WILLS

[[1] TERMS 6](#_Toc36305953)

[ADMINISTRATOR, AMBULATORY, CODICIL, ESTATE TRUSTEE, EXECUTOR, INTESTACY, INTESTATE, LAW OF PROBATE, LAW OF SUCCESSION, TESTATE, TESTATOR, LAW OF WILLS, WILL 6](#_Toc36305954)

[Notes: (i) person born outside marriage treated as if inside (*SLRA*, *CLRA*); (ii) on intestacy, only married spouses can make claim; (iii) only married spouses eligible for interspousal rights (*FLA*) 6](#_Toc36305955)

[[2] PROBATE 7](#_Toc36305956)

[Obtaining grant of PROBATE [not nec to obtain]. **§2 *ESTATES ADMINISTRATION ACT*** [property vests in personal rep]. 7](#_Toc36305957)

[TYPES OF EXECUTORS & ADMINISTRATORS 7](#_Toc36305958)

[EXECUTOR [Estate Trustee with Will. **§34 *ESTATES ACT*** states may decline]. ADMINISTRATOR [Estate Trustee without Will. **§29 *ESTATES ACT*** gives court discretion to appoint]. 7](#_Toc36305959)

[ESTATE ADMINISTRATION PROCEDURE 8](#_Toc36305960)

[(1) get in assets; (2) pay debts/ equities/ transfer bequests; (3) distribute residue. 8](#_Toc36305961)

[Terms: CAVEAT, INTERVENTION, CITATION, COMMON FORM PROBATE, SOLEMN FORM PROBATE. 9](#_Toc36305962)

[Personal rep: (i) Costs. ***McDOUGALD ESTATE*** [costs at court discretion]; (ii) Compensation of Personal rep. **§61 *TRUSTEE ACT*** [entitles compensation]; (iii) Duties of personal rep; (iv) disposition of body; (v) ***INCOME TAX ACT*** [personal rep personally liable]; (vi) debt payments [must pay debts]; (vii) distribution of estate [must distribute property] 9](#_Toc36305963)

[[3] INTESTATE SUCCESSION 11](#_Toc36305964)

[Terms: INTESTATE, PARTIALLY INTESTATE. **§2 *ESTATES ADMINISTRATION ACT*** [personal rep responsible for estate admin] 11](#_Toc36305965)

[SPOUSES & PARTNERS 11](#_Toc36305966)

[Terms: SPOUSE [not CL partners, Part I *SLRA*], ISSUE. **§1(1) *SLRA*** [spouse]; **§44 *SLRA*** [Laughing Heir]. 11](#_Toc36305967)

[SPOUSE & DESCENDANTS 11](#_Toc36305968)

[Terms: (i) PREFERENTIAL SHARE [intestate survived by spouse, spouse entitled to $200,000 (**§45(5) *SLRA***)]; (ii) NET VALUE [property value less charges (**§45(4) *SLRA***)]; (iii) PARTIALLY INTESTATE [valid will disposes of part estate, spouse entitled to interest]; (iv) DISTRIBUTE SHARE [share surviving spouse entitled after preferential share (**§46(1) *SLRA***); (v) DESCENDANTS; (vi) *PER CAPITA* (**§47 *SLRA***); (vii) *PER STIRPES*; (viii) ASCENDANTS; (xi) COLLATERALS 11](#_Toc36305969)

[TABLE OF CONSANGUINITY 13](#_Toc36305970)

[Gradual Scheme [**§47 *SLRA*** (1) no spouse/issue🡪surviving parents; (2) no parents🡪bro/sis; (3) no bro/sis🡪nephew/niece; (4) no nephew/niece🡪next of kind; (5) no next of kin 🡪 Crown] 13](#_Toc36305971)

[ILLEGITIMACY & ADOPTION 13](#_Toc36305972)

[Person born outside marriage/ adopted = born in marriage. Adoptee loses right to share intestacy of biological parents. 13](#_Toc36305973)

[[4] FAMILY: SPOUSAL RIGHTS 14](#_Toc36305974)

[PART I – FAMILY LAW ACT (FLA) 14](#_Toc36305975)

[*FLA* [for all property of spouses during marriage]. **§(1)(1)-(5)(6) *FLA*** [SPOUSE, COURT, M HOME, PROPERTY, VALUATION DATE]. **§5(6) *FLA*** When spouse dies, if **NFP** of deceased spouse exceeds NFP of surviving spouse, surviving spouse is entitled to ½ dif 14](#_Toc36305976)

[EQUALIZATION & NFP 14](#_Toc36305977)

[EQUALIZATION of NFP [*FLA* confers right to money payment, not property]. NFP deductions. **M HOME** always included in NFP! [**§18(1) *FLA***] EXCLUDED PROPERTY [property after marriage/ valuation day **§4(2)**]. VALUATION DATE [date of death of one spouse **§4(1)].** Surviving spouse sacrifices other entitlements if elects equalization. ELECTION [to qualify on death, must elect equalization. Deemed to elect under will/ intestacy otherwise]. Personal rep can’t make distribution for **6 MO** after election. JOINT TENANCY [severed immediately upon spouse death **§26(1) *FLA***; ***CY PRES* DOCTRINE** [if impossible, look to original intention]; 14](#_Toc36305978)

[[5] FAMILY: SUPPORT OF DEPENDANTS (Part V SLRA) 17](#_Toc36305979)

[LEGAL & MORAL OBLIGATIONS 17](#_Toc36305980)

[***RE SPENCER*** [spouse nor children entitled to receive anything]. ***TATARYN*** [T’s moral duty relevant]. ***RE CUMMINGS*** [legal + moral duty]. ***RE DAVIES*** [moral relevant]. 17](#_Toc36305981)

[PRACTICE & PROCEDURE 17](#_Toc36305982)

[NOTICE [**§63(5)** ***SLRA*** all persons affected by order must get notice]. LIMITATION PERIOD [**§61(1) *SLRA*** 6 mo from grant of letters probate]. **§67(1)** [personal rep can’t distribute estate until court disposed of app. Personal rep **personally liable** if violates **§67(3) *SLRA***]. 17](#_Toc36305983)

[SATISFACTION OF SUPPORT OBLIGATIONS 18](#_Toc36305984)

[**§57 *SLRA*** [CHILD, COHABIT, DEPENDANT, SPOUSE]. CONJUGAL RELATIONSHIP [def in ***MOLODOWICH***]. ***RE COOPER*** [not req dependant actually depending on deceased; (i) must be in certain relationship; (ii) deceased must provide support (or be under legal obligation to)]. SUPPORT [***INTERPRETATION ACT*** def liberally for money and services]. 18](#_Toc36305985)

[DETERMINING SUPPORT 19](#_Toc36305986)

[**§62(1) *SLRA*** [consider all circumstances (a) current assets; (b) age/mental health; (m) any agreement] Other evidence. Wavy Gravy/ Loosie Goosy. 19](#_Toc36305987)

[CONTRACTING OUT OF LEG 19](#_Toc36305988)

[WAIVER **[§63(4) *SLRA*** court discretion to make support order, even if dependant waived right to spouse]. 19](#_Toc36305989)

[DETERMINING SUPPORT – CONTINUED 19](#_Toc36305990)

[CHILDREN [priority obligation to support minors]. PARENTS [parents and adult children obligations]. 19](#_Toc36305991)

[PROPERTY SUBJECT TO ORDER 20](#_Toc36305992)

[**§71 *SLRA*** [property falling into estate for support of dependants]. **§72(1) *SLRA*** [10 situations when asset not asset of estate] **§72(5) *SLRA*** [corporations/ bank/ insurance]. ***MOORES*** [group life insurance isn’t life insurance policy]. 20](#_Toc36305993)

[COURT ORDERS 21](#_Toc36305994)

[**§58(1) *SLRA*** [court discretion to order adequate payment for dependant]. SUSPENSORY ORDER [**§59 *SLRA*** order for personal rep not to distribute until pending app for support disposed of]. INTERIM ORDER [***RE PULVER*** fair and liberal interpretation]. VARIATION ORDER [**§65 *SLRA*** court vary/ discharge order]. ***MALDAVER*** [court can’t increase support order, only decrease]. 21](#_Toc36305995)

[THREE DOORS METHOD FOR PART V *SLRA* 22](#_Toc36305996)

[1. Est that client is DEPENDANT 22](#_Toc36305997)

[2. Est that client is receiving support or is under legal obligation to provide support 22](#_Toc36305998)

[3. Consider the merits for court to make an order 22](#_Toc36305999)

[GENERAL GUIDELINES 22](#_Toc36306000)

[GUIDELINE 1:courts strive to give effect to T’s scheme of distribution as set for in will 22](#_Toc36306001)

[GUIDELINE 2: Courts provide for estate if there is purpose to action 22](#_Toc36306002)

[GUIDELINE 3: Courts try not to interfere with gifts 22](#_Toc36306003)

[GUIDELINE 4: courts look to deceased’s moral obligations (*RE CUMMINGS*) 22](#_Toc36306004)

[[6] NATURE OF TESTAMENTARY DISPOSITIONS 23](#_Toc36306005)

[NATURE OF WILL [disposing T’s property; takes effect on T’s death; ambulatory; *ANIMO TESTANDI*; formalities; not oral; no legal effect except disposing property; can have CODICILS for minor amendments]. *SPES SUCCESSIONIS* [hope of succession]. GIFT LAPSE [gift not part of residue, deal as intestacy]. MUTUAL WILLS [similar spouse terms]. ***UNIVERSITY OF MANITOBA*** [mutual wills; will is always revocable. For revoked mutual will, executor of new will holds assets on trust to carry out provisions of mutual will agreement]. ***EDELL*** [need clear proof of agreement for mutual will]. 23](#_Toc36306006)

[INCORPORATION BY REFERENCE 24](#_Toc36306007)

[1. Document must exist when will is signed [i.e. compensation agreement, list] 24](file:////Users/maximbasu/Desktop/2L/Winter%20Courses/Wills/basu_wills_attack.docx#_Toc36306008)

[2. Will must refer to that document as existing document – can’t exist in future 24](file:////Users/maximbasu/Desktop/2L/Winter%20Courses/Wills/basu_wills_attack.docx#_Toc36306009)

[3. Will must describe document with sufficient certainty to be identified 24](file:////Users/maximbasu/Desktop/2L/Winter%20Courses/Wills/basu_wills_attack.docx#_Toc36306010)

[***GOODS OF SMART*** [If T, in testamentary paper duly executed, refers to existing unattested test. paper, the instrument so referred to becomes part of will – it is incorporated into will] 24](file:////Users/maximbasu/Desktop/2L/Winter%20Courses/Wills/basu_wills_attack.docx#_Toc36306011)

[[6.5] WILLS SUBSTITUTES 25](#_Toc36306012)

[*INTER VIVOS* GIFTS [donor parts with property absolutely with *ANIMUS DODANDI*]. *MORTIS CAUSA* GIFTS [in contemplation but not expectation of death]. DEEDS [legal doc of property ownership]. *INTER VIVOS* TRUST [est during lifetime, max tax]. JOINT INTERESTS [property directly to survivor, not personal rep]. ***PECORE/ SAYLOR*** [onus on adult child to prove parent intended gift]. LIFE INSURANCE [**§196(1) *INSURANCE ACT*** insured property not part of estate; **(2)** exempt from gov’t seizure]. RRSP/ RRIF/TFSA [***AMHURST CRANE*** states creditors can’t take money out of RRSP if none in estate]. 25](#_Toc36306013)

[USE OF WILLS SUBSTITUTES TO AVOID PROBATE FEES 28](#_Toc36306014)

[Some use substitutes to avoid paying PROBATE FEES/ taxes: (1) *INTER VIVOS* GIFT; (2) LIFE INSURANCE; (3) JOINT INTERESTS; (4) MULTIPLE WILLS [***GRANOVSKY*** states multiple will scheme -Will 1 probate, Will 2 not – is valid]. 28](#_Toc36306015)

[[7] SUBSTITUTE DECISIONS – POA 29](#_Toc36306016)

[SUBSTITUTE DECISIONS aren’t testamentary (i.e. POA). CAPACITY, ask: (1) understand info? (2) appreciate RF conseq? 29](#_Toc36306017)

[SUBSTITUTIONS DECISIONS ACT (SDA) 29](#_Toc36306018)

[POA FOR PROPERTY 30](#_Toc36306019)

[POA PERSONAL CARE 34](#_Toc36306020)

[[8] TESTAMENTARY CAPACITY 38](#_Toc36306021)

[Will can’t be probated if T lacked mental capacity to make it. Age 18+ deemed competent **(§8(1) *SLRA*).** Disability restrictions. 38](#_Toc36306022)

[KNOWLEDGE & APPROVAL 38](#_Toc36306023)

[Will can’ be probated if T didn’t know of contents. Propounders must prove. REBUTTABLE PRESUMPTION [T knew + approved if will properly executed]. T didn’t understand ENTIRE will [can’t be probated] or PART will [rest may be probated ***RUSSELL*].** 38](#_Toc36306024)

[MENTAL CAPACITY 39](#_Toc36306025)

[MENTAL CAPACITY [person of unsound mind can’t make will]. ***GOODFELLOW* Criteria**: (1) understand nature of acts/effects; (2) understand extent of property of which disposing; (3) not have disorder of mind; (4) not have insane delusion [affirmed in ***HALL***]. 39](#_Toc36306026)

[Two types of unsound mind: (1) general lack of capacity [***RE DAVIS*** laymen of good sense/ doctors can provide good evidence]; (2)insane delusions [***SKINNER*** irrational belief]. 39](#_Toc36306027)

[SUSPICIOUS CIRCUMSTANCES [will doubtful]. ***VOUT v HAY*** [law on suspicious circumstances]. ***DOHERTY*** is app. ***BANTON*** is app. If T gives instructions while capable, but becomes incapable[***PARKER***] or doesn’t remember [***RE BRADSHAW***], will is valid. 40](#_Toc36306028)

[UNDUE INFLUENCE 43](#_Toc36306029)

[FRAUD 43](#_Toc36306030)

[[9] SOLICITOR’S DUTIES 44](#_Toc36306031)

[1. Duty that solicitors owe in taking instructions for will 44](#_Toc36306032)

[2. Duty that solicitor owes to (potential) beneficiaries or will 44](#_Toc36306033)

[1. TAKING INSTRUCTIONS FOR A WILL 44](#_Toc36306034)

[***RE WORRELL*** [what not to do]. JOINT RETAINERS [make clear acting as if only one client, no CON]. 44](#_Toc36306035)

[2. DUTY OF CARE TOWARD BENEFICIARIES 44](#_Toc36306036)

[***HEDLEY BYRNE*** [beneficiaries can get damage from negligent solicitors]. ***WHITE*** [principle extended]. 44](#_Toc36306037)

[[10] FORMAL VALIDITY OF WILLS 46](#_Toc36306038)

[ATTESTED WILLS 46](#_Toc36306039)

[**§3-7(3) *SLRA*** [formal req]. Symbols fine [***MURRAY***]. *AMANUENSIS* fine [***RE: WHITE***]. All things presumed to be done correctly, if no evidence [***RE REVA***]. PRESUMPTION OF DUE EXECUTION [***YEN ESTATE***]. ***CHESLINE*** [witness need to know attesting]. **§11-14 *SLRA*** witness provisions. 46](#_Toc36306040)

[HOLOGRAPH WILLS 48](#_Toc36306041)

[**§16 *WILLS & SUCCESSION ACT*** [no need to attest/ other formality]. **§6 *SLRA*** [T must make wholly in own handwriting, no formalities]. ***BENNETT*** [need deliberate/ fixed intention – lacks intention]. ***POPOWICH*** [‘take my money and do things for yourself’ lacks intention]. ***RE CLARKE*** [**§7** formalities for signature position apply]. DOCTRINE OF INCORPORATION [doc valid if property identified in will]. ELECTRONIC WILLS [wavy gravy/ loosie goosy]. 48](#_Toc36306042)

[ELECTRONIC WILLS 50](#_Toc36306043)

[[11] REVOCATION OF WILLS 51](#_Toc36306044)

[VITIATING FACTORS 51](#_Toc36306045)

[Will revoked if mistake, lack of capacity, undue influence (***HUBLEY***), fraud, inadvertence. 51](#_Toc36306046)

[REVOCATION BY OPERATION OF LAW 51](#_Toc36306047)

[Change in circumstances, MARRIAGE. **§15(1) *SLRA*** [will revoked by marriage, not CL relationship]. ***BANTON*** [marriage lower std for mental capacity than testamentary capacity]. CONTENPLATION OF MARRIAGE will valid [**§16 *SLRA*** make clear intentions]. Partial MARRIAGE DISSOLUTION [**§1 *SLRA***]. 51](#_Toc36306048)

[REVOCATION BY ACT OF TESTATOR 53](#_Toc36306049)

[**§15 *SLRA*** [will revoked by (b) another will (c) writing]. T can revoke by sub doc [have intention to revoke ***BATES***]. T can PHYSICALLY REVOKE by (i) physically destroying and (ii) having intention to revoke [**§15(d) *SLRA*** ‘burning, tearing, otherwise destroying’]. ***EJUSDEN GENERIS*** for **§15(d) *SLRA***. If destroyed BY ANOTHER, must do in presence + intention of T (***DELACK***). 53](#_Toc36306050)

[ALTERATIONS IN WILL 54](#_Toc36306051)

[**§18 *SLRA*** [complicated – advise to make codicil/ new will instead]. ***RE DOUGLAS*** [when words of alteration are ‘APPARENT’]. 54](#_Toc36306052)

[[12] CAPACITY OF BENEFICIARIES 56](#_Toc36306053)

[ILLEGITIMACY 56](#_Toc36306054)

[**§2 *CHILDREN’S LAW REFORM ACT*** [children born outside marriage inherit SAME as inside marriage]. To overcome, insert BOOM CLAUSE. 56](#_Toc36306055)

[ADOPTION 57](#_Toc36306056)

[**§217 *CHILD YOUTH & FAMILY SERVICES ACT*** [adopted children inherit as if born to adoptive parents]. 57](#_Toc36306057)

[WITNESSES 57](#_Toc36306058)

[If beneficiaries attest, will VALID, yet dangerous. Booby traps in **§12 *SLRA***. ***RE TROTTER*** [solicitor is beneficiary, valid]. 57](#_Toc36306059)

[SUPERNUMERARY WITNESSES 58](#_Toc36306060)

[Two+ witnesses attest will. One is beneficiary. **§12(4) *ONTARIO ACT*** [validates gift]. 58](#_Toc36306061)

[[13] TESTAMENTARY GIFTS 59](#_Toc36306062)

[SUBJECT MATTER 59](#_Toc36306063)

[TYPES 59](#_Toc36306064)

[Testamentary gifts: DEVISES, BEQUESTS, LEGACIES. Terms: ADEEM, ABATEMENT. Gifts are: SPECIFIC, GENERAL, DEMONSTRATIVE, RESIDUARY. 59](#_Toc36306065)

[ABATEMENT 60](#_Toc36306066)

[*Pro rate* reduction in amount of testamentary gifts when estate insufficient to pay debts. LAW OF ASSENT [personal rep must assent before beneficiary gets property]. 60](#_Toc36306067)

[ADEMPTION 61](#_Toc36306068)

[Gift sold, given away, lost, stolen, destroyed – beneficiary gets NOTHING! [***RE HUNTER***]. 61](#_Toc36306069)

[DATE FROM WHICH WILL SPEAKS 61](#_Toc36306070)

[Will speaks of DATE OF DEATH, unless CONTRARY INTENTION **(§22 *SLRA***, **BATTEN**). 61](#_Toc36306071)

[CHANGE IN NAME & FORM – at 550 61](#_Toc36306072)

[TRACING – at 554 61](#_Toc36306073)

[ENCUMBERED PROPERTY 61](#_Toc36306074)

[[14] LAPSE & SURVIVORSHIP 62](#_Toc36306075)

[DOCTRINE OF LAPSE [gift fails to beneficiary of T; to avoid, T can make substitutionary gift]. DISPOSITION OF LAPSED GIFT [(1) gift falls into residue (**§22 *SLRA***); (2) gift passes on intestacy ***RE STUART***). 62](#_Toc36306076)

[ Gift to beneficiary who predeceases T lapses – gift fails 62](file:////Users/maximbasu/Desktop/2L/Winter%20Courses/Wills/basu_wills_attack.docx#_Toc36306077)

[ANTI-LAPSE LEGISLATION 62](#_Toc36306078)

[Ontario LEG doesn’t prevent lapse but provides for statutory substitutionary beneficiaries **§31 *SLRA*** [gift made to person who has spouse/issue and person dies doesn’t lapse but goes to spouse/ issue – not desirable!]. 62](#_Toc36306079)

[CONTRARY INTENTION 63](#_Toc36306080)

[ Anti-lapse LEG applies only if T doesn’t express contrary intention in will 63](file:////Users/maximbasu/Desktop/2L/Winter%20Courses/Wills/basu_wills_attack.docx#_Toc36306081)

[EXCEPTIONS TO LAPSE 63](#_Toc36306082)

[JOINT TENANTCY [if T gives property to JTs and one dies, other JT takes whole interest; devise default is tenancy in common]. 63](#_Toc36306083)

[CLASS GIFTS 63](#_Toc36306084)

[Gift to group of beneficiaries who have characteristics in common; i.e. my children, my nephews. 63](#_Toc36306085)

[CHARITIES 63](#_Toc36306086)

[Lapse applies to charities. However, if general charitable intention *CY-PRES DOCTRINE* invoked [give to another charity]. 63](#_Toc36306087)

[SUBSTITUTIONARY GIFTS 63](#_Toc36306088)

[If beneficiary should predecease T, will states property goes to someone else. ***COUSEN*** [if sub ben predeceases T and primary beneficiary, gift lapses. ***RE RAMSDEN*** [if ben survives T but dies shortly after, no lapse]. 63](#_Toc36306089)

[SURVIVORSHIP 64](#_Toc36306090)

[**§55(1) *SLRA****.* [in common death, property of each person disposed as if each survived other]. 64](#_Toc36306091)

[[15] CLASS GIFTS 64](#_Toc36306092)

[NATURE & EFFECT OF CLASS GIFT 64](#_Toc36306093)

[CLASS GIFT [gift to persons with same characteristics and bear some relation to T ***KINGSBURY***)]. If member of class predeceases T, person’s share doesn’t lapse but increases others’ shares. ***KINGSBURY*** [class gift if some ind are named; composite class; interest must vest at SAME time; ‘near the line’ det]. NOTE: **§31 *SLRA*** doesn’t apply to class gifts. 64](#_Toc36306094)

[GIFT *NOMINATIM* [gift to named individuals; not class gift though collective]. NOTE: **§31 *SLRA*** applies. 65](#_Toc36306095)

[ARTIFICIAL CLASSES 65](#_Toc36306096)

[DESCRIPTION BY NUMBER 65](#_Toc36306097)

[GIFT *NOMINATIM* [gift to named individuals; not class gift though collective]. NOTE: **§31 *SLRA*** applies. ***RE HUTTON*** [T’s will provided for equal division among persons related to T/ each other. This was class. If were unrelated, wouldn’t be class]. 65](#_Toc36306098)

[[16] POSTPONED PAYMENT 65](#_Toc36306099)

[***SAUNDERS v VAUTIER* RULE [***sui juris* beneficiary entitled to indefeasibly vested gift entitled to payment when reaches age 18/majority]. 65](#_Toc36306100)

[[17] ACCUMULATION 66](#_Toc36306101)

[When fund put out at interest, income not distributed, but added to capital. **§(1) *ACCUMULATIONS ACT*** [no disposition longer than **21 YEARS** from death of T]. ***RE ARNOLD*** [21 yrs law]. 66](#_Toc36306102)

[**21 Years from T’s Death** 66](file:////Users/maximbasu/Desktop/2L/Winter%20Courses/Wills/basu_wills_attack.docx#_Toc36306103)

[TERMINATING ACCUMULATION 66](#_Toc36306104)

[***SAUNDERS v VAUTIER* RULE**terminates. 66](#_Toc36306105)

[EXCESS INCOME 67](#_Toc36306106)

[If T fails to dispose of surplus income (i.e. through annuity), will must state excess added to capital. ***RE STRUTHERS*** [surplus income falls into residue unless contrary intention in will]. 67](#_Toc36306107)

[[18] RULES OF CONSTRUCTION 68](#_Toc36306108)

[ Rules give court flexibility and guidance in interpretation. T’s intention always > rules of construction 68](#_Toc36306109)

[[19] INCOME TAX 69](#_Toc36306110)

# **[1] TERMS**

[at 21]

### ADMINISTRATOR, AMBULATORY, CODICIL, ESTATE TRUSTEE, EXECUTOR, INTESTACY, INTESTATE, LAW OF PROBATE, LAW OF SUCCESSION, TESTATE, TESTATOR, LAW OF WILLS, WILL

**ADMINISTRATOR**

**AMBULATORY**

**CODICIL**

**ESTATE TRUSTEE**

**EXECUTOR**

**INTESTACY**

**INTESTATE**

**LAW OF PROBATE**

**LAW OF SUCCESSION**

**TESTATE**

**TESTATOR**

**LAW OF WILLS**

**WILL**

person appointed by court to administer the estate of a person who dies intestate

[revocable] T free to change will until death as long as has testamentary capacity, no undue influence

testamentary doc which supplements, explains, or modifies a will bearing an earlier date. Usually used for minor amendments to original do. Major changes are made through new will

new term of Ontario Rules for ‘estate trustee with/ without a will’ EXECUTOR, ESTATE TRUSTEE, PERSONAL REPRESENTATIVE

personal representative of deceased. The person named in the will to administer the estate, who is willing and able to act as such

condition of estate of deceased who dies without having made valid will

describes state of T when dies without a will

concerned with the validity of testamentary instruments and admin of estates

all transfers of property from one generation to another; includes wills + instate succession

describes state of testator when dies with valid willthat is upheld after his death

the person who makes a will

concerned with validity of dispositions that take effect on person’s death and are contained in a will

written, typed, or printed doc that is made by person to dispose of property on death and is executed in the manner prescribed by statute. It has effect only upon that person’s death. During a person’s lifetime, the will is revocable, or ambulatory (inoperative)

### Notes: (i) person born outside marriage treated as if inside (*SLRA*, *CLRA*); (ii) on intestacy, only married spouses can make claim; (iii) only married spouses eligible for interspousal rights (*FLA*)

Persons born outside of marriage treated same as if inside of marriage

* Survivorship rules for death in common disaster distributive shares of surviving spouse on intestacy equalized
* Conduct of man and woman both taken into account and equalized . . .

*SLRA*

* Treats children born outside of marriage the same as if born inside of marriage

*CLRA*

INTESTACY – only married spousescan make claim under Part II *SLRA*

Spouse is only married spouse (not CL partner)

*FLA* – only married spouseseligible for interspousal rights upon death of spouse

# **[2] PROBATE**

### Obtaining grant of PROBATE [not nec to obtain]. **§2 *ESTATES ADMINISTRATION ACT*** [property vests in personal rep].

* NOT nec to always obtain probate. **Executors** have authority to handle estate without it
* Probateis evidence of named executors’ authority but it isn’t source of authority

OBTAINING

GRANT OF

PROBATE

[at 33]

* Property vests on death in personal rep in trust to pay debts and distribute residue
* Doesn’t apply to personal property (except chattels) outside ON
* Personal rep takes authority directly from will and person – not grant of probate
* All assets on death (not joint assets) ownership transferred to executor; owner

**§2 *ESTATES ADMINISTRATION ACT***

§2(1) All real and personal property that is vested in a person \* on the person’s death, \* testate or

intestate \* becomes vested in his personal representative \* and \* it shall be administered,

dealt with and distributed as if it were personal property not so disposed of

***§2 ESTATES***

***ADMINISTRATION***

***ACT***

[at 35]

## TYPES OF EXECUTORS & ADMINISTRATORS

### EXECUTOR [Estate Trustee with Will. **§34 *ESTATES ACT*** states may decline]. ADMINISTRATOR [Estate Trustee without Will. **§29 *ESTATES ACT*** gives court discretion to appoint].

* [**Estate Trustee with a Will]** Personal representative
* Named in the will to administer the estate; willing and able to act as such person appoints one+ executors. Court appoints via letters probate
* Disqualified if: minor, unsound mind, bankrupt
* May decline to be executor by **§34 *ESTATES ACT***

**§34 *ESTATES ACT***

§34 Where a person renounces probate of the will \* the person’s right in respect of the executorship wholly cease, \* as if such person had not been appointed executor

**EXECUTOR**

[at 36]

* [**Estate Trustee without a Will**] Appointed by court to administer estate if person died intestate, without executor, or executor can’t act
* Court has discretion to commit administration of property via **§29 *ESTATES ACT***
* Order of priority to letters of administration: (1) surviving spouse or CL spouse; (2) children; 3) grandchildren; (4) great-grandchildren; (5) father/ mother; (6) siblings; (7) next of kin

**ADMINISTRATOR**

[at 36]

## ESTATE ADMINISTRATION PROCEDURE

[at 44]

### (1) get in assets; (2) pay debts/ equities/ transfer bequests; (3) distribute residue.

Pay probate fees/ taxes

Prepare **WILL** and **POWER OF ATTORNEY**

*Legal doc giving authority to act for another*

If Incapacity

*Use POA for property and personal care*

Consider Death

*§2 ESTATES ADMINISTRATION ACT*

*Executor’s duty: give body decent burial. Right to custody of body. Burial expenses have* **priority *over other debts.***

Funeral expenses

Intestate

Testate

1. Get in the assets

Det assets/ liabilities

Apply for Certificate of Appointment (Letters Probate)

*Certify that will was ‘proved’ and SCJ gave estate admin to executor.*

Part II of *SLRA*

Common Form/ Solemn Form

*(Non-Contentious/ Contentious proceedings)*

*If something is wrong with will, must file* ***caveat* *in solemn form***

Will Dispute?

Will Interpretation?

*Notice of objection; no grant can be made except on notice to caveator*

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** (rest of asset)

2. Pay debts, legacies, transfer bequests and devises, set up trusts req by will

3. Distribute residue

### Terms: CAVEAT, INTERVENTION, CITATION, COMMON FORM PROBATE, SOLEMN FORM PROBATE.

* [**Notice of Objection**] Notice to court (and others interested in estate) requiring that nothing be done in estate without notice to caveator. Lapses after 3 years; can file new
* i.e. no grant can be made to any person except on notice to caveator

**CAVEAT**

[at 47]

* [**Request for Notice**] Similar to caveat in that it’s notice filed with court
* Thereafter notice of all proceedings is given to intervener

**INTERVENTION**

[at 47]

* [**Order for Assistance**] Order of judge made upon affidavit of person requesting it
* Addressed to another person with an interest in proceedings
* requires that person to enter an appearance or do such other things as may be specified

**CITATION**

[at 47]

* 95% cases where applying to court for Certificate of Appointment of estate trustee
* Requires lawyer to fill out right papers, as per §74, depending on what type of application is being submitted, delivering the completed docs to court office, with ‘probate’ fees and waiting for phone call from court clerk that Certificate of Appointment of estate trustee is ready to be picked up

**COMMON FORM**

**PROBATE**

*No commencement*

*of action*

* Occurs when someone is challenging validity of will for lack of testamentary capacity, undue influence, execution of will not in accordance with law or that doc was signed by person ineligible to make a will (i.e. minor who isn’t married)
* If objection to will can’t be settled, case goes to trial with witnesses

**SOLEMN FORM**

**PROBATE**

*Contentious*

*proceedings*

### Personal rep: (i) Costs. ***McDOUGALD ESTATE*** [costs at court discretion]; (ii) Compensation of Personal rep. **§61 *TRUSTEE ACT*** [entitles compensation]; (iii) Duties of personal rep; (iv) disposition of body; (v) ***INCOME TAX ACT*** [personal rep personally liable]; (vi) debt payments [must pay debts]; (vii) distribution of estate [must distribute property]

1. Costs entirely at discretion of court (***McDOUGALD ESTATE***)
2. Court may depart from general principles to allow payment of litigation costs from estate if
3. Reasonable grounds existed to question execution of will or T’s capacity, or
4. Difficulties in will are caused in whole/ part by T

***McDOUGALD ESTATE***

Role of courts . . . [to ensure] that only valid wills executed by competent testators are propounded

Gone are the days when costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

**COSTS**

[at 48]

**§61 *TRUSTEE ACT*** *–* entitles personal rep to be compensated for services;

compensation fixed

§61 A trustee, guardian or personal representative is entitled to such fair and reasonable

allowance for the care, pains and trouble, and the time expended in and about the estate . . .

(5) Nothing in this section applies where allowance is fixed by instrument creating the trust

* Executor gets 2.5% on capital & income; 2.5% on income & capital is paid out
* Duty of personal rep to keep proper accounts; account when called upon

**COMPENSATION**

**OF PERSONAL REP**

[at 54]

(1) get in assets; (2) pay debts and legacies, transfer bequests/ devises and set up any trust; (3) distribute residue

* Once functions completed, duties cease (office remains)
* May req to bring axn on behalf of estate

**DUTIES**

**OF PERSONAL REP**

[at 58]

* **Personal rep req to give deceased’s body decent burial or cremate remains**
* Has right to body custody. Not automatic if deceased’s family opposed
* Not bound by deceased’s unreasonable or extravagant instructions; may depart
* Burial expenses have **priority** over other estate debts

**DISPOSITION**

**OF BODY**

[at 58]

* Personal rep also has responsibilities under *Income Tax Act*
* i.e. file a terminal income tax return, deal with income tax liability for CG
* must obtain certificate from Department of National Revenue stating all taxes paid
* Personal rep is **personally liable** if does not

***INCOME TAX ACT***

[at 59]

* Personal rep has duty to pay debts of estate ASAP within the ‘executor’s year’
* Secured debts incurred during the deceased’s lifetime have priority

**DEBT**

**PAYMENTS**

[at 60]

* Personal rep must distribute property among persons beneficially entitled to it
* If there is a will, they must follow its terms
* Personal rep must convert assets of residue into cash and then distribute it
* Court can order payment of all or any money belonging to a minor

**DISTRIBUTION**

**OF ESTATE**

[at 66]

# **[3] INTESTATE SUCCESSION**

### Terms: INTESTATE, PARTIALLY INTESTATE. **§2 *ESTATES ADMINISTRATION ACT*** [personal rep responsible for estate admin]

* person who dies without leaving a valid will that disposes of deceased’s estate

**INTESTATE**

* person dies leaving valid will but fails to dispose of entire estate

(intentionally, through inadvertence, due to residuary gifts in will being void)

* If person dies partially intestate, surviving spouse is entitled to **preferential share**
* Preferential share is reduced by amount, if any, spouse receives under will
* Main point: topping up surviving spouse; otherwise distribution is same

**PARTIALLY**

**INTESTATE**

* Personal rep is responsible for estate admin, whether testate or intestate

**§2 of *ESTATES ADMINISTRATION ACT***

§2(1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person’s death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto . . .

PROPERTY

DEVOLUTION

[at 72]

## SPOUSES & PARTNERS

[at 75]

### Terms: SPOUSE [not CL partners, Part I *SLRA*], ISSUE. **§1(1) *SLRA*** [spouse]; **§44 *SLRA*** [Laughing Heir].

* Only same/opposite sex **spouses** entitled to inherit. **CL spouses** have no right

[Part I *SLRA*]

**SPOUSE**

* All lineal descendants

**ISSUE**

**§1(1) *SLRA***– spouse

§1(1) ‘spouse’ means either of two person who

Are married to each other, or

Have together entered into a marriage that is voidable or void, in good faith . . .

**§44 *SLRA*** – doctrine of Laughing Heir – spouse; no descendants

* Targets remote next of kin with no contact who stood to make a windfall

§44. Where a person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely.

*SLRA*

[at 75]

## SPOUSE & DESCENDANTS

[at 76]

### Terms: (i) PREFERENTIAL SHARE [intestate survived by spouse, spouse entitled to $200,000 (**§45(5) *SLRA***)]; (ii) NET VALUE [property value less charges (**§45(4) *SLRA***)]; (iii) PARTIALLY INTESTATE [valid will disposes of part estate, spouse entitled to interest]; (iv) DISTRIBUTE SHARE [share surviving spouse entitled after preferential share (**§46(1) *SLRA***); (v) DESCENDANTS; (vi) *PER CAPITA* (**§47 *SLRA***); (vii) *PER STIRPES*; (viii) ASCENDANTS; (xi) COLLATERALS

* where intestate is survived by spouse + descendants, spouse is entitled to preferential share or entire estate if its net value is less than preferential share
* Current preferential share is **$200,000** **(§45(5) *SLRA*)**

**PREFERENTIAL**

**SHARE**

[at 76]

**§45 *SLRA*** – preferential share

§45(1) \* Where person dies intestate \* with \* property of net value NOT MORE than

preferential share \* and is survived by spouse and issue \* spouse is entitled to property

absolutely

(2) \* Where person dies intestate \* with \* property of net value MORE THAN preferential

share \* and is survived by spouse and issue \* spouse is entitled to preferential share absolutely

* value of property after payment of charges, i.e. funeral and admin expenses **(§45(4) *SLRA*)**

**NET VALUE**

* interest to which spouse is entitled under will valued as of date of T’s death
* T dies leaving valid will but will only disposes of part of estate
* Intestacy rules apply to property that isn’t disposed of in will

**PARTIALLY**

**INTESTATE**

[at 98]

* share surviving spouse is entitled to after the preferential share
* varies with # children or remoter descendants surviving
* not reduced by any amount surviving spouse received under will if partial intestacy

**§46(1) *SLRA*** – distributive share – at 78

§46(1) Where a person dies intestate \* and leaves spouse and one child, the spouse is entitled to ½ of residue of property \*

(2) Where person dies intestate \* and leaves a spouse and more than one child, the spouse is entitled to 1/3 of residue of the property

(3) Where a child has died leaving issue living \*, the spouse’s share shall be the same as if the child had been living \* [1/3 of residue]

**DISTRIBUTIVE**

**SHARE**

* After surviving spouse’s shares paid, intestate’s descendants get balance of estate
* Methods: (i) ***per stripes***and (ii) ***per capita*** (Ontario law reflects both)

**DESCENDANTS**

[at 85]

* [default distribution] all beneficiaries take EQUAL amount, even though may be

different generations, stand in different degrees of relationship to T

* i.e. gift ‘to A and B and their children; ‘to the children of A and B’

**§47*SLRA***– intestate succession

§47(1) \* where a person dies intestate in respect of property and leaves issue surviving \* property

shall be distributed . . . equally among his issue who are of the nearest degree \*

***PER CAPITA***

[**by head]**

[at 86]

* [older] each stirps/ stock/ family takes equal amount and that amount is then distributed within that strips, stock/ family – based on relation to other issue
* i.e. gift ‘to A and B and C’

***PER STIRPES***

**[by stocks or families]**

* If intestate is not survived by spouse/ descendants, other blood relatives become entitled to estate
* direct ancestors of the intestate

**ASCENDANTS**

[at 89]

* descendants of ascendants other than intestate and his descendants

**COLLATERALS**

[at 89]

## TABLE OF CONSANGUINITY

[at 90]

### Gradual Scheme [**§47 *SLRA*** (1) no spouse/issue🡪surviving parents; (2) no parents🡪bro/sis; (3) no bro/sis🡪nephew/niece; (4) no nephew/niece🡪next of kind; (5) no next of kin 🡪 Crown]

* Order for Table of Consanguinity:

SPOUSE

ISSUE

PARENTS

BRO/SIS

NICE/NEPHEW

NEXT OF KIN

ESCHEAT

* Gradual scheme of distribution of relationship degrees applied to det entitlement **(§47 *SLRA*)**

1. In no spouse/issue survive, the surviving parents take all equally, or if only one survives, parent takes all
2. If no parents survive, the brothers and sisters share the estate equally with representation being permitted among brothers’ and sisters’ children
3. If no brothers and sisters survive, however, the nephews and nieces take ***per capita***
4. If no nephews or nieces survive either, any other next of kin of equal degree with take ***per capita***
5. If no next of kin survive, the property becomes the property of the Crown

**§47 *SLRA*** – above is sum

§47(3) Where person dies intestate \* and leaves no spouse or issue \* the property shall be distributed btw

parents of deceased equally \* or where there is only one parent surviving the deceased, to that parent

absolutely

(4) \* there is no surviving spouse, issue or parent, the property shall be distributed among the surviving

brothers and sisters \* equally, and if any brother or sister predeceases the intestate, the share \* shall be

distributed among his or her children (not issue)

(5) \* there is no surviving spouse, issue, parent, brother or sister, the property shall be distributed among the

nephews and nieces of intestate equally \*

(6) \* there is no surviving spouse, issue, parent, brother, sister, nephew or niece, the property shall be

distributed among the next of kin of equal degree of consanguinity to intestate equally \*

(7) \* there is no surviving spouse, issue, parent, brother, sister, nephew, niece or next of kin, the property

becomes \* of the Crown and the *ESCHEATS ACT* applies . . .

(9) \* descendants and relatives of 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

**GRADUAL**

**SCHEME**

[at 91]

## ILLEGITIMACY & ADOPTION

[at 97]

### Person born outside marriage/ adopted = born in marriage. Adoptee loses right to share intestacy of biological parents.

* Persons born **outside marriage**/ adopted have equal rights of inheritance with persons born within marriage
* Persons given up for adoption lose right to share on the intestacy of their former parents and relatives

# **[4] FAMILY: SPOUSAL RIGHTS**

## PART I – FAMILY LAW ACT (FLA)

### *FLA* [for all property of spouses during marriage]. **§(1)(1)-(5)(6) *FLA*** [SPOUSE, COURT, M HOME, PROPERTY, VALUATION DATE]. **§5(6) *FLA*** When spouse dies, if **NFP** of deceased spouse exceeds NFP of surviving spouse, surviving spouse is entitled to ½ dif

* Applies to all property acquired by spouses during **marriage** (some exceptions)
* Provides for deferred equalization scheme on marriage breakdown and death
* *FLA* doesn’t provide for division of assets
* Allows for equalization payment on marriage breakdown/ death

***FLA***

[at 810]

**§(1)(1)–5(6) *FLA*** – spouse, court, net family property, valuation date

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

1. Are married to each other, or
2. \* together entered into marriage that is voidable or void, in good faith

§4 **COURT** does not include the Ontario Court of Justice

**MATRIMONIAL HOME** means value of all the property \* that a spouse owns on valuation date, after deducting

1. Spouse’s debts and other liabilities
2. Value of property (other than m home) that spouse owned on date of marriage \*

**PROPERTY** means any interest, present or future, vested or contingent, in real or personal property \*

§5 **VALUATION DATE** means the date before the date on which on of spouses dies leaving other spouse surviving

§5(1)(3) The onus of proving a deduction under \* NFP \* is on person claiming it

§5(2) When spouse dies, if **NFP** of deceased spouse exceeds NFP of surviving spouse, the surviving spouse is entitled to ½ difference btw them

§5(6) The court has discretion if equalizing NFP is unconscionable

*FLA*

TERMS

[at 811]

## EQUALIZATION & NFP

### EQUALIZATION of NFP [*FLA* confers right to money payment, not property]. NFP deductions. **M HOME** always included in NFP! [**§18(1) *FLA***] EXCLUDED PROPERTY [property after marriage/ valuation day **§4(2)**]. VALUATION DATE [date of death of one spouse **§4(1)].** Surviving spouse sacrifices other entitlements if elects equalization. ELECTION [to qualify on death, must elect equalization. Deemed to elect under will/ intestacy otherwise]. Personal rep can’t make distribution for **6 MO** after election. JOINT TENANCY [severed immediately upon spouse death **§26(1) *FLA***; ***CY PRES* DOCTRINE** [if impossible, look to original intention];

* Ensures that each spouse benefits equally from value of property (net of debts and liabilities) accumulated throughout marriage
* *FLA* doesn’t confer right to property but rather **right to money payment**
* It doesn’t divide property of spouses but rather the **value of the property**

**EQUALIZATION**

[at 817]

* Mechanism through which this is achieved is equalization of NFP

**EQUALIZATION**

**OF NFP**

[at 817]

1. Each spouse calculates their NFP
2. Each spouse deducts from their NFP value of all property (not m home) owned on date of marriage
3. This is spouse’s NFP
4. Compare NFP with spouse
5. Spouse with grater NFP must pay to other spouse equal to ½ the difference

* Estate of deceased spouse **cannot** bring equalization app
* Spouses have entitlement to equalization. Yet, court has discretion if equalization unconscionable
* Each spouse entitled to deduct value of property held on date of marriage, debts, liabilities
* Debts and liabilities need to be incurred in foreseeable future
* i.e. asset needs to be liquidated by titled spouse to make equalization payment
* Ensures only wealth throughout marriage is subject to sharing thru equalization
* MATRINOMIAL HOME is EXCEPTION!

**NFP**

**DEDUCTIONS**

[at 825]

* always included in titled spouse’s NFP; no deduction is permitted, even if held as of

date of marriage

**§18(1) *FLA*** – M Home

§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 spouse as their family residence is their matrimonial home

**MATRIMONIAL**

**HOME**

[at 839]

* **§4(2) *FLA***property is not included in spouse’s NFP if owned on valuation date
* i.e. awards of (or right to) damages, life insurance proceeds, pensionable earnings
* i.e. gifts and inheritances received *after* marriage

If received *before*, they are deductible from NFP under §4(1)

**EXCLUDED**

**PROPERTY**

[at 827]

* **§4(1) *FLA*** defines as date *before* one of spouses dies leaving other spouse surviving

**VALUATION**

**DATE**

[at 829]

* Surviving spouse electing equalization sacrifices entitlement under:
* Deceased’s spouse’s will (if testate)
* Intestacy rules (if intestate)
* Both (if partially intestate)
* Surviving spouse doesn’t sacrifice entitlements if expressly provides for this in will

ADDITIONAL

RIGHTS

[at 832]

*Sacrifice entitlements*

* To qualify for equalization on death of spouse, surviving spouse must elect in favour of equalization
* Election must be filed within **6 MONTHS** of deceased’s spouse’s death with Estate Registrar
* If not done, surviving spouse deemed to elect under will, and/or rights on intestate succession
* Spouse’s executor cannot make election (***RONDBERG ESTATE***)
* Whether spouse can revoke election debatable; no (***RE BOLFAN***); yes (***WYNGAARD ESTATE***)

**ELECTION**

[at 834]

* The right under *FLA* has priority over:
* All gifts in will
* Person’s right to share on deceased’s intestacy
* Order for dependants’ support; i.e. claim of dependent child has priority of spouse claim
* Spouse’s right to equalization is inferior to rights of creditors

PRIORITIES

[at 837]

* *FLA* doesn’t say who should bear burden of equalization payment
* *FLA* doesn’t clarify which class of beneficiaries get property reduction
* This is serious design defect

BURDEN OF

EQUALIZATION

PAYMENT

[at 837]

* Can’t make distribution for **6 MONTHS** after spouse’s death and after notification of application for equalization by surviving spouse has been received
* Personal rep may be personally liable

**DUTIES OF**

**PERSONAL**

**REP**

[at 838]

* If spouse dies owning interest in M Home as JT with 3rd person – not spouse –

then JT is deemed to be severed immediately before time of death

**§26(1) *FLA*** – JT severed immediately

§26(1) If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death

**JOINT**

**TENANCY**

* If T’s objective is impossible, court invokes Doctrine to prevent trust from failing
* Amends terms of charitable trust as closely as possible to original intention of T

***CY PRES***

***DOCTRINE***

*Defence*

* Both spouses have equal right to possession of M Home
* However, right ceases when parties cease to be spouses
* If Spouse A has title to M home, both spouses have equal rights of possession
* Upon divorce/ death the right of non-titled spouse ceases
* May be continued if there is separation agreement or court order

ADDITIONAL

SPOUSAL

RIGHTS

[at 845]

# **[5] FAMILY: SUPPORT OF DEPENDANTS (Part V *SLRA*)**

## LEGAL & MORAL OBLIGATIONS

### ***RE SPENCER*** [spouse nor children entitled to receive anything]. ***TATARYN*** [T’s moral duty relevant]. ***RE CUMMINGS*** [legal + moral duty]. ***RE DAVIES*** [moral relevant].

* Neither T’s spouse nor children are entitled to receive anything (***RE SPENCER***)
* CL protects T’s freedom to distribute property as he chooses
* However, conceptions of family/ social obligations must be reconciled (Ontario Law Reform Commission)
* Instead of *entitlement*, look to specific obligations unfulfilled at death

No one, including the spouse or children of a testator, is *entitled* to receive anything under a testator’s will \* (***RE SPENCER***)

NO

ENTITLEMENT

[at 849]

***TATARYN*** moral relevant

Facts:

* T ‘purposefully excludes’ son from will. Son is ‘difficult’ and ‘abusive’

BLL:

* Deceased’s moral duty toward dependants is relevant
* Both moral and legal obligations are relevant; legal > moral precedent

***RE CUMMINGS***  legal + moral

BLL: court must consider:

1. Legal obligations of deceased had question of provision arisen during lifetime; and
2. Moral obligations that arise btw deceased and his dependants as result of society’s expectations of what judicious person would do in circumstances

***RE DAVIES*** moral relevant

‘Support in SLRA \* includes \* not only food and subsistence \* but also support has a secondary meaning of giving physical or moral support’

CASE-LAW

[at 854]

[at 857]

[at 879]

## PRACTICE & PROCEDURE

### NOTICE [**§63(5)** ***SLRA*** all persons affected by order must get notice]. LIMITATION PERIOD [**§61(1) *SLRA*** 6 mo from grant of letters probate]. **§67(1)** [personal rep can’t distribute estate until court disposed of app. Personal rep **personally liable** if violates **§67(3) *SLRA***].

* The proper respondent is the **executor** of the estate of the deceased
* Ontario courts allow to make one judgment on all dependants in one hearing – save costs
* The **applicant** is the one who claims to be owed support

[at 866]

* All persons affected by order must have notice of application before court makes order

PLEADINGS

& NOTICES

**§63(5) *SLRA*** – notice

§63(5) The court shall not make any order \* until it is satisfied \* that all person who are \* affected by order have been served with notice of the application \* and every such person is entitled to be present and to be heard in person or by counsel at the hearing

[at 867]

* No application for order may be made after **6 MONTHS** from grant of letters probate
* Courts however grant extensions; but not if have no assets

**§61(1) *SLRA*** – 6 mo

§61(1) \* no application for an order under §58 may be made **after six months** from the grant of letters probate of the will \*

(2) The court \* may allow an application to be made at any time as to any portion of the estate remaining

The purpose of the limitation period is to avoid delays \* courts have readily granted extension times

\* the purpose of the legislation is to ensure reasonable support to needy dependants

\* where there is \* no assets remaining in estate, the limitation period may not be extended \* pointless

exercise

**LIMITATION**

**PERIODS**

[at 868]

* Personal rep can’t distribute estate until court disposed of application (§67(1) *SLRA*)
* Personal rep not limited in reasonable advances for support to dependants (§67(2) *SLRA*)
* **Should personal rep violate §67(1) *SLRA*, he is personally liable to pay distribution (§67(3) *SLRA*)**
* The notice in Part V *SLRA* is more related than *FLA* (***DENTINGER***)

PRESERVATION OF

ESTATE DURING

LITIGATION

[at 869]

|  |  |
| --- | --- |
| *FLA –* at 839 | *DENTINGER* – at 839 |
| * Personal rep must receive notice of actual application to prevent distribution before distributing property – strict | * Letter sent by surviving spouse’s solicitors after distribution is sufficient notice to estate to prevent distribution |

## SATISFACTION OF SUPPORT OBLIGATIONS

### **§57 *SLRA*** [CHILD, COHABIT, DEPENDANT, SPOUSE]. CONJUGAL RELATIONSHIP [def in ***MOLODOWICH***]. ***RE COOPER*** [not req dependant actually depending on deceased; (i) must be in certain relationship; (ii) deceased must provide support (or be under legal obligation to)]. SUPPORT [***INTERPRETATION ACT*** def liberally for money and services].

§57 **CHILD** includes a grandchild and person whom deceased has demonstrated a settled intention to treat as a child \*

**COHABIT** means to live together in a **conjugal relationship**, whether within or outside marriage

**DEPENDANT** means

1. The spouse of the deceased
2. A parent of the deceased
3. A child of the deceased, or
4. 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 death

**SPOUSE** has the same meaning as in §29 of *FLA* and also includes either of two persons who were married to each other by marriage that was terminated by divorce (conjoint).

[*FLA* §29] **SPOUSE** means \* either of two persons who

1. are married to each other, or
2. have together entered into a marriage that is voidable or void, in good faith relying on this clause \*

and in addition, includes either of two persons who are not married to each other and have cohabited,

1. Continuously for a period of not less than 3 years, or
2. In a (conjugal) relationship of some permanence, if they are the parents of a child \*

**§57 *SLRA***

[at 871]

* **CONJUGAL RELATIONSHIP** categories defined in ***MOLODOWICH***– at 884
* Dependantdoesn’t req that applicant be actually dependent on deceased

1. Dependent Person must be in certain relationship to deceased
2. Deceased must either (i) provide support or

(ii) be under legal obligation to provide support to person claiming

to be dependant immediately before death

* Spouses are under legal obligation to provide support for each other according to need

**SUPPORT** definition is broad; **monetary and services** – interpreted liberally

(*INTERPRETATION ACT*)

Not contingent on applicant being second wife

***RE COOPER***

[at 874]

*Spousal obligations,*

*dependant*

## DETERMINING SUPPORT

### **§62(1) *SLRA*** [consider all circumstances (a) current assets; (b) age/mental health; (m) any agreement] Other evidence. Wavy Gravy/ Loosie Goosy.

**§62(1)** In det amount and duration of support, court shall consider all the circumstances of the application, including:

1. the dependant’s current assets and means

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

(m) any agreement btw deceased and dependant

(r) if dependant is a spouse

. . . [full list]

* Court may direct other evidence to be given **(§62(2))** Little bit **wavy gravy**/ **loosie goosy**
* Court may consider evidence it considers proper, including statements in writing **(§62(3))**

**§62(1) *SLRA***

[at 876]

*Factors for support*

## CONTRACTING OUT OF LEG

### WAIVER **[§63(4) *SLRA*** court discretion to make support order, even if dependant waived right to spouse].

* court **discretion** to make support order, even if dependant waived right to support **(§63(4) *SLRA*)**
* court must consider agreement btw deceased and dependant (**§62(1)(m))**
* Separation Agreement has release clause. Standard Release releases spouse from:

1. Equalization rights under *FLA*
2. Rights in *SLRA* Part II
3. Rights/ benefits from other spouse’s will
4. Any rights spouse may have against other under Part V

**WAIVER**

[at 882]

## DETERMINING SUPPORT – CONTINUED

### CHILDREN [priority obligation to support minors]. PARENTS [parents and adult children obligations].

* Obligation to support minor children after entitlement is det
* Priorities:
* minor child’s entitlement to support has **priority** over
* Equalization payment to deceased’s surviving wife/ husband ranks above
* dependants’ support obligations to non-minors

**CHILDREN**

[at 889]

* Parents have a support obligation toward their unmarried minor children
* Adult children have a like obligation toward their parents

**PARENTS**

[at 891]

## PROPERTY SUBJECT TO ORDER

### **§71 *SLRA*** [property falling into estate for support of dependants]. **§72(1) *SLRA*** [10 situations when asset not asset of estate] **§72(5) *SLRA*** [corporations/ bank/ insurance]. ***MOORES*** [group life insurance isn’t life insurance policy].

* property falling into estate for support of dependants [at 897]
* Property is not liable to provisions of order made
* i.e. lawyer says I will work for personal rep. Lawyer dies 2 months before

Property is not liable

**§71 *SLRA***

[at 892]

* 10 situations when asset is not asset of estate; therefore, taxed/charged for payment

§72(1) \*the capital value \* shall be included as testamentary dispositions as of the date of the death of deceased and shall be deemed to be part of \* estate \* and being available to be charged for payment by an order \*

1. Gifts *mortis causa* (deathbed gift)
2. Money deposited \* in account in name of deceased in trust for another \* with any bank \* and remaining on deposit at \* death

. . .

(e) Any disposition of property made by deceased in trust \*

* Also see **corporations** at §72(5) [not prohibited from trans prop] and (6) [service of §59 is defence to axn]

CORPORATION would be possibly an insurance company (§59 order would prohibit insurance company from paying death benefit to named beneficiary) or alternatively, a banking CR, i.e. Royal Bank (59 order would prohibit Bank from paying out joint account to surviving joint tenant)

Generally, CR in these subsections will be financial institution or insurance company that is holding money of deceased person or which has a contractual obligation to pay money to a beneficiary.

***MOORES*** life insurance

* Group life insurance policy isn’t life insurance policy

**§72(1) *SLRA***

[at 896]

On Corporations

**§72(5)**

*CR is Bank or*

*Insurance CR*

[at 899]

## COURT ORDERS

### **§58(1) *SLRA*** [court discretion to order adequate payment for dependant]. SUSPENSORY ORDER [**§59 *SLRA*** order for personal rep not to distribute until pending app for support disposed of]. INTERIM ORDER [***RE PULVER*** fair and liberal interpretation]. VARIATION ORDER [**§65 *SLRA*** court vary/ discharge order]. ***MALDAVER*** [court can’t increase support order, only decrease].

* Court has discretion to order adequate payment from estate of deceased for support of dependants

§58(1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants \* 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 \*

**§58(1) *SLRA***

[at 905]

* order directing personal rep not to distribute until a pending application for support is disposed of

**§59 *SLRA*** – suspensory order

* Allows court to make order to suspend admin of estate by estate trustee/ personal rep
* Personal rep prohibited from doing anything with respect to estate without court order
* Says: ‘thou shalt do no more with estate’

§59 \* court may make an order suspending in whole or in part the administration of the deceased’s estate, for such time and to such extent as the court may decide

**SUSPENSORY**

**ORDER**

[at 906]

* Where any or all matters in **§62/63** haven’t been ascertained by court, court may make interim order. Court embraces ‘fair and liberal interpretation’ (***RE PULVER***)

***RE PULVER*** – interim order

* Balance of convenience favoured app for interim order with ‘fair and liberal interpretation’
* Even though ultimately may be det dependant not entitled to support

**INTERIM**

**ORDERS**

[at 907]

* court’s jurisdiction to vary or discharge order for maintenance
* Makes sense: it is impossible to account for all future contingencies at outset

**§65 *SLRA*** – variation order

§65 Where an order has been made \* court \* may

1. Inquire whether dependant \* has become entitled to benefit of any other provision \*
2. Inquire into the adequacy of the provision ordered
3. Discharge, vary or suspend the order \* appropriate in the circumstances

**VARIATION**

**ORDERS**

[at 910]

* **Court cannot increase order for support, only decrease**
* Adequacy of provisions by T should be det on circumstances + being RF at T’s death
* Counters situation where beneficiary learns B2/3 won lottery or inherits $1mi from estate
* Qualifies **§65 *SLRA*** – *but is case correctly decided?* Old case

Recall: ½ reside held in trust to pay income to applicant. On applicant’s death, capital goes to A and second ½ of residue **paid outright to B.** If applicant applies, a few years down the road, for increase, (i.e. lottery) the only money available is capital in which A has gift over. If I were A’s counsel, I’d argue that it’s **unjust** that A’s money gets used to satisfy an order when B has no liability to contribute to increased amount.

***MALDAVER***

[at 911]

*Lottery*

## THREE DOORS METHOD FOR PART V *SLRA*

### Est that client is DEPENDANT

* Recall **DEPENDANT** means (§57) the (a) spouse; (b) parent; (c) child; (d) sibling; (d) one being supported
* Therefore, must be spouse, parent, child, sibling
* Note there are expanded meanings: i.e. parent includes grandparent

### Est that client is receiving support or is under legal obligation to provide support

* **SUPPORT** includes money, but also services accustomed to
* Part V is remedial legislation and ‘must be interpreted liberally’ (*INTERPRETATION ACT*)
* i.e. if dependent was blind and T read to him, support includes professional reader after death
* Key cases is *RE COOPER* – **SUPPORT** not limited to making more than another or being second wife
* Key case is *RE DAVIES* – **SUPPORT** is not only food/ sustenance; also physical/ moral support

Meaning extends to non-essential luxurious. Contra *RE DURANCEAU*

* Reference *FLA*
* §33 – obligation for spousal support
* §31 – obligation for parent to support minor child
* §31 – obligation on parent to support adult child who is unable to withdraw because of disability
* §32 – obligation of adult child to support parent
* Part V application doesn’t survive death of applicant (at 67)

### Consider the merits for court to make an order

* Court has power to make order on application where T did not exercise due diligence (§58)
* If intestate, intestacy rules apply. Court will award ‘adequate provision for proper support’
* *FLA* is a math calculation. Part V *SLRA* is very discretionary
* Court is not restricted to look only to financial circumstances (*RE CUMMINGS*) – moral obligations
* Client must consider all circumstances in §62(1) list
* Court has discretion to look at other evidence (§62(2)) and statements in writing of deceased (§62(3))

## GENERAL GUIDELINES

### GUIDELINE 1:courts strive to give effect to T’s scheme of distribution as set for in will

***RE MANNION*** – courts disturb provisions of will as little as possible – at 910

* Widow allowed to live in M Home until death or remarriage, latter condition of T
* Court makes lump-sum order against what T intended [residue income flow doesn’t give adequate support]

1. Courts disturb provisions of will as little as possible
2. Court generally avoid making order that simply provides someone with estate. That isn’t purpose of Part V

### GUIDELINE 2: Courts provide for estate if there is purpose to action

### GUIDELINE 3: Courts try not to interfere with gifts

### GUIDELINE 4: courts look to deceased’s moral obligations (*RE CUMMINGS*)

POINT (i): If ind is entitled to equalization (*FLA*), isn’t precluded from making Part V *SLRA* claim

POINT (ii):If dependant gets entitlement under intestacy, isn’t precluded to apply under Part V *SLRA*

# **[6] NATURE OF TESTAMENTARY DISPOSITIONS**

### NATURE OF WILL [disposing T’s property; takes effect on T’s death; ambulatory; *ANIMO TESTANDI*; formalities; not oral; no legal effect except disposing property; can have CODICILS for minor amendments]. *SPES SUCCESSIONIS* [hope of succession]. GIFT LAPSE [gift not part of residue, deal as intestacy]. MUTUAL WILLS [similar spouse terms]. ***UNIVERSITY OF MANITOBA*** [mutual wills; will is always revocable. For revoked mutual will, executor of new will holds assets on trust to carry out provisions of mutual will agreement]. ***EDELL*** [need clear proof of agreement for mutual will].

* Instrument which disposes of T’s property
* Takes effect only upon T’s death (neither before nor after)
* Testator retains full control over property while living; may dispose *inter vivos*
* Will is **ambulatory** (revocable) until T dies and will takes effect
* Made ***ANIMO TESTANDI*** [with intention of making a will]
* Void if fraud, duress, undue influence, no mental capacity
* i.e. outline of will, instructions to solicitor, will written in jest (lol) lack *animus*
* Executed with formalities – will invalid otherwise
* Oral wills not permitted
* T’s directions have no legal effect except to extent they dispose of property
* One will can be contained in several documents; will amended by **CODICILS**

NATURE OF A WILL

[at 107]

* testamentary doc which supplements, explains, or modifies a will bearing an earlier date

Usually used for minor amendments to original do. Major changes are made through new will

Amends will and any unattested document which may be incorporated by reference

**CODICIL**

[at 113]

* ‘hope of succession:’ beneficiary does not own property will gives until T dies;

T may always have change of heart

***SPES***

***SUCCESSIONIS***

[at 113]

* Beneficiaries must survive T to get gift
* Suppose beneficiary dies before; T doesn’t name substitutionary gift to another ind
* property does not go to beneficiary’s estate; but to others
* Where gift is not gift of residue and gift lapses, gift becomes part of residue
* Where gift of residue lapses, gift is deal with as intestacy

**GIFT LAPSE**

[at 113]

* two+ make wills with similar terms with agreement to make wills and not revoke them
* i.e. spouse and spouse make **reciprocal wills**; give each other life interest with remainder to third party or provide that if other dies, property goes to third party

***UNIVERSITY OF MANITOBA*** mutual wills

BLL:

* **Will is always revocable** – obligation of survivor not to revoke mutual will doesn’t depend on externals
* Benefit is not essential to imposition of trust
* U Manitoba entitled to succeed

A will is always revocable. However, where revoked will is mutual will (subject to agreement) then executor of new will holds assets on trust to carry out provisions of mutual will agreement

**MUTUAL**

**WILLS**

[at 126]

* Need clear proof of agreement btw two T’s; cases are entirely fact driven

***EDELL*** no mutual wills

Facts:

* Mr and Mrs S made identical wills. Gave each other life interest in estates, capital equally to kids.
* Set up *inter vivos* trusts for kids, parents trustees. Shares of family business transferred to trusts
* Mr and Mrs S fight. It’s over. Mr S made new will leaving benefits to kids, but disinherited Mrs S

Decision:

* Requirements of mutual wills doctrine not satisfied
* Prerequisite is binding agreement btw testators – Mrs S **didn’t prove** such agreement

PROOF OF

AGREEMENT

[at 134]

## INCORPORATION BY REFERENCE

* Probate doctrine under which existing, unattested docs may be incorporated into will:

### Document must exist when will is signed [i.e. compensation agreement, list]

* Onus on ind seeking incorporation to prove doc existed before will

### Will must refer to that document as existing document – can’t exist in future

* If will purports to incorporate either existing or future doc, no doc incorporated (*GOODS OF SMART*)

### Will must describe document with sufficient certainty to be identified

* Apart from restrictions, any doc can be incorporated into will, by T or another person
* If document is subsequent to will, but prior to codicil which confirms will and if reference is to existing document only, doctrine of republication permits document to be incorporated

WILL – DOCUMENT – CODICIL (confirms will)

* Law is uncertain regarding holograph wills – must be wholly in handwriting of ind; what if have typed will instead?

**INCORPORATION**

**BY REFERENCE**

[at 136]

***GOODS OF SMART*** future doc

* T gave furniture, books, plates to cousin for life. Then, told trustee to give friends articles/ books
* No articles/ books when made will. T made codicil with no reference to articles/ book
* Incorporation of articles/ book by reference into will?

Principle:

### ***GOODS OF SMART*** [If T, in testamentary paper duly executed, refers to existing unattested test. paper, the instrument so referred to becomes part of will – it is incorporated into will]

* Testator must refer to written instrument at time of execution (*ALLEN v MADDOCK*)
* If document of future character, there is no incorporation

Held:

* No incorporation of articles/ books
* Will did not refer to documents as existing at date of will. Instead, referred to future document
* It isn’t possible to have property in corpse/ human remains
* It is illegal to pay for eggs, sperm, surrogate pregnancies
* Sperm is held to be property for storage purposes

DISPOSITION OF

PARTS OF BODY

[at 162]

# **[6.5] WILLS SUBSTITUTES**

### *INTER VIVOS* GIFTS [donor parts with property absolutely with *ANIMUS DODANDI*]. *MORTIS CAUSA* GIFTS [in contemplation but not expectation of death]. DEEDS [legal doc of property ownership]. *INTER VIVOS* TRUST [est during lifetime, max tax]. JOINT INTERESTS [property directly to survivor, not personal rep]. ***PECORE/ SAYLOR*** [onus on adult child to prove parent intended gift]. LIFE INSURANCE [**§196(1) *INSURANCE ACT*** insured property not part of estate; **(2)** exempt from gov’t seizure]. RRSP/ RRIF/TFSA [***AMHURST CRANE*** states creditors can’t take money out of RRSP if none in estate].

* Wills substitutes are as much a part of planned estate as will itself
* Donor parts with property absolutely while living
* donor must have ***ANIMUS DODANDI*** (intention to give)
* donor must have capacity to make gift

***INTER VIVOS***

**GIFTS**

[at 165]

* *Inter vivos* gift of personalty; made in contemplation of but not expectation of death
* Personalty (personal movable property) is not real estate
* Must provide subject matter of gift and deliver it
* Donor may revoke gift while living; revoked automatically if donor recovers from peril

***MORTIS CAUSA***

**GIFTS**

[at 166]

* **Legal doc regarding ownership of property;** person may transfer property to another absolutely via deed
* Person may retain life interest and give remainder interest to family members
* i.e. person lives in home during life (claims PR), property transfers to children on death
* Although remainder interest takes place on death, creates vested interests in children
* Donor cannot recall property should donor change mind (drawback)
* Can retain right of reversion or right of re-entry for conditions broken in deed

i.e. I don’t want spouse’s family to use my home. Property reverts back if not followed

* No obligation on transferee to register deed (it is in best interests though)

**DEEDS**

[at 166]

* Grantor retains control over deed and doesn’t intend that it shall have effect until death
* In this case, deed is really a will because it is dependent upon death to take effect

***CARSON v WILSON*** not deed

Facts:

* W (deceased) owned land/ mortgages. W made deeds to grantees
* Instruction to solicitor: hold deeds and don’t deliver until after my death
* W had condition: could demand deed back at any time

Decision: NO TRANSFERS

1. No delivery of documents

* Transfers after W’s death are ineffective as *inter vivos* gifts
* W intended to take effect on death. DEEDS take effect immediately

1. Docs not witnessed by two people

DEED

PROBLEM

[at 166]

* Est during settlor’s lifetime
* Defined in §108(1) *ITA* as trust other than testamentary trust
* Taxed at highest marginal rate – §122(1)
* Must use calendar year end – para 249(1)(c) [must end Dec 31, not Jan 2]

***INTER VIVOS* TRUST**

[at 167]

* When title to real property is taken by two people in joint tenancy, the **right of survivorship** operates on death of first of joint tenants to increase interest of survivor
* Can avoid making will – entire interest passes automatically to survivor
* Property doesn’t pass to personal rep first; goes directly to survivor
* Doesn’t form part of deceased’s probate estate
* Must state expressly in deed that title is taken in joint tenancy – otherwise tenancy in common is created (*Conveyancing and Law of Property Act*)

i.e. deed btw A and B means they own property as tenants in common

§13 of *CLPA* extends to real property only

Example

Assume two people, A and B, hold title to property as joint tenants with right of survivorship. On death of A or B, survivor automatically owns ½ interest of deceased person. The ½ interest of deceased person DOESN’T pass through their estate.

However, if A and B own property as tenants in common, and, say, A dies first, then A’s ½ undivided interest passes to their executor and then through their estate, while B remains the owner of the other undivided ½ interest. If B were to die, say, 10 days after A, then A’s estate would own a ½ interest and B’s estate would own a ½ interest.

**JOINT INTERESTS**

[at 168]

*Anyone can be.*

*Need mutual intention.*

* Donor may intend done to share property with siblings/ children
* Dishonest donee can claim transfer was gift to donee
* SCC has wrestled with problem in ***PECORE*** and ***SAYLOR***

**SCC Principles from *PECORE*** and ***SAYLOR*:**

* Parents have an obligation to support dependent children
* Common for ageing parents to transfer assets into joint names with kids
* Apply presumption of resulting trust; means that
* **Onus on adult child to prove that parent intended gift**
* If no sibling/ child contests transfer, transferee retains property

Terms: rebuttable presumption of advancement [presumption of gift]

Presumption of resulting trust [do not presume gift]

* For interspousal transfers – *FLA* §14 at 817.
* Intention btw joint owners is paramount – *EDWARDS* at 169.

JOINT TENANCY

CASE-LAW

[at 169]

***PECORE/ SAYLOR***

Problem

* Contract under which insurer agrees to pay insurance moneys on the insured’s death or on specified event. Includes annuity contract
* Insurer has right to designate beneficiary. If doesn’t, it is estate/ executor
* Executor owns money subjects to will terms.
* Three ways to change beneficiaries in life insurance policy:

1. In actual contract – state in contract when buy insurance policy
2. Make change of beneficiary by declaration
3. Make change of beneficiary in the will (clause 2)

**LIFE INSURANCE**

[at 172]

**§196(1) *INSURANCE ACT***

* when insurance beneficiary is designated, insurance money is not part of estate (of insured). Money is not subject to anything of estate
* estate’s funds are independent of insurance policy (except if getting it)

**§196(2) *INSURANCE ACT***

* insurance money is exempt from gov’t seizure where have spouse/ child/ parent designated as beneficiary
* exception: can be seized by *ITA* if haven’t paid taxes!
* Where estate is beneficiary, have significant delays – months

§72 of *SLRA* can bring insurance policy back into value of estate where dependent relief claim. Are limitations

**RRSPs**

* Retirement savings and investing vehicle for employees/ self-employed. Pre-tax money is placed into RRSP. Grows tax-free until withdrawal (age 71). Taxed at marginal rate.
* Huge tax savings for spouses.Transfer RRSP to spouse. Spouse realizes income on rollover.
* No real benefit for children.Can get annuity taxed in hands of very minor child.

**RRIFs**

* RRIF is vehicle ind transfers RRSP into; basket of assets which distributes min amount of assets to ind annually. Provides retirement income like pension through mandatory withdrawal.
* At age 71, must convert RRSP into (one option) RRIF
* Designate spouse as beneficiary under RRIF plan to avoid probate

**RPPs**

* Plan for well-being of recipient after ind’s death; recipient taxed after death

**TFSAs**

* Tax-free account where deductions on investments not given. Tax is pre-paid. Put money in/ take money out tax-free. Take money out, can recontribute again (no RRSP fresh contribution). Benefits old, disabled, and poor. Money doesn’t erode access to benefits, i.e. OSA

**PENSIONS &**

**BENEFICIARIES**

**DESIGNATIONS**

[at 175]

***AMHURST CRANE*** creditors PCV of RRSP!

BLL:

* Creditors, who deceased owed money to, cannot take money out of RRSP in hands of designated beneficiary if there is no money remaining in estate
* Why? RRSP expectation is for other spouse to be supported after death of spouse

**Decision for RRSP. Leap is SAME for RRIF and TFLA (McNamara ARG)**

## USE OF WILLS SUBSTITUTES TO AVOID PROBATE FEES

### Some use substitutes to avoid paying PROBATE FEES/ taxes: (1) *INTER VIVOS* GIFT; (2) LIFE INSURANCE; (3) JOINT INTERESTS; (4) MULTIPLE WILLS [***GRANOVSKY*** states multiple will scheme -Will 1 probate, Will 2 not – is valid].

* One use of will substitutes is to avoid paying probate fees and taxes of a will
* Fees charged by province on value of ‘probate estate’ – estate that is administered by personal rep and in respect of which probate is sought

Ontario tripled its probate fees

**PROBATE**

**FEES**

[at 185]

1. ***INTER VIVOS* GIFT.**
2. **LIFE INSURANCE.** Named beneficiary is someone other than estate
3. **JOINT ASSETS.** Spouses put everything in joint assets (i.e. house)

* Disadvantages: (i) will lose control if sell asset

(ii) in disaster, daughter’s nasty son-in-law will be working with you

(iii) daughter files for bankruptcy/ in car accident – creditors jump

‘Testators must record intentions regarding jointly held assets’ – *The Globe and Mail*

* In *PECORE* and *SAYLOR*, SCC reversed long-time presumption in cases of assets held jointly btw parent and adult child
* Historically, where parent put asset into joint names with adult child, there was presumption that it was GIFT to child
* Now, there is presumption of resulting trust in favour of parent’s estate on parent’s death, rather than gift to child by survivorship

‘Separate will may be required for assets held in joint names’ – *The Globe and Mail*

1. **MULTIPLE WILLS.** Testator makes primary and secondary will

* Two wills exactly same except primary [non-offering CR shares] and secondary [all other assets]
* When client dies, apply for probate of primary will only
* Assets covered by secondary will occur without probate fees

***GRANOVSKY*** – at 187

Scheme:

* Apply for probate of primary will. Do not apply for probate of secondary will

BLL:

* Court approved of multiple wills scheme – not nec to submit secondary will to probate
* *Ontario Rules of Civil Procedure* amended to provide for new forms where only one will is sought

1. **TAX VEHICLES.** Set up alter ego trust or joint spousal or CL partner trust

* see conditions at 188.

WAYS OF

AVOIDING

# **[7] SUBSTITUTE DECISIONS – POA**

### SUBSTITUTE DECISIONS aren’t testamentary (i.e. POA). CAPACITY, ask: (1) understand info? (2) appreciate RF conseq?

* Actions that are part of typical estate practice but aren’t themselves testamentary
* Actions are appointments of substitute decision-makers by clients
* i.e. attorneys, appointed by power of attorney (POA)

**SUBSTITUTE**

**DECISIONS**

* document that confers upon another (attorney) an authority or power to act on behalf of person granting authority (grantor or donor)
* POA doc proved attorney’s authority to act with third parties for grantor
* Attorney for POA is ‘attorney in fact’
* Lawyers are ‘attorneys at law’

**POWER OF**

**ATTORNEY**

**(POA)**

1. Does person understand info that is relevant to making decision?
2. Does person appreciate RF consequences of decision being made? (objective test)

* Law doesn’t designate specific person for det capacity of person to grant POA
* If incapacity is suspected, person assisting with POA (lawyer) is responsible for ensuring person is capable of granting continuing POA
* Grantor det who det capacity; can be anyone
* If grantor doesn’t specify, **CAPACITY ASSESSOR** or physician det capacity;

issues Certificate of Incapacity

**CAPACITY**

## SUBSTITUTIONS DECISIONS ACT (SDA)

§7-14 – authority and structure to make POA for property [not only real estate]

§15-21 – structure for statutory guardianship

When person gets psychiatric certificate and Certificate of Incompetence issued

§22-30 – structure for court to appoint Guardian of Property

§46-53 – POA for personal care [medical]

§55-65 – structure for court to appoint Guardian of Person

OVERVIEW

POA for Property

* Client driven
* Client chooses attorney
* No ‘management plan’

Statutory Guardian

* Certificate of Incapacity (MHA)
* PGT
* POA for Property if POA covers all property (no management plan)
* Others (management plan)

POA for Personal Care

* Client driven
* Client chooses attorney
* No ‘management plan’

Guardian for Person

* ‘too late’ for POA
* Court chooses guardian
* Management plan
* Expense (court process)

Guardian of Property

* ‘too late’ for POA
* Court chooses guardian
* Management plan
* Expense (court process)

Advance Directives

* ‘living will’
* ‘Enduring POA’

Meanings:

* ‘Client drive’ – there is no law to have POA. Client voluntarily chooses attorney
* ‘Management plan’ – the plan for deceased’s finances of attorney (fiduciary) who takes over after death
* ‘Guardian of Property/ for Person’ – court chooses Guardian
* ‘PGT’ – Public Guardian and Trustee is ‘Statutory Guardian’ [doesn’t really know person]
* If person signed unrestricted POA for Property, attorney just files POA and PGT backs away.
* If no POA/ no unrestricted POA, PGT has discretion to be involved
* ‘living will’/ ‘enduring POA’ – person’s specific instructions to personal care attorney when in intense pain/ heart attack/ death

## POA FOR PROPERTY

* CC: POA takes effect immediately when signed

§4 – grantor or donor must be **age 18+** for *SDA* to apply

§2(1) – grantor must be capable; must have assumption of capacity

Person age 18+ presumed capable of entering into contract

§8 – Capacity to give POA for Property; person is capable if he:

1. Knows what kind of property he has and its ~value
2. Is aware of obligations owed to his dependants
3. Knows that attorney will be able to do on person’s behalf anything in respect of property that person could do if capable, except make a will, less POA conditions
4. Knows that attorney must account for his dealings with person’s property
5. Knows that he may, if capable, revoke continuing POA
6. Appreciates that unless attorney manages property prudently its value may decline
7. Appreciates possibility that attorney could misuse authority given to him

§5 – Attorney needs to be age 18+ and capable of managing property

§6 – person is incapable of managing property if he can’t understand info relevant to making

decision in management of property, or cannot appreciate RF consequences of decision

POA 101

PROPERTY

[at 950]

* Valid POA for property is effective when original, signed doc is in hands of attorney

9(3) – process; det incapacity when grantor incapable of managing property and doesn’t

provide method for det situation

Grantor can det capacity. If doesn’t, public guardian/ trustee/ capacity assessor will.

§9(3) If continuing POA provides that it comes into effect when grantor becomes incapable of managing property but does not provide a method for det whether that situation has arisen, POA into effect when:

1. Attorney is notified in prescribed form by assessor that assessor has performed assessment of grantor’s capacity and found that grantor is incapable of managing property; or
2. Attorney is notified that certificate of incapacity has been issued \*

**§9(3)**

**DET**

**INCAPACITY**

[at 953]

*Process for Property*

√. Grantor capable of granting power

√. Named attorney(s)

√. Statement that attorney has power to make property decisions on grantor’s behalf

√. Grantor’s signature

√. Date

√. Signature of two qualifying witnesses

*If Multiple attorneys*

√. Specify if attorneys act **jointly**, severally, or sequentially

√. How capacity of grantor will be assessed (if relevant)

√. Clear directions on how power is to be used

CREATION

[at 955]

*Legal req for POA*

*McNamara’s Additions*

√. Est scope of authority (i.e. to TD, CIBC, RBC or only TD? Bad idea to limit)

TIP: do not limit authority. When donor incapacitated, donee can do anything

√. Hesitantly ack that conditional/ contingent POA’s exist §7(7) (problem: limbo land)

* Acting together; default if not specified in POA with two attorneys (§7(4))

**ACTING**

**JOINTLY**

[at 956]

* Does POA continue after person is incapacitated?

YES, if POA is unrestricted.

* Should I insert a PGT clause, in event grantor admitted to psychiatric facility and wants POA for property to manage business affairs and not Public Trustee?

YES. Have two witnesses (§10(1).

Some people cannot be witnesses (§10(2)): [too close!]

* Attorney’s spouse/ partner
* Grantor’s spouse/ partner
* Child of grantor/ person whom grantor intended to treat as child
* Person whose property is under guardianship or who is guardian of person
* Person under age 18
* What if I make mistake? Is my POA void? [compare to §12 *SLRA*]

NO. ‘Non-compliant’ POA is not effective.

But: court may declare continuing POA effective if in interests of grantor

* When does a POA come into effect?

Continuing POA, even if effective during grantor’s incapacity, may come into effect at any time before or at time of grantor’s incapacity depending on grantor’s wishes/ needs. For seamless transfer of power, some recommend power to be effective upon execution, but to prevent abuse of power, that document be kept with drafter (lawyer) until further notice.

Common

Questions

**§7(2)** – attorney may do ‘anything in respect of property’ except make a will

**POWER SCOPE**

[at 9506

* If POA doesn’t say otherwise, attorney is entitled to take annual compensation from grantor’s property at prescribed rate (§40)
* Taking compensation raises std of care attorney must meet in managing property

1. Uncompensated std of care. ‘Person of ordinary prudence’ test (§32(7))
2. Compensated std of care. ‘Person in business of managing property of others.’ Higher std of care (§32(8))

**COMPENSATION**

[at 958]

*Std of cares*

§37(3) and (4) – attorney can only make gifts if gifts satisfy narrow window of wording

of statute

‘my attorney can make gifts in cases of necessity, det by attorney by discretion’

* Provide attorney with explicit right to make gifts/ loans

**GIFTS/**

**LOANS**

[at 958]

§37(3) and (4) – same as gifts. Narrow window

Client may include wording in doc to permit attorney to make charitable donations.

* Provide attorney with explicit right to make gifts/ loans

**CHARITABLE**

**DONATIONS**

[at 958]

* Unless specific provision included, attorney obstacle to dispose of any interest in M Home in which grantor has right of possession (Part II, *FLA*)

i.e. grantor is disabled, attorney can’t sell home

*FLA*: right of possession of M Home is ‘personal right’ against other spouse’

* Provide attorney with explicit consent on behalf of grantor to disposal or encumbrance of matrimonial interest

**MATRIMONIAL**

**HOME**

[at 959]

* Attorney can’t make decisions for grantor in types of investments unless grantor provides attorney with right
* Attorney is delegate of donor. Delegate can’t further delegate to mutual funds manager.

**MUTUAL**

**FUNDS**

[at 959]

1. Valid POA effective when original, signed doc in hands of attorney, and
2. Attorney is acting on behalf of grantor, subject to conditions of POA

**EXERCISE**

*When effective*

[at 960]

§32(1) – **Guardian is fiduciary** who acts honestly and in GF for person’s benefit

(1.2) – must manage personal care of person

(2) – explain to incapable person what powers/ duties are

(3) – encourage person to participate in guardian’s decisions

(4) – foster regular personal contact with friends/ family of person

(5) – consult supportive family members/ friends and personal care providers

(6) – keep accounts of all transactions involving property (also Reg 100-96)

§38(1) – attorney is under a continuing POA

Reg 100-96 – Confidentiality. Keep records of decisions made

§35.1 – Guardian prohibited to sell property subject to testamentary gift referred to in will, unless needs to comply with duties; i.e. paying bills of donor

**DUTIES**

[at 962

]

*Of Attorney*

§33.2(1) – Person with custody/ control of property belonging to incapable person shall

1. Tell guardian info guardian requests about property; and
2. Deliver property to guardian when required

(2) – Property includes a **WILL**

PROPERTY IN

ANOTHER’S

CONTROL

§36(1) – **Doctrine of Ademption** doesn’t apply to property subject to specific

testamentary gift and that guardian of property disposes of, and,

anyone who would’ve acquired right to property on death of incapable person

is entitled to receive from residue of estate equivalent of corresponding right in

PD of property without interest

* If attorney sells assets, Doctrine doesn’t apply
* i.e. McNamara leaves ring to me. Then gifts to X. I’m out of luck.

**DOCTRINE**

**OF ADEMPTION**

**§36(1)**

[at 964]

* Without exception, attorney’s power to act on behalf of grantor ends with grantor’s death
* Grantor (is capable), resignation, law, or court may also terminate attorney’s power

§12(1) A continuing power of attorney is terminated

(e) when power of attorney is revoked

(f) when grantor dies

**TERMINATION**

* If attorney acts for POA for person who still has capacity, std of care is higher
* Attorney acts as **AGENT** of person
* Primary responsibility: carry out person’s instructions as principal
* Has fiduciary obligation; pale in comparison with if person incapable

**STD OF CARE**

**IF CAPABLE**

*BANTON*

*RICHARDSON*

* Public Guardian and Trustee is ‘Statutory Guardian’ [doesn’t know person’]

§15 – Public Guardian becomes guardian of person’s property

*Appointed when*:

* Patient of psychiatric facility is incapable of managing property
* Person assessed by **CAPACITY ASSESSOR** as being incapable of managing property **AND** there is no knowledge of existing POA for property of spouse/ relative
* Statutory Guardianship can be terminated if less restrictive option is available

**STATUTORY**

**GUARDIAN,**

**PROPERTY**

[at 974]

* Where person signed **UNRESTRICTED** POA, follow process in §16.1
* File some docs; PGT steps aside/ terminated, spouse/ relative is statutory guardian
* Where person has **RESTRICTED** POA, spouse/ relative can apply to be guardian

§17 – PGT has discretion to permit applicant to become statutory guardian

Must submit file **management plan** (detail of assets; easy – complex) §70(1)(b)

UNRESTRICTED/

RESTRICTED

POA

* Court has authority to hear cases involving directions in connection with guardianship of property or POA for property
* §39(1) is restricted to property. This is expeditious process

§39(1) – If incapable person has guardian or attorney under POA, court may give

directions on any question arising in connection with guardianship or POA

DIRECTIONS

FROM COURT

*Only property!*

## POA PERSONAL CARE

* CC: POA valid when signed, yet effective only when donor capable of making decision

§44 – grantor must be **age 16+** for *SDA* to apply

§2(3) – grantor must be capable; can rely on presumption of capacity with respect to another

person unless he has reasonable grounds to believe other person is incapable of entering into contract or giving/ refusing consent

§47(1) Capacity to give POA. Person is capable of giving POA for personal care if:

1. Donor has ability to understand whether proposed attorney has genuine concern for person’s welfare; and
2. Appreciates that person may need to have proposed attorney make decisions for person

NOTE: Property $8 has 7 req. Personal care has only 2.

Capacity to make decisions for personal care is lower std than property

§45 – personal care includes ‘healthcare, nutrition, shelter, clothing, hygiene, safety’

i.e. runs from having toenails clipped to surgery

POA 101

P CARE

§46(3) – Person can’t be attorney for p care (excludes spouse/ partner/ relative) if person:

1. provides health care to grantor for compensation
2. provides residential, social, training or support services to grantor for

compensation

RESTRICTION

§46(3)

§46(4) – Acting together; default if not specified in POA with two attorneys. SAME, property

**ACTING**

**JOINTLY**

[at 979]

RECALL: For property, §7(2) – attorney may do ‘anything in respect of property’ except

make a will

* There is no def of personal care. Refer to enumerated categories of §45 for scope:
* Health care, nutrition, shelter, clothing, hygiene or safety
* Not able to appreciate RF consequences of decision/ lack of decision

**POWER**

**SCOPE**

* Depends on if *Health Care Consent Act*, other statute, or CL applies

*Health Care Consent Act* Process (§49(1)(a) grants authority to *Act*, *SDA*)

* Health care practitioner proposing treatment **responsible** to assess if patient is incapable
* Person needs to understand info relevant to make decision and appreciate consequences
* **‘treatment’** is act for therapeutic, preventive, palliative, diagnostic, cosmetic, other health-related purpose (§2(1) *Health Care Consent Act*)
* NOT assessment of capacity, taking health history, admitting to hospital, other

*Health Care Consent Act* DOESN’T Apply (§49(1)(b) applies)

* Test: POA triggered when attorney has reasonable grounds to think grantor incapable

**DET**

**INCAPACITY**

[at 953

]

*Process for P Care*

* Most important reason for POA personal care; opportunity grantor has to express any wishes/ instructions he wants about treatment
* May be drafted in separate doc; may exist **without** accompanying POA; may be **oral**
* Req 2 witnesses (§48(1)). The witnesses can’t be: (§48(1), see list §10(2))
* Attorney or attorney’s spouse/ partner
* Grantor’s spouse/ partner
* Child of grantor or person who grantor treats as child
* Person whose property under guardianship or has guardian of person
* Person who is less than age 18
* In all cases, directives are binding
* Poorly drafted directives cause more problems than address
* Health practitioners think directives replace communication with patient
* Rather, directives guide communication with practitioner on patient’s behalf

i.e. pain treatment, euthanasia, organ donation, wanting to be seen by priest

* Level of capacity for directives is higher than lever for personal care

P care is base level. Now, account for cognitive ability

TIP: draft POA noting only conditions and restrictions for legal use of power

**ADVANCED**

**DIRECTIVE**

[at 982]

*Living will*

* Never appoint one POA. Always have a backup POA for both property and personal care
* Advise client to have POA acted upon from (i) moment it is signed, and not (ii) moment in future – delays
* Provision authorizes attorney/ others to use force (necessary/ reasonable) to:

1. Det whether grantor is incapable of making decision, *HCCA*
2. To confirm if grantor incapable of personal care
3. To obtain assessment of grantor’s capacity by assessor

* Allows attorney to use force to have person taken to place of safety

For clients with episodic psychiatric disorders

* Difference with regular p care agreement:
* 30-day limit for donor to sign certificate ack and understanding what signed

**ULYSSES**

**AGREEMENT**

**§50**

USE OF FORCE

[at 980]

§66(1) – powers/ duties exercised diligently and in GF

(2) – explain to incapable person what powers/ duties are

*Process*

(3) process when *Health Care Consent Act* doesn’t apply

(4) process for deciding what is in person’s best interests

(6) – shall foster regular personal contact btw incapable person and family

(9) – shall choose the least restrictive/ intrusive course of action appropriate

(12) – shall not use electric shock as aversive conditioning

. . .

§67 – applies §67 to attorneys with necessary modifications

**DUTIES**

[at 985]

*Of Attorney*

Similar to

POA Property

* Decisions of substitute decision-maker for p care may be challenged is are against patient’s wishes or are not in patient’s best interests [§21 & 37 *SDA*; *BENES*]
* Attorney must keep careful records [Reg 100/96]
* Without exception, attorney’s power to act on behalf of grantor ends with:
* Grantor’s death
* Resignation by attorney (process; must give notice to those dealing with p care)
* Revocation by grantor (§47)
* Operation of law (guardian appointed by court)
* If Consent & Capacity Review Board declares grantor is incapable

**TERMINATION**

[at 987]

* If incapable person or any person is dissatisfied with attorney appointed in POA by Consent Capacity Review Board, application to court is req to change attorney

**APPOINTMENT**

**OF GUARDIAN**

*Application for*

*Change*

§55(1) – Court may, on application, appoint guardian of person for incapable person

Has discretion. Needs to be satisfied

§57 – restrictions on who can/ can’t be appointed

1. Person who provides health care or support services to person for compensation shall not be appointed. This excludes spouse, partner, relative (2(1))

(4) court may appoint two+ persons as joint guardians

**COURT’S**

**AUTHORITY**

§70(2)(b) – application to appoint guardian req a management (guardianship) plan

Plan different depending on complexity of health issues of person

**MANAGEMENT**

**PLAN**

* purpose: resolve conflicts about p care quickly and keep conflict out of court

Powers:

* hear applications for appointment of substitute decision-maker
* review findings of incapacity
* provide directions if incapable person’s wishes are unclear
* hear applications to depart from incapable person’s wishes
* review actions of substitute decision-maker if there is concern that he is not complying with duties
* may grant permission for substitute decision-maker to consent to treatment that person declined in advanced directives
* CANNOT authorize substitute decision-maker to refuse consent to treatment that incapable person requested

***CONSENT &***

***CAPACITY***

***BOARD***

*Powers*

* If person doesn’t have POA P Care, it takes time for Board to appoint guardian. Thus,
* §20(1) *Health Care Consent Act* provides prioritized list of substitute decision-makers

§20(1) [1] guardian of person; [2] attorney for p care; [3] Board appointed; [4] spouse . . .

TIP: have a POA for P Care. WAY faster.

IF NO POA

P CARE!

[at 992]

*If HCCA applies*

*Health Care Consent Act*, §2(1) applies to ‘**treatment’**

* Anything that is done for therapeutic, preventive, palliative, diagnostic, cosmetic, or other health-related purpose’

Doesn’t include assessment of capacity, taking of person’s health history, admission to hospital (other health care facility) or personal assistance service

**‘TREATMENT’**

[at 953]

* If incapable person (or any person concerned) is dissatisfied with substitute decision-maker, person may apply to Consent Capacity Board to have representative appointed

§33(1) Person age 16+ who is incapable may apply to Board for appointment of rep

(2) Person age 16+ may apply to have himself appointed as rep of incapable

(6) Board may make appointed if satisfied of req:

1. Incapable person doesn’t object to appointment
2. Rep consents to appointment, is age 16+, and is capable in treatment
3. Appointment is in incapable persons’ best interests . . .

**APPOINTMENT**

**OF**

**REPRESENTATIVE**

[at 994]

*Req for Rep*

* Each party pays their own costs (follow Rules of Civil Procedure)

***McDOUGALD ESTATE*** – process for costs

* Unsuccessful party pays costs in estates litigation
* Court will punish party starting ‘frivolous litigation’ for stupid reasons

i.e. to eat up other party’s estate money

LEGAL COSTS

# **[8] TESTAMENTARY CAPACITY**

### Will can’t be probated if T lacked mental capacity to make it. Age 18+ deemed competent **(§8(1) *SLRA*).** Disability restrictions.

* Will can’t be probated if T lacked mental capacity to make it
* Will can’t be probated if T didn’t know + understand contents of will
* Will can’t be probated if T subject to undue influence or if fraud practiced

**TESTAMENTARY**

**CAPACITY**

[at 189]

* In Ontario, application for Certificate of Appointment of estate trustee with will

**PROBATE**

* Persons age 18+ are deemed competent to make will
* Exception: if person is/was married, member of armed forces, or sailor (§8(1))

§8(1) A will made by a person who is under the age of 18 is not valid unless the person:

1. Is or has been married;
2. Is contemplating marriage;
3. Is member of Canadian Forces
4. Is a sailor and at sea

**AGE REQ**

[at 190]

1. Disabilities of age (under age 18)
2. Unsoundness of mind

* No other disabilities prohibit making a will

**DISABILITY**

**RESTRICTIONS**

[at 189]

## KNOWLEDGE & APPROVAL

### Will can’ be probated if T didn’t know of contents. Propounders must prove. REBUTTABLE PRESUMPTION [T knew + approved if will properly executed]. T didn’t understand ENTIRE will [can’t be probated] or PART will [rest may be probated ***RUSSELL*].**

* Will can’t be probated if testator didn’t know of its contents
* **Propounders** must prove testator knew and approved will’s contexts at execution

**KNOWLEDGE**

**& APPROVAL**

[at 192]

* Executor when he asserts that testamentary instrument is person’s last will
* Party propounding will must prove:

1. Testator satisfies age req in *SLRA*
2. Testator knew and understood contents of will and will has no mistake
3. Testator had testamentary capacity
4. No lack of compliance with formality (non-holograph (written) homemade wills)

**PROPOUNDER**

* Presumed that T knew and approved contents once propounders prove that will properly executed after was read to/by testator and testator appeared to understand it
* i.e. useful when appears that have proper will, but witness died and other disappeared
* presumption rebutted if shows testator didn’t understand contents of will
* if suspicious circumstances, must prove knowledge/ approval affirmatively (higher std)

**REBUTTABLE**

**PRESUMPTION**

[at 192]

*Aids propounders*

* If testator didn’t understand entire will, will can’t be probated
* If testator didn’t understand one clause or made mistake about part of will, rest of will may be probated (*RUSSELL*)

SCOPE

[at 193]

## MENTAL CAPACITY

### MENTAL CAPACITY [person of unsound mind can’t make will]. ***GOODFELLOW* Criteria**: (1) understand nature of acts/effects; (2) understand extent of property of which disposing; (3) not have disorder of mind; (4) not have insane delusion [affirmed in ***HALL***].

* Person of unsound mind can’t make valid will
* Rule protects person who has unsound mind, his assets, his heirs
* Problem: hard to det degree of unsoundness
* Two types of unsound mind (*GOODFELLOW*):

1. General lack of capacity – caused by disease, congenital defect, age
2. Insane delusions

* ***GOODFELLOW* Criteria for soundness of mind – testator must:**

1. Understand nature of acts + effects of acts
2. Understand extent of property of which disposing
3. Not have disorder of mind poison affection or poison sense of right
4. Not have insane delusion influencing will (affirmed in *HALL*)

TIP: ask open-ended questions for Criteria.

**MENTAL**

**CAPACITY**

[at 193]

### Two types of unsound mind: (1) general lack of capacity [***RE DAVIS*** laymen of good sense/ doctors can provide good evidence]; (2)insane delusions [***SKINNER*** irrational belief].

* ‘sound disposing mind’ means testator understands nature/ extent of property, moral claims of dependants, reasons for excluding claimants (***HARWOOD***)
* Testator may be moved by ‘capricious, frivolous, mean/ bad motives to gratify spite or pride’ – will still valid (*BOUGHTON*)
* Testator makes will and commits suicide, ~has testamentary capacity (*POPOWICH*)
* Look to nature of act to be done and consideration of all circumstances (*MARSH*)
* Memory is insufficient; testator must have disposing memory with reason (*MARQUESS*)

***RE DAVIS*** different solicitor

FACTS:

* Mrs D (testator) had 4 wills. Suffered medical issues. Lost mental capacity. No memory
* Got infatuated with elderly male. Took clothes off in front of opposite sex
* Made new will with different solicitor who didn’t closely inquire her affairs
* Mrs D left her estate to non-existent cancer society

DECISION: Lacked capacity, will void

* Justice/injustice of disposition casts light upon question of capacity
* Evidence of testamentary capacity is practical question
* **‘laymen of good sense’ and doctors** can provide good evidence
* Evidence of people surrounded by testator often better evidence than doctor’s evidence

**1. GENERAL**

**LACK OF**

**CAPACITY**

[at 195]

* Court often prefers evidence of close disinterested non-medical witnesses over physician

(*LEGER, RE DAVIS*)

* Physician’s evidence that testator had capacity to execute simplest of wills with simple dispositions is highly valuable for court
* Testator incapable of managing property doesn’t nec lack testamentary capacity (differ)
* Testator can’t revoke will made while capable, after becoming incapable
* Testator with manic depressive symptoms has capacity to make will when not affected

*Physician vs relatives’*

*evidence*

*Situations*

* Person is generally sane and yet suffer from delusions that affect capacity to make will

Means **irrational belief in state of facts that are not true (***GOODFELLOW*)

* **If delusion is one that can influence dispositions in will, will may be invalid** even if delusion wasn’t manifest at time will made, but was latent (*GOODFELLOW*)

***SKINNER*** incestuous relationship

FACTS:

* Testator made Will 1. Left large estate/ money to wife + son
* Testator married with ‘sugar baby.’ Testator left less to ex-wife + son
* Ex-wife + son challenged will. Argued Testator under **insane delusion** – they had incestual relationship. This perverted judgement. Testator incapable of making will
* Testator in mental asylum. Solicitor didn’t know of incest rumour.

SCC DECISION: Held – will valid

* Will not irrational nor unjust. If under **insane delusion**, would leave less
* Will not void if alleged insane delusion can be explained

i.e. testator didn’t leave anything to son, had business dispute with son

* If no delusion but instead suspicion or doubt or indifference, will must stand

***ROYAL TRUST***  onus

ONUS on propounder of will to prove capacity, including onus of negativing alleged existence of insane delusion

**2. INSANE**

**DELUSIONS**

[at 204]

* Onus of proving capacity always lies on those who propound the will – EXECUTORS

[*BARRY v BUTLIN, ROBINS*] [Note: it is different for undue influence]

* If one of parties raises issue of capacity, trial is req and capacity must be proved on balance of probabilities. Will must thus be proved in **SOLEMN FORM.**
* After probate in **COMMON FORM** is granted, onus shifts to those attacking will to show lack of capacity (*BADENACH*)

McNamara ARG: this is not good law

ONUS

[at 212]

*Common and*

*Solemn form*

### SUSPICIOUS CIRCUMSTANCES [will doubtful]. ***VOUT v HAY*** [law on suspicious circumstances]. ***DOHERTY*** is app. ***BANTON*** is app. If T gives instructions while capable, but becomes incapable[***PARKER***] or doesn’t remember [***RE BRADSHAW***], will is valid.

* Will prepared under circumstances which raise well-grounded suspicion that it doesn’t express mind of testator (*BARRY*)
* While beneficiary is not guilty of undue influence or fraud and gift may be proper, there are circumstances which arouse suspicion of court
* Court not ought to pronounce in favour of will unless suspicious circumstances removed (*BARRY*)
* Will is prepared/ preparation is obtained by person who takes benefit under will
* i.e. disabled testator unable to visit solicitor and asks family member to give instructions to solicitor for will

**SUSPICIOUS**

**CIRCUMSTANCES**

[at 215]

***VOUT v HAY*** [at 217] Suspicions Circumstances Law

Facts:

* Testator (age 81, alone, lived on farm) murdered. Left WILL (2), to acquaintances and nephew.
* However, WILL (1) (20 year ago), left everything to brother and sister

BLL: [sum in *SCOTT* by Justice Cullity]

1. **Person propounding will has legal burden of proof with respect to execution, knowledge and approval, and testamentary capacity**
2. **Person opposing probate has legal burden of proving undue influence**
3. Std of proof on each above issues is civil std of proof on balance of probabilities
4. In attempting to discharge burden of proof of knowledge and approval and testamentary capacity, propounder is aided by **rebuttable presumption**

Upon proof that will was duly executed with requisite formalities, after having been read over to or by testator who appeared to understand it, it will generally be presumed that testator knew and approved of contents and had necessary testamentary capacity (*VOUT*)

1. This presumption ‘simply casts evidential burden on those attacking will’ (*VOUT*)
2. This 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.’ Legal burden reverts to propounder
3. Existence of suspicious circumstances doesn’t impose higher std of proof on propounder of will than civil std of proof on **balance of probabilities**. However, extent of proof required is ∞ gravity of suspicion
4. Well-grounded suspicion of undue influence will not, *per se*, discharge burden of proving undue influence on those challenging will

Notes from *VOUT*:

* Extent of proof req ∞ gravity of suspicion. Degree of suspicion varies with circumstances
* Suspicious circumstances may be raised by:

1. Circumstances surrounding preparation of will
2. Circumstances tending to call into question capacity of testator
3. Circumstances tending to show that free will of testator were tainted by coercion/fraud

* All 3 circumstances affect burden of proof for knowledge/ approval and testamentary capacity
* Circumstances affecting mental capacity of testator to make will affect burden too
* Propounder has legal burden:
* Due execution, knowledge and approval, testamentary capacity
* Propounder aided by **rebuttable presumption**
* Upon proof will was duly executed with requisite formalities, after being read over to/ by testator who appeared to understand it, it is ~presumed that testator knew + approved of contents and had necessary capacity
* Where suspicious circumstances present, presumption is spent and propounder reassumes legal burden of proving knowledge + approval

[at 221]

Propounder onus.

Opposing probate onus.

[at 225]

***DOHERTY*** App of *VOUT*

* Daughter (D) told Testator (T) home will be sold in Will 1, left = to all children
* T didn’t want that. T made Will 2 which left most estate to D
* T consulted with lawyer and accountant. Evidence showed T had capacity
* Held: T had capacity. Suspicions removed
* Onus not on D to disprove undue influence

***BANTON*** App of *VOUT*, omnibus

FACTS:

* Mr. Banton (testator, age 86) married waitress Muna (age 31). Close attachment
* Muna persuaded Banton to marry her
* Banton (cash cow) left entire estate to Muna the cash mooch + POA control over assets
* Prior will left estate equally to children. Banton died. Children sued

CAPACITIES: App of *VOUT*

* Banton appreciated nature of testamentary act + extent of his assets when gave to Muna
* But, no longer understood moral claims of children. Had **delusion** due to mental disorder
* Delusion activated by relationship with Muna
* **Banton didn’t satisfy *VOUT* Test for sound disposing mind**

MARRIAGE

* Marriage was valid
* Test for marriage has lower std than test for capacity
* Test for marriage req: understand nature of marriage relationship and responsibilities
* Banton had sufficient capacity to enter into marriage and not coerced into it

HELD:

* Banton died intestate
* Muna entitled to share on his intestacy

**KEY CASE:**

***BANTON***

Suspicious

circumstances,

unsound mind,

undue influence,

marriage

[at 226]

* If testator gives instructions for will while capable, but executes will while incapable, will is valid

***PARKER***  cognitive ability req

BLL:

* If testator gave instructions to solicitor to make will, and solicitor prepares will, all that is nec to make it good will is that testator should think thus far:

‘I gave my solicitor instructions to prepare will making certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the doc which is put before me as carrying it out.’

* Where testator is capable of understanding will when executing will, but testator doesn’t remember/ understand instructions to solicitor after, will is valid (*RE BRADSHAW*)

WHEN CAPACITY

IS REQ

[at 229]

***RE BRADSHAW***  timing

* Relevant time for having capacity to make will is when instructions are given
* If person has capacity, he may make good will later, so long as he knows that he is executing will for which he has previously given instructions and is physically capable of showing his assent
* If instructions give through intermediary, apply rule with caution (*CALDERARO*) at 232
* It is possible that person who ~doesn’t have mental capacity recovers sufficiently during lucid intervals to enable to make will. Onus on one who alleges capacity (*BINNS*) at 232

## UNDUE INFLUENCE

* Pressure of another which ‘**overpowers the volition** without convincing the judgement’ and will of testator; i.e. importunity, moral command, escaping from distress of mind or social discomfort
* Must have **coercion**. Mere talking to T before death can qualify (*WINGROVE*)

Inter-vivos Gifts

* If person receives gift in position to exert undue influence and stood in fiduciary/ confidential relationship to person, presumption of undue influence is **raised** (*RE CRAIG*)

**UNDUE**

**INFLUENCE**

[at 232]

* Onus of proof is on **person alleging** undue influence at CL [CC mental capacity] (*MARSH ESTATE*)
* It doesn’t matter whether undue influence did not benefit person exercising it, but someone else (*MARSH ESTATE*)
* Testator acting on **inaccurate facts** reported to him by beneficiary is not undue influence
* Undue influence is species of **FRAUD.** Thus, will can be contested on BOTH (*CROMPTON*)

ONUS

[at 233]

## FRAUD

* Involves lie by which liar persuades testator to believe in ‘facts’ that are false
* i.e. testator acts on lie by making will or testamentary gift that he wouldn’t otherwise make, will or gift can be set aside (John POYSER)

**FRAUD**

[at 240]

# **[9] SOLICITOR’S DUTIES**

### Duty that solicitors owe in taking instructions for will

[Process of advising client, taking instructions, ensuring will is drafted according to client’s wishes]

### Duty that solicitor owes to (potential) beneficiaries or will

## TAKING INSTRUCTIONS FOR A WILL

### ***RE WORRELL*** [what not to do]. JOINT RETAINERS [make clear acting as if only one client, no CON].

* Solicitor brought in to ascertain mind and will of testator (*MURPHY*)

PURPOSE

[at 916]

***RE WORRELL*** What not to do

Improper solicitor conduct:

* Prepared will for testator whom solicitor never acted for and saw; knew testator was age 82
* Drew will without knowledge of testator’s estate and size
* Drew will leaving substantial portion of estate to person who consulted him
* Made changes to will from original letter without any consultation with testator
* Did not keep docket entries/ records

Held:

* Improper for solicitor to draft will without taking direct instruction from testator
* Improper that testator did not attend personally when will executed

IMPROPER

[at 916]

* Solicitor acting for two clients under joint retainer
* Solicitor must ask as if two parties are only one client
* Must tell client no info is CON
* If conflict btw parties, lawyer may need to withdraw
* Hold docs for both under one file
* Docs available to either party at any time
* If making change, must tell other party
* Mutual wills. If not mutual wills, put such provision in retainer agreement

JOINT

RETAINERS

## DUTY OF CARE TOWARD BENEFICIARIES

### ***HEDLEY BYRNE*** [beneficiaries can get damage from negligent solicitors]. ***WHITE*** [principle extended].

* Disappointed beneficiaries can receive damages from negligent solicitors
* Duty of care of *HEDLEY BYNE* can be extended in favour of disappointed beneficiary who, at relevant time, is unaware testator engaged solicitor to create will (*WHITE v JONES*)

***HEDLEY BYRNE*** Principle

BLL:

* If (P) seeks info from (D) who possesses extraordinary special skill or knowledge, if (P) trusts (D) to exercise due care, and if (D) knew or ought to have known of that reliance, then (D) owes a duty of care to (P)
* If (D) breaches standard of care by making negligent misstatement, then (P) is entitled to compensation for any resulting econ loss, unless (D) disclaimed liability

DUTY OF CARE

[at 922]

*YES. Extension of*

*HB&H*

***WHITE v JONES*** Principle extended

Facts:

* Senior (testator) disinherited daughters after quarrel. Instructed clerk
* Senior made up with daughters. Prepared new gift. Informed clerk
* Firm received letter. Nothing done. Clerk on vacation
* Senior died. Daughters brought axn for damages for negligence

BLL:

* Drafting solicitor has obligation legally in negligence to beneficiary under will
* If solicitor makes negligent mistake, can be liable in negligence to disappointed beneficiary

Decision:

* Other categories of special relationship have been treated as sufficient to create special relationship to which law attaches duty of care
* By accepting instructions to draw will, solicitor does come into special relationship with those intended to benefit under it in consequence of which law impose duty to intended beneficiary to act with due expedition and care in relation to task on which he has entered
* Imposition of liability can improperly compromise lawyer’s undivided loyalty to client

Creates incentive for lawyer to pressure client to sign will before due consideration to avoid liability to potential third-party beneficiaries

* Solicitor doesn’t owe duty of care to beneficiaries under previous will (*GRAHAM*)

# **[10] FORMAL VALIDITY OF WILLS**

* To make valid will, must adhere to formalities prescribed by law

## ATTESTED WILLS

### **§3-7(3) *SLRA*** [formal req]. Symbols fine [***MURRAY***]. *AMANUENSIS* fine [***RE: WHITE***]. All things presumed to be done correctly, if no evidence [***RE REVA***]. PRESUMPTION OF DUE EXECUTION [***YEN ESTATE***]. ***CHESLINE*** [witness need to know attesting]. **§11-14 *SLRA*** witness provisions.

* Doc signed by testator at end and attested by 2 witnesses

Formal *SLRA* Requirements:

**§3** – will is valid only when **in writing**

**§4(1)** – will is not valid unless [detail where and how it’s signed]

1. At end its signed by testator or some other person in his presence/ his direction
2. Testator makes/ acknowledges signature in presence of 2+ attesting witnesses present at same time
3. 2+ attesting witnesses subscribe (sign) will in presence of testator

**§7(1)** – signature must be placed at, after, following, under or beside or opposite to end of

will so it is apparent T intended to give effect by signature

**§7(2)** – will is not rendered invalid by circumstance that

1. Signature doesn’t follow or isn’t immediately after end of will
2. Blank space intervenes btw concluding words of will and signature
3. Signature [placements . . .]

**FORMAL/**

**ATTESTED**

**WILL**

[at 279]

**§7(3)** – the generality of sub (1) is not restricted by enumeration of circumstances set out in sub (2), but **signature** in conformity with §4, 5, or 6 or this section **does not** give effect to:

1. Disposition or direction that is underneath signature or that follows signature; or
2. Disposition or direction inserted after signature was made

* If T’s handwritten name is at top of will, not end and T didn’t acknowledge signature to witness who didn’t see T sign it, will void (*DALEY*)
* There is only **one signed copy of will**. Second would revoke. Make photocopies!
* Statutes req will be ‘in writing’
* Includes recognized forms of writing, i.e. handwriting, typescript, printing

***MURRAY*** includes symbols

BLL:

* Will not required to be ‘in words’
* Shorthand notes, symbols, are ‘writing’

**IN**

**WRITING**

[at 285]

* T/ other person in T’S presence and by his direction allowed to sign will
* i.e. testator unable to write because didn’t learn to, can’t due to infirmity
* If someone else signs, attestation clause should state:
* that this is done in testator’s presence and at his request
* If testator unable to read, state will was read over and he understood it

***RE WHITE*** mental state deteriorated, must be assisted

BLL:

* If testator’s mental state deteriorated and req assistance, and testator sufficiently directed will, it is just the same as if testator made will without any assistance
* i.e. Client with Parkinson. McNamara puts hand to help sign. Fine.

***AMANUENSIS***

[SIGNED BY

THE TESTATOR]

[at 286]

Conflicting *SLRA* Provisions

§4(1)(a)– will invalid unless signed at end

§7 – permits some kids of irregular forms of executions

***RE REVA***  maxim, intention

BLL:

* Maxim: *omnia praesumuntur rite esse acta* [all things presumed to be done correctly]
* If intention to carry out formal act (make a will) is est, inference is drawn that on reasonable probability testator did what he intended to do according to law
* Gives effect to intention of testator
* Only applied if no proof one way or the other; i.e. witness dead, disbelieved

**END OF**

**WILL**

[at 290]

**PRESUMPTION OF DUE EXECUTION**

* Presumption when will has proper attestation clause
* Applied, even if there is inconsistent evidence about whether will was completed before it was signed/ attested, so long as there’s credible evidence proving will done

***YEN ESTATE*** Presumption not applied

BLL:

* Presumption not applied if shown that making of will orchestrated by major beneficiary, testator didn’t have benefit of legal advice, and evidence of capacity/ knowledge and approval of will’s contents is unconvincing

§4 *SLRA*

* Req testator either to sign in presence of 2 witnesses who are both present at same time, or, having already signed will, to acknowledge signature in presence of 2 witnesses who are both present at same time
* 2 witnesses must then sign will in presence of testator, although not nec in presence of each other
* Executors must prove **due execution**
* If unable, will fails; i.e. evidence of witnesses conflict about order of wills, no probate

***CHESLINE*** witness need to know attesting

BLL:

* Witnesses need to know they are attesting a will
* Testator signature must be written/ ack by testator in actual visual presence of both witnesses together before either of them attests will

**ATTESTATION**

[at 295]

* If testator signed will out of presence of witnesses, testator must acknowledge signature in presence of both witnesses present at same time (§4 *SLRA*)
* Witnesses must then sign will in presence of testator, although not nec in each other’s presence (§4, *RE GUNSTAN*)

**ACKNOWLEDGEMENT**

[at 298]

* If witness is beneficiary under will, have great potential for fraud
* Gift to witness, is therefore invalid
* However, will itself is not nec invalid

§11 – 14 *SLRA*

§11 – witness who attest will and then becomes incompetent – will is valid

§12 – where will attested by person to whom spouse has beneficial disposition of property,

the disposition is void concerning

1. person so attesting; (b) spouse; (c) person claiming under either of them

§13 – where creditor attests will as witness, creditor is competent to prove execution

§14 – where **executor** attests will as witness, executor is competent to prove execution

NOTE: for POA, executor – but not donee – can act as witness

**BY**

**BENEFICIARIES**

**& OTHERS**

[at 301]

*SLRA*

WITNESS

PROVISIONS

*Creditor*

*Executor*

## HOLOGRAPH WILLS

### **§16 *WILLS & SUCCESSION ACT*** [no need to attest/ other formality]. **§6 *SLRA*** [T must make wholly in own handwriting, no formalities]. ***BENNETT*** [need deliberate/ fixed intention – lacks intention]. ***POPOWICH*** [‘take my money and do things for yourself’ lacks intention]. ***RE CLARKE*** [**§7** formalities for signature position apply]. DOCTRINE OF INCORPORATION [doc valid if property identified in will]. ELECTRONIC WILLS [wavy gravy/ loosie goosy].

* Will written **entirely**/**wholly** in testator’s own handwriting and signed by him; doesn’t req attestation (§16 *Wills and Succession Act*)
* So long court satisfied no fraud, technical failure to comply with formalities should not have effect of voiding will
* However, CAN statute continues formal req for attested wills, although discretion

§16 *Wills and Succession Act*

§16 – will may be made wholly in testator’s own handwriting and

signed by testator without presence/ signature of witness or any other formality

§6 *SLRA*

§6 – T may make valid will **WHOLLY** by his own handwriting and signature, without formality, and without presence, attestation or signature of witness

**HOLOGRAPH**

**WILL**

[at 303]

Ontario

authority

is §6

* Testator must intend to make will + give expression to his deliberate/ fixed and final intention to do so
* Since **holograph** **wills** ~informal, expression often lacking

**DELIBERATE/**

**FIXED FINAL**

**INTENTION**

[at 304]

***BENNETT*** lacking intention

BLL:

* Holograph paper not testamentary unless has deliberate/ fixed final expression of intention to dispose of property upon death
* Will read as a **whole**, according to ordinary and natural sense
* **ONUS** upon party setting up paper to show paper is of character and nature

Held:

* Letter amounted to nothing more than preliminary to a will
* Letter not *animo testandi*

***POPOWICH*** lacking intention

Facts:

* T had bipolar disorder. Married Italian husband. Returned to Canada
* Hospitalized. Committed suicide
* Note to Mom: ‘**take my money and do things for yourself’**

Analysis:

* T had testamentary capacity when wrote note; met req for holograph will
* Will not valid. Didn’t reflect deliberate/ fixed final expression of intention to dispose property on death
* Note simply explanation of illness, love for Mom and husband
* Meaning: Mom should do with money she received whatever she wanted
* Held: money given to husband in formal will
* Testator may use printed form of will, from stationer and fill in his testamentary intentions on form
* Problem: doc not entirely in his handwriting
* While only handwritten portions may be admitted to probate, not automatic. Must clearly include words of disposition (*RE FOREST*)

Compare:

1. ‘I give, devise, and bequeath all my real and personal estate of which I may die possessed in the manner following…all residue of my estate’ (*RE FOREST*) [probate not granted]
2. ‘To the above I bequeath $500 each. To the following institutions whatever is left divided equally’ (*SUNRISE*) [req of disposition clearly met, probate granted]

**PRINTED**

**WILLS**

[at 308]

* Formalities of execution of formal will are, *inter alia*, that it be signed at its end by testator or by someone authorized by testator in his presence

***RE CLARKE*** holograph wills

BLL:

* Position of signature in holograph will not bar to doc being valid, but…
* **§7 *SLRA* – formalities respecting position of signature apply to holograph wills**
* §7(3) *Ontario Act* – signature in holograph can’t give direction if text underneath

Held:

* Court refused probate
* Using initials is signature. Will valid (*RE BRIGGS*)

**FORMALITIES**

[at 310]

* Although formal will is normally changed by codicil executed with same formalities, this is not necessary
* Holograph codicil is apt to amend formal will as well
* Holograph codicil must **manifest present intention to change will**
* Expression of future intention is **insufficient** (*RE KINAHAN*)

TIP; use word ‘codicil’ a lot to make clear doc is codicil

**HOLOGRAPH**

**CODICILS TO**

**FORMAL WILLS**

[at 313]

* Issue: incorporation of non-holograph doc into holograph will

**DOCTRINE OF INCORPORATION:** permits existing doc to be

incorporated into will if it is property

identified in will

***RE DIXON*** holograph will

* only handwritten words can be tendered for probate
* since mean nothing, probate refused

***RE CHAMBERLAIN*** states opposite. ONCA hasn’t settled issue [at 316]

**INCORPORATION**

**BY REFERENCE**

**OF NON-HOLOGRAPH**

**DOCS**

[at 316]

## ELECTRONIC WILLS

* Wavy gravy. Little jurisprudence and no statutory provisions. Hard to define characteristics/ validate will

# **[11] REVOCATION OF WILLS**

* Revoking will is testamentary act. T must have same capacity to revoke as to make a will

## VITIATING FACTORS

### Will revoked if mistake, lack of capacity, undue influence (***HUBLEY***), fraud, inadvertence.

* Revocation of will fails if:
* Revocation doesn’t meet statutory req
* Mistake, lack of capacity, undue influence (*HUBLEY*), fraud, inadvertence (accident)
* i.e. lack of capacity – if lacks capacity when destroying will, will not revoked

***HUBLEY*** undue influence

Facts:

* Mom (testator) made will for sons D and P. D didn’t care for Mom. P did, had HIV.
* Will 1: estate left equally to D and P. Will 2: estate left fully to P.
* D went to Mom’s home, wrote ‘VOID’ on will, yelled and screamed
* Months later, Mom mentally incapacitated

Decision: Will 2 valid.

* Revocation of Will 2 invalid because D exercised undue influence
* Mom sick, old, upset by D’s fighting

VITIATING

FACTORS

[at 331]

## REVOCATION BY OPERATION OF LAW

### Change in circumstances, MARRIAGE. **§15(1) *SLRA*** [will revoked by marriage, not CL relationship]. ***BANTON*** [marriage lower std for mental capacity than testamentary capacity]. CONTENPLATION OF MARRIAGE will valid [**§16 *SLRA*** make clear intentions]. Partial MARRIAGE DISSOLUTION [**§1 *SLRA***].

* Often have change in circumstances of testator, especially **marriage.**
* Was thought appropriate to revoke person’s will if person subsequently married
* If no new will made, spouse/ issue become entitled to deceased’s estate. Intention presumed
* Some exceptions: (i) wills made in contemplation of marriage

(ii) wills made pursuant to power of attorney

**§15(a)** *SLRA* Will or part of a will is revoked only by (a) marriage \* [not CL relationship]

* Possible to contest marriage
* Marriage may be (i) **void** – if party lacked capacity to consent to marriage or mistaken

Challenged by personal rep and **any person** with fin interests

(*BANTON* at 334)

(ii) **voidable** – if formal req not followed, testator coerced, or consummate\*

Only challenged by living parties

* **Marriage doesn’t req great deal of mental capacity**

i.e. testator may lack capacity to make will, but have capacity to marry (*RE MCELROY*)

CC: testamentary capacity requires more (*GOODFELLOW, HALL*)

**BY**

**MARRIAGE**

[at 333]

MARRIAGE

VALIDITY

[at 334]

**Lower std**

**than will**

***BANTON*** valid marriage

* Will invalid under testamentary capacity
* Will signed under undue influence
* However marriage is valid – Muna gets 200,000, then 1/3 or ½ via Part II *SLRA*

MARRIAGE

* Marriage was valid
* Test for marriage has lower std than test for capacity
* Test for marriage req: understand nature of marriage relationship and responsibilities
* Banton had sufficient capacity to enter into marriage and not coerced into it

***BANTON***

[at 334]

* Void marriage doesn’t revoke will; marriage never existed in law
* Voidable marriage revokes will, unless it is avoided. If avoided, marriage deemed not to exist

TIP: If client remarries again and has void will, make a new will

* Person about to marry may make will (provision) for future spouse prior to marriage
* Must make clear that this is **testator’s intention** (§16 *SLRA*)
* i.e. write will ‘in contemplation of marriage’ with X
* Contemplation must relate to will as a whole, not part (*RE COLEMAN*)

**§16(a)** – Will not revoked if will has declaration made in contemplation of marriage

**CONTEMPLATION**

**OF MARRIAGE**

[at 337]

* i.e. Have will. Marry. Will not revoked unless spouse **elects** to take under will
* will can make provision for surviving spouse even though will is not made in contemplation of marriage
* Election can save will that would otherwise be revoked because it doesn’t contain declaration that it is made in contemplation of marriage
* i.e. T leaves property ‘to my wife, X,’ and later marries X and then dies, X can elect to take under the will, thereby saving the gift

**§16(b)** – Will is [not] revoked if spouse of testator elects to take under will, by instrument

in writing signed by spouse and filed within one year after death . . .

* Must file in office of Estate Registrar for Ontario

**ELECTION**

[at 342]

*Not often*

* Statutes suppose testator doesn’t wish to benefit former spouse
* i.e. testator doesn’t explicitly intend in will to override §17(2) – (*RE BILLARD*)

§17 – partial marriage revocation – *SLRA*

§17(1) – Subject to sub (2), **will is not revoked** by presumption of intention to revoke it

on ground of change in circumstances

§17(2) – Except when **contrary intention** appears by will, where, after T makes a will, his

marriage is terminated by judgement absolute of divorce or is declared a nullity,

1. a devise or bequest of beneficial interest in property to his former spouse
2. an appointment of his former spouse as executor or trustee . . .

are **revoked** and will shall be construed as if former spouse predeceased T.

i.e. T leaves gift to X’s spouse. X divorces. **X’s spouse is still entitled to gift.**

If X remarries, his second spouse is not entitled to gift in absence of contrary intention

* contrary intention to revoke gift must appear from will and not from evidence of surrounding circumstances (*RE BILLARD ESTATE*)

MARRIAGE

DISSOLUTION

[at 348]

*Partial revocation,*

*not full*

## REVOCATION BY ACT OF TESTATOR

### **§15 *SLRA*** [will revoked by (b) another will (c) writing]. T can revoke by sub doc [have intention to revoke ***BATES***]. T can PHYSICALLY REVOKE by (i) physically destroying and (ii) having intention to revoke [**§15(d) *SLRA*** ‘burning, tearing, otherwise destroying’]. ***EJUSDEN GENERIS*** for **§15(d) *SLRA***. If destroyed BY ANOTHER, must do in presence + intention of T (***DELACK***).

* Will may be revoked by testator by: (i) subsequent doc stating intention to revoke, i.e. codicil

(ii) destroying will

* Printed and professional wills commence by revoking all previous testamentary docs
* Holograph wills may not have ‘I hereby revoke all previous wills’ clause

**§15** – will/ part of will revoked only by

**(b)** another will [or] (c) writing (i) declaring intention to revoke (ii) . . .

**ACT OF**

**TESTATOR**

[at 351]

* Must be made with statutory formalities required to make will
* Must declare intention to revoke
* May revoke holograph or privileged will (*RE GOSSAGE*)
* Not nec for testator to state in subsequent will/ codicil that he is revoking previous wills
* Court will still revoke former will if **intention to revoke** can be inferred (*BATES*)
* i.e. Codicil doesn’t alter disposition of Farm A in will (*RE DAVIES*)

NOTES:

* Once will (or part of will) is revoked, will remains revoked even though subsequent gift fails (*RE DAVIES*). If there is merely inconsistency btw two docs and gift in last one fails, gift if first stands unrevoked
* **‘THIS IS MY LAST WILL’** doesn’t revoke former will, unless it is T’s intention

If Will 2 disposes of all T’s estate, even though it doesn’t appoint executor, while Will 1 did, Will 1 is *prima facie* revoked (*HENFREY*)

* Oral declaration is insufficient to revoke will (*RE MCLEAN ESTATE*)
* Holograph will can revoke formal will (*RE GRIFFITHS*)

**BY**

**SUBSEQUENT**

**DOC**

[at 352]

* If will is (i) physically destroyed and (ii) have intention to revoke, will is revoked
* Normally need complete destruction. (i) and (ii) must coincide
* If will partly torn, but contents remain legible, presumption done by testator

Burden of proving was done ***animo revocandi***on person alleging revocation

* If portion cut out, will is **not revoked** unless rest of will can’t stand without parts
* Cutting testator’s/ witness’s signature revokes will (*EVANS*)

§15(d) *SLRA* – [satisfy all req] A will or part of a will is revoked only by

(d) burning, tearing or otherwise destroying it by T or by some person in his

presence and by his direction with intention of revoking it

* §15(d) speaks only of ‘burning, tearing or otherwise destroying’ will. ‘Tearing’ and ‘destroying’ is read ***ejusdem generis*** with first two. When T merely draws line through will and writes ‘VOID/ REVOKED’ but keeps will, will is not revoked (*CHEESE*)

***LEONARD*** removing pages

* Testator removed relevant page from will. Inserts correct page to have it executed
* Held: factual det. Destroyed validity of whole will

**BY PHYSICAL**

**ACT**

[at 356]

**ON EXAM**

NOTES:

* If will can’t be located after T’s death, rebuttable presumption T destroyed will ***animo revocandi*** (*KENNEDY*). Presumption not operative if T lacks capacity to revoke
* If propounders of will prove that, although T burned will, T did not do so ***animo revocandi***, but by accident, will can be probated
* Testator left will with another person for safekeeping; i.e. solicitor
* If testator wants to revoke will without making new will, must instruct solicitor to destroy
* Statute req if another destroys will, must be done in presence of testator at his direction
* Validity of execution doesn’t depend on recollection of witnesses

Court infers all due formalities observed (*DELACK*)

**BY ANOTHER**

[at 360]

## ALTERATIONS IN WILL

### **§18 *SLRA*** [complicated – advise to make codicil/ new will instead]. ***RE DOUGLAS*** [when words of alteration are ‘APPARENT’].

**ALTERATIONS**

* Testators may cross out original provision and replace it with another
* Alteration isn’t effective unless complies with statutory req (see at 363 §19 margin req)
* Presumption that changes in will made after will was executed
* Onus on person alleging that changes existed when will executed to prove allegation

§18 *SLRA* – (1) Subject to sub (2), unless alteration that is made in will after will has been

made is made in accordance with provisions of this Part \* the alteration has no effect except to invalidate words or effect of will that it renders no longer **apparent**\* [‘apparent’ discussed in *RE DOUGLAS*]

**IN WILL**

[at 362]

(2) [How validly made] An alteration \* is validly made when signature of T

and subscription of witnesses to signature of T to alteration, or, in case of will that was made under §5 or 6, signature of T, are or is made,

(a) in margin or in some other part of will opposite or near to alteration; or

(b) at end of or opposite to memorandum referring to alteration and

written in some part of will

* If someone wants to make alteration, say NO. Make codicil or new will instead.

***RE DOUGLAS*** When words of alteration are **apparent**?

Facts:

* Testator made will. Before death, spilled will with whiteout. Didn’t sign alteration.

BLL:

* When alteration (not signed attested) obliterates original words, original words revoked
* Alteration forces question is words are ‘**apparent’**
* If words are decipherable/ apparent, they will be restored to will and included
* If words aren’t, extrinsic evidence can’t est that they were and blank space remains

Test for Not Being Apparent:

‘Apparent’ means optically apparent on the face of the will. A word in will is not apparent if an expert cannot decipher it by any ‘natural’ means, such as holding paper up to light with frame of brown paper around portion attempted to be read or by using magnifying glasses

* Holograph alteration signed by T is effective, as codicil, to change formal will (*RE SCHLEE*)
* Holograph codicil will not be admitted to probate if suspicious circumstances or undue influence (*RE QUANDT ESTATE*)

Holograph

wills

# **[12] CAPACITY OF BENEFICIARIES**

* Situations where capacity of beneficiaries under will called into question

## ILLEGITIMACY

### **§2 *CHILDREN’S LAW REFORM ACT*** [children born outside marriage inherit SAME as inside marriage]. To overcome, insert BOOM CLAUSE.

* Children born outside of marriage inherit as if born within marriage

§2 – *Children’s Law Reform Act*

1. – \* unless a contrary intention appears, a reference to person or group or class of persons described in terms of relationship by blood or marriage to another person,
2. Includes person who comes within that description by reason of relationship of parent and child set out in this Part; and
3. In respect of child conceived through assisted reproduction or through insemination by a sperm donor, doesn’t include,
4. A person who provided reproductive material or embryo for use in conception if that person is not parent of child . . .
5. – Sub (1) applies to an Act, regulation or other instrument made under Act, regardless of when it was enacted or made
6. – [before 1978, Act doesn’t include people outside marriage. After 1978, includes]

§3 – outside of marriage – *SLRA*

\* unless contrary intention is shown in will, reference to person in terms of relationship to another person det by blood or marriage shall be deemed to include person who comes within description despite fact he \* was born outside marriage

* Client can add **BOOM – Born Outside Of Marriage Clause** [not for every will]

T can restrict will only to beneficiaries work within marriage

NOTES:

§24 of *Estates Administration Act* [at 411]

1. Executor shall make reasonable inquiries for persons who may be entitled \* through birth outside of marriage
2. Executor is not liable for failing to distribute property to [such] person where
3. Executor makes inquiries and entitlements of person not known at time and
4. Executor makes search of records of Registrar General relating to parentage . . .

[may be required to hire private investigator or advertise where child is thought to be]

* Although executor may not be liable, §24 doesn’t shield beneficiaries
* §24 applies whether T died testate or intestate. Executor/ administrator must inquire
* Solution to not trigger §24 is to insert **BOOM Clause**

**ILLEGITIMACY**

[at 409]

BOOM Clause

## ADOPTION

### **§217 *CHILD YOUTH & FAMILY SERVICES ACT*** [adopted children inherit as if born to adoptive parents].

* Adopted children, for all purposes, as though they were born to their adoptive parents
* Adopted children inherit from their adoptive parents and kin – not biological (*RE MARSHALL)*
* Estates of adopted children pass to adoptive parents and kin – not biological
* Doesn’t matter when adoption took place, before/ after will **(§216 *CYFSA)***

§217 *Child Youth and Family Services Act*

§217(1) ‘adopted child’ means person who was adopted in Ontario

(2)(a) adopted child becomes child of adoptive parent and adoptive parent becomes parent of

adopted child; and

(b) adopted child ceases to be child of person who was his parent before adoption order made

and that person ceases to be parent of adopted child, except where person is spouse of

adoptive parent . . .

(4) [reference in will or other doc] reference to person or group or class of persons described in terms of

relationship by blood or marriage to another person is deemed to refer to or include \* person who

comes within description as result of adoption, unless contrary is expressed

NOTES:

* Children adopted by **stepparents** can’t inherit from stepparent or relatives unless will states contrary intention (*MARCY*)
* However, *MONTGOMERY ESTATE* (2006) states that **stepchildren** are included
* Solution: include clause in will excluding stepchildren

FOREIGN ADOPTION:

§218 *Child Youth and Family Services Act*

§218. An adoption effected according to law of another jurisdiction \* has same effect in Ontario as adoption

under this Part

**ADOPTION**

[at 412]

## WITNESSES

### If beneficiaries attest, will VALID, yet dangerous. Booby traps in **§12 *SLRA***. ***RE TROTTER*** [solicitor is beneficiary, valid].

* Beneficiaries are ~asked to attest wills, especially homemade wills. Attestation **VALID**

Yet, fraught with dangers

* Legislation long invalidated gifts to witnesses. Same if witnesses is beneficiary’s spouse
* §12 *SLRA* is why I must never have witnesses be beneficiaries or spouses of beneficiaries

§12 – *SLRA*

1. Where will attested to whom then spouse a disposition is given, the disposition is void to:
2. Person so attesting; (b) spouse; or (c) person claiming under either of them
3. Where will is signed for testator by another person [***amanuensis*]** to whom then spouse a disposition is given, disposition is void for
4. Person so signing; (b) spouse; or (c) person claiming under either of them
5. Where **SCJ** is satisfied that neither person attesting for spouse exercised any improper or undue influence, disposition is not void
6. Where will attested by two+ not within (1) or where no attestation nec, disposition not void

**WITNESSES**

[at 429]

***RE TROTTER*** unattested codicil

Facts:

* T created will and 2 codicils. Will named T’s solicitor as executor
* Will stated solicitor entitled to all professional charges for services to estate
* Solicitor attested will and Codicil 2, but not Codicil 1

Issue:

* Can solicitor charge for services?

BLL:

* Invalid will itself may be valid instrument when referred to in valid codicil
* Valid gift in will not rendered invalid by attesting codicil
* Although gift by valid will to attesting witness is void, such gift may be rendered effectual if will is republished by codicil referring to will but not attested by legatee
* Legatee must point to instrument giving him legacy not attested by himself before has right

Decision:

* Solicitor can point to Codicil 1 which states his benefit
* Has not lost his benefit by not attesting Codicil 1

## SUPERNUMERARY WITNESSES

### Two+ witnesses attest will. One is beneficiary. **§12(4) *ONTARIO ACT*** [validates gift].

* Problem: two+ witnesses attest will. One is beneficiary under will
* §12(4) *Ontario Act* **validates gift** in this situation

BEQUESTS TO EXECUTORS (Notes)

* Executor who attests will is not entitled to compensation (which amounts to a gift) if will provides for it (*RE BARBER*). Contrary intention will reverse presumption

‘I direct my estate trustee shall be entitled to proper compensation…not withstanding that he is a beneficiary under my will’

* Clause makes clear legacy/bequest is executor compensation (add to §61 *Estates Act*)

**SUPERNUMERARY**

**WITNESSES**

# **[13] TESTAMENTARY GIFTS**

## SUBJECT MATTER

* What can T dispose of by will? **ANYTHING T owns except property T ceases to own at death**

EXAMPLES:

* Life estate
* Contingent interest

\*Not joint tenancy

* T can’t dispose of more than he owns (*CHERRY*)
* T can only dispose of interest in property
* **T can’t dispose of expectancy or *spes successionis***

**EXPECTANCY:** something that T hopes to receive but may not

i.e. hope of inheriting property

* Beneficiary under will only has expectancy while T lives;

Expectancy is not property (*DEL GRANDE*)

THE LAW

[at 514]

## TYPES

### Testamentary gifts: DEVISES, BEQUESTS, LEGACIES. Terms: ADEEM, ABATEMENT. Gifts are: SPECIFIC, GENERAL, DEMONSTRATIVE, RESIDUARY.

**DEVISES:** gifts of real property

**BEQUESTS:** gifts of personalty (personal movable property) [i.e. transfer piano to L]

**LEGACIES:** gifts of money [i.e. pecuniary legacy – pay to W $1,000]

* Devises, bequests, legacies are classified into four broad categories/ types

Assists court in deciding if gift (i) ceased to exist or (ii) comes into existence after will

Det order in which property is available to pay T’s debts; if gift adeems or abates

**(i) specific; (ii) general; (iii) demonstrative; (iv) residuary gifts**

TESTAMENTARY

GIFTS

[at 515]

**ADEEM:** gift adeems when its subject matter isn’t in estate at T’s death.

Beneficiary receives nothing

**ABATEMENT:** *pro rata* reduction of gifts when there are insufficient funds in estate to

pay debts and gifts in full

* T’s intention determines whether gift is (i) specific; (ii) general; (iii) demonstrative; (iv) residuary gifts
* Contractual obligations don’t prevent person from bequeathing property via will

i.e. transfer each share of BMO to my children

i.e. gift in my account at BMO

* **GENERAL LEGACY** is payable out of general assets of estate; not gift of identified article owned by T nor is it direction to pay money out of specific fund
* It is direction to personal representative to pay/transfer assets described to legatee
* **PECUNIARY LEGACY** is gift of money payable out of general assets of estate **(*RE MILLAR*)**

**GENERAL**

**GIFTS**

[at 516]

* Gift of specified amount or quantity which is directed to be satisfied *primarily* out of particular fund or asset
* Treated as **specific legacy** to extent that it doesn’t abate if fund out of which it is payable is adequate to satisfy it, until estate out of which general legacies are payable is exhausted
* If, however, fund ceased to exist, gift doesn’t adeem, but is treated as **general legacy**
* If gift is to be paid *solely* out of fund, it is **specific legacy**

**DEMOSTRATIVE**

**GIFTS**

[at 519]

Primary over general (***CELENTANO***)

Adding word ‘MY’ makes gift specific

* Gift of identifiable property or object which T has described with sufficient particularity to distinguish it from his general estate
* T not owning asset described when making will doesn’t make asset general gift
* Specific legacy is subject to **ademption**

If specific property no longer exists at T’s death (i.e. destroyed, sold), subject matter of gift is gone, and beneficiary receives nothing

**SPECIFIC**

**GIFTS**

[at 523]

i.e. gift of my account No 569 in BMO at Yonge/Eglinton

* Gift (all assets) that part of T’s estate which he has **not specifically disposed of**
* Includes all T’s property after pecuniary, general, demonstrative, specific gifts are satisfied
* i.e. gifts such as ‘the balance of my estate’ and ‘the rest of my estate’
* **All specific gifts which fail via LAPSE fall into residue** (§20(2)) of *SLRA*)
* If entire gift of residue fails, property passes on **intestacy**
* If part of gift of residue fails, it goes out on intestacy

**RESIDUARY**

**GIFTS**

[at 526]

All assets net of debt after gifts paid out

## ABATEMENT

### *Pro rate* reduction in amount of testamentary gifts when estate insufficient to pay debts. LAW OF ASSENT [personal rep must assent before beneficiary gets property].

* *Pro rata* reduction of amounts/ quantities of testamentary gifts when estate is insufficient to pay debts and gifts in full (***CELENTANO***)
* If T’s debts are not paid and estate is insolvent – has insufficient assets – creditors are entitled to entire estate according to priority/ preference
* General creditors come last and take *pro rata* share of what is left

**CL Order of Abatement for Testamentary Gifts:** **(*CELENTANO***)

(1) Residuary personalty; (2) residuary real property; (3) general legacies, including pecuniary legacies from residue; (4) demonstrative legacies; (5) specific bequests of personalty; (6) specific devises of real property

* Primary fund liable for debts is **residue**. T can always provide otherwise via will

**ABATEMENT**

[at 528]

* Beneficiaries only acquire equitable title to property once personal rep **ASSENTS** to transmission of title
* Acknowledgement by personal rep that asset of T is no longer req for payment of debts of estate, funeral expenses, or general pecuniary legacies’ (*WILLIAMS*).

LAW OF ASSENT

[at 536]

## ADEMPTION

Asset exists at date of will but not at date of death

### Gift sold, given away, lost, stolen, destroyed – beneficiary gets NOTHING! [***RE HUNTER***].

* Occurs when property which is subject matter of specific gift (although exists at date of will) is not in T’s estate at T’s death – sold, given away, lost, stolen, destroyed
* If specific gift has adeemed, beneficiary receives nothing

***RE HUNTER*** cite **§22 *SLRA***, restates

If T received proceeds of insurance for destroyed property, owns property which he took in exchange, or holds mortgage which he took back on sale of property, beneficiary cannot claim them.

* T can avoid result by stating intention that beneficiary shall receive specific property

**ADEMPTION**

[at 538]

… and you get

NOTHING!

Occurs by act of T or by act over which T has no control

## DATE FROM WHICH WILL SPEAKS

### Will speaks of DATE OF DEATH, unless CONTRARY INTENTION **(§22 *SLRA***, **BATTEN**).

* Will speaks of **DATE OF DEATH**, unless contrary intention is indicated

**(§22 *SLRA*** and *BATTEN*) §22 applies only to property

**GENERAL**

**RULE** [at 542]

* Courts respect any language in will that displays T’s intention to give only property he owned at **DATE OF WILL**

**CONTRARY**

**INTENTION**

[at 545]

* T must describe property by referring to it as property of certain description he owns at date of will
* Unfortunately, T often uses words such as ‘**now’ and ‘then’**

**TEMPORAL**

**WORDS**

[at 548]

## CHANGE IN NAME & FORM – at 550

* ‘where change is in name or form only but specific thing is substantially the SAME, it is over-refinement to find ADEMPTION’ (***RE BRITT***) [change not sufficient in mortgage to adeem gift].

## TRACING – at 554

* On death, T converts asset to something else (i.e. puts money into different bank account)
* Can what T owned at death be TRACED to what T owned now? (***RE CUDECK***)
* Impossible once funds mixed with other funds in bank account

## ENCUMBERED PROPERTY

* Devisee takes property subject to mortgage **(§32(1) *SLRA*)**

**ENCUMBERED**

**PROPERTY**

[at 568]

# **[14] LAPSE & SURVIVORSHIP**

### DOCTRINE OF LAPSE [gift fails to beneficiary of T; to avoid, T can make substitutionary gift]. DISPOSITION OF LAPSED GIFT [(1) gift falls into residue (**§22 *SLRA***); (2) gift passes on intestacy ***RE STUART***).

### Gift to beneficiary who predeceases T lapses – gift fails

* Applies to gifts to any object (including CRs and charities), power of appointment
* **T can avoid effects of lapse by making substitutionary**, or alternative gift, by naming beneficiary to take if first one should predecease him [i.e. have accruer clause].
* Lapse inherent in **law of survivorship**

i.e. 2 people die at same time, one/both leave property by will to other

**DOCTRINE**

**OF LAPSE**

[at 589]

1. At common law, (i) lapsed devise of real property devolved upon heir

(ii) **gift of personal property lapsed fell into residue (*WRIGHT*)**

[(ii) is statutory law in ON, §22 *SLRA*]

§23 Except where have contrary intention, property \*in devise or bequest [gift] that fails/ is void because of

1. Death of devisee/ donee in lifetime of T or
2. Devise or bequest [gift] being disclaimed or being contrary to law

Is included in residuary devise or bequest \* of will

1. If no residuary gift/ gift is residuary, **property passes to persons entitled on intestacy** (*RE MIDGLEY*, ***RE STUART***)

DISPOSITION OF

LAPSED GIFT

[at 589]

(1) residue

(2) intestacy

## ANTI-LAPSE LEGISLATION

### Ontario LEG doesn’t prevent lapse but provides for statutory substitutionary beneficiaries **§31 *SLRA*** [gift made to person who has spouse/issue and person dies doesn’t lapse but goes to spouse/ issue – not desirable!].

* Doctrine of lapse is inconvenient and contrary to T’s intention
* **T would likely want heirs of relative to take if primary beneficiary dies**
* Ontario LEG doesn’t prevent lapse, but provides for statutory substitutionary beneficiaries

INCONVENIENT

[at 594]

* Where person to whom property is devised/bequeathed for estate dies in T’s lifetime leaving issue, [gift] doesn’t lapse but takes effect as if death of person happened after T’s death, unless contrary intention

**§31 – no lapse – can be TRAP – *SLRA***

Except when a **contrary intention** appears \* where a [gift] is made to a child, grandchild, brother or sister of T who dies before T \* and **leaves spouse or issue** surviving T, [gift] does not lapse but takes effect as if it had been made directly to persons among whom and in shares in which estate of that person would have been divisible,

1. If that person had died immediately after death of T
2. If that person died intestate;
3. If that person died without debts; and
4. If section 45 [preferential share of Part II] had not been passed

* T must leave SPOUSE (married only) or ISSUE (lineal descendants)
* In ON, rule doesn’t apply to class gifts

ONTARIO LAW

[at 595]

i.e. ‘to pay 1/3 estate to Bro. Bro dies. Spouse left. Spouse gets 1/3. T didn’t want that.

To avoid, state in will

## CONTRARY INTENTION

### Anti-lapse LEG applies only if T doesn’t express contrary intention in will

1. Contrary intention expressed if T makes substitutionary gift

CONTRARY

INTENTION

[at 600]

## EXCEPTIONS TO LAPSE

### JOINT TENANTCY [if T gives property to JTs and one dies, other JT takes whole interest; devise default is tenancy in common].

* If T gives property to two+ persons as joint tenants and one predeceases him, other takes **whole interest**
* Under **tenancy in common,** gift does not, unless expressed, carry right of survivorship
* If gift made in tenancy in common and one predeceases T, his interest lapses
* Devises to two+ persons take effect as **tenancies in common,** unless contrary intention

JOINT

TENANCY

[at 603]

## CLASS GIFTS

### Gift to group of beneficiaries who have characteristics in common; i.e. my children, my nephews.

* Gift to group of beneficiaries who have certain characteristic in common;
* i.e. my children; my nephew and nieces
* **Doctrine of lapse doesn’t apply to class gifts**, unless statute provides otherwise
* If member of class dies before T, other members of class take his share (*RE JACKSON*)
* i.e. ‘to my children, A, B, and C’ is not class gift

**CLASS**

**GIFTS**

[at 610]

## CHARITIES

### Lapse applies to charities. However, if general charitable intention *CY-PRES DOCTRINE* invoked [give to another charity].

* Doctrine of lapse applies to gifts for charitable purposes
* If charitable purpose has ceased to exist before T’s death, gift will *prima facie* lapse
* However, if T has general charitable intention, court applies *cy-pres* doctrine to another charity

MORAL

OBLIGATION

[at 612]

* If T’s objective is impossible, Doctrine prevents charitable interest from failing
* Amends terms of charitable trust as closely as possible to original intention of T

***CY-PRES***

**DOCTRINE**

## SUBSTITUTIONARY GIFTS

### If beneficiary should predecease T, will states property goes to someone else. ***COUSEN*** [if sub ben predeceases T and primary beneficiary, gift lapses. ***RE RAMSDEN*** [if ben survives T but dies shortly after, no lapse].

* [alternative gift] T can avoid doctrine of lapse by providing that if beneficiary named should predecease T, property shall go to someone else
* i.e. ‘To A, but if A predecease me, to B, and if B predecease me to C’
* While T can avoid doctrine of lapse, can’t contract out (*RE GREENWOOD*)
* If substitutionary beneficiary predeceases T and primary beneficiary, gift lapses (***COUSEN***)
* If beneficiary survives T, but dies shortly after, no lapse (***RE RAMSDEN***)

SUBSTITUTIONARY

GIFTS

[at 613]

* i.e. ‘To A, his heirs, executors and assigns’
* Gift appears to A an absolute interest, with ‘heirs, executors and assigns’ limitation
* However, if A predeceases T, can argue words are substitution –

there is substitutionary gift to A’s heirs

WORDS OF

LIMITATION OR

SUBSTITITUTION?

[at 616]

## SURVIVORSHIP

### **§55(1) *SLRA****.* [in common death, property of each person disposed as if each survived other].

* If two tenants die in common accident or in circumstances where it is uncertain who died first or person missing – need to det order of death
* §55(1) *SLRA* holds that
* **in common death, property of each person is disposed of as if each survived other**
* property owned in joint tenancy and all joint tenants die, they’re deemed to hold property as **tenants in common** – passes to respective estates
* statutory presumption is unchanged if prove actual order of death (*ADARE*)
* For insurance context, see §194(1) *INSURANCE ACT* AT 627.

**SURVIVORSHIP**

[at 624]

i.e. plane crash

# **[15] CLASS GIFTS**

## NATURE & EFFECT OF CLASS GIFT

### CLASS GIFT [gift to persons with same characteristics and bear some relation to T ***KINGSBURY***)]. If member of class predeceases T, person’s share doesn’t lapse but increases others’ shares. ***KINGSBURY*** [class gift if some ind are named; composite class; interest must vest at SAME time; ‘near the line’ det]. NOTE: **§31 *SLRA*** doesn’t apply to class gifts.

* **Gift to class consisting of persons who are included and comprehended under some general description and bear certain relation to T (*KINGSBURY*)**
* Gift to body of persons, who are normally, although not nec, related to T
* There can’t be class before T’s death – only at T’s death
* Effect of class gift may be modified by substitutionary gift
* **If member of class predeceases T, person’s share doesn’t lapse but increases others’ shares**
* Body of persons uncertain in number; may increase or decrease before/after T’s death
* Amount each member receives depends on # persons in each class

**CLASS**

**GIFTS**

[at 633]

i.e. cousins, children, nephews, 2020 Wills class

i.e. ‘to my family’ *prima facie* means children. i.e. divided equally ‘among my nearest relations, named MacMurray’ (***RE MACMURRAY***).

***KINGSBURY*** – at 640 Class Gift, Important

1. May be class gift if **some of ind of class are named** [i.e. ‘to my nephews including A’ or ‘to C and nieces’].
2. May have **composite class** [i.e. ‘children of A and B.’ NOT ‘gift to A and all children of B’ (***ATTER***)].
3. All interests of members of class must vest in interest **at same time.**
4. If gift to defined groups (bro, sis), class is clear. Once depart, murky water. Case is **‘near the line.’**

*Prima facie* means ‘at first instance’

### GIFT *NOMINATIM* [gift to named individuals; not class gift though collective]. NOTE: **§31 *SLRA*** applies.

* T give aliquot portions of sum of money/ property/ residue to named individuals; gift is not class gift but gift *nominatim* and persons named take as *personae designatae* even though described collectively
* i.e. ‘to my children, A, B and C’ is not class gift; gift to each of named persons
* whether gift is class gift or gift *nominatim* depends on T’s **intentions**

**GIFT**

***NOMINATIM***

[at 635]

i.e. to my 3 bros

## ARTIFICIAL CLASSES

* When T wishes to make one gift to two+ groups of person who don’t share same characteristics and intends that it shall be class gift, T creates **artificial classes**
* i.e. ‘To the children of M and children of E equally’ is gift to **composite class**. Allowed.

**ARTIFICIAL**

**CLASSES**

[at 633]

## DESCRIPTION BY NUMBER

### GIFT *NOMINATIM* [gift to named individuals; not class gift though collective]. NOTE: **§31 *SLRA*** applies. ***RE HUTTON*** [T’s will provided for equal division among persons related to T/ each other. This was class. If were unrelated, wouldn’t be class].

* If T describes class of persons by number, such as ‘to my three brothers,’ *prima facie* gift is not class gift, but **gift *nominatim* –** doctrine of lapse applies (***RE SMITH’s TRUSTS***)

**GIFT**

***NOMINATIM***

[at 643]

***RE HUTTON***– at 640 provision for ‘equal division’ key

Facts:

* T divided estate residue **EQUALLY** among bros and sis’s: A,B,C,D. If any predecease him, survived by child who survive T to take parent’s share
* A,B predeceased T. B’s only child predeceased T

Decision:

* T wanted to leave entire residue to bro/sis’s or children. T created **CLASS**
* Thus, share of B accrued to other members of class (not B’s family)

Hark:

* If will provided for equal division among list of named persons some of whom are unrelated to T and each other, court wouldn’t find class gift

# **[16] POSTPONED PAYMENT**

### ***SAUNDERS v VAUTIER* RULE [***sui juris* beneficiary entitled to indefeasibly vested gift entitled to payment when reaches age 18/majority].

* T gives property to Child A absolutely, but then states A gets property in future at Age *x*
* Direction to pay is separate from words of gift
* In such case, payment is only postponed, not vested

*BICKERSTETH*

PRINCIPLE

[at 695]

* Beneficiary who is *sui juris* (age of majority and mentally competent) and who is entitled to indefeasibly vested gift is entitled to call for payment or transfer **when he reaches age of majority**
* True even if will provides for delayed enjoyment
* Property can’t be simultaneously given and withheld
* Applied in *RE SQUIRE*

***SAUNDERS v***

***VAUTIER***

RULE

[at 695]

# **[17] ACCUMULATION**

### When fund put out at interest, income not distributed, but added to capital. **§(1) *ACCUMULATIONS ACT*** [no disposition longer than **21 YEARS** from death of T]. ***RE ARNOLD*** [21 yrs law].

* When fund is **put out at interest** and income is not distributed, but **added to capital**
* ACCUM **exceeding** permissible period not void, but allowed to take effect for appropriate period
* Surplus income falls into residue (gift of residue) or goes to intestacy (specific gift)

§1(1) *Accumulations Act*

No disposition of any real/ personal property shall direct income \* to be wholly/partially accumulated for longer than:

1. Life of grantor
2. 21 years from date of making *inter vivos* disposition
3. …
4. **21 years from death of grantor, settlor or T…**

(6) Where accumulation is directed contrary to Act, direction is null and void

3(1) Rules \* do not apply to trusts of pensions, retirement allowances, annuities, sickness

**ACCUMULATION**

[at 783]

21 Years limit

* T may not choose more than one of periods permitted by statute
* If T’s directions are unclear, court selects one that most closely approximates his intention
* For course, use **21 Year Period**

**21 Years from T’s Death [at 787]**

* Applies if T directs that certain annuities be paid and that any surplus income not req for that purpose be accumulated during lives of annuitants and then distributed (***RE BENOR***)

***RE ARNOLD*** 21 Yr Limit

* Direction to accumulate is not void in its entirely
* Direction to accumulate is **good for 21 years from T’s death**
* Unless accumulation is (i) for X with vested interest or

(ii) in will express/ implied disposition of accumulation made

Released income to be dealt with upon **intestacy**

* If money bequeathed to minor, can’t be paid until minor reaches age 18/majority

Income must be accumulated, even though no direction in will (***RE DELEMERE’s***)

**ACCUMULATION**

**PERIODS**

[at 787]

## TERMINATING ACCUMULATION

### ***SAUNDERS v VAUTIER* RULE**terminates.

* T directs accumulation of income from fund for certain period and then directs capital and accumulated income be paid to person at age beyond age of majority
* ***SAUNDERS v VAUTIER*** **RULE** terminates accumulation
* if person is *sui juris* and solely interested in property, can transfer when reaches age of majority

***SANDERS***

***v VAUTIER***

**RULE**

[at 793]

## EXCESS INCOME

### If T fails to dispose of surplus income (i.e. through annuity), will must state excess added to capital. ***RE STRUTHERS*** [surplus income falls into residue unless contrary intention in will].

* If T directs payment of limited income (i.e. annuity) but fails to dispose of surplus income
* Will must address what happens to income – usually income accumulated and added to capital

i.e. $50,000 estate pays grandson $100/mo. This is $1,200 per year. Have excess income

* Conversely, if income not sufficient for annuity (periodic payment) will must provide for trustee to pay difference out of capital

***RE STRUTHERS*** – at 801 I f no intention, falls into **residue**

1. Surplus income of specific fund falls into residue.

Surplus income of residue passes to intestacy

1. Accumulated income after 21 years of residue passes to intestacy

Money assessed at date of T’s death

1. Rule of law vs rule of construction

Rule of law: applies whether result consistent or not consistent with T’s intentions

Rule of construction: ascertains intention of T when unclear language used

1. **Surplus income of specific fund falls into residue unless contrary intention in will**

Held: It is rule of law whether result of specific fund invalidly directed to be accumulated falls into residue

* If T gives whole income to Ben, no accumulation
* If T pays Ben annuity monthly, have accumulation
* Result: (i) income > annuity. Have excess [add money to capital through will].

(ii) income < annuity. Have shortfall [pay money out of capital through will].

**NUTSHELL**

# **[18] RULES OF CONSTRUCTION**

### Rules give court flexibility and guidance in interpretation. T’s intention always > rules of construction

* Attribute fictional/ presumed intention to T if words used by T left intention doubtful

GENERAL PRINCIPLES – at 440

* T’s intention is collected from will as whole, read in context

Whole will must be read in context

Identical words presumed to have

* Words with clear meaning in one part of will have same meaning elsewhere

same meaning

Effect given to all words

* Restricts meaning of general word included with words having particular meaning to meaning similar to latter
* i.e. ‘my watches, chains, and studs’ restricted to articles of masculine jewellery

***Ejusdem Generis***

* If T expresses both intentions, and they’re inconsistent, court will give effect to general intention by modifying/ restricting particular

General vs particular intention

* Presumed T intended to dispose of estate and didn’t intend to die intestate

Presumption against intestacy

Presumption of rationality

Presumption of legality

* Court favours construction that benefits T’s heirs/ immediate next of kind over distant relatives. Intention of T voids this favour.
* Equality of distribution presumed. Distribution ***per capita***.

Presumption against disinheritance

Last clause prevails in irreconcilable dispositions

SPECIFIC PRINCIPLES – at 447

**LEGATEES –** only persons to whom pecuniary gift made by will; includes to whom bequests of personalty made

***PER CAPITA*** [**by head]** – default distribution; all beneficiaries take EQUAL amount, even though may be

different generations, stand in different degrees of relationship to T; i.e. gift ‘to A and B

and their children; ‘to the children of A and B’

***PER STIRPES*** **[by stocks or families]** – each stirps/ stock/ family takes equal amount and that amount is then

distributed within that strips, stock/ family; i.e. gift ‘to A and B and C’

# **[19] INCOME TAX**

1. **Creation of two TPs**, deceased taxpayer and estate of deceased taxpayer

* Estate TP created as a result of TP’s death

1. **Legal responsibility of personal reps**–returns for previous years (Voluntary Disclosure Program – VDP) —final T1 Return; T3 Trust return (income earned after death)

* There are penalties and interest if don’t file

1. **CRA clearance certificate** – personal liability of estate trustees if not obtained; (Circular IC82-6)

* All returns must be filed and assessed
* 1 Page form but supplementary info req
* Estate trustees no personal liability but CRA can trace to beneficiaries

1. **Final T1 Return to date of death** from Jan 1st of year of death to date of death

* TP net income (Age Pension, RRSP, income, dividends, rents received, periodic payments, deemed dispositions)

1. **Periodic payments**: i.e. accrual of interest, rentals in final T1 to date of death

* Accrual of interest (GIC’s in our example) from last date paid to date of death
* Apportionment of rents from last date paid to date of death
* Deemed dispositions of capital assets
* Other amounts deemed payable on death (RRSP, RRIF, lump sum pension payment)

1. **Deemed disposition of capital assets on death**: CGs, recapture of depreciation; CLs

* All TP’s deemed to dispose of capital assets on death – it is DEEMED
* CG = FMV – ACB = CG. CG taxed at 50%
* No gain nor loss on disposition of PR
* **Residuary beneficiary is responsible for paying taxes on assets, not others who may sneakily benefit**
* **Put in clause for other beneficiary to pay deemed disposition tax to estate**

1. CL carry back against CG in year of death **for 3 years before death**
2. **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

* Exception if have married/ CL spouse (*ITA*) for SPOUSAL ROLLOVER

1. **T3 Return:** **income earned from date of death,** i.e. interest, dividends, capital gains (less CL from date of death to date of disposition of capital asset)

* No personal deductions

1. **Testamentary trust fiscal year and other testamentary trust issues:**

Testamentary trusts, other than graduated rate estates (GREs), will be subject to the rules applicable to *inter vivos* trusts, including: (1) max 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

Graduated rate estate (GRE) – (1) only an estate and not, for example, a trust established under a will or an insurance testamentary trust; (2) **max 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** [spouse receives at ACB, not FMV].

QST: 1. spouse resident in Canada immediately before death

2. spouse must be entitled to receive all income of trust during spouse’s lifetime

3. no person except spouse may obtain use of income or capital of trust during spouse’s lifetime

4. Assets vest in spouse or spousal trust no later than 36 months following death

5. 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.

1. **Filing deadline** for year of death T1 Return - **April 30th** in year following death; **6 months from date** of death if death occurs between Nov 1st and Dec 31st

* Different deadlines

1. **Filing deadline** for T3 Trust Return - **90 days** (not 3 months) following end of testamentary trust fiscal period as selected by estate trustee if estate trustee elects for estate to be GRE --- easier for tax accountant if Dec 31st year end as tax slips issued on a calendar year basis

* **Executor can fix trust year to any date of death and first anniversary of date of death**

1. **‘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)

* [non-periodic payments personal rep can elect for]
* T3 return has no personal deductions

1. **Multiple testamentary trusts 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.

* All trusts taxed separately; tax benefit lost with GRE

1. **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 CG

* Taxable CG goes into T3 Return

1. **Charitable Donations:** [way of reducing tax]

special rules applicable that do not apply to living TP’s 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

rules for GREs different than rules for non-GREs

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 (not shares in a non-offering corporation)

1. **Life insurance** **non-taxable** except for interest on death benefit following date of death (taxable to beneficiary/estate)
2. **§69 *ITA* - inadequate consideration and non-arm’s length transactions**

Arm’s length defined section 251 *Income Tax Act*

i.e. Law Business sold for 50,000. It is worth 250,000

Non AL – immediate family members transactions

Have adverse tax consequences for client and recipient – double taxation

* If TP acquires property from non-AL person in excess of FMV, deemed to acquire at FMV
* If TP disposes property to non-AL person for no PD/ PD less FMV, TP gets PD = FMV
* If TP acquires property via gift, deemed to acquire at FMV

§69(1) Inadequate Consideration

69(1) Except as \* otherwise provided

1. Where TP has acquired anything from person with whom TP was not dealing at AL at amount in excess of FMV \* TP shall be deemed to have acquired it at FMV;
2. Where TP has disposed of anything
3. To person with whom TP was not dealing at AL for no PD or PD less FMV
4. To any person by way of gift, or
5. To trust \*

TP shall be deemed to have received PD = FMV; and

1. Where TP acquired property by way of gift, bequest or inheritance \* TP is deemed to acquire property at FMV

* At FMV, value of price btw non-AL parties acting independently with knowledge of market
* At FMV, non-AL transactions deemed to take place on full realization basis

**§69(1)**

**GENERAL RULE**