statutory provision or contrary intention, that **gift will adeem and beneficiary gets nothing**

* **Assets do not survive conversion *Re Britt*:** Ademption holds true even if the asset was converted and that converted property is in the estate (e.g. mortgage from sale of devised house – would-be beneficiary has no claim on the mortgage).

### Substitute Statutory Gifts SLRA s20(2)

* If property destroyed and T die simultaneously (i.e. T dies in fire of devised house), insurance proceeds go to general estate, *not* to the disappointed legatees (***Re Hunter***). (*This has now been* ***OVERRULED*** *by statute* ***20(2)*).**
  + DO NOT LOOK AT RE HUNTER

Section 20(2) of SLRA: after a *technical* ademption arises, because the asset has been converted (*ReBritt*), s20(2) gives the devise or donee T’s interest as a “substitute gift” unless a contrary intention appears in the will:

**Operation of will as to interest left in testator**

[**20. (1)**](http://www.e-laws.gov.on.ca/DBLaws/Statutes/French/90s26_f.htm#20.(1)) A **conveyance** of or other act relating to property **that is the subject of a devise**, bequest or other disposition, made or done **after the making of a will**, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of his or her death.

**Rights in place of property devised**

[**(2)**](http://www.e-laws.gov.on.ca/DBLaws/Statutes/French/90s26_f.htm#20.(2)) Except when a contrary intention appears by the will, where a testator at the time of his or her death,

1. has a right, **chose in action** or equitable estate or interest that was **created by a contract** respecting a conveyance of, or other act relating to, property that was the subject of a devise or bequest, made before or after the making of a will; (T shows settled intent to sell a gift bequest e.g. a K to sell house but T dies suddenly before sale 🡪 Benef gets net value of sale)

**(b)** has a right to receive the proceeds of a **policy of insurance** covering loss of or damage to property that was the subject of a devise or bequest, whether the loss or damage occurred before or after the making of the will; (beneficiary gets cash from insurance policy)

**(c)** has a right to receive **compensation for the expropriation of property** that was the subject of a devise or bequest, whether the expropriation occurred before or after the making of the will; or

**(d)** has a **mortgage**, charge or other security interest in property that was the subject of a devise or bequest, taken by the testator on the sale of such property, whether such mortgage, charge or other security interest was taken before or after the making of the will,

the devisee or donee of that property takes the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator.

* Sale of a house: The T has signed an Agreement of Purchase & Sale regarding the property that it scheduled to close 2 months after death. T does not own the asset because it is subject to a k. BUT owns a chose in action (the right to receive the proceeds of a sale)
  + The devisee or donee takes the right or the chose in action or the equitable estate or interest. So the beneficiary would not get the DEED, they get the net proceeds of sale.
* Insurance on a specifiv bequest: E.g. A week before my death I accidentally smash watch that’s specifically listed asset in my insurance. The insurance claim existed before my death so under **(b)** the beneficiary doesn’t get the (smashed) watch but gets the proceeds of insurance.
* E.g**. (d)** if I make a devise in my will for property and sold property in lifetime, law of ademption says devisee gets nothing – this subsection says: if when you sold property, you’ve taken back a mortgage or some other security interest, the person who was supposed to get property under will gets the mortgage

### Where POAs Dispose of Assets in Will (before or after death)

* **POAs are prohibited from disposing of property they know is in will**, unless obliged to do so in order to perform their duties as POAs (e.g. to pay T’s bills)(***SDA*****s 35.1**). If they do, beneficiary is entitled to corresponding proceeds from residue (**s 36(1)**). If not enough in residue, the right to proceeds abates **(s 36(2)).**
* After death: E.g.: a gift of piano, and after death there is a fire at T’s house and piano is destroyed: issue at that point is whether estate trustee had insurance, if not, ET is potentially liable to beneficiary of the piano:
  + Because of ongoing liability of ET, generally encourage ET to deal with specific items as quickly as possible.
  + NOT an example of ademption (piano existed at T’s death
* Practical components:
  + If lawyer called by executor then lawyers asks: Do you have adequate insurance about house and contents?
  + Once we have seen assets and liabilities in estate and there is enough to distribute specific items, we are encouraging executor to get them in hands of beneficiary and get a release because until they are in hands of beneficiary then **executor is liable if they are damaged.**

## DATE FROM WHICH WILL SPEAKS (542)

* When will says “I give such and such” what is the date that the will speaks?

### Property = Speaks from Just Before Death; Person = Speaks from Date of the Will

**S. 22 SLRA**: with respect to property, except where there is a contrary intention in the will, the will takes effect as if it had been made immediately prior to death – will speaks from date of death, unless contrary intention (with respect to the property of T)

**T assumed to have read will or carried it in his mind, shortly before death *Re Rutherford***

Contrary Intentions **(545)** (i.e. where look at what was owned at *date of* *will*)**:**

1) specifies giving property owned at date of will **(temporal words)**, and

2) **specific asset** that is **INCAPABLE** of increase or decrease (e.g. watch/car) (***Re Rutherford***).

##### Use or Misuse of Temporal Words Pg. 548

Issues about using the words “now” or “then”

* **22:** will speaks from date of death except where **contrary intention** appears by will
  + **Clearer terminology “to transfer land I own in London at date of making will”** 
    - E.g.: gift in a will “to my children *then* living” – question: what point in time is T referring to in terms of “*then*”?
* Stand back from the document and think about NOW means and THEN means. Generic temporal words can be dangerous.
  + E.g. in ***Re Forbes*** the court held “now” referring to devise of “premises where I now reside” to mean *at time of the will*, in part, bcs T had used phrase “date of my decease” to refer to residue. Contrast made clear use of “now” meant at will.

#### *Re Forbes* pg. 548

* The gift was “where I now reside”, so a lawyer gets legal description of property.
* “Then” 🡪 if a will says to leave the whole of residue of estate in trust until death of so and so and then divide residue among so and so’s children then living.
  + Better way: “to divide residue among such of children on so and so who survive me

**In practice we try to avoid use of *temporal terms* such as now and then.**

##### Examples of assets CAPABLE of increase/decrease:

* “**my household goods and furnishings**” – the person who gets, gets what is there at the date of death (and what was in existence at time of will making if still present)
* **Loans**: Court found “forgiving loans” also included a loan to son made *after* the will (***Therres v Therres***).
* **“House and premises**”: ***Re Bird*:** Where devise specified “house and premises at 14 Mitchell St”, and, after will, the house was condemned and two new houses built on lot (“14 & 16 Mitchell St”), court held that the devise left *both* houses to beneficiary (i.e. address at time of will was held correspond to the Lot on which both later addresses were built – it was city who designated separate 14 & 16, not the T).
* **Jewelry, or land: *Re Rutherford***(1918) (p. 543): Where there is a gift given under a will and it has been added to between date of will and date of death, the **whole property** answering the description is what passes to beneficiary.
  + E.g.: a gift of “my jewelry”, includes the jewelry that existed at date of making will as well as jewelry added to the collection and existing at date of death – but it would *not* include items given away by T during his lifetime.
  + In ***Rutherford*,** devises a parcel of land, then later acquired additional frontage. Is the frontage included? Yes, b/c the asset was capable of being added to or diminished and the court held that the frontage was included in the devise.

### Persons

Persons by Description: The *prima facie* rule is that **person** in existence at the **date of the will** who fits the description takes the gift (***Hickman’s Will Trusts***)

* E.g. “Tom’s wife” – would means wife at date will was made, not wife at date of death
* Exception: Reference to T’s spouse:
  + In terms of the reference to **people** by description, **s. 17(2)** of SLRA has **reversed the rule** in respect of **dissolved marriage** between T and T’s spouse (above)
  + A divorce or civil annulment, revokes a gift to T’s spouse and revokes an appointment of T’s spouse as estate Trustee UNLESS contrary intention in the will.

Class of persons: For a **gift to a class** of persons, *prima facie* rule is that membership to group is determined at **time of T’s death**.

## Change in name and Form– deals with specific gifts pg. 550

* Issue arises where: T has given a specific asset and at the date of death the asset is not in the same form as it was at the date of making the will.
  + Changed in form but can still seem remnants of what was there.
  + Ex. T bequeaths 100 shares to ABC and had those dates at the date of the will. Suppose the stock then splits to 200 shares at date of death. Who gets the extra 100 shares? Residuary beneficiary would argue they get the other 100.

**Laskin) Where the change is in name and form only but the specific thing given is substantially the same, it would be an over-refinement to find ademption. *Re Britt***

* + Change in form only, “mortgage debt” was now a (uncollected but enforceable) foreclosure judgment. It was not just the mortgage, it was the monies owing, which survived conversion. ***Re Britt***

Courts favour saving the gift if that is the T’s intention.

**Other Examples of mere change:**

* E.g gifting a classic car that has changed substantially by way of *customized* modifications
* E.g. Given gift of shares in specific company and at date of death *reorganization of company* so share under different name.
* E.g. gifts money from a numbered account, and then at time of death the money is in another account. Is that the same? So… When clients ask for a named account, there’s a risk.

## Tracing pg. 554

* E.g. T sells gift before death and puts money in a bank account; or transfers from one bank account to another. How to trace?

**Has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such?” *Re Cudek***

***Re Cudeck* on OWL**

* T gave in his will “the proceeds of a term deposit $28k principle + interest”
* Can the investment that was given in the will be traced into the currency in the safety deposit box at date of death
* J Mackinnin, “**has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such?”**
* Courts are more willing now to hear extrinsic evidence, but in this case could only look at the words of the will
* Court is looking at physically what is there at date of death and having come a conclusion that with the evidence tendered the $37k retain a form that can be identified as term deposit.
* Court has to be decided whether T intended that the assets change in form but still given.
  + J Mackinnin, “*Morgan and Thomas* shows in case such as this a **broad and even a lax instruction** of terms of the will **should prevail** if there by effect will more probably be given to T’s intention”.

#### Is tracing practically possible?

When dealing with monetary assets and an issue in change in form:

* **Where T has comingled the funds from the specific asset with his or her own funds then the tracing becomes impossible**. (***Re Stevens***) [Note 1 & 2 pg. 556]

**Acts by Pubic Guardian Trustee**: If a specific bequest of a bank account is closed or invested by PGT not by T then the gift doesn't adeem and legislation preserves the right of B under the will to the proceeds. **SDA 35.1, 36** [Note 6 pg. 557]

**Conversion is traceable:** Courts are more willing to have regard to T’s intention (***Doyle) -*** [Note 7 page 557]

* **Issue:** date of will – shareholder had common shares but by the time he died, estate freeze had taken place – no longer had common shares but had a significant amount of money in special shares
* Residuary beneficiaries argued that the gift adeems because no more common shares
* Specific beneficiaries argued tracing (***Cudack***)
* **Held:** special shares are really just converted common shares, **can be traced**

## S. 32 of SLRA - Primary liability of real property to satisfy mortgage Pg. 568

* Generally, the residue is responsible for paying the debts, BUT here **the mortgage stays with the property UNLESS the will has a contrary or other intention**
* **S. 32** Becomes relevant when we have a client who is making a devise – a gift of real estate
* Q to ask client:
  + Is there a mortgage on property or could there be a mortgage on property?

**S. 32** – where a person disposes of an interest in freehold or lease hold property and at time of death there is mortgage and no contrary intention in will, Beneficiary who takes property is subject to mortgage.

* Ex. Like to give 123 Dundas street to sister, yes there is a mortgage, might want to do investing, if there is a mortgage on date of death who is responsible? Sister? Or to be a debt of estate? And even though **s.32** if client says sister is to pay mortgage and say in Will to transfer 123 Dundas and on basis sister shall be responsible on mortgage against property.
  + **S.32(2) says T doesn't signify a contrary intention or other intention by a general direction for payment of debts.** 
    - **General debts clause in a will is not sufficient to shift the mortgage to a residuary beneficiary**

# Lapse & Survivorship (589-610, 612-631)

## 

**Rule Of Law For Lapsed Gifts**: A gift to a beneficiary (incl a corporation) who predeceases the T fails or lapses; it falls into residue.

***SLRA* s 23**– Except where a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest (or legacy) that **fails or becomes void** by reason of,

**(a)** the **death of the devisee** or donee in the lifetime of the testator; or

**(b)** the devise or bequest being **disclaimed** [refused] or being **contrary to law** or otherwise incapable of taking effect, (e.g. witness attests)

is included in the **residuary** devise or bequest, if any contained in the will.

* If beneficiary survives T for even half a minute, that’s not a lapse. Gift goes to (now dead) beneficiary’s estate (***Re Ramsden***). ET of B’s estate is paid for B per **S. 2 EAA**.
* *How to avoid effect*: Make a substitutional gift / alternative gift / gift over in will. These are all synonymous terms.
  + ***doctrine* of lapse *cannot* be avoided**: e.g. “If A predeceases me the gift shall not lapse but shall be construed as if A had survived me.” This is ineffectual and gift will lapse nonetheless. (see ***Re Ladd***).
* S23 does not deal with lapsed residuary

**Example:**

* **“To pay 50K to my cousin Jodie.”** 🡪 **Jodie predeceases me.**
* That gift to Jodie lapses. Her estate does not get the gift
* What happens to the gift is governed by s. 23
* Can add a phrase – If Jodie predeceases me then this legacy shall lapse, or shall be paid to her estate, or shall be divided among her children who survive me…

### Gifts that don’t Lapse and s31 doesn’t apply

These gifts don’t lapse unless ALL B’s die before T

#### Class gifts in ONT *re Holmes Estate*

#### Gifts to joint tenants *re Hutton*

#### Joint Tenancy (603) – gift of entirety and confers right of survivorship, Must be explicit or Bs will be tenants in common

* “**To transfer #123 Dundas St. to my friend A and my friend B as joint tenants”/ “or the survivor of them**”
  + Registered deed as **joint tenants** – if A dies before T and B survives, whole goes directly to B and not A’s estate.
* If A and B ***both*** **die before T**, then assuming that they are aren’t child, grandchild, brother, sister, then the **gift would lapse** under **s. 23 (become residue)**. To be clear “**if both A and B predecease me, this devise shall lapse**”.
  + - This way, even if both A and B are in **s 31,** then still shows a **contrary intention**.

#### Tenants in Common

***Conveyancing Law and Property Act*** – **S 13(1)** **Where land is granted**, conveyed or devised to two or more persons, other than executors or trustees, **in fee simple** or for any less estate**, it shall be considered that such persons took or take as TIC and not as JT**, unless an intention sufficiently appears that they take as JT.

**(2)** Applies notwithstanding that one person is spouse of another. **(3)** “Spouse” includes same sex marriages and CL spouses.

**Tenancy in common** is a type of shared ownership of property, where each owner owns a share of the property. TiC passes down through estates of owners. Unlike in a joint **tenancy**, these shares can be of unequal size, and can be freely transferred to other owners both during life and via a will.

* “**To transfer #123 to my friend A and my friend B**”. These are TIC b/c of *CLPA* s 13.
* If A dies before T, normal rules apply (A’s half-interest lapses by virtue of **s 23** to become residue. B’s half-interest is unaffected).
* If A dies before T and if includes “or survivor of them” then A’s half-share doesn’t lapse and B owns the whole of the property.
* ***Re Couglin*** (p. 605) *–* generally “share and share alike” means tenancy in common; really stretch here to find a JT – but here a JT b/c included words “to be theirs absolutely” (contrary intention).

### Lapsed residuary Gift

|  |
| --- |
| ***Re Stuart*  (p. 590) *–* If a *residuary* gift lapses, there is a partial intestacy – s. 23 does not provide for lapsed residuary bequests or devises. Those are dealt with as on an intestacy.**   * To avoid: a substitutionary gift should be written in the will – e.g. give it to the children of the deceased beneficiary (or issue; children living now; children under 18 – put in ‘infants clause’). * This also applies if will “divides residue *equally* b/w” (or “divide among *such of*”) named beneficiaries. Most cases hold that the lapsed portion goes to intestacy (e.g. ***Kossak***); use an accruer clause to avoid this (***Re Allen***) |

|  |
| --- |
| ***Re Hutton* (1982)** *–* **if share of residue given to 2 or more as JT and one predeceases, then the remaining takes it by survivorship, e.g.: “To A, B + C jointly”.** Could also use the phrase “To divide among A, B + C equally who survive me.” |

***Re Stuart*** [pg. 590]

* + **Where we have a gift of residue that lapses, now we have an intestacy of T**
  + Back to part II of SLRA
  + Ex. To give 1/3 of estate to A 1/3 to B and 1/3 to C and C dies, then we have intestacy as to 1/3 of estate.

### Accruer Clause = Contrary Intention

A contrary intention for the purpose of the legislation is normally expressed by an **accruer clause**. [Note 10 pg. 593]

An accrue clause is a type of substituionary gift.

* Examples:
  + to deliver ring to X but if X predeceases me to deliver to X’s estate then ring is delivered to X’s estate trustee
    - then get into issue of let’s say this is $100k ring do you just give this on basis on notarized copy of will or are you going to want a certificate of appointment.
  + To divide residue of my estate equally among A,B,C as joint tenants and not at tenants in common; or
  + to divide into 3 equal shares and if one predeceases goes to other two.
  + A residual bequest to “X, Y & Z” that “if any of those individuals predecease me, the share of the deceased beneficiary shall be added to the shares of the surviving residuary beneficiaries” (e.g. ***Re Allan***) (same effect as *class gift*)
* Surplus income from a specific fund set apart for purpose of annuity fall into residue (in absence of contrary intention) (***Re Herman***)

## S. 31 Anti Lapse Legislation/ Substitutional Gifts

***SLRA* S. 31** “Except when a contrary intention appears by the will, where:

[1] a **devise** or **bequest** [includes legacy and residue] is **made to** a **child**, a **grandchild**, **brother** or **sister** of T who

[2] dies before T and **leaves a spouse or issue** [lineal descendants] surviving T,

the devise or bequest **does not lapse** but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible,

**(a)** if that person had died immediately after the death of the testator; **and**

**(b)** if that person had died **intestate**; **and**

**(c)** if that person had died w/o debts; **and**

**(d)** if section 45 had not been passed (*i.e.* ***no preferential share*** *– spouse doesn’t get flat minimum*)

**BASIC RULE** is that the **gift lapses** **s. 31 changes gift to follow intestacy rules for B’s estate** but w/o preferential share.

* **S 31 SAVES the gift,** **but it may go to a completely unanticipated group of recipients** (e.g. brother predeceases: 1/3 goes to brother’s spouse and 2/3 to brother’s two children).

***But if no spouse and no issue in the circumstances, back to part II!***

### Definitions for s 31:

* Confined to SLRA Part 1 definition of spouse as “**married spouse**” (i.e. *not* CL spouse – ***Re Lange Estate***).
* “**Issue**” includes inside or outside marriage even if there is a BOOM exclusion clause in the will.
* Note**: Next of kin of legatee is determined as of the date of the *legatee*’s (not T’s) death (*Re Branchflower*).**

### Application to Types of Gifts

* *only* applies to individuals - **does *not* apply to** gifts to “children or other issue” or **class gifts in ONT.**
* S 31 applies to residuary gifts as well (***Rothstein Estate***).
* S 31 does *not* apply to failed contingent gifts **(here legatee had gift contingent on reaching 25 yo, died at 24 before T but would have been 25 at T’s death. Court refused application of s 31 – *Re Wolson*).**

**Contrary Intention** (600) – If a contrary intention is included in will (e.g. “if she survives me”), **s 31** **does *not* apply.**

* it’s incumbent upon us to ask what if your brother/sis/child/grandchild dies before you?
  + If they say that they want it to go to the other brother then include this as a contrary intention.
* Unclear if contrary intention needs to be express.
  + Some say yes (e.g. ***Doucette v Fedoruk Estate*** Man CA, 1992). And Smith Estate v Davis 2002 ONSCJ
  + ***Re Wudell*** (ABQB 1982) found contrary intention to be *implied* from the gifts in the will and surrounding circumstances that showed her intention was to treat all of her grandchildren equally so that the grandchildren of one child who predeceased her shouldn’t get a much larger share than all the other grandchildren.

## Cy-Pres Doctrine - Charity

Means “this here”

Requirements:

1. Cy-pres comes into play where a will is drawn with a gift to a charity and this charity no longer exists at date of death or has gone out of operation.
   * If goes out of operation after date of death but before distribution the it is still charity’s asset.
   * Simple name change or amalgamation = cy-pres doctrine doesn't apply. till the same person/organization its just the name has been changed.
     + Get certificate of amalgamation or article/resolution for name change.
2. If T has evidenced that T wants to advance **a general charitable purpose** and has evidence the non-existent charity was an example, then the gift does not lapse.

* T is found to have a general charitable intent. The gift will apply to another charity with as near a purpose as possible. (e.g. ***Re Voorhees***)

1. Submit notice of application to apply doctrine must be sent to residuary B’s, because they would want gift to lapse.
2. ET must show court efforts to choose appropriate charity “near to” charity named in the will.

### 

### Substitution clause for charity

To solve problem so cy-pres doctrine doesn't come into play is a standard form clause that says

* “if any organization cease to exist and no longer carry on purpose at date of will then gift will not lapse and estate trustee can give gift as trustee in sole discretion determines appropriate

## Substitutionary Gift 613

***Effects* of lapse can be avoided by substitutionary gifts**: e.g. “To A, but if A predeceases me, to B, but if B predeceases me, to C.”

* However, the ***doctrine* of lapse *cannot* be avoided**: e.g. “If A predeceases me the gift shall not lapse but shall be construed as if A had survived me.” This is ineffectual and gift will lapse nonetheless. (see ***Re Ladd***).

If primary beneficiary predeceases T *and* his gift is void (e.g. b/c witnessed will), substitutionary gift is still valid (***Re Bird***).

Can use substitutionary gifts in **class gifts** too.

* E.g., 1/18th to dead niece’s kids instead – put this provision in will: “Share shall be divided equally … such as to those who survive me ….”
* If a member of the class is already dead at time of will though, presumption is T did not mean to make gift to dead person (i.e. the dead person`s issue do *not* take) (***Sterling v Navjord***),
  + However, this assumption can be displaced by appropriate language in the will (e.g. “To my sister**s**” where T knows 1 of 2 sisters is dead – plural suggests to issue: ***Re Grasett***).

### Words of limitation or substitution pg. 616

* “**To A *or* his heirs, executors and assigns”** is a substitutionary gift (***Re Whitehead***). “To A *and* his heirs...” *may* have this effect if gift is personal property (***Re Couldon***), but usually does *not* unless “*per stirpes*” is added (***Pearson v Stephen***): so there could be a lapse.

JUST DON’T USE THESE TERMS. Confusing, and gives rise to interpretation. Ask the client precisely what they want.

* To give to “heirs” as a substitution say “children or issue”
* To give to "executors” as substitution say to “estate”.

## Survivorship

Part IV SLRA s 55-56– page 626

**Circumstances in which people die at the same time or they die in circumstances rendering it uncertain which of them survived each other** (i.e. can’t tell whether or not beneficiary died before T).

* **If it can be determined on a balance of probabilities** 🡪 **sections do not apply** (e.g. ***Adare v Fairplay*** where *autopsies* were able to establish order of death following mutual carbon monoxide poisoning).

**s.56 SLRA** – 55 only applies to deaths after March 31st 1978 when SLRA came into effect.

* Prior to **s. 55** had statute called ***Survivorship Act*** – so in circumstances where people die at the same time or in circumstances where it was **unable to be determined who died first**.
  + **Survivorship Act** says the elder of 2 people was deemed to have died first.

**S. 55 (1)**Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he or she is competent to dispose, shall be disposed of as if he or she had survived the other or others.

* **S. 55:**
  + **(1)** deals with property
  + **(2)** joint tenancy situation (in land and in joint accounts)
  + **(3)** designation of personal representative
    - two people who have appointed each other to be executor and they both died in circumstances where it cannot be determined who survived the other.
  + **(4)** when it comes to insurance look at insurance act

**Example 2 brothers:**

* J leaves estate to S, but if predeceases then goes to vic hospital
* S leaves estate to J, but if predeceases then goes to uwo
  + Under the survivorship act, because J is the elder, S is deemed to have survived J. All money went to UWO
* BUT now under SLRA Part IV – J deemed to have survived S and S deemed to have survived J.

### 

### s. 194 Insurance Act Pg. 627

Insurance policy may be payable to Bs named in insurance contract; and B’s named in K may declare their own Bs in their will.

* When we talk about gifts, as part of dispositive provisions of T, cannot give interest in insurance policy because it was already given in contract and declaration.
  + But if T is B of policy of life insurance on someone else ex. Child, parent can deal with that policy in dispositive provisions of will.

### Beneficiary predeceasing life insured

**194.** (1) Where a beneficiary predeceases the person whose life is insured, and no disposition of the share of the deceased beneficiary in the insurance money is provided in the contract or by a declaration, the share is payable,

(a) to the surviving beneficiary; or

(b) if there is more than one surviving beneficiary, to the surviving beneficiaries in equal shares; or

(c) if there is no surviving beneficiary, to the person whose life is insured or the their personal representative

**S.194(2)** Where two or more beneficiaries are designated (otherwise than alternatively), but no division of the insurance money is made, the insurance money is **payable to them in equal shares**

* **Ex.** Designate A B C then all will get 33.33%, but can say A 20% and B 20% and C 60% but if don't under this section its an equal split.

**S.215** situation where person who’s life is insured and B die at same time. This section says that it is to be dealt with as if the **beneficiary pre-deceased the person who’s life is insured.**

* Go back to s. 194 to see where the share goes

# Class Gifts (633-646)

### Class Gifts (e.g. divide my estate equally among “my brothers”).

**Definition: “A class gift is a gift to a class consisting of persons included and comprehended under some general description and bear a certain relation to the T.” (*Kingsbury v Walter*)**

* Persons are normally, though not necessarily, related to T,
  + The court also noted that if the residue clause provides for **equal division** but some are **unrelated** to T and to each other, it is unlikely the court will find a class gift (and likely there will be litigation). ***Re Snyder***
* body of persons is **uncertain in number**: may increase or decrease by T’s death, before class closes.
  + amount of gift depends on number of people.
  + Could also change the class closing to say “who are alive on the 5th anniversary of my death”.
* S31 doesn’t apply to true class gifts: *re Holmes Estate*
  + If a class member predeceases T, or is unable to take b/c they witnessed the will or their spouse witnessed the will, etc., his share doesn’t “lapse” – it is divided amongst (and so increases) the shares of the other class members.
  + This can be modified by a substitutionary gift (e.g. “If a brother predeceases me, his share goes to his issue that survive me.”)
    - E.g.: “**To divide $20,000 among my brothers who survive me**”: Putting in “survive me” closes the class at the date of death. If a brother has dies before T, his share passes to the others.

Looks at T’s Intention

* Ultimately, it depends on the **T’s intention**: i.e. did T intend to make it a class gift? (***Robinson v Des Roches***):
  + E.g. ***Re Stuart*** – Court found *was* intended to be treated as a class gift since residual clause was uncompleted while earlier disposition in will was carefully considered – suggested T thought previous clauses had avoided intestacy.
  + ***Robinson v. Des Roches****,* Whether a gift is construed as a class gift or as a gift *nominatim* depends on the testator’s **intention** and one must really **examine the testamentary instrument and the extrinsic evidence** using the “armchair” rule where judge puts himself there (so take the evidence where the four guys are a four-some for 20 years etc.)
  + ***Re Hutton*** *-* where the residue was divided among the T’s brothers and sisters, A, B, C and D (named) and if any were to predecease leaving children who survived the testator, the children would take his, her or their deceased parent’s share; He thus **created a type of class**, with the result that the share of B (and his child) accrued to the other members of the class.

### Names and Fractions – Class Gift vs. Gift by Name (634)

* Where testator gives **fractional portions** of a sum of money or residue to **named individuals**, then there is **NO CLASS GIFT but a gift *nominatim*** (gift by name) individuals taking as designated persons even though the people are named collectively
  + E.g. no class gift **named**: “Gift to children A, B, and C” – *gift nominatm* – to **named persons**.
    - But if you added ‘who survive me’ it still takes it out of **s 31**.
  + E.g. no class gift **unequal** **fractions:** “To divide $50k – half to my sister, one quarter each to my brothers”

***Re Collishaw*** *-* The court held that the use of the phrase “four equal shares, one share each”, the naming of four children, the fact that 3 shares went to the children of the testator’s sister and the fourth share to the grandchildren of the sister, and the use of the words of substitution “or their heirs” indicated that the testator **was not treating the beneficiaries as a class but as individuals**

***Re Snyder*** *-* The will named two **potential** members of the class by name (so you might automatically think it’s a gift nominatm) but in coming to his decision that it was a **class *gift****;* stretch case; **found there was a class** of two named persons so shares accrued

### Artificial Classes (640)

It may be that the T wishes to make one **gift to two groups of persons which do not share the same characteristics** and intends that it shall be a class gift. (e.g. “$21 000 to children of A and children of B”)

Trying to create an artificial class and the problems with this are listed in *Kingsbury*

* ***Kingsbury v Walter***, Lord Davey held can still be a class gift despite a person being named:
  + “gift to all my nephews and nieces, including A” *is* class gift
  + “gift to C and all my other nephews and nieces” *is* a class gift
  + BUT “gift to A and children of B” *is not* prima facie a class gift, although it could be one if intention shows it to be so.

Example: $25, 000 to children of Mary and Evelyn equally. If Mary and Evelyn are related then likely found class gift but not likely if they are unrelated to testator.

* It is theoretically possible to have a will say “I intend this to be a class gift”

### Description by Number (643)

* If T describes a class of persons by number, (e.g. “**to my three brothers**”), *prima facie* is ***not* a class gift**, but a **gift *nominatim*** so in ***Re Smith’s Trusts***the gift lapsed when “to be divided equally between the five daughters”, two of whom predeceased.

***Re Burgess****,* It was held that where there is a gift **to the unnamed “children” of someone, that means *all* their children (class gift),**

* *even* if a certain number of children was specified, unless there is some (extrinsic) evidence to show which of the children specified are meant;

### Determining Closure of Class (647)

* First look at the will to see if the testator has directed **when it is to close** (e.g. “on A’s death”).
* If T’s intentions are not clear after a meaningful inquiry by the court, ONLY then, court will go to the **class closing rules** (rules of convenience – i.e. ascertained at T’s death) (***Nat Trust Co v Fleury***).
  + At CL, assumption is woman can *always* have children until death. At equity though, court may be willing to allow estate to distribute gift if it is clear woman cannot bear child by reason of age or medical condition (***Inland Revenue Commissioners v Berstein***), but not before woman reaches ages of 54 (***Re Westminster Bank’s Declaration of Trust***).
  + Class closing rule only apply to gifts of capital, not to gifts of income (***Re Ward’s Will Trusts***).

# Vested and Contingent Gifts

## 

## The Rule in Saunders v. Vautier

Pg. 695 footnote 116 and at bottom of 697

* *If a gift is not setup correctly so that it vests, the rule applies and the intention of T is defeated*

***S v V*** and **S. 31** are both traps for solicitors preparing wills.

* S31 b/c: If you don’t put in the magic words “if he or she shall survive me” – then gift may end up in different hands than the T intended.
* ***S v V*** is a trap because the client will be unaware and will be focusing on the postponed gift
  + SO use a gift-over to a group of people who can’t be determined until the future

**RULE IN *SAUNDERS V VAUTIER*: “if a person is capable and is sole person with interest in property given to him, then he can call for the conveyance or transfer of the asset when he reaches the age of majority”** (18 in Ontario).

**1) B is *sui juris* (of age; independent)**

**2) no one else is interested in that share in the estate (gift must be vested)**

* The critical question: who gets the $$ if grandson dies before age 25.
* Example of mere post-poning of payment: A circumstance in which T comes to lawyer and says want a gift of $50k to be made to grandson and grandson is 16 – don't want money paid to grandson till 25. Accumulate interest and then $50k and interest gets paid at age 25. The gift has vested.
* The vested owner can collapse the trust at 18, the OCL will not collapse a trust on behalf of a minor.
  + I.e. they can call for the conveyance or transfer of the asset.

**Create substitutional gifts to avoid this rule**. But if he dies before age 25 to pay the residue to his children who survive him. That group cannot be determined until the grandson’s death. So use an open term like children or issue.

* E.g. “$25,000 to nephew at 25, but if doesn’t reach 25, then divided among children of nephew who survive nephew”. This way there is an **uncertain class** interested in the share **and *S v V* rule can’t apply**: class doesn’t close until nephew is dead (i.e. don’t know how many kids he’ll have).
  + This works because you have a class gift and the class wont close until the grandchild has died and the children of grandchild all have to be under 18 and so not of legal age to make a deal.

# ACCUMULATIONS (783-789)

Statute in Ontario - ***Accumulations Act*** - pg. 785 & 786.

**1(1)4** - no person shall direct the income for any longer than 21 years from death of grantor, settlor, testator.

An accumulation arises when income from a fund is invested and interest not distributed but is rather added to the capital.

* If there is a specific direction that the income earned on that fund goes to someone else, there is no accumulation.
* If no interest is paid out then there is an accumulation.

***Accumulations Act*:** Applies to a trust and power of accumulation (***Re Robb***) as well as implied accumulation if it will bear that construction (by expressly or impliedly carrying an indeterminate income) (***Re Burton***).

* **S 1(1)** **prohibits an indefinite accumulation…** [*6 periods*] **[for longer than]** **3)** **21 years from T’s death**…
  + **S. 1(6)** – if directed contrary to act then that **direction is null and void**
    - if there is an accumulation beyond the period permitted in the statute, the accumulation is **not totally void:** it is **only void beyond the period permitted** in the statute; after that they’re to be received by such person as if accumulation hadn’t been so directed
    - Example: GS is 1 year old at date of death and nothing is to be paid out until age 25 --- accumulation of 24 years. Then go to *Re Struthers*: and *that* income instead **falls into residue**: dealt with as if under **intestacy.**
      * Intestacy / residue beneficiary is determined as per **date of T’s death** (***Bullock v Downs***).
* **S 2**: Act does not apply to directions to pay debts or respecting the produce of timber or wood upon any lands.
* **S 3: Act** **does not apply to pension plans, retirement allowance** (RRSPs, RRIFs) **&** **employee benefits**.

***Re Struthers*** (801)

* Where the income after the 21 year period arises in a fund that is created within the will other than the residue clause, then that income becomes part of the residue of the estate
* Then goes to Part II of SLRA to determine who if not specifically addressed

### What is an accumulation?

* An accumulation is where we have either a specific fund (amount of money) or specific share of residue to be set aside and held by testator and the income from that fund or share is not to be paid out and so it accumulates.
* Where you have a portion of a will that establishes a trust and a whole of an outcome to be paid in a year then you don’t have any accumulations issue.
* But where you have a direction that the estate trustee can’t pay out the income or where you have a discretion given to estate trustees to pay or not to pay the income then you have the potential for an accumulation.
* Ex. So lets assume we are dealing with $100k. The percentage yield in every year is 5%. So if there is no income paid out at the end of year one that fund is going to be worth $105k because next year it is 5% so then following year you have $110,250 - interest on interest. By end of year 4 you have $127k.
* Accumulations act says **cannot do this for more than 21 years after the date of death and every direction to do that is void.**
* Where we will frequently see the potential of accumulation in wills law is a client who will make a will that leaves everything to children and then says if any of my children has died before me then that share goes to his or her children.
* The second someone picks an age over 21 then you have an accumulation issue. So say child dies at day of T’s death but had another child. So now money will go to grandchild. So then need to have a gift over.
* But a well-drawn infants clause will address issue of income on that share so have to say to client what happens to income on that money?
  + Cannot be paid directly to grandchild till they are 18.
  + Client can say I want accumulated till age 18 and then income from that point is paid out to grandchild.
  + Standard clause is hold that for the person with authority from executor to pay such amounts from income or capital that executor think is appropriate. So maybe years where executor pays out all income or holds back income.
  + That income will be added to capital of the trust.
* By having ability to access capital then that medical device can be paid for. When executor or trustee takes money out of the capital we call it **encroachment** of property. And this is the power to encroach.
* At the end of 21st year this is when the accumulations act kicks in because even though the statute says its void the cases are clear that you are allowed to accumulate up to the 21 years – it is not void as of issue **–**
* ***Re Arnold*** pg. 788 “the direction to accumulate is not void in its entirety”.
* When drawing standard inference clause and it says it will be held till age 25.
* I know that with this discretion we can accumulate for up to 21 years, so then what happens to income after 21 years.
* Client may say – then pay it out.
* Not the accumulated capital, but the income after year 21 paid out to grandchild.
* But if the client is really reluctant to have it paid to grandchild for some reason then another substitute is that it would be paid among the issue of T in such amounts as determined by executor in her/his discretion.
* This language is sometimes referred to as a **sprinkling** clause because instead of the income just going to one person or say going to a defined group of people where it was to be divided where it would be a fixed number where our client wants Executor to divided that income up unevenly because some people may have different needs – then say to divide income for 21 years as they believe appropriate.
* Well drawn clause will then go on to provide for gift over if person doesn’t reach age 25 so that rule in ***Saunders v. Vautier*** which would enable the grandchild to break or collapse trust which would defeat intention of T.

Problem: when you have a person drawing a will that isn’t aware of accumulations act that may, for example set aside $50k to grandson and hold it to age 25 and accumulate income and if doesn’t reach age 25 it goes to grand children living at death. We have the gift over so don’t have the rule in ***Saunders v. Vaultier***. But doesn’t tell you what happens to income after 21 years?

**Law is:** if the income that is directed to be accumulated beyond 21 years is income on a particular fund or trust that has been set up within the will then it goes to the residuary beneficiaries.

Ex. Will that says set aside $50k or to hold my house at 125 Dundas street till grandson is age 25. And it didn’t deal with income on fund after year 21 then law is that money drops into residue of estate. Where you have a direction contrary to accumulations act on a share of residue, it is the same rule as a lapse gift – ***Re Stewart*** now you have a partial intestacy.

* ***Fleury Case*:** the rule is that the intestacy is determined as of the date of death.
* So makes a difference whether it is income on a trust established within a will or income on a share of residue.
* Can be either in a specific fund or a residue.

Lets assume an interest rate of 5% and it is $25000 and annuity is $2000. So have income on fund more than what is being paid out. So as lawyers we have to consider what if there is more income then amount of annuity. This is an accumulation so what happens to that access income.

* When dealing with annuity: $5000 $200 month now drops to 2% so only $1500
* When drawing annuity clauses have to think about whether short fall in the interest. And if income isn’t enough then can be paid by executor.

**If there is an excess out of payouts over income**

Monthly annuity payments shall be paid first out of income and thereafter shall be paid out of the capital

Contemplate if:

Interest exceeds or interest is less than the amount to be paid out

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### Terminating the Accumulation (Breaking a Trust)

* If money is bequeathed to a minor, the minor cannot get it until reaches the age of majority unless there is a contrary provision in a will; there is a deemed type of direction to accumulate even if there is no specific direction to that effect.
* **RULE IN *SAUNDERS V VAUTIER*: But “if a person is capable and is sole person with interest in property given to him, then he can call for the conveyance or transfer of the asset when he reaches the age of majority”** (18 in Ontario).
  + E.g.: **legacy** – client wants to leave nephew $25,000, he is 10 now. If you simply say to pay him $25,000 when he is 25, this may not work: as soon as he is 18 (and has capacity) he could write demanding the payment of the money “**Break the trust**”.
  + To avoid this, make a **substitutional gift** or **gift over**– this can also be problematic b/c they can join together and collapse the trust – they are the only 2 people interested in the property. E.g. “$25,000 to nephew at 25, but if doesn’t reach 25, then divided among children of nephew who survive nephew”. This way there is an **uncertain class** **and *S v V* rule can’t apply**: class doesn’t close until nephew is dead (i.e. don’t know how many kids he’ll have).
* ***S v V*** rule also applies to context of gift to charity (***Wharton v Masterman***).
* ***S v V***rule also applies where accumulation is directed to class of persons when they reach age of majority but to last until last class member reaches majority: members can stop accumulation of their presumptive share upon reaching majority (***Hilton***).

# GENERAL PRINCIPLES OF INTERPRETATION (437-512)

* ***SLRA* s 23** (459): Unless a contrary intention occurs, **if property devised fails** ((a) devisee predeceases or (b) void because incapable of taking effect or is disclaimed or contrary to law), it **falls to residue**.
* ***SLRA* s 33** (463): At CL, executor is entitled to undisposed residue of estate. S 33 says instead **undisposed residue is held in trust by the executor** for those who take it on a (partial) intestacy.
* ***Bullock v Downes*** (473): **Next of kin is determined as per date of T’s death** (unless contrary intention in the will).
* **Admissibility of Evidence** (477): What evidence is admissible when a will is being interpreted? Old English cases have very strict guidelines (generally just looked at will itself – ***Perren v Morgan***: “you sit in the T’s chair”): e.g. notes taken by lawyer that might assist court as to what T meant was not admissible. Technically they still aren’t admissible. However, since 19th century, there’s been a **liberalization in the types of extrinsic evidence that can be admitted**. Some jurisdictions (not Ontario) have put into statute what evidence can be admitted (and they are all more liberal than the 19th century English standard).