**LAW 582**

**Wills & Administration**

**Gordon**

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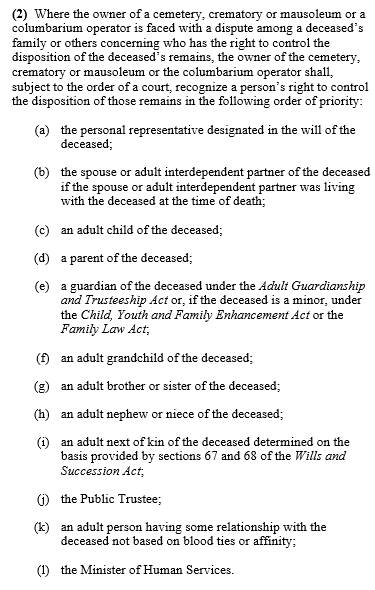
# Intestate:

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| --- |
| **Intestate:** means an estate, or any part of an estate, that is not disposed of by will ***(Section 58(1)(a), WSA).***  **Why Don’t people have a will?**   * Too young to worry about it (25%), didn’t have enough assets to make it worth it (23%), too expensive (18%)   **3 major issues**   * **1. Who deals with the FUNERAL**   + Whoever wants to – but if there’s a dispute – legislation governs   + ***Cemeteries Act (s.11)***     - Question 1: Is there a Will?     - Question 2: Re: the girlfriend –are they a AIP?     - Question 3: Were they living with the deceased? (see 11(1)).     - Question 4: BUT –Where is the other parent? Are they in agreement? * **2. Who is the PERSONAL REPRESENTATIVE (PR)? (‘administrator’)**   + **Intestate: *Estate Administration Act (s.13(1)(b))***   + **Partial Intestate:** ***Estate Administration Act (s.13(2))***   + If equal applicants – priority goes to resident of AB (***13.2(a))***   + Subject to nominations under ***(13(4))*** * **3. Who inherits the ESTATE?**   + ***Wills and Successions Act (Part 3)***   **Claims against an Intestate Estate:**   * FMS Claim – ***WSA s.88(1)(b)*** * Matrimonial Property Claim – ***WSA s.58(1)(b)*** + *Coyle v Coyle* * Dower Interests – *Re Rick Allen Estate* |

**Note:** Failing to have a **residue clause** often creates a partial intestacy.

## 1. Planning the Funeral

* ***Cemeteries Act*** - order of who controls the disposition of the remains if there is a dispute
  + S.11: listing of priority – ONLY IF THERE IS A DISPUTE
    - If no dispute – the Funeral director can take directions from whomever.
    - If there IS **A DISPUTE** – go to s.11.
      * Note: its also subject to a court order – so the court can appoint someone.
* **Note:** if there’s a dispute with people of the same ranking – priority is given to the **eldest** (s.11(3))
* **Note**: If someone is unable or unwilling – it passes to next person with priority (s.11(4)).

**Process to go through:**

* **1. Do they have a will?**
  + If yes – then that is who makes the decision
  + If no – go to s.11 of Cemeteries Act.
* **2. Do they have a spouse or AIP?**
  + If yes – were they living together (*s.11(1))?*
    - Yes: – that’s who does it *(11(2)(b))*
    - No: – was the reason for the living apart because of relationship breakdown? (if yes – they cannot do it- move on).
  + If no – move on
* **3. Do they have any children?**
  + If yes – was the child an adult?
    - If there is any dispute between adult kids– eldest governs (s.11(3)).
  + If no – move on
* **4. Do they have any parents?**
  + If yes – the parents do it jointly.
    - If there is any dispute between parents – eldest governs (s.11(3)).

## 2. Who is the Personal Representative?

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| **Governing Legislation:**   * **If there IS A WILL**   + **If there is a named PR – that person does it**     - Gets status by virtue of will     - Unless they renounce / nominate ***(s.13(4))***     - PR must apply for **grant of probate**   + **If NO named PR - determine in accordance with *s.13(1)(a) EAA***     - Gets status by virtue of legislation     - Person who gets PR in order can make nominations ***(s.13(4))***     - PR must apply for a **“Grant of Administration with Will Annexed”**   + **If partial intestacy, but PR is named – that person does it**     - ***s. 13(1)(a) EAA***     - Gets status by virtue of will     - Unless they renounce / nominate ***(s.13(4))***     - PR must apply for **grant of probate** * **If NO WILL (no PR named) – governed by *s.13(1)(b) EAA***   + Gets status by virtue of legislation   + Person who gets PR job in order can make nominations ***(s.13(4))***   + PR must apply for **grant of administration**   **Nominations: *(s.13(4))***   * Who is the person entitled to administer the estate? * Is there more than one with same entitlement? (remember s.13(4)) * If person(s) who are entitled to be the PR all agree, they can nominate him and pass along their priority to him (Form NC15 –Renunciation (signed by whoever is stepping down), NC16 –Nomination and Consent (signed by everyone renouncing + person taking over)   **Duties – see other section (page 89 CAN) on duties of a PR**   * Handle the Funeral * Apply for grant of probate / administration * Have fiduciary obligations to the beneficiaries * Must account regularly * Must ascertain and address all estate assets and debts * Must pay out the estate in accordance with the legislation |

**Note:** in an Intestacy – the PR is called the “administrator” (not the executor). The Administrator gets their legal status by virtue of the legislation: the ***EAA (s.13(1)(b)).***

**Note**: Have to apply for a grant of administration, then s.13(1) lists priority for applications

**Note:** the only difference between executor and administrator is that an executor is nominated by a will, an administrator is granted by legislation.

**Note**: If there are 2 applicants of EQUAL priority – preference is given to AB resident ***(EAA s.13(2)(a)).***

**Note:** If BOTH a spouse / AIP – then goes to person who most recently lived with deceased ***(EAA s.13(2)(b)).***

**Note:** If there’s remaining multiple people in a category – they are all the administrators – e.g. 3 adult children (**THEN ALL OF THEM ARE THE ADMINSITRATORS**) – so you often try to get one person to do and the rest to renounce.

**Nominations:** ***(s.13(4)):*** You can give it to someone outside of this list if you want to – by being someone in the list who creates a nominee.

* E.g. person dies without a will, they have a surviving spouse, and she’s old and doesn’t want to – she can nominate a trust company or a friend.
* Person(s) would have to renunciate their own authority (form NC15) and then nominate another (form NC16), and then nominee would have to consent.

**Duties: See page 89 CAN**

* Have a fiduciary duty (same as an executor)
* Must account regularly
* Must ascertain and address all estate assets and debts
* Must pay out the estate in accordance with the legislation.

## 3. Who receives the Estate?

Determined by ***Part 3 of the Wills & Succession Act (s.58 on).* Note: If a section ever says DESCENDANTS – go back to s.66.** Go down the list here and put people into each category – then its easier to distribute (AIP/ SPOUSE / KIDS / GRANDKIDS).

|  |
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| **Person – Spouse/AIP - Children – Grand Children – Parents -siblings – nieces/nephews – grand nieces/nephews – Grandparents – Uncles/Aunts – Cousins**  In an intestacy, the beneficiaries of the estate are determined in accordance with the legislation – ***Part 3 of WSA***   1. Just A Spouse **OR** AIP (NO KIDS)? s***.60 WSA***    * Spouse: Legally married + not separated (separated defined ***s.63(1) WSA***)    * AIP: Living together for 3+ years OR Kid + living together OR AIP agreement (s***.3 AIPA***) 2. (Rare) Spouse **AND** AIP (no kids)    * ***s.62(b)*** 3. Spouse **AND** Kids (/Grandkids)    * **No**: Step-kids (*Peters v Peters)*    * Is the surviving spouse the parent of all the surviving kids?      + **yes*: s.61(1)(a)***      + **If no**: ***s.61(1)(b)*** 4. Spouse **AND** AIP **AND** Kids (rare)    * ***s.62(a)*** 5. **No AIP/Spouse -- Just Descendants**? (Kids / Grandkids) (PER STIRPES)    * Yes: Blood related, adopted,    * No: Step-kids (*Peters v Peters),* genetic material    * ***S.65(a) + S.66***   **Graph shows ‘Lineal Descendants’**  ***s.1(1)(e) WSA***   1. **No AIP, No kids 🡪** Parents? (parentelic dstrbt)    * ***S. 67(1)(a)*** 2. **No AIP, No kids, No Parents** 🡪 Siblings + Nieces / Nephews    * ***S.67(1)(b)***    * **Note**: dead siblings of the deceased have their share passed equally to their children (nieces/nephews of the deceased).    * **Note:** Step-siblings don’t count (as long as they aren’t blood related) (*Peters v Peters*) 3. **No AIP, No kids, No Parents, No siblings** 🡪 Grandparents    1. ½ to the maternal grandparents ***(s.67(1)(c)(i)) and (ii))***       1. Note: If no maternal grandparents – this share would pass to the maternal aunts/uncles    2. ½ to the paternal grandparents ***(s.67(1)(c)(i) and (ii))***       1. Note: If no paternal grandparents – this share would pass to the maternal aunts/uncles 4. **No AIP, No kids, No Parents, No siblings, No grandparents 🡪** Aunts / Uncles    1. ½ divided between all maternal aunts/uncles ***(s.67(1)(c)(i) and (ii))***    2. ½ divided between all paternal aunts/uncles ***(s.67(1)(c)(i) and (ii))*** 5. **Great-Grandparents** |

**Process:**

**1. Did the deceased have a Spouse / AIP?**

**Spouse:**

* Must be Legally married AND not yet separated
  + 1. Were they legally married, or did GF meet AIP definition?
  + 2. Were they not yet separated?
    - Definition of separated is in *s.63(1) of WSA.*
      * Living separate and apart for more than 2 years at the time of the intestate’s death
    - If they were legally married & not separated = spouse /AIP

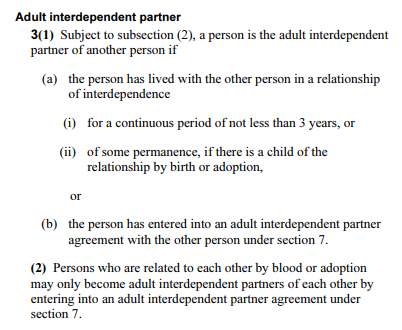
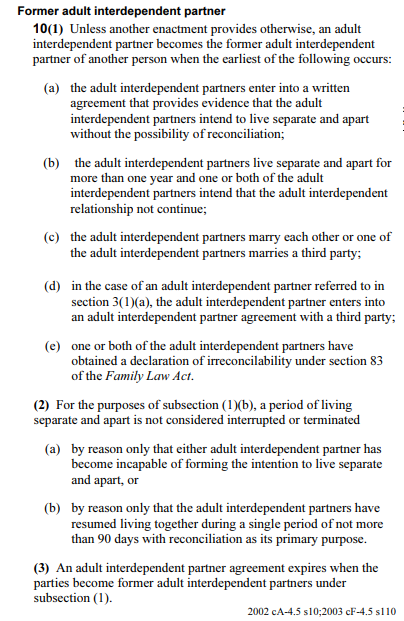
**AIP:**

Defined in the ***Adult Interdependent Relationships Act (AIPA), s.3***

* Need to make sure they meet the definition of AIP and need to make sure they are NOT a FORMER AIP ***(s.10 of AIPA)***
* Requirements:
  + 1. ONE of the following:
    - A. 3 years in a relationship of “interdependence” or
      * “Interdependence”: Share on another's lives, Emotionally committed to one another, Function as an “economic and domestic unit”
        + “economic and domestic unit” factors:

a) whether or not the persons have a conjugal relationship; (b) the degree of exclusivity of the relationship; (c) the conduct and habits of the persons in respect of household activities and living arrangements; (d) the degree to which the persons hold themselves out to others as an economic and domestic unit; (e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another; (f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being; (g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons; (h) the care and support of children; and (i) the ownership, use and acquisition of property.

* + - B. relationship of some permanence and a child of the relationship or
    - C. signed adult interdependent partnership agreement



**Both Spouse AND AIP:**

* See ***section 62 of WSA.***

**2. Did the deceased have descendants?**

* **Descendants:** All lineal descendants – “a blood relative” (black laws dictionary) –
  + **Note:** descendants defined in ***s.1(1)(e) WSA.***
  + **“Illegitimate” Children:** ARE dependents *(ALRI, 1999)*
  + **Adopted Children:** ARE dependant children
    - Test is whether that person is a “parent***”*** in accordance with Part 1 of Family Law Act. ***(WSA s.1(3)).***
    - “Parent” is defined in ***Child, Youth and Family Enhancement Act, s.72(4):***
      * *(4) In any testamentary or other document, whether made before or after the coming into force of this section, unless the contrary is expressed, a reference to a person or group or class of persons described in terms of their relationship by blood / marriage to another person is deemed to refer to or to include, a person who comes within the description as a result of the person’s own adoption, or the adoption of another person.*
  + **Children in the womb:** ARE included ***(WSA, 58(2)).***
  + **Step-Children**: NOT descendants in an intestate distribution (*Peters v Peters*)
    - Not included because: the relationships between stepchildren and stepparents are too variable to support a presumption that a majority of stepparents intend their stepchildren to inherit in their estate. *Peters v Peters*
    - PARA 26 is a good para to have when you want to tell people why to have a will.
  + **Posthumously conceived children:** NOT descendants (could change in future)
    - ALRI recommendation: ASK if they have embryo / genetic material saved – then can put this in the will if they want.

##### Peters v Peters – steps kids are not ‘children’

***2015 ABCA* - First attempt to test whether step-kids where children.**

**Ratio**: A stepchild is excluded from inheriting estate of intestate stepparent.

**Context:** Deceased and spouse had one biological child together and spouse also had four children from previous marriage.

**Issues**: Whether the legislation includes stepchildren as beneficiaries of an intestate

**Positions:** Stepchild wanted the estate to be divided equally among the step children and the one biological child (1/5 each).

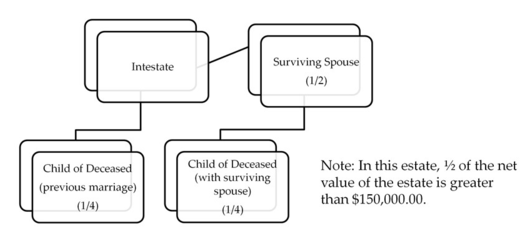
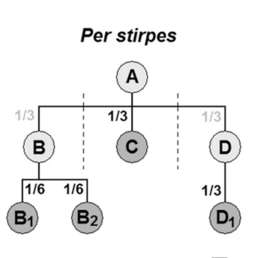
**Decision:** a stepchild is not a "descendant" for the purposes of sections 65 and 66 of the *Wills and Succession Act*, SA 2010, c W-12.2.

**Analysis:**

* *S.65:* If an individual dies and has no surviving spouse / AIP, the intestate estate shall be distributed according to s.66
* *S.66:* The intestate estate or the portion of it being distributed shall be divided into as many shares as there are (a) children of that individual who survived the intestate
* Descendants" is defined in the *Act* as "all lineal descendants of an individual through all generations"
  + *Black's Law Dictionary*, 10th ed. defines a lineal descendant as "a blood relative in the direct line of descent-children, grandchildren and great grandchildren are lineal descendants."
* Intestate succession legislation in Alberta has historically excluded stepchildren from inheriting the estate of an intestate stepparent
* **The legislation is clear in its intent and we are bound to follow it**

**3. Determine distribution in accordance with the legislation**

Once you have figured out if they have Spouse / Kids – you have determined all the classes, and now can go by the legislation to determine the distribution.

* **If they just have a Spouse/ AIP (no kids)**
  + All to spouse ***(s.60)***
* **If they have a Spouse/AIP + Kids**
  + **Were the kids all the kids of the surviving spouse / AIP?** 
    - ****If yes*: s.61(1)(a)***
      * **All to spouse**
    - **If no**: ***s.61(1)(b)***
      * **Spouse gets greater of $150k or 50% of the net value of estate, rest divided to decedents**
* **If they have Spouse AND AIP**
  + If kids – then ½ to spouse and ½ to AIP ***s.62(a)***
  + If no kids – then ½ to spouse and ½ to AIP ***s.62(b)***
* **If they just have kids**
  + *Per Stirpes* 🡪 Distributed in accordance with s. 66 ***(s.65)(a)***
    - Note: Would cite s.65 and s.66
    - Note: Anytime you give a portion to a branch, you go all the way to the end of the branch (So, if given to your brother, it would be given to your brother & his kids).
* **If they have no spouse, no kids**
  + *Parentelic Distribution* 🡪 Distributed in accordance with s. 66 and 67 ***(s.65)(b).***
  + **Note:** In AB, capped at 5th degree relationship.
* **If they have NO heirs**
  + The *unclaimed personal property and vested property act* applies

## Problems with Intestacies

* Doesn’t deal with blended families well
* There are no charitable bequeaths in intestacies
* There are no funeral instructions
* Often has significant confusion
* People can make claims against the estate

### Claims against the estate

* Can make a family maintenance and support (FMS) claim on intestate / partial intestate estates ***(WSA s.88(1)(a)).***
* Can make a Matrimonial property claim against an intestate / partial intestate estate
  + See definition of “net value of estate” (***WSA, sec. 58(1)(b***).
  + *Coyle v Coyle Estate*, 2005 ABQB 436
* Dower Claims
  + In accordance with *Alberta’s Dower Act*, the deceased’s surviving spouse was granted a life estate in his unencumbered property.
  + Does not apply where married person is joint tenant or co- tenant with someone other than the spouse

### Dower Issues

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| **\*\*Only applies to MARRIED spouses\*\* \*\*Doesn’t apply where married person is JT or Co-tenant with someone other than the spouse (married spouse must own 100%)\*\***  “**Dower Rights**”: means Life Estate in the *Homestead* + personal property ***(s.1(c)(iv)/ s.23 Dower Act)***  “**Homestead**”: 4 city blocks (city) or quarter section of land (country) (***s.1(d) Dower Act)***   * Note – this can be increased if you show the court the land is necessary for living.   Under Dower 🡪 if someone has **title to property in their name alone** and they are married, the spouse **gets a life estate** in that property (***s.18 Dower Act***)   * Also gives them a life estate in personal property ***(section 23)*** * Both the life tenant and the remaindermen have a present interest in the same land.   Having a dower claim on an estate causes a lot of problems:   * 1. Someone is holding up the admin of the estate by living, and * 2. Capital expenses is paid by ultimate owners, day to day paid by current resident   + E.g. furnace goes on the property = capital expense = paid by the kids     - Imagine the elderly mom invoicing the kids for a furnace 🡪 can cause huge problems. * 3. Dower Act also applies to personal property ***(s.1(c)(v) Dower Act)***   + E.g. couch, bed, tv, tables and chairs, etc…   **Purpose of Dower Act:**  The purpose of the Act is to secure a dower rights holder’s interest in the homestead by requiring that person’s consent before the owner spouse may dispose of the homestead and providing the dower rights holder with a life estate in the homestead if that person survives the owner spouse: *Senstadv. Makus*  **What the Dower Act does:**   * No married person can dispose of the homestead without the spouse’s consent (***s.2***) unless the court dispenses with the consent of the spouse (***s. 10***)   + ***S.10***: shows court can consent for the spouse – usually done when you cannot find them.   + Note: If a deceased could make a court application to dispense with consent while alive, then the executor or administrator can make the same application (***section 22***) * Disposition in contravention of Act - $1,000 or 2 years in prison * Release or consent – ILA   + If someone has dower rights – these can be bought or sold     1. E.g. Dower rights tie up the property (see #1 above) – so you can negotiate the sale of these rights – the surviving spouse can say to the estate – if you pay me – I will give up my dower right.     2. Usually calculated on the basis on how much the property would generate if property was rented – and then how many years they would live there and then discount it to PV / or how much to rent something equivalent. * If there is more than 1 homestead – the surviving spouse can choose which one they want (***s.19***) * Agreement releasing dower rights – ***Section 9***   + Spouse of married person can execute an agreement releasing their dower rights in the homestead   **Note:** You cannot place a value on a life estate *Re: Rick Johnson*   * Note: A POA cannot sign a dower consent once person loses capacity |

##### Re: Rick Johnson Estate – A dower right is not a right to capitalize to defeat intestacy distribution

*2017 ABQB 399 - -Mom is wanting to place a value on the life estate and then have that amount deducted from the total value of the estate -- The spouse claimed that by capitalizing and deducting the value of the life estate under the Dower Act the value of the estate was less than $150,000 thereby entitling her to the entire value of the deceased’s estate. Then the estate is only worth 80k = less than the prescribed amount – so she gets all of it. Court said NO – you cannot value a life estate – you just have to let her live there.* ***The court determined that what the spouse proposed to do was to artificially reduce the value of the estate in order to defeat the interests of the remaindermen as she would be entitled not only to the life interest in the home but also the residue of the entirety of the estate****.*

**Ratio**: You cannot value a dower estate – you have to just let her live there.

**Context:** Rick died intestate. His surviving spouse is the respondent, and his 2 children from a previous marriage are the appeallants. The *Dower Act* grants the surviving spouse a **life estate** in the homestead. S.61 of the Wills & Succession Act gives the surviving spouse or AIP, the greater of either A.) The prescribed amount ($150k) or B.) 50% of the net value of the estate. If the value of the estate exceeds the prescribed amount, the residue of the estate is distributed among the intestate's descendants where they are not the descendants of the surviving spouse.

**Issues:** 1. Can the wife deduct the capitalized value of the life estate from the net value of the property, so that the value is below the prescribed amount of $150,000?

**Positions:** Wife is claiming entire value of the estate based on capitalizing / deducting the value of the life estate from the estate value. Kids say that is stupid and say the surviving spouse gets half, and the decedents get the other half (1/4 per kid).

**Decision:** NO – the value of a life estate cannot be deducted

**Analysis**: Previous case law has found that the ONLY time a life estate can be given a value is when the homestead was sold without the consent of the other – then the wronged spouse can claim damages.

* S.18 of the *Dower act* – grants the surviving spouse a life estate in the homestead - declared to be vested in the surviving spouse.
  + When the life tenant dies – it goes back to the estate of the fee simple holder
  + Therefore - both the life tenant and the holders of the interest in remainder therefore have a present interest in the same land
    - So, **a life estate cannot be sold without the consent of the holders in remainder.**
* Sec 2 of the *Wills and Succession Act* provides that, in the event of a conflict between the legislation respecting a spouse's rights in respect of property after the death of the other spouse, **the *Dower Act* prevails**.
  + Conflict: The *Dower Act* provides a life estate in the homestead following the death of the owning spouse, while the *Wills and Succession Act* provides for a scheme of the distribution of the estate in the event of intestacy.
* The legislature did not intend for the life estate to be valued except in those narrow circumstances.
  + There’s no method provided to valuing a life estate, except in the circumstances where it was disposed of without consent.
* Further, there is no authority for putting a value on the life estate in this context either.

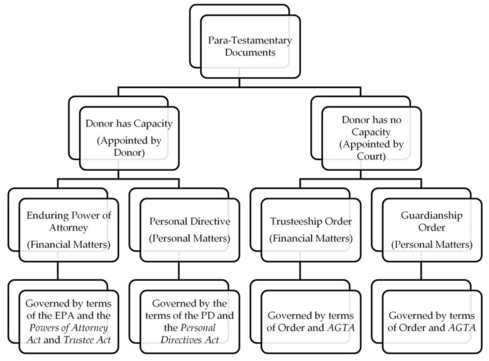
### Other Issues

* No charitable donations given in intestacies
* Step-children not considered
* No funeral instructions

## Adult Guardianship & Trusteeship (AGTA)

### What happens if person doesn’t have a PD / POA?

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| **When there is NO EPA / PD and they lose capacity:**  When people do not complete an EPA and a PD and then they lose capacity, the family needs to obtain a Guardianship Order (personal matters) or a Trusteeship Order (financial matters) to administer that family members affairs.   * Need to apply for para-testamentary documents:   + Family must obtain a **Guardianship Order** (personal matters) to administer that family member’s affairs.     - This is the same thing as Personal Directive had the person made one before they lost capacity       * But when you lost capacity you can no longer make a PDand need this   + Family must obtain a **Trusteeship Order** (financial matters) to administer that family member’s affairs.     - Note: to become a trustee – **you have to have a background check + credit check**     - This is the same thing as an Enduring POA had the person made one before they lost capacity       * But when you lost capacity you can no longer make a POA and need this   E.g. My dad just lost capacity, but he still has a farm and we need to sell it. But my sister + I are fighting about what to do.   * Does he have a POA?   + No * Does he have a PD?   + No * Would have to go to court and file a contested guardianship application   **Guardianship Applications Options:**   * Co-decision-making   + Adult does not have capacity wants assistance.   + A Co-Decision Maker would be able to work with the Adult, but the Adult has the final say. * Specific decision-making   + This would allow someone to make a one-time decision for an adult relative who’s lost the capacity to make a decision about their healthcare or healthcare facility. * Supported decision-making   + These Adults may have capacity, but they would like to have someone they trust help them in the decision-making process (eg. illness, poor English, mild disabilities). |



* When people don’t have a Power of Attorney or a Personal Directive, and then they LOSE capacity **– the family must obtain a GUARDIANSHIP Order** (personal matters) or a **TRUSTEESHIP Order** (financial matters) to administer their affairs.
  + These are tedious – to get to be a trustee – need a credit check and a background check
  + Plus, now your family is in the court system (often will have siblings fighting over this – she shouldn’t be the guardian because she’s not a good person for these reasons – now that is all public record).
* Options under AGTA
  + Co-decision-making
    - Co-decision maker works WITH the adult who doesn’t have capacity, but the adult without capacity has final say.
    - Don’t see this often
  + Specific Decision-making
    - Allows someone to make a one-time decision for someone who has lost capacity
    - Nursing homes often facilitate this
  + Supported decision-making
    - These adults may HAVE CAPACITY – but they want someone they trust help them with decisions
      * E.g. illness, poor English, mind disabilities.

**Class 3:**

# Solicitor’s Duties

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| 1. Who is your client?  2. Understand the clients:   * Family situation * Nature + extent of property * Existence of any agreements   3. Verify everything   * *Meier v. Rose*, [2012] ABQB 82   **Common Problems:**   * Failure to dispose of all of the property in Will (partial intestacy)   + Anti-lapse rule – ***s.32 – WSA*** * Failure to verify ownership of assets * Failure to properly implement instructions * Failure to properly address capacity and undue influence   + TAKE LOTS OF NOTES\*\* * Failure to ask “What if…” * Failure to instruct to change constitution of assets |

**Important for the lawyer to understand the client’s:**

* **Family:** Is this a second marriage, is there kids from previous marriage, is anyone disable, is there any tension between siblings (may be important when determining testators).
* **Nature and Extent of Property**: What kind of property is there, how is it owned? Who’s name is it in? How much is it worth?
* **Existence of agreements**:
  + pre/post nuptial
  + Co-habitation
  + Unanimous shareholder agreements
    - Not relevant for this class
  + Contracts
    - Trump a will
* **Verify**: verify everything the client says – verify who the actual owner of property is.
  + *Meier v. Rose:* Land devised to brother but Testator’s company owned land, not the testator personally

**Common Mistakes:**

* Failure to give everything away
  + **Anti-Lapse Rule**: (***S.32, WSA***) where the beneficiary dies before the testator.
    - Sort of like intestacy – sometimes a will says “Everything to A” but A isn’t alive. So the Anti-Lapse rule steps in and passes it to the biological descendants of A to avoid intestacy.
    - Applies when “**A” was a decedent of the testator** (both of whom are now dead), then it goes to the decedents of A (but NOT spouses) the same way it would go to them if they died intestate w/o a spouse.
    - But if A was a sister, then that wasn’t a descendant of the testator, so = intestacy.
* Failure to verify ownership of assets (Meier v Rose)
* Failure to properly implement instructions
* Failure to ask “What if…”
* Failure to address capacity / undue influence 🡪 TAKE LOTS OF NOTES.

**Taking Instructions:**

* First, a will must meet the formalities in ***s.9 of WSA***
* Then, must look to capacity & undue influence
  + This is on a BALANCE OF PROBALITIES standard.
  + The final decision of whether there was capacity is up to the LAWYER, not a physician.

## Ascertaining Capacity Intro

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| **Hierarchy:**   * Levels of capacity needed:   + 80% to handle own financial   + 60-70% to do a will   + 20-30% to do POA   + 10% to marry * But context matters - Capacity can be different depending on the task. (e.g. simple financial affairs could be different than someone who runs their own company).   **Capacity for a will:** \*very hard to challenge will for capacity\*  Capacity will be presumed (rebuttable presumption) (*Vout v Hay*) unless there is any doubt in the circumstances about the persons capacity – then the burden shifts to the people saying they did have capacity to prove it. (*Weidenberger**Estate****)***   * Test for capacity is at the time the document is made – ‘moment in time test’ *Weidenberger Estate* * Testamentary capacity is a question of fact *Stiles Estate v. Stiles* * Insane delusions are a good sign of incapacity *Banks v Goodfellow* * Mental illness and suicide are not determinative of lack of capacity, but factors to be considered *Stewart v. McLean* * For capacity to be overturned on public policy – must be ONLY in the CLEAREST cases *Charles* *Millar* * The presumption is that once a will meets the formal requirements, it’s presumed the person HAD capacity, unless there is evidence that they didn’t – but where any dispute or doubt exists, the propounders of a will have the onus of proving capacity. *Weidenberger* * A racist will isn’t going to violate public policy *Spence* v *BMO* * Cannot leave money in your will to fund criminal enterprises *McCorkill*   *Banks v Goodfellow* **test for capacity, reformulated in *Weidenberger Estate*:**   * When challenging for capacity – law says capacity is presumed * So someone who says there isn’t, has to present evidence to show that. * Once this is presented, the burden switches to the person upholding the will to show there WAS capacity. * The Testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way   + (1) the nature and extent of his property   + (2) the persons who are the natural objects of his bounty, and   + (3) the testamentary provisions he is making;   + (4) he must, moreover, be capable of appreciating these factors in relation to each other, and   + (5) forming an orderly desire as to the disposition of his property.   **Capacity for a PD**  Need “the ability to understand the information that is relevant to the making of a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision” (***Personal Directives Act, s.1(b))***   * Low standard, test comes from *Personal Directives Act* * Essentially: can they understand the nature and effect of the document.   **Capacity for POA**   * Comes from *Godelie v. Public Trustee (1990) 39 E.T.R. 40*   + Have to understand:     1. Powers given (given them full powers to deal with your stuff)     2. Financial matters (they have full reign to sell land, move money)     3. Nature and extent of her property     4. Right to revoke is lost when capacity is lost (once you lose capacity you are stuck with that person). |

### Capacity for a WILL:

* Each of these decisions is heavily reliant upon the facts.
* **A Doctor’s note may assist the Court in making a determination (or a drafting lawyer), but is not determinative** *Christensen*
* Perfect capacity not required - can have memory loss / be confused and can still do a will. *Weidenberger Estate*
  + Don’t just write people off because they have diminished capacity
  + Remember hierarchy – will is lower than being able to manage financial affairs.
* **Even if you have concerns – take good notes – because its better to have a will because it may not be challenged**
* *Banks v Goodfellow:*
  + Established the 3-part test for capacity for a will.
    - 1. Nature and extent of property
      * Just need a relative idea. Important to verify this information
    - 2. Persons who are natural objects of his bounty
      * Means **who do people normally leave their stuff to**
      * The typical way to attack a will – is you have to have the discussion that ensures the person knows that the people exist (like a son) – so if they say yeah but I don’t like my son – that’s fine.
      * AB: basic principle – its your stuff, do what you want
      * But in AB – you can cut out a capable adult child (but this isn’t the case in BC). Don’t have to have a good reason either.
      * But it has to be realistic – if they say my son is an alien and is controlling me – then that’s not a good answer - will want to look into this
      * **Basically, if they are leaving someone out who is in their immediate circle, WANT TO ASK ABOUT THIS to make sure**
    - 3. Understand nature / effect of a testamentary document
      * Ask them what a will does.
* **Reformulated in *Weidenberger Estate* to add:** 
  + - 4. He must, moreover, be capable of appreciating these factors in relation to each other, and
    - 5. forming an orderly desire as to the disposition of his property.
* *Stiles Estate*: Capacity is a question of FACT (lots of discretion to fact finder)
* *Weidenberger*: test for capacity is at the time the document is made. Capacity can exist in a single moment of time – so it’s a moment in time test (can have capacity- capacity – no capacity – capacity..)
* *Goodfellow*: No insane delusions 🡪 if the client is completely deluded – “my child is an alien” that’s probably a suggestion of capacity
* *Stewart* v *McLean*: Mental Illness / suicide are not determinative of lack of capacity – but are factors to consider 🡪 Just because you have schizo, by-polar, or are suicidal doesn’t mean you don’t have capacity.
* *Charles* *Miller:* Public policy should be invoked ONLY IN THE CLEAR CASES, where harm to the public is substantially incontestable, and doesn’t depend on idiosyncratic inferences.
* *Spence v BMO*: Racist isn’t against public policy – cut out the daughter who married a white man.
  + There shouldn’t have even been a public policy argument open in the first place – because the will clause was not discriminatory on its face.
  + A testator's freedom to distribute her property as she chooses is a deeply entrenched common law principle
* **There are various categories of cases where public policy may be invoked to void a conditional testamentary gift**
  + i) conditions in restraint of marriage and those that interfere with marital relationships, *e.g.*, conditional bequests that seek to induce celibacy or the separation of married couples;
  + ii) conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent;
  + iii) conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation;
  + iv) conditions that incite a beneficiary to commit a crime or to do any act prohibited by law
* *McCorkill:* Left money to a neo-nazi organization. Said it violated the Cc and charter because he was funding a criminal enterprise.
  + See the distinction between *Spence & McCorkill*: one is saying I am a racist, this one – I want to give money to racists

### What questions should lawyer ask to ascertain capacity?

**Should be asking these questions at the TIME OF INSTRUCTIONS and TIME OF SIGNING** *(Christensen)*

* **1 - What are your assets, what are you giving away** 
  + May have to prompt some things – do you have insurance, etc…
* **2- Tell me about your family – are you married / common law spouse / BF / are you living with them / any disabled kids / grandkids / how old are they?**
  + Do you think there is anyone who would feel left out?
  + Also gives you a good sense of capacity because if they canot give you names or ages that tells you something
* **3 – you would just know because they are telling you – but cannot be a form filled out by someone else, need to talk to them about what they are making**
* **4- not really a question – but does it make sense – why are you not leaving things to your son**… etc…
* **5 – does it make sense, if leaving everything to Prince Harry – why?**

**The issues with this test is:**

* They will tell you the answers – but how do you know they are true
  + People who have cognitive issues can come across as very cogent – I have 4 kids, these are their ages – and it all could be false.

##### Weidenberger Estate, Re – capacity is presumed until challenged, then must prove Banks test

***2002 ABQB 861 -* Formal Proof of a Will Case – capacity will be presumed until its challenged. If there is a challenge to capacity, then the propounders must show there was capacity by proving the Banks v Goodfellow test.** Normally, once the propounders prove the formal requirements to be met and that it was read to / by the testator – they are aided by the presumption that they knew the contents of the will and this has to be shown otherwise by the challenger.

**Ratio**: Capacity will be presumed unless there is any doubt in the circumstances about the persons capacity – then the burden shifts to the people saying they did have capacity to prove it. Also lays out the test for capacity.

**Context:** Will is handwritten, signed by the deceased, uses dispositive language, directs that all of his possessions be left to his family in Hungary. A certificate of incapacity was initially issued in 1980 (He passed in 1995). His estate was taken over by a public trustee. His incapacity certificate was cancelled in 1987. They were hoping he could return back to the hospital. But, the attempts to get him home failed because he didn’t leave the hospital, or he had erratic behavior. He was mad that the public trustee sold his house. The certificate of incapacity was reinstated in 1987 until his death. Evidence at trial – 3 doctors testified (none of whom treated the deceased) – 2 said he didn’t have capacity. **A person seeking to uphold the testamentary instrument must establish testamentary capacity in circumstances that cast doubt on the mental capacity of the deceased to make a will**. Because Deceased lived in the AB hospital, his capacity was raised – so the applicants must prove he had capacity (on a balance) at the time the will was created.

**Issues**: Was the will a valid holographic will? Did the deceased have capacity to execute the will?

**Positions:** The family is saying it’s a real will and he had capacity. Respondents are saying that he did not have capacity required to form a will.

**Decision:** Yes, he had capacity because no evidence to the contrary was there.   
**Analysis**: The will meets the technical requirements of a will under the Wills Act (its in his handwriting, and signed by him). The presumption is that once a will meets the formal requirements, its presumed the person HAD capacity, unless there is evidence that they didn’t – but where any dispute or doubt exists, the propounders of a will have the onus of proving testamentary capacity.

* The fact that the Deceased was mentally ill and suffered from confusion is **not determinative** as to whether the Deceased did or did not have the requisite testamentary capacity.
* **What is required to establish capacity?**
  + The Testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way
    - (1) the nature and extent of his property
    - (2) the persons who are the natural objects of his bounty, and
    - (3) the testamentary provisions he is making; and he must, moreover, be capable of
    - (4) appreciating these factors in relation to each other, and
    - (5) forming an orderly desire as to the disposition of his property.
* He must of at least been informed of what his estate was worth when he signed the release on the public trustee.
* In my view the evidence demonstrates that the Deceased understood who the natural objects of his bounty were. His natural beneficiaries were included in the Will
* The act of creating the Will is evidence of his intent to control his Estate and possession of a rational mind.
* Without direct evidence on this issue, I must rely on the circumstances surrounding the creation of the Will and the expert evidence.
* I find that the Will was not affected by any delusions

#### Intro - Suspicious Circumstances

##### Vout v. Hay – suspicious circumstances – propounder must show definitive proof of knowledge + approval – no presumption to help

***1995 Carswell Ont - The propounder of the will must establish that the testator had a disposing mind and memory;*** *if the propounder can provide evidence that the will was duly executed with the requisite formalities after having been read to or by the testator who appeared to understand it the presumption that the testator had capacity is presumed* ***– HOWEVER-*** *if there are suspicious circumstances, such as when a beneficiary has prepared the will or has been instrumental in having the will prepared, the propounders must prove testator knowledge/ approval* ***affirmatively****. Suspicious circumstances make the person have to work that much harder to prove the will is valid because the presumption that normally aids them is thrown out. The evidence must be scrutinized in accordance with the gravity of suspicion – but onus is on BOP.*

**Context:** Vout was the major beneficiary, and the residual beneficiary in the deceased’s will. The respondent, Carl Hay, the deceased’s brother was given $1000, and 7 nieces and nephews were given $3000. A legal secretary in the office of the appellant's parents' lawyer prepared the will. She testified that she had received her instructions from a woman who identified herself as the appellant. Prior to the execution of the will, she testified that she read it to the testator in front of the appellant. She stated that the testator had a quizzical look on his face at one point and was reassured by the appellant, who said, "Yes, that's what we discussed. That's what you decided."

**Issues**: Did the TJ err in the application of the suspicious circumstance’s doctrine? Did the TJ err in saying the will was properly executed?

**Positions:** **TJ** found that the suspicions of the family surrounding the preparation and execution of the will were unfounded. The trial judge held that the testator had testamentary capacity and that there was no undue influence and, therefore, admitted the will to probate. **COA** found issues, and issued a new trial.

**Decision:** TJ decision reinstated. No suspicious circumstances.  
**Analysis**:

* When challenging for capacity – law says capacity is presumed.
* Suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.
* Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval.
  + If someone raises suspicious circumstances – the burden somehow switches, and the person who wants to say the will is valid – has to show it.
  + Its still balance – but we will scrutinize this really closely
  + The person will have to work much harder to show that the will is valid then.
* Onus of proof is BoP.

#### Intro - Undue Influence

##### Kozak Estate (Re) 2018 ABQB 185 – standard for Undue Influence

Undue influence is more than mere influence – it is “Influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased” = coercion.

## Nature of Assets / Designations

|  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| \*Always make a table with 4 columns:   |  |  |  |  | | --- | --- | --- | --- | | **OUTSIDE estate**  **-note: exes NOT considered pre-deceased** | | **INSIDE estate**  **-note: exes considered pre-deceased** | | | ***Joint Tenancy***  ***(quasi testamentary)*** | ***Beneficiary Designation***  ***(quasi testamentary)*** | ***CO-owned*** | ***Sole Owned*** | | Asset name + value  E.g. Land, bank accounts,  **\*\*Always ask why the property was made joint**  \*Deemed to have passed prior to death outside of estate | Asset name + value  E.g. RRSP, TFSA, Life Insurance, Pension  **\*\*Can change beneficiaries in your will** | Asset name + value | Asset name + value |   **Beneficiary Designations:** CANNOT chance beneficiary once you lose capacity (Trustees/ Attorneys cannot make these decisions for you). If beneficiary is a MINOR – it will be held by the Public Trustee until minor is 18 (***Minors Property Act***). **Designation in favour of spouse or AIP is not revoked at the end of relationship.**   * **RRSP’s /Pensions**:   + Can assign a beneficiary in your will that overrides beneficiary in the document (***S.71 of WSA)***   + Last Designation wins (***s.71(7) of WSA****).* * **Life Insurance:**    + Creditor Proof – ***s.731(1) of Insurance Act***   + Estate is the ultimate beneficiary – ***s.664 of Insurance Act***     - If no one is named, it goes to your estate (then not creditor proof)   + Insurance Trust – ***s.663(1) of Insurance Act***     - Allows insurance money to be distributed according to will, keeps it creditor proof     - *Re Goldstein* proves this is valid way of making funds creditor proof       * Must establish the trust as a free-standing, separate and apart from the deceased’s estate assets.       * Include words that insurance proceeds are to be administered **separate and apart from the deceased’s estate**   + Last designations wins ***– s.661(1) of Insurance Act***   **Common Disaster:**   * Will:   + Each is deemed to survive the other – ***s. 5 WSA***   + Joint tenancy is converted to a tenancy in common – ***s. 5(2) WSA***   + UNLESS other contract is found to change these rules – ***s.5(1)(a) WSA*** * Insurance:   + Beneficiary is deemed to have predeceased ***- ss. 685 and 664 of the Insurance Act*** * RRSPs:   + Beneficiary is deemed to have predeceased – ***s. 5 WSA*** |

1. Solely Owned: Assets that are Solely Owned
   * Comes into estate
2. Beneficiary Designations: assets that you name a beneficiary in the asset themselves
   * E.g. pension, life insurance, RRSP, tax free savings account (the big 4)
   * Stays outside of estate (unless beneficiary is the estate)
3. Co-Owned: Assets that are Co-Owned
   * When you die, your estate keeps your ownership share in that property – so the will DOES deal with this.
   * Comes into estate
4. Joint Tenancy: Assets that are owned Jointly
   * When you die, full ownership is transferred to the survivor. So will cannot deal with this.
   * Stays OUTSIDE of estate
     + Deemed to have passed prior to death outside of estate
   * Can have unintended consequences including:
     + Unequal or unfair distribution on death
     + Taxes
     + Unreasonable joint owners
     + Bankruptcy and divorce / separation

**Note: Will ONLY deals with assets you OWN or CO-OWN.**

**Note: You can give beneficiary designations through your WILL\* (e.g. Life insurance, registered funds). BUT only if the person has capacity. Once they lose capacity, the beneficiaries cannot be changed.**

### RRSP designations:

* You wouldn’t want to designate children as beneficiaries to RRSP – because if one of the kids is deceased – it all just goes to the other kid (not to the first kids grandkids).
  + **Important to know:** the tax from RRSPs come from the estate – so if you gave RRSP to kids, one is dead, their grandkids don’t get any money from the RRSP, but they have to pay the taxes on it (because it comes from the estate).
  + You can change the RRSP **to have the estate as the beneficiary** – then its exempt from creditors, and goes equally to the two kids, and if one is dead, it does go to their grandkids.
* Can designate beneficiary of this in your Will. (***S.71 of WSA***)
  + Also applies to Registered Fund, TFSA, a fund, a trust, pension, etc.
* Last designation wins ***(s.71(7) of WSA***).

### Life Insurance Designations:

* + Creditor Proof ***(s.731(1) of Insurance Act***)
  + Designation: In the contract, declaration, or will
  + Last designation wins –***s.661(1) of Insurance Act***
    1. Can designate kids as the beneficiary – but then if one is deceased, it goes to the other and not the one kid + grandkids.
    2. Can designate the estate as the beneficiary – but then its subject to creditors (who can eat up the money)
    3. Can designate an insurance trust as the beneficiary – then say that its to be distributed according to the will.
* **Insurance Trust:** Can set up an insurance trust, so the trust is the beneficiary – then lawyers say I want my insurance trust to be distributed according to my will.
  + Allows you to decide how the property goes, and **keeps it creditor proof.**
  + *Goldstein*: Court upheld that insurance trusts are legitimate planning tools.
    1. Must establish the trust as a free-standing, separate and apart from the deceased’s estate assets.
    2. Include words that insurance proceeds are to be administered separate and apart from the deceased’s estate

**What happens when MINOR is given a gift of Life Insurance?**

* Delivery to the Public Trustee until minor is an adult - ***Minors Property Act***
* Prudent Investment - ***the Public Trustee Act s.36(1), the Trustee Act ss. 2- 8.***
* Court Application required to encroach on capital

**Estate Planning – TAX:**

* Deemed disposition at FMV ***– s.70(5) of the Income Tax Act***
  + Deemed disposition on death (Income tax act says when you die, government pretends you sold everything at FMV (fair market value) (Michael calls this “**the great garage sale of life**”).
  + So generally, you end up having a tax bill on death
  + But 2 exceptions to the rule:
    - 1. Automatic roll over to spouse or common law spouse –***s. 70(6) ITA*** 
      * If you have a spouse or common law (Common law is a federal term, means 1-year conjugal relationship) then you get a “roll over.”
    - 2. No capital gain on principal residence
      * Can live in principal residence, tax free.
* Common law different than AIP – ***s. 248 ITA***
* Estate and beneficiaries jointly and severally liable for tax on RRSPs and RRIFs ***– s.160.2(1) ITA***
  + Morrison v. Morrison, 2015 ABQB 769

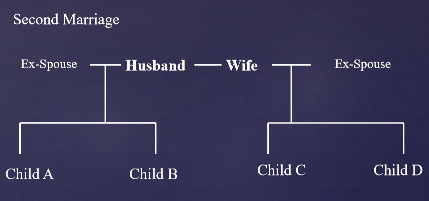
## Common Disaster:

* **Common Disaster:** A clause that deals with the case where 2 or more people die at the same time rendering it uncertain who died first.
* **NOTE:** **this CAN be changed by contract** (***s.5(1)(a) WSA)***
  + “unless the court in interpreting a will or other instrument finds a contrary intention”
    - So CAN make a contract to provide a different result
    - E.g. Pre-nuptial agreement: “If the spouses die in a common accident, or do not survive each other by 14 days, the land will be divided in the following proportions…”
    - OR: “the land will form part of the estate of the Wife….”
* If 2 people die in an accident, the insurance act and the WSA determine who dies first
* **Will:**
  + Each is deemed to have survived the ***other (s.5 WSA)***
  + **Joint tenancy is converted to tenancy in common**
    - As a lawyer, you have to think about that and say – do I want to change that?
      * Remember with a will you can always change the rules in the will, because most sections say unless will provides otherwise….
  + If they held property jointly, and they both die in circumstances where its unclear who died first, then the property is converted to a TIC and each persons share goes into their estate and divided according to will
    - If one JT dies first, then by survivorship, the other gets 100% ownership
    - If there are 3 JT’s and 2 die at same time, then by survivorship, the third gets 100% ownership.
    - But if they die together, they each die with an equal share that gets passed down.
* **Insurance**
  + Beneficiary is deemed to predeceased ***(s. 685 & 664 of Insurance Act)***
  + Therefore, the gift does not pass to the beneficiary
* **Registered Funds**
  + Beneficiary is deemed to predeceased (***s.5 WSA)***
  + Therefore, the gift does not pass to the beneficiary

***Example 1:*** Mom, Dad and A have a farm property as joint tenants (all own it equally). They all die in a common disaster. The wills of Mom & Dad give the property to each other, or if they are both gone, then equally to their children.

* **Answer:** **First thing is that joint tenancy is converted to a tenancy in common**. So each person retains 1/3 that goes to their estate (or is divided according to will)
  + So, Mom estate = 1/3, Dad estate = 1/3, A estate =1/3
  + Will of Mom/Dad gives everything to their kids:
    - Mom = 0, Dad = 0, Estate of A= 2/3 and B = 1/3
      * Because Mom and Dad each give 1/3 to each child, and A already has a 1/3 interest.
  + Then: Child A’s interest in the land will be given to their spouse
    - Under their will or through intestate provisions.
  + If the intention was to give 100% of the property to A, the will should have said: if we did in common accident, then the farmland goes to A.

***Example 2:*** Husbands will says – everything to wife but if she dies first, then equally to children A & B. Wife’s will says: everything to husband but if he pre-deceases me, then equally to children C &D. Assume they die in common disaster and own a house jointly. What happens?

**Answer:** No one dies first, so common disaster provisions apply. So Joint tenancy is severed and put into TIC.

* Husband = 50% into husbands estate
* Wife = 50% into wifes estate
  + Then each 50% is split according to their will = each child gets 25%.

**Class 4:**

# Drafting the Documents-Types of Documents

|  |
| --- |
| **Who can Make a Will? *S.13 WSA***   * Adults with capacity * Some minors with capacity (military, those with a spouse, with permission)   **All Wills**   * The will must be in writing ***S.14(a) WSA*** * The will must contain the testator’s signature. ***S.14(b) WSA***   + For problems with signature – see ***s.19 WSA***   + **Signature MAY be added under *s.39 WSA (****Hood v South Calgary Community Church, 2019 ABCA 34*) (must be done w/in 6 months of probate) * Problems can be fixed under ***s.37 WSA*** (except ***s.14*** requirements)   **Formal Wills**   * ***S.14*** Requirements (writing + signature) * Signed by the testator in the presence of 2 witnesses who were present at the same time- ***s.15 WSA***   + ***S.20*** – who can be a witness * Signed by the 2 witnesses in the presence of the testator- ***s.15 WSA*** * **Signature MAY be added under *s.39 WSA (****Hood v South Calgary Community Church, 2019 ABCA 34*) (must be done w/in 6 months of probate)   **Holograph Wills**   * ***S.14*** Requirements (writing + signature) * Wholly in testators handwriting ***s.16***   **Codicils**   * Are wills ***s.1(1)(k)(i) WSA*** * Must meet same requirements as a will to be valid (***s.14 + either s.15 or 16***)   **Alterations**   * ***S.22 WSA*** – alterations must be done in accordance with ***s.15, 16*** requirements. * Invalid alterations can be saved under ***s.38 WSA*** (*Smith Estate*)   **Revocation**   * ***S.23(1) WSA*** * Doesn’t revive an earlier will – ***s.23(3) WSA*** * Gifts to ex spouses will be treated as if ex predeceased testator – ***s.25(1) WSA***   **Revival**   * ***S.24(1) WSA*** * Just do a new will instead. Revival is rare   **Enduring POA**  **Personal Directives** |

## Formalities of a Will

Who can make a will? ***S.13 WSA***

* Adults (over18) with capacity
  + Test for Capacity:
    - *Banks v Goodfellow*
* Minors:
  + Minors (under 18) with capacity in the military - ***s.13(2)(B)(i) WSA***
  + Minors (under18) with a spouse/AIP - ***s.13(2)(A) WSA***
  + Minors(under18) with the permission of the Court undersection 36 – ***S.13(c) WSA***
    - Test for capacity:
      * *Banks v Goodfellow* AND the following because of ***s.36(2) WSA***
        + A.) The individual understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it
        + B.) The proposed will, alteration or revocation accurately reflects the individual’s intentions and
        + C.) It is reasonable in all the circumstances that the order should be made
  + See rule ***54.1 Surrogate Rules***
  + Also see ***s.36(1)WSA*** – where court can give authorization

**Formalities:**

* Rationale:
  + The formalities prescribed for making a will provide some sort of safeguard not only against forgery and undue influence but also against hasty or ill-considered dispositions.
  + The formalities emphasize the importance of the act of making a will and serve as a check against improvident action.
  + In general, formalities can be justified by the need to provide reliable evidence of a person’s testamentary intentions, which may have been expressed many years before his death
* Under previous law, Court had no power to amend the statutory requirements.
  + This led Courts to awkward positions where they knew that the testator had a testamentary intention, but the will, on its face, was valid and had no ambiguity about it.
    - E.g. *Conner v. Bruketa Estate*

### Mandatory Requirements of a Valid Will

**ALL WILLS:**

* ***S.14 WSA:***
  + ***(a)*** **Must be in writing**
    - “In writing” is defined in the *Interpretation Act*:
      * “writing”, “written” or any similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form.
    - Cannot be remedied – this is mandatory for a will - *Woods Estate*
  + ***(b)*** **Must be signed**
    - ***S.19 WSA*** deals with signature problems:
      * (1) Can direct someone to sign for you
        + Has to be done in their presence and at their direction.
        + The person signing may either **sign the testator’s name or his or her own name or make a mark for the testator** (Feeney, p. 39).
        + Make sure this person isn’t a beneficiary as well or their gift will be voided ***s.21 WSA***

Note: void gifts can be fixed under ***s.40 WSA***

* + - * (2) A will is not invalid because the testator’s signature is not placed at the end of the will if it appears that the testator intended by the signature to give effect to the will.
      * (3) A testator is presumed not to have intended to give effect to any writing that appears below the testator’s signature.
        + If they don’t sign at the end, its not invalid, but anything after their signature is presumed NOT to be given effect

Rebuttable.

* + - * (4) A testator’s signature does not give effect to any disposition or direction added to the will after the will is made.
    - Signature can be a mark – but should look like your normal signature.
    - **No signature = No will** *Woods Estate, 2014 ABQB 614.*
    - **Signature MAY be added under *s.39 WSA (****Hood v South Calgary Community Church, 2019 ABCA 34 –* **VERY DIFFICULT**) (must be done w/in 6 months of probate)
* ***S.37 WSA:***
  + Validation of a Non-Compliant Will
  + Can order a will is a valid if not compliant with 15,16,17 if its clearly sets out their intentions and was meant to be a will.
  + **NOTE: S.14 REQUIREMENTS CANNOT BE FIXED**
    - **No signature = No will** *Woods Estate, 2014 ABQB 614.*

##### Conner v. Bruketa– court can complete a will where there has been a clear omission

***2010 ABQB 517- A will was signed but omitted a re-designation of pension/ life insurance to Conner as he clearly intended in his instructions. The lawyer said that Bruketa told her that Conner was the beneficiary of these already – so the lawyer didn’t include this in the will – therefore there was a mistake / omission in the will.*** *2 positions: handwritten name at top written by lawyer = enough to re-desigante the polices OR the court should fix the omission. The Court ultimately found that the handwritten instruction is a declaration fo rthe purposes of s.47(2)(a) of the Trustee Act and s. 554 and s.574(1) of the Insurance Act. The handwritten instructions were admissible as proof of an omission.*

**(NOTE – THIS CASE IS PRE-WSA, so wouldn’t use this often).**

**Ratio**: **The Court may “complete a testator’s Will” by supplying words that have been omitted.** **Even in the case of an ambiguity (this case is pre-WSA) that the Court will stretch itself to interpret wills in accordance with incontrovertible evidence about the testator’s intent.**

**Context**: Bruketa named his father and mother as the beneficiers of his insurance policy and pension plan. In his will, he named Connor as the sole beneficiary and executrix of the estate. In 2000, he attended a lawyer’s office and said he would provide her with written instructions. On a second, meeting he provided them. The will was signed by Bruketa, but omitted a re- designation of the pension/life insurance to Conner. The will doesn’t designate her as the beneficiary of his life / pension plan. The lawyer’s instruction sheet, however, included the words “John Bruketa” and “Shirley Conner” which were written by the lawyer at the top of the page.

**Issues**: Whether the handwritten instructions can constitute a “will” which shows that Connor was the intended beneficiary of the insurance / pension plan, even though this was not in his actual will.

**Positions:**

**Decision:**  Bruketa's intentions were clear and unequivocal. He believed that the disputed assets formed part of his estate. He intended to leave the residue of his estate to Connor including the .disputed assets. The court should give effect to Bruketa's intentions.

**Analysis:** The handwritten instructions of Bruketa is admissible as proof that there had been an omission. This is an extraordinary case as the Bruketa's will is silent on the issue of the pension plan and insurance beneficiary. This is only so because the lawyer misunderstood Bruketa's instructions and therefore inadvertently omitted his designation.

* This is an exceptional case where the Bruketa's hand written will instructions and the surrounding circumstances dictate that the Court should strive to give effect to Bruketa's wishes.
* Bruketa's written instructions were not signed by him. Nevertheless, the instructions represent a clear expression of his intent to designate Ms. Conner as the beneficiary of life insurance and pension plan entitlements.
* It is within the Court's discretion to admit Bruketa's handwritten instructions as extrinsic evidence of his intention.

**Class Notes:**

* 1. Tells you to take careful notes, review a document thoroughly to ensure it accords with the testator’s wishes, and to consider having a testator sign instructions along with the will
* 2. Stands for the principle that even in the case of an ambiguity (this case is pre-WSA) that the Court will stretch itself to interpret wills in accordance with incontrovertible evidence about the testator’s intent.
* 3. Continues to be used for the principle that “The object of this exercise is for this Court to attempt to determine the Deceased’s actual or subjective intent, rather than an objective intent that the law presumes”
  + says you should look to subjective intent instead of sticking to formal requirements.

### How to Properly Execute a Will

* From *Kozak*: steps to do to avoid undue influence challenges -
  + Meet with a client alone
  + Establish capacity
  + Keep VERY DETAILED NOTES
  + Ensure third parties do not interfere
  + No third parties present
  + No third parties signing the retainer
  + No communications with third parties
  + No information provided to a third party without the client’s consent
  + If you suspect undue influence, see what you can do to suss out the actual facts.
    - Can you involve other family members (with the consent of the testator)?
    - Can you request additional documents or financial statements to see what’s really going on?
    - Consider the “two will” option or the secret Codicil.

## Formal Wills

* **Requirements:**
  + ***S.14 WSA + S.15 WSA***
  + they have to be acknowledged in presence of 2 witnesses
  + each of those people have to sign in presence of the person
    - Everyone is trapped until all the documents are signed.
      * Keep everyone in room so everyone is present at the same time
    - What usually happens is all 3 are in a room, and you all do it in one transaction at the same time.
  + Can be remedied by ***s.37 WSA***
* **Who can be a witness? *S.20 WSA***
  + (1) – need capacity
  + (2) – can’t be a person who signed on behalf of testator
  + (3) – If its one of the people listed, their gift in the will will be revoked.
    - Beneficiary, person who signed on behalf of testator,
    - See ***sec. 21(1)***
    - Will really good evidence that this was a mistake, the gift can be fixed
  + (4) – Witness doesn’t need to know it’s a will, witness can lose capacity after, can have more than 2 witnesses
* **Void Dispositions** ***s.21(1) WSA***
  + Note: Void dispositions can be fixed by ***s.40(1) WSA***
  + Not void ***s.21(2) WSA***

## Holograph Wills

* **Requirements:**
  + S.14 WSA + S.16 WSA
  + Can be remedied by ***s.37 WSA***
* **Challenging:**
  + Is it really in their own handwriting?
* **Problems:**
  + Most do not name an executor
    - ***S.13(1)(a) EAA*** gives priority of who gets to be one
  + Vague wording may cause problems
  + Words using ‘or’ may lead to disputes about what should be – option 1 or 2
  + Many don’t leave a residual beneficiary – what about their other assets
  + If talks about trusts – who is the trustee, when does the trust get dispersed?

## Codicils

* Is a will under ***s.1(1)(k)(i) WSA***
* Basically, is like an amending document:
* E.g. “I am writing this in relation to my will on this date, I revoke / delete this, I replace para 4 with the following… or I strike para 3. In all other aspects I confirm my will”
* **Requirements:**
  + Same as a Will
    - Formal – needs to meet formal requirements of a will
    - Holograph – needs to meet holograph requirements of a will
* **Problems:**
  + Codicils can be misplaced, lost or destroyed or are not stored in the same place as the will which can cause confusion.
  + Can probate a will and then it turns out they wrote a codicil

## Altering a Will

* ***Section 22 of the WSA*** codifies the rules for alterations to a will.
* Valid alterations must accord with the type of will that is being altered (either holograph or formal will)
  + ***S.15*** for Formal
    - E.g. Each change would need to be signed by testator + 2 witnesses
      * In practise – you would just re-do the will rather than doing markings on an existing will.
  + ***S.16*** for Holograph
* Invalid alterations can be fixed by a court ***under s.38*** *(Smith estate)*
  + Court is open to consider evidence before it on the alterations to ensure they reflect the testamentary intentions of the testator.

##### Re: Smith Estate – court can validate non-compliant alterations (especially when not contested)

*Re: Alteration to Wills - deceased separated from wife and changed his will to give everything to his kids instead but these changes weren’t signed by him and 2 additional witnesses. Therefore, it had to go to court to validate the alterations. The Court is open to consider evidence before it on the alterations to ensure they reflect the testamentary intentions of the testator – here the changes made sense.*

**Ratio:** **Even if changes are made to a will without following the requirements in the legislation, it can be saved by a court under s.38 if it is proven on a balance that it was the testator’s intention to do so.   
Context:** After separation, the deceased made handwritten alterations which removed Ms. Charpentier (his ex) as the personal representative under his will, and substituted his daughter, Mavis Smith, as his personal representative. He also removed Ms. Charpentier as the sole residual beneficiary, and instead named his four children and Ms. Charpentier's granddaughter, Jasmine Molloy. These alterations were neither initialled by the deceased, nor signed by witnesses. (it was a formal will)

**Issue**: Whether the handwritten changes to the will are valid, even though they don’t comply with the statutory requirements.

**Position**: Applicant wants the handwritten changes to the will to be declared valid. This was NOT contested.   
**Decision**: Will is saved under s.38 of WSA

**Analysis**:

* The validity of alterations to a will are governed by ***section 22*** of the new Wills and Succession Act
* The alteration be acknowledged by the signature of the testator in the presence of two witnesses at the same time, and that those witnesses both sign the will in the presence of the testator: **WSA*, ss 22(1)(b)(i), and 15.***
* The altered will before me does not comply with these provisions.
* ***Section 38*** is the only provision that can save the testator's alterations.
  + This says the court can save a will that was modified without following the instructions, if the court is sure that it was their intention to modify the will.
* Here it can be invoked:
  + Evidence included:
    - Affidavits re: handwriting; Made to an otherwise valid will;
    - Dissolution of relationship - the changes made sense.
  + There’s evidence that it was in his own handwriting, it was made to an otherwise valid will, the breakdown in his relationship with his spouse make it more reasonable than not that he would want to take her out of his will.

## Revocation

* ***S.23(1) WSA*** –
  + Testator can make another will
  + Testator can make a written declaration to revoke his or her will in accordance with Part 2 (i.e. formal or holograph);
  + Testator burns, tears or otherwise destroys a will **with the intention of revoking it** (\*), or has someone else do this for them.
* **Revocation of a will does not revive a prior will – *sec. 23(3).***
* **Gifts to an ex-spouse:**
  + if you make a will and marriage ends in divorce / no longer are an AIP – then unless you had contrary intention – anything that gives spouse something in the will / appoints them as a trustee is deemed to be revoked – and they are treated to have pre-deceased the testator. ***S.25(1) WSA***

## Revival

* ***S.24(1) WSA***
* RARE – never have seen this – no case law on this
* Just do a new will instead

## Enduring POA

* Governed by ***Powers of Attorney Act***
* An Enduring **Power of Attorney (“EPA”)** is a legal document in Alberta which allows someone who is appointed (**Attorney**) to manage the financial affairs of someone else (**Donor**).
  + **Note:** Without an EPA, you would need a **Trusteeship Order.**
* In a traditional Power of Attorney, once the Principal loses capacity, the Agent loses capacity as well.
  + The *Powers of Attorney Act* is a piece of legislation in Alberta which aims to solve this issue.
  + It allows the creation, by legislation, of an ***enduring power of attorney*** – a document which will **endure after the loss of capacity** of the Donor. Once created, it survives incapacity
* In Alberta, you are not required to tell your Attorney they have been named or get their consent.
* An Attorney may refuse the appointment.
* However, if an Attorney acts under the EPA or otherwise accepts the appointment, the Attorney **has a positive duty to act and then cannot renounce** without permission of the Court.
* **Two types:**
  + **Immediate** – These EPAs come into effect immediately upon signing.
    - Donors do not lose their own capacity to manage their own affairs.
    - Only see immediate in specific cases – like when people are leaving on a trip and they want someone to pay mortgage, do banking, military members etc
    - Subject to challenge because 2 people have ability to make decisions (in springing, there is only 1)
  + **Springing** - These EPAs come into effect upon a specified triggering event. Generally, people choose incapacity as their triggering event – they will define what “incapacity” they wish to bring the document into effect. These are the most common types

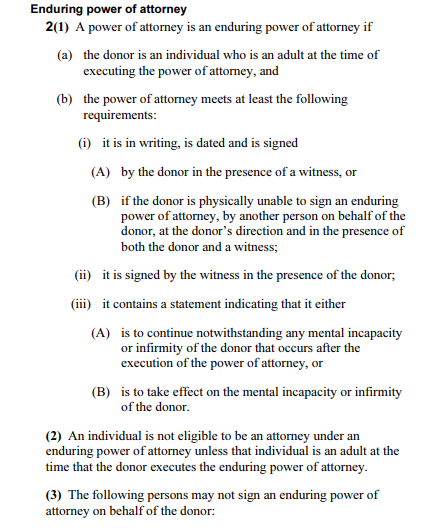
### What Can / Must a POA do?

* The **Powers** *of Attorney Act* allows an Attorney to obtain health care information to the extent it is needed to find out if the EPA has come into effect (***see section 6).***
  + This is important if the attorney thinks the donor lost capacity – but they don’t think so
    - **E.g.** A situation where you are watching your parent decline, but they aren’t allowing me to check their financial info
* ***Section 7(a) of the Powers of Attorney Act*** says that an Attorney “has authority to do anything on behalf of the donor that the donor may lawfully do by an attorney”.
  + Big restriction is that you can only use money for the person who’s money it is – so cannot use the money for someone else (restricted for gifting unless EPA says you can).
    - But not a conflict if you are benefiting yourself if you’re the spouse – like paying a mortgage. ***(section 7(b)).***
* ***(Section 7(b))*** An Attorney “may exercise the attorney’s authority for the maintenance, education, benefit and advancement of the donor’s spouse, adult interdependent partner and dependent children, including the attorney if the attorney is the donor’s spouse, adult interdependent partner or dependent child” (section 7(b)).
* Can also be limited by the **terms** of the EPA.
* **Duties of POA**
  + **Duty to Act:** Have a DUTY TO ACT – can refuse, but if they accept then they cannot renounce without courts permission.
  + **Accounting:** keep careful records of the activities done on behalf of the donor, including bank statements, receipts and evidence of all transactions, etc.
    - Some EPAs include a mandatory requirement for accounting to certain family members and/or the donor.
      * Not a bad idea to have this
    - Section 10 of the EPAA allows the donor, the donor’s PR, or a Trustee of a donor to apply to the Court to have an Attorney pass his/her accounts
      * If the donor lacks capacity, any interested person can apply.

### What can a POA NOT do? (i.e. Restrictions)

* ***Common law restrictions***
  + An Attorney cannot make a will for the Donor
  + An Attorney cannot do anything “testamentary” for the Donor (eg. Beneficiary designations) unless being given that power expressly
  + An Attorney cannot exercise a discretionary power given to the Donor personally
    - Can set up compensation for the attorney in the EPA – can say for any time they act they can receive $100. But if its silent about it – you can seek compensation from a court – but they cannot just take a fee if they want it.
  + Cannot delegate unless given that power expressly
  + An Attorney cannot sign a Dower Consent for the Donor after the Donor has lost capacity
  + An Attorney cannot sell or deal with land unless the EPA allows that expressly
  + An Attorney must act as a “fiduciary” (relationship of trust)
  + Can set up compensation for the attorney in the EPA – can say for any time they act they can receive $100. But if its silent about it – you can seek compensation from a court – but they cannot just take a fee if they want it.
* ***Trustee Act restrictions (Fiduciary Duties)*** 
  + The Trustee Act applies to Attorneys (see sections 2 – 8).
  + This is known as the **“prudent investor rule”** which widens the scope of authorized investments and allows trustees to invest in any reasonable investment, subject to contrary directions in the trust document.
  + Formerly, the scope of investments that a trustee could make was very narrow – now there is a guideline in the legislation as to what a trustee can invest trust funds in.

POA Requirements: ***S.2 POA Act***

* Must Be signed by an adult who has mental capacity at the time of signing;
* Must Be in writing;
* Must Be dated and signed by the donor in the presence of one (1) witness (or, if the donor cannot sign, be signed by another person in the presence of one (1) witness);
* Must Be signed by the witness in the presence of the donor;
* Must **Contain a statement re incapacity** – see sec. ***2(1)(b)(iii);***
  + This is unlike a will – a POA MUST have this statement \*\*\* “This is to continue beyond incapacity”
* Must Name an Attorney who is an adult **at the time the EPA is signed**.
* Should also get an **Affidavit of Execution**
  + Not required by legislation
  + But often needed by land titles + banks
  + E.g. an affidavit stapled to back of POA saying I witnessed the person sign, I believe both donor and attorney are over 18, it was signed in Edmonton

### What should be Included in a POA?

* Requirements above plus:
* Ensure that an Attorney is appointed.
  + Discuss multiple Attorneys v. single
  + Discuss joint and several
    - Means one attorney can do something without the other
  + Discuss cascading/alternate Attorneys
    - If A… otherwise B..
* Who would make a good Attorney?
  + Want someone who is financially savvy, trustworthy – because no real oversight over these people.
* Ensure coming into effect is clear
  + Immediate / springing?
  + Springing: how many notes do you want before it springs?
* Ensure that general power is given.
* Give thought to:
  + **Powers re: land**
    - **If the EPA does not expressly contain these powers, land cannot be transferred or sold.**
    - An EPA with general powers will not work.
    - **Note**: Land Titles requires an original EPA. They will not accept a photocopy – therefore, we generally recommend that the Donor sign multiple EPAs.
  + **Powers re: support**
    - Attorney is very restricted in terms of what he/she can use the donor’s money for.
    - Consider including clauses to support a spouse/AIP and dependent children.
    - E.g. paying rent: If the donor has a wife/AIP who is living there, can the Attorney pay the rent if it benefits the wife/AIP as well?
  + **Powers re: gifts**
    - If a donor expressly wants their Attorney to be able to gift funds (to a charity, to family members, to grandchildren, etc.), this must be included in the EPA expressly.
* Any other specific requirements of donor? (i.e. bank accounts, restrictions, accounting, sale of home, personal effects if sold?)
  + E.g. **Accounting** – may want to include mandatory accounting – because POA are ripe for abuse and this would give some protection

### Who can sign a POA?

* **Who CANNOT Sign on behalf of Donor?**
  + Any Attorney named in the EPA
  + A spouse/AIP of any Attorney named in the EPA
* **Who CANNOT be a witness?** (basically no one named + spouses of those named)
  + Any Attorney named in the EPA
  + A spouse/AIP of any Attorney named in the EPA
  + The spouse/AIP of the Donor
  + Someone who has signed on behalf of the Donor
  + A spouse/AIP of someone who has signed on behalf of the Donor
  + Note: ***s.40WSA*** saves gifts voided for this reason

### Capacity test for POA

* **Capacity Test:**
  + ***POAA sec.3***: the donor must be “mentally capable of understanding the nature and effect of the EPA when it is made”
  + **Test comes from case of *Midtdal v Pohl***
    - Capacity to execute the power of attorney would be established if the donor understood that:
      * A. the attorney would be able to assume complete authority over the donor's affairs;
      * B. the attorney could do anything with the donor's property that the donor could have done;
        + “they can do anything you could do – e.g. sell your house”
      * C. that the authority would continue if the donor became mentally incapable; and
        + After you lose capacity, you cannot revoke the POA until you regain capacity.
      * D. would in that event become irrevocable without confirmation by the court.
    - Common for lawyers to explain POA to people 🡪 go over the document, and **see if the person can repeat back the requirements** and what it does and say it in their own words – that is the capacity you are looking for.

### Revoking an EPA

* **Revoking an EPA**
  + Determination of capacity must be made at the time of revocation and the time of new appointment (***Pirie*** para. 25).

##### Pirie v. Pirie – capacity is assessed at time of revocation / creation

**Re: Enduring Power of Attorney, Revoking an EPA**

**Ratio: Determination of capacity must be made at the time of revocation and the time of new appointment – the Midtdal v Pohl test will be applied to determine capacity.**

**Context:** Jack was 88 and after separating from his first wife hired an expensive matchmaker and met a woman, whom he agreed to pay 100k to if it didn’t work out. Kids found out – they were upset. Had him see a doctor. First doctor said he had dementia, but had adequate understanding of the purpose of an EPOA. Saw another doctor who said no dementia, and as long as he wrote notes to himself, he could manage his finances just fine. The EPOA said that a declaration from a doctor + his attorney would be proof that the contingency occurred. 2008 EPA appointing 3 children and wife jointly as Attorneys. “Springing”. To come into effect: Required Jack’s attending physician plus his Attorneys. Obtained signature from attending physician (Dr. Williams) and all three Attorneys in 2008 -- springing the EPOA into action. Jack was pissed. He sought to have this revoked in 2016. He attended at a lawyer and sought a revocation of the 2008 EPA. At the same time, he wrote a replacement EPOA listing his brother.

**Issues**: whether Jack's 2016 Revocation of the 2008 Power of Attorney is valid, and whether his appointment of new attorneys in 2016 is valid.

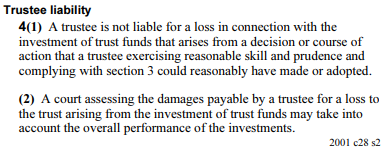
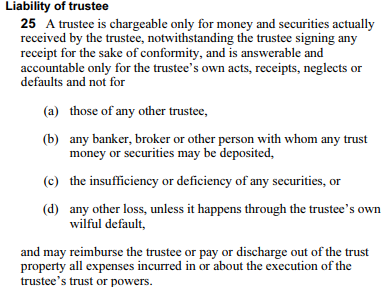
**Positions:** Children say not valid, he says valid because he had capacity.

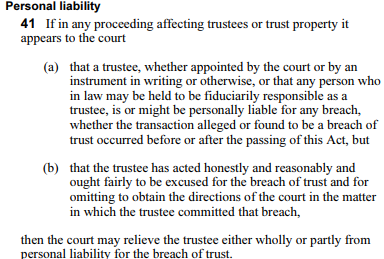
**Decision:** Applying *Midtdal v. Pohl* test - Both are valid.

**Analysis**:

* The Powers of Attorney Act states that an enduring power of attorney terminates: if it is revoked in writing by the donor at a time when the donor is mentally capable of understanding the nature and effect of the revocation.
* **The determination that must be made is whether**, **at the time of the Revocation** and new appointment, **Jack was mentally capable of understanding the nature and effect of the Revocation** and the nature and effect of the new Enduring Power of Attorney.
* In *Re K*, they said **the test was whether the person could understand that:**
  + **(a) the attorney would be able to assume complete authority over the donor's affairs;**
  + **(b) the attorney could do anything with the donor's property that the donor could have done;**
  + **(c) that the authority would continue if the donor became mentally incapable; and**
  + **(d) would in that event become irrevocable without confirmation by the court.**
* The test for Revocation of an Enduring Power of Attorney, set out in section ***13(1)(a)*** of the Act, utilizes the same test; ie for the Revocation to be valid the donor must be mentally capable of understanding the nature and effect of the Revocation.

### Attorney Liability

* 1. Liability for investments – ***see Trustee Act, sec. 4:***
  + Major downside of attorney is that if you lose money in an investment you could potentially be liable.
  + But as long as you act with reasonable skill / prudence, ***s.4(1)*** of trustee act gives some exclusions for liability.
* 2. Liability regarding things done – ***see Trustee Act, sec. 25:***
* Only in charge of money actually received by them
* 3. Personal liability – ***see Trustee Act, sec. 41***
  + But if they acted fairly and honestly – court can relieve trustee
  + S.41 important for advising attorney being sued – keep records, be careful about what you’re doing, and if you acted in good faith, court can discharge you from liability.

**If people challenge actions of attorney – they acted improperly – bring stuff forward about what they did that was wrong – attorneys defence will always be *s.41***

### Terminating an EPA

* An EPA can be terminated by:
  + The donor revoking the EPA in writing, provided the donor is capable of understanding the revocation;
    - but EPA are often in place because they lack capacity – so usually they don’t have capacity to revoke.
  + An interested person applies to the Court for an order terminating the EPA – consider issues!;
    - Consider issues – if you’ve been managing their affairs – you’d have to ask for something in your stead – terminate it because nothing at all is better than this guy.
  + The Attorney applies to Court for leave to renounce the appointment;
    - Need permission from Court to renounce one they have acted.
  + A Trusteeship Order is granted (AGTA);
    - Sometimes it’s a waste to go to court – but if you apply for trusteeship that would revoke the POA
  + The donor dies (EPA is over), or the Attorney dies and there is no alternate Attorney named; or
  + A Trusteeship Order is granted for the Attorney.
    - \* Know that this is way to get around these issues\*

### Red Flags in POA

* **What are some red flags that would cause you concern if someone is coming in to sign an EPA?**
  + A neighbour comes in / someone else who isn’t related
  + Sometimes attorney sets up the appt for their mom
  + Someone capacity feels borderline – talking to them and they don’t seem with it – would want to go through the test with them.
  + Person seems uncomfortable
* **What are ways to deal with red flags in the signing of an EPA?**
  + Try to speak to person on their own – make sure the person is meeting with you by themselves.
    - Daughter can sit in, but when we go to signing, she has to leave.
  + Have lengthy conversation with them to ascertain their reasoning – that also will help to show that they understand it.
  + Ask people if this is being done voluntarily.
  + Give them opportunity to sign an alternate one or not sign at all.
  + Make good notes – make a memo to your file notes.
  + Can do a doctors note – can say I think you have capacity but if someone were to challenge this – a doctors note can help – tell the doctor what test to go through

## Personal Directives

* Governed by ***Personal Directives Act***
* A **Personal Directive** (“PD”) is a legal document in Alberta which allows someone who is appointed (Agent) to make decisions about the personal matters of someone else (Maker).
  + Personal matters include:
    - (i) health care; (ii) accommodation; (iii) with whom the person may live and associate; (iv) participation in social, educational and employment activities; (v) legal matters; (vi) any other matter prescribed by the regulations [nothing presently]
  + **Note:** Without a Personal Directive, you would need a **Guardianship Order.**
* Not as fearful about people signing these – because doesn’t give anyone financial power – and generally, these aren’t misused.
* They invoke strong family disagreements, but not financial.

### Who can make a PD?

* The maker must be over the age of 18;
* The maker must have capacity (see capacity slide) – note presumption in sec. 3(2)!;
  + There is a presumption of capacity
* The Agent appointed must be over 18 when it comes into effect; and
  + In theory could have minor agent named that becomes agent when they turn 18
* The Agent must have mental capacity to act when it comes into effect.

### Who can be an Agent of a PD?

* **Agent Requirements:**
  + ***S.(12)(a)*** Must be over 18 at the time the PD comes into effect;
  + Can be identified by office or position; and
  + Can be Office of the Public Guardian if:
    - Only Agent designated;
    - No other person can act; and
    - The OPGT consents.
      * They usually say no
  + Discuss OPG as Agent
* **Choosing an Agent:**
  + Because an Agent’s job is so linked with knowledge of the maker, and perhaps some of the maker’s most intimate values, wishes and beliefs, choosing the right Agent is imperative.
    - Good agents are people who knows the makers beliefs, wishes, religion, etc…
  + Along with that, encouraging the maker to have lengthy and detailed conversations with the Agent (in consultation with their Doctor?) about their medical wishes is important as well.
* **Acting as an Agent**
  + ***S.14:*** Authority is set out
  + Must follow the PD carefully and ensure that if it contains a specific instruction, that the instruction is followed.
  + If the instructions are not clear, the Agent must make the decision that the agent believes the maker would have made in the circumstances
  + If the Agent does not know the maker’s wishes, beliefs and values are, make the decision that the agent believes in the circumstances is in the best interests of the maker.
  + ***S.13:*** before making a personal decision pursuant to a personal directive, an agent must consult with the maker regarding the decision.

### Formal Requirements of a PD

* See ***section 5 of the PDA*** for requirements.
* **A Personal Directive must:**
  + Be in writing;
  + Be dated and signed by the maker in the presence of **one (1) witness** (or if the maker is physically unable to sign, by another on behalf of the maker in the presence of both the maker and a witness);
  + Be signed by the witness in the presence of the maker.
* Similar to an EPA, we recommend having the witness swear an Affidavit that they watched the maker sign the PD.
  + Not a technical legal requirement but is good practice and may be requested by hospitals, care facilities, or nursing homes, and so it is best to do it at the time the PD is originally signed.

### What to Include in a PD

* Ensure that an Agent is appointed.
  + Discuss multiple Agents
    - its challenging to have many – differing opinions
  + Discuss joint and several
    - can make independent decision, but if together, can make it together
  + Discuss cascading/alternate Agents
    - if A is unwilling or unable then B, if B is unwilling or unable…etc
  + Who would make a good Agent?
* Ensure coming into effect is clear
* Ensure that the matters that the PD applies to are clearly stated (“personal matters”) and provide restrictions, if appropriate.
  + Restrictions aren’t common – but could say so and so does health, so and so does accommodation.
* Notifications of coming into effect?
* Accessing the maker’s medical information?
  + E.g. Even if I am not incapacitated – my son/daughter can access my medical records – the privacy officers – if it doesn’t have this, talk about it.
* Guardianship of minors during incapacity?
  + Can appoint an interim guardian – if you have guardianship powers, can create an interim guardian for kids.
* Medical wishes/end of life requests
  + **Note:** will want to bring up the *Rasouli* case
    - E.g. if you want to be kept on life support – think about what you are putting your family through, your children through, etc..

### Duties of an Agent

* Authority is set out in ***section 14*** of the Act.
* Agents must follow the PD carefully and ensure that if it contains a specific instruction, that the instruction is followed.
* If the instructions are not clear, the Agent must make the decision that the agent believes the maker would have made in the circumstances, based on the agent’s knowledge of the maker’s wishes, beliefs, and values.
  + If they don’t know what maker would want – they should make the decision that the agent believes in the circumstances is in the best interests of the maker.
* ***S.13:*** **Duty to Consult:** Before making a personal decision pursuant to a personal directive, an agent must consult with the maker regarding the decision.
* ***S.17:*** **Record Keeping:** Agent must keep records of decisions during the entire time that the maker is incapacitated and for up to two years after the agent’s authority ceases
  + An agent must provide a copy of the record to the maker, the maker’s lawyer, the maker’s legal representative, and any other agent upon request

### Limitations on Authority of Agent in a PD

* ***Section 15*** of the Act includes certain things that an Agent is restricted from doing unless the PD contains clear instructions that enable the Agent to do so, including:
  + Psychosurgery
  + Sterilization
  + Removal of tissue from the maker’s living body for implantation into another living person/for research/medical education purposes
  + Research/experimental activities
  + Any other matter prescribed
* If the PD contains an instruction prohibited by law, that instruction is void.
* *Carter* decision: now you have to consent to medical assistance in death - Once PD comes into effect – you lack capacity – so right now, agent cannot make this decision for you.

### Who can’t Sign for the Maker?

* ***S.5(2):*** A person designated as an Agent; or
* The spouse/AIP of the person designated as an Agent.
  + Same group of people
  + Just want it to be a random person
  + A lawyer is great.

### Who Can’t Witness a PD?

* ***S.5(3):***
* The Agent;
* The spouse/AIP of the person designated as an agent in the PD;
* The spouse of AIP of the maker;
* A person who signed on behalf of the maker; or
* The spouse/AIP of a person who signed on behalf of the maker.

### Capacity test for PD

* **No test for capacity – just the definition**
* For a PD to be valid, the maker must be mentally capable of understanding its nature and effect at the time of making it.
* Capacity” is defined in ***section 1(b)*** as:
  + “(b) “capacity” means the ability to understand the information that is relevant to the making of a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision;”
* **So:** Go through what the document is – ask them why they want to do the document – what they think the document will do
  + Ask them: If you were to make a healthcare decision, what things would you want to be considered
    - if they could talk about things important to that decision you’d be covered,
* If capacity is questionable probably ask for a doctors note, like a POA

### How does it come into effect?

* A PD can ONLY be Springing ***(s.9(1))***
* The PD itself can designate the people who can determine if the maker has last capacity.
  + Examples:
    - My Agent
      * 1 Doctor’s Note
      * 2 Doctor’s Notes
      * Specific physician?
      * Service provider? (See Definition)
        + try to avoid this – or add but in the event they cannot be located
* Note that section ***9(2)(a)*** states that the decision maker must consult with a physician or psychologist.
* If: the personal directive does not designate a person to determine the maker’s capacity OR the person designated in the personal directive to determine the maker’s capacity is unable or unwilling to do so or cannot be contacted, THEN: ***section 9(2)(b)***
  + **Default is then 2 service providers – 1 of which is a psychologist or physician**. ***section 9(2)(b)(ii)***
* ***S.9(5):*** Within a reasonable time of the PD coming into effect, the Agent must, subject to the PD, make every reasonable effort to notify: “the nearest relative” and “legal representative” of the maker that the PD is in effect.

### When does a PD come to an end?

* ***S.10***
* A PD will cease to have effect when:
  + A determination is made that the maker has regained capacity;
  + The maker dies;
  + The PD is validly revoked; or
    - A PD is validly revoked in one of the following ways:
      * The maker revokes **it in writing**, provided that the maker **understandings the nature and effect of revoking** the PD;
      * A date passes or an event occurs that is stated in the PD to be the date or event that determines when the PD is revoked;
* E.g. Say: I want this to apply until 2020, and then it ends.
  + - * The maker creates a later PD that contradicts an earlier PD (\*);
      * The maker creates a document, including a later PD, which expresses an intention to revoke an earlier PD;
      * The maker destroys the original PD with the intention to revoke it (\*).
  + The Court orders.

### Applications to Court

* ***Part 5*** of the Act allows for Court review of various matters relating to PDs.
* ***Section 27*** gives the Court many powers relating to the activation, use or termination of PDs.
* Courts are restricted, though, in altering the intentions of the maker as expressed in the PD (s. ***27(2)-(3)).***

### Agent Liability

* ***S.28:*** An Agent who has acted in good faith in carrying out their authority is protected from liability
* Agents are not disentitled to benefits under a maker’s will, insurance policies, an intestacy or for an FMS claim so long as they act in good faith.
  + Probably had to include because if you are a spouse, you are likely their beneficiary – and likely making the decision to pull the plug – hard because you are likely to benefit by this – so make sure everyone is on board with this, document it, etc…

**Class 5:**

# Introduction to Challenges

|  |
| --- |
| **Challenging a Will: (All on BoP standard)**   * Requirements not Met (and no validation under ***s.37 WSA*** has occurred). Note: onus is on the executor who is putting forth (propounding) the will to prove these elements.   + Age ***S.13 WSA***   + Formal Requirements (e.g. not properly executed) ***S.13 WSA***     - Not in writing ***S.13(a) WSA***     - Signature Problems ***s.13(b) WSA + 19 WSA***       * No signature, no will *Woods Estate, 2014 ABQB 614.*       * **Signature MAY be added under *s.39 WSA (****Hood v South Calgary Community Church, 2019 ABCA 34*) (must be done w/in 6 months of probate)     - Formal Will: 2 witnesses ***(s.15(a)WSA)***       * Problem with who witness is ***s.20 WSA***         + E.g. they didn’t have capacity, it was the person who signed for testator     - Holograph Will: Not in their actual handwriting ***s.16 WSA***       * No intent for this to be a will *Re Popowich Estate*   + Amendment to a will was invalid (***s.22(1) WSA***) and not fixed by ***s.38*** * Show the will was revoked (***s.23(1)WSA***): Burden on propounder to show not revoked * Lack of knowledge + approval: The testator didn’t know or understood the contents of the will: Burden on propounder   + This is different from capacity but often overlaps – a person may have capacity and not know and approve of the document they are signing or what is contained in it.     - Usually done by sending a draft of the will with a letter asking client to read it over carefully and then confirm he is satisfied with it before he signs it.       * If lawyer has any indication they didn’t read it as sent, the lawyer should read it to the client before its signed.   + Propounders must prove that the testator knew and approved of the contents at the time it was made.   + They are aided by rebuttable presumption that he did know + approve of the contents ONCE they prove that the will was properly executed (formal requirements) and was read TO the testator / read by the testator * Will was a mistake: Burden on propounder   + If testamentary intent was there, didn’t need to know it was a will (*Lindblom (Estate) v. Worthington)* * Lack of Capacity: Burden on propounder   + Capacity presumed until its challenged. Then **A person seeking to uphold the testamentary instrument must establish there was testamentary capacity in circumstances that cast doubt on the mental capacity of the deceased to make a will**. Applicants must prove he had capacity (on a balance) at the time the will was created. *Weidenberger Estate* * Suspicious Circumstances   + Basic rule is that evidence of suspicious circumstances has the effect of forcing the party propounding the will to **produce MORE evidence** of the testators capacity + knowledge and approval than normal – basically Capacity presumed until suspicious circumstances raised. Once raised, presumption is spent, and person claiming the will is valid must prove it’s a valid will to **BoP.** (must prove the banks steps). *Vout v Hay*   + The challenger will give evidence to their allegation – if they do then the burden is back to the propunder to show evidence that despite these suspicious circumstances, they did have capacity and knowledge and approval.     - E.g. they had a conversation right after discussing the will / it was made according to their specific instructions   + If the propounders do not overcome the allegations – the court will set will aside.   + The evidence will be scrutinized in accordance with the gravity of the suspicion. *Vout v Hay*   + Normally, once the propounders prove the formal requirements to be met and that it was read to / by the testator – they are aided by the presumption that they knew the contents of the will and this has to be shown otherwise by the challenger.     - HOWEVER – when this is raised – the propounders must prove knowledge and approval affirmatively – no presumption. * Undue Influence / Fraud: burden on challenger   + Difference between this + knowledge and approval: A person may well appreciate what they are doing, but be doing it as a result of coercion or fraud. *Vout v Hay*   + Need to show Coercion: Influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased *Kozak Estate*   + Allegations of this nature does NOT shift the burden to the propounders to disprove that this was present. *Vout v Hay*   Balance of Probabilities: |

## Challenging a Will:

The most common ways in which a will is challenged are the following:

1. **The testator was under 18 when the will was signed (or falls into one of the exceptions in the WSA): burden on propounder**
   * Age ***S.13 WSA***
   * Need to show date of testators birth
   * *The onus is on the executor who is putting forth (propounding) the will to prove these elements.*
2. **The will was not properly executed (per last class); burden on propounder**
   * Formal Requirements (e.g. not properly executed) ***S.13 WSA***
   * Will should be reviewed to see if it meets formalities
   * *Onus is on person propounding the will to prove it was properly executed*
3. **The will was revoked; burden on propounder**
   * ***Section 23*** of the WSA outlines the ways that a will can be revoked.
   * *Onus is on person propounding the will to prove will was not revoked*
4. **The testator didn’t know of and understood the contents of the will; burden on propounder**

* A will cannot be probated if the testator did not know its contents.
* **There is a presumption in law that the testator knew and approved the contents** once the propounders prove that the will was properly executed after it was read to or by the testator and the testator appeared to understand it. (*Vout v. Hay*)
  + This is a presumption – it can be rebutted (often, by suspicious circumstances).
    - It’s hard to prove this, because the testator is now deceased – so the SCC said if you can prove it was read to them, it was appeared to be understood and it was properly executed there’s a presumption of knowledge and approval.
* This concept is distinct from, but related to, testamentary capacity.
  + One can have testamentary capacity but, due to undue influence or mistake, did not know of and approve of the contents of a will.
  + But if someone lacks testamentary capacity, they will often not have knowledge and approval of the wills’ contents.
* This is presumed unless challenged – usually by suspicious circumstances
  + **Suspicious circumstances may be raised by:**
    - Circumstances surrounding the preparation of the will (Technical challenges); Circumstances tending to call into question the capacity of the testator (capacity challenges); or Circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud (undue influence challenges). (*Vout v. Hay*)
      * If you have any indications of these – may consider a challenge
    - Suspicious circumstances must be proven by attackers of will *Christensen*
    - Should a challenger be able to demonstrate “suspicious circumstances”, the presumption will be spent and the propounder will need to assume the onus of proving items 1 – 6.
  + **Facts that may support an inference of “suspicious circumstances***” (Kozak)*
    - The extent of physical and mental impairment of the testator around the time the will was signed;
    - whether the will in question constituted a significant change from the former will;
    - whether the will in question generally seems to make testamentary sense;
    - the factual circumstances surrounding the execution of the will;
    - whether a beneficiary was instrumental in the preparation of the will.
* *Onus is on propounder to show that they did have knowledge – note – they are aided by the presumption that once they show the formalities are met – the person is deemed to have knowledge and approval of the contents.*

1. **The will was affected by mistake; burden on propounder**
   * Instances where the will itself or issues surrounding the will make it clear that an error was made – either by the testator or his/her solicitor.
   * Note: There’s a rectification power in the WSA so courts can correct some mistakes – ***s.38,38,39***
   * “The term pure mistake implies that the testator thinks she is doing one thing but in fact does something else. For example, a testator might believe she is signing her will but mistakenly sign a power of attorney.” *Edmunds Estate*
   * *Onus is propounder to show it wasn’t done by mistake.*
2. **The testator did not have testamentary capacity; burden on propounder**

* Capacity presumed until its challenged.
  + *Banks v Goodfellow Test*
* Applicants must prove he had capacity (on a balance) at the time the will was created. *Weidenberger Estate*
* See below for challenging capacity

1. **The will was procured by undue influence/fraud: burden on attacker**
   * *The burden of proving item 7 (undue influence and fraud) remains on the attacker.*

### Suspicious Circumstances

* Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity. *(Vout v Hay)*
* Should a challenger be able to demonstrate “suspicious circumstances”, the presumption will be spent and the propounder will need to assume the onus of proving items 1 – 6.
* Suspicious circumstances may be raised by: *Christensen* 
  + 1. Circumstances surrounding the preparation of the will (technical challenge)
  + 2. Circumstances tending to call into question the capacity of the testator; or
  + 3. Circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud (undue influence)
* Facts that may support suspicious circumstances *Kozak*
  + *(If you are considering challenging a will – you would want evidence about each of these things).*
  + the extent of physical and mental impairment of the testator around the time the will was signed;
  + whether the will in question constituted a significant change from the former will;
  + whether the will in question generally seems to make testamentary sense;
  + the factual circumstances surrounding the execution of the will;
  + whether a beneficiary was instrumental in the preparation of the will.

### Challenging Capacity

* Under the WSA, the only requirement is “mental capacity”:
  + ***Section 13(1):*** An individual who is 18 years of age or older may make, alter or revoke a will if the individual has the mental capacity to do so.
* Capacity is CONTEXTUAL - i.e. test for Bill Gates may be different than the test for a law student
  + The greater the complexity in one’s situation, the higher the level of appreciation would be required. *(Ward v. Hunt)*
* Capacity is not a ‘fixed’ concept – it moves through time and lawyers must be aware of it.
* Evidence is generally given by:
  + Medical capacity assessors
  + Medical evidence (on charts); and/or
  + Evidence and perceptions of lay witnesses
* **Remember the test for testamentary capacity comes from the historical case of *Banks v Goodfellow –* which was reformulated in *Weidenberger Estate* as:** 
  + The Testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way
    1. (1) the nature and extent of his property
    2. (2) the persons who are the natural objects of his bounty, and
    3. (3) the testamentary provisions he is making;
    4. and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and
    5. (5) forming an orderly desire as to the disposition of his property.
* Challenging capacity based on disorder of the mind / insane delusion
  + Question whether these are conjunctive / disjunctive
    - *Sharp v. Adam* case out of the UK has concluded that it is disjunctive.
      * Case where man created new will that cut out daughters – but he could describe assets. Court found he had disorder of the mind – example of where no insane delusion – but the scope of his estate meant capacity was higher – so it was disjunctive.
  + **Insane Delusion:** an irrational belief in a state of facts which are not true
    - easy to identify because they are assuming a set of facts that aren’t true
    - E.g. leaving everything to Prince Harry because I am in the royal family

##### Christensen v Bootsman – contains a good capacity analysis

***2014 ABQB -* Undue Influence & Capacity Challenge – Leading case on Capacity**

**This case shows why when going to a doctor for medical evidence – show them the *Banks* test and ask if person would have passed it**.

**Context**: Joan & Holger had 4 kids – Yvonne, Sandra, Roxanne, Lance. Joan appointed Sandra as her sole PR and then Roxanne, Yvonne and Lance were nominated as alternates. Joan had a former will from August 31, 1976 – Yvonne was the executrix. After applying for probate, Sandra sent documents she found alleging them to be a holograph will. Joan was never assessed for her mental capacity after being moved to the Glenrose. August 31, 1976 Formal Will – Yvonne as Executor; Equal to all 4 children; Applies for Probate; Granted. June 28, 2010 Holograph Will – Sandra propounding; Parties agree she signed it and valid; capacity is questioned; Gives larger share to Sandra.

**Position**: The 3 children (Yvonne, Roxanne and Lance) are challenging the holograph will alleging the deceased lacked capacity, and was subject to undue influence of one of the other daughters (Sandra).

**Issue**:  Did the deceased have testamentary capacity at the time of executing the Holograph Will? 2. Was the deceased subject to undue influence

**Decision**: Holograph will valid. No suspicious circumstances. She had capacity at the time of the holograph will. No evidence of undue influence.

**Analysis**:

* Vout v. Hay Principles of Undue Influence / Capacity / Suspicious Circumstances
  + a) The person propounding the will has the onus of proving due execution, knowledge and approval by the testator of the will, and that the testator had testamentary capacity at the time of making the will.
  + b) The person propounding the will is aided by a rebuttable presumption: upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
  + c) If the person attacking the will is able to demonstrate suspicious circumstances, this presumption will be spent and the propounder will again assume the onus of proving due execution, knowledge and approval, and if the suspicious circumstances relate to the mental capacity of the testator to make a will, testamentary capacity.
  + d) Suspicious circumstances may be raised by:
    - i. circumstances surrounding the preparation of the will;
    - ii. circumstances tending to call into question the capacity of the testator; or
    - iii. circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.
  + e) The burden of proof with respect to fraud and undue influence remains with those attacking the will. That is, the person propounding the will does not have to disprove fraud or undue influence.
  + f) The civil standard of proof on a balance of probabilities applies throughout.
* **C. Undue Influence**
  + Proof that a testator had capacity and knew and appreciated what she was doing will largely disprove undue influence
  + However, undue influence may be present even in circumstances where a testator had capacity and knew and appreciated what she was doing.
  + **Therefore, the burden of establishing undue influence belongs to the party alleging it.**
    - Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean. **(*Vout v Hay)***
  + **The test for undue influence is effectively coercion.**
* **Application**
  + ***Technical Validity (Holograph Will): Met***
    - Burden on propounder – Sandra.
    - its in the handwriting and signed at the bottom.
  + This raises an initial presumption that the deceased knew and approved of the contents of the Holograph Will and had the necessary testamentary capacity
  + However, the Applicant is not entitled to rely on this presumption because the Respondents have raised suspicious circumstances concerning Joan's testamentary capacity.
  + ***Suspicious circumstances: Not met***
    - Burden on attackers – Yvonne, Roxanne, Lance
    - Everything makes sense – so not made out
  + The medical evidence shows she likely had capacity – Burden on Sandra
  + The evidence of Yvonne as to having a discussion with her mother concerning the House sometime before August, 2010 suggests that Joan was aware of owning a house and was considering making a gift of that House to Sandra.
    - I conclude, therefore, that Joan had testamentary capacity at the time that she wrote the Holograph Will.
  + the Respondents have not provided any evidence to support a finding of undue influence.

### Challenging based on Undue Influence

* **The onus to prove testamentary undue influence is on the party alleging it**. *Kozak*
* It must be established “on a balance of probabilities that the influence imposed by some other person on the deceased was so great and so overpowering that the document reflects the will of the former and not that of the deceased” *Kozak*
  + - “There is no undue influence unless the testator if he could speak his wishes would say “this is not my wish but I must do it.” - *Scott v. Cousins*
  + **BoP definition:** “That is, the applicant must establish that the likelihood of the will being the product of undue influence is more likely or more probable than the likelihood that it was not the product of undue influence.
    - The applicant does not succeed just because it is shown that it is possible that the will was the product of undue influence.
    - The applicant does not succeed just because there is a reasonable probability that the will was the product of undue influence.
    - The applicant does not succeed just because it is as probable that the will was the product of undue influence as it was not.
    - If it is more likely that the will was not the product of undue influence, the applicant loses. If both hypotheses are equally likely, if a judge cannot decide whom to believe, the applicant loses.
    - The applicant succeeds only if the evidence supports the finding that it is more likely that the will was the product of undue influence than it was not.” *Kozak*
* Test is SUBJECTIVE – depending on ability of testator
  + E.g. a testator who was weakened by disease / in great pain – may have lesser force amounting to undue influence than in other cases
* **\*\* Risky because undue influence is a species of fraud and if plead fraud and you lose – there can be costly consequences – can add costs**. *Kozak*
* The test is very high and stringent – so hard to prove.

#### What WILL amount to Undue Influence?

* Coercion or threat, involving force or a promise of force
* Controlling or manipulating judgment and desire
* Manipulation (added in *Kozak*)
* Coercion, fraud and undue influence are all “cousins” of the same type of challenge.

#### What will NOT amount to undue Influence?

* Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded. *Kozak*
* Appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like may be fairly pressed on the testator *Kozak*
  + Can use affections – please I am your first born, I have helped you, I will be poor – that’s all okay.
* More than “mere influence”, more than “unexpected”, more than an “unreasonable testamentary disposition” *Kozak*

#### Proving It

* Hard to prove because undue influence claim is the fact that generally speaking, these acts are done secretly and below the radar.
* Undue influence, however, may be established by **circumstantial evidence**, that is, from a set of facts that together and through their interaction support the inference of undue influence. *Kozak*
  + Evidence of facts preceding, existing at the time, and even following the alleged undue influence may be relied on to assist in establishing undue influence.” *Kozak*
  + In many other cases, the Courts limited themselves to suspicious circumstances prior to the execution of the will – but Kozak shows that they can look at suspicious circumstances following the execution of the will.
    - Case stands for the notion that post- testamentary events would be relevant to the Court to proving the operation of undue influence.
* A promise of future conduct coupled, at the same time, with no intention of ever keeping the promise, can amount to undue influence by fraud if it induces a will in favour of the person making that false promise of conduct. *Kozak*
* An utterance of emotion (such as “I love you”) coupled, at the same time, with the clear knowledge that it is a false utterance (“the truth is I do not”), can amount to undue influence by fraud if it induces a will in favour of the person making the utterance.” *Kozak*
* **Types of circumstances of relevance: *Kozak***
  + the increasing isolation of the testator including a move from his home to a new city which increased the respondent’s control over him;
  + the testator’s dependence on the respondent;
  + substantial pre-death transfer of wealth from the testator to the respondent;
  + the testator’s expressed yet apparently unfounded concerns that he was running out of money;
  + the testator’s failure to provide a reason or an explanation for leaving his entire estate to the respondent and excluding family members who would expect to inherit;
  + documented statements that the testator was afraid of the respondent.
* ***Alberta Evidence Act, section 11*** – is what you use when it comes to estates.
  + *11: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party’s own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.*
    - **Says you have to corroborate everything you are saying**
* **Note:** Hard to prove because these acts are done secretly and below the radar.
  + Also hard to prove because the testator is deceased and cannot give evidence as to his or her intentions

##### Re: Kozak Estate – test for undue influence – can be met through manipulation / promise of marraige

***2018 ABQB -* Undue Influence Challenge Met – but lawyer did everything right.** A promise of future conduct coupled, at the same time, with no intention of ever keeping the promise, can amount to undue influence by fraud if it induces a will in favour of the person making that false promise of conduct. An utterance of emotion (such as “I love you”) coupled, at the same time, with the clear knowledge that it is a false utterance (“the truth is I do not”), can amount to undue influence by fraud if it induces a will in favour of the person making the utterance.” **Post- testamentary events would be relevant to the Court to proving the operation of undue influence.** Case stands for proposition that if will fails – can go to intestacy but can suggest that it should go back to the prior will

**Ratio: Provides the test/ factors for undue influence. case represents the use of “manipulation” in the form of the hope of marriage as the “goad” into creating 2 invalid wills.**

**Context**: Ted - 72 year old bachelor- died March 16, 2014. He lived on the farm where he was born, near Kingman, Alberta. He was 5’7” and 400 pounds. Ted had executed a Will on September 8, 2009, appointing Yvonne (his sister) as executrix or as alternates her children Jeffrey and Kristie Krezanoski. He left his estate to Yvonne. Should she have predeceased him, he left his estate to Yvonne’s children. Ted met Maryann in June or July 2011 at a gun show in Camrose. Engaged in August 2011. In August 2011 (1-2 months after meeting Maryann), Ted sold the farm to a neighbour. He bought an acreage near Daysland, Alberta. Ted made a new will in 2011 leaving everything to Maryann and if she predeceased him, her son William. In 2012, Ted made a very similar Will which is expressly made “in contemplation of marriage” to Maryann. October 9 Ted’s lawyer makes new documents for Ted ousting Maryann - November 1, Maryann brings Ted to see Andreassen. Ted confirms that he’s changed his mind and does not want to sign new documents.

**Issue**: Whether Maryann exerted undue influence on Ted, such that his wills are invalid – (it would then go through intestacy).

**Position**: Yvonne (his younger sister) seeks to have the January 2012 Will and the September 2011 Will declared invalid because the Wills were the product of undue influence exerted by Maryann (his future wife). She brings circumstantial evidence to prove her case of undue influence.

**Decision**: **Wills invalid – undue influence made out**. **Wills were the result of a deliberate manipulation of Ted.** Maryanns interest in Ted was economic, not love (no pictures, she didn’t take care of him, etc). She had no intention of every marrying him. She used marriage to get Ted to do what she wanted. Isolation was presented – he sold the farm and told no one.

**Analysis**:

* 1. The Nature of Undue Influence
  + Generally, people are entitled to dispose of their assets through their wills as they wish. **Undue influence occurs if it is established that what appears to be the testator's will is not his or her will.** It is the will of another.
    - A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. (Banton v Banton)
* 2. Undue Influence and Testimonial Incapacity
  + A finding of undue influence is not the same as a finding of lack of testimonial capacity.
  + An individual may have had testimonial capacity but nonetheless have been unduly influenced.
    - Alberta courts have often used the test for testamentary capacity set out in [Banks v Goodfellow](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0004923&cite=1870ALERUK47&originatingDoc=I6769b75095ea2a00e0540021280d7cce&refType=IC&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))
    - This test was restated in more contemporary terms in Re Schwartz (1970), cited in [Weidenberger Estate, 2002 ABQB 861 at para 34](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002513825&pubNum=0006457&originatingDoc=I6769b75095ea2a00e0540021280d7cce&refType=IC&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))
      * The Testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty, and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.
* **B. Burden and Standard of Proof**
  + The burden of proving a will's invalidity through undue influence is carried by the applicant, in this case Yvonne (the applicant)
  + **The applicant must prove undue influence on the balance of probabilities**
    - If both hypotheses are equally likely, if a judge cannot decide whom to believe, the applicant loses.
    - The applicant succeeds only if the evidence supports the finding that it is more likely that the will was the product of undue influence than it was not
* ***C. Evidence***
  + 1. Circumstantial
    - May not have direct evidence of the undue influence, such as observations or recordings of coercive acts
    - Undue influence, however, may be established by circumstantial evidence, that is, from a set of facts that together and through their interaction support the inference of undue influence.
    - The types of circumstances that may be relevant to establish undue influence include
      * the increasing isolation of the testator including a move from his home to a new city which increased the respondent's control over him;
      * the testator's dependence on the respondent;
      * substantial pre-death transfer of wealth from the testator to the respondent;
      * the testator's expressed yet apparently unfounded concerns that he was running out of money;
      * the testator's failure to provide a reason or an explanation for leaving his entire estate to the respondent and excluding family members who would expect to inherit;
      * documented statements that the testator was afraid of the respondent.
      * the extent of physical and mental impairment of the testator around the time the will was signed;
      * whether the will in question constituted a significant change from the former will;
      * whether the will in question generally seems to make testamentary sense;
      * the factual circumstances surrounding the execution of the will;
      * whether a beneficiary was instrumental in the preparation of the will.
  + 2. Independent Legal Advice
    - must also be considered in determining whether a will is the product of undue influence is whether the testator received independent legal advice.
    - **A finding of undue influence is not rebutted or made unlikely just because a testator received independent legal advice**
    - **the following factors may affect the character of legal advice:**
      * whether the party benefitting from the transaction is also present at the time the advice is given and/or at the time the documents are executed;
      * whether, through technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence;
      * in a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor;
      * whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place;
      * whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her.
    - The question regarding independent legal advice is whether the techniques employed in providing the advice removed "[the] taint that, if not removed, might invalidate a transaction.
  + 3. Hearsay
  + 4. Credibility
    - Credibility concerns the sincerity and reliability of witnesses
* Conclusion:
  + Circumstantial evidence reviewed shows, on a balance of probabilities, that Maryann unduly influenced Ted and the September 2011 and January 2012 wills were the result of her undue influence.
* Remedies:
  + 2011 Will – Invalid
  + 2012 Will – Invalid
  + Finds that it turns into an intestacy.

#### How to Avoid Undue Influence:

* From *Kozak*: steps to do to avoid undue influence challenges -
  + Meet with a client alone
  + Establish capacity
  + Keep VERY DETAILED NOTES
  + Ensure third parties do not interfere
  + No third parties present
  + No third parties signing the retainer
  + No communications with third parties
  + No information provided to a third party without the client’s consent
  + If you suspect undue influence, see what you can do to suss out the actual facts.
    - Can you involve other family members (with the consent of the testator)?
    - Can you request additional documents or financial statements to see what’s really going on?
    - Consider the “two will” option or the secret Codicil.

**Class 6:**

# Alterations by Law

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| **Order of Estate Distribution:**   1. Legal Obligations:    1. Divorce Act, Family Law Act, Matrimonial Property Act, Dower Act, and Contracts, car loans, etc.    2. Look for any agreements that would bind the estate 2. Family Maintenance and Support:    1. Wills and Succession Act and other statutes    2. Case law    3. **Note:** Delicate balance between testamentary autonomy and providing adequate support of family members *Tataryn* 3. Specific Gifts 4. Residue 5. Intestacy |

## WSA Guiding Principles

* 1. A person is free to transfer her property to others upon death and any interference with a person’s wishes in this regard must be justified.
  + **testamentary freedom** – you’re stuff – do what you want
* 2. A person’s freedom to transfer property on death is subject to satisfying the person’s legal and family support obligations.
  + You can do what you want but there’s law that comes in that says not so fast, and then **duty to take care of certain people in your life**
* 3. If a person does not formally indicate how his/ her property is to be distributed upon death, it is presumed the person wants it to go to family members.
  + if you don’t make up your mind – **we will do it for you (Intestacy section)**

## Order of Estate Distribution:

### 1. Legal Obligations

1. **Legal Obligations:**
   1. *Divorce Act,* 
      1. *Child and Spousal Support*
         1. **Note:** Spousal support is usually based on income, no more income= no more support
         2. Child support – based on income, but court will find a way to get you to support your children
   2. *Family Law Act,* 
      1. *Partner Support + child support for non-married AIP’s*
      2. *Property division for AIPS’ governed by case law*
   3. *Matrimonial Property Act,* 
      1. *Spouses*
      2. *Property Division*
      3. *Estate or Spouse can continue application, but cannot commence one*
   4. *Dower Act, and (\*Only applies to MARRIED spouses)* 
      1. *See Dower section on page 17 of CAN*
   5. *Contracts*
      * Basically 🡪 if you’ve made obligations in your life– you have to pay that before it goes to beneficiaries
        + E.g. running up credit card debt, car loan, getting divorced, spousal support, child support, separation agreement,
      * Lawyers have to check if they had any agreements and see if they bind the estate
      * Once this is all paid – you are left with the NET estate

### 2. Family Maintenance and Support: Temporary Possession and FMS Claims

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| --- |
| **Family Maintenance and Support:**   * **Governed by WSA + Case Law**   + ***Wills and Succession Act – Sections 72 – 108***     - **Temporary Possession of the Family Home**       * Division 1 - ***Sections 75(1) – 86 WSA***     - **Maintenance and Support**       * Division 2 – ***Sections 87 – 108 WSA*** * **Only comes into play once legal obligations are taken care of**   **A. Temporary Possession of Family Home Claims: *Sections 75(1) – 86 WSA***   * Kind of like Dower rights – used to protect AIPS (it’s the Dower Rights for AIPS)   + Applies to AIPS + Spouse – (but if you have a spouse – use Dower) * Can be granted by statute (***s.75***) or by Court ***(s.82)***   + ***S.82*** also allows the court to EXTEND the duration of possession * Rights can be waived in life or on death ***(s.78)***   **Rights given:**   * Gives the surviving spouse / AIP a right to EXCLUSIVE possession of the family home for **90 days** – ***s.75(1)***   + Right is enforceable against beneficiaries, JT’s, CO-tenants   + **Applies to Wholly (*s.75(1))* or partially owned (*75(1))* or leased (*s.75(3)* property** ***(s.72(a)(v)***)     - So if married couples – and deceased owned less than 100% - there would be no dower rights – so use this. * Gives the surviving spouse / AIP a right to possession of the “household goods” for **90 days** – ***s.76***   + “household goods” defined in ***s.72(c)*** * Unless a will says otherwise **(s.79(2)(a)),** the estate will pay all costs associated **(s.79(1)).**   + But any costs paid are considered to be an **advancement (s. 79(3))**   **Restrictions:**   * Only applies to the “family home” – the one ordinarily occupied (Dower you could elect which home) ***(S.75(1))*** * **Subject to Right of Entry** by Personal Representative of estate + owners and co-owners (***s.81 WSA***)   + PR’s Must give 24 hours notice. ***(s.81(1))***   + Co-Owners / Owners must give reasonable notice ***(s.81(2))*** * Surviving spouse or AIP does not acquire obligations owed by deceased ***(s.77(b))*** * No greater interest then at death ***(s.77(a))*** * Spouse cannot rent, sell or assign property (In Dower you can) (***s.77(3)***) * Temporary possession is terminated if the spouse or AIP ceases to occupy the family home as his ordinary residence ***(s.77(6))*** * Temporary possession is terminated if spouse fails to maintain or repair family home or household goods ***(s.77(7)).***   **Court Variations:**   * A court order under ***s.82*** can:   + Shorten, extend, terminate temporary possession ***(s.82((1)(a))***   + Cannot exceed 6 months if family home passes by right of survivorship ***(s.82(2))***     - Doesn’t have limits on other forms of ownership though   + Who pays costs? ***82(1)(b) and (c)***     - Court can order estate to pay short term costs ***(s.79)***     - But can be considered an advance on their inheritance (***s.79(3))***   **B. Maintenance and Support Claims: *Sections 87 – 108 WSA***  **\*Only have 6 months from grant of probate / administration to make a claim (s.89(1))**  **\*Can only apply for Dower or this – not both. So need to choose which is better\***   * Any **“family member**” who received less than 100% of estate can make an application for a greater share   + “family member” defined in ***s.72 (b))***   + Doesn’t apply to step children, unless will changed “children” to apply to step-children * In AB, there is a delicate balance between testamentary autonomy and providing adequate support of family members   + FMS is seen as basically re-writing the will – so this isn’t done lightly.   **Test:**   * **1. Establish Applicant is a “Family Member”** (defined in ***s.72 (b)))***   + Difficult cases involve proving AIP (see definition in glossary + AIPA act for factors)     - See page 13 of CAN for AIP test   + Difficult cases involve disabled child (may need doctors note) * **2. Must have died without making adequate provision for maintenance and support** (***s. 88***)   + In-life and on death     - E.g. did they get 1M before deceased passed? It’s a consideration   + All assets of deceased used to calculate award, but only can satisfy award with estate assets (so **if no money in estate = no claim**).   + Applies whether testate or intestacy (***s.88(3)***   **Factors to Consider in awarding FMS:**  **AB statute empowers court to make ‘any provision that the judge considers adequate’ *(s.88(1))***   * **Guiding standards:**   + ***Legal Rights***: ***Matrimonial Property Act, Family Law Act, Divorce Act, Unjust Enrichment and Constructive Trust, Case Law*** *Tataryn*     - Legal rights guided by laws in *Divorce Act* ***(15.2(4)-(6))*** / Family Law Act (s***.56-60***)     - Matrimonial Property Division: ***s.7*** (including exempt property***), s.8*** factors     - AIPS’ only have unjust enrichment + constructive trusts to fall back on       * Unjust enrichment: Enrichment, corresponding deprivation (loss) and absence of a juristic reason for the deprivation (See box below this)       * *Tomich Estate*: says FMS is not the right place to bring a constructive trust claim – Michael says do a statement of claim and bring it here.   + ***Moral Rights:*** What would a judicious person do in the circumstances based upon a standard of living to which the spouse is accustomed within the context of contemporary community standards. Not about needs. *Tataryn*     - Common law factors: (factors = discretion) Try to check as many as possible       * Size of the Estate       * Other family members       * Age and state of health of family members       * Character of the testator and the family members       * Likelihood of the dependent’s needs increasing (fortune telling)       * Likelihood of inflation       * Other sources of income for family members       * Mode of life to which the family members ought to be accustomed       * Other claims against the estate       * Other future contingencies that are reasonably foreseeable (more fortune telling)       * Testator’s reasons and wishes for excluding a dependent   + ***Section 93 of WSA***: Codified some of the moral rights in Tataryn     - See list of factors in statute   **General Principles:**   * This is Remedial legislation (meant to fix things) (*Stone Estate (Public Trustee of) v. Stone Estate)* * Onus is on the applicant * Relevant time is at the time of the application, not death * B of P * Cannot waive right during life, but still relevant ***(section 93)*** * 6-month limitation from the grant of probate   + May bring claim after 6 months, if the court approves     - But if it comes after the limitation period – you can only go after what is remaining in the estate: Judgement against assets remaining – so if everything was liquidated- nothing to claim. * No distribution before 6 months or until claim is resolved   + During this period you cannot make a distribution – don’t do anything until you have a waiver. * Legal obligations take precedence over moral obligations and some moral claims may be stronger than others (*Tataryn*) * Spouse or AIP family members takes precedence over children family members * Relief cannot be sued to build up an estate for the beneficiaries of a family member (*Rudd-Birkenbach v. Birkenbach Estate*)   + Purpose of this legislation isn’t to build an estate for the surviving spouse (but that’s what they are doing)     - This is to ensure you are getting the life you are accustomed to – not to get a big estate to leave * Testamentary Autonomy should not be interfered lightly. FMS legislation attempts to balance testamentary autonomy and obligation to provide for family members (*Tataryn*) * Legislation confers a broad discretion on the courts and must be read in light of modern values and contemporary community standards (*Tataryn*)   + Has to be looked at in terms of today * Adequate provision is beyond the bare necessities; history and lifestyle; actual cost of living (*Petrowski v. Petrowski* *Estate*) * Actual cost of living to maintain style of living. Statistical averages and providing over-inflated expenses are not the correct methods (*Woods*-*McKenna*)   + E.g. ‘the average couple needs’…. – say well yeah but if they are only spending this much, that is all they need. |

##### Tataryn v. Tataryn Estate – court will modify if testator provisions is below their legal / moral obligations

***1994 CarswellBC 283 SCC***

NOTE: This deals with **BC** Will variation Act – but in the *Tomich* case – says this is the leading case

* British Colombia legislation that empowers the court to make "provision that it thinks adequate, just and equitable in the circumstances". The Alberta statute empowers the court to make "any provision that the judge considers adequate".

**Ratio**:   
**Context**: Mr. Tataryn did not wish to leave anything to John. He feared that if he left any of his estate to his wife in her own right, she would pass it on to John. He made a will leaving his wife a life estate in the matrimonial house. Mrs. Tataryn was made the beneficiary of a discretionary trust of the income from the residue of the estate, with the second son Edward as trustee, with encroachment. Mrs. Tataryn and John claimed against the estate under the *Wills Variation Act*.

**Issue**:   The issue is whether the courts below erred in their interpretation of s. 2(1) of the *Wills Variation Act*.

**Decision**: Because of the moral and legal obligations owed the spouse – the Mrs should be given: Title to the matrimonial home; A life interest in the rental property; The entire residue of the estate after payment of the immediate gifts to the sons.

**Analysis**:

* By s. 2(1) of the *Wills Variation Act*, a testator has a duty to make adequate provision for the proper maintenance and support of a surviving spouse and children. If the testator fails to discharge this duty, the Court may order for the claimant the provision from the estate that it considers "adequate, just and equitable in the circumstances"
  + The court must ask itself whether the will makes adequate provision and if not, order what is adequate, just and equitable.
* **Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.**
  + **Legal Obligations** - the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise
    - the testator's legal obligations while alive may be found in the *Divorce Act*
    - Maintenance and provision for basic needs may be sufficient to meet this legal obligation – but they may not as well
    - Statute and case law accepts that, depending on the length of the relationship, the contribution of the claimant spouse and the desirability of independence, each spouse is entitled to a share of the estate. Spouses are regarded as partners.
    - Includes: *Matrimonial Property Act, Family Law Act, Divorce Act, Unjust Enrichment and Constructive Trust, Case Law*
  + **Moral Obligations** - found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards
    - most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permit
* **Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve**.

#### Unjust Enrichment Claims (Legal Rights)

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| *Tomich Estate*: says FMS is not the right place to bring a constructive trust claim – Michael says do a statement of claim and bring it here.  **Unjust Enrichment**   * Cause of action * Available to Spouses and AIPs * **3 Elements:** Enrichment, corresponding deprivation (loss) and absence of a juristic reason for the deprivation   **Remedy of Unjust enrichment:**   * Constructive Trust   + constructive trust idea is that if B leaves everything to C and D, they hold half of it on constructive trust for A.   **Principles of Unjust Enrichment & Constructive Trusts**   * 3 kinds:   + **1. Quantum meruit/ Fee for service** – purely: I spent all day at the golf course serving drinks, I deserved to be paid $20/hr   + **2. Constructive Trust–** where monetary damages are inadequate link between the contribution and the increase in value of property (i.e., land).     - You have increased value of property (like building a deck on the house) gives you a claim – I have an interest in this property so part of it should be mine   + **3. Joint family venture** – where the distribution of assets between the parties is inequitable     - this seems like a step up because in this – says you together have goals of moving family forward – this seems like a higher standard than marriage   **Joint Family Ventures:**   * Hard to prove a joint family venture – and then good luck doing a calculation (usually a version of the matrimonial property division) * **Question of fact; no presumption** * The party claiming to be unfairly deprived must also acknowledge and account for any benefits conferred on them by the other party. * **4 types of evidence**   + ***1. Mutual effort*** - parties worked collaboratively towards common goals. Indications of this would be raising children together, the length of the relationship and mutual goals.     - Working together – raising children, have a future you are working towards   + ***2. Economic integration -*** degree of economic interdependence and integration that characterized the parties’ relationship. Indications of this would include the existence of things such as joint bank account or the sharing of expenses.     - E.g. joint bank accounts, sharing expenses on things…   + ***3. Actual intent –*** Actual intent according to the Courts would be in a situation where parties held themselves out to be in a relationship equivalent to marriage publicly and the stability and length of cohabitation would also be factors the Court would consider.     - What do the parties do – do they act like they are causally dating, or serious?   + ***4. Priority of the family*** -Actual intent according to the Courts would be in a situation where parties held themselves out to be in a relationship equivalent to marriage publicly and the stability and length of cohabitation would also be factors the Court would consider.     - E.g. length of relationship, but these are factors * Remember these are factors - Factors mean nothing is determinative – and no one is better than another – and can come up with some that aren’t on the list |

### 3. Specific Gifts

* 1. Usually shares of a company, family heirlooms, or real estate
     1. E.g. I am giving my red truck to Johnny

### 4. Residue

### 5. Intestacy

**Class 7:**

## Gifting:

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| 3 elements must be met: (and all must be met AT THE SAME TIME)   * **Actus Reus** – physical transfer of property   + Actual delivery of the good or constructive delivery (like giving a house key)   + Assignment or constructive delivery – like a right to sue   + Land sales – must be in writing (statute of frauds) * **Mens Rea** – Intention to Gift it   + ***S.26 WSA*** – can show evidence of testators intentions   + ***S.11 AEA*** – everything needs to be corroborated   + Without evidence, presumptions apply *Pecore*     - No presumption of gift from parent -> adult child *Pecore*   + Onus is on the transferee to demonstrate a gift and not a resulting trust   + Court must determine, on a balance of probabilities, the testators actual intentions at the time of the transfer   + Court will consider evidence of the transferor’s intentions prior to the transfer and conduct subsequent to the transfer so as it relates to the intention at the time of the transfer * **Acceptance** – the beneficiary accepts   If any of these items are missing = **resulting trust** created for benefit of the donor of the gift.  **Presumptions that apply to gifts:**   * Gift Spouse → Spouse – Legal presumption of gift * Gift of Parent → Minor child – Legal presumption of gift * Gift Parent → Adult child (dependent or independent) – Legal presumption of resulting trust *(Pecore)* * Person → Not a parent or minor child – Legal presumption of resulting trust   **How to rebut presumption of RT?**   * Onus is on the transferee to demonstrate a gift and not a resulting trust – BOP * Court must determine, on a balance of probabilities, the testators actual intentions at the **time of the transfer** * Court will consider evidence of the transferor’s intentions prior to the transfer and conduct subsequent to the transfer so as it relates to the intention at the time of the transfer * ***Factors:***   + Dependency of an adult child is one fact to consider   + Bank documents   + Survivorship is about legal and not beneficially ownership   + Control and use of funds   + Tax treatment   + Granting a power of attorney   **Practise Tips**: ANYTIME there is a JOINT asset – ASK the intentions behind this: is this meant to be a gift, resulting trust for estate or advancement. Record these notes at the time of the transfer, because this is the strongest evidence. Evidence before/after is helpful but not as strong. If people putting someone on JT to give them access – do a POA instead.   * **If meant to be gift**: can do a deed of gift (plus statement of intention of advancement or not), make notes, put in the will   + Also need to find out if its meant to be an **advancement on inheritance** (next section) * **If meant to be RT:** can do a bare trust (see defn in glossary), make notes, put in the will   **Events during life:**  **Ademption:** The destruction or extinction of a testamentary gift by reason of a bequeathed asset ceasing to be part of the estate at the time of the testator’s death. A devise of a specific piece of property will fail if that property is not a part of the deceased’s estate upon his or her death   * When you gift a specific piece of property but before death its destroyed/ sold   **Abatement:** The reduction of a legacy, general or specific, as a result of the estate being insufficient to pay all debts and legacies   * when you are giving money but don’t have enough money to go around   **Lapse:** A specific legacy ($), bequest (property) or devise (land) which falls into the residue as if the gift had not been made if the recipient predeceases the testator. ***(S.32(1)WSA)***  **Anti-Lapse Rule *(s.32(1)WSA):***  Use when a gift fails:   * 1. See if Will named alternate * 2. If beneficiary was a descendant of testator – then gift will go to the deceased beneficiaries descendants who survive (in the same way it would if the deceased beneficiary died intestate w/o spouse) ***– s.32(1) WSA***   + CANNOT go to spouses – just descendants * 3. If cannot be saved by #2 – it goes into **reside** * 4. Intestacy * 5. Void dispositions must be considered (***s.21 WSA***) |

**Presumptions**: say when we don’t have evidence, we are already moving pendulum in favor of what we think answer is – so makes onus more difficult if fighting against it.

**Advancement** is a gift during the transferor’s lifetime to a transferee who, by marriage or a parent-child relationship, is financially dependent on the transferee

* Advancement is when parents give you stuff, or give spouse things
  + This is generally between spouses and children
  + Comes from notion that you have duty / moral obligation to look after your dependants
  + An advance is any significant gift you make

**Gratuitous Transfers**: occurs where property is given for no or less than adequate consideration

* **E**.g. Gift 100% or by making bank account or land joint

\* Court of equity hates getting stuff for free – they hate gifts but love bargains

* When talking about gifts – always remember there may be resulting trust if gift fails

**3 elements of gifting: *(Need to physically give gift + with intention of gifting it + acceptance)***

* **1. Actus Reus:** There has to be an act of giving
  + Delivery or constructive delivery (chose in possession) –Tangible item allowing access (i.e. house key)
    - can be actively giving you something – or constructive delivery – like giving a key to the house (cannot hand a house, but would give something that allows access to it)
  + Assignment or constructive delivery (chose in action)
    - Can assign – like if you have right to sue, can assign that right (like in insurance).
  + Land – Statute of Frauds
    - Land sales must be in writing – general rule – and transfer of land must be in writing
* **2. Mens Rea**: Need an intention to give gift
  + Intention + Own Free will (must be own free will – did it without a gun to your head)
    - \*\* Usually the issue in cases
    - Can now bring in evidence of Testators intention (e.g. lawyers notes***) s. 26 WSA***
    - Without evidence – presumption applies:
      * Gift Spouse → Spouse – Legal presumption of gift *Pecore*
      * Gift of Parent → Minor child – Legal presumption of gift *Pecore*
      * Gift Parent → Adult child (dependent or independent) – Legal presumption of resulting trust *Pecore*
      * **\*\*NOTE:** because of ***s.11 of AEA*** – you need corroborating evidence – cannot rely on testimony of beneficiary
    - Onus is on the transferee to demonstrate a gift and not a resulting trust
    - Court must determine, on a balance of probabilities, the testators actual intentions **at the time of the transfer**
      * Because for gifts, AR, MR and acceptance have to occur at same time
    - Court will consider evidence of the transferor’s intentions prior to the transfer and conduct subsequent to the transfer so as it relates to the intention at the time of the transfer
      * But before / after has less weight
    - Note: re: Joint Banks Accounts
      * Always look at who was putting money in / taking money out
      * ‘Joint AND’ account: where you need both people to sign to withdraw
      * ‘Joint OR’ account: where you only need one
        + Usually done to avoid probate / giving child access – this is bad estate planning (do an immediate POA instead).
      * Definitely given legal title but whether or not beneficial was intended is the question
* **3. Acceptance**:

**If one of these elements is missing you get a RESULTING TRUST. All of these have to occur at the same time.**

* **Resulting Trust** arises when title to property is in one party’s name, but that party, because she is a fiduciary or gave no value for the property, is under an obligation to return it to the original owner.
* **Note: Promises aren’t worth anything – no legal consequences**

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| **PRACTISE NOTES**: If clients come in and nothing is in joint – you want to put POA to give them access.   * **If NOT meant to be Gift / meant to hold for estate**   + If goal is to avoid probate – then you an put it in joint, but then you to **build a chain of evidence to show what intention was.**   + **Also consider doing a bare trust if NOT meant to be a gift (see defn in glossary).**      - A bare trust protects the donor in life + death (life – because if daughter goes bankrupt and creditors come, or if there’s a divorce and the husband wants this – it protects it).   + Also document this in the will / signed letter * **If IS meant to be a gift:**   + Do a **deed of gift** (shows intention at the time of transfer\*)   + Put it in the will / signed letter   + Ask whether its meant to be **an advancement** on inheritance or straight gift * **If its meant to be a loan:**   + Hopefully they did **loan agreement**     - If collectable – can be taken from their share of the estate     - If not collectable – usually statute of limitations is up   + Can also put in will: the loan isn’t collectable, but please pay it back and if you don’t, it can come from your inheritance. |

##### Pecore v. Pecore – no presumption of advancement for adult children – will need to rebut RT to get gift

***2007 SCC 17 - Gratuitous Transfers -*** *No longer any presumption of advancement for adult children – Evidence of intention is paramount, but often lacking. So common law intervenes – equity presumes bargains not gifts - so instead the law imposes a presumption of a resulting trust – the person saying it’s a gift will have to prove that – can use s.26 WSA to show testators intentions, but because of s.11 of AEA, they must prove everything with corroborating evidence.* ***Job of lawyer is to build evidence – why are you putting things in Joint.***

**Ratio**: Abolished presumption of advancement of adult children. Applies to gifts of 100% legal title and transfer into joint tenancy with right of survivorship

**Context**: Father gratuitously placed mutual funds, bank accounts and income trusts into joint accounts with adult daughter. Father told by financial advisor that joint ownership can be used to avoid probate (Ontario Case). Later father made will leaving estate to daughter and daughter’s husband. Father discussed beneficiary designations with Wills lawyer but not joint accounts. Only father contributed to the accounts. Daughter not well off financially, but her siblings were.

**Issue**: Did father intend to make a gift of the beneficial interest to daughter?  
**Positions**: Ontario Trial Court and Court of Appeal said yes 🡪 Presumption of advancement for gift from parent to adult child

**Decision**: No longer any presumption of advancement for adult children – instead the law imposes a presumption of a resulting trust.

**Analysis**:

* Here we had the Actus Reus: transfer into Joint, Acceptance: she had to sign, but mens rea (intention) was unclear
* Factors:
  + Father closest to daughter and helped her financially during his lifetime
  + Father had sole use and control
  + Father paid all of the taxes on the income made
  + Daughter could make withdrawals with father’s consent
  + Daughter became legal owner by right of survivorship on death of father
* **Evidence of intention is paramount, but often lacking. So common law intervenes**
* **Equity presumes bargains, not gifts**
  + Rebuttable presumption of resulting trust applies to gratuitous transfers, Onus on recipient to prove that a gift was intended
* Prior to Pecore and Madsen → Presumption of Advancement for gifts to spouse and children (adult or minor)
* Now abolished
* New Presumptions:
  + Gift Spouse → Spouse – Legal presumption of gift
  + Gift of Parent → Minor child – Legal presumption of gift
  + Gift Parent → Adult child (dependent or independent) – **Legal presumption of resulting trust**
  + Person → Not a parent or minor child – **Legal presumption of resulting trust**

##### Popowich Estate – need evidence of intention to rebut presumptions

*2012 ABQB 665*

**Contex**t: Deceased sold house and deposited into joint account with mother. Everything daughter owned was in JT with mom. Died a few weeks later. Only deceased contributed to joint account. Will divided estate between husband and mother. Deceased had also lived overseas and out of province for some period of time. Deceased had mental illness and wanted her mother’s help to manage her finances.   
**Decision**: Mother did not rebut the presumption of resulting trust for gratuitous transfer

**Notes**:

* Wills Lawyer MUST ask about intention & joint assets, beneficiary designations and gifts made during lifetime
* Ideally record intentions at the time of transfer (clients sometimes transfer property into joint tenancy without consulting lawyer)
  + Worst case scenario, record intentions after transfer but prior to death
    - Remember before / after conduct isn’t as strong, but its still good.
* **Record in Will, notes, letter and bare trust deed**
  + Can put in the will what it is meant to be
* Record whether intention is gift, resulting trust on behalf of estate or advance

### Anti-Lapse Rules:

* ***S.32(1) WSA***
* Lapse = where a gift fails
  + E.g. will says I give my dog all my gear – but if dog dies first – the gift fails
    - If a good will writer – then will say if A and if A dies first, it goes to B – play the what if game.
    - But if you don’t do this – you go to ***s.32***
* **Anti-Lapse Rule**: (***S.32, WSA***) where the beneficiary dies before the testator.
  + Sort of like intestacy – sometimes a will says “Everything to A” but A isn’t alive. So the Anti-Lapse rule steps in and passes it to the biological descendants of A to avoid intestacy.
  + Applies ONLY when “**A” was a decedent of the testator** (both of whom are now dead), then it goes to the decedents of A (**but NOT spouses**) the same way it would go to them if they died intestate w/o a spouse.
    - But if A was a sister, then that wasn’t a descendant of the testator, so = intestacy.
* **Process for if a gift fails:**
  + 1. See will for contrary intention (A, but if not A, then B) – ***WSA s.32(1)(a)***
  + 2. If the deceased beneficiary was a descendant of the testator, to the deceased beneficiary’s descendants who survive the testator, in the same manner as if the deceased beneficiary had died intestate without leaving a surviving spouse or adult interdependent partner (unless AIP was decedent, then he or she can inherit) ***s.32(1)(b) WSA***
    - if it’s a descendant, the law will presume there is a gift over to the child
      * E.g. if mom leaves it to daughter and daughter dies, and will doesn’t sya anything else, law will step in and says it goes to grandkids
      * E.G. IF GAVE everything to sister and sister isn’t alive, and she has kids – they think lapse rule goes to them – but it doesn’t – its DESCENDANTS only – so children and grand children – so this will be a failure and s.32 cannot remedy this
  + 3. If not saved by s.32 (#2) then it goes to Residue - ***WSA s.32(1)(c)***
  + 4. Intestacy - ***WSA s.32(1)(d)***
    - E.g. say residue goes to A & B & C – and if one isn’t alive, its shared by the ones that are alive.
      * But sometimes people will say 1/3 to A, 1/3 B and 1/3 to C and you **didn’t say what happens if one of these aren’t alive** – then it’s a **partial intestacy** – then this may not end up where you think it should.
  + **Note:** Void dispositions must be considered (***s.21 WSA***)
    - E.g. this is what occurs if a beneficiary is a witness to the will, etc..
    - Its prima facie void – but can be saved under ***s.33 WSA***
    - So gift can lapse because it was made to beneficiary who was witness, but ***s.40/33*** can fix this (with ‘clear and convincing evidence’).

**Example**: George’s will leaves his residue to the following: 30% to Judith, if she predeceases me, to Kim. 20% to Mindy (George’s daughter) and 50% to James (George’s friend). Before George dies, all 3 die. Mindy leaves behind 2 children (Abby and Ben) and James dies with no children or spouse. Who inherits the estate?

* **Answer**: Judith’s shares goes to Kim – ***WSA s.32(1)(a***). Mindy’s share would go to her 2 kids – 10% each because she is a descendant of the testator, so its saved by the anti-lapse rules (***WSA s.32(1)(b)***). Jame’s share would be distributed intestate because there is no residual beneficiaries named. (***s.32(1)(c))***

## Advances

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| ***S.109 WSA*** \*Whether something is considered to be a gift on inheritance or not ***(is it a gift or a loan?)***  **Limitation to make claim is 6 months from the grant of probate or administration *s.109(8) WSA***  **\*These rules can be modified by will**  **Gift vs Loan vs RT?**   * If RT – no problem, goes into estate assets, then divided as per the will   + So even if D1 is on the joint – if its meant to be a RT (say there was a bare trust) it goes into estate * If it’s a loan 🡪 is it a collectable loan?   + If its collectable – then you collect it (and deduct it from their pay out of estate) * If its not or if it’s a gift – then you have to say is it an advance?   Depends on intentions – can or cannot have it taken out of their share  **Who can make an application*? S.109(1)(a)***   * A PR (executor or administrator) * A beneficiary (including charities)   **Who’s share can it be deducted from? *S.109(1)(b)***   * If claim is successful, it can only come out of a share of a ‘prospective beneficiary’   + This means a Spouse / AIP / or descendant of the deceased.   **What evidence can be used to show intentions? *S.109(3)(a) and (b)***   * Oral statements at time of transfer * Written statement by the D respecting the transfer made anytime * Oral / written from perspective beneficiary – this wont help   **If Court determines its an advancement, then what? *S.109(5)***   * The transferred property will be considered part of the estate available for distribution ***(a)***   + The prospective beneficiary will only receive the difference between his or her share and the value of the property advanced to him or her ***(b)***   + *How: Add the gifted amount back into the amount of the estate, divide that amount by 50% then deduct the gifted amount from the share that receiver would have gotten* * If the value of the property equals or exceeds the prospective beneficiary’s share, then the prospective beneficiary is excluded from any share of the estate ***(c)***   + E.g. if beneficiary A got 200k and estate is only worth 100k, A gets 0. But this doesn’t say that A has to pay excess back * On intestacy, unless there is a contrary intention, presumed that the intestate did not intend the transfer to be an advance repayable by the decedents of the prospective beneficiary. ***(d)*** |

* Gift or loan (whether collectible or not) made to beneficiary **can** be considered an advance on inheritance
  + Intentions - Ask, Ask Ask…Record, Record, Record…Ideally in Will, but also in lawyers notes
* If gift is a RT – then its held for the estate, and don’t get into this issue.
* **But if it’s a gift or loan – you have to ask is it an advancement of their inheritance – and again, you usually have no evidence.**
* Court has wide discretion: (=FACT DEPENDANT)
  + Determine the nature of the transfer ***s.109(4)(a)***
    - e.g. this 50k was a gift, or it was a loan with interest
  + Determine the value of the transferred property ***s.109(4)(b)***
    - Unless there is a contrary intention, value is at the time of transfer
      * Can be an issue because in 1957 was given 50k and then in 2019 they take 50k off, that’s a good deal for them
  + Order the value of the property be deducted from the prospective beneficiary’s share ***s.109(4)(c)***
  + Order that the prospective beneficiary’s share be held on trust for the estate ***s.109(4)(d)***
    - e.g. situation where beneficiary got more assets than estate is worth.
  + Anything else the court considers appropriate ***s.109(4)(e)***

## Ranking of Debts

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| ***S.27(1) EAA***   * Secured assets – e.g. Mortgage (section 29)   + Secured = registered against the property * Funeral and Estate Administration Expenses   + Super priority * Unsecured debts must be paid proportionately and without any preference or priority – e.g. credit card debt, debt on a loan, CRA   + treated equally, ranked proportionally   If you are ranking debts and you find out there isn’t enough in the estate – you can declare bankruptcy  **Marshalling Rules** ***s.28 EAA***  This is when you have a solvent estate (More assets then debts) but the property in an estate is insufficient to pay all of the deceased’s debts and make the specific gifts to the beneficiaries in the deceased’s Will.**\*Can be changed in a will**   * the more specific you are, the more importance given to it – and less likely it will be used to pay debts -- but can change that in will * before you go to next class, must eat up that entire class. * No distinction made between classes between real and personal property. |

**Marshalling rules can be changed in the will**

* E.g. could be huge capital gains to pay when giving away the property (this would likely be an ‘A’ gift – so other people would have to pay this debt) – so can say in will that the tax on this is to be paid by person who gets the house.
* Marshalling just categorizes the gifts, and the more specific you are, the more importance given to it – and less likely it will be used to pay debts -- but can change that in will
* Under ***28(E)*** it says: property over which the deceased person had a general power of appointment that has been expressly exercised by will
  + Power of appointment = Power = have ability to give away property in another document = but don’t have to
    - E.g. If you had a family trust where beneficiaries were spouse me dog and niece – power of appointment says I have the power / ability in another document to direct how this family trust distributes the trust when I die
* No distinction in each class between real and personal property
* Each asset within a class, according to its value, contribute proportionately to the payment of funeral and estate administration expenses and unsecured debts and liabilities
  + Each class is treated equally – so before you get to next class, have to eat up that entire class

## Mutual Wills (Not on Exam)

* Mutual wills – what happens if we die – mutual will is where you say I don’t like idea that husband can change his will after I die and cut my kids out
  + So can come up with scheme – everything to each other and if not to our 4 kids, and we also agree we wont change our wills.
* During life – B says – screw it, I don’t like her, I am changing my will – there is no recourse for A – because A is alive and can change their will. So as long as B changes will and A knows, nothing happens. If B does a secret will and doesn’t tell A, or if B dies and didn’t change will, then it locks it in.
  + E.g. say have scheme and agreement. Then B dies – A says sucker, and changes her will to just be A and B, then when A dies, legally, the property goes to just their kids, but beneficially its all of them. So the gift worked – legal title passed – but law imposes a constructive trust (trust police) and they say legally nothing wrong – youre allowed to change it, but now they hold it on trust pursuant to this agreed scheme.
* Mutual wills are just a mine field.
  + Proving you have a mutual will is hard – so mention that it in the will, and can also do a separate agreement – that says agreed scheme and don’t want to revoke.
* Mutual Wills (joint will where only one document used):
  + Wills that dispose of property of two people who have agreed to pool their property and dispose of their property according to an agreed scheme
  + Agreement not to alter or revoke
    - May be incorporated into the will or be established outside of the Will or both (ideally)
  + Constructive Trust
    - Agreement not to revoke
    - The first party died without having revoked or changed his or her Will
  + Unless a contrary intention, does not included after acquired property
  + Revocable until the first part dies
  + Survivor is free to deal with his or her own property in his or her own lifetime
  + Distinguishable from mirrored Wills
    - Not presumed
    - Need independent evidence of agreement to dispose of property in a particular way
  + Wise to Seek Independent Legal Advice
* *Edell v. Sitzer40 E.T.R. (2d) 10 (Ont. Sup. Ct. J.), aff’d (2004)*
  + The agreement must satisfy the requirements for a binding contract and not be “just some loose understanding or sense of moral obligation”
  + It must be proven by clear and satisfactory evidence  It must include an agreement not to revoke the wills.
* *Doherty v. Berry Estate, 1999 ABQB 1023*
  + Doherty – kids from previous marriage (5 and 2)
    - Henry and Ella
    - Henry changed will from Ella and kids to Ella alone
    - Irrevocable trust is imposed if..
      * Mutually agreement not to revoke
      * One dies without revoking
    - Will terms and surrounding circumstances

## Denial of Benefits

* Idea is that you cannot profit from your own crime – CL principle
* ***Alberta Evidence Act - Section 26*** – Admissibility of previous court proceedings
  + Finding of guilt in criminal proceedings is admissible as evidence in a subsequent civil proceeding
  + ***Ab evidence act – s. 26*** – says criminal court proceedings are admissible in civil as evidence – but not guaranteed – but when you go to civil court and say court found BRD that son killed dad, please find he did this on BoP – so normally wait until after criminal so you can do this
    - But if they acquitted in criminal – they can still be found guilty in civil
* Public Policy
  + Public policy reason why they do this
* NCR?
  + Not guilty – can get benefits if you are NCR.

## Disclaimer vs. Assignment

* **Disclaimer (avoidance):** Refusal to accept an interest which has either been bequeathed to the disclaiming party or is entitled pursuant to an intestacy (Refusing to accept a gift)
  + ***Section 33 WSA*** – Void (s.21), Contrary to Law or **Disclaim** 
    - Think of gifts falling from the sky – you get out of the way – that means it goes to next person in line
    - Then goes to: Alternate, Descendent, Residue, Intestacy
    - Deemed to have predeceased
    - Residue vs. Intestacy (augmentation)
  + Disclaimer can be done:
    - Orally
    - Conduct
    - In Writing
    - Before the beneficiary has derived a benefit and can be retracted so long as no one has altered his or her position in reliance on the disclaimer
      * You can change your mind about disclaiming as long as the party didn’t rely on your disclaimer yet.
* **Assignment:** Beneficiary conveys a gift he or she is entitled to, to another person. (You actually receive the gift, and then give it to someone else).
  + Is where you get it and then give it to someone else - You actually receive it and then give it to someone
  + Conveyance of property
  + This triggers tax.
* **There’s a fine distinction to this – because sometimes in law, people say I will give up gift then it will go to my kids – well no – sometimes it goes to someone else entirely.**

**Class 8**:

# Construction & Interpretation of Wills

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| **Construction & Probate handled by QB**   * **Construction**: try to determine intent of testator without straying too far from written words   + ***S. 26 WSA***   + ***S.11 CEA***   + **The first question is whether the will is ambiguous or lacks clarity. If it doesn’t, you likely don’t need to resort to these rules.**     - **But keep in mind *Ryrie* – the Court doesn’t require ambiguity to get into an analysis of intention if there is a lack of clarity or competing interpretations.**   + Analysis:     - **1. Are there two or more reasonable interpretations of a disputed passage?** *Ryrie*       * If yes – then court MUST look at evidence of intention and MAY consider 3 types of evidence *Ryrie*         + ***26(b):*** ambiguity is a floating requirement – because if its not ambiguous you don’t get into it – but its not a pre-condition         + ***26(c):*** very broad – doesn’t say you have to prove ambiguity     - **2. Does extrinsic evidence disclose that there are prospective beneficiaries who are not apparent by reading the words of the will?** *Ryrie*       * What would the lawyer say – the lawyer who drafted the will – comes back to keeping really good notes     - Correction can be made under ***s.39 WSA*** (rectification provisions * \*\*Corroborating evidence is really important in these cases by virtue of ***s.11 of AEA*** - Can be corroborated by another interested party – but its better to get more evidence beyond this |

**Historically:**

* **Court of Probate**: This Court determined whether a document, or several documents, constitute the will of the deceased and to issue a Grant of Probate, once satisfied.
  + - Would apply to say this is what will is
  + external evidence was permitted (lawyers can come and testify, friends can testify, people can say they knew she wanted this revoked, etc.);
* **Court of construction**: Even if a will is validly probated, it can still include confusing or unclear terms or phrases, and a Personal Representative could seek the guidance of this Court to interpret those clauses.
  + - Would apply to say we don’t know what this clause means
  + Court could only hear “armchair evidence” – not direct evidence of the testator’s intent (i.e. surrounding circumstances in making the will which put the Court in the position of the testator regarding his/her life, affections, and general disposition).

**Current Trend:**

* Everything to ABQB (surrogate division)
  + Most probate is done by desk – construction is usually done in a court application
* In terms of evidence in both cases, the WSA has allowed the Court much greater flexibility in terms of what it can consider to ascertain the true meaning of the words in a will.
* The function of the Surrogate Court (when sitting as a “Court of Construction”) is to ascertain the true intention of the testator within the limits of the law.
  + Should not be extending far beyond the written words, as we know that “in writing” is a fundamental element of all wills in Alberta.

## Construction of a will:

* ***S.26 WSA +s.11 AEA*** are key here
  + Can then be fixed under ***s.39***
* **First question when looking at will is to say – does this make sense? Because if its not ambiguous don’t want to waste time doing it.**
  + Is what I am looking at confusing to the point you need a court to interpret it
    - If you can get all the parties on board with what things mean – then its easier to apply and get this.
  + **But keep in mind *Ryrie* – the Court doesn’t require ambiguity to get into an analysis of intention if there is a lack of clarity or competing interpretations**
* **Court of Construction Function:** is to ascertain the true intention of the testator within the limits of the law.
  + In principle, when constructing a will, the Court should not be extending far beyond the written words, as we know that “in writing” is a fundamental element of all wills in Alberta.
    - In writing is very important to courts – so any time you are adding / changing things you are deviating from this.
* Evidence that can be looked at:
  + ***S.26 WSA***
  + ***S.11 AEA***: all evidence must be corroborated.

##### Ryrie v. Ryrie – 2 reasonable interpretations is enough to get into s.26 WSA

**2013 ABQB 370 - Ratio: Ambiguity is not a pre-req to using *s.26 WSA*, if there are 2 reasonable interpretations of a section / the evidence discloses that there are prospective beneficiaries who have been left out – can use this section. Corrections can be made by court under *s.39.*** Extrinsic evidence was needed to determine testator's intention in context of his circumstances when will was made to determine if any child predeceased testator leaving live issue — Applicants fit that description — Clause in will was ambiguous — Testimony of solicitor who drafted will was clear indication that matter of including children of testator's child who died without issue as beneficiaries to will was raised, discussed, and testator included applicants — That was evidence of intent — Solicitor's evidence was credible and reliable – this was a mistake in drafting - Testator intended his estate to be divided amongst his surviving children and issue of his deceased children

**Context**: Bruce Alexander Ryrie died February 22, 2012 at the age of 93 years. Had a clause that said *“To divide and distribute the residue of my estate among my children, Brian Martin Ryrie, Lynette Fern Ryrie, Wallace Bruce Ryrie, Lionel Gary Ryrie, Diane B. Howard and Barry David Ryrie, in equal shares, provided that if any child of mine has predeceased me leaving issue alive at my death, then I direct that such issue shall receive in equal shares, per stirpes, that share in my estate to which such deceased child of mine would have been entitled, had he or she survived me*.” But the testator had 8 children: 6 named in that above clause and 2 that had pre-deceased. One died without children, one died with two children (Michael and Brenton). Michael and Brenton applied to have the names of the children removed so that the estate would be split 8 ways per stirpes.

**Issue**: Is the estate to be divided among the 6 named children or the 6 alive and the one passed who left children?   
**Decision**: **It was ambiguous because 2+ reasonable interpretations of the passage.**   
**Analysis**:

* ***S.26 WSA***: requires that the Court “must” look at intention and “may” consider 3 types of evidence.
  + **doesn’t say ambiguity is a pre-condition to using that evidence.**
* ***Section 26(a):*** “evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will”
  + Words and phrases noted in section 26(a) are not limited to those mentioned in sections 29 – 31.
* ***Section 26(b):*** “evidence as to the meaning of the provisions of the will in the context of the testator’s circumstances at the time of the making of the will”
  + Would require extrinsic evidence to know
  + **No precondition of ambiguity**
* ***Section 26(c):*** “evidence of the testator’s intent with regard to the matters referred to in the will”
  + Very broad
  + **Does not require ambiguity**
* Flow of analysis should be:
  + **1. Are there two or more reasonable interpretations of a disputed passage?**
  + **2. Does extrinsic evidence disclose that there are prospective beneficiaries who are not apparent by reading the words of the will?**
* Used the lawyers notes that he had intended per stirpes, and the assistant was the one who added in the names – this was not standard practise.
* Court find that Mr. Ryrie intended to include his two grandsons, Michael & Brenton, the sons of his deceased child Leslie, largely based on the evidence of the drafting lawyer.
* Court uses section ***39(1) of the WSA*** to rectify the wording of the will by deleting the specific names of the children and creating a per stirpes distribution.

## Principles & Rules of Construction

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| **The first question is whether the will is ambiguous or lacks clarity. If it doesn’t, you likely don’t need to resort to these rules.**   * **But keep in mind *Ryrie* – the Court doesn’t require ambiguity to get into an analysis of intention if there is a lack of clarity or competing interpretations**   In the construction of wills, there are two categories of rules:   * Statutory Rules - ***WSA***   + **Will Speaks from Time of Death *(sec. 27)* –** as if written right before they died     - E.g. “the car to my daughter” – if at time of writing had a Porsche, but when died had a Fiesta – they get the Fiesta   + References to Children, Descendants, Issue ***(sec. 28)***   + References to Having No Issue ***(sec. 29)***   + Disposition to “Heir” or “Next of Kin” ***(sec. 30)***   + Disposition to “Issue” or “Descendants” ***(sec. 31)***   + **Where Beneficiary Dies Before Testator *(sec. 32)* *–* ANTI-LAPSE RULE**   + **Where Gift Void or Contrary to Law (*sec. 33) –* ANTI-LAPSE RULE**   + Portion Not Disposed of by Will ***(sec. 34);*** and   + Gift for Charitable Purpose ***(sec. 35).*** * Common Law Rules.   **Other Rules:**   * **Property to 2 people**: take as tenants-in-common not as joint tenants unless an intention sufficiently appears on the face of the will ***(Law of Property Act, sec. 8)*** * Gift to multiple beneficiaries: the law presumes per capita, not per stirpes. * Multiple gifts are cumulative, not substitutionary. * E.g. 500 in a will and then create a codicil that says 10k – then you get 10k+ 500 |

In the construction of wills, there are two categories of rules:

* **Statutory Rules** - ***WSA***
  + **\*remember – UNLESS THE WILL SAYS OTHERWISE**
  + **Will Speaks from Time of Death *(sec. 27)***
    - Useful section
    - E.g. If the will says give my car to my daughter, and when they wrote the will they had a porche and when they died they had a ford fiesta – the daughter gets the fiesta – so they get whatever as if it was written right before they died.
      * Wills are always interpreted this way unless the will has a contrary intention
  + References to Children, Descendants, Issue ***(sec. 28)***
    - Maya never has used
    - if you get into fight with lawyer about what children, issue or decedents mean – go to this section
    - ***S.28(a):*** any child for whom that individual is a parent within the meaning of Part 1 of the Family Law Act, and
      * Section 7 – ***Family Law Act:***
        + 7(1) For all purposes of the law of Alberta, a person is the child of his or her parents. (2) The following persons are the parents of a child: (a) unless clause (b) or (c) applies, his or her birth mother and biological father; (b) if the child was born as a result of assisted reproduction, a person identified under section 8.1 to be a parent of the child; (c) a person specified as a parent of the child in an adoption order made or recognized under the Child, Youth and Family Enhancement Act.
  + References to Having No Issue ***(sec. 29)***
  + Disposition to “Heir” or “Next of Kin” ***(sec. 30)***
    - Reason for this one – if I said who are your heirs or next of kin – does that mean all the way back to 5th cousins – could mean parents – what leg has done – is they said if using this term – here is what it means.
    - trying to make the group determinable.
  + Disposition to “Issue” or “Descendants” ***(sec. 31)***
    - Issue with the fact that prima facie – the words issue / decedents are broad
    - But leg said just using intestacy to define this
    - trying to make the group determinable.
  + **Where Beneficiary Dies Before Testator (sec. 32)** 
    - Useful – anti lapse rules
    - See example on page 66 of CAN
  + **Where Gift Void or Contrary to Law (sec. 33)**
    - Useful – anti lapse rules
    - **Note:** if the gift is void under sec. 21, this won’t re-create the void gift.
  + **Portion Not Disposed of by Will *(sec. 34);*** and
    - Even if will talks about many things – the trustee is a trustee of anything not disposed of by the will
    - Section says everything in this estate is governed by the estate – and they are to hold it in trust for those beneficiaries under part
  + Gift for Charitable Purpose ***(sec. 35).***
    - Maya never has used
    - Why does this exist?
      * Used to be case that if you gave to charity – the bequest had to be well drafted, and if there was something void, it voided all the clause
      * This was trying to save charitable clauses
        + So it’s a saving provision
    - Example: A – can use it for this or this – but one is void for public policy -- 35 a is saying strike off the void part, and use it for the non-void purpose. B- 30% to spca for treatment of animals and also to be given to sarah who works at spca 🡪 Throwing on a non-charitable purpose -- Condition is valid -- So under b – you would divide it between both – but the whole gift is not void.
* Note: ***s.8 WSA*** says these rules only apply to wills made AFTER FEB 1, 2012

**Common Law Rules** (very old and not used often)

* Again – the first question is whether the will is ambiguous or lacks clarity. If it doesn’t, you likely don’t need to resort to these rules.
* General Principles of Interpretation:
  + **Whole Will Read in Context** 
    - The intention of the testator is to be collected from the will as a whole, read in its context.
    - E.g. *Gichuru v. Deichmann Estate:* Testatrix had 3 sons and 3 parcels of land - Gave 1 parcel to each son and split the residue - Before death, transferred one parcel to one son 🡪 found that son’s pre-transferred property should be taken into account for his share of the residue due to testatrix’s desire for equality which was evidenced in the will as a whole.
    - Sometimes if arguing about interpretation – go to will – because can show contrary intention to trump stat clause
  + **Identical Words have Same Meaning**
    - The presumption is that if a word is clearly defined in one instance in a will, the same definition applies across the will (unless contrary intention)
    - E.g. *Middlebro v. Ryan:* Testator operated a business and used the phrase “book value” twice in his will - In one instance, it was clear the book value was to be ascertained at the time of death. In the second instance, it wasn’t clear - Court applied the presumption and held that since the first instance referred to time of death, the same interpretation should apply to the second instance.
    - E.g. if children is defined at beginning means step kids and kids – applies throughout – but can say for the purposes of this section – kids means this… etc.
  + **Effect Given to All Words** 
    - We presume that all of the words that the testator included are intended for a reason.
      * A statutory interpretation principle
      * Everything in a will is included for a reason
        + *Ryrie* tells us that’s not true – sometimes things are included in a will by mistake
    - E.g. “car” vs “cars” – they intended to keep S or not.
    - *Eg: Re Stark:* The will directed that the residue be divided “equally among my nephews”. Testator had 2 full siblings and two half-brothers. Did this include full-blood nephews and/or half-blood nephews? -- At the time of drafting, he only had 1 full-blood nephew and it was unlikely he would have more full-blood nephews, but he used the plural intentionally. --- Therefore, applies to both full and half-blooded nephews.
  + **Ejusdem Generis (of the same kind)** 
    - This rule operates to tie specific words which are linked to a general word to the same genus – the specific then limits the general.
    - Eg: *Re Resch’s Will Trusts*: Bequest to 2 year old grandson read: “my watches (other than my calendar watch), chains, studs, and other personal jewelry”. Clause was held to be restricted to articles of masculine jewelry of small value and did not pass to other valuable jewelry.
      * Court said the listing is what informs the ‘other personal jewerly’ – and said it was just small value jewels.
  + **General versus Particular Intention**
    - If the testator expresses both a general and a particular intention with respect to a certain gift and the two are inconsistent, the Court will give effect to the paramount general intention by disregarding, modifying, or restricting the particular intention.
    - E.g. *Kilby v. Meyers*: Testatrix’s will had two scenarios: (a) she died before husband, or (b) if they both died in circumstances where it was unclear who died first. -- Didn’t contemplate what actually happened – he died first. -- Will expressed two intentions: (a) the particular desire to give her assets in a particular way, and (b) the general desire to avoid an intestacy – these are in conflict. -- Court preferred the general intention and distributed the estate as if she had died first.
  + **\*\* Presumption Against Intestacy**
    - If a will is capable of two interpretations, it is presumed that the testator did not intend an intestacy.
    - “There is one rule of construction, which to my mind is a **golden rule,** that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce – that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.” (*Re Harrison)*
    - E.g. “All the rest of my money to X” – court is likely to construe this to mean RESIDUE to avoid an intestacy.
  + **Presumption of Rationality**
    - It is assumed that the testator did not intend capricious, arbitrary, unjust or irrational consequences to flow from his/her dispositions.
    - E.g. *NSPCC v. Scottish*: Testator lived his entire life in Scotland and gave gifts to Scottish organizations. -- Left funds to “The National Society for the Prevention of Cruelty to Children” – turns out there are two of them – one in Scotland, one not. -- There is no evidence to suggest the testator had any idea about the non-Scottish version, Court concluded he meant the Scottish version.
    - Relates to *Fuchs* case – testator wouldn’t intend something arbitrary or irrational.
  + **Presumption of Legality** 
    - If there’s ambiguity and one is legal and one is illegal – the legal wins.
    - When initially reading a will, read for intention without taking into account the law because people don’t really draft their wills with a full understanding of all legalities.
    - However, if there is an ambiguity and one interpretation is allowable by law and another interpretation is not, the legal interpretation will presumptively prevail.
  + **Presumption Against Disinheritance**
    - In the event of an ambiguity, the Court will prefer an interpretation that benefits closer relatives versus farther away relatives. The testator is, however, always entitled to disinherit close relatives (subject to FMS, etc.).
    - Eg: *Re Gregory’s Settlement and Will* (1865 Ch): Testator’s will gave $10,000.00 to “Charles Francis”. Knew two people of that name – a nephew and a work colleague. -- Court applied presumption and awarded gift to the nephew.
    - When estate drafter – often asked for middle names – can help differentiate this because it avoids this.
  + **Irreconcilable Dispositions**
    - The Court will try to construe a disposition to avoid an inconsistency.
      * Eg: “My house to my wife, for her own use absolutely. When she dies, my house to my nephew.”
    - **If two inconsistent clauses appear in the same will or codicil and it is impossible to reconcile them, the last one prevails**.
      * Eg: “one hundred dollars ($500.00)
    - If the same property goes to two different beneficiaries in different clauses, the beneficiaries will take as tenants-in- common, or in succession, depending on the nature of the property.
      * Has been codified in ***Law of Property Act, sec. 8***
    - However, this is a rule of last resort and Court should attempt, in all cases, to reconcile the clauses and ascertain true intent.

## Rectification

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| ***S.39(1) WSA***   * Have to apply to get this * If you notice a problem where words need to be deleted or added – this is the section to go to. * ***39(1)*** – can fix everything except a signature * ***39(2)*** – can fix a signature, but it’s a VERY high bar * ***39(3)*** – time limitation – can only apply within 6 months unless an extension is granted. |

##### Fuchs v. Fuchs – wills can be rectified under s.39 with evidence of intention

**2013 ABQB 78 🡪 Ratio**: Court can fix mistakes in a will under ***s.39*** by adding that it was made in contemplation of marriage. *(This case had everything – contemplation of marriage, mistakes of TJ, intestate succession issues, drafting omission, legislation changeover, s.26 evidence consideration, s.39 rectification).*

**Context**: Deceased: Hans Joachim Fuchs (died February 12, 2012); Spouse: Barbara Marie Lippka/Fuchs (cohabiting since 1999, married first on February 21, 2000 and then again on April 20, 2001). Applicant: Mrs. Fuchs (spouse). Respondents: Roger Fuchs & Harry Fuchs (sons). Will dated June 23, 1999: they were living CL and couldn’t marry yet because of pending divorce. Appointed “my friend, Barbara Lippka” as Executor, Roger Fuchs as alternate; All of the residue, after payment of debts to be transferred “to my friend Barbara Lippka, if she survives me”; will didn’t have contemplation of marriage clause and then they got married. Court held the marriage was invalid because he got married during the appeal period of his divorce. But then they got married again in 2001 and lived as married couple until he died.   
**Issue**: If will is valid – it all goes to Barbra, if will is not valid = intestacy and split 50% between Barbra and the 2 sons.   
**Decision**: Intention is clear that this was made in contemplation of marriage. Sec 39 invoked to rectify will  
**Analysis**:

* Under the Wills Act, a will is revoked by marriage unless the will states it is in contemplation of marriage ***(sec. 17).***
  + Rooke A.C.J. finds the will is invalid under section 17 of the Wills Act. Revoked due to marriage.
  + Holds (incorrectly) that Mrs. Fuchs inherits the entire estate in an intestacy, subject to a review?
  + Thereafter, Mrs. Fuchs seeks review and Roger Fuchs alleges constructive trust over estate.
* **Legislation**: Court considers ***section 17 of the Wills Act*** + Court considers ***section 26 of the WSA***
  + Court uses ***section 26*** powers to consider all evidence before it: Why did he use the term “friend”?
    - Why was the declaration omitted? Intention of testator “clear” to Court.
      * But they couldn’t say spouse – because he was still married / not yet divorced – so couldn’t say spouse – but all of this is being inferred.
      * Why was declaration omitted?
        + Maya says he likely thinks they forgot or didn’t know about it
* **Conclusion**: it is clear that it was made in contemplation of marriage, and the requirements of ***s.39(1)*** of the New Act regarding why that intention was not expressed in the will have been satisfied.
  + In the result, under the provisions of the New Act, that requires the Court to give effect to the intention of the testator, and, notwithstanding the provisions of ***s.17*** of the Old Act, ***s.39*** is invoked to rectify the will to provide specifically (as indicated (supra)) that it is in contemplation of marriage.
* **Remedy**:
  + There is no formal application before me under s.39 of the New Act for rectification but that is, in effect, the nature of the arguments before me.
  + In the result, it seems to me appropriate that, and I so direct that, the will be rectified pursuant to s.39 of the New Act, to add a clause at the end of the sentence in the first paragraph that reads as follows: “This will is in contemplation of my marriage to my friend BARBARA LIPPKA at such time as I am legally able to do so”.
  + **Don’t take that as a takeaway from this course.**

##### Edmunds Estate – adding a signature under 39(2) is very hard

*2017 ABQB 754 🡪* **Unsigned will validation** *🡪* **Ratio: Adding a signature under s.39(2) is a high bar that requires clear and convincing evidence.** **Clear and convincing evidence” reinforces that the burden is on the applicant (but still BOP).** Court found they couldn’t add it because this was not an accidental omission ***(s.39(1)(a))*** nor was it a misunderstanding or failure of a paralegal to give effect to her instructions ***(s.39(1)(b)).***  
**Context**: Testatrix made will naming brother-in-law as executor, giving life interest in estate to second husband and giving remainder to various charities. Testatrix later executed codicil naming first husband's nephew, Hood, to whom she had become quite close, as executor in place of brother-in-law. Testatrix later instructed paralegal to prepare new will giving life interest in estate to husband, who was suffering dementia and residing in long term care facility, and remainder to H instead of charities.  Paralegal met with testatrix to review draft will and receive further instructions — Testatrix died one month later, before seeing or executing final draft. H brought application for order validating unsigned will by adding testatrix's signature.   
**Issue**: Can the court add a signature by virtue of ***s.39 WSA?***

**Decision**: No – no clear and convincing evidence here   
**Analysis**:

* The Court considered sections 37 (validating non-compliant wills) and 39 (rectification) of the WSA:
  + ***Section 37*** is a “weak” dispensing provision that does not excuse compliance with every formality.
  + ***Section 39(2)*** only allows rectification of a signature in very specific circumstances – when the signature was omitted by “pure mistake or inadvertence”.
    - **“Clear and convincing evidence”** reinforces that the burden is on the applicant (but still BOP).
* The Court found that this was not a proper circumstance to add Ms. Edmund’s signature:
  + Was not an accidental omission – ***39(1)(a).***
  + Was not a misunderstanding or failure of paralegal to give effect to Ms. Edmund’s instructions – ***39(1)(b).***
  + Was not inadvertent – ***32(1)(a)*** – must be the testator’s inadvertence, not Mr. Hood’s.
  + No evidence other than Mr. Hood’s that this was her final intention.
  + **Important to note:** court says its common when people come in to sign will, its common for them to make more changes.
    - Its possible she saw it and then would say im not going to leave it all to him.

##### Edmunds Estate – s.39(2) – narrow circumstances where signature can be added

*2017 ABCA 754 🡪* **Ratio: The failure to finalize the will because it was inconvenient to do so, and the failure to anticipate Ms. Edmunds’ imminent death, do not amount to inadvertence**

Context: Same facts as above – but Hood appealed   
Decision: Appeal dismissed.

Analysis:

* ABCA confirms the narrow application of sections 37 and 39.
* The failure to finalize the will because it was inconvenient to do so, and the failure to anticipate Ms. Edmunds’ imminent death, do not amount to inadvertence on the facts of this case” (para. 39).

## Vested & Contingent Gifts

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| **Vested:**   * A gift is a “vested” gift if it:   + 1. Is limited to a person who is     - In existence; and     - Ascertained;   + 2. Is **not** subject to any unsatisfied conditions precedent.     - CAN be subject to a CS – if so its said to be ‘not vested indefeasibly’   **Contingent Gift:**   * Contingent gifts can be defined as any gift that is not vested. * Common contingencies: Reaching a certain age; Being born; Achieving certain things. * Common language: “but if”, “on the condition that”, “provided that”   **Types of Conditions:**   * **1. Conditions precedent / conditions of acquisition**   + These delay vesting     - Eg: “To A when he turns 21” * **2. Conditions subsequent/ conditions of retention**   + These do not delay vesting   + Just means a gift is not vested indefeasibly – the gift can be unvested   + Eg: “To A, but if he attempts to sell the property, then to B.” |

**Examples:**

“My condominium to William for his life, and then to William’s first born child”.

* **Answer:** William’s gift is vested (he is ascertainable and no CP). The child’s gift depends if the child has been born yet – If he IS born then it’s contingent on CP that William must die, if he isn’t born then its contingent.

“To Sarah for her life, and then to Sarah’s daughter Lily upon reaching the age of 21”.

* **Answer**: Sarah’s life is vested (he is ascertainable and no CP). Lily’s is a contingent gift – she may not be ascertainable if she hasn’t been born yet – but its subject to CP of her turning 21.

“The farm to Greg on the condition that he continues to use it farming, failing which to Tom.”

* **Answer**: Greg’s gift is vested – no CP to get it – it’s a CS, but it’s not vested indefeasibly. Toms interest is contingent on tom failing to abide by the conditions

## Void Conditions

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| **Conditions are presumed to be valid (law gives people wide latitude) unless:**   * **Void for public policy reasons;**    + Requiring a beneficiary to commit a crime;   + Requiring divorce or abandonment;   + Restraining marriage;     - E.g: Can’t prevent someone from marrying – goes to daughter but if she marries current bf then to my son instead.   + Discriminatory conditions (race, gender);   + In terrorem conditions (a mere threat to induce the beneficiary to comply);     - Mere threats are void   + Repugnant conditions (restraints on alienation).     - E.g. Can’t sell it outside the family – cannot do this. * **Impossible to Perform; or**    + Conditions which a beneficiary can prove are impossible to perform are void in law.   + This is a very high standard – can’t just be hard or improbable.   + Examples:     - “Go from London to Rome in 3 hours” (?)     - “Cause it to rain on a given day”     - “Use a code of conduct developed by me” (which was never developed) * **Uncertain**   + If a condition is uncertain in its meaning or operation, it is void **and, if it is a condition precedent, the disposition (and not merely the condition) fails.**   + It must be possible to determine “from the beginning, precisely and distinctly” what the condition requires in all circumstances (*Clavering v. Ellison 1859 EngHL*).   + Examples:     - “Of Jewish blood” (*Re: Tuck’s Settlement Trusts*, 1978 Eng CA)     - “So long as she shall continue to reside in Canada” (*Sifton v. Sifton*, 1939 Ont. PC)       * person lived in Canada part time – and wasn’t clear if they could be in Canada some time, and spend time elsewhere… etc   **Consequences:**  **A void condition subsequent**: results in the condition merely being struck + gift vests absolutely   * (the rabbit dies and falls off the log – making the log free to take)   **A void condition precedent** will:   * Render the disposition void if it is real property (kills the whole gift).   + (the rabbit dies and rots inside log, ruining the log). * If it is personal property, usually it will render the disposition void, but not always.   + There are some legal exceptions which keep the gift alive and just strike the condition (in terrorem is an example). |

Class 9:

# Estate Administration

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| **A. Duties of a PR *s.23 WSA***   * PR includes executors + administrators * ***Estate Administration Act*** – ***s.5 + s.7***    + The listing of tasks is under ***s.7 + Schedules*** and the avenue to go to court is under ***s.8***   + ***7a)*** Identify Assets + Liabilities + apply for all insurance payouts +cancel all accounts     - See page 28 of ***EAA*** for task list [Schedule 1]   + ***7b)*** Administer + manage estate: Maintain records: spreadsheet with 3 tabs + insurance protection + secure property     - See page 28 of ***EAA*** for task list [Schedule 2]   + ***7c)*** Satisfy Debts: Pay / Rank / Marshall debts + advertise for claimants     - See page 29 of ***EAA*** for task list [Schedule 3]   + ***7d)*** Distribute + Account: Interim Accounting + interim + final disbursements     - See page 29 of ***EAA*** for task list [Schedule 4] * \*\*If a PR fails in any of the duties in ***s.5*** or core tasks in ***s.7*** – you can get an order under ***s.8*** * Surrogate Rules - ***table “personal representatives’ duties”*** (page62)   + Mostly about planning the funeral / funeral expenses * ***Trustee Act***   + Executors are holding everything in the estate on trust for the beneficiaries   + Certain duties under Trustee Act like prudent investor rules * CL duties – mostly subsumed by the legislation * Terms of the Will   **B. Estate Administration**   * Grants of Probate / Administration   + Often needed before you can cash out bank accounts and definitely needed to move land. * Acting without a Grant – ***s.10 EAA***   + Can go without if you don’t need it (e.g. everything in Joint) but must comply w/ s.10   **C. Compensation and Liability**   * *Re: Berry Estate* – Compensation   + Compensation is case-specific, guidelines are to be used as a starting point * *Re: Warren Estate* – Removing a PR   + Very hard, very high standard to remove |

## Duties of a Personal Representative

* Recall, Personal representative = executor (with a will) or administrator (no will)
* ***S.23 WSA***
  + Section says you have to follow the law.

### What are the sources of PR duties?

#### 1. Estate Administration Act, secs. 5 and 7 and Schedule

* ***S.5*** has codified the standard of care (Used to be in CL)
  + Have to perform the role honestly / good faith
    - They took standard of care form pre-existing cases and codified it, they threw on b – distribute asap
  + ***S.5(1)(b):*** The concern of all beneficiaries is that this is taking too long – so can refer to and say you needed to this asap
    - But no timeline because all estates are different
    - Executors: if you can try to get everything done in a year that’s the gold standard, but if it goes beyond that – doesn’t really matter – the legislation has no deadlines.
  + ***S.5(2):*** A PR is a trustee – so have to abide by that as well as the EAA
  + ***S.5(3):*** Important: if you are an executor and are a professional (lawyer /accountant) you will be held to a higher standard.
    - So there is 2 standards – one is ordinary person and second is professionals.
* ***S.7***: what leg has done is to take the 4 basic headings of EAA and turned into core tasks
  + The schedules in the back give you an idea of the things that fall under these headings.
* ***S.8:*** a new avenue you can take to court – to nudge an executor forward if you think they failed a core task
* ***7(1)* The core tasks of a personal representative when administering an estate are** 
  + ***(a)* to identify the estate assets and liabilities**
    - See page 28 of ***EAA*** for task list [Schedule 1]
    - E.g. apply for life insurance, pension, death benefits, etc..
    - It is the PR’s job to identify all assets belonging to the deceased, and all liabilities.
      * Assets can include:
        + Real property (houses, cabins, vacation properties, farms)
        + Bank accounts (chequing, savings, US accounts)

Look through their mail, look for debit cards / credit cards / instructions from lawyer

* + - * + Investments (RRSPs, RRIFs, investment account, GICs, stocks)

Usually RRSP/ RRIF have designated beneficiary

* + - * + Other assets (pensions, refunds, life insurance, household

Refunds: like cancelled bills / portions of unused rent etc..

* + - * + Other items (valuable collections, vehicles, livestock, crops)
        + Remember some things don’t ever go into estate (don’t need probate) – (e.g. life insurance w/ beneficiary, RRSPs, Property held in joint, bank accounts held jointly with spouse (NOT CHILDREN presumptively\*)

IF YOU DON’T KNOW WHO BENEFICIARIES ARE – re-designate them in the will (*Connor v Bruketta*)

* + - * Must cancel accounts: (to limit the risks of identity theft or credit card fraud.)
        + Advise all credit card companies, debtors, accounts of any kind (i.e. Netflix, gym memberships, etc) and banks that the person has died and provide Funeral Director’s Statement of Death as proof, if required.
        + For every account cancelled, **seek a letter outlining the amount in an account or balance owing as of death**.
        + will need to cancel the other cards of the deceased, including:

Alberta Health – to cancel health care card

Service Alberta – to cancel Driver’s License or identification

Federal Service – to cancel passport and SIN cards

Club Memberships – for example, gym memberships, rewards cards and other memberships, and

Any other cards or memberships belonging to the deceased.

* + ***(b)* to administer and manage the estate,**
    - See page ***28 of EAA*** [Schedule 2]
    - *A. Creating and maintaining records*
      * Tell them to make an **excel spreadsheet 3 tabs:**
        + 1. Assets: All of the assets of the deceased as of the date of death and all changes to each asset as the estate progresses

And in it detail all those things coming into estate – if you sell vehicle, why, how much, refunds, etc..

* + - * + 2. All of the liabilities of the deceased and how they were each paid off

And then all the debts – insurance costs, credit cards, things that you are paying off

* + - * + 3. All the things you did to justify your fees – met with lawyer, drove here, cleaned house…etc… some keep hourly log (3 hours here, etc…)
      * Failure to do this can result in liability to the PR/Trustee, lower PR fees, or disgorgement by the Trustee of improperly held funds.
      * *Middlestadt Estate*: Failed to pass his accounts in an acceptable manner. He never kept records so he could identify which money he put into the joint account, or which money he took out for his own benefit. He cashed pension cheques of Adele Mittelstadt, and never kept any record of the use of the cash. He never presented an opening or closing inventory. He made no record of monthly income and expenses. The most he could do is produce some receipts, and estimate amounts he spent for his mother’s benefit. He admitted he had a gambling problem and used money in the joint account for his own purpose**. There has been a breach of trust by Bruno**. Bruno Mittelstadt clearly misappropriated trust funds to his own use.
        + \*\*Would never put money of an estate into a joint account of your own.
    - *C. Insuring the estate*
      * Make sure insurance is in place for all assets (vehicles, properties) and ensure that insurance companies know that property is vacant (**it can void a policy if you fail to advise of a material change**).
      * ***Section 24 of the Trustee Act*** discusses insurance of trust property and allowance to pay premiums.
    - *D. Securing the estate*
      * Obtaining all keys to real property from anyone who has one
      * Ensuring that real property and vehicles continue to be insured
      * If there are concerns about family members attending on the property, a PR can change locks if needed and hire a property manager if the property is vacant
      * Putting in place a manager if there is an ongoing business or farming operation – or a checker/property manager. ***2(e)***
  + ***(c)* to satisfy the debts and obligations of the estate, and** 
    - See page ***29 of EAA***
    - *A)* Tax Liability
      * A PR should hire an accountant who specializes in the area of estates (or is comfortable filing estate returns) to assist in reducing taxes payable and in filing the appropriate tax returns, including:
        + The final tax return (January 1 – date of death)
        + The terminal tax return (Date of death – December 31)
        + Any corporate tax returns required
        + Apply for the Final Clearance Certificate from the CRA

means the CRA has said person owes us nothing – it’s a protection

* + - * Although there are currently no provincial estate taxes in Alberta (for now), there are fees for land transfers (paid at Land Titles) and for applying for Probate (paid at the Courthouse).
    - *B)* Pay Debts
      * Keep in mind that PRs have a duty to creditors to ensure they get paid (so long as it’s a valid debt and there are funds to do so).
        + In some estates with significant debts, people will attempt to keep their assets out of the estate to try to get funds to the hands of beneficiaries, instead of creditors.
        + PRs have a duty to creditors to ensure they get paid (so long as it’s a valid debt and there are funds to do so).
      * Debts could include:
        + Estate debts (funeral expenses, legal fees for estate)
        + Secured debts (mortgages, lines of credit, financing of vehicles)
        + Unsecured debts (credit card debts, membership cards like Costco or Sears cards, utilities payments or living expenses, invoices payable by deceased)
        + Unusual debts (debts owed to family members, debts owed to a former spouse, obligations for child support)
      * ***S.27 EAA:*** Ranking of debts
        + If the estate is insolvent and cannot satisfy all debts – want to think about bankrupting the estate
        + Insolvency trustees can assist with this process.
        + Creditor can force an involuntary bankruptcy
        + Executors wont be liable for this if they dint breach trust
      * ***S.28 EAA:*** Marshalling Rules
        + There are rules as to how debts are paid in an estate. These come from section 28 of the EAA (Marshalling Rules).
        + They mandate that funeral and estate administration expenses and unsecured debts and liabilities as follows:

Property charged with the payment of debts;

Property passing by way of an intestacy;

General gifts of property;

Specific gifts of property;

Property over which the deceased had a general power of appointment.

* + - *C)* Advertising for Claimants
      * This doesn’t happen in all estates, but it is a very good idea to protect the PR.
      * ***Surrogate Rule 38***
        + ***S.31(1) EAA*** – limitations on liability if advertising

Doesn’t delete debts you are aware of – still have to satisfy those – but it caps debt after that date as ‘debts you are aware of’

* + ***(d)*** to distribute and account for the administration of the estate.
    - See page ***29 of EAA***
* In conjunction with ***s.31(1)EAA*** - can give to beneficiaries once debts are paid off
  + - Once funds are made into a larger fund, the PR should then be in a position to ascertain the ‘residue of the estate’ which can be paid out.
      * Executor should liquidate all assets that are not specific requests to pay off debts / expenses / taxes, etc.. then they are left with residual of what to give away.
    - Before releasing funds, the PR accounts to all residual beneficiaries in an **‘Interim Accounting’.**
      * See Appendix 1 for example
      * An Interim Accounting is generally done to distribute much of the estate **less a holdback** for final expenses and taxes.
        + Completing one of these is much easier if a PR has kept a careful accounting of the estate and, ideally, kept one bank account for the estate (as opposed to several).
      * Once satisfied with the accounting, the beneficiaries sign Releases approving the accounts.
        + ***The Surrogate Rules*** allow a PR to present the accounts and to obtain releases “in Form ACC 12” from the residuary beneficiaries ***(Rule 100).***
    - Once all beneficiaries have submitted the Interim Releases (we request originals for the PR), the PR can pay out the interim bequests per the Schedule of Distribution.
      * Specific gifts (i.e. “my watch to my son, John”)
      * Specific monetary gifts (i.e. “$2,000.00 to each grandchild”)
      * Residual gifts (i.e. “the residue of my estate is to be divided equally between my three children for their own use absolutely”)
    - Then the PR can issue the interim distribution and continue to hold a proper release.
      * Interim is the fun distribution – the big one. The final one isn’t as much.
      * We then await the “Final Clearance Certificate” from the CRA.
      * Once obtained, we do a Final Accounting and Final Release (very similar to Interim) to pay out the remainder of the estate.

#### 2. Surrogate Rules, Table: “Personal Representatives’ Duties”

* See ***page 62 of Surrogate Rules***
* 1. Planning the Funeral
  + The first (and sometimes the hardest) thing a PR must do is to plan and complete the disposition of the remains and funeral.
  + ***Estate Administration Act, sec. 6:***
    - Note: under ***Cemeteries Act, General Regulation s.11(***2) – the PR has priority
  + It is up to the PR to make appropriate funeral arrangements and to keep expenses reasonable.
    - Can sometimes be a fight about what is appropriate.
    - Depends on expectations – how well known person was
  + Disposition of remains must be “determined in light of the deceased’s station in life and circumstances” (*Tzedeck v. Royal Trust Co*.)
  + A PR is not bound to observe a deceased’s wishes concerning his or her remains (*Hunter v. Hunter*)
  + ***Who pays for the funeral?***
    - Financial institutions will generally allow a PR to pay for funeral expenses and ongoing debts of the deceased from the deceased’s bank accounts – this is ideal as the PR does not have to bear that cost
      * Usually they don’t have access to these funds until they get grant of probate – but banks usually allow for this.
    - However, if the financial institution will not allow this or has frozen the accounts, the PR may need to pay these costs out of pocket and reimburse himself or herself from the estate (although ***this can be risky if estate doesn’t have any assets)***
  + **Note:** Although funeral expenses are a debt of the estate which can always be paid from the assets of the estate by the PR, **the headstone/monument is not** and must be approved by all beneficiaries of the estate (unless the will expressly authorized in the will).

#### 3. Trustee Act;

* Flow of assets upon death: Deceased 🡪 estate 🡪 beneficiaries and creditors
  + Maya 🡪 estate of Maya 🡪 in the name of beneficiaries
    - **When its in the middle ‘holding zone’ – the executor is a trustee – they are trustee because they are holding money on someone elses’ behalf**
* Recall, a “trustee” includes “an executor, an administrator or a trustee of a person” (sec. 1(a)).
* Personal representatives of an estate are trustees who owe fiduciary duties to the beneficiaries of the estate: *Tatum v Tatum*, 2011 ABQB 253 at para 28.
* Trustees have certain powers and duties under the *Trustee Act:*
  + With respect to investment (called the Prudent Investor Rule) – see section 3;
    - Investments – deceased can do whatever, beneficiaries can do whatever, but when its being held in middle – they have to comply with prudent investor rules.
  + To use a stockbroker, investment dealer or investment counsel but must be prudent in who they select – see section 5; and
  + To appoint agents in accordance with section 23.

#### 4. Common law duties;

* Have been absolved into the legislation

#### 5. The Executor can also be bound by the terms of the will (Administrators are not).

## Part 2 - Estate Administration: Grants

### Grant of Probate

**Grants of Administration** are similar to Grants of Probate, but they do not contain a will (because in these cases, the deceased died without a will).

* The Administrator will need to obtain these in the same circumstances as when you require a Grant of Probate.

**Grants of Probate**: a Court-validated copy of the Will.

* Will always be required if there is land in the name of the deceased (sole) or the deceased owns as a tenant-in- common.
* Will usually be required if the deceased owns accounts in his/her sole name (over 20,000 – 30,000), dependent on the bank.
* To obtain a Grant of Probate, there are a series of legislated forms which must be completed by the Executor and submitted to the Surrogate Clerks at the Court of Queen’s Bench of Alberta.
* Currently in Edmonton, it takes between 6-8 weeks to obtain a Grant of Probate after the Application is submitted (presuming no issues after submission).

**Before the Grant of Probate has been issued, the PR can work to:**

* Transfer assets where no Grant is required
* Clean up and prepare a property for sale
* Ensure that all property is insured and secured
* Distribute household items as per the directions in the Will
* Report to beneficiaries on the progress in the estate
* Pay any urgent or problematic debts that arise

**After the Grant of Probate has been issued, the PR can:**

* Everything becomes vested in the executor
* Consolidate all bank accounts and investments into an estate account, which can either be held at a bank or in a lawyer’s trust account as you direct
* Sell real property or vehicles/boats/etc to third party and deposit proceeds of sale into the estate account
* Pay any urgent debts that are valid and need to be paid

**Acting without a Grant *EAA s.10* + S.9 Surrogate Rules**

* Can work without a grant, but just have to comply with ***EAA s.10.***
* In the past, PRs often worked without a Grant, because often they did not require one.
  + **E.g. if everything is in joint with a spouse – the spouse just needs to produce a death certificate**
* In the Estate Administration Act (2014), there was a new requirement introduced that if a PR chooses to proceed without a Grant, they must send written information to beneficiaries and family members.
  + There was a concern that if they did not proceed with a Grant, people were not being notified of their rights in an estate (i.e. FMS).
* Have to give notice to:
  + Family member Attorney, Trustee, Public Trustee of Guardian

**Acting With a Grant**

* ***S. 9 of the EAA*** and ***Rule 26 of the Surrogate Rules***

## Part 3- Compensation and Liability

|  |
| --- |
| **The usual methodology is that:**   * The PR keeps a record of their actions in the estate; * Lawyer for PR compares against chart in the Surrogate Rules to estimate complexity of estate; * Lawyer for PR prepares a range of fees that would be reasonable (often using Guidelines);   + **Note:** Guidelines are not binding *Re Berry*   + See guidelines screen shot in Re Berry case below   + *Re Berry:* The following circumstances appear proper to be taken into consideration in fixing the amount of compensation: (1) the magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied in performing its duties; (4) the skill and ability displayed; (5) the success which has attended its administration. * PR chooses fee to propose to beneficiaries; * Fee is contained in the Interim Accounting for approval by all affected beneficiaries; and * If approved by all, is paid to PR when Interim Distribution is made (or final distribution)   + See ***(Surrogate Rules, Part 1, 6);*** Pre-taking compensation   **What does the Court use to determine proper compensation?:**   * Schedule 1 of the Surrogate Rules, including factors (para. 19); * Section 44 of the Trustee Act (para. 20); * Sections 5 and 7 of the Estate Administration Act (roles and duties of the PR) (para. 21); and * Core Tasks Schedule of the EAA (para. 22). |

### PR Compensation

* ***The Surrogate Rules, Schedule 1, Part 1*** contain the fundamental rules for PR compensation in Alberta (page 61-62)
  + **Quantum**: “fair and reasonable compensation for their responsibility in administering an estate by performing the personal representatives’ duties.” (***Surrogate Rules – Part 1, 1(1));***
  + **Factors**: Includes factors to be considered (***Surrogate Rules, Part 1, 2);***
  + **Fixed in Will**: If the compensation is fixed in a will, no greater amount can be charged unless it is varied by agreement of the beneficiaries or the Court ***(Surrogate Rules, Part 1, 4);***
  + **Cannot pre-take compensation** unless (a) the Will allows for it, (b) all the affected beneficiaries agree to it; or (c) the court order it ***(Surrogate Rules, Part 1, 6);***
  + **Can be entitled to reimbursement for expenses** properly incurred by them in the administration of the estate (***Surrogate Rules, Part 1, 9).***
* ***Trustee Act, sec. 44:*** A trustee under a trust, however created, is entitled to any fair and reasonable allowance for the **trustee’s care, pains and trouble** and the trustee’s time expended in and about the trust estate that may be allowed

\*Neither of these sections give a clear direction on how to estimate how much to pay these people

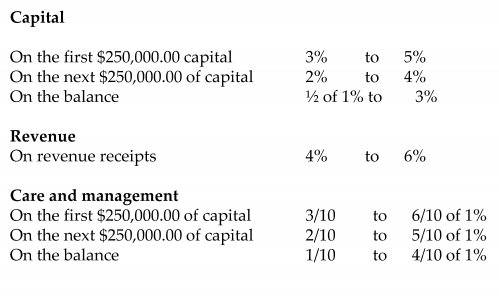
* **The usual methodology is that:**
  + The PR keeps a record of their actions in the estate;
  + Lawyer for PR compares against chart in the Surrogate Rules to estimate complexity of estate;
  + Lawyer for PR prepares a range of fees that would be reasonable (often using Guidelines);
    - **Note:** Guidelines are not binding *Re Berry*
    - See guidelines screen shot in Re Berry case below
  + PR chooses fee to propose to beneficiaries;
  + Fee is contained in the Interim Accounting for approval by all affected beneficiaries; and
  + If approved by all, is paid to PR when Interim Distribution is made (or final distribution)
    - See ***(Surrogate Rules, Part 1, 6);*** Pre-taking compensation

##### Re Berry – test for what is fair and reasonable compensation of a PR

**2017 ABQB 77 🡪 Court reviews the parameters under which this PR fee is set.**   
**Context**: Administrators of the Estate (John Berry and Linda Lee) applied to have their accounts approved, to set their compensation, and for costs. Sought $64,000.00 (total) for compensation. Objected to by Ms. Burniston (beneficiary): Should be $10,000.00 like when she was PR of mother’s Will; and they didn’t actually do that much and delegated to their lawyer. Because compensation was not addressed in will, Ms. Burniston could not be faulted for asking court to scrutinize compensation of JB and Linda.

**Issue**: What does the Court use to determine proper compensation:  
**Decision**:

**Analysis**:

* ***Schedule 1 of the Surrogate Rules***, including factors (para. 19);
* ***Section 44 of the Trustee Act*** (para. 20);
  + Although no definition of “pains and trouble” is found in the jurisprudence, it is clear that compensation to personal representatives is based not only on the work or duties or tasks performed by those persons, but also on the responsibility which they assume
* ***Sections 5 and 7 of the Estate Administration Act*** (roles and duties of the PR) (para. 21); and
* ***Core Tasks Schedule of the EAA*** (para. 22).
* **The Guidelines by the Legal Education Society of Alberta**
  + The Court made it clear that these do not bind the Court, but in practice, these are often used by lawyers in Alberta to negotiate or propose a PR’s fee to beneficiaries.
  + **Note:** Capital = gross value of estate. Revenue = if earning money on estate (rent/business earning income), Care & Management: Maya doesn’t do this but if had ongoing business and executor was running it, could charge this.
  + See Appendix 1 for sample calculation
* It is the duty of the court to determine what is fair and reasonable within the principles of the statute.
* **Application**
  + Various guidelines have proposed compensation as a percentage of the value of the estate or as a percentage of transactions within the estate
  + In Alberta, there is no legislative cap on executor fees such as the 5% on the gross aggregate value cap in British Columbia
  + It is the duty of the court to determine what is fair and reasonable within the principles of the statute.
  + The following circumstances appear proper to be taken into consideration in fixing the amount of compensation: (1) the magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied in performing its duties; (4) the skill and ability displayed; (5) the success which has attended its administration.
    - The five factors set out by Teetzel J. have been recognized as appropriate considerations in determining "fair and reasonable" compensation under ***s. 61 of the Trustee Act***
  + Court applying the general principles:
    - (1) the magnitude of the trust;
      * Large estate (about $2 million);
    - (2) the care and responsibility springing therefrom;
      * Although this was an estate which was relatively liquid from the outset, the will itself caused difficulties and exacerbated the hostility amongst the parties;
    - (3) the time occupied in performing its duties;
      * These applicants assumed their responsibilities in February 2013 and were ready to wind up the estate in January 2017 – nearly 4 years
    - (4) the skill and ability displayed;
      * By making judicious choices in the deployment of professionals, the applicants reduced the costs to the estate and improved some of its revenue
    - (5) the success which has attended its administration.
      * The applicants have effectively wound up the administration of the estate;
  + The existence of unusual difficulties or situations 🡪 Recognizing the stress which working in this atmosphere would produce, the applicants even tried, unsuccessfully, to have the Public Trustee accept responsibility for this estate
  + Finds that the requested compensation - $65,000.00 – is appropriate in these circumstances.
    - while the amount claimed may be at the high end of what is permissible in the circumstances, that compensation is nevertheless fair and reasonable.

**Example:** Estate is worth $1,450,000.00.  You act on behalf of the executor. What is the range of PR compensation that you would offer to your client to propose to the beneficiaries?

**Answer**:

* Guidelines:
  + **Capital:** 3% to 5% on first 250k = $7,500 - $12,5000 PLUS
  + **Capital:** 2% to 4% on next 250k = $5,000 - $10,000 PLUS
  + **Capital:** 0.5% to 1% to 3% on rest = (1450000-5000k=950,000) = ($4750 to $9500) -$28,500
  + **=** (7500+5000+4750) – (12500+10000+9500) =
  + **= Range of $17,250 - $51,000**

### PR Liability

* There are several well-established defences available to trustees facing breach of trust allegations, such as: (I) exculpatory clauses; (ii) concurrence by the beneficiary; (iii) expiry of limitation periods; and (iv) statutory excuse. *Re Cikanek*
* Executors are only liable to do their best and if they honestly do their best, they are not liable for errors in judgement; the standard expected of them is purposely not made too onerous by the law, so as to encourage persons to accept a position as executor. *Lopushinsky*.
  + But if they leave money or property around uninvested, they must personally make up the income it would have earned if it had been invested. It is also clear that they are liable both for wilful default and acting with reckless carelessness. *Lopushinsky*.
* ***Section 25 of the Trustee Act:***
  + A trustee is only chargeable for money and securities **actually received** by the trustee and is answerable and accountable only for the trustee’s own acts, receipts, neglects or defaults.
* ***Section 41 of the Trustee Act:***
  + ***(a)*** A trustee “may be held to be fiduciarily responsible as a trustee, is or might be **personally liable** for any breach”, but…
  + ***(b)* BUT If the trustee has acted honestly and reasonably** and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach, then the Court may relieve the trustee either wholly or in part of his/her personal liability for the breach of trust.
    - Executors mess up but do it in a way they didn’t mean to – cashed out bank account they shouldn’t have – but did in good faith – this is where accurate records are really important – to convince court you were acting good.
* ***Section 23, EAA:*** Duties and liabilities of personal representative

##### Lopushinsky Estate (Re) – PR Liabilities and ability to relive under s.41 of Trustee Act

*2015 ABQB 63 🡪* The proper determination to be made with respect to ***s 41*** requires an analysis of all relevant circumstances

* In the case of a non-professional executor (i.e. someone other than a trust company) the courts have been relatively slow to find an executor responsible for errors made honestly and in good faith”
* An executor may bear personal liability for failure to act to the requisite standard of duty
  + Executors have a duty to abide by the terms of the will, act impartially, exercise ordinary care and prudence in dealing with estate assets and properly account for such assets.
* An executor is also bound to fulfill the Personal Representatives’ Duties set out in Part 1 of Schedule 1 of the Surrogate Rules.
* **Executors are only liable to do their best** and **if they honestly do their best, they are not liable** for errors in judgement; the standard expected of them is purposely not made too onerous by the law, so as to encourage persons to accept a position as executor.
* Similarly, executors may not be liable in case of mistake. But if they leave money or property around uninvested, they must personally make up the income it would have earned if it had been invested.
* **It is also clear that they are liable both for wilful default and acting with reckless carelessness.**

**The most common areas where PRs are sued are:**

* Improperly interpreting or not following the Will
* Paying the wrong amounts to the wrong beneficiaries or missing a beneficiary, or delays in payments – (***S.5(1)(b) EAA***)
* Taking PR compensation without beneficiary approval - ***(Surrogate Rules, Part 1, 6);***
* Improper payment of debts (preferring creditors improperly) ***EAA s.27(1)***
* Failing to prudently invest estate assets
* Failing to properly protect or secure estate assets ***(7(1)(b) EAA)***
* Not selling assets in a timely or beneficiary way such that the estate takes a loss when the sale does occur
* Failing to invest excess cash
  + Subject to prudent investor rule - ***Public Trustee Act s.36(1), the Trustee Act ss. 2- 8.***
* Unreasonably prosecuting or defending legitimate claims against the estate (the estate will not always pay your costs!)
* Improper delegation of duties
* Improvident settlements
* Failure to keep accurate records of the administration – ***7(1)(b) EAA***; *Middlestadt Estate*

**To decrease the chances of liability as a PR can:**

* Step away (renounce) from the job before undertaking any tasks and let another person step forward
  + You can only renounce if you have not intermeddled
* Follow the advice of lawyers, accountants and investment experts
* Ensure that you are transparent, fair and communicate often with all interested parties
* Consider executor’s insurance (e.g. ESAssure)

### Removal of a PR

* ***S.15(1) EAA*** - Court of Queen's Bench has both statutory and an inherent jurisdiction to remove executors. *Warren Estate*
* It is notoriously hard to remove a PR and is a very high standard.
* The standard of proof in a proceeding to remove an executor is a balance of probabilities. *Warren Estate*
* The Court does not want to lightly interfere with the written direction of the testator (who must have chosen the Executor or Executors for a reason – this doesn’t apply to Administrators, of course).
* **Test to remove a PR:** PR should ONLY be removed when necessary on clearest evidence and when no other option. *Warren Estate*
  + The court must consider whether the continuance of the trustee would be detrimental to the execution of the trust, jeopardize the assets of the trust, put the welfare of the beneficiaries at risk, or prevent the trust from being properly executed *Warren Estate*
  + Factors:
    - Conflict of interest, misconduct, lack of bona fides, an inability or unwillingness to carry out the terms of the trust, incapacity, personally benefiting from the trust, acting to the detriment of beneficiaries, or any other ground that shows that the trustee is not fit to control another's property *Warren Estate*
    - However, **mere allegations are insufficient**. Alleged acts and omissions must endanger the trust property, show dishonesty, lack of proper capacity to execute the duties, or a lack of reasonable fidelity.
  + Friction or hostility may provide grounds where it has affected the manner in which the trust has been administered. The court must be guided by the welfare of the beneficiaries
    - **Some level of friction between an executor and one or more of the beneficiaries may be quite normal, and even anticipated**. However, where the degree of hostility between the beneficiaries and the trustee renders administration of the trust difficult such that the executor is unable to exercise the duties in a completely impartial and objective manner, removal may be necessary regardless of fault

##### Warren Estate (Re) – test to remove a PR, s.15(1) EAA

*[Smith v Lister] 2015 ABQB 420 🡪* **Ratio**: **Removing a PR is very hard and often unsuccessful. VERY HIGH bar -** Level of perceived unfairness and inappropriate interference by L in administration of estate did not rise to level of seriousness that would lead to removal - **Estate assets had not been jeopardized**. **Mere allegations are insufficient**. Alleged acts and omissions must endanger the trust property, show dishonesty, lack of proper capacity to execute the duties, or a lack of reasonable fidelity.

**Context**: Margaret Warren (deceased) executed a will on May 26, 2014 which names Karolyn Lister as the executor of the estate. Applicants (residual beneficiaries) applied to remove Ms. Lister as executor and Reid (son and Ms. Lister’s spouse) applied for interpretation of the will – challenging on the basis of testamentary intention and mistake.  
**Issue**: Should the PR be removed?  
**Decision**: Cannot be removed  
**Analysis**:

* **Authority to Remove an Executor:**
  + The Court of Queen's Bench has both statutory and an inherent jurisdiction to remove executors *McDonald Estate*
  + ***EAA S.15(1)***
* **Test to Remove an Executor:**
  + The standard of proof in a proceeding to remove an executor is a balance of probabilities.
    - However, a court should not act too readily to remove an executor; it is a sensitive exercise not to be lightly undertaken.
  + **An executor should be removed only in a case of clear necessity and on the clearest of evidence that there is no other course to follow. There must be serious allegations of maladministration to remove an executor and/or trustee.**
  + The court must consider whether the continuance of the trustee would be detrimental to the execution of the trust, jeopardize the assets of the trust, put the welfare of the beneficiaries at risk, or prevent the trust from being properly executed
  + The historical factors which a court was required to consider when appointing an administrator should be considered on an application for removal, including conflict of interest, misconduct, lack of bona fides, an inability or unwillingness to carry out the terms of the trust, incapacity, personally benefiting from the trust, acting to the detriment of beneficiaries, or any other ground that shows that the trustee is not fit to control another's property
  + Some level of friction between an executor and one or more of the beneficiaries may be quite normal, and even anticipated.
    - where the degree of hostility between the beneficiaries and the trustee renders administration of the trust difficult such that the executor is unable to exercise the duties in a completely impartial and objective manner, removal may be necessary regardless of fault:

Application:

* Friction between the Applicants and Executor – outlined in para. 29.
* Ms. Lister rushed the grieving progress.
* Ms. Lister made arguments in favour of a particular interpretation of the will (unseemly).
* She has properly applied to the Court for advice and direction.
* No basis to conclude that she will not administer the estate in accordance with the will.

**Class 10:**

# Grants of Probate, Administration, { Limited, Re-sealed, Ancillary and Other

|  |
| --- |
| **Key Legislation:**   * Estate Administration Act, s.20,21, 38 * Surrogate Rules, Alta Reg 130/1995 * Wills and Succession Act s.27,   **Key Terms:**   * ***Executor de son tort:*** A stranger takes it upon himself to act as executor or administrator without just authority…intermeddling with the goods of the deceased (Dictionary of Canadian Law)   + So if there’s a will, it means you’re not named in the will, or you are named but someone is named ahead of you. * **Intermeddling:** If a person acts, in relation to the property of the deceased, in a manner that shows an intention to assume the responsibilities of an executor ***(s.34 EAA)*** * **Will** – includes codicil (***EAA s. 1 (m))*** * **Grant of probate** – a will naming an executor * **Grant of administration** – dies intestate or has a will with no one named * **Resealed / Ancillary Grant** - when another grant is obtained in different jurisdiction and now you’re coming to AB to get a grant   **Key Concepts:**   * Will speaks from the date of death ***(s. 27 WSA)*** * Deceased’s property (both personal and real) vests in the personal representative ***(s. 20 and 21 EAA)***   + Executor receives authority from Will and not from the grant of probate * Administrator receives authority from the Court.   + Therefore, the deceased's property vests in the Court and then is delegated to the court appointed administrator |

### Grants:

* **Grant (*EAA s. 1 (f)*** – means the Court’s grant of authority to administer an estate
* **Types of Grants *(Rule 10, Surrogate Rules)***
  + **Unlimited & Unrestricted *(Rule 10(1)(a) Surrogate Rules)*** 
    - **Grant of probate:** when will names an executor
    - **Grant of administration:** dies intestate or has a will but no one named
      * **Note:** Administrator receives authority from the Court. Therefore, the deceased's property vests in the Court and then is delegated to the court appointed administrator
      * Would apply for one when:
        + Deceased dies intestate
        + Deceased leaves a will but names no executor or the executor(s) named is/are unwilling or unable to act
        + Partial intestacy
    - **Grant of administration with will annexed -** Will exists but no executors named in the will are willing or able to act or will does not name an executor or named executor has predeceased
    - **Supplemental Grant (cessate):** This type of application is made when the original grant of probate is issued for a limited time.
      * Grant limited to an administration during the minority of the named executor and when the child turns 18 she can apply for probate
      * Its limited in time, but say its unrestricted because no restriction on executory
    - **Grant of Double Probate (double double):** Named executor does not apply for probate and does not renounce and reserved to him or her the right to apply later. The later grant is the double probate
      * ***Rule 34 of the Surrogate Rules*** Alternate personal representative named in will may apply if it is necessary for the alternate personal representative to complete the administration of the estate. The original grant must be surrendered
  + **Grants Limited to part of the deceased’s property (*s. 10(1)(b) Surrogate Rules*):**
    - **Grant of administration of unadministered property (de bonis non administrates)**
      * If an administrator dies, or is removed from office before his or her duties are completed, the court will appoint a new administrator of the property not yet administered
        + or no PR for deceased’s estate or PR resigns and no alternate PR named in Will
      * ***Rule 37 of the Surrogate Rules***
      * Applies in “With Will Annexed” context as well
        + Sole or remaining executor dies or administrator with will annexed dies leaving part of the estate unadministered
        + Chain of executorship
    - **Grant of re-sealed probate / administration with respect to property in Alberta;**
      * ***s.18 of the EAA***
      * ***Rule 35 of the Surrogate Rules***
      * **Note:**
        + **Resealed or Ancillary Grant *(rule 35/36 Surrogate rules)***

If its coming from another province commonwealth= reseal / If non commonwealth = ancillary

“Reseal” means the sealing of a foreign grant with the seal of the Court ***(EAA s. 1 (k)***

Other provinces and commonwealth countries

when another grant is obtained in different jurisdiction and now you’re coming to AB to get a grant

So maybe someone was resident in BC, and got a grant, but AB courts don’t recognize BC - so you need AB grant of probate = resealed grant of probate

Ancillary Grant – Same as reseal, but for non- commonwealth countries

* + - **Grant of administration limited to specific property;**
    - **Grant of administration of property not included in another grant (caeterorum bonorum);**
      * If a will appoints general executors and executors for a specific purpose (i.e. literary executor) and the latter applies first for a grant, then the general executors would then receive a caetorum grant or a grant for the rest of the estate
      * Works in reverse as well
    - **Ancillary grant or probate or grant of administration**
      * ***S. 19 of the EAA***
      * ***Rule 36 of the Surrogate Rules***
  + Grants that are for a limited time ***(s. 10(1)(c)):***
    - Grant of administration until will is found;
    - Grant of administration during the minority, absence or mental incompetence of the personal representative (durante minoritate, absentia, dementia);
      * Never comes up
  + Grants that are for a limited purpose only ***(s. 10(1) (d):***
    - Grant of administration when the validity of a will is in question (pendente lite);
      * ***S. 17 of EAA*** – Grant when litigation pending
      * Not authorized to distribute the estate
    - Grant of administration for the purposes of litigation (ad litem);
    - Grant of administration for the preservation of property (ad colligendum bona defuncti);
    - Grant of administration limited to a specified matter.
* The Court may make a grant of any kind, general or a limited grant ***(EAA s. 14)***
  + **General** – No restrictions
    - General duties (***EAA s. 5***) and core tasks ***(EAA s. 7)***
      * These are the sections to read before they go off and do their things
  + ***Limited Grant*** (some sort of restriction)
    - For all or specific part of real or personal property;
      * e.g. I collect hockey jerseys, if I die, wife has no idea on the value – because she doesn’t know any better – then can appoint someone to JUST do that.
      * **Note:** Executor has decision making power – can delegate jobs but NOT decisions – can get someone to
    - For a limited time; and ***(s. 10(1)(c) Surrogate rules)***
      * E.g. guy is 17, public trustee administers it for first year then turn it over
    - For a limited purpose or matter. ***(s. 10(1)(d) Surrogate Rules)***
      * E.g. limited to property, time or purpose / responsibility
  + Courts are given lost of discretion to make grant and on any terms or limits
  + Death of one or more than one personal representatives
    - Powers and authority of deceased personal representative vests in the remaining personal representative(s) ***(s. 40 EAA)***
  + Death of named personal representative prior to obtaining a grant of probate
    - Deemed as if never named in Will ***(s. 41 (EAA)***

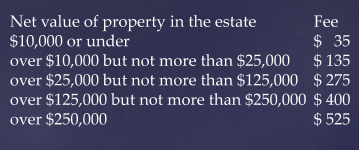
### Probate Grant Applications:

* The original will and any original codicils must be included in the application for the grant of probate or grant of administration with will annexed ***(Rule 15 of the Surrogate Rules)***
  + **Lost will** ***(Rule 24 of the Surrogate Rules)***
    - Law says when will is lost, court presumes (starting point) that person destroyed it with intention of revoking – so if you have a copy, you can admit it to probate and have court make it an orgiirinal – but have to get over the hurtle of this presumption
      * Can rebut presumption with evidence – there was house fire, dad talked about fact he was so happy he had this but coudn’t find it, etc..
    - **Have to prove:**
      * 1. Contents (going off hearsay – don’t have a copy at all)
      * 2. Rebut presumption that it was destroyed with intention of revoking it
        + Also have to prove that the testamentary document was done in accordance with the formalities
* A witness to a will or codicil must prove that signing formalities were observed by providing an affidavit of witness ***(Rule 16 (3) of the Surrogate Rules)***
  + If cannot obtain affidavit from the witness (ex. both are dead), then can submit affidavit of handwriting or affidavit from someone who was not a witness but was present at the time of the signing of the will
* If the will is a holographic will, then a person other than the applicant, unless otherwise ordered by the court, must prove the deceased's handwriting by signing an affidavit of handwriting ***(Rule 16 (4) of the Surrogate Rules)***
* Will not in English must be accompanied by an affidavit of translation
  + If its foreign – you need affidavit of translation – someone who is qualified to be a translator.

### Bonding:

* If you’re out of province – you have to post bond – this is an insurance policy that pays beneficiaries if you take off with money.
  + bonding is only if NONE OF EXECTUORS are from AB.
* Out of Province Executor(s) or Administrator(s)
  + ***S. 45 of EAA***
  + ***Rules 28 – 31*** of the Surrogate Rules
    - Must post bond unless dispensed with by the Court
    - Licensed insurer under the Insurance Act
    - Equal to the gross value of estate in Alberta
    - Can apply to dispense with bond
    - Beneficiaries can consent to dispensation with bond
      * Can sign a waiver bond saying I trust this person, and then will submit an application to dispense

### Grant of Probate:



**Courts / Grants of Probate:**

* When you have a Will naming executor
* **Note:** Executor receives authority from Will and not from the grant of probate

**Probate Court:**

* The principal duty or role of a probate court is to *decide whether or not a document is entitled to probate as a valid testamentary paper*, and to *determine who is entitled to be the personal representative* of the deceased (whether testate or intestate)
  + Probate may raise issues of testamentary capacity, knowledge and approval of contents of the will, fraud, undue influence and execution.
    - When doing probate – what you are looking for testamentary capacity, knowledge and approval of contents of will, proper execution, lack of fraud and lack of undue influence.
* Probate Court may need to interpret the will to some extent:
  + Determine whether several documents, or several parts of the same document, are reconcilable in order to be able to admit only those parts truly representing the final intentions of the testator
    - E.g. it says – I give everything to susan malkin and then susan changed her name, or that’s not her name but its what everyone called her – so may have to clarify things – but not actually deciding an issue where someone wins and someone loses – more just filling in gaps.
  + Interpretation of a will by a court or probate necessarily incidental to the proper exercise of its function does not bind another court that subsequently has to construe the will in order to determine what beneficial interest it create
  + Court of Probate cannot add words but **can delete words** in the case of mistakes
* Functions of a court of probate are exercised in Alberta by the court of Queen’s Bench performing a surrogate function
  + Judicature Act section 2
  + ***EAA s. 1(d) –*** “Court” means the Court of Queen’s Bench
  + ***EAA s. 3 (2)*** – An application to the Court under this Act must be heard by a judge and not by a master in chambers
* Capacity and lack of undue influence or fraud are presumed
  + 9/10 you are probating and if there’s a problem – it will be capacity, fraud, undue influence or poorly drafter – here you are saying its NOT a valid testamentary document because its lacking one of the foundation s(But for most case courts presume this is the case unless they are challenged)

### Probate Court Jurisdiction:

* Issue Grants:
  + Whether the will was properly executed and attested;
  + Whether the testator had the necessary capacity;
  + Whether there was fraud or undue influence;
  + Testator knew and approved of contents;
  + Confirm that there were no mistakes on the face of the will and if necessary, expunging the mistakes;
  + Confirm that alterations were properly executed and attested;
  + Address void gifts;
  + Address incorporation by reference;
  + Address ademption, abatement and lapsed gifts;
* Revoke Grants
* Appoint Executors and Administrators
* Passing of accounts and awarding compensation
* Applications for maintenance and support
* In order to be granted jurisdiction, deceased must have been either: ***s.2 EAA***
  + Deceased resident in Alberta; or
  + On the date of death deceased owned property in Alberta; or
  + The Court, on application is satisfied the grant is necessary.

### Common and Solemn Form

* **Proof of Will in Common Form:**
  + There is no contention to the right to obtain probate or administration
    - No issues – just telling court here is what will says, here is who beneficiaries are – here are some affidavits, have a good day and they give you grant
  + Administrative procedure
  + Story time
* **Proof of Will in Solemn Form (Same as Formal Proof of will)** 
  + Solemn form is because shit has gone wrong – then that means courts are like – you have to check all the boxes – shows testamentary capacity (goodfellow), no undue (kozka), so you have to go prove all these things (when normally its presumed
  + ***Rule S. 75*(1)–** says everything the court can do – or can ask the court to do
  + Court is alerted to the fact that there may be something wrong with the will, then the will must be proven in solemn form. This means it must be proven in open court on notice to all interested parties and it will not be permitted to probate unless the court is satisfied of the due execution of the will, the testator’s knowledge and approval of contents, his or her capacity, and non-revocation (Oosterhoff on Wills and Succession, pg 45)
  + 3 ways you have to do this
    - Court orders it on the face of application itself;
      * Judge will see it and say I am not signing off on this – even though probate isn’t judgment – they just say it checks all boxes – but judge can say this will go sideways anyways – so instead of granting probate
    - Court reviews filed caveat; or
      * caveat is a document – where you file with courts saying I have a problem, don’t issue the grant – then you have 90 days to do something about it – gives you more time to make investigations / give you more time.
        + Sometimes people just want time to greive
        + So do it because its simple document, no trouble for filing it – just do it to give you breathing space.
    - Court application commenced.
  + Contentions matters
  + Generally proceeds by Trial ***– Rule 83***
* Chambers – ***Rule 84*** – “Only if the issue is proof of death of the testator or proving the signing of the will or both” 🡪 usually not what you are arguing about – usually you are alleging lack of capacity (*banks v goodfellow*)
  + - Proof of signing of Will
    - Proving testator’s signatures or handwriting
    - Proving the fact of the witness’ signatures, presence or qualification  Proving signing of the will complied with the formalities in the WSA
  + Evidence – ***Rule 85*** - Person (i.e. Lawyer) who took instructions or the preparation of the Will is compellable as a witness and subject to pre- trial disclosure and production of documents and oral questioning…”
  + ***Rule 93*** – If a proof of will application is made, the PR who has already obtained a grant must return it to the Court Clerk
  + Order of Proceedings – “Proponent of Will is heard first and must present evidence concerning the proof of death, proof of the signing of the Will (i.e. formalities) and the capacity of the deceased.”

**Attacks on Validity**

* Lack of Capacity – Suspicious circumstances
  + *Vout v. Hay [199] 2 SCR 876* 
    - What important is that they could raise suspicious circumstance s- doesn’t mean will is defeated – just means person has to prove the things of the will that are normally taken for granted.
* Undue Influence
  + *Kozak Estate 2018 ABQB 185*
* Fraud

**Threshold: Proof of Will Application**

##### Beimler v. Kendall – capacity challenge with no evidence – solemn proof of will – need evidence

2017 ABCA 117 **- this is case that says you need evidence to corroborate what you’re saying -** Common law partner of testator and her son applied to set aside a grant of probate, to prove a will in solemn form and to have the will declared invalid by reason of the testator's incapacity or because of undue influence— Chambers judge found that evidence consisted mainly of **uncorroborated subjective assessments**, opinions and self-centred evidence.  The chambers judge was not satisfied that there was an evidentiary basis to support the appellants' suspicions. 🡪 **Ratio: Allegations alone aren’t enough – need corroborating evidence.**

**Context**: Applicants were previous common law spouse and son. 2009 Will and 2011 codicil left property to applicants. 2013 Will left everything to sister. The chambers judge found that the evidence consisted mainly of the appellants' subjective assessments, opinions and self-centred evidence. “In determining whether there is a genuine issue requiring a trial, the court must decide whether there is an evidentiary basis for a suspicion that the will does not represent the true wishes of the testator” ***Section 11 of the Alberta Evidence Act***. Application to set aside grant; prove will in solemn form; invalid will for lack of capacity or undue influence

**Issue**:

**Decision**: Judge told them to GTFO – they brought no evidence for undue influence.   
**Analysis**:

* The appellants were required to establish on a balance of probabilities that there were suspicious circumstances surrounding the preparation of the will, the capacity of the testator or that the free will of the testator was overborne by acts of coercion or fraud
* Application summarily dismissed

### Is a Grant Required?

* If there is an executor named in a will who is willing and able to act → Depends how the property was owned by the deceased
  + Authority comes from Will
  + No dispute of validity
  + Real property or bank accounts registered in the name deceased’s name alone
    - Land titles has policy that they need probate every time
    - Banks have discretion – usually under 20grand you can ask them to waive probate, but you have to sign an indemnity (if you aren’t executor, you pay us back)
  + Bringing or defending actions
  + All about how the property was owned by the deceased
* If there is no executor named in a will who is willing or able to act; or the executor (s) named are not willing or able to act; or intestacy → **Yes**
  + Authority comes from the Court

### Notice

* When acting without a grant
  + ***S. 10 of the EAA and Rule 9.1 of the Surrogate Rules***
  + Notice to: Beneficiaries Family member Attorney, Trustee, Public Trustee of Guardian
* When acting with a grant
  + ***S. 9 of the EAA and Rule 26 of the Surrogate Rules***
* Notice to family members on application for a grant ***(s. 11 EAA)***
* Notice to Public Trustee and others on application for a grant ***(s. 12 EAA)***
  + Role of Public Trustee is to look out for the interests of minors and incapacitated adults under the care of the Public Trustee
  + Looks after missing persons

### Right to Act as Executor

When you are acting as executor – your right comes from fact you are named

* Not renounced
* Disqualified:
  + Minority
    - ***Rule 21 of Surrogate Rules*** – if deceased testator was a minor
    - The Public Trustee has the same priority to a grant of administration of the estate that the person would have if he or she were an adult of full legal capacity (***s. 14 Public Trustee Act)***
      * So for Minors – public trustee administers estate and then takes over when they are 18. ***(S.13(5))***
  + Incapacity
    - ***S. 14 Public Trustee Act***
    - Subject to Enduring Power of Attorney or Trusteeship Order
* Criminal responsible for testator’s death
  + If you murder person you cannot be executor

### Multiple Personal Representatives

* Unless the Will says otherwise, multiple personal representatives have equal decision making authority and must make decisions **unanimously** - ***EAA s. 37***
  + Majority rules clause in Will
* Unless the Court orders otherwise, **a grant of administration** must not be given to more than 3 persons at the same time
  + Whereas in a will can have as many as you want (although this is a nightmare without maj rule clause)

### Renouncing:

* **Executor de son tort**: stranger takes it upon himself to act as executor or administrator without just authority…intermeddling with the goods of the deceased (Dictionary of Canadian Law)
  + So if there’s a will, it means you’re not named in the will, or you are named but someone is named ahead of you.
  + Want to always caution clients about acting without authority – but if doing things in best interests of estate
    - E.g. looking after the newly abandoned house – call the insurance – who is this harming?
* Can renounce right to probate but reserve right to manage any ongoing testamentary trusts
  + E.g. If sister is named as executor and trustee of trust for niece – she can say don’t wanna be executor but want to stay trustee
* **An Executor may renounce her right to probate a will if the executor had not intermeddled in the estate** ***(EAA s. 38)*** 
  + Renunciation must be in writing - ***Rule 32, Surrogate Rules***
    - Renunciation does not prevent a personal representative from applying for a grant of administration with will annexed ***– rule 32(4) – Surrogate rules***
  + “**Intermeddling**” - If a person acts, in relation to the property of the deceased, in a manner that shows an intention to assume the responsibilities of an executor…” ((Alberta Estate Administration, (Legal Society of Alberta, 2005), 2-6)) ***S.34 EAA*** – can apply for order to restrain intermeddling.
  + Once someone has intermeddled, she is no longer able to renounce and must be discharged by Court Order
    - Make sure you are advising clients to decide if they want to do this before they act\*
* Not intermeddling:
  + Payment of reasonable funeral expense; (because burying body is in societies interest)
  + acts of necessity (e.g. house insurance); - want to encourage positive behavior
  + and inquiries into deceased’s property and debts.
* Intermeddling:
  + Taking possession of estate property; and
    - once you start paying people you have a problem
  + Holding oneself out as an executor by letter or advertisement.
* **Reasons to renounce:**
  + So you can get authority to nominate
    - No authority to nominate in a will (e.g. I don’t wanna do it, but ill appoint my sister) a will can give you the power to nominate, but if the will doesn’t then no
      * But you can nominate someone in administration context (no will or no executor)
    - So say A is executor and they only name A, and then no executor that can act in a will – there is list of priority (***EAA s. 13(1***)) – executor is #1, that means just because you renounce off the bat, you get another kick of the can – then the executor can then nominate who they want
  + Liability risk;
  + Executor lacks time, ability or temperament;
  + Executor resides outside of Alberta or Canada;
  + Tension between executors or executor and beneficiaries; or
  + Executor is in a conflict of interest.
    - Example: Spouse is the named executor and has family maintenance and support rights personally
    - E.g. if you wanted to challenge the will – shouldn’t be an executor- Executors are supposed to be neutral.

### Nominations and Consents

* ***Rule 33 of the Surrogate Rules*** and section ***13(4) of the EAA***
* Administration and administration with will annexed
* Probate context only if person is expressly authorized by the will
* If there is a will but no PR is named, and #3 wants to be executor – 1 & 2 must renounce first ***(s.13(1)(A) EAA)***
* \*Remember the rule about equal priority in ***s. 13(2)EAA***

**Class 11**

# Estate Litigation Primer

|  |
| --- |
| **Surrogate Rules:**   * ***EAA – Section 4 –*** “Surrogate Rules apply to any application or matter that arises in the administration of an estate under this Act.” * **Non-contentious matters** – this is the stuff from class 10 – the different types of grants   + Part one, Rules 9.1 - 54.1   + Different kinds of grants which can be applied for   + 3 divisions * **Contentious matters**   + Definition – Rule 1(d)   + Part two, Rules 55 – 96   + 5 divisions * Accounting – not on exam   + Rules 97 – 117   + 4 divisons |

## Surrogate Rules

* Surrogate rules are broken up into 3 parts
  + 1. Non-contentious matters
    - Part one, Rules 9.1 - 54.1
      * Different kinds of grants which can be applied for
    - 3 divisions
  + 2. Contentious matters
    - Definition – Rule 1(d)
    - Part two, Rules 55 – 96
    - 5 divisions
  + 3. Accounting
    - Rules 97 – 117
    - 4 divisions

### Contentious Matters

* Substantively the challenges with wills come from either legislation or common law.
* Division 1 (General)
* Parties interested in the Estate ***(Rule 57)***
  + Formal Proof of Will different ***Rule - 78***
    - When doing grants, have to assure the court that it was signed properly, formalities in accordance with WSA, 2 witnesses, etc…, have capacity
      * but when making those applications - the court doesn’t ask many questions – they take it as face value unless there’s a challenge to it
    - Formal proof of will 🡪 Instead of court assuming its okay – you have to prove it step by step – applies when you have capacity, undue influence and fraud.
* Documents to commence an action ***(Rule 58)***
  + Notice of Motion (C1) and Affidavit (C2)
    - C1 = cause of action – tells you what issue is, what facts you’re relying on, and what you want as a relief (like a statement of claim in civil issues).
      * Notice of motion is more argumentative.
    - Affidavit = your evidence.
  + Different Rules and forms for Formal Proof of Will and Accounting
* Service = make sure the ppl who are affected know
  + Who ***– Rule 59***
  + How – ***Rule 60***
  + When – ***Rule 61***
* Application under this section must be in front of a Justice ***(Rule 63)***
  + ***Section 3 – Estate Administration Act***

**Applications – Other Acts**

* Use C1 and C2
* Order to Restrain intermeddling
  + Section 34 of the Estate Administration Act WSA
* ***WSA***
  + 36 – Court authorize a minor to make a will
    - Rule 54.1
    - E.g. high profile case – murdered – left a large insurance policy to his daughter, who was daughter, she’s a minor, so money goes to public trustee until shes 18 – but if something happened to her before she turned 18 and she could do a will – she would die intestate – and her alcoholic parent – according to intestate rules would inherit it – so she got authority to make a will so she could leave it to aunt.
  + 37 – Court can validate invalid will with clear and convincing evidence of intention
  + 38 – Court may validate non-compliant alteration with clear and convincing evidence of intention
  + 39(1) – Rectification
    - save the lawyer clause
      * E.g. client says want to give shares of company A to daughter and B to son and lawyer mixes this up or executor fails to sign the will.
      * Can go in and rectify it – add a signature
    - Mistake
    - Misunderstanding
    - Fail to sign
  + 40(1) – Validation of gift to witnesses
  + Part 5
    - Family maintenance and support
      * Disclosure of Financial Information ***s. 95 and Rule 70.9***
      * Anytime you are asking for documents – standard is relevant and material – relevant and material to answering an issue, or creating an issue – so these sections are good starting point.
    - Temporary Possession
  + 109 – Advances
    - advances – different from Pecore about presumption of advancement (that’s about is a gift from parent meant to be an advancement in life) this is about when you give gift to child, is it an advance on their inheritance – s.110 got rid of the thing that said yes – but this section exists too.

### Advice and Direction Application

* ***Rule 4 + Section 49 of the EAA***
* Questions regarding administration or management of estate
  + What this is: go to court and say I have this issue, what do I do – but courts do not want to make this decision – so they want you to come with your issue and an answer – so when you make these they are often steps along the way when administering an estate
    - E.g. trying to sell house, cannot get a hold of the beneficiary – doing something you may get in trouble for later – one beneficiary might object to price later – so you go to court and say why do I want to sell the house – get appraisal, realtor opinion, and court says okay yeah you’re good to go – this is so beneficiary cannot come back later and sue you for it.
      * **Ask for permission instead of forgiveness**
* Personal Representative acting on advice or direction of the court is deemed to have discharged the PR’s duty
* Does not indemnify PR if PR is guilty of fraud, wilful concealment or misrepresentation in obtaining advice and direction
  + Use this when you are doing stuff where you could get backlash – like a cover your ass order – the only way it wouldn’t cover you is if you completely lied on your application.
    - As long as you are honest & forthcoming – it’s a good tool to have.
* E.g. E.g. trying to sell house, cannot get a hold of the beneficiary – doing something you may get in trouble for later – one beneficiary might object to price later – so you go to court and say why do I want to sell the house – get appraisal, realtor opinion, and court says okay yeah you’re good to go – this is so beneficiary cannot come back later and sue you for it.

### Caveat Applications

* Caveat 🡪 caveat here is like a WOAH hold on – when someone files application for probate – you can file caveat if you object to probate being granted
  + Says I might have an issue with this estate – so don’t just go granting probate
  + All it does is **a TEMPORARY pause** on an estate – and then person who filed caveat either has to follow it up with their notice of application – has to say what issue is and has to give evidence in an affidavit.
  + If you are lawyer for estate – you say is this person really going to follow through and do a court application – or should we just wait it out – can bring an application saying this application is bullshit – but its 3-5grand – so just wait it out.
* Division 2
* ***Section 46 of the Estate Administration Act*** 
  + 3 months ***s.47(1)EAA***
  + Need permission of court to file subsequent caveat ***s.47(2)EAA***
* ***Rules 71 to 74*** 
  + File to prevent issuance or resealing of grant ***(rule 71(1))***
  + Expires, withdrawn or discharged contentious matter is dealt with as non-contentious
    - Way it ends – clock runs out – person withdraws the caveat – or you can bring application to discharge it – but 90% of time if someone files caveat – they follow through with an application.
  + Warning to caveator (***Rule 72) -*** Show cause why caveat should not be discharged
    - If they wont withdraw it, wont bring application to withdraw, don’t wanna wait – you can send them a warning – gives them 10 days to file their claim – the 3 month limit is now 10 days
    - Caveat is hey we have an issue, then warning is tell us your issue, file something substantive.
  + Notice of Objection ***(73)***
    - Must be filed within 10 days of warning
  + Frivolous or Vexatious Caveat ***(Rule 74)***
    - Costs against caveator
  + Caveats have their own forms – C3 (caveat), C4 (warning), (C9 Notice of Objection)

## Proof of Death

* Rule 94
  + This never comes up
  + But if someone went missing, can bring an application to have deemed them to have died.

## Notice of Contestation

* Can do this notice of contestation – dangerous because you tell the person who has the claim – prove it in court – taunting them to bring a court application – but if they don’t in 2 months, they cannot bring the claim.
  + Do you wait the 2 year limit, or just do the notice of contestation
* Claimants – Includes Creditors (Rule 1 (c))
* ***Rules 95 and 96*** 
  + C11 – notice of contestation
  + C12 – Response
* 2 months limitation vs. Limitations Act
* (How does this interact with ***7(1)(c)*** obligations to pay all known debts?)

## Legal Costs

* When executor is paying the lawyers bills – the estate isn’t paying the bill, the executor is, and estate will re-imburse executor for reasonably incurred expenses.
* Important because the costs of litigation can be used as leverage – but its hard to tell private clients – we will win this, but you will be 60k in the hole.
  + May make you settle a claim you wouldn’t normally settle
  + Important to understand costs – so when advising client on pursuing a claim, you have to keep costs in mind – for best interest of client
* Costs are always up to the absolute discretion of the Judge
  + So when looking at cases – they are more about trends – but warn clients you don’t know how this will go.
* Cases provide guidance and show trends, but are not law
* **Typically costs paid in one of six ways:**
  + Payable by the Estate
  + Payable by a Beneficiary
  + Costs payable by the Executor and not reimbursable by the Estate
  + Costs in Family Relief Cases
  + Mixed Costs Award
* **Party to Party Costs** – Payable pursuant to Schedule C of the Alberta Rules of Court
  + there’s a schedule in rules of court that is like a grocery list and you get so much for each step (e.g. file statement of claim, get so much..)
    - Then that is what other party must pay if you are successful
    - 99% of costs will be party-to-party
  + typically, its about 10-20% of what it actually costs
* **Solicitor and own client costs** – Fully indemnity
  + what it actually cost me to go to court.
    - only if you really messed up – egregious conduct only.
* **Cost in the cause** – Costs of interlocutory applications are recoverable by the winner
* **Costs payable forthwith** – Costs of interlocutory applications are recoverable immediately
* Personal Representatives are entitled to indemnification from the estate for expenses reasonable and properly incurred in the court of his or her administration of the estate.

##### Holowaychuk v. Lopushinsky – cautionary costs case

*2015 ABQB 63 🡪* **Cautionary Costs Case - Solicitor and own client costs against the applicant because the challenge was grossly unreasonable and entirely disproportionate to the nature of the dispute -** *Executor did her best and diligently administered estate in face of much opposition from brother — Had brother accepted explanations about allegedly missing canola and properly reviewed grain tickets and other records, significant time and resources could have been saved — Brother's conduct in litigation had to be discouraged – they had no hope of winning but still lawyered the shit out of it.*

**Ratio**: this case says lawyers have to be careful what they do - Lawyers have duty to reign in your clients as well – you can fire your clients.

**Context**: In this case what lawyer did, he was representing neutral executor and they defended it like it was 10 commandments – and point is – they had no hope of winning and they lawyered the shit out of it  
**Issue**:  
**Decision**: in the end, the judge handed the entire bill to her client – and judge chewed out the lawyer in the decision.   
**Analysis**:

* In Surrogate matters of this nature, costs may be awarded under the authority of rule 113(2)(k) of the Surrogate Rules and rules 10.29-10.33 of the Alberta Rules of Court.
* The awarding of costs is almost always discretionary and that discretion must be exercised judicially
* Historically in estate litigation, courts often allowed costs to be paid out of the estate. It is now clear that this is no longer the case.
* **The "modern" approach to costs awards in estate litigation is that, like other types of litigation, costs follow the event.** *Foote*
* costs are awarded on a solicitor-client basis only in exceptional cases, particularly where there has been misconduct, *mala fides*, or unreasonable conduct on the part of the unsuccessful party
  + Blameworthy litigation or pre-litigation conduct may create a rare and exceptional case
* In the circumstances of this matter, and particularly in light of Julian's conduct (as more fully canvassed elsewhere in these reasons), costs on a solicitor and own client full indemnity basis are appropriate to be awarded to each of Barbara Holowaychuk and Denis Lopushinsky as against Julian Lopushinsky personally

##### Foote Estate, Re – Modern approach to costs

*2010 ABQB 197* – Odd case where the losing party had their costs paid by the winning party. **Typically, winner takes costs form loser on a party to party basis.** But in estate litigation – used to say people get paid -so this encouraged people to take runs at the estate without penalty. The modern approach Trying to make estate litigation more like rest of litigation and not just paid out of estate 🡪 When they are paying the costs of unsuccessful party – this is kind of exception – when loser can get paid. See the factors below that led to this outcome.

**Modern Approach to Cost -** This is where the modern approach started, and all case law started with this - The respondents were successful – but if you read costs section, it doesn’t go well.

**Context**: Litigation involving domicile of the deceased. $120 million estate. Applicant was spouse and children who wanted to bring a **family maintenance and support claim.** Respondents were the executor and beneficiaries (two charities). Executor and beneficiaries wanted solicitor and own client costs, or in the alternative, party to party cost to be paid by the applicants. Applicant wanted solicitor and client costs to be paid out of the estate (exception to the “costs follow the event rule”).

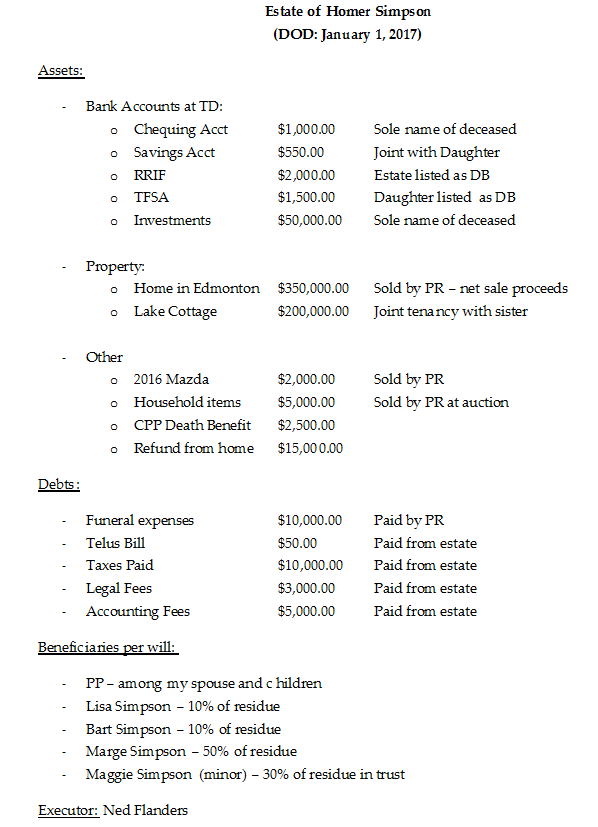
**Issue**: Should the respondents have their costs awarded?  
**Decision**: Respondents won – but the respondents got nothing – because they asked it to be paid by applicants – and even though applicant lost – they got their full legal costs paid out of estate. Application was reasonable Conduct was reasonable. Costs were hundreds of thousands – that made judge man – because thought it was ridiculous to go after mom and daughter.

**Analysis**:

* **Modern Approach:**
* Discretion should be exercised judicially
* Careful scrutiny to restrict unwarranted litigation and protect estates from being depleted
* **Payment of unsuccessful party’s costs requires analysis of many factors:**
  + Did the testator cause the litigation?
  + Was the challenge reasonable?
  + Was the conduct of the parties reasonable?
  + Was there an allegation of undue influence?\*
  + Should costs be treated differently during different points of the litigation?
  + Were there offers to settle?
* Who initiated the proceedings?
* Successful claimant for maintenance and support claims are generally awarded on a **solicitor and own client basis**
* Estate litigation is no longer the exception to the rule that costs follow the event
  + Costs will normally follow the event in estate litigation, unless the challenge to the estate was reasonable or on the basis of a public policy exception recognizing society's interest in only probating valid wills
* solicitor-client costs should only be resorted to where the facts so warrant.
* Application:
  + *Did the testator cause the litigation?*
    - The answer to this question is yes.
    - Mr. Foote left a tiny fraction of his estate to his wife and children. He directed that his widow move out of the home he and she shared for more than 20 years, within 2 years from his death, and that the home be sold.
  + *Was the challenge reasonable?*
    - The questionable nature of a poison pill clause invites legitimate litigation.
    - Mr. Foote must have contemplated family relief challenges when he essentially disinherited his immediate family, having regard to the size of his Estate.
    - It was, in my view, reasonable for his family to bring this application to determine the extent of their jeopardy in the event they sought family relief.
  + *Was the conduct of the parties reasonable?*
    - All parties conducted themselves reasonably in the litigation. They cooperated and no one can or should be criticized for the manner in which the matter was litigated.
  + *Was there an allegation of undue influence?*
    - No one has suggested that Mr. Foote was not of sound and disposing mind. This is a neutral factor here.
  + *Were there different issues or periods of time in which costs should differ?*
    - This is not a factor in regard to costs.
* Conclusion
  + The questions that are the subject matter of this litigation result from the manner in which Mr. Foote chose to draft his will and dispose of his Estate. Further, the public interest is invoked as a result of the poison pill clause.
  + These factors dictate that the Estate and the Executor should not recover costs from Anne and the children, despite the fact that the Estate was successful in arguing that Mr. Foote's domicile was Norfolk Island.
  + I have the same concerns about the Executor and Estate seeking solicitor and client costs from Anne and the children. There was no arguable basis to do so.
    - the Executor and the Estate are not entitled to recover any costs from Anne and the children.
  + In my judgment, this is an appropriate case for the Applicants to recover their costs, on a solicitor and client basis, from the Estate.
    - Having regard to the complexity of the matter and the size of the Estate, it was reasonable for Anne and the children to involve counsel and second counsel.

# APPENDIX

## Appendix 1: INTERIM ACCOUNTING EXAMPLE:



**Step 1: Do all Revenue & Assets of Estate**

**Estate of Homer Simpson: Died Jan 1, 2017. Today: March 12, 2019**

**Revenue & Assets** (Everything in cash / everything sold / any refunds / anything with Estate as beneficiary)

|  |  |
| --- | --- |
| **Funds received from chequing account** | 1,000 |
| **Funds received from investments** | 50,000 |
| **Funds received from RRIF** | 2,000 |
| **Net proceeds from sale of property (See schedule ‘A’**   * Note: beneficiary would say we sold it for 400, so schedule A would show what was deducted like realtor fees, etc… | 350,000 |
| 2016 Mazda (sold):   * Can put – “see schedule B” and then have bill of sale that shows the amounts, and then can say note mazda was wrecked before sold | 2,000 |
| Household items (sold): | 5,000 |
| CPP death benefits | 2,500 |
| Refund from senior home | 15,000 |
| TOTAL | 427,500 |

**Note:** joint account with daughter is a question mark -daughter could say he intended for me to receive it – so presumptively it goes into estate, but I am over turning that.

**Step 2: Do all Debts + Expenses**

ESTATE Expenses

|  |  |
| --- | --- |
| Funeral expenses (paid by PR, to be reimbursed)   * Because when cheque is written, will say why was Ned paid out? Could say see schedule C – and screenshot the PDF | 10,000 |
| Telus Bill (paid from estate) | 50.00 |
| Taxes (paid to cra) - tells us PR did a bunch of returns – another good one to have a schedule – 2017 taxes, 2018 taxes, etc.. | 10,000 |
| Legal fees paid from estate | 3,000 |
| Accounting fee paid from estate | 5,000 |
| **\*\* Executor fee (Proposed*) (Re Berry)***   * A lot of executors will propose a fee at this point – if a beneficiary doesn’t agree, then can go to court to set an amount. | 15,000  **How to set a fee:** on first 250k, take 3% and then 2% on next 250, range: 11k and high end 18,600k (First 250k is 7,500 to 12,000) and then second 250 (ask executor how complicated was this estate – had to deal with TD, sell a house, so lets choose 15k its in the middle of the range, so we will propose an executor fee of 15k and see if they agree) **[SEE *Re Berry*]** |
| TOTAL | 43, 000 |

**Step 3: Find total value of estate – Revenue - Expenses**

**REVENUE – EXPENSE**

|  |  |
| --- | --- |
| Revenue & assets | 427,500 |
| Expenses | (43,000)? |
| TOTAL | 314,459 (?) |

**Step 4: Do a holdback, anticipating final expenses and taxes.**

**SUMMARY**

|  |  |
| --- | --- |
| NEXT EXPENSES AND REVENUE | 314, 459 |
| Holdback | 14, 459 |
| Total interim distribution | 300k |

**Step 5: Determine Gifts + Residuals**

* Specific gifts (i.e. “my watch to my son, John”) – NONE
* Specific monetary gifts (i.e. “$2,000.00 to each grandchild”) - NONE
* Residual gifts (i.e. “the residue of my estate is to be divided equally between my three children for their own use absolutely”)

Residual Beneficiaries

|  |  |  |
| --- | --- | --- |
| **Name** | **% allotted** | **Total Interim Distribution** |
| Lisa | 10 % of estate | 30k |
| Bart | 10% of estate | 30k |
| Marge | 50% of estate | 150k |
| Maggie (In trust) | 30% of estate | 90k |
| TOTAL | 100% | 300K |

**Step 6: Get all beneficiaries to sign a release**

* Would send this to everyone, along with a release (the release is in the surrogate rules)
* This doesn’t include everything, but its like a cover page.
* Most beneficiaries will see this and then they will sign a release.
* You release me, and I will give you this money.

**Step 7: Do an Interim Release to beneficiaries**

* Once you get all releases back, release it all