ALBERTA WILLS AND ESTATES PRACTICE MANUAL

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ALBERTA WILLS AND ESTATES PRACTICE MANUAL

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Anne S. de Villars QC is well-known for her expertise and thoughtful approach in all areas of estate law. Anne co-founded de Villars Jones in 1988. She works with clients in all areas of estate law including estate planning through wills, powers of attorney, personal directives, and trusts; estate administration; and estate mediation and litigation. Anne is also recognized for her scholarly work, as co-author of Jones & de Villars’ *Principles of Administrative Law* (6th edition 2014), co-editor of the *Administrative Law Reports*, and of the *Annotated Surrogate Rules*. Furthermore, Anne wrote the Legal Education Society of Alberta’s *Wills Fundamentals*, and is currently president of the Collaborative Estates and Trusts Lawyers Society. Currently, Anne sits on the board of the Alberta Law Reform Institute working on reforming Alberta’s succession law.

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Karen Rackel QC

Karen Rackel graduated from the University of Alberta with a Bachelor of Commerce and a Bachelor of Laws, and has since gained over 40 years of experience in wills and estates. Recognized by *Best Lawyers in Canada* as one of Canada’s top trust and estate lawyers, and named the best trust and estate lawyer in Edmonton in 2013, Karen’s current focus is on wills and estates as well as corporate and commercial law. Karen was awarded the designation of Queen’s Counsel in 2005. In addition, she served as the past president of the Estate Planning Council and the past chair of the Canadian Bar Association Wills Section, and is a member of the Surrogate Rules Advisory Committee.

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Janice Henderson-Lypkie completed her LL. B. in 1981. After, spending several years in private practice developing her litigation skills, she began work as counsel for the Alberta Law Reform Institute, where she conducted legal research and wrote reports in a number of areas including corporate law, matrimonial property law, mortgage law, and several areas of wills and estate law. Janice then entered private practice in 2000. Janice previously served as the Edmonton Chair of the Wills, Estates & Trusts subsection of the Canadian Bar Association and is a member of the Society of Trusts and Estates Practitioners (STEP). In addition, Janice has been awarded the Registered Trusts and Estates Practitioner (TEP) designation by STEP.
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ALBERTA WILLS AND ESTATES PRACTICE MANUAL

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# CHAPTER 1

## INTRODUCTION TO PLANNING FOR DEATH AND INCAPACITY

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1 PLANNING FOR DEATH AND INCAPACITY

Planning for death or incapacity is an important aspect of life. It requires considering how to distribute money and property on death, what to leave to benefit a spouse, children, family members, charities, and others, and how affairs will be handled if one becomes unable to manage them. Lawyers play an important role in helping clients plan for death and incapacity. This can include advising and drafting such estate planning documents as:

- wills and codicils,
- enduring powers of attorney or standard powers of attorney, and
- personal directives (living wills, advanced health care directives).

Lawyers also play an important role when plans are not made. That role can include advising clients dealing with intestacy and advising clients on and applying for guardianship or trusteeship orders.

Effectively performing these and all the other tasks requires an in-depth knowledge of the case law and statutes that affect personal planning, wills and estates. Relevant Alberta statutes include:

- *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2,
- *Dower Act*, RSA 2000, c D-15,
- *Estate Administration Act*, SA 2014, c E-12.5,
- *Family Law Act*, SA 2003, c F-4.5,
- *Funeral Services Act*, RSA 2000, c F-29,
- *Human Tissue and Organ Donation Act*, SA 2006, c H-14.5,
- *Insurance Act*, RSA 2000, c I-3,
- *Land Titles Act*, RSA 2000, c L-4,
- *Law of Property Act*, RSA 2000, c L-7,
- *Matrimonial Property Act*, RSA 2000, c M-8,
- *Minors’ Property Act*, SA 2004, c M-18.1,
- *Perpetuities Act*, RSA 2000, c P-5,
Understanding how tax laws affect an estate is also key to estate planning. For general estate practitioners, it is essential that to seek expert tax advice in more complicated estate planning.

Other relevant topics include the governing legislation, the relevant common law, and the legal processes relating to will preparation, intestacies, family maintenance and support, enduring powers of attorney, personal directives and applications under the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2 [Adult Guardianship and Trusteeship Act].

2 INTRODUCTION TO THE WILLS AND SUCCESSION ACT

The Wills and Succession Act, SA 2010, c W-12.2 [WSA] was proclaimed in force in Alberta on February 1, 2012.

2.1 The effect of the Wills and Succession Act

The WSA replaced parts of the repealed Administration of Estates Act, RSA 2000 c A-2 [Administration of Estates Act], and repealed the:

- Dependants Relief Act, RSA 2000, c D-10.5,
- Intestate Succession Act, RSA 2000, c I-10,
- Survivorship Act, RSA 2000, c S-28, and
- Wills Act, RSA 2000, c W-12 [Wills Act].

The WSA updates the repealed Wills Act, which was still largely based on the English Wills Act, 1837 ((UK), 7 Will IV & 1 Vict, c 26). The WSA aligns Alberta legislation with other
Canadian provinces, with some notable innovations. A mandate of the WSA is to give primacy to testamentary intent through the new rules for the interpretation and validation of wills. Specifically, the WSA:

- gives primacy to testamentary intent with rules for the interpretation and validation of wills,
- gives the courts expanded powers regarding the interpretation, correction, and validation of wills,
- gives the courts dispensing power, and
- makes extrinsic evidence admissible.

The WSA also removes archaic language and many old concepts and presumptions that are no longer useful.

2.2 Related reforms

Major amendments to the Matrimonial Property Act, RSA 2000, c M-8 were proposed for inclusion in the WSA, most notably those making death a triggering event for matrimonial property division. Members of the estate bar had considerable discussion regarding the proposal that a surviving spouse receive his or her matrimonial property share plus what he or she is entitled to under the will, plus any intestacy entitlements. The Alberta government discussed these technicalities with wills and estates and family law practitioners to determine how best to transition the matrimonial property division on death, and to seek further public input. The feedback from these discussions resulted in a repeal of the provisions (s 117 of the WSA) in December 2013.

The reforms continued with the June 1, 2015 proclamation of the Estate Administration Act, SA 2014, c E-12.5. This act reorganizes and modernizes the content of the repealed Administration of Estates Act and the Devolution of Real Property Act, RSA 2000 c D-12 and creates substantive rules from the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules].

Also proclaimed June 1, 2015, the Surrogate Rules were reorganized as a part of the final phase of succession law reform in Alberta.

In the meantime, the Alberta Law Reform Institute is reviewing the Uniform Law Conference of Canada’s Uniform Trustee Act (ULCC, 2012) in order to make proposals for changes to Alberta’s trustee law.
The Legal Education Society of Alberta recommends the Alberta Law Reform Institute’s [ALRI] publication, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (Edmonton: ALRI, 2010), released before the WSA was proclaimed. This publication is noted by the court in *Ryrie v Ryrie*, 2013 ABQB 370, 2013 CarswellAlta 1096 at paras 24–26:

... The Act gives effect to many of the ALRI’s recommendations. It is appropriate to refer to it as evidence of context, purpose and textual meaning contained in the legislation (see *Sullivan on the Construction of Statutes*, 5th ed, Markham: LexisNexis Canada, 2008 at 600). The relevant portions of this Report are pages 59 to 113.

In *Lecky Estate v. Lecky*, 2011 ABQB 802, Justice Kent found that the ALRI recommendations had been adopted in the legislation. The report was treated as persuasive evidence of the existing law in Alberta (at paras 78, 82).

I find the ALRI report to have considerable weight in the interpretation of the *Wills and Succession Act* (see also, James McKenzie, *Feeney’s Canadian Law of Wills*, loose-leaf, Markham: LexisNexis, April 2013, ch 10-55 at 10-18-19).

### 3 INTERPRETATION AND APPLICATION OF THE WILLS AND SUCCESSION ACT

#### 3.1 Definitions

Definitions are set out at the start of the WSA and within its various parts. Below is a discussion of the general definitions of particular interest.

**Adult interdependent partner**

Under the WSA, “family” includes married spouses and adult interdependent partners (s 1(1)(a)). The term “adult interdependent partner” [AIP] is defined by ss 3–4 of the *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 [*Adult Interdependent Relationships Act*] as a person of either gender that resided with an intestate in a relationship of interdependence, as defined in s 1(f), and

- cohabitation has lasted for a continuous period of not less than three years,
- a child was born of the relationship, or
- a written agreement was made.

A relationship of interdependence may arise in non-spouse-like relationships, such as between siblings or parent and child. For a blood relative to qualify there must be a written agreement in place to that effect (s 3 of the *Adult Interdependent Relationships Act*).
There are places where the WSA applies differently to AIPs who are related by blood (as described in s 3(2) of the Adult Interdependent Relationships Act). For example, see s 25(2) of the WSA, which excludes blood-related AIPs from the application of s 25(1).

For more on the definition of an AIP see the materials on family maintenance and support under the topics “Understanding Family Maintenance and Support” and “Applying for Family Maintenance and Support.”

**Beneficiary**

The definition of “beneficiary” (s 1(1)(b)) applies to the whole WSA, except Part 4, which deals with beneficiary designations. A beneficiary is defined as a person who receives or is entitled to receive a beneficial disposition of property under a will or intestacy. This definition includes the term “beneficial disposition” which means a gift given via will or intestacy.

The drafters considered, but decided against, using the term “gift” for the WSA instead of “beneficial disposition”. The problem with “gift” is that it creates confusion in other parts of the statute that refer to *inter vivos* and other non-testamentary gifts. As a result, the WSA generally refers to “dispositions” under or made by a will, which distinguishes them from other legal forms of gifts that may occur before or around the time of death. See s 7(1)(a) of the WSA for a definition of “disposition.”

**Descendant(s)**

The term “descendants” (s 1(1)(e) of the WSA) replaces the word “issue,” which was used in the now repealed Intestate Succession Act, RSA 2000, c I-10 and other succession legislation. Descendants are a person’s offspring: children, grandchildren, great-grandchildren, and so on. There is no generational limit to this term.

See *Re Peters Estate*, 2015 ABQB 168 at para 10, 2015 CarswellAlta 389, where Jerke J confirms that:

“Descendants” means all lineal descendants of an individual through all generations: Wills and Succession Act, s1(1). “Lineal descendants” means a blood relative in the direct line of descent – children, grandchildren and great grandchildren are lineal descendants: Black’s Law Dictionary, 7th Ed.

**Property**

The definition of “property” (WSA, s 1(1)(i)) is substantively similar to definitions used in the Adult Guardianship and Trusteeship Act and the Civil Enforcement Act, RSA 2000, c C-15.
The intention is to cover all forms of property that are transmittable upon death. The WSA does not distinguish between real and personal property.

**Estate**

“Estate” is not defined in the WSA. The WSA presumes that an “estate” is property that passes via will or intestacy. During development of the WSA there were discussions and suggestions that “estate” be formally defined in the WSA, in particular to deal with the issue of property passing by beneficiary designation (i.e., under Part 4 of the WSA) not being part of the estate and not being creditor-protected. Some other jurisdictions do so (see e.g., *Succession Law Reform Act*, RSO 1990, c S-26, s 72). For more information, refer to the content on “Designated beneficiaries” in “Interviewing and Advising a Client Seeking a Will.”

**Intestate estate**

Section 1(2) of the WSA addresses intestate estates; it does not change the law, but there is a shift in the perspective. The repealed *Intestate Succession Act* referred to the disposition of an “intestate’s estate.” The WSA refers to the disposition of an “intestate estate,” which is “an estate or any part of an estate that is not disposed of by the will” (s 58(1)).

**Child**

Section 1(3) of the WSA is intended to make it clear that a “child” is a child of both parents, as defined in Part 1 of the *Family Law Act*, SA 2003, c F-4.5 [FLA]. Under the FLA, the parents of a child are the genetic father and the birth mother unless:

- the child is adopted, or
- the child is conceived using assisted reproduction. (See the specific provisions in Part 1, Establishing Parentage, of the FLA).

A “child” of an intestate includes all natural and adopted children whether born inside or outside of marriage. It also includes a child who is “in the womb” (formerly referred to as *en ventre sa mère*) at the time of an intestate’s death and is later born alive (WSA, s 58(2)).

Under the WSA, posthumously conceived children (i.e., children who are born from stored genetic material) do not inherit through intestacy. For more information on this subject, see ALRI’s *Succession and Posthumously Conceived Children*, Report for Discussion 23 (ALRI: Edmonton, 2012).
A step-child is not a “child” of an intestate under the WSA. In Re Peters Estate, 2015 ABQB 168, 2015 CarswellAlta 389 at paras 10-11 [Re Peters], Jerke J found that step-children do not fall under the WSA’s definition of descendants because they are not “lineal descendants” of an intestate. In this case, the intestate’s son took all of her estate, and her 4 step-children received nothing despite the intestate treating them “in every respect” as her own children (Re Peters at para 16). Jerke J was clear that factors relating to the relationship between an intestate and any step-children are irrelevant; only the existence or non-existence of a lineal blood relationship matters (Re Peters at para 13).

**Parent**

The term “parent” is also used in the WSA. According to s 7 of the FLA, “parent” is defined as:

- a child’s birth mother and biological father,
- a person specified as a parent in an adoption order or recognized under the Child, Youth and Family Enhancement Act, RSA 2000, c C-12, or
- in the case of assisted reproduction, a person described in s 8.1 of the FLA.

For discussion and definitions surrounding the terms spouse, AIP, child, and grandchild, refer to the content on “Categories of dependants” in “Understanding Family Maintenance and Support.”

### 3.2 Interpretation

Section 2 of the WSA provides that if there is a question about a spouse’s property rights under a will or intestacy, the spouse’s rights under the Dower Act, RSA 2000, c D-15 prevail.

Section 3(3) of the WSA applies s 11 of the Alberta Evidence Act, RSA 2000, c A-18 [Alberta Evidence Act]. This is significant because of:

- the new provisions in the WSA for extrinsic evidence (s 26),
- rectification (s 39) and alleged advances (Part 6), and
- dispensation of formalities (ss 37–38).

Section 11 of the Alberta Evidence Act provides that in an action involving an estate, evidence of any matter occurring before a deceased’s death must be corroborated.
This was confirmed by Pentelechuk J in Re Malkhassian Estate, 2014 ABQB 353, 2014 CarswellAlta 951 at para 36:

...[T]he legislature’s clear intent, as reflected in s 3 of the WSA is that s 11 of the Alberta Evidence Act applies to all applications under the WSA. Since the evidence in issue in this case relates to a matter occurring before the death of the deceased, corroboration is required. It is enough that the corroborating testimony produces “inferences or probabilities tending to support the truth of the plaintiff’s statement”: Stochinsky v Chetner Estate, 2003 ABCA 226 (CanLII) at para 29, citing Harvie v Gibbons, (1980) 1980 ABCA 38 (CanLII), 12 Alta LR (2d) 72, 1980 CarswellAlta 20 at paras 39-40 and Stephenson v McLean, (1978) 1977 CanLII 598 (AB QB), 4 Alta LR (2d) 197, [1977] AJ No 393 at paras 209-210.

Section 4 of the WSA is the same as s 5(1) of the FLA. It reinforces the policy that the law favours appropriate and reasonable settlement. Lawyers have a duty to look at alternative methods of resolving contentious issues and ensure that their client is aware of alternative methods of settlement. See also “Relationships to Clients” in the Law Society of Alberta, Code of Conduct, Calgary: Law Society of Alberta, 2015, ch 2.02(7), requiring lawyers to encourage compromise or settlement whenever possible.

4 SURVIVORSHIP

Sections 5 and 6 of the WSA implement the succession rules for application when people die in circumstances where the order of death cannot be established.

Under the repealed Survivorship Act, RSA 2000, c S-28, the “seniority” rule for property division used to mean that if 2 or more people died at the same time, or if it was uncertain who died first, it was presumed that the older person died first. Now, under the WSA, when the order of death cannot be ascertained, for property distribution purposes, the presumption is that each individual predeceased the other (s 5(1)).

Alberta’s Insurance Act, RSA 2000, c I-3 contains the same rule for “simultaneous deaths” in ss 685 and 737.

Section 5(2) of the WSA follows the survivorship rule and applies in situations where the deceased owned property jointly with each other. If joint owners die in circumstances where the order of death cannot be ascertained, the property is deemed to be held as a tenancy in common.
This rule for survivorship is not new in Canada. This is also the presumption in Saskatchewan, Manitoba, Ontario, Yukon, New Brunswick, and British Columbia. This approach also follows the recommendations made by the Uniform Law Conference of Canada [ULCC] in the Uniform Survivorship Act (ULCC, 1971).

Note that:

- If a court, in interpreting a will or other instrument, finds a contrary intention, then the default determinations do not apply, and
- In relation to s 5(2) of the WSA, if the deeming provisions apply and the individuals hold the property as tenants in common with each other, there must be a determination of the fractional interest each individual owns in the property. (Tenants in common do not necessarily hold the property equally. Therefore, there is the need to prove the contribution of each individual to the property in order to determine the interest held).

The Honourable Verlyn Olson commented on these survivorship provisions when he spoke to Bill 21, which became the WSA (Alberta, Legislative Assembly, Hansard, 27th Leg, 3rd Sess, No 46e (23 November 2010) at 1438–39):

Regarding survivorship, the survivorship rules in section 5 create a statutory rule that applies if there is no other intention found in the will. A court may find that in interpreting the will to give effect to the intention of an individual, there is evidence through the provisions in the will and in the context of the individual’s circumstances at the time of making the will that show a contrary intention. Examples of this are rare, but through the rules that apply to the types of evidence the court can hear and accept, the court may, in reading the provisions in the will and in considering the individual circumstances, also find that section 5 has been displaced. These instances will be very fact specific.

5 ADVANCES AND THE ABOLITION OF PRESUMPTIONS

For the purpose of discussing s 109 of the WSA, “advancement” means an advance of a share of a testator’s estate.

5.1 Advances

The old evidentiary presumption of advancement (which applies to wills) and the doctrine of advancement (which applies to intestacy) are abolished by WSA ss 110(1) and (2). The possibility remains, however, that a deceased has, during his or her life, transferred property
to a child, spouse, or partner (i.e., made an *inter vivos* transfer), with the intention that the value of the transfer is an advance of the recipient’s share of his or her estate. To provide for this, s 109 of the WSA allows a personal representative or a beneficiary of the estate to apply to court for a determination of the nature of the *inter vivos* transfer.

Issues arise when it is not clear whether or not a testator intended a transfer to be an advancement of the estate that must be repaid from the recipient’s share of the testator’s estate, or whether the transfer is intended to be in addition to the recipient’s share of the estate.

Section 109 allows a court application to determine whether an advance against an estate has occurred, and if so, how and whether it is to be accounted for.

An application can be used where there is a question involving an *inter vivos* transfer of property (a gift, loan, or other transmission of property interest) by a deceased to a “prospective beneficiary.” The latter term includes a spouse, AIP, or a descendant (e.g., children, grandchildren, great-grandchildren, etc.). The application may be made for both testate and intestate estates. The potential applicants are the personal representative of the deceased’s estate or any person interested as a beneficiary of the estate.

As s 109 allows for an exploration of the nature of an *inter vivos* transfer, the application is not limited to interpreting wills; therefore, there are different evidentiary considerations. A court can examine the surrounding circumstances and, in particular, the recipient’s and the deceased’s intent at the time of, and after, the transfer in order to determine the nature of the transfer. The review may include:

- an interpretation of a will, if there is one. This would include an application of the interpretation and evidence provision found in s 26 of the WSA, which sets out the admissible evidence, including extrinsic evidence, for interpretation,
- a review of the deceased’s oral statements at the time of the transfer, or his or her written statements made at any time, and
- a review of a recipient’s oral or written statements. Implicitly, this includes statements made at any time.

In such applications, evidentiary rules relating to admissibility and weight of self-serving evidence are important. Under s 3(3) of the WSA, s 11 of the *Alberta Evidence Act* applies to
court applications, requiring corroboration of the evidence of an interested party. In an action by or against the heirs, next of kin, executors, administrators, or assignees of a deceased person, an opposed or interested party will not obtain a verdict, judgment, or decision on the party’s own evidence about any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

Section 109(6) applies only to an intestate estate. Where an inter vivos transfer is made and the prospective beneficiary of the transfer dies before the intestate, there is a presumption that the intestate did not intend the transfer to be an advance repayable by the beneficiary’s descendants. In such a situation, the descendants are not accountable for the advance and receive the full share of the intestate estate, unless it can be shown on a balance of probabilities that the intestate intended otherwise.

5.2 Presumptions and doctrines

Sections 110 and 111 of the WSA abolish some old common law presumptions, including the old evidentiary presumption of advancement (applied to wills) and the doctrine of advancement (applied to intestacy). Any perceived disadvantage from the abolition of these rules may be compensated, at least in regard to testate estates, by the WSA allowing extrinsic evidence.

Section 109 and the abolitions in s 110 of the WSA are not intended to interfere with Pecore v Pecore, 2007 SCC 17, [2007] 1 SCR 795 [Pecore v Pecore] or Madsen Estate v Saylor, 2007 SCC 18, [2007] 1 SCR 838, dealing with the presumption of a resulting trust and the presumption of advancement. These presumptions act as a guide for a court where there is unreliable or insufficient evidence (Pecore v Pecore at para 23).

The presumption of a resulting trust is the general rule for gratuitous transfers. The presumption is that an implied trust is created when property is transferred for no consideration. The amount of the transfer is deducted from the transferee’s share of the transferor’s estate. The transferee has the onus of proving that, on a balance of probabilities, the transfer was intended to be a gift.

The presumption of advancement is applied to a gratuitous transfer from a parent to his or her minor child. The onus is reversed under this presumption, and the person challenging the transfer must prove that it was not intended to be a gift.
Abolitions

Section 110(1) of the WSA abolishes the old presumption against double portions for testate estates. This means that there is no longer a presumption that, after a will is made that includes a gift to a child, a substantial *inter vivos* transfer made to that child is to be deducted from his or her share of the testator’s estate after the testator’s death.

Section 110(2) abolishes the doctrine of advancement in relation to intestacy. Under this section, there is no longer a requirement to deduct the value of a transfer from a child’s share of an estate if the deceased made a substantial transfer to the child before dying intestate.

Another abolished presumption, found in s 110(3)), is the “satisfaction of debt” presumption, which is also known as the “presumption of satisfaction” or “doctrine of satisfaction” (AH Oosterhoff, *Oosterhoff on Wills and Succession*, 6th ed (Toronto: Carswell, 2007) at 578–579 [*Oosterhoff on Wills*]). There is no longer a presumption that a disposition in a testator’s will to his or her creditor, in an amount equal to or greater than an owed debt, is intended to be a repayment of that debt. With the abolition of this presumption, those alleging that such a disposition was meant to satisfy a debt must prove the intent surrounding the transaction and the disposition.

Similarly, s 110(4) abolishes the presumption of “satisfaction of legacy.” It is no longer presumed that when a testator makes a will leaving a monetary disposition to a person, and then makes an *inter vivos* gift to that person in an amount equal to or greater than the disposition, the *inter vivos* gift revokes the gift in the will.

Also abolished is the fairly rare and limited doctrine of election (WSA, s 111). The British Columbia Law Institute [BCLI] publication *Wills, Estates and Succession: A Modern Legal Framework*, Report 45 (Vancouver: BCLI, 2006) at 46, defines the doctrine of election as:

> [W]hen a will contains a gift that is conditional on performance by the beneficiary of an implied obligation to give property belonging to the beneficiary to another. In order to take the benefit under the will, the beneficiary must perform the obligation.

Further, *Oosterhoff on Wills* (at 570) says:

> . . . a person cannot take a benefit under a will without confirming all its provisions. Hence, if the testator gives his or her own property to a person, but also purports to give property that belongs to that beneficiary to a third
person, whether purposely or by mistake, the beneficiary cannot take the gift and (emphasis added) retain his or her own property. Instead he or she is put to an election.

The intended effect of s 111 is, in these circumstances, to eliminate the election and to make a disposition of a non-owned property void. However, s 111(2) is a saving provision in that the right to make a disposition, conditional on the disposition of property owned by a beneficiary, is not affected.

6 REGULATIONS

The Lieutenant-Governor in Council (i.e., the Cabinet) may make regulations under s 112 of the WSA. The current regulatory provisions are:

- The Court Procedures Regulation, Alta Reg 9/2012, which states that every application under the WSA must be made in accordance with the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules]. In addition, a request for financial information under the WSA must be fulfilled in accordance with r 70.9 of the Surrogate Rules,

- The International Wills Registration System Regulation, Alta Reg 8/2012, which establishes a system of registration for international wills,

- The Preferential Share (Intestate Estates) Regulation, Alta Reg 217/2011, which sets the current prescribed amount under s 61(1)(b)(i) of the WSA to $150,000. This regulation expires on January 15, 2017, allowing the amount to be reviewed, and

- The Surrogate Rules, which governs procedure.
CHAPTER 2
UNDERSTANDING THE LEGAL REQUIREMENTS FOR WILLS

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1 INTRODUCTION TO WILLS

Consistent with the principles guiding wills reform, the Wills and Succession Act, SA 2010, c W-12.2 [WSA] gives primacy to testamentary intent and modernizes some ancient concepts.

Wills can be made in 3 forms: formal, holograph, or military. The formalities for making, varying, and revoking each are set out in Part 2 of the WSA. All forms of will are interpreted by the same rules.

1.1 A brief history of wills and the “subjective intention” approach

The WSA adopts the “subjective intention” approach to wills interpretation, emphasizing a testator’s intention based on his or her situation at the time of making a will. See Lord Denning’s discussion of this approach below. To better understand this concept as a practitioner, it is also helpful to understand the history and evolution of this modern view.

Originally, all Canadian provinces adopted the 19th century English law (Wills Act, 1837 (UK), 7 Will IV & 1 Vict, c 26 [Wills Act, 1837]), which required that, for a will to be valid, certain formalities had to be strictly complied with. Very generally, those formalities included:

- a will had to be in writing,
- a will had to be signed at the end by the testator (or by someone on his or her behalf),
- the signature had to be made or acknowledged by the testator in the presence of two or more witnesses present at the same time,
- the witnesses had to attest to the signature of the testator in the presence of the testator,
- a testator had to have knowledge and approval of the contents of the will, and
- a gift to a witness or the spouse of a witness was void.

The rationale for the formalities is set out in James MacKenzie, ed, Feeney’s Canadian Law of Wills, 4th ed (Toronto: Butterworths, 2000) at 39 [Feeney]:

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 imprudent 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.

In *Feeney*, the author notes that the underlying purpose for the formalities was to ensure the testator’s intentions were known and carried out. However, critics have suggested that over time the formalities became ends in themselves and that, consequently, formalism thwarted the intentions of numerous testators (*Feeney* at para 4-1).

The strict requirement for compliance with the formalities in the *Wills Act, 1837* was mirrored by a strict view of the evidence a court could consider when interpreting a will. The strict view (sometimes called the 19th century view) did not allow a court to consider extrinsic evidence of a testator’s intention or the surrounding circumstances. Instead, a court could consider only what was within the four corners of the document. To do otherwise risked asking the court to “make a will for [the testator] which [it thinks] he ought to have made...” (*Higgins v Dawson*, [1902] AC 1, cited in AH Oosterhoff, *Oosterhoff on Wills and Succession*, 6th ed (Toronto: Carswell, 2007) at 450 [*Oosterhoff on Wills*]).

Dissatisfaction with the strict approach to both the formalities and the rules of evidence led to legislative reform as well as various court decisions. Over time, changes to wills legislation recognized the presumption of due execution, holograph wills, and substantial compliance. Various court decisions tried to determine and carry out the testator’s intention. In *Re Rowland* ([1963] Ch 1 (CA) [*Re Rowland*], as cited in Oosterhoff on Wills at 457), a case dealing with the admissibility of evidence, Lord Denning summarized this “subjective intention” approach:

> ...[I]n point of principle, the whole object of construing a will is to find out the testator’s intentions, so as to see that his property is disposed of in the way he wished. True it is that you must discover his intention from the words he used: but you must put upon his words the meaning which they bore to him. .......What you should do is to place yourself as far as possible in his position, taking note of the facts and circumstances known to him at the time; and then say what he meant by his words.

Later in the decision Lord Denning quotes Lord Atkin, quoting Viscount Simon LC:

> The sole object is, of course, to ascertain from the will the testator’s intentions. He clearly thought that by the decision of the House the old mistaken approach would be corrected. ‘I anticipate with satisfaction’ he said, ‘that henceforth the group of ghosts of dissatisfied testators who .... wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills, may be considerably diminished’. 
1.2 The rules governing creating a will

Part 2 of the WSA sets out rules governing the creation of a will. It applies to wills made in Alberta on or after February 1, 2012, the date of the proclamation of the WSA.

Section 7(1)(a) of the WSA defines “disposition”. This is an inclusive, and not exhaustive, definition. It does away with any lingering distinctions between “legacy”, “devise”, and “bequest”— none of these terms are used in the WSA. Generally, the WSA refers to “dispositions”, which are gifts made by will. The term “disposition” is used to distinguish gifts made by will from other legal forms of gift, especially those that may be made before or around the time of death.

Section 7(2) of the WSA is interpretive. It reflects the law that a surrogate may validly sign a military or formal will at the direction and in the presence of the testator. This does not apply to holograph wills.

Section 8 of the WSA is an important general transitional rule: the repealed Wills Act, RSA 2000, c W-12 [Wills Act] applies to wills made before the WSA came into force. There are exceptions in s 8(2) and elsewhere in the WSA.

Under s 8(2) of the WSA, the provisions for extrinsic evidence (WSA, s 26) and rectification and dispensation of formalities (WSA, ss 37–40) apply to ALL wills or alterations of wills made before or after the WSA came into effect, as long as the testator’s death occurred on or after the date the WSA came into force. This promotes the principle of respect for testator intent, and for this reason the provisions apply retroactively.

1.3 Legal effect of wills

A person can, by will, dispose of all property that he or she legally has the ability to dispose of (WSA, s 9). Unless a court interprets the will otherwise, a disposition transfers 100% of the testator’s interest in the property.

Section 10 of the WSA deals with ademption by conversion. If estate property is converted from one form to another between the time of the will and the time of death, the beneficiary is entitled to any remaining interest in the property. No tracing is permitted. If no identifiable interest remains, a gift is no longer in existence (it adeems). Note: there is an exception to the ademption rule in the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2, s 67.
Section 11 of the WSA relates to the disposition of property described in a will in a general manner. Unless there is a contrary intention, the disposition includes any property to which the description applies and which the testator has the power to appoint.

While s 12 of the WSA states that a power of appointment may be created by a will, it is not limiting. A will is not the only way a power of appointment may be created or exercised. For a general description of the law of power of appointment, see AH Oosterhoff, *Oosterhoff on Trusts*, 7th ed (Toronto: Carswell, 2009) at 131 [Oosterhoff on Trusts].

2 **FORMALITIES FOR MAKING A WILL**

Sections 13 through 21 of the WSA deal with the legal requirements for making a will, including capacity, writing and signature requirements, and other formalities.

Section 37 of the WSA allows the court to dispense with some of these requirements. It does not, however, allow a court to dispense with the writing and signature requirements. There is one very small exception for signatures, discussed in these materials in relation to s 39(2) of the WSA.

2.1 **Capacity**

Sections 13 and 36 of the WSA provide that capable adults and some minors can make a will.

Section 13(1) of the WSA is a statement of the current law: adults with mental capacity, according to the common law test set out in *Banks v Goodfellow* (1870), LR 5 QB 549, All ER Rep 47 (Eng QB) [Banks v Goodfellow] can make a will. (See Oosterhoff on Trusts at 179–222).

The WSA does not define the phrase “mental capacity”; therefore, look at the common law for guidance.

In *Christensen v Bootsman*, 2014 ABQB 94 at paras 139–144, 2014 CarswellAlta 254 [Christensen v Bootsman], Gill J reviewed the law on testamentary capacity:

> Alberta courts have often used the test for testamentary capacity set out in *Banks v Goodfellow* ... at 56:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to
comprehend and appreciate the claims to which he ought to give
effect; and, with a view to the latter object, that no disorder of the
mind shall poison his affections, pervert his sense of right, or prevent
the exercise of his natural faculties - that no insane delusion shall
influence his will in disposing of his property and bring about a
disposal of it which, if the mind had been sound, would not have been
made.

This test was restated in more contemporary terms in Re Schwartz (1970), 2
OR 61 (CA), aff'd [1972] SCR 150, cited in Weidenberger Estate, 2002 ABQB
861 at para 34, 324 AR 286 [Weidenberger Estate]:

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.

A person may have testamentary capacity despite confusion or cognitive
impairment. Medical evidence may help a judge make this factual
determination, but is not necessarily conclusive. In Stevens v Morrisroe,
2001 ABCA 195, 281 AR 201, Picard JA for the majority stated (emphasis
added):

17 Capacity is to be assessed both when instructions are given and
when the will is executed: C.H. Sherran et al, Williams on Wills, 6th

18 A testator may have testamentary capacity even if she is not of
entirely sound mind: Banks, supra, at p. 56. A person diagnosed with
senile dementia may have testamentary capacity: Re: Ferguson

19 Even if a disease is of a progressive nature, it is a question of fact
whether she has sufficient mental awareness to appreciate and
understand the testamentary act: T.G. Feeney, The Canadian Law of
Wills, 3rd ed. (Toronto: Butterworths, 1987) at p.36. In Leger v. Poirier,
[1944] S.C.R. 152 at 161, Rand, J said:

[The mind of the old person must be capable] of carrying
apprehension beyond a limited range of familiar responses and
suggested topics.... Merely to be able to make rational responses
is not enough, not to repeat a tutored formula of simple
terms...[the mind must be able] to comprehend of its own
initiative and volition.

Soundness of mind is a practical question and does not depend on
scientific or medical definition. As Feeney said, supra, at p. 33:

Medical evidence is not required not necessary nor necessarily
conclusive when given.
20 Put simply, testamentary capacity is possible even where the testator has a disease of the mind. While medical or scientific evidence may be of assistance, the finding of testamentary capacity is a matter of fact for the trial judge to determine.

... In Weidenberger Estate, the respondents conceded that the holograph will in question met the technical requirements of the legislation then in force, but challenged the validity of the will on the basis that the deceased lacked testamentary capacity at the time the will was executed. Clark J considered the evidence of several mental health experts, who disagreed as to whether the deceased had testamentary capacity at the relevant time. Applying the test in Banks v Goodfellow, Clark J found that the deceased had testamentary capacity to execute the holograph will despite the fact that the deceased was mentally ill and suffered from confusion, and despite the fact that the deceased lacked the capacity to manage his own affairs.

At para 33, Clark J cautioned that the test for testamentary capacity, as set out in Banks v Goodfellow, should not be applied so strictly as to defeat the deceased’s wishes. He quoted the following passage from Den v Vancleve, 2 Southard 589 at 660 (NJ Sup Ct 1819) (emphasis added):

By the terms ‘a sound and disposing mind and memory’ it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory. ([cited in] Banks v. Goodfellow; Re MacMillan Estate, [2000] A.J. No. 180 (Alta Surr. Ct.); and Scramstad v. Stannard (1996), 188 A.R. 23 (Q.B.), additional reasons 190 A.R. 1 (Q.B.).)

Subsection 13(2) of the WSA invalidates wills made by minors, with certain exceptions. Notably, a minor may make or revoke a will if he or she is married, an adult interdependent partner [AIP], a member of the Canadian Forces, or is authorized by the court to make a will under s 36 of the WSA (which generally provides that the court must consider it to be reasonable in the circumstances for the minor to make a will). Unless there is a valid will under ss 13(2) or 36, the estates of such minors go by intestacy.

2.2 In writing and signed

Section 14 is key to the WSA. The first two subsections define the two mandatory requirements for a valid will:

1. the will must be in writing, and
2. it must contain the testator’s signature.

These requirements demonstrate that the testator intended the document to be his or her will.

Section 37 of the WSA, discussed briefly under the topic “validating wills that do not comply with formalities,” gives the court the authority to validate a will that does not comply with the formalities set out in the WSA for formal wills (s 15), holograph wills (s 16), or military wills (s 17). However, the court has no authority under s 37 to waive the need for it to be in writing (s 14(a)) or for a signature (14(b)).

In writing

The WSA does not define the word “writing” although the Interpretation Act, RSA 2000, c l-8 [Interpretation Act] does. In s 28(1)(jjj), the Interpretation Act states that “writing” or any similar term includes “words represented or reproduced by any mode of representing or reproducing words in visible form.” This definition does not preclude a formal or military will from being created electronically, provided there are visible words. However, an electronically created will still requires a signature. There are ways an electronic “signature” can be attached to a document or “electronically signed,” but there are obvious issues about identifying who electronically signed the document (i.e., confirming that it is in fact the testator), who the witnesses were that were present, and how they each then “sign[ed] the will in the presence of the testator” as required by s 15(b) of the WSA.
The requirement under s 28(1)(jjj) of the Interpretation Act that words are “in visible form” means that wills cannot validly be in video or audio formats.

As an example of the type of issue that arises on this point, see Rioux c Coulombe, 19 ETR (2d) 201, 1996 CarswellQue 1226 (CSQ). In that case, the deceased committed suicide and left a will on a computer disk on which she wrote “this is my will/Jaqueline Rioux/february 1, 1996.” Her diary confirmed that she completed her will on the computer. The Quebec Civil Code requires that a holograph will be signed without the use of mechanical processes but has a validation section. The headnote of the case reads:

… Great caution must be exercised by a court before validating a will recorded on computer memory. However, there was no doubt that the [disk] and the text printed therefrom constituted the will of the deceased. In addition, even though the document entitled “will” is not signed, the computer [disk] does bear the signature of the deceased. In the same way that a signature on an envelope has, in the past, been considered as sufficient, the signed [disk] met the signature requirements of… the Code.

No doubt the use of technology to prepare wills will continue to evolve. In the meantime, as a matter of practice, print and have clients sign hard copies of their wills.

Signed and witnessed

Section 15 of the WSA sets out the additional requirements for a formal will:

- The written document must be signed by the testator (this includes a person who signs on behalf of a testator, as per WSA, ss 7(2), 19(1)),
- The signature must be acknowledged by the testator in front of two witnesses in the presence of each other, and
- Each witness must sign in the presence of the testator.

2.3 The signature

Section 19 of the WSA deals with signatures on wills. It should be read with these sections in mind:

- Section 7(2) of the WSA provides that reference to a testator’s signature includes the signature of an individual who signs a will on the testator’s direction and in his or her presence), and
• Section 14(b) of the WSA provides that a valid will must contain the testator’s signature that makes it apparent on the face of the will that he or she intended to give effect to the writing in the will. (Note that proof of intent relating to a signature is distinct from proof of intent in relation to interpretation of the will under s 26 of the WSA).

Under s 19(1) of the WSA, a person may sign on behalf of a testator, at the testator’s direction. The direction and the signing must be in the presence of the testator and the witnesses. The person signing may sign either the testator’s name or his or her own name or make a mark for the testator (Feeney at 39).

In Conner v Bruketa Estate, 2010 ABQB 517, 2010 CarswellAlta 1575, the testator provided handwritten will instructions to his solicitor, including a direction that his employment pension benefits and life insurance coverage should be left to his friend Shirley Conner. By mistake, the solicitor thought that the testator had already signed a separate beneficiary designation form in favour of Ms. Conner and did not include the beneficiary designation in the documents she prepared.

However, the lawyer had written the testator’s full name at the top of the page of the handwritten will instructions during the first interview with the testator. Ms. Conner argued that this was sufficient to meet the signature requirements for a beneficiary designation under the Trustee Act, RSA 2000, c T-8, which then governed the designation of pension benefits, and the Insurance Act, RSA 2000, c I-3, which governed the designation of life insurance coverage.

Clark J reviewed a number of cases finding relatively informal documents to effectively alter a beneficiary designation. He concluded “that a persons [sic] sufficiently ‘signs’ a document if it is signed in his name and with his authority by somebody else” and found that the handwritten instruction to the solicitor met this requirement.

This was not a testamentary signature on an actual will. However, the decision demonstrates the efforts the court was prepared to make to find a signature.
Sections 19(2) and (3) of the WSA are based on wording recommended by the Uniform Law Conference of Canada (Uniform Wills Act, ULCC 1953). These provisions provide that:

- generally, a signature will “make the will” effective if it appears that the testator intended to give effect to the whole document by the signature,
- generally, the signature should be at the end of a will, but it is not fatal if it is elsewhere,
- there is a rebuttable presumption that the testator did not intend to give effect to writing appearing below a signature, and
- any writing added after the will is fully made (i.e., all formalities, including signature, are completed), is never validated by the signature.

For evidentiary purposes, it must be apparent on the face of the document that a testator intended the signature to give effect to the writing (WSA, s 14).

As to the form of the signature, according to Feeney at para 4-3:

Any mark intended to give effect to a will is a sufficient signature. Part of a signature, initials, or a rubber stamping device will do, but apparently a seal alone will not.

The making of a mark and the printing of a person’s name are also listed as valid means of “signing” a will, although there are conflicting cases when the will is signed with a nickname, or “Mother.” The key is whether the testator intended to sign the will.

Location of a signature

The repealed Wills Act required the testator’s signature be placed “at or after or following or under or beside or opposite to the end of the will” (s 8(1)). The Wills Act provided that certain circumstances, such as a blank space intervening between the concluding words and the signature, did not invalidate a will.

The case law reflects several common situations where the location of the signature has caused problems, including:

- cases where a testator wrote his or her name at the beginning of a stationer’s will form so that all of the dispositive provisions were located below the “signature,” and
situations where a testator signed his or her name on the envelope or cover paper containing the will.

A review of the cases indicates the courts have often gone to considerable lengths to find that a signature was at “the end” of a document, if there is strong evidence that the testator intended the document to be a will. These cases seem to turn on whether the “signature” was made for the purpose and with the intent of signing a testamentary document or for simply identifying or labelling the document.

See, for example, Re Riva Estate, 3 ETR 307, 1978 CarswellOnt 524 (Ont Surr Ct) [Riva Estate]. In that case, McDermid CJ dealt with a situation where the signatures of the two witnesses were located on the third page of a printed form will along with a space reserved for the testator’s signature. The testator had left that space blank and instead signed on the fourth page, where she wrote the word “Dated” above the date and then handwrote her name and address. The dispositive provisions were in the first 2 pages. McDermid CCJ reviewed the law relating to intent, and concluded (at paras 85–91):

I have therefore come to the conclusion that the writing on the fourth or back page of the will, which I find to be in the handwriting of the deceased, was appended by her with the intention of executing the document as her last will and testament.

I have come to that conclusion for many reasons:

Firstly, by reason, as I have already indicated, of the deficient fashion in which the will form was structured, namely the insufficient space for the signature of the testatrix in the place so designated by the form.

Secondly, by reason of the existence of letters written by the deceased expressing three main areas of concern, as outlined above, which are also expressed in the will form.

Thirdly, because these three main areas of concern would in her circumstances be reasonable and proper areas of concern.

Fourthly, because it would not seem necessary for her to have signed on the reverse of the will for the purpose of identifying the document as her will since the first few words of the document so identify it...

Fifthly, because it would appear curious to me that the testatrix would go to the trouble of obtaining a will form, completing it in her own handwriting, disposing of her assets in the same fashion as she had indicated in letters previously written that it was her intention to do, and of having two persons append their signatures to this document, unless she intended it to be her last will and testament [emphasis added].
Under the repealed *Wills Act*, the decisions in the “signature on the envelope” cases were divided. In some cases, the writing on an envelope was held to have been done solely for the purpose of identifying the envelope. In others, it was held that the signature on an envelope was intended to be the testator’s signature of the will. See *Re Mann Estate*, [1942] 2 All ER 192, in which the court upheld the signature on an envelope as the signature of the will. Conversely, in *Re Bean Estate*, [1944] 2 All ER 348, the opposite result occurred.

**Writing below a testator’s signature**

Section 19(3) of the WSA contains a rebuttable presumption that any writing that appears below (or following) a testator’s signature is ineffective. Presumably, the approach taken in the cases under the repealed *Wills Act* still provide guidance for the WSA on the evidence courts are prepared to accept to rebut this presumption. See the reasoning of McDermid CCJ in *Riva Estate*.

**Writing added after the will is signed**

Section 19(4) of the WSA provides that a signature does not give effect to any disposition or direction made after the signature is placed on the document. This is, of course, subject to the ability of the testator to properly alter the will.

2.4 **The witnesses**

A holograph will does not require witnesses to the testator’s signature. For formal wills, however, witnesses are required in addition to the testator’s signature. The information in these materials relating to a testator’s signature applies to all forms of wills. The information relating to witnesses applies only to formal wills.

A witness is a witness to the testator’s signature, not necessarily to the contents of the will. This point can be confusing because, in practice, witnesses to signatures are often called on to attest to other aspects of the making of a will. However, witnesses don’t even need to know the document is a will (WSA, s 20(4)).

The requirement that a testator sign or acknowledge his or her will in the presence of 2 witnesses, both present at the same time, is long-standing. Under the repealed *Wills Act*, the rules regarding witnesses were strictly applied. Non-compliance meant the court finding that a will was invalid.
However, there has been a significant change in practice. Section 37 of the WSA allows the court to validate the will even though the witness requirements are not complied with.

Section 20 of the WSA provides detailed rules for witnesses of a will under the WSA:

- Under s 20(1), a witness must have mental capacity. While a mental competence test is not specified, the fact is there is not much for the witness to attest to. He or she must be capable of stating that he or she saw the testator sign the document or capable of acknowledging the testator’s signature. There is no age limit for a person to be a witness.
- Under s 20(2), a person who signs a will on behalf of a testator cannot then be a witness. This is to reduce the risk of fraud or undue influence.
- Under s 20(3), a witness is not disqualified from acting as a witness because he or she is also the executor, a beneficiary under the will, or the spouse or interdependent partner of a beneficiary.
- Under s 20(4), a will is not invalidated because a witness did not know the document was a will, because the witness subsequently loses capacity, or because more than 2 individuals witness the will (referred to by Oosterhoff as “supernumerary witnesses” (Oosterhoff on Wills at 450)).

2.5 The military

Sections 17 and 18 of the WSA address military wills and active service. Modern Canadian Forces practice encourages members to have a valid will before engaging in active service, making this form of will extremely rare. This law continues in the WSA, however, to cover all possible situations where a military member may need a will. Under s 17, an individual making a will while on active service does not require the presence or signature of a witness or any other formality.

2.6 Gifts to a witness

Section 21(1) of the WSA expands the previous law that a gift or the conferral of a power of appointment to a witness or his or her spouse or AIP is void. Subsections 21(1)(b)–(c) add interpreters and individuals who sign the will on behalf of the testator to the list of beneficiaries who are disqualified from taking a benefit under the will. Their spouses or AIPs are also disqualified (21(1)(d)). The intent is to reduce the risk of fraud or undue influence.
Section 21(2) says that a disposition referred to in s 21(1) is not void:

- if it is a direction for payment of remuneration, including professional fees,
- if the will is a holograph or military will (in which case a witness was unnecessary in the first place),
- if the will is witnessed by at least 2 other individuals, or
- if “the Court validates the disposition by order under section 40” (s 21(2)(c)).

Section 40 allows a person whose gift has been rendered void under s 21(1) to apply to the court to have the gift allowed. For more information, refer to the content on “Validating gifts to witnesses that would otherwise be void.”

3 ALTERATION, REVOCATION AND REVIVAL

The changes effected by ss 22–25 of the WSA were intended to achieve a testator’s intended result while protecting against fraud and undue influence.

3.1 Alteration

Section 22 of the WSA codifies the rules for altering a will. It provides that any marking or obliteration made on a will is presumed to be made after the will was made and that an alteration is only valid if it follows the formalities for the type of will that it is. Thus, if a will is a holographic will, any alterations must made in the holographic style (WSA, s 16). If the will is a formal will, valid alterations must meet the requirements for a formal will, including witness requirements (WSA, s 15).

“Alterations” includes “writing” as well as any “marking or obliteration” inserted after a will is made. That includes holes, scribbles, white-out, and the like.

Section 22(1)(b)(iii) of the WSA specifies that the court has the power under s 38 to validate a non-compliant alteration. For more information, refer to the content on “Validating alterations that do not comply with formalities.”

Obliterations occur where words are cut out, painted or inked-over, or otherwise completely illegible. In the past, the court has had limited powers to restore the original words of the will where an obliteration is unattested or unsigned. Under the WSA, the court can use “any means [it] considers appropriate” to decipher the original words (s 22(2)). Only when the court is unsuccessful in discovering the words will an unattested obliteration stand.
3.2 Revocation

Section 23 of the WSA deals with revocation of a will or a part of a will.

There are several ways that a will may be revoked:

- A testator makes another will (s 23(1)(a)),
- A testator makes a written declaration of an intention to revoke the earlier will, in accordance with Part 2 of the WSA (s 23(1)(b)). A revocation may be formal and thus require witnesses (formal wills, s 15), or it may be holograph (s 16) or military (s 17).
- A testator burns, tears, or otherwise destroys a will with the intention of revoking it (s 23(1)(c)), or
- A testator has another individual burn, tear, or otherwise destroy a will in the testator’s presence, at the direction of the testator given with the intention of revoking the will (s 23(1)(d)).

The following circumstances do not revoke a will or part of a will, regardless of when the will was made:

- A testator marries on or after February 1, 2012 (WSA, s 23(2)(a)). (Before February 1, 2012, a marriage of a testator revoked any existing will of that testator (Wills Act, s 16(a)), unless the will stated that it was made in contemplation of marriage (Wills Act, s 17(a)). This provision of the Wills Act continues to apply to wills made before February 1, 2012 (WSA, s 8); therefore, wills revoked by marriage prior to February 1, 2012 are not revived by the WSA).
- A testator enters into an AIP agreement on or after February 1, 2012 (WSA, s 23(2)(b)). (Before February 1, 2012, entering an AIP agreement (but not entering into an AIP by passage of time or having a child) revoked any existing will of the testator (Wills Act, s 16(a.1)), unless the will stated that it was made in contemplation of entering into the AIP agreement (Wills Act, s 17.1). This provision of the Wills Act continues to apply to wills made before February 1, 2012 (WSA, s 8); therefore, wills revoked by entering into an AIP agreement prior to February 1, 2012 are not revived by the WSA).
- Any other change in circumstance of a testator, except to the extent that s 25(1) of the WSA applies (WSA, s 23(2)(c)).

Unless the will shows a contrary intention, s 25(1) of the WSA revokes gifts in wills to:

- former spouses where the marriage was terminated by divorce or found to be void, and
- former AIP(s).

Section 25(1) also voids a former spouse/AIP's appointment as executor or trustee.

Section 25 of the WSA applies only in respect of the will of a testator whose marriage is terminated by a divorce judgment or found to be void, or who becomes a former AIP, on or after February 1, 2012, and applies regardless of when the will was made.

The revocation of a will does not revive an earlier will (WSA, s 23(3)). This is different from what happens if a will is found to be void because of lack of capacity.

3.3 Effect of marriage or adult interdependent relationship

At common law, a major change in life circumstances (for instance, a marriage) revoked a will. Over time, statutes have changed that. A compelling reason for change was that the legal test for capacity to marry is lower than that for capacity to make a will. Further rationale for the change to the “revocation by marriage” rule was summarized by the British Columbia Law Institute [BCLI] in 2006 (British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework, Report 45 (Vancouver: BCLI, 2006) at 33-34 [BCLI, Wills]):

Practitioners note that it is not widely known or understood by the public that a will is revoked by later marriage. As a result, unintended intestacies occur and careful testamentary planning may be inadvertently overturned. For example, a testator may make a will containing a trust in favour of a mentally disabled child by a prior marriage or other relative and later marry a person who is independently wealthy. The marriage would operate to disinherit the child in favour of the wealthy second spouse.

While the purpose of revocation of a will by marriage is to protect the interests of the spouse and children of the testator, a new will is not the only or even the principal means by which people secure the interests of their dependents in the present day. Life insurance and RRSP beneficiary designations may play an equally important role in estate planning, and these are not subject to revocation by later marriage. There are now other legislative mechanisms in place that protect a spouse and children that did not exist when the Wills Act 1837 was enacted. Matrimonial property law
provides remedies to the spouse during the testator’s lifetime. Dependants relief legislation ... provides a remedy against the terms of a will that does not make adequate provision for a spouse and children, although it is not urged here that litigation is an ideal substitute for the current law.

Another reason for abolishing automatic revocation by marriage is that the supposed protection it provides to spouses and children is available only when there has been a legal marriage. In today’s society many long-term domestic relationships are not predicated on a legal marriage. Thus, to the extent that revocation by marriage may still be seen as protective, the umbrella of protection is uneven and unequal.

Since the proclamation of the WSA in Alberta, marriage or the creation of an adult interdependent relationship does not revoke a will (WSA, s 23). Specifically, s 23(2)(a) says that no will is revoked by a marriage that occurs on or after February 1, 2012. It applies to all wills, regardless of when they were made. In this regard, s 23 of the WSA is an exception to the application of the Wills Act to wills made before the WSA (WSA, s 8).

For a discussion of the effect on a will of divorce or ending an adult interdependent relationship, refer to the content on “Gifts to an ex-spouse or former adult interdependent partner.”

3.4 Revival

Section 24 of the WSA provides that a will, or part of a will, that has been revoked in any manner may only be revived by:

- making a valid new will, or
- re-executing the revoked will in accordance with the formal requirements of the WSA in a manner that shows an intention to give effect to the will or the part that was earlier revoked (s 24(1)). A will or part of a will that is revived by re-execution is deemed to be made at the time of the re-execution (s 24(2)).

3.5 Gifts to an ex-spouse or former adult interdependent partner

Under s 25(1) of the WSA, where a testator’s marriage or adult interdependent relationship ends after a will is made but before the testator’s death, any disposition under the will to the former spouse or AIP is revoked. Any appointment of the former spouse or AIP as a guardian or personal representative is also revoked. The former spouse or AIP is deemed to have predeceased the testator for the purpose of the disposition. The disposition is then
distributed according to the lapse provisions in the will or, failing that, those under the WSA. The former spouse or partner is not deemed predeceased for any other purposes.

This rule is subject to a contrary intention of the testator.

Becoming an ex-spouse or AIP

A spouse becomes an ex-spouse on divorce. An AIP becomes an ex-AIP when one of the circumstances set out in s 10 of the Adult Interdependent Relationships Act, SA 2002, c A-4.5 arises:

- the parties enter into a written agreement to live separate and apart,
- the parties live separate and apart for one year and one or both intends that the adult interdependent relationship will not continue, or
- the parties marry each other or one partner marries a third party. (But see s 25(2) of the WSA, which says that s 25(1) of the WSA does not apply to a former AIP who is a testator’s spouse or is related to him or her by blood at the time of death.)

There can be significant evidentiary issues surrounding the dates that AIPs began and ended cohabitation, particularly when only one of the parties is still alive to give evidence. When acting for an AIP, make every effort to document dates that cohabitation started and ended, as the consequences of those dates may be significant.

From a practical perspective, a gift to an AIP who has separated from a testator is presumably valid until the parties have been separated for one year, as that is when the parties become “former” AIPs. Interestingly, a separation of any length does not void a gift to a married spouse; only divorce does that.

Section 25 of the WSA only applies to wills made before a marriage or adult interdependent relationship ends. If the will is made after a divorce or termination of an adult interdependent relationship, this section does not apply. This makes sense, given that a testator who makes a will in favour of an ex-spouse or ex-AIP does so intentionally.
4 INTERPRETING WILLS

4.1 Rules of interpretation

These are the general and specific rules for interpretation of a will. The overall goal of interpreting a will is to fairly ascertain testamentary intention. Section 26 of the WSA, the general interpretive provision, sets out the principles guiding interpretation. Sections 27 to 35 of the WSA fill in gaps where testamentary intention is unknowable.

Before interpreting a will,

- First, assess whether the testator had the requisite testamentary capacity to make the will.

- Second, determine whether there is evidence of a testator’s intentions in the will itself. On this point, regard should be had to Lord Esher’s comments in Re Harrison (1885), 30 Ch D 390, 55 LJ Ch 799 (CA) at 393:

  There is one rule of construction, which to my mind is a golden rule, viz., 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...

- Third, consider the extrinsic evidence of a testator’s intention. Before the WSA was implemented, lawyers relied on case law to govern the admissibility of extrinsic evidence relating to a testator’s intentions. There was considerable confusion about whether and when ambiguity permitted a court to venture outside the corners of the document and if so, by how much. Section 26 of the WSA governs the use of extrinsic evidence in determining a testator’s intention. This refocuses the interpretation process on the underlying goal, which is determining testamentary intent.

The terminology used in the WSA reflects the change in approach towards extrinsic evidence. Peppered throughout the WSA is the phrase “unless the Court, in interpreting the will, finds that the testator had a contrary intention.” (Contrast that with s 14(b) of the WSA, which uses the phrase “apparent on the face of the document.”) Conversely, the repealed Wills Act used the phrase: “unless a contrary intention appears in the will,” which reflected that Act’s prohibition on the use of extrinsic evidence.
Sisson J outlined the admissibility of extrinsic evidence under s 26 of the WSA in *Ryrie v Ryrie*, 2013 ABQB 370 at paras 40-41, 2013 CarswellAlta 1096 [*Ryrie v Ryrie*]:

...what is clear is that Section 26 says it is mandatory that the court look at intentions (“must”) and has the discretion (“may”) to admit three types of evidence.

In the majority of cases, the issue of intention will not arise. If the issue is raised by a personal representative, or a person having an interest as a beneficiary or prospective beneficiary, then the Court must consider extrinsic evidence.

Sections 26(a) and (b) of the WSA codify the common law rules that require a court to look at the special or general meaning of the words in a will and that allow limited external evidence under the “armchair” rule (*Oosterhoff on Wills* at 450).

In *Ryrie v Ryrie*, Sisson J described the use of these subsections (at paras 42–45):

... Section 26(a) refers to “evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will.”

The *Wills and Succession Act* contains several standard sections defining terms such as found in section 1 or section 46. It has several other sections that make the standard meaning of words, phrases and terms of art subject to evidence of a contrary intention such as set out in sections 29 to 31.

In the circumstances these sections address, extrinsic evidence will often be necessary to demonstrate that there is even an issue that the testator may have had a contrary intention. The words and phrases subject to section 26(a) are not limited to those specifically mentioned in sections 29 to 31.

Moving to 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,” two elements come to mind. First, this section requires extrinsic evidence to put meaning to “the testator’s circumstances at the time of the making of the will.” Second, there is no precondition that the wording of the will must show ambiguity before the investigation as to the “testator’s circumstances at the time of the making of the will,” is triggered.

Section 26(c) of the WSA goes a step further and allows the use of extrinsic evidence of a testator’s intent when interpreting a will (*Re Lubberts Estate*, 2014 ABCA 216, 2014 CarswellAlta 1019 at para 63). The admission of extrinsic evidence has been adopted with success in the United Kingdom and is supported by a number of law reform agencies (see Alberta Law Reform Institute, *The Creation of Wills*, Final Report 96 (Edmonton: Alberta Law Reform Institute, 2009) [ALRI, *Creation of Wills*]; New South Wales Law Reform Commission,

In Ryrie v Ryrie at paras 46-48, Sisson J described the use of s 26(c):

Finally, section 26(c) allows “evidence of the testator’s intent with regard to the matters referred to in the will.” This is very broad.

Section 26(c) does not require an apparent ambiguity. Anyone with an interest and an interpretation can ask the court to determine the testator’s intent. As mentioned, in most cases, the testamentary document will not face a challenge.

However, once the issue is raised, the obvious first step for the Court is to determine whether or not the testator’s intention is clear. In the Ryrie case, the issues raised are, first, are there two or more reasonable interpretations of a disputed passage and, second, does extrinsic evidence disclose that there are prospective beneficiaries who are not apparent by reading the words of the will.

Section 26 of the WSA applies retroactively to all Alberta wills, whenever made, provided the death occurs after the WSA came into force.

Note that s 26 ameliorates the impact of the new revocation rules concerning marriage and divorce. It allows the court and lawyers to take a broad look at a testator’s intentions to better determine whether he or she meant a will to survive marriage or the creation of an adult interdependent relationship or a gift to survive divorce or the end of an adult interdependent relationship (see WSA, ss 23, 25).

See also s 3(3) of the WSA and s 11 of the Alberta Evidence Act, RSA 2000, c A-18, which require corroboration of self-serving evidence in testamentary matters. This limits the potential for a free-for-all of “he said, she said” evidence on interpretation, hopefully both at the settlement table and in court.

Finally, estate planning lawyers should keep in mind that the validity of a will must be established before applying interpretation rules. The court is not empowered to create a will where there is none.

Case law

Giving effect to a testator’s intentions can involve obtaining evidence from his or her lawyer. In Lecky Estate v Lecky, 2011 ABQB 802 at paras 79-82, 2011 CarswellAlta 2230, Kent J noted that an exception to solicitor-client privilege has arisen to allow such evidence:
It is also noteworthy that in the past, certain types of direct evidence of intent were also excluded under the principle of the solicitor-client privilege. The issue of solicitor-client privilege arises in the context of direct evidence of intent provided by a will-maker’s solicitor after the will-maker’s death, given the solicitor-client privilege against non-disclosure continues even after the death of the client (see Bullivant v. A.G. Victoria, [1901] AC 196 at 206 (HL); Stewart v. Walker (1903),6 OLR 495 (Ont CA) at 497).

However, as stated in Goodman v. Geffen, [1987] 80 AR 47 (Alta QB), rev’d on other grounds 1989 ABCA 206 (CanLII), [1989] 98 AR 321, 61 DLR (4th) 431 (Alta CA), aff’d 1991 CanLII 69 (SCC), [1991] SCR 353, 125 AR 81 (SC), at para 24, an exception to the above principle has developed in cases where the succession of property turns on the existence, interpretation or validity of a will. The rationale for this exception is based on the fact that in such circumstances, it is both in the interest of the client and in the interest of justice that the solicitor give testimony.

In the cases of Stewart v. Walker (1903), 6 OLR 495 (CA), Langworthy v. McVicar (1914), 25 OWR 297, 5 OWN 345 and Re Ott, 1972 CanLII 694 (ON SC), [1972] 2 OR 5, 7 RFL 196, 24 DLR (3d) 517, which dealt with the issue of the testator’s intention in the preparation or revocation of a will, solicitor-client privilege was discussed in relation to direct evidence of intent. The position taken in those cases was that the interests of justice to discover the true intentions of the testator outweighed the purpose underlying solicitor-client privilege which is to promote free and full disclosure between client and solicitor.

Given the policy reasons behind the exception to the solicitor-client privilege, the principled approach to hearsay evidence, and the recommendations of the ALRI, it appears that the law is moving in the direction of relaxing the rule excluding direct extrinsic evidence of intent.

For a very useful discussion of the rules on the admissibility of extrinsic evidence and hearsay as to a testator’s intent, see Re Decore Estate, 2009 ABQB 440, 2009 CarswellAlta 1090. In that case, Clackson J set out the historical law with respect to armchair and extrinsic evidence and the policy reasons for the traditional restrictions. He went on to say (at paras 9, 12):

It appears that the restrictive rules relating to the admissibility of extrinsic evidence are rooted in the foregoing concerns. However, the evidentiary landscape has changed. The Supreme Court of Canada in R. v. Starr, (2000), 147 C.C.C. (3d) 449 confirmed the process it had begun in R. v. Khan, [1990] 2 S.C.R. 531 and R v. Smith, (1992), 75 C.C.C. (3d) 257. Described as the principled approach to hearsay, the Supreme Court of Canada identified the twin requirements of necessity and reliability as the touchstones for the admission of hearsay evidence...
Starting from the premise that all relevant and circumstantially trustworthy evidence is or ought to be admissible, there must be a principled reason to refuse to receive such evidence. In the case of a will where the testator’s intention is in issue, any evidence on the subject which is probative should be received. Plainly, direct evidence of the context in which the testator lived and wrote her will would be helpful. Probative evidence of her actual intent would also be helpful. Of course the proposed evidence is not probative unless it has sufficient potential reliability to actually bear upon the issue.

That case was decided under the repealed Wills Act but, arguably, is directly relevant to the evidence the court is likely to admit under the WSA.

4.2 Children, descendants, issues, heirs, and kin

Section 28 of the WSA repeals what is left of the common law rule that an illegitimate child cannot inherit. Under the WSA, unless a contrary intention is shown, a reference in a will to person’s child, descendant, or issue refers to all that person’s children.

Section 28(b) includes children in the womb at the time of the testator’s death. However, a reference to a child in a will does not apply to posthumously conceived children, that is, embryos or other reproductive material implanted after the testator dies, unless contrary intent is shown.

The Uniform Law Conference of Canada has recommended a Uniform Child Status Act (ULCC 2010) which would allow an application for a court declaration of parentage if a deceased consented to be the parent of a posthumously conceived child while still alive. This Act has not yet been adopted in Alberta. However, the British Columbia Family Law Act, SBC 2011, c 25 has gone a step further and adopted a presumption of parentage if a deceased consented to be the parent of a posthumously conceived child while still alive (s 28(2)).

For more information, see Alberta Law Reform Institute, Succession and Posthumously Conceived Children, Report for Discussion 23 (Edmonton: Alberta Law Reform Institute, 2012) at 52–53; see also Manitoba Law Reform Commission, Posthumously Conceived Children: Intestate Succession and Dependants Relief, Report 118 (Winnipeg: Manitoba Law Reform Institute, 2008).

The definition of “kin” in s 30 of the WSA includes a spouse or AIP. This is not the case for the general definition of “kin” (see WSA, s 1(1)(g)), which applies to the rest of the WSA.

The effect of ss 29 and 30 of the WSA default to the rules for intestacy.
4.3 Rules for lapse and other failed gifts

Sections 32 and 33 of the WSA apply to situations where a gift cannot take effect and the will does not provide for an alternative. Although the circumstances covered by the two sections are quite different, the general principles are the same: they provide a best legislative guess about unknown and unknowable testamentary intent. These sections “default” to the rules for intestacy.

Section 32 of the WSA covers a lapse caused by a beneficiary dying before the testator and provides a hierarchy of alternate recipients of the gift. It removes the old distinction in treatment between specific gifts and gifts of residue.

Section 32(2) is an exception and is applicable when dealing with an AIP related by blood or adoption. When a person is both an AIP and a descendent of a dead beneficiary, he or she can inherit as a descendent under s 32(1)(b).

Section 32(3) prevents an “end run” around s 21(1), the section making certain dispositions void: A gift is void if the beneficiary-by-lapse was also a witness, interpreter, or surrogate signatory to the will, per s 21(1) (unless the exceptions in s 21(2) apply).

Section 33 of the WSA fills in gaps where a beneficiary disclaims or a gift is forfeited. The best-known example of forfeiture is the “murderous beneficiary” who cannot inherit because he or she murdered the testator.

The disposition of the gift to alternate beneficiaries follows the same hierarchy as in s 32 of the WSA.

Section 33(1)(b) allows an innocent descendant of a murderous beneficiary to inherit, if the murderous beneficiary was a descendant of the testator. For an interesting fact situation and discussion, see Re Bowlen Estate, 2001 ABQB 1014, 2001 CarswellAlta 1541.

Under s 33(2), an intended beneficiary is deemed to predecease the testator for the purpose of the gift in question only. For all other purposes of the will, the beneficiary remains alive.
5  COURT ORDERS AND VALIDATING WILLS

There are many ways a will can be considered invalid. Some of the more common ones include:

- a stationer’s form is signed by the testator with no witnesses or with only one witness,
- a typewritten will is signed by the testator alone,
- a handwritten will is in handwriting other than the testator’s but signed by the testator,
- a formal will is signed by the testator with only one witness, and
- handwritten interlineations (initialed by the testator with no witnesses) are contained in a properly signed and witnessed formal will.

Sections 36–40 appear in the WSA under the heading “Court Orders,” and represent ways a court can allow various validation processes to achieve testator intention. Court oversight provides protection against fraud or undue influence.

Section 36 of the WSA is a companion to s 13, which deals with the capacity to make a will. It permits a court order authorizing a minor to make a will. This section has not yet been judicially considered in Alberta (as of the time of publication). However, public policy considerations are similar to those for health care decisions by mature minors and the ability of minors to make contracts. There are many practical considerations involved, which include the need for a minor to have independent legal advice and the role his or her parents may play. For further discussion, see ALRI, Creation of Wills.

Sections 37–40 of the WSA give the court authority to:

- validate wills that do not comply with the formalities (s 37),
- validate alterations that do not comply with the formalities (s 38),
- rectify wills by adding or deleting characters, words, or provisions (s 39), and
- validate gifts to witnesses that would otherwise be void under s 21(1) of the WSA (s 40).
Different terminology is used to describe provisions like the ones found in ss 36–40. For example, while the WSA uses the term “validation,” Oosterhoff calls this “a dispensing power” (Oosterhoff on Wills at 450).

In implementing these sections, Alberta has joined the ranks of other provinces with similar legislation. Indeed, all of the provinces have provisions like these with the exception of Ontario and Newfoundland (see Feeney at paras 4-36–4-39).

Though cases involving failure to comply with testamentary formalities are always fact-driven, presumably cases from the provinces with similar legislation can provide some guidance for when the courts will to use a validation power.

For an overview of the WSA’s validation provisions and the relevant case law, see Lois J. MacLean, Rectification and Validation of Wills and Codicils (Edmonton: LESA, 2015).

5.1 Clear and convincing evidence of a testator’s intentions

Before validating a will, the court must be satisfied on “clear and convincing evidence” that the validation reflects the testator’s intentions (ss 37–39).

Clear and convincing evidence

There are several estate cases that refer to the phrase “clear and convincing evidence” and suggest that this requirement does not create a higher standard of proof than balance of probabilities. See, for instance, Re Curtis Estate, 2014 ABQB 745 at para 25, 2014 CarswellAlta 2219 [Re Curtis], Read J wrote that:

The term “clear and convincing evidence” does not imply a higher standard of proof than the normal civil standard. The Supreme Court of Canada confirmed that there is only one civil standard of proof, which is proof on a balance of probabilities: C.(R.) v. McDougall, 2008 SCC 53 at 49.

See also Re Green Estate, 2001 ABQB 835, 2001 CarswellAlta 1307; Cewe Estate v Mide-Wilson, 2009 BCSC 975, 2009 CarswellBC 1912.

The test for testator intention

In Re Smith Estate, 2012 ABQB 677 at paras 8–12, 2012 CarswellAlta 1990 [Re Smith], Gates J looked to other jurisdictions to determine the meaning of the testator’s intentions for the validation provisions. He wrote:
As the new WSA came into force in Alberta in February of this year, there has yet to be judicial consideration of this particular provision. However, similar provisions are found in the comparable legislation in four other provinces, namely: Saskatchewan’s *Wills Act*, 1996, c W-14.1, s 37, Manitoba’s *Wills Act*, CCSM, c W-150, s 23, New Brunswick’s *Wills Act*, RSNB, 1973, c W-9, s 35.1, and Nova Scotia’s *Wills Act*, RSNS 1989, c 505, s 8(a). The judicial consideration of these comparable provisions is persuasive authority on the correct approach to interpreting section 38.

...Although slight variations exist between the language of the respective statutes in regards to the limitations of the dispensation powers, the test of testamentary intention is the same throughout. Specifically, under the four pieces of legislation, the dispensation power can be invoked where the Court is satisfied that the document or writing in question embodies: (a) the testamentary intentions of the deceased, or (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will. This test of testamentary intention, although phrased differently, can also be found in section 38 of Alberta’s WSA where it states: “...it reflects the testamentary intentions of the testator and was intended by the testator to be an alteration of his or her will”.

This issue was considered by the Manitoba Court of Queen’s Bench in *Evelyn Elizabeth Sawatzky et al. v The Estate of Harry Leonard Sawatzky*, 2009 MBQB 222. In *Sawatzky*, the Court summarized the guiding principles to be applied in interpreting section 23 of the Manitoba *Wills Act* as established by the Manitoba Court of Appeal in *George v Daily* (1997), 115 Man R (2d) 27 at para 65 (Man. C.A.), at paragraph 21 as follows:

...in order for a document to be declared a valid will notwithstanding lack of compliance with the formal requirements of the Act, the applicant must prove, on a balance of probabilities, that the document embodies the deceased’s testamentary intention, that is, that it is “a deliberate or fixed and final expression of intention as to the disposal of his/her property on death...”.

The Court went on to quote the statement in *George* that “...the greater the departure from the requirements of formal validity..., the harder it may be for the court to reach the required state of satisfaction” that the document contains the deceased’s final testamentary intentions: *Sawatzky*, at para 23.

In *Re Walmsley Estate*, 2001 SKQB 105 at para 9, 2001 CarswellSask 163, the court reiterated that testamentary intention must be determined before any question of validation. In that case, the court was considering whether a probate document expressed sufficient testamentary intent to constitute a will. The court said:

Essentially, the provision allows the Court to remedy problems associated with the execution of the will. However, before the Court can overlook the execution flaw, it must be satisfied that the testamentary intentions of the deceased are embodied in the document. Therefore, the scope of the remedial provision is not limitless. The document must still contain the deceased’s testamentary intention before the provisions can be invoked.

### 5.2 Validating wills that do not comply with formalities

Section 37 of the WSA allows validation of a will that does not comply with the formalities in ss 15–17 of the WSA (relating to formal wills, holograph wills and military wills). Recall that the requirement under s 14 for writing and signing cannot be dispensed with.

Similar provisions to those in s 37 are applied in Saskatchewan (*The Wills Act*, SS 1996, c W-14.1), Manitoba (*The Wills Act*, CCSM c W150), and British Columbia (*Wills, Estates and Succession Act*, SBC 2009, c 13). In *Re Curtis*, a testator’s will did not comply with the requirements for a will under ss 15–17 of the WSA. It was prepared by the testator’s wife in her handwriting and was signed by the testator. There were no witnesses. In applying s 37 of the WSA, Read J concluded that there was clear and convincing evidence that the will expressed the testator’s intention. She gave a number of reasons (at paras 27-32):

1. She was satisfied that the deceased had signed the document/will, and therefore because it was signed, the document complied with the statutory obligations under s 14 of the WSA,

2. The deceased testator and the applicant had made their wills together. Their intent was to “share the estate with [their] immediate family only” because, at the time, their children were very young, whereas the children from the testator’s first marriage were almost adults,

3. The testator believed he had a will and that the document was what he considered to be his will,

4. There was no evidence that the testator either changed his mind or wrote any other document as his will. He kept it in a file with other important papers from the time it was executed until his death, and
5. Most importantly, the testator’s older children did not appear to contest the application.

In *Re Woods Estate*, 2014 ABQB 614, 2014 CarswellAlta 1846 (*Re Woods*), the deceased was diagnosed with terminal cancer. She consulted with a lawyer about making a will, but died before the will could be formalized. Her siblings brought an application for a declaration that notes in the deceased’s handwriting and/or the will questionnaire prepared during the consultation set out her testamentary intentions and represented a valid will under s 37. Neither was signed by her. The applicants unsuccessfully attempted to rely on the Manitoba legislation; however, Strekaf J found that Manitoba’s statutory language is broader than Alberta’s. She said (at paras 18–19):

> The Court’s ability to “validate” a will pursuant to s. 37 does not enable the Court to override the requirement in section 14(b) that a will be signed by the deceased. While the courts in certain other jurisdictions, such as Manitoba, have this authority, the legislature in Alberta has chosen not to permit it.

Further, s. 37 of the Act permits the Court to validate as a will only a writing that “was intended by the testator to be his or her will or a revocation of his or her will”. It cannot be said that Pat intended that either Pat’s Notes or the Will Questionnaire would be her will, as she was contemplating that her will would be the document to be prepared by her lawyer that she was planning to execute on December 5, 2012.

5.3 Validating alterations that do not comply with formalities

Section 38 of the WSA complements s 37 by allowing a court to validate a non-compliant alteration, including unattested writing, markings, and obliterations that appear on a will.

In *Re Smith*, Gates J applied s 38 to a situation in which a testator made handwritten alterations to his will. The alterations were neither signed nor witnessed. Acknowledging that section 38 is the only possibility of saving the testator’s alterations (at para 6), Gates J said (at paras 14-15):

> Section 37 of the Saskatchewan *Wills Act* has been used in a comparable factual circumstance. In Swanson Estate, the Court used section 37 as a remedial provision to cure non-compliant alterations made to an otherwise valid will. In reaching this conclusion, the Court relied upon the fact that a heavy black pen had been used to effectively obliterate the previous writing, the testator had handwritten their initials beside the obliterations, and there was a corresponding change in the testator’s life insurance beneficiary designations.
Applying these principles to the case before me, I find that section 38 of the Alberta WSA may be invoked to validate what would otherwise be invalid alterations made to a valid will. I find that the alterations were an expression of the deceased’s intention to make a deliberate and final disposition of his property upon his death. I find so for the following reasons:

I. Affidavit evidence indicates the alterations were made in the deceased’s own handwriting;

II. The alterations were made to an otherwise valid will, indicating the deceased understood the nature of the testamentary disposition as final;

III. The prior dissolution of the relationship between the deceased and his former common law spouse, accompanied by the following facts, make it more reasonable than not that the deceased would wish to make alterations to his will and indeed had informed others of his intentions to do so:

   (a) Prior to his death, the deceased and his former common law spouse had a property settlement arrangement;

   (b) The former common law spouse was given adequate notice and did not contest the application.

In Re Woods, Strekaf J cited Re Smith to explain the difference between a validation of an unsigned will under s 37 and a validation of an unsigned alteration under s 38 of the WSA. She said (at para 23):

The Applicants referred to the decision of Justice Gates of this Court in Re Smith Estate, 2012 ABQB 677 (CanLII), 84 ETR (3d) 83 in which, pursuant to s. 38, he validated handwritten changes made to the deceased’s will that were not signed by the deceased, as required by s. 22(1)(b)(i) and s. 15. That case is distinguishable as the language in ss. 22, 15 and 38 is different, when read as a whole, from the language in ss. 14, 15 and 37. Section 14 sets out the requirements for a valid will while s. 22 sets out the requirements for a valid alteration of a will. Section 22(1)(b) requires compliance with s. 15 or s. 16, as the case may be, but recognizes through s. 22(1)(b)(iii) that an order under s. 38 can validate the lack of such compliance. Section 22 does not contain the equivalent of s. 14(1)(b) which, unlike s. 14(1)(c), is not subject to validation under s. 37.

In other words, s 38 of the WSA allows the court to validate an unsigned alteration. However, s 37 does not allow the validation of an unsigned will.

5.4 Rectifying wills by adding or deleting characters, words, or provisions

Section 39 of the WSA codifies the common law and allows a court to remove characters or words in a will if they were included because of a misdescription or a misunderstanding of
the testator’s instructions. The WSA also introduces a new power to add characters or words to correct errors or misunderstandings.

Under s 39(2), a court is able to cure the omission of a testator’s signature from a will. The test is stricter than that in any of the other validation provisions, including s 39(1). In addition to proving the testator’s intentions, an applicant must also prove pure mistake or inadvertence. This section likely will not be considered often; however, it will prove useful where, for example, spouses mistakenly sign each other’s wills.

The court in Re Woods acknowledged the limited application of a court’s ability to validate a will without a signature under s 39 of the WSA (at paras 22–25):

By including s. 39 in the Act, the Alberta legislature elected to adopt a middle position between the jurisdictions like Manitoba, which permit a writing to be recognized as a will notwithstanding the lack of the deceased’s signature, and jurisdictions like Prince Edward Island that require a signature in all cases....

... I recognize that the Alberta Law Reform Institute, in its Final Report No. 84 entitled Wills: Non-Compliance With Formalities issued in June 2000, recommended adopting a broader power to dispense with the deceased’s signature in certain circumstances. However, the Alberta legislature elected not to follow that recommendation when enacting the Act. That is a policy decision upon which I make no comment.

In Fuchs v Fuchs, 2013 ABQB 78, 2013 CarswellAlta 244 [Fuchs v Fuchs], Rooke ACJ applied s 39(1) of the WSA to rectify a deceased testator’s will. The will was made before the WSA came into effect and, as a result, would be voided by marriage unless it contained a declaration that the will was made in contemplation of marriage (see Fuchs v Fuchs at para 17). The testator married shortly after making the will. On the evidence, Rooke ACJ found that it was made in contemplation of marriage and used s 39(1) to add a declaration to that effect (Fuchs v Fuchs at para 25).

In Ryrie v Ryrie, Sisson J applied s 39(1) to rectify a will that had mistakenly left out the descendants of children who had predeceased the testator. He found (at paras 122–125):

In this case Section 39(1) of the Wills and Succession Act could be invoked to rectify the wording of the Will as the evidence is clear that there was “an accidental slip, omission or misdescription”, together with “a failure to give effect to, the Testator’s instructions by a person who prepared the will”.
The evidence is clear and convincing that the interpretation of the Will proffered by the Respondents, who include the Personal Representatives, does not reflect the Testator’s intention and that the inclusion of [only] the names of Mr. Ryrie’s surviving children was a mistake, as was admitted by Ms. Tams.

... 

The Applicants sought an Order as to the interpretation of clause 4 of the Will. I find that clause 4 of the Will shall be interpreted to include the Applicants, who shall each share 1/2 of a 1/7th share in the Estate.

Procedurally, applications under s 39 of the WSA may be made before a grant of probate or administration, but not more than 6 months after the grant (s 39(3)). An application under s 39(2) is made before a grant as part of proof of the will.

5.5 Validating gifts to witnesses that would otherwise be void

Section 40 complements s 21 of the WSA. It allows the court to save a void disposition to an interpreter, witness, or surrogate signatory (or to their spouses or AIPs).

The applicant must prove that the testator intended to make the disposition to the applicant and that there was no undue influence. Section 21(2)(c) and the court authority under s 40 to validate an otherwise invalid gift are completely new to Alberta legislation. Under s 13 of the repealed Wills Act, such a gift was void, no matter how clear the evidence may have been as to the testator’s intent.

For a summary of cases involving situations where gifts to a witness have been validated, and for a discussion of the various reforms in this area, see Feeney at paras 4-32–4-43.
CHAPTER 3

INTERVIEWING AND ADVISING A CLIENT SEEKING A WILL

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1 INTERVIEWING AND ADVISING A CLIENT SEEKING A WILL

While the vast majority of people dying in Canada do so without a will, it is better for a testator to distribute his or her estate to a deliberately chosen beneficiary through a will.

In preparing a will for a client, there are many things an estate lawyer must keep in mind when taking instructions from a client:

- all of the legislative provisions that affect the situation,
- the property that forms an estate,
- the duties and responsibilities of an estate lawyer,
- the possibility of testamentary incapacity and undue influence,
- the duties owed to beneficiaries,
- the limits on testamentary freedom, and
- potential tax implications.

Estate lawyers play a large role in the planning, advising, and drafting of a valid and enforceable will and other estate planning documents. An in-depth knowledge of the provisions of the case law and statutes that affect wills and estates is required.

2 PROPERTY EXCLUDED FROM AN ESTATE

Certain types of property are not a part of an estate and are not distributed according to a will or under intestacy provisions. This includes:

- property for which an owner may designate a beneficiary, and
- joint tenancy assets.

2.1 Designated beneficiaries

Section 71 of the Wills and Succession Act, SA 2010, c W-12.2 [WSA] represents the old s 47 of Alberta’s Trustee Act, RSA 2000, c T-8 [Trustee Act] and deals with the designation of beneficiaries under certain plans. Where a beneficiary is designated under s 71 of the WSA, the property does not form part of the deceased owner’s estate.
The plans covered by s 71 are:

- insurance policies (s 71(1)(d)(ii)),
- registered retirement savings plans [RRSPs] and registered retirement income funds [RRIFs] (s 71(1)(d)(iii)),
- pensions, annuities, and similar property (s 71(1)(d)(i)), and
- tax-free savings accounts [TFSAs] (s 71(1)(d)(iv)). (Note: TFSAs were previously in a regulation under the Trustee Act.)

However, s 71 does not apply to a contract or a beneficiary designation to which the Insurance Act, RSA 2000, c I-3 [Insurance Act] applies (s 71(17)).

For the plans that s 71 does apply to, a designation of beneficiaries is effective on the date the designation is created. A new designation revokes any earlier designation (s 71(7)). An earlier designation is not revived by the revocation of a subsequent designation (s 71(11)).

Designations can be made in a will or in a separate document. If a designation is made in a will, the designation must refer to the plan either generally or specifically (s 71(5)). A designation in a will is effective from the date the will is signed (despite the rule in Part 2 that says wills are effective from the date of death) (s 71(12)). If a will is revoked, any designation in the will is also revoked as of the date of the will’s revocation (ss 71(8), (12)).

Some plans require filing a designation with a plan trustee. If designations are not filed and the trustee pays out to the beneficiary on file, who is not the latest beneficiary, the payment is deemed to have been validly made as far as the trustee is concerned (s 71(15)). Therefore, if including a new or changed beneficiary designation in a will or other document for a client, be sure to file (or have the client file) the updated beneficiary designation with the plan trustee to avoid any payments going to an unintended beneficiary.

While filing a will with the plan’s trustee works, this may raise other confidentiality issues related to a client’s matters. Consider using a separate document to advise the plan trustee of the change so that the whole will does not have to be given to the trustee.

Section 25 of the WSA, which holds that a gift in a will is revoked on divorce or at the end of an adult interdependent relationship, does not apply to property transferred by beneficiary designation.
Whether or not these plans are or should be protected from creditors is the subject of great debate. Note ss 81.1–92.1 of the Civil Enforcement Act, RSA 2000, c C-15, which creates creditor protection for certain classes of RRSPs, deferred profit sharing plans (DPSPs), and similar plans, may provide some protection when these plans transfer on death. The protection is similar but not identical to creditor protection for insurance products under Alberta’s Insurance Act.

The Alberta Law Reform Institute [ALRI] and others have proposed various ways to protect property passing by beneficiary designation to certain beneficiaries or to the estate from creditors (see Alberta Law Reform Institute, Exemption of Future Income Plans on Death, Final Report 92 (Edmonton: ALRI, 2004)). Some practitioners advocate attachment of assets “outside the estate” for family maintenance and support and matrimonial property claims on death. Others vehemently argue against that position. Such initiatives raise interesting considerations for pensions, insurance, tax, civil enforcement, savings plans, property law, and family maintenance policy.

2.2 Advancement - transfers into joint names

Real or personal property owned by two or more owners with a right of survivorship is excluded from estate property. However, even if a property is registered in the names of two or more people “as joint tenants,” this does not in and of itself mean that the right of survivorship applies.

In the past, where a parent transferred property to himself or herself and his or her child as joint tenants, the presumption of advancement operated. That is, the parent was presumed to have advanced the property to the child so that, on the parent’s death, the child would take the property by right of survivorship. That presumption has been replaced by the presumption of resulting trust. Now, a parent is no longer presumed to have given the property to a child with survivorship rights. Instead, on the parent’s death, the child is presumed to hold the property in trust for the parent’s beneficiaries. The question is what the parent intended when making the transfer. However, the presumption of advancement still operates where a transfer is made from a parent to a minor child.

Confusion surrounding a ‘transfer’ can arise in cases where elderly parents add a child’s name to their bank accounts solely for convenience but still intend that all of their children share in the property on their deaths. Similarly, a parent might transfer real property into his or her name and the name of one child to avoid probate costs. This is not a consideration in
Alberta, where the maximum probate fee is $400 regardless of the value of the estate. However, people are often misled by reports of high probate costs in Ontario and British Columbia.


In *Pecore v Pecore*, Rothstein J, writing for the majority, concluded that common law presumptions continue to play a role in disputes surrounding gratuitous transfers (at para 23).

The court held that the presumption of advancement continues to apply when there is a transfer from a parent to a minor child (*Pecore v Pecore* at para 40). However, given that the principal justification for the presumption of advancement is the parental obligation to support the transferor’s dependent children, the presumption of advancement does not apply with respect to a gratuitous transfer from a parent to independent adult children. In such a situation, the presumption is one of resulting trust.

Both of these presumptions are rebuttable. Where transfers are made to adult children, the onus is on the transferee to rebut the presumption of resulting trust and demonstrate that the transfer was intended to be a gift. Where the presumption of advancement operates, the onus is on the party challenging the transfer to rebut the presumption. The evidentiary burden in both cases is on a balance of probabilities.

More specifically, the Supreme Court of Canada in *Pecore v Pecore* described the evidence that may be considered when determining whether a presumption has been rebutted. (In this case, the court was determining whether a transferor’s intention was to make a gift of the right of survivorship to the surviving joint holder of the funds in the account.) This evidence includes (at paras 55–70):

- evidence subsequent to the transfer if it is relevant to the intention of the transferor at the time of the transfer,
- bank documentation detailed enough to provide strong evidence of the intention of the transferor regarding how the balance in the account should be treated upon death (the clearer the evidence in the documents, the more weight that evidence should carry),
control and use of joint account funds,

- tax treatment of joint accounts, and

- a power of attorney granted by a transferor to transferee. If the transferee has a power of attorney, joint ownership as a measure of convenience is unnecessary. The testator may have, therefore, intended something more by the transfer, such as an assurance that the investments were given to the transferee on the transferor’s death.

In *Pecore v Pecore*, the Supreme Court of Canada found that the transferor did intend a gift of the right of survivorship.

Applying the same reasoning in *Madsen Estate v Saylor*, the majority again held that the presumption of advancement did not apply. In that case, jointly-held properties were subject to the presumption of a resulting trust. The Supreme Court of Canada found there was insufficient evidence to rebut this presumption, as there was no other evidence to show a contrary intention of a gift from the father to the daughter. Although banking documents may be proof of an intention to gift a right of survivorship, the documents in *Madsen Estate v Saylor* lacked the clarity required.

As a practical application of the case law, when joint accounts are opened, some banks ask account holders to indicate their intention for their property upon their death and to state this intention on their bank documents. Therefore, it is crucial for estate planning lawyers to request and obtain copies of any banking documents relating to this issue.

The presumptions of advancement and resulting trust apply to both real and personal property. They are also not affected by s 110 of the WSA, which revokes the common law presumption of double portions.

3 DUTIES AND RESPONSIBILITIES OF AN ESTATE LAWYER

Part of the duty of an estate planning lawyer is to ensure that his or her client has the requisite mental capacity to both give instructions for the creation of a will and to sign it. At the time of signing, the client must know and approve of the contents of the will, and there must be no undue influence, coercion, or fraud influencing the client. A lawyer must take reasonable steps in the circumstances to satisfy him- or herself that a client has capacity and is not being pressured. Otherwise, the lawyer may be found liable for losses in negligence.
3.1 Lawyers’ duties owed to clients

Taking instructions

It is important to take instructions to prepare a will directly from a client and not from anyone else. However, there are times when a lawyer will receive instructions from a third party (e.g., trust companies or a relative of the client). In those cases, a lawyer must confirm those instructions with his or her client and make necessary inquiries to satisfy him- or herself that the client’s wishes are honoured and properly reflected in the will provisions. (Re Worrell, [1970] 1 OR 184, 1969 CanLII 269 (Ont Surr Ct); Danchuk v Calderwood (1996), 15 ETR (2d) 193, 1996 CanLII 914 (BCSC)).

Chapter 2.02(12) (and commentary) of the Law Society of Alberta, Code of Conduct, (Calgary: Law Society of Alberta, 2015) [Code of Conduct], explains a lawyer’s obligations when dealing with possible incapacity and third party instructions. A client’s agent under a personal directive or attorney under an enduring power of attorney does not have authority to give instructions for a will. Lawyers must confirm instructions with the client independent of the third party, and must be satisfied that the instructions are given freely and voluntarily by the client, who has capacity to give those instructions.

Moreover, lawyers must be cautious when allowing a third party to attend an instruction-taking meeting with a testator. For instance, elderly clients may want a relative with them to help answer questions and to make them more comfortable. This is regularly done and, in fact, may be helpful. If a lawyer does need to ask general questions to establish capacity, the answers can be verified by the third party. That person may also have reliable information on the state of the client’s health, where it is an issue.

Whatever the situation, a lawyer should, without the presence of a third party and before the will is signed, ensure that the will reflects the client’s wishes and that the client understands the contents.

Taking instructions from a married or other couple

It is very common to have spouses attend instruction-taking meetings together, to provide their joint views on how they want to plan their estates. They may be married. They may be living together but not have made any formal arrangements. They may or may not fall into the legal definition of adult interdependent partners [AIPs]. The clients may not know or understand the legal differences and it is up to the lawyer to explain and explore what those differences mean if they are not married.
Meeting with a couple is not usually a problem in situations where each party is on an equal playing field and if the two are in a happy relationship. However, watch for any signs that one party is being coerced, is afraid to ask questions, or is uncomfortable with any decisions that are being made. If this is not a first marriage for one or both of the parties, then this also becomes more complicated if there are surviving children, whether dependent or adult, for either of the parties.

One spouse may mention later that he or she is not comfortable with some decisions or wants changes made to the will without the other spouse knowing. This can potentially create a conflict for the lawyer, who is obligated as counsel to talk to both parties about it. The lawyer may have to withdraw services from both clients if the conflict cannot be resolved.

**Providing advice**

Estate planning and tax matters can be complex. When dealing with complicated estates that are composed of significant assets, most estate planning lawyers work together with tax lawyers, financial or investment professionals, accountants or a combination of these professionals to help prepare an estate plan for the client. Some law firms specialize in this area. While a firm may wish to retain a client’s business, it must act in the client’s best interest. If a lawyer is not competent to counsel in an area, he or she may not render advice or services (Code of Conduct, ch 2.01.). If an estate plan requires specialized advice, the lawyer must refer the client to tax accountants, estate planners, or tax lawyers, as required, or work with those professionals to ensure that he or she is providing the necessary specialized advice and instruction in those areas. In those cases, it is very important that everyone communicates well, and that the client continues to understand and approve of the planning choices and instruction decisions.

**Assessing testamentary capacity**

When taking instructions to prepare a will, the client’s mental capacity must be assessed.

The test for testamentary capacity is set out in *Re Johnson Estate*, 2007 ABQB 461 at para 53, 2007 CarswellAlta 989 [*Re Johnson*]:

The test for testamentary capacity is well established. It was set out long ago in the case of *Banks v. Goodfellow*, [1870] L.R. 47 (Q.B.) and was adopted by the Supreme Court of Canada in *Ouderkirk v. Ouderkirk*, 1936 CanLII 8 (SCC), [1936] S.C.R. 619, at p.621, in the following terms:

*It is essential to the exercise of such a power (of making a will) that a Testator shall understand the nature of the act, and its affects; shall*
understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give affect, and with a view to the latter object that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusions shall influence his will in disposing of his property, and bring a disposal of it, which, if the mind had been sound, would not have been made.

Canadian courts have not strictly applied the test for testamentary capacity to try to avoid setting an impossibly high standard. This is especially true when dealing with the elderly. Binder J in Scramstad v Stannard (1996), 40 Alta LR (3d) 324 at para 137, 1996 CanLII 10408 (ABQB) [Scramstad v Stannard] held that:

...[J]ust because a person’s mind and memory is not what it used to be, does not mean that such person lacks testamentary capacity; the test to determine testamentary capacity is not therefore one of certainty or satisfaction beyond a reasonable doubt.

A client does not need to have perfect capacity. He or she may suffer from mental defects, but if the defects do not materially affect the answers to capacity questions, then a lawyer can proceed as counsel. If there are concerns relating to a client’s capacity to sign his or her will, a lawyer should arrange to have a medical practitioner examine that client to confirm capacity before signing the will.

It is important for an estate planning lawyer to understand there are differences between medical and legal capacities. A doctor may feel a patient is medically incapacitated, however, that is not necessarily the same test as the legal test for capacity to sign a will. It is a lawyer’s duty to keep detailed notes of the questions asked and the answers given by his or her client, as well as the client’s general demeanour and behaviour.

The questions a lawyer asks a client should specifically solicit answers that address the first part of the test laid out in Banks v Goodfellow (1870), LR 5 QB 549 (Eng QB). In particular, a lawyer should make sure that his or her client is providing the details of the answers, and not simply answering “yes” or “no” to the questions. Even if the client was able to provide the information at the initial client interview and had capacity at that time, it is important that the lawyer be able to confirm that the client has capacity to answer those questions about the contents of the will at the time of signing as well.

The lawyer who prepares the will is a compellable witness under s 85 of the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules]. It is very difficult for a lawyer to remember what was
said and done at an interview that may have taken place many years before; therefore, the best memory aid is to have a very complete and detailed file of the will and the preparation leading up to it. This will enable the lawyer to better defend the client’s position later if the will is challenged.

The onus of proving testamentary capacity is on the propounder of a will (the personal representative) on a balance of probabilities (Vout v Hay, [1995] 2 SCR 876 at para 27, 1995 CanLII 105 [Vout v Hay]). Absent suspicious circumstances, a will’s propounder is aided by a rebuttable presumption that the testator knew and approved of the contents of the will and had the necessary testamentary capacity when there is proof that (Vout v Hay at para 26):

- the will was signed with the requisite formalities,
- the will was read to or by the testator, and
- the testator appeared to understand the will.

Surrogate Rules Form NC 8, titled “Affidavit of witness to a will,” provides this proof. It is good practice to also prepare this form at the same time that the final copy of the will is ready and have one of the witnesses swear this affidavit at the same time as the will is signed. Often, the lawyer is one of the witnesses to the will, and his or her assistant will be another. A legal assistant can also be the witness on the NC 8, which can then be sworn and sealed in with the original wills.

The onus of attacking a will falls to those challenging its validity. If challengers can bring forward suspicious circumstances surrounding a will’s preparation and signing, then the personal representative’s task of positively proving testamentary capacity becomes more onerous.

The Supreme Court of Canada reviewed the law relating to suspicious circumstances in Vout v Hay (at para 25). Suspicious circumstances may be raised by:

- circumstances surrounding the preparation of the will,
- circumstances tending to call into question the capacity of the testator, and
- circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.
When suspicious circumstances are present, the presumption of validity is rebutted. The propounder must then positively prove (Vout v Hay at para 27):

- due signing of the will,
- knowledge and approval of its contents by the testator, and
- soundness of the testator’s mind, memory, and understanding, on a balance of probabilities.

Admissible evidence proving testamentary capacity may include:

- oral and documentary evidence,
- statements made by the testator at the time of making the will or giving instruction,
- evidence of the attesting witnesses,
- evidence as to the manner in which the will was made,
- evidence of consistency with earlier wills or that the will matches the moral duty of the testator,
- evidence of the testator’s general habits,
- medical evidence,
- a lawyer’s notes, and
- tape or video recordings.

All self-serving evidence from the parties requires corroboration under s 11 of the Alberta Evidence Act, RSA 2000, c A-18.

While medical evidence regarding mental capacity is important, it may not be conclusive. In Spence v Price, [1946] 2 DLR 592, 1945 CarswellOnt 376 (CA), the evidence of laypersons was preferred to medical evidence. This decision has been followed in Babchuk v Kutz, 2006 ABQB 422, 2006 CarswellAlta 1738 [Babchuk v Kutz].

In Babchuk v Kutz at para 249 (citing Scramstad v Stannard at para 133), the court stated that:
“[T]he evidence of a layperson may be preferred, or carry greater weight than that of a physician...” Further, “the question of whether a person has testamentary capacity is a practical question which may be answered by a layman of good sense and/or on the basis of the judgment of the deceased’s solicitor.”

The extent of the proof required is proportionate to the gravity of the suspicion, and the degree of suspicion varies with the circumstances of each case (Vout v Hay at para 24).

Under s 46(1)(b) of the Indian Act, RSC 1985, c I-5, the Minister can declare an Indian’s will void in whole or in part if the testator lacked testamentary capacity at the time it was signed. (Note that this Act is to be reviewed. See the Indian Act Amendment and Replacement Act, SC 2014, c 38).

Ensuring absence of undue influence

Undue influence is coercion or pressure exerted on a testator that overcomes his or her free will. If proven, undue influence invalidates a will.


> 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.

The individual asserting undue influence to invalidate a will has the burden of proof. The challenger needs sufficient evidence to establish the claim. Failure to do so will result in significant costs being assessed against the unsuccessful claimant. The costs can sometimes amount to the full indemnity of the opposing party’s legal fees.

Estate planning lawyers should be wary of the potential for duress or undue influence by a relative or close friend on a client. Lawyers should keep a clear, written record of their conversations and impressions at the time of the preparation of a will, and again at the time of execution of the will.

Certain “red flags” require that lawyers proceed carefully, including:

- the fact that the client is elderly,
the client is exhibiting frailty of mind or body,

- the appointment is not made by the client but by one child or a friend of the client (or more than one),

- the client is accompanied to the appointment by one child or a friend (or more than one),

- the instructions come from someone other than the client,

- one child is left the entire residue and other children are excluded,

- the distribution of the estate is not equal among the client’s children,

- a special “friend” or “housekeeper” suddenly becomes a beneficiary of an elderly person’s estate, and

- the will leaves the estate to all the children, but some property is being transferred outside of the will now and to one child or other “special person.”

There should be good reasons for a client to distribute his or her estate in an unusual way. Lawyers should explore these reasons and note them. In some cases, it is appropriate to include these reasons in the will. However, people are not required to provide for independent, adult children. Some people will choose to leave some or all of their estates to non-family members, charitable organizations, or others. Some families do not get along or have abusive or otherwise dysfunctional relationships that lead to a client’s decision not to include some or all of the expected family members in the estate plan. It is not a lawyer’s job to convince the client to provide for independent adult family members; it is a lawyer’s job to document his or her client’s wishes to ensure that they are given effect if anyone later challenges a client’s choices. In some cases, if such challenges are anticipated, a lawyer may also consider how to help the client to give effect to those wishes during his or her lifetime, to minimize the possibility of those challenges on death.

In some cases, a child caring for an elderly person may demand that the elderly person change his or her will at the risk of losing care and support. Reports of elder abuse are becoming more common. Some elderly people can be vulnerable to their caregivers — physically, emotionally, and financially. Similar abuses also happen to clients with disabilities and those in care facilities or who require assistance with daily living. In practice, lawyers can help identify or even prevent such abuses and unfairness and may even be able to find help for victims of these types of abuses. A client may not feel comfortable raising issues with his
or her lawyer, so it is the lawyer’s job to ask the client directly if they are being harmed or threatened and let the client know that he or she can help. The Alberta Elder Abuse Awareness Network may offer alternatives for helping a victim.

Additional Considerations

Estate planning lawyers should strive to always take exceptional notes, consider getting a medical opinion on the issue of capacity, and consider whether to destroy the previous will. If the later will is valid, the renunciation clause will revoke the earlier will. If the new will is invalid due to incapacity, then the older will remains valid. In some cases, however, one may not want to revoke an earlier will. Some clients have assets in other jurisdictions outside of Canada and have a will dealing solely with the assets in that jurisdiction. In that case, it is important that the “out of jurisdiction” will is NOT invalidated by the will covering all of the rest of the client’s estate. Similarly, if a client is updating an “out of jurisdiction” will, any reporting letter to the client should emphasize that the update does not include any statement that says that it revokes all other wills, for example.


...Common errors that have been either the subject of criticism by the courts or the basis of liability for professional negligence in the preparation of a will... include:

- the failure to obtain a mental status examination;
- the failure to interview the client in sufficient depth;
- the failure to properly record or maintain notes;
- the failure to ascertain the existence of suspicious circumstances;
- the failure to react properly to the existence of suspicious circumstances;
- the failure to provide proper interview conditions (e.g. the failure to exclude the presence of an interested party);
- the existence of an improper relationship between the solicitor and the client (e.g. preparing a will for a relative); and
- failing to take steps to test for capacity.
Carrying out a testator’s instructions

Lawyers must be satisfied that a will actually fulfils a client’s goals and objectives. Poor drafting or a lack of knowledge in the estates area can render a will ineffective. It is also essential to draft a will to avoid estate litigation due to ambiguities or a failure to provide for future events. Finally, a personal representative must be given sufficient powers to fulfil the purpose of the will.

Ensuring proper will signing

Ensure that a will is signed and follows the requirements under the WSA. It is typical to send draft documents to clients to review (usually with the signature lines stamped or crossed out). The client can then advise if there are any changes needed, or if he or she has any questions about the draft, before meeting with the lawyer to sign the original version. This is also a time that the lawyer can confirm the client’s understanding of the contents, and the client’s capacity, if that is a concern. It is unusual to mail unsigned wills to clients for execution. However, in extremely urgent circumstances, this may be done so long as detailed instructions for a signature are provided to the client along with directions indicating who can and cannot be a witness to the will. Otherwise, the lawyer may be liable to disappointed beneficiaries if a will is not properly signed.

It is good practice to attach an affidavit of witness to a will (Form NC 8 from the Surrogate Rules) and stamp the back of the will as exhibit “A” to the affidavit. A client may keep the same will for decades. By the time Form NC 8 is needed, the witnesses may have died, moved, or become incapacitated.

3.2 Lawyers’ duties owed to beneficiaries

A lawyer may be liable for any breach of duty to a client in preparing a will. Further, a lawyer may be held liable to disappointed beneficiaries under the will if it is held to be invalid, even if the lawyer had no previous relationship with those beneficiaries. This is based on the Hedley Byrne principle (see CCH Canadian, Canadian Estate Planning Guide (North York, Ont: CCH Canadian, 1995) at 920; Wilhelm v Hickson, 2000 SKCA 1 at paras 23-42, 2000 CarswellSask 49 (leave to appeal to SCC refused); Whittingham v Crease & Co, 88 DLR (3d) 353, 1978 CarswellBC 456 (BCSC)). Under that principle, for a duty of care to be established, 3 factors must be present:

1. It was foreseeable that the disappointed beneficiary would suffer financial loss,
2. There was a sufficient degree of proximity between the lawyer and the intended beneficiary, and

3. It was fair, just, and reasonable that liability in negligence should be imposed on the lawyer to compensate the beneficiary in circumstances where the lawyer was in breach of his or her professional duty, but there was no remedy in contract, and the client’s estate had no effective remedy for the client’s purpose being thwarted by the lawyer’s failure to carry out the instructions properly.

4 USE OF QUESTIONNAIRES AND CHECKLISTS

A checklist or questionnaire provides information about a client and clues to testamentary capacity. These documents are also evidence of the efforts made in carrying out a lawyer’s obligations.

When taking instructions, the best and most effective protection is usually through checklists, notes, and correspondence to ensure that complete details of a client’s personal, financial, and other relevant matters are on file. At the interview, any areas on the questionnaire that the client did not complete at home, or which the client did not understand or has questions about, can be discussed more productively. After the interview, notes relating to the discussions and the completed checklists should be kept on file. These will highlight the reasons why certain decisions are made. Any discussions and decisions should be confirmed in writing, particularly if there is reason to believe that the will or any estate planning decisions may be challenged on the client’s death.

Most lawyers forward a questionnaire to a client before the initial interview. The purpose of the questionnaire is to identify all relevant information about the client, the beneficiaries, and the assets. The questionnaire should prompt a client’s personal and family information, information about the proposed personal representative and beneficiaries, and information about the nature and extent of estate and non-estate property.

4.1 Background information about the testator

It is important that estate planning lawyers obtain a well-rounded picture from their client about the present as well as his or her past. This involves collecting much personal and financial information about the client as well as his or her family and assets.

Most practitioners find that the best way to ensure they do not miss collecting any important information is to use a standard style of questionnaire. Regardless of the questionnaire that
is used, it is important to organize the information gathered. For a sample will questionnaire, refer to the appendices.

Generally, the following types of information should be sought:

1. Personal information:
   (a) Citizenship is important to know about because there are different tax rules depending on a client’s citizenship,
   (b) Marriage information:
      (i) The place of marriage is important because some jurisdictions create a community of property regime at the time of marriage,
      (ii) Keep in mind that just because a client does not consider himself or herself to be in a common-law relationship or adult interdependent relationship, it is not a matter of choice. Ask for specific details regarding relationships to determine the nature of the relationships,
      (iii) If a client is contemplating divorce, the divorce will revoke the will, and the client will need to complete a new will after divorce, and
      (iv) If the client is contemplating marriage, the will is NOT revoked on marriage (this is a recent change made by the WSA), so information about contemplated marriages is no longer significant from the perspective of a concern over will revocation,
   (c) Children:
      (i) Some clients may not consider some individuals to be children or grandchildren because they are born outside a traditional marriage. Others will consider step-children in blended families to be children or grandchildren, when the law may not consider them the same way. Be aware of whom a testator intends to include and exclude, compared to what the legislation defines for those terms, and ensure the final document reflects the client’s wishes. Standard draft wording may not fit all clients’ intended beneficiaries in various combined family situations.

2. Instructions for will:
   (a) Personal representative (s):
(i) Make sure that the client understands that the “new” term personal representative is what most clients understand to be “executor,”

(b) Guardian(s) for minor children,

(c) Beneficiaries:

(i) If any beneficiaries are receiving government benefits due to a mental or physical handicap, be aware of the situation and that the structure of the estate may affect their benefit entitlement. More information about the benefits may be required to help the client with the planning.

3. Financial information:

(a) real estate

(i) Be aware of dower rights, and

(ii) Be aware of claims to rights to possession of the family home,

(b) bank accounts,

(c) various other investment vehicles,

(d) registered investment plans and pension plans,

(e) life insurance,

(f) debts owed to the lawyer,

(g) business interests,

(h) shares,

(i) valuable personal property, and

(j) other assets.

4. Liabilities and miscellaneous:

(a) creditors,

(b) safety deposit box, and

(c) funeral arrangements

(i) Traditionally, instructions for funerals and burials are included in wills. However, the problem is that often wills are not consulted until
after those arrangements are made. Clients should be encouraged to provide their wishes in these areas to family members to ensure their wishes will be followed at the critical time.

5. Other estate planning:

(a) If the client has a previous will, ask to see it. Inquire about the reasons for the changes, and document those in the file. If the client does not bring a copy, still document what the client says about the changes or reasons for the changes.

(b) As an estate planning practitioner, it is important to ensure that the client has all his or her estate planning completed, both for while he or she is alive (with an enduring power of attorney and personal directive) and after death (with a will).

(c) It is more efficient to complete and review information for all three estate planning documents at the same time, both for the lawyer and for the client, than to do them individually.

5 ASSISTING A CLIENT IN SELECTING APPROPRIATE PERSONS

5.1 Personal representatives

In Alberta, an executor or administrator of an estate is called a “personal representative” (see WSA, s 1(1)(h)). A personal representative is responsible for arranging the funeral, gathering the property of the deceased, paying estate debts, preparing tax returns, keeping and passing accounts, administering the estate, and distributing the assets to the beneficiaries according to the will. A personal representative can be called upon to list and sell real property, administer trust property, give instructions to accountants or brokers, buy or sell investments, make tax designations, and deal with business affairs or litigation.

In carrying out these duties, s 5 of the Estate Administration Act, SA 2014, c E-12.5 [EAA] requires a personal representative to act:

- honestly and in good faith,
- according to the testator’s intentions and the will (if a valid will exists), and
- with the care, diligence, and skill of a person of ordinary prudence in comparable circumstances.
The duties of a personal representative are compellable, and personal liability attaches to any personal representative who does not discharge his or her duties according to the requirements of s 5 of the EAA (see EAA, s 23).

Selecting an appropriate personal representative is best done after a client describes all the property and debts, potential beneficiaries, and time frames for the distribution of property. Gathering this information early allows for an informed decision on the issue of personal representative selection. A client should always ask a proposed personal representative (and any alternates) if he or she consents to this responsibility.

Considerations when selecting a personal representative include:

(a) the size and complexity of the estate,
(b) the demands that the obligation will make on the potential personal representative’s time,
(c) that person’s knowledge of the property, family dynamics, and duties involved in the nature of estate property,
(d) the experience, expertise, and specialized skills required during administration,
(e) whether the property is to be held in trust for a lengthy period of time,
(f) whether there are conflicting interests among beneficiaries, and
(g) taxation issues.

In some cases, a client will appoint 2 or more people to act jointly as personal representatives. Under s 37 of the EAA, where there are 2 or more personal representatives, they must act unanimously (unless the will allows a majority vote between three or more personal representatives). Problems arise when the personal representatives chosen cannot agree on how to handle the estate. If they cannot agree, it is very difficult to administer the estate. The selection of personal representatives and whether to have more than one must be weighed carefully. In most cases, spouses name each other as the personal representative and, in the alternative, one of their adult children, if applicable. If children are minors, then it is more complex to choose the alternates.

Choosing the largest residuary beneficiary as a personal representative can be a good choice, since that person has the greatest personal interest in the estate. However, if a will
provides for a life estate or lengthy trusts before final distribution of the residue, this choice can cause some conflict. In these situations, one option is to name a professional or unrelated person to act as the personal representative. Alternatively, the size and nature of the estate property may justify the appointment of a bank or trust company as the personal representative. Further, personal representative fees are taxable income, and this also can become a consideration within the estate planning process.

Where a client chooses a professional personal representative, arrangements must be made with the bank or trust company before preparing the will. This is because, in most cases, the bank or trust company will require particular clauses to be included in the will, as well as a particular fee agreement to be signed. As well, the bank will usually require that the client have a minimum asset value that they already administer before they agree to act. It is also important that the client get information on the fees to be charged. In addition, banks and trust companies that are selected as a professional personal representative usually require a client to sign a contract.

Appointing a professional personal representative may be appropriate in situations where:

(a) the size and complexity of property require specialized skill or knowledge,
(b) the duties involved in the administration would place a great burden on an individual,
(c) certain property will be held in trust for a number of years, or
(d) the personalities of those involved dictate the need for an impartial body.

It is also important to consider naming an alternate personal representative in case the primary personal representative cannot fulfil the final administration of the estate due to death, inability to act, or a desire to discontinue acting.

By law, all personal representatives are entitled to compensation. To avoid unexpected conflict or problems, lawyers should discuss with clients and recommend providing, at least generally, personal representative remuneration in a will. If a will provides for a specific amount of compensation, beneficiaries cannot challenge it. Otherwise, Schedule 1 in Part 5 of the Surrogate Rules lists the factors to consider for a personal representative’s compensation. The Surrogate Rules Committee issued guidelines relating both to personal representatives’ compensation and to lawyers’ fees in administering an estate.
Lawyers who are preparing a will may also be asked to serve as the personal representative. The decision about whether to serve in both capacities should be made on a case-by-case basis. Most lawyers decline to act (except for family members). Keep in mind that trustees are strictly liable to account for their acts. The compensation received may not be enough to account for the time spent dealing with an estate. Although a personal representative can also act as a witness, there may be concerns about a lawyer “wearing too many hats” if a will is later challenged.

5.2 Guardians

Under s 22 of the Family Law Act, SA 2003 c F-4.5, a parent may appoint a guardian of his or her children in a will. The guardianship takes effect immediately on the parent’s death. The appointed person only has the powers, responsibilities, and entitlements of guardianship that the parent had at the time of his or her death (Family Law Act, ss 22(5)). For the court to issue a guardianship order, the proposed guardian and the child (if 12 years of age or older) must consent to the guardianship appointment.

A client must decide who is best suited as a guardian. Factors to consider include the values, religious beliefs, and the location of potential guardians. A client should consider whether a guardian’s house is large enough to accommodate the extra children and, if not, whether any of the estate funds can be used for renovations to the guardian’s house. A client should also consider who keeps the benefit of such expenditures.

It is good practice to counsel a client to name an alternate guardian in case the primary guardian predeceases the client or is unwilling or unable to assume the guardianship responsibility.

The court considers, but does not necessarily follow, a testator’s wishes in making a declaration of guardianship. The surviving parent, if any, is generally the preferred guardian unless there is some reason why he or she is not a fit and proper guardian. The court will always determine what is in the best interests of the child. If a client has reasons why the other parent should not be the guardian, ensure that the will—or possibly a separate sworn document—contains an explanation of that reasoning. This is the only way that a client can make his or her wishes known to the court after death.
5.3 Beneficiaries

Most clients know who their beneficiaries are. However, they may not be aware of the different methods of leaving their property to those beneficiaries.

When discussing beneficiaries, ensure a client is aware of:

(a) those who are entitled to a share of the client’s property under the Matrimonial Property Act, RSA 2000, c M-8 and how this interacts with the will provisions,

(b) those who may claim benefit or support under the family maintenance and support provisions of the WSA,

(c) those who may make a dower claim under the Dower Act, RSA 2000, c D-15, and

(d) those who may claim possession of the family home.

Secondly, lawyers need to ensure a client understands that certain property or funds may already be spoken for or designated to individuals through joint ownership and direct beneficiary designations. Make the client aware that jointly owned property does not form part of the estate and that, by designating beneficiaries to instruments such as life insurance policies, pension plans, RRSPs, and RRIFs, these assets also do not form part of the estate but transfer directly to the named beneficiary upon death (see Insurance Act, ss 660-66; see also WSA, Part 4). Some pension-related legislation does not allow a pensioner to disinherit a spouse or an AIP.

Relating to property in joint ownership, determine whether a client intends the surviving joint tenant to take all of the benefit of the property on the client’s death. Alternatively, a joint tenancy may be an arrangement of convenience, under which a client intends for all of the children to benefit from property despite being held in the names of the client and only one child. Lawyers should make notes to document this discussion so that if any question arises about this after the client’s death, evidence of the client’s intention will exist.

If a client does not intend a joint owner to have the right of survivorship over a property, include provisions to that effect in the will.
For more on the presumption of advancement, resulting trusts, and the Supreme Court of Canada’s decisions in *Pecore v Pecore* and *Madsen Estate v Saylor*, refer to the content on “Advancement – transfers into joint names” under “Property excluded from an estate.”

When determining whether a client should designate beneficiaries under a will or by way of any other specific document (refer to the content on “Designated beneficiaries” under “Property excluded from an estate”), consider the client’s estate planning goals and the income tax implications. If he or she wishes to designate a beneficiary by way of a previous specific instrument, the client must check that the designations are still consistent with his or her intentions (particularly if a divorce, separation, or marriage has occurred). A subsequent divorce has no effect on beneficiary designations. By contrast, dispositions in a will are affected by a later divorce.

Beneficiary designations can be revoked in a will. Since they take effect on the date when they are made (not on date of death as a will does), it is good practice to confirm beneficiary designations in a new will or in a separate document signed after the will is signed. By making new designations, any suggestion that the revocation clause in the will revoked previous beneficiary designations can be avoided. For more information on beneficiary designations under these types of instruments, see Kary B Hargreaves, “Beneficiary Designations” (Paper delivered at LESA Refresher Course: Wills, Estates and Elder Law, 9 May 2007), (Edmonton: LESA, 2007). See also Nancy L Golding, “Challenges to Beneficiary Designations in Recent Case Law” (Paper delivered at the LESA Refresher Course: Wills, Estates and Elder Law, 8 May 2007), (Edmonton: LESA, 2007).

Where a client intends to exclude some family members from benefitting under a will, but not others, it is wise to document the reasons for the decision. Also, make clients aware of the effect certain dispositions may have on beneficiaries. For example, a gift may affect the amount a beneficiary receives under Alberta Income for the Severely Handicapped. Tax implications or disqualification from other benefits may far outweigh the benefit of the gift.

### 6 LIMITS ON TESTAMENTARY FREEDOM

One of the principles guiding the WSA is testamentary freedom. However, testamentary freedom is not an unlimited right. It is subject to the discharge of a deceased’s legal obligations. These obligations are governed by the *Matrimonial Property Act*, RSA 2000, c M-8 [MPA] and Part 5 of the WSA.
Spouses have the right to a share of the deceased’s property under the MPA. Spouses, AIPs, and other dependants have the right to claim family maintenance and support under the WSA. Successful claims alter how an estate is distributed. Clients should be advised of these limitations.

6.1 Rights of spouses - matrimonial property claims

A major change to the law surrounding matrimonial property division, proposed in 2012, was that married people would be entitled to their share of matrimonial property on the death of their spouse. This was to achieve consistency between Alberta and many of the other common law jurisdictions in Canada. The proposed amendments to the MPA reflected the principle that regardless of whether a marriage ends due to marital breakdown or death, a spouse should be able to claim an equal share of the property acquired during the marriage. This is because both spouses contributed equally to the marriage and to the accumulation of property during the marriage. For a detailed discussion of the policy reasons for a division of matrimonial property on death, see Alberta Law Reform Institute, Division of Matrimonial Property on Death, Final Report 83 (Edmonton: ALRI, 2000).

The proposed provisions, contained in s 117, were repealed while the government considers the impact of sharing matrimonial property on gifts to a spouse and others made by will (Statutes Repeal Act, SA 2013 c S-19.3 s 28).

Married spouses can still claim matrimonial property sharing on death “through the back door” under Tataryn v Tataryn Estate, [1994] 2 SCR 807, 1994 CanLII 51 [Tataryn v Tataryn Estate]. Draft wills with this in mind. If a surviving spouse is to receive the entire estate under a will, this does not affect how the will is drafted. If the surviving spouse is to receive none or only a portion of an estate, however, lawyers must consider how to draft the will, or otherwise plan with the client for assets to transfer, because the spouse will have a potential action available. It is the lawyer’s responsibility to explain the rights of a surviving spouse under the MPA and Tataryn v Tataryn Estate (as well as the family maintenance and support provisions in the WSA) to a testator who wants to leave none or some, but not all, of an estate to his or her surviving spouse. Once informed, the client must decide if the gift (if any) satisfies the MPA and Tataryn v Tataryn Estate entitlement. The lawyer must then draft the will accordingly, keeping detailed notes of the discussion, the decisions made, and the reasons for them. It is good practice to confirm the discussion and decisions in writing with the client. All of this may be used as evidence of the testator’s intention if there is litigation over the
surviving spouse’s claims. Under s 26 of the WSA, extrinsic evidence is admissible to determine a testator’s intention when interpreting a will.

There are several possible ways to write a will to reflect a client’s wishes in this regard.

1. A client may want to ensure that his or her surviving spouse receives only half of the matrimonial property, plus sufficient funds to support the spouse (as the spouse would be entitled to such funds under the MPA and Tataryn v Tataryn Estate and the family maintenance and support provisions). The will can be structured accordingly so that it is clear that any gift in the will is not in addition to the entitlement but is instead to satisfy it.

2. Spouses can have a matrimonial property agreement. This is especially useful in second marriage situations where the spouses have children from previous relationships. Section 37 of the MPA allows spouses to contract out of Part 1 of the MPA. The spouses agree which property will go to whom. Their wills reflect the terms of this agreement. The spouses must discuss this while they are both alive and have decision-making power. It is not left to a surviving spouse and a deceased spouse’s children to fight it out. While spouses may agree to contract out of the provisions of the MPA, it is against public policy for spouses to contract out of dependent claims. Spouses cannot contract out of the provisions of Part 5 of the WSA (i.e., the family maintenance and support provisions). Where matrimonial property sharing under Tataryn v Tataryn Estate is accomplished through the “back door,” the back door is a dependency claim. It is not clear whether spouses (and AIPs) can validly agree to forego their rights under the first part of Tataryn v Tataryn Estate—the legal claim—while being unable to agree to forego their rights under the second part—the moral claim.

3. A practice from other provinces is to allow a surviving spouse to choose between a gift in the will and a matrimonial property claim. The wording might be:

   It is a condition precedent of all gifts and benefits that I provide in my will for my spouse [NAME], that my spouse accept them in lieu of any claims my spouse might otherwise make against my estate under the provisions of any applicable matrimonial property legislation.

A will might also include a direction to a personal representative to defend any MPA claim that the spouse might bring, in order to uphold the testator’s wishes, and to pay the cost of the action from the estate.
4. A will might give a gift to a surviving spouse if he or she pursues a MPA claim but an even more generous gift if he or she does not pursue the MPA claim.

5. A will might say that any gift to a surviving spouse is to be reduced by the amount of any MPA order granted to that surviving spouse. This would need to apply to both money judgments and transfers of property in kind.

6. The marshaling rules determine the order in which assets in an estate are to be used to pay estate debts. Use the marshaling rules and state that any monetary judgment to a surviving spouse under the MPA is to be paid first out of property gifted to the spouse in the will and that the value of any property transferred in kind to the surviving spouse under the MPA reduces the gift made to the spouse in the will. Specific beneficiaries who were to receive the property now transferred to the spouse under an MPA order instead receive the value of the property in cash.

6.2 Rights of spouses and adult interdependent partners - family maintenance and support

A surviving spouse can bring both a matrimonial property claim and a claim for family maintenance and support. An AIP may only bring a claim for family maintenance and support. However, AIPs may still get their share of matrimonial property “through the back door” under the principles set down by the Supreme Court of Canada in Tataryn v Tataryn Estate and Kerr v Baranow, 2011 SCC 10, 2011 CarswellBC 240.

7 FUNERAL AND BURIAL ARRANGEMENTS AND DONATION OF ORGANS

Testators can include funeral and burial instructions in their wills. However, lawyers should advise testators that a personal representative has the right to make final decisions about the funeral and burial arrangements. Since a will is not usually read until after the funeral, it is generally preferable to leave instructions on funeral and burial wishes in a separate memorandum for the personal representative. A testator should also consider who would be most likely to fulfil his or her wishes in this regard when selecting a personal representative.

Section 36 of the General Regulation, Alta Reg 226/1998 (under the Funeral Services Act, RSA 2000, c F-29) lists those persons who have authority to dispose of the remains. The list is in order of priority, beginning with the personal representative, then spouses or AIP, then adult children, and so on.

A testator should notify family members and his or her personal representative of any wishes regarding organ donation. This can be the subject of a separate memorandum and is not
properly in a will, since harvesting organs must be done immediately after a person dies and the will is often not consulted until after the funeral.

Under s 9 of the Human Tissue and Organ Donation Act, SA 2006, c H-14.5, an adult must give written consent to organ use. The consent must be dated and signed by the donor and a witness or by two witnesses if the donor cannot sign for any reason. Consent may be given to use all or some body parts after death for transplantation, medical education, or scientific research.

8 TAX ISSUES

Most lawyers do not have the expertise required to give detailed legal advice on taxation matters. However, it is important to have enough familiarity with the tax consequences on death to be able to alert clients to them and of the need, where appropriate, to obtain the advice of an expert. In most cases, it’s advisable to obtain an accountant’s advice relating to family trusts, share dispositions, and other tax matters. If tax planning is already started by a client’s accountant, draft the will according to that plan.

8.1 Estate tax

There is no gift or estate tax in Canada. It was replaced in 1972 by the federal capital gains tax. The provinces abandoned succession duties at the same time.

There may, however, be estate tax and succession duties in jurisdictions outside of Canada where the client owns property or where the beneficiaries live. Lawyers need to review the nature and location of a client’s property in other jurisdictions and advise the client to get tax and legal advice in that jurisdiction. In those cases, it is important to consider whether the client should have a separate will only for the assets in that jurisdiction. If so, remember that the will for application in the foreign jurisdiction should not state that it revokes all other wills, and the will prepared in Alberta should not revoke the foreign jurisdiction will. As an extra protection, lawyers should consider drafting the will to revoke all others except the foreign jurisdiction will, specifically identified by jurisdiction and date (if known).

Further, lawyers need to determine their client’s citizenship. Estate tax in the United States of America [USA] is imposed on the worldwide property of USA citizens no matter where they are domiciled at their deaths. Therefore, lawyers also need to consider whether the will should contain a provision for payment of foreign estate taxes.
8.2 Capital gains tax

Since January 1, 1972, the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*Income Tax Act*] has provided that on death there is a “deemed” disposition of capital and certain depreciable assets passing to, or held in trust for, the beneficiaries of an estate. Under this deemed sale, the property is considered to be sold by the deceased immediately before death for a price equal to its fair market value (and depreciable property for a lesser amount). The purpose is to make any untaxed capital gains that accrued during the deceased’s lifetime taxable in the year of death. The capital gains from some types of property are tax-exempt.

8.3 Principal residence

There is no capital gains tax payable on the sale or deemed disposition of a person’s principal residence, as defined in the *Income Tax Act*.

The definition of “principal residence” in the *Income Tax Act* is about a page long. Generally, if the taxpayer has lived in the house for as long as he or she has owned it, it is likely to be the principal residence. If this is not the case, the property may or may not qualify as the principal residence. A person can only have one principal residence.

8.4 Spousal rollover

On the death of a spouse, certain property may be rolled over tax-free to the surviving spouse (including an AIP). This defers payment of the tax until the spouse sells the property or dies. The following conditions must be satisfied:

(a) The property must be transferred “as a consequence of death,” meaning pursuant to the will or intestacy, by virtue of an order for maintenance and support under the WSA, or through a disclaimer of other beneficiaries,

(b) The deceased taxpayer must have resided in Canada immediately before death,

(c) The transferee spouse or AIP must have resided in Canada immediately before the death of the deceased taxpayer, and

(d) The property must vest indefeasibly in the spouse within 36 months of the date of death.
8.5 Spousal trust rollover

In a testamentary spousal trust, a trustee holds property in trust for life for the spouse of a deceased. To qualify as a spousal trust, the following conditions must be satisfied:

(a) The property must be transferred “as a consequence of death,” meaning under a will, a WSA order, or a disclaimer of other beneficiaries,

(b) The deceased taxpayer must have resided in Canada immediately before death,

(c) The trust was resident in Canada immediately after the time the property vested indefeasibly in it,

(d) The property must vest indefeasibly in the spousal trust within 36 months of the date of death,

(e) The spouse or AIP is entitled to receive all of the income of the trust during his or her lifetime,

(f) No one other than the spouse or AIP may receive or otherwise have the use of the income or capital of the trust, and

(g) The trust was created by the deceased’s will, by court order under the WSA, or by equivalent legislation in other provinces.

8.6 Farm rollover

Qualifying farm property or shares of a qualifying farm corporation may be rolled over either to a spousal trust with a child of the deceased as residuary beneficiary or directly to a child of the deceased. The effect of the rollover is that the child acquires the property at the cost base of the deceased.

8.7 Capital gains exemption

The lifetime $100,000 capital gains exemption for individuals was revoked in 1995.

There remains a capital gains exemption for qualified farm property, shares of a family farm corporation, an interest in a qualified farm partnership, and shares of an Active Canadian Small Business Corporation (as defined in the Income Tax Act). In 2014, the government raised the exemption amount to $800,000 (indexed to inflation for subsequent years). There
are very complex rules concerning these additional exemptions under the *Income Tax Act*. Obtain expert tax advice when dealing with them.

### 8.8 Registered Retirement Savings Plans and Registered Retirement Income Funds

RRSPs are savings devices available to an individual to defer income tax until funds in the plan are withdrawn for retirement income. Contributions are deductible during the individual’s lifetime and the income in the plan accumulates tax-free. Unless an RRSP is subject to one of the exemptions under the *Income Tax Act*, its fair market value is included in a taxpayer’s income for the year of death.

If a spouse or dependent child is not the named beneficiary of an RRSP or RRIF, the deceased’s personal representative may make a joint election with the spouse or dependent child to claim a roll-over.

The *Income Tax Act* provides for joint and several liability between the estate and a beneficiary of an RRSP. This provision is to ensure that the Canada Revenue Agency receives payment of any taxes owing on death.

### 9 SAFEKEEPING WILLS AND INSTRUCTIONS TO AND FROM A CLIENT

After a will is signed, the issue of storage of the original document arises. Many lawyers provide an additional service to their clients and store original wills at their office in a fireproof and waterproof vault. The client is given a copy of the signed will. If a firm provides that service, the lawyer should advise the client to notify the personal representatives named in the will and to provide the personal representatives with the will’s location. Lawyers are, however, increasingly deciding against storing clients’ wills. This is because it is difficult to trace and hand over original wills to clients when clients change addresses and fail to inform their lawyers. This becomes a problem for lawyers who wish to retire, as well as when lawyers transfer firms.

Lawyers should always retain copies of previous, revoked wills. Despite best efforts, the most recent will may be considered invalid if a client is found to have lacked required testamentary capacity. The previous will would then be the valid will.

Further, keep a will file, including notes, instructions from the client, details discussing why, for example, a person was excluded from the will, the client’s appearance of capacity, and any suggestions of influence. If the will is ever challenged, a lawyer can rely on those notes.
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1 DRAFTING WILLS

Drafting wills is a technically difficult skill. Lawyers should use, but not slavishly follow, precedents to ensure that they do not overlook vital provisions while creating valid and enforceable provisions. Wills must be drafted using language that accurately represents the testator’s intentions. For more information on drafting wills, see Legal Education Society of Alberta (LESA) publications: Dana Chittick & Paul Dunn, “The Average Estate” (Edmonton: LESA, 2005) and the materials in LESA 40th Refresher Course: Wills, Estates and Elder Law (Edmonton: LESA, 2007). These materials represent an overview of issues to consider when preparing a will.

1.1 Plain language drafting

A will belongs to a testator, who must be able to understand it. Draft in plain language, which is easier for a testator and any beneficiaries and personal representatives to understand. For more information, there are numerous texts on the subject, including Robert C Dick, Legal Drafting in Plain Language, 3d ed (Toronto: Carswell, 1995).

Avoid older will precedents, which are typically clogged with unnecessary repetitions – a throwback to a time when Latin and French were the languages of the law and courts, while Anglo-Saxon was the language of the populace.

An example of this repetition is the often-used clause “I give, devise, and bequeath,” which uses words from Old English, Latin, and French to repeat the same idea. A similar example is “I nominate, constitute, and appoint.” In each case, one word is enough: “give” in the first instance and “appoint” in the second.

Historically, realty and personal property were treated differently. Wills traditionally dealt with real property and testaments dealt with personal property, hence the use of the phrase, “This is my last will and testament.” Today, however, there is no distinction between land and personal property, and there is no need to use both words; “will” is enough.

2 COMPONENTS OF A WILL

Wills generally have the following structure:

1. statement of intention and name,
2. revocation,
3. personal representative(s’) nomination and alternates,
4. general clauses with respect to personal representative(s),
5. debt payment,
6. dispositive clauses of specific and residuary property,
7. personal representative(s’) specific powers,
8. interpretation,
9. guardianship provisions, and
10. attestation clause.

More complicated wills contain more components.

Note that drafting wills requires more than the right components; it also requires that there are no internal inconsistencies or contradictions that leave the will open to misinterpretation.

For a sample will, refer to the appendices.

2.1 Statement of intention and name

A will must identify a testator by name and state that the document is a will (or codicil) by which the testator intends to dispose of his or her property.

There is no need to draft a statement like: “I, being of sound mind, make this will.” Testamentary capacity is not decided by the testator or by including or excluding such a statement. However, be aware that lawyers must address for themselves whether or not the testator has capacity to provide instructions regarding the contents of and signing the will.

If a person uses different versions of his or her name, include them all (for example, John Smith, also known as John A. Smith). It is important to use the version of the testator’s name that appears on any land title certificate, as the Land Titles Office wants a grant of probate to reflect the same name as is on the certificate of title.

**EXAMPLE**

Intention and name

```
WILL OF [name of testator]

This is my last will.
```
2.2 Contemplation of marriage

Under s 23(2) of the Wills and Succession Act, SA 2010, c W-12.2 [WSA], a will is no longer revoked when a testator marries or enters into an adult interdependent relationship on or after February 1, 2012. Therefore, it is no longer necessary to state that a will is made “in contemplation of marriage to [name]” in order to avoid revoking the will once the marriage occurs.

2.3 Revocation

A testator must state whether any previous wills and codicils are revoked. This ensures that his or her personal representative knows which will to administer for the estate. Usually, there is only one valid original will in existence at any time for any individual. There are some exceptions.

A special revocation clause may be used if a testator owns property in another country and made a will in that country that deals with the property. The testator may wish to leave that will in place to avoid future international probate issues. Having two wills in this circumstance is appropriate, as long as each will is designed to work with the other. In that case, a revocation clause may state that the will revokes all wills except the will dated ____, made in ______. This will address the desire to limit any other potential wills in this jurisdiction, but also remind administrators of the asset(s) and will dealing with the asset(s) in the foreign jurisdiction.

There has been some discussion about whether it is still acceptable to use the old phrase “I revoke all wills and testamentary dispositions of whatsoever nature and kind previously made by me.” The concern is whether this sentence revokes beneficiary designations affecting instruments like registered retirement savings plans [RRSPs] and life insurance policies, as these are testamentary in nature. The majority of cases have found that this kind of general statement does not revoke those instruments because the revocation is too vague. However, develop better practice habits and avoid the problem by not using this clause. It is also not plain English.
EXAMPLE

Revocation

   I cancel all my earlier wills and codicils.

   OR

   I cancel all my earlier wills and codicils made in Canada and which deal only with my
   Canadian property.

2.4 Appointment of a personal representative/executor

Every will should appoint a personal representative or executor. Some practitioners use the
term “personal representative” exclusively in wills, while others continue to refer to “executor
and trustee.” Both are acceptable. (It is likely that clients will be more familiar with the word
and concept of “executor.” Educate each client that the phrase “personal representative”
means the same thing as the client’s understanding of “executor.”)

An executor is the person who administers the estate after the testator’s death. (Note that
there can also be more than one person appointed as executor, or an executor can be a trust
company.) The executor is often, but not always, also the trustee of any on-going trusts that
are set up in a will. The roles of executor and trustee are distinct from one another. An
executor’s job is to deal with probate, make funeral arrangements, pay debts, and distribute
the estate. Once that is all taken care of, the trustee deals with any on-going trusts in the will
until they end. This may take years depending on the terms of the trust.

Usually, the executor and trustee is described at the beginning of a will as my “personal
representative” or “my trustee” or “my executor.” The individual(s) is then referred to in that
way throughout the rest of the will, making the will more readable.

Historically, a female executor or administrator of an estate was described as an “executrix”
or an “administratrix – an outdated practice. The gender-neutral title “personal
representative” is now typically used in Alberta since the implementation of the Surrogate
Rules, Alta Reg 130/1995 [Surrogate Rules]. This title includes executors, trustees, and
administrators.

A testator should name both an executor and alternates. The will should clearly state that it
is the testator’s wish that the named alternate be appointed if the first named executor
cannot complete the administration of the estate. This might be because the first named executor dies, becomes incapacitated, or does not wish to continue the task. Further, naming an alternate prevents the application of the “chain of executorship” rule, which dictates that if an executor has not completed the administration of an estate before the executor dies, the executor’s executor becomes the executor of the testator’s estate. Appointing an alternate to the executor avoids this outcome. Executors are often not only identified by their names but also by their relationship to the testator.

If two or more executors are appointed jointly and one dies or refuses to act, the other may carry on alone (see ss 41–42 of the *Estate Administration Act*, SA 2014, c E-12.5 [EAA]).

**EXAMPLE**

Appointment of personal representatives and alternatives

*In this will, my personal representative is both the executor of my will and the trustee of my estate, unless another is appointed as trustee.*

*I appoint [relationship to testator and name of personal representative] to be my personal representative.*

*If [name of personal representative]:*

- *dies before me,*
- *is unable or unwilling to act as executor,*
- *is unable or unwilling to continue to act as executor,* or
- *dies before the trusts in this will are completed,*

*then I appoint [relationship to testator and name of alternate personal representative] to be my personal representative.*

### 2.5 General clauses relating to personal representatives

Two or more joint personal representatives must act unanimously unless the will provides otherwise (EAA, s 37). Appointing two or more joint personal representatives can be a problem if they do not agree on matters. Therefore, where there are 3 or more joint personal representatives, a testator may wish to include a clause providing that the personal
representatives may make decisions on a majority basis or, where 2 are appointed and they disagree, that the first-named personal representative decides the issue.

It is necessary to keep the trusts created in a will as Canadian trusts for tax purposes. If the named trustees are non-residents of Canada, the Canada Revenue Agency [CRA] may deem that the trust is a non-resident trust, making it subject to the tax regime of the personal representative’s residency. For the drafting lawyer, this may create legal and liability issues that he or she does not want to deal with in the estate and with the beneficiaries. Avoid this by ensuring that the trustees or a majority of the trustees are Canadian residents for tax purposes, and consult a tax professional for additional information or advice in this area.

If a personal representative is a resident outside Alberta, the court may require the personal representative to post a bond, which can be expensive. To get around this, a testator may indicate in the will that the personal representative be permitted to administer the estate without a bond.

Some testators wish to include a will provision that the personal representative is not liable for any good faith conduct for administering the estate, regardless of any resulting loss due to the personal representative’s administrative decisions. This is the general law; there is no need to include this type of clause in a will.

EXAMPLE

Clauses about personal representatives

*My executors must act unanimously.*

OR

*My executors may act by majority vote.*

*My executor must be a Canadian resident to ensure the trust remains a Canadian trust for income tax purposes. If not, the appointment is or becomes invalid.*

*No bond is required if my executor is not an Alberta resident. I direct my executor to apply to the court to dispense with the requirement for a bond and I request the court to grant this application.*
2.6 Transmission

Under a will, a deceased does not give his or her property (real and personal) directly to the named beneficiaries on death. Rather, that property is temporarily transmitted to a personal representative, who has legal title during the time he or she administers the estate. The personal representative holds the property beneficially as trustee for the beneficiaries, under the terms set out in the will (EAA, ss 20–21). Real and personal property are transmitted to a personal representative in the same clause of a will.

EXAMPLE

Transmission

*I give all my property, wherever located, to my executor, in trust, to carry out the terms of my will.*

2.7 Debt payment

The personal representative must pay a testator’s debts from the estate before the net estate is distributed. The “debt payment” clause directs a personal representative to pay these obligations. This is generally drafted as a simple direction to pay expenses and legally enforceable debts. The testator may give more specific instructions and list specific debts. Common debts often specifically included are funeral and burial expenses, legal and testamentary expenses, taxes, and expenses associated with administering the estate.

A testator may specify which property to use to pay debts. Debts can be paid from the residue of the estate or from specific property. If a will does not specify the property from which to pay debts, they are first paid from the residue of the estate according to the marshalling rules. (For a discussion of marshalling rules, see the Alberta Law Reform Institute [ALRI] publication, Order of Application of Assets in Satisfaction of Debts and Liabilities, Report for Discussion 19 (Edmonton: ALRI, 2001)). If the residue is exhausted by paying the debts, then other property is used in a certain order. Section 27 of the EAA provides a ranking of debts where there is a deficiency.

Sometimes the marshalling rules create unfairness among beneficiaries. For example, the tax associated with the proceeds of a RRSP (which is fully taxable at the date of death as income in the testator’s hands unless a roll-over is available) is paid from the residue. If a RRSP is designated to one beneficiary and the residue of the estate is given to another, the
residue of the estate will be reduced by the taxes owed for the RRSP. As a result, the residuary beneficiary’s share has the effect of paying the tax on the RRSP but does not receive the RRSP. Estate planning lawyers should be aware of these rules, and advise the testator in case the testator wants clauses drafted so that the RRSP beneficiary is responsible for paying the taxes related to the RRSP.

Any real or personal property against which debts, charges, or liabilities are secured (including those prescribed by the *Personal Property Security Act*, RSA 2000, c P-7, or its equivalent federally and in other provinces) must be used first to pay the debt, charge, or liability (EAA, s 29).

### EXAMPLE

**Debt payments**

*My executor must pay my debts and estate administration expenses in the following order:*

1. **(a)** My funeral expenses, including the cost of a suitable marker,
2. **(b)** The costs of administering my property and the trusts I have created under my will, including legal fees and executor’s compensation,
3. **(c)** All taxes and duties levied against my property, and
4. **(d)** My legally enforceable debts.

**Tax on RRSP**

*I direct that any tax payable on the transfer of my RRSP [description of RRSP] must be paid by the beneficiary who receives the property. This beneficiary must reimburse my estate for any tax which the Canada Revenue Agency assesses against my estate and which my executor pays from my estate. The tax is to be calculated at my highest marginal rate.*

3 **DISPOSITIVE CLAUSES OF SPECIFIC AND PERSONAL PROPERTY**

3.1 **Household goods and personal effects**

Generally, household goods and furniture used by a married or cohabiting couple in their daily lives are considered joint property and become the property of the surviving spouse
after the death of the other. Personal effects are owned by the person using them. The survivor of a married or cohabiting couple is left to distribute the household goods and personal effects in his or her will.

Since no one knows who will die first, all testators need to deal with the distribution of household goods and personal effects. This is usually addressed in a separate clause, especially since this type of property is often not divided up according to value. The items may have little monetary value but hold great sentimental value, and are often the cause of difficulties among siblings or other beneficiaries. It is good practice to include in a will a method for dividing up the household goods if the beneficiaries cannot agree. Otherwise, the personal representative needs authority to make the decisions.

### 3.2 Memorandum of household goods and personal effects

A testator may wish to give certain specific household goods and personal effects to a specific beneficiary and to list them in the will. (For more information, refer to the content on “Specific gifts.”) However, these lists can become unwieldy; if a testator wants to change the list, the will may have to be re-done, or at the very least, a codicil addressing the changes will need to be prepared and properly signed and witnessed. Consider suggesting, as an alternative, preparing a memorandum of household goods and personal effects, incorporated into the will by reference. Through incorporation, the memorandum has the same legal effect as the rest of the will. A memorandum that is not incorporated is only precatory and has no legal effect; it is not part of the will and is only followed if all beneficiaries agree to do so. The memorandum must be prepared before the will is signed in order to incorporate it.

Many testators, however, like the option of preparing a memorandum in the future and will often change it many times. In that case, the memorandum must be prepared as a codicil to the will and follow the signing formalities. It is important to advise the testator about the different treatment of memoranda, understand what the testator wishes to do, and prepare the will accordingly.

This type of memorandum can cover items like jewellery, photos, clothing, souvenirs, personal correspondence, family heirlooms, goods and furnishings, artwork, collections, and so on. They are generally not used to make gifts of money or real property, bequests which are properly made in a will.
EXAMPLE

Specific gifts of household items

I give my china and silverware to my daughter, Mary.

I give my paintings to my son, Edward.

Memorandum incorporated by reference

Before I signed this will, I prepared and signed a memorandum in which I distribute certain household goods and personal effects. I incorporate this memorandum into this will for the purposes of distributing that property.

Memorandum prepared later as a codicil

I give those articles of household goods and personal effects as I may provide in a separate list to be prepared after my will is signed as a codicil to it.

Memorandum which will be precatory only

I may prepare written directions or other memoranda in which I distribute my household goods and personal effects. It is my wish that my executor carries out my wishes set out in the memorandum. I acknowledge that if such a memorandum is not incorporated into my will by reference or is not signed according to the signing formalities for codicils, then it is an expression of my intention only and is not binding on my executor.

Delivery of goods and method of division

The beneficiary of any items of household goods and personal effects must pay the delivery and storage costs of the items once my executor is in a position to deliver them.

Where I have not specified a beneficiary of any items of household goods and personal effects but such items are to be divided among beneficiaries, the division must be agreed by all the beneficiaries.

However, if the beneficiaries do not agree on the division of any items of household goods and personal effects, my executor must decide on a method of making this division, including by lottery, sealed bids, rotation of choice, selling the items, or any other method chosen by my executor whose decision is binding on the beneficiaries.
3.3 Specific gifts

When a particular item or a specific sum of money is left to a beneficiary, it is called a specific gift. Old terms used for specific gifts include “bequests of in kind property,” “legacies of money,” and “devises of land.” It is important when drafting a will to include these types of gifts before residuary gifts. Contrast a specific gift with a residuary gift, which comes out of what is left of an estate after debts are paid and specific gifts are distributed.

Accurately describe any specific gift so that a personal representative can identify it. A gift of “my diamond ring,” for example, can be confusing if the testator owns three diamond rings of various values. An unclear gift can require court determination of the testator’s intention.

Clearly identify the beneficiary receiving a gift both by name and relationship to the testator. Naming a beneficiary as “Joe” when the testator has both a brother and a cousin named “Joe” causes a problem.

**EXAMPLE**

**Specific gift of property**

_I give my shares in the ABC Company to my friend, James Latimer, of Edmonton, Alberta._

**Gifts of money**

_I give $10,000.00 to my cousin, James Stuart, of Edmonton, Alberta._

3.4 Gifts to charities

Many people make charitable gifts in their wills, whether for tax benefits or a desire to benefit their community. The gifts to charity may be specific property, a specific amount of money, or some or the entire residue of their estate. When including this type of bequest in a draft will, check the charity’s donor guide or webpage to ensure the charity’s full and correct legal name and address is used. The CRA website also contains a searchable list of registered charities.

Some considerations relating to charities include:

- Where there is no information on a particular charity, ask the testator for the information. This is important because if the right name cannot be ascertained,
there is a good chance that the executor will not be able to find it after the
testator dies. At that point, the testator will no longer be able to specify which
charity was intended.

- The testator may believe that a group is a charity, when it actually does not have
charitable status with CRA. If the expected tax benefits are not available, a
testator may want to re-think the choice to give or the amount or nature of the
gift.

- It is important to check that the charity has a charitable registration number with
the CRA before the will is prepared. If the charity does not, the testator’s estate
will not receive the benefit of a tax credit for the donation.

- Ensure that the will indicates which branch of the charity is to receive the gift,
such as the Edmonton or Calgary Branch of the Canadian Cancer Society (where
there is more than one).

- Many charities have particular clauses that they suggest for use in estate
planning. To ensure that a gift is properly directed to them, charitable
organizations are eager to share that information with estate planning
professionals.

- Charities may change their names or cease to exist. To account for this situation,
it is important to include a cy près provision in the will to allow the gift to be
directed to a charitable institution which reasonably approximates the original
charitable beneficiary.

- A testator may wish to direct a charitable gift towards a specific purpose, such as
missionary work or a building fund. This may be specified in the will or may be
included in a non-binding letter to the charity. If no specific purpose is set out, the
beneficiary charity may use the monetary gift for whatever purpose it sees fit,
with no obligation to consult the will’s executor.

EXAMPLE
Specific gift to charity

I give $100,000.00 to Holy Trinity Anglican Church, 10037 - 84 Avenue, Edmonton,
Alberta, to be used to fund the musical life of the parish.
OR

to be used as its vestry sees fit.

I give $500 to the Canadian Cancer Society, Edmonton, Alberta.

Cy près provision

I declare my general charitable intention regarding any gift to any charitable institution designated as a beneficiary in my will (the original charitable beneficiary) that does not exist at the time of my death.

Property I designated to a charity that no longer exists will be distributed as follows:

(a) to the charitable institution which appears to be the successor institution to the original charitable beneficiary, or, if there is no such successor institution, then

(b) to other charitable institution(s) with substantially the same or similar purposes to the purposes of the original charitable beneficiary, as determined by my executor.

3.5 Gifts paid only once

When spouses and adult interdependent partners [AIPs] make wills together, those wills typically mirror each other. The couple makes provisions for each other and for their children, after which each testator leaves his or her estate to charities or extended family members. In such cases, it is possible that each will provide for a specific gift to a certain beneficiary. Initially, it may seem like that beneficiary inherits the money twice—once when the first member of the couple dies and again upon the death of the other. To make it abundantly clear that they only intend for the beneficiary to receive the gift once, this must be drafted clearly in the wills.

EXAMPLE

Gift to be paid only once

My spouse has a similar provision to clause ___ in her Will. If my spouse predeceases me, I direct that this gift to [name of beneficiary] be paid only once, either from my estate or my spouse’s estate or from a combination of both estates.
3.6  Residuary gifts

After debts are paid and specific gifts are distributed, everything that is left in an estate is called the residue of the estate. In older wills, it was called “the rest and residue of my estate,” although for plain language reasons that clause is redundant and not necessary. Every will should designate the person, people, or charity intended to receive the residue. If there is no residue clause, the residuary property is distributed under the intestacy rules.

Lawyers can help clients to structure their estates so that the residue is distributed immediately to the beneficiaries, or so that the trustees are directed to hold it for any period up to that which is permitted by the rule against perpetuities.

Very often, couples simply transfer the whole residue, or the whole estate, to each other. After the death of one, each will usually directs that for whoever is the survivor, that person’s estate (which will contain their whole collective estate value) is to be divided equally among their children, or if there are no children (or grandchildren), then among both spouse’s siblings or other family, regardless of who dies first.

A will should also provide for what happens if the named residual beneficiary dies before receiving the residue. If it does not, there is an intestacy. Where beneficiaries are minors, draft trusts in the will so that the testator directs how the funds will be held and administered. For more information, refer to the content on “Trusts”.

EXAMPLE

Gift of residue to spouse/AIP

I give the rest of my property to my wife, Mary Smith.

Gift over to children (adults)

If Mary dies before me, I give the rest of my property equally among my children, to be distributed to them as soon as practical after my death.
Dependants and those unable to earn a livelihood because of mental or physical disability

Any person making a will is legally obligated to provide for his or her dependants. Dependants are now called “family members” (as defined in s 72(b) of the WSA). Family members include:

- spouses or AIPs,
- minor children,
- adult children who have a disability that prevents them from earning a livelihood,
- adult children still in school until 22 years of age, and
- in some cases, grandchildren and great grandchildren (see s 72(b)(vi)).

An adult child claiming to be a family member under s 72(b)(iv) of the WSA must prove to the court that he or she suffers from a mental or physical disability and is unable to earn a livelihood because of the disability (Soule v Johansen Estate, 2011 ABQB 403, 521 AR 238 [Soule v Johansen Estate]). From case law, examples of adult dependent children qualifying under s 72(b)(iv) include those who receive government assistance, are institutionalized, or those not “capable of self-sufficiency” (Soule v Johansen Estate at para 35).

While an inability to earn a livelihood should not be a result of laziness or personal lifestyle choices, an adult dependent child can choose not to work because of his or her health issues (Soule v Johansen Estate at para 39). It generally does not matter whether or not an applicant received or sought support from the testator during the testator’s life (Soule v Johansen Estate at para 30).

A mental or physical disability can be proven through evidence (Soule v Johansen Estate at para 36). Under the WSA, the court has broad discretion relating to what is relevant evidence. The ability to “earn a livelihood” has been interpreted by Alberta courts to mean the ability to earn adequate livelihood for one’s “proper maintenance and support” (Soule v Johansen Estate at para 35). This principle is similar to that of s 88(1) of the WSA.

In determining what is “proper maintenance and support”, the court takes into consideration each case’s unique circumstances (Walker v McDermott, [1931] SCR 94, 1930 CanLII 1 (SCC) [Walker v McDermott]). “Proper maintenance and support” goes beyond the necessities of life; the court considers, as reference, the standard of living that arises from
the circumstances surrounding each case (Stone v Stone Estate, [1994] 8 WWR 5, 1994 CanLII 8979 at para 9 (ABQB); Walker v McDermott at 94).

If a testator does not adequately provide for a family member, the family member may make a claim for maintenance and support under Part 5 of the WSA. Adult children who do not fall into these categories have no automatic right to receive anything from their parents’ estates.

For more information, refer to the content under the topics “Understanding Family Maintenance and Support” and “Applying for Family Maintenance and Support.”

Having recognized and dealt with any dependants, a testator has an infinite choice of residuary beneficiaries. The will must fully identify them by their names and relationships to the testator. Often, for clarity, their location is also included. The will must clearly state the portion of the residue that each person is to receive. If there is more than one residuary beneficiary, the will may use the words “in equal shares” or clearly state what portion each beneficiary is to receive and provide for what happens if the beneficiary predeceases the testator.

EXAMPLE
Gift of residue

I give the rest of my property in equal shares among:

- my nephew, Gordon White, of New Sarepta, Alberta
- my niece, Joanna Black, of Montreal, Quebec
- my niece, Valerie Green, of Prince Albert, Saskatchewan,

or to the survivors of them.

OR

I give the rest of my property as follows:

- 25% to my nephew, Gordon White, of New Sarepta, Alberta
- 25% to my niece, Joanna Black, of Montreal, Quebec
- 50% to my niece, Valerie Green, of Prince Albert, Saskatchewan.

If any of Gordon, Joanna, or Valerie dies before me, I give that share among the surviving residuary beneficiaries according to their proportionate share.
3.7 Trusts

A trust is created in a will whenever property does not pass immediately to a beneficiary but is held for some period of time first. The trust created by a will is called a “testamentary trust.” The person who holds the money is usually the executor, although specific trustees for specific testamentary trusts can be appointed if a testator so wishes. For more on trusts, see Donovan WM Waters, Mark Gillen & Lionel Smith, Waters’ Law of Trusts in Canada, 4th ed (Toronto: Carswell, 2012).

**Why set up a trust?**

A trust situation typically arises when a testator has minor children or other minor beneficiaries who are not legally allowed to inherit capital until they are 18 years old. A trustee must hold the funds in trust for the children. Parents often delay giving capital to their children past the age of 18 because they are concerned that if the children inherit too young, they will spend it foolishly. Distribution of capital can be spread over several age points. Trusts may also be set up for parents, spouses, or others. Whenever funds are placed in a trust, the will setting up that trust must provide for the possibility of the beneficiary failing to live long enough to receive all of the inheritance. Trusts have a lot of flexibility and can be tailored to meet a testator's needs. For example:

- children may receive part of their inheritance immediately on the death of the testator and the rest in trust over time,
- spouses may be given a trust for their lifetimes, with a gift over on the spouse’s death to children or others, or
- a trust may hold a matrimonial home in trust for a surviving spouse’s lifetime with provisions to deal with who is to pay the expenses like insurance, property taxes, utilities, and capital and minor repairs.

Also consider that trusts attract different tax treatment than gifts that simply flow to an adult beneficiary. Trustees will also need to file annual returns for the trusts, and will be entitled to annual fees for their work administering the trusts. These considerations may negate some of the intended benefits that a testator intends, particularly for smaller estates. Encourage testators considering long-term trusts to obtain tax advice to ensure that they understand both the benefits and the costs of setting up and administering the trusts over the long-term.
Trustee powers

Trustees were once required to maintain trust property in trustee-authorized investments under the *Trustee Act*, RSA 2000, c T-8 [*Trustee Act*]. This was unduly restrictive and imposed onerous obligations on trustees to convert unauthorized investments as soon as the trust property was received by the trustee. Conversion could cause losses to the estate when investments were prematurely sold.

In 2001, the *Trustee Act* was amended to address these problems. The new provisions contain a “prudent investor rule,” allowing a trustee to make reasonable investments, having regard to the value of the estate, tolerance for risk, and other relevant matters. The trustee may also hire a broker to handle the investments. The trustee has immunity from losses occasioned while the investments are delegated to the broker, provided that the trustee uses reasonable diligence in hiring the broker (*Trustee Act*, ss 3–8).

Creating a testamentary trust

Every testamentary trust must address:

- who the beneficiaries of the trust funds are,
- when the beneficiaries receive the trust funds during the term of the trust,
- when and how the trust ends, and
- what happens to the funds in trust if the beneficiary dies during the term of the trust.

Clauses dealing with an extended trust period must provide for:

- distribution or accumulation of income during the period capital is to be held,
- a power to encroach upon the income, capital, or both, for the benefit of the beneficiary (or whether the capital cannot be encroached on) and the extent of the personal representative’s discretion,
- whether the use of income or capital is restricted to a certain purpose,
- that the personal representative may need discretion to accumulate some or all of the income and to make unequal distributions of income,
• whether the distribution to several children should be delayed until the youngest or oldest reaches a prescribed age, or if the shares should be divided and paid as each child reaches the prescribed age, or if shares are to be divided immediately on death, and

• that capital may be distributed to beneficiaries at various ages or upon a condition precedent (trustees are normally given the power to encroach on capital for the benefit of minor beneficiaries if payment of the shares is to be delayed).

EXAMPLE

Trust for minor children

I give the rest of my property to my children, in trust.

My executor must initially hold the rest of my property in one trust for the benefit of my children.

When my (youngest/oldest) child then alive reaches the age of 18 years, my executor must divide the rest of my property equally among my children, in separate trusts. Children include those who survive me and those who die before me but whose children are then living.

The terms and conditions of the children’s trusts operate both before and after my executor divides the property remaining in the one trust into separate trusts for my children. All payments of income and capital from the trusts can only be made for the benefit of my children.

Terms of the trust

My executor must invest the property in the trusts to generate income.

My executor is to pay to my children directly, or to a third party for my children’s benefit, whatever portion of the income my executor decides is appropriate. Examples of a third party include a parent or an educational institute.

My executor must add any income earned, but not paid out in any year, to the capital of the trust and invest it.

If my executor decides it is appropriate, my executor may also pay out some or all of the capital to my children directly, or to a third party for my children’s benefit, such as a
parent or educational institution. This power to pay out capital extends as far as collapsing the entire trust.

While my executor holds the rest of my property in one trust for my children, my executor may pay out income and capital unequally to my children depending on each child’s needs.

After my executor divides the trust property into separate trusts, my executor may pay out income and capital only to the child who benefits from the trust.

Survivorship provisions

If any of my children

- dies before me, or
- dies before he or she receives all of the funds held in trust for him or her,

and if that child has living children, those children take their parent’s place and share their parent’s portion equally.

If any of my children

- dies before me, or
- dies before he or she receives all of the funds held in trust for him or her,

and if that child has no living children, my children (that is, those living and those who predeceased but whose children are living) take my deceased child’s share equally.

The directions in my will about investment of capital and payment of income and capital in the children’s trusts apply to any shares held in trust for grandchildren.

Distribution to children

My executor must pay each child his or her remaining share when the child is 23 years of age.

OR

My executor must pay each child his or her remaining share as follows:

(c) 25% of the share, when the child is 21 years of age,

(d) 33% of the remaining share, when the child is 25 years of age,
3.8 Family disaster clause

When giving will instructions, most people want to provide for their spouses or AIPs and children, and some also include grandchildren. Most do not plan past that point. However, an entire family can die in a common disaster, especially when the children are young and the family travels together. If the will does not provide for further beneficiaries, the intestacy provisions will apply.

A family disaster clause can respond to these situations.

Commonly, spouses use a family disaster clause to divide their estates between the two sides of their family. This type of clause also takes care of the circumstance where minor children, for whom funds are left in trust, fail to survive to the necessary age. Note that this clause does not say that the beneficiaries will inherit “if they survive me” because the triggering event is not necessarily the death of the testator, but could be a later point depending on whether funds have been left in trust. Testators may use this type of clause to make a gift to charity.

EXAMPLE

Family disaster clause

*If all of my property is not distributed under the previous clauses of my will, I divide the remainder of my undistributed property into two equal parts to be given as follows:*

- Transfer one part to my parents [names], in equal shares, or to the survivor of them, and
- Transfer one part to my spouse’s parents, [names], in equal shares, or to the survivor of them.*
4 ADVANCES, SET-OFFS, LOANS

After a testator dies, his or her personal representative must collect all debts owed to the testator. This can get complicated when the testator has made loans to his or her children. The children who received the loans often insist that their parent never intended them to repay the loan.

Subsection 110(1) of the WSA abolishes the common law presumption of double portions. Consequently, where a testator made a substantial transfer to a child during the testator’s life, after making a will that gives a beneficial disposition to that child, it is no longer presumed that the testator intended the transfer to be an advance or portion of the child’s share of the testator’s estate.

To avoid potential difficulties, insert a clause in the draft will that sets out the testator’s intentions about such a transfer. If the testator does not want the child to repay it, the testator can say so in the will. Conversely, the testator can require the transfer to be taken into account in the division of the estate so that all the children receive an equal share of the estate, regardless of whether the gifts were inter vivos or testamentary. If other beneficiaries allege that such a transfer is an advance on inheritance and should be deducted from the recipient child’s share of the estate, they have the onus of proving this allegation on the balance of probabilities. Corroborative evidence is required.

Note that this change in the law is not intended to interfere with the modern common law evolving in this area through rulings like those in Pecore v Pecore, 2007 SCC 17, [2007] 1 SCR 795, and Madsen Estate v Saylor, 2007 SCC 18, [2007] 1 SCR 838.

EXAMPLE

Gifts made during lifetime

When calculating the division of my estate, my executor must not take into account any gifts or loans my beneficiaries received from me during my lifetime by any means. Any outstanding loan amounts are forgiven. The beneficiary’s share of my estate is not reduced.

OR

During my lifetime, I loaned different amounts of money to my children. Any outstanding amounts which remain owing at my death are not forgiven. They are to be taken into account in the division of my estate.
account in the distribution of my estate. My children must either repay the outstanding loan amounts, or alternatively their shares are to be commensurately reduced. The records that I kept in connection with these loans are conclusive proof as to the amounts that were repaid and that are still owed to me by my children.

5 FAMILY MAINTENANCE AND SUPPORT DECLARATION

The WSA ensures that testators contemplate dependant family members in the wills. Subsection 88(1)(a) of the WSA provides that if a testator does not, in his or her will, make adequate provision for certain family members, those family members (spouses, AIPs, and minor children) can apply to the court for a change in the distribution of the estate to give them a greater share. Therefore, a testator who has just married or entered an AIP relationship for a second time, and who has minor children from a previous marriage or relationship, has two competing claims to balance. Ensure that a testator is aware of these WSA provisions when planning and drafting his or her will.

A testator in a second marriage or relationship may not wish to leave his or her estate to a new spouse or AIP, but rather to the children of a first marriage or relationship. Advise the testator of the applicable provisions of the WSA. If the testator still wants to leave a new spouse or partner out of the will, consider including in the will a declaration regarding the rights of certain family members under the WSA and the testator’s obligation to them. The purpose of this type of declaration is to give evidence that the testator made a conscious choice to make this distribution and to point out any relevant facts that support the decision. Another situation in which a married spouse might be left out of a will intentionally is during separation and divorce proceedings. An AIP may be left intentionally out of a will during the one-year separation period that ends the relationship.

Although spouses and AIPs can enter into pre- and postnuptial agreements and cohabitation agreements dealing with the disposition of their property on death, they cannot contract out of statutory family maintenance and support provisions.

For more information, refer to the content under the topics “Understanding Family Maintenance and Support” and “Applying for Family Maintenance and Support.”
EXAMPLE

Declaration regarding claims of family members to maintenance and support

I have been advised of the provisions of Part 5 of the Wills and Succession Act of Alberta. I am writing this will with these in mind. I am completely satisfied that those I am responsible for are well taken care of and that I am providing for the proper maintenance and support of my spouse by way of joint property and life insurance policies.

At the time of signing this Will, I am separated from and in the process of obtaining a divorce from my spouse, [name]. I therefore do not wish my spouse to share in my estate, but wish my estate to pass to the beneficiaries designated in this Will.

6 ADMINISTRATIVE PROVISIONS AND SPECIFIC POWERS

As a general rule, a personal representative is bound by the same rules as any other trustee. The Trustee Act and the common law afford certain rights and impose certain responsibilities and limitations on a personal representative. Therefore, it is important that all wills grant other specific powers in addition to those provided for in the Trustee Act. The general rules can be changed or confirmed by administrative clauses within a will.

7 STANDARD POWERS OF THE PERSONAL REPRESENTATIVE

Once a testator sets out instructions for what his or her personal representative is to do, the personal representative needs sufficient authority to carry out those instructions. Lawyers must apply their knowledge of succession, trust, family, and tax law in advising a testator on what is needed to achieve the desired dispositions in the will. At least some powers need to appear in every will.

EXAMPLE

General powers

Except where to do so would conflict with the express provisions of this will, I give my executor the following powers.
This clause contains the words “except where to do so would conflict with the express provisions of this will” because the powers given to a personal representative must not inadvertently create a conflict or inconsistency between a power and an earlier disposition. For example, a power to sell real property may conflict with a gift of that real property to a beneficiary.

Absent a reason to want to limit a personal representative’s discretion, they are usually given very wide discretion to carry out their duties. This is because when a will is signed, the testator cannot know all of the possible circumstances that the personal representative will have to deal with after the testator’s death.

Section 20 of the EAA outlines the broad powers of a personal representative subject to the will.

7.1 Power to sell or retain

A testator may want his or her personal representative to have the flexibility to decide which property the personal representative may sell or retain. Under the common law, all property must be converted to an income-producing asset. This would force a sale of non-producing assets (such as the matrimonial home). If the testator does not want this, he or she should say so in the will.

**EXAMPLE**

Power to sell or retain property

*My executor has the authority to sell my property but also to keep my property and investments, including real property, in the same form as they are in when I die. The power to keep my property in its original form continues for as long as my executor is administering my estate. This is so even if there is a debt against any of the property or it does not produce income.*

7.2 Power to distribute property

A testator may want his or her personal representative to have flexibility in how and when gifts are distributed.
EXAMPLE

Power to distribute land or personal property

My executor may divide and distribute any part of my property without first converting it into cash.

The property received by each beneficiary need not be identical. However, the division must be as close as practical to their shares.

My executor’s decisions about the values of this division are binding on the beneficiaries.

7.3 Power to invest

Investment clauses in wills have changed in the last few years. The Trustee Act, which governs trustees, was amended to allow for a greater choice of the type of investments personal representatives are allowed to put in place. At one time, the Trustee Act provided a list of acceptable investments (the so-called "legal list"). If a will did not provide otherwise, the personal representative was limited by that legal list. Now that the list has been abolished, wills no longer need to provide that a personal representative is not limited to those investments allowed by law.

The standard set out in the Trustee Act is that of the “prudent investor.” (For a discussion of the legal list and the prudent investor rule, see Alberta Law Reform Institute, Trustee Investment Powers, Final Report 80 (Edmonton: ALRI, 2000)). This means that any kind of investment is allowable as long as the personal representative exercises reasonable skill and prudence and follows the general guidelines set out in the Trustee Act. Prudent investments include purchasing mutual funds, which was not previously allowed because it represented an improper delegation of powers by the personal representative. The personal representative may still need power to retain property that earns no income.
EXAMPLE

Power to invest

*My executor must adhere to the prudent investor standard when investing my property. However, my executor may depart from the prudent investor standard by holding real property and items of household goods and personal effects if my executor decides it is reasonable to do. To make such a decision, my executor must consider my circumstances and family situation at my death.*

7.4 Power to delegate

By default, personal representatives may not delegate their powers. However, it is usual for a will to expressly allow some delegation, given that it is impractical to expect a personal representative to have all the specialist skills necessary to carry out the administration of an estate. Rule 9 of Schedule 1, Part 1 of the *Surrogate Rules* contemplates delegation to agents. Agents contemplated by a delegation clause include, but are not necessarily limited to, lawyers, realtors, investment advisers, accountants, appraisers, and tax preparers.

Although a personal representative may delegate some tasks, such as listing and selling a house, personal representatives cannot delegate any judgment calls, such as deciding whether or not to accept a specific offer to buy the house.

EXAMPLE

Power to employ professional advisors

*My executor may employ professional advisors to help administer my property and then must pay them from my estate for their services.*

7.5 Power to pay taxes

As personal representatives are responsible for the completion of personal and estate tax returns and payment of taxes, it is customary to give them the maximum amount of flexibility in order to carry out these duties.
EXAMPLE

Taxes

My executor may make any elections or other decisions allowed by the Income Tax Act (Canada) and other tax legislation. To do so, my executor may rely on advice from specialists in this area and is not liable for any adverse consequences to my estate or the beneficiaries in so doing.

8 OTHER SPECIFIC POWERS OF THE PERSONAL REPRESENTATIVE

After including the standard personal representative powers in a will, the need for any additional powers depends on each testator’s specific situation, needs, and instructions. If a testator owns real estate, his or her personal representative needs the power to sell or otherwise deal with the property.

EXAMPLE

Power to deal with land and buildings

My executor has full discretion to manage any land and building forming part of my property, including:

(a) Repairing, renovating, removing, or adding buildings,

(b) Selling, mortgaging, leasing, or otherwise disposing of the property,

(c) Employing a person or company to manage the property.

8.1 Power to deal with a business

Where a testator owns a business (either as a sole proprietor or in any other business structure) or is involved in a partnership, corporation, personal corporation, or joint venture, his or her personal representative needs a power that allows the personal representative either to wind up the corporation or to carry on business until it can be sold or transferred.
**EXAMPLE**

Power to carry on business operations

*My executor may carry on any business in which I was involved and I appoint my executor as a director of any corporations of which I was a director and shareholder. This appointment takes effect immediately on my death.*

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**9**  
**EXECUTOR’S COMPENSATION AND EXONERATION**

**9.1 Setting the fee**

An executor is entitled to be paid for work done as an executor, as well as being reimbursed for out-of-pocket expenses.

A will may be silent about personal representative compensation, leaving the issue to the general law. In Alberta, Schedule 1 of the *Surrogate Rules* sets out rules and charging principles for determining personal representative compensation. Alternatively, a will may specify the amount a personal representative is to be paid. This may be a set amount or a percentage of the estate value. Both the personal representative and the beneficiaries are bound by this provision. Personal representatives cannot pre-take their compensation unless the beneficiaries agree, the court orders, or the will says so. Where there is more than one personal representative, any one fee is split among them.

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**EXAMPLE**

Personal representative compensation - amount not set

*For acting as my executor and trustee, my executor is entitled to compensation as described in the fee guidelines for surrogate matters. This is in addition to any gift that I give my executor as a beneficiary in my will.*

*My executor is entitled to receive pre-payment of compensation on the first anniversary of my death and annually after that until my executor completes administering my estate.*

*My executor should immediately pay himself or herself from my estate for any reasonable expenses my executor incurs in administering it.*
Set fee

<table>
<thead>
<tr>
<th>My executor is to receive compensation of $25,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>OR</td>
</tr>
<tr>
<td>My executor is to receive compensation equal to 3% of the net value of my estate</td>
</tr>
<tr>
<td>and is also to be reimbursed for the reasonable out-of-pocket expenses incurred by my executor in so acting.</td>
</tr>
<tr>
<td>The net value of my estate is the value of my property after paying all of my liabilities, including my funeral expenses and taxes.</td>
</tr>
<tr>
<td>If I have named two persons to act as my executor, they must divide the 3% of the net value of my estate between them as they shall agree.</td>
</tr>
</tbody>
</table>

9.2 Professional charging clause

If a testator appoints a personal representative who is also a lawyer, accountant, or realtor (or anyone else who might reasonably be expected to provide professional services to a personal representative for a fee), it is prudent to include a professional charging clause. This clause distinguishes between services provided by the personal representative in the role of a personal representative and those provided by the personal representative in a professional capacity. If the estate had paid a third party for the service, it is reasonable that it would pay the personal representative for the same service, in addition to normal personal representative compensation.

A testator cannot name a law firm as a personal representative; he or she can only name a specific lawyer. If a testator wants the personal representative to use a firm with which he or she has a relationship, he or she can recommend that firm to the named personal representative. However, the ultimate decision about which firm to retain to help with administration of the estate is made by the personal representative.
EXAMPLE

Professional charging clause

If my named executor is in a profession or business and provides that professional service or business to the estate, then he or she must be paid for that service, and reimbursed for any disbursement or other expenses my executor incurs for my estate in that professional or business service. This is separate from the executor duties and related fees and charges that he or she is also entitled to.

These professional fees may include services provided by my executor or his or her firm to probate my will and administer its trusts, in the same manner as if the executor was not an executor of my estate.

In addition, my executor must be paid reasonable charges in addition to disbursements for all work done and time spent by my executor and his or her firm and partners to administer my estate. This includes matters which an executor not being a professional person may personally complete, but who might reasonably require to be done by a professional agent.

I recommend that my executor retain the law firm of [name] or any successor firm to do all necessary legal work in connection with my estate.

9.3 General exoneration clause

A personal representative is a fiduciary and, as such, is held to a high standard of care. A personal representative who fraudulently or negligently causes a loss to a trust or estate can be held personally liable for the loss. However, personal representatives are not held liable for things beyond their control, such as the general state of the economy or natural disasters, as long as they act in good faith. This may be acknowledged in the will; however, as it is the general law, this clause is not necessary.

EXAMPLE

General exoneration clause

My executor is not liable for any loss to my estate or to any beneficiary due to any discretion given in my will and exercised in good faith by my executor.
10 SURVIVORSHIP

It is good practice to include a survivorship clause in every will.

While it is possible to end every gift made in a will with the words “if (s)he survives me” or “if (s)he survives me by 30 days,” this is not recommended. Counsel must then catch every instance in which the survivorship clause needs to be used for all the dispositions in the will. Develop a pattern of drafting that instead includes one blanket clause that sets the amount of time that beneficiaries must survive the testator in order to receive their inheritance. This ensures that it both applies to all clauses, as well as results in an easier to read, less cluttered document for the clients.

A survivorship clause avoids the costs of administering the same property twice: once in the testator’s estate and again in the beneficiary’s estate, where the beneficiary has died within the survivorship period. Common survivorship periods are 10 to 30 days. Longer periods are not recommended because they delay the estate administration for no useful purpose.

**EXAMPLE**

Survivorship clause

Any beneficiary must live for 30 days after my death in order to receive any benefit from my estate.

11 IN TERRUREM OR FORFEITURE CLAUSES

To stop beneficiaries or other family members from contesting a will, some testators consider including an in terrorem clause in their will. Under an in terrorem clause, if a person who is a beneficiary in a will contests that will, he or she forfeits their inheritance. Without more, these clauses are invalid.

A valid method of attempting to ensure that a will is uncontested requires including a gift over in the clause. It must state who inherits the forfeited share if the original beneficiary contests the will. For more on in terrorem clauses, see David J Koski, “In Terrorem Clauses - Putting the Spouse to an Election - Implications of the In Terrorem Rule and Conditions Void as Against Public Policy” (Paper delivered at the LESA Drafting Considerations under the Wills & Succession Act program, 3 November 2011), (Edmonton: LESA, 2011).
EXAMPLE

Forfeiture clause

Any beneficiary named in this will who commences an action for a greater share of my estate [the contesting beneficiary] forfeits the share of my estate that the contesting beneficiary would receive if he or she did not commence the action. Instead, I give the contesting beneficiary’s original share to [name].

12 INTERPRETATION CLAUSES

12.1 Definitions

Define words and phrases in a will through interpretation clauses. For example, a testator may wish to define “my children” to include stepchildren or define “my grandchildren” to include children of a child’s spouse who are not blood grandchildren of the testator.

In Alberta, an executor and trustee of a will is referred to as a “personal representative,” defined in the WSA. As some wills are probated in another jurisdiction, a definition may be included explaining that the position of personal representative is the same as executor and trustee and the same rights and responsibilities are associated with both positions.

12.2 Interpretation

A typical interpretation clause stipulates that the usage of a masculine or singular term encompasses the respective female and plural forms, as required. It is good practice to include this clause to ensure that there can be no dispute over the use of gender or number in a will.

EXAMPLE

Interpretation clause

This will must be read with all changes of gender or number required by the context.
12.3 Common words and phrases

Ensure that legal terms are used properly. Plain language writing does not use Latin expressions since it is doubtful that many non-lawyers understand their meaning. Some words and phrases to avoid might include:

- **Per capita**: by heads or polls, according to the number of individuals,
- **Per stirpes**: by roots or stocks, by representation (where a named beneficiary predeceases a testator, the next “branch” in the named beneficiary’s family tree takes the gift), and
- **Issue**: all lineal descendants born either inside or outside marriage.

Develop drafting skills that explain a testator’s intentions using plain language in English. Note, however, that s 66 of the WSA continues to use the phrase *per stirpes*, and it is still common to see the expression “in equal shares *per stirpes*” used when a testator wishes descendants of a deceased beneficiary to take the share of that beneficiary. However, a bequest “to my children alive at my death in equal shares *per stirpes*” does not make sense. That is because the normal meaning of “children” is limited to the first generation following the deceased person, while *per stirpes* includes all generations. This can lead to confusion about whether the testator wished to limit gifts to the children and ignore the *stirpes* other than children. When such phrases are used in a will, keep in mind that the testator must understand the meaning of the phrase being used. If he or she does not, then the language used in the drafting must reflect the testator’s understanding.

Be particularly wary of using the term “issue” where a testator may only intend that a gift goes to a child or grandchild. The term “issue” refers to all descendants.

The WSA now uses “descendants” instead of “issue” in the intestacy provisions. Further, the WSA no longer refers to “heirs” and “next of kin”; rather, “beneficiary” appears throughout the entire WSA.

13 GUARDIANS

13.1 Appointment

A testator may appoint someone to look after his or her minor children if the testator dies before the children reach the age of majority.
The surviving parent of minor children already has custody rights. Therefore, a guardianship clause is typically worded to take effect where the other parent has predeceased the testator. Alternate guardians can also be appointed.

A divorced, non-custodial parent has the legal right to assume custody of minors on the custodial parent’s death. If a testator has a reason why he or she does not wish the other parent to assume guardianship, include that reason in his or her will. Consider, however, that a will becomes a public document once admitted to probate. A client may prefer to set out in a statutory declaration or affidavit the reasons why the other parent should not be a guardian, which can later be admitted as extrinsic evidence if there is a contest. (See also the Family Law Act, SA 2003, c F-4.5, s 22). Providing reasons will not necessarily mean that the testator’s wishes will be followed. It is, however, a way to get the testator’s wishes and reasons before a court. The court has ultimate jurisdiction to decide on the guardianship of minors and acts in the children’s best interests.

**EXAMPLE**

Guardianship clause

*If my [name of other parent and relationship] dies before me and any of my children is a minor when I die, I appoint [name(s) of guardian(s)], as the children’s guardian.*

*If [name(s) of appointed guardian(s)] dies before me, or is unable or unwilling to act as guardian when I die or at a later time, I appoint [name(s) of alternate guardian(s)], as their guardian instead.*

Guardianship clause where testator is divorced/separated

*If my children’s other parent wants guardianship and my children object or my guardians believe this would not be best for them, my guardians must take all reasonable legal steps to get custody of my children. My executor must pay the legal fees for so doing from my estate.*

*I believe that it is not in my children’s best interests that their other parent have custody of them because [reasons for not appointing other parent as guardian].*
13.2 Payments

On the death of both parents, where a trust is created under their wills, a personal representative is obligated to make payments of income for the benefit of the deceased parents’ children.

The personal representative typically arranges for the guardians of the children to receive funds each month from the funds that the children will eventually inherit. The money is intended to support the children so that they are not a financial drain on the guardian. The amount paid varies with the size of the trust funds, the rate of investment return, the ages, and the number of children. Payments can continue after the children are 18 years old. In addition to a payment of income, a testator may give a personal representative the power to encroach on capital. These clauses vary widely.

EXAMPLE

Guardianship directions

I do not wish to financially burden my guardians as a result of entrusting them with the care of my children. I direct that my property be made available to my guardians to pay the cost of medical expenses, clothing, feeding, educating, and providing a home for my children. It is more important that my children have a secure, happy, and comfortable home life while they grow up than to preserve their inheritance for later. My guardians are not obligated to account in any way for the manner in which the funds are spent.

If my children are over 14 years of age, my guardians must consider my children’s wishes about where they want to live.

13.3 Renovations

Testators can stipulate in a will that the minors’ funds can be used to renovate their guardian’s house to accommodate extra people, or for other expenditures, for example, to allow the guardian to buy a bigger car. Testators should state who keeps the benefit of these funds.
14 BURIAL/CREMATION/FUNERAL INSTRUCTIONS

Section 6 of the EAA sets out the need to properly dispose of remains and make funeral arrangements. Personal representatives have the legal right to dispose of remains in any way that they see fit, regardless of a testator’s instructions.

Including instructions for burial or cremation in a will continues to be a popular idea. Note, however, that statements of wishes regarding disposition of remains by a testator are not legally binding on a personal representative, and often, a will is not read and such statements are not viewed until long after the funeral and burial arrangements are completed. To find out that the family or personal representative did the “wrong” thing not in keeping with the testator’s stated wishes can be very traumatic. For that reason, encourage testators to keep such a statement out of the will, and instead to advise the personal representative and other family of the wishes either in person, in a letter, or by other means. Further, instructions for burial or cremation in a will are also merely precatory: a statement of the testator’s wishes only. Nevertheless, most personal representatives do their best to follow the testator’s wishes.

EXAMPLE

Funeral wishes

I want my remains cremated and the ashes scattered as my executor decides

OR

I want my remains cremated and the ashes scattered [describe location].

OR

I want my remains buried at [where remains are to be buried].

I wish my funeral arrangements to be dignified, simple, and inexpensive.

It is my wish that on my death there shall be no funeral or memorial service.

OR

It is my wish that a mass be said for me at [location].
15 ATTESTATION CLAUSE

Every will must be signed by the testator in front of two witnesses (unless it is a holographic will).

While not a requirement, it is good practice to direct a testator and witnesses to initial each page of the will, providing some substantiation that none of the pages were altered. If pages are being initialled, it is important that no pages are missed in this process.

Importantly, s 21 of the WSA voids a disposition to an individual who acts as a witness to a testator’s signature in a will (with some exceptions listed in s 21). Failure to ensure that appropriate witnesses are used can leave a lawyer liable in negligence to the witness/beneficiary whose gift is voided (Graham v Bonycastle, 2004 ABCA 270 at para 18, 354 AR 266).

The WSA does not require a specific attestation clause, but most traditional wills contain an attestation clause similar to the one below.

EXAMPLE

Attestation Clause

I signed my will and initialled the previous [#] pages on [date].

[name of testator]

[name of testator] signed this will in our presence and we then signed this will in his/her presence and in the presence of each other.

Witnesses:

[name, occupation and address of witness] [name, occupation and address of witness]
16  AFFIDAVIT OF SIGNATURE TO A WILL

For a will to be probated, one of the witnesses must swear Form NC8, “Affidavit of witness to a will” (Surrogate Rules, Schedule 3 [NC8 Affidavit]), proving that the will was signed by the testator before two witnesses and in the presence of each other. The NC8 Affidavit requires a notation below the signatures and on the front or back of the last page of the will indicating that the will is “Exhibit A” to the witness’ NC8 Affidavit. To apply to court for a grant of probate, additional notations are required on the front or back of the last page of the will. All of these notations can be made on the will when it is signed, although the balance of the notations will not be completed until it is time to submit the will to the court in an application for a grant of probate.

Many estate planning lawyers develop a practice of completing this document at the time the will is signed and attaching it to the original will, as part of their practice and service to their client.

A common error made on an NC8 Affidavit prepared after a testator dies is in the paragraph in which the affidavit asks for a description of any changes made to the will before it was signed. This refers to any handwritten changes, words crossed out and initialled, spellings corrected and initialled, etc. The witness swearing the affidavit must check carefully to see whether there were any changes made and note them. Otherwise, changes are assumed to have occurred later and are not valid, unless they follow the rules about alterations to wills.

From time to time, there is an issue about whether writing the date by hand when a will is signed amounts to a “handwritten change” to the will. Some judges believe that it does and therefore want it noted on the NC8 Affidavit, but most judges feel that the date is part of the jurat, not the body of the will, and do not require the handwritten date to be noted on the NC8 Affidavit.
EXAMPLE

Witness' notation

This is Exhibit A referred to in the affidavit of [name of witness], a witness to this will.

Sworn before me at Edmonton, Alberta, on [date]

A Commissioner for Oaths in and for Alberta
[name of commissioner and commission expiry date]

Applicant's notation

This is the will referred to in Schedule 2 and is Exhibit A to the affidavit of [name of witness], a witness to this will.

Sworn before me at Edmonton, Alberta, on [date]

__________________________________________
A Commissioner for Oaths in and for Applicant
Alberta
[name of commissioner and commission expiry date]

Justice of the Court of Queen’s Bench of Alberta

17 PRECEDENTS

Precedents may be useful to focus the drafter on the task and to provide some guidance with respect to form. There is a particular tendency in the wills area to rely strongly on precedents, because many firms charge only a nominal amount for a will, and the time required for an originally drafted document far exceeds the fee. As well, there are many ways for the will to fail, and it is simpler to rely upon commonly used precedents.

However, it is wise to be wary of older precedents. They are almost certainly not drafted in plain language. They may not take into account changes in the law of tax and succession, interpretation of long-standing terms of art, or modern approaches to estate planning and distribution. Every testator and every will is unique. Modern, less traditional families make estate planning more challenging and less likely that every client will fit a standard "one size fits all" style of will drafting approach. Carefully consider whether particular precedential clauses reflect the testator’s intention or are written in language that the testator, personal representative, and beneficiaries can understand. Many estate disputes arise from a disagreement on what a will really means.
Considering the importance of a will and the liability that could arise in this area, wills are considerably undervalued. A drafting lawyer may be called on to testify at a trial about competency, duress, and the testator’s intentions. Given the significant risk associated with wills and their importance to each testator, take great care in drafting them.

18 SOME OTHER CONSIDERATIONS

18.1 “Absolutely”

A frequent mistake made in wills is including the word “absolutely” at the end of sentences that give gifts. For example:

    I give my friend, LOIS LANE, the sum of $10,000 absolutely.

The effect of this word is poorly understood by lawyers and, unfortunately, using it incorrectly sometimes causes a will to end up in court. It is one of those words that has a specific legal meaning that may not be the same as the popular meaning of the word.

When, as in the example above, Lois is given $10,000 absolutely, it means that if Lois dies before the testator, Lois’ estate gets the $10,000 because it was given to her absolutely, or irrevocably. The testator cannot choose to give it to anyone else. If that is what the testator wants, there is no problem.

However, the problem arises when the $10,000 is given to Lois absolutely, followed by another sentence saying that if Lois predeceases the testator, the $10,000 goes to someone else instead or falls back into the residue. Those two instructions are contradictory, with the result that the personal representative ends up in court asking the judge to interpret the will. It’s better to avoid using the word and instead spell out exactly what the testator intends.

18.2 Beneficiaries

Be sure to use the correct and full name of any beneficiary referred to by name or by relationship dependent on birth or marriage. Also, be sure that those referred to by relationship are recognized in law as having that status.

Where possible, anticipate and provide for

- unusual sequences of deaths,
- an adoption or birth of additional people whom the testator might wish to include as beneficiaries,
• divorce or marriage breakdown,
• a loss of mental capacity by a beneficiary, and
• payment of legacies to children.

18.3 Lapses/gifts over

A lapse occurs when a beneficiary predeceases the testator. As the beneficiary no longer exists, the gift cannot be distributed as provided. Assume a bequest is:

I give $5,000 to my friend, Mary Smith.

If Mary dies before the testator, there is no bequest and the gift “lapses.” If the testator does not want that gift to go to anyone else, and to simply fall into the residue, the provision should read:

I give $5,000 to my friend, Mary Smith, if she survives me.

However, if the testator would like the gift to go to a different beneficiary, the will should provide a “gift over.” A gift over reads:

I give $5,000 to my friend Mary Smith if she survives me, but if Mary Smith dies before me, then I give this $5,000 to my friend, Fred Jones.

Be aware of the legislative rules that apply to lapsed gifts and the potential for unintended results. Section 32 of the WSA is an “anti-lapse” provision. If there is no gift over, a gift to a child who has died before a testator does not lapse but is given to the surviving descendants of the child per stirpes. (For an explanation of this term, refer to the content on “per stirpes” under “Common words and phrases”). This does not apply to gifts to any other categories of relatives.

For example, a testator leaves one-half of the residue of his estate to his son. The son dies before the testator, leaving a wife and two children. The share is distributed equally between the son’s children. The wife receives nothing.
Given the content of the anti-lapse provision in s 32 of the WSA, gift-over provisions in a will are important. In order to avoid the results of the anti-lapse provisions, always include gift-over provisions, particularly for the residue. Ask the testator:

- “If X dies before you do, who receives this property?”, and
- “If both X and Y die before you do, then who receives the property?”

Get exact instructions from a testator about what happens if a child beneficiary predeceases the testator. If the testator does not want to benefit the grandchildren, then an alternate beneficiary of the gift must be named. The will can also instead stipulate that the beneficiary receives the gift if (s)he survives me.

18.4 Ademption

Problems can arise when specific articles or heirlooms are gifted. If the article does not exist or cannot be found on the testator’s death, the gift will fail or “adeem.” To avoid problems, consider suggesting that, where a testator wants a specific article to go to a specific person, the testator gives the item to the intended beneficiary while the testator is still alive.

Otherwise, if it is a testator’s intention to benefit a specific beneficiary in some manner, provide for it in the will and make sure that the possibility of the gift adeeming is addressed. Consider this disposition:

I give my gold ring to my friend, Mark Smith.

If the testator loses the ring during his lifetime, Mark does not get anything from the estate. This may not be what the testator wanted. The testator may have intended to substitute something else for the ring:

I give my gold ring to my friend, Mark Smith, but if I do not have a gold ring at my death, I give $2,000 to Mark Smith, if he survives me.

18.5 Difficult beneficiaries

There will be instances when a testator wishes to do something that may be controversial within his or her family or likely to incite a challenge. In these cases, take clear and concise notes. It’s also a good idea to describe in the will the reasons for the testator’s decisions, so that the beneficiaries (or those who expected to be and who are not) and the court know what was in the testator’s mind when he or she made his or her will. For example:
If the testator wishes to benefit a helper or friend in preference to family, obtain specific reasons and take detailed notes. It is useful to put the reasons in the will or in a letter from the testator to family members so that they have an explanation,

If someone received an advance on the estate portion or if debts are owed by a beneficiary, the testator needs to provide exact details about any gifts or loans made during life and whether they are advances or are to be forgiven in order to prevent any conflict when the estate is distributed,

If a person is to be “cut out” of the will, detailed instructions must be obtained and specific statements to that effect may be drafted into the will to prevent the disappointed beneficiary from claiming a drafting error, and

It is preferable to divide the shares into parts instead of percentages to prevent confusion about gifts over and to prevent incomplete distributions.

18.6 Gifts to minors

If a minor may benefit from an estate, ensure that the testator understands that outright gifts of capital cannot be distributed under a will until the minor is at least 18 years old, which can delay the final administration of the estate. Discuss with the testator at what age the minor is to receive the gift. If there is no provision, he or she will receive it at the age of majority.

If a gift to a minor is large, the testator may want to split the gift up into phases, to be given, for example, at ages 18, 21, and 25.

If a minor benefits under a will, the will must give the personal representative power to hold the funds for the minor’s benefit, with the power to pay income or capital to or on behalf of the minor. For more on trust arrangements for minor beneficiaries, see the materials in “trusts” under “dispositive clauses of specific and personal property.”

Usually, a will provides a personal representative the power to encroach on the capital, giving the personal representative the discretion to assess the needs of a minor and make any payments he or she feels necessary. For example, a testator may want to give the personal representative the power to pay for a minor’s college or university costs (before obtaining the age of majority or the age of distribution). The power may be unlimited or limited.
Another consideration is whether to give the personal representative the power to pay the funds or provide an item to a minor’s parents or guardians before becoming 18. A will may also give a personal representative the power to transfer the funds or items directly to a minor and accept the minor’s receipt for the goods before the child reaches the age of majority.

If a will grants none of these powers, a minor’s interest must be deposited with the Office of the Public Guardian and Trustee [Public Trustee] until the minor reaches the age of majority or distribution. The alternative is to have a minor’s parent appointed as trustee for the minor. Parents are not automatically their children’s trustees. It requires a court application under the Surrogate Rules and often posting a bond.

The Public Trustee must, in some jurisdictions, administer gifts to minors. If a will is probated in a different jurisdiction, a personal representative may be required by law to pay a minor’s funds to the Public Trustee or an equivalent government agency.

18.7 Gifts to social assistance recipients

Special considerations apply when a testator makes a gift to a recipient of social assistance benefits.

If a beneficiary receives benefits under the Assured Income for the Severely Handicapped Act, SA 2006, c A-45.1, ss 3(3)(c)-(d), there is a limit to the total property a beneficiary can hold without affecting the Assured Income for the Severely Handicapped [AISH] benefits received. Specifically, an AISH recipient must not hold funds totalling more than $100,000 (s 3(3)(d)). Anything over these prescribed limits will affect, and possibly cancel, the AISH benefits and services otherwise available to an AISH recipient. However, the Assured Income for the Severely Handicapped General Regulation, Alta Reg 91/2007 states that certain property and income are exempt from income calculation (see schedules 1–2; for example, an adapted vehicle and a home). The Alberta government website provides information that may assist in this situation. For clients with a beneficiary or potential beneficiary who is or may become an AISH recipient, consult resources related to structuring an estate in that situation. As well, consider consulting with estate planning lawyers with particular expertise in this area.
18.8 Protecting disability benefits

In some provinces (e.g., Ontario and British Columbia), specific trusts known as “Henson trusts” can be set up to safeguard a beneficiary’s social assistance benefits. If a disabled person is a beneficiary of a discretionary trust and his or her interest in the trust is subject to a trustee’s discretionary power, holding that trust in and of itself will not cause the beneficiary to lose access to any government services. Because the beneficiary of that trust has no right to any of the income or capital, he or she is not considered to be entitled to that trust property or trust income. Only the amounts actually distributed will be included in the disabled person’s income for purposes of calculating property when determining eligibility for government services. Estate plans can, therefore, ensure that only the amount that will meet eligibility requirements will be paid out. However, in Alberta, discretionary trusts are not exempt from the AISH rules, and the use of Henson trusts will not work.

Given the unavailability of a Henson trust, testators should consider whether they wish to provide a benefit to an AISH recipient and other disabled people through a Registered Disability Savings Plan, which may be held in addition to receiving full AISH payments. (For more information, see Monica Johnston, “Registered Disability Savings Plans and Registered Education Savings Plans Tips and Tricks for Estate Administration” (Paper delivered at the LESA 44th Annual Refresher Course: Wills & Estates, 2 May 2011), (Edmonton: LESA, 2011)). These plans can give generous amounts to disabled persons and qualify for generous government contributions.

18.9 Mutual wills

Spouses and AIPs often make wills that contain the same provisions. They are virtually identical except for the names of the testators. These wills may be called mirror wills or reciprocal wills, but they are not mutual wills. Unfortunately, the term “mutual will” is often used incorrectly by non-lawyers (as well as by lawyers who are not regular estate planning lawyers). Testators may ask a lawyer to draft mutual wills when what they mean are mirror wills.

Unlike mirror wills, mutual wills contain a specific agreement that the parties will not change the distribution set out in their wills, except by mutual agreement. It is a contract between the parties to distribute their estates in a certain way and, specifically, to not change their wills without the consent of the other.

The law of constructive trust applies to these wills and agreements.
The trusts contained in mutual wills are only revocable if both parties agree. The result is that after the death of the first party, the surviving party is not able to change his or her will. For more on mutual wills, see Thomas G Feeney & Jim Mackenzie, Feeney’s Canadian Law of Wills, 4th ed (Toronto: Butterworths, 2000) at paras 1.44–1.60.

Mutual wills are becoming increasingly used in second marriage situations where the spouses wish to provide for each other but they also want to provide for their children of a previous relationship. The testator must understand that if mutual wills are prepared and one party dies, the surviving party cannot change his or her will to accommodate a further marriage or relationship (even if there are children), changes in financial circumstances, changes in will legislation, or estrangements with family members.

18.10 Codicils

A codicil is a supplement, addition, or change to a previously signed will. A codicil does not revoke the entire will, but it may revoke some part of the original will, or change, add, or delete provisions in it. A codicil cannot stand on its own without a will, but it may be in holographic form. If the codicil is not in holographic form, the same formalities with respect to will signing must be followed.

18.11 A note about holograph and home-made wills

While the general public knows that people can make their own wills, there is a lot of confusion about how to do so. A holograph will must be completely in the maker’s handwriting. Will kit forms with blanks to be filled in, or those downloaded from the Internet, printed, and then signed, are not holograph wills, unless the handwriting on the pages can by itself be read separately as a testamentary document while ignoring the printed words (Re Romaniuk Estate (1986), 74 AR 278, 1986 CanLII 1757 (Alta QB)). Further, a holograph will cannot be handwritten by someone else and then signed by the testator.

A holograph will may be challenged on the grounds of lack of capacity.

Generally speaking, the problems that arise with do-it-yourself or home-made wills are:

- failure to appoint an executor,
- failure to clearly identify items to be given away,
- giving away things that the testator does not actually own,
• failure to dispose of all of the estate property, usually by listing every major asset
  the testator owns and forgetting that assets change over time,
• failure to fully identify a beneficiary,
• using nicknames or pet names for beneficiaries,
• failure to plan for payment of taxes,
• failure to give trustees adequate authority, particularly with respect to dealing
  with real property or business interests,
• using words that the testator does not understand or trying to use “legalese,”
• failure to date the document,
• putting unlawful conditions on gifts,
• making incorrect assumptions about the law based on popular ideas seen on
  television or in books,
• accidentally setting up trusts by using language that is not clear (e.g., giving
  someone “access to” an account rather than giving him or her the account), and
• including things in a will that belong in other documents (e.g., instructions
  regarding being removed from life support, which unfortunately have no legal
  validity until the testator is already dead).
## CHAPTER 5
### UNDERSTANDING FAMILY MAINTENANCE AND SUPPORT

1. **Family maintenance and support**

2. **History of family maintenance and support**

3. **Availability of relief**
   - 3.1 Adequate provision for proper maintenance and support
   - 3.2 *Tataryn v Tataryn Estate*
   - 3.3 Statutory and other bases for support obligations
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4. **Legal and moral obligations**
   - 4.1 Legal obligations generally
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5. **Qualifying for family maintenance and support**
   - 5.1 Categories of dependants
   - 5.2 Factors considered on application for relief
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6. **Introduction to temporary possession of a family home**

7. **Definition of a “family home”**

8. **The right to temporary possession of a home and household goods**

9. **Obligations and rights of the estate**

10. **Obligations and rights of a surviving spouse and effect of an order**

11. **Temporary possession and the *Matrimonial Property Act***
1 FAMILY MAINTENANCE AND SUPPORT

Dependant relief legislation allows dependants to claim against the estate of a deceased who fails to adequately provide support for dependants through a will, or on intestacy. The Wills and Succession Act, SA 2010, c W-12.2 [WSA] carries forward frameworks from previous legislation regarding dependant claims and expands the class of dependants and provisions dealing with occupying the matrimonial home. The underlying principle of testamentary freedom continues, but this principle is balanced against the principle that dying Albertans—testate or intestate—must provide for their dependants.

2 HISTORY OF FAMILY MAINTENANCE AND SUPPORT

When dependant relief legislation was first introduced in Alberta, only widows were able to receive relief through the Married Women’s Relief Act, SA 1910 c 18 (2nd Sess) and later, the Widows Relief Act, RSA 1922, c 145 [Widows Relief Act] in 1922. The Widows Relief Act allowed a widow to apply for relief where, in the opinion of the court, she would receive less by her husband’s will than if her husband died intestate. The court was empowered to make a “just and equitable” allowance to a widow from the estate of her husband.

It was not until 1947, when the Widows Relief Act was repealed and replaced with the Testator’s Family Maintenance Act, SA 1947, c 12 [Testator’s Family Maintenance Act], that the potential dependant relief applicants were expanded to include children and widowers. Over time, the Testator’s Family Maintenance Act was further amended and renamed, becoming the Family Relief Act, RSA 1955, c 109 in 1955 and then the Dependants Relief Act, RSA 2000, c D-10.5 [Dependants Relief Act] in 2003.

When the WSA repealed and replaced the Dependants Relief Act, as well as other legislation, its introduction carried forward the law allowing dependants to claim support from the estate of a deceased, while still making some changes.

Over the last 100 years, family maintenance and support legislation has further expanded in scope, relating not only to who can apply for relief but also the amount and type of relief a court can grant.

For a thorough discussion of the general principles that apply to all family maintenance and support applications made in Alberta, extracted from the legislation and case law, see the Legal Education Society of Alberta [LESA] publication: Anne S de Villars, QC & Dawn M Knowles, “For Mercy’s Sake: Principles of family maintenance and support in the 20 years

3 AVAILABILITY OF RELIEF

Alberta law operates under the premise of testamentary freedom, which was reflected in the repealed Dependants Relief Act and continues in the WSA. Based on that premise, the courts do not interfere with the distribution of an estate in a will unless absolutely required; to do so impacts the ability of a testator to decide where to distribute his or her property (Gavinchuk v Mickalyk, 2003 ABQB 849, 27 Alta LR (4th) 291). This non-interference principle, except in special circumstances, also applies to an intestacy distribution.

3.1 Adequate provision for proper maintenance and support

Under the Dependants Relief Act, courts retained the discretion to determine if additional support was warranted given the specific circumstances of a case. A court could order “adequate” provision for the “proper maintenance and support” of dependants. The WSA presents no substantive change to what a court can order on an application for relief. That is, the court may order “adequate” provision for the “proper maintenance and support” of a family member (WSA, s 88). Therefore, the same principles apply.

When an individual made an application under the Dependants Relief Act, the court would decide the following issues:

(a) Whether the individual was a dependant as defined in the Dependants Relief Act,

(b) If yes, whether the dependant had been properly provided for according to a will or intestate succession legislation,

(c) Where there was not adequate provision, whether the dependant had done anything that would disqualify him or her from the court varying the distribution (Re Kinsella Estate, 2004 ABQB 664, 11 ETR (3d) 275), and

(d) Whether the distribution set out in the will or under the intestate legislation should be varied to provide more for the dependant.

Under the WSA, when deciding on a family maintenance and support order for a dependant, the court has a broader discretion than it did under the Dependants Relief Act over what it takes into consideration, including any matter or evidence that it considers relevant (WSA, s
93). The court may also consider any reasons a testator had for not making adequate provision for a dependant, including any statement in writing signed by the deceased (s 93(e)). For instance, a deceased could have given his or her dependant substantial sums of money while alive, arguably making additional funds unnecessary on death (Webb v Webb Estate, [1995] 6 WWR 52, 1995 CanLII 9299 (Alta QB) [Webb v Webb Estate]). For more on s 93 of the WSA and the factors for court consideration on a family maintenance and support application, refer to the content under the topic “Applying for Family Maintenance and Support.”

3.2 Tataryn v Tataryn Estate

In Tataryn v Tataryn Estate, [1994] 2 SCR 807, 1994 CarswellBC 283 (SCC) [Tataryn v Tataryn Estate], the Supreme Court of Canada conducted an in-depth analysis of dependent relief law. Although Tataryn v Tataryn Estate involved a consideration of British Columbia legislation, general principles from this case have been adopted in Alberta (Re Rubis Estate, 2006 ABQB 381, 2006 CarswellAlta 624 [Re Rubis Estate]). In Tataryn v Tataryn Estate, the testator feared that if he provided for his wife under the terms of his will, the estate would eventually fall into the hands of an estranged son favoured by the wife. To avoid that, he left his wife a life estate in the matrimonial home. The court held that the deceased was required to provide for his dependants, and the wife was entitled, at a minimum, to what she would have been granted had her spouse survived and the couple separated or divorced. In coming to this conclusion, the court found that there are both legal and moral obligations requiring a deceased to provide for his or her surviving dependants to avoid any potential burden on other members of society.

3.3 Statutory and other bases for support obligations

There are several different legislative avenues through which legal obligations may arise. For example:

- The Divorce Act, RSC 1985, c 3 (2nd Supp) [Divorce Act] requires that individuals provide for the maintenance and support of their spouses,

- The Matrimonial Property Act, RSA 2000 c M-8 [MPA] legislates the distribution of property acquired over the course of a marriage, and

- The Dower Act, RSA 2000, c D-15 [Dower Act] provides for certain real property rights with respect to a homestead of a married person.
In addition to these statutory rights and obligations, the doctrines of constructive trust and unjust enrichment recognize individuals for their involvement and contribution to a relationship. These legal obligations may be met if a deceased provides adequate support to meet the needs of his or her dependant. In other instances, a greater proportion may be allocated to a dependant by a court (Tataryn v Tataryn Estate at paras 29–30).

In Tataryn v Tataryn Estate, McLachlin J discussed the moral obligations imposed on a deceased to provide for dependant individuals. The determination requires analysis of “what a judicious person would do in the circumstances, by reference to contemporary community standards” (Tataryn v Tataryn Estate at para 28; see also Walker v McDermott, [1931] SCR 94, 1930 CanLII 1 (SCC) [Walker v McDermott]). The court in Walker v McDermott commented at p 96:

What constitutes “proper maintenance and support” is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view) consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

Factors considered in assessing moral obligations typically include the nature of the relationship between the parties and the contribution of a claimant to the deceased’s estate (Re Broen Estate, 2002 ABQB 806, 324 AR 396 at paras 12–20 [Re Broen Estate]).

For more on moral and legal claims, refer to the content on “Legal and moral obligations.”

3.4 Rights of spouses and adult interdependent partners

A surviving spouse can bring both a matrimonial property claim under the MPA and a claim for family maintenance and support under the WSA. In contrast, an adult interdependent partner [AIP] may only bring a claim for family maintenance and support under the WSA. However, AIPs may still get their share of matrimonial property “through the back door” under the principles set down by the Supreme Court of Canada in Tataryn v Tataryn Estate.
For more on Tataryn v Tataryn Estate, refer to the content on “Limits on testamentary freedom” in “Interviewing and Advising a Client Seeking a Will.”

Part 5 of the WSA, which contains the family maintenance and support provisions, has two divisions. Division 1 deals with the temporary possession of the family home; division 2 deals with maintenance and support.

4 LEGAL AND MORAL OBLIGATIONS

In deciding whether provisions are adequate for the proper maintenance and support of a family member, the court considers the legal obligations and moral obligations owed by a testator to family members. Together, these legal and moral norms provide a guide to what is adequate provision for proper maintenance and support (Petrowski v Petrowski Estate, 2009 ABQB 196, 466 AR 59 [Petrowski v Petrowski Estate]; Re Lafleur Estate, 2014 ABQB 698, 2014 CarswellAlta 2087 at para 42 [Re Lafleur Estate]).

Tataryn v Tataryn Estate and Re Stang Estate, 1998 ABQB 113, [1998] 7 WWR 551 [Re Stang Estate] are the leading cases on the application of the “legal-moral” test in determining what is “adequate, just and equitable in the circumstances” (Re Stang Estate at para 22). Re McKenna Estate, 2015 ABQB 37, 2015 CarswellAlta 58 [Re McKenna Estate] is a recent court decision involving many of the issues involved in this area of the law. The court in Re McKenna Estate applies Tataryn v Tataryn Estate to unravel the issues of legal and moral obligation (at paras 14–23).

Under this test, a court first looks at any legal obligations (or equivalents) that would have been imposed by law on a testator during his or her lifetime. The court then looks at the testator’s moral obligations. These are the community standards and values which could be reasonably expected to measure adequacy and propriety in the circumstances of a testator and his or her family (Koma v Tomich Estate, 2011 ABCA 186 at para 17, 505 AR 372 [Koma v Tomich Estate]; Petrowski v Petrowski Estate).

Legal and moral obligations “arise separately and must be considered separately” (Petrowski v Petrowski Estate at para 451). There can still be moral obligations even where there is an absence of legal obligations. In general, legal obligations have priority over moral claims, and the court must rank the competing obligations (Petrowski v Petrowski Estate at para 452).
There are many ways to divide an estate in an adequate, just, and equitable way. Unless a testator’s will fails to meet his or her legal or moral obligations, the courts should not easily interfere with a testator’s will.

4.1 Legal obligations generally

With respect to legal obligations, there is a “desirability of symmetry between the rights which may be asserted against [a] testator before death and those which may be asserted against [his or her] estate” after the testator’s death (Tataryn v Tataryn Estate at 821; see also Re Siegel Estate, 177 AR 282, 1995 CanLII 9233 [Re Siegel Estate] at para 32; Re Stang Estate at paras 22-32; Petrowski v Petrowski Estate at para 446). This means that a legal obligation enforceable upon a testator while he or she was alive should remain enforceable against his or her estate after death.

Additionally, the court in Petrowski v Petrowski Estate said that legal obligations include claims flowing from family support legislation that arise only on the death of a testator. The court went further to suggest that such a claim should be ranked in the same manner as a legal obligation that arose during the testator’s lifetime. However, Moen J suggests, in obiter, that legal obligations from the testator’s lifetime take precedence over legal obligations arising upon death (Petrowski v Petrowski Estate at para 592).

Some courts have used terms such as “guide,” “yardstick,” and “starting point” to describe certain legal obligations, for example, obligations arising from the Divorce Act, RSC 1985, c 3 (2nd Supp) [Divorce Act] and obligations of living parents to their children (Tataryn v Tataryn Estate at 821; Re Siegel Estate at para 38; Re Spinelli Estate, 1998 ABQB 966 at para 12, 229 AR 137 [Re Spinelli Estate]). Likewise, courts have also stated that maintenance and support allocations, which the law would have supported during a testator’s lifetime, “should be reflected” in the court’s interpretation of what is adequate, just, and equitable (Tataryn v Tataryn Estate at 821). In Alberta, these allocations are reflected in a court’s interpretation of what is an adequate provision for the proper maintenance and support of a family member.

However, other courts have suggested that legal obligations represent the minimum amount a family member is entitled to (see Re Stang Estate at para 29). According to this view, a surviving spouse is entitled to at least the same allocation of matrimonial property as that to which he or she would have been entitled had the spouses separated before the testator’s death (Re Gow Estate, 1998 ABQB 1073, 238 AR 39 [Re Gow Estate] at para 77).
4.2 Legal obligations to spouses

Spouses are entitled to a share of an estate, the size of which depends on the length of the relationship, contributions made by the claimant spouse, and the desirability of independence (Re Stang Estate at para 29). While the legislation does not give much guidance about the desirability of independence, this principle is generally weighed against the need for support. There are some other unique legal obligations that developed from case law. For example, in Re Lafleur Estate, the court noted that the deceased had a legal obligation to support his spouse’s mother whom he had co-sponsored for permanent residency.

With respect to claims by a surviving spouse, legal obligations are generally found in matrimonial property principles, the Divorce Act provisions dealing with spousal support, unjust enrichment/constructive trust principles, and, possibly, the Dower Act, RSA 2000, c D-15 [Dower Act]. For more information on unjust enrichment, refer to the content under the topic “Legal obligations to adult interdependent partners.”

Under s 2 of the WSA, if there is a conflict between the Dower Act and a provision of Parts 2 or 3 of the WSA for a surviving spouse’s property rights, the Dower Act prevails. However, s 2 does not mention Part 5 of the WSA, which deals with family maintenance and support.

In such cases of overlap, the courts have been inconsistent on whether or not dower rights take precedence over family maintenance and support claims. There are cases that group dower rights into the legal obligation analysis (see Re Broen Estate; see also Re Stadler Estate, 2001 ABQB 408, 290 AR 179). In Carlson v Carlson (1983), 49 AR 117, 1983 CarswellAlta 412 (Alta QB), the court took the view that it could not override the widow’s dower rights. Further, Re Nelson Estate, 2013 ABQB 15, 2013 CarswellAlta 372 [Re Nelson Estate] suggests that dower rights take priority over family maintenance and support claims. However, if a court wants to make adequate provision for a dependant, the court has the ability to make an order conditional on a spouse relinquishing dower rights and interest (Re Nelson Estate at paras 49–52).

For a case dealing with whether a party can waive dower rights in a prenuptial agreement, see Re Starosieliski Estate, 1998 ABQB 651, 238 AR 112.
4.3 Legal obligations to adult interdependent partners

Where a family member is seeking an order for proprietary interest in property, he or she must make a separate application claiming unjust enrichment and constructive trust. Where a family member is claiming relief under family maintenance and support, and not a proprietary interest \textit{per se}, no separate claim is necessary, as the court will consider unjust enrichment principles as a part of the legal obligation analysis.

Legal obligations to adult interdependent partners [AIPs] are found in these unjust enrichment principles. For this cause of action, 3 elements must be established:

- an enrichment,
- a corresponding deprivation, and
- an absence of a lawful reason for the enrichment.

On the other hand, constructive trusts are generally remedial. While there is a difference between these two terms, they are often used interchangeably. Unjust enrichment claims are usually brought by disappointed individuals who want a share, or a larger share, of an estate than what they received through a will.

For a discussion on the principles of unjust enrichment, including the three elements, appropriate remedies, and how to value a monetary claim, see \textit{Kerr v Baranow}, 2011 SCC 10, [2011] 1 SCR 269 [\textit{Kerr v Baranow}]; see also Jason L Wilkins and Shale Monds, “\textit{Kerr v. Baranow} - The Wages of Sin Revisited” (Paper delivered at LESA's Matrimonial Property Division, 20 January 2015), (Edmonton: LESA, 2015). Although \textit{Kerr v Baranow} does not deal specifically with a family maintenance and support claim, its discussion also applies to claims of unjust enrichment made under such claims. For further information, see \textit{Lemonine v Griffith}, 2014 ABCA 46, 2014 CarswellAlta 150, dealing with the issue of division of property in common law relationships, and \textit{Koma v Tomich Estate}, where the Court of Appeal stated (at para 16):

\begin{quote}
... a claim for relief under the [Dependants’ Relief] Act is not intended to be a surrogate method of advancing a constructive trust claim. Such a claim is an assertion of a proprietary interest in the property of the deceased, and does not depend on the exercise of any judicial discretion under the Act. A claim under the Act, on the other hand, assumes that the applicant has no proprietary right in the assets in question, and seeks a statutory redistribution of those assets. The two types of claims are based on inconsistent assumptions about the true ownership of the property in
\end{quote}
question. What the applicant might have received on a hypothetical break up of the relationship is more important in determining what sort of ongoing support the applicant should receive under the Act, rather than as a basis for the redistribution of property. If the applicant claims a proprietary entitlement under a constructive trust claim, that claim should be advanced directly.

4.4 Legal obligations to children

Legal obligations to minor children are imposed by the Divorce Act provisions dealing with child support, federal and provincial child support guidelines, and any other legislation dealing with the support of minors (e.g., Family Law Act, SA 2003 c F-4.5 [Family Law Act]). In Re Lafleur Estate at para 38, the court rejected an argument that the interests of the surviving spouse (who was also the caregiver and guardian of the deceased’s children) and the interests of the minor children were the same. Greckol J held that such an argument, which was successful in Re Woycenko Estate, 2002 ABQB 640, 315 AR 291, ignores the eventuality that a surviving spouse may remarry, as well as the desire of the deceased to preserve a portion of the estate for the children without it being vulnerable to a third party who becomes involved with the surviving spouse.

Under the WSA, a testator may also need to make adequate provisions for an adult dependent child. For more information, refer to the content under the topic “Categories of dependants” in “Adult Interdependent Relationships”.

4.5 Moral obligations

Moral obligations are norms found “in society’s reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards” (Tataryn v Tataryn Estate at 821). Moral claims “vary in strength on the basis of social expectation” (Petrowski v Petrowski Estate at para 452). Slatter J (as he then was) alluded to the subjective nature of assessing moral claims in Re Stayko Estate, 2002 ABQB 1005, [2003] 3 WWR 649 [Re Stayko Estate]. Citing from Tataryn v Tataryn Estate, he commented at paras 10 and 21 that the “identification and valuing of moral obligations is of course a matter of some inherent uncertainty”. Some moral claims may be stronger than others, and it is up to a court to “weigh the strength of each claim and assign to each its proper priority” (Tataryn v Tataryn Estate at 823; See also Petrowski v Petrowski Estate at para 452). For example, in Re Kinsella Estate, 2004 ABQB 664, 11 ETR (3d) 275 [Re Kinsella Estate], an adult dependent child was denied relief over and above other beneficiaries based on his
character and conduct, including his demonstrable lack of need and his sporadic work history.

A moral claim is limited to the size of an estate and any legal and moral claims that have priority.

**Surviving spouses**

In general, the moral claim of a surviving spouse is considered of the highest order. This recognizes that marriage is an economic unit to which both parties contribute and a surviving spouse is entitled to be provided for in his or her final years (Tataryn v Tataryn Estate at 824; Re Boychuk Estate, 2008 ABQB 38, 439 AR 313 [Re Boychuk Estate]; Re Broen Estate at para 19; Re Stang Estate at para 53; Re Gow Estate; Re Nelson Estate at para 36; Re Birkenbach Estate, 2015 ABQB 3, 2015 CarswellAlta 4 [Re Birkenbach Estate]; Re McKenna Estate at paras 17–23).

**Estranged family members**

The courts have recognized a testator’s continuing moral obligation toward those from whom he or she is estranged and for whom he or she does not wish to provide support, especially in the case of dependent children. For example, in Re Spinelli Estate, the court awarded a testator’s illegitimate minor daughter, with whom the testator unjustifiably had no contact, relief on the basis of the size of the estate and the fact that the daughter had been living well below the standard of living she was entitled to expect. Similarly, in Boje v Boje Estate, 2005 ABCA 73, 2005 CarswellAlta 192, additional reasons given in Re Boje Estate, 2009 ABQB 749, 2009 CarswellAlta 2195, the court awarded payment of considerable maintenance from the deceased father’s estate to the estranged daughter who was driven from her home by the testator at the age of 16 years. She was excluded from the terms of his will. The court found she was an adult dependent child under the provisions of the Family Relief Act, RSA 2000, c F-5 [Family Relief Act] (since repealed and replaced by the WSA) on the basis that she had significant mental and physical problems, which were in part due to the physical and emotional abuse imposed by her father.

In the case of dependant claims by estranged spouses, spousal moral claims continue to be recognized. In circumstances where there was a continuing personal, social, or economic relationship between a testator and his or her estranged spouse, courts tend to find a continuing moral obligation by an estate (Re Stayko Estate at paras 18–22).
5 QUALIFYING FOR FAMILY MAINTENANCE AND SUPPORT

Section 72 of the WSA uses the term “family member” instead of “dependant,” which is consistent with government policy for terminology in social legislation. Only a “family member” can apply for family maintenance and support. The term “relief” is replaced by “maintenance and support,” signalling the intent to distinguish post-death family support from child and spousal support, as provided under the Divorce Act and the Family Law Act. Different principles are used to determine family support during the life of the parties.

5.1 Categories of dependants

Under the repealed Dependants Relief Act, RSA 2000, c D-10.5 [Dependants Relief Act], 4 categories of dependants could apply for relief:

1. a spouse of a deceased,
2. an AIP of a deceased,
3. a child of a deceased who was under the age of 18 at the time of the deceased’s death, and
4. a child of a deceased who was 18 years of age or over at the time of the deceased’s death and unable by reason of a mental or physical disability to earn a livelihood.

The WSA maintains these 4 categories and adds 2 new ones:

1. a child of a deceased who is at least 18 years old but under 22 years of age at the time of the deceased’s death and is unable to withdraw from his or her parents’ charge because he or she is a full-time student as determined in accordance with the Family Law Act and its regulations (WSA, s 72(b)(v)), and
2. a grandchild or great-grandchild of the deceased who is under 18 years old and in respect of whom the deceased stood in the place of a parent at the time of the deceased’s death (WSA, s 72(b)(vi)). The grandchild (as defined) must have been living with and financially dependent on the deceased grandparent. This status is further defined in s 73 of the WSA, and sets out the factors to determine the status of the applicant. These factors are similar to those contained in the family law legislation to establish if a person falls within the ambit of in loco parentis (in place of a parent) for the purpose of providing child support and determining custody.
The court in *Tataryn v Tataryn Estate* acknowledged a deceased’s moral obligations towards adult dependent children by stating that “most people would agree that an adult dependent child is entitled to such [moral] consideration as the size of the estate and the testator’s other obligations may allow” (at 822).

**Spouse (s 72(b)(i))**

In Part 5 of the WSA, “spouse” is defined only as including “a party to a void or voidable marriage” (s 72(d)).

As judicially interpreted, “spouse” includes a person legally married to a deceased. Alberta courts have interpreted this to include spouses who have been separated from a testator, even for a significant number of years. In *Re Stayko Estate*, the court found the spouse, who had been separated from her husband for 50 years, was a dependant under the then-in-force *Family Relief Act*, but did not qualify for relief given the number of years of separation, the lack of contact, and her failure to pursue spousal support. *Re Stayko Estate* can be compared to *Re Boychuk Estate*, which involved a couple married for 71 years. They lived separately for a few years before the deceased’s death because of the applicant wife’s placement in a long-term care facility. The court held that, under the circumstances, the bonds and connection between the couple remained and ordered the residue of the deceased husband’s estate to be paid to the applicant wife.

In *Re Stang Estate*, the testator and the applicant surviving spouse, who were elderly when they married, had paid their own expenses and kept separate bank accounts. Johnstone J considered the applicant’s legal and moral claims, and found that she was entitled to a greater level of support than that provided by the will. Johnstone J considered that the spouse’s moral claim was of a very high order; higher than the moral claims of the adult children of the deceased who were named as beneficiaries in his will.

Correspondingly, a review of Alberta decisions reflects that its courts grant relief to spouses where their legal and moral rights are apparent and take precedence over claims of adult children (*Re Rubis Estate; Re Broen Estate*).

A surviving spouse and a deceased spouse living separate and apart at the time of a deceased’s death does not disentitle the surviving spouse from making a family maintenance and support claim. In *Re Quon* (1969), 4 DLR (3d) 702, 1969 CarswellAlta 117 (Alta QB), the deceased purportedly had two living spouses – one in China and one in
Canada. The wife in China successfully made a claim for relief under the Dependants Relief Act.

Likewise, the fact that spouses file for divorce and one or both of them brings, or is entitled to bring, an action under the MPA does not disentitle a surviving spouse from making a family maintenance and support claim. (See Chityala v Chityala Estate, 71 AR 200, 1986 CanLII 559 (Alta QB), Webb v Webb Estate, and Re Stayko Estate.) However, in Re Stayko Estate, the court refused to grant family maintenance and support relief where the parties had been living separate and apart for over 50 years.

Adult interdependent partner (s 72(b)(ii))

Under s 3 of the Adult Interdependent Relationships Act, SA 2002, c A-4.5 [Adult Interdependent Relationships Act], an AIP is someone who has:

- lived with another person in a relationship of interdependence for a continuous period of at least 3 years,
- lived with another person in a relationship of interdependence of some duration where there are children of the relationship (by birth or adoption), or
- entered an AIP agreement under s 7 of Adult Interdependent Relationships Act.

This definition of an AIP was formulated from the criteria of common law relationships established by Alberta courts before the enactment of the Adult Interdependent Relationships Act (see Medora v Kohn, 2003 ABQB 700, 336 AR 163 at paras 23 and 34 [Medora v Kohn]).

When determining whether an adult interdependent relationship exists, Alberta courts have found that couples keeping separate finances, car registrations, and tax returns, yet who divided household chores, attended weddings, travelled together, and had an exclusive conjugal relationship to be AIPs (Medora v Kohn). On the other hand, couples doing most or all of the above but not living together continuously for a period of 3 years are precluded from the definition of AIPs (Howard v Sandau, 2008 ABQB 34, 439 AR 379; Henschel Estate, 2008 ABQB 406, 56 RFL (6th) 406; Re Fricker Estate, 2005 ABQB 972, 390 AR 111).

The criteria outlined in the Adult Interdependent Relationships Act are not exhaustive. Over time, courts have developed criteria that are helpful in determining whether a relationship of interdependence exists. The court in Bowles v Beamish, 2008 ABQB 395, 452 AR 307
[Bowles v Beamish] recognized that common law relationships (where the court equated common law relationships with AIP relationships) cannot be precisely defined. The court in Bowles v Beamish (at paras 9–13) then outlined factors to consider in determining a common law relationship, including:

- Were the parties living together?
- Were the parties committed to one another?
- Were the parties companions?
- Did the parties have physical intimacy?
- Were the parties publicly recognized as a couple?
- Were the parties financially interdependent?
- Did the parties share assets?
- Did the parties share vacations?
- Did the parties share household responsibilities and duties?

The court in Kiernan v Stach Estate, 2009 ABQB 150, [2009] AJ No 243 [Kiernan v Stach Estate], after reviewing the factors in the Adult Interdependent Relationships Act, provided that the better approach is to look at the facts as a whole with no one particular factor carrying more weight than another. (See also Re Racz Estate, 2013 ABQB 668, 2013 CarswellAlberta 2390 at paras 18–19 [Re Racz Estate]).

If an AIP advances a dependant claim and the court finds an adult interdependent relationship existed, it will likely impose a similar test as was used in Re Stang Estate; that is, based on a determination of what the AIP would receive on termination of the relationship if the deceased was still alive. It is expected that the starting point for the claim of an AIP living in harmony with a deceased at the time of the deceased’s death will involve an analysis of the AIPs rights under the Family Law Act, and the principles of constructive trust and unjust enrichment. For more information on the concept of constructive trust and unjust enrichment, refer to the content under the topic “Legal obligations to adult interdependent partners” in “Adult Interdependent Relationships” and see Kerr v Baranow.

It is unclear whether former AIPs are entitled to apply for relief under the WSA. The definition of an AIP in the Adult Interdependent Relationships Act expressly excludes former AIPs (ss
The court in *Re Bosanac Estate*, 2005 ABQB 590, 388 AR 175 held that the common law relationship must be continuous up to the date of death. On the other hand, prior to the enactment of the WSA, the court in *Re Tsang Estate*, 2004 ABQB 735, 2004 CarswellAlta 1345 held that the former common law spouse was entitled to notice of her rights under the former *Dependants Relief Act* despite being separated from the deceased for 30 years, suggesting that former common law spouses are entitled to apply.

**Child (s 72(b)(iii) – (v))**

For the purposes of family maintenance and support, children who are “family members” include minor and unborn children and adult children who are unable, by reason of mental or physical disability, to earn a livelihood.

The WSA offers a changed definition of “child” to that in the repealed legislation. Under s 28 of the WSA, use of the term “child” in a will (subject to any findings of a contrary intention by a testator) is interpreted as including

- any child for whom a testator is a parent within the meaning of Part 1 of the *Family Law Act*, and
- any child in the womb at the time of a testator’s death that is later born alive.

**Children under 18**

The relevant age for an applicant child is the age at the time of a deceased’s death – not his or her age at the time of the application for relief. In *Re Buchholz Estate*, 1980 ABCA 243, 24 AR 287 [*Re Buchholz Estate*], a testator died leaving his wife and 5 children, 3 of whom were under 18 at the date of his death. His will left everything to his wife. The Public Trustee successfully applied for family maintenance and support on behalf of the children. The Court of Appeal affirmed that decision. The case is interesting because it discusses the age at which relief for a minor child should come to an end, although the court did not decide the issue. The court in *Re Buchholz Estate* also noted the fact that the testator wanted to treat all of his children equally during his life and that he trusted his wife to look after the children’s well-being.

Similarly, in *Re Birkenbach Estate*, a family member only 17 days away from his 18th birthday at the date of the testator’s death was found to be entitled to make a family maintenance and support claim.
The term “child” includes a testator’s legitimate, illegitimate, and adopted child (Re Pauliuk Estate, 73 AR 314, 1986 CarswellAlta 213; Re JKT Estate, 2003 ABQB 769, [2004] 4 WWR 131; Re Spinelli Estate). However, the definition does not give guidance to the inclusion or exclusion of step-children or children to whom a testator stood in place of a parent.

The court in Re Peters Estate, 2015 ABQB 168, 2015 CarswellAlta 389 [Re Peters Estate] found that an intestate’s step-children were not descendants under the WSA. While an argument was put forward for equal treatment because of the relationship between the deceased and the step-children, it did “not change the effect of the clear provisions in the [WSA]” (at para 16). While Re Peters Estate involved an intestate situation, the same principle might be applied by the courts in a situation where step-children apply for a family maintenance and support claim from an estate under the WSA. A situation with a will most likely will involve an analysis of the surrounding circumstances.

A parent, guardian, the Public Trustee, or any other person, according to the Alberta Rules of Court, Alta Reg 124/2010 and the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules], may apply for family maintenance and support relief on behalf of a minor child under s 90(a) of the WSA.

Adult dependent children

In pre-Tataryn v Tataryn Estate cases dealing with applications for relief for adult dependent children, courts appeared to be more willing to dismiss a testator’s obligation if there was evidence of sufficient external sources of support. In Re Kinloch Estate, [1972] 2 WWR 445, 1972 CarswellAlta 16 (Alta QB), the court relieved the testator from providing support for his dependent adult daughter, who had been incarcerated in mental hospitals for various lengths of time, as she would be cared for by the province’s universal medical scheme.

However in the later decision of Re Stone Estate, [1994] 8 WWR 5, 1994 CarswellAlta 129 (Alta QB) [Re Stone Estate], var’d 1997 ABCA 380, 209 AR 138, the court determined that receipt of government assistance by the applicant adult dependent child did not alleviate the obligation of the deceased father to make adequate support for the child in his will.

In coming to its decision in Tataryn v Tataryn Estate, the Supreme Court of Canada specifically acknowledged a deceased’s moral obligations towards adult dependent children. Since that decision, Alberta courts appear to be more reluctant to dismiss a testator’s obligations toward adult dependent children, despite other support systems available to those children. For instance, in Re BGB Estate, 2003 ABQB 683, [2004] 4 WWR 766, while
acknowledging that the claimant was in receipt of a previous lump-sum payment of $45,000 from his father’s estate, the court determined that this did not alleviate the mother from her obligation to provide for the claimant.

In the more recent case of Petrowski v Petrowski Estate, the court considered a claimant who argued he was an adult dependent child because of a physical disability. In analyzing the claimant’s ability to earn a living and how this impacted his entitlement to relief, Moen J set out a number of factors to be considered by the courts in claims for dependent relief, including the dependant’s needs, the likelihood that those needs will increase, and his or her other sources of income (at para 503).

This list of factors was reiterated in Re Ponich Estate, 2011 ABQB 33, 2011 CarswellAlta 2512 [Re Ponich Estate].

Alberta courts have generally determined that there is no time limit under which support for a dependent child (adult or minor) may be assessed (Re Spinelli Estate; Re Finlan Estate (1951), 3 WWR (NS) 671, 1951 CarswellAlta 62). This is especially true of cases where the court determines that it is proper for an estate to give relief and where the size of the estate can accommodate those needs without creating undue hardship on other dependants or intended beneficiaries.

The relevant time to look at whether a legal obligation arises for an adult dependent child is the testator’s time of death. On the other hand, the relevant time to determine whether adequate provision has been made for the adult dependent child is the date of application (Petrowski v Petrowski Estate at paras 488–494; Soule v Johansen Estate, 2011 ABQB 403, 2011 CarswellAlta 2562 [Soule v Johansen Estate]).

In determining if an applicant is an adult dependent child, the court must first establish 2 things:

1. the applicant has a disability, and
2. as a result of that disability, he or she is unable to earn a livelihood.

In addressing the first issue, a family member’s disability must be established on a preponderance of the evidence (Soule v Johansen Estate at para 36). This includes any medical records, assessments, etc.
On the second issue, the ability to “earn a livelihood,” has been interpreted by Alberta courts to mean that one can provide adequate livelihood for one’s proper maintenance and support (Petrowski v Petrowski Estate at paras 500–556; Soule v Johansen Estate at para 35). The court held in Petrowski v Petrowski Estate (at para 501) that “earn a livelihood” should not be viewed in the context of any given point in time but rather as a reflection of a person’s lifelong economic activity and status (adopting the view from Re Lee Estate, 2006 NWTSC 13, 2006 CarswellNWT 16 [Re Lee Estate]).

One indication of a failure to meet the threshold of adequate maintenance and support is an erosion of financial status (Petrowski v Petrowski Estate at para 527). Flowing from that, if a family member has a means to obtain the funds to maintain and support him or herself, and if these means provide an income adequate for his or her proper maintenance and support, he or she can earn a livelihood.

The fact that a person has been approved for government assistance, such as Assured Income for the Severely Handicapped (AISH) and Canada Pension Plan (CPP) disability benefits, and/or is a represented adult under the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2, supports the position that the applicant is disabled for the purposes of a family maintenance and support claim (Petrowski v Petrowski Estate at para 500; Re Nelson Estate at paras 16–17).

However, the availability of government assistance for disabled individuals should not be considered in determining whether a person is able to earn a livelihood. Assistance offered by the state to disabled persons does not discharge a parent’s obligation to provide support in a will, nor should government assistance be considered when calculating a family member’s income going forward (Petrowski v Petrowski Estate at paras 521–522; Re Stone Estate at para 23; Re EAH, 2005 ABQB 678, 386 AR 187 [Re EAH]; Carter v Alberta Conference Corp of the Seventh Day Adventist Church, [1998] AJ No 1479 (Alta QB)).

There are conflicting views about whether the courts consider one’s role in causing or contributing to his or her disability. In Soule v Johansen Estate at para 36, the court held that it was not open to the court to ask about the family member’s role in causing or contributing to his or her own disability, although questions of volition, character, and conduct may arise when the disability is related to drug use. Similarly, in Re Ponich Estate, the court took into consideration that the family member’s drug use may have contributed to his mental illness. (See also Soule v Johansen Estate at para 51).
There is no requirement that an adult dependent family member must have received, or even sought, support from the testator during the testator’s life (Soule v Johansen Estate at para 30).

**Grandchild (ss 72(b)(vi) and 73)**

The most common issue in cases involving the support of minor grandchildren is whether the deceased grandparent stood in the place of a parent to his or her grandchild (as defined in s 72(b)(vi) of the WSA). More specifically, the questions are whether a deceased, during his or her life, showed a “settled intention” to treat a grandchild as his or her own child; whether, since the grandchild’s birth or for at least 2 years immediately before the grandparent’s death, the grandchild’s primary home was with the grandparent; and whether the grandparent provided the primary financial support for the grandchild (WSA, s 73(2)).

The meaning of “settled intention” comes from the case of Spring and Spring, 61 OR (2d) 743, 1987 CarswellOnt 1022 at para 16 (Ont SC). Settled intention is “a state of mind consciously formed and firmly established,” and is a question of quality. A grandparent’s settled intention to act in the place of a parent, under s 73(2) of the WSA, can be expressed formally or inferred from the deceased’s actions (Chartier v Chartier, [1999] 1 SCR 242, 1999 CanLII 707 [Chartier v Chartier]).

The list of factors in s 73(3) of the WSA helps the court in making this determination. It includes:

- a grandchild’s age,
- the duration of the relationship between the grandchild and grandparent,
- the nature of the relationship between the grandchild and grandparent, including:
  - the grandchild’s perception of the grandparent as a parental figure, and
  - whether, as between the parent and grandparent, the grandparent was the primary decision maker for the grandchild’s care, discipline, education, and recreational activities,
- whether the grandparent considered applying for guardianship of the grandchild,
- the nature of the grandchild’s relationship with his or her parents, and
- any other factor the court finds relevant.
This list is similar to the criteria considered by the courts in determining whether a spouse stands in place of a parent to the other spouse’s children. In Chartier v Chartier, the Supreme Court of Canada looked at the nature of the relationship between the alleged parent and the child to determine if that person stood in the place of a parent under s 2(2) of the Divorce Act. Factors that the court looked at included:

- whether the child participated in the family in the same manner as the biological children,
- whether all of the children were treated the same,
- whether financial provisions were made for the child,
- whether the alleged parent disciplined the child,
- whether the alleged parent implicitly or explicitly represented to the child, family, or world that he or she was, in fact, a parent to the child, and
- what the nature of the relationship was absent any biological child.

However, take care in applying these criteria to a claim under the WSA. Section 2(2)(b) of the Divorce Act considers a spouse standing in the place of a parent, which is not the same under s 73 of the WSA.

Evidence that a deceased stood in the place of a parent to a grandchild at the time of his or her death must be corroborated, as indicted in s 3 of the WSA (Re Malkhassian Estate, 2014 ABQB 353, 2014 CarswellAlta 951 at para 36 [Re Malkhassian Estate]).

The court in Re Malkhassian Estate decided on the issue of whether or not the deceased acted as a parent for his daughter’s child. Pentelechuk J found that there was no settled intention, as required by the WSA (at para 43). She took into consideration the factors listed in s 73(3) of the WSA in light of the facts, including the short period of cohabitation, the lack of parental decisions made by the deceased, and the lack of evidence that the deceased wanted to apply for guardianship of the grandchild. Although the deceased did act as a “secondary caregiver” (at para 46), this role did not equate to being in the place of a parent.

At para 50, Pentelechuk J said:

In my view, s 72(b)(vi) was not intended to capture all of those familial relationships where three generations live together for some period of time. Something more must be shown than the fact that the grandparent provided childcare while the parent was working, or that the grandparent provided
direct or indirect financial support to their children or grandchildren. A
grandparent should be free to provide this type of assistance for the benefit
of a child and grandchild, without it affecting the ultimate disposition of his or
her estate.

The court in *Re Malkhassian Estate* recognized that, socially, it is not unusual for
grandparents to provide for their grandchildren. However, this act of assistance does not
equal to settled intention and should not instantly trigger provision from a grandparent’s
estate.

The inclusion of these “minor grandchild” provisions requires personal representatives to
report the possibility of dependent minor grandchildren to the Public Trustee. From a policy
perspective, the content of this section of the WSA aligns with public consultation results as
well as with the documented increase in grandparents acting as parents to their
grandchildren. (See Esme Fuller-Thomson, “Grandparents Raising Grandchildren in Canada:
a Profile of Skipped Generation Families”, online: (2005) SEDAP Research Paper 132
<http://socserv.mcmaster.ca/sedap/p/sedap132.pdf>.)

### 5.2 Factors considered on application for relief

The addition of 2 new categories of dependent applicants requires that a court consider not
only the factors outlined in *Tataryn v Tataryn Estate*, but other factors as outlined by Moen J
in *Petrowski v Petrowski Estate*. These factors, which were discussed by Johnstone J in *Re
Spinelli Estate* at para 28, include:

- the overall size of an estate,
- the income and resources of the various competing potential recipients,
- the present and future requirements of a claimant, as determined by age, health,
  and lifestyle, for provisions to be of adequate standard of support and
  maintenance,
- the legitimate expectations and lifestyles of competing potential recipients,
- the moral obligation that society places on a person to maintain and support
  persons in certain relationships and circumstances, and
- facts that may negate a right to receive a part of an estate.
The court in *Tataryn v Tataryn Estate* stated that, where the size of an estate permits, competing claims should be satisfied. Where there are competing claims, the court weighs the strength of each claim. Legal claims are to be given priority over moral claims. See *Gavinchuk v Mickalyk*, 2003 ABQB 849, 27 Alta LR (4th) 291 at para 29 where, after weighing moral claims, the court found that both the testator’s legal and moral obligations had been met.

### 5.3 Practice points relating to “family members”

The WSA’s expanded categories of “family member” claimants against a deceased’s estate create the need to have detailed discussions when taking instructions for a will or when acting on behalf of a personal representative.

If such a claim arises, the onus is on an applicant to prove on a balance of probabilities that he or she is a family member for the purposes of a family maintenance and support claim (See *Kiernan v Stach Estate*; *Re Racz Estate*; *Re Bogi Estate*, 2012 ABQB 253, [2012] AJ No 416 [*Re Bogi Estate*]; *Re Paull Estate*, 2013 ABQB 709, 2013 CarswellAlta 2853 [*Re Paull Estate*]; *Re Riley Estate*, 2014 ABQB 725, [2015] 2 WWR 330 [*Re Riley Estate*]).

These allegations must be corroborated by other evidence to satisfy s 11 of the *Alberta Evidence Act*, RSA 2000, c A-18 [*Alberta Evidence Act*] (Kiernan v Stach Estate; Re Bogi Estate; Re Racz Estate; Paull Estate; and Re Riley Estate). If there are conflicting affidavits dealing with primary facts, the court will not decide based on those affidavits. A trial with oral testimony may be required (*Surrogate Rules*, r 64). (See also *Charles v Young*, 2014 ABCA 200, 577 AR 54, reversing *Re Charles Estate*, 2013 ABQB 632, 2013 CarswellAlta 2039; *Re Paull Estate*; Re Riley Estate). In *Re Riley Estate*, the court accepted that, although the parties were aware that they could take this matter to trial or to an oral hearing, all parties wanted the decision be made based upon the available affidavit and cross-examination evidence because “this would achieve the most cost-effective, timely and efficient method of obtaining a final disposition” (at para 3).

As estate planning counsel, be aware of potential issues arising from multiple individuals claiming status as a spouse or AIP. Under s 72(d) of the WSA, “spouse” includes a party to a void or voidable marriage, acknowledging the possibility of more than one spouse applying for relief under Part 5. This could occur in cases of polygamy. Since at least 2004, there has been a possibility that both a spouse and an AIP may apply for dependant relief (previously under the *Dependants Relief Act*).
INTRODUCTION TO TEMPORARY POSSESSION OF A FAMILY HOME

Division 1 of Part 5 of the WSA addresses the temporary possession of a family home when the sole owner dies, leaving behind a spouse or AIP still living in that home.

While a surviving spouse has a right to the life estate in a homestead of his or her deceased spouse and to occupy the home under the Dower Act, these dower rights do not apply to an AIP. Issues can also arise if a family home is not within the definition of “homestead” in the Dower Act. For example, if the land on which a home is located was owned by a deceased spouse as a tenant in common together with someone other than his or her surviving spouse, the Dower Act does not apply (Dower Act, s 25(1)). For these reasons, the temporary possession provisions of the WSA are very important.

Under s 75 of the WSA, a surviving spouse or AIP is entitled to temporary possession of a family home for 90 days. The purpose is to give a surviving spouse or AIP some breathing room in a situation where his or her deceased spouse or AIP was the sole owner of a family home.

While these provisions will raise new questions and issues, there is no doubt they will be helpful in providing some structure to some difficult circumstances.

Other Canadian jurisdictions have similar provisions. In Ontario, the Family Law Act, RSO 1990, c F3, s 26(2) provides a similar right to a 60-day temporary possession of a family home for spouses only. For more information, see Luyks v Luyks, 1998 CanLII 14824, 39 OR (3d) 469 (Ont. Ct. G.D.) and Szuffita v Szuffita Estate, 2000 CanLII 22556, 97 ACWS (3d) 147 (Ont SC).

Similarly, the Northwest Territories’ Family Law Act, SNWT 1997, c 18, s 57 provides a 60-day temporary possession period. This legislation is much narrower and contains no provision for shortening or extending the temporary possession period.

DEFINITION OF A “FAMILY HOME”

Section 72(a) of the WSA defines “family home” broadly, and similarly to the definition of “matrimonial home” in s 1(c) of the MPA. The definition includes houses, condominiums, mobile homes, and apartments. A home must have been ordinarily occupied by the spouses or AIPs as their home. The difference between the MPA and WSA is that a qualifying home
under the WSA must be owned (wholly or in part) or leased by the deceased spouse but not by the surviving spouse or AIP.

8 THE RIGHT TO TEMPORARY POSSESSION OF A HOME AND HOUSEHOLD GOODS

In the past, a spouse or AIP who had no legal interest in a family home may not have had a right to stay in the home after the death of his or her spouse, the sole homeowner. To address this, s 75 of the WSA allows for a period of 90 days in which a surviving spouse or AIP can remain in the family home, as long as he or she was ordinarily occupying the family home when the deceased died. The 90 days run from the date of the deceased’s death.

The right to temporary possession arises where a spouse or AIP is not on the title or lease. It is unnecessary and thus does not arise where a spouse has a life interest under the Dower Act (WSA, s 75(2)). Under s 75(1), the right to temporary possession is good against:

- the deceased’s estate and anyone inheriting from the estate other than a disabled adult child,
- any person owning the home by right of survivorship,
- any person with an interest as co-owner, and
- any person who has a contract to buy the home during the 90 days.

According to s 75(3), if the family home is a rental, there must be a written tenancy agreement binding the deceased, but not his or her surviving spouse or AIP, with a landlord. The surviving spouse or AIP is deemed to be a tenant for all matters other than rent or security deposits.

In addition, where the family home is a rental, a court can make an order to terminate the tenancy under s 75(4). However, before doing so, if the order would shorten the period of temporary possession or prevent the period from being extended, the court will take into consideration two factors listed in s 75(5):

- the availability of other accommodation within the means of a surviving spouse or AIP, and
- any other factor the court considers relevant.

Section 76 of the WSA allows for temporary possession of necessary “household goods” along with the temporary possession of a home. “Household goods” is defined in s 72(c)
broadly, and presumably includes vehicles ordinarily used by the family, given the reference to transportation. The definition includes items that are “needed” or ordinarily being used by the family; a spouse or AIP is not restricted only to items that are “needed.” The WSA definition of household goods is similar to the MPA definition (MPA, s 1(b)), except the MPA definition includes property used for “social or aesthetic” purposes, which the WSA does not.

Section 77 of the WSA clarifies that a right to possession does not give greater rights to a surviving spouse or AIP than what he or she had at the time of the deceased’s death. Both a residence and any household goods remain subject to taxes, mortgage payments, and so forth. The rights of joint owners, arising from survivorship of a deceased spouse, will be deferred by the deceased’s surviving spouse or AIP’s right to possession.

Section 78 of the WSA allows a spouse or AIP to contract out of the home possession provisions (“waive a right”) in ss 75–76 by a written agreement. Such an agreement survives the death of a spouse or AIP, and binds an estate. No formalities about the agreement are specified in the WSA, and there is no reference to independent legal advice.

By contrast, spouses and AIPs cannot previously agree to contract out of rights to family maintenance and support. This is considered void for public policy reasons (WSA, s 103).

9 OBLIGATIONS AND RIGHTS OF THE ESTATE

During a period of temporary possession of a family home, an estate is responsible for the expenses outlined in s 79 of the WSA. Under this section, costs such as rent, mortgage payments, taxes, and insurance are paid out of the estate unless there is an arrangement or order providing for an alternate means of payment (such as life insurance to cover a mortgage).

The obligations of an estate do not apply if a testator’s will provides that a person other than the estate or his or her surviving spouse or AIP is to pay those costs (s 79(2)).

Section 79(3) provides that if an estate pays the costs outlined in s 79(1), those costs are deducted from a spouse’s or AIP’s share of the estate, unless there is a court order, will, or agreement provides otherwise. This could include an order under the family maintenance and support provisions in Part 5, Division 2 of the WSA.

Section 79 does not use the word “written agreement.” Presumably, though, if a surviving spouse or AIP asserts that there was an oral agreement, s 11 of the Alberta Evidence Act,
which requires corroboration of evidence of matters occurring before a deceased’s death, would apply (see Re Paull Estate at para 22). For a helpful review of the rules of evidence in the estate context, see Clackson J’s decision in Re Decore Estate, 2009 ABQB 440, 12 Alta LR (5th) 221).

10 OBLIGATIONS AND RIGHTS OF A SURVIVING SPOUSE AND EFFECT OF AN ORDER

Section 80 of the WSA requires a surviving spouse or AIP to reasonably maintain and repair the family home during the period of temporary possession. The reasonableness standard takes into account the state of repair at the time of the deceased’s death.

The right to possession of a home and use of any goods is terminated if a surviving spouse or AIP fails to maintain or repair the home or goods (WSA, s 77(7)). The right to possession is also terminated if a surviving spouse or AIP ceases his or her occupation of a family home as his or her ordinary residence (WSA, s 77(6)).

Section 81 of the WSA creates an obligation on a spouse to allow entry to a personal representative, owner, or co-owner. This provision does not preclude entry by consent of an occupier. It is not necessary for a personal representative or any person to provide notice if the occupier consents. In the case of a personal representative, 24 hours’ written notice is required prior to entry. In comparison, no notice is required to trigger the obligation to allow the owner or co-owner to enter.

Section 82 of the WSA sets out the authority of the court to make various orders, on application by a surviving spouse or AIP, a personal representative of an estate, or an interested person, which includes a purchaser.

Section 82(1)(b) allows the court to require a surviving spouse or AIP to pay any cost in respect of a home or goods, which may include any of the costs listed in s 79(1) of the WSA (i.e., rent, mortgage, insurance, etc.). Section 82(1)(b) does not specify any factors for the court’s consideration in making an order to pay. Presumably, the court looks at all of the circumstances and applies general equitable principles within the framework of a family or blended family situation.
This approach of modifying traditional commercial concepts to suit family law situations is reflected in Slatter J’s (as he then was) decision in *Kazmierczak v Kazmierczak*, 2001 ABQB 610, [2001] 10 WWR 139, dealing with the issue of occupation rent. At para 90, he said:

> In my view, care must be taken in carrying forward the common-law concept of occupation rent into the family law context. Non-family joint tenants generally do not have mutual obligations of support for each other, and for children. In the family law context, such mutual obligations of support are generally present, and would usually dominate and outweigh the common-law property rights associated with joint tenancy. Occupation rent should only be awarded in the family law context with great caution.

As well, orders may be obtained:

- directing someone other than the estate to pay the rent, mortgage, or other expenses,
- directing that the property be maintained, and
- with respect to household goods.

Section 82(2) creates an exception for property that was owned jointly by a deceased spouse or AIP. In this case, the application for temporary possession is limited to 6 months from the deceased’s death.

### 11 TEMPORARY POSSESSION AND THE MATRIMONIAL PROPERTY ACT

Section 19 of the MPA, which is similar to the WSA’s temporary possession provisions, allows a spouse to apply for a court order with regard to the matrimonial home. Moreover, s 19(1)(a) of the MPA authorizes a court to grant exclusive possession of a matrimonial home to a spouse in appropriate circumstances. It is important to note that, like the *Dower Act*, the MPA only applies to married spouses (*Nova Scotia (AG) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325).

Because the provisions in the MPA and WSA are similar, the MPA-related cases can give some indication as to how the courts will decide a WSA claim. Section 20 of the MPA can also be considered, which provides factors for court consideration on an MPA application, including:

- the availability of other accommodation within the means of both of the spouses,
- the needs of any children residing in the matrimonial home,
• the financial position of each of the spouses, and
• any previous orders for possession.

While there are differences between the MPA and WSA, reflecting the different circumstances in which each applies, the first consideration for the court in both acts relates to the availability of other accommodation within the means of a spouse (WSA, s 75(5); MPA, s 20).

The cases that have considered s 20 of the MPA are often fact specific, but there are some common themes. In particular, the financial means of the parties seems to be the determinative issue in several of the reported decisions. That was the case in Veit J’s decision in Verburg v Verburg (1994), 153 AR 67, 1994 CarswellAlta 557 (QB). (See also Veselic-Titheridge v Titheridge, 2007 ABQB 456, 427 AR 384; Tawiah v Tawiah, 2002 ABQB 314, 2002 CarswellAlta 388; and Grunenwald v Grunenwald, 2006 ABQB 186, [2006] AJ No 27.)

Section 20 of the MPA was also considered in Yakemchuk v Yakemchuk, 2000 ABQB 803, 91 Alta LR (3d) 59 [Yakemchuk v Yakemchuk]. In that case, the wife obtained an exclusive possession order of the matrimonial home for herself and for the benefit of the couple’s disabled adult daughter. The home was jointly owned by the wife and the husband. When the wife realized that she was terminally ill, she took steps to sever the joint tenancy by transferring her interest into a trust for the daughter. Following the wife’s death, the husband moved back into the house and, despite having been advised of the trust, caused the Registrar of Land Titles to register the property in his name alone based on his right of survivorship. The daughter temporarily moved out of the home.

In Yakemchuk v Yakemchuk, Veit J found that the home remained matrimonial property despite the wife’s death and so, prima facie, the MPA applied. She said (at para 21):

Section 20 of the [MPA] mentions two factors that are potentially attributable to living individuals - the availability of alternative accommodation for a spouse and the financial position of each spouse. However, the statute also mentions two other factors, which have as much legislative weight as the first two mentioned, which are not narrowly related to the spouses - the “needs of any children residing in the matrimonial home” and “any order made by a court with respect to the property or the maintenance of one or both of the spouses”. Naturally, when one spouse dies, the deceased spouse no longer needs to worry about accommodation. However when the deceased spouse had sheltered a child of the marriage in the matrimonial property, the need to
maintain that property, at least in the short run, to continue the protection of the child of the marriage is both a common sense, and a statutory, result. In this case, Ms. Yakemchuk had provided shelter for J. in the matrimonial home. That initiative should be maintained, at least until the matter can be fully heard on the merits.

While the facts in Yakemchuk v Yakemchuk may have drawn a particularly sympathetic response from the court, it is quite likely that a surviving spouse or AIP may be able to demonstrate circumstances to convince a court to grant some relief. The key is how the court balances the natural sympathy for a recently bereaved spouse or AIP with the rights of the beneficiaries of the estate or other individuals who have an interest in the property.

In contrast Yakemchuk v Yakemchuk, the court in Webb v Webb Estate was much less sympathetic to the applicant, Mr. Webb, in its decision. After taking into consideration the behavior, intentions, and history of Mr. Webb, the court found that Mr. Webb was “quite content to take advantage of the deceased’s [Mrs. Webb] largess during her lifetime” (at para 25). While the court did interfere with the testator’s will, it did so reluctantly and “in such a way that there [would] only be income available ... for a limited time” (at para 57).
CHAPTER 6
ADULT INTERDEPENDENT RELATIONSHIPS

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WHO IS AN ADULT INTERDEPENDENT PARTNER?

1.1 Required elements

Section 3 of the Adult Interdependent Relationships Act, SA 2002, c A-4.5 [AIRA] defines an “adult interdependent partner” [AIP]. Under s 3, a person is the adult interdependent partner of another person if:

(a) the person has lived with the other person in a relationship of interdependence for a continuous period of not less than 3 years, or of some permanence, if there is a child of the relationship by birth or adoption, or

(b) the person has entered into an adult interdependent partner agreement with the other person under s 7 of the AIRA.

Section 1(1)(f) of the AIRA defines a “relationship of interdependence” as a relationship outside of marriage between 2 persons which includes the existence of three elements:

- sharing one another’s lives,
- emotional commitment to one another, and
- functioning as an economic and domestic unit.

A person cannot have more than one AIP at any one time (AIRA, s 5(1)), and a married person cannot have an AIP while living with his or her spouse (s 5(2)).

A minor may be an AIP, but must be at least 16 years of age and must have his or her guardian’s written consent (AIRA, s 7(2)). Unlike between adults, a relationship of interdependence cannot exist between 2 persons related to each other by blood or through adoption where one of the persons is a minor (s 4).

1.2 What is a “relationship of interdependence”?  

While the first 2 elements (sharing one another’s lives and emotional commitment to one another) are arguably more subjective to prove, s 1(2) of the AIRA provides a list of potentially relevant factors the court is required to consider in determining the 3rd element of a relationship of interdependence: whether or not the parties function as an economic and domestic unit. As per s 1(2), these factors include:

(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;

(i) the ownership, use and acquisition of property.

Importantly, the overriding consideration for the court is the requirement that “all of the circumstances of the relationship must be taken into account” when assessing the 3rd element (AIRA, s 1(2)). Re Paull Estate, 2013 ABQB 709, 2013 CarswellAlta 2853, is an example of how the court can weigh the evidence in attempting to determine whether or not an applicant and a deceased have, in fact, been AIPs. Similarly, in Re Charles Estate, 2013 ABQB 632, 2013 CarswellAlta 2039, rev’d 2014 ABCA 200, 2014 CarswellAlta 957, the Court of Appeal reversed the chambers judge’s finding that there had been a relationship of interdependence because it was based on conflicting affidavit evidence. The Court of Appeal ordered a viva voce hearing to determine the issue.

1.3 How is a relationship of interdependence terminated?

Section 10 of the AIRA sets out when a relationship of interdependence is terminated. This occurs on the earlier of:

- the parties agree in writing that they intend to live separate and apart with no chance of reconciliation,

- the parties live separate and apart for more than one year and one or both parties intend for the relationship not to continue,
1.4 The adult interdependent partner agreement

Section 7(1) of the AIRA provides that any 2 persons who are living together or intend to live together in a relationship of interdependence may enter into an AIP agreement. Section 7(2) outlines those who may not enter into such an agreement:

- someone who is already party to an AIP agreement,
- someone who is married, or
- someone who is a minor, unless the minor is at least 16 years of age and has their guardian’s written consent to enter into an AIP agreement.

The criteria required in order for an AIP agreement to be valid are outlined in s 8 of the AIRA.

1.5 Onus of proof

Section 11 of the AIRA provides that the party alleging the existence of an AIP relationship has the onus of proving it.

Relatedly, s 9 of the AIRA provides that anyone who alleges the existence of an AIP relationship knowing that the relationship does not exist is liable to compensate any person for pecuniary loss and costs incurred in reliance on the existence of the alleged adult interdependent relationship.

2 DETERMINING IF SOMEONE IS AN ADULT INTERDEPENDENT PARTNER

While the AIRA is clear on the criteria for determining if a person is an AIP, the consideration of the criteria and the determination of the existence of an adult interdependent relationship are very fact-specific. (See Rogers v Bogi Estate, 2012 ABQB 253, 2012 CarswellAlta 710; EVF v WM, 2010 ABQB 451, 2010 CarswellAlta 1427; and Chatten v Fricker, 2005 ABQB 972, 2005 CarswellAlta 1925 for examples of how the court analyzes each of the factors in s 1(2) of the AIRA).
In interpreting s 1 of the AIRA, the courts have held that the length of the relationship is an important factor in determining whether a relationship of interdependence exists. The 3-year period of required cohabitation is a necessity (Dotto Estate v Thickson, 2013 ABQB 348, 2013 CarswellAlta 1019), and it must be a period of continuous cohabitation of not less than 3 years under the same roof (Brandenburg v McLeod, 2008 ABQB 406, 2008 CarswellAlta 946; Howard v Sandau, 2008 ABQB 34, 2008 CarswellAlta 82). However, courts have found parties to have had a 3-year period of continuous cohabitation and an AIP relationship in circumstances where the parties maintained two separate houses in two different communities (see Tait v Westphal, 2013 ABQB 668, 2013 CarswellAlta 2390).

The courts have determined that the factors in AIRA, s 1(2) should be regarded holistically, and that failing to satisfy one factor should not mean failure to satisfy the definition of an AIP (Medora v Kohn 2003 ABQB 700, 2003 CarswellAlta 1169 [Medora]). In Medora, the court found that the parties had a relationship of interdependence from living together for 9 years under the same roof and functioning as a domestic unit, despite maintaining complete separation of their finances and having no financial dependence on one another.

Similarly, in Kiernan v Stach Estate, 2009 ABQB 150, 2009 CarswellAlta 324, the fact that the parties held themselves out as “single” or “widowed” on government entitlement/application forms did not negate the existence of their adult interdependent relationship for the purposes of one making a claim on the other’s estate.


**3 THE IMPACT OF THE ADULT INTERDEPENDENT RELATIONSHIPS ACT ON ESTATE ADMINISTRATION**

**3.1 The Surrogate Rules**

Rule 9.1(2) of the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules] provides that a personal representative’s notice under s 10(1)(b) of the Estate Administration Act, SA 2014, c E-12.5 [EAA], to a family member or an attorney, a trustee, the Public Trustee, or a guardian on behalf of a family member may be in Form NGA 2.
Under r 33(1) of the Surrogate Rules, a person entitled to a grant of administration or a grant of administration with will annexed may nominate (in Form NC 16) a person to be the personal representative for the purposes of applying for a grant. A spouse or AIP has first priority to apply for a grant of administration, unless otherwise ordered by the court, under s 13(1)(b) of the EAA.

Rule 14 of the Surrogate Rules and s 40 of the Wills and Succession Act, SA 2010, c W-12.2 [WSA] allow the court, upon an application, to save a void gift in a will due to a beneficiary being disqualified. This includes beneficiaries who are disqualified for being (Surrogate Rules, r 14):

(a) a witness to the will,

(b) a person who signs the will on behalf of the testator on the direction of the testator,

(c) an interpreter who provided translation services in respect of the making of the will, or

(d) a witness to the will who is a spouse or interdependent partner of one of the above.

Rule 78 of the Surrogate Rules confirms that a surviving AIP is one of the persons who can make application for an order under r 75 of the Surrogate Rules, which includes making an application for an order for formal proof of a will, an order confirming that the deceased died intestate, and for an order restraining the personal representative from exercising any powers during an application under r 75.

Table 1 in Schedule 1, Part II (being the description of core legal services), now includes a reference to arranging for a surviving AIP to receive notices under the WSA. Forms NC 2, NC 3, NC 4, and NC 5 make reference to AIPs.

Further, forms NC 23, NC 29, NC 31, NC 33, C 5, and C 6 make reference to notice being given to an AIP under the Family Maintenance and Support provisions of the WSA. There is no requirement that an AIP be served with notice under the Matrimonial Property Act, RSA 2000, c M-8 [MPA]. Form C 7 includes provisions for a deceased having entered into an AIP agreement after the date a will is signed. It also requires confirmation as to whether any of the witnesses to the signing of the will are an AIP of one of the beneficiaries named in the will.
3.2 The *Wills and Successions Act*

The WSA includes a surviving AIP in the list of persons entitled to receive a benefit if a deceased dies without a will (WSA, ss 60–62). The AIP is treated as if he or she were a surviving spouse, including being entitled to receive the entire estate if all of the intestate’s descendants are also descendants of the AIP (s 61(1)(a)). If any of the deceased’s descendants are not descendants of the AIP, the AIP is entitled to receive the greater of $150,000 (the current prescribed amount under the *Preferential Share (Intestate Estates) Regulation*, Alta Reg 217/2011, s 1) or 50% of the net value of the estate (s 61(1)(b)(i)).

Section 62 of the WSA specifies that, where an intestate dies leaving both a surviving spouse and a surviving AIP, the share to be received under s 61 is divided equally between the spouse and the AIP. If there are no descendants, then the spouse and AIP each receive 50% of the deceased’s estate.

However, note that where AIPs have lived separate and apart for more than one year, they may have ceased to be AIPs under s 10(1)(b) of the AIRA.

Under s 64 of the WSA, where a person is entitled to receive a part of an intestate’s estate as an AIP, he or she is not entitled to receive a further part of the estate in any other capacity.

Section 63 of the WSA provides that a surviving spouse is deemed to have predeceased an intestate if the intestate and the spouse:

- had been living separate and apart for more than 2 years at the time of the intestate’s death,
- were parties to a declaration of irreconcilability under the FLA, or
- were parties to an agreement or order finalizing their marital break-up.

Section 88 of the WSA allows a family member, including an AIP, to make a claim against a deceased’s estate if the deceased did not making adequate provision for the family member’s maintenance and support.

There are no priority provisions in the WSA in terms of claims that might be made by both a spouse and an AIP. As a consequence, both a spouse and an AIP can make a claim under the WSA and the court must weigh the rights and entitlements of both parties in making a determination.
3.3 **The Estate Administration Act**

Section 13(1)(b) of the EAA provides that a surviving spouse or AIP has the first priority to apply for a grant of administration, unless otherwise ordered by the court. If the AIP and the intestate were living separate and apart for more than 1 year or became former AIP’s under s 10 of the AIRA, then there is no right to administer the estate and the AIP is not a beneficiary under the intestacy.

Section 11(1)(b) of the EAA provides that when applying for a grant of probate or administration in a situation where a surviving AIP is not the sole beneficiary either under a will or the intestacy provisions of the WSA, the applicant must serve a copy of the application and a notice on the deceased’s AIP. The notice pertains to the AIP’s rights under Part 5 of the WSA. At this time, there is no requirement to serve an AIP with notice under the MPA as well.

3.4 **The Dower Act and the Matrimonial Property Act**

The Dower Act, RSA 2000, c D-15 [Dower Act] and the MPA were not significantly amended by the AIRA. As a consequence, an AIP does not have the same rights and entitlements that a married spouse does under the Dower Act and the MPA. A charter challenge in connection with the MPA has been attempted, on the basis that the exclusion of an AIP from the definition of “spouse” in the MPA amounted to discrimination. It was ultimately unsuccessful, however, as the Supreme Court of Canada noted that there are differences between married and unmarried relationships, as reflected in the MPA, which respect fundamental personal autonomy (see *Attorney General of Nova Scotia v Walsh*, 2002 SCC 83, [2002] 4 SCR 325).
## CHAPTER 7

### PLANNING FOR INCAPACITY: ENDURING POWER OF ATTORNEY

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1 POWERS OF ATTORNEY AT COMMON LAW

As part of an overall estate plan, everyone should plan for what happens if he or she becomes incapacitated.

At common law, a person (called a “donor”) can appoint someone as his or her attorney to manage his or her financial affairs. (Note that in Canada, “attorney” means a person appointed under a power of attorney, and not a lawyer, as frequently used in the United States of America.) The power given to the attorney can be specific, allowing an attorney to deal only with specified property, or very general, giving an attorney the power to handle the donor’s entire financial affairs.

The documents that give an attorney these powers can create some issues. First, when produced by the banks, powers of attorney can be covered in almost indecipherable writing and written in very complicated language, which neither the donor nor the attorney can read or understand.

A second problem with powers of attorney is that they become invalid as soon as the donor loses the mental capacity to revoke them (Drew v Nunn (1879), 4 QBD 661, 40 LT 671 (Eng CA); Axler v Axler, 50 ETR 93, 1993 CarswellOnt 566 (Ont Ct J (Gen D)); Re Cutler (1988), 92 NBR (2d) 76, 1988 CarswellNB 193 (NB QB)). Often, a donor is not aware of this and, in fact, it is precisely the circumstance in which a donor wants an attorney to continue to help him or her. As a result, the Alberta Legislature enacted the Powers of Attorney Act, RSA 2000, c P-20 [Powers of Attorney Act], to provide for enduring powers of attorney. The Powers of Attorney Act allows an attorney’s authority under a power of attorney to continue despite “any mental incapacity or infirmity” of the donor (s 2(5)).

2 ENDURING POWERS OF ATTORNEY

Under Alberta’s Powers of Attorney Act, an individual may sign an enduring power of attorney [EPA], a legal document that allows a person (the donor) to choose a person or persons (the attorney or attorneys) to look after the donor’s legal and financial affairs both before and after the donor becomes incapable of doing so, depending on how the document is written. Once created, the EPA survives later incapacity.

Without an EPA, someone must apply for an order under the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2, to be appointed as a trustee to make financial decisions for an incapacitated donor.
2.1 Requirements for a valid enduring power of attorney

Under the *Powers of Attorney Act*, only an adult may make an EPA (s 2(1)).

According to s 2, an EPA must:

1. be in writing,
2. be dated and signed by the donor in the presence of a witness (or if the donor is physically unable to sign, by another in the presence of both donor and witness),
3. be signed by the witness in presence of the donor,
4. contain a statement indicating that the EPA is either:
   (a) immediately in effect and is to continue despite the later mental incapacity or infirmity of the donor, or
   (b) it is only to take effect upon the mental incapacity or infirmity of the donor,
5. name an attorney who is an adult when the power is signed,
6. not be signed, on behalf of the donor, by
   (a) a person named as an attorney in the EPA, or
   (b) the spouse or adult interdependent partner [AIP] of a person named as an attorney in the EPA, and
7. not be witnessed by
   (a) an attorney named in the EPA,
   (b) a spouse or AIP of an attorney named in the EPA,
   (c) the spouse or AIP of the donor,
   (d) a person who signs the EPA on behalf of the donor, or
   (e) the spouse or AIP of the person who signs the EPA on behalf of the donor.

Section 3 of the *Powers of Attorney Act* makes an EPA void if the donor did not have the mental capacity at the time of its creation to understand the nature and effect of the document.
A power of attorney is *enduring* if

- it is a valid power of attorney according to the law of the place where it is signed (s 2(5)),
- the subsequent mental capacity or infirmity of the donor will not invalidate the attorney’s authority (s 4), and
- all the requirements under s 2 are met.

For a sample Enduring Power of Attorney Questionnaire (for use when interviewing a prospective donor) refer to the appendices.

### 2.2 Types of enduring powers of attorney

An EPA can come into effect either:

- immediately, or
- at a future time or on a future contingency (called a “springing EPA”).

An immediate EPA is effective as soon as it is signed. Donors do not lose the power to handle their own property until they are later incapacitated, and both the attorney and donor have the authority to sign and handle financial matters immediately. Often, this is referred to as a “continuing EPA” because it takes effect now and continues on through into incapacity.

A springing EPA is effective in the future when a contingency set out in the EPA occurs. The EPA may come into effect at a future specified time, when a donor reaches a certain age, or when a specified future contingency occurs, such as the mental incapacity of the donor (*Powers of Attorney Act*, s 5).

For a sample Declaration, which relates to the happening of the contingency specified in an EPA for the purposes of the Land Titles Office, refer to the appendices.

### 3 DETERMINING CAPACITY

A donor can name those who may declare in writing that the specified contingency has occurred, and thus that the EPA is in effect (*Powers of Attorney Act*, s 5(2)). A donor may name any person of his or her choosing to fill this role, including the named attorney. Often, a donor also names or includes his or her attending physician. Consider naming “my attending
physician” rather than the doctor by name, because the contingency may arise after a donor’s doctor changes or retires.

If the specified contingency relates to a donor’s mental capacity and the donor does not name someone who can make this declaration, then the Powers of Attorney Act provides that two medical practitioners may make the declaration in writing (s 5(4)).

3.1 Test for necessary capacity to sign an enduring power of attorney

For an EPA to be valid, a donor must be mentally capable of understanding the nature and effect of the EPA when it is made (Powers of Attorney Act, s 3). The test for capacity of a donor to make an EPA is different from the test for determining the mental capacity of a testator to make a will. As a result, a donor may not have testamentary capacity, but may still have sufficient capacity to sign an EPA.

The donor in an EPA does not have to understand the nature and effect of the acts that the attorney is authorized to perform. In its Final Report, the Western Canada Law Reform Agencies [WCLRA] summarize the test of capacity for a power of attorney as requiring the donor to have the mental capacity to understand the nature and effect of the Enduring Power of Attorney (Enduring Powers of Attorney: Areas for Reform, Final Report (Edmonton: WCLRA, 2008) at 22–24 [WCLRA, Areas for Reform]). The report also notes that legal capacity is task specific; incapacity in one area does not necessarily mean incapacity in another. See also the Alberta Law Reform Institute website for papers on this subject (http://www.alri.ualberta.ca/).

According to English and Canadian cases on the subject, the legal test for capacity to sign an EPA does not require a donor to be capable of managing his or her own financial affairs (British Columbia (Public Guardian and Trustee of) v Egli, 2004 BCSC 529, 2004 CarswellBC 843; Godelie v Public Trustee (1990), 39 ETR 40, 1990 CarswellOnt 497 (Ont Dist Ct); Re K, [1988] 1 All ER 358 (ChD)). Instead, the test requires that a donor be capable of understanding that:

- the attorney will assume complete authority over his or her affairs,
- depending on the terms of the power, the attorney will be able to do anything with the donor’s property that the donor could have done,
- the power will continue if the donor becomes mentally incapable, and
the power is irrevocable if the donor becomes mentally incapable.

Ensure that a donor clearly understands the above points and also the EPA. If there is any hesitation about capacity, the best practice is to have the donor see his or her physician and have the physician assess and confirm in writing the donor’s ability to understand the nature and effect of an EPA.

For a sample Letter to a Physician Requesting a Capacity Assessment for an EPA, or for a sample Medical Opinion Regarding Legal Mental Capacity (for completion by a physician), refer to the appendices.

For more on the test for capacity, the approach to assessing capacity, the consequences of failing to properly assess capacity, and the proper practice where capacity is uncertain, see the Legal Education Society of Alberta [LESA] publication: Paul D Trotter, “Capacity and the Duties of a Lawyer” (Paper delivered at LESA’s Drafting Personal Directives and Enduring Powers of Attorney, 2 December 2013), (Edmonton: LESA, 2013).

### 3.2 Privacy issues

When and if a donor reaches a stage at which he or she is believed to be incapacitated, the named attorney (or his or her lawyer) can request a physician’s assessment of the donor under s 6 of the *Powers of Attorney Act*. This specifically allows the release of confidential health care information about a donor. It permits a donor’s physician to disclose information concerning the donor’s mental and physical health to the extent necessary to determine whether the specified contingency of incapacity has occurred to put the EPA into effect.

Similarly, for lawyers acting for a donor, if the donor disputes that this contingency has happened, request information from the donor’s physician for the purposes of confirming that the donor still has capacity.

If a lawyer is consulted by a donor’s family, who believes the donor is incapacitated, and that lawyer previously acted for the donor in preparing an EPA, he or she must be aware of potential conflicts of interest. If the donor is not incapacitated, the donor may not agree to the lawyer disclosing his or her personal information. As well, the donor may disagree with the document coming into effect.
4 AUTHORITY OF ATTORNEY

A donor may appoint one or more people to act as his or her attorney; if more than one, the attorneys may be appointed to act either jointly or jointly and severally. A donor may also appoint alternate attorneys.

Under s 8 of the Powers of Attorney Act, an attorney who agrees and starts to act under an EPA has a duty:

- to exercise the attorney’s powers to protect the donor’s interests during any period in which the attorney knows, or reasonably ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor’s estate.

An attorney is normally authorized to do anything that the donor could do, had the donor not suffered a mental incapacity. An EPA may be “general,” providing an attorney with the power to manage all of the donor’s property and financial affairs; or the power can be “limited,” providing an attorney with the power to deal with only specifically identified property or providing directions as to what the attorney may or may not do with various assets.

Section 7 of the Powers of Attorney Act sets out the broad authority of an attorney. Under this section, an attorney is granted:

(a) ... authority to do anything on behalf of the donor that the donor may lawfully do by an attorney, and specifically may use the donor’s property, and

(b) ... 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.

This is important because an attorney cannot use a donor’s property for anyone’s benefit other than the donor’s. If a donor wants an attorney to have this ability, for example, to continue to make charitable donations on the donor’s behalf, then the EPA must give this power to the attorney specifically.

Another important consideration when drafting EPAs for a married couple or for AIPs is whether they intend that one individual’s assets and property can be used to support the other. There are a variety of possibilities that can be included in such clauses including statements that not only the donor, but the donor’s spouse or AIP both wish to remain in
their home as long as possible, and that the donor’s assets may be used to pay to modify the home for either of their needs, or to pay for a caregiver for either of them, in order to give effect to those wishes. This is particularly important if one spouse or AIP is the primary income earner or holds more assets in his or her name. Similarly, if a client has other dependents, continuing to provide for them may be a useful and practical provision in the EPA.

There are some restrictions on an attorney’s power:

- an attorney may not make a will on a donor’s behalf,
- an attorney may not exercise a power of discretionary nature which has been given to a donor personally,
- an attorney likely cannot change a donor’s beneficiary designations unless specifically given the power to do so,
- a donor cannot delegate his or her duties as an executor or trustee to an attorney unless allowed by the instrument appointing the donor or by statute,
- an attorney may not execute a dower consent under the Dower Act, RSA 2000, c D-15 [Dower Act] once the donor is a mentally incompetent person; instead the attorney must apply for a court order waiving the donor’s consent under s 10 of the Dower Act, and
- an attorney cannot deal with the donor’s real property unless the EPA specifically grants the attorney the power to deal with land (Land Titles Act, RSA 2000, c L-4, s 115).

The Land Titles Office also requires an express statement in the affidavit of attestation of an EPA stating that the witness to the signing is not one of the persons prohibited from acting as a witness under 2(4) of the Powers of Attorney Act. Prepare and have this document signed at the same time as the EPA.

As the Land Titles Office requires on original EPA for registration on title, it is good practice to prepare the original EPA together with a “land titles original” EPA to which the required affidavit of attestation is attached. For a sample Affidavit of Attestation, refer to the appendices.
Since it is unclear whether the Canada Revenue Agency requires a specific power to administer a donor’s tax issues in an EPA, consider including the power to make designations and otherwise deal with tax matters as a specific power, as part of best practices in drafting.

5 POWERS OF ATTORNEY AND TRUSTS

Sections 2–8 of the Trustee Act, RSA 2000, c T-8 [Trustee Act] apply to investments made by an attorney for a donor. This is known as the “prudent investor rule.” The prudent investor rule widens the scope of authorized investments and allows trustees to invest in any reasonable investment, subject to contrary directions in the trust instrument. Reasonableness is determined by taking into account the nature of the trust, its duration, risk, and “other relevant factors.”

In comparison, before the 2001 enactment of the amendments to the Trustee Act, trustees were limited to the so-called “legal list” of investments. These “trustee authorized investments” precluded trustees from investing trust assets in anything other than fairly low risk and very restrictive instruments. Additionally, the list of “authorized” investments used to be appended to the Trustee Act, but was repealed in 2006. The Trustee Act now provides a non-exhaustive list of considerations, and a trustee should take these into account when investing trust funds (Trustee Act, s 3(5)). Due to these previous provisions in the Trustee Act, wills and trust instruments signed before 2001 may limit a trustee’s investment power to “trustee authorized investments.”

6 TERMINATING AN ATTORNEY’S POWER

According to the Powers of Attorney Act, an EPA is terminated in one of the following ways:

- the donor revokes the EPA in writing, provided the donor is mentally capable of understanding the revocation (s 13(1)(a)),
- an interested person applies to the court for an order terminating the EPA, which the court may grant if it is in the donor’s best interests to do so (ss 11(1)–(4), 13(1)(c)),
- the attorney applies to the court for leave to renounce the appointment on notice to the donor and any other named attorneys (ss 12(1), 13(1)(b)),
- a trusteeship order is granted for the donor (s 13(1)(d)),

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7 APPLYING FOR ADVICE AND DIRECTION

Attorneys can apply to the court for advice and direction concerning the management or administration of a donor’s property. If an order is granted, attorneys may act on the opinion, advice, or direction in the order. An attorney is protected in doing so, unless he or she is guilty of fraud, wilful concealment, or misrepresentation in obtaining the order.

8 ACCOUNTING

Under s 10 of the Powers of Attorney Act, a donor, the donor’s personal representative, or a trustee of the donor’s estate may apply to the court to have the attorney pass his or her accounts. If a donor lacks mental capacity to make reasonable judgments, any interested person can apply for an accounting. Any purported agreement or waiver by the donor to the contrary does not bar this application.

9 CHARACTERIZING AN ATTORNEY’S ROLE

The role of an attorney under a power of attorney has been characterized in various ways, including agent, trustee, and fiduciary. The powers, authority, and duties associated with each of these descriptions have been the subject of numerous cases, none of which provide certainty about how the role of attorney fits into any of the categories.

The Western Canadian Law Reform Agencies considered that the duties align most closely with the concept of a fiduciary (WCLRA, Areas for Reform at 29). Some of the characteristics of a trustee fit with an attorney’s role, while others do not fit well at all. Attorneys under common law powers of attorney are agents, but an attorney under an EPA is usually in the role on a long-term basis, particularly if the donor’s incapacity is irreversible. By contrast, the agency relationship includes the ability of the donor to end the agency agreement, which is lost to an incapacitated donor.

For sample Attorney Duties, refer to the appendices.
 COMPENSATING AN ATTORNEY

At common law, an attorney, as an agent, is only entitled to payment for services if either the agency contract provides for it or if the attorney has a right to restitution or to claim remuneration on a quantum meruit (reasonable value of services) basis. However, the appointed attorney under an EPA is best characterized not as an agent but rather as a trustee and fiduciary. Trustees and fiduciaries are entitled to be paid. In addition, attorneys are entitled to be reimbursed for any expenses incurred in carrying out the duties of an attorney under an EPA.

To avoid any confusion, encourage donors to discuss payment terms with the proposed attorney or attorneys. If compensation is to be paid, a clause describing the amount and timing of the compensation should be added to the power of attorney. This can be worded as compensation similar to that awarded to personal representatives under the Surrogate Rules, Alta Reg 130/1995.

FORM OF ENDURING POWER OF ATTORNEY

There is no required form for an EPA. Every EPA must be tailored to an individual donor’s requirements and suited to his or her circumstances. For a sample Enduring Power of Attorney, which gives some ideas for clauses that might be incorporated into an EPA, refer to the appendices. For more ideas, see Farha Salim, “Drafting Powers of Attorney and Personal Directives: The Basics and Beyond” (Paper delivered at LESA’s Drafting Personal Directives and Enduring Powers of Attorney, 2 December 2013), (Edmonton: LESA, 2013).

A valid power of attorney does not have to incorporate a schedule of explanatory notes, an acknowledgement, or a certificate of legal advice. However, appending explanatory notes is recommended. Using explanatory notes is beneficial to focus attention on what the donor must understand and provides a written explanation of the legal implications of an EPA. Consider amending the “traditional” or original explanatory notes to better reflect the document the client is signing and the basic capacity requirements for EPAs (WCLRA, Areas for Reform).

ASSETS IN OTHER JURISDICTIONS

If a donor has assets in another jurisdiction, the donor may grant an EPA for each jurisdiction. Each EPA should be restricted to dealings with assets in the specified
jurisdiction. In addition, a donor may need a notarized copy of the EPA in order to deal with property outside of Alberta.

The Powers of Attorney Act does not require a certificate of independent legal advice in Alberta, but other jurisdictions may require this and they may not recognize the EPA if it does not conform to that jurisdiction’s formal and procedural requirements. Thus, it is good practice to include one.

Some jurisdictions may require an affidavit of signature by a witness. Any competent adult person can act as a witness and can swear the affidavit (subject to the stated exclusions in s 2(4) of the Powers of Attorney Act). Without this affidavit, the document may not be accepted by banks or government departments. The Land Titles Office has its own affidavit requirement and this can be used as an affidavit of signature. For a sample Affidavit of Attestation, refer to the appendices.
## CHAPTER 8

**PLANNING FOR INCAPACITY: PERSONAL DIRECTIVES**

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1 PERSONAL DIRECTIVES AT COMMON LAW

At common law, there was really nothing that people could do to plan for others to make personal care and medical decisions, such as where they should live or whether they should have medical treatment, if they had lost the necessary mental capacity to understand the nature of those decisions.

A practice developed for people to sign so-called “living wills” to set out their wishes about what they wanted to happen in that case. (A “will,” of course, can only speak from death, so to call something a “living will” is nonsensical.) Medical personnel were reluctant to follow these documents because they feared they might be held liable for failure to perform medical procedures, even where the person had clearly written that he or she did not want them.

To address these concerns, the Personal Directives Act, RSA 2000, c P-6 [Personal Directives Act] was proclaimed, allowing Albertans to provide instructions in a personal directive [PD] about personal matters and to appoint someone to make decisions and carry out those instructions.

Without a PD, someone else must apply for an order under the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2 [Adult Guardianship and Trusteeship Act] to be appointed as a guardian of the incapacitated adult and to make these decisions.

2 PERSONAL DIRECTIVES

An adult with capacity (called a “maker”) may appoint another adult person (called an “agent”) in writing in a PD to make personal decisions for him or her at a future time when the maker no longer has the capacity to make them. (For more about “capacity,” refer to the content on “The test for necessary capacity to sign a personal directive.”) A PD allows a maker to plan for non-financial personal matters, such as medical treatment, residence, and other personal activities.

A PD is an alternative to a guardianship order under the Adult Guardianship and Trusteeship Act, just as an enduring power of attorney is an alternative to a trusteeship order.

PDs are governed by the Personal Directives Act. Both the maker and the appointed agent must be at least 18 years old, and the agent must also have the capacity to make personal
decisions on behalf of the maker (Personal Directives Act, s 3(1)), s 12). Under s 3(2), adults are presumed to understand the nature and effect of a PD.

A maker may have more than one PD covering various matters (Personal Directives Act, s 6). Once an agent is acting, the personal decisions made by the agent have the same effect as if made by the maker (s 11).

However, a maker who is the subject of a guardianship order may not make a PD with respect to any matter over which his or her guardian under the Adult Guardianship and Trusteeship Act has authority.

For a sample PD Questionnaire, for use when interviewing a prospective PD maker, refer to the appendices.

2.1 Requirements for a valid personal directive

In addition to being an adult when the PD is signed, s 5 of the Personal Directives Act stipulates that a PD must:

- be in writing,
- be dated and signed by the maker in the presence of a 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),
- not be signed, on behalf of the maker, by
  - a person designated as an agent in the PD, or
  - the spouse or adult interdependent partner [AIP] of a person designated as an agent in the PD,
- be signed by a witness in the presence of the maker,
- not be witnessed by
  - the agent,
  - the spouse or AIP of a person designated as an agent in the PD,
  - the spouse or the AIP of the maker,
  - a person who signed on behalf of the maker, or
  - the spouse or the AIP of a person who signed on behalf of the maker.
A PD that complies with these requirements, even made outside Alberta, is valid in Alberta (s 7.3).

3  THE TEST FOR CAPACITY TO SIGN A PERSONAL DIRECTIVE

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 s 1(b) of the Personal Directives Act as “the ability to understand the information that is relevant to the making of the personal directive and the ability to appreciate the reasonably foreseeable consequences of the decision.”

The test for capacity of a maker is different from the test for determining the mental capacity of a testator. As a result, a maker may not have testamentary capacity but he or she may still have capacity to sign a PD.

3.1  Determining capacity

A PD is in effect, relating to a personal matter, when the maker lacks capacity to make decisions regarding that matter (Personal Directives Act, s 9(1)). Unlike enduring powers of attorney, there are not both “immediate” and “springing” variations of PDs. Rather, PDs are all similar to the idea of a “springing” enduring power of attorney, and spring into effect when and if the maker lacks capacity and the designated person signs a declaration of incapacity.

A maker can designate the people who can determine his or her capacity. These people can be whomever the maker chooses, including the agent. Often a maker also names or includes his or her attending physician. In such a case, for drafting purposes, consider naming “my attending physician” rather than the doctor by name as the maker may lose capacity when he or she has a new doctor.

To determine capacity, the people who are designated must first consult with a physician or psychologist and then make the declaration in writing (Personal Directives Act, s 9(2)(a)). If no one is designated or if the designated individuals are unable or unwilling to make the determination or cannot be found, then two service providers may make the determination (s 9(2)(b)). Section 1(n) of the Personal Directives Act defines “service provider” as “a person who carries on a business or profession that provides or who is employed to provide a personal service to an individual and when providing the service requires a personal decision from the individual before providing the service.” At least one of the service providers must
be a physician or psychologist (s 9(2)(b)). For more on service providers, refer to the content on “Service providers.”

4 CONTENT OF PERSONAL DIRECTIVES

Section 7 of the Personal Directives Act provides that a PD may contain information and instructions about any personal matter. It lists what some of these might be (but PDs are not restricted to these):

- designating agents and their authority,
- designating who may determine the maker’s capacity under s 9 of the Personal Directives Act,
- naming who is and is not to be notified of the coming into effect of the PD,
- instructing on access to the maker’s confidential information, and
- if the maker is a guardian of a minor, designating an agent to take over the care and education of a minor until another guardian takes over or is appointed, or the maker regains capacity.

Where a PD contains an instruction that is prohibited by law, that instruction is void. The preamble to the Personal Directives Act specifically mentions aided suicide and euthanasia as illegal actions. Note, however, that in Carter v Canada (AG), 2015 SCC 5, [2015] 1 SCR 331, the Supreme Court of Canada found that the ban on assisted suicide in cases of irremediable and intolerable medical conditions violated the s 7 right to life, liberty, and security in the Canadian Charter of Rights and Freedoms, s 2(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. Consequently, to the extent that they prohibit assisted suicide in these instances, ss 14 and 241(b) of the Criminal Code, RSC 1985, c C-46 are invalid as of February 2016.

Under s 7 of the Personal Directives Act, a PD may designate an agent or agents. An agent may be:

- any individual (as long as he or she is over 18),
- someone identified by virtue of his or her office or position, or
- the Public Guardian if
  - the Public Guardian is the only agent designated in the PD,
the maker can satisfy the Public Guardian that no other person is able and willing to act as agent, and

- the Public Guardian consents.

An agent can make decisions in specific areas as set out in the PD or can be given general powers as set out in the *Personal Directives Act*. Personal matters are defined in s 1(l) of the *Personal Directives Act*:

(l) “personal matter” means, subject to the regulations, any matter of a non-financial nature that relates to an individual’s person and without limitation includes:

1. health care;
2. accommodation;
3. with whom the person may live and associate;
4. participation in social, educational and employment activities;
5. legal matters;
6. any other matter prescribed by the regulations.

### 5 BRINGING A PERSONAL DIRECTIVE INTO EFFECT

The regulations under the *Personal Directives Act* provide a form to be completed when those designated in a PD or under the *Personal Directives Act* believe that the PD maker is incapacitated. A copy of the declaration must be given to the maker, the maker’s agent, and any other person designated in the PD. Designated people must also advise that a determination of incapacity has been made and that the maker can apply to the court for a review of the determination.

When a determination of capacity is made, the agent must notify the maker’s nearest relative and legal representative that the PD is in effect. However, in the PD, a maker can direct the agent not to notify certain people (s 9(5)). “Nearest relative” and “legal representative” are defined in ss 1(g) and (i) of the *Personal Directives Act*:

(g) “legal representative” means an attorney under the *Powers of Attorney Act* [RSA 2000, c-20] or a guardian or trustee under the *Adult Guardianship and Trusteeship Act*.
“nearest relative” means, with respect to any person, the relative of that person first listed in the following subclauses, relatives of the whole blood being preferred to relatives of the same description of the half-blood and the elder or eldest of 2 or more relatives described in any subclause being preferred to the other of those relatives regardless of gender:

(i) spouse or adult interdependent partner;
(ii) son or daughter;
(iii) father or mother;
(iv) brother or sister;
(v) grandfather or grandmother;
(vi) grandson or granddaughter;
(vii) uncle or aunt;
(viii) nephew or niece.

If an agent believes there is a “significant change” to a maker’s capacity — that is, an “observable and sustained improvement that does not appear to be temporary” (Personal Directives Act, s 1(o)) — the agent must consult with a service provider who provides health care services to the maker. If the agent and the service provider agree that the maker has regained capacity, they must make the determination in the prescribed form (s 10.1). There are similar provisions in the circumstance where a health care provider notes a significant change. A maker can also ask for an assessment, but the agent or service provider does not have to complete one if he or she believes there is no significant change.

6 WHEN A PERSONAL DIRECTIVE CEASES TO HAVE EFFECT

Under s 10 of the Personal Directives Act, a PD ceases to have effect when:

- a determination is made that the maker has regained capacity,
- the maker dies,
- the PD is validly revoked, or
- the court so orders.
6.1 Revoking a personal directive

According to the *Personal Directives Act*, a PD is revoked in one of the following ways:

- The maker revokes it in writing, provided the maker understands the nature and effect of revoking the PD (s 8(1)),
- 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 (s 8(2)(a)),
- The maker creates a later PD that contradicts the earlier PD (s 8(2)(b)),
- The maker creates a document, including a later PD, that expresses an intention to revoke an earlier PD (s 8(2)(c)), or
- The maker destroys the original PD with the intention to revoke it (s 8(4)).

Other than when a maker destroys the original PD, any revocation must be in writing, signed and dated by the maker (s 8(3)).

7 AGENTS’ DUTIES, AUTHORITY, AND LIMITATIONS ON AUTHORITY

An agent’s authority extends to all personal matters unless specifically excluded by the PD (*Personal Directives Act*, s 14(1)). Before making a personal decision, an agent must consult the maker (s 13). An agent must follow all instructions in the PD if they are clear. If they are not clear, an 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 an agent does not know the maker’s wishes, beliefs, and values, then the agent must make the decision he or she believes is in the maker’s best interests in the circumstances (ss 14(2)–(3)).

Since an agent needs to know the maker’s wishes, beliefs, and values, the choice of agent is crucial. Makers should discuss their wishes, beliefs, and values with their agents when they have the capacity to do so. This is especially true of end-of-life decisions when an agent may be called upon to make decisions having significant consequences on the maker’s life and death. An agent cannot be asked to make such decisions without knowing the maker’s wishes, beliefs, and values.

Consequently, some decisions must have clear instructions in the PD in order for an agent to make them. For instance, most PDs include instructions regarding organ donations and
whether a donation is for implantation, medical education, or scientific research purposes. Under s 15 of the *Personal Directives Act*, without clear instructions in a PD, an agent does not have authority to make personal decisions related to:

(a) psychosurgery as defined in the *Mental Health Act* [RSA 2000, c M-13];

(b) sterilization that is not medically necessary to protect the maker’s health;

(c) removal of tissue from the maker’s living body

(i) for implantation in the body of another living person pursuant to the *Human Tissue and Organ Donation Act* [SA 2006, c H-14.5], or

(ii) for medical education or research purposes;

(d) participation by the maker in research or experimental activities, if the participation offers little or no potential benefit to the maker;

(e) any other matter prescribed in the regulations.

[Citations added].

Where there is more than one agent who cannot agree on a decision, and the PD has no conflict-resolving directions, then the majority decision prevails. If agents cannot agree on who should communicate decisions, then the first agent appointed does so (*Personal Directives Act*, s 16). Therefore, it is a good idea to provide a conflict-resolution process in a PD.

An agent must keep records of decisions during the entire time the maker is incapacitated and for two years after the agent’s authority ceases (*Personal Directives Act*, s 17(1)). Subject to a contrary instruction in the PD, an agent must provide a copy of the record to the maker, the maker’s lawyer, the maker’s legal representative (only relevant portions of the record), and any other agent (only relevant portions of the record) on request (s 17(2)(a)). An agent may also make the record available to any person if the agent considers it is in the maker’s best interests to do so (s 17(2)(b)).

Agents are entitled to access a maker’s personal information that is relevant to the personal decision being made, and public bodies holding such information are permitted to disclose it to agents, persons making capacity determinations, and service providers (*Personal Directives Act*, s 30).
8 COMPENSATING AN AGENT

An agent is not entitled to be paid a fee for exercising any authority under a PD unless the PD specifically provides for it (Personal Directives Act, s 18). Agents are, however, entitled to be reimbursed for any expenses they incur to carry out the duties of an agent under a PD.

To avoid confusion, encourage makers to discuss payment terms with the proposed agent. If compensation is to be paid, a clause describing the amount and timing of payment should be included in the PD.

9 SERVICE PROVIDERS

Part 4 of the Personal Directives Act deals with service providers. As well, the term “service providers” is defined in s 1(n).

Most nursing homes and other care facilities ask that residents have a PD. Similarly, admissions clerks at hospitals ask whether patients being admitted have a PD. As a result, makers should take a copy of their PD with them when entering the hospital. Their family physician should also have a copy of the PD on their patient’s file.

Before providing a service, service providers must determine if the maker continues to lack capacity. In an emergency, care can be provided without consent.

Service providers must follow an agent’s instructions when they are providing personal services to a maker lacking capacity. If there is no agent or the agent cannot be found, service providers must follow the instructions in a PD. If there is no agent and the PD does not have clear instructions, then service providers must contact the maker’s nearest relative (defined in Personal Directives Act, s 1(i)).

10 PUBLIC GUARDIAN

Part 4.1 (ss 24.1–24.6) of the Personal Directives Act deals with the Public Guardian’s role. This includes:

- delegating powers and duties,
- receiving complaints from interested persons about agents failing to comply with a PD or perform their duties,
- reviewing complaints and investigating where necessary,
• attempting to resolve complaints, sending them to alternative dispute resolution, or applying to the court for an order,

• collecting, using, and disclosing personal information as provided in s 24.5 of the Personal Directives Act, and

• notifying authorities about criminal activity, abuse, or statutory offences.

11 COURT REVIEW

Part 5 of the Personal Directives Act deals with court review. Makers, the Public Guardian, and interested persons can apply to the court for various orders. Section 27 gives the court power to do any one or more of the following:

(a) make a determination of capacity of the maker or agent after considering a report made under subsection (2)(b);

(b) determine the validity of a personal directive or any part of it;

(c) based on instructions contained in a personal directive, vary, confirm or rescind a personal decision, in whole or in part, made by an agent;

(d) determine the authority of an agent;

(d.1) revoke the authority of an agent referred to in section 24.4, in whole or in part, if the agent is failing to comply with the personal directive or the duties of an agent and the Court considers that the failure is likely to cause serious harm to the physical or mental health of the maker;

(e) provide advice and directions;

(f) make a decision where a majority cannot agree under section 16(2);

(g) stay a decision of an agent;

(h) make any other order that the Court considers appropriate that is not inconsistent with a personal directive.

The court may require that an agent provide or prepare a report of the personal decisions made by the agent. However, in making a decision, the court cannot add to or alter the intent of the PD’s instructions (s 27(2)–(3)).

12 AGENTS’ LIABILITY AND PROTECTIONS

As long as agents act in good faith in carrying out their authority, their actions are protected from liability (Personal Directives Act, s 28(1)). Similarly, service providers are protected
when acting in good faith under the *Personal Directives Act* (s 28(2)). The actions of agents and service providers are protected even if a PD is revoked or changed if they did not know about the revocation or changes (s 28(3)). Lastly, no action lies against the Public Guardian or delegates for acting in good faith under the *Personal Directives Act* (s 28(4)).

When making decisions that affect a maker, agents are not disentitled to benefits under the maker’s will, insurance policies, intestacy, or an order for family maintenance and support, as long as they act in good faith (s 29).

### 13 FORMS AND TECHNICAL RULES

Under s 6.1 of the *Personal Directives Act*, the Minister may establish a form for PDs; however, use of this form is not mandatory. The *Personal Directives (Ministerial) Regulation*, Alta Reg 26/1998 [*Personal Directives (Ministerial) Regulation*] prescribes various forms, including a form of PD at Schedule 1. This is not a required form. Every PD must be tailored to an individual maker’s requirements and suited to his or her circumstances. For a sample PD, refer to the appendices.

Other schedules in the *Personal Directives (Ministerial) Regulation* include:

- **Schedule 2**, which is a Declaration of Incapacity (under s 9(2)(a) of the *Personal Directives Act*). It is used when a person designated in a PD to determine capacity consults with a physician or psychologist. It is completed and signed by the person who is designated in a PD to bring it into effect and by the physician or psychologist who is consulted,

- **Schedule 3**, which is a Declaration of Incapacity (under s 9(2)(b) of the *Personal Directives Act*), to be completed by a service provider, who is a physician or a psychologist,

- Schedules 4, 5 and 6, which deal with regained capacity, and

- **Schedule 7**, which is a Complaint to the Public Guardian under s 24.2 of the *Personal Directives Act*, for use by an interested person where there is reason to believe that an agent is failing to comply with a PD or his or her duties as an agent, and that it is likely that the agent’s behaviour will cause harm to the maker.
Any competent adult can act as witness and can swear the affidavit of witness to a signature (subject to stated exclusions). Without a sworn affidavit of witness to a signature, a PD document may not be accepted by care facilities and caregivers. For a sample Affidavit of Attestation and sample Notes on the PD (suggested, non-prescribed notes to be read by a maker before signing), refer to the appendices.

14 OTHER JURISDICTIONS

The Personal Directives Act does not require a certificate of independent legal advice, but other jurisdictions may not recognize the document if it does not conform to that jurisdiction’s formal and procedural requirements. Check the legislation of the relevant jurisdiction to see whether that jurisdiction recognizes a foreign PD. Note that Alberta recognizes foreign PDs that comply with Alberta formalities (Personal Directives Act, s 7.3).
CHAPTER 9

DEALING WITH INCAPACITY: ADULT GUARDIANSHIP AND TRUSTEESHIP ACT

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1 INTRODUCTION TO ADULT GUARDIANSHIP AND TRUSTEESHIP ACT

If a person fails to plan for his or her incapacity and does not have a personal directive or an enduring power of attorney, someone must step in when that person loses the ability to manage personal affairs and financial matters. In Alberta, the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2 [AGTA] provides an avenue for the care and supervision of a person through guardianship provisions and for administering the estate of an adult who, because of disability, is unable to look after his or her own personal or financial affairs. The AGTA replaced the Dependent Adults Act, RSA 2000, c D-11 [Dependent Adults Act] on October 30, 2009.

The AGTA is divided into 5 parts:

Part 1 contains definitions and the guiding principles of the Act. Section 2 states that:

This Act is to be interpreted and administered in accordance with the following principles:

(a) an adult is presumed to have the capacity to make decisions until the contrary is determined;

(b) an adult is entitled to communicate by any means that enables the adult to be understood, and the means by which an adult communicates is not relevant to a determination of whether the adult has the capacity to make a decision;

(c) where an adult requires assistance to make a decision or does not have the capacity to make a decision, the adult’s autonomy must be preserved by ensuring that the least restrictive and least intrusive form of assisted or substitute decision-making that is likely to be effective is provided;

(d) in determining whether a decision is in an adult’s best interests, consideration must be given to

(i) any wishes known to have been expressed by the adult while the adult had capacity, and

(ii) any values and beliefs known to have been held by the adult while the adult had capacity.

Part 2 - deals with supported decision-making, co-decision-making, guardianship, and trusteeship.
Part 3 - deals with specific decisions and emergency health care decisions.

Part 4 - deals with general provisions like capacity assessments, access to personal information, appeals, costs, regulations, etc.

Part 5 - contains the transitional provisions, consequential amendments, and sections dealing with the repeal of the Dependent Adults Act and the coming into force of the AGTA.

The Adult Guardianship and Trusteeship Regulation, Alta Reg 219/2009 [AGTA Regulation] contains more details about capacity assessments and court applications. It also contains all the forms that are to be used in the various court applications. The Adult Guardianship and Trusteeship (Ministerial) Regulation, Alta Reg 224/2009 [AGTA (Ministerial) Regulation] provides detail relating to supporters and supporter authorizations and decisions. The Transitional (Applications Made in Conformity with the Dependent Adults Act; Certificates of Incapacity) Regulation, Alta Reg 218/2009, is another regulation to the AGTA and it deals with certificates of incapacity.

The AGTA and its regulations are long and complicated; thoroughly review the legislation before giving advice and making applications under the AGTA.

1.1 “Capacity” defined

The AGTA defines capacity in s 1(d):

“capacity” means, in respect of the making of a decision about a matter, the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of

(i) a decision, and

(ii) a failure to make a decision.

Adults for whom AGTA orders are issued are called

• “supported adults” under supported decision-making orders (s 1(nn)),
• “assisted adults” under co-decision-making orders (s 1 (c)), and
• “represented adults” under guardianship and/or trusteeship orders (s 1(hh)).
Previously, under the Dependent Adults Act, adults for whom orders were issued were called “dependent adults,” and this terminology may still be seen in older cases and literature on this topic.

1.2 Jurisdiction

The Surrogate Court ceased to exist in 2001. All surrogate matters are now heard by the Court of Queen’s Bench under its surrogate matters jurisdiction. The Surrogate Rules, Alta Reg 130/1995 apply to represented adult matters.

AGTA applications are styled: “In the Court of Queen’s Bench of Alberta (Surrogate Matter).” Applications may proceed by way of a desk application (i.e., a judge reviews them without a hearing) if there are no objections and proof of service is in order.

1.3 Types of orders

A court may appoint supporter decision-makers, co-decision-makers, guardians, and trustees under the AGTA. The various types of orders available under the AGTA’s framework recognize that a person’s capacity is not all or nothing. It changes over time, is different for each kind of decision to be made, and can improve or deteriorate.

Personal matters

The supporter decision-makers, co-decision-makers, and guardians make decisions on behalf of a supported, assisted, or represented adult regarding their “personal matters.” What constitutes a personal matter is defined in s 1(bb) of the AGTA:

“personal matter” means, subject to the regulations, any matter, except a financial matter, relating to the person of an adult, including, without limitation,

(i) the adult’s health care,

(ii) where, with whom and under what conditions the adult is to live, either permanently or temporarily,

(iii) with whom the adult may associate,

(iv) the adult’s participation in social activities,

(v) the adult’s participation in any educational, vocational or other training,

(vi) the adult’s employment,
(vii) the carrying on of any legal proceeding that does not relate primarily to the financial matters of the adult, and

(viii) any matters prescribed by the regulations.

Financial matters

Trustees look after a represented adult’s financial affairs, such as business affairs, banking, investments, and real or personal property. Property is defined in s 1(cc) of the AGTA to include “things and rights or interests in things.”

2 HELP WITH DECISION-MAKING ON PERSONAL MATTERS

Under the AGTA, there is a continuum of roles an individual can take on to assist an adult with his or her personal matters. On one end of this continuum, adults may appoint a supported decision-maker to help them deal with personal matters. This provides assistance to adults who have the capacity to make decisions but would benefit from having someone else (who they trust) involved.

2.1 Supported decision-making

Division 1 of Part 2 of the AGTA deals with supported decision-making.

After a “supported adult” signs Form 1 (“Supported Decision-Making Authorization”), a supporter can then access relevant information about that supported adult, speak on behalf of or alongside that supported adult, or help make or communicate a decision. Other examples of what a supporter can do include interpreting what a professional is saying, putting what the adult is being told into the context of the adult’s life, or helping the adult to access information.

Forms 1 through 10 are prescribed in the AGTA (Ministerial) Regulation. With some exceptions, such as the Public Guardian and the Public Trustee, almost any adult can be appointed as a supporter for supported decision-making.

In addition to the role as a supporter, a supporter must also:

- keep a record of all decisions he or she assisted the supported adult in making, and
- act in the supported adult’s best interests, diligently, and in good faith.
A supported adult can terminate an authorization for a supporter to act in that role by:

- completing a termination form (Form 2; AGTA, s 7),
- granting a co-decision-making or guardianship order, or
- activating a personal directive (AGTA, s 8).

2.2 Co-decision-makers

Division 2 of Part 2 of the AGTA governs co-decision-making relationships. This is the next point along the continuum of helping adults with personal matters.

Both the assisted adult and the co-decision-maker must agree to the arrangement (s 13(4)).

The application is made by completing prescribed Forms 11 and 12. The arrangement terminates when the assisted adult withdraws consent by completing prescribed Form 13 and filing it with the court. At that point, the clerk of the court must notify the Public Guardian, who may take any steps it considers appropriate to determine the needs of the adult after the order is terminated.

A co-decision-maker cannot make decisions for an assisted adult but can engage with the assisted adult to reach an appropriately considered decision. There can be more than one co-decision-maker, in which case the order must specify whether they are to act jointly, successively, or separately (s 16). It must also list the areas of personal decision-making to which the order applies (s 17).

It is not a conflict of interest for a relative or potential beneficiary of an assisted adult to be appointed as a co-decision-maker (s 14(3)).

An application to appoint a co-decision-maker can also be made in respect of a youth who is 17 years of age, to come into effect when he or she turns 18 (s 11).

Again, similar to the supporter in supported decision-making, neither the Public Guardian nor the Public Trustee can be appointed as a co-decision-maker (s 15).

Under s 13(4), before a court grants a co-decision-making order, it must find that:

- the adult’s capacity is “significantly impaired”, but that the adult can make a decision with “guidance and support,”
• less intrusive measures are not adequate, and
• it is in the best interests of the adult to have a co-decision-maker.

Significant impairment must be determined by a capacity assessment.

Section 1(2)(d) of the AGTA Regulation defines the term “significantly impaired” as meaning that the adult’s cognitive and adaptive abilities:

(i) are substantially limited as the result of an impairment, including, without limitation, a developmental disability, an organic, degenerative or neurological disease or disorder, an acquired brain injury or a chronic mental illness, and

(ii) are not so substantially limited that the adult would not have the capacity to make decisions with appropriate guidance and support.

Section 13(5) of the AGTA sets out the evidence a court must consider in determining whether to appoint a co-decision-maker, including:

• the capacity assessment report and other relevant information respecting the adult’s capacity, which may be enough when the adult refuses or cannot undergo a capacity assessment,
• the review officer’s report,
• any personal directive made by the adult,
• any supported decision-making authorization made by the adult,
• whether the significant impairment of the adult’s capacity to make decisions about the matters to be referred to in the order is likely to expose the adult to harm,
• the personal matters for which the adult’s capacity to make decisions has been assessed as significantly impaired and with respect to which the adult needs or will likely need to make decisions,
• whether the appointment of a co-decision-maker would likely produce benefits for the adult that would outweigh any adverse consequences for the adult, and
• any other matter the court considers relevant.
A court cannot grant a co-decision-maker order dealing with a personal matter over which an adult has already granted a personal directive (AGTA, s 17(3)).

Furthermore, co-decision-maker orders and guardianship orders are mutually exclusive. A guardianship order must be terminated if a co-decision-maker order is issued because an adult’s situation or capacity has improved.

Rules for co-decision-makers

Co-decision-makers:

- must exercise their authority diligently, in good faith, and in the best interests of the assisted adult (s 18),
- cannot refuse to sign documents within their authority if a reasonable person would sign them and the decision is not likely to cause harm to the assisted adult (s 18(5)),
- cannot be paid a fee but can be reimbursed for expenses (s 19),
- may seek the advice and direction of the court on a question respecting the assisted adult (s 20), and
- are not liable if acting in good faith (s 23).

Under s 21, co-decision-maker orders can be reviewed, and must be reviewed:

- if the order itself requires review,
- where there has been a significant change in the needs, circumstances, or capacity of the assisted adult and it would be in his or her best interest to have the order varied or terminated, or
- where there is a change in circumstances of the co-decision-maker that warrants a review.

However, there is no prescribed review period.

An application for a co-decision-maker order is routed through a review officer at the Public Guardian’s office (s 81). For a description of this process, refer to the content on Review officer.” The complaints and investigation provisions of the AGTA apply to co-decision-makers (ss 82–83).
3 GUARDIANS

Guardianship (governed by Part 2, Division 3 the AGTA) represents the furthest point in the decision-making continuum. The court appoints a guardian when it is satisfied that an adult has no capacity to make a decision on a personal matter. The threshold test for guardianship orders requires the court to find that all aspects of capacity, as defined in s 1(d) of the AGTA, are lacking before granting a guardianship order. In other words, the court must find that the adult is:

- unable to understand the information that is relevant to the decision, and
- unable to appreciate the reasonably foreseeable consequences of a decision or failure to make a decision.

As well, the court must be satisfied that less intrusive and less restrictive measures have been tried, or at least considered, but did not meet an adult’s needs and therefore, it is in the adult’s best interests to appoint a guardian (s 26(6)).

Section 26(4) further requires that a notice be given to the adult who is the subject of a guardianship order application. However, the court can dispense with service of an application on an adult if it is satisfied that notice of the application would be harmful to the adult (s 26(5)).

Section 26(7) also sets out the considerations for the court in determining whether it is in the best interests of an adult to appoint a guardian to act on his or her behalf. This list includes:

- the capacity assessment report and other relevant information respecting the adult’s capacity, which may be enough when the adult refuses or cannot undergo a capacity assessment,
- the review officer’s report,
- the proposed guardianship plan,
- any personal directive made by the adult,
- any supported decision-making authorization made by the adult,
- any co-decision-making order that is in effect appointing a co-decision-maker for the adult,
• whether the adult’s lack of capacity to make decisions about the personal matters to be referred to in the order is likely to expose the adult to harm,
• the personal matters with respect to which the adult needs or will likely need to make decisions,
• whether the appointment of a guardian would be likely to produce benefits for the adult that would outweigh any adverse consequences for the adult, and
• any other matter the court considers relevant.

In considering an application for a guardianship order, the court will ensure that the proposed guardian has consented to act as a guardian (s 28(1)). Applications for guardianship orders are routed through a review officer at the Public Guardian’s office (s 81).

A guardian may be necessary where an adult has not voluntarily made a personal directive [PD] before losing capacity, or, if there is a PD, where there are disputes about an agent’s authority under that PD. If an adult has made a PD under the Personal Directives Act, RSA 2000, c P-6, the court cannot grant powers and authority to a guardian that are already designated to a PD agent, unless the court terminates the PD agent’s authority (AGTA, s 33(5)).

A guardian will only be appointed if it is in the best interests of an adult for the court to make the order (AGTA, s 26(6)(c); Re Nemeth (1989), 99 AR 351, 1989 CanLII 3218 (Alta QB)). The court will order only whatever is absolutely necessary and will not unduly restrict an adult’s freedom to make his or her own decisions. The intent of the legislation is to allow adults to govern their own affairs as much as possible.

Under s 35 of the AGTA, guardians must:
• always act in the best interests of adults, diligently, and in good faith,
• encourage adults to take responsibility for their own care and decision-making,
• act in the least restrictive manner possible,
• keep adults apprised of decisions they make that affect them, and
• comply with any conditions, limits or requirements set out in the guardianship order.
Where questions arise with respect to the represented adult, guardians can apply to the court for advice and direction (s 39).

The court may also grant an order to “give effect to a decision” of a guardian in circumstances where the guardian has reason to believe that his or her decision is not being given effect, resulting in “a serious risk” to the represented adult (s 38). This allows guardians to apply to the court to authorize steps needed to carry out the order, including police involvement. Such applications usually occur where a represented adult refuses or fails to follow a guardian’s decisions or where someone else is interfering and preventing compliance, risking the adult’s health or safety.

Further, there is no liability attached to a guardian who has acted in good faith (s 42). However, the complaints and investigation provisions of the AGTA do apply to guardians (ss 82–83).

### 3.1 Guardianship orders

A guardianship order must set out the personal matters over which a guardian has authority to act and make decisions for an adult. Under s 33(2) of the AGTA, these are:

- the adult’s health care,
- where, with whom, and under what conditions the adult is to live, either permanently or temporarily,
- with whom the adult may associate,
- the adult’s participation in social activities,
- the adult’s participation in any educational, vocational, or other training,
- the adult’s employment,
- the carrying on of any legal proceeding that does not relate primarily to the financial matters of the adult, and
- any other personal matters the court considers necessary.

There can be two or more guardians appointed with separate areas of authority or with joint authority (s 31). In addition, it is possible to appoint alternate guardians (s 32). Subject to the terms of the guardianship order granted, an alternate guardian can act as guardian without further proceedings on becoming aware of the death of the previous guardian, if appointed
for the previous guardian, or if the previous guardian becomes incapacitated. The previous
guardian may also authorize the alternate guardian to act for a certain period.

In addition, a capacity assessment report indicating an adult’s capacity must also be filed in
support of an application for a guardianship order (s 26(3)(a)). Under s 27(3), a court may
only appoint a guardian without a capacity assessment report if it is satisfied that the adult
who is the subject of the application:

- lacks the capacity to make a decision about a personal matter, and
- is in immediate danger of death or suffering serious physical or mental harm.

Furthermore, a guardianship order terminates any existing co-decision-making order
(s 33(6)). If an adult is an involuntary patient in a mental health facility, the court cannot
grant to the guardian powers that are vested in the facility, such as residence, association,
work, education, and day-to-day decisions (Re Osinchuk (1983), 45 AR 132, [1983] AJ No
933 (Alta Surr Ct)).

Note that under s 24 of the AGTA, a guardianship application can be made and granted when
a subject is 17 years old, to take effect when the youth turns 18.

3.2 Review of guardianship orders

There is no required review period for a guardianship order; however, the court may decide
that a review period is required and make it part of the initial order (AGTA, s 33(8)).

3.3 Who may be appointed as a guardian?

Any interested person can apply to become a guardian. However, the court must be satisfied
that a proposed guardian will act in the best interests of an adult and will not be in a conflict
of interest (AGTA, s 28(2)).

If no individual is willing, able, and suitable to act as the adult’s guardian, and if the Public
Guardian has been given a reasonable opportunity to make representations regarding the
proposed appointment, the court may appoint the Public Guardian to fulfil the role (s 26(2)).

3.4 Guardian compensation

Guardians are not entitled to compensation, but can be reimbursed for expenses incurred in
carrying out their authority and responsibilities (AGTA, s 37).
4 PROCEDURES FOR SPECIFIC CIRCUMSTANCES

There are provisions in the AGTA to address circumstances where substitute decision-making is needed. These include:

- guardianship orders granted in urgent situations,
- situations where decisions must be made regarding an adult’s health care or temporary admission to a residential facility, and
- situations involving emergency health care.

4.1 Guardianship orders granted in urgent situations

Under s 27 of the AGTA, the court can grant a guardianship order on an urgent basis for up to 90 days in the first instance and up to 6 months on review if:

- it is satisfied that the adult lacks capacity to make a decision on a personal matter, and
- the adult is in immediate danger of death or serious physical or mental harm.

The court can dispense with or modify any requirements of the AGTA and the AGTA Regulation, such as filing documents, service, and evidence, if the urgency of the situation so warrants.

4.2 Urgent health-related decisions

There may be situations where there is no guardianship order in place and a health care provider believes that an adult lacks capacity to make a decision about health care or temporary admission to a residential facility. Provisions under Part 3, Division 1 of the AGTA set out a process for a health care provider to select a decision-maker to make a specific health care decision or temporary residency decision for the adult (ss 87–100).

The AGTA provides a process for, and protects health care providers who have often informally followed this route. Sometimes decisions have to be made and there is no time to wait for the issuance of a formal guardianship order, which takes several months to obtain.

The health care decisions made in these circumstances cannot include:

- psychosurgery as defined in the Mental Health Act, RSA 2000, c M-13 (s 88(2)(a)),


• sterilization that is not medically necessary to protect the maker’s health (s 88(2)(b)),
• removal of tissue for medical or research purposes (s 88(2)(c)),
• participation in research or experimentation that does not benefit the adult (s 88(2)(c)), and
• end of life decisions (AGTA Regulation, s 23).

Under s 89, a health care provider must select an adult’s nearest adult relative who is:
• willing to act as a specific decision-maker,
• in contact with the adult (during at least the previous 12 months),
• aware of the adult’s wishes, beliefs, and values, and
• on good terms with the adult.

If there is a dispute about this selection, the health care provider can select the Public Guardian.

Section 93 of the AGTA also lists considerations to be taken into account when making a decision about health care or temporary residency.

If there is a dispute about an adult’s capacity, the health care provider can request a capacity assessment (s 96). There is an option for court direction to review any assessment or decision where a relative, legal representative, or person with a “close and substantial personal relationship” disputes the assessment or decision (s 97).

Sections 18–26 of the AGTA Regulation contain provisions for a capacity assessment when dealing with specific decision-making. In addition, the AGTA provides that:
• specific decision-makers must sign a declaration that they meet the criteria of the AGTA (s 90),
• a health care provider is authorized to act on the decision of a specific decision-maker (s 98),
• specific decision-makers can access an adult’s personal information (s 99),
• health care providers who select a specific decision-maker must keep a written record of the declaration and decisions made (s 91; AGTA Regulation, s 25),
• health care providers who act in good faith are protected from liability (AGTA, s 100), and
• health care providers are not required to provide health care they consider futile (s 98(4)(b)).

4.3 Emergency health care

A physician may provide emergency health care without consent to an adult who lacks capacity due to alcohol or drugs, a complete or partial lack of consciousness, or “another cause,” if the health care is necessary to preserve the adult’s life, to prevent serious physical or mental harm to the adult, or to alleviate severe pain (AGTA, s 101).

If practical, a physician must obtain a second concurring opinion in writing before providing emergency health care. However, s 101 is not authorization for a physician to provide care if he or she reasonably believes that an adult has expressed a wish or instruction (when the adult had capacity) not to receive emergency health care.

5 TRUSTEESHIP

Trusteeship in Alberta is governed by Division 4 of Part 2 of the AGTA.

Alberta courts have jurisdiction to make a trusteeship order for any adult who is ordinarily resident in Alberta or for any adult who is not ordinarily resident in Alberta if the order only applies to land in Alberta that the non-resident adult owns. The court also has jurisdiction to make an order in exceptional circumstances, if it is appropriate to do so (AGTA, s 45).

5.1 Threshold test for trusteeship order

Under s 46(5), certain criteria must be met before a trustee can be appointed:

• an adult must be unable to make reasonable judgments regarding his or her financial matters,
• less intrusive or less restrictive means must have been tried or at least considered and would not adequately protect the adult, and
• the court must be satisfied that it is in the adult’s best interest.
An application for a trusteeship order over a minor can be made when he or she is 17 years of age, and takes effect when the youth becomes 18 (s 43).

A trustee may not be necessary if an adult signed an enduring power of attorney before losing capacity or if an “informal” trusteeship is available. This may happen, for example, when the adult’s only source of income is from the Assured Income for the Severely Handicapped or Canada Pension Plan. Before a trusteeship order is granted, s 2 of the AGTA requires applicants to satisfy the court that an adult’s financial matters cannot be dealt with by less restrictive and less intrusive means, such as an informal trusteeship or by an enduring power of attorney.

Section 46 sets out what the court must consider in determining whether it is in the best interests of an adult to appoint a trustee, including:

- the capacity assessment report and other relevant information respecting the adult’s capacity (which may be enough when the adult refuses or cannot undergo a capacity assessment),
- the review officer’s report,
- the trusteeship plan,
- any enduring power of attorney,
- whether the benefits outweigh the adverse consequences, and
- any other relevant matters.

### 5.2 Who may be a trustee?

The court may appoint as trustee:

1. the Public Trustee if no one else is suitable or willing to act, and the Public Trustee, having been served and consents (AGTA, s 50),
2. a trust corporation that consents to act (s 49(1)(b),
3. any interested adult who satisfies the court that he or she
   (a) will act in the best interests of the adult,
   (b) is suitable to be appointed as trustee, and
(c) is ordinarily resident of Alberta, or if not ordinarily resident, provides security for the performance of his or her duties (ss 49(1)(a), 49(4)), or

4. another person who meets the requirements on any notice the court may direct where the proposed trustee does not meet the requirements (s 51).

The court may dispense with security where a trustee is not ordinarily resident in Alberta (s 49(6)). Conversely, the court may require a resident trustee to provide security (s 49(7)).

In determining an applicant’s suitability to act as a trustee, under s 49(1)(a)(ii), the court considers:

- the views and wishes of the adult,
- the relationship between the adult and the proposed trustee,
- the apparent ability of the proposed trustee to manage financial matters,
- any circumstances that could impair the court’s ability to exercise control over the trustee, and
- any other relevant matter.

The court may appoint multiple trustees to act jointly unless the order specifies otherwise. Further, the court may give exclusive authority over certain financial matters to one trustee and not another (s 52).

The Public Trustee can inquire into allegations that an adult needs a trustee. The allegations must be in writing. If the Public Trustee believes that the threshold criteria are met, the adult is likely to suffer serious financial loss if a trustee is not appointed, and no other person is likely to apply, the Public Trustee must apply to be appointed (s 47).

A capacity assessment report is required before a trusteeship order can be issued. The court may dispense with this requirement or any other requirement if it is satisfied that an adult lacks capacity to deal with financial matters and is in immediate danger of suffering serious financial loss (s 48(1)).
5.3 Trustees’ authority and responsibilities

Once a trustee is appointed, he or she has broad authority, as well as onerous responsibilities. A trustee has the authority to:

- take possession and control of all the adult’s real property in Alberta and all personal property wherever located,
- do anything and sign all documents in relation to financial and estate matters that the adult could do if capable,
- register a trusteeship order against title to the adult’s land,
- grant leases of real property of three years or less,
- make expenditures from the adult’s property required to educate, support, and care for the adult (AGTA, s 56(2)), and
- make expenditures for the benefit of the adult’s spouse, adult interdependent partner, minor child, physically or mentally disabled adult child, or, with the consent of the court, any other person (s 56(3)).

However, a trustee cannot:

- sell, transfer, or encumber real property unless specifically permitted to do so by the AGTA, the AGTA Regulation, or the order (s 55(2)). In such a case, the affidavit should contain independent information about the fair market value of property and an explanation of why the adult no longer needs the property,
- consent to a disposition of the adult’s homestead under the Dower Act, RSA 2000, c D-15, unless the order specifically so authorizes (AGTA Regulation, s 13(2)),
- make a will or other testamentary disposition for the adult (AGTA, s 85(2)),
- change a beneficiary designation previously made by the adult (note that this is subject to some debate),
- act against any limits or conditions on the trustee’s authority imposed by the court (s 54(4)), or
• deal with any property or financial matter not covered by the order (s 54(5)). (For example, a trusteeship order may be limited to allowing the trustee to deal with the adult’s claim for family relief and support only.)

A trustee’s responsibilities are onerous, given that he or she:

• has a fiduciary duty to exercise his or her powers to protect an adult’s financial interests,

• cannot delegate this responsibility to others or profit personally from dealings with the adult’s estate,

• must keep the adult’s property separate from his or her own and hold money and other financial assets in an account which identifies the adult as the beneficial owner (s 62),

• is prohibited from purchasing the adult’s property without previous court approval,

• must invest the adult’s estate according to ss 2–8 of the Trustee Act, RSA 2000, c T-8 — the “prudent investor” rule — although a trusteeship plan and the order may take priority over this rule (AGTA, s 59(3)),

• is required to keep a detailed record of the adult’s assets and liabilities and any receipts or disbursements made in connection with the adult’s estate,

• must ensure that the adult’s annual income tax returns are filed on a timely basis,

• must act in accordance with the trusteeship order and the trusteeship plan approved by the court (s 56(1)). Consider carefully the wording of the trusteeship plan: if it is too specific, circumstances may change and require an amendment to the plan,

• must use the care, skill, and diligence that a reasonably prudent person would exercise when managing his or her own financial affairs (s 57(1)),

• must keep accounts according to the regulations (s 63(1)), and

• may permit the adult to open or maintain a deposit account in the adult’s own name with appropriate limits and conditions if it is specified in the order (s
54(6)); in this case, the trustee is not liable to account for the funds in an account operated by the adult as authorized by the order (s 58).

Any action taken by a trustee has the same effect as if the represented adult was capable and had taken that action him or herself (s 55(4)).

5.4 Ability to make gifts

Trustees have limited authority to make gifts from a represented adult’s property without specific court authority:

- The gift must be made from property not required to meet the adult or a dependent’s needs (AGTA, s 60(2)(a)),
- The trustee must have reasonable grounds to believe that the adult would have made the gift if he or she had capacity (s 60(2)(b)),
- The grounds for the gift must be based on the adult’s actions while capacitated, and
- The trustee must give consideration to any current wishes expressed by the adult.

Section 14 of the AGTA Regulation stipulates that the total value of gifts in one year cannot exceed 5% of an adult’s taxable income from the previous year. Furthermore, trustees cannot make a gift to themselves unless it is disclosed in the trusteeship plan and approved by the court.

Section 60(3) of the AGTA allows the court to authorize a trustee to make gifts.

5.5 Trusteeship plans

A trustee must file a trusteeship plan as part of an application, which includes an inventory of an adult’s assets and liabilities (AGTA, s 46(2)(b)). A trustee may amend a plan with court approval (s 54(2)).

Additionally, the court must approve a trusteeship plan, and can vary it or require a trustee to submit an amended plan within a specified time period (s 54(1)).

5.6 Wills and testamentary dispositions

Section 85(1) of the AGTA provides that a guardianship or trusteeship order is not, of itself, sufficient to establish that an adult does not have legal capacity to make a will. Regardless of
the adult’s capacity, a guardian or trustee cannot make a will for that adult (s 85(2)) or any similar disposition, such as a beneficiary designation of life insurance or a registered retirement savings plan.

Trustees must make reasonable efforts to determine whether an adult has a will (s 61(1)), and may request the original will from any person, including a lawyer who must surrender the will on request (s 61(2)).

Trustees can apply to the court to sell property that is the subject of a specific gift in a represented adult’s will. The proceeds must be placed in an identifiable trust account to be administered as the court directs, considering the adult’s needs (s 67(1)).

If a trustee complies with an order under s 67(1), a gift made by a will does not fail under the doctrine of ademption, as it might otherwise have. The recipient of the gift may apply to the court, before or after the adult’s death, to give effect to the adult’s testamentary intention that the recipient receives the property as a gift despite the sale (s 67(3)).

5.7 Trustee compensation

A trustee is entitled to receive a fee from a represented adult’s property based on that trustee’s effort, care, responsibility, and the time expended on behalf of the adult (AGTA, s 66). A trustee is also entitled to be reimbursed for the direct expenses incurred and disbursements made on behalf of the adult (s 66(7)).

Trustees may elect:

- to be compensated according to a fee schedule prescribed in the AGTA Regulation, if the election is included in the trusteeship plan (AGTA, s 66(2)) and the court later approves the fee (s 66(3)), or
- to have the court set the compensation considering the trustee’s effort, care and responsibility, and the time expended (s 66(4)–(5)).

Joint trustees must share a fee. The court can also reduce or eliminate a trustee’s compensation for failure to discharge the duties adequately (s 66(3)(b)).
5.8 Review of trusteeship orders

The court must set a review date if an adult’s capacity report indicates that his or her capacity is likely to improve (AGTA, s 54(7)(a)). Otherwise, the court may set a review date – but it is not required to do so (s 54(7)(b)).

Trustees must apply for a review in additional specified circumstances, such as a change in an adult’s capacity or circumstances, or where there is a change in circumstances affecting the trustee’s ability or suitability (s 70(2)(c)). The trustee, the adult, or an interested person may apply for a review at any time (s 70(1)). A new capacity assessment is required, as it is for any review required under an original order or to terminate a trusteeship.

5.9 Accounting requirements

Section 63(1) of the AGTA requires trustees to maintain accounts according to the AGTA Regulation. Accounts must include an inventory, as of the date of appointment, and a record of all transactions (AGTA Regulation, s 15).

Trusteeship orders may specify a time when trustees must submit accounts for examination and approval by the court (AGTA, s 63(2)). The court has discretion whether to require periodic accounting or not, which depends on the nature and value of an adult’s property.

Trustees must apply for court approval of their accounts if:

- the represented adult or an interested person obtains an order to that effect (s 63(3)),
- the court of its own initiative directs a trustee to apply (s 63(4)), or
- the personal representative of a deceased represented adult obtains an order to that effect (s 63(6)).

Trustees may apply for court approval of their accounts at any time (s 63(9)(b)).

If a trustee dies or loses capacity, that trustee’s personal representative, attorney, or trustee must account to any alternative trustee, new trustee, or the Public Trustee. If the accounting is not satisfactory, an application can be made to the court for an order directing the party to have the accounts approved by the court (s 63(8)).
5.10 When a trustee dies or loses capacity

If an appointed trustee dies or loses capacity, the court may appoint an alternate trustee who consents to act where sufficient notice is given. On the death or incapacity of the first trustee, the alternate trustee takes over. The first trustee is considered “incapacitated” where a guardian or trustee is appointed for him or her or where his or her personal directive or enduring power of attorney becomes effective (AGTA, s 53(3)(a)). The alternate trustee must provide evidence of the first trustee’s death or incapacity to a clerk of the court.

The first trustee may authorize an alternate trustee to act, for a specified period, during the first trustee’s temporary absence (s 53(3)(b), 53(4)).

If no alternate trustee is appointed, the Public Trustee may take possession and control of a represented adult’s property (s 64(1)). The Public Trustee must protect and preserve the property and pay the adult’s ordinary living expenses until a new trustee is appointed. The Public Trustee may apply to be appointed trustee (s 64(2)), and must apply if no one else has done so within 60 days of being notified of the first trustee’s death or incapacity (s 64(5)).

5.11 Death of a represented adult

When a represented adult dies, his or her trustee’s authority continues to the extent necessary to preserve and protect the property until the adult’s personal representative takes over (AGTA, s 65).

6 ACCESS TO AND USE OF PERSONAL INFORMATION

6.1 Guardians

Health and personal care service providers are frequently insisting on a guardianship order under the AGTA before releasing any personal information to family members of an adult. Health care professionals are permitted to release information to family members or other persons with whom an adult patient has a close personal relationship if he or she has not expressly prohibited disclosure, and if the disclosure is made to diagnose or treat an illness (Health Information Act, RSA 2000, c H-5, s 35 [Health Information Act]).

Proposed guardians can access an adult’s personal information to make a guardianship application and guardians can obtain an adult’s personal information if it is relevant to exercising guardianship responsibilities (AGTA, s 41).
6.2 Trustees

A public body, custodian or organization may disclose personal information about an adult, other than financial information, to a person who intends to apply for trusteeship where the information is necessary and relevant for the application (AGTA, s 72(1)):

- A “public body” as defined in the Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25, s 1(p),
- A “custodian” as defined in the Health Information Act, s 1(f), and
- An “organization” as defined in the Personal Information Protection Act, SA 2003, c P-6.5, s 1(i).

The recipient of the information must use the information only for the application and must keep it secure (AGTA, s 72(2)).

Once appointed, a trustee must:

- use or disclose the information only to exercise his or her authority and carry out his or her duties (s 72(6)(a)),
- take reasonable care to ensure that the information is secure from unauthorized access, use, or disclosure (s 72(6)(b)), and
- not try to access information other than the information to which a trustee is entitled (s 72(7)).

7 TRANSITIONAL PROVISIONS

A guardianship order made under the Dependent Adults Act continues under the AGTA as if it was made under the AGTA (AGTA, s 117(2)). This includes powers granted under s 10 of the Dependent Adults Act that did not carry over into the AGTA, such as subsections 10(f) and 10(i). However, these powers do not survive when an order is reviewed under the AGTA. When a guardianship order under the Dependent Adults Act comes up for review, that review follows AGTA procedures and evidentiary requirements.

Similarly, a trusteeship order made under the Dependent Adults Act continues under the AGTA as if it was made under the AGTA (AGTA, s 117(4)). The powers granted under ss 38–40 and 52 of the Dependent Adults Act continue until a review order is made under s 70 of
the AGTA. However, the trustee cannot make any gifts under s 60(2) of the AGTA until there is a review order.

8 INTERESTED PERSONS AND CONFLICTS OF INTEREST

Under the AGTA, any “interested person” can apply to become a co-decision-maker, guardian, or trustee of an adult. An “interested person” is defined as the Public Guardian, the Public Trustee, or an adult person who is concerned for the welfare of an adult (s 1(u)). According to the Court of Appeal in Dyck v Laidlaw, 1999 ABCA 254 at para 6, 244 AR 193, the AGTA is complete in this definition. This means that the courts do not have the independent discretion to declare a person an interested person if he or she does not otherwise fall within the statutory definition.

To obtain a co-decision-making, guardianship, or trusteeship order, the court must be satisfied that an interested person will act in the best interests of an adult, and will not be in a conflict of interest position (ss 14, 28, and 49). The AGTA clearly identifies that there is an issue surrounding conflicts; however, the legislation does not define conflict of interest.

The general principles regarding this issue are set out in McLennan v Newton et al, [1928] 1 DLR 189 at para 12, [1927] 3 WWR 684 (Man CA), quoting from Aberdeen Railway Co v Blaikie Bros (1854), 1 Macq HL 461, 2 Eq R 1281:

...It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect.

...So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object.

The leading Supreme Court of Canada case on the issue of conflict of interest for trustees and guardians is Gronnerud (Litigation Guardian of) v Gronnerud Estate, 2002 SCC 38, [2002] 2 SCR 417 [Gronnerud v Gronnerud Estate]. The court held that a litigation guardian must be “indifferent” to the outcome of the proceedings, and similarly to this, “a property guardian must be able to handle the finances of the represented party in a disinterested, unbiased manner” at minimum (Gronnerud v Gronnerud Estate at para 24).

While the AGTA does not define conflict of interest, it states that being a potential beneficiary or being a relative alone will not create a conflict (ss 14(3), 28(3), and 49(3)). The leading
Alberta decision in this area is *Re Weisgerber Estate*, 2003 ABQB 619, 2 ETR (3d) 253. *Gronnerud v Gronnerud Estate* also dealt with this issue.

9 APPLICATION FOR APPOINTMENT/REVIEW OF ORDER

The AGTA and the AGTA Regulation set out the procedure and forms required for an application or a review. Additional information is located on the Alberta Courts website (https://albertacourts.ca/).

9.1 Applications

Most applications to have a co-decision-maker, guardian, or trustee appointed for an individual for the first time are done as a desk application. They are sent first to a review officer, who acts as a clearing house for all the documents that are to be filed with the court and served on an adult and other interested parties. There are provisions for making an application by hearing in court. It depends on the circumstances of a case whether an applicant decides to proceed by a desk application or by hearing.

9.2 Review applications

There are no longer any requirements that co-decision-making arrangements, guardianships, and trusteeships must be reviewed periodically by the court. If a capacity assessment report indicates that an adult’s capacity is likely to improve, then the court will specify a review date in the order (AGTA, ss 17(7), 33(8), and 54(7)).

A represented adult or any interested person has the right to apply to the court to compel a review at any time (ss 21, 40, and 70). As with initial applications, review applications may be made either by desk application or by hearing.

9.3 Review officer

The AGTA creates a review officer position (operating out of the Public Guardian’s office), and gives these officers specific duties in connection with applications under the AGTA. The duties of review officers include:

- meeting with an assisted adult to serve the documents and explain the application,
- serving copies of the application on every family member of the assisted adult who lives in Canada and is
o a spouse or adult interdependent partner,

o a parent,

o a child over 18, or

o a sibling over 18,

- providing a written report to the court on applications to appoint a co-decision-maker, guardian, or trustee. The report must address the views and wishes of the adult regarding the application and the suitability of any proposed co-decision-maker, guardian, trustee or alternates (a person who consents to act as one of these must provide prescribed information to the review officer), and

- receiving any requests for a hearing which may be submitted. If no one requests a hearing in the time allowed, the review officer sends the application to the court with the report.

9.4 Documents

The AGTA prescribes the forms to be used for applications. Circumstances of each AGTA application vary. Inevitably, the prescribed forms need to be adapted to fit the application. The AGTA explicitly authorizes adaptation.

Under ss 34 and 43 of the AGTA Regulation, an interested person can bring an application for a co-decision-making, guardianship, or trusteeship order by desk application, using the forms indicated in the table below. These forms are in the regulations, unless otherwise specified.

<table>
<thead>
<tr>
<th>Form and purpose</th>
<th>Co-decision-making form no.</th>
<th>Guardianship form no.</th>
<th>Trusteeship form no.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application: This document sets out who is applying and what they are applying for. It also indicates whether a court appearance is requested, or whether a desk application is sufficient.</td>
<td>1</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Affidavit with exhibits and attachments</td>
<td>2</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>Capacity assessment report</td>
<td>3*</td>
<td>4*</td>
<td>4*</td>
</tr>
<tr>
<td>Guardianship or trusteeship plan: The plan sets out the proposed guardian’s or trustee’s ideas for making decisions on behalf of the adult.</td>
<td>n/a</td>
<td>32</td>
<td>34 or 35</td>
</tr>
<tr>
<td>Form and purpose</td>
<td>Co-decision-making form no.</td>
<td>Guardianship form no.</td>
<td>Trusteeship form no.</td>
</tr>
<tr>
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</tr>
<tr>
<td>Consent of each proposed co-decision-maker, guardian and trustee and each proposed alternate guardian and trustee.</td>
<td>12</td>
<td>24 or 25 for proposed</td>
<td>27 for proposed</td>
</tr>
<tr>
<td>Consent of assisted adult.</td>
<td>11</td>
<td>26 for alternate</td>
<td>28 trust company</td>
</tr>
<tr>
<td>Two personal references for each proposed co-decision-maker, guardian, alternate guardian, trustee, and alternate trustee. (Use Form 30 and omit Forms 4 and 17.)</td>
<td>30</td>
<td>30 for proposed and alternates</td>
<td>30 for proposed and alternates</td>
</tr>
<tr>
<td>This is only required for desk applications.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Persons signing Form 30 consent to act as guardian or trustee, and also consent to a background checks, including criminal and credit checks.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inventory.</td>
<td>n/a</td>
<td>n/a</td>
<td>37</td>
</tr>
<tr>
<td>Draft form of order</td>
<td>5</td>
<td>18</td>
<td>18</td>
</tr>
<tr>
<td>Notice of application and hearing (Use Forms 4 or 17 and omit Form 30.)</td>
<td>4</td>
<td>17</td>
<td>17</td>
</tr>
<tr>
<td>This is only required for applications proceeding by hearing.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* in the Schedule of the AGTA (Ministerial) Regulation

Under s 47 of the AGTA Regulation, a co-decision-maker, guardian, or trustee can bring an application for a review of an order through the forms indicated in the table below. These forms are in the AGTA Regulation, unless otherwise specified.
### Form and Purpose

<table>
<thead>
<tr>
<th>Form and Purpose</th>
<th>Co-decision-making Form No.</th>
<th>Guardianship Form No.</th>
<th>Trusteeship Form No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affidavit with exhibits and attachments</td>
<td>7</td>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td>Capacity assessment report</td>
<td>3*</td>
<td>4*</td>
<td>4*</td>
</tr>
<tr>
<td>Guardianship or trusteeship plan: The plan sets out the proposed guardian’s or</td>
<td>n/a</td>
<td>32</td>
<td>34 or 35</td>
</tr>
<tr>
<td>trustee’s ideas for making decisions on behalf of the adult.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consent of each proposed co-decision-maker, guardian, and trustee and each</td>
<td>12</td>
<td>24 or 25 for proposed</td>
<td>27 for proposed</td>
</tr>
<tr>
<td>proposed alternate guardian and trustee.</td>
<td></td>
<td>26 for alternate</td>
<td>29 for alternate</td>
</tr>
<tr>
<td>Consent of assisted adult</td>
<td>11</td>
<td>24 for proposed</td>
<td>27 for proposed</td>
</tr>
<tr>
<td>Two personal references for each proposed co-decision-maker, guardian,</td>
<td>30</td>
<td>30 for proposed</td>
<td>30 for proposed and</td>
</tr>
<tr>
<td>alternate guardian, trustee and alternate trustee.</td>
<td></td>
<td>and alternates</td>
<td>alternates</td>
</tr>
<tr>
<td>This is only required for desk applications.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Persons signing Form 30 consent to act as guardian or trustee, and also consent</td>
<td>30</td>
<td>30 for proposed</td>
<td>30 for proposed and</td>
</tr>
<tr>
<td>to a background check, including criminal and credit checks.</td>
<td></td>
<td>and alternates</td>
<td>alternates</td>
</tr>
<tr>
<td>Draft form of order</td>
<td>5</td>
<td>23</td>
<td>23</td>
</tr>
<tr>
<td>Notice of application and hearing.</td>
<td>9</td>
<td>22</td>
<td>22</td>
</tr>
<tr>
<td>This is only required for applications proceeding by hearing.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* in the Schedule of the AGTA (Ministerial) Regulation

## 10 APPLICATIONS TO EXAMINE AND APPROVE ACCOUNTS

There is no longer a requirement for a trustee to account to the court every two years as there was under the Dependent Adults Act. Any accounting requirement must be specified in the trusteeship order granted (AGTA, s 63(2)). If possible, applications to examine and approve accounts should be made with applications for review to minimize legal costs to the estate of the adult.
Under ss 61–62 of the AGTA Regulation, examination and approval of accounts and review applications may proceed by a desk application. A trustee must submit the following documents to a review officer:

<table>
<thead>
<tr>
<th>Form and Purpose</th>
<th>Form No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application: This document sets out who is applying and</td>
<td>19</td>
</tr>
<tr>
<td>what they are applying for. It also indicates whether a</td>
<td></td>
</tr>
<tr>
<td>court appearance is requested, or whether a desk</td>
<td></td>
</tr>
<tr>
<td>application is sufficient.</td>
<td></td>
</tr>
<tr>
<td>Affidavit with exhibits and attachments</td>
<td>20</td>
</tr>
<tr>
<td>Inventory</td>
<td>37</td>
</tr>
<tr>
<td>Statement of transactions: this is a statement of</td>
<td>36</td>
</tr>
<tr>
<td>receipts and disbursements. If the trustee has kept an</td>
<td></td>
</tr>
<tr>
<td>accurate, complete, and legible statement of receipts</td>
<td></td>
</tr>
<tr>
<td>and disbursements in a different form, either by hand</td>
<td></td>
</tr>
<tr>
<td>or on computer, the trustee’s document is acceptable in</td>
<td></td>
</tr>
<tr>
<td>place of the Form 36.</td>
<td></td>
</tr>
<tr>
<td>Overview of accounts (reconciliation)</td>
<td>38</td>
</tr>
<tr>
<td>Draft form of order</td>
<td>23</td>
</tr>
</tbody>
</table>

11 COSTS

Under s 115 of the AGTA, the court may order that the costs of any application be paid by:

- the Crown,
- the person making the application, or the person or estate in respect of whom that application was made, if it would not impose a hardship,
- a trustee, if that trustee has been ordered to reimburse the estate, or
- the person making or opposing the application, where the court is satisfied that the application or opposition is frivolous or vexatious.

The Crown will contribute to the costs where a represented adult’s estate is small enough. The amount of that contribution is set by regulation. If an applicant wishes to claim costs against the Crown, he or she must indicate this. The court requires an explanation, in the application information summary accompanying the affidavit, of why it would be a hardship for either the applicant or the represented adult to pay all of the costs (AGTA Regulation, s 100).
Costs awarded against an adult’s estate must either be set by a review officer under Part 10 of the Alberta Rules of Court, Alta Reg 124/2010, or set by the court (not to be confused with the review officers operating out of the Public Guardian’s office under the AGTA).

**12 FINALIZING THE FILE**

When acting for an applicant, once an order is granted and served on the appropriate parties, report to the applicant. In the reporting letter, outline the powers of the co-decision-maker, guardian, or trustee, as the case may be. If the powers are not specifically listed in the order, include copies of the relevant sections of the AGTA.

Also, provide appointed trustees with copies of the “prudent investor rule” sections of the Trustee Act, RSA 2000, c T-8, advising them that it is a trustee’s obligation to keep accounts and to take the necessary steps to pass accounts if directed by the order.
CHAPTER 1
INTRODUCTION TO ESTATE ADMINISTRATION

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2 The *Estate Administration Act* and Surrogate Rules................................................................. 1-3
   2.1 The effect of the *Estate Administration Act* ..................................................................... 1-4
1 Introduction to estate administration

The administration of an estate can be complex, involving myriad of tasks and responsibilities for Alberta lawyers. Lawyers play an important role in helping clients fulfill their obligations in estate administration, performing tasks like these:

- providing advice to a personal representative,
- ensuring a will executed by a deceased testator is valid and enforceable,
- making an application for a grant of probate or administration,
- paying estate debts and devolving property,
- preparing a client to account to the court, and
- dealing with contentious matters.

The *Estate Administration Act*, SA 2014, c E-12.52 [EAA] governs many of the tasks a lawyer will perform relating to estate administration. Other legislation with which lawyers must be familiar when practicing in estate administration includes:

- *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2,
- *Dower Act*, RSA 2000, c D-15,
- *Family Law Act*, SA 2003, c F-4.5,
- *Funeral Services Act*, RSA 2000, c F-29,
- *Human Tissue and Organ Donation Act*, SA 2006, c H-14.5,
- *Insurance Act*, RSA 2000, c I-3,
- *Land Titles Act*, RSA 2000, c L-4,
- *Law of Property Act*, RSA 2000, c L-7,
- *Matrimonial Property Act*, RSA 2000, c M-8,
- *Minors’ Property Act*, SA 2004, c M-18.1,
- *Perpetuities Act*, RSA 2000, c P-5,
- *Personal Directives Act*, RSA 2000, c P-6,
- *Powers of Attorney Act*, RSA 2000, c P-20,
• Public Trustee Act, SA 2004, c P-44.1,
• Surrogate Rules, Alta Reg 130/1995,
• Trustee Act, RSA 2000, c T-8,
• Wills and Succession Act, SA 2010, c W-12.2, and
• Unclaimed Personal Property and Vested Property Act, SA 2007, c U-1.5.

Understanding how tax laws affect an estate is also key to estate administration. For general
estate practitioners, it is essential to seek expert tax advice in more complicated estate
planning.

2 THE ESTATE ADMINISTRATION ACT AND SURROGATE RULES

The EAA was proclaimed in force in Alberta on June 1, 2015. On the same day, new
Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules] were also proclaimed in force. The
amendments to the Surrogate Rules arose from new provisions in the EAA requiring new and
changed forms. At the time of preparation of these materials, additional amendments to the
Surrogate Rules are expected.

According to Donna L Molzan, QC in a publication prepared for the Legal Education Society of
Molzan, QC]), the drafters of the EAA applied these 8 principles to it:

1. The EAA recognizes testamentary freedom; that is, testators can do what they want
with their property and their decision will be respected. Interfering with testamentary
freedom must be justified.

2. Testamentary freedom is subject to the settlement of the legal obligations of a
deceased person and his or her estate.

3. Where there is no will, it is presumed a deceased wished his or her property to go to
family.

4. At a minimum, family members that were dependent on a deceased are entitled to
adequate support from his or her estate.

5. Succession laws must be consistent with the Canadian Charter of Rights and
 Freedoms (s 2(b), Part I of the Constitution Act, 1982, being Schedule B to the
Canada Act 1982 (UK), 1982, c 11) and other prevailing social values and realities. It must also harmonize with other Alberta laws and statutes.

6. Laws and statutes should be user-friendly, clear, and practical.

7. The law should make it clear that a personal representative’s role is a fiduciary one, obliging him or her to carry out a deceased’s final testamentary intent.

8. The law should reduce delay and cost for a personal representative, an estate’s beneficiaries, and their advisors.

2.1 The effect of the Estate Administration Act

The EAA repealed and consolidated the Administration of Estates Act, RSA 2000 c A-2, the Devolution of Real Property Act, RSA 2000 c D-12 [Devolution of Real Property Act], and certain substantive rules previously found in the Surrogate Rules. It governs how an estate is administered when someone dies, in an updated format using plain language to describe a personal representative’s role, duties, and obligations in administering an estate.

According to Donna L Molzan, QC, the following represents the significant changes in the law effected by the EAA:

- A personal representative includes an executor, administrator, and judicial trustee as well as a personal representative named in a will, whether or not a grant is issued.

- The EAA lists the duties of a personal representative, specifies in plain language his or her fiduciary role, and requires a personal representative to distribute the estate as soon as possible. Further, the EAA requires that a professional personal representative must exercise a greater degree of skill than a layperson.

- The EAA sets out the core tasks for a personal representative. The Schedule to the EAA provides details of those core tasks (for instance, identifying the nature and value of online accounts; creating and maintaining records; and regularly communicating with beneficiaries).

- A personal representative named in a will who does not apply for a grant must provide notices to beneficiaries, family members, a spouse, or the Public Trustee, where applicable.
• A court application may be brought where a personal representative fails to perform a duty or core task, or fails to provide notice.

• A personal representative stands in the shoes of the deceased and has all the same powers as the deceased, but only to the extent of administering the estate, subject to the will and the EAA. A personal representative is not required to get consent from adult beneficiaries or to obtain court orders prior to dealing with real property (as was the case under the repealed *Devolution of Real Property Act*). Further, there are no longer limitations on a personal representative’s power to grant an option to purchase, lease, or mortgage real property.

• The EAA makes statutory the common law marshalling rules, applied when the property in an estate is insufficient to pay all the debts, while still providing the designated gifts to the beneficiaries.

• With the implementation of the EAA, all provisions relating to the trusteeship of a minors’ estate are now in the *Minors’ Property Act*, SA 2004, c M-18.1.
# CHAPTER 2
THE PERSONAL REPRESENTATIVE

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<th>Page</th>
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<td>representative</td>
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<td>Failing to perform the core tasks or failing to provide notice</td>
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INTRODUCTION

The following provides an overview of the advice to be given to a person who is deciding whether to assume the responsibilities of a personal representative and the advice to be given to a person who agrees to act as a personal representative.

IDENTIFICATION OF THE PERSONAL REPRESENTATIVE

2.1 “Personal representative” defined

Rule 1(l) of Alberta’s Surrogate Rules, Alta Reg 130/1995 [Surrogates Rules] defines “personal representative” as:

... an executor of a will or an administrator or trustee of an estate to which these Rules apply, and includes a person named as an executor or trustee in a will before a grant is issued[.]

For the purposes of the Surrogates Rules, an executor, an administrator, and a trustee are all referred to as a “personal representative.” When identifying how a personal representative obtains his or her authority, the terms “administrator,” “executor,” and “trustee” continue to be used.

Section 1(g) of the Estate Administration Act, SA 2014, c E-12.5 [EAA] contains a similar, though not identical definition:

“personal representative” means an executor or an administrator or judicial trustee of the estate of a deceased person and includes a personal representative named in the will whether or not a grant is issued[.]

2.2 Executor

Appointed by will

Ordinarily, a will expressly appoints one or more executors. If a named executor is unwilling to accept an appointment as executor and has not intermeddled, he or she may sign a renunciation. (For a more detailed discussion, see the materials under the sub-heading “dealing with estate assets before deciding to act as a personal representative” found under the heading “Deciding whether to act as a personal representative.”) In that case, a grant of probate will issue to a co-executor if one has been named or, if there is no co-executor, then to an alternate executor if one has been named.
If a named executor is mentally incapable of assuming his or her appointment as executor, the co-executor (or alternate executor), upon proving the incapacity of the named executor to the satisfaction of the court (for example, by annexing a medical report or current dependent adult order or adult guardianship order), may obtain a grant of probate in the co-executor’s name alone.

The grant of representation granted by the court to an executor is called a “grant of probate.”

*Executor according to the tenor of the will*

In some cases, no executor is appointed but a named person is directed to perform some or all of the duties that would ordinarily be performed by an executor (e.g., payment of debts or legacies). In these situations, that person may be able to apply for probate as an “executor according to the tenor of the will.”

*Executor de son tort*

A person who has not been appointed as an executor may intermeddle in the estate to such an extent that they may be deemed to be an executor. Such a person is called an *executor de son tort*. In these cases, he or she may have the obligations and liabilities of an executor.

2.3 **Administrator**

*Appointed by the court where a deceased leaves a will*

Where a deceased leaves a will but fails to appoint an executor, or where the appointment is ineffective (for example, the named executor has died or is unable or unwilling to act, or the named executor has renounced the office), an administrator is appointed by the court to administer the estate. The court also appoints an administrator to act if the will makes a provision for the alternate executor to act only if the first-named executor is predeceased, but that first-named executor, though alive, is unwilling or unable to act as executor (which wasn’t contemplated in the will).

The grant issued by the court to an administrator under these circumstances is called a “grant of administration with will annexed.”

Rule 13(1) of the *Surrogate Rules* identifies the documents filed in an application for a grant of administration with will annexed.
Appointed by the court where a deceased does not leave a will

Where a deceased does not leave a will, an administrator must be appointed by the court to administer the estate. The grant issued in this case is called a “grant of administration.”

Rule 13(2) of the Surrogate Rules identifies the documents filed in an application for a grant of administration where there is no will.

Section 13(1) of the EAA governs priority among applicants for grants with and without a will.

Preference within a class given to Alberta residents

Section 13(2) of the EAA provides that as between applicants of equal priority, except surviving spouses or adult interdependent partners [AIPs], priority is given to a resident of Alberta.

Grant not to be given to more than 3 persons

Under the Surrogate Rules, r 10(3), unless a court orders otherwise, a grant of administration is not given to more than 3 persons at one time. (Also see the EAA, s 13(3), relating to priority among applicants for a grant.)

Renunciation of administration

Form NC 15 is a renunciation of administration. It is signed by all those persons named in the hierarchy set out in s 13 of the EAA who rank equal to or higher than the applicant.

Court discretion under the EAA

Section 13(1)(b) of the EAA sets out the order of priority of applicants for a grant of administration of the property of an intestate. However, s 15(1) gives the court discretion and provides that if, because of special circumstances, the court considers it necessary that

- a deceased person’s property be administered immediately or on an interim basis, or
- a person other than the personal representative, determined in accordance with s 13, be appointed to administer the deceased person’s property,

then the court may issue a grant of administration to the Public Trustee or some other person, as the court considers appropriate. The court may also impose any conditions it considers appropriate on a grant given in these special circumstances (EAA, s 15(2)).
Nomination of administrator

Section 13(4) of the EAA provides that if a person dies intestate, fails to appoint a personal representative, or the personal representative appointed is unwilling or unable to act, then the person entitled to a grant of administration may nominate another person to be appointed as administrator of the property of the deceased or any part of the property of the deceased. The “nominee” has the same priority to apply as the person who nominated him or her. This allows the nominated person to trump the priority of someone ahead on the list who has not been nominated.

A Nomination and Consent (Form NC 16) is generally used when the person or persons entitled to apply for a grant of administration wish to renounce in favour of another who may not be listed in the hierarchy or may not be next in line in that hierarchy. It must be signed by all those persons in the EAA, s 13 hierarchy who have first priority to apply. Every person of the same rank as the person nominating must agree. For more discussion, see the content on “Personal representative appointments” in “Grant Applications.”

3 DECIDING WHETHER TO ACT AS A PERSONAL REPRESENTATIVE

3.1 Requirement to act as a personal representative

The first decision a prospective personal representative must make, whether an executor or a potential administrator, is whether or not to assume the responsibilities of being the estate personal representative.

A person cannot be compelled to act as an estate personal representative so long as he or she has not intermeddled. (For more information on intermeddling, see the materials under the subheading “dealing with estate assets before deciding to act as a personal representative” under the heading “Deciding whether to act as a personal representative.”) An executor may renounce his or her appointment in the will, and a potential administrator cannot be compelled to apply for a grant of administration.

3.2 Dealing with estate assets before deciding to act as a personal representative

What is intermeddling?

A person is considered to have intermeddled if, in relation to a deceased’s property, that person acts in a manner that shows an intention to assume the responsibilities of an executor or otherwise results in his or her characterization as an executor de son tort.
Acts that do not by themselves amount to intermeddling include:

- payment of the deceased’s reasonable funeral expenses,
- acts of necessity, and
- inquiries into the deceased’s property and debts.

Acts that have been held to amount to intermeddling include:

- taking possession of estate property, and
- holding oneself out as an executor by letter or advertisement.

**Intermeddling by an executor**

The concept of intermeddling in the administration of an estate applies where a deceased leaves a will under which a person is either appointed as executor or given responsibilities akin to those of an executor, or where a person acts without authority.

An executor’s authority is derived from the will of a testator and therefore arises immediately upon the death of that testator. An executor may renounce his or her appointment as long as he or she does not intermeddle.

Once an executor has intermeddled, he or she:

1. loses the right to renounce the appointment as executor, and
2. may incur personal liability for any loss or damage resulting from the improper administration of the estate.

A person must therefore be warned not to intermeddle if there is a possibility that he or she may decide not to assume the role of a personal representative.

Intermeddling where there is no named executor

If a person dies intestate, or there is a will but no valid appointment of an executor, a grant of administration must be obtained before anyone can legally deal with the assets of the estate. An administrator’s authority arises from the grant. A person must therefore be advised that they are not authorized to deal with the deceased’s property prior to the issuance of the grant of administration and, if they do deal with such property, personal liability may be incurred if it is dealt with improperly.

3.3 Issues to review before deciding to act

A personal representative’s responsibilities may be affected by any or all of the provisions in wills and succession legislation, estate administration legislation, the common law, and the circumstances of the estate.

The duties of a personal representative can be onerous, and therefore a prospective personal representative ought to be made aware at the outset of the extent of those duties, allowing for an informed decision on whether to assume responsibility.

The duties of a personal representative are particularized in Schedule 1 to the Surrogate Rules, under the table “Personal Representatives’ Duties” (see also the topic “Accounting and Expenses” for a full discussion of the duties of a personal representative).

What follows are some general considerations for the prospective personal representative when deciding whether to act as a personal representative.

General duties of a personal representative

Generally, s 5(1) of the EAA requires a personal representative to perform his or her role:

- honestly and in good faith,
- in accordance with the intentions of the testator and with the will (if a valid will exists), and
- with the diligence, skill, and care that a person of ordinary prudence would exercise in a comparable circumstance where there is a fiduciary relationship.

Section 5(1) also requires the personal representative to distribute the estate as soon as practicable.
However, s 5(3) of the EAA makes it clear that if a personal representative possesses any special skills that would give him or her a greater degree of skill than that of an ordinary person in the performance of the duties concerning the estate, then the personal representative must exercise that greater degree of skill in performing his or her duties.

Further, s 8 of the EAA gives the court discretion to deal with a personal representative who refuses or fails to perform the tasks for which he or she is responsible. The options available to the court includes, among others, ordering the personal representative to perform the duty or task, removing the personal representative, and “make any other order that the Court considers appropriate.” (For more information on the consequences of a personal representative’s failure to perform, see the content under the heading “Failing to perform the core tasks or failing to provide notice.”)

**Personal liability**

What is the risk of liability for a personal representative? Section 23 of the EAA imposes personal liability on a personal representative in the discharge his or her duties. Specifically, the personal representative of an estate assumes the potential for personal liability arising out of:

- a breach of trust,
- mismanagement of estate assets,
- neglect or waste of estate assets,
- failure to pay legally enforceable debts,
- improper investments,
- improper payment of debts,
- improper payment out of legacies,
- carrying on the testator’s business without authority,
- improper accounting of estate assets,
- improper conduct of estate litigation, and
- failure to pay all taxes owing by the deceased and the deceased’s estate.
Estate solvency

Do the estate’s assets exceed its liabilities? Is the estate solvent or insolvent? Organizing, prioritizing, and paying out the debts of an insolvent estate may be extremely difficult. The application for probate or administration must indicate that the estate is insolvent. The same applies to a bankrupt estate. (For a more detailed discussion, see the topic “Estate Obligations.”)

The complexity of the will

How complex are the terms of the will and any trusts? A will that directs an outright distribution will generally result in a shorter and simpler administration than a will that directs an ongoing trust with various terms. Consider the age of the beneficiaries, the trust terms, the duration of the trust, and the age of the potential trustee.

The nature of the deceased’s assets

Does the prospective personal representative have a personal interest in any of the assets of the estate? Do the assets require any specialized knowledge or expertise that the prospective personal representative does not have? In either of these circumstances, consider whether it may be prudent to renounce the appointment as executor or simply not apply for a grant of administration.

Obligation to act personally

Does the prospective personal representative have the time, resources, and the expertise necessary to personally carry out the duties of a personal representative?

A personal representative has a general obligation to act personally, although delegation may be allowed in certain circumstances.

There is a distinction between discretionary and administrative powers as they relate to delegation. Discretionary powers may only be delegated if permitted by a will. Purely administrative functions may be delegated to others; agents may be employed to perform services that a personal representative is not personally qualified to perform. Note, however, that the agent must be properly supervised and employed to act within the agent’s special qualifications and the use of agents may impact upon the personal representative’s compensation. See the topic “Accounting and Expenses” for a full discussion of bonding requirements.
Conflicts of interest that are apparent or that may arise in the administration of the estate

Will the prospective personal representative be in a conflict of interest or a potential conflict of interest if he or she assumes the responsibilities of a personal representative? One possible example is a conflict between a deceased’s spouse, named as executor, and one of a number of beneficiaries who may wish to bring an action against the estate under the *Wills and Succession Act*, SA 2010, c W-12.2 [WSA]. This conflict may cause the spouse to reconsider applying for a grant.

Personal relationship with beneficiaries

What is the prospective personal representative’s personal relationship like with the beneficiaries of the estate? Personal and familial rivalry may take on new proportions in the context of an estate administration. This potential for discord may cause the prospective personal representative to reconsider his or her choice to act.

Chain of representation

If a deceased dies leaving a will, consider whether the prospective personal representative becomes an executor (by chain of representation) of any wills in which the deceased was named executor and in respect of which a grant of probate has been issued to the deceased (the *Trustee Act*, RSA 2000, c T-8, s 14 [Trustee Act] governs substitute trustees). Further, consider whether the executor of the prospective personal representative’s will is prepared to assume the responsibility of being personal representative of the deceased’s estate in the event the prospective personal representative dies before fulfilling his or her responsibility as personal representative of the estate of the deceased. (Note that there is no chain of representation for administrators.)

Priority to apply for a grant of administration

If the deceased dies intestate, does the prospective personal representative have priority over other potential applicants to apply for a grant of administration (see EAA, s 13)? If not, how difficult would it be to obtain renunciations from those who rank equal to or higher than the person in priority?

Bonds

Is a bond required? If all personal representatives live outside of Alberta, *Surrogate Rules*, r 28(1) requires a bond, unless that requirement is waived by a court under r 29 of the *Surrogate Rules*. Therefore, if a prospective personal representative lives outside of Alberta,
he or she must consider whether he or she is bondable. Where there are two or more personal representatives, only one needs to be a resident of Alberta to avoid the bonding requirements (*Surrogate Rules*, r 28(2)(b)). See also s 45 of the EAA.

**Compensation**

What remuneration does the prospective personal representative expect? He or she must consider the fact that, depending on the circumstances of the estate, remuneration for time and effort (including the possibility of sharing remuneration with agents, etc.) may be minimal or nonexistent. (See the topic “Accounting and Expenses” for a full discussion of personal representative compensation.)

### 3.4 Alternatives to acting as a personal representative: renouncing, nominating, or reserving the right to apply

**Renouncing**

No person can be made to act as an administrator of an estate (except the Public Trustee by legislation, and only then with its consent). Anyone with first priority under s 13 of the EAA to apply for a grant of administration may renounce, thereby allowing someone with equal or lower priority to apply for the grant (*Surrogate Rules*, r 32(2)). The renunciation is in Form NC 14 or Form NC 15, or in accordance with a method approved by the court.

If a named personal representative has not intermeddled, he or she may renounce the appointment as personal representative (*Surrogate Rules*, r 32(1)). The renunciation of probate is in Form NC 12 of the *Surrogate Rules*, or in accordance with a method approved by the court.

If more than one personal representative has been appointed in a will, any one of them may choose not to act and may sign a renunciation.

**Nominating**

If the person with first priority to apply for a grant of administration does not wish to act, he or she may nominate, in Form NC 16, a person to be the personal representative (*Surrogate Rules*, r 33). The right of the person with first priority to apply for a grant is then passed to their nominee (EAA, s 13(4)).
Reserving one’s right to apply

A named personal representative may initially choose not to participate in an estate administration. In that case, the other named personal representatives would apply for probate or apply for a supplemental grant of administration. The right of the reluctant personal representative to apply at a later date can be preserved by filing with the court, at the time of the initial application for a grant, Form NC 13 (Surrogate Rules, r 34(1)).

The fact that a personal representative does not obtain a grant of probate does not mean that he or she is no longer a personal representative. Anyone appointed as a personal representative under a will may accept the duties and obligations of the personal representative until the appointment is renounced. Therefore, third parties may deal with a non-proving personal representative with respect to matters where probate is not required. Ensure that the non-proving personal representative is advised of the potential liability associated with assuming the personal representative role.

Reserving the right to apply for probate may be appropriate where a person resides out of the jurisdiction or prefers not to act initially for reasons like age, illness, or efficiency of administration.

4 DUTIES OF THE PERSONAL REPRESENTATIVE

When someone decides to act as a personal representative, he or she must recognize and appreciate the duties involved – both immediate and eventual.

4.1 General duties

Section 5 of the EAA sets out the general duties of a personal representative, including the duty of honesty and good faith and acting with “care, diligence and skill” (EAA, s 5(1)(a)(iii)).

For more information of the general duties of a personal representative, see the content under the heading “Deciding whether to act as a personal representative.”

4.2 Disposition of human remains

Section 6 of the EAA provides that the Funeral Services Act, RSA 2000, c F-29 and the Cemeteries Act, RSA 2000, c C-3, and the regulations made under them, govern the authority and control over a deceased’s remains and his or her funeral arrangements. Section 36(2) of the Funeral Services Act General Regulation, Alta Reg 226/1998 gives a personal representative authority to control the disposition of human remains. Where there
is no personal representative, the same section sets out the order of priority of those to receive the authority to dispose of the deceased’s remains.

The arrangements suitable for the disposition of remains are determined in light of the deceased’s station in life and circumstances (Tzedeck v Royal Trust Co, [1953] 1 SCR 31, 1952 CarswellBC 141). Further, at common law, a personal representative is not bound to observe a deceased’s wishes concerning the disposition of his or her remains (Hunter v Hunter (1930), 65 OLR 586 at 596, 1930 CarswellOnt 208).

4.3 Making funeral arrangements

Funeral costs – the liability of a personal representative at common law

Funeral expenses are paid out of a deceased’s estate in priority to all other liabilities (EAA, s 27(2)(b)). A personal representative must therefore ensure that these expenses are reasonable in relation to the size of the entire estate. If a personal representative incurs expenses beyond what would be reasonable in the circumstances, he or she may be liable in an action by the deceased’s creditors or unsecured beneficiaries (Menzies v Ridley [1851], 2 Gr 544 (UC Ch)). On the same basis, a personal representative may be personally liable for extravagant or unusual funeral expenses or for an unpaid funeral account.

With respect to the acquisition of a grave marker, unless the will expressly authorizes the expense, the prudent approach is for a personal representative to obtain the consent of the beneficiaries. (See Watterworth v Wilkinson (1992), 34 ACWS (3d) 1052, 1992 CarswellOnt 2297 (Ont Ct J (Gen Div)); Goldstein v Salvation Army Assurance Society, [1917] 2 KB 291, 86 LJKB 793; but see also Chernichan v Chernichan Estate, 2001 ABQB 913, 2001 CarswellAlta 1730).

Legislative regulation of registration of deaths and burials

The Vital Statistics Act, SA 2007, c V-4.1, ss 31 -43, regulates the registration of deaths and the issuance of burial permits. Every death occurring in Alberta must be registered. The attending funeral director is responsible for obtaining the personal details of the deceased and a medical certificate of death. This information is then submitted in the prescribed form to the district registrar who, upon signing the document, thereby registers the death. A burial permit is then prepared and issued to the funeral director. This permit must be obtained before disposition of the remains.
4.4 Core tasks of the personal representative

Section 7(1) of the EAA sets out the 4 core tasks of a personal representative, which are to:

- identify the estate assets and liabilities,
- administer and manage the estate,
- satisfy the estate’s debts and obligations, and
- distribute and account for the administration of the estate.

Details relating to each of these tasks are discussed below.

Identify the estate assets and liabilities

One of the core tasks of a personal representative is to identify the full nature of the assets and liabilities of the estate as at the date of death. To do so, the following must be completed:

1. As required, review the deceased’s previously filed income tax returns for information relating to the existence of certain assets like registered retirement savings plans [RRSPs] and assets which generate income,
2. Arrange for the listing of the contents of any safety deposit box,
3. Notify the appropriate authorities from whom the deceased received benefits prior to his or her death. The estate is usually entitled to the pension benefits issued for the month of the deceased’s death. The federal and provincial governments will continue to issue benefits until notified of the death. Ensure any benefits to which the deceased is not entitled are returned before distribution,
4. Notify the appropriate financial institutions of the deceased’s death and request details of his or her assets, including accrued interest to the date of death. Ask that any non-income producing monies be placed in an interest-bearing account pending the issuance of a grant,
5. Review the maturity dates on bonds, expiry dates of warrants, and share conversion rights, and
6. Request and review an accounting from an attorney appointed under an enduring power of attorney or trustee appointed under the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2.
Administer and manage the estate

The personal representative is responsible for administering and managing the estate, which requires the following:

1. Ensure all estate property is properly secured and insured:
   (a) Examine existing insurance policies, noting expiry dates. Advise the relevant insurance companies of the deceased’s death and place additional insurance, if necessary, on real property, motor vehicles, furniture, jewelry, electronic equipment, etc. Coverage should generally include fire, vandalism, and liability insurance,
   (b) Arrange regular inspections of real property as required by an insurer’s vacancy permit (see s 24 of the Trustee Act; see also Donovan WM Waters, Mark Gillen & Lionel Smith, Waters’ Law of Trusts in Canada, 4th ed (Toronto: Carswell, 2012) at 1104 [Waters’ Law of Trusts] for the law relating to a trustee’s authority to insure trust property, payment of premiums, and how the cost is borne),
   (c) If necessary, arrange for the redirection of the deceased’s mail,
   (d) Apply for any pensions, annuities, death benefits, life insurance, and other benefits payable to the estate, including federal or provincial government pension and death benefits,
   (e) Take possession of or secure cash, securities, jewelry, and other valuables,
   (f) Preserve business assets (the personal representative has a duty to preserve business assets; however, he or she must be extremely cautious in continuing active business operations without express authority to do so by the will or a court order),
   (g) If the personal representative has been given the required authority in the will, he or she will arrange for interim management of the deceased’s business until distribution in kind or the sale of the business (see Linsley v Kirstiuk (1986), 1 ACWS (3d) 84, 1986 CarswellBC 3262 for discussion),
   (h) Establish an estate bank account that returns or records cancelled cheques and ensure all estate funds are earning interest,
(i) Determine whether the bank will deposit any cheques payable to the
deceased into the estate bank account. If the bank will not deposit them,
have them re-issued in the name of the estate,

(j) Review leases (and, if appropriate, give notice to cancel them), and arrange
for the collection of rents,

(k) Advise all financial institutions and other authorities that any attorney or
trustee no longer has any authority to deal with the deceased's assets, and

(l) Where the deceased may have been irrational or incompetent before death,
review all of his or her financial transactions that occurred during any period
of mental disability,

2. Retain a lawyer to advise on the administration of the estate, as needed:

   (a) Review the provisions of the will or the WSA to identify the estate’s
       beneficiaries and obtain their addresses and dates of birth,

   (b) Instruct the lawyer regarding any litigation involving the estate, as applicable,

   (c) Ensure that the style of cause on any court actions involving the deceased is
       amended to reflect the death, and

   (d) Apply for a grant, if necessary,

3. Deal with non-assets:

   (a) Advise any joint tenancy survivor of the deceased’s death, and

   (b) Advise any designated beneficiaries of interests under life insurance, RRSPs,
       pensions, and other property that will pass outside the estate.

Satisfy the estate’s debts and obligations

The personal representative is also required to satisfy the debts and obligations of the estate
by dealing with estate liabilities and tax matters:

1. Determine whether to advertise for claimants and creditors,

2. Determine and verify the legitimacy of all claims,

3. Make payment of debts and legitimate claims as funds become available,

4. Determine whether the bank will refuse to honour any cheques drawn but not cleared
   by the deceased prior to his or her death,
5. Review mortgages, agreements for sale, leases, and other relevant documents. Arrange for payment of installments when due,

6. Determine whether any debts are life-insured,

7. Review contingent liabilities of the deceased (e.g., guarantees) and consider whether they can or should be released and whether any rights of indemnity exist in respect of them, and

8. Serve notice of the deceased’s death on any party to whom the deceased has given a guarantee. Confirm in writing that the estate will not be liable for any further advances made.

9. Determine the deceased’s income tax or other tax liability and also that of the estate,

10. File the necessary returns and pay any tax owing, and

11. Obtain income tax or other tax clearance certificates before making a final distribution of the estate.

Note that s 25 of the EAA gives a personal representative the power to require any claimant on an estate to verify his or her claim in accordance with the Surrogate Rules and the Alberta Rules of Court, Alta Reg 124/2010.)

Distribute and account for the administration of the estate

A personal representative must keep accurate accounts of the estate assets and be ready at all times to account fully, on reasonable notice, to the beneficiaries in respect of the administration of the estate (see Waters’ Law of Trusts at 1120):

1. Distribute the estate assets:
   (a) Administer any continuing trust and transfer any property to the applicable trustees,
   (b) Prepare the personal representative’s accounts, proposed compensation schedule, and plans of distribution,
   (c) Obtain releases from beneficiaries,
   (d) Transfer assets as specified or issue distribution cheques, and

2. Account for expenses incurred in the administration of the estate:
   (a) Personal representative expenses,
(i) A personal representative must maintain a record of estate expenses, including full particulars of all expenses incurred relative to the administration of the estate. Schedule 1, Part 1 of the Surrogate Rules holds that a personal representative is entitled to be indemnified by the estate for all expenses properly incurred in the administration of the estate.

(b) Expenses incurred prior to a grant,

(i) Notwithstanding the general right to indemnity, a personal representative who expends money before a grant of probate or administration is obtained may be personally liable. This is particularly true for a proposed administrator, because his or her authority is derived from the grant of administration, and therefore he or she cannot bind the estate (except as regards to reasonable funeral expenses) until the grant of administration has been issued.

(ii) An executor, on the other hand, is in a more secure position because his or her authority derives from the will (rather than from the issuance of a grant of representation from the court). An executor therefore has the power to bind the estate immediately after the deceased’s death. Notwithstanding that, however, the will that appoints the executor may not be the most recent will or may not be enforceable (e.g., the deceased may have lacked testamentary capacity). Where that is the case, someone other than the named person may be appointed personal representative of the estate and the named person’s compensation for expenses will be subject to the discretion of that appointed personal representative or the court should there be a dispute.

Note that Part 3, Division 4 of the Surrogate Rules sets out the procedure for passing the accounts of the estate. Specifically, r 107 describes the procedure to be followed by a personal representative to formally pass his or her accounts. Rule 108 describes the procedure for applying for an order requiring a formal passing of the estate accounts.

For a more detailed discussion, see the content under the topic “Accounting & Expenses.”
5 FAILING TO PERFORM THE CORE TASKS OR FAILING TO PROVIDE NOTICE

Unlike the repealed Administration of Estates Act, RSA 2000, c A-2, the EAA, and specifically s 8, addresses the effects and consequences of the personal representative’s failure or refusal to provide notice under Part 2 of the EAA or to perform a duty or core task under s 7. As stated in EAA, s 8, if the court is satisfied, on application, that a personal representative has failed to provide notice or to perform a duty or a core task, it may:

(a) order the personal representative to provide the notice or perform the duty or core task;

(b) impose conditions on the personal representative;

(c) remove the personal representative;

(d) revoke a grant;

(e) make any other order that the Court considers appropriate.
## CHAPTER 3
### TESTAMENTARY DOCUMENTS

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1 INTRODUCTION

The following is a review of those matters a solicitor must consider in preparing an application for a grant of probate or administration.

2 ORIGINAL DOCUMENTS OR COPIES

Rule 15 of the Surrogates Rules, Alta Reg 130/95 [Surrogates Rules] provides that the original will and any original codicils must form part of an application for a grant of probate or a grant of administration with will annexed. (Section 4 of the repealed Administration of Estates Act, RSA 2000, c A-2 made an exception for wills made in Quebec. That exception does not appear in the Estate Administration Act, SA 2014, c E-12.5 [EAA]).

An applicant must mark any will and any codicil he or she believes to be the last will or codicil of the deceased to identify it for the purposes of the application. Rule 16(8) of the Surrogates Rules specifies forms of identification that may be used to mark a will in satisfaction of this rule:

(a) respecting Schedule 2 of the application:

This is the will referred to in Schedule 2 and is exhibit A to the affidavit of ________, a witness to this will.

____________________________________
(Applicant’s Signature)

____________________________________________________________________________
(A Commissioner for Oaths)

____________________________________________________________________________
(Justice of the Court of Queen’s Bench of Alberta)

(b) respecting an affidavit of a witness to the will:

This is exhibit A referred to in the affidavit of (deponent’s name).

Sworn before me on ________

____________________________________________________________________________
(A Commissioner for Oaths)

The Surrogates Rules provide that these markings must be made below the signatures on either the front or back of the last page of the will or codicil on which text appears. The markings should not obliterate or damage the original will or codicil (r 16(2)).
Further, the Surrogate Rules provide that a copy of a will or other evidence of it may be admitted to probate if the original will is lost or destroyed, but a copy or other evidence of it exists (r 24). The copy of the will or other evidence of the will must be proved formally under Part 2, Division 3 of the Surrogate Rules, unless:

- the applicant shows, to the satisfaction of the court, that s 40 of the Alberta Evidence Act, RSA 2000, c A-18 (dealing with photographic film as evidence) applies, or
- the court orders otherwise.

### 3 LOCATING THE ORIGINAL WILL

In Form NC 4, which must be attached as Schedule 2 to the affidavit filed by the applicant for a grant of probate, the personal representative must state that to the best of his or her information and belief, the document presented by the applicant is the deceased’s original last will and, if applicable, codicil. As a consequence, the personal representative must make every effort to ensure that it is in fact the last will or codicil.

To be certain there is no subsequent will or codicil, a personal representative may have to search a number of locations, including the deceased’s residence, office, and safety deposit box. As well, other personal representatives, previous legal counsel, and family members should be contacted. Also contact the Public Trustee’s Office, as that office holds a number of original wills.

Historically, the Surrogate Rules permitted a will or codicil to be deposited in the office of the Clerk of the Court for safekeeping. The clerk no longer accepts wills. However, any wills already on deposit will continue to be held in safekeeping by the court, and under r 45(2)(c) of the Surrogate Rules, the clerk will check if a will from the deceased is being held when a grant application is made.

If it is believed that the individual may have signed a will but the identity of the lawyer or firm that prepared it is unknown, it may be necessary to advertise in legal publications.

Finally, it may be necessary to locate any original memoranda, if such are referenced in the will and any codicil.
WHEN A WILL CANNOT BE LOCATED

Where a will cannot be located, an applicant for a grant of administration is required to swear, as part of the affidavit filed in support, that after a thorough search of all likely places, no testamentary paper of the deceased has been found. This statement is in Form NC 3, “Schedule 1: Deceased.”

TECHNICAL REQUIREMENTS

5.1 Affidavit of a witness to a will

Unless a will is formally proven, r 16(3) of the Surrogate Rules provides that one of the witnesses to the will must prove that the signing formalities required under the Wills and Succession Act, SA 2010, c 12.2 [WSA] were observed. This proof is made by affidavit in Form NC 8. The original will or codicil, as the case may be, must be marked as an exhibit to this affidavit. The witness must specify in the affidavit any changes the deceased made on the will before it was signed (see Surrogate Rules, r 16(5)).

If changes are made after a will is made, they are of no effect unless the changes were made in the manner set out in s 22 of the WSA or, if the court so orders, under s 38 of the WSA. Previously, under the now repealed Wills Act, RSA 2000, c W-12 [Wills Act], a change made in a will after it was prepared was valid when the testator’s signature and those of the witnesses were made in the margin or in some other part of the will opposite or near to the change. Section 19(4) of the WSA now provides that a testator’s signature does not give effect to any disposition or direction added to the will after the will is made. However, the change is valid if it is made in accordance with ss 15 or 16 of the WSA, or by court order (WSA, s 22).

Further, a testator is presumed not to have intended to give effect to any writing that appears below his signature. Note, however, that the existence of writing below a signature will not make the will invalid if it appears that the testator intended by the signature to give effect to the writing above (WSA, s 19).

Where a will is a holograph will or a military will (i.e., a member of the Canadian Forces on active service or a mariner or seaman when at sea or in a course of a voyage), as provided for in ss 16 and 17 of the WSA, only the signature of the testator is necessary. In these very specific instances, the signatures of witnesses are not required.
Rule 16(5) states that an affidavit by a witness at the time a will is signed is acceptable proof that the formalities were observed, unless there is an apparent change in the will that the witness has not explained in the affidavit. This is good practice, where possible. It avoids the need to locate a witness many years later when he or she may have diminished recollection of what transpired when the will was signed. If a testator has property in other jurisdictions, have the affidavit sworn before a Notary Public so that the affidavit may be used if a grant is required in other jurisdictions.

5.2 Affidavit of a witness unavailable

If both of the witnesses to a will are dead or cannot be located, or neither witness can provide an affidavit for any reason, the applicant may establish that the formalities were observed through an affidavit sworn by an individual who can attest to the authenticity of the signature of the deceased. It is preferable that the deponent be neither a beneficiary nor a spouse or adult interdependent partner of a beneficiary or the applicant. As well, an affidavit may be signed by any person who, although he or she did not sign as a witness, was present during the signing of the will and can attest to the circumstances of the signing (Surrogate Rules, r 19). There is no prescribed form in the Surrogate Rules for this affidavit.

If a will is a holograph will, proof that it is in the deceased’s handwriting is given by affidavit evidence using Form NC 9. Unless otherwise ordered by the court, a person other than the applicant must sign this affidavit (r 16(4)).

5.3 Initialing each page of a will

If a will is on more than one page, the testator and the witnesses must each initial each page. The court may require further identification of the will if it is written on more than one piece of paper, and not all pieces are identified by the signature or initials of the deceased and the witnesses (Surrogate Rules, r 16(7)).

5.4 Dating a will

The WSA does not require that a will be dated to be valid. Obviously, where more than one testamentary document exists, the date is important in determining which document is the last will of the deceased. If there is no indication on the will of the date on which it was signed, or reference to the date is imperfect, it is necessary for one of the attesting witnesses to sign an affidavit providing evidence of the date on which the will was signed. For example, evidence of the date a will was signed may be obtained by reviewing the solicitor’s file or
time dockets to determine when that solicitor met with the testator. If evidence like that is unavailable, the court may require the applicant to provide evidence that the will was signed between two stated dates and to attest that a search for a later will has been made but none has been found (Surrogate Rules, r 20).

5.5 Affidavit of a witness where the testator is unable to sign

Where a testator is unable to sign a will or codicil, he or she can give effect to the will by having another person sign on his or her behalf, at his or her direction, and in his or her presence under WSA, s 19(1). This other person can sign either his or her own name or the testator’s name.

In such situations, care must be taken, and careful records kept, to confirm that the will was fully explained to the testator and the testator appeared to the witnesses to fully understand the will, despite that the testator (Surrogate Rules, r 17):

- was blind,
- was illiterate,
- did not fully understand English,
- indicated an intention to give effect to the will with a mark, or
- indicated an intention to give effect to the will by having another person sign at the testator’s direction.

Where a will is written in a language other than English, the will must be translated and accompanied by an affidavit verifying its translation into English (Surrogate Rules, r 18). The form of affidavit required to verify the translation is in Form NC 10.

5.6 Wills made by minors

Under s 13 of the WSA, a will prepared by a person under the age of 18 years is valid if, at the time of the making of the will, the minor had the mental capacity to do so and:

- had a spouse or adult interdependent partner,
- was a member of a regular force as defined in the National Defence Act, RSC 1985, c N-5 [National Defence Act],
• was a member of another component of the Canadian Forces and was placed on active service, or
• was authorized by court order under WSA, s 36.

Rule 21 of the Surrogate Rules provides that where a person was under 18 years of age at the time his or her will was signed, the applicant must prove that s 13 of the WSA or s 9 of the Wills Act (if the will was made before the coming into force of the WSA) was applicable at the time the will was signed. This information should be included on Surrogate Rules Form NC 4.

5.7 Military wills

A member of the Canadian Forces, while placed on active service pursuant to the National Defence Act, or a member of any other naval, land, or air force while on active service, may make a will by signing it, without the presence or signature of a witness or any other formality (WSA, s 17).

Section 18 of the WSA provides that, for the purposes of ss 13(2)(b) and 17,

(a) a certificate signed by or on behalf of an officer purporting to have custody of the records of the force in which a member was serving at the time the will was made setting out that the member was on active service at that time is sufficient proof of that fact, and

(b) if a certificate referred to in clause (a) is not available, a member of a naval, land, or air force is deemed to be on active service after the member has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service.

5.8 Arrangement for payment of fees

The filing fees must be paid to the court before a grant will issue. It is important to discuss in advance with an applicant how the fees will be paid. The amount of fees can be calculated using Schedule 2 of the Surrogate Rules and should be addressed with an applicant before the application is filed. The applicant or one of the beneficiaries may be prepared to lend money to the estate to enable the grant to be issued. In exceptional circumstances, it may also be possible to approach a financial institution where the deceased had his or her bank accounts to determine whether it is prepared to release the appropriate amount to facilitate issuance of the grant (see Re Eurig Estate, [1998] 2 SCR 565, 1998 CarswellOnt 3950
(SCC)). Filing fees are considerably lower in Alberta than in some provinces; therefore, it is typically not be difficult to arrange for the funds to pay the fees.
# CHAPTER 4

**DEALING WITH INTESTACY**

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1 INTESTACY

Part 3 of the *Wills and Succession Act*, SA 2010, c W-12.2 [WSA] governs intestacy, and replaces much of Alberta’s repealed *Intestate Succession Act*, RSA 2000, c I-10 [Intestate Succession Act]. Part 3 maintains the long-held principle that assumes that Albertans who die without wills want their estates to go to their family members. The distribution scheme is generally unchanged: closest relatives take first, starting with the deceased’s spouse or partner. There are a few key changes, however, highlighted below.

1.1 **What is an “intestate estate”?**

The person who dies without a will, or with some property not disposed of by a will, is called the intestate. An “intestate estate” is all of an intestate’s property not disposed of by a will (WSA, s 58(1)(a)). It includes every kind of property.

The title of Part 3 and s 59 of the WSA both use the phrase “distribution of intestate estates,” reflecting that, under the WSA, intestacy is addressed from the perspective of the “intestate estate,” rather than the “intestate’s estate.”

Importantly, under s 58(1)(b) of the WSA, the “net value of intestate estate” is calculated after deducting an intestate’s debts, including debts arising from an order or agreement under the *Matrimonial Property Act*, RSA 2000, c M-8 [MPA]. Funeral and administration expenses are also deducted first.

An intestate’s net estate may also be subject to a claim by a “family member” (as defined in WSA, s 72(b)) under the family maintenance and support provisions in Part 5 of the WSA. For a more detailed discussion, refer to the content under “Understanding Family Maintenance and Support.”

In the face of a conflict between the *Dower Act*, RSA 2000, c D-15 [Dower Act] and any provision in Parts 2 (dealing with wills) or 3 (dealing with intestacy) of the WSA regarding a spouse’s right to property after the death of the other spouse, the *Dower Act* prevails (WSA, s 2).

1.2 **Who is “family” in an intestacy?**

The distribution of an intestate estate involves potential transfers to family -- spouses, adult interdependent partners [AIPs], and descendants, making the definitions of those and other terms important.
1.3 Distribution of intestate estates

The net value of an estate is reduced by the value of claims against it, including those relating to “debts arising from an order or agreement under the Matrimonial Property Act” (WSA, s 58(1)(b)). The potential claims under the MPA may be significant. If there are any arrears in spousal or child support or any property division issues existing at the time of death, those take priority over the intestate claim. See, for example, Coyle v Coyle Estate, 2005 ABQB 436 at para 5, 2005 CarswellAlta 842, where Greckol J subtracted spousal support arrears from the intestate’s estate before distribution.

Section 58(2) of the WSA extends inheritance of an intestate estate to children who are in the womb at the time of an intestate’s death and who are later born alive. Posthumously conceived children (i.e., children born from stored genetic material) do not inherit through intestacy.

1.4 Spouses and adult interdependent partners

A major change brought by the WSA is the “all to spouse” rule. Previously, a surviving spouse or AIP had to share an estate with an intestate’s children; however, this is no longer the case if the intestate’s children are also the spouse or AIP’s children. In that situation, the spouse or AIP receives the entire estate (WSA, s 61(1)(a)). This reflects the assumption that surviving spouses and AIPs will provide for their own children.

The “all to spouse” rule does not apply if an intestate has surviving children that are not also the surviving spouse or AIP’s children (WSA, s 61(1)(b)). In that case, the estate is shared between the spouse or AIP and the intestate’s children. Under s 61(1)(b), the spouse or AIP’s share is the greater of:

- 50% of the net value of the estate, or
- the amount of the preferential share set by regulation.

The Preferential Share (Intestate Estates) Regulation, Alta Reg 217/2011 [Preferential Share Regulation] sets the preferential share in s 61(1)(b) of the WSA at $150,000 (s 1). Thus, if an estate is $150,000 or less, the entire amount goes to the spouse or AIP. If an estate is more than $150,000, the spouse or AIP takes the greater of 50% of the value of the estate and $150,000. The remainder is divided equally among the children. This regulation expires on January 15, 2017 so that it may be reviewed for “ongoing relevancy and necessity” (Preferential Share Regulation, s 2).
If an intestate has both a surviving spouse and a surviving AIP, and the intestate leaves no descendants, the spouse and the AIP share the estate equally (WSA, s 62). This is a change from the previous law, which gave the entire estate to a surviving AIP in preference to a surviving spouse.

If an intestate has both a surviving spouse and a surviving AIP, and the intestate left one or more descendants, the spouse and the AIP share equally in the greater of 50% of the estate and the preferential share under s 61. The descendants share the remainder (s 62(a)).

Given the limitations on the definition of a “surviving spouse” under s 63 of the WSA, it is increasingly unlikely that an intestate will have both a surviving spouse and an AIP. (See the Adult Interdependent Relationships Act, SA 2002, c A-4.5, s 3(1)(a) [Adult Interdependent Relationships Act]).

The repealed Intestate Succession Act disinherited adulterous and deserting spouses. The WSA abandons this approach and instead disinherits former spouses.

Under s 63 of the WSA, a spouse who has been separated from an intestate for 2 years before death is disinherited from sharing in the intestate estate. The spouse may still, however, have a claim under the MPA. As such, s 63 should be addressed in every separation agreement entered into. There is no specified reconciliation period under s 63.

Section 63 relates to surviving spouses, and not AIPs. Section 10 of the Adult Interdependent Relationships Act describes when a person becomes a former AIP.

1.5 Distribution to descendants

Section 66 of the WSA codifies the per stirpes rule, which applies if an intestate has descendants (defined at s 1(1(e) of the WSA) but no surviving spouse or AIP. The rule is the default distribution for wills under Part 2 of the WSA (see ss 30-31).

Under the per stirpes rule, an estate is divided into as many shares as there are children of a deceased intestate. There is no share for predeceased children who leave no surviving descendants. There is, however, a share for predeceased children who have surviving descendants, and in that case the surviving descendants take their parent’s share.

There is no generational limit on per stirpital sharing to descendants.

### 1.6 Parentelic distribution

Where an intestate dies leaving no surviving spouse, no AIP, and no descendants, a parentelic system of inheritance applies (WSA, s 67). This system’s general principles are set out in ALRI’s *Report 78* at 151:

- Living descendants of the closest ancestor take to the exclusion of living descendants of a more remote ancestor; for example, descendants of parents (1st degree) take before descendants of grandparents (2nd degree),
- Degrees of consanguinity are irrelevant in the sense that higher degrees of consanguinity do not necessarily share; for example, a grandniece (4th degree) takes before an aunt (3rd degree) because she descended from a closer ancestor (parent), whereas an aunt descends from a grandparent,
- Representation is admitted among next-of-kin; that is, *per stirpes*, and
- Not every surviving member in the family line of the closest ancestor will share in the estate; those further down a family line do not share if their ancestors are still alive.

Following these principles, the order of distribution (from first to last) under s 67 of the WSA is:

1. parents or the survivor of them,
2. parents’ descendants (i.e. the intestate’s siblings or their descendants),
3. surviving grandparents, one half to the grandparents on each side,
4. grandparents’ descendants, one half to each side or all to one side if there are no survivors on one side,
5. surviving great grandparents, one half to the great grandparents on each side, and
6. great grandparents’ descendants, one half to each side or all to one side if there are no survivors on one side.
Note that individuals of the 5th degree or greater to an intestate are deemed to die before the intestate, and any part of the estate that otherwise would be distributed to them must be distributed to relations of a closer degree (WSA, s 67(2)).

The WSA uses the updated term “half-kin” instead of the term “half-blood” used in previous legislation. Half-kin inherit in the same way as whole kin; siblings need only have one parent in common (WSA, s 68(b)). Aside from modernizing the language, the new terminology reflects the possibility that children may be adopted or may be born using artificial insemination or other forms of assisted reproduction and may not be “blood” relatives.

1.7 No heirs

Under s 69 of the WSA, if no one entitled to an intestate estate is found, the Unclaimed Personal Property and Vested Property Act, SA 2007, c U-1.5 applies, and rights to unclaimed property vest in the Alberta government. Under s 48 of that Act, a relative of the 5th or greater degree to an intestate may file a claim for a share of the property.

If a personal representative is unable to find an heir 2 years after a grant of administration, he or she may deposit the remaining intestate estate with the Minister.

2 SUMMARY OF INTESTACY INHERITANCE PROVISIONS

Part 3 of the WSA sets out the distribution scheme of an intestate estate. Below is a summary of the sections and their application for different situations of intestacy:

<table>
<thead>
<tr>
<th>Section</th>
<th>Intestate dies leaving</th>
<th>Net value of estate goes to</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>surviving spouse and no descendants</td>
<td>spouse</td>
</tr>
<tr>
<td>60</td>
<td>surviving adult interdependent partner [AIP] and no descendants</td>
<td>AIP</td>
</tr>
<tr>
<td>61</td>
<td>surviving spouse and descendant(s), all of which are descendants of intestate and spouse</td>
<td>spouse</td>
</tr>
<tr>
<td>61</td>
<td>surviving AIP and descendant(s), all of which are descendants of intestate and AIP</td>
<td>AIP</td>
</tr>
<tr>
<td>61</td>
<td>surviving spouse and descendant(s), not all of which are descendants of intestate and spouse</td>
<td>greater of prescribed amount or 50% to spouse residue to descendants</td>
</tr>
<tr>
<td>Section</td>
<td>Intestate dies leaving</td>
<td>Net value of estate goes to</td>
</tr>
<tr>
<td>---------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>61</td>
<td>surviving AIP and descendant(s), not all of which are descendants of intestate and AIP</td>
<td>greater of prescribed amount or 50% to AIP</td>
</tr>
<tr>
<td></td>
<td></td>
<td>residue to descendants</td>
</tr>
<tr>
<td>62</td>
<td>surviving spouse and AIP and no descendants</td>
<td>50% to spouse</td>
</tr>
<tr>
<td></td>
<td></td>
<td>50% to AIP</td>
</tr>
<tr>
<td>62</td>
<td>surviving spouse and AIP and descendants</td>
<td>½ of greater of prescribed amount or 50% to spouse</td>
</tr>
<tr>
<td></td>
<td></td>
<td>½ of greater of prescribed amount or 50% to AIP</td>
</tr>
<tr>
<td></td>
<td></td>
<td>residue to descendants</td>
</tr>
<tr>
<td>66</td>
<td>descendants but no surviving spouse or AIP</td>
<td>descendants per stirpes</td>
</tr>
<tr>
<td>67</td>
<td>no surviving spouse, AIP, or descendants</td>
<td>by parentelic distribution to fourth degree</td>
</tr>
<tr>
<td>68</td>
<td>descendants of half-kinship and whole kinship in the same degree of relationship to the</td>
<td>descendants of half-kinship and whole kinship inherit equally</td>
</tr>
<tr>
<td></td>
<td>intestate</td>
<td></td>
</tr>
<tr>
<td>69</td>
<td>no individual entitled to receive an intestate estate</td>
<td>to the Alberta government under the <em>Unclaimed Personal Property and Vested Property Act</em></td>
</tr>
</tbody>
</table>

For Intestate Flow Charts that help explain these concepts in more visual terms, refer to the appendices.
CHAPTER 5
NOTICE

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1 INTRODUCTION

The Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules] and the Estate Administration Act, SA 2014, c E-12.5 [EAA] provide that notice must be given to beneficiaries and to persons who may have rights under the Wills and Succession Act, SA 2010, c W-12.2 [WSA] or the Matrimonial Property Act, RSA 2000, c M-8 [MPA].

The following is a review of the notice requirements under the EAA, namely:

- who must be given notice, and
- what type of notice must be provided:
  - when no grant of administration or probate is required, and
  - when the estate is being administered with a grant of administration or probate.

2 NOTICE UNDER THE ESTATE ADMINISTRATION ACT AND THE SURROGATE RULES

Section 9 of the EAA provides that notice requirements under the EAA are in addition to the notice requirements found in the Alberta Rules of Court, Alta Reg 124/2010 [Rules of Court], the Surrogate Rules, and any notice requirements imposed by the court. Rules 26–27 of the Surrogate Rules provide that notice must be given to beneficiaries and to any persons who may have rights under the WSA or the MPA.

3 NOTICE WHEN ACTING WITHOUT A GRANT

An estate can be administered without a grant where a personal representative is able to deal with a deceased’s estate without needing to formally prove his or her authority to do so. For example, where a deceased held land or bank accounts jointly with another person, the transfer to the other occurs upon the death of the deceased without the need for probate.

Under the repealed Administration of Estates Act, RSA 2000, c A-2 [Administration of Estates Act], there were no formal requirements to provide notice to persons interested in an estate when the estate was being administered without a grant. As such, potential beneficiaries or persons with potential claims under the MPA or the WSA may not have been aware that the estate was being administered. In its August 2013 report, Estate Administration, Final Report 102 (Edmonton: Alberta Law Reform Institute, 2013), the Alberta Law Reform Institute [ALRI] recommended that notice to beneficiaries and claimants be required, regardless of whether or not a grant is obtained. Section 10 of the EAA implements this recommendation and
expands the group of persons to whom notice must be given. Besides the obligation to provide notice to the beneficiaries of a deceased, notice must also go to other affected persons (s 10(1)(b)–(d)).

3.1 **Who must be given notice?**

**Beneficiaries**

Beneficiaries entitled to either a specific gift in a will or a share in the residue of an estate must be given notice (EAA, s 10(1)(a)), which may be in Form NGA 1 (*Surrogate Rules*, r 9.1(1)). Notice must be given even when there is no property in the estate.

In addition to the requirements under the *Surrogate Rules*, s 10(2) requires that notice to beneficiaries must:

1. identify the deceased person,
2. provide the name and contact information of the personal representative,
3. describe the gift left to the beneficiary in the will or the share of the residue to be received or refer to the applicable provisions of the WSA or the *Intestate Succession Act*, RSA 2000, c I-10,
4. state that all gifts are subject to the prior payment of the deceased person’s debts and other claims against the estate, and
5. include any other information or documents required by the *Surrogate Rules*.

**Deceased beneficiaries**

The *Surrogate Rules* do not specifically deal with notice procedures where a beneficiary has predeceased a testator and the gift has not lapsed. In this circumstance, send notice to the personal representative of the estate of the deceased beneficiary, if one has been appointed. If there is a will, but a grant has not been issued, give notice to the personal representative named in the deceased beneficiary’s will. Where a deceased beneficiary’s personal representative or next of kin has not taken possession of the deceased person’s property, s 12 of the *Public Trustee Act*, SA 2004, c P-44.1 [*Public Trustee Act*] allows the Public Trustee to take possession of the property on an interim basis.

If the personal representative of the estate of a deceased beneficiary’s estate is unknown or cannot be located, contact the Public Trustee to see whether it would be willing either to make an application for a grant of administration under s 15 of the *Public Trustee Act* or to
act as administrator under s 15 of the EAA. If a deceased beneficiary dies intestate and there is no personal representative of the estate, but the individual’s heirs are known, consider giving notice to the individual heirs. In this situation, also consider an application to the court for directions under rules 2(4) and 4 of the Surrogate Rules.

Others interested in an estate

Section 10(1) of the EAA requires, in addition to service on beneficiaries, that others who may be interested in an estate also be served. These include a deceased’s family members and an attorney, trustee, Public Trustee, or a guardian in relation to someone interested in the estate. Section 72(b) of the WSA defines “family members” to include a deceased’s spouse, adult interdependent partner (AIP), children, and grandchildren.

(a) Spouse

Sections 10(1)(c) and 11(2) of the EAA provide that if a spouse is not the sole beneficiary under a will or under Part 3 of the WSA, it is necessary to send notice to the deceased’s spouse referring to his or her rights under Part 5 of the WSA and under the MPA. Forms NGA 2 and NGA 3 may be used for the notice.

If the spouse is a dependent or represented adult and has an appointed trustee, or an attorney is acting for the spouse under a power of attorney, send the notice to the spouse’s trustee or attorney in Form NGA 4 (EAA, ss 10(1)(d), 12(1)(a)–(b)). If there is no trustee or attorney, have a trustee appointed to represent the spouse to determine whether an application on the spouse’s behalf for a greater share of the estate is warranted. Alternatively, consider seeking court direction on who to serve.

Occasionally, a deceased may be survived by both a spouse and an AIP. In that case, notice is given to both the spouse and the AIP, or to their trustees or attorneys.

(b) Adult interdependent partner

Sections 10(1)(b) and 11(1)(b) of the EAA provide that if an AIP of a deceased is not the sole beneficiary under the deceased’s will or under Part 3 of the WSA, it is necessary to send notice to the AIP referring to his or her rights under Part 5 of the WSA. Form NGA-2 may be used for this notice. Where an AIP is a represented adult or has an attorney acting under a power of attorney, the required notice and procedures are identical to those required for the spouse of a deceased, described above.
(c) Children

Sections 72(b)(iii) –(v) of the WSA provide that a deceased’s child is a family member if the child is:

- under the age of 18 years at the time of the deceased’s death, including a child in the womb who is later born alive, or
- over the age of 18 years at the time of the deceased’s death and unable by reason of mental or physical disability to earn a livelihood, or
- between the ages of 18 and 22 years and unable to withdraw from his or her parents’ charge because he or she is a student.

The EAA and the WSA make no distinction between children born inside or outside of marriage.

Sections 10(1)(b) and 11(1)(c)–(h) of the EAA require notice to be served on any child of a deceased qualifying as a family member. The notice must refer to the child’s rights under Part 5 of the WSA and may be in Form NGA-2. If a child under 18 is interested in an estate, notice in Form NGA-4 is served on the child’s parent or guardian and also on the Public Trustee. Section 5(c) of the Public Trustee Act allows the Public Trustee to act to protect the property or estate of children under 18. If no one has been appointed as trustee, and a child under 18 has or may have property vest in him or her or is contingently entitled to property, the Public Trustee, with its consent, will act for this limited purpose.

Since r 1(i) of the Surrogate Rules defines “minor” as including an unborn child, the requirement to serve notice on the Public Trustee where a minor is interested in an estate includes a situation where an unborn child is interested in the estate.

(d) Grandchildren and great-grandchildren

If a deceased is survived by a grandchild or great-grandchild who was a minor on the date of the deceased’s death and in respect of whom the deceased stood in the place of a parent on the date of the deceased’s death, send notice in Form NGA-4 to the Public Trustee (EAA, ss 10(1)(b), 11(1)(g)–(h)).
(e) Attorney of an adult or trustee of a represented adult

Where an adult child of the deceased is unable by reason of physical disability to earn a livelihood, send notice to the child directly (EAA, s 11(1)(c)). Form NGA 2 may be used. Where an adult child of the deceased is unable by reason of mental disability to earn a livelihood, notice should be sent to the attorney or trustee of the adult child (EAA, ss 11(1)(e)–(f)). Form NGA 4 may be used for this purpose. If there is no attorney or trustee appointed for an adult child, the court may, having regard to the value of the estate, the circumstances of the child, and the likelihood of success of an application under Part 5 of the WSA, direct that a trustee of the child’s estate be appointed. The court may direct that the applicant or some other person apply to have a limited trustee of the child’s estate under the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2 [AGTA] for the sole purpose of determining the child’s entitlement.

(f) Missing persons

Section 1(h) of the Public Trustee Act defines a missing person as “a person declared to be missing under s 7.” Section 7 of the Public Trustee Act permits the court to declare a person to be missing if it is satisfied that after a reasonable inquiry the person cannot be located. Therefore, a person is a missing person for the purposes of s 12(1)(c)(iii) of the EAA only if he or she has been declared missing by a court order.

It is necessary to make an effort to locate a missing beneficiary. This might include contacting other family members, advertising in the local newspaper where the individual last lived or worked, or hiring a locate service. As well, inquiries may be directed to government departments such as the Canada Pension Plan, Old Age Security, Child Tax Benefit, Alberta Seniors Benefit and Assured Income for the Severely Handicapped. These departments will not provide an address or phone number of an individual but will often forward a letter advising that the missing person is a beneficiary in an estate and should contact your office. All efforts must be made to find the missing person. If the person cannot be found, an application is made to declare the person to be missing and to involve the Public Trustee.

Sections 10(1)(d) and 12(1)(c)(iii) of the EAA provide that if a missing person is interested in an estate, a copy of the required notice must be sent to the Public Trustee, for which Form NGA-4 may be used.
4 NOTICE TO FAMILY MEMBERS AND BENEFICIARIES

Similar to s 7 of the repealed Administration of Estates Act, ss 11 and 12 of the EAA identify those persons to be notified when an applicant applies for a grant. Those persons are the same whether or not a deceased dies leaving a will.

4.1 Who must be given notice?

Beneficiaries

On an application for a grant of probate or administration with will annexed, the beneficiaries entitled to a share under the will must be identified on Form NC 6.

Notice is given to beneficiaries entitled to a specific gift in a will in Form NC 20. This notice must provide a description of the gift to the beneficiary and may include a copy of the relevant section of the will. It is not necessary to provide these beneficiaries with a copy of the application for the grant or a copy of the complete will. If a specific gift is no longer in the testator’s estate at the time of the testator’s death (the gift has adeemed), there is no need for notice to the beneficiary, but the application should reflect that the gift no longer exists.

Beneficiaries entitled to share in the residue of an estate must be given notice in Form NC 19. This notice indicates the percentage or fractional share of the residue of the estate that a beneficiary is entitled to receive. The notice must include a copy of the application for the grant, including a complete copy of the will and a list of the estate property and debts (Surrogacy Rules, r 26(2)).

Heirs on intestacy

Where a deceased dies intestate, give notice to the beneficiaries in Form NC 21. This form identifies the nature of the interest of the beneficiary in the estate. A copy of the application for the grant, including a list of the estate property and debts is sent with this notice (Surrogacy Rules, r 26(2)).

Others interested in an estate

Sections 11 and 12 of the EAA require that others who may be interested in an estate also be given notice. These individuals include family members of the deceased, a spouse or AIP of the deceased, and an attorney, trustee, guardian, or Public Trustee in relation to someone interested in the estate. Section 72(b) of the WSA defines “family members” to include a deceased’s spouse, AIP, children, and grandchildren.
(a) Spouse of a deceased person

Sections 11(1)(a) and 11(2) of the EAA provide that if a deceased’s spouse is not the sole beneficiary under a deceased’s will or under Part 3 of the WSA, the applicant for the grant is required to serve on the spouse:

- a copy of the application for a grant,
- a notice pertaining to the rights of a spouse under Part 5 of the WSA in Form NC 23, and
- to any spouse, as defined in the MPA, a notice pertaining to the rights of a spouse under the provisions of the MPA in Form NC 22.

Note that for the purposes of giving notice of rights under the MPA, an individual may have more than one spouse. Section 6 of the MPA provides that a matrimonial property action may be brought within 2 years of the date of a decree of divorce, declaration of nullity, or judgment of judicial separation.

If a spouse is a dependent or represented adult, the required procedures are identical to those applicable when acting without a grant. Note, however, that notice must still be in the form described the Surrogate Rules. Occasionally, a deceased may be survived by both a spouse and an AIP or AIPs, in which case, give notice of rights under the WSA to all spouses and partners or their trustees or attorneys. No notice is required to be given to an AIP with respect to the MPA.

Section 11(3) of the EAA provides that the court may dispense with the notice requirement under subsection 11(2) if it is satisfied that a spouse does not have a right to make a claim under the MPA against the estate of a deceased person. This may be established by providing the court with copies of minutes of settlement or a court order dealing with the division of matrimonial property. If a divorce occurred more than 2 years prior to death, no notices need be served on the divorced spouse. A grant will not issue unless the court is satisfied that the requirements for notice of rights under the MPA are complied with (EAA, s 11(5)).

(b) Adult interdependent partner

Section 11(1)(b) of the EAA provides that if an AIP of a deceased is not the sole beneficiary under the deceased’s will or under Part 3 of the WSA, it is necessary to serve the AIP with a
copy of the grant application and a notice pertaining to the AIP’s rights under Part 5 of the WSA. This notice is in Form NC 23.

If the AIP is a dependent or represented adult, the required procedures are identical to those used when acting without a grant. Note, however, that notice must still be in the form described in s 11(1)(b) and the Surrogate Rules.

Occasionally, a deceased may be survived by both a spouse and an AIP or AIPs, in which case notice is given to all spouses and AIPs or their trustees or attorneys.

(c) Children of the deceased

Sections 11(1)(c)–(h) of the EAA provide that notice of the application for a grant and notice of any rights under Part 5 of the WSA must be served on any children of the deceased (in Form NC 24) or their guardians, trustees, or attorneys.

For more information on the definition of a child of a deceased under the EAA and the WSA, see the content under “Who must be given notice?”.

If an unborn child or child under 18 is interested in an estate, the notice is given to the Public Trustee and the child’s guardian in Form NC 24.1. The required procedures, however, are identical to those used when acting without a grant.

If a child of a deceased has a guardian, a copy of the grant application and a notice outlining the child’s rights under Part 5 of the WSA is served on the guardian (EAA, s 11(1)(h)).

If a child was an adult at the time of a deceased’s death and is unable by reason of physical disability to earn a livelihood, the required procedures are identical to those used when acting without a grant. Note, however, that notice must be in Form NC 24.

Under s 11(4) of the EAA, if there is no attorney or trustee appointed for an adult child who is unable by reason of mental disability to earn a livelihood, the court may, having regard to the value of the estate, the circumstances of the child and the likelihood of success of an application under Part 5 of the WSA, direct that the grant of probate or administration in the deceased’s estate not be issued until a trustee of the child’s estate has been appointed. The court may direct that the applicant or some other person apply to have a trustee of the child’s estate appointed under the AGTA.
(d) Grandchildren and great-grandchildren

If a deceased is survived by a grandchild or great-grandchild who was a minor at the time of the deceased’s death, and the deceased stood in the place of a parent for the grandchild or great-grandchild on the date of the deceased’s death, then notice of the grant application is given to the child in Form NC 24. Notice pertaining to the child’s rights under Part 5 of the WSA is sent to the Public Trustee in Form NC 24.1 (EAA, s 11(1)(g)(i)) or to the guardian (EAA s 11(1)(h)) of the child in Form NC 24.

(e) Missing persons

As discussed earlier, s 1(h) of the Public Trustee Act defines a missing person as a person declared by the court to be missing. Therefore, a person is a missing person for the purposes of s 12(1)(c)(iii) of the EAA only if he or she has been declared missing by a court order.

Section 12(1)(c)(iii) of the EAA provides that if a missing person is interested in an estate, a copy of the notice and a copy of the grant application must be sent to the Public Trustee in Form NC 24.1. It is necessary to make an effort to locate a missing beneficiary before applying for a declaration that the person is missing. For more information on missing persons, see the content under “Who must be given notice?”. All efforts made by an applicant to find a missing person must be set out in Form NC 25.

Note that ss 12(2)–(3) of the EAA require that, except as otherwise ordered by the court, an application must not proceed until the attorney, trustee, or Public Trustee, as applicable, is represented on the application or has expressed the intention of not being represented.

4.2 Court discretion regarding compliance with notice requirements

Section 11(5) of the EAA is clear that a grant must not be issued unless the court is satisfied that all of the notice requirements in s 11 have been complied with. However, s 11(5) also provides discretion to the court regarding compliance with the notice requirements in both the Surrogate Rules and the EAA. The section allows the court to dispense with the requirement to serve a copy of an application or a notice on any person if it is shown to the court’s satisfaction that the person could not be found after reasonable inquiry. This relief will be granted in the same way as would an order dispensing with service. It may be necessary, however, to provide the court with a plan to protect the interests of the person on whom service is being dispensed with.
5 HOW IS NOTICE GIVEN?

5.1 Notice when acting without a grant

Rule 9.1 of the Surrogate Rules lists the information that must be included in the personal representative’s notice when acting without a grant. Under r 9.1, a personal representative may give notice when acting without a grant by completing forms NGA 1–4 and serving the notice on an individual. It is recommended that this be done by registered mail or personal service. A personal representative must be able to prove service has occurred.

5.2 Notice when applying for a grant

Under r 26(2) of the Surrogate Rules, a beneficiary or an heir on intestacy must be served with notice of any application for a grant, along with a copy of the completed application. Service by an applicant of any application for a grant may be done by registered mail or by serving a lawyer who is authorized to accept service on behalf of that person (r 26(3)). Proof of service must be filed with the court in Form NC 27 (r 26(4)). However, proof of service on any party is not necessary where the party acknowledges receipt of the documents. This acknowledgement can be contained in section 4 of the affidavit by the applicant on the application for the grant (Form NC 2) or on the bottom of the notice.

If an applicant does not file proof of service, the court may issue the grant only if it is satisfied with the reason given by the applicant for not filing the proof of service as required (r 26(5)).
### CHAPTER 6

**GRANT APPLICATIONS**

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1 INTRODUCTION

The following reviews the issues and steps involved in putting together a grant application, including what is required for a normal or typical application as well as some additional information to help with less usual situations.

2 PRELIMINARY MATTERS

2.1 Gathering information

Preparing a grant application requires, at a minimum, the following:

- client contact information,
- compliance with the Law Society of Alberta’s client identification and verification rules and, if there is more than one personal representative, multiple representation rules,
- if there is a will, determining if the will is the last will of the deceased and if there are any issues regarding its validity,
- if there is no will, determining who is entitled to apply for a grant of administration,
- confirming who is entitled to a share in an estate under a will and/or Part 3 of the Wills and Succession Act, SA 2010, c W-12.2 [WSA], including names, addresses, and ages,
- deciding if a grant is necessary, and if so, what kind of grant,
- determining what assets are in an estate and what needs to be done to establish their value,
- preparing Forms NC 1 – NC 7 from the Surrogate Rules, Alta Reg 130/95 [Surrogate Rules],
- determining what notices are needed (Surrogate Rules, Forms NC 19 – NC 24.1), and the names, addresses, and ages of the persons on whom the notices need to be served, including, as applicable,
  - an ex-spouse with rights under the Matrimonial Property Act, RSA 2000, c M-8 [MPA],
o persons with a claim under the family maintenance and support provisions of Part 5 of the WSA,
o the Public Trustee (under the repealed Administration of Estates Act, RSA 2000, c A-2, Form NC 24.1 needed to be “sent” to the Public Trustee; it now must be “served” on the Public Trustee (Estate Administration Act, SA 2014, c E-12.5, s 12 [EAA]),

- determining whether any other NC forms are needed, such as Form NC 8 (affidavit of witness to a will), Form NC 9 (affidavit of handwriting of deceased), Forms NC 12–16 (renunciations and reservation), Forms NC 17–18 – (affidavit and consents to dispense with or to waive bond or other security),
- discovering any “unusual circumstances” that will need to be addressed during preparation of the application or administration of an estate, and
- discovering if there is likely to be conflict.

For a sample estate administration information-gathering form, refer to the appendices.

2.2 Reviewing a will

If there is a will, it must be reviewed. First, consider whether the document to be submitted for probate qualifies as a will. According to s 1(1)(k) of the WSA, a will includes:

- a codicil,
- a written document that
  - alters or revokes another will,
  - appoints a personal representative, or
  - on the death of the testator, confers or exercises a power of appointment, and
- any other written document that is a testamentary disposition.

Issues may arise if a will was made outside of Alberta. If it has, investigate whether it has already been the subject of a grant in another jurisdiction. If it has not, determine whether it meets Alberta’s formal requirements and whether it contains unfamiliar language. For more on a will made outside of Alberta, see the content on “Wills made outside Alberta”.

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Where the original will or other testamentary document cannot be found after a diligent search, an application can be made for a grant of probate of a copy, a draft, or a reconstruction of its contents. (For more information about lost or missing wills, see the content under “Lost or missing wills” and the content under “Formal proof of a will” in “Technical and Court Matters.”)

The maker

Consider whether the will uses the maker’s full legal name and whether the maker used any other names. If the maker used another name, determine whether he or she may have assets registered in names other than the name in the will (e.g., “Bill Smith” instead of “William Smith,” “Mary Thompson” instead of “Elizabeth Mary Suzanna Jones”).

Revocation

Determine whether the will revokes prior wills and other testamentary instruments, whether in whole or in part. If the maker executed a separate will for assets in another jurisdiction, one consideration is whether the revocation clauses in the two wills cross-refer or conflict. Documents or circumstances that may constitute a revocation need to be reviewed. Divorce or ceasing to be an adult interdependent partner [AIP] on or after February 1, 2012, may have revoked gifts or appointments of personal representatives. For more information on revocation, see the content on “Alteration, revocation and revival” in “Understanding the Legal Requirements for Wills”.

The personal representative

Consider whether the testator used a name for his or her personal representative that uniquely designates one person. Once the personal representative has been identified, determine whether the first named personal representative is capable of acting and willing to act. If not, determine whether there is a named alternate personal representative who is capable of acting and willing to act. If an alternate has not been named, review s 13(1) of the EAA and determine if there is a person with priority that is capable of acting and willing to act. For more information on priorities for applications for a grant, see the content on “Priorities for grant applications”.

A final consideration is whether the named personal representative or anyone else with priority has renounced. For more information on this, see the content on “Renunciations”.
Disposition

When reviewing the disposition clauses of the will, the following things should be considered:

- Who gets what?
- Are the gifts clearly worded?
- Are specific gifts clearly identified?
- Are any gifts revoked?
- Have any gifts lapsed?
- Are any gifts adeemed?
- Are there conditions on any gifts and are they clearly worded?
- Are any gifts or conditions on gifts void or contrary to law?
- Are there any gifts to beneficiaries who do not reside in Alberta?

For more information about revoked, lapsed, adeemed, and void gifts, see the content on “Failed gifts”.

It should also be determined whether there are sufficient assets in the net estate to pay all the specific and general gifts. If so, consider whether the entire estate is disposed of in the will. If not, part of the residue will pass as intestacy.

Beneficiaries

Review the will to determine whether the beneficiaries are clearly identified. Note whether charitable beneficiaries, if any, are clearly identifiable and in existence. Canada Revenue Agency [CRA] maintains a public, online listing of all registered Canadian charities which can be used to confirm if a Canadian charity is registered and eligible to issue official donation receipts, as well as to locate a charity’s contact information.

Review the will for a requirement that a beneficiary survive the deceased by a number of days. If there are gifts to minors or persons lacking capacity, the Public Trustee or an attorney or trustee will be required to receive notice of the application and the gift.
List of personal property

Note whether a will refers to a list of gifts of personal property. If so, ask for a copy of the list to review and determine if it was made before or after the will was signed and whether it was properly witnessed. If it is in the testator’s handwriting and signed, determine if it is a holograph codicil. (For more information on lists, see the content on “Property Lists”.)

Powers of a personal representative

Look at what powers a will gives its personal representative and whether there are any limits on the powers of the personal representative. If the powers of the personal representative are not spelled out in detail, determine if the plenary power in s 20(1) of the EAA sufficient to administer the estate.

Under s 34 of the WSA, unless the court “finds that a testator had a contrary intention, an executor appointed by [a] will”:

- is a trustee of any property not disposed of by the will, and
- holds that property in trust for the person(s), if any, who would be entitled to receive it under Part 3 of the WSA if the testator had died intestate.

Trusts

Consider if there are any testamentary trusts in a will, such as a spousal trust, trusts for minor children, residence trusts for surviving spouses, represented adult trusts, spendthrift trusts, or charitable trusts. Determine who the trustee is and who the beneficiaries are of each trust. Review the terms of and trustee’s powers for each trust, including the trustee’s encroachment powers and duties. Review when the trusts terminate.

Beneficiary designations

Review whether the will contains any beneficiary designations regarding life insurance or registered plans, as per s 71 of the WSA (e.g., Retirement Savings Plan [RSP], Retirement Income Fund [RIF], Tax-Free Savings Account [TFSA]). If so, immediate steps should be taken to ensure that the issuer does not pay out on the basis of a filed beneficiary designation form that predates the will.
Formalities

Determine whether the will meets the formal requirements of the WSA. Sections 13–20 of the WSA set out the requirements for a will signed in Alberta on or after February 1, 2012. The will:

- must be made by a testator who is 18 years of age or older (WSA, s 13) or, if under 18, meet the criteria under s 13(2) of the WSA (see the topic “Understanding the Legal Requirements for Wills” for a full discussion on the issue of capacity to make a will),
- must be in writing (WSA, s 14(a)),
- must contain a signature of the testator that makes it apparent on the face of the document that the testator intended to give effect to the document as a will (WSA, s 14(b)),
- should be signed at the end of the will (see the content on “Irregular or defective wills” for information on irregularly placed signatures),
- may be signed
  - by the testator, or
  - if not a holograph will, by another person on behalf of the testator, in the presence of the testator, and at the testator’s direction (WSA, s 19(1)),
- if a formal will,
  - must contain a signature made or acknowledged by the testator in the presence of 2 or more witnesses who are both present at the same time (WSA, s 15(a)), and
  - must contain the signatures of two or more of the attesting witnesses who signed the will in the presence of the testator (WSA, s 15(b)),
- if a holograph will, must be a writing that is wholly in the testator’s own handwriting and signed by the testator without the presence or signature of a witness or any other formality (WSA, s 16), and
- if a military will, must meet the requirements of s 17 of the WSA.
Note that not all formal defects are fatal. (For more information about validating documents with formal defects and rectification, see the content on “Irregular or defective wills”.

See the topic “Understanding the Legal Requirements for Wills” for a full discussion of the formal requirements of a will.

**Date**

Determine whether the will is dated before February 1, 2012. The WSA applies to wills made on or after February 1, 2012 (WSA, s 8). If a will is dated before February 1, 2012 and after July 1, 1960, the former *Wills Act*, RSA 2000, c W-12 [*Wills Act*] applies.

**Alterations and erasures**

Note whether there are any marks, notes, deletions, alterations, or erasures on the face of a will. For more information about alterations and erasures, see s 22 of the WSA and the content on “Irregular or defective wills”.

**Survivorship**

If any personal representatives or beneficiaries died at the same time or in circumstances where it is impossible to say who died first, the survivorship rules in Part 1 of the WSA apply. (For more information about survivorship rules, see the content on “Survivorship”.)

**Other issues**

Consider whether there are any other issues raised by the wording of the will, the circumstances of its execution and preservation since being signed, conflict among personal representatives and/or beneficiaries, the nature and location of the assets and beneficiaries, or any other matter relating to the will.

### 2.3 Is a grant necessary?

Following a review of the will, the next step is to determine what property is in the estate and whether a grant is necessary.

In some circumstances, it may be possible to administer an estate without obtaining a grant. For example, a credit union can release accounts up to $20,000 without a grant (*Credit Union Act*, RSA 2000, c C-32, s 116(1); *Credit Union (Principal) Regulation*, Alta Reg 249/1989, s 45). Banks will sometimes waive the requirement of a grant if a personal representative provides a bond of indemnity. If the sole or major asset is shares in a private
corporation, it may be possible to transmit and transfer the shares without probate. The Public Trustee may file an election to administer an estate without probate if the value of the estate is less than the prescribed amount of $75,000 (Public Trustee Act, SA 2000, c P-44.1, s 16(1); Public Trustee General Regulation, Alta Reg 201/2015, s 3(1)). As a matter of policy, the Public Trustee is the personal representative of last resort and will not get involved in the administration of an estate unless there is no one else to take it on.

A personal representative who proceeds without obtaining a grant must provide notice under s 10 of the EAA. (For more information, see the topic, “Notice.”)

The appointment of a personal representative in a will comes into effect when the testator dies and does not require a grant of probate. Subject to the will, the EAA, or any other enactment, a personal representative has authority to (EAA, s 20(1)):

- take possession and control of the deceased’s property,
- do anything in relation to the property that the deceased person could do if he or she were alive and of full capacity, and
- do all things concerning the property that are necessary to give effect to any authority or powers vested in the personal representative.

Although a grant of probate is not, strictly speaking, required to give a personal representative named in a will authority to administer the estate, third parties who pay out or deliver a deceased’s property to a personal representative based on a non-probated will could find themselves having to pay out or deliver the property a second time if a later will with a different personal representative is probated. The probate protects the third party because it provides official confirmation of a personal representative’s authority.

Likewise, a personal representative who proceeds without obtaining a grant may be liable for intermeddling if a later will is found and probated.

There are, therefore, many circumstances where it is necessary to obtain a grant of probate or administration to:

- establish that a document attached to a grant is the deceased person’s last will and testament, and
• confirm the appointment of, or confer authority on, the personal representative named in the grant.

Generally it will be necessary to obtain a grant where:

• a person or institution that controls one or more estate assets requires a grant as a condition of releasing the assets,

• the deceased was registered on title as the owner of an interest in land other than a joint interest,

• the validity or interpretation of the will is at issue,

• the personal representative needs protection against liability (for example, where a family member, other beneficiary, or a creditor may question the personal representative’s administration of the estate or where there is a potential claim for family maintenance and support under the WSA (which requires a grant to start the 6 month limitation period (WSA, s 89)) or for a division of matrimonial property under the MPA), and

• there is no will, the will does not appoint a personal representative, or none of the personal representatives named in the will are alive and willing and able to act.

A person who administers an estate without either an appointment in a will or a grant of administration is a personal representative de son tort (of his or her own wrong) and assumes the same fiduciary responsibilities to creditors and beneficiaries as a duly appointed personal representative.

3 TYPES OF GRANT

3.1 Deciding on the kind of grant required

The most common types of grants are probate, administration with will annexed, and administration. An application for a grant of probate can only be made by a personal representative named in the deceased person’s last will. An application for a grant of administration with will annexed is made where there is a will but none of the named personal representatives are willing or able to apply for a grant. An application for a grant of administration is made if there is no will.
Rule 10(1) of the Surrogate Rules lists several other, more rarely issued, types of grants. In addition, r 10(2) allows the court to issue any grant that is not referred to in r 10(1) that the court considers proper in the circumstances. Grants issue in Forms NC 36–42, although the court may issue a grant in any other form that is appropriate to the nature of the grant (r 10(4)).

The priority to apply for a grant is set out in s 13 of the EAA. For more information about priorities for applications, see the content under “Priorities”.

3.2 Supplemental grant

A supplemental grant (or cessate grant) is issued when an original grant is limited for a specific period of time or until the happening of a certain event. For example, where a minor has been named as personal representative in a will and another person has obtained a time-limited grant to administer the estate during the named personal representative’s minority, the minor would apply for a supplemental grant upon reaching the age of 18. A supplemental grant is distinguished from a grant of administration of unadministered property because it is a re-grant of the whole of the estate of the deceased, and not merely a grant of the portion of the estate remaining unadministered.

3.3 Double probate

A grant of double probate is issued to a named personal representative electing not to be an applicant on the initial application but reserving the right to apply later in Form NC 13 (Surrogate Rules, r 34(1)), and later applying.

A grant of double probate is also issued when the first named personal representative is unable to complete the administration of the estate and the alternate personal representative needs authorization to complete the administration (r 34(3)). (Note that if the person completing the administration is not the named alternate personal representative in the will, the application is for a grant of administration of unadministered property.) The application is made using Forms NC 30 and 31.

3.4 Administration of unadministered property

A grant of administration of unadministered property (sometimes referred to as a grant de bonis non or a grant de bonis non administratis) is issued to a subsequent personal representative when the first personal representative fails to complete the estate
administration. If the applicant is a named alternate personal representative, the application is for a grant of double probate.

3.5 **Administration of unadministered property with will annexed**

If a sole or last surviving personal representative dies testate before completing the administration of an estate, the personal representative named in the deceased personal representative’s will also becomes the personal representative of the estate for which the deceased personal representative was the personal representative. No further grant is required. This is known as the chain of executorship. The chain of executorship does not apply on the death of a personal representative under a grant of administration with will annexed or a grant of administration.

If a sole or last surviving personal representative dies intestate before completing the administration of the estate, the personal representative’s personal representative does not become the personal representative of the estate for which the deceased personal representative was personal representative. A new personal representative must be appointed to complete the administration of the original deceased’s estate. The grant is a grant of administration of unadministered property with will annexed.

On an application for a grant of unadministered property, Form NC 7 should disclose only the property of the deceased in Alberta still remaining unadministered. The undertaking in paragraph 6 of Form NC 2 is modified to say:

> The applicant(s) will faithfully administer the estate of the deceased according to law and will give a true accounting of their administration to the persons entitled to it when lawfully required.

3.6 **Re-sealed probate or administration**

A grant of re-sealed probate/administration is a grant issued in Alberta after another jurisdiction has issued an original grant, and is limited to property in Alberta over which the foreign court does not have jurisdiction (e.g., real property, including minerals, or a credit union account, in Alberta). A grant may be re-sealed in Alberta only if it is a grant of probate or administration, or a document with the same general effect of that as a grant in Alberta, issued by a court in (EAA, s 18(1)(a)):

- a Canadian province or territory,
- the United Kingdom or any British possession, colony, or dependency, or
• a member nation of the British Commonwealth.

Letters of verification issued in Quebec qualify as a probate for the purpose of resealing, even though they are not issued by a court (EAA, s 18(1)(b)).

Foreign grants from other jurisdictions cannot be re-sealed. In those cases, the applicant must apply for an ancillary grant.

3.7 Ancillary grant

An ancillary grant is an application for a grant to deal with property in Alberta of a deceased person who was not resident in Alberta at the time of death and where the original grant was not made in a jurisdiction that entitles the applicant to re-seal the original grant under s 18(1) of the EAA (EAA, s 19).

3.8 Grant of administration limited to specific property

A grant limited to part of a deceased’s property authorizes a personal representative to deal only with some, not all, of the deceased’s property. For example, a testator may make a will that appoints a personal representative to deal with specific real or personal property in Alberta and a different will with a different personal representative to deal with the rest of the deceased’s property.

Form NC 7 only lists the property to which the grant is limited. The grant specifies the property that a personal representative has authority to administer.

3.9 Grant of administration of property not included in another grant

This form of grant is used when two personal representatives are appointed to administer different portions of a deceased’s property, one with limited and the other with general authority. For example, a will might appoint a personal representative to deal with only some of the deceased’s property, such as business assets or literary rights, and another personal representative to deal with the rest of the deceased’s property.

If the two personal representatives apply for a grant at the same time, the court issues a single grant in which the powers of each personal representative are distinguished.

If a limited personal representative applies first, the court issues a grant to the limited personal representative stating the specific part of the estate over which that personal representative has authority. Form NC 7, included in the application by the limited personal
representative, should list only the property of the deceased in Alberta that the limited personal representative is authorized to administer. The general personal representative then applies for a grant for the administration of property not included in the other grant, that is, for the rest of the estate.

If a general personal representative applies for a grant first, the court issues a grant to the general personal representative “save and except” the property in respect of which the limited personal representative is appointed. Form NC 7 in the application by a general personal representative should exclude the property to be administered by the limited personal representative.

In both cases, paragraph 1 of Form NC 2 is modified to show the relationship between the limited and general personal representatives.

3.10 Other grants

Some other, more rare forms of grants listed in r 10(1)(c)–(d) are:

- a grant of administration until a will is found,
- a grant of administration during the minority, absence, or mental incompetence of a personal representative,
- a grant of administration when the validity of a will is in question (pendente litem),
- a grant of administration for the purpose of litigation (ad litem),
- a grant of administration for the preservation of property, and
- a grant of administration limited to a specified matter.

3.11 Bonds

Section 45 of the EAA and rules 28–31 of the Surrogate Rules provide that a bond or other security approved by the court is required if there is no personal representative resident in Alberta. If a bond is required, it must be issued by an insurer licensed under the Insurance Act, RSA 2000, c I-3 to undertake fidelity insurance (Surrogate Rules, r 28(c)). The amount of the bond must be for the gross amount of the deceased’s property in Alberta, less, if the court so orders, any amount distributable to the personal representative as a beneficiary.
A non-resident personal representative can use Form NC 17 to ask the court to dispense with the bond, approve security other than a bond, or reduce to amount of the bond or other security. This application is usually accompanied by consents of the beneficiaries in Form NC 18. Form NC 11 (Affidavit of Execution) must be attached to any Form NC 18, sworn before a notary if sworn outside Alberta.

See the topic, “The Personal Representative” for a full discussion of bonding requirements.

4 THE APPLICATION

When preparing an application for a grant, consult the forms in the Surrogate Rules for all purposes of interpreting and applying the law. The following notes are intended to offer suggestions and only address elements of the forms where the content is not self-evident.

4.1 NC 1 – Application

If possible, try to get Form NC 1 onto one page. If it’s not possible, make sure that the Order and Justice’s signature are not the only items appearing on the second page.

**Court file number**

This space should be left blank. The clerk will assign a file number when the application is submitted.

**Judicial centre**

An application for a grant is filed at the judicial district closest by road to the location where the deceased resided on the date of death, unless the court permits otherwise (Surrogate Rules, r 6(1)). If a deceased resided outside of Alberta immediately prior to death, an application for a grant may be filed at the judicial centre that is closest by road to a location in Alberta where the deceased had property on the date of death (r 6(2)). A financial institution account is located in any judicial district in which the financial institution has a branch.

**Estate name**

If there is a will, use the name in the will. On intestacy, use the deceased’s legal name. If the deceased used other names and it is necessary to include other names on the grant (for example, if land is registered in a name other than the name in the will), state “(also known as [other name])”.
Procedure

Form NC 1 can be used for applications for any type of grant. It should be called “Application by the personal representative(s) for a grant of [type of grant]”.

Bond

If there is at least one personal representative who is resident in Alberta, state “Not required” on the form. If there are no personal representatives resident in Alberta, state:

- “Required – Bond attached (or to be filed)
- “Required – Affidavit to dispense and consent(s) attached”
- “Required – Affidavit to approve other security and consent(s) attached”, or
- “Required – Affidavit to reduce amount of bond or other security and consent(s) attached”,

as the case requires.

Notices required

List only the notices that are required. These may include:

- NC 19 – Notice to beneficiaries (residuary),
- NC 20 – Notice to beneficiaries (non-residuary),
- NC 20.1 – Notice of void gift,
- NC 21 – Notice to beneficiaries (intestacy),
- NC 22 – Notice to spouse of deceased under the MPA,
- NC 23 – Notice to spouse/adult interdependent partner of deceased - Family Maintenance and Support,
- NC 24 – Notice to dependent child or minor grandchild or great-grandchild of the deceased - Family Maintenance and Support, and
- NC 24.1 – Notice to Public Trustee.
Copy of the application filed with the Public Trustee’s office

State “yes” or “no” as required. See the topic “Notice” for a full discussion of when notice must be served on the Public Trustee.

Personal representative(s) name(s)

If the name used in a will is not the personal representative’s legal name, state the legal name followed by “named in the will as [name]”. Use paragraph 7 of Form NC 2 to explain the circumstances and to confirm that the applicant is one and the same person as the personal representative named in the will.

Address for service on the personal representative

Use the law firm’s address.

Address of the personal representative(s)

The personal representative’s actual address is required (not “c/o” the law firm).

Lawyers for personal representative(s)

It is acceptable to put the number of certified copies of the grant required at the bottom of Form NC 1. This information can also be put in a cover letter.

Footer

It is good practice to include a footer on all pages of NC documents that includes the name of the estate, the name of the law firm, and the responsible lawyer.

4.2 NC 2 – Affidavit

Form NC 2 provides the factual foundation for the issuance of a grant. It is almost invariably sworn by the personal representative, although the form is worded in such a way that it could be sworn by a third party with the knowledge or information and belief necessary to swear its truth.

A deponent of Form NC 2 swears the truth of the attached schedules as well as the affidavit itself.

Paragraph 1 – Applicant

The deponent must provide evidence of an applicant’s right to apply. The order of priority and the rules for settling conflicts are set out in the EAA under s 13.
An applicant who is not the first person with priority to apply for a grant must address any persons with higher priority (r 32(2)).

The following are examples of how to deal with paragraph 1:

- The applicant is entitled to apply for a grant because the applicant is the personal representative named in the deceased’s last will.
- The applicant is entitled to apply for a grant under s 13(1)(b) of the EAA because the deceased died intestate, and the applicant is the deceased’s surviving spouse/surviving AIP (or other person with lower priority, after addressing all persons with higher priority).
- The applicant is entitled to apply for a grant because the applicant is one of two personal representatives named in the deceased’s last will. The other personal representative, [name], died (or renounced, or reserved, or lacks capacity, or is unwilling to apply for a grant) on [date].
- The applicant is entitled to apply for a grant because the applicant is the alternate personal representative named in the deceased’s last will. The first named personal representative(s), [name], died (or renounced, or reserved, or lacks capacity, or is unwilling to apply for a grant) on [date].
- The applicant is entitled to apply for a grant because the personal representative named in the deceased’s last will, [name], died (or renounced, or reserved, or lacks capacity, or is unwilling to apply for a grant) on [date] and the applicant is [fill in status from EAA, s 13(1) after addressing all persons with higher priority].

If you have jumped over an applicant with equal or higher priority because of a renunciation or reservation, mention the renunciation or reservation in paragraph 3 and include it with the application.

There may be conditions attached to the appointment of a personal representative or alternate personal representative, such as the personal representative must survive the deceased by a certain number of days, or a condition on the appointment of an alternate personal representative should the first-named personal representative be unwilling or unable to act. Such conditions must be addressed in paragraph 1.
If a person with equal or higher priority is cleared off because of lack of capacity or unwillingness to apply for a grant, use the “special or unusual circumstances” section (paragraph 7) of Form NC 2 to provide further information. (For more information about unusual personal representative appointment clauses and the Public Trustee as an applicant, see the content on “Personal representative appointments”.)

**Paragraph 2 – Schedules attached**

On intestacy, NC 4 (Schedule 2) is not needed. Delete or cross out this line. A separate NC 4 (Schedule 2) is needed for the will, for each codicil, and for each other testamentary document, such as a list of household goods referenced in the will and in existence when the will was made. (For more information about lists, see the content on “Property lists”.)

**Paragraph 3 – Documents attached**

List the documents that are part of the application and that are not listed in paragraph 2. On a typical application, this list may include:

- If there is a will,
  - the will,
  - any codicils, and
  - Form NC 8 (Affidavit of witness to a will) or Form NC 9 (Affidavit of handwriting of deceased) for the will, each codicil, and each other testamentary document.

- On any application:
  - Renunciations (NC 12, NC 14, NC 15), reservations of right to apply for probate (NC 13), and nominations (NC 16),
  - Affidavits (NC 17) and consents (NC 18) to dispense with a bond, approve other security, or reduce the amount of the bond or other security, and
  - Other surrogate forms, orders, agreements, submissions to the court, and any other documents as the case requires (Surrogate Rules, r 13(6)).

The deponent must also swear in paragraph 3 that:
I have personally prepared or carefully read the schedules and documents
that are part of this affidavit and to the best of my knowledge the information
in them is accurate and complete.

Paragraph 4 – Notices

The notices listed in this paragraph are the same as the notices listed on Form NC 1. There is
no need to refer to a notice to creditors (NC 34.1) in this paragraph because it is not a notice
that needs to be served.

The prescribed Form NC 2 says, “The applicant(s) have served the following notices as
required and in the manner prescribed by the Surrogate Rules.” There’s a technical problem
with the wording of this paragraph because an applicant usually reviews the application and
swears the affidavit before the notices have been served. It is acceptable to modify this
paragraph to read:

The applicant(s) will serve the following notices as required and in the
manner prescribed by the Surrogate Rules.

This is especially so since Form NC 27 (Affidavit of Service), filed with the application, proves
that the notices were in fact served.

Paragraph 5 – Undertaking regarding Form NC 6.1

This paragraph is needed if there are trusts in the will. If there are no trusts, the paragraph
can be crossed out or it can be deleted and the remaining paragraphs renumbered.

The purpose of Form NC 6.1 is to ensure that, before the trust assets are distributed, the
trustees have acknowledged that they have been given notice of their fiduciary duties and
have undertaken to administer the trust according to law and to give an accounting of the
administration. This is similar to the undertaking that the personal representative gives with
respect to the estate. The applicant does not have to file Form NC 6.1 with the application,
but must not distribute property to a trustee of a trust until an NC 6.1 signed by the trustee
has been filed. It will often be more convenient to get Form NC 6.1 signed and filed early so it
doesn’t get missed when the estate is distributed.

Paragraph 6 – Undertaking

The applicant undertakes to faithfully administer the estate of the deceased according to law
and to give a true accounting of their administration to the persons entitled to it when
lawfully required.
Remember to renumber this paragraph if the Form NC 6.1 paragraph is deleted.

**Paragraph 7 – Special or unusual circumstances**

Use this paragraph to identify and explain any “special or unusual circumstances” that should be brought to the court’s attention. Try to anticipate issues that the clerk or the judge may be concerned about and provide additional information to enable the court to understand the specific circumstances of your application.

Remember to renumber this paragraph if the Form NC 6.1 paragraph is deleted.

**Marking the will for identification**

The applicant and the commissioner or notary public must “mark” (i.e., sign) the will to identify it as the document referred to in Form NC 2. The wording prescribed in *Surrogate Rules*, r 16(8)(a) is:

This is the will referred to in Schedule 2 and is exhibit A to the affidavit of 
__________________________, a witness to this will.

__________________________
(Applicant’s Signature)

__________________________
(A Commissioner for Oaths)

__________________________
(Justice of the Court of Queen’s Bench of Alberta)

The marking may be made either on the front (below the signatures) or the back of the last page of the will, as long as it does not obliterate or damage the original will (*Surrogate Rules*, r 16(2)). The standard practice is to put the marking on the back of the signature page of the will, unless, as is sometimes the case with holograph and home-made wills, there is no alternative but to put the marking on the same page as the signatures.

4.3 **NC 3 – Schedule 1: Deceased**

*Name*

If there is a will, state the name of the deceased as in the will. On intestacy, state the legal name of the deceased.
Any other name(s) by which known

State any other names needed to deal with property of the deceased. This field is also used to correct a misspelling of the deceased’s name in the will.

Testate/intestate

If the deceased died intestate, ensure the following statement is included:

After a thorough search of all likely places, no testamentary paper of the deceased has been found.

A testamentary paper would include any writing that constitutes a holographic disposition of property.

Spouse

If there is no spouse, check the box or state “No” or “None” and cross out or delete the other lines in this part of the form.

On intestacy, s 63(1) of the WSA deems a surviving spouse of an intestate to have predeceased the intestate if the intestate and the surviving spouse:

(a) had been living separate and apart for more than 2 years at the time of the intestate’s death,

(b) are parties to a declaration of irreconcilability under the Family Law Act, [SA 2003, c F-4.5] or

(c) are parties to an agreement or order in respect of their property or other marital or family issues which appears to have been intended by one or both of them to separate and finalize their affairs in recognition of their marital break-up.

Any information relevant to a determination of whether the claim of a surviving spouse is subject to s 63(1) of the WSA should be stated in Form NC 4, and any supporting agreements or orders should be noted in paragraph 3 of Form NC 2 and submitted with the application.

Adult interdependent partner

If there is no AIP, check the box or state “No” or “None” and cross out or delete the other lines in this part of the form. Note that an AIP does not terminate when parties separate.
If your client questions whether the deceased’s relationship was ever, or continued to be, an AIP at the time of the deceased’s death, provide the information about the relationship as the applicant understands it. State that the applicant takes the position that the relationship was not an AIP, or that it had terminated, and that the information is provided not as evidence that there was an AIP but out of an abundance of caution so the court will have full knowledge of the circumstances.

Former spouse(s)

If there is no former spouse, check the box or state “No” or “None” and cross out or delete the other lines in this part of the form. If there is a former spouse, and the exact date of death or divorce is unavailable, state the date as precisely as you can determine and explain the circumstances.

Information about former spouses is needed to determine if the former spouse continues to have rights under the MPA, which gives an ex-spouse 2 years after a divorce to apply for a division of matrimonial property. If a deceased dies within the 2 years, his or her former spouse is entitled to notice of the grant application (see Form NC 22 (Notice to spouse of deceased under the MPA)). A former spouse does not have any rights under Part 5 of the WSA (see the definition of “family member” in the WSA, s 72(b)), but may have residual rights to apply for support or a variation of support under the Divorce Act, RSC 1985, c 3.

Children

If the deceased had no children, check the box or state “No” or “None” and cross out or delete the other lines in this part of the form. Otherwise, list all children of the deceased, including deceased children and adopted children, but not step-children who have not been adopted. Include both the age and date of birth for each child.

If the deceased has an adult child who is unable to earn a livelihood by reason of a mental (not a physical) disability, then:

- if the child has an attorney under an enduring power of attorney [EPA] or is a represented adult with a trustee, provide the name of the attorney or trustee and a copy of the EPA or order appointing the trustee, or
- state that the child has no attorney and is not a represented adult with a trustee.

In this case, it may be necessary to make an application for the appointment of a limited trustee under the Adult Guardianship and Trusteeship Act, SA 2008, c A-
4.2 [AGTA] or the Public Trustee to represent the adult with respect to the family maintenance and support provisions in Part 5 of the WSA.

If there is a surviving spouse or AIP and children, state either that:

- all the of the deceased’s children are also children of the deceased’s surviving spouse or AIP, or
- some (or all) of the deceased’s children are not children of the deceased’s surviving spouse or AIP.

This information is relevant for intestacies because under s 61(1)(a) of the WSA, if all the descendants of an intestate are also descendants of the surviving spouse or AIP, the entire estate goes to the surviving spouse or AIP. However, if any of an intestate’s descendants are not descendants of his or her spouse or AIP, the surviving spouse or AIP receives the greater of 50% of the estate or $150,000 (the prescribed amount; see Preferential Share (Intestate Estates) Regulation, Alta Reg 217/2011), and the residue of the estate is distributed among the intestate’s descendants in accordance with Part 3 of the WSA (WSA, s 61(1)(b)).

**Grandchildren and great grandchildren to whom the deceased stood in the place of a parent (in loco parentis)**

This part of the form provides information about grandchildren or great-grandchildren of the deceased:

- who were under 18 years of age at the time of the deceased’s death,
- in respect of whom the deceased, during life, demonstrated a settled intention to treat as his or her own child,
- whose primary home, since birth or for at least 2 years immediately prior to the grandparent’s death, was with the grandparent, and
- whose primary financial support, since birth or for at least 2 years immediately prior to the grandparent’s death, was provided by the grandparent.

If there are no grandchildren or great-grandchildren who meet the above criteria, state “No” or “None” and cross out or delete the other lines in this part of the form.
Additional family information

Although not provided for on Form NC 3, when submitting an application for the administration of an intestacy where there is no spouse, AIP, or lineal descendants, it is acceptable to use this form to provide information about any surviving or deceased parents, siblings, and other relatives as necessary to ensure proper priority to apply for a grant of administration and to substantiate the distribution in Form NC 6.

4.4 NC 4 – Schedule 2: Will

Form NC 4 must be provided for the will, each codicil, and each other testamentary document.

Date of will

State the date as written in the will, even if it is incomplete. Indicate any further information available about the date on which the will was signed (such as from Form NC 8).

If a will was made before February 1, 2012, and the deceased married or entered an AIP after making the will but before February 1, 2012, under the then-existing Wills Act (since repealed), the will is void. The WSA does not revive such void wills.

Witnesses

If Form NC 9 (Affidavit of handwriting of deceased) is submitted in lieu of Form NC 8 (Affidavit of witness to a will), explain why. (For example, “witnesses’ signatures unreadable,” “witnesses cannot be located,” “witnesses deceased,” etc.)

Erasures, changes, or other additions to the will

Any markings, items or gifts crossed out or amended, tears, insertions, notes, etc. must be identified and explained to the best of the applicant’s knowledge and belief. The applicant states here (or uses paragraph 7 (special or unusual circumstances) of Form NC 2) the position he or she takes on whether the markings have testamentary effect. (For more information about alterations, see the content on “Irregular or defective wills”.)

List clause

If the will refers to a list that the testator may have intended to make to deal with personal effects:

- state that no list was found after a thorough search of all likely places, or
• state that a list was found, include it with the application, and state the position
the applicant takes on whether the list has testamentary effect.

(For more information about lists, see the content on “Property lists”.)

4.5 NC 5 – Schedule 3: Personal representative(s)

Name

State the name of the personal representative(s) as shown in the will. Clarify if a personal
representative is known by another name, has changed his or her name, or if there is a
misspelling/error in the will.

Status

This refers to the applicant’s status to apply (e.g., named in the will) and should parallel the
information in paragraph 1 of Form NC 2. It is not his or her marital status or relationship to
the deceased.

Any persons with prior or equal right to apply

Provide the names, addresses, and relationship to the deceased of all persons with a prior or
equal right to apply, and state whether they are co-applicants, have renounced, have
reserved, or are unwilling or unable to act. This information should parallel the information in
the “Status” field on the form.

If a person with equal or prior right to apply is unwilling or unable to act but will not or cannot
renounce, provide the particulars here or in the “special or unusual circumstances” section
(paragraph 7) of Form NC 2.

Indicate “N/A” if there aren’t any persons with a prior or equal right to apply (e.g., the
applicant is the sole personal representative named in the will).

Renunciations

Provide the names of all renunciators. Renunciations are required from those who have
priority or equal right to apply but are not applying. It is also acceptable to use this field to
provide the names of nominators and attorneys, and to modify the form to say “Nomination
attached” or “Power of Attorney attached.”

If there are no renunciations, indicate “N/A” as this section is not applicable.
4.6 NC 6 – Schedule 4: Beneficiaries

If a distribution is complex, it is helpful for the court to have a summary of the distribution at the beginning of Form NC 6.

Form NC 6 should also disclose any interpretation problems or disputes about the disposition of the property and state briefly the possible effect of the problem or dispute on the distribution of the estate.

**Name**

State the name of the beneficiary as shown in the will. Clarify if the beneficiary is known by another name, has changed his or her name, or if there is a misspelling/error in the will.

If a beneficiary specifically named in a will has predeceased the testator, Form NC 6 must note this and state the consequent disposition of the beneficiary’s interest. (For more information on lapsed gifts, see the content on “Lapsed gifts”.)

Likewise, state if a beneficiary is unknown or missing and include Form NC 25. (For more information on missing beneficiaries, see the content on “Missing beneficiaries”.)

**Relationship**

The relationship field is used to clarify the identity of the beneficiary in cases where there is more than one potential beneficiary with the same name. It is also used to identify the members of a class (e.g., “my children alive at my death”).

Under s 28 of the WSA, unless the court, in interpreting a will, finds that a testator intended otherwise, references in the will to children, descendants, and issue must be interpreted as including:

- any child for whom the testator is a parent within the meaning of Part 1 of the Family Law Act, SA 2003, c F-4.5, and
- any child who is in the womb at the time of the testator’s death and is later born alive.

**Age**

The age field is used to identify beneficiaries who are minors, triggering the need to serve Form NC 24.1 on the Public Trustee, and beneficiaries whose gifts are held in trust until they
reach an age specified in the will. Either provide the age on the date of the deceased’s death or the current age and date of birth.

**Nature of gift**

Property specifically gifted in a will must be described as it is in the will.

Gifts of residue can be described as percentages, fractions or shares of residue, or in any other way that tracks the wording of the will.

Particulars should be provided regarding gifts that are subject to conditions or trusts. For example, where a will establishes a spousal trust of the residue, with a pour-over to children of the deceased, the spouse’s gift would be described as:

Residue, in trust for the lifetime of the beneficiary

and the pour-over gift would be described as:

[ ] % of the residue, subject to a trust for the lifetime of [name of spousal]

Indicate in this section of the form if it is not possible to determine the beneficiaries of a pour-over gift when the application is filed (e.g., “remainder to my children alive at the death of my spouse”).

**Paragraph number of will**

Where the testator had a will, indicate the paragraph number in the will that gives the beneficiary’s gift. If the paragraphs are not numbered, just count them.

**Section number (intestacy)**

In the case of intestacy, indicate whether the application is being made under the Intestate Succession Act, RSA 2000, c I-10 (death before February 1, 2012) or the WSA (death on or after February 1, 2012). Provide the section number that entitles the beneficiary to a share of the estate.

**Void and revoked gifts**

Void and revoked gifts must be disclosed with the reasons why the gift is void or revoked. Otherwise, check the “No” boxes for void and revoked gifts. (For more information about void or revoked gifts, see the content on “Failed gifts”.)
Other issues

- Adeemed gifts: Property mentioned in a will that was disposed of prior to the death of the testator must be mentioned in Form NC 6, with a statement that the gift adeemed.

- Disclaimed gifts: Note any disclaimed gifts and indicate the devolution of that gift.

- Loans owed by beneficiaries: If a will directs that a loan or other amount owed to a deceased by a beneficiary (or anyone else, for that matter) is to be forgiven, or words to that effect, the loan is not included in Form NC 7 (Inventory) and is not mentioned in Form NC 6. However, where a will directs a hotchpot distribution of a loan or other receivable owed by a beneficiary, the amount of the loan or other receivable is included on Form NC 7 and is shown as a gift to the beneficiary on Form NC 6.

- Partial intestacy: Unless the court, in interpreting a will, finds that the testator had a contrary intention, a personal representative appointed by the will is a trustee of any property not disposed of by the will, and holds that property in trust for the person or persons, if any, who would be entitled to receive it if the testator had died intestate.

4.7 NC 7 – Schedule 5: Inventory of property and debts

Form NC 7 is a public document and is available to non-residuary beneficiaries and creditors.

Form NC 7 is also available to the CRA. Since the applicant swears to the truth of the values in Form NC 7, care must be taken that the date-of-death values of capital property set out in Form NC 7 are values the personal representative is ready to use in the deceased’s terminal tax return. If the personal representative needs or wishes to apply for a grant before the tax values of the deceased’s capital property have been established, it is acceptable to state the value as “to be determined” and to provide an undertaking on Form NC 2 or Form NC 7 to provide a supplementary affidavit with an amended Form NC 7 when the value has been established. The supplementary affidavit may result in additional surrogate fees if it increases the gross value of an estate into a higher fee bracket.

Form NC 7 should not include property that passes to a beneficiary outside the will by operation of law, such as property that passes to a surviving joint tenant or to the designated
beneficiary of a policy of insurance or registered plan. However, proceeds of insurance and registered plans that have the estate as the beneficiary must be included.

The market value of the estate’s property as of the date of death must be indicated on Form NC 7. If property (such as personal effects) has no commercial value, that must be stated.

Form NC 7 also forms the foundation for the personal representative’s duties to communicate with the beneficiaries and to account.

Form NC 7 requires the personal representative to list property in Alberta, which includes all immovables in Alberta, but does not include immovables outside Alberta. Therefore, this does not necessarily include all movables that an Alberta grant may be effective to liquidate. For example, you should not include an account at a financial institution that does not have a branch in Alberta, even if the financial institution will pay out the account on presentation of an Alberta grant.

At a minimum, the inventory includes:

- land (including minerals) and buildings in Alberta,
- chattels, cash, uncashed cheques, stocks, bonds, etc. legally located in Alberta,
- financial institution accounts where the institution has a branch in Alberta (names and address of an Alberta branch required),
- accounts receivable collectable in Alberta,
- Canada Pension Plan death benefit, and
- insurance and registered funds payable to the estate.

**Land and buildings in Alberta**

The following information is required on Form NC 7:

- Location of property: Provide municipal address or, if none, closest village, town, or city,
- Description: Provide the legal land description, not a description of the land,
Gross value: Provide the market value of the property as of the date of death. Non-producing minerals can be shown as having “NIL” value unless there is activity in the area that gives the minerals a market value, and

Encumbrances: Detail is not required.

Other property

Counsel has a great deal of flexibility in listing other property in Form NC 7. The prescribed form does not require detail, but the practice is to provide sufficient detail to give the court and the beneficiaries a clear picture of the assets and debts of the estate, as of the date of the deceased’s death. If the personal effects of the deceased are of minimal value, they can be shown as having “no commercial value.”

Debts

All debts should be listed. Some practitioners include the cost of the funeral here, but technically the cost of the funeral, although it is a debt of the estate, is not a debt of the deceased as of the date of death.

4.8 Notices

A personal representative is required to serve notices under Part 2 of the EAA and r 26 of the Surrogate Rules. A grant will not be issued unless a court is satisfied that the requirements regarding service of notice have been complied with. However, the court may dispense with the requirement to serve a copy of the application or notice on any person if it is satisfied that the person could not be found after reasonable inquiry (EAA, s 11(5)).

FORM NC 19 – Notice to beneficiaries (residuary)

Include with Form NC 19 a copy of the application for a grant of probate or grant of administration with will annexed (as well as a copy of the will and list of the deceased’s property and debts).

FORM NC 20 – Notice to beneficiaries (non-residuary)

Unlike Form NC 19, Form NC 20 does not include a copy of the application and supporting documents.
FORM NC 20.1 – Notice of void gift

Form NC 20.1 must be served on a beneficiary who is also a witness to the will, a person who signed on behalf of the testator, a person who provided translation services in relation to the making of the will, or a spouse or AIP of any of the foregoing, unless the gift is saved by WSA, s 21(2).

FORM NC 21 – Notice to beneficiaries (intestacy)

The description of the gifts in Forms NC 19, 20, 20.1, and 21 should parallel the wording of Form NC 6.

Where a beneficiary receives a residuary gift, non-residuary gift, or an interest on intestacy, or any combination thereof, it is acceptable to combine the notices to that person into a hybrid form (e.g., Form NC 19/21; NC 20/21; NC 19/20/21).

FORM NC 22 – Notice to spouse of deceased (MPA)

Form NC 22 must be served on a spouse of the deceased (but not an AIP), as defined in the MPA, who is not the sole beneficiary under the will or on intestacy (EAA, s 11(2)). Under the MPA, s 1(e), “spouse” includes a former spouse and a party to a marriage notwithstanding that it is a void or voidable marriage. The court may dispense with service of Form NC 22 if satisfied that the spouse does not have any right to make a claim under the MPA by reason, for example, of the expiration of a limitation period or of the minutes of settlement in which the spouse waives all further claims under the MPA. Use the special or unusual circumstances section (paragraph 7) of Form NC 2 to ask the court to dispense with service of Form NC 22.

FORM NC 23 – Notice to spouse/adult interdependent partner of deceased (Family Maintenance and Support)

Form NC 23 must be served where a spouse or AIP is not the sole beneficiary under the will or on intestacy.

Even where there is a small gift to a church, charity, or other beneficiary, with the vast bulk of an estate going to a surviving spouse or AIP, who is also the personal representative, the personal representative must still serve Form NC 23 on himself or herself.
FORM NC 24 – Notice to dependent child or minor grandchild or great-grandchild of the deceased (Family Maintenance and Support)

Form NC 24 must be served on the following persons who, on the date of the deceased’s death, were:

- an adult child of the deceased who was unable by reason of a physical (not a mental) disability to earn a livelihood,
- a child of the deceased who was between the ages of 18 and 22 and unable to withdraw from his or her parents’ charge because of full-time school attendance,
- the attorney of a child or trustee of a represented adult child of the deceased who was unable to earn a livelihood by reason of a mental disability,
- the guardian of a minor child, and
- the guardian of a minor grandchild or great-grandchild in respect of whom the deceased stood in the place of a parent.

Where Form NC 24 is served on an attorney or a trustee of a represented adult, the application cannot proceed unless the attorney or trustee is represented or has expressed the intention of not being represented (EAA, s 12(2)). The court can waive this requirement, though this does not apply to the guardian of a minor (presumably because the Public Trustee is also served where there is a minor interested in the estate).

FORM NC 24.1 – Notice to the Public Trustee

Under ss 11 and 12 of the EAA, a personal representative must serve a notice on the Public Trustee in Form 24.1 if:

- the Public Trustee is trustee for the estate of a represented adult, who may have a family maintenance and support claim under the family maintenance and support provisions of the WSA by reason of a mental disability, or is otherwise interested in the estate,
- the deceased is survived by a child who was a minor on the date of the deceased’s death (even if the child has subsequently become an adult, and irrespective of whether the child is a beneficiary),
- the deceased is survived by a grandchild or great-grandchild for whom the deceased stood in the place of a parent on the date of the deceased’s death, or
• a person has been declared a missing person by an order of the court under the Public Trustee Act, SA 2000, c P-44.1 [Public Trustee Act] (the Public Trustee will not represent a missing person without such an order).

The application cannot proceed unless the Public Trustee is represented or has expressed the intention of not being represented (EAA, s 12(3)). The Public Trustee expresses its intentions by filling in the bottom part of Form NC 24.1 and filing it. This requirement can be waived by the court, however.

Use the special and unusual circumstances section (paragraph 7) of Form NC 2 to explain service of Form NC 24.1, as required.

All notices, except Form NC 20, include a completed copy of the application.

Under the Administration of Estates Act, RSA 2000, c A-2, since repealed, the NC 24.1 needed to be “sent” to the Public Trustee. The EAA now requires it to be “served” (s 12).

Service may be personal, by recorded mail, or by serving a lawyer who is authorized to accept service on behalf of a person (Surrogate Rules, r 26(3)). Proof of service must be filed in Form NC 27. Include copies of the notices as exhibits. It is not necessary to include copies of the application as served with the notices.

Service is valid despite a later amendment that is made at the direction of the court; however, a later voluntary amendment should be re-served on all persons entitled to a notice, other than those entitled to Form NC 20 (where the amendment does not affect their gift).

4.9 Service of NC 24 on a person with mental disability and no attorney or trustee

If a deceased is survived by a child

• who was an adult on the date of the deceased’s death,
• who is unable to earn a livelihood by reason of a mental disability,
• who has no attorney, and
• for whom a trustee has not been appointed,
the court may, having regard to the value of the estate, the circumstances of the child, and the likelihood of success of an application made on the child’s behalf under the family maintenance and support provisions of the WSA,

- direct that a grant be issued subject to any conditions the court considers appropriate, or
- direct that a grant not be issued in respect of the deceased person’s estate until a trustee has been appointed for the child, and that the applicant or some other person must apply to have a trustee appointed for the child under the AGTA.

If it is not in the best interests of an adult to have a plenary trustee appointed under the AGTA, or where there is no one willing to take on the role, an application can be made under the AGTA for the appointment of a trustee with the limited authority to receive Form NC 24 and to make decisions on behalf of the adult regarding the adult’s rights under the family maintenance and support provisions of the WSA. A limited trustee is authorized to seek independent legal advice before making any decisions. The appointment terminates when the limited trustee advises the court that he or she has dealt with the matter.

It takes time to get a (limited) trustee appointed. If it is not desirable to delay the application for a grant until that happens, the applicant can use the special and unusual circumstances section (paragraph 7) of Form NC 2 to ask the court to issue the grant subject to an undertaking by the applicant to refrain from distributing the estate until the earlier of:

- 6 months after service of Form NC 24 on a (limited) trustee,
- consent of the (limited) trustee to distribution of the estate, or
- an order of the court authorizing distribution.

4.10 Submitting an application

Absent emergency circumstances, an application should not be submitted until the expiry of any commorièntes clause that makes the appointment of personal representative or the gifts conditional (typically 10 or 30 days).

When sending the application to the surrogate clerk in the appropriate judicial centre, indicate the number of copies of the grant required (Form NC 1) on the cover page or in a
covering letter. If there is real estate, a certified grant for the Land Titles Office is required. For most other circumstances, a notarial copy suffices.

On receipt of an application, the surrogate clerk’s office searches the court records to determine if:

- any other application has been filed,
- a grant has issued regarding the estate,
- a caveat has been filed and is still in effect, or
- a will was deposited with the clerk under archaic laws in effect until 1995.

The clerk will also review an application against a surrogate checklist, a copy of which is included in the appendices. A forms checklist is also included in the appendices. These checklists can be used to ensure that an application is complete.

The clerk comments on the application in Form NC 26, and then forwards it to a justice for review and signature. The justice considers the application and, if satisfied, signs the bottom of Form NC 1 and the back of the will, and returns the application to the clerk. The clerk notifies the applicant’s lawyer of the issuance of the grant and the amount of the fees. When the fees are paid, the grant is released. A grant of administration consists of one sheet of paper issued by the clerk. A grant of probate or administration with will annexed consists of a sheet of paper plus a copy of the will. The original grant and one certified copy are included in the surrogate fee; additional certified copies can be obtained for additional fees.

The surrogate fees for issuing grants of probate or administration or re-sealing grants are as follows (from Schedule 2 of the Surrogate Rules):

<table>
<thead>
<tr>
<th>Net Value of Estate per NC 7</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>$10,000 or under</td>
<td>$35.00</td>
</tr>
<tr>
<td>Over $10,000 and up to $25,000</td>
<td>$135.00</td>
</tr>
<tr>
<td>Over $25,000.00 and up to $125,000</td>
<td>$275.00</td>
</tr>
<tr>
<td>Over $125,000 and up to $250,000</td>
<td>$400.00</td>
</tr>
<tr>
<td>Over $250,000.00</td>
<td>$525.00</td>
</tr>
</tbody>
</table>
For other Services

<table>
<thead>
<tr>
<th>Service</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excluding items referred to above (issuing or resealing grants), for documents that require the opening of a court file respecting an estate and all subsequent filings or acts, there is a single fee</td>
<td>$250.00</td>
</tr>
<tr>
<td>Filing an application during an estate or trusteeship action or proceeding</td>
<td>$50.00</td>
</tr>
<tr>
<td>Additional certified copy of grant</td>
<td>$10.00</td>
</tr>
<tr>
<td>Search</td>
<td>$10.00</td>
</tr>
</tbody>
</table>

Sometimes applications are returned to counsel for further consideration. This is known as a “bounce.” Applications may be bounced in two common scenarios.

The first occurs if the clerk believes that the application raises issues that will likely result in the application being rejected by the justice. The clerk does not adjudicate on applications, but performs a kind of “gate-keeper” function by diverting applications with obvious flaws before they get to the justice. A bounce by the clerk should be treated as a “heads-up” for counsel that changes or further material may be needed to assist the justice to deal with the application. Counsel should consider the clerk’s comments seriously and, if they have merit, make changes or provide additional material. If counsel concludes that the application should be forwarded to a justice as submitted, the application can be returned to the clerk with a request that the application be forwarded to a justice without changes, together with a letter addressed to the justice containing counsel’s submissions regarding why the grant should be issued notwithstanding the comments of the clerk.

The second type of bounce occurs if a justice rejects the application. That justice’s notes usually indicate what is needed to correct the application.

5 WILLS MADE OUTSIDE ALBERTA

Under the EAA, s 2, Alberta courts have jurisdiction over the estate of a deceased person if:

- on the date of death, the deceased person was an Alberta resident,
- on the date of death, the deceased person owned property in Alberta, or
- the court, on application, is satisfied that a grant is necessary.
The manner and formalities of making a will and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the law of the place where the land is situated (WSA, s 41(2)). An interest in land includes a leasehold estate, as well as a freehold estate, and any other estate or interest in land, whether the estate or interest is real property or personal property (WSA, s 41(1)(a)).

The manner and formalities of making a will and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of his or her death (WSA, s 41(3)). An interest in movables includes an interest in an intangible or tangible thing other than land, including personal property other than an estate or interest in land (WSA, s 41(1)(b)).

Under s 42 of the WSA, regarding the manner and formalities of making a will, a will made outside Alberta is valid and admissible to probate in Alberta, as it relates to an interest in movables, if it was made in accordance with the law in force at the time it was made in the place where:

- the will was made,
- the testator was domiciled at the time the will was made, or
- the testator had his or her domicile of origin.

In summary, under Alberta law, a will made outside Alberta will be valid and admissible to probate in Alberta to deal with:

- land in Alberta, if it complies with Alberta formalities,
- land outside Alberta, if it complies with the formalities of the place where the land is situated, and
- movables anywhere, if it complies with the formalities of the place where the will was made or where the testator was domiciled when the will was made.

When submitting a foreign will for probate in Alberta, it may be necessary to submit expert evidence on the law dealing with the manner and formalities of making a will in that jurisdiction.

Under Part 2, Division 3 of the WSA, an international will made in conformity with the Convention Providing a Uniform Law on the Form of an International Will (contained in the
Schedule to the WSA is valid with regard to its form, irrespective of the place where it was made, of the location of the assets, and of the nationality, domicile, or residence of the deceased. An international will has 3 witnesses, one of whom must be a person authorized to act in connection with international wills (for example, a lawyer).

Under Quebec law, as in other civil law jurisdictions, when a will is notarized, the notary retains the original, issues a notarial copy, and registers the will with the province. When the testator dies, the person named as the personal representative can administer the estate without probate because a notarial copy of the last registered notarial will, accompanied by letters of verification issued in the province, are as effective as probate in a common law jurisdiction. Letters of verification are equivalent to a probate for the purposes of re-sealing a Quebec notarial will in Alberta (EAA, s 18(1)).

In other cases, where an original will cannot be produced because of foreign law and the will has not been the subject of a grant of probate or administration or other court order having the same general effect that a grant has in Alberta, paragraph 3 of NC 2 should be modified to accurately describe the document being submitted. For example,

3.1  [Verified/Notarially certified] copy of the will of the deceased certified by [name], of [city, jurisdiction], who retains the original according to the laws of [jurisdiction].

See also the discussion on resealing of foreign grants under “Re-sealed probate or administration” and “Ancillary grants”.

6  LOST OR MISSING WILLS

Where an original will or codicil has been lost or destroyed, but a copy or other evidence of it exists, an application can be made to admit the copy or other evidence to probate (Surrogate Rules, r 24). The application can be made in a desk application, but if the court is of the opinion that a will has not been adequately identified, it must be formally proved. The standard of proof is proof on a balance of probabilities.

For an application to succeed, the applicant must prove:

- that a valid will was made (i.e., that it was properly signed and witnessed, and that the testator had capacity),
- that the will was not revoked, and
the contents of the will.

Evidence of the solicitor or other persons who witnessed the will may be used to establish proper signing.

If a will last known to be in the custody of the testator is not found at his/her death, it is presumed that the testator destroyed it with the intention of revocation. The presumption may be rebutted by evidence, including:

- the character of the deceased,
- the existence of codicils,
- statements made to beneficiaries with respect to provisions made for them, and
- the words and actions of the deceased before and after the signing of the will.

To prove the contents of a will, submit to the court:

- a copy or a completed draft of the will, and
- the evidence of the witnesses or the solicitor who prepared the will, to the effect that a will containing these provisions was signed by the deceased.

If there is no copy or completed draft, the evidence of a witness as to the contents of the will may be sufficient, even if that witness has an interest in the will. Such evidence may include:

- statements made by the deceased before or after the signing of the will,
- evidence that the witness read the will,
- the existence of codicils to a will, and
- reference to the will in another written document.

An application to prove a copy of a will may impact the claims of beneficiaries who would be entitled to share in an estate on intestacy or under a previous will. As a matter of practice, it is advisable to:

- obtain the consent of or give notice to all such competent adult beneficiaries,
- give notice to the Public Trustee if there are any such minors,
obtain the consent of or give notice to the attorneys of any such mentally incapable adult beneficiaries and the trustees of any such represented adult beneficiaries, and

if there are any such mentally incapable adult beneficiaries without an attorney or trustee, apply to have a neutral representative appointed as a limited trustee under the AGTA with authority to represent the adult with respect to the application.

Use Form NC 4 to set out the evidence of the loss of the original will and, if applicable, the evidence rebutting the presumption of revocation.

The grant issued by the court will be limited in duration until the original will or a more authentic copy can be found. Distribution may take place. There is a duty to present the original to the court when located.

7 PRIORITIES FOR GRANT APPLICATIONS

Where there is a will, ss 13(1)(a)(i)—(ix) of the EAA sets out the priority for grant applicants as follows, in descending order of priority:

(i) to a personal representative named in the will, unless that person is incapable of acting or unwilling to act;

(ii) to a personal representative appointed by the person expressly authorized in the will to appoint a personal representative;

(iii) to a residuary beneficiary named in the will;

(iv) to a life tenant of the residue in the will;

(v) to a beneficiary under an intestacy if the residue is not completely disposed of in the will;

(vi) to a beneficiary receiving a specific gift in the will;

(vii) to a contingent beneficiary of the residue in the will;

(viii) to a contingent beneficiary of a specific gift in the will;

(ix) to the Crown in right of Alberta.
Note that, subject to the court finding that the deceased had a different intention, if the will names as personal representative:

- a spouse who was divorced from the deceased on or after February 1, 2012, or
- a person who became a former AIP of the deceased on or after February 1, 2012 (see s 10 of the Adult Interdependent Relationships Act, SA 2002, c A-4.5 for provisions on how one becomes a former AIP),

then the appointment in the will is revoked (WSA, s 25).

If no will exists, s 13(1)(b)(i)–(xi) of the EAA sets out the priority for grant applicants as follows, in descending order of priority:

(i) to the surviving spouse or surviving adult interdependent partner;
(ii) to a child of the deceased person;
(iii) to a grandchild of the deceased person;
(iv) to a descendant of the deceased person other than a child or grandchild;
(v) to a parent of the deceased person;
(vi) to a brother or sister of the deceased person,
(vii) to a child of the deceased person’s brother or sister if the child is a beneficiary under the intestacy;
(viii) to the next of kin of the deceased person determined in accordance with sections 67 and 68 of the Wills and Succession Act who are beneficiaries under the intestacy and who are not otherwise referred to in this clause;
(ix) to a person who has an interest in the estate because of a relationship with the deceased person;
(x) to a claimant;
(xi) to the Crown in right of Alberta.
Note that the surviving spouse of an intestate is deemed to have predeceased the intestate if the intestate and the surviving spouse had been living separate and apart for more than 2 years at the date of death, were parties to a declaration of irreconcilability under the Family Law Act, SA 2003, c F-4.5 [FLA], or were parties to an agreement or order in respect of their property which appears to have been intended by one or both of them to separate and finalize their affairs in recognition of their marital breakup (WSA, s 63; EAA, s 13(1)(b)(i)).

Note also that a former AIP does not have the right to administer the estate.

The priority given in s 13(1)(b)(ix) of the WSA to “a person who has an interest in the estate because of a relationship with the deceased” is intended to capture, for example, a long-term friend of a deceased who had no relatives.

If there are two or more persons with equal priority because of degree of kinship, a court may grant the authority to administer an estate to one or more of them, as the court considers appropriate (EAA, s 13(3)).

Renunciations are used to address other potential applicants for a grant who have higher priority to apply, or who have equal priority and who do not wish to be co-applicants.

See the materials under the heading “Renunciations” for more information.

8  REINUNCIATIONS

A person entitled to apply for a grant under s 13(1) of the EAA can renounce that right.

The forms used for renunciations are:

- Form NC 12 – renunciation of probate by a personal representative named in a will,
- Form NC 14 – renunciation of a grant of administration with will annexed, and
- Form NC 15 – renunciation of a grant of administration where the deceased died intestate.

Under s 38(1) of the EAA, when a person named in a will as a personal representative renounces probate of the will:

- his or her authority under the will ceases, and
his or her authority with respect to any trusteeship under the will ceases, unless the renunciation expressly reserves the trusteeship.

Additionally, Form NC 12 requires a renunciator to swear that he or she has not “intermeddled” in the estate.

Where a person named in a will as a personal representative renounces probate of the will, any subsequent grant application must be made and dealt with as if the person had never had or been granted the authority to administer the estate (EAA, s 38(2)). However, renunciation of probate does not, by itself, prevent a personal representative named in the will from applying for a grant of administration with will annexed (Surrogate Rules, r 32(4)). This can be useful when a person named in a will wishes to nominate someone else to apply.

9 NOMINATIONS

There are two circumstances where a person with priority may use Form NC 16 to nominate someone else to be the personal representative for the purpose of applying for a grant (Surrogate Rules, r 33):

1. the person is entitled to a grant of administration or a grant of administration with will annexed (not probate), and
2. the person is expressly authorized in a will to appoint a personal representative.

A person named as personal representative in a will cannot nominate someone else to apply. However, there are two ways around this rule:

- the named personal representative can appoint an attorney and the application can be made by the attorney using Forms NC 28 and NC 29, or
- the named personal representative can renounce probate using Form NC 12. Presuming that there are no other named personal representatives willing and able to apply, and the named personal representative is, after renouncing, next in priority to apply for a grant of administration with will annexed, then the named personal representative can nominate another person to apply under r 33(1) of the Surrogate Rules.
10 FAILED GIFTS

10.1 Lapsed gifts

Absent a contrary intention expressed in a will, under the common law, a gift to a beneficiary who predeceases the testator lapses.

Sections 34 and 35 of the repealed Wills Act prevented the lapsing of gifts to children and siblings who predecease a testator. It remains applicable to wills made before February 1, 2012. However, these “anti-lapse” provisions were dropped in the WSA, and are not applicable to wills made on or after February 1, 2012 (WSA, s 8).

In addition, for wills made before February 1, 2012, absent a contrary intention expressed in a will, a lapsed gift is included in the residuary devise or bequest, if any, contained in the will (Wills Act, s 23). For wills made on or after February 1, 2012, lapsed gifts are distributed under s 33(1) of the WSA.

10.2 Adeemed gifts

The common law doctrine of ademption provides that if a deceased testator no longer owns the subject matter of a specific gift in his or her will, the gift adeems, and the personal representative is not obligated to make up the value of the gift out of the remaining assets of the estate. For example, if a testator made a will leaving his car to his nephew, then sold the car before he died, the nephew would not receive anything from the estate with respect to that gift.

10.3 Void gifts

Under s 21(1) of the WSA, a disposition made by a will is void if it made to:

- a witness of the testator’s signature,
- someone who signed on behalf of the testator,
- an interpreter who provided translation services in respect of the making of the will, or
- a spouse or AIP of an individual described above.
However, as an exception to the above, s 21(2) of the WSA provides that such disposition is not void if:

- it is a charge or direction for payment of remuneration, including professional fees for a personal representative of the estate or of the interpreter,
- in the case of a disposition to a witness, it is made under s 16 (holograph will) or s 17 (military will) or if the testator’s signature is witnessed by at least 2 other individuals, or
- a court validates the disposition by an order under s 40 of the WSA.

10.4 Distribution of void gifts

Under s 33 of the WSA, unless a contrary intention is found by a court, if a beneficial disposition cannot take effect because its disposition to the intended beneficiary is void, contrary to law, disclaimed, or for any other reason (such as a lapse), the property is distributed in the following order of priority, as provided in s 33(1):

(a) to the alternate beneficiary, if any, of the disposition, regardless of whether the will provides for the alternate beneficiary to take in the specific circumstances,

(b) if clause (a) does not apply and the intended beneficiary was a descendant of the testator, to the intended beneficiary’s descendants who survive the testator, in the same manner as if the intended beneficiary had died intestate without leaving a surviving spouse or [AIP],

(c) if neither clause (a) nor clause (b) applies, to the surviving residuary beneficiaries of the testator, if any, named in the will, in proportion to their interests, or

(d) if none of clauses (a), (b) or (c) applies, in accordance with Part 3 [of the WSA] as if the testator had died intestate.

For the purposes of subsections 33(1)(a)–(d), listed above, the intended beneficiary is deemed to have predeceased the testator (WSA, s 33(2)).

Further, an individual listed under s 21(1) of the WSA cannot receive a share of the property under s 33(1) unless s 21(2) applies (WSA, s 33(3)).
10.5 Missing beneficiaries

Use Form NC 25 to advise the court that there are beneficiaries whose identities are known but whose locations are unknown, or that there are beneficiaries who have not been identified at all. Rule 26(5) of the Surrogate Rules allows the court to issue a grant even though an estate’s beneficiaries are unknown or have not been located at the time of the application. A personal representative may, however, have to make an application for directions to complete the administration of the estate.

One way to deal with the interests of a missing beneficiary is to apply to the court for a declaration that a person is a missing person and the appointment of the Public Trustee as trustee of the missing person’s property (Public Trustee Act, s 7). The Public Trustee will not represent a missing beneficiary without such an order.

Under the common law and s 94 of the Surrogate Rules, the court may allow an application to declare a person deceased.

11 “CHILDREN” AS BENEFICIARIES

Unless the court, in interpreting a will, finds that a testator had a contrary intention, references in a will to children, descendants, and issue must be interpreted as including (WSA, s 28):

- any child for whom that individual is a parent within the meaning of Part 1 of the FLA, and
- any child who is in the womb at the time of the testator’s death and is later born alive.

Part 1 of the FLA provides:

- rules for determining parentage (s 7),
- a presumption of parentage regarding a child’s biological father (s 8), and
- rules for legally establishing parentage in the cases of assisted reproduction (s 8.1) and surrogacy (s 8.2).

Under s 9 of the FLA, a court application can be made to resolve a dispute regarding parentage by a declaration from the court that a person (including a deceased person (s
9(4)) is or is not the parent of a child. This is applicable if the child is born in Alberta or an alleged parent resides in Alberta (s 9(6)).

A declaration that a deceased person is not the parent of a child, made after property has been distributed to the child, does not affect the distribution, unless the court orders otherwise (FLA, s 9(10)(b)).

An application for a declaration of parentage may not be made with respect to an adopted child or if the declaration would result in the child having more than 2 parents (FLA, s 9(7)).

The definition of “child” in Part 1 of the FLA does not include step-children, no matter how clearly the step-parent treats the child as his or her child. This is different from Part 3 of the FLA, which deals with support obligations and contains provisions that deem a person standing in the place of a parent to be a parent (FLA, s 47).

See the materials under the heading, “Distribution of intestate estates” in “Dealing with Intestacy” for a full discussion of the rights of children to a share of an intestate estate.

12 PROPERTY LISTS

It is common for Alberta testators to leave lists outlining their wishes for the distribution of personal property.

A list that is in existence when a will is made can be incorporated into the will by specific reference.

Under the WSA, a list created after a will is made:

- may be a codicil if it complies with s 15 (formal will with 2 witnesses), s 16 (holograph will), or s 17 (military will), or

- may be validated under s 37 of the WSA (for more information, see “validating documents with formal defects and rectification” under the heading, “Irregular or defective wills” below).

13 IRREGULAR OR DEFECTIVE WILLS

13.1 Validating documents with formal defects and rectification

The court may validate a will that does not comply with ss 15 – 17 of the WSA if the court is satisfied, on clear and convincing evidence, that the writing sets out the testamentary
intentions of the testator and was intended by the testator to be his or her will or a revocation of his or her will (WSA, s 37).

The court may rectify a will by adding or deleting characters, words, or provisions if satisfied, on clear and convincing evidence, that the will does not reflect the testator’s intentions because of an accidental slip, omission, or misdescription, or because of a misunderstanding of, or a failure to give effect to, the testator’s instructions by the person who prepared the will (WSA, s 39(1)).

However, rectification of the omission of a testator’s signature is only available if the court is satisfied, on clear and convincing evidence, that the testator intended to sign the document but omitted to do so purely by mistake or inadvertence, and that the testator intended to give effect to the writing in the document as his or her will (WSA, s 39(2)).

A rectification application must be made within 6 months after the issuance of the grant of probate or administration, unless the court grants an extension (WSA, s 39(3)–(4)).

13.2 Alterations and erasures

A will may be altered by another will made by a testator (WSA, s 22(3)).

Under s 22 of the WSA, any writing, marking, or obliteration made on a will is presumed to be made after the will was signed, and is valid as an alteration only if:

- in the case of formal wills, the alteration was made in accordance with s 15 of the WSA,
- in the case of holograph wills, the alteration was made in accordance with s 16 of the WSA, or
- the court makes an order under s 38 validating the alteration.

For the court to make an order validating an alteration, it must be satisfied on clear and convincing evidence that the alteration reflects the testamentary intentions of the testator and was intended by the testator to be an alteration of his or her will (WSA, s 38).

If an alteration makes part of a will illegible, and is has not been validated under s 22 or by the court, the court may allow the original words of the will to be restored or determined by any means that the court considers appropriate (WSA, s 22(2)).
If the court directs that any alterations, interlineations, erasures, or obliterations be omitted from a will, the clerk must omit them from the copy of the will attached to the grant (Surrogate Rules, r 25).

13.3 Irregularly placed signature

Signing a will other than at the end of the will does not render the will invalid if it appears the testator intended to give effect to the will by his or her signature (WSA, s 19(2)). However, a testator is presumed not to have intended to give effect to any writing that appears below his or her signature (WSA, s 19(3)). A beneficiary of a gift that appears below the signature would have to overcome the presumption by presenting evidence of the testator’s intention to make the gift.

For more on alterations, signatures on wills, and other formalities for making a will, see the materials under the topic “Understanding the Legal Requirements for Wills.”

14 SURVIVORSHIP

Under s 5(1) of the WSA, if 2 or more persons die at the same time or in circumstances rendering the order of death uncertain, the individual whose rights and interests are being considered is presumed to have predeceased the other(s) unless:

- the court, in interpreting a will or other instrument, finds a contrary intention,
- s 685 or 737 of the Insurance Act, RSA 2000, c I-3 applies (in which case, the beneficiary of the insurance is deemed to have predeceased the person insured), or
- a legislative provision provides for a different result.

For the purposes of determining who has priority to apply for a grant of administration and entitlement to a share of an estate (EAA, s 13(1)(b)), a surviving spouse of an intestate is deemed to have predeceased an intestate if the intestate and the surviving spouse (WSA, s 63):

- had been living separate and apart for more than 2 years at the date of death,
- were parties to a declaration of irreconcilability under the FLA, or
were parties to an agreement or order, in respect of their property, which appears to have been intended by one or both of them to separate and finalize their affairs in recognition of their marital breakup.

If a personal representative named in a will survives the testator but dies prior to obtaining a grant, the authority of that personal representative ceases with respect to the administration of the estate and any trusteeship under the will, and any application for a grant must be made and dealt with as if that personal representative had never been named as a personal representative or trustee (EAA, s 41).

If there are 2 or more personal representatives of a deceased’s estate and one or more of them die, their authority and powers vest in the surviving personal representative(s) (EAA, s 42).

15 PERSONAL REPRESENTATIVE APPOINTMENTS

15.1 Priorities

Unless the court, on application, orders otherwise,

- between applicants of equal priority, preference is given to a resident of Alberta (EAA, s 13(2)(a)),
- between a surviving spouse and a surviving AIP, preference is given to the spouse or AIP who lived with the deceased most immediately or recently before the deceased person’s death (EAA, s 13(2)(b)), and
- a grant of administration must not be given to more than 3 persons at the same time (Surrogate Rules, r 10(3)).

15.2 General appointment

If a will appoints a personal representative in general terms (for example, “any partner” of a law firm, rather than an individually named partner), all persons meeting the description are considered alternate personal representatives and must be dealt with in the application.

Either all must apply for probate or all who don’t apply must renounce.

15.3 Appointment by description

If a will appoints a personal representative by description only, rather than by name, the evidence in the NC 2 must establish that the applicant is the correct individual to apply. For
example, where a will names “my son” as a personal representative, the applicant would depose:

The applicant is entitled to apply for a grant because the will names the son of the deceased as personal representative. The applicant is the deceased’s only son.

15.4 Minor as a personal representative

Under s 13(5) of the EAA, and subject to s 14 of the Public Trustee Act, if the sole personal representative named in a will is a minor,

- the court must grant the authority to administer the estate to another person the court considers appropriate, and
- the minor may be granted the authority to administer the remainder of the estate on becoming an adult.

Use paragraph 2 and the “special and unusual circumstances” paragraph (paragraph 7) of Form NC 2 to explain the circumstances.

For more information on the role of the Public Trustee, see the materials under the subheading “Public Trustee as applicant” under the heading “Personal representative appointments.”

15.5 Reservations

When not all personal representatives named in a will apply at the same time, a personal representative not applying may use Form NC 13 to reserve the right to apply later. The later application by a personal representative who reserves is for a grant of double probate using Forms NC 30 and NC 31, which replicate Forms NC 1 and NC 2, though modified to reflect the fact that the application is an application for double probate (Surrogate Rules, r 34).

On the initial application, paragraph 3 of Form NC 2 should mention the reservation in Form NC 13 and a copy of it should form part of the application. Paragraph 3 of Form NC 31 on the application for a grant of double probate should list Form NC 13 and the original should form part of the application.

15.6 Personal representative nominations

For information on nominations, see the materials under the heading “Nominations.”
15.7 Attorneys

A person entitled to apply for a grant may appoint an attorney to apply using Forms NC 28 and NC 29. Those replicate Forms NC 1 and 2, though modified to reflect the fact that the application is made by an attorney (Surrogate Rules, r 13(3)).

15.8 No one applies

If the administration of an estate is delayed because no one with priority will apply, any person interested in the estate may apply to the court for directions (Surrogate Rules, r 4).

15.9 Public Trustee as applicant

If a person dies leaving property in Alberta, and a minor or a represented adult for whom the Public Trustee is trustee has an interest in the estate, the Public Trustee has the same priority to apply for a grant of administration as the minor or represented adult would have had if they had been an adult of full legal capacity.

The Public Trustee has priority to apply for a grant of administration over any person who is not a resident of Alberta if (Public Trustee Act, s 14(2)):

- a deceased did not leave a will,
- the deceased’s will does not appoint a personal representative, or
- any personal representatives appointed by the will have renounced, died, or cannot be located.

The Public Trustee can apply for and obtain a grant of administration where there is property in Alberta and no grant of probate or administration has been issued in Alberta (Public Trustee Act, s 15(2)). However, under s 15(3), subject to the court ordering otherwise, the Public Trustee may not apply for a grant until at least:

- 30 days after the death of an intestate, or
- 120 days after the death of a person who left a will.

The Public Trustee may file an election to administer an estate without probate if the gross value of the estate is less than the prescribed amount of $75,000 (Public Trustee Act, s 16(1); Public Trustee General Regulation, Alta Reg 201/2015, s 3(1)).
As a matter of policy, the Public Trustee is a personal representative of last resort and will not get involved in the administration of an estate unless there is no one else to take it on.
### CHAPTER 7

#### OTHER APPLICATIONS

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1 CONTENTIOUS APPLICATIONS

Estate applications other than a conventional grant application are often contentious, or at least potentially contentious. Rule 55 of the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules] provides that any application regarding a contentious matter may be made to the court under Part 2 of the Surrogate Rules. Rule 2 provides that if the Surrogate Rules do not deal with a particular aspect of an application, then the Alberta Rules of Court, Alta Reg 124/2010 apply. Further, the court may vary any rule where appropriate and may make any order necessary where no applicable rule exists. Note that all applications are made to the Court of Queen’s Bench (Surrogate Matters).

See the content on “Technical and Court Matters” for a full discussion of the procedure for contentious matters. For a full discussion of the conventional proceedings for grants, see the content on “Grant Applications”.

2 THE DIFFERENCE BETWEEN RECTIFICATION AND CONSTRUCTION OF WILLS

In matters relating to the wording of a will, the Court of Queen’s Bench may sit as either a court of probate or a court of construction. When the court sits as a court of probate, it has jurisdiction to grant probate. In the exercise of its probate jurisdiction, the court certifies that a will is valid and that the personal representative named in the grant is entitled to administer the estate.

Once probate of a will has been granted, the court sits as a court of construction and has jurisdiction to interpret the will. In the exercise of its construction jurisdiction, the court interprets or construes the contents of the testamentary documents that have been previously approved by the court in the exercise of its probate jurisdiction. A court of construction can only interpret the words that validly constitute the will, as determined by the court of probate. If a will is admitted to probate without any application for rectification, then the words that validly constitute the will are those contained in the original document. If a rectification application was brought, the words that validly constitute the will are those that resulted from the court’s rectification prior to the grant of probate.

If there is a problem with a will, such as the mistaken inclusion of certain language, it may be desirable to bring an application for rectification to clarify the issue before proceeding to probate. Otherwise, the relief available will be restricted to the more limited jurisdiction of a court of construction to interpret the wording contained in the will.
For a general discussion of the difference between the probate and construction jurisdictions, see James MacKenzie, ed, Feeney’s Canadian Law of Wills, 4th ed (Toronto: Butterworths, 2000) at paras 7.1–7.2; AH Oosterhoff, Oosterhoff on Wills and Succession, 7th ed (Toronto: Carswell, 2011).

3 RECTIFICATION OF WILLS

3.1 General

The equitable doctrine of rectification of written documents does not apply to wills. However, s 39 of the Wills and Succession Act, SA 2010, c W-12.2 [WSA] gives a court of probate the power to add or delete words or characters where required to fulfill a testator’s intention.

This power of rectification is available if an application is brought within 6 months after the issue of the grant of probate or administration with will annexed, unless the court chooses to extend the period. If rectification is no longer available, but words have been omitted from a will in error, a construction application can be brought to determine the meaning of the will in the form in which probate was granted. (For more information, see the materials under the heading “Construction of wills.”)

For additional resources on the court’s power to rectify a will under the WSA, see Lois J MacLean, “Rectification and Validation of Wills and Codicils” (Paper delivered at the Legal Education Society of Alberta [LESA] 48th Annual Refresher: Wills & Estates, 21 April 2015), (Edmonton: LESA, 2015).

3.2 Deletion of words

Under s 39 of the WSA, an application may be made to have certain words in a will struck out if they were included by accident or because of a failure to give effect to a testator’s instructions by a person who prepared the will. See, for example, the court decision in Ryrie v Ryrie, 2013 ABQB 370, 564 AR 312.

3.3 Addition of words

The traditional rule is that a probate court will not add or substitute words in a will in any circumstances (see e.g., Re Horrocks Estate, [1939] P 198, [1939] 1 All ER 579 (CA); Brewer v McCauley, [1954] SCR 645, 1954 CanLII 63 (SCC); Krezanosky v Krezanosky, 6 Alta LR (3d) 145, 1992 CanLII 6205 (Alta QB)). Under s 39 of the WSA, however, the court may add any words necessary to reflect the testator’s intentions.
3.4 Evidence

Previously, a court could only consider extrinsic evidence in limited circumstances, such as when it was alleged that, due to mistake or inadvertence, words included in a will were not known and approved by the testator. However, under s 26(c) of the WSA, a court is able to consider extrinsic evidence of a testator’s intention in interpreting a will.

4 CONSTRUCTION OF WILLS

4.1 General

The terms “interpretation” and “construction” are used interchangeably. Both terms refer to the court’s interpretation or construction of the contents of testamentary documents sanctioned by the court in the exercise of its probate jurisdiction.

An application for construction is made in a separate proceeding after probate has been granted. The purpose of the application is to ensure that the personal representative distributes an estate in accordance with the testator’s wishes.

4.2 When to bring an application

An ambiguity arises when the meaning of a particular word or phrase is unclear. A mistake usually arises where there has been a mistaken inclusion of unintended words, a failure to include intended words, or a mistaken use of one word or expression in place of the one intended. Ambiguities and mistakes can occur for a number of different reasons, including poor use of language, clerical error, a misunderstanding of the testator’s instructions, a failure to carry out the testator’s instructions, or a failure by the testator to appreciate the effect of the words used.

It may not always be necessary to obtain judicial clarification of the wording of a will. A personal representative may proceed with distribution where all those having any interest or potential interest:

- are ascertained,
- are of legal age and capable of managing their own affairs, and
- consent to a particular distribution.

Generally, in these circumstances a personal representative will also obtain an indemnity from all parties before making a distribution.
If, however, there is some doubt as to whether all potential beneficiaries have been identified or if there is some concern about relying on an indemnity from the parties to the arrangement, it would be prudent for the personal representative to obtain court approval of the arrangement.

See the material in “Public Trustee’s Role in Administration of Estates” for a full discussion of the Public Trustee’s role.

4.3 Ascertaining a testator’s intent

In construing a will, the court attempts to ascertain a testator’s intent with respect to disposition of his or her property. This is necessary:

- when that intent is not clear on the face of the will, usually as the result of either ambiguity or mistake,
- when, even though the language appears to be clear, problems emerge when the facts are discovered in preparation for distribution (e.g., the words “to my grandson James,” when two grandsons are named James), or
- when extrinsic evidence suggests an alternative interpretation of the testator’s intent.

The WSA contains a number of provisions establishing the presumed intention of a testator. These provisions may be determinative for questions of interpretation, so it is always prudent to refer to the WSA at the outset of a matter. Be aware, however, that most of the provisions are subject to a determination that the testator had a contrary intention and, as a result, an application for interpretation may still be necessary.

4.4 Judicial approaches to the construction of a will

The goal of interpreting a will is to determine the testator’s intention for how his or her estate should be distributed.

Prior to the proclamation of the WSA, the courts took two different approaches to construing a will. The first used an objective or literal construction of the meaning of the words in the will, which presumed that the testator intended the objective meaning of the will. The second approach focused on determining the meaning that the testator attributed to the words in the will by looking at the circumstances surrounding the making of the will.
Section 26 of the WSA formally adopts the subjective approach. It requires a will to “be interpreted in a manner that gives effect to the intent of the testator” (WSA, s 26). It also allows the court to consider extrinsic evidence by allowing the admission of direct evidence of the testator’s intention in addition to evidence about the surrounding circumstances.

Evidence of a testator’s surrounding circumstances may include:

- the given name or surname of a person named in the will (Re Gregson’s Trusts (1864), 71 ER 559, 2 H & M 504 (KBD); see also Re Gregson’s Trust Estate (1864), 46 ER 441, 2 De GJ & S 428 (Ch); In the Goods of De Rosaz, [1877] 2 PD 69 (PDAD)),

- the fact that a person named in the will was dead when it was made (Re Walker Estate, 53 OLR 480, 1923 CarswellOnt 198 (Ont SC); Re Perry Estate, [1941] 2 DLR 690, 1941 CanLII 77 (Ont CA)),

- the state of a person’s family, including the knowledge that one member of the family is better off than another (Re Gregory’s Settlement and Will (1865), 55 ER 767, 34 Beav 600 (Ch) [Re Gregory’s]; Re Taylor Estate (1886), [1886] 34 Ch D 255, [1888] 58 LT 538 (CA)),

- the habit of calling a person by their nickname (Re Gregory’s; Re Smith Estate, [1953] 9 WWR (NS) 173, 1953 CarswellBC 127 (BCCA)), and

- the fact that the testator referred to certain property by an inaccurate description (Webb v Byng, 69 ER 591, [1855] 1 K & J 580 (Ch); Re Vear (1917), 62 Sol J 159 (ChD)).

4.5 **The court’s limited power of rectification as a court of construction**

In construing a will, a court of construction can ignore words and has a limited power to add or substitute words. This is separate and apart from the power to rectify a will under s 39 of the WSA.

A court of construction will only add or change words where it is satisfied that a mistake or omission has occurred and it is able to discover what the testator meant. The cases differ as to the standard of certainty required before the missing words can be supplied.

Be cautious in relying on cases decided prior to the proclamation of the WSA and the new principles allowing the admission of extrinsic evidence to ascertain a testator’s intent.
4.6 Rules of construction

The common law “rules of construction” may be applied if the meaning of the words in a will remains uncertain after construing the will with reference to extrinsic circumstances (Perrin v Morgan, [1943] AC 399, [1943] 1 All ER 187 (HL (Eng))). (Notably, however, with the implementation of s 26 of the WSA, the older rules of construction will give way to any convincing evidence of a testator’s intention.)

These rules have developed over the years and are aids to interpretation rather than hard and fast directives.

Some common rules of construction include:

- Technical terms are given their technical meanings in the absence of contrary intention,
- Where particular words are followed by general words, the latter may be restricted in meaning by the former (the *ejusdem generis* rule),
- If possible, the court will avoid construing a will in such a way that it creates an intestacy (i.e., there is a presumption against intestacy), and
- Testators do not make gifts to those persons they know are deceased (see e.g., Sterling Estate v Navjord, 36 BCLR (2d) 93, 1989 CanLII 2722 (BCCA)).

Further, the rule in Browne v Moody, [1936] AC 635, 1936 CarswellOnt 92 (PC) creates a presumption of early vesting of a remainder interest after a life interest. The rule is applied in the situation where it is not clear whether a gift is vested or contingent. This rule states that where a gift is postponed, it nevertheless vests at the death of the testator unless the reason for the postponement is personal to the beneficiary, in which case the gift is contingent. For example, if the gift is “to my wife for her life, then to my children,” the children’s gift vests at the testator’s death. If the gift is “to my wife for her life, then to be divided among such of my children as have attained the age of 25,” the children’s gifts are contingent.

In Re Dale (1930), [1931] 1 Ch 357 (ChD), the court dealt with the rule for when there is an ambiguous gift of “to the children of A and B,” which had been traditionally interpreted to mean that there is to be a distribution to B and to the children of A (as opposed to the other possible interpretation: a distribution to the children of A and to the children of B). Applying the rule in the case of Re Dale, both A and B were alive; A had one child and B had six. In Re
Dale, the court was quick to displace this rule of construction on the basis of context and surrounding circumstances, and instead held that the gift was intended to benefit the children of A and the children of B.

4.7 Role of a personal representative

Where an issue is fully argued by those beneficially interested, a personal representative’s function is generally limited to ensuring that matters are properly placed before the court for due consideration, including all relevant evidence that has come to the attention of the personal representative.

Where a personal representative has no personal interest in the application, he or she is clearly neutral. However, if the personal representative has a personal interest (e.g., the personal representative is a beneficiary or his or her family member is a beneficiary), it is recommended that the personal representative retain separate counsel to represent him or her as a beneficiary.

5 TERMINATION, REVOCATION, VARIATION, AND ACCELERATION OF TRUSTS

5.1 General

A trust normally terminates when the trustee has properly transferred all the remaining trust property to the beneficiaries and has had his or her accounts passed. However, the instrument creating a trust may reserve a power to a person to revoke or vary the trust. It may also contain a provision as to when the trust terminates (e.g., when a beneficiary attains the age of 21).

5.2 Legislation

The rule in Saunders v Vautier (1841), 49 ER 282, 4 Beav 115 (Ch) was abolished in Alberta in 1972 by s 42 of the Trustee Act, RSA 2000, c T-8 [Trustee Act]. That rule had provided that if there was an absolute vested gift to a beneficiary with:

- payment postponed to a future event,
- a direction to accumulate income for the term, and
- payment of accumulated income and principal to the beneficiary,

then the trust for accumulations was not enforceable and the beneficiary could enforce a payment out prior to the specified term.
Section 42(2) of the Trustee Act provides:

Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen’s Bench.

This section makes it necessary to obtain a court order to prematurely terminate a trust. Granting or withholding the order is at the discretion of the court, even if the termination has the consent of all beneficiaries of legal age and capable of managing their own affairs (i.e., sui juris beneficiaries).

According to s 42(3) of the Trustee Act, s 42(2) applies to any variation or termination of a trust regardless of whether it is by merger, by consent of all beneficiaries, or by a beneficiary’s renunciation of his or her interest so as to cause an acceleration of the remainder or reversionary interests. Under s 42(1), “beneficiary” includes charitable purposes and charitable institutions.

Section 42(4) of the Trustee Act provides that the court’s approval shall come in the form of an order approving the variation or revocation of all or part of a trust, the resettling of any interest under a trust, or the enlargement of a trustee’s powers to manage or administer trust property.

Section 42(5) of the Trustee Act allows the court to consent to an arrangement on behalf of incapacitated beneficiaries, including minors, missing persons, and unborn or contingent beneficiaries.

Section 42(6) requires that before a proposed arrangement is submitted to the court for approval, it must have the consent in writing of all persons who are beneficially interested under the trust and who are capable of consenting.

Section 42(7) prevents the court from approving an arrangement unless it is satisfied that the arrangement appears to be for the benefit of each person on whose behalf the court is consenting and that, in all the circumstances, the arrangement is of a justifiable character.
5.3 Criteria for court approval

The courts are generally reluctant to prematurely terminate a trust. For example, in *Kinnee v Alberta (Public Trustee)*, 6 AR 102, 1977 CanLII 586 (Alta SC), the Court refused an application to pay out a trust prior to the beneficiary attaining the age of 21, even though the beneficiary had an absolute indefeasible interest in the trust.

Similarly, in *Salt v Alberta (Public Trustee)*, 71 AR 161, 1986 CanLII 1695 (Alta QB), the court refused an application to terminate a trust and distribute the proceeds to the applicants because the two requirements set out in s 42(7) of the *Trustee Act* were not satisfied.

The fact that the adult beneficiaries wanted to receive the immediate enjoyment of the capital of the estate was not a justifiable reason for interference with the intention of the testator as expressed in the will. (See also *Re Sabo Estate*, 164 AR 151, 1995 CanLII 9006 (Alta QB); *Re Hoffos Estate* (1992), 106 Sask R 96, 1992 CanLII 8115 (Sask QB).)

However, in *Re Wood Estate*, 2001 ABQB 619, 2001 CarswellAlta 921, the Court approved the premature termination of a trust for the benefit of an elderly woman. In that case, the contingent beneficiaries were the woman’s children and their possible unborn children. The Court recognized that the amount involved was modest and that the woman had a current need for the money, and it was satisfied that provisions for any unborn contingent beneficiaries would be made from their parents’ estates.

6 POWERS OF A TRUSTEE

A trustee has the powers given by the document creating the trust (such as a will). A trustee also has the powers set out in the *Trustee Act* unless otherwise specified in the document creating the trust. Section 21 of the *Trustee Act* allows the Court of Queen’s Bench to confer additional powers on a trustee where those powers are required to carry out a transaction which, in the court’s opinion, is expedient.

Under s 40 of the *Trustee Act*, a trustee may pay money or securities belonging to the estate of a deceased person into the Court of Queen’s Bench, to be dealt with according to orders of the court.

Where the income from property held by a trustee in trust for a minor is insufficient for the maintenance and education of the minor, the trustee may apply under s 37 of the *Trustee
Act for an order authorizing the sale of any portion of the trust property and payment of the proceeds towards the maintenance or education of the minor.

7 CHARITABLE INTENT

When a gift to a charity made by a testator is:

- impossible to carry out (for example, because the beneficiary has ceased to exist), or
- possible to carry out, but it would be impractical to do so,

and the testator expressed a general charitable intent, then the court will not let the gift fail but, rather, will approve a scheme “cy-près” for applying the trust property to an object or to a method of achieving the object that is as close as possible to that desired by the testator.

The Crown is the historical protector of charities. It has a duty to the court whenever called upon to advise and assist it with regard to charities. When an application is made for the approval or the ordering of a scheme, the Crown will, upon being served with the application, either represent the charity or be available for the court’s assistance. Service on the Crown is effected by service on Alberta Justice, Civil Law.

For more information, see: Governors of University of Alberta v Alberta, 11 Alta LR (2d) 26, 1979 CanLII 1105 (Alta QB); Rufenack v Hope Mission, 2002 ABQB 1055, 2002 CarswellAlta 1558 at para 164, aff’d 2006 ABCA 60, 2006 CarswellAlta 188.

8 SALE OR RETENTION OF REAL PROPERTY/LEASES

8.1 Trustee Act

Section 3 of the Trustee Act allows a trustee to invest in or retain any kind of property, including real property or leases, if the trustee makes the investment decision “with a view to obtaining a reasonable return while avoiding undue risk” (s 3(2)) and considers the matters listed in s 3(5) of the Trustee Act:

- a) the purposes and probable duration of the trust, the total value of the trust’s assets and the needs and circumstances of the beneficiaries,
- b) the duty to act impartially towards beneficiaries and between different classes of beneficiaries,
- c) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries,
d) the need to maintain the real value of the capital or income of the trust,
e) the need to maintain a balance that is appropriate to the circumstances of the trust between
   (i) risk,
   (ii) expected total return from income and the appreciation of capital,
   (iii) liquidity, and
   (iv) regularity of income,
f) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust,
g) the role of different investments or courses of action in the trust portfolio,
h) the costs, such as commissions and fees, of investment decisions or strategies, and
i) the expected tax consequences of investment decisions or strategies.

Section 21 of the *Trustee Act* allows the court to confer any necessary power on a personal representative:

21(1) When in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition or any purchase, investment, acquisition, expenditure or other transaction is expedient in the opinion of the Court of Queen’s Bench, but it cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court

(a) may by order confer on the trustees, either generally or in any particular instance, the necessary power for the purpose, on any terms, and subject to any provisions and conditions that the court thinks fit, and

(b) may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income. *Estate Administration Act*

The *Estate Administration Act*, SA 2014, c E-12.5 [EAA] came into force in Alberta on June 1, 2015. It repealed and replaced both the *Administration of Estates Act*, RSA 2000, c A-2 and the *Devolution of Real Property Act*, RSA 2000, c D-12 [*Devolution of Real Property Act*]. The EAA has made changes to the law as it relates to real property, making some of the case law decided under the *Devolution of Real Property Act* obsolete. By virtue of s 20 of the EAA, a personal representative has the authority to do anything in relation to the property that the deceased person could do, subject to the terms of the will. Since the EAA repealed the *Devolution of Real Property Act*, its provisions requiring the consent of beneficiaries to the sale of land in certain circumstances are no longer effective.
Section 21 of the EAA states that, regardless of any testamentary disposition, real property in which a deceased person continues to have an interest devolves to and vests in the personal representative as if it were personal property, and must be dealt with in the same manner as personal property.

8.2 Leases

The EAA gives personal representatives relief from liability under certain types of agreements.

Under s 30(1) of the EAA, a personal representative is not liable in respect of a lease, an agreement to lease, the conveyance of a rent charge, an agreement to convey a rent charge or any similar agreement that was not fully performed by the testator. To qualify for this relief from liability, the personal representative must:

(a) satisfy all liabilities that have accrued and are claimed under the lease, conveyance or agreement until the time of the assignment referred to in clause (b),

(b) validly assign the lease, conveyance or agreement to a purchaser, and

(c) set aside a reserve from the estate to meet any future claims over any fixed or determined amount that the testator agreed to pay or for which the testator was liable under the lease, conveyance, or agreement.

Nothing in s 30(1) affects the right of a claimant to pursue a claim with respect to the property of an estate against a person to whom it has been distributed (EAA, s 30(2)).

8.3 Minors’ Property Act

Where a minor is a beneficiary of an estate and the personal representative wishes to transfer land forming part of the estate, the consent of the Public Trustee is required (Land Titles Act, RSA 2000, c L-4, s 120 [Land Titles Act]). The Public Trustee, as guardian of the estates of minors, may consent to the transfer after consideration of practical matters such as the requirement for ongoing payment of taxes, insurance, and maintenance on the property. If the Public Trustee agrees to the transfer, the practice of the Public Trustee is to register a caveat against the title so that the land cannot be dealt with without the Public Trustee’s consent. Once the minor reaches the age of majority, the Public Trustee discharges the caveat.
Section 2 of the *Minors’ Property Act*, SA 2004, c M-18.1 provides that the court, on application, may authorize or direct a sale, lease, or other disposition of property of a minor if it is in the minor’s best interest to do so. Section 14 then sets out the procedure for making an application under s 2. An application may be made by any person that the court considers appropriate to make the application. Any application relating to a minor who is 14 years of age or older requires the consent of the minor. Additionally, s 15 requires that the Public Trustee be given at least 10 day’s notice of any application.

Section 120 of the *Land Titles Act* provides that the registrar will not register a transfer, mortgage, or other instrument executed by a personal representative or trustee, except an application for transmission, a caveat, or a discharge of mortgage, unless:

- a certificate of the Public Trustee certifying it has no knowledge of any minors being interested in the estate of the testator has been filed with the Registrar,

- in cases where minors are interested, the instrument to be registered is accompanied with the Public Trustee’s consent, which is endorsed on the signed transfer with payment of the examination fee,

- the applicant swears on affidavit that no minors are interested in the estate of the testator, nor were there at the time of death, or

- the instrument to be registered is accompanied by an order of the court.
CHAPTER 8
APPLYING FOR FAMILY MAINTENANCE AND SUPPORT

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1 TYPES OF RELIEF UNDER THE FAMILY MAINTENANCE AND SUPPORT PROVISIONS

The court has a wide discretion when granting a remedy to a family member for whom a testator did not provide adequate maintenance and support. Under the *Wills and Succession Act*, SA 2010, c W-12.2 [WSA], the court can:

- make any provision that it considers adequate (s 88(1)),
- make an order in respect of one or more family members (s 88(2)),
- make an order in respect of all or any part of an estate (s 88(3)),
- limit or terminate any period of temporary possession of a family home (s 88(4)),
- allow an application to be made outside the 6-month limitation period, with respect to any part of an estate that is not distributed at the date of the application (s 89(2)),
- consider any matter it deems relevant (s 93),
- make an interim order (s 94),
- impose any conditions or restrictions that it considers appropriate (s 96(1)),
- direct that the provision for adequate maintenance and support be made out of and charged against an estate in a proportion and manner the court considers appropriate (s 96(1)(a)),
- direct that the provision for maintenance and support be made out of income or capital, or both (s 96(1)(b)),
- give all necessary directions for an execution of a transfer or assignment of estate property, as needed (s 96(2)), and
- direct immediate distribution of an estate (s 97).

Notably, a remedy may be an amount payable annually or otherwise, a lump sum to be paid or held in trust, or a transfer or assignment of a specified property.
2 APPLYING FOR FAMILY MAINTENANCE AND SUPPORT

For the purpose of family maintenance and support, s 87 of the WSA includes these definitions:

- An “incapacitated person” means “a person who is the subject of a certificate of incapacity that is in effect” (the same definition as in s 1(f) of the Public Trustee Act, SA 2004, c P-44.1), and

- An “interested person” incorporates s 91(1)(b) of the WSA and means “any other persons [besides a personal representative or the Public Trustee] who may be interested in or affected by an order under...Division [2].”

Section 88 of the WSA sets out the court’s jurisdiction in relation to family maintenance and support. The court can grant family maintenance and support if a testator or an intestate does not adequately provide for a family member. Section 88 continues the language of the former legislation (Dependants Relief Act, RSA 2000, c D-10.5 [Dependants Relief Act]) that the court may order any provision that it considers “adequate” to be made out of a deceased’s estate for the support of a family member. In cases decided under the Dependants Relief Act, Alberta courts followed the principles set out by the Supreme Court of Canada in Tataryn v Tataryn Estate, [1994] 2 SCR 807, 1994 CarswellBC 1243 (SCC) [Tataryn v Tataryn Estate]. The Supreme Court of Canada found in that case that deceased spouses and partners have a legal and a moral obligation to provide for their surviving spouses and adult interdependent partners [AIPs]. For more on Tataryn v Tataryn Estate, refer to the content on “Availability of relief” in “Understanding Family Maintenance and Support.”

Legal obligations may arise in several ways: legislatively, through the Divorce Act, RSC 1985, c 3 [Divorce Act], Matrimonial Property Act, RSA 2000, c M-8 [MPA], or Dower Act, RSA 2000 c D-15 [Dower Act]; and equitably, through constructive trust and unjust enrichment. The moral obligations are more subjective and require a discussion of “what a judicious person would do in the circumstances, by reference to contemporary community standards” (Tataryn v Tataryn Estate at 821). For more on legal versus moral obligations, refer to the content on “Obligations owed by a testator” under the topic “Understanding Family Maintenance and Support.”
Section 88(3) of the WSA links the family home possession provisions in the WSA with the family maintenance and support provisions.

2.1 “Adequate” provision for proper maintenance and support

The onus is on an applicant for family maintenance and support to satisfy the court that a will does not adequately provide for the proper maintenance and support of a family member (Re deBeaudrap (1983), 44 AR 100 at para 35, 1983 CarswellAlta 351 (Alta QB); Re Protopappas Estate (1987), 78 AR 60, 1987 CarswellAlta 356 (Alta QB) [Re Protopappas Estate]; Malychuk v Malychuk Estate (1978), 11 AR 372, 1978 CarswellAlta 75 (Alta SC) [Malychuk v Malychuk Estate].

Determining adequate family maintenance and support

In Petrowski v Petrowski Estate, 2009 ABQB 196 at para 534, 466 AR 59 [Petrowski v Petrowski Estate], the court held that the question of whether a testator has made adequate provision for the proper maintenance and support of a family member is:

- an individual matter, tested by a variety of variables,
- a reflection of lifestyle and history, and
- an ongoing requirement that may undergo future changes.

“Proper maintenance and support” is not limited to “bare necessities” (Tataryn v Tataryn Estate at 817). Determining “proper maintenance and support” requires the court to consider the standard of living that a family member is accustomed to or ought to be accustomed to (Re Willan Estate, [1951] AJ No 4, 4 WWR (NS) 114 [Re Willan Estate]; Re Protopappas Estate; Re Siegel Estate (1995), 177 AR 282, 1995 CarswellAlta 775 at para 32; Re Stang Estate, 1998 ABQB 113, [1998] 7 WWR 551 [Re Stang Estate]; Re Spinelli Estate, 1998 ABQB 966 at para 12, 229 AR 137 [Re Spinelli Estate]; Re Lafleur Estate, 2014 ABQB 698, 2014 CarswellAlta 2087 [Re Lafleur Estate]; Re McKenna Estate, 2015 ABQB 37, 2015 CarswellAlta 58 [Re McKenna Estate]; Re Birkenbach Estate, 2015 ABQB 3, 2014 CarswellAlta 4 [Re Birkenbach Estate]).

However, complicating things, some Alberta courts have referred to a “needs-maintenance” approach. These cases focus on the difference in wording between the Alberta and British Columbia legislation. They conclude that, in Alberta, the inquiry into whether there is adequate provision of proper maintenance and support must be assessed from the
standpoint of a family member’s needs and maintenance because the Alberta legislation, unlike the BC legislation, focuses on the dependency of the family member. Do not interpret this discussion to mean that a testator only has to meet the mere needs or bare necessities of a family member (Re Stang Estate at paras 22-29; Petrowski v Petrowski Estate at para 456; Soule v Johansen Estate, 2011 ABQB 403 at para 23, 2011 CarswellAlta 2562 [Soule v Johansen Estate]; Re Birkenbach Estate at para 45).

Relevant evidence

The court in Re McKenna Estate discussed the need to consider a family member’s actual cost of living — that is, the cost that is necessary for the family member to continue to live the kind of lifestyle he or she enjoyed before the testator’s death. Providing over-inflated expenses or merely using statistical averages is not the correct method to determine the cost of living. Bensler J in Re McKenna Estate noted that “[f]or counsel to stake out opposite ends of a conceptual spectrum while leaving the Court to make a proper determination without benefit of reasonable evidence is an increasingly common practice but it is a practice to be actively discouraged” (at para 47).

In Re Broen Estate, 2002 ABQB 806 at para 22, 2002 CarswellAlta 1139 [Re Broen Estate], Acton J reiterated the Tataryn v Tataryn Estate decision, in which the Supreme Court of Canada said “...[S]upport is not to be determined using Statistics Canada averages, but rather should be based on actual evidence of the standard of living [the applicant] shared with [the testator] during their lives together, and should take into consideration their plans for the future.” In general, adequate provisions should continue the lifestyle that a surviving spouse was accustomed to during the marriage.

Timing

The relevant time for determining whether adequate provisions have been made is the time of the family maintenance and support application – which is the same approach used in matrimonial property actions (Re Willan Estate; Malychuk v Malychuk Estate; Carter v Alberta Conference Corp of the Seventh Day Adventist Church, [1998] AJ No 1479 (Alta QB)). See also the Legal Education Society of Alberta [LESA] publication: Anne S de Villars, QC & Dawn M Knowles, “For Mercy’s Sake: Principles of family maintenance and support in the 20 years since Tataryn”, (Paper delivered at the LESA: 48th Annual Refresher: Wills and Estates, 21 April 2015), (Edmonton: LESA, 2015). This method is, arguably, the best way to ensure that people to whom a testator owes a duty are adequately provided for by the testator’s estate. It
is also consistent with the case law where courts tend to look at the assets as of the trial date. (That case law, however, provides no discussion on the issue of date of valuation).

This approach is also consistent with the fact that, where a family member applies for family maintenance and support outside the 6-month limitation period set out in s 89 of the WSA, the court has discretion to make a family maintenance and support order for any undistributed part of the estate at the date of the application.

The court does have discretion to use a different date, such as the date of death, if the circumstances warrant it. The court in *Re Willan Estate* suggested that a court should consider the circumstances not only at the time of an application but as they likely will be in the future. In *Downton v Royal Trust Co* (1980), 8 ETR 229, 1980 CarswellNfld 19 (Nfld CA) [*Downton v Royal Trust Co* (1980)], the court used the net value at the date of deemed realization of the estate assets. For more information, see *Hodgson v Hodgson*, 2005 ABCA 13, 361 AR 190; *Baker v Baker Estate*, [1992] AJ No 1160, 1992 CarswellAlta 371 (Alta QB) [*Baker v Baker Estate*]; and *Repas v Repas*, 2012 ABQB 572, 2012 CarswellAlta 1612.

Under s 102 of the WSA, property given in a will according to a contract to do so, made in good faith and for valuable consideration, is not subject to a family maintenance and support order except to the extent that the value of the property, in the opinion of the court, exceeds the consideration received by the testator under the contract. (For more on s 102, refer to the content on “Miscellaneous family maintenance and support provisions.”)

Further, if a surviving spouse files an MPA claim before his or her deceased spouse’s death or within the 6-month limitation period, the MPA claim must be decided first. If the surviving spouse files a family maintenance and support claim as well, the claim applies to what is left in the estate after the MPA claim. The rationale for this principle is that s 15 of the MPA provides that money paid or transferred to a surviving spouse under the MPA does not form part of a deceased’s estate, and is not subject to a claim against the estate by a dependant under the (now repealed) *Dependants Relief Act*. (MPA amendments have been an area of debate; therefore, it is best to consult the most recent legislation).

To file an MPA claim after a deceased spouse’s death (but within the 6-month limitation period), a surviving spouse must have been eligible to commence a MPA claim immediately before the deceased spouse’s death. This means that the factors set out in ss 3 and 5 of the MPA must be satisfied (for example, the parties must have been living separate and apart for
at least one year). (See Baker v Baker Estate; Zubiss v Moulson Estate, 80 AR 105, 1987 CarswellAlta 186).

It is clear that a MPA claim, filed at the same time or before a family maintenance and support claim, must be dealt with first and that the family maintenance and support claim proceeds against what is left in an estate after the matrimonial property is divided. However, it is not clear whether a matrimonial property division is required where the spouses were not separated and a surviving spouse makes a family maintenance and support claim.

One view is that there is no requirement for a matrimonial property analysis to be done first, and that matrimonial property is taken out of an estate before a family maintenance and support claim is decided. The court has the complete discretion to give a surviving spouse more or less than what a matrimonial property allocation would give him or her, depending on the circumstances of the case. While matrimonial property principles should be considered and used as a guide in family maintenance and support claims, the court is not bound by them.

The opposing view is that, in considering a testator’s legal obligations owed to a surviving spouse, the court is bound to ensure that the surviving spouse receives at least as much as he or she would have received under a MPA division. The law should treat surviving spouses who were happily married to, or at least still cohabiting with, the testator at the time of the testator’s death at least as well as it treats spouses who were separated at the time of death. This line of thought focuses on the desirability of symmetry discussed in Tataryn v Tataryn Estate. Moreover, this view is based on the notion that a surviving spouse is, and always has been, the beneficial owner of one half of the matrimonial property.

For further discussion of this issue, see the Alberta Legal Reform Institute [ALRI] publication: Division of Matrimonial Property on Death, Final Report 83 (Edmonton: ALRI, 2000). See also the interpretation of Tataryn v Tataryn Estate in Re Gow Estate, 1998 ABQB 1073, 238 AR 39 [Re Gow Estate], so that a surviving spouse receives, at a minimum, what he or she would have been entitled to under a MPA division. Note, however, that there were no competing family maintenance and support claims in Re Gow Estate and that, as a result, it is unclear what the court would have done had there been competing claims. See also Re Stang Estate, where the court discusses the principle that a surviving spouse should not be worse off than a divorcing or separating spouse eligible for a MPA division.
The former s 117 of the WSA, which was never proclaimed in force, addressed this issue by providing for matrimonial property sharing on death.

2.2 Limitation periods

When the Married Women’s Relief Act, SA 1910, c 18 (2nd Sess) was enacted, no application was permitted after 6 months from a husband’s death. This 6-month limitation period was replaced in 1919 with a provision providing that, if an application was made 6 months after the death of a husband, relief was restricted to that portion of the husband’s estate that was undistributed.

This limitation was extended under the now repealed Dependents Relief Act: an application had to be brought within 6 months of grant of probate or letters of administration. After that time, an applicant needed leave of the court to make a claim and, if granted, the court could only order distribution from the remaining undistributed portion of a deceased’s estate. This provision remains the same in s 89 of the WSA.

Section 89 of the WSA sets out the limitation period for bringing a family maintenance and support application: 6 months from grant of probate or letters of administration. Under s 89(2), if a family member applies for family maintenance and support outside the 6-month limitation period, the court has the discretion to make a family maintenance and support order related to any part of an estate that is not distributed at the date of an application. (See Koma v Tomich Estate, 2011 ABCA 186, 505 AR 372 [Koma v Tomich Estate] and Re Racz Estate, 2013 ABQB 668, 2013 CarswellAlta 2390). Where an entire estate is distributed by the time an application is made (outside the 6-month limitation period) and there is no estate which a family member can claim, the application will be dismissed (see Re Singer Estate, 2000 ABQB 944, 2000 CarswellAlta 1580, aff’d 2002 ABCA 294, 2002 CarswellAlta 1600).

Until the limitation period passes, an executor, administrator, or trustee cannot distribute any portion of an estate unless he or she has the consent of all of the dependants who are capable of providing informed consent or a court order. Under s 106 of the WSA, if distribution is made in contravention of this section, as in the repealed Domestic Relations Act, RSA 2000, c D-14, the personal representative may be held personally liable. (For more information about s 106, refer to the content on “Miscellaneous family maintenance and support provisions.”)
Further, once an executor, administrator, or trustee receives notice of an application under the WSA, the personal representative cannot proceed with the distribution of an estate without a court order (WSA, s 107(1)).

2.3 Applicants

Section 90 of the WSA allows an application to be brought on behalf of a minor or represented adult. Under s 104, the Public Trustee has no duty to apply for relief in certain circumstances. Under s 105, the Public Trustee’s decisions, made under Part 5, Division 2 of the WSA, are immune to legal action. (For more information about ss 104 and 105 of the WSA, refer to the content on “Miscellaneous family maintenance and support provisions.”)

2.4 Notices

As a successful claim by a family member under the WSA may impact the distribution of an estate as written in a will, or the distribution under intestacy, notices of applications must be issued to potential estate claimants. Section 91 of the WSA sets out the parties that must be served with those notices, and updates the rules for serving family members with limited capacity:

- If an application is made for family maintenance and support and must be served on a minor child, the parent or guardian of the minor child is served, unless the child is subject to a permanent guardianship order, in which case, the Public Trustee is served (s 91(2)(a)).

- A represented adult within the meaning of the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2 is served by serving his or her trustee (s 91(2)(b)).

- Incapacitated people, within the meaning of the Public Trustee Act, SA 2004, c P-44.1 are served via the Public Trustee (s 91(2)(c)). The application may not proceed until the Public Trustee indicates to the court whether he or she will make representations on the application (s 91(3)).

Section 92 of the WSA continues the law that an application under Part 5, Division 2 of the WSA is a representative action and covers all family members who have notice of it, unless a court orders otherwise. This catch-all phrasing is very important when a claim is made on behalf of a family member because this triggers a claim on behalf of all others who qualify as family members. Section 92(2) provides that, if a family member does not receive notice of
an application, the family member is not deprived of any rights he or she has under Part 5, Division 2.

2.5 Factors for court consideration

In Alberta and elsewhere, family maintenance and support is paid out of a deceased’s estate. (See the Succession Law Reform Act, RSO 1990, c S 26, s 72; Dependants of a Deceased Person Relief Act, RSPEI 1988, c D-7, s 19; and Dependants Relief Act, RSY 2002, c 56, s 21).

Determining the adequacy of maintenance and support can also take into account assets outside of an estate, including property transferred by beneficiary designation, survivorship, or otherwise, or any benefits (such as insurance) paid as a result of death.

In assessing proper maintenance and support, a court should not assume that government funded programs such as Assured Income for the Severely Handicapped [AISH] and Canada Pension Plan [CPP] will always be available to a family member (Re Stone Estate, [1994] 8 WWR 5, 1994 CarswellAlta 129 at paras 23-28 [Re Stone Estate]; Petrowski v Petrowski Estate at para 522; Re BGB Estate, 2003 ABQB 683, 24 Alta LR (4th) 278).

Section 93 factors

Section 93 of the WSA sets out 9 factors a court must consider in determining an application for family maintenance and support, including the nature and duration of the relationship between testator and family member (s 93(a)), the age and health of the family member (s 93(b)), any legal obligations of the testator to support the family member (s 93(d)), and any reasons why the testator made provisions for or failed to make provisions for the family member (s 93(e)).

The factors apply to:

- whether the original provisions in the will are adequate for proper maintenance and support, and
- if not, what provision would be adequate in the circumstances.

Most of the factors in s 93 were included in the now repealed Dependants Relief Act (e.g., consideration of the Dower Act and consideration of the reasons of a testator). However, a
few were developed based on case law and public consultation. For more information, refer to the content on “Common law factors.”

The consideration represented in s 93(c) of the WSA is a family member’s capacity to contribute to his or her own support, including any entitlement to support from another person. The cases are not clear on whether a family member is expected to exhaust his or her own savings or assets before using money from an estate where, for example, a court awards a life estate in a certain bank account, with the balance going to other beneficiaries when the family member dies. While the court has discretion to impose any conditions or restrictions it sees fit on family maintenance and support awards (WSA, s 96), it rarely does so. Of course, the principle that family maintenance and support claims should not be used to build up an estate for a family member must always be kept in mind.

In *Re McKenna Estate*, the court seems to suggest that the legal obligations referred to in s 93(d) – relating to the question of whether the deceased had any legal obligation to support the family member – are the same ones discussed by the court in *Tataryn v Tataryn Estate* (*Re McKenna Estate* at para 28).

Legislation in other jurisdictions employs different tests and frameworks than those at work in Alberta. For example, Manitoba uses a financial needs test (under the *Dependants Relief Act*, CCSM, c D37 at s 2(1)). British Columbia legislation does not have a “dependency” aspect; under that legislation, independent healthy adult children may apply for variation. For more information, see Cameron Harvey & Linda Vincent, *The Law of Dependants’ Relief in Canada*, 2d ed (Toronto: Carswell, 2006) [Harvey & Vincent, *Law of Dependants’ Relief*].

Under s 93(f) of the WSA, the court considers any relevant agreement or waiver made between a deceased and a family member. However, s 103 of the WSA says that a family maintenance and support order may be made despite any waiver or agreement to the contrary.

Notwithstanding s 103 of the WSA, there are many cases holding that parties cannot contract out of the family maintenance and support provisions for public policy reasons.

In *Re McKenna Estate*, Bensler J found the parties’ pre-nuptial agreement was not determinative of the issues before her, per s 103 of the WSA. She stated (at para 37):

In light of section 103 of the WSA, I find that nothing turns on the Pre-Nuptial Agreement. Though the assets in question might not have been subject to
division on divorce, what is before me is the issue of proper maintenance and support for Ms. Woods-McKenna upon Mr. McKenna’s death. Though the Pre-Nuptial Agreement makes reference to each spouse’s estate, it does not preclude redistribution of Mr. McKenna’s assets if necessary.

For more on WSA, s 103, refer to the content on “Miscellaneous family maintenance and support provisions.”

The best view is that, while parties cannot contract out of family maintenance and support provisions, contracts like prenuptial agreements, matrimonial property settlement agreements, and dower releases can be considered by a court as factors in assessing whether a deceased adequately provided for the proper maintenance and support of a family member in the circumstances. (For a case dealing with whether or not a party can waive dower rights in a prenuptial agreement, see Re Starosielski Estate, 1998 ABQB 651, 238 AR 112).


Common law factors
Since not all of the common law factors are included in s 93 of the WSA, it is arguable that the common law factors continue to apply and should be considered by a court in addition to the s 93 list when assessing moral obligations.

Below is a non-exhaustive list of common law factors a court considers when assessing moral obligations or when determining the threshold level of maintenance and support. (In contrast, s 93 factors are those that a court considers when deciding on a family member’s family maintenance and support application. The court can also consider any additional factors it deems relevant (Koma v Tomich Estate at para 18; Re Lafleur Estate at para 45)):

- the size of the estate (Re Birkenbach Estate at para 17, 21),
- other family member(s) (Re Lafleur Estate at para 45),
- the age and state of health of the family member(s) (Re Protopappas Estate at para 33; Re Webb Estate at para 34),
the station in life of the testator and the family members(s) (Re Spinelli Estate at para 25),

the character of the testator and the family member(s),
  o e.g., Soule v Johansen Estate at para 51, where the court suggested that questions of volition, character, and conduct may arise when a family member’s disability is related to drug use,
  o e.g., Re Protopappas Estate at para 46, where the court suggested considering “the wishes of the testator, if [his or her] failure to perform [his or her] duty is due to admission or oversight”, and
  o e.g., Re Kinsella Estate, 2004 ABQB 664, 2004 CarswellAlta 1196 [Re Kinsella Estate], where the court focused on the character of the applicant,

the likelihood of the needs of the family member(s) increasing (Re Nelson Estate, 2013 ABQB 15, 2013 CarswellAlta 372 at para 61 [Re Nelson Estate]; Re Stone Estate at para 7),

the likelihood of inflation (Re Gow Estate at para 87),

other sources of income of the family member(s). (See Re Birkenbach Estate at para 94, where the court rejected the argument that the minor child applicant could rely on his mother to contribute to his maintenance and support. In that case, the deceased’s estate was valued at over $46 million and the applicant’s mother had modest assets. The court stated the mother’s contribution would be “negligible” compared to what the estate could and should pay),

the mode of life the family member(s) “ought” to be accustomed to (Re Birkenbach Estate at paras 95–98),

the cost of living (Re McKenna Estate at paras 39–56),

any claims against the estate, or competing moral claims ([Re Nelson Estate at paras 35–42), and

any future contingencies that can be reasonably foreseeable (Re Spinelli Estate at para 25).

All of the cases cited immediately above are good examples of the courts’ application of s 93 of the WSA and also the common law factors. See also Tataryn v Tataryn Estate, Re Boje
Estate, 2005 ABCA 73, 2005 CarswellAlta 192 [Re Boje Estate], Kiernan v Stach Estate, 2009 ABQB 150, 2009 CarswellAlta 324 (regarding character), Skworoda v Skworoda Estate (regarding needs), Re Kinsella Estate (regarding disabled adult children).

For more, see Koma v Tomich Estate at para 18; Re Willan Estate; Pauliuk v Pauliuk Estate, [1986] 3 AR 314, 1986 CanLII 1758 [Pauliuk v Pauliuk Estate] at para 19; and Petrowski v Petrowski Estate at para 503.

In Re Ponich Estate, 2011 ABQB 33, 2011 CarswellAlta 2512 [Re Ponich Estate], Veit J’s list of factors varies from the cases cited above, and suggests that another parent, who is alive and able to support the family member, may be a relevant factor (at paras 24–25).

2.6 Competing family maintenance and support claims

Where there are competing family maintenance and support claims and the size of an estate permits, all family maintenance and support claims should be met. However, where an estate is insufficient to satisfy all claims, the court must weigh the strength of each claim (Tataryn v Tataryn Estate at 823; Petrowski v Petrowski Estate at para 452; Re Nelson Estate at para 33).

Legal versus moral obligations

Legal obligations generally take precedence over moral claims. However, given Moen J’s conclusion in Petrowski v Petrowski Estate that family maintenance and support claims are legal obligations arising on death, to be ranked with all other legal obligations arising during the deceased’s lifetime, it is unclear how a situation could exist where there is more than one family maintenance and support claimant but only one has a legal claim. For more on legal versus moral obligations, see the sub-heading “obligations owed by a testator” under the topic “Understanding Family Maintenance and Support.”

Competing moral obligations

In assessing competing moral obligations, the court considers the following factors, which supplement and to some extent reiterate the s 93 and common law factors discussed above:

- the overall size of an estate,
- the income and resources of the competing applicants,
- the present and future needs of the applicants,
• the considerations involved in maintaining an adequate standard of support and maintenance (for instance, age, health, and lifestyle),
• the legitimate expectations and lifestyles of the competing applicants,
• the moral obligation that society places on a person to maintain and support persons in certain relationships and circumstances, and
• other facts that may negate a right to receive a part of an estate (see Petrowski v Petrowski Estate at para 594, citing Tataryn v Tataryn Estate; Re Kinsella Estate; Re Lee Estate, 2006 NWTSC 13, 2006 CarswellNWT 16; Re EAH, 2005 ABQB 678, 2005 CarswellAlta 1280).

Although Alberta courts are restricted in what they may provide as relief, the Tataryn v Tataryn Estate principles still apply (Koma v Tomich Estate).

2.7 Disclosure

The disclosure requirements in s 95 are new to the WSA and allow a family member and a personal representative to request financial information from each other. These are similar to the family law rules, as no court order is required (Family Law Act, SA 2003, c F-4.5; Divorce Act). These rules are intended to ease the discovery of assets, both inside and outside an estate, to determine adequacy and appropriateness of family maintenance and support.

The rights and obligations relating to disclosure do not extend to all parties to an application. They only apply to a “party,” defined in s 95(1) of the WSA as a family member or the personal representative of a deceased’s estate. This means that an applicant beneficially entitled under a will or as a result of intestacy, but not a family member or personal representative, is not entitled to request disclosure.

This restrictive definition of “party” may reflect concerns that granting all interested parties a right to disclosure could lead to an abuse of the right.

Practically, the WSA’s narrow definition of “party” could force a personal representative into being an active litigant on maintenance and support claims advanced by family members. Further, where a personal representative requests and receives disclosure, the question becomes whether or not the personal representative should share it with all other interested parties who may not be a “party” as defined in s 95(1) of the WSA.
Is a personal representative even obligated to request such information, regardless of whether the other interested parties are represented by counsel? Section 95(3) reminds us that there are methods beyond the WSA to get the financial information required for making a family maintenance and support order. For instance, interested parties can use the disclosure provisions under the *Alberta Rules of Court*, Alta Reg 124/2000 to obtain the information needed to fully defend a claim brought by a family member.

### 3 COURT ORDERS AND THEIR EFFECT

Unless a court orders otherwise, a family maintenance and support order charges the whole of a deceased’s estate over which it has jurisdiction (WSA, s 98).

**Defining an “estate” for family maintenance and support purposes**


In awarding a family maintenance and support provision, the court looks to a deceased’s net estate to determine the size of the estate available to family maintenance and support claimants. That is, the court looks to the estate after debts, liabilities, and reasonable estate administration expenses are paid. The costs of winding up an estate are considered estate administration expenses. This includes the costs of defending a family maintenance and support claim if an executor acted reasonably and in good faith in defending the action (*Re Broen Estate*; *Kazarian v Fraser*; *Downton v Royal Trust Co* (1973)).

In *Boje v Boje Estate*, 2009 ABQB 749, 2009 CarswellAlta 2195 [*Boje v Boje Estate*], Graesser J held that the specific bequests were to be paid before the family maintenance and support award and the family maintenance and support award was to be paid out of the residue of the estate (at para 78). However, this case dealt with a claim under the repealed *Domestic Relations Act*, RSA 2000, c D-14 [*Domestic Relations Act*], which contained different wording from the current WSA. Section 9 of the *Domestic Relations Act* stated that
any provision for maintenance and support ordered “falls ratably on the whole estate of the deceased” (Boje v Boje Estate at para 77). The WSA does not contain the words “falls ratably”.

Where an estate is insolvent, there is no estate for family maintenance and support purposes (Kazarian v Fraser; Harvey & Vincent, Law of Dependents’ Relief, citing Re Thomson Estate, [1942] 2 WWR 46, 1942 CanLII 173; Re McIntyre, [1925] 3 WWR 172, 1925 CarswellAlta 59 (Alta SC)).

The court only has jurisdiction to distribute assets located within Alberta. Presumably, however, the court can take the value of foreign assets into account in family maintenance and support claims similar to what is done in matrimonial property disputes (Alpugan v Baykan, 2014 ABCA 152, 2014 CarswellAlta 751; Chikonyora v Chikonyora, 2013 ABCA 320, 2013 CarswellAlta 2126.

Assets not forming part of an estate for probate purposes, such as property held in joint tenancy, joint bank accounts, and life insurance or investments with named beneficiaries, do not form part of a deceased’s estate for the purposes of family maintenance and support claims (see Harvey & Vincent, Law of Dependents’ Relief).

Alberta has no legislative provision that specifically includes property like joint bank accounts, property held in joint tenancy, and life insurance in a deceased’s estate (Ontario, PEI, NWT, and Yukon do).

4 MISCELLANEOUS FAMILY MAINTENANCE AND SUPPORT PROVISIONS

Section 101 of the WSA, sometimes called a “vulture clause,” is for the protection of family members. It provides that a mortgage, assignment, or similar charge given by a family member in anticipation of an entitlement under this Division of the WSA, and before an order is entered, is void.

If a testator disposes of property according to a contract that the testator made during his or her life, entered into in good faith and for valuable consideration, the property is not subject to a family maintenance and support order (s 102).

The courts have generally found any attempt to contract out of dependants’ relief legislation is void as being contrary to public policy, given that it is considered proper and necessary that people provide for their dependants. Accordingly, the courts have consistently held that
a dependant is not barred from making a relief application, even if there is a waiver or release of his or her right to make that a claim (Stepaniuk v Kozial Estate at para 13). Instead, the courts more frequently only take into account such a waiver when deciding a relief application (Stepaniuk v Kozial Estate at para 13; Re Berube Estate).

In keeping with these principles, under s 103 of the WSA, family members cannot contract out of a right to family maintenance and support. (In Re McKenna Estate, Bensler J applied s 103 of the WSA to find that a pre-nuptial agreement was irrelevant to a discussion related to the need for maintenance and support).

Notably, however, a spouse can waive dower rights and rights under the MPA. Section 78 of the WSA also makes an exception, allowing contracting out of the right to possession of a family home. The policy difference is that family maintenance and support is a “support right,” while an application under the MPA is a “property right.”

Section 104 of the WSA represents a modernization of the Public Trustee’s obligations related to family maintenance and support applications. The Public Trustee, acting as a trustee for a family member (i.e., a person who is under a permanent guardianship order, is a represented adult, or an incapacitated person), may make a family maintenance and support application. However, the Public Trustee has no duty to make an application if the Public Trustee is satisfied that there is adequate support.

Under s 105 of the WSA, any actions or omissions performed in good faith under Part 5, Division 2 of the WSA by the Public Trustee, or any other person, are immune to any action against them. This includes a decision to make (or not to make) an application on behalf of a family member.

Section 106 of the WSA governs when a personal representative may distribute any portion of an estate.

Family members have 6 months from a grant of probate or administration to make a claim. Unless a personal representative has a court order or the consent of all the family members who are capable of providing informed consent, a personal representative cannot distribute any part of an estate to any beneficiary during this 6-month period. If the personal representative distributes an estate in contravention of this section, he or she may be held personally liable.
Section 107 of the WSA provides for personal representative liability where he or she distributes an estate after receiving notice of a family maintenance and support application and without the permission of the court. The fines were increased by 5 times with the proclamation of the WSA.
# CHAPTER 9

## ADMINISTRATION OF THE ESTATE

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1 \ INTRODUCTION

The following deals with the documentation and procedures necessary to effect the transmission of assets to the personal representative of an estate, the transfer of assets into the name of a surviving joint tenant, and the transfer of assets from the personal representative of an estate to a beneficiary. A grant of probate or administration [a “grant”] is not always necessary.

The *Estate Administration Act*, SA 2014, c E-12.5 [EAA] is the main source of authority for the administration of estates.

The underlying assumption in the following is that the personal representative has the legal authority to receive and transmit the assets and that all debts and legal claims have been satisfied prior to the transfer of assets to the beneficiaries. While every effort has been made to ensure the accuracy of the transfer requirements, the personal representative should contact the institution involved to verify the documents required.

The terms “transmission” and “transfer” are not interchangeable. Transmission refers to the process of re-registering the assets of the deceased into the name of the personal representative while transfer refers to the process of re-registering the assets of the estate into the name of the beneficiary from that of the personal representative.

Section 20 of the EAA gives authority to the personal representative with respect to the property included in a deceased’s estate. This section specifically gives the personal representative the authority to:

1. take possession and control of the property (s 20(1)(a)),
2. deal with property in the same manner the deceased could if he or she were alive (s 20(1)(b)), and
3. do all things concerning the property that are necessary to give effect to any authority or powers vested in the personal representative (s 20(1)(c)).

These provisions are subject to the provisions of the will, the EAA, and any other legislation. Section 20(2) of the EAA confirms the personal representative’s authority has the same effect as that of the deceased person had he or she been alive and with full capacity.
Further, s 23 of the EAA makes it clear that in the exercise of authority, the personal representative is subject to all the liabilities and is compellable to discharge all of the duties in the exercise of the authority or powers vested in him or her.

2 EXECUTOR’S YEAR

While no two estates are alike, the general rule of thumb is that an estate should take one year to administer from the date of the grant. For this reason, a beneficiary cannot demand payment of a legacy prior to the expiration of this “executor’s year.” However, after a year, interest must be paid on any unpaid legacies. This is subject to the provisions of the deceased’s will (if any), which may stipulate the payment of interest within or outside of this period. If there is a delay and the personal representative fails to realize any of the property, then the onus is on the personal representative of the estate to provide valid reasons for the delay. (See Re Perrin (1925), 28 OWN 173, aff’d (1925), 28 OWN 289 (CA); Re MacDonald (1919), 46 OLR 358, 1919 CarswellOnt 107 (Ont CA); Czaban v Plamondon, 2005 ABQB 917, 2005 CarswellAlta 1857.) This also applies to administrators.

Section 5(1)(b) of the EAA provides that a personal representative must distribute the estate as soon as practicable. This is an attempt to replace the idea of an “executor’s year” referred to in s 8 of the repealed Devolution of Real Property Act, RSA 2000, c D-12. Section 8 allowed a beneficiary to make an application for the conveyance of real property if the personal representative had not, within one year, conveyed that real property to which the beneficiary was entitled. Section 5 of the EAA may not affect the previous right of a beneficiary to require interest to be paid on a legacy which remains unpaid after one year.

3 VALUATION AND INVENTORY

3.1 General

A personal representative must make an inventory and valuation of the deceased’s property and debts as of the date of death. A personal representative should also be aware of assets passing on death that, generally speaking, do not form part of the estate (e.g., assets held in joint tenancy, registered retirement savings plans [RRSPs], registered retirement income funds [RRIFs], insurance policies with a designated beneficiary, etc.). These may be important for income tax or family maintenance and support application purposes. A sample estate administration information gathering form is included in the appendices.
3.2 Purpose

A personal representative’s inventory of property and debts is important for the following purposes:

- for the application for a grant (Form NC 7 in the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules]),
- as a checklist to make sure all assets are identified, administered, and sold or distributed,
- to assist the personal representative to comply with the duty to pay debts,
- to assist the personal representative in filing a terminal income tax return to the date of death and subsequent estate tax returns until the estate is distributed,
- as an opening inventory for the personal representative’s accounts to be approved by the beneficiaries or, if necessary, passed by the court (Surrogate Rules, Part 3, Division 4),
- to assist the personal representative to consider the implications for the estate of claims under the family maintenance and support provisions of the Wills and Succession Act, SA 2010, c W-12.2 [WSA], the Matrimonial Property Act, RSA 2000, c M-8, and the Adult Interdependent Relationships Act, SA 2002, c A-4.5 [AIRA], as well as potential common law claims, and
- to assist in determining the solicitor’s fees and the personal representative’s remuneration (Surrogate Rules, Schedule 1).

Personal representatives should keep the inventory current throughout the administration of the estate by recording sales of property, payment of debts, transmissions, transfers, distributions, investments, and other changes.

3.3 Property and debts

It is very important that the inventory contains a full list of all property and debts of the estate. The personal representative will then have the necessary information to complete the administration of the estate. It may be necessary to file a supplementary affidavit if significant property is subsequently discovered. Where it is not possible to ascertain values at the date of filing, a personal representative will often provide an undertaking to file a supplementary affidavit. Remember that the inventory is part of the court application and as
such, is sworn to be true by the personal representative. Once filed, it becomes a public document.

*Property that passes to the personal representative*

The inventory must include all real and personal property that passes to the personal representative, whether the deceased held that property beneficially or in a representative capacity. The personal representative should make inquiries as to whether the deceased was named as the personal representative of any estate(s) not fully administered. If so, the deceased’s personal representative also becomes the personal representative of the estate which the deceased did not fully administer (referred to as the “chain of executorship”).

*Debts*

A personal representative may be personally liable for the debts of the deceased, to the extent of property coming into the hands of the personal representative. Advertising for creditors and claimants under r 38 of the *Surrogate Rules* limits the personal liability of a personal representative. Accordingly, a personal representative must ensure that the debts are properly listed and valued in the inventory of property and debts. Debts should include not only those immediately payable, but also deferred debts (which it may be necessary to value), contingent liabilities, and outstanding guarantees. If the debt is, or may be disputed, then the inventory should indicate that the validity of the debt has not yet been determined. Care must be taken in ascertaining and describing debts and liabilities in an application for a grant, since consents from creditors may be required, the existence of creditors may affect bonding requirements, and the creditors may challenge a personal representative attempting to vary a valuation sworn to be true in the application.

*Property that does not pass to the personal representative*

Property that does not pass to the personal representative includes:

- property for which the deceased was a joint tenant passes by law to the surviving joint tenant. If the property is real property and the relationship of the owners is not specified, they are presumed to be tenants in common (see *Law of Property Act*, RSA 2000, c L-7, s 8),

- property that passes directly to a beneficiary and not to the personal representative. This can include insurance payable to an assignee for value or a designated beneficiary, registered retirement savings plans [RRSPs], registered
retirement income funds [RRIFs], tax-free savings accounts [TFSAs], annuities, etc. (WSA, s 71 (which was previously s 47 of the Trustee Act, RSA 2000, c T-8)). Notably, there is an argument that non-insurance funded RRSPs and RRIFs may be subject to the claims of the creditors of the deceased (see Alberta Law Reform Institute [ALRI], Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act, Report 68 (Edmonton: ALRI, 1993)),

- property that passes to another personal representative. For example, if a personal representative applies in Alberta for probate of a will that expressly disposes of Alberta property only, then the executor named in that will is required to account only for property within Alberta, and

- property, such as life estates and some pensions and annuities, which terminate with the death of the deceased.

3.4 Form of inventory

There are many acceptable ways to organize an inventory. (See Form NC 7, which provides an inventory template.)

As suggested earlier, a personal representative should determine what property passed outside the estate, notwithstanding that the value of that property is not included in the application for a grant.

3.5 Valuation

Purpose

Reasons for valuing property include:

- to quantify tax liability,

- to calculate foreign taxes, including death taxes if they are payable, due to the location of property or to the domicile or citizenship of the deceased or beneficiary,

- to resolve questions arising in the course of administration (for example, buy-sell agreements, sale or distribution of property, insuring property, and determining option prices),

- to complete Surrogate Rules, Form NC 7,
• to calculate the amount of the court fees for issuing a grant,
• to assist in calculating personal representative compensation and legal fees, and
• to make a proper distribution of the estate as required by the will or intestacy provisions.

General principles
For the most part, the value of the property and debts will be fair market value. Value, however, may depend on the circumstances. For example, the value of a minority shareholding for the purpose of sale may not be the same as the value for tax purposes upon the death of that minority shareholder. The value of business interests may be affected by the terms of a partnership agreement, unanimous shareholders’ agreement, or a buy-sell agreement existing at the date of death.

For insurance purposes, the value is usually the replacement value of the property, which is almost always higher than the fair market value.

Date for valuation
Generally, the relevant date for the purposes of valuation is the date of death, although there may be other dates on which valuation may be required for tax purposes. If a deceased owned property such as currency and publicly traded shares, and died on a Sunday or another day for which no published price is available, the date selected is usually the last preceding date for which a price is available.

Use of appraisers
It may be prudent for a personal representative to employ a qualified appraiser to value the property. However, personal representatives may make their own valuation if they have a particular knowledge of the property or the valuation is not of great importance.

If property is to be sold, a personal representative may be well advised to obtain an appraisal to assist in ascertaining fair market value. Similarly, if property is to be distributed in kind (also called in specie) it may be prudent to obtain an appraisal so that the distribution is equitable.
3.6 Types of property described in an inventory

Although all of the information listed in this section should be obtained for purposes of an inventory, the completion of Form NC 7 in the Surrogate Rules may only require that part of it be included.

Real estate

Describe interests in real property clearly (e.g., fee simple, leasehold interests, mineral rights, profits à prendre, options to purchase, etc.).

For a fee simple interest, the description should include the:

- civic address (if applicable),
- legal description,
- registered owner(s),
- encumbrances (description and amount owing), and
- the method of determining fair market value ("appraised value" or "estimated market value").

Property encumbered by a mortgage passes subject to that mortgage unless otherwise provided (EAA, s 29). The mortgage should be shown as a deduction from the value of the property and not as a separate liability.

For an agreement for sale, the description of a purchaser’s interest should include the:

- civic address (if applicable),
- legal description,
- purchaser(s) under the agreement for sale,
- vendor(s) under the agreement for sale,
- value of the purchaser’s interest (that is, the fair market value of the property at the date of death less the balance owing under the agreement for sale as at the date of death),
- deceased’s share of the net value, and
- payment schedule.
Likewise, the description of a vendor’s interest in an agreement for sale should include the:

- civic address (if applicable),
- legal description,
- vendor(s) under the agreement for sale,
- purchaser(s) under the agreement for sale,
- total balance owing under the agreement for sale at date of death (principal and interest),
- deceased’s share of the total balance,
- payment schedule.

For monies secured by mortgage, the description should include the:

- civic address (if applicable),
- legal description,
- mortgagor(s),
- mortgagee(s),
- total balance owing on the mortgage at the date of death,
- deceased’s share of the total balance,
- type of mortgage (i.e., first or second mortgage, or other such information), and
- date when the mortgage is due and payable.

Include accrued interest in the calculation. Accrued interest is also required for the year of death income tax return.

Finally, for leasehold interests, the description should include:

- civic address (if applicable),
- legal description,
- lessor,
- lessee, and
value of the leasehold interest.

Personal property
The following lists the description requirements for various forms of personal property. (Note the provisions of s 29 of the EAA. You may wish to reflect charges or liens in Form NC 7 in a manner similar to mortgages against real property.)

For cash, the description should include the:

- amount, and
- value of any foreign currency converted into its equivalent in Canadian currency (use the exchange rate at date of death).

For cheques that remain uncashed at the date of death, the description should include the:

- payor,
- amount, and
- value in Canadian currency.

The estate is entitled to receive the deceased’s federal Old Age Security cheque, GST credit cheque, and Canada Pension Plan cheque for the month of death. The estate is only entitled to private pension cheques and annuity payments payable prior to the date of death.

For money on deposit, the description should include the:

- name and branch of the financial institution,
- address of the institution,
- type of account,
- number of account (often only the first four digits and the last four for security reasons),
- owner(s), and
- balance of the account (principal and accrued interest).

Confirm the balance at the date of death with a letter from the financial institution. Accrued interest must be declared to the date of death.
For **life insurance**, the description should include the:

- company name,
- policy number and/or certificate number,
- owner,
- proceeds or value,
- outstanding loans, and
- beneficiaries.

For **annuities, pensions, and death benefits**, the description should include the:

- company or institution name,
- certificate or annuity number,
- owner,
- terms of payment,
- guaranteed period (if any),
- present value, and
- beneficiaries.

Obtain written confirmation from the insurance company as to the amount payable under any life insurance policies or annuities. The same applies to benefits under pension plans and annuity contracts.

For **Canada Pension Plan benefits**, the description should include the:

- lump sum death benefit, if any, and
- any other benefits.

For **RRSPs and RRIFs**, the description should include:

- company name,
- amount,
• beneficiary, and
• type of investment.

For death benefits from fraternal organizations, unions, etc., the description should include the:

• name of organization,
• amount of benefit, and
• beneficiary.

For book debts and promissory notes, the description should include the:

• amount,
• date,
• interest rate,
• payor,
• payee,
• maturity date, and
• value at date of death (including interest to date of death).

Also, take care in valuing receivables based on the likelihood of collectability.

For bonds and term deposits, the description should include the:

• face value,
• name of issuer,
• issue or series, or issue date,
• due date,
• interest rate and dates of payment,
• certificate number(s),
• name in which they are registered (or whether they are in bearer form),
market value,
coupons attached,
accrued interest,
matured coupons, and
physical location at death.

For **stocks, stock options and warrants**, the description should include the:

- company name,
- number and class of shares,
- certificate number(s),
- registered owner(s) (if in street form or bearer, so state),
- market value per share,
- date of the certificate,
- time for exercise,
- where transferable (when shares are not in bearer form),
- physical location at death, and
- dividend rate.

For **household goods and personal effects**, the description should include the:

- item, and
- value.

In most cases, it is sufficient to describe household goods and personal effects by a general category. The personal representative must place a fair market value on the household goods and personal effects. Typically, these assets have a high replacement cost but a low resale value.

Unless the articles are of substantial value, it may be appropriate for the personal representative to value them rather than to retain a professional appraiser. If any items have
appreciated significantly in value since being acquired by the deceased, it may then be appropriate to obtain a valuation, given the potential income tax consequences.

For **automobiles and other vehicles**, the description should include the:

- make and model,
- year,
- identification (serial) number,
- registered owner(s), and
- value.

A dealer will often disclose the “blue book” value or, for most cars, the value can be ascertained with some degree of accuracy from newspaper or online classified advertisements.

For **business interests** (incorporated and unincorporated), the description of interests should include the:

- particulars (in some detail),
- assets and liabilities, and
- value.

For **Interest in estates and trusts**, the description should include the:

- particulars, and
- value.

Finally, for **art, jewelry, and antiques**, the description should include the:

- particulars, and
- value.

These values are difficult to obtain without retaining a qualified appraiser. A personal representative should first check to see if the deceased had any of these items appraised for insurance disclosure purposes.
Debts and liabilities

The description of debts and liabilities should include the:

- creditor,
- address,
- payment schedule, and
- amount owing.

Contingent liabilities and guarantees should also be described.

4 PROPERTY THAT DOES NOT PASS TO A PERSONAL REPRESENTATIVE

4.1 Joint tenancy

Joint tenancy is a legal method of holding an asset where the parties own property jointly, and on the death of one joint tenant, the asset passes to the surviving joint tenant. By contrast, a tenancy-in-common is a form of ownership where each tenant holds an undivided interest in property (or a stated actual interest, such as a 1/3 interest). Upon the death of one tenant-in-common, the undivided or actual interest passes to the personal representative and is dealt with as part of that deceased owner’s estate.

Ensure that property registered in joint tenancy is truly intended to have rights of survivorship and is not merely registered jointly for convenience, with no intention that survivorship rights apply. Generally, if property is registered in joint tenancy with rights of survivorship, the asset is not an estate asset and it will pass directly to the surviving joint tenants. It is possible to demonstrate that this was not the intention when the asset was made joint and thus avoids this result. This is difficult if no documentation exists, for example, a trust agreement or a letter of intention.

The Supreme Court of Canada in Pecore v Pecore, 2007 SCC 17, 2007 CarswellOnt 2752 reversed the common law presumption of advancement as between parent and child (that the right of survivorship is presumed) to a presumption of a resulting trust. As a result, a child must provide evidence that his or her parent intended the right of survivorship to prevail. The presumption between spouses is the reverse to parent and child (i.e., it is presumed that the spouse intended the right of survivorship to the other spouse).
Survivorship

The WSA provides that when 2 or more people die at the same time or in circumstances making it uncertain as to who died first, it is deemed that each person predeceased the other or others (s 5).

The exceptions to this deeming provision are where:

- a contrary intention is found in the will,
- sections 685 and 737 of the Insurance Act, RSA 2000, c I-3 [Insurance Act] (regarding simultaneous deaths) apply, or
- a statute provides a different result than that provided for under the WSA.

Sections 685 and 737 of the Insurance Act provide that where a beneficiary and the person whose life is insured die in circumstances that render it uncertain as to who died first, the beneficiary is presumed to have predeceased the insured. The proceeds of the policy of insurance will then be paid either to the surviving beneficiaries, if any, under the policy of insurance, or if none, to the personal representative of the deceased insured.

Legal and equitable ownership

Legal ownership does not automatically equate to equitable or beneficial ownership. Inquiries must be made to determine the equitable or beneficial ownership of an asset. Only where there is a joint tenancy in equity will the beneficial interest pass to the surviving joint tenant.

Severance

Joint tenants may sever the joint tenancy. The effect of severance is to convert the joint tenancy into a tenancy-in-common. Prior to death, severance of the joint tenancy may be effected by: (a) transferring the title, or (b) agreement by the joint tenants.

With respect to a transfer of title, s 65 of the Land Titles Act, RSA 2000, c L-4 [Land Titles Act] provides as follows:

The Registrar shall not register a transfer that has the effect of severing a joint tenancy unless

(a) the transfer is executed by all the joint tenants,
(b) all the joint tenants, other than those executing the transfer, give their written consent to the transfer, or

(c) the Registrar is provided with evidence satisfactory to the Registrar that all the joint tenants who have not executed the transfer or given their written consent to the transfer have by

(i) personal service, or

(ii) substitutional service pursuant to a court order,

been given written notice of the intention to register the transfer.

In *Bank of Montreal v Pawluk*, [1994] 10 WWR 75, 1994 CarswellAlta 170 at para 67 (Alta QB), it was held that the predecessor section to s 65 of the *Land Titles Act* specifically allows a joint tenancy to be severed if there is consent or on proof of notice.

Relatedly, joint tenancy may also be severed by agreement among joint tenants. This is done by an express or implied agreement between all of the joint tenants. The agreement need not be registered to be binding.

It is not clear whether the commencement of divorce proceedings severs a joint tenancy.

**Succession**

A will that disposes of property held in joint tenancy does not have the effect of severing the joint tenancy.

### 4.2 Life insurance policies and proceeds

**Succession**

An owner of a life insurance policy may designate a beneficiary to receive the proceeds of that policy upon the death of the life-insured. The *Insurance Act* permits a beneficiary designation that does not need to comply with the provisions of the WSA.

If a named beneficiary survives the insured, and the designation has not been revoked, then the proceeds from the policy pass directly to the named beneficiary.

**Designation and revocation**

The designation of a beneficiary of the proceeds of a life insurance policy may be made within the actual policy, or by a later declaration (see the *Insurance Act*, s 637(g) for the definition of a declaration). Such a designation can be either irrevocable or revocable. A
testator is able to revoke a designation under a policy of insurance by means of a declaration in a will (see Insurance Act, ss 724–725). Therefore, it is important to ensure that if such a declaration has been made in a will, the insurer should be notified of the declaration as soon as possible. However, a general revocation clause in a will does not revoke any beneficiary designation. Also, note that the document latest in time is the effective designation document.

Survivorship

Under s 728 of the Insurance Act, where the beneficiary under an insurance policy predeceases the insured, and no disposition of the share of that beneficiary is provided for in the insurance contract or by a declaration, then the share goes to any surviving beneficiaries in equal shares or, if there are no surviving beneficiaries, to the insured or his or her estate.

Accidental death and accident insurance

Accidental death insurance is defined as a life insurance contract whereby the insurer undertakes to pay an additional amount of insurance money if the death of the insured occurs by accident.

Accident insurance is covered under Part 5, Subpart 6 of the Insurance Act dealing with accident and sickness insurance (ss 695–749). The designation of beneficiaries is the same under these policies as for other insurance policies.

4.3 Pensions and retirement plans

Under s 71(1) of the WSA, a person may designate a beneficiary to receive, after that person’s death:

- benefits arising out of an employment pension plan, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees, former employees, agents or former agents of an employer or their beneficiaries or dependants,
- annuity arrangements, and
- a RRSP, a RRIF, and/or a TFSA.

Also under s 71(2) of the WSA, a person may designate a beneficiary to receive a benefit payable under one of these plans on his or her death by will, by an instrument signed by him
or her, or by an instrument signed by someone else on his or her behalf, at his or her direction and in his or her presence. There are also provisions dealing with revocation of such designations at a later time (WSA, ss 71(2)–(17)).

Registered Retirement Savings Plan

RRSPs were created by the Canadian government under the Income Tax Act, RSC 1985, c 1 (5th Supp). Effectively, the individual who purchases the contract from a person who is licensed, or otherwise authorized to sell such contracts, can designate a beneficiary either under the terms of the purchaser’s will, or in accordance with the WSA (s 71). If the designated beneficiary survives the RRSP purchaser, then the proceeds of the plan are transferred to that surviving beneficiary. If the designated beneficiary predeceases the RRSP purchaser, then the proceeds are transferred to the surviving beneficiaries or, if no surviving beneficiaries, then to the personal representative of the purchaser’s estate.

There is some question as to whether the RRSP proceeds form part of the deceased’s estate if the beneficiary is someone other than the estate. It is clear that, because of the provisions of the Insurance Act, insurance-funded RRSPs pass directly to the named beneficiary, do not form part of the deceased’s estate, and are not subject to the claims of creditors of the deceased. However, the law with regard to non-insurance funded RRSPs continues to evolve. There is some case law to suggest that these too are not part of the deceased’s estate and should not be subject to the claims of creditors (Kiperchuk v R, 2013 TCC 60, 2013 CarswellNat 1928).

Registered Retirement Income Fund

An RRSP plan holder may have purchased a RRIF during their lifetime. A RRIF is a type of annuity that allows the plan to earn investment income tax-free, while payments out of the plan are taxable in the hands of the recipient. RRSPs must be converted into RRIFs in the year the plan holder turns 71.

The issues with respect to designation of beneficiaries under RRIFs are the same as those related to RRSPs.

Employee pension plans

There are both public sector pension plans and private sector pension plans, each with their own legislation and plan rules.
Public sector plans include those under the Employment Pension Plans Act, SA 2012, c E-8.1 [Employment Pension Plans Act]. The Employment Pension Plans Act governs certain types of pensions. Where a member (as defined in s 1(1)(gg)) who is not yet in receipt of his or her pension benefits dies, benefits are payable to the following, in order of entitlement priority (s 89):

1. the surviving pension partner, or
2. if there is no surviving pension partner, by way of a lump sum payment to the designated beneficiary, or
3. if there is no living designated beneficiary, by way of a lump sum payment to the personal representative of the estate in his or her capacity as personal representative.

Where an individual dies after commencing receipt of pension benefits, the benefits may be payable to the surviving pension partner depending on the pension clause at the time he or she took the pension.

Section 1(3) of the Employment Pension Plans Act provides the following definition of pension partners:

Persons are pension partners for the purposes of this Act on any date on which one of the following applies:

(a) they

   (i) are married to each other, and

   (ii) have not been living separate and apart from each other for a continuous period longer than 3 years;

(b) if clause (a) does not apply, they have been living with each other in a marriage-like relationship

   (i) for a continuous period of at least 3 years preceding the date, or

   (ii) of some permanence, if there is a child of the relationship by birth or adoption.

The above commentary is subject to s 71 of the WSA, which allows certain variations in pension plan benefits. Periodic payments may be replaced with a one-time lump sum or a decrease in the amount of the periodic payments. The pension, or part of it, may be converted on a prescribed basis, to a payment or series of payments, for a shorter fixed term.
4.4 Canada Pension Plan

Three types of benefits are provided on death under the Canada Pension Plan, RSC 1985, c C-8:

- death benefits payable to the personal representative that form part of the estate and are taxable as income in the year of death,
- survivor’s benefits payable to the contributor’s spouse or common-law spouse that do not form part of the estate, and
- survivor’s benefits payable to children under 18, or over 18 but under 25 and in full time attendance at school, that do not form part of the estate.

Where a deceased had remarried and had previously entered into a settlement with his or her former spouse regarding Canada Pension Plan entitlement, the survivor’s benefits to the widow or widower from the new marriage may be reduced due to the former spouse’s entitlement to the Canada Pension Plan benefits.

4.5 Other plans

Other pensions are governed by unique statutory provisions. Some are governed by federal legislation. In either case, consult the appropriate legislation.

Private sector pensions are governed by their particular terms. The plan administrator must be consulted to determine the particulars.

Section 71 of the WSA entitles a participant to designate a person to receive a benefit payable under plans defined in that section of the WSA.

4.6 Gifts made in contemplation of death

A donatio mortis causa is a gift of personal property by a party in contemplation of death, on the condition that it will belong to the donee if the donor dies, but not otherwise. The gift must have been delivered to the donee prior to the donor’s death for delivery to be complete.

Real property is excluded from these types of gifts. The Alberta Court of Appeal in Dyck v Cardon (1984), 17 ETR 54, 1984 CarswellAlta 284 held that “the weight of judicial opinion is that real property cannot be the subject of a donatio mortis causa” [italics added] (para 11).
Further, there must be clear and unequivocal evidence showing a thought, fear, or apprehension of death to indicate that a gift was made in contemplation of death ([Anderson v Patton, [1947] 2 WWR 837, 1947 CarswellAlta 64 (Alta SC)]). A gift of money made in contemplation of death may be charged by the donor with the payment of expenses ([Cooper v Severson (1955), [1956] 1 DLR (2d) 161 (BCSC)]).

4.7 Bankrupt estate

If a receivership order is made after death, a deceased’s property vests in the bankruptcy trustee and the personal representative has no further standing.

4.8 Statutory benefits

Various statutes provide that benefits are payable to spouses, common-law spouses, children, or other dependants. Any such entitlements should be carefully reviewed and considered.

4.9 Voluntary payments

An employer may make voluntary payments directly to a person (e.g., the deceased’s spouse, children, etc.) in recognition of the deceased employee’s service. These payments may not be part of the deceased’s estate.

4.10 Interests in trusts

If the deceased was the beneficiary of a trust, the terms of the trust must be examined to determine if the deceased’s estate will receive a benefit.

5 LEGISLATION AFFECTING TRANSMISSION AND TRANSFER OF ASSETS

5.1 General

While either a will or the provisions of the WSA guide the transfer and distribution of a deceased’s assets, further legislative intervention can create what is perceived to be a more fair and equitable result. The legislation that can alter the scheme of distribution in a will or an intestacy involves situations in which the spouse, adult interdependent partner [AIP], or other dependants of a deceased are involved. A personal representative must be made aware of various statutes that authorize alterations to the dispositions made by the deceased. What follows is a comprehensive, but not exhaustive, list.
5.2 Family maintenance and support

The Dependants Relief Act, RSA 2000, c D-10.5 was repealed when the WSA came into force. Section 88 of the WSA now addresses situations where the deceased does not make “adequate provision” for a family member (as defined in s 72(b) of the WSA). In such situations, the court has authority to order whatever provision it determines to be adequate “for the proper maintenance and support of the family member” (WSA, s 88(1)). Family members have 6 months after the issuance of the grant of probate or administration within which to bring any such application (s 89(1)). During that period, a personal representative “shall not distribute any portion of the estate” unless all the family members agree or a court so orders (s 106(1)). Failure to comply can render a personal representative personally liable to a successful claimant (s 106(2)). Under s 89(2), the court may allow an application outside the 6-month application period where there are undistributed assets remaining in the estate.

Where a spouse or AIP does not receive the entire estate or where a child is deemed to be a dependent, s 11(1) of the EAA requires that the spouse, AIP, or dependent child receive notice of their rights under the WSA.

5.3 Matrimonial Property Act

Where a married couple is living separate and apart or have commenced matrimonial proceedings and the condition precedents of s 5 of the Matrimonial Property Act, RSA 2000, c M-8 [MPA] are met, a spouse can apply for a matrimonial property order which allows the court to “make a distribution between the spouses of all the property owned by both spouses and by each of them” (MPA, s 7(1)). The intervening death of a spouse does not foreclose an application under the MPA, as the surviving spouse has up to 6 months after the grant in which to bring an action (by way of a Statement of Claim). This claim can be made in addition to a claim under the WSA, but there is no extension provision as is permitted under the WSA. Also, it should be noted that the limitation periods in s 6 of the MPA override and may shorten the limitation period after death to less than six months from the date the grant is issued. For instance, if the parties have been divorced for 20 months at the date of death, then the applicable limitation period is 4 months from date of death since the matrimonial property action must be commenced within 2 years from the date of the divorce judgment.

As with the WSA, a personal representative can make no distribution within the noted 6-month period without the consent of the surviving spouse or a court order. Any distribution in
contravention of this can render the personal representative personally liable. As well, the EAA, s 11(2) requires notice be given to the surviving spouse of his or her rights under the MPA, where the spouse does not receive the entire estate. A spouse, for the purposes of the MPA, means a legally married spouse and also includes certain ex-spouses, but does not include AIPs.

For additional information on the WSA’s family maintenance and support provisions, see the topics, “Understanding Family Maintenance and Support” and “Applying for Family Maintenance and Support.”

5.4 Income Tax Act

The personal representative of the deceased has the responsibility of ensuring that all income tax and GST payable to the date of death and at the distribution date are fully paid prior to any distribution being made. The Income Tax Act, RSC 1985, c 1 (5th Supp), s 159(3) makes a personal representative personally liable for unpaid taxes, penalties, and interest where a distribution is made and the estate, as a consequence of the distribution, does not have sufficient remaining assets to satisfy its tax liabilities. To avoid such liability, before making any distributions, a personal representative should apply for a clearance certificate under s 159(2) of the Income Tax Act, certifying that all payments for which the taxpayer (or personal representative, in his or her capacity) is or can be liable for have been paid.

5.5 Estate Administration Act

Under s 21 of the EAA (which deals with devolution of real property), a testator’s real property vests in the personal representative as if it were personal property, despite any testamentary disposition.

5.6 Notice to creditors and claimants

Section 31 of the EAA allows distribution of an estate, providing the notice provisions of the Surrogate Rules have been adhered to and claims filed against the estate dealt with. The personal representative must be aware of the notice periods under other statutes (such as the WSA) prior to any distribution.

5.7 Wills and Succession Act

Where a beneficiary, spouse of a beneficiary, or AIP of a beneficiary acts as a witness to the will, the will is not invalidated but the bequest to the witness, or to the spouse or AIP of the
witness, is void (WSA, s 21(1)). This result can be reversed by the court in certain circumstances under s 40 of the WSA.

5.8 **Dower Act**

A surviving spouse is granted a life estate in the homestead property of the deceased, including mines and minerals (if they are contained in the certificate of title to the homestead of the deceased) (*Dower Act*, RSA 2000, c D-15, s 24 [*Dower Act*]). Any disposition by a will or devolution on intestacy, if passing to a party other than the spouse, is subject to this life estate of the spouse (*Dower Act*, s 18). Where there is more than one homestead, the surviving spouse has 3 months after the date of death to elect, in writing, which homestead is claimed for the life estate. After the 3 month period, if no election is made, the personal representative may apply to the court for an order designating the homestead (*Dower Act*, s 19). The surviving spouse is also given a life estate in the deceased spouse’s personal property that is exempt from seizure under the *Civil Enforcement Act*, RSA 2000, c C-15 (*Dower Act*, s 23).

The *Dower Act* does not apply to AIPs.

5.9 **Surrogate Rules**

A personal representative may choose whether or not to publish a notice to creditors and claimants. If the personal representative so chooses, r 38 of the *Surrogate Rules* requires 1 publication of a notice to creditors and claimants for an estate of $100,000 or less, and 2 publications, separated by not less than 5 days, for estates over $100,000. The publication must be in a newspaper in the area in which the deceased lived or, if the deceased lived outside Alberta, in the area where a significant amount of the assets are found. The form of notice is set out in Form NC 34. (For more information on advertising for claimants, see the materials under the sub-heading “advertising for and notice to claimants” under the heading “Instructions” in “Estate Obligations.”)

5.10 **Public Trustee Act**

Under s 8 of the *Public Trustee Act*, SA 2004, c P-44.1 [*Public Trustee Act*], the Public Trustee may take possession of a person’s property for safekeeping if the Public Trustee is satisfied that:

- after reasonable inquiry, a person cannot be located,
it is appropriate to take possession of the property, and

- it is impracticable or uneconomic to obtain an order under s 7 of the Public Trustee Act.

The Public Trustee will not accept property from a personal representative under s 8 without a court order under s 7 declaring a beneficiary to be a missing person.

6 TRANSMISSION AND TRANSFER PROCEDURES

6.1 Land

All transmissions and transfers of an interest in land involve specific documentation and requirements. These documents, forms, and requirements are set out in Service Alberta, Land Titles and Procedures Manual, (online: http://www.servicealberta.gov.ab.ca/land-titles-procedures-manual.cfm [Land Titles Manual]. It is strongly recommended that anyone working with such transfers refer to this manual, which includes copies of the most commonly used Land Titles Office forms.

Joint tenancy

Since joint tenancy creates a right of survivorship, there is no transfer needed to take the deceased’s name off title. An affidavit from the surviving joint tenant is used to remove the deceased’s name from title. Although this is not the responsibility of the personal representative, the estate solicitor is often called upon to complete the paperwork. The surviving joint tenant must pay all associated costs, however, as this is not an estate expense.

To transfer the deceased’s interest in land to the surviving joint tenant(s), the Land Titles Office requires the following:

- a certificate of death issued by Service Alberta Vital Statistics or an original or notarized funeral director’s certificate of death. (If the original is used, it may be returned, if requested.),
- a statutory declaration confirming the death and joint tenancy (see Form A in the Land Titles Manual, TEN-1), and
- a fee payable to the Land Titles Office.
**Fee simple title**

If a deceased is the registered owner of an interest in land, including mines and minerals, in the Province of Alberta, which is not held in joint tenancy, this interest cannot be transmitted or transferred by the Land Titles Office unless there is a grant of probate or administration from an Alberta court. A court certified copy of the grant must be provided to Land Titles Office, as they will not accept a notarized copy. When transferring interests in land, a personal representative should also remember to address GST issues and any minors’ interests.

**Mortgages of real property**

Where the deceased’s real property is mortgaged, the following is required by the Land Titles Office for a transmission to the personal representative:

- application for transmission on death to the personal representative (see Form A in the *Land Titles Manual*, TRA-1). (Note that as the wording on the form is not entirely accurate, some adjustments will be required to indicate a transfer of an interest in land rather than the transfer of land itself.),
- court certified copy of the Alberta Grant, and
- fee payable to the Land Titles Office.

For transfers to a beneficiary or third party, the Land Titles Office requires:

- transfer of mortgage form (see Form 18 in the *Land Titles Manual*, MOR-1), and
- fee payable to the Land Titles Office.

**Agreements for sale**

Agreements for sale cannot be registered and are generally protected by way of a caveat. For transmission to the personal representative, the Land Titles Office requires:

- a court certified copy of the Alberta grant,
- application for transmission on death to the personal representative (see Form A in the *Land Titles Manual*, TRA-1). (Note that as the wording on the form is not entirely accurate, some adjustments will be required to indicate a transfer of an interest in land rather than the transfer of land itself),
• foreign ownership declaration, where applicable, and
• fee payable to the Land Titles Office.

For a transfer to a beneficiary or third party, the following is required:
• transfer of caveat (see Form 28A in the Land Titles Manual, CAV-1),
• foreign ownership declaration, where applicable, and
• fee payable to the Land Titles Office.

Leases

Leases can be registered or protected by way of a caveat. For transmission to the personal representative, the Land Titles Office requires:

• a court certified copy of the Alberta grant,
• for either a registered lease of an interest in land or a caveat, an application for transmission on death to the personal representative (see Form A in the Land Titles Manual, TRA-1). (Note that as the wording on the form is not entirely accurate, some adjustments will be required to indicate a transfer of an interest in land rather than the transfer of land itself), and
• fee payable to the Land Titles Office.

For transfers to a beneficiary or third party:

• if a lease is registered, use a transfer of lease (see Form A in the Land Titles Manual, TRA-1). If a lease is protected by way of a caveat, use a transfer of caveat (see Form 28A in the Land Titles Manual, CAV-1), and
• submit the fee payable to the Land Titles Office.

Mines and minerals

When dealing with mines and minerals, the same procedures and forms used to transfer fee simple title apply for the transmission to the personal representative.

Similarly, for transfers to a beneficiary or third party, it’s the same procedure and forms as for a fee simple title. Note that the Land Titles Office will not usually accept transfers of
interests of less than 1/20. Also, for the stated value of the interest, the Land Titles Office will, in some circumstances, accept a nominal value.

Caveats (miscellaneous interests in land)

When dealing with a transmission to the personal representative, the following is required:

- a court certified copy of the Alberta grant,
- application for transmission on death to personal representative (see Form A in the Land Titles Manual, TRA-1), and
- fee payable to the Land Titles Office.

For a transfer to the beneficiary or third party, the Land Titles Office requires:

- transfer of caveat form (see Form 28A in the Land Titles Manual, CAV-1), which includes a notice of change of address for service,
- a transfer of a caveat held by the personal representative of the deceased must be accompanied by appropriate evidence under s 120 of the Land Titles Act regarding any minors interested in the estate, and
- fee payable to the Land Titles Office.

6.2 Stocks and bonds

As each security transfer involves fulfilling the requirements of individual fiduciary agents, a comprehensive list cannot be produced. Each transfer agent should be contacted directly for its own particular requirements, since many require that their specific form of transmission be utilized. Often one can get the name and address of a specific company’s transfer agent by accessing the company’s website. However, the following represents a general list of requirements where the certificate is in registered form. If it is in bearer form, no documentation is necessary. In all cases of publicly-traded securities, the signature of the transferor must be guaranteed by a stock broker or an authorized officer of a chartered bank, federal bank, or trust company, using their official “signature guarantee” stamp. (Credit unions and treasury branches are not acceptable.)

If dealing with shares in a company incorporated under Alberta’s Business Corporations Act, RSA 2000, c B-9 [ABCA], refer to s 50 of the ABCA, which outlines the rights of a personal representative or an heir and the documents required to transmit shares of a deceased.
Public companies

For securities in public companies, transmission to the personal representative generally requires:

- an original stock or bond certificate, if issued (signed off on by the power of attorney, usually on the reverse side of the certificate or a separate Power of Attorney form),
- a declaration of transmission, and
- a certified copy of the Alberta grant, unless waived. Some transfer agents will accept a notarized copy of the Alberta grant.

For transfers to a beneficiary or third party:

- if the certificate is registered as “The Estate of John Smith,” a further certified copy of the grant will be required, whereas if certificate is registered as “Fred Smith, Executor of the Estate of John Smith,” this is not necessary. In either case, a stock or bond power of attorney will be necessary.

When dealing with a lost certificate, a securities transfer will generally require a:

- statutory declaration of lost certificate (as each transfer agent has their own format, contact the transfer agent for their particular forms),
- certified copy of the Alberta grant, and
- bond of indemnity and fee (which depends on the value of the lost certificate). The form is provided by the bonding company, usually through the transfer agent.

Private companies

When dealing with securities in private companies, in all circumstances, the company’s articles, by-laws, and any unanimous shareholder agreements must be reviewed as there may be restrictions on transfer or first rights of refusal.

For transmissions to a personal representative, generally there are similar requirements as for a public company (discussed above). The requirement for a grant is at the discretion of the board of directors.
Likewise, a transfer to a beneficiary or third party will likely have similar requirements as for a public company. The same goes for dealing with a lost certificate, however, it is unlikely that a bond will have to be posted when dealing with private companies.

**Canada Savings Bonds**

For reasons not entirely clear, the officials at the Bank of Canada prefer copies of court documents that are notarized with the notarial declaration on a separate cover sheet, as opposed to accepting a court certified copy of probate. The transfer requirements can be obtained from the Bank of Canada or from your local chartered bank.

When dealing with Canada Savings Bonds, transfers to the personal representative will require:

- an original bond certificate,
- a Government of Canada Estate Transfer Form (Form 2351; available online at www.csb.gc.ca), and
- a notarized copy of the Alberta grant.

For transfers to the beneficiary or third party:

- an original bond certificate,
- a Government of Canada Estate Transfer Form (Form 2351), and
- a notarized copy of the Alberta grant.

Where the original bond certificate has been lost, the following is required:

- a statutory declaration from an estate representative, and
- bond of indemnity.

Where the estate is not probated, the Bank of Canada will waive the requirement of the grant in certain circumstances.

One of the advantages of Canada Savings Bonds is that they are redeemable at any time. Nonetheless, there is an advantage in redeeming them at the beginning of a month, because otherwise an entire month’s interest is lost, since interest is only paid on a monthly, and not a daily, basis.
Mutual funds

In most cases, the institution involved will need a copy of the grant. Some may require their own power of attorney form, letter of direction, and a copy of the death certificate. While probate should, in all cases, obviate the need for a death certificate, this is a requirement often insisted upon and it is easier to produce one than to argue unsuccessfually.

Oil and gas royalty units

As a result of Guaranty Trust Company of Canada v Hetherington (1987), 77 AR 104, 1987 CarswellAlta 34 (Alta QB), aff’d (1989) 95 AR 261, 1989 CarswellAlta 94 (CA), leave to appeal to SCC refused (1989) 70 Alta LR (2d) liii, 103 AR 24on (SCC) [Hetherington] (wherein the validity of some royalty trust agreements was placed in doubt), not all units can be transferred until a “patch agreement” is signed. Where a trust is not affected by Hetherington, or where a patch agreement is in place, the following is required:

- copy of the Alberta grant (notarized or certified),
- original certificate,
- declaration of transmission,
- power of attorney,
- acceptance of transferee (the trustee of the Oil Royalty Trust [ORT] may request that the transferee accept the terms of the ORT prior to issuance of the certificate), and
- payment of the cost of issuing a new certificate (varies from trustee to trustee).

Lost certificates require a bond of indemnity. In all situations, contact the transfer agent.

6.3 Life insurance

As an insurance declaration in a will may alter the designation, review the will first. Also, contact each insurance company, whether the beneficiary is the estate or is named in the will, to ascertain the insurance company’s particular requirements. The usual requirements are:

- original insurance policy,
- copy of the Alberta grant,
• payment instructions,
• claims form (provided by the particular insurance company), and
• death certificate.

6.4 Pensions

Contact a plan’s trustee in all cases for its specific requirements, including where a pension contract has a named beneficiary or the estate is the beneficiary, either by name or default. As a general rule, the following will be needed:

• copy of the Alberta grant,
• death certificate, and
• payment instructions signed by the personal representative.

Canada Pension Plan

When a person dies having made contributions to the Canada Pension Plan, the personal representative of the estate can apply for a one-time payment of a death benefit, and a spouse and dependent children can apply for a survivors’ benefit in the form of a monthly pension. Under the provisions of the Canada Pension Plan, a spouse includes a common-law spouse of either gender who has lived with the deceased for a period of 1 year or more. One should not delay the application for benefits, since a delay may result in a loss of benefits because there is a limit on the number of months of retroactive payments. Application forms are available on the Employment and Social Development Canada, Canada Pension Plan webpage.

To apply for the death benefit, the following is required from the personal representative:

• a completed application form, and
• a certified or notarized copy of proof of death (e.g., funeral director’s statement of death or death certificate from Service Alberta).

To apply for the survivor’s pension and children’s benefits, Service Canada requires:

• a completed application form,
• a certified or notarized copy of proof of death (e.g., funeral director’s statement of death or death certificate from Service Alberta),

• a certified or notarized copy of the qualifying children’s birth certificates, if you did not provide their social insurance number, and

• a certified or notarized copy of the marriage certificate, if the deceased was married, or

• if the deceased was living in a common-law relationship, a Statutory Declaration from the deceased’s AIP declaring the same.

In all cases, contact Service Canada or review its website to ensure no changes have been made in the requirements. Also, keep in mind that the process often takes several months.

6.5 Registered retirement savings plans
For the transmission and transfer of benefits from registered retirement savings plans [RRSPs], the requirements and procedure are generally the same as for pensions (see the heading “Pensions”).

6.6 Registered retirement income funds
For the transmission and transfer of benefits from registered retirement income funds [RRIFs], the requirements and procedure are generally the same as for pensions (see the heading “Pensions”).

6.7 Life income funds
For the transmission and transfer of life income funds, the requirements and procedure are generally the same as for pensions (see the heading “Pensions”).

6.8 Annuities
For the transmission and transfer of annuities, the requirements and procedure are generally the same as for pensions (see the heading “Pensions”).

6.9 Banks and other financial institutions
As noted earlier, each institution has its own requirements for transmission and transfer. What follows is generally applicable information, but each institution should be contacted directly in each case.
Accounts
For transmission and transfers involving accounts, banks will generally require:

- a copy of the Alberta grant,
- death certificate, and
- a letter of direction signed by personal representative (or, in some cases, by a lawyer) directing payment of the funds held.

Guaranteed investment certificates/term deposits
For transmissions and transfers of guaranteed investment certificates or term deposits, the requirements are typically the same as for bank accounts. As a general rule, non-redeemable certificates can be redeemed before maturity without penalty on the death of the person in whose name the deposit is held, but the financial institution must be contacted to ascertain its particular requirements.

Safety deposit box
The requirements for safety deposit box transmissions and transfers are generally the same as for bank accounts, above. All banks should allow entry to the safety deposit box, prior to issuance of the grant, to locate a will and itemize assets. Where the original will is found in the safety deposit box, the bank must allow the release of the document to the executor, as it is required to secure the grant. However, it is not uncommon in smaller branches for the manager to refuse to release the will. In that case, consider making contact with a more senior bank official outside the branch to force the release of the will.

Gaining access to a safety deposit box requires a death certificate or funeral director’s certificate of death and the box key. Where the key cannot be located, make arrangements to drill the box, the cost of which is significant and will have to be borne by the estate. All contents (except for the will) must remain in the box until the grant issues (some financial institutions will also release the insurance policy so as to allow the application for benefits under the policy).

In all cases, contact the institution for details. As each financial institution has different internal policies, the safety deposit box issue can present problems. Some institutions will not allow access (even to list the contents) until a grant is issued. This could necessitate the filing of a supplementary affidavit.
6.10 Motor vehicles

*Automobiles, trucks, motorhomes, motorcycles, and other motor vehicles*

In all ownership situations, except joint ownership, a personal representative should, as soon as possible, take a death certificate (or funeral director’s certificate of death), the deceased’s driver’s license, the vehicle registration, and the vehicle plates to a vehicle registry office to cancel the registration. While the vehicle registry has this information on its system, the process will be expedited by the delivery of all of the above.

To transfer ownership, a bill of sale (signed by the personal representative) is all that is necessary. A bill of sale form is available from Service Alberta (online: https://www.servicealberta.ca/pdf/mv/REG3126.pdf).

Where the vehicle has joint owners, the following should be provided on registration of the vehicle for use:

- proof that the insurance coverage has been amended to delete the deceased as the insured,
- death certificate (or funeral directors certificate),
- the registration, and
- a service charge (this amount may vary by registry office and depends upon whether new plates are necessary).

Assuming the deceased’s vehicle registration has been cancelled, a transfer to a beneficiary and subsequent registration for use generally requires:

- a copy of the grant,
- a letter from the personal representative stating that the transferee is entitled to the vehicle,
- registration,
- proof that the transferee has valid Alberta insurance,
- proof of ownership, such as a bill of sale, and
- a service charge (this amount may vary by office and depends upon whether new plates are necessary).
Likewise, after cancellation of the deceased’s registration, a transfer to a third party and subsequent registration of the vehicle for use generally requires:

- a bill of sale signed by personal representative in his or her capacity as representative. (Note that a form of bill of sale appears on the reverse side of the vehicle registration form, and is also available online from Service Alberta),
- proof that the transferee has valid Alberta insurance, and
- a service charge (this amount may vary by office and depends upon whether new plates are necessary).

**Farm machinery**

There is no registry for farm machinery. All that is necessary to convey title is a bill of sale. If the machine has a license plate, the process is similar as for motor vehicles.

### 6.11 Miscellaneous property

**Boats**

The jurisdiction for boat registration falls under Transport Canada. Every watercraft that uses an engine of 10 horsepower or more must be registered and the owner receives a certification of registry with a unique number that is affixed to the bow of the watercraft. Two categories of watercraft are generally recognized: small craft and large craft. Large craft is defined as 15 ton or more (commercial), 20 ton or more (pleasure), or given a special, unique name if required, regardless of size. All other vehicles are defined as small craft. All recreational vessels under 15 gross tons and powered by a 10 horsepower (7.5 kilowatts) engine must be licenced or registered. Licencing is through Transport Canada, the Office of Boating Safety. Registration is undertaken by the Vessel Registration Office of Transport Canada.

For transfers of small craft to a beneficiary, the following is generally required for registration or licensing:

- a copy of the Alberta grant,
- an original or notarized death certificate or funeral directors certificate,
- a letter of direction from the personal representative stating the name of the beneficiary the vessel is to be transferred to,
- a certificate of registry endorsed by the personal representative. (If the certificate has been lost, the personal representative will have to submit a letter stating the circumstances and recite the registration number found on the bow of the boat),
- an application for registry completed by the transferee, and
- transfer fee.

For transfers of a small craft to a third party, all of the above is required (with the exception of the letter of direction), as well as a bill of sale. (Note that Transport Canada has a bill of sale form available on its webpage.

For transfers of large vessels, in all cases, a personal representative must provide a copy of the grant with a notarized or original death certificate or funeral director’s certificate with a letter of what is requested. Transport Canada will then advise as to what is required and the steps to be taken. In general, it is best to refer to Transport Canada for instructions prior to taking any action.

**Furniture and personal possessions**

Generally, these assets are not registered and mere transfer of possession should be sufficient. The personal representative should secure a receipt from the transferee.

**Stamp and coin collections, jewelry, artwork**

As with furniture and personal possessions, these assets are not registered and therefore transfer of possession should be sufficient. The personal representative should secure a receipt from the transferee.

**Traveller’s cheques**

As a general rule, a copy of the grant is required. However, each institution maintains its own requirements and must be contacted for a complete list of the requisite documents.

### 6.12 Assets in foreign jurisdictions

In respect of foreign assets, because the requirements vary substantially from jurisdiction to jurisdiction, contact the jurisdiction in question. Generally, moveable assets follow the law of the domicile of the deceased, while immovable assets follow the law of the jurisdiction where the assets are situated, although you must comply with the administrative requirements of the jurisdiction in question.
6.13 Debts due to the deceased

How a debt is transferred depends on its nature. For example, if the debt is a promissory note, a simple transfer to a beneficiary or third party with notice to the debtor is sufficient. In other instances, such as a contract, the provisions of the contract must be considered to determine if it is assignable. While it may have no provisions for death, it will set out the timing of the repayment of the debt. A personal representative typically must give notice to the debtor of the change of debt holder. The debtor may require some form of proof that the personal representative, in fact, has the authority to effect the change but each situation must be approached on a case-by-case basis.

6.14 Mobile homes

The licensing and registration of mobile homes is handled by the municipality in which it is registered. To transfer ownership, contact the municipality for its own particular requirements. Generally, though, a copy of the grant and a letter of direction from the personal representative are required. Fees for this service will vary between municipalities.

To move a mobile home over 3.05 metres wide, apply for a permit authorizing a wide load, issued under s 62 of the *Traffic Safety Act*, RSA 2000, c T-6 (see s 66 of the *Vehicle Equipment Regulation*, Alta Reg 122/2009). Consider contacting an authorized mobile home mover for procedural information and regulatory requirements.

6.15 Aircraft

All registration and licensing of aircraft is under the jurisdiction of Transport Canada. (For more information, visit the Transport Canada website at: http://www.tc.gc.ca.) All operators of aircraft in Canada must apply for registration of the aircraft. Where a certificate of registration cannot be located, Transport Canada will accept a statement or statutory declaration setting out the details.

The transmission of the registration of an aircraft to the personal representative requires:

- a copy of the Alberta grant, and
- a certificate of registration.

For transfers of aircraft registration to a beneficiary, the following is required:

- a copy of the Alberta grant,
• a previous certificate of registration (with completed application Form 26-0478, located on the certificate),
• a completed application for registration (Form 26-0522 or Form 26-0521),
• continuous proof of ownership documents from the last registered owner to the beneficiary (e.g., letter from the personal representative), and
• a registration fee (cheque is payable to Receiver General for Canada).

For transfers of aircraft registration to a third party who is an individual, the requirements are the same as for transfers to a beneficiary, but a bill of sale is required.

Transfers to a third party that is a company require:

• a copy of the Alberta grant,
• a previous certificate of registration (with completed application Form 26-0478, located on the certificate),
• a completed application for registration (Form 26-0522 or Form 26-0521),
• a bill of sale,
• a certificate of incorporation,
• a copy of minutes electing directors,
• a copy of minutes detailing authorized signatures, and
• a registration fee (cheque is payable to Receiver General for Canada).

6.16 Workers’ Compensation

A Workers’ Compensation pension may be transferable where the deceased was receiving a pension from Workers’ Compensation and later dies as a result of the injury being compensated for, or dies as a result of his or her employment. (For example, the deceased was receiving a pension for a work-related lung disorder and the cause of death is the result of the lung disorder). This pension may be transferred to a spouse, AIP, or dependent children where there is no spouse or AIP, after investigation by the Workers’ Compensation Board [WCB]. (For more information, visit the WCB website at www.wcb.ab.ca.)
For transfers, a personal representative must advise the WCB of the death, in writing, including as much detail as is known; that is, place and date of death (with a notarized death certificate or funeral director’s certificate), whether an autopsy was performed, name and age of spouse or dependent children, and other similar details. The WCB then conducts an investigation to determine its liability towards the survivors and if liability is accepted, a pension will then be transferred at the legislated levels.

6.17 Veterans benefits

In certain circumstances, where a deceased was receiving a disability pension, the benefit may be transferable to a surviving spouse. In all cases, contact Veterans Affairs Canada for requirements and forms (for more information, see online at: www.veterans.gc.ca/eng).

In general, though Veterans Affairs Canada may specify the form to be used, the following are required to transfer a veteran’s benefits to a surviving spouse:

- a declaration from the surviving spouse (where the veteran was living common law, the surviving AIP may be eligible for survivor’s benefits),
- an application form may or may not be required, depending on how the original benefits were applied for (as such, contact the Veterans Affairs Canada in all cases), and
- notarized marriage, death, and birth certificates (though the necessity of these depend on which of the original benefits were applied for – again, check with Veterans Affairs Canada).

6.18 Firearms

There is federal legislation restricting the transfer of firearms. A firearm can only be transferred to:

- an adult (18 years or older) with a possession and acquisition license,
- a business, museum, legion, or other organization with a valid firearms business license, or,
- a public service agency (e.g., a police force, a police academy, or a department or agency of any level of Canadian government).
To legally transfer a firearm, a personal representative must complete the proper forms to ensure that the beneficiary or transferee of the firearm is eligible to have the firearm. The type of transfer form to be used depends on whether the firearm is restricted, prohibited, or non-restricted, and there are transfer and registration fees which must be paid. Consult the website above for more detailed information.
# ESTATE OBLIGATIONS

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1 GENERAL PRINCIPLES

The following is intended as a guide to assist in the task of advising an estate’s personal representative on the procedures involved in dealing with creditors’ claims and the law related to such claims.

1.1 Definitions

Section 22 of the Estate Administration Act, SA 2014, c E-12.5 [EAA] defines “gift,” “mortgage,” and “valid money claim” as those terms relate to the obligations of an estate. These issues must be addressed before any distribution to beneficiaries can be made.

In comparison to the repealed Administration of Estates Act, RSA 2000, c A-2 [Administration of Estates Act], which was replaced by the EAA, the definition of “mortgage” is expanded under s 22(b) of the EAA to include:

- a charge (equitable, legal, or any other nature),
- a lien or claim for unpaid purchase money,
- a security interest as defined in the Personal Property Security Act, RSA 2000, c P-7, and
- an agreement for sale.

The expanded definition will affect a personal representative when ranking debts under s 27(1) of the EAA, as well as when dealing with the satisfaction of a mortgage debt under s 29 of the EAA.

1.2 Duties and liabilities of a personal representative

The general duties of a personal representative, with regard to creditors, are:

1. To ascertain the assets and liabilities of the estate (EAA, s 7(1)(a)),
2. To pay the debts of the estate before distributing the balance of the estate among its beneficiaries (EAA, ss 7(1)(c) and 10(2)(d); Sharp v Lush (1879), 10 Ch D 468), and
3. To perform all contracts made by the deceased and enforceable against the deceased’s estate (Deglman v Guaranty Trust Co of Canada, [1954] SCR 725, 1954 CanLII 2 (SCC) [Deglman]; Angullia v Estate and Trust Agencies (1927) Ltd, [1938] 3
WWR 113, [1938] AC 624 (PC)). However, not all personal contracts made by a testator survive his or her death.

Section 23 of the EAA makes it clear that a personal representative has a personal responsibility in the fulfillment of his or her duties. A personal representative is compellable to discharge all the duties required as part of exercising his or her authority as a personal representative. He or she is subject to all of the duties and responsibilities imposed under the EAA (including the duties and tasks under Part 1 of the EAA), by other laws, by a will, or by a court. It is imperative that a personal representative understand the importance of his or her duties when taking on this task. (For more information on the personal representative’s duties, see the heading “General duties” under the topic “The Personal Representative.”)

The Schedule to the EAA provides examples of activities that may be included as a part of the core tasks of a personal representative referred to in s 7. Review the tasks and activities in this list, especially the ones associated with satisfying debts and obligations of the estate and administration of the estate.

Personal representatives must be advised that they are responsible for settling any debts and liabilities of an estate before distributing it. If they fail to do so, they may be found to be personally liable for those debts. In addition, under s 8 of the EAA, the court may order a personal representative removed if he or she fails to perform a duty or core task.

Personal representatives must also be aware of ss 27 (ranking of debts) and 28 (marshalling) of the EAA. For more information on these sections, see “Ranking and payment of debts.”

Under s 27(1), if there are not enough funds to pay all money claims against an estate, the claims are paid proportionately and without preference or priority. Section 27(2) lists 2 exceptions: a mortgage existing on the deceased’s property during the lifetime of the deceased and a common law priority given to payment of funeral and estate administration expenses.

Where an estate does not have enough funds to pay all the debts and to distribute the gifts of a will, the marshalling rules in s 28 apply. Originating from the common law, these represent the statutory order for classes of property and the order they are to be applied to debts.
Personal representatives should be aware that creditors of an estate can be secured, preferred, or ordinary, and must take note of the different priorities claimed by creditors.

1.3 Claims against the estate

Claims against an estate will normally arise in 1 of 3 situations:

1. Debts incurred by a deceased while alive, which were enforceable against the deceased immediately prior to death. (For more information on debts incurred by the deceased, see “Debts incurred by the deceased”),

2. Debts with respect to the death itself, such as the liability for funeral expenses. (For more information on debts with respect to the death, see the content on “Debts relating to the death”), and

3. Debts incurred by the actions of a personal representative in administering the estate. (For more information on debts incurred by a personal representative, see the content on “Debts incurred by a personal representative.”) Note that these are not debts of the estate included in Form NC 7 (Inventory of property and debts) from the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules], as required under s 95(2) of the Wills and Succession Act, SA 2010, c W-12.2 [WSA].

2 DEBTS INCURRED BY THE DECEASED

The first category of claims concerns the claims enforceable against a deceased before his or her death. A deceased will almost certainly have incurred debts that were enforceable immediately prior to death. These must be paid from his or her estate. Some of the usual debts include loans, credit card balances, utility charges, etc. Other examples of debts enforceable against a deceased that must be taken care of by his or her estate are discussed below.

2.1 Continuing debts

Continuing debts are those that occur on a recurring basis. They cannot typically be cancelled easily. In the case of a continuing debt, it may be beneficial for a personal representative to negotiate a liquidated amount to settle the matter and expunge the debt. Examples of continuing debts include:

- a debt under a settlement agreement to pay spousal or child maintenance, which does not terminate on death. (For more information on spousal and child...
maintenance, see “spousal and child support” under the heading “Debts incurred by the deceased.” For additional resources, see Blair Laven, “Are Child and Spousal Support Obligations Binding upon the Payor’s Estate” (Paper delivered at the Legal Education Society of Alberta [LESA] 48th Annual Refresher Course: Wills & Estates, 19 April 2015), (Edmonton: LESA, 2015); see also Lippolt v Lippolt Estate, 2015 ABQB 118, [2015] 4 WWR 749,

- a debt arising out of an order or agreement under the Matrimonial Property Act, RSA 2000, c M-8 (WSA, s 58(1)(b)),
- leased premises or lease payments, and
- a mortgage entered into by the deceased. Under s 29 of the EAA, the right of a mortgagee to obtain satisfaction of a mortgage debt out of estate property is specifically preserved (formerly s 37 of the WSA and s 39 of the Administration of Estates Act).

2.2 Contingent debts

Contingent debts are those that may be incurred against an estate depending on the outcome of an uncertain future event, such as a court case. Before finalizing an estate, contingent debts must be dealt with, released, or an adequate reserve set aside (Commander Leasing Corporation Ltd v Aiyede, 16 ETR 183, 1983 CanLII 1649 (Ont CA)).

Under s 3 of the Survival of Actions Act, RSA 2000, c S-27, a cause of action can be maintained against the estate of a deceased who has committed a wrong (e.g., liability of a deceased who was involved in a motor vehicle accident). Provision must be made for a contingent liability of this sort before distributing the estate (Re Berry Estate, 10 ETR 152, 1981 CanLII 1753).

A personal guarantee signed by a testator during his or her life is another example of a contingent liability. Provided the guarantee was properly signed, an estate may be liable for future advances. Most guarantees require written notice specifically stating that the guarantor will no longer be liable for future advances.

If a testator was involved with a business that was indebted to a financial institution, his or her personal representative should determine immediately if there is a personal guarantee. If so, written notice should be served on the bank pursuant to the terms of the guarantee to
confirm that the estate will not be liable for any subsequent advances that may be made to the business.

If a mortgage will not be paid out, particular attention must be paid to contingent liabilities that might arise under a *National Housing Act*, RSC 1985, c N-11 [NHA] mortgage-backed security. A release of a deceased’s obligation must be negotiated prior to distribution of his or her estate or the sale of the mortgaged property where the mortgage will be assumed.

### 2.3 Statute-barred or unenforceable debts

A debt that is statute-barred against a deceased should not be paid by his or her personal representative, unless otherwise directed by the will (*Walker v Bostwick*, [1986] 10 BCLR (2d) 75, 1986 CanLII 731 (BC CA)).

A claim against an estate may also be otherwise unenforceable. The claim might not satisfy the *Statute of Frauds*, RSO 1990, c S.19 [*Statute of Frauds*]. As well, a claim might be illegal, against public policy, or be a claim that is personal to the deceased.

### 2.4 Personal (or quasi-familial) relationship between creditor and deceased

**A claim under a contract**

A promise made by a deceased to an individual is enforceable only if it is a valid contract. A claim of this type usually arises where an individual claims that a deceased promised to leave certain property to the individual by will if the individual performed certain services for the deceased during his or her lifetime (*Deglman*).

In these situations, the court must determine if there was a valid agreement between a claimant individual and a deceased, and if so, if the agreement is enforceable for specific performance against the estate. In addressing this issue, the court will turn to the following:

- The intention of the parties to create legal relations (*Ross v Dodd Estate*, 98 AR 229, 1989 CanLII 3442 at para 20 (Alta QB); *Meisner v Bourgaux Estate* (1994), 131 NSR (2d) 244, 1994 CanLII 4371 (NSSC) [*Meisner*]; *Morochove v Adams Estate* (1996), 13 ETR (2d) 95, 1996 CarswellOnt 1137). Without intention, there can be no enforceable contract. A mere promise to give a gift in a will, whether verbal or written, is incomplete. The court cannot make an order against a deceased’s estate for specific performance because this type of gift lacks intention (*Re Hogg Estate* (1987), 83 AR 165, 1987 CanLII 3549 (Alta QB)).
• The certainty of the terms of the contract (Racette v Bearden, [1977] 5 WWR 762, 1977 CarswellSask 90 at para 23 (Sask QB) [Racette]; Leeson v Brentz (1978), 3 ETR 161, 1978 CarswellOnt 521 (Ont Surr Ct); Phillips v Spooner, [1981] 1 WWR 79, 1980 CanLII 2109 (Sask CA)),

• Section 4 of the Statute of Frauds, which provides that actions cannot be brought for certain contracts not made in writing. This can be applied as a defence against an action for an alleged contract, agreement, or promise that a deceased has made to an individual. A contract must be “proven by satisfying s. 4 of the Statute of Frauds unless there has been part performance of the contract” (Swan v Public Trustee, [1972] 3 WWR 696, 1972 CanLII 211 at para 4 [Swan]). A claimant must prove that certain acts amount to part performance (Swan at paras 7 - 8). (See also Deglman; Devereux v Devereux et al, [1979] 2 ACWS 551, 1979 CarswellOnt 2646 (Ont CA); Wegwitz v Mandryk Estate (1980), 6 ETR 104, 2 Sask R 62 (Sask QB); Bakken Estate v Gibbons, 1980 ABCA 38, 12 Alta LR (2d) 72 [Bakken]). Further, a contract relating to land that does not meet the requirements of s 4 of the Statute of Frauds is unenforceable against an estate unless there is sufficient part performance of the contract to enable a court to order specific performance (Deglman).

• Under the Alberta Evidence Act, RSA 2000, c A-18, s 11 [Evidence Act], a court will require corroboration of the evidence of the claimant individual. (See also Swan at para 5; Hink v Lhenen (1974), 52 DLR (3d) 301, 1974 CarswellAlta 176 (Alta SC); Bakken; Murphy Estate v Mclean Estate, 1992 ABCA 240, 96 DLR (4th) 535; Meisner v Bourgaux Estate; Stochinsky v Chetner Estate, 2003 ABCA 226, [2004] 3 WWR 54.)

An individual who asserts a contractual claim against an estate must overcome numerous obstacles to prove the existence of a valid and enforceable contract with the testator. Those obstacles include these:

• Under s 11 of the Evidence Act, one cannot obtain a judgment in the action on the basis of his or her own evidence unless the evidence is corroborated by other material evidence. However, not every fact necessary to prove a claim needs to be corroborated by some other material evidence. It is sufficient if the
corroborating evidence “produces inferences or probabilities tending to support the truth of the plaintiff’s statement” (Bakken at para 39).

- Where services were rendered by a near individual or members of the same household, there is a rebuttable presumption that the services were rendered out of affection, mutual convenience, or familial duty rather than in consideration of a contractual promise (Sprague v Nickerson (1844), 1 UCQB 284, 1844 CarswellOnt 133 (Ont QB); Gerald HL Fridman, Restitution, 2nd ed (Toronto: Carswell, 1992) at 329 - 30 [Fridman, Restitution]; Robert Spenceley, Estate Administration in Ontario: A Practical Guide, 2nd ed (North York, ON: CCH Canadian Limited, 1999)).

- In comparison to business services, services like housekeeping and personal care are harder for an individual to establish that there was a contract.

**A claim under the principle of quantum meruit or unjust enrichment**

A relative who is unable to establish an enforceable contract may still have a claim on the basis of quantum meruit. Quantum meruit, in the context of a contract, means that an individual has earned something of a reasonable value for his or her services. In other words, an individual may be entitled to restitutionary relief in situations where it is clear that the services were requested or freely accepted and the individual did not give them gratuitously or in the hopes of receiving a legacy (Fridman, Restitution at 329–31). The leading case on this topic is Deglman.

An individual may also have a claim based on the principle of unjust enrichment, even if there is no contract or understanding. These claims usually arise between spouses or cohabitants who live in a relationship tantamount to marriage. A series of Supreme Court of Canada cases deal with claims of this nature (see Rathwell v Rathwell, [1978] 2 SCR 436, 1978 CanLII 3 (SCC); Pettkus v Becker, [1980] 2 SCR 834, 1980 CanLII 22 (SCC); Sorochan v Sorochan, [1986] 2 SCR 38, 1986 CanLII 23 (SCC); Rawluk v Rawluk, [1990] 1 SCR 70, 1990 CanLII 152 (SCC); Peter v Beblow, [1993] 1 SCR 980, 1993 CanLII 126 (SCC); Kerr v Baranow, 2011 SCC 10, [2011] 1 SCR 269). See “Adult Interdependent Relationships,” for a full discussion of claims in unjust enrichment. Also see Jason Wilkins, “Kerr v Baranow – The Wages of Sin Revisited” (Paper delivered at LESA’s Matrimonial Property Division seminar 20, January, 2015), (Edmonton: LESA, 2015); and see also Kevin Hannah, “Property of Common Law Spouses” (Edmonton: LESA, 1998).
2.5 Pledges

A commitment by a deceased to make a gift or donation is unenforceable against his or her estate unless the commitment was under seal or amounted to a contract (Dalhousie College v Boutilier Estate, [1934] SCR 642, 1934 CanLII 62 (SCC)). If the pledge does not have the status of a contract, it cannot be enforced unless all beneficiaries consent to the payment of the pledge. If a pledge is truly a contract, the personal representative must honour the pledge under the general duty to perform all contracts made by the deceased and it is thus enforceable against the estate.

2.6 Spousal and child support

If a deceased was obliged to pay spousal or child support under a court order or settlement agreement, any arrears due as of the date of death are a debt of the estate and must be paid accordingly (McLeod v Security Trust Co, [1940] 1 WWR 423, 1940 CarswellAlta 9 (Alta SC); Re Sheppard Estate (1969), 5 DLR (3d) 458, 1969 CarswellNWT 3 (NWT Terr Ct); Ducharme v Ducharme, [1981] 3 WWR 336 at 341, 1981 CarswellMan 73 (Man QB)).

The obligation of an estate to continue to pay spousal or child support after the deceased’s death was unclear under the repealed Administration of Estates Act and the repealed Wills Act, RSA 2000, c W-12. However, s 80 of the Family Law Act, SA 2003, c F-4.5 now binds the estate of a payor in a support order or agreement, unless provided otherwise.

2.7 Matrimonial property claims

A deceased spouse’s money and property, transferred to his or her surviving spouse by an order made under the Matrimonial Property Act, RSA 2000, c M-8 [MPA], is deemed to have never been a part of the deceased spouse’s estate (MPA, s 15).

2.8 Creditor as personal representative or beneficiary


2.9 Defences to creditor’s claims

A personal representative may defend any claim made against an estate, and can make any defence that would have been available to the deceased. The personal representative can:

- deny a claim of indebtedness,
• claim a set-off or counterclaim, or
• submit a defence that a claim is statute-barred or that a claim is unenforceable, such as a gambling debt. (For more information on statute-barred or unenforceable claims, see “statute-barred or unenforceable debts” under the heading “Debts incurred by the deceased.”)

A creditor who brings an action against an estate, pleading the debt incurred by the deceased, names the personal representative as the defendant. If the creditor obtains judgment, he or she is established as a creditor of the deceased and the property of the estate is liable for payment. The judgment, however, does not create personal liability against the personal representative.

There may also be claims personal to a deceased but unenforceable against his or her estate. In that situation, the general rule is that a personal representative must perform the contracts made by the deceased or make compensation out of the estate for non-performance. The exception is contracts involving personal performance by a deceased, in which case the personal representative is not liable for performance (for example, an unfulfilled contract to write a book; see Marshall v Broadhurst (1831), 148 ER 1480, 1 C & J 403).

3 DEBTS RELATING TO THE DEATH

3.1 Funeral expenses

Under s 6 of the EAA, the Cemeteries Act, RSA 2000, c C-3 and its regulations, and the Funeral Services Act, RSA 2000, c F-29 and its regulations, a personal representative has a set of duties and powers with regard to the funeral services of a deceased. There is also a common law duty on a personal representative to see that a deceased is buried in a manner that is befitting of his or her station in life. The expenses that arise from these services are the most common debt incurred relating to a death.

The expenses of a funeral, including the provision of a grave marker, must be reasonable and fair in all the circumstances, considering the size of an estate and the circumstances of a deceased’s life (Hutzal v Hutzal, [1942] 2 WWR 492, 1942 CanLII 151 (Sask QB); Re Chernichan Estate, 2001 ABQB 913, 100 Alta LR (3d) 386 (Alta QB) [Chernichan]). This includes the deceased’s “cultural and religious beliefs, traditions and practices” (Re
Where funeral expenses are reasonable, they are allowed as a part of preferred debts from an estate and the personal representative is indemnified accordingly (EAA s 27(2)(b)).

Fridman, *Restitution* states at 279–80 that “the primary responsibility for insuring the burial of a deceased person falls on the personal representative of the deceased, who will in turn be entitled to an indemnity for expenses in this regard out [of] the estate at first charge.”

See the material under the topic “The Personal Representative” for a full discussion of making funeral arrangements.

4 **DEBTS INCURRED BY A PERSONAL REPRESENTATIVE**

4.1 **Entitlement to incur debts**

It is expected that a personal representative will incur expenses to carry out his or her duties, which expenses are subject to indemnification (Donovan WM Waters, Mark Gillen & Lionel Smith, *Waters’ Law of Trusts in Canada*, 4th ed (Scarborough, Ont: Carswell, 2012)). Section 32 of the EAA refers to a personal representative’s duty to comply with the *Surrogate Rules* and the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules of Court*] and account for the administration of an estate.

4.2 **Entitlement to indemnification**

As well as an indemnity for proper funeral expenses, a personal representative is also entitled, at common law, to be indemnified out of the property of an estate for proper testamentary or administration expenses (*Re Miller Estate* (1963), 43 WWR 83, 1963 CarswellBC 88 (BC SC); *Chernichan* at para 19). Under the EAA as well, these expenses have priority over certain other debts (s 27(2)(b)).

However, a personal representative must account for each expense incurred and payment made during the course of the administration of an estate to the satisfaction of the beneficiaries and the court, if required (EAA, s 32). Under Division 1 of Part 3 of the *Surrogate Rules*, a personal representative is required to provide accounts at regular intervals (r 97). The *Surrogate Rules* specify how these statements are to be done, the contents, and situations where a request for accounting information can be made. If a court decides that the administration costs are excessive, the personal representative will be obliged to repay them to the estate, possibly with interest (*Re Eisenbeis Estate*, 2005 ABQB 63 at para 136, [2015] AWLD 1122; *Chernichan* at paras 22 – 24).
4.3 Examples of administration expenses

The Schedule to the EAA provides examples of activities that may be a part of the core tasks described in s 7 of the EAA. The following elaborates on certain activities listed in the Schedule and the costs associated with them.

Carrying on business

Section 2(f) of the EAA Schedule refers to arrangements for proper management of estate property, which includes the continuation of a deceased’s business operations. Normally, a personal representative will not have the power to carry on a deceased’s business further than is necessary to wind it up. Sometimes a will expressly authorizes an indefinite carrying on of the business, but normally, a personal representative will carry on the business only until he or she can sell it or transfer it to the beneficiaries to whom it is gifted to under the will.

To this extent, there is an indemnity available out of the property of an estate for the proper debts incurred by a personal representative in operating a business to the stage of a sale or transfer. The expenses incurred in administering a business are payable in priority to general creditors. If a personal representative carries on a business further than otherwise empowered to do with a view to making the business a profit-making enterprise and, if in that enterprise, the personal representative has the consent of the creditors and beneficiaries, then those expenses incurred by the personal representative in carrying on the business will properly be expenses to be indemnified out of the property of the estate.

However, a personal representative should be aware that knowledge and non-interference on the part of creditors is not sufficient to assume the consent of the creditors (Wright et al v Beatty et al (1909), 2 Alta LR 89, 1909 CarswellAlta 17 (Alta QB)).

A deceased’s personal projects

On occasion, a deceased will leave an incomplete personal project at the time of death, such as the construction of a home. The personal representative must decide as a discretionary matter whether to finish and dispose of the finished project or find a buyer on an “as-is”
basis. In light of the case law, a personal representative is well advised to act cautiously (see, for instance, \textit{Linsley v Kirstiuk} (1986), 28 DLR (4th) 495, 1986 CanLII 1292 (BC SC)).

\subsection*{4.4 Claims against personal representatives}

During the course of administering an estate, a personal representative can face liabilities based on allegations of improper performance of his or her duties as a personal representative (see the material on under the topic “Accounting and Expenses” for a full discussion of a personal representative’s liability).

\textit{Personal representatives’ standard of care}

Under s 41 of the \textit{Trustee Act}, RSA 2000, c T-8 [Trustee Act], if a trustee acts honestly and reasonably and fairly ought to be excused for his or her actions, a court has the power to absolve him or her from liability. Under s 5(2) of the EAA, a personal representative is a trustee within the meaning of the \textit{Trustee Act}, which means a personal representative can be excused from liability under the \textit{Trustee Act}.

A similar approach can be seen in the EAA. Section 5 of the EAA provides that a personal representative must perform his or her role honestly and in good faith, in accordance with the will, if there is one, and with the care, diligence, and skill that a person of ordinary prudence would exercise in comparable circumstances. He or she must also distribute the estate as soon as practically possible.

However, a different standard may be applied to certain personal representatives, depending on their profession, occupation, or business. If a personal representative possesses or ought to possess a degree of skill greater than that of an ordinary person and if that skill is relevant to his or her role as a personal representative, the personal representative must exercise that greater level of skill when he or she is acting or retained in his or her professional capacity (EAA, s 5(3)).

Devastavit (mismanagement)

A personal representative is under a duty to manage an estate prudently. When he or she mismanages, squanders, or neglects to gather in the property of an estate, that personal representative is guilty of wasting property or committing mismanagement, often known as devastavit. This liability arises both in the case of willful default or reckless carelessness (Re City Equitable Fire Insurance Company Limited, [1925] 1 Ch D 407 at 417 (Eng CA)) or possibly inadvertence (Slemko v Dye (1989), 32 ETR 250, 1990 CanLII 1313 (BCSC)). If devastavit is successfully established by a person prejudiced by those actions, the person is entitled to judgment against the personal representative personally for damage suffered (Commander Leasing Corp Ltd v Aiyede (1983), 16 ETR 183, 1983 CanLII 1649 (Ont CA)). For example, spending lavishly on funeral expenses for a deceased whose station in life or size of estate did not warrant such expenses is devastavit by the personal representative, and the beneficiaries might be able to claim damages for which the personal representative is personally liable.

Breach of trust

Personal representatives are subject to certain fiduciary duties inherent in their position. If they fail in the performance of these duties, they can face personal liability. For example:

- If a personal representative is under a trust, express or implied, to pay a debt but fails to use estate property to make such a payment, he or she is personally liable to the creditor for a breach of trust,

- A personal representative is personally liable where he or she admits an estate has property where, in fact, it has none. This is one reason why it is so important that, if a personal representative is sued as a personal representative of an estate, he or she must be careful to plead properly. Where he or she does not plead that either there is no property or that all property has been fully administered (plene administravit), he or she is presumed to have admitted that there is property to pay a claim. If the fact is that an estate does not have property, the personal representative will be personally liable to that estate’s creditor,

- As noted above, a personal representative is entitled to be indemnified for normal administration expenses. However, where a personal representative contracts personally to pay debts or legacies, he or she will be held personally
liable if there is insufficient property. However, according to some cases, a mere gratuitous statement that a personal representative will pay a creditor is not personally binding (Rann v Hughes (1778), 101 ER 1014, 7 TR 35; Caswell v Steele (1967), 62 DLR (2d) 433, 1967 CanLII 454 (Sask QB)),

- A personal representative can be personally liable if he or she has not properly accounted for all the property of an estate,

- A personal representative can also be personally liable for the cost of litigation. The general rule is that a personal representative is entitled to be indemnified for the costs of litigation out of the estate as a proper administration expense; however, a personal representative risks having to pay the cost personally if he or she loses. This might occur if the personal representative conducted the litigation negligently or exposed the estate to unnecessary litigation. Costs are always in the court’s discretion,

  - If during the course of litigation, a personal representative defends and loses, he or she should plead plene administravit. Failing to do so can result in the personal representative being held personally liable for any costs awarded to the claimant over and above the property of the estate (Marshall v Willder (1829), 109 ER 243, 9 B & Cress 655),

- A personal representative can be personally liable for an improper delegation of powers. In a 1991 case, an elderly person agreed to be appointed administrator of an estate as a favour. He then granted a general power of attorney to a solicitor allowing that solicitor to administer the estate. The solicitor absconded with all of the property of the estate. The court decided that the personal representative had breached his duties by improperly delegating his powers, and he was held personally liable to the estate for misappropriated funds. Although a personal representative can employ agents to assist, as this case shows, he or she should be wary of improper delegation of powers (Wagner v Van Cleef (1991), 43 ETR 115, 1991 CanLII 7168 (Ont SC)).

5 ADMINISTERING ESTATE DEBTS

5.1 Instructions

In setting up a first meeting with a personal representative, request that he or she bring a list of the deceased’s debts (as accurate and complete as possible), as well as details of any
debts relating to the death, such as funeral expenses (including organist, flowers, and any reception). It is good practice to remind a personal representative in strong terms that it is his or her duty to pay all valid debts of the deceased before distributing the remaining property to the beneficiaries. Failure to settle debts before distribution will mean that the personal representative will be personally responsible for paying the debts.

5.2 Searches and Inquiries

A personal representative must make a reasonable and prudent investigation of all possible claims and debts by checking through all of the deceased’s personal records and papers. The personal representative should also:

- write to financial institutions and credit card companies asking for outstanding balances,
- canvass all institutions where the deceased had a line of credit or a credit account and all credit cards should be destroyed,
- ascertain all outstanding utility balances,
- make enquiries into all services rendered to or on behalf of the deceased, such as ambulance or medical expenses incurred, and
- make enquiries into any contingent liabilities, lines of credit, supply contracts, maintenance agreements, buy/sell agreements, etc.

Those familiar with a deceased’s business affairs should enquire into loans and other agreements entered into by the deceased. After death, funeral and other testamentary expenses, such as legal costs and income tax debts, will arise.

As well, in certain circumstances, a personal representative should consider searching the appropriate personal property registries.

Advertising for and notice to claimants

1. Necessity for advertising

A personal representative must decide whether or not to advertise for creditors and claimants. The decision is based on many factors, such as how involved the personal representative was in the deceased’s finances prior to death, how complicated the deceased’s affairs were, and the identity of the beneficiaries of the estate. It is unnecessary
to advertise where a personal representative is the sole beneficiary and has handled the deceased’s affairs for some years. Section 24 of the EAA requires that any advertising be done in compliance with the Surrogate Rules and the Rules of Court.

2. Effect of advertising

If a personal representative advertises in accordance with r 38 of the Surrogate Rules and then distributes the estate after the deadline given in the published notice, any claim brought forward after that time is not enforceable unless the personal representative had actual or constructive notice of the claim (EAA, s 31).

A creditor who makes a claim after the advertised deadline, but before the claim is statute-barred, can enforce the claim against the estate property still held by the personal representative (Smith v Day (1837), 150 ER 931, 2 M & W 684; Re Moody Estate, 2011 ABQB 222, [2011] 12 WWR 740). Additionally, a creditor can trace the property to a beneficiary to enforce the claim.

Should a personal representative choose not to advertise for creditors and claimants, he or she will be personally liable to legitimate creditors whose claims are brought forward after the estate is distributed, up to the net value of the estate.

Formal requirements and publication

Rule 38 of the Surrogate Rules contains the formal requirements for publication of a notice. A notice to claimants must use the proper form and be published or circulated in the area where a deceased usually lived or, if the deceased did not usually live in Alberta, be published or circulated in the area where a significant amount of the deceased’s property is situated.

The notice must be published at least once in the case of an estate with a gross value of $100,000.00 or less (Surrogate Rules, r 38(3)(a)). In the case of an estate with a gross value of more than $100,000.00, it must be published at least twice, with 5 days or more between the publications (r 38(3)(b)).

Under r 39(1) of the Surrogate Rules, a claimant must notify a personal representative of the claim not more than 1 month after the date the last notice is published. If the creditor does not comply with r 39(1), the creditor can then only make a claim against the estate with the prior consent of a court (r 39(2)).
5.3 Proof of claims

Admitted claims

At common law, personal representatives can accept and pay claims that they, on competent advice, believe to be valid (Mayhew v Stone, 26 SCR 58, 1896 CanLII 45 (SCC)).

Verification of claims and deciding contested claims

Personal representatives who have notice of a claim, following publication or otherwise, may require the claimant to verify the claim using a statutory declaration in the proper form. The EAA, ss 25–26 and Part II, Division V of the Surrogate Rules together have a mechanism for use where a personal representative does not agree to all or part of a claim against an estate. Under r 95 of the Surrogate Rules, a personal representative must serve a claimant with a notice of contestation in the proper form (Form C11). A claimant whose claim is contested may apply to a court for an order allowing the claim and setting the amount by filing a notice of claim with an affidavit in proper form (Form C12) and serving it on the personal representative. The application must take place within 2 months of the claimant receiving the notice of contestation, unless a court has waived the time limit (r 96(3)). (For more information on filing the application, see “claims barred” under the heading “Claims on an estate” under the topic, “Technical and Court Matters.”)

5.4 Compromise of claims

At common law, personal representatives can compromise a claim (Re Taubner Estate, 2010 ABQB 60, 485 AR 98; Re Hrycoy Estate, 2004 ABCA 320, 357 AR 329). The risk to a personal representative is that the beneficiaries, upon being asked to approve the accounts, may contest the compromise payment as excessive or unnecessary. Personal representatives and lawyers should therefore proceed cautiously and record all information on the validity of the claim, the projected cost of contesting the claim, and the advice to the beneficiaries of the projected delay in distribution to them if the claim is litigated.

5.5 Ranking and payment of debts

Ranking of debts (insolvent estates)

1. Insolvent estates and bankruptcy

An estate’s personal representative determines the insolvency of an estate when all the assets and liabilities are known. Where the liabilities exceed the assets, a personal representative must proceed with caution so as to avoid personal liability.
The general rule of “secured before unsecured claims” is complicated by Canada Revenue Agency claims and other statutory claims. Claims will be considered on a case by case basis. Where doubt exists, secure a court order to govern payment. For a further discussion on secured and unsecured claims, preferential creditors, and priority of assets, see Anne EP Armstrong, *Estate Administration: A Solicitor’s Reference Manual* (Toronto: Carswell, 2003).

2. Alternate procedures

If there is a deficiency in property, an estate can be administered either under s 27 of the EAA or under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. For proceedings under the EAA, an estate is administered by the personal representative; under the BIA, an estate is administered by the trustee in bankruptcy. For the latter, the personal representative, on behalf of an estate, makes a voluntary assignment into bankruptcy (BIA, s 49(1)). Failing this, the estate is administered under the EAA.

In some cases, it is clear that an estate is insolvent, while in other cases the fact of insolvency is not known until litigation is resolved. For example, someone may be alleging a beneficial interest in property that forms part of an estate, or there may be a question as to the income tax liability for the terminal tax year of a deceased. When a personal representative is considering whether to assign an estate into bankruptcy, he or she should consider these factors:

(a) complexity: if an insolvent estate involves many creditors, large amounts of money, or difficult issues (e.g., liquidation or priorities), the expertise of a licensed trustee in bankruptcy may be required,

(b) control: unless deterred by complexities, a personal representative may wish to control administration of the estate (e.g., to ensure that family members have an opportunity to acquire estate assets at documented fair market value),

(c) remuneration: the opportunity to earn trustee remuneration may be important to the person entitled to act as a personal representative,

(d) risk: before acting, there may be an advantage to negotiating an agreement with all or some of the creditors to protect a personal representative for remuneration and indemnity against proper expenses (e.g., negotiated terms in consideration for creditor consent to administration without bond), and

(e) whether to refer the matter to the Public Trustee.
3. **Similarities**

Under both the EAA, s 27 and the BIA, secured creditors can enforce their security – and they fall outside the priority scheme except to the extent of any deficiency owing after enforcement of the security. Under both schemes, funeral and testamentary expenses are given first priority (BIA, s 136(1); Re Stewart Estate, 50 Alta LR (3d) 170, 1997 CanLII 14784 [Stewart]; Chernichan).

4. **Differences**

The main difference between s 27 of the EAA and the BIA lies in the treatment of unsecured creditors. If an estate is administered under the EAA, all unsecured creditors are treated equally except those under maintenance orders, given priority by virtue of s 20 of the *Maintenance Enforcement Act*, RSA 2000, c M-1. If an estate is administered under the BIA, there are several types of unsecured creditors who are given priority over other unsecured creditors by virtue of s 136 of the BIA.

There are two other differences of note. The BIA provides for a stay of proceedings on an assignment into bankruptcy or a receiving order. The EAA does not provide similar protection. Moreover, the EAA does not affect the priority position of the federal crown, and it does not prevent a creditor from exercising any contractual right of set off that it may have against the deceased (Stewart). This flows from the fact that provincial legislation does not bind the federal crown.

5. **Administration by the personal representative**

If a personal representative elects to administer an estate under s 27 of the EAA, the following practice is advisable:

- (a) keep funeral expenses modest (for example, grave markers are not considered to be an appropriate expense),
- (b) ensure that any enquiries and replies detailing the debts of the deceased are in writing,
- (c) enquire of any government agency which might have a claim against the deceased, and
- (d) advertise for creditors in the appropriate manner.
Payment of debts

1. Funding payment

(a) Power to sell property

At common law, personal representatives have the power to sell an estate property to fund payment of the lawful debts of creditors. Under s 51 of the repealed Administration of Estates Act, an executor had the specific authority to raise money to fund payment of lawful claims of creditors in certain situations.

The EAA provides a personal representative with a broad power of sale. Section 20 gives a personal representative the power to take possession and control of property, to do anything with that property that the deceased testator could do if alive and of full legal capacity, and to do anything with the property necessary to give effect to the authority and powers of the personal representative. Under s 21, real property in which a deceased had an interest devolves to and vests in a personal representative.

(b) Assets charged with payment

A specific asset can be designated as the primary source of payment of debts by the terms of the will or under s 29 of the EAA. By virtue of that section, property that is charged with payment of money by way of mortgage is liable primarily for the payment of the charge, unless a deceased expresses a contrary intention.

A beneficiary of real property must take the land subject to the mortgage. A personal representative should seek a covenant from the beneficiary to indemnify the estate against the mortgage liability, if it is an enforceable covenant against the estate (i.e., a NHA mortgage).

Take special care with any life insurance policy purchased to ensure that there is sufficient money to pay a mortgage debt. In Perry v Hicknell (1981), 10 ETR 288, 128 DLR (3d) 63, the court interpreted a section similar to s 29 of the EAA in a situation in which a will left to a common law spouse the house that was subject to a mortgage. The deceased had arranged for life insurance payable to the estate, intending that these funds would be available for payment of the mortgage debt. The documents themselves did not evidence this intention. The court held that the spouse acquired the deceased’s equity of redemption in the home and was responsible for the mortgage payments after death, but was not entitled to the life insurance proceeds payable to the estate. It held that a contrary intention must be
found in the documents themselves and not in the events surrounding the transactions.

(c) Marshalling: Order of sale of assets to pay unsecured debts

The value of property in most estates exceeds the debts, funeral, and testamentary expenses and, therefore, a personal representative typically has sufficient means to pay these obligations in full. There will, however, be cases in which the size of an estate, while sufficient to pay these obligations, is not sufficient to pay all of the debts, funeral, and testamentary expenses as well as the gifts made in the will.

Before the EAA came into force, Alberta had no statutory order governing which property of an estate can be resorted to for payment of unsecured debts, funeral, and testamentary expenses. Rather, the common law marshalling rules applied, a set of rules developed over the course of several centuries by the courts in England. Section 28 of the EAA specifically sets out the marshalling rules now applicable in Alberta, based on the recommendations set out in the report from the Alberta Law Reform Institute’s [ALRI], Order of Application of Assets in Satisfaction of Debts and Liabilities, Report for Discussion 19 (Edmonton: ALRI, 2001). Under s 28, the order in which property is applied among beneficiaries toward the payment of funeral and estate administration expenses and unsecured debts and liabilities is as follows:

(i) property specifically charged with the payment of debts or left in trust for the payment of debts,

(ii) property passing by way of intestacy and property passing by way of residue,

(iii) general gifts of property,

(iv) specific gifts of property, and

(v) property over which the deceased person had a general power of appointment that has been expressly exercised by will.

Section 28(2) of the EAA provides that all of the classes mentioned above include both real and personal property. Each asset within a class must, according to its value, contribute proportionally to the payment of funeral and estate administration expenses and unsecured debts and liabilities. The order set out above applies unless the will sets out a contrary intention of the testator. A contrary intention is not signified by:
2. Time for payment

The general rule is that there is an “executor’s year” in which to administer the estate (Re Freeland Estate, 2014 ABQB 705, [2015] AWLD 205). Generally, debts should be paid and an estate distributed within that year. The particular principles are:

(a) interest-bearing debts should be paid as soon as reasonably possible,

(b) non-interest-bearing debts should be paid as soon as reasonably possible, but there is no fixed rule of law that such debts must be paid within one year,

(c) a personal representative who fails to exercise due diligence in paying the debts may be held liable to the beneficiaries for any interest and cost incurred, and

(d) the provisions of a will do not override contractual obligations (Re Tankard Estate, [1941] 3 All ER 458, [1942] Ch 69).

For more information on the executor’s year, see the content on “Executor’s year” in “Administration of the Estate.”

6 RELIEF FROM LIABILITY UNDER CERTAIN AGREEMENTS

Section 30 of the EAA provides that a personal representative is not liable for a lease, agreement to lease, assignment of rents, or similar agreements not fully performed by the deceased during his or her lifetime. For this section to apply, a personal representative must satisfy all of the liabilities related to these forms of agreement until he or she is able to sell the property or assign the agreement. In addition, a personal representative must set aside a reserve from the estate to meet future claims. This amount is fixed by agreement or by a court on application by the personal representative. This does not affect a claimant’s right to pursue a claim against a person to whom property has been distributed.
CHAPTER 11

DISTRIBUTION OF PROPERTY

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1 DISTRIBUTING ESTATE PROPERTY

Section 31 of the Estate Administration Act, SA 2014, c E-12.5 [EAA] mirrors s 37 of the repealed Administration of Estates Act, RSA 2000, c A-2. Section 31(1) of the EAA provides that a personal representative can distribute estate property to those entitled to receive it as long as that personal representative:

- has complied with the requirements of the EAA, the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules] and the Alberta Rules of Court, Alta Reg 124/2010, and
- has been mindful of any claims against the estate that the personal representative has notice of.

It is generally inadvisable for a personal representative to distribute an estate until at least 6 months have passed after the grant is obtained. This is to ensure that the time period for challenging the will has expired (Surrogate Rules, r 70.1). A personal representative should also be mindful of any notice periods under other statutes that may be applicable (e.g., the Wills and Succession Act, SA 2010, c W-12.2 [WSA] or the Matrimonial Property Act, RSA 2000, c M-8). It is also generally recommended that an estate not be distributed before all of the debts and taxes are paid.

Considerations and tasks for a personal representative in the process of distributing the estate property include:

- examining the will for details regarding the distribution scheme of assets and, if necessary, discussing distribution of assets in kind with beneficiaries,
- reviewing any restrictions or time periods imposed on the distribution of estate assets,
- preparing cheques,
- for distributions in kind, providing beneficiaries with securities and obtaining receipts for them,
- providing beneficiaries with personal effects and obtaining receipts or releases from them,
- providing beneficiaries with legacies (cash amounts) and obtaining receipts or releases from them,
• determining whether the will provides for trusts. If it does, the personal representative should arrange them and organize an ongoing review of investments. Also, he or she should arrange a review to ensure an ongoing compliance with the rest of the terms of the trust (including tax issues). The Office of the Public Trustee can be contacted for advice and direction,

• if any cash and belongings remain after specific gifts have been distributed, dividing the remainder (the “residue”) as instructed by the will. Where a will does not have a residue clause, the remainder is distributed as if there were no will. This is provided for in the WSA,

• obtaining releases from residuary beneficiaries, and

• applying for a tax clearance certificate.

(See Centre for Public Legal Education Alberta, *Being a Personal Representative* (Edmonton: Legal Resource Centre of Alberta, 2015).)

2 A PERSONAL REPRESENTATIVE’S LIABILITY

A personal representative choosing to advertise for claims against the estate must do so in accordance with r 38 of the Surrogate Rules. Any claimant then has 1 month from the date of the last notice to submit a claim against the estate (r 39). Section 31(2) of the EAA provides protection to a personal representative for claims made subsequent to that deadline: the personal representative will not be liable for any claim made in respect of any distributed property if, at the date of the distribution, he or she has complied with the EAA and had no notice of the claim on the date of the distribution.

3 RIGHTS OF CLAIMANTS

Section 31(3) of the EAA confirms that a claimant retains the right to pursue his or her claim against the property in the hands of the person to whom it is has been distributed, regardless of the operation of ss 31(1) and (2).
# CHAPTER 12

## ACCOUNTING AND EXPENSES

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1 THE PERSONAL REPRESENTATIVE

1.1 Duty to account

Nature and scope of duty

A personal representative has a strict legal duty under s 32 of the Estate Administration Act, SA 2014, c E-12.5 [EAA] and at common law to render accounts when and if required and must be ready to do so at any time. (See also Surrogate Rules, Alta Reg 130/1995, r 97 [Surrogate Rules]; James Mackenzie, ed, Feeney’s Canadian Law of Wills, 4th ed (Toronto: Butterworths, 2000) at 8-15.) In fact, the affidavit sworn by a personal representative on application for a grant of administration, or a grant of probate, still includes a positive statement from the personal representative to “faithfully administer the estate of the deceased according to law” and the subsequent commitment to “give a true accounting of their administration to the persons entitled to it when lawfully required” (Surrogate Rules, Form NC 2 at para 6).

Where an application is made for a formal passing of accounts, a personal representative must provide an accounting as required by the EAA and the Surrogate Rules. Part 3 of the Surrogate Rules sets out the requirements and describes “an accounting” and the report to be produced by the personal representative advising beneficiaries of the status of the administration of the estate. Depending on the level of accounting required, an accounting can, but may not necessarily, include financial statements.

To whom the duty is owed

A personal representative’s duty to account is owed:

- to all residuary beneficiaries in full and at regular intervals,
- to the court or a person interested in the estate who applies to the court and obtains an order requiring the personal representative to give an accounting of the administration of the estate, and
- to the beneficiary of a specific gift under a will, who will be entitled only to an accounting in respect of that gift and is not entitled to apply for any further accounting to the court once that gift has been received.

Rule 97 of the Surrogate Rules describes this accounting requirement. Interested parties entitled to apply encompass a broad class, as listed in r 57.
**Frequency of accounting**

A personal representative is required under r 97 of the *Surrogate Rules* to give an accounting at regular intervals. At the very least, accounting of the administration of the estate must take place every two years after the date of death or the date of the last period of accounting. On application, the time period may be lengthened or shortened by court order.

**1.2 Bonding**

Section 45 of the EAA provides that, except where otherwise provided, no grant issues unless the applicant has given a bond or other security in accordance with the *Surrogate Rules* and the *Alberta Rules of Court, Alta Reg 124/2010 [Rules of Court]*.

*Residents of Alberta*

The *Surrogate Rules* provide that a bond is not required where a personal representative is a resident Albertan, regardless of whether that personal representative is an executor or administrator (r 28).

*Non-residents of Alberta*

Bonds are required if all personal representatives are non-resident unless the court or the will dispenses with this requirement (*Surrogate Rules, rules 28–29*). The purpose, broadly speaking, is to have the personal representative post security for the proper administration and distribution of the estate in the form of the bond. Absent a bond, a non-resident personal representative would have no assets in the province against which a beneficiary could enforce any judgment or costs award.

*Application by an interested party*

Regardless of the residency of a personal representative, any interested person can apply to the court to request that a bond be required. The bonding requirement is a flexible one that can be altered by the court. See rules 28–31 of the *Surrogate Rules* for the requirements and powers of the court relating to these applications.

Where the requirement for a bond is maintained, bonds can only be obtained from those insurers licensed to provide bonds under the *Insurance Act, RSA 2000, c I-3 (Surrogate Rules, r 28(3))*.

A bond is required for an amount equal to the gross value of a deceased’s Alberta property less, where the court so orders, any amount that would be distributable to the personal
representative as a beneficiary (Surrogate Rules, r 28(4)). Under r 31(1), the court has considerable powers to require a bond, to reduce the bond, to dispense with the bond requirements, to impose conditions on either the personal representative or any others interested in the estate, or to do anything that the circumstances may require. The court does not have the power to require that a lawyer representing an applicant undertake to retain control of the property in the estate as a condition of dispensing with a bond.

### 1.3 Duty to invest

A personal representative has a common law duty, subject to the terms of a will if one exists, to call in and convert the property of the estate that does not meet the standard of the prudent investor rule as set out in the Trustee Act, RSA 2000, c T-8 [Trustee Act].

The “prudent investor rule” was adopted in Alberta on February 1, 2002. It replaced the “legal list approach” that previously existed under the Trustee Act respecting authorized trustee investments.

The overriding requirement of the prudent investor rule is found in s 3(2) of the Trustee Act as follows:

> A trustee must invest trustee funds with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust.

Section 3(5) outlines the factors that a trustee must consider in planning the investment of trust funds.

Prior to the adoption of the prudent investor rule, wills drafters employed clauses to oust the former legal list approach under the Trustee Act. It is difficult to say, at this point, how the courts will interpret these clauses with the adoption of the prudent investor rule. (See Phillip J Renaud, “The Alberta Prudent Investor Rule” (Paper delivered at the Legal Education Society of Alberta [LESA] 35th Annual Refresher Course: Wills, Estates, & Elder Law, April 2002), (Edmonton: LESA, 2002)).

The accounting process may serve as a measure of a trustee’s performance of his or her duty to invest, under the terms of the will or the applicable provisions of the Trustee Act, as the case may be. Note that it is up to the beneficiaries to scrutinize the actions of the personal representative. This is detailed in the notices that beneficiaries receive as part of an application for a grant.
1.4 Record-keeping

Format

The Surrogate Rules do not set out an actual format where a formal or informal passing of accounts is required. However, rules 98 and 99 of the Surrogate Rules govern the information that must be included in financial statements. Therefore, in order to properly account, a personal representative must maintain detailed records and evidence supporting all transactions.

Vouching

A personal representative is not required to produce vouchers for all receipts and payments unless ordered by the court to do so. However, a full explanation of the administration of the trust assets is required under rules 98 and 99 of the Surrogate Rules.

Compensation issues

Where a personal representative’s compensation is at issue, he or she should be able to produce evidence of all steps taken, a description of the exercise of any discretionary powers, time spent, and, where the passing of accounts is final, the statement of the ultimate receipts and disbursements (Surrogate Rules, r 98(1)(i)).

Rule 8 under Schedule 1, Part 1 of the Surrogate Rules says that, where required to give a beneficiary an accounting in which personal representative compensation is shown, the personal representative must give to the beneficiary a copy of Part 1 of Schedule 1 (dealing with personal representative compensation).

The Surrogate Rules provide that a personal representative may pre-take compensation before the complete administration of the estate where that compensation is provided for in the will, where agreed to by the beneficiaries, or where the court so orders. However, should a court later reduce that compensation, then a personal representative must reimburse the estate for the disallowed amount with interest at a rate and for a period that is ultimately determined by the court.

Minors’ estates

The rules relating to accounting apply to the trustee of a minor’s estate.
1.5 Accounting

Levels of accounting

The Surrogate Rules provide a formal accounting procedure with three levels of accounting. In reality, while a formal process to pass accounts before the court exists, those to whom an accounting duty is owed can consent to the accounting. This consent, evidenced by the signing of a release (Form ACC 12), dispenses with the requirement for a formal passing of accounts.

In some instances, it may be impossible to obtain consent. For example, where one or more of the beneficiaries will not sign a release or approve the accounts, where a bond must be discharged, where a beneficiary is missing, or where the beneficiaries have signed releases but there is no agreement as to compensation for the personal representative.

The 3 forms of accounting available to a personal representative are:

1. Formal passing of accounts (Part 3, Division 4 of the Surrogate Rules)
   A formal passing of accounts can take place at the initiative of either the personal representative or a person interested in the estate. The court may also on its own initiative order a formal passing of accounts.

2. Dispensing with a formal passing of accounts (Part 3, Division 3 of the Surrogate Rules)
   Where a personal representative needs an order for the purposes of discharging a bond, where compensation needs to be set, or where not all beneficiaries have signed releases but do not provide an actual objection, a personal representative may apply to dispense with a formal passing of accounts and request a less onerous form of accounting.

3. Informal accounting
   Where all beneficiaries have signed releases, accepting the accounting provided by the personal representative, and no issue arises as to compensation, no formal application to the court is necessary.
Formal passing of accounts

Part 3, Division 4 of the Surrogate Rules describes the process of formally passing accounts. An application for a formal passing of accounts includes financial statements, described in great detail under r 98, accompanied with the documentation as prescribed in r 99.

Rules 107 to 117 of the Surrogate Rules describe the notice and required forms. Beneficiaries are provided with an accounting in advance, including any proposed compensation and the basis upon which that compensation is calculated. Beneficiaries objecting to anything raised in that supporting documentation are required to indicate exactly what matters are in dispute and to provide reasons to the court for such objection (r 114; Form ACC 3).

Where a dispute arises over one or more entries in the financial statements provided by a personal representative, the court may order those entries be examined by an accountant under r 115. The court will determine the nature, scope, and extent of the examination and provide a form of appointment for the accountant. Under r 116, a personal representative is required to fully cooperate, including making available all records and documents to that appointed accountant. Ultimately an appointed accountant must file a report in the specified form and serve a copy of that report by ordinary mail on both the personal representative and persons interested in the estate (r 117).

In the event further hearings are required in order to pass accounts, the accountant may be required to attend.

The fees incurred for this process (legal and accounting) are payable out of the residue of the estate or as otherwise directed by the court. Although solely in the discretion of the court, the court may be guided by common law principles of costs and the applicable Surrogate Rules and Rules of Court. For instance, where an objection against a personal representative was ultimately found to be frivolous, the costs could be ordered against the party making the allegations.

Dispensing with a formal passing of accounts

A personal representative may apply to have a formal passing of accounts dispensed with and to permit an informal passing of accounts by filing and serving those documents described in r 103 of the Surrogate Rules. In this manner, a personal representative is
spared the time and trouble, and the estate itself is spared the expense, of a formal passing of accounts.

Under r 105, even where all residuary beneficiaries have signed releases, the court must still be satisfied that the required documentation is in order and has the power to do any of those things described in r 113.

*Informal accounting - Releases*

Once all residuary beneficiaries have provided releases to a personal representative, the administration of the estate is complete. It is recommended that the releases be filed with the court so there is a permanent record available with the court should the beneficiary forget that they had earlier given such a release.

Beneficiaries are generally interested in saving expenses and the vast majority of estates are dealt with through this informal accounting process.

*Examination by an accountant*

The court can appoint an accountant at the estate’s expense (*Surrogate Rules*, Form ACC 4) and has wide powers to order appropriate remedies against a delinquent trustee. Where a trustee has been guilty of neglect and default resulting in the decline in value of an estate, that decline can ultimately be charged against the trustee. (See *Re O(H) Estate*, 2002 ABQB 575, 2002 CarswellAlta 821.)

1.6 Remuneration of a personal representative

The *Surrogate Rules* do not give any percentages or dollar amounts, nor do they set out a tariff, for setting compensation for personal representatives. However, they do provide a schedule that lists and describes the principles suggested for lawyers and personal representatives. In the absence of specific compensation directives in a will or the consent of beneficiaries, a formal or an informal passing of accounts will be necessary before a personal representative is entitled to take remuneration (*Re Welbourn*, [1979] 3 WWR 113, 4 ETR 122 (Alta Surr Ct); *Re Prelutsky*, [1982] 4 WWR 309, 1982 CarswellBC 90 (BCSC)). However, a personal representative can be reimbursed for reasonable out-of-pocket expenses.
Examples of factors considered by the court in setting a personal representative’s compensation include (Surrogate Rules, Schedule 1, Part 1, r 2):

- the gross value of the estate,
- the care and responsibility required, including the nature and extent of the problems encountered and the amount of revenue receipts and disbursements,
- the amount of time involved in administration, including the complexity of the work involved and whether any difficult or unusual questions were raised,
- the skill and ability demonstrated, including the amount of skill, labour, responsibility, technological support, and specialized knowledge required,
- the time expended,
- the number and complexity of tasks delegated to others, and
- the number of personal representatives appointed in the will, if any.

For more information on a personal representative’s remuneration, see the content on “Personal representative compensation”.

1.7 Discharge of a personal representative

In the absence of releases by beneficiaries, once a personal representative’s accounts have been passed and the court determines that no further accounting or disclosure is required, the court will order the discharge of the personal representative. However, a personal representative is never fully discharged unless he or she has been replaced and the court so orders.

Where a bond was taken out, the court can order the completion of any specifics required by the bond as a condition of discharge.

The court can also direct the manner of transition where one personal representative is discharged and replaced by a new one.

An order discharging a personal representative has the effect of releasing the personal representative in respect of all claims that could be made relating to the administration of the estate. However, it is always open to interested parties to revisit the administration where matters such as fraud or undisclosed acts are raised.
1.8 Discharge of a trustee of a represented adult’s estate

The court has the power to discharge a trustee appointed under the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2 [AGTA] on a final passing of accounts under s 63 of the AGTA. A trustee may be terminated or discharged under s 70 of the AGTA. With that discharge, the court can provide direction with respect to passing of accounts by accepting what is filed with the formal application, dispensing with accounting, or directing a passing.

Where a represented adult dies during the currency of a trustee order, the trustee under s 63(5) of the AGTA must account to the personal representative of the estate of the represented adult. Where the personal representative finds the accounting unsatisfactory, the personal representative can apply to the court requiring formal passing of accounts relating to the estate or whatever part of the estate was dealt with under the trusteeship.

In setting compensation for the trustee of the represented adult, the court considers similar factors to those in the setting of compensation for a personal representative.

1.9 Discharge of an attorney under the Powers of Attorney Act

The court has the power to discharge an attorney on a passing of accounts. See s 10 of the Powers of Attorney Act, RSA 2000, c P-20 [POAA] and specifically s 10(4), which gives the court the authority to grant whatever order for an accounting it considers appropriate in the circumstances.

If a donor dies during any period that a power of attorney is in force, the attorney should account to the personal representative or trustee of the donor’s estate on application under s 10 of the POAA, and subject to whatever the court orders in accordance with its authority under s 10(4) of the POAA.

In setting compensation for an attorney, the court considers similar factors to those in the setting of compensation for a personal representative.

1.10 Guardian compensation

There is no similar compensatory provision for guardians under the AGTA and, in fact, guardians are explicitly prohibited under s 37 of the AGTA from claiming any remuneration, compensation, fees, or allowance for the effort made or time expended on behalf of the represented adult.
1.11 Personal representative compensation

Entitlement to compensation

The common law does not provide for payment of compensation to personal representatives and trustees. The right of personal representatives and trustees to compensation is founded in statute law, in the instrument creating the trust, or in contract.

Section 44(1) of the Trustee Act provides for trustee compensation as follows:

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 by the Court of Queen’s Bench or by any clerk of those courts to whom the matter is referred.

Section 1 of the Trustee Act defines “trustee” to include an executor, administrator, or trustee of the estate of a person.

Further, s 44(4) specifically restricts the application of s 44 in its entirety where “the allowance is fixed by the instrument creating the trust”: (Re Grosch Estate, [1945] 2 WWR 252, 1945 CarswellAlta 49 (Alta CA)).

Part 1 of Schedule 1 of the Surrogate Rules gives authority for personal representative compensation where it is not mentioned in the will.

Instrument creating a trust

Personal representatives’ and trustees’ entitlements to compensation may arise where the instrument creating the trust, such as a will, allows for their compensation. Such entitlement is separate from the statutory right to receive compensation. (See the subheading, “entitlement to compensation” under “Personal representative compensation.”)

If a legacy, other than a residuary bequest, is made in favour of a personal representative, the law presumes that the legacy is made in lieu of compensation. The presumption is rebutted by very slight evidence of a contrary intention by the testator as shown in the will or by extrinsic evidence (Canada Permanent Trust Company v Guinn (1981), 10 ETR 256, 32 BCLR 288 (BCSC)). For example, the presumption has been rebutted where two out of three personal representatives were left benefits under a will (Re Ross (1975), [1976] 3 WWR 465, 1975 CarswellBC 244 (BCSC)).
Where a personal representative’s entitlement to compensation arises from the provisions of a will, and the personal representative is one of the two attesting witnesses to the will, the provision fixing the compensation and the entitlement to compensation may be void. This results from the operation of s 21(1) of the *Wills and Succession Act*, SA 2010, c W-12.2 [WSA], that invalidates any beneficial disposition to a witness of the will or a witnesses’ spouse or adult interdependent partner. However, if the only gift to a witness is a charge or direction for the payment of remuneration for services rendered to an estate as personal representative, s 21(2)(a) acts to dispense with any validity concerns. As well, an application under s 40 of the WSA can be brought seeking an order validating a gift to a witness if the requirements in ss 40(1)(a) and 40(1)(b) are met and the application is brought within the time required by s 40(2) or as extended by the court under s 40(3). (See also *Re Anderson Estate*, 2012 ABQB 517, 2012 CarswellAlta 1422).

Often, where professional personal representatives are involved, the instrument creating the trust incorporates a compensation agreement by reference. This practice has the effect of establishing an entitlement to compensation under the instrument in addition to the entitlement arising from the agreement itself.

*Contract*

The entitlement to compensation of a personal representative or trustee may be fixed by:

(a) an agreement between the testator and the personal representative or trustee (often incorporated by reference into the will), or

(b) an agreement between the personal representative or trustee and the beneficiaries after the testator’s death (*French v Toronto General Trusts Corporation* (1923), [1924] 1 DLR 288, 1923 CarswellOnt 194 (Ont SC)).

### 1.12 Amount of compensation

The principles used in fixing the amount of compensation for personal representatives and trustees are well established in case law. In Alberta, the common law is embodied in Schedule 1, Part 1, r 2 of the *Surrogate Rules*, which sets out the principles used when setting personal representative compensation. However, the *Surrogate Rules* do not give any percentages or dollar amounts for such compensation.
Schedule 1, Part 1, r 2 provides:

The following factors are relevant when determining the compensation charged by or allowed to personal representatives:

(a) the gross value of the estate,
(b) the amount of revenue receipts and disbursements,
(c) the complexity of the work involved and whether any difficult or unusual questions were raised,
(d) the amount of skill, labour, responsibility, technological support and specialized knowledge required,
(e) the time expended,
(f) the number and complexity of tasks delegated to others,
(g) the number of personal representatives appointed in the will, if any.

(See also Toronto General Trusts Corporation v Central Ontario Railway (1905), 6 OWR 350, 1905 CarswellOnt 449 (Ont Weekly Ct.).)

No definite rule can be laid down as to the amount of compensation allowed to a personal representative. Each case is decided on its own merits (Re Macdonald Estate, [1933] 1 WWR 421, 133 CarswellSask 12 (Sask CA)). The size of an estate is not necessarily determinative of the amount of compensation (Sproule et al v Montreal Trust Company, (1979), 2 WWR 289, 1979 CarswellAlta 194 (Alta CA) [Sproule]; Re Douglass Estate, 2002 ABQB 564, 2002 CarswellAlta 752).

Schedule 1, Part 1, r 7 of the Surrogate Rules says that “[i]f a lawyer or other agent performs some or all of the duties of the personal representative, the amount payable to the personal representative must be reduced commensurately.”

The misconduct of a personal representative or trustee in the administration of an estate or trust is a factor in determining compensation. However, the courts are reluctant to disallow compensation totally on the grounds of an error or misconduct in administration, preferring to apply other remedies available against the personal representative or trustee. Examples include damages for breach of trust, disallowance of expenses incurred by the personal representative, and reimbursement orders against the personal representative in his or her personal capacity (see Proctor et al v Bentley (1929), [1930] 2 DLR 6, 1929 CarswellSask 106 (Sask CA); Re Rychliski Estate (1982), 15 Man R (2d) 340, 1982 CarswellMan 277
A professional acting as a personal representative is subject to the same principles related to compensation as are other personal representatives and is not entitled to charge the estate at their professional fee rate unless the will so authorizes (Finbow v Finbow Estate (1997), 213 AR 138, 1997 CarswellAlta 1070 (Alta Surr Ct); Re Salmon, 2004 ABQB 598, 2004 CarswellAlta 1154).

The Suggested Fee Guidelines [Fee Guidelines] were published in 1995 by the Surrogate Rules Committee (as it then was) for guidance only and not as a tariff. The case law that has developed confirms this (see Re Gladue Estate, 2004 ABQB 130, [2004] AJ No 167 at paras 5–9 [Re Gladue]; Re Boje Estate, 2006 ABQB 599, 405 AR 41 at paras 19–24 [Re Boje]). The Fee Guidelines can be found in the appendices.

Based on the Fee Guidelines, there are 4 categories of personal representatives’ fees:

- (ii) fees charged on the gross capital value of the estate,
- (iii) fees charged on revenue received by the estate during the administration,
- (iv) care and management fees charged in trust estates, and
- (v) additional compensation.

**Capital account**

Fees are typically charged against capital receipts and disbursements. According to the Fee Guidelines, 3% to 5% is charged on the first $250,000; 2% to 4% on the next $250,000; and 0.5% to 3% on the balance.

**Revenue account**

Traditionally, fees are only charged against the revenue receipts and not disbursements. According to the Fee Guidelines, compensation on revenue receipts is 4% to 6%.

Professional personal representatives will often charge a pre-taking or reserve fee on revenue receipts at a rate in excess of 6%, but this rate includes a care and management fee component.
Care and management

Rule 3 in Schedule 1, Part 1 of the Surrogate Rules provides that:

Additional compensation may be allowed when personal representatives

(a) are called upon to perform additional roles in order to administer the estate, such as exercising the powers of a manager or director of a company or business,

(b) encounter unusual difficulties or situations, or

(c) must instruct on litigation.

A personal representative may receive remuneration for care and management of estate property only if there is no outright distribution of the property at the date of death and the trust is not varied by agreement amongst the affected beneficiaries or by the court (Surrogate Rules, Schedule 1, Part 1, Rule 1(3)).

Fees that may be charged against the capital of an estate, according to the Fee Guidelines, are 0.3% to 0.6% on the first $250,000 of capital; 0.2% to 0.5% on the next $250,000, and 0.1% to 0.4% on the balance.

Additional compensation

A personal representative may be entitled to charge additional compensation for special services that are outside the realm of an ordinary administration. He or she may be entitled to additional compensation for acting as a director of a company, for preparing income tax returns, or for winding up a business. The amount of additional compensation is dependent on the qualifications and expertise of the personal representative and the extraordinary services rendered to the estate.

Specified by will or contract

The amount of compensation, or the basis on which it is to be calculated, may be fixed by a will or by agreement. Schedule 1, Part 1, r 4 of the Surrogate Rules provides that:

If the compensation payable to the personal representative is fixed in a will, no greater amount can be charged or allowed unless the fixed amount is varied by agreement among the affected beneficiaries or by order of the court.
(See also Re Holmes Estate (1959), 29 WWR 238, 1959 CarswellBC 82 (BCSC); Williams v Roy (1885), 9 OR 534 (Ont HC).)

Expenses

Under r 9 of Schedule 1, Part 1 of the Surrogate Rules, personal representatives are entitled to reimbursement for expenses “properly incurred by them in the administration of the estate, including ... expenses reasonably incurred by the personal representatives in carrying out their duties.”

Similarly, s 25 of the Trustee Act says that a trustee “may reimburse the trustee or pay or discharge out of the trust property all expenses incurred in or about the execution of the trustee’s trust or powers.”

The Alberta Law Reform Institute [ALRI] produced a paper (see Alberta Law Reform Institute, A New Trustee Act for Alberta, Report for Discussion 28 (Edmonton: ALRI, 2015) discussing recommendations for implementing in Alberta the Uniform Trustee Act, which was published by the Uniform Law Conference of Canada in 2012. Section 66 of the Uniform Trustee Act, dealing with reimbursement of expenses, says:

During the administration of the trust and without prior authorization of the court, a trustee may reimburse himself or herself out of the trust property for expenses incurred by the trustee in the administration of the trust.

Wilson J in Goodman Estate v Geffen, [1991] 2 SCR 353, [1991] SCJ No 53 at para 75 (SCC) [Goodman] stated and applied this principle: “[t]he courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. Reasonable expenses include the costs of an action reasonably defended.” The court in Goodman cited, at para 75, Sir Robert Megarry’s statement in Re Dalloway as follows:

In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he was acting unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.

See also Thompson v Lamport (1944), [1945] SCR 343 at 356, 1945 CarswellOnt 97 at para 24 (SCC), where Rand and Estey JJ said:
The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly.

According to Albert H Oosterhoff, *Indemnity of Estate Trustees as Applied in Recent Cases* (Paper delivered to the STEP Toronto Branch Conference, 9 January 2013) [Oosterhoff], the question becomes “what are reasonable or proper” expenses? Oosterhoff suggests that certain general principles have emerged from the older cases which “clearly make sense and continue to be accepted in modern case law” (Oosterhoff at 6). Those principles include:

- Expenses must have been incurred on behalf of or in the course of the administration of the trust or estate. If not, they are not recoverable even though they were incurred in a related matter and, if not incurred, would have had a deleterious effect on the trust. If they were incurred on behalf of the trust, however, they are recoverable,
- Expenses voluntarily assumed by a trustee are not recoverable, and
- Trustees and estate trustees are not entitled to be indemnified for expenses that arise out of their own misconduct.

Oosterhoff notes that the application of these principles is not always clear, but maintains that the principles apply to all trustee costs and expenses, and that (at 6):

It should not matter whether they arose directly in the administration of the estate; whether they are contractual, tortious, or statutory obligations of the trustees; or whether they consist of legal costs incurred in litigation conducted by the trustee or estate trustee on behalf of the estate or trust either as plaintiff or defendant in an action, or as applicant or respondent in applications or motions.

1.13 Procedure for payment of personal representative

Approval by beneficiaries

If all of the affected beneficiaries of an estate or trust agree, a personal representative may be paid compensation, whether it is interim or final. Normally, the personal representative submits a statement of proposed compensation with or as part of the accounting to the
beneficiaries. The approval of the proposed interim or final distribution is generally part of the interim or final release executed by the beneficiaries.

Approval by the court

Where it is not possible to obtain the approval of all the necessary beneficiaries, the court can determine compensation either on a passing of accounts or by an application under s 44(2) of the Trustee Act. An application under s 44(2) is appropriate where the beneficiaries approve the accounts, but take issue with the proposed compensation.

Pre-taking

According to Schedule 1, Part 1, r 6(1) of the Surrogate Rules:

Personal representatives may be paid compensation before completing the administration of the estate if

(a) the will provides for it,

(b) all the affected beneficiaries agree to it, or

(c) the court orders it.

Rule 6(2) goes on to provide that:

If all or any part of the amount of compensation paid to a personal representative under subrule (1) is later reduced by the court, the personal representative must repay the disallowed amount immediately to the estate with interest at a rate and for a period set by the court.

In anticipation of compensation being awarded by the court or approved by the beneficiaries, personal representatives commonly, and from time to time, take compensation before completely administering the estate. This is particularly true where there are no compelling reasons to pass accounts and where compensation is taken on income receipts (Re Welbourn, [1979] 3 WWR 113, 4 ETR 122 (Alta Surr Ct) [Re Welbourn]). A personal representative can also reserve sufficient funds to cover an anticipated award of compensation (Re Welbourn), enter into an agreement with affected beneficiaries, or seek the court’s approval for pre-taking compensation.

There is, however, no statutory authority in Alberta to permit such pre-taking of compensation (although reimbursement for proper out-of-pocket expenses is allowed).
In fact, s 44 of the Trustee Act provides that the fairness and reasonableness of an allowance is something for the Court of Queen’s Bench or any clerk thereof to decide, suggesting that it is improper to pre-take compensation.

**Tax**

Any compensation paid to an individual who acts as a personal representative is not generally subject to GST, unless the services are provided in the course of a commercial activity.

Compensation is taxed as income in the hands of the personal representative, but reimbursement of out-of-pocket expenses is not taxable.

**Priority**

The compensation owed to a personal representative is treated by the court as a lien or charge upon an estate. In the case of an insolvent estate, it has priority of payment after reasonable funeral and testamentary expenses.

**Allocation between personal representatives**

Where there are multiple personal representatives, compensation is determined in the usual manner. However, r 2 in Schedule 1, Part 1 of the Surrogate Rules provides that having multiple personal representatives is a factor to be considered when setting compensation. The compensation paid to two or more personal representatives may be unequal, having regard to the number and value of the services rendered by each (Re Macdonald Estate (1925), [1926] 1 WWR 556, 1925 CarswellAlta 129 (Alta CA); Sproule). Rule 5 in Schedule 1, Part 1 of the Surrogate Rules specifically provides that:

> The compensation once determined must be shared among the personal representatives in proportions agreed to among the personal representatives or as ordered by the court.

### 2 LAWYERS’ CHARGES

Section 33 of the EAA states: “[a]n account for a lawyer’s charges is subject to review and assessment in accordance with the Alberta Rules of Court (AR 124/2010).” Estate practitioners are free to negotiate their own contracts with their clients. The purpose and nature of a solicitor’s retainer in estate matters will dictate the manner in which his or her remuneration is quantified. It may also play a part in determining the source of that
remuneration, whether it be the client personally, the estate, or another party. Clearly defining the role a solicitor will play is fundamental to the relationship with the client and to receiving fair compensation for services rendered. The role or roles assumed by the solicitor will give rise to varying methods of calculating the remuneration.

When a solicitor is retained to act on core legal matters only, a fee is often calculated having regard to the Fee Guidelines. For more information, refer to the appendices. The Fee Guidelines were published for guidance only and not as a tariff (see Re Gladue; Re Boje). Lawyers should always be mindful of the relevant factors set out in the Surrogate Rules and the Rules of Court when determining fees. When a solicitor assumes part or all of the responsibilities of the personal representative for an uncontested estate administration, time multiplied by the hourly rate is frequently chosen as a fair method of assessing the legal expenses. Where a solicitor attends to non-core matters or acts in the course of estate disputes or formal litigation, a fixed fee is very difficult to determine, particularly when taking into account the octopus-like nature of contentious matters in estates and the possibility, though not a certainty, of receiving remuneration through awards of costs. In this instance, hourly billing is a more likely choice for a solicitor and the client.

2.1 The client

A direction in a will appointing a particular person as the solicitor to an estate imposes no duty on the personal representative of the estate to retain that solicitor (Foster v Elsley (1881), 19 Ch D 518 (Eng Ch Div)). Retaining legal counsel for a personal representative is that personal representative’s decision or, in rare cases, is made by appointment of the court under r 62(1) of the Surrogate Rules. However appointed, legal counsel for a personal representative:

- must recognize that the client has multiple interests in the conduct of the estate,
- must always act in the interest of the beneficiaries,
- has an obligation to deal properly with the claims of creditors and other claimants,
- has an obligation to carry out the intention of the testator,
- has certain personal interests in the administration of the estate including compensation for work undertaken, reimbursement of expenses or indemnification for things such as claims or legal fees, and
may also be a beneficiary.

Counsel must recognize these various personal representative interests as potential sources of conflict, potentially requiring resolution. This is fundamental to the unique manner in which fees and costs are dealt with in estate matters.

Remember that as an estate is not a legal entity, the personal representative is the client.

2.2 Retainer agreement

The Surrogate Rules, in particular r 3(1) of Schedule 1, Part 2, provide that a lawyer and an estate’s personal representative must agree to the categories of service that the lawyer will perform and also must agree on an arrangement or amount for each category of fees, disbursements, and other charges. The rule specifies no time frame for such an agreement and therefore any agreement should be flexible enough to accommodate the unexpected. The agreed fees cover all core legal services and non-core legal services, any personal representative’s duties required to be performed by the lawyer, and any other services required to be performed by a lawyer. If an initial agreement is later varied with the consent of the client, ensure the amendments are confirmed in writing.

The initial perception of the services required in any particular estate may change over time, as property and debts are made known and claims made. It is important to differentiate in any fee agreement between actual and potential services. If a fixed fee is not or cannot be determined for any category of service, a formula for calculating the appropriate fees (including unknown contingencies) should be stated in the fee agreement. There is no reason why conditions cannot be attached to the stated fee or the formula which relates to unknown contingencies at the time the fee agreement is made.

2.3 Remuneration for legal services

A solicitor’s entitlement to remuneration for services rendered to a personal representative falls under Schedule 1 of the Surrogate Rules. Schedule 1, Part 2, r 1 provides that a lawyer may charge fees for “core legal services” and “non-core legal services” in the administration of an estate. Furthermore, reasonable costs incurred by a lawyer as disbursements and other charges in performing services in any category are allowed in addition to any fees charged (Schedule 1, Part 2, r 6).
“Core legal services” are defined by reference to a list of services normally rendered by a lawyer for the personal representative in connection with the non-contentious administration of an estate (Schedule 1, Part 2, Table 1 of the Surrogate Rules). Similarly, “non-core legal services” are also defined, as a list of services, in Schedule 1, Part 2, Table 2 of the Surrogate Rules.

The Surrogate Rules do not provide specific fees that may be charged for core and non-core legal services. However, r 5 of Schedule 1, Part 2 provides a list of factors that are relevant in determining the fees charged by or allowed to a lawyer. These include:

- the complexity of the work involved and whether any difficult or novel questions were raised,
- the amount of skill, labour, responsibility and specialized knowledge required,
- the lawyer’s experience in estate administration,
- the number and importance of documents prepared or perused,
- whether the lawyer performed services away from the lawyer’s usual place of business or in unusual circumstances,
- the value of the estate,
- the amount of work performed in connection with jointly held or designated assets,
- the results obtained,
- the time expended, and
- whether or not the lawyer and the personal representative concluded an agreement and whether the agreement is reasonable in all the circumstances.

The Fee Guidelines from the Surrogate Rules Committee are consistent with these factors. Although the Fee Guidelines have no official sanction, they are useful in providing a general frame of reference for lawyers and clients to refer to in the calculation of fees to be charged to the personal representative for legal services.

The Fee Guidelines suggest that if a lawyer performs only the normal core legal services a fee be charged consisting of a base fee and an estate value fee as follows:
Gross Value of Estate | Base Fee | Estate Value Fee
--- | --- | ---
up to $150,000 | $2,250 | 0.5%
over $150,000 | $2,250 | 1%

There is no split on the percentage. That is, on a $200,000 estate, 1% would be applied to the whole aggregate value, not just to the last $50,000. However, no lawyer is bound by these Fee Guidelines, unless he or she agrees with the client that this is the basis for the remuneration for the services specified.

The estate value component is designed to increase at a point where the size of the estate is likely to introduce more complexity in the administration. As per the Fee Guidelines, when calculating the gross value of an estate, the values of the following property are not included:

- all property held in joint tenancy by the deceased and another person,
- all property passing directly to a named beneficiary outside the will,
- Canada Pension Plan payments to a spouse or child of the deceased,
- personal property outside of Alberta if the deceased’s usual residence was outside of Alberta as of the date of death,
- land outside of Alberta, and
- property which does not pass through the hands of the personal representative.

Consider a fee for service relating to property outside of the Alberta jurisdiction, which is still the responsibility of the personal representative. This may require retaining legal counsel in the outside jurisdiction to make an application for an ancillary grant or for resealing of the Alberta grant. Property that is outside of the Alberta jurisdiction is not shown in the Alberta application for probate or administration and does not form part of the aggregate value disclosed in the application, although it remains the responsibility of the personal representative and his or her legal counsel.

The Fee Guidelines suggest that the fee for non-core legal services be on a *quantum meruit* basis (being a reasonable fee for the services rendered). Notwithstanding this, a solicitor and his or her client are free to agree on any reasonable method for the calculation of fees.
2.4 Remuneration for performing functions of a personal representative

The Surrogate Rules provide that a lawyer may charge fees for legal services that involve carrying out personal representatives’ duties (Schedule 1, Part 2, r 2). “Personal representatives’ duties” are defined by reference to certain enumerated tasks normally performed by a personal representative in the administration of an estate (Schedule 1, r 1(c)). As with non-core legal services, these services can be charged on a quantum meruit basis, a fixed percentage, or by the hours expended.

2.5 Remuneration where a solicitor is the personal representative

A solicitor who is a personal representative is entitled to receive remuneration for acting as a personal representative. In addition, the Surrogate Rules provide that when a lawyer is appointed as the personal representative under a grant, he or she may charge additional fees for any core and non-core legal services performed as a lawyer (Schedule 1, Part 2, r 4; s 45 of the Trustee Act).

2.6 Liability for payment

A personal representative is personally liable for his or her solicitor’s account. However, he or she may be indemnified from the estate for the account provided that the legal costs have been reasonably and properly incurred and do not relate to work that the personal representative should have performed himself or herself (Re Lloyd Estate (1954), 12 WWR (NS) 445, 1954 CarswellMan 41 (Man CA) [Lloyd Estate]; Re Roemer Estate, [1928] 2 WWR 566, 1928 CarswellSask 84 (Sask CA)). If a solicitor has been paid from the estate for services that the personal representative is responsible for, the payment is deducted from the personal representative’s remuneration (Lloyd Estate, and Re McCullagh (1983), [1984] 2 WWR 279, 1983 CarswellSask 211 (Sask Surr Ct)).

If a personal representative fails to pay a solicitor’s account, the solicitor may be able to subrogate the personal representative’s right of indemnity to claim directly against the estate for payment of the account, if the will contains a direction for payment of “all my debts, funeral and testamentary expenses” (Morrison v Canadian Surety Co (1954), 12 WWR (NS) 57, 1954 CarswellMan 30 (Man CA)). Furthermore, the solicitor’s claim may be enforced against any company which has bonded the personal representative (Weldon v Canadian Surety Co (1966), 64 DLR (2d) 735, 1966 CarswellNS 28 (NS Co Ct)).
2.7 Form of bill

The Surrogate Rules require a lawyer to present a written statement of fees, disbursements, and other charges to a personal representative, showing the details of the services performed, together with a copy of relevant provisions of the Surrogate Rules (Schedule 1, Part 2, r 7). It is good practice to provide a new client with a copy of this Schedule from the Surrogate Rules as part of an initial fee agreement. The form of bill should delineate the core and non-core legal services and the fees charged for such services. Any additional services relating to personal representatives’ duties should be charged separately. Opening separate files specifically relating to the nature of the services performed (i.e., core and non-core) may assist in billing by segregating the services at the time they are performed.

2.8 Review of bill – assessment procedure

The Surrogate Rules provide that the lawyer or the personal representative may have the lawyer’s account reviewed by the assessment officer under the Rules of Court. The assessment officer may increase or decrease any of the fees, or decrease the disbursements and other charges (Schedule 1, Part 2, r 8).

A beneficiary is not entitled to tax an estate solicitor’s account or to be present at the taxation (Re Ilkew Estate (1988), Action No 8703-26964 (Alta QB)). A beneficiary who disputes the fee of the solicitor for the personal representative must raise that matter in a passing of accounts. For taxation purposes, a beneficiary is not the client of the solicitor retained by the personal representative. A beneficiary can, of course, have their own counsel’s fee taxed.
### CHAPTER 13

#### COSTS

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INTRODUCTION TO COSTS IN AN ESTATE ACTION

The issue of costs relating to an estate action can involve questions like these:

- When should the estate pay a litigant’s costs?
- Should the successful party get party-party costs or solicitor-client costs?
- If party-party costs are appropriate, what Schedule C column is appropriate for those costs?
- Should the unsuccessful party get its costs paid out of the estate?

In deciding these and other issues, Alberta courts have developed some general principles that are consistently applied. What follows is a discussion of those principles, with some details of their application and their interplay with the applicable Alberta Rules of Court, Alta Reg 124/2010 [Rules of Court].

GENERAL PRINCIPLES ON ESTATE COSTS

These are some general principles lifted from the most recent Alberta court decisions discussed in this chapter:

- Costs awards primarily exist for two reasons (McCullough Estate v McCullough, 1998 ABCA 38, 1998 CarswellAlta 84 at para 29 [McCullough]):
  o to take some of the burden off victors, ensure that not all victories are pyrrhic, and so to encourage those who are right to persevere, and
  o to deter those who are wrong,
- The court has authority to award costs in its own discretion, but that discretion must be exercised judicially (Dansereau Estate v Vallee, 2000 ABQB 288 at para 16, [2000] AJ No 533) [Dansereau]),
- The traditional approach to award costs of estate litigation from out of the estate is dead (Chabros v Anderson, 2012 ABQB 517, 2012 CarswellAlta 1422 at para 7 [Chabros]),
- Under the “modern approach” to costs in estate litigation, the court scrutinizes and restricts unwarranted litigation to protect estates from depletion by such litigation (Babchuk v Kutz, 2007 ABQB 88, 2007 CarswellAlta 162 at para 7, aff’d at 2009 ABCA 144, 2009 CarswellAlta 512 [Babchuk]).
• Under the “modern approach,” estate litigation is no longer treated as an exception to the basic rule that costs follow the event (Petrowski v Petrowski Estate, 2009 ABQB 753, 2009 CarswellAlta 2154 at paras 76–78 [Petrowski]; Re Foote Estate, 2010 ABQB 197, 2010 CarswellAlta 513 at para 16, aff’d at 2011 ABCA 1, 2011 CarswellAlta 8, leave to appeal to SCC refused at 2011 CarswellAlta 481 [Foote]). Rather, costs incurred in estate litigation typically follow the event unless the matter falls within a recognized exception, for instance, that a challenge to the estate was reasonable (Petrowski at para 78), or on the basis of a public policy exception recognizing society’s interest in only probating valid wills (Petrowski at para 79). In those cases, the court can exercise its discretion to depart from the general rule and award costs to an unsuccessful litigant (St Onge Estate v Breau, 2009 NBCA 36, 2009 CarswellNB 237 at para 69 [St Onge]),

• Solicitor-client costs are typically awarded only in exceptional cases, particularly where there has been misconduct, bad faith, or unreasonable conduct on the part of the unsuccessful party (Torkelson v Bukkems, 2014 ABQB 678 at para 9, 2014 CarswellAlta 2102 [Torkelson]; Bizon v Bizon, 2014 ABCA 174, 2014 CarswellAlta 812 at para 79),

• The reasonableness on which litigation is based can change during the course of the litigation. A challenge that started out as being reasonable may become unreasonable as additional facts become known (Schwartz Estate v Kwinter, 2013 ABQB 147 at para 117, 2013 CarswellAlta 2949 [Schwartz]).

3 APPLICABLE SURROGATE RULES AND RULES OF COURT

3.1 Applicable Surrogate Rules

As Graesser J noted in Schwartz (para 119), the jurisprudence on costs is subject to statutory or regulatory modification. One of those modifications is represented in r 90(h) of the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules], which provides that the court may direct the payment of costs, including penalizing any person who required formal proof of the will, if it becomes clear during the proceedings that

• the application was frivolous or vexatious,

• the person caused undue delay, or
- the person had no substantial basis for requiring the scrutiny of the court.

In Schwartz, Graesser J said this ( paras 120–121):

... What Surrogate Rule 90(h) does is to supplement the ordinary cost principles. There is nothing in the Surrogate Rules to shelter a losing party from ordinary Schedule C costs or ordinary principles. Instead, Surrogate Rule 90(h) makes it clear that an unsuccessful claimant may be liable for penalty costs if the conditions in the rule are found to apply.

I do not see that the provisions of Rule 90(h) conflict in any material way with the general principles of costs in civil litigation, but they may well start the discussion in estate cases. Indeed, passing over the threshold of frivolous or vexatious, or unreasonable, or having caused delay, gets directly to whether penalty costs should be imposed, and in what amount. Getting over that threshold then gets to the general cases on how the court’s discretion should be exercised in quantifying the costs award.

Graesser J differentiated between regular litigation matters and estate matters, pointing out that it may be that the “misconduct” bar is set lower for an elevated costs award or a penalty award in estate matters than it is for regular litigation matters (para 122). He pointed out that where the court finds it to have been unreasonable at the outset for a party to require formal proof, he or she may well attract an elevated costs award. On the other hand, in regular litigation, parties are generally entitled to their day in court, subject to paying Schedule C costs where they are unsuccessful.

Graesser J concluded that ( paras 123–124):

Because of Surrogate Rule 90(h), it is necessary for me to consider not only the Defendants’ conduct in the estate litigation, but also the objective reasonableness of the Defendants’ positions in that litigation.

Losing makes them potentially liable for Schedule C costs; if they are found to fall within Surrogate Rule 90(h), they are potentially liable for penalty or elevated costs. Misconduct may take those costs beyond mere elevation to indemnification in the form of solicitor and client costs.

Other Surrogate Rules dealing with costs issues include:

- Rules 2(1) and 2(4) provide that matters not expressly dealt with in the Surrogate Rules are governed by the Alberta Rules of Court to the extent that the latter can be applied directly or by analogy,
• Rule 62(3) states that the cost of a lawyer appointed under r 62(2) to act for one or more persons in a class who do not accept the lawyer appointed by others in that class may be paid from the estate only on order of the court,

• Rule 64 (1)(h) - (i) allows the court to order costs to be paid from an estate or by any person who is a party to the application or make any order that the court considers necessary in the circumstances,

• Rule 69 states that the court may order security for costs,

• Rule 74(2) holds that where the court determines that a caveat is frivolous or vexatious, it may order the caveat removed and award costs against a caveator,

• Rule 89 states that a witness at a hearing may be entitled to an allowance under the Rules of Court and any other allowances specified by the court,

• Rule 105(c) allows the court to do anything it could do under r 113,

• Rule 113(2)(k) states that at a hearing to pass accounts, the court may allow and direct the payment of costs, and

• Rule 115(5) holds that when the court orders an accountant to examine a personal representative’s financial statements, an accountant’s fees, disbursements and charges are payable out of the residue of the estate, unless otherwise ordered by the court.

3.2 Applicable Rules of Court

Rule 1.3 of the Rules of Court gives the court general authority to provide any relief or remedies, whether or not those remedies have been claimed or sought in an action.

Rule 10.29(1) states that a successful party to an application is entitled to a costs award against the unsuccessful party, subject to the court’s discretion described in r 10.31.

Rule 10.31(1) says that, after considering the matters described in r 10.33, a court may order one party to pay to another party, as a costs award, one or a combination of the types of awards listed in the rule, spanning from party-party costs to an indemnity of a party’s lawyer’s charges.

Rule 10.33 sets out the considerations for the court in making a costs award. They include taking stock of the degree of each party’s success, the amount claimed and recovered, and
the action’s complexity. It must also consider party conduct, and in particular conduct that serves to elongate the litigation process.

In Schwartz, Graesser J reflected on the interaction between the modern approach, Surrogate Rules, r 90(h), and the Rules of Court (paras 261–262):

... In estate litigation, the ‘modern rule’ applies so litigants start with the general presumption of ‘loser pays’ as with other civil litigation. Surrogate Rule 90(h) then requires an assessment as to whether the position taken by the party seeking costs from the estate, or resisting payment of costs to the estate, was reasonable. The court’s determination of ‘reasonableness’ will inform the decision as to no costs, basic costs, or punitive costs.

Once that determination has been made, Rule 10.31 of the general Rules of Court applies to the quantification of those costs and the exercise of the court’s discretion as to the appropriate column, whether there should be multiples of a column, or the extent to which costs may be elevated up to full solicitor and client costs or even more...

4 The modern approach and its exceptions

The “modern approach” is that costs follow the event, even in estate litigation, subject to certain exceptions.

The following are the “recognized exceptions” to the rule that costs follow the event in modern litigation (Foote at para 21, citing the New Brunswick Court of Appeal in St Onge):

- cases involving the validity of a will,
- cases involving the interpretation of a will or trust,
- cases involving dependant or family relief claims (wills variation cases),
- cases where the cause of the litigation takes its origin in the fault of the testator or those interested in the residue, and
- cases where there are sufficient and reasonable grounds concerning the testator’s testamentary capacity or whether there was undue influence on the testator.

The courts have acknowledged that there may be further exceptions applicable to estate litigation (St Onge at para 71, Re Anderson Estate, 2009 ABQB 663, 2009 CarswellAlta 1874 at para 10 [Anderson]).
5 Estate payment of costs to an unsuccessful litigant

5.1 Six factors

Factors for the court to consider in determining whether to award costs to an unsuccessful litigant payable out of an estate include (Foote at para 16):

1. Did the testator cause the litigation?
2. Was the litigant’s challenge reasonable?
3. Was the conduct of all of the parties reasonable?
4. Was there an allegation of undue influence?
5. Were there different issues or periods of time in which costs should differ?
6. Were there offers to settle?

In her often-cited decision in Babchuk, Moen J applied these 6 factors in deciding whether or not to award costs to an unsuccessful party in estate litigation.

5.2 Causing the litigation

There must be a “substantial link between the testator or beneficiary’s actions and the actual need for litigation” before a court will find that the testator or the beneficiary caused the litigation for the purposes of a costs award (Babchuk at para 9). In Babchuk, Moen J found that the testator’s will had been consistent in his wishes as stated for many years before he died, and therefore, he had not caused the need for litigation (para 12).

In Nelson v Balachandran, 2014 ABQB 765, 2014 CarswellAlta 2322 at para 115 [Nelson], Sullivan J provided these examples of testator conduct causing litigation:

- by making an uncertain or ambiguous will,
- by disinheriting family members who have arguable dependency claims, or
- by making a will in suspicious circumstances.

In Petrowski (para 31), Moen J confirmed that testator fault can include:

- whether the testator has left an ambiguous will,
- whether he had testamentary capacity when he executed the will, and
• whether his behaviour when signing the will gave rise to questions about its validity.

In Petrowski, Moen J found that the challenger had, from the outset, the requisite knowledge and evidence on the issue of testamentary capacity, making the litigation unnecessary and not caused by the actions of the testator (paras 33–36). She dismissed the challenger’s claim to costs payable out of the estate.

The court in Chabros held that it is unreasonable to find a testator has caused litigation by dying intestate (para 25). Rather, dying without a will in Alberta is anticipated by the Surrogate Rules and the legislation, both of which provide for that expectation.

5.3 Reasonable challenges/conduct

“If there is a sufficient and reasonable ground for a challenge, the losing party may properly be relieved from the costs of his or her successful opponent” (Babchuk at para 13). However, “[i]f at the trial the allegations prove to be completely unfounded and the associated litigation is therefore unreasonable, costs should not be awarded to the unsuccessful challenger” (Babchuk at para 17). (See also Anderson at para 10; Petrowski at paras 78–79; Foote at para 16.)

In Babchuk, Moen J found that the challenge to the will had been reasonable at the outset, given that there had been some evidence that the testator lacked capacity to make a will. She found, however, that the challenge ceased being reasonable as more evidence came out (paras 21–23).

In Petrowski, Moen J found that the circumstances surrounding the testator’s capacity, challenged by the plaintiff, “would not have raised suspicions in the minds of a reasonable person in the shoes of the Plaintiff” (para 38), and that the allegations of undue influence were, similarly, unreasonable, making the plaintiff’s challenge unreasonable (paras 39–41). She found that the unsuccessful challenger had gone ahead with a trial notwithstanding the equivocation of his own medical experts, all of which was not reasonable and did not entitle him to costs paid out of the estate (para 45).

In Nelson, Sullivan J held that “[n]ot all uncertainties, irregularities, ambiguities, disinheritances and suspicions will entitle the parties to get costs out of the estate, or to avoid paying costs to the estate as a consequence of unsuccessful challenges, as the threshold is a determination of ‘reasonableness’” (para 115). He went on to confirm that
“reasonableness” can change over the course of a matter before the courts; and that a challenge may start out reasonably but become unreasonable as additional facts become known (Nelson at para 117). In Nelson, the deceased died intestate, leaving a woman claiming to be his adult interdependent partner, a status that the deceased’s brother disputed. The brother applied for advice and directions, which culminated in a finding in favour of the adult interdependent partner. On the issue of costs, the court awarded that partner costs on an elevated scale but less than full indemnity. It declined to order the brother’s costs paid out of the estate, finding that any notion of reasonableness had vanished when the adult interdependent partner swore an affidavit demonstrating the extent and depth of her relationship with the deceased.

5.4 Undue influence allegations

In Babchuk, Moen J said this at para 34:

If an allegation of undue influence or fraud is made in situations where there is very little or no basis for such an allegation, it may be appropriate to order the unsuccessful party to pay costs... In situations where a party would likely be awarded costs for a reasonable challenge on the issue of testamentary capacity, an unfounded allegation of undue influence can result in that party failing to recover any costs, and instead paying costs to the successful party....

5.5 Different costs for different periods of time in litigation

Moen J also commented on different costs for certain time periods in Babchuk (para 44–45):

The court may make separate and distinct decisions regarding costs with respect to individual issues related to the litigation. If an unsuccessful challenger makes one allegation that is reasonable while another allegation is completely unfounded, a different award of costs could be made for the costs incurred with respect to each allegation....

Further, it is possible to make different cost orders with respect to different periods of time. Therefore, if a challenge was reasonable up to a certain date, and unreasonable thereafter, a challenger could be awarded costs or merely bear his or her own costs before that date and be required to pay costs to the other side after that date....

5.6 Offers to settle under the Rules of Court

In Babchuk, Moen J found that, given the generous (and rejected) offer to settle made under r 174(2) of the Alberta Rules of Court, Alta Reg 390/1968, to the challengers early in the litigation, it had not been reasonable for them to carry on with the action all the way to trial
(para 66). She held this to be a factor weighing in favour of those challengers paying double party-party costs.

On the other hand, she also noted that a “special reason” against the challengers paying double party-party costs was the fact that they were the only parties likely to bring to court the doubt about the testator’s testamentary capacity (para 69). Ultimately, Moen J did not award double party-party costs against the challengers in Babchuk.

In deciding on costs in Petrowski, the fact that the unsuccessful challenger had rejected a formal offer to settle was weighed against granting costs paid from the estate to him (para 55). Moen J also noted that an offer to settle made by the unsuccessful party to the estate did not represent a “realistic compromise” and so she discounted it. She ultimately ordered that, given the challenger had been wholly unsuccessful in his challenge, he was to pay the estate’s costs based on Column 5 of Schedule C (and double party-party costs under Column 5 of Schedule C for all actions taken after the formal offer to settle had been made to him). Moen J ordered that the challenger not be awarded any of his costs payable from the estate, and that he was to pay the estate’s party-party costs of the costs application.

6 SOLICITOR-CLIENT (OR FULL INDEMNITY) COSTS IN ESTATE MATTERS

In Dansereau, Veit J confirmed that “(a) judge must be extremely cautious in departing from the normal rule which is that costs are awarded on a party/party scale according to the tariff. In order to award solicitor-client costs, there must be some departure from the ordinary” (para 18).

Hutchinson J’s decision in Jackson v Trimac Industries Ltd (1993), 138 AR 161, 1993 CarswellAlta 310 (Alta QB) at paras 28–37, aff’d on costs, (1994), 155 AR 42, 1994 CarswellAlta 135 (Alta CA) [Jackson], remains an often-cited case on solicitor-client costs versus party-party costs. There, he held that full-indemnity compensation is appropriate in exceptional circumstances.

In Fraser v Menard Estate, 2010 ABQB 208, 2010 CarswellAlta 597 at para 155 [Fraser], Mahoney J quoted from Jackson at some length, and then restated these examples of exceptional circumstances:

1. circumstances constituting blameworthiness in the conduct of the litigation by that party;
2. cases in which justice can only be done by a complete indemnification for costs;

3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was “contemptuous” of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;

4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion;

5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs;

6. defendants found to be acting fraudulently and in breach of trust;

7. the defendants’ fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial;

8. fraudulent conduct;

9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges.

Mahoney J added that there are two propositions that appear to mitigate against an award of solicitor-client costs (para 155). Those propositions are as follows:

- it is the conduct of the action, not of the party, that gives rise to the action that determines an award of solicitor-client costs, and

- damages or punitive damages should not be confused with an award of costs.

The courts dealing with estate-related matters have embraced these principles, finding that before a court will award solicitor-client costs in those matters, there must be some departure from the ordinary (Dansereau at para 18). For instance, “unreasonable or
vexatious conduct which would warrant an elevation from party-party costs (Petrowski at para 14, Foote at paras 18–19), or “some form of misconduct, mala fides, or unreasonable conduct on the part of the unsuccessful party” – that is, “rare and exceptional circumstances” (Torkelson at para 9).

In Babchuk, Moen J commented on how the courts have handled the situation where a reasonable challenge turns unreasonable (paras 81–83). They have either:

- ordered the unsuccessful challenger to bear his or her own costs throughout, as well as paying the other party’s solicitor-client costs from the date on which the challenge became unreasonable onwards, or
- awarded the unsuccessful challenger his solicitor-client costs out of the estate for the period prior to the date the challenge became unreasonable, and ordered him to pay the successful party’s party-party costs after that date, with those costs being set off by the solicitor-client costs.

6.1 Blameworthy conduct/misconduct in litigation

Blameworthy litigation or pre-litigation conduct can represent a “rare and exceptional” circumstance (Bizon at para 79), for example, where allegations of misconduct fail, particularly when little evidence of weight is adduced to support them (McCullough), or where there is no reasonable basis on which to bring or continue an action (College of Physicians & Surgeons (Alberta) v H (J), 2009 ABQB 48 at para 33, 2009 CarswellAlta 137).

In Paniccia Estate v Toal, 2012 ABCA 397, 2012 CarswellAlta 2159 at paras 135–136 [Paniccia], the Court of Appeal restated the law on costs where misconduct in litigation is involved. It said this:

... It may be that in principle solicitor-client costs should not be commonly awarded. But in Alberta (and elsewhere) there is a very well-settled rule which gives a judge discretion to award larger-than-usual, even solicitor-client, costs for significant misconduct during litigation. The reported categories of what is bad enough are dozens, maybe a hundred, and the many examples they furnish illustrate that the list of categories is not closed....

If one goes through the long list of categories in all the reported cases, it may be hard to call many of them abuse of process. Yet they are serious misconduct, and very few people would contend that full-indemnity costs for them would never be proper...
In Schwartz, Graesser J cited these passages from Paniccia in deciding whether to award solicitor-client costs against the challengers to a will (paras 210–211). He found that such an award was, given the facts, “well within [his] jurisdiction and could be a valid exercise of [his] discretion” (para 212). In the end, however, he held that an award of solicitor-client costs was inappropriate, given the magnitude and importance of the dispute and the fact that it would be impractical for the court to perform an hour by hour analysis of the time spent to determine what would be reasonably recoverable from the unsuccessful party as its solicitor-client costs (para 276). Rather, he ordered costs equivalent to triple Schedule C and then doubled that amount “to take into account inadequacies in Schedule C in some areas as well as consideration of the penalty component under Surrogate Rule 90(h)” (para 277).

There are a number of other cases that involve the issue of whether or not solicitor-client costs are appropriate. For instance, in Popke v Bolt, 2005 ABQB 861, 2005 CarswellAlta 1751, aff’d at 2006 ABCA 338, 2006 CarswellAlta 1452 (also referred to as Re Serdahely Estate), Johnstone J declined to award the unsuccessful claimants their costs out of the estate, and instead ordered them to pay the executors’ solicitor-client costs after a specified date. She based this award on the fact that the executor and the estate had bettered an offer of judgment, and her finding that it had been unreasonable for the claimants to proceed with their challenge after full disclosure had been provided. She found that the claimants had pursued a “highly oppositional course of conduct with little or no substantive basis for their position” and found many examples of arbitrary conduct and bad faith. Johnstone J said of the case that (para 55):

It was the most egregious of obstructionist litigation I have observed. It was tantamount to what I would categorize as the shotgun approach to surrogate warfare.

In Galloway v Galloway, 2009 ABQB 587, 2009 CarswellAlta 1595, (also referred to as Re Gibbons Estate) [Galloway], aff’d at 2011 ABCA 46, 2011 CarswellAlta 1303, (Alta CA), an executor was found to have breached his fiduciary duty, to have engaged in misconduct, and to have acted irresponsibly and unreasonably. Shelley J ordered him removed as executor and ordered him to pay to the estate, among many other things, the beneficiaries’ solicitor-client costs. She found that the successful beneficiaries and the estate had incurred legal fees that would have been unnecessary had the executor fulfilled his duties. The Court of Appeal affirmed that finding, as well as the finding related to costs payable, and confirmed
that “solicitor-client costs may be awarded against an executor who is guilty of serious misconduct” (para 12).

In *Foote*, challengers to a will (the testator’s widow and her children) intending to bring a family relief claim sought advice and directions as to the testator’s domicile at the time of his death. Also at issue was the validity of a poison pill clause in the will that disinherited any beneficiary who challenged the will. When Graesser J ruled against the challengers, the successful respondents (the executor and two residual beneficiaries) applied for solicitor-client costs against them. The challengers also applied for payment of their solicitor-client costs out for the estate, which Graesser J granted, citing the fact that this case fell within the exception to the modern rule of costs following the event. He denied the respondents’ application for solicitor-client costs against the challengers, citing Moen J’s decisions in *Babchuk* and *Petrowski*, and finding that:

- the need for litigation was “caused” by the testator. The issues raised by the challengers resulted from the manner in which the testator chose to draft his will, making it necessary to determine his domicile for the purpose of any family relief application by the challengers, and also creating the matter of the poison pill and its validity or enforceability,
- the challenge had been reasonable, caused by the way in which the testator drafted his will and disposed of his estate, preferring charities to his family, and
- all parties had conducted themselves reasonably in the litigation.

Two residual beneficiaries, both charitable organizations, involved in the litigation in *Foote*, also sought solicitor-client costs against the challengers. In dismissing that claim for costs, Graesser J noted that the charities had been unnecessary to the litigation, taking no position on the issues (para 26). He pointed out that intervenors typically participate in litigation at their own cost. He went on to say (paras 38, 45):

> I am constrained to add that the charities’ application for costs from the Applicants on a solicitor and client basis was inappropriate and unseemly. No conceivable basis for such a cost award was made out or even argued. As noted by Moen J. in *Petrowski*, infra, solicitor and client costs in estate matters are limited to situations where the unsuccessful claimant has been unreasonable or vexatious.

...
It was not unreasonable for the charities to seek party and party costs, and
even party and party costs on an elevated scale because of the size of the
estate. But groundlessly to seek an award of solicitor and client costs from
the testator’s closest family members, the effect of which would undoubtedly
cause financial ruin to some or all of them, was totally without merit, and is
unseemly of any litigant, let alone charitable organizations.

In Fraser, Mahoney J held that, although he was “troubled” by the manner in which the action
had proceeded (para 157) and although there had been “some sloppiness” on the part of
the executor (para 161), the executor’s actions did not rise to the level of deliberate
misconduct. Accordingly, he declined to order her to pay the requested solicitor-client costs.
Instead, taking into account the fact that the challenger had alleged but failed to prove fraud
against the executor, Mahoney J awarded both sides their party-party costs out of the estate
(para 168).

In Tatum v Tatum, 2011 ABQB 253, 2011 CarswellAlta 677, an estate’s personal
representatives failed to pass their accounts, notwithstanding four court orders to do so.
Strekaf J removed the co-executors of their mother’s estate and awarded solicitor-client
costs against them.

In Knight v Lucas, 2014 ABQB 8, 2014 CarswellAlta 13 [Knight], Veit J found that an estate’s
executor had been derelict in his duties. She removed him as executor, but declined to award
the challenger solicitor-client costs of the application. Rather, she found that, although “the
beneficiaries should not have been put to the cost of forcing an executor to do his duty,” the
removed executor had not acted in such an egregious manner as to justify an award of
solicitor-client costs against him (para 23). She noted that the executor had not breached
court orders, nor had he made personal use of estate funds. As such, Veit J ordered the
executor to pay the challenger’s Schedule C costs (para 23).

In Torkelson, a deceased testator’s common law wife unsuccessfully made a claim under the
Wills and Succession Act, SA 2010, c W-12.2 [WSA] for a share of the estate. The successful
beneficiaries claimed their solicitor-client costs against her. The wife argued that her
challenge had been reasonable and warranted in the circumstances. She argued that just
because she was unsuccessful didn’t mean she should be personally liable for costs at all,
and in any event, not solicitor-client costs; there was no evidence that she engaged in any
misconduct, and so no basis for such an order (para 17). However, Shelley J found that,
given that the deceased had adequately provided for the wife, her challenge of the will was
neither reasonable nor warranted. She ordered the wife to pay the beneficiaries’ party-party
costs (para 22), on the basis that paying their costs out of the estate would ultimately penalize them.

In Holowaychuk v Lopushinsky, 2015 ABQB 63, 2015 CarswellAlta 114 [Holowaychuk], all of the beneficiaries (all siblings) of an estate, but one, supported the executor’s application to pass her accounts. A brother alleged that the executor had failed to account for a canola crop. In granting the application, Acton J awarded the estate its solicitor-client costs, payable by the challenging brother. She found that, had he accepted the executor’s explanations about the allegedly missing canola and had properly reviewed the records, the litigation could have been avoided and the accounts passed. Acton J held that “[t]here are times when certain conduct in litigation needs to be discouraged,” and that “[t]his [was] one of those times” (para 232).

7 ELEVATED COSTS AWARDS

For the purposes of these materials, “elevated costs” are those that are higher than simple party-party costs, but are not full indemnification, as with solicitor-client costs.

The court in Chabros cited the principle that, even though it may be difficult to find grounds to order solicitor-client costs, the grounds for a discretionary increase in taxable costs are broad (para 28). Similarly, Graesser J in Schwartz said that where a court finds that a full indemnification of costs is not quite appropriate, it will often order party-party costs instead, on a multiplier of 3 (para 226).

Schwartz involved a nasty litigious “war” between an executor and beneficiary and other family members, labeled by Graesser J as a “take no prisoners” form of litigation (para 227), involving millions of dollars in legal fees. After examining the jurisprudence on costs generally, and the interplay with the Rules of Court, Graesser J awarded punitive costs to the estate and the defending executor against the challengers. He declined, however, to award full indemnity, based on his finding that the executor and estate’s costs had been unreasonable and amounted to “overkill” (para 237). Instead, he awarded triple Schedule C (which he called a “typical” solicitor and client equivalency) and then doubled it to account for the inadequacies in Schedule C, as well as the penalty component under Surrogate Rules, r 90(h).
Similarly, other cases where an elevated costs award has been granted include:

- *Nelson*, where the court was “not satisfied” that the matter had reached the status of full indemnity costs. It awarded to the successful litigant (the adult interdependent partner to the intestate deceased) an award amounting to about 2.5 of her Schedule C party and party costs.

- *Re McDonald Estate*, 2013 ABQB 602, 2013 CarswellAlta 2002, where Mahoney J declined to award solicitor-client costs, but awarded 4 times the Column 5 amounts of Schedule C instead.

- *Dansereau*, where Veit J declined to award solicitor-client costs, but instead awarded costs to the successful party representing double Column 5 of Schedule C. She did so on the basis that the estate was worth at least $6 million and that the claim had been relatively complex on the facts and the law (para 19).

## 8 REIMBURSEMENT OF A PERSONAL REPRESENTATIVE’S EXPENSES AND COSTS

### 8.1 General principles

Under r 9 of Schedule 1, Part 1 of the *Surrogate Rules*, personal representatives are entitled to reimbursement for their expenses “properly incurred by them in the administration of the estate, including ... expenses reasonably incurred by the personal representatives in carrying out their duties.”

Similarly, s 25 of Alberta’s *Trustee Act*, RSA 2000, c T-8 says that a trustee “may reimburse the trustee or pay or discharge out of the trust property all expenses incurred in or about the execution of the trustee’s trust or powers.”

A detailed discussion of the general principles in respect of reimbursement of a personal representative’s costs and expenses can be found in the content on “Personal representative compensation” in “Accounting and Expenses.”

### 8.2 Trustee indemnification for legal costs

Legal costs seem to be scrutinized more closely by the courts than other expenses, likely to discourage unnecessary litigation that ultimately costs the beneficiaries. Albert H Oosterhoff submits in *Indemnity of Estate Trustees as Applied in Recent Cases* (Paper delivered to the STEP Toronto Branch Conference, 9 January 2013) [Oosterhoff], that based on the case law, the cost of some legal services are “true administration expenses” and the estate trustee is
entitled to be indemnified for them, unless the expenses are excessive (Oosterhoff at 6–7). For example, indemnification should follow for the following legal expenses:

- legal advice on the duties of estate trustees and the interpretation of a testator’s will,
- legal advice on the amount of compensation to which the estate trustee is entitled,
- legal costs on an application for advice and directions, and
- legal services provided on the contested passing of accounts.

Other legal matters are less clear cut; for instance, where litigation is brought by the trustee, a beneficiary, or a third party. In that case, the modern approach serves to make costs follow the event, unless an exception to the rule applies. Oosterhoff adds that where an action is only for a trustee’s benefit, he or she is subject to a costs award against him or her personally (Oosterhoff at 11).

Although the principle that trustees are entitled to full indemnification for the costs of administering an estate (including legal costs) seems entrenched, certain cases (discussed below) out of Ontario and one out of Alberta have created some uncertainty.

In *Coppel v Coppel Estate*, 2001 CarswellOnt 4660 at paras 8–9, [2001] OJ No 5246 (Ont SC) [*Coppel*], the court was asked to rule on the question of whether, absent court or beneficiary approval, an estate trustee can use estate funds to pay legal fees incurred in defending an action brought by a beneficiary. The court held that it was not permissible for the trustee to pay litigation accounts (or non-litigation, estate-related accounts either) from estate funds without approval or consent. (Note that this decision was labeled by Oosterhoff as a “weak authority” given that it was decided on an uncontested motion and decided without reference to statute or judicial precedents.)

Other Ontario courts have followed this reasoning, for instance: *DeLorenzo v Beresh*, 2010 ONSC 5655, 2010 CarswellOnt 7756. In that case, the court distinguished costs for passing accounts – which it considered fully indemnifiable – from legal costs incurred in contentious or adversarial legal proceedings between estate trustees and beneficiaries or between estate trustees and third parties. In the latter situation, the court considered that each party must pay its own costs until litigation is complete, after which the court will determine, on
passing accounts, whether and to what extent the estate trustee should be indemnified for the costs.

Closer to home, in the Alberta case, Chabros, Clark J concluded that executors may not reimburse themselves for legal costs without prior court or beneficiary approval. He held that legal fees are governed by the general rule that “executors are entitled to be indemnified from the estate for expenses, including legal fees, reasonably and properly incurred by them in the course of their administration of the estate” (para 13).

Clark J declined to award the executors in Chabros reimbursement for the legal fees they incurred while seeking the court’s decision on their compensation, finding that the costs had not been reasonably and properly incurred in the course of administering the estate (paras 35–36), and in fact, that the executors had acted out of self-interest and possibly vindictiveness. In the end, however, Clark J granted the executors a lump sum of $50,000 toward their legal fees. He awarded the respondent beneficiary his solicitor-client costs, payable out of the estate, based on these factors (para 41):

- this beneficiary was justified in objecting to the extravagant compensation claimed by the executors,
- he acted properly in bringing his objection to court, and
- although a costs award to this beneficiary against the estate would operate to the detriment of the other residuary beneficiary, it was relevant that, absent his objection, the executors would have taken $2.9 million in compensation (an amount Clark J found to be grossly disproportionate to their efforts) which would have been more of a detriment to the estate and the other beneficiary.

In arriving at his decision, Clark J did not cite s 25 of Alberta’s Trustee Act or s 9 of the Surrogate Rules, but he did cite Coppel, a case that, as noted above, Oosterhoff considers a “weak authority.”

The principle that legal fees must be “reasonably and properly” incurred in order to be reimbursable has been cited and applied by one Alberta and one Saskatchewan court since Chabros was handed down (see Re McDonald Estate, 2012 ABQB 704, 2012 CarswellAlta 2235 at para 71; see also Re Beecher Estate, 2015 SKQB 19, 2015 CarswellSask 39 at para 16).
8.3 Costs awards against rogue personal representatives

Acton J, in *Holowaychuk* at para 222, said this about the liability of executors failing in their duties:

In certain situations, executors may be liable to the estate for the manner the estate is administered. Where the circumstances warrant, beneficiaries should not bear the costs of forcing an executor to perform her duties: [citing *Knight*]. Executors may be liable for solicitor-client costs for the use of estate funds and assets for personal gain or where they fail to make full disclosure of estate expenditures.... Likewise, an executor may be liable where she does not account to the beneficiaries for an extended period of time and fails to realize, actively market, or rent real property...

In *Dansereau*, Veit J ordered the unsuccessful litigant removed as executor. She found that his conduct had not “reached the level of malfeasance, but it certainly was wrongful conduct in the sense that he had over-powered his mother’s testamentary will” (para 20). Veit J found that awarding the executor’s costs to be paid out of the estate would be further punishment to the residual beneficiaries, and so made him responsible for his own costs, and also for payment of the successful party’s costs (on the scale of double Column 5 of Schedule C).

In *Kuliska v Kuliska*, 2011 ABQB 528, 2011 CarswellAlta 1569, Hembroff J awarded solicitor-client costs against an executor he found had failed to act faithfully or responsibly, and who had demonstrated self-serving bad faith, contrary to the interests of other beneficiaries (para 55). The costs were in respect of all applications arising from the original application, made by the beneficiaries to have the executor removed, and for all applications arising from the executor’s applications relating to passing accounts.

In *Re McDonald Estate*, 2012 ABQB 704, 2012 CarswellAlta 2235, Gates J granted an application for the removal of the trustee of a dependent adult’s estate and co-executor of another estate. He found that the removed trustee/co-executor had caused proceedings that were longer, more complex, and more costly than they needed to be. Gates J expressed surprise at the amount of time spent on this matter, and noted that much of the time was spent in trying to get information from the trustee/co-executor that she ought to have offered freely (para 71). He ordered the trustee/co-executor to reimburse the applicants for their thrown-away costs relating to cross-examinations that she failed to attend and unnecessary court appearances (based on Schedule C). He also ordered her to pay the applicants their solicitor-client costs of the civil contempt proceedings and relating to passing of accounts for all steps after they filed their notice of objection. Lastly, relating to the cost of removing the
respondent, Gates J awarded the applicants their solicitor-client costs of obtaining the trustee/co-executor’s removal – 75% of which were to be paid out of the estates and 25% to be paid by the trustee/co-executor (para 113). Given that it was not “wholly unreasonable” for her to oppose the application for her removal, the court awarded the trustee/co-executor 50% of her costs of the application, payable by the estates, rather than from her share in those estates (para 114).

In a subsequent decision in the same action (Re McDonald Estate, 2013 ABQB 602, 2013 CarswellAlta 2002), the removed trustee/co-executor was found to have made applications to determine issues already decided and other meritless and harassing applications. She had failed to pay the costs awards previously made against her, launched an appeal and then failed to appear, and used proceedings in the Provincial Court for an improper purpose. She was held to be in contempt of court. The estate’s beneficiaries successfully applied for an order declaring the former trustee/co-executor to be a vexatious litigant. Mahoney J ordered that she not bring any further proceedings without leave, and awarded costs against her, holding that “[n]ot making such an award would be, in effect, a punishment for the victims of the contempt,” being the beneficiaries of the estate (para 51). Although the applicants had asked for full-indemnity costs payable by the former executor amounting to over $202,000, Mahoney J awarded them costs based on 4 times the Column 5 amounts in Schedule C, totaling just over $170,000.

In Bizon, the Court of Appeal upheld Sulyma J’s decision that, because a co-executor’s behaviour had caused unnecessary costs in an application involving executor compensation, he was to pay the respondents’ costs out of his share of the estate. Sulyma J found the co-executor’s behavior amounted to “reprehensible litigation conduct” (para 19) and found that he deserved an order to pay solicitor-client costs. The Court of Appeal agreed, finding that

(paragraph 80):

Mr. Bizon’s conduct before Justice Sulyma was blameworthy and intolerable. For no other reason than their refusal to acquiesce to this domineering behaviour, he alleged that the respondents were dishonest and incompetent. His efforts to impugn the reputations of the respondent’s counsel because they represented their client’s interests diligently were completely unjustified. Justice Sulyma’s decision to order the wrongdoer to pay for his misdeeds by an enhanced costs award is in accord with principle and defensible. It is not evidence that she was biased against him. It is evidence that she did not condone outrageous behaviour.
The Court of Appeal also ordered the impugned co-executor to pay the respondents their solicitor-client costs of the appeal, on a full-indemnity basis (para 90).

A notable case out of Ontario is Zimmerman v McMichael Estate, 2010 ONSC 3855, 2010 CarswellOnt 5179, in which a trustee was found to have failed to account, made improper payments and loans to himself, benefitted himself out of the trusts he was administering, mingled trust property with his own, paid himself unauthorized compensation, and used trust property to his own use. The trustee was ordered to pay compensation and also ordered to pay the costs of “getting to the truth,” representing full indemnity for all of the costs incurred by the beneficiaries in the proceedings (para 14).

9 JUDICIAL COMMENT ON LEGAL FEES GENERALLY

At paragraph 50 of Chabros, Clark J made this comment, generally, about large estates and the need for restraint on their costs:

I feel obliged in this case to make some general comments. I am concerned that a large estate file is perceived by both executors and estate lawyers as a “dripping roast”. To be sure, in any estate, there is work that must be done. But a large estate value does not justify abandoning all restraint. Both executors and estate lawyers must be judicious with respect to costs they purport to incur against an estate. In this case, both the compensation claimed and the legal costs amassed in pursuing that compensation were out of all proportion to what should have been required and I find the absence of good judgment disquieting. It is to be hoped that the result in this case will remind those involved in future estates of the importance of prudence.

In Schwartz, Graesser J noted that for the costs hearing, one of the parties had prepared a brief of 191 pages with 6 schedules, citing 65 authorities, which he characterized as “overkill” (para 145). He cited, at paragraph 149, the decision in Moon v Sher, [2004] OJ No 4651, 2004 CarswellOnt 4702 (Ont CA), where the Ontario Court of Appeal said (at para 33):

If a lawyer wants to spend four weeks in preparing for a motion when one week would be reasonable, this may be an issue between the client and his or her lawyer. However, the client, in whose favour a costs award is made, should not expect the court in fixing costs to require the losing party to pay for over-preparation, nor should the losing party reasonably expect to have to do so.
CHAPTER 15
TECHNICAL AND COURT MATTERS

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1 CONTENTIOUS MATTERS

1.1 Bringing an action

All applications to the court relating to contentious estate matters, with the exception of an application by a personal representative for formal proof of a will, are begun by filing a notice of application in Form C 1 and an affidavit in Form C 2, as prescribed by the Surrogate Rules, Alta Reg 130/1995 [Surrogate Rules].

1.2 Parties

Rules 56 and 57 of the Surrogate Rules describe the parties to any application and list the classes of persons who may be interested in a particular estate.

1.3 Service

An applicant must serve copies of the documents required to be filed under the Surrogate Rules on all persons interested in the estate. Rules 59–61 of the Surrogate Rules provide directions regarding service.

1.4 Representation

Under Surrogate Rules, r 62, the court may decide that certain parties form a class, that all parties in a class be represented by the same lawyer, that parties be represented by different lawyers if they are presently represented by the same lawyer, or appoint a lawyer to represent an unrepresented person. The court may also determine which parties may cross-examine witnesses and make representations to the court.

1.5 Chambers proceedings

Under Surrogate Rules, r 63, all proceedings relating to contentious matters are heard in justice chambers unless the court or the Surrogate Rules or Alberta Rules of Court, Alta Reg 124/2010 [Rules of Court] specifically require otherwise. Applications requiring more than 20 minutes must be heard in special chambers.

1.6 Hearings

Rule 64(1) of the Surrogate Rules states that, on hearing an application, the court may:

- receive evidence by affidavit or orally,
- dispose of matters summarily or as it considers appropriate,
• direct a reply and affidavit to be filed, or a demand for notice,
• direct the trial of issues (in which case, the court must order the procedure to be followed and the terms and conditions under which the trial is to take place),
• grant any relief because of a breach of trust, wilful default, or other misconduct of a respondent,
• direct that notice of the court’s judgment or order be given to a particular person,
• dispense with service of notice or of an order of the court, or
• make directions regarding the payment of costs either from the estate or by any person who is a party to the application.

1.7 Accepting or refusing probate

Under r 67 of the Surrogate Rules, no application can be made for an order requiring a personal representative to accept or refuse probate until at least 2 months after the death of the testator unless, in the court’s opinion, the circumstances warrant otherwise.

1.8 Production of testamentary documents

An application may be made under r 68 of the Surrogate Rules for an order requiring the production of a testamentary document. The court may require a person (either by affidavit or by a personal appearance before the court) to:

• explain why the document should not be produced and deposited with the clerk,
• explain why the document cannot be produced,
• give a statement that no testamentary document is or has been in the person’s possession or control, or
• give any information that is relevant to discovering the document’s present location.

1.9 Security for costs

The court may order that security for costs must be posted by any party at any stage of the proceedings relating to contentious matters (Surrogate Rules, r 69).
1.10 Time for completion
Under r 70 of the Surrogate Rules, the court may set a time limit for completion of proceedings.

2 PROOF OF DEATH

2.1 Permission to swear to the death of a person
Under r 94 of the Surrogate Rules, if there is no direct evidence of an individual's death but there is evidence from which the death can be presumed or inferred, an applicant wishing to apply for a grant under Part 1 or wishing to prove a will formally may obtain court permission to swear to the death of that individual. An application for permission to swear to the death of a person may be made in Forms C 1 and C 2, either without notice or on such notice as the court orders.

2.2 Court order
Further, where a court is satisfied with the evidence and the form of the evidence presented to it, it may declare that the death of a person is proven or presumed and grant an order permitting the applicant to swear to the death of the person (r 94(3)).

3 CLAIMS ON AN ESTATE

3.1 Contested claim
If a personal representative does not agree with all or part of a claim against the estate, he or she must serve the claimant with a notice of contestation in Form C 11 (Surrogate Rules, r 95).

3.2 Application to the court
Under r 96 of the Surrogate Rules, a claimant whose claim is contested may apply to the court for an order allowing the claim and setting the amount by filing and serving on a personal representative a notice of claim with an affidavit in Form C 12. The application must be made within 2 months of receipt of a notice of contestation. The court may extend the time limit if the claimant applies for an extension of time before the expiration of the 2 months, and provided that the application is heard not more than 5 months after receipt of the notice of contestation under r 95.
3.3 Notice to a personal representative

Under r 61 of the Surrogate Rules, a claimant must give at least 1 months’ notice to a personal representative for any application regarding a contentious matter.

3.4 Claim barred

Under s 26 of the Estate Administration Act, SA 2014, c E-12.5 [EAA], where a claimant fails to make an application within the 2 month period after receipt of a notice that the claim is being contested, as prescribed by the Surrogate Rules or such longer period as may be allowed by the court, the claim is barred.

3.5 Procedure to avoid duplication of grant applications

Applications for grants are made by filing them with the clerk of the Court of Queen’s Bench (Surrogate Matters) in the applicable judicial district. Section 35 of the EAA provides a procedure to avoid duplication of grants. Essentially, where more than one application is made, all applications for a grant are stayed pending a decision on which will proceed.

The clerk’s office reviews the applications for obvious errors. Where it finds them, the office returns the application to the applicant, with comments. Once the clerk’s office approves the form of an application, it submits the file and a fiat to a judge for signature. The judge may refer an application back to the applicant if there are questions to be answered, or he or she may sign the fiat. The clerk then issues the grant on the basis of the fiat.

4 RENOUNCING

A personal representative named in a will cannot be compelled to accept the office, provided that he or she has not intermeddled in the estate and has not begun his or her duties with respect to the estate property and debts. Rule 32(1) of the Surrogate Rules provides that if a personal representative named in a will does not wish to or cannot apply for a grant of probate, he or she must renounce in Form NC 12 or by using a method approved by the court.

The person renouncing must sign a renunciation before a witness. It is prudent to have a person other than the applicant witness the renunciation.

This renunciation requires the person renouncing to confirm that he or she has not intermeddled in the deceased’s estate. Section 38 of the EAA provides that if a person renounces probate of a will in which they are named as personal representative, their
authority under the will and with respect to any trusteeship under the will ceases, except insofar as the renunciation expressly reserves the trusteeship. Where a personal representative wishes to reserve his or her rights in respect of a trusteeship, Form NC 13 (Reservation of right to apply for grant of probate) must be modified appropriately and filed. The renunciation is required to be filed with the application for probate.

Where a personal representative renounces probate, he or she may still qualify to apply for a grant of administration with will annexed (Surrogate Rules, r 32(4)). If that is the case, and the personal representative does not wish to apply, he or she will be required to waive his or her right to a grant of administration of the estate (r 32(2)).

5 FORMAL PROOF OF A WILL

Where there is a dispute or the potential for a dispute as to the validity of a will, it should be proved formally. An application for formal proof of a will, under r 75 of the Surrogate Rules, may be made at any time whether or not a grant of probate has issued. When a grant has issued following an application for formal proof of a will, it is binding on all persons, in the absence of fraud, even if a will is discovered after the grant has issued. The only exception to this rule applies to a person interested in an estate who is not served with notice of the proceedings in an application for formal proof of a will. That person may apply for an order for formal proof a testamentary document that has not been considered by the court in a prior application (Surrogate Rules, r 91).

5.1 Who may apply?

A personal representative or a person interested in an estate may begin an action. Rule 78 of the Surrogate Rules sets out the classes of persons who may apply for an order to obtain formal proof of a will:

- surviving spouse or surviving adult interdependent partner,
- adult children,
- the Public Trustee or any other person representing minors,
- trustees of represented adults under the Adult Guardianship and Trustee Act, SA 2008, c A-4.2,
- attorneys appointed under the Powers of Attorney Act, RSA 2000, c P-20,
- the Public Trustee when representing missing persons,
heirs on intestacy,

personal representatives and beneficiaries in any will in respect of which an application is made under the Surrogate Rules,

personal representatives appointed under a prior grant issued in respect of the will, and

the alleged deceased if the fact of death is an issue.

5.2 Required documents

An application made by a personal representative requires that the following documents be filed and served on the persons interested in the estate:

- Form C 5 – Application,
- Form C 6 – Affidavit,
- Form C 8 - Notice to persons interested in estate.

An application made by a person interested in an estate requires that a notice of objection in Form C 9 be filed and served (Surrogate Rules, r 77).

5.3 The court may require formal proof

The court may require formal proof of a will, either before or after a grant is issued. If the court makes such an order, the personal representative or applicant, as the case may be, must file and serve a Form C 5, a Form C 6, and a Form C 8 (Surrogate Rules, r 81).

5.4 Stay of proceedings

Under r 75(3) of the Surrogate Rules, an application for formal proof of a will operates to stay informal application proceedings under Part 1 of the Surrogate Rules. A personal representative appointed by a grant issued under Part 1 must not distribute any estate property without court approval or the consent of all persons interested in the estate (r 75(4)).

5.5 Original will lost or destroyed

If an original will is lost or destroyed, a person interested in the estate must apply for an order for formal proof of the will unless the applicant shows to the satisfaction of the court that s 40 of the Alberta Evidence Act, RSA 2000, c A-18 applies, or the court orders
otherwise (Surrogate Rules, r 76). Section 40 provides for the admissibility of photographic prints of lost or destroyed documents in certain circumstances.

5.6 Application by a person interested in an estate

Under r 79 of the Surrogate Rules, if a person interested in an estate files an application for formal proof of a will, a personal representative named in the will may:

1. file and serve Form C 5, Form C 6, and Form C 8,
2. renounce all right to be the personal representative so long as he or she has not intermeddled in the estate,
3. apply to be discharged, or
4. apply for an order that the application is frivolous or vexatious.

An application under Part 2, Division 3 or under Part 1 is not, by itself, intermeddling in the estate.

5.7 Chambers hearings

The hearing of an application for formal proof of a will must be in chambers if the only issue is proof of the testator’s death or proving the proper execution of the will, or both (Surrogate Rules, r 84(1)).

Evidence at a hearing in chambers may be given by affidavit or orally, or both (Surrogate Rules, r 85(1)).

5.8 Evidence of a person who took instructions for the will

Under r 85(2) of the Surrogate Rules, any person who took instructions for the preparation of a will is compellable as a witness respecting the following:

- the circumstances of that person’s involvement in the preparation of the will and of any lawyer’s retainer,
- the instructions given by the testator,
- the preparation of the will or the circumstances of its signing, or
- any steps taken to ascertain or record, by any means, the testator’s capacity or the witness’ or lawyer's opinion concerning that capacity.
5.9 Trial

Where,

- in the opinion of the court, several witnesses are necessary, or
- if the court orders a trial,

then the hearing of an application for formal proof of a will is held in the form of a trial and not in chambers (Surrogate Rules, r 83(1)). If a trial is required, the applicant must apply to the court in chambers for directions on the procedure to be followed at the trial (r 83(2)). On such an application, the court may (r 83(3)):

(a) set the procedure to be followed at the trial, including

(i) giving directions on pre-trial disclosure of documents and questioning,
(ii) ordering the production of documents,
(iii) stating the parties and their roles,
(iv) ordering the representation of parties, or
(v) dispensing with pre-trial procedures and sending the matter straight to trial,

or

(b) ... order a hearing in chambers on affidavit or oral evidence or both respecting certain issues.

5.10 Order of decisions

Under r 86 of the Surrogate Rules, on an application for formal proof of a will, the court must do the following:

- if several wills of the deceased are in issue, consider each will individually in the order in which they were made, starting with the most recent,
- once the court admits to probate one or more wills that dispose of all of the deceased’s property, consider no further wills,
- if the wills admitted to probate do not dispose of all of the deceased’s property, consider whether an intestacy exists,
• if a will is opposed and there is an application for a declaration of intestacy made, decide whether the will should be admitted to probate.

5.11 Order of proceedings

In an application for formal proof of a will, the proponent of the will must be heard first and must present evidence concerning the proof of death, proof of the signing of the will, and the capacity of the deceased. Then, the party or parties contesting the will must be heard next (Surrogate Rules, r 87).

5.12 Powers of the court

On an application for formal proof of a will, the court may do any of the following (Surrogate Rules, r 90):

• determine the fact of death,
• determine whether the deceased died intestate or testate,
• determine which will of the deceased to admit to probate, if any,
• terminate any grant issued under Part 1 of the Surrogate Rules appointing a personal representative,
• terminate the appointment of a personal representative who was appointed to apply for formal proof of a will,
• issue any grant referred to in r 10 of the Surrogate Rules,
• order the payment of costs, including penalizing any person who required formal proof of the will if it became clear during the proceedings that
  o the application was frivolous or vexatious,
  o the person caused undue delay, or
  o the person had no substantial basis for requiring the scrutiny of the court,
• determine any other matter that the court considers to be relevant or that is incidental to the application.

6 SURVIVORSHIP

Under ss 41 and 42 of the EAA, where a personal representative survives a testator but dies without obtaining a grant, his or her authority ceases. Where 1 of 2 or more personal
representatives survive a testator but then dies, his or her authority vests in the surviving personal representative(s).

7 BOND OR OTHER SECURITY REQUIREMENT

Rules 28–31 of the Surrogate Rules deal with the requirement of bonds or other security. For more information on bonding, see the content on “Bonding” in “Accounting and Expenses.”

7.1 Requirement to obtain a bond

Section 45 of the EAA stipulates that no grant will issue unless an applicant has given a bond or other security in accordance with the Surrogate Rules. A personal representative who is a resident of Alberta is generally not required to provide a bond. Further, if there are two or more personal representatives, a bond is generally not required if one of the personal representatives is resident in Alberta (Surrogate Rules, r 28(2)). However, if none of the personal representatives are residents of Alberta, then a bond will generally be required (r 28(1)), unless dispensed with by the court (r 29(1)).

Notwithstanding r 28(2), if a personal representative is not named as executor in the will, a person interested in the estate may bring an application to require a resident personal representative to provide a bond (Surrogate Rules, r 30(1)).

Under r 30(2) of the Surrogate Rules, a person interested in an estate may apply to the court for an order requiring a non-resident personal representative to provide a bond notwithstanding r 28(2), and whether or not an application is made under r 29(1).

A personal representative required to provide a bond must obtain it from an insurer licensed under the Insurance Act, RSA 2000, c l-3 to provide fidelity insurance as defined in Classes of Insurance Regulation, Alta Reg 144/2011 (Surrogate Rules, r 28(3)).

A bond must be for an amount equal to (a) the gross value of the deceased’s property in Alberta less (b) any amount distributable to the personal representative as a beneficiary, if the court so orders (Surrogate Rules, r 28(4)).

7.2 Dispensing with a bond

A non-resident personal representative may apply to the court to dispense with the requirement of obtaining a bond or to reduce the amount of the bond (Surrogate Rules,
the affidavit in support of this application is in Form NC 17. In that affidavit, the applicant must:

- set out details regarding the deceased’s debts in Alberta and in any other jurisdiction,
- indicate that the property of the estate is sufficient to pay all of the debts,
- indicate that all debts have been or will be paid before the estate is distributed, and
- set out any other relevant matters that might assist the court in making the decision.

Rule 29(2) provides that, in support of an application, an applicant may file a beneficiary’s consent to dispense with a bond in Form NC 18.

The court must not require a lawyer representing an applicant to undertake to retain control of the property in the estate as a condition of dispensing with a bond (Surrogate Rules, r 31(2)).

7.3 Bond applications

On an application for an order dispensing with a bond under r 29 of the Surrogate Rules, or to require a personal representative to provide a bond under r 30, the court may, after considering the interests of the beneficiaries and of the claimants of the estate (r 31(1)):

- require a bond or other security, or
- dispense with a bond or other security,
- require more information,
- impose conditions on the applicant or any other person interested in the estate,
- reduce the amount of a bond or other security,
- do any other thing that the circumstances require.

In most circumstances, the Public Trustee will not consent to the dispensing of the bond if a minor person has an interest in the estate.
8 CAVEATS

A caveat temporarily stops an application for an informal grant or resealing of a grant, allowing the caveator time to decide whether to oppose the application. Under s 46 of the EAA, until a caveat has expired, been discharge or withdrawn, or has otherwise been dealt with, an application cannot proceed.

8.1 Entitlement to file a caveat

Anyone who is interested in an estate may file a caveat in Form C 3 (Surrogate Rules, r 71).

8.2 Filing of caveat

Under r 71 of the Surrogate Rules, the caveat is filed with the clerk of the court, which then sends a copy to the grant applicant.

8.3 Expiry of a caveat

Under s 47(1) of the EAA, a caveat remains in force for 3 months from the date of filing unless the court reduces or extends that time. After it has expired or been discharged, a new caveat may not be filed by the same caveator without leave from the court (s 47(2)).

8.4 Discharge of a caveat

A person whose application for a grant is affected by a caveat may apply, in accordance with the Surrogate Rules, requesting that the caveator be required to show cause for why the caveat should not be discharged.

8.5 Alternate means of discharge

Under r 72 of the Surrogate Rules, an applicant may file and serve on a caveator a warning in Form C 4. To object to a grant being issued, a caveator who receives a warning must file and serve on the applicant a notice of objection in Form C 9 not more than 10 days after having been served with the warning unless this time is extended by the court (r 73(1)). If a notice of objection is not filed and served within the time allowed, the clerk removes the caveat (r 73(4)). If a notice of objection is filed, the application is continued under the Surrogate Rules relating to formal proof of a will (rules 75–93).
8.6 Frivolous or vexatious caveats

An applicant who views a caveat as frivolous or vexatious may apply for an order discharging the caveat even though the caveator has filed and served a notice of objection. The application is begun by the filing of a notice of motion in Form C 1 (Surrogate Rules, r 74).

If the court determines that the caveat should be discharged, costs may be awarded against the caveator.

9 APPLICATIONS FOR ADVICE OR DIRECTIONS

9.1 Legislation

A number of statutes and regulations allow for an application to the Section 49 of the EAA provides that a personal representative of an estate may apply for the court’s advice or direction on any question respecting the management or administration of the estate.

Section 43(1) of the Trustee Act, RSA 2000, c T-8 provides for an application to the Court of Queen’s Bench by any trustee for an opinion, advice, or direction on any question respecting the management or administration of trust property, which has been interpreted to mean any trust property and not just property involved in the administration of an estate (see National Trust Co v Hartney, [1922] 3 WWR 454, 1922 CarswellSask 174 (Sask QB)).

Section 10 of the Perpetuities Act, RSA 2000, c P-5 permits an application for advice or direction as to the validity or invalidity, with respect to the rule against perpetuities, of an interest in property.

Rule 4 of the Surrogat Rules provides that a personal representative or person interested in an estate may apply to the court for directions at any time. “Personal representative” is defined as an executor of a will or an administrator or trustee of an estate to which the Surrogate Rules apply, including a person named as an executor or trustee in a will before a grant is issued (Surrogate Rules, r 1(1)).

9.2 When is it appropriate to apply?

It is appropriate to apply to the court for advice and direction on any matter respecting the management or administration of the estate (see DWM Waters, Mark Gillen & Lionel Smith, Waters’ Law of Trusts in Canada, 4th ed (Scarborough, ON: Carswell, 2012) at 1155. However, such an application should not be used to determine questions of ownership or
other matters affecting the rights of the parties (see *Re Royal Trust Co* (1962), 39 WWR 636, 1962 CarswellBC 112 (BCSC)).

The focus is on assisting trustees by giving advice on the manner of administration that will benefit the beneficiaries, rather than resolving a dispute between interested parties. The courts have consistently refused to exercise a trustee’s discretion for him or her. If an application is considered to be inappropriate, the applicant may be penalized with costs.

In the following circumstances, an application was found to be appropriate:

- to construe the extent of a discretion or power (*Re Floyd* (1960), [1961] OR 50, 1960 CarswellOnt 78 (Ont HC)),
- to determine the beneficiary under an RRSP when there was a general revocation clause in the will and a prior designation in the plan, and where no facts were in dispute (*Re Bottcher Estate* (1990), 47 BCLR (2d) 359, 1990 CarswellBC 162 (BCSC)), and
- to interpret the wording of a will (*Re Connor Estate* (1970), 72 WWR 388, 1970 CarswellAlta 65 (CA); *Re Forsythe*, [1974] 4 WWR 98, 1974 CarswellSask 56 (Sask QB)).

In the following circumstances, an application was found to be inappropriate:

- to determine whether certain property was part of an estate (*Re Mayer Estate*, [1950] 2 WWR 858, 1950 CarswellAlta 50 (Alta SC)),
- to determine the appropriate time or price for a sale of shares (*Re Fulford* (1913), 29 OLR 375, 1913 CarswellOnt 854 (Ont SC)),
- for a direction as to whom should be paid on intestacy (*Re George Estate* (1960), 30 WWR 462, 1960 CarswellAlta 7 (Alta District Ct)),
- where the legal and administrative principles were well-established and a solicitor’s opinion would have provided adequate protection to the trustee (*Re Vant Estate* (1958), 27 WWR 429, 1958 CarswellMan 61 (Man QB)).

### 9.3 Estates with missing beneficiaries

If a missing person (as defined in the *Public Trustee Act*, SA 2004, c P-44.1 [*Public Trustee Act]*) is a person interested in an estate, the applicant must serve the Public Trustee with
notice of an application (Surrogate Rules, r 59). Section 1(h) of the Public Trustee Act states that a missing person means a person declared to be missing by the court under s 7.

If, after reasonable inquiry, a person cannot be located, the court may, on application, declare a person to be a missing person and appoint the Public Trustee as trustee of the missing person’s property generally, or as a trustee of specific property (Public Trustee Act, s 7).

Section 8 of the Public Trustee Act allows the Public Trustee to take possession of a missing person’s property for safekeeping without a court order in certain circumstances. The Public Trustee will not accept property from a personal representative under s 8. Rather, the Public Trustee will always require a missing person order under s 7 before accepting any property from a personal representative.

Benjamin order

Where a beneficiary of an estate has been missing continuously prior to the death of a deceased, a personal representative or a person interested in the estate may, under certain circumstances, wish to consider an application utilizing the case of Re Benjamin, [1902] 1 Ch 723. The court in that case directed that the estate property be distributed on the basis that the missing person had predeceased the testator without leaving issue.

9.4 The effect of a personal representative acting on advice and direction

A personal representative who is acting on the advice or direction of the court is deemed to have discharged his or her duty as personal representative in respect of the subject matter of the advice or direction (EAA, s 49(2)).

Section 49(2) of the EAA does not indemnify a personal representative if he or she has been guilty of any fraud, willful concealment, or misrepresentation in obtaining the advice or direction of the court (EAA, s 49(3)).

9.5 Costs

On hearing an application, the court may order costs to be paid from an estate or by any person who is a party to the application (Surrogate Rules, r 64(l)(h)). Similarly, the court may order security for costs to be posted by any party at any stage of the proceedings (Surrogate Rules, r 69).
Generally, where an application for advice and direction is necessary because of the actions of a testator, or where an application is appropriate and for the benefit of an estate, the court will direct that costs be paid from the residue of the estate. However, in situations where there is no room for serious doubt or difference of opinion, in which case a personal representative should have exercised his or her own discretion, a personal representative may be denied his or her costs and penalized with the costs of the other parties to the proceedings.
CHAPTER 16
PUBLIC TRUSTEE’S ROLE IN ADMINISTRATION OF ESTATES

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1 PUBLIC TRUSTEE AS PERSONAL REPRESENTATIVE

1.1 As personal representative

Under s 5(a) of the Public Trustee Act, SA 2004, c P-44.1 [PTA], the Public Trustee may act as personal representative of a deceased person’s will. However, the Public Trustee is not required to act as personal representative if appointed as so by a will (PTA, s 6(1)). Nevertheless, the Public Trustee will generally only decline to act if there is some specific circumstance that, in the Public Trustee’s view, makes it either inappropriate for the Public Trustee to act or more appropriate for someone else to act. For example, the Public Trustee might renounce if all beneficiaries of an estate are adults of full capacity who want one (or more) of the beneficiaries, rather than the Public Trustee, to administer the estate.

The Public Trustee will renounce where the Public Trustee is appointed as co-executor. The Public Trustee will not act as co-executor of an estate, nor will the Public Trustee act as a co-trustee of a trust. This policy is largely due to concern that the internal controls that exist within the Public Trustee office could not be applied in situations where the Public Trustee is a co-executor or co-trustee. The Public Trustee will not act where the Public Trustee is potentially liable for the actions of a co-executor.

1.2 Interim administration

Section 12 of the PTA allows the Public Trustee to take possession of a deceased person’s property if that person’s personal representative or next of kin have not done so. This broadly worded provision is intended to give the Public Trustee the ability to act in an expeditious manner to preserve a deceased person’s property until a personal representative appointed by a will or by the court takes over that responsibility. (Incidentally, both the Matrimonial Property Act, RSA 2000, c M-8 and the PTA define the term “court” as the Court of Queen’s Bench. The term has the same meaning in the materials below.)

In some cases, the Public Trustee will act immediately to preserve property under its s 12 powers and will then either apply for a grant under ss 14 or 15 of the PTA, or elect to administer the property under s 16 of the PTA. In other cases, the Public Trustee might act under s 12 to preserve the deceased’s property pending an anticipated grant of probate or administration to someone else.

When acting under s 12 of the PTA, the Public Trustee has the powers of an administrator until someone is granted probate or administration. Section 12 does not authorize the Public
Trustee to distribute any property of the estate or dispose of any property, unless there is reason to believe that the estate might otherwise suffer a loss.

Section 12(4) makes the costs of anything done by the Public Trustee with respect to interim administration a first charge against the property of the estate.

1.3 **Expeditious administration of very small estates**

Section 13 of the PTA is intended to allow the Public Trustee to administer very small estates expeditiously and with minimal cost. It applies if a deceased person’s estate consists only of personal property of a value that does not exceed the prescribed amount of $10,000 (Public Trustee General Regulation, Alta Reg 201/2015, s 2 [PTA General Regulation]) and no one has been granted probate or administration in Alberta. If these conditions are met, the Public Trustee may take possession of the deceased’s property and administer the estate without obtaining a grant of administration.

1.4 **Public Trustee priority to a grant**

Section 14 of the PTA gives the Public Trustee priority to a grant of administration in certain circumstances. The reason for the Public Trustee having priority in these circumstances is to enable the Public Trustee to protect the interests of a person under legal disability who has an interest in the estate. Section 14(1) defines “person under legal disability” to include any minor as well as any represented adult for whom the Public Trustee is acting as trustee. If a person under legal disability has an interest in the deceased’s estate, the Public Trustee could have priority under ss 14(2)(a) or 14(2)(b).

Section 14(2)(a) of the PTA gives the Public Trustee what might be referred to as a step-into-the-shoes priority. It gives the Public Trustee the same priority to a grant that the person under legal disability would have had if the person had been an adult of full capacity. In other words, the Public Trustee has priority to a grant over anyone whom the minor or represented adult, but for their legal disability, would have had priority over under the Surrogate Rules, Alta Reg 130/1995.

An example of the Public Trustee’s step-into-the-shoes priority is where the parent of minor children dies leaving no will, spouse, or adult interdependent partner. Another example is where a deceased leaves a will appointing as sole executor a person who predeceased the testator, and the residuary beneficiary is a represented adult for whom the Public Trustee is acting as trustee.
While the Public Trustee’s priority under s 14(2)(a) flows from the priority that the person under legal disability would have if of full capacity, s 14(2)(b) gives the Public Trustee priority over any non-residents of Alberta, even where the person under legal disability would not have had priority. Essentially, s 14(2)(b) gives the Public Trustee priority to a grant over anyone who is neither an executor nor a resident of Alberta. Consider, for example, a situation where the deceased resided in Alberta with his or her minor child and left a surviving but estranged spouse who resided in another province. Assuming that the deceased died without a will or adult interdependent partner, the Surrogate Rules would ordinarily give the surviving spouse a preference to a grant. However, because the surviving spouse is neither an executor nor a resident of Alberta, s 14(2)(b) of the PTA overrides the Surrogate Rules and gives the Public Trustee priority to a grant.

The Public Trustee will not necessarily always exercise the priority given to it by s 14 of the PTA. The object of giving the Public Trustee priority is to allow the Public Trustee to protect the interest of a person under legal disability. Therefore, the Public Trustee might decide not to assert its priority if satisfied that this will not put the person under legal disability at undue risk or disadvantage.

### 1.5 Administration where no one else is willing and able to act

Section 15 of the PTA, which applies notwithstanding any other enactment, is intended to provide the Public Trustee with an expeditious means of applying for and receiving a grant of administration where there is a need for someone to apply for a grant and no one has done so. Unlike s 14, s 15 does not give the Public Trustee priority to apply for a grant of administration. Another difference between the two sections is that s 15 is not limited to situations where a person under legal disability is interested in the estate.

The Public Trustee may apply for a grant under s 15 if the deceased left property in Alberta and no one has obtained a grant of probate or administration. If a deceased leaves a will, the Public Trustee cannot apply for a grant under s 15 until at least 120 days after the deceased’s death. If the deceased has not left a will, the Public Trustee cannot apply until 30 days have elapsed from the date of death. In either case, the court may permit the Public Trustee to apply before the waiting period has expired (PTA, s 15(3)).

Once the waiting period has elapsed, the Public Trustee may give notice of the application in the manner, and to the persons, that the Public Trustee considers appropriate, and may apply without obtaining a renunciation from anyone who might have priority to a grant over
the Public Trustee (PTA, s 15(4)). Thus, the Public Trustee is not necessarily required to give notice of the application to, or obtain a renunciation from, every person who would ordinary be entitled to notice of an application for a grant under the Surrogate Rules. However, the Public Trustee will not lightly depart from the notice requirements of the Surrogate Rules, especially since nothing in s 15 requires the court to grant the Public Trustee’s application.

Section 15 of the PTA imposes few restrictions on the Public Trustee because it is intended to provide the Public Trustee with an expeditious procedure for acquiring the right to administer an estate that needs administering when no one else has done so. Section 15 is not intended to give the Public Trustee an opportunity to dash in and get itself appointed as administrator under the nose of an executor or would-be administrator who takes a little too long to apply for a grant. This is emphasized by s 15(5), which gives the court a broad discretion to revoke the Public Trustee’s grant and issue a grant of probate or administration to some other person. The court need only be satisfied that the person is eligible to receive a grant and that it would be appropriate to revoke the Public Trustee’s grant and make a grant to the other person.

### 1.6 Election to administer an estate

Section 16 of the PTA provides the Public Trustee with an expeditious mechanism for acquiring the right to administer estates of modest value. It applies where a person has died anywhere, testate or intestate, leaving property in Alberta, and the gross value of their estate, as estimated by the Public Trustee, does not exceed the prescribed amount of $75,000 (PTA, s 16(1); PTA General Regulation, s 3(1)). Where the foregoing condition is met and no grant of probate or administration has been issued in Alberta, the Public Trustee may elect to administer the deceased person’s estate without applying for a grant by filing with the court an election in the prescribed form (PTA s 16(2); PTA General Regulation, s 3(2) and Schedule, Form 2). The Public Trustee must also file an affidavit containing certain prescribed information and exhibiting the will, if any (PTA General Regulation, s 3(3)–(4)). A certified copy of the filed election is the equivalent of a certified copy of a grant of administration for all purposes (PTA, s 16(5)).

Like s 15, s 16 of the PTA provides for termination of the Public Trustee’s authority by the court. The court may revoke an election and grant probate or administration to another person if the person is eligible to receive a grant and the court is satisfied that it would be
appropriate, under the circumstances, to revoke the Public Trustee’s election and make a
grant to the other person (PTA, s 16(10)).

1.7 Court or government order

Section 28 of the PTA applies on the death of an incapacitated person for whom the Public
Trustee has been acting as trustee. In this special circumstance, s 28(2) authorizes the
Minister of Justice and Solicitor General to issue an order appointing the Public Trustee to
administer the deceased person’s estate. This order gives the Public Trustee the powers and
duties of an administrator appointed by the court.

The Public Trustee may act in any capacity in which the Public Trustee is authorized to act by
an order of the court (PTA, s 5(d)(i)). Thus, whenever the court may appoint someone to act in
a particular capacity in relation to an estate, the Public Trustee is a potential appointee. For
example, the court might appoint the Public Trustee as judicial trustee of an estate under s
46 of the Trustee Act, RSA 2000, c T-8 [Trustee Act] (the administration of any deceased
estate is a trust for the purposes of the Trustee Act, s 46), or as a “special circumstances”
administrator under s 15 of the Estate Administration Act, SA 2014, c E-12.5 [EAA].

Keep in mind, however, that unless a statute expressly allows the court to direct the Public
Trustee to perform a particular task or act in a particular capacity, the Public Trustee’s
consent is required to any such appointment, as well as to the terms of the appointment
(PTA, s 6(2)). If a statute expressly authorizes the court to direct the Public Trustee to
perform a function, the Public Trustee must be given a reasonable opportunity to make
representations regarding the proposed appointment (PTA, s 6(3)).

1.8 Fees

Section 40(1)(a) of the PTA authorizes the Public Trustee to charge a fee that the Public
Trustee considers to be reasonable for any service, including legal services, that it provides
to a client or for any task or function performed by the Public Trustee for the benefit of a
client. (The term “client” is defined in PTA section 1(a.1) to include any person, trust, or
estate for whom the Public Trustee holds property, or to whom or for whose benefit the
Public Trustee provides any service or performs any function or task.)

Section 40(1)(b) states that the Public Trustee is also entitled to recover from a client any
expense reasonably incurred by the Public Trustee on behalf of the client. Section 40(2)
provides that the Public Trustee may charge fees and recover expenses before or after
providing a service or incurring an expense or periodically, while providing services under an ongoing client relationship.

The Public Trustee charges fees for administering deceased persons’ estates in accordance with a fee schedule published under “What are the fees?” on the Public Trustee’s portion of the Alberta Justice website (see http://humanservices.alberta.ca/guardianship-trusteeship/deceased-persons-estate.html). This schedule represents the Public Trustee’s assessment of what is a reasonable fee for the various services that the Public Trustee provides in relation to the administration of deceased persons estates. Similar fee schedules are published for services provided to represented adults, incapacitated persons and minors. However, the Public Trustee does not have the last word on whether a fee is reasonable. The court is specifically authorized to review any fee charged to a client under s 40(4) of the PTA.

2 NOTICE TO THE PUBLIC TRUSTEE OF AN APPLICATION FOR A GRANT

2.1 Where a vulnerable person is interested in an estate

Section 12 of the EAA and the associated Surrogate Rules require notification to the Public Trustee of an application for a grant if certain vulnerable persons are interested in the estate. A person applying for a grant must notify the Public Trustee of the application if any of the following are interested in the estate (EAA, s 12(1)(c); Surrogate Rules, r 26(1)):

- a minor,
- a person who was a minor on the date of the deceased person’s death,
- a missing person as defined in ss 1(h) and 7 the PTA.

The Public Trustee must be given a copy of the application and served with Form NC 24.1.

While s 12(1) of the EAA requires notice of a grant application to the Public Trustee, s 12(3) stipulates that an application may not proceed unless the Public Trustee is represented on the application or has expressed the intention not to be represented. In most cases, the Public Trustee will return Form NC 24.1 with a reply indicating that the Public Trustee does not intend to be represented. In general, the Public Trustee will only appear if the Public Trustee has reason to oppose the application.

For more information on notice to the Public Trustee, see the content on “Notice to family members and beneficiaries” in “Notice.”
2.2 Family members

Section 11 of the EAA imposes a notification requirement that has considerable overlap with the requirement in s 12. An applicant for a grant must serve notice to the Public Trustee pertaining to the rights of family members under Part 5 of the Wills and Succession Act, SA 2010, c W-12.2 [WSA] if the deceased is survived by (EAA, s 11(g)):

- a child who was a minor on the date of the deceased’s death, or
- a grandchild or great-grandchild who was a minor on the date of the deceased’s death and in respect of whom the deceased person stood in the place of a parent on the date of the deceased’s death.

The Public Trustee may apply for maintenance and support on behalf of family members falling in either of the above two categories (WSA, s 104(2)).

The WSA does not expressly describe what the duty of the Public Trustee or any other representative of a dependant is when notified of the application for a grant. However, s 104 of the WSA specifies that where the Public Trustee is satisfied that a family member is receiving adequate support, the Public Trustee has no duty to make an application on behalf of that family member who:

- is subject to a permanent guardianship order under the Child, Youth and Family Enhancement Act, or
- is a represented adult or an incapacitated person.

For more information on notice to the Public Trustee, see the content on “Notice to family members and beneficiaries” in “Notice.” Also see the material on family maintenance and support in the Legal Education Society of Alberta [LESA] publication, Wills and Succession Practice Manual (Vol 1): Planning for Death and Incapacity (Edmonton: LESA, 2016).

3 OTHER APPLICATIONS RELATING TO ADMINISTRATION OF A DECEASED’S ESTATE

No single provision specifies all the circumstances in which the Public Trustee must be notified of applications other than the initial application for a grant of probate or administration. There are a number of relevant provisions. Circumstances in which notice to the Public Trustee may be required include:

- where the Public Trustee is trustee for a represented adult,
where a minor is interested in the estate, and
where a missing person is interested in the estate.

In these circumstances, the Public Trustee may be entitled, otherwise than as personal representative, to take certain actions regarding a deceased person’s estate.

3.1 Public Trustee is trustee for a represented adult

Rule 59 in Part 2 of the Surrogate Rules (which deals with contentious matters) requires a copy of any document required to be filed on an application under the Surrogate Rules or the Alberta Rules of Court, Alta Reg 124/2010 [Rules of Court], to be served on all persons interested in the estate. Rule 57 of the Surrogate Rules enumerates the classes of persons that may be interested in an estate, including trustees of represented adults (r 57(f)). Therefore, if the Public Trustee is trustee of a represented adult who is interested in an estate, the combination of rules 59 and 57(f) requires that the Public Trustee be served with copies of any documents filed in connection with an application under the Surrogate Rules or Rules of Court.

Further, r 75 of the Surrogate Rules allows a personal representative or a person interested in an estate to make certain applications, including an application for an order requiring formal proof of a will. Rule 78 specifies the classes of persons interested in an estate who, notwithstanding r 57, may make an application under r 75. The list includes a trustee under the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2 [AGTA]. Thus, the combination of rules 75 and 78 authorizes the Public Trustee to make any of the applications mentioned in r 75 when the Public Trustee is trustee of a person who is interested in the estate.

Part 3 of the Surrogate Rules is concerned with accounting requirements. It contains a number of rules that either require something to be served on a person interested in the estate or allow a person interested in the estate to make an application, or take some other action, in connection with the estate (rules 103, 107). If the Public Trustee is trustee under the AGTA for a person who is interested in the estate, the Public Trustee is a person interested in the estate for the purpose of these rules (see rules 1(k) and 57).

Additionally, r 100 provides for the personal representative to obtain a release from residuary beneficiaries. The Surrogate Rules are silent on the matter of who, if anyone, may sign a release on behalf of a beneficiary who is under a legal disability. However, where acting as trustee under the AGTA, the AGTA and the PTA appear to give the Public Trustee
authority to execute a binding release on behalf of the Public Trustee’s client (PTA, ss 25(1), 26(1); AGTA s 84(4)).

3.2 **A minor interested in an estate**

There are a number of situations in which the Public Trustee must be notified of an application, or may take some action, because the Public Trustee, as trustee under the AGTA, falls within the *Surrogates Rules*, r 57 definition of person interested in an estate. However, where a minor is interested in an estate, the *Surrogates Rules* do not expressly give the Public Trustee the status of a person interested in an estate, with one exception. While r 57(f) refers to trustees of represented adults, r 57(h) simply refers to minors as a class of persons who may be interested in an estate. Rule 57(h) does not specify that the Public Trustee or any other representative of a minor is a person interested in the estate.

However, r 78 of the *Surrogates Rules*, which defines persons interested in an estate for the purposes of applications under r 75 (e.g., for an order requiring formal proof of a will), does refer in clause (c) to the “Public Trustee or any other person representing minors.” Indeed, r 78 provides that “[d]espite rule 57, the classes of person interested in an estate who may apply for an order under rule 75” include the Public Trustee or any other person representing minors.

While it’s not explicitly stated in the *Surrogates Rules*, it seems reasonable to assume that where other rules (e.g., rules 59, 103, and 107) require a document to be served on a minor person interested in an estate, it is intended that the document be served on someone on behalf of the minor, rather than directly on the minor. The *Surrogates Rules* do not make it clear who is to be served on behalf of a minor; however, from the overall context it seems reasonable to infer that it is intended that the Public Trustee must be served unless some other person has been appointed by the court to represent the minor with respect to his or her interest in the estate.

Rule 100 allows the personal representative to obtain a release from residuary beneficiaries. Unlike where the residuary beneficiary is under a legal disability (in which case, the PTA and AGTA give the Public Trustee authority to execute a binding release on behalf of the represented adult), there is no specific statutory authority for the Public Trustee to execute a binding release on behalf of the minor.
3.3 A missing person interested in an estate

Rule 59(2) of the Surrogate Rules provides that the Public Trustee must be notified of any application under the Surrogate Rules or the Rules of Court where a missing person is interested in an estate. The PTA defines a “missing person” as a person declared to be missing by an order under s 7 of the PTA.

Further, if a missing-person order appoints the Public Trustee as trustee of that missing person’s interest in an estate, and the latter is a residuary beneficiary, PTA, s 7(2)(a) appears to give the Public Trustee the authority to execute a binding release under the Surrogate Rules, r 100 on behalf of the missing person. That is, the Public Trustee’s authority under s 7(2)(a) of the PTA to “administer, sell, dispose of or otherwise deal with” the missing person’s interest in the deceased estate would, it would seem, empower the Public Trustee to execute a binding release with respect to that interest.

4 OTHER CONSIDERATIONS WHERE A MINOR IS INTERESTED IN AN ESTATE

4.1 Expenditures by the Public Trustee for a minor’s benefit

Section 18 of the PTA governs expenditures by the Public Trustee out of property that the Public Trustee holds for a minor. It also governs transfers of property by the Public Trustee to a minor’s guardian.

Section 18 of the PTA applies in any circumstance where the Public Trustee is holding property for a minor. It applies, for example, where property to which a minor is entitled has been transferred to the Public Trustee by a third party under s 9 of the Minors’ Property Act, SA 2004, c M-18.1 [Minors’ Property Act]. It also applies where the Public Trustee is personal representative of an estate in which a minor is interested. In the latter case, however, the discretion conferred on the Public Trustee by s 18 could be restricted or enlarged by the terms of a will under which the Public Trustee is acting as personal representative (PTA, s 18(7)).

Section 18(1)(a) gives the Public Trustee a broad discretion to expend all or any of the property that the Public Trustee holds for a minor. The only formal requirement is that Public Trustee be of the opinion that the proposed expenditure is in the minor’s best interest. If necessary, the Public Trustee may sell property held for the minor to provide funds for expenditure that the Public Trustee considers to be in the minor’s best interest.
If the Public Trustee declines to make a requested expenditure, the minor’s parents (or any other person whom the court considers to be an appropriate person to make the application) could apply to the court under s 18(6) of the PTA. On such an application, the court may act on its own view of whether the requested expenditure would be in the minor’s best interest. (An application under the PTA may be made by any person the court considers appropriate to make the application, under s 39 of the PTA.)

Section 18(1)(a) of the PTA contemplates that the Public Trustee will make decisions about a specific proposed expenditure and ensure that the property is expended for the intended purpose. Section 18(1)(b), on the other hand, allows the Public Trustee to transfer property to the minor’s guardian, and also, in effect, to transfer decision-making responsibility regarding the property to the guardian. Given that the discretion given by s 18(1)(b) involves a transfer of both control over the property and decision-making responsibility to the guardian, it is subject to a monetary ceiling that does not apply to s 18(1)(a). As prescribed by the PTA General Regulation, s 4(1), the value of the property held by the Public Trustee for the minor, and then transferred to the guardian under s 18(1)(b), must not exceed $10,000. The guardian must also sign an acknowledgment of responsibility and hold the property as trustee for the minor (PTA, ss 18(3), 18(5); PTA General Regulation, Form 3). Transfer of the property to the guardian discharges the Public Trustee’s obligation to the minor with respect to the property (PTA, s 18(4)).

Note that the monetary limit under s 18(1)(b) of the PTA refers to the value of the property held by the Public Trustee for the minor, not the value of the property to be transferred to the guardian. Thus, if the value of the property held for the minor exceeds $10,000, the Public Trustee cannot transfer any amount to a guardian under s 18(1)(b), even if the amount transferred would not exceed $10,000. Similarly, if the amount originally held by the Public Trustee exceeded $10,000 but expenditures have reduced the amount to less than $10,000, the Public Trustee will not transfer the balance to a guardian under s 18(1)(b).

4.2 Dispositions of real property by a personal representative or testamentary trustee

If a minor is interested in land that forms or formed part of a deceased person’s estate, a personal representative or trustee may not sell the land except with the consent of the Public Trustee or under an order of the court (Devolution of Real Property Act, RSA 2000, c D-12, s 11). Section 120 of the Land Titles Act, RSA 2000, c L-4 [Land Titles Act] must also be complied with before the Registrar will register a transfer or mortgage executed by an
executor, an administrator of a deceased estate, or a trustee under a will. The Public Trustee’s involvement (or the court’s) will be required unless the instrument to be registered is accompanied by an affidavit, based on personal knowledge, stating that no minor is currently interested in the estate, and that no minor was interested in the estate at the time of the deceased owner’s death (Land Titles Act, s 120(1)(d)).

The test under s 120 of the Land Titles Act is whether any minor is or was ever interested in the estate. The required affidavit cannot be provided if a person interested in the estate was a minor when the deceased died, even if this person has now reached adulthood and consents to the transaction. If a minor was ever interested in the deceased’s estate, the Public Trustee must certify that the Public Trustee has no knowledge of any minors who are now interested in the estate (see Service Alberta, “Execution of Documents by Personal Representatives”, Land Titles and Procedures Manual, issued 1 January 2002 (online: http://www.servicealberta.gov.ab.ca/land-titles-procedures-manual.cfm). If a minor is still interested in the estate, the Public Trustee may consent to the sale or other proposed dealing (Land Titles Act, s 120(1)(b)). The other alternative is to get a court order authorizing the disposition (Land Titles Act, s 120(1)(c)).

4.3 Distribution of a minor’s share of an estate

The Minors’ Property Act deals with how a person who is “obligated to a minor” may discharge the obligation.

If a minor is entitled to receive property (including money) that comprises part of a deceased’s estate (or would be entitled to receive the property if he or she was an adult), the personal representative falls within the Minors’ Property Act definition of “person obligated to a minor.” This means “a person, including the Crown, who is under an obligation to deliver property to a minor or who would be under an obligation to deliver property to a minor if the minor were an adult” (Minors’ Property Act, s 1(d); see also ss 1(b), (c) for definitions of “deliver property” and “property”).

Section 5 of the Minors’ Property Act says that, notwithstanding any other act, a person obligated to a minor may discharge his or her obligation only in accordance with certain provisions of the Minors’ Property Act.
The *Minors’ Property Act* provisions most likely to be relevant to a personal representative are ss 7, 8, and 9. Under these provisions, a person obligated to a minor may discharge that obligation by delivering the relevant property:

- to a trustee (s 7),
- to a guardian (or the minor, if the minor has a legal duty to support another person) where the property is not over the prescribed amount of $10,000 (s 8), or
- to the Public Trustee (s 9).

**Trustee appointed by will**

Wills that leave property to a minor may appoint a trustee to administer any property to which the minor is entitled. Section 7 of the *Minors’ Property Act* provides that a person obligated to a minor may discharge the obligation by delivering the relevant property to a trustee who is authorized by a trust instrument or court order to receive the property. If the executor and the trustee are not the same person, the executor may discharge his or her obligation to the minor by delivering the trust property to the trustee, who must then administer the property in accordance with the terms of the trust.

**Court application to appoint a trustee**

An obligation to a minor may be discharged by delivering relevant property to the minor’s trustee. In addition to a trust instrument, a trustee may be authorized to receive the property by court order. Sections 10–12 of the *Minors’ Property Act* authorize the court to appoint a trustee of a minor’s property. The mechanics of an application to appoint a trustee are outside the scope of this discussion, though a brief summary of the process is provided below.

Section 10 of the *Minors’ Property Act* allows the court to appoint a trustee either of particular property to which a minor is (or will likely become) entitled, or of the minor’s property generally (*Minors’ Property Act*, s 10(1)). As is the case with any application under the *Minors’ Property Act*, the Public Trustee must be given notice of an application to appoint a trustee of a minor’s property, and the application may not proceed until the Public Trustee is represented on the application or has expressed its intention not to be represented (*Minors’ Property Act*, s 15(1)). If the minor is at least 14 years of age, an application may be
made only with the minor’s consent, unless the court otherwise allows (Minors’ Property Act, s 14(3)).

The court may appoint a trustee of particular property to which the minor is entitled, such as the minor’s interest in a deceased person’s estate, if the court is of the opinion that it is in the minor’s best interest to do so. In deciding whether it is in the minor’s best interest to appoint a trustee, the court must have regard to at least the following matters (Minors’ Property Act, s 10(2)):

- the proposed trustee’s apparent ability to administer the property,
- the merits of the proposed trustee’s plan for administering the property, and
- the potential benefits and risks of appointing the proposed trustee compared to other available alternatives.

If the applicant seeks an order appointing a trustee of the minor’s property generally, the court must also consider whether the minor’s interests are likely to be better served by a general order than by an order restricted to particular property.

An order appointing a trustee of minor’s property may include any provision, limitation, or direction that the court considers to be in the minor’s best interest, including a provision that (Minors’ Property Act, s 10(6)):

- requires the trustee to pass their accounts periodically,
- limits the duration of the trusteeship,
- specifies or limits the trustee’s investment powers, or
- provides for compensation of the trustee.

Section 11 of the Minors’ Property Act deals with security provided by the trustee. It creates a presumption that a person may be appointed trustee only after providing a bond or other security of a nature and value and in terms approved by the court (Minors’ Property Act, s 11(1), (2)). Security is not required if a trustee, or one of several trustees, is a trust corporation (Minors’ Property Act, s 11(3)). In other cases, the court may dispense with the requirement for security if the court considers it to be in the minor’s best interest to do so, having regard to “other safeguards that are or will be in place” (Minors’ Property Act, s 11(4)).
Where a minor’s entitlement is not over $10,000

If a deceased does not leave a will, or the will does not appoint a trustee for the minor’s interest, a personal representative may discharge their “small” obligation to the minor in accordance with s 8 of the Minors’ Property Act.

Section 8 of the Minors’ Property Act applies where the value of a minor’s entitlement does not exceed the prescribed amount of $10,000 (Minors’ Property Regulation, Alta Reg 240/2004, s 2(1) [Minors’ Property Regulation]). Where s 8 applies, the person obligated to a minor may discharge their obligation by delivering the property to a guardian having the power and responsibility to make day-to-day decisions regarding the minor. Alternatively, if a minor has a legal duty to support another person, the person obligated to the minor may deliver the property to the minor. In either case, the person obligated to a minor is discharged of his or her obligation only where the guardian or minor provides an acknowledgment of responsibility in the prescribed form (Minors’ Property Act, s 8(2)(b); Minors’ Property Regulation, Form 1 (guardian) or Form 2 (minor)). If the statutory criteria are satisfied, the Public Trustee’s involvement is not required.

It may be that a personal representative can discharge his or her obligation to a minor by delivering property to the minor’s guardian but is reluctant to do so. For such a case, s 9(2) of the Minors’ Property Act allows the personal representative to discharge the obligation to the minor by turning the relevant property over to the Public Trustee. Although not bound to accept the property from the personal representative in these circumstances, the Public Trustee normally does so.

A personal representative also appointed trustee of the property to which a minor is entitled under a will should realize that s 8 of the Minors’ Property Act is not intended to relieve trustees of their duties as trustee. It does not affect the duty of a trustee to deal with trust property in accordance with the terms of a trust (Minors’ Property Act, s 8(5)). Suppose, for example, that a will has left $8,000 to a minor and appointed the executor as trustee of the minor’s interest. The will has entrusted the executor-trustee with responsibility for administering the money for the minor, and s 8 of the Minors’ Property Act does not allow an executor-trustee to get out of this responsibility by turning the money over to a guardian.

No trustee and a minor’s entitlement is over $10,000

Situations frequently arise where the value of a minor’s interest in a deceased person’s estate exceeds $10,000 and no trustee for the minor’s interest has been appointed either by
a will or by the court (the minor’s entitlement usually arises under the WSA). In such cases, the personal representative may discharge their obligation to the minor by delivering the property to which the minor is entitled to the Public Trustee (Minors’ Property Act, ss 5, 9).

4.4 Accounting by the Public Trustee to a minor

If the Public Trustee is trustee under a trust instrument, the Public Trustee must account to the minor according to the terms of the trust instrument. When the Public Trustee receives funds under s 9 of the Minors’ Property Act, it transfers them into an account for the minor, to be held until the minor reaches the age of 18. When funds are to be distributed to the minor, the Public Trustee sends the minor a release form and a statement showing receipts, disbursements, and fees of the Public Trustee. Once the minor returns the signed release to the Public Trustee, the Public Trustee sends a cheque for the trust funds to the minor. If the minor has concerns with the accounting or the Public Trustee’s fees, the Public Trustee applies to the court to have the accounts passed and the Public Trustee’s fees approved.

4.5 Monitoring of a trustee for the benefit of minor beneficiaries

Section 12(c)(i) of the EAA requires an applicant for a grant of probate or administration to notify the Public Trustee of the application if a minor is interested in the estate.

Under the PTA, the Public Trustee has no duty to monitor a minor’s trust in the absence of an express direction to do so in a trust instrument or court order (PTA, s 20). Section 21(1) of the PTA allows a will or other trust instrument to appoint the Public Trustee to monitor a trustee on behalf of minor beneficiaries. This applies only to minor beneficiaries (see PTA, s 21(6)(c), 21(7)). If so appointed, the Public Trustee is under a duty to monitor the trustee (PTA, s 21(2)), and the trustee must provide the Public Trustee with the documents and information identified by the Minors’ Property Act and regulations (PTA, s 21(3)). The court may, however, terminate the Public Trustee’s monitoring duties if the court considers that it is not in the minor’s best interest for the Public Trustee to monitor the trustee (for instance, because of the cost) (PTA, s 21(9)).
If appointed by the trust instrument to monitor the trustee, as soon as practicable after receiving notice that the trust has come into effect, the Public Trustee must obtain and review a copy of the trust instrument and an inventory of the trust’s assets and liabilities (PTA, s 21(2)(a); PTA General Regulation, s 6(1)). Then, at prescribed one-year intervals, the Public Trustee must obtain and review (PTA s 21(2)(b); PTA General Regulation, s 6(2)):

- an inventory of assets and liabilities at the beginning of the year,
- a statement of receipts and disbursements for the year,
- a separate statement of capital receipts and disbursements, if relevant under the terms of the trust, and
- an inventory of assets and liabilities at the end of the year.

The Public Trustee’s duty is to conduct a sort of “face-value” review rather than to undertake an audit of a trustee’s records (see, in particular, PTA, s 21(4), 21(6)). The trust instrument could, however, require a trustee to provide the Public Trustee with audited financial statements to review (PTA, s 21(2)(c)). The Public Trustee’s monitoring role does not authorize or require it to second-guess decisions by a trustee that appear to be within the range of discretion given to the trustee by the trust instrument.

Nothing in s 21 gives the Public Trustee any power to compel a trustee to do anything. However, the trustee has a duty to supply the information that the Public Trustee is supposed to review (PTA, s 21(3)). If a trustee is uncooperative in the Public Trustee’s efforts to carry out its’ monitoring duties, the Public Trustee may apply to the court for whatever order may be required to protect the minor beneficiary’s interest (PTA, s 21(5)(c)).

Section 21(11) of the PTA provides for the Public Trustee to be paid prescribed fees when appointed by a trust instrument to monitor a trust. (See the PTA General Regulation for information on those fees.) Where the Public Trustee was already monitoring a trustee when the new PTA came into force, the Public Trustee must continue to monitor the trust without charging a fee until the minor beneficiaries reach the age of 18 (PTA, s 21(12)).

If a trust instrument has not appointed the Public Trustee to monitor the trustee on behalf of minor beneficiaries, the court may direct the Public Trustee to do so (PTA, s 22(1)(a)). The court may also direct the Public Trustee to monitor a court-appointed trustee, such as a trustee of a minor’s property appointed under s 10 of the Minors’ Property Act (PTA s
22(1)(b)). If the court directs the Public Trustee to monitor a trustee, the presumption is that the Public Trustee’s monitoring duties will be the same as if appointed to monitor by a trust instrument (PTA, s 22(2)). However, with the Public Trustee’s consent, the court may expand the scope of the Public Trustee’s monitoring activities (PTA, s 22(3)). The Public Trustee is entitled to the same prescribed fee when directed by the court to monitor a trustee as when appointed by a trust instrument, except that the court may specify a higher fee if the order imposes more extensive duties on the Public Trustee (PTA, s 22(4)).

For more information on notice to the Public Trustee, see the content on “Notice to family members and beneficiaries” in “Notice.”

5  MISSING BENEFICIARY

It may be that, at the time of distribution, a personal representative cannot locate a person entitled to a share of an estate. If such a beneficiary cannot be located after reasonable efforts have been made to do so, the personal representative can apply under s 7 of the PTA for an order declaring the beneficiary to be a missing person. If the court is satisfied that reasonable efforts have indeed been made to find the beneficiary, the court may declare the beneficiary to be a missing person and appoint the Public Trustee as trustee of the property to which the missing person is entitled (PTA, s 7(1)(b)). (Section 7(1)(b) of the PTA contemplates that the Public Trustee can be appointed as trustee of particular property or of a missing person’s property generally. Likely, the narrower type of order (i.e., particular property) will be regarded by the court as more appropriate than the broader type.)

In the case of missing persons, the Public Trustee will insist on an order under s 7 of the PTA, and will not accept property from a personal representative without a court order.

What happens to funds of a missing beneficiary once they are transferred to the Public Trustee? Section 11 of the PTA requires the Public Trustee to retain the funds for at least 10 years from the date of the missing-person order, unless the missing beneficiary or some other person obtains an order directing the Public Trustee to transfer the funds to them (see PTA, s 7(4)). The funds earn interest while held by the Public Trustee. Section 10 of the PTA authorizes the Public Trustee to expend any portion of the funds for the purpose of attempting to locate the person entitled to the property.

Once the 10-year period expires, the Public Trustee may transfer the funds (including accrued interest) to the Province’s General Revenue Fund (PTA, s 11(3)). If the property is
not already in the form of money, it will be converted into money. On transferring the funds to the General Revenue Fund, the Public Trustee must publish a notice in The Alberta Gazette (PTA, s 11(4); PTA General Regulation, s 1).

A missing person never loses the right to establish entitlement to, and get back, the funds that have been transferred to the General Revenue Fund, but no interest accrues on the funds after they are transferred from the Public Trustee to the General Revenue Fund (PTA, s 11(5)–(6)).

6 SUBSTITUTE TRUSTEE OR JUDICIAL TRUSTEE

Section 5(b) of the PTA allows the Public Trustee to act as trustee of any trust, and s 5(d) allows the Public Trustee to act in any capacity in which it is authorized to act by court order or under the PTA. Thus, there is ample authority for the court to appoint the Public Trustee as a substitute trustee under ss 14(2) or 16, or as a judicial trustee under s 46 of the Trustee Act.

Notably, the Public Trustee’s consent is required for such an appointment (PTA, s 6(2)). The Public Trustee generally will not consent unless the retiring trustee has fulfilled his or her trust obligations up to the time that a substitute trustee is sought and until an order has been obtained passing accounts up to the date of the application seeking a substitute trustee. Similarly, the Public Trustee will not consent to being appointed as a substitute trustee for a trustee wishing to retire where there is a co-trustee of the trust whom is willing to act. This is a reflection of the Public Trustee’s policy, already noted, of not acting as a co-trustee or co-executor.
CHAPTER 17
RURAL ESTATES

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INTRODUCTION

The administration of an estate that includes a farm and/or ranch operation [a “rural estate”] is not different from other, non-rural estate administration. That includes the procedure for transmitting and transferring most assets. As such, the information contained elsewhere in is also applicable to rural estates.

However, some assets are unique to rural estates and require special considerations. The purpose of the following is to provide a lawyer’s guide to those assets and the considerations that relate to them.

NATURE OF RURAL OPERATIONS

When dealing with rural estates, the manner of operation of the rural estate must be determined. Identify whether the operation is a sole proprietorship, partnership, corporation, or joint venture.

2.1 Sole proprietorship

Many rural estates are sole proprietorships. In such cases, there will be no formal agreement related to the business unless the deceased operated on a crop-share basis or under a cash lease.

2.2 Partnership

Often, farm partnerships are carried on without a written partnership agreement. Where there is one, obtain a copy for review. In any case, the following should be determined:

- assets contained in the partnership,
- division of assets and profits in the partnership,
- procedure for sale of the partnership interest on the death of a partner, and
- insurance on principals (i.e., key person insurance).

The death of one of the partners results in the dissolution of the partnership, unless the agreement contains a provision to the contrary. Consult an accountant relating to the resulting tax consequences where the partnership is dissolved.
2.3 Corporation

If a rural estate has been carried on by a corporation, review the following documents to determine whether there are any restrictions on the transfer of shares:

- articles of incorporation,
- by-laws,
- any buy-sell agreement or unanimous shareholders agreement, and
- insurance policies on the principals (i.e., key person insurance).

2.4 Joint venture

Where a rural estate has been carried on as a joint venture, the terms of any joint venture agreement must be reviewed. In particular, ensure that the agreement contains no restrictions on the transfer of the property contributed by the deceased to the joint venture.

3 ASSETS OF RURAL OPERATIONS

When reviewing the assets of a rural farming or ranching operation, there are a number of items for the personal representative and his or her solicitor to consider related to rural estates.

3.1 Real property

*Fee simple land*

For rural estates involving fee simple land, determine whether there are cultivated lands (crops being grown on the land), or grasslands (livestock grazing on the land).

*Lease land*

If the rural estate has leased land, determine if there is cultivated land or grassland, and also review the type(s) of leases associated with the rural estate: private leases, grazing leases, special areas leases, and forestry permits.

*Ownership*

Determine the nature of ownership for the rural estate (i.e., legal ownership or beneficial ownership (e.g., ownership by partnership)).
Valuation of fee simple land

Valuation can be obtained from:

- recent sales of similar land in the area,
- a local certified appraiser, or
- a local real estate agent with experience in agricultural real estate.

A tax professional should be contacted with respect to the tax consequences resulting from the disposition of land on death and the requisite valuations obtained as at the date of death and for income tax purposes. Whenever possible, the remaining amount of the deceased’s lifetime capital gains exemption for qualified farm or fishing properties should be used. The maximum lifetime capital gains exemption for individuals who realize capital gains on the disposition of qualified farm or fishing properties and qualified small business shares was $813,600 for the 2015 tax year. However, this amount has since been indexed for inflation, and for properties disposed of after April 20, 2015, the lifetime capital gains exemption has been effectively increased to $1,000,000. (For more information, see Government of Canada, “Strong Leadership: A Balanced-Budget, Low-Tax Plan for Jobs, Growth and Security” (21 April 2015), online: http://www.budget.gc.ca/2015/docs/plan/budget2015-eng.pdf; See also Canada Revenue Agency, “Lifetime capital gains exemption for qualified farm or fishing property” (15 July 2015), online: http://www.cra-arc.gc.ca/gncy/bdgt/2015/qa07-eng.html.)

Farming of land

If the land was being farmed by the deceased, arrange to preserve and harvest the crop. If someone in the family is not able to do this, arrangements can be made for the farming to be completed by way of:

- a cash lease,
- a crop share lease,
- a joint venture agreement, or
- a custom farm agreement.
If the land was being leased on a cash or crop share arrangement at the death of the deceased, the tenant should be notified of:

- the deceased’s death,
- the name of the personal representative, and
- any arrangements for payment of rent.

It is necessary to determine whether there are growing crops or harvested crops. Growing crops pass with the land (unless the will states otherwise). Conversely, harvested crops are considered a separate asset of the estate.

**Insurance**
Review the insurance coverage to ensure there is adequate insurance on the buildings located on the lands. Notify the insurer and obtain a vacancy rider to the insurance policy, if necessary.

**Hail and crop insurance**
Review the deceased’s insurance policies to determine whether hail and crop insurance has been placed on the crops. This is especially important early in the growing season because crop insurance must be obtained by April 30th of each year.

Crop insurance automatically continues until cancelled. All policy holders are required to check with Alberta Agriculture Financial Services Corporation prior to April 30th each year to confirm any new rates and changes in the policy. (For more information, see the Alberta Agriculture Financial Services Corporation website, online at: www.afsc.ca.)

Hail insurance expires when the crop has been harvested, or at midnight on October 31st of the year of application, whichever comes first. Hail insurance comes into effect at noon on the day following the date of purchase.

**Farm income stabilization programs**
A deceased may have participated in federal or provincial farm income stabilization programs from time to time. If the deceased did participate in these programs, consider whether any reserves have accumulated. Unless specifically gifted, this asset will normally form part of the residuary estate.
Contact the deceased’s accountant for help to determine the tax consequences on the withdrawal of these reserves.

As well, the Government of Alberta Ministry of Agriculture and Forestry can be contacted for additional information on farm programs.

**Other insurance**

Other insurance programs may be available for a farmer to protect against a number of perils. An estate’s participation will depend largely, of course, on the nature of the deceased’s farming operation. The personal representative should review the deceased’s current coverage and contact an insurance specialist to obtain advice as to whether participation in a particular plan should be immediately terminated or continued, or whether additional coverage may be required.

**Security**

Determine whether the buildings are occupied. Security arrangements for any unoccupied buildings must be made to preserve these assets, and a vacancy rider added to the insurance policy.

**Utilities**

Confirm the supplier of utilities to the rural property. Advise of the deceased’s death and make arrangements for monthly billings to be sent to the solicitor or personal representative. Additionally, investigate any telephone or Alberta Federation of Rural Electrification Association liens.

**Surface leases, occupant’s agreements, or Surface Rights Board orders**

These agreements or orders cover such things as oil and gas wells, transmission line towers, and above ground facilities for pipelines located on the lands. The annual rent for these agreements is generally payable in advance. Advise the payor(s) under these documents of the deceased’s death and provide the address to which all future payments can be sent.

Any surface leases or board orders are assigned on the transfer of the lands. Advise the payor(s) of the assignment and the address to which all future payments can be sent. Sometimes it is difficult to determine the payor(s) to contact due to amalgamations or takeovers in the oil and gas industry. The Alberta Surface Rights Board can be useful in obtaining information on these companies.
Additionally, review any farm lease agreements to determine whether the annual surface lease payment, if applicable, is to be split between the owner of the land and the tenant.

The same considerations apply to Consent of Occupant Agreements. These agreements cover the annual rent for oil and gas wells located on Crown-lease lands.

3.2 Mines and minerals

Ownership of mines and minerals

Perform a search at the Alberta Land Titles Office to confirm the type of ownership of mines and minerals (e.g., single owner, joint tenancy, or tenancy in common).

Mines and minerals lease

Determine whether the deceased entered into any royalty agreements or lease agreements affecting the mines and minerals associated with the estate property. Under these agreements, the developer of the mines and minerals pays a royalty to the deceased from the production of the mines and minerals, if they are in production. Otherwise, a yearly rental is generally paid to the deceased to retain the developer’s rights under the agreement.

Royalty trust agreements and gross royalty certificates

A rural estate may include gross royalty certificates. These certificates arose in the 1940s and 1950s with the rise of oil exploration in Alberta, and generally under the following circumstances:

1. the owner of mines and minerals entered into a petroleum and natural gas lease (“PNG Lease”) with an oil company. Typically, the PNG Lease would provide the owner of the mines and minerals a percentage royalty payment from the production achieved under the PNG lease,

2. the mines and minerals owner then entered into an agreement with a trust company, placing the royalty interest into trust (“Royalty Trust Agreement”). The trust company administered the trust, and issued a gross royalty certificate, representing a fractional share of the royalty interest, and

3. the trust company registered caveats against the mines and minerals title, claiming an interest in the land under the Royalty Trust Agreement.
The mines and minerals owners would often trade these gross royalty certificates among themselves or gift them to family members. Since production under a PNG Lease was speculative and, as experience has shown, might not be achieved until many years later, the gross royalty certificates provided a way for a mines and minerals owner to realize some income without having to wait for production under their PNG Lease.


Depending on the wording of the Royalty Trust Agreement, the oil and gas royalties are payable to either the holder of the gross royalty certificates or to the current owner of the mines and minerals.

It is important when dealing with a rural estate that the personal representative is made aware of the importance of ascertaining whether the estate includes:

- mines and minerals subject to a Royalty Trust Agreement, or
- gross royalty certificates.

A solicitor for a personal representative should compare the language of any Royalty Trust Agreements with the trust agreements in the cases noted above. A solicitor should also determine, from the appropriate trust company, the requirements for transferring any interests in Royalty Trust Agreements and gross royalty certificates held by the deceased.
Accountants

An accountant should be contacted for assistance with:

- determining the tax consequences of the transfer of mines and minerals. The transfer of mines and minerals is subject to a resource property tax in Canada, which is taxed as income to the deceased.
- determining GST payable on the transfer of mines and minerals, and
- determining tax implications on the income received under royalty agreements. Pay particular attention to estates that include a life estate. Generally, if at the date of death there is a royalty agreement, then the income will be included in the life estate. If, however, the royalty agreement is entered into after the date of the deceased’s death, the resulting income may have to be split between the life tenant and the residual beneficiaries.

3.3 Farm machinery and equipment

Ownership

Determine ownership of any machinery and equipment (for instance, whether the deceased had full ownership or a percentage ownership of equipment). Percentage ownership may occur if the deceased carried on a partnership or joint venture operation.

Insurance

Ensure that the machinery and equipment is adequately insured.

Sale

Determine if any of the machinery or equipment is to be sold. If so, arrangements should be made for either a private sale or public auction.

Valuations

Valuations on machinery and equipment can be obtained from a local farm equipment dealer or auctioneer.

Security preservation

Steps should be taken to ensure that the machinery and equipment is preserved and protected from theft.
3.4 Grazing leases

Valuation

If possible, obtain the details of other grazing leases in the area. If unavailable, contact an appraiser or a realtor with experience in farm real estate to obtain a valuation. The same considerations apply on determining the value of a grazing lease as in determining the value of fee simple lands.

Assignment fee

If a grazing lease is to be sold, the sale agreement should specify the party responsible for the assignment fee charged by the Government of Alberta under the Public Lands Act, RSA 2000, c P40. Contact the Government of Alberta Ministry of Environment and Parks prior to the sale to determine the amount of the assignment fee. If the lease is being assigned to a specified family member, a $100.00 assignment fee will apply.

The transfer of a grazing lease must be registered with the Government of Alberta Ministry of Environment and Parks.

Consent of occupant agreement

Determine if any grazing lease lands are subject to any oil or gas well production agreements. If so, the wells will likely be covered by a Consent of Occupant Agreement, which specifies the annual rent payable to the holder of the grazing lease. The Consent of Occupant Agreement should be assigned to the new holder of the grazing lease.

3.5 Livestock

Inventory

An inventory of any livestock should be taken.

Valuation

If the personal representative is knowledgeable in farming or ranching operations, he or she may be able to provide the value of livestock. If not, contact a local livestock dealer for values.

Security

Make arrangements for feeding and security of the livestock and, during calving season, make arrangements for calving to be carried out.
Sale

If livestock is to be sold, arrange for either a private or public sale through a livestock auction dealer.

3.6 Grain

Inventory

In order to determine the grain on hand, inventory should be taken. Contact a grain company for existing grain prices to determine the value of the grain inventory. Similarly, local feedlots and local seed dealers can be contacted to determine the value of feed grain and seed grain.

Security

Make arrangements to ensure the security of growing crops. If no one in the deceased's family is available to tend to the crops, have the growing crops farmed through either a lease agreement or a custom farm agreement.

A lease agreement allows for a renter to harvest the crop in exchange for either a fixed cash rent or a share of the harvested crop. A custom farm agreement allows for a custom operator to perform specified duties at specified custom rates.

It is advisable to contact a tax professional prior to entering into a lease agreement or custom farm agreement to avoid adverse tax consequences. Some favourable tax provisions (e.g., roll-overs) for the beneficiaries can be forfeited if the property is leased rather than custom farmed, but the capital gain may be offset by the capital gains exemption, in any event.

Insurance

Determine whether the crops are insured. If crops are uninsured, determine (in consultation with the beneficiaries) whether the crops should be insured with hail insurance or such other coverage as may be required or appropriate.

Grain marketing

Determine what contracts the deceased had with grain buyers concerning the future delivery of grain. Make arrangements to ensure the delivery of grain in accordance with those commitments.
As well, make arrangements for the marketing of the current grain supply. Consultations with grain buyers can be undertaken to secure the best arrangements given the quality levels and amount of the deceased’s inventory of various grains.

4 MISCELLANEOUS MATTERS

4.1 Farm grant programs

A personal representative (or his or her solicitor) should check with an accountant to determine the applicability of any existing farm grant or subsidy programs.

4.2 Transmission and transfer of property

The transmission and transfer of property in rural estates should include certain GST and income tax considerations. For additional items to consider when dealing with the transmission and transfer of property, see the content on “Transmission and transfer procedures” in “Administration of the Estate.”

GST

An accountant should be contacted to determine the applicability of GST on a transfer of land and equipment.

GST will be payable on a transfer of land to a named beneficiary unless the beneficiary is registered for GST purposes, or unless the land is a GST-exempt property. An accountant can confirm arrangements for the filing of the necessary GST forms.

Income tax

There are a number of tax returns to consider when dealing with the administration of a rural estate. Contact an accountant to discuss the processing of the following tax returns: the Terminal Return (T1); the Rights and Things Return; and the T3 Return.

The Terminal Return (T1) covers all income received for the year of the deceased’s death. It covers the period from January 1st to the date of death. The return is to be filed by April 30th of the year following the year of death or 6 months from the date of death, whichever is later.

The Rights and Things Return covers items which, if realized by the deceased during his or her lifetime, would have resulted in taxable income to the deceased. In a rural estate, examples of rights and things are:
• farm crops in existence at the time of death,
• herds of cattle existing at the time of death, less basic herd, and
• accounts receivable for farmers reporting on a cash basis.

The Rights and Things Return must be filed by the later of one year from the date of death or 90 days after the mailing date of the notice of assessment of the Terminal Return.

Finally, the T3 Return reports income and expenses of the estate from the date of the deceased's death until distribution. It is filed annually until the estate administration is concluded. In filing the return, the personal representative can elect any date for filing up to one year from the date of death.

4.3 Quotas
The rural estate may contain quotas for the delivery of certain commodities.

Milk quota
Contact Alberta Milk to advise of the deceased’s death. On receiving a death certificate, Alberta Milk will transfer the quota into the name of the estate to allow the dairy operation to continue to deliver milk under the quota.

If a quota is to be sold, transfer forms are available from Alberta Milk (online: www.albertamilk.com).

Egg quota
Egg quotas are handled through the Egg Farmers of Alberta. Contact them to advise of the deceased’s death and to request the transfer of the quota into the name of the estate.

The sale of an egg quota must be approved by the Egg Farmers of Alberta. They will also help in the estate administration by allowing the quota to be sold through Egg Famers of Alberta.

Other quotas
Contact the Alberta Chicken Producers with respect to the transfer of chicken quotas, the Alberta Turkey Producers with respect to the transfer of turkey quotas, and the Alberta Hatching Egg Producers with respect to the transfer of quotas for hatching eggs.
4.4 Co-operatives

Determine if the deceased had any interests in co-operatives (for example, United Farmers of Alberta).
# CHAPTER 18

## ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

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1 INTRODUCTION

There are ways of settling disputes among parties apart from the traditional litigation process. These alternatives are now generally entrenched in Alberta and across Canada. They have found favour with the general public, as they tend to be faster, more efficient, and less expensive means of resolving disputes. In the area of estate law, a further advantage is obtained: early settlement of disputes by alternative means may also help to mend rifts in family relations which are only inflamed and cemented into antagonistic positions by the traditional litigation process and its rules of combat.

The momentum for alternative dispute resolution [ADR] in North America originated in the United States, where the outcry against the adversarial judicial system has been loudly voiced. The ADR movement has been a major force for change in the United States. It has also influenced thinking, practices, and reforms in Canada. That thinking continues as ADR becomes further entrenched in the system as a legitimate legal dispute resolution mechanism.

ADR began in the private sector, outside the civil justice system. It includes negotiation, arbitration, mediation, and collaborative law, with the latter two using an interest-based model to reach settlement. In recent years, these models have been adopted in the civil justice system itself, and now there are court-annexed ADR processes using non-judges. Also, there are a variety of judicial dispute resolution [JDR] models where judges step out of their usual role and effect a settlement using ADR techniques. In Alberta, the role of ADR has been acknowledged through the Alberta Rules of Court, Alta Reg 124/2010 [Rules of Court], which generally apply to all estate matters.

The following material describes the processes that are currently available in both the justice system and the private sector. The various techniques described here are:

- negotiation,
- arbitration,
- mediation,
- collaborative law, and
- court-assisted ADR processes.
This discussion of alternative techniques to the litigation process for the resolution of disputes in the civil justice system is largely taken (with permission) from the Alberta Law Reform Institute [ALRI], *Alberta Rules of Court Project: Management of Litigation*, Consultation Memorandum 12.5 (Edmonton: ALRI, 2003) [ALRI, *Management of Litigation*]. This is one of the consultation memoranda issued under ALRI's "Alberta Rules of Court Project"; other related ALRI publications include *Alberta Rules of Court Project: Promoting Early Resolution of Disputes by Settlement*, Consultation Memorandum 12.6 (Edmonton: ALRI, 2003) [ALRI, *Promoting Early Resolution*] and *Dispute Resolution: A Directory of Methods, Projects and Resources*, Research Paper 19 (Edmonton: ALRI, 1990) [ALRI, *Dispute Resolution Directory*].

ALRI, *Management of Litigation* concentrates on what role judges and the courts might play in the early resolution of disputes. The following expands on this to describe not only what is happening in the court system but also what is available privately.

2 WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Over the years, different meanings have been attributed to the acronym “ADR.” Now, ADR is generally defined as a process that contrasts with the determination of disputes by court adjudication. ADR may refer to assistance with dispute resolution offered entirely outside the civil justice system, or as a program or service connected to the court, or by judges of the court acting in a facilitative rather than an authoritative role (in effect, “judicial ADR” or JDR).

The range of ADR methods is far-reaching, bound only by the limits of human imagination. The use of one or another or any combination of these private sector settlement processes is a choice lying entirely within the control of the parties. That is to say, the parties define the issues in the dispute, control the choice of the procedure, and (generally) agree on the resolution to be achieved by settlement (although the parties could agree to accept a process such as binding arbitration that has an adjudicative result).

A cultural shift toward dispute resolution using methods other than court adjudication is in progress. Evidence of this shift is provided by the appearance in the workforce of persons who make a living by helping others resolve disputes (e.g., mediators, arbitrators, and other persons with similar skills). But not just anyone can facilitate ADR. Filling such a role requires extensive training and a paradigm shift in attitude; the other side is no longer an opponent but a partner in solving a common problem. The cultural shift is further evidenced by the large amounts of lawyers and law firms that have begun to specialize in ADR processes.
Indeed, it appears that law firms may soon be using ADR to address procedural and interim issues rather than just final or more encompassing issues.

A cultural shift is also in progress in the civil justice system to promote early settlement and reduce the antagonistic nature of litigation. The Canadian Bar Association Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: CBA, 1996) [CBA Task Force Report] signaled a move toward greater management of the judicial process by the courts and an enhanced role for judges in promoting settlement. Subsequently, this greater involvement has come to bear, through court-mandated ADR and a more formalized JDR process. For more information on court-mandated ADR and the JDR process, see the content on “Court-annexed ADR processes.” These processes have become an integral part of managing litigation in Alberta and in assisting parties resolve disputes without having to go through full litigation.

The trend toward placing greater emphasis on settlement, and less reliance on court adjudication to resolve disputes, is well under way. Today, more than ever before, society recognizes the advantages of promoting settlement at the earliest time appropriate to the nature and circumstances of a dispute. The existing civil justice system offers a range of measures that promote settlement, and new measures have been introduced. Programs and services formerly provided only in the private sector are now being annexed to the court and offered by the court as part of its service. Further, organizations like the ADR Institute of Alberta and the ADR Institute of Canada (online: www.adralberta.com and www.adrcanada.ca, respectively) offer professional organization, education, and administration relating to private sector ADRs.

*ADR process in the private sector*

The range of alternatives falling within the rubric of ADR is limitless, making ADR processes difficult to categorize. The 4 basic methods are: negotiation, mediation, arbitration, and collaborative law. Negotiation and mediation are non-binding processes, while arbitration is usually (but not always) binding. Collaborative law has its own unique set of rules.

### 2.1 Negotiation

Negotiation is the most common form of dispute resolution and is the method traditionally used by lawyers. In negotiation, the parties (perhaps assisted by their lawyers) attempt to settle their dispute themselves. It is considered to be the superior option, in terms of
efficiency, flexibility, and reducing costs (both public and private), given that disputants control the entire process and outcome themselves. Although lawyers engaged in negotiating in the past typically received no training in negotiation techniques, the current norm is for new lawyers to receive training in both negotiation and ADR processes. Alberta law schools offer negotiation and ADR courses, and lawyers wishing to be admitted to the Alberta bar must pass the Canadian Centre for Professional Legal Education [CPLED] program, which includes a negotiation component.

2.2 Third party interventions

In cases where private negotiations are not successful, a next step for consideration is the option of third party intervention. Third party intervention in a dispute can vary greatly, ranging from the minimal intervention of a mediator, acting as a facilitator to help disputants settle their dispute between themselves, to the maximum intervention of an adjudicator, acting as a decision-maker imposing resolution on disputants.

Mediation

Mediation involves a neutral third party assisting the parties in a dispute to reach a settlement, and is the least intrusive form of third party involvement in a dispute. A mediator’s role is that of a facilitator—not adjudicator. The parties themselves reach a decision. A mediator controls and structures the negotiations, defuses emotional tensions, and keeps the channels of communication open, thus increasing the chances of settlement by the parties. In the mediation model, the parties define the issues, explore each other’s underlying interests, and come to terms with the problem. Once agreement is reached, it is enforceable as a contract between the parties.

Mediation is generally non-binding and non-coercive, although some jurisdictions may require parties to try mediation before litigation. For information on the rules in Alberta, see the content on “ADR processes in the civil justice system.”

As well, mediation can be annexed to the court system and become a judgment of the court, if agreement is reached. The parties may define, between themselves or with a mediator’s assistance, the issues to be settled. Finally, the extent to which a mediator is involved in the negotiation process can vary widely on a continuum, ranging from merely acting as a chairperson to where, in a very structured negotiation process, a mediator may go so far as to suggest settlements to the parties.
Perceived advantages of mediation

When used in a context where relationships should be ongoing, mediation permits underlying issues and emotions to be addressed and resolved. This allows the relationship to continue rather than risking permanent estrangement. For this reason, mediation is commonly used in the area of estate law and family law.

Given that a decision is reached by the parties to the dispute instead of being imposed on them, there is greater participant satisfaction with the dispute resolution process and outcome, and consequently, greater compliance with the result.

The process is less confrontational than adjudication, reducing the likelihood of a win-lose mentality, and provides a framework to resolve future disputes between the parties.

As opposed to adjudication, mediation is faster, less expensive, and less formalized, both in terms of process and in tailoring results. This increased flexibility enables the needs of particular parties to be addressed.

The process also permits income tax considerations to be addressed.

Perceived disadvantages and limitations of mediation

Mediation may be inappropriate where there is an imbalance of power among the parties, or where there is a history of physical violence, as one party may intimidate the other. Similarly, unrepresented parties may be at a disadvantage against represented parties in mediation.

If mediation fails and adjudication follows, it has added another step to the process, thus increasing time and money spent.

It is also questionable whether the perceived advantages of mediation are possible if the process has been mandated. That said, if mediation is voluntary, it is useful only if the parties are predisposed to settle. Such participants would probably reach settlement on their own.

Additionally, the ability and qualifications of mediators, and whether they should be subject to professional standards, is of concern. The use of mediators as an alternative to court adjudication may result in a second tiered justice system for low-income and disadvantaged groups.
Arbitration

Arbitration involves submissions of evidence and argument to an adjudicator. The arbitrator renders a decision that is binding upon the parties. The parties do not find solutions for themselves.

Private arbitration includes only private, voluntary methods of adjudication. Arbitration proceedings are generally less formal than court adjudication. However, in some cases, the arbitration process will have been structured in advance, by reference to a statute, regulation, contract, or a method agreed to by the parties. Specifically, the ADR Institute of Canada publishes a set of rules for arbitration, the “ADRIC Arbitration Rules” (Toronto: ADR Institute of Canada, 2014). Parties may adhere to these rules entirely, partially, or not at all. Again, the use of these rules would be subject to agreement. However, they do provide a very useful foundation for the arbitration procedure.

The ADR Institute of Alberta and the ADR Institute of Canada also provide administration services for arbitration, such as receiving filings and enforcing the agreed-upon rules. Again, this is all done by agreement and parties can withdraw from such administration as simply as they can utilize it.

Arbitration is common in the context of ongoing contractual relationships and in collective bargaining, where the parties design their own process. They decide for themselves the identity and number of arbitrators, the procedure to be followed in the process, on what the decision is to be based, and the extent to which the decision may be challenged.

Arbitration awards are subject to judicial review on the basis of an arbitrator’s error, infringement of the rules of natural justice, or deceit. Further, if there is an error on the face of the award, or if new evidence has come to light, an award may generally be challenged. If the parties do not adequately define the necessary elements in their agreement to arbitrate, the Arbitration Act, RSA 2000, c A-43 [Arbitration Act] affords options. It also provides the mechanism for the enforcement of the award upon application, and also court supervision of arbitration.

There may be a single arbitrator or a panel. In the absence of agreement, s 9 of the Arbitration Act provides that there must be a single arbitrator. Often, though not necessarily, an arbitrator is an expert in the field in which the dispute arose.
Perceived advantages of arbitration

Arbitration may allow a dispute to remain private, allowing the participants to avoid the publicity inevitably associated with litigation.

Additionally, arbitration is more flexible than litigation. The parties have control over their own dispute, the procedures followed, and the principles applied to resolve it. This increases the satisfaction of the disputants with the process and the outcome. Since the procedure can be designed to be far less formal and intimidating than court, the confrontational atmosphere of the dispute is diminished. This is especially important in maintaining on-going business relationships.

Arbitration is also faster, and consequently, less expensive, than litigation. The public interest is served because the parties bear the costs of arbitration. The process also permits income tax considerations to be addressed.

There is no precedent value in the decision reached, so a concern for future cases does not impact on the decision. As well, if experts are used as arbitrators, the process is likely more efficient, and results may be more in accord (or perceived to be more in accord) with the parties’ expectations.

Perceived disadvantages and limitations of arbitration

Arbitration may not always be faster, less expensive, and less formal. It may be more expensive and time-consuming than litigation, if the arbitration agreement, choice or conduct of arbitrators, procedure, or award is challenged.

There are also concerns regarding ability and qualifications of arbitrators, and whether they should be subject to professional standards. Some arbitral decisions are not reviewable for errors of fact or law, which may lead to unfair results.

Negotiation/mediation/adjudication hybrids

The use of hybrids, in which various combinations of dispute resolution techniques are employed, recognizes that one particular method or another may not always be suited to a dispute. Viewing negotiation, mediation, and adjudication as separate and distinct processes may not only be misleading but may also discourage the most efficient resolution of disputes. Hybrids allow the flexibility to deal with disputes in the way best suited to the type of dispute and the disputants involved.
Med/arb

Med/arb is a process under which the same person serves both as mediator and arbitrator. In this situation, where mediation does not yield a settlement, the mediator switches roles from mediator to arbitrator and imposes a decision. Med/arb is commonly used in labour disputes in the United States.

Perceived advantages of med/arb

There is less posturing by parties in a mediation process when the mediator also has the power of a decision-maker, as parties are more likely to attempt serious and reasonable negotiations. The parties will reach a better agreement by themselves in med/arb than what would be imposed with arbitration alone.

Perceived disadvantages and limitations of med/arb

If the same person acts as both mediator and arbitrator, and mediation fails, the adjudicative role of the arbitrator has been compromised, in that information learned while acting as mediator may affect, or appear to affect, the objectivity of the decision made.

2.3 Collaborative law

The collaborative law process is a variation on negotiation. It is set up by contract: lawyers and clients together agree not to go to court. Instead, they all direct their energies toward finding a lasting solution to the dispute. Collaborating for shared purposes often leads to creative possibilities for resolving disputes.

The lawyers involved in collaborative law must be trained in collaborative law techniques. Further, if the clients cannot reach an agreement and decide to litigate, they must retain different lawyers.

Collaborative law is a fairly new form of ADR. The concept was developed by Stu Webb, a family lawyer in Minneapolis, Minnesota. In Stu Webb, “Collaborative Law”, as cited in Honourable Michael H Porter, Collaborative Law Level I for Wills & Estates Lawyers (Edmonton: Resolution Associates, 2002) [Porter, Collaborative Law Level I], Webb describes the process as:

A way of practising law whereby the attorneys for both of the parties to a dispute agree to assist in resolving conflict using cooperative strategies rather than adversarial techniques and litigation. The commitment to working collaboratively is reflected in an agreement between both attorneys and their
respective clients that, should settlement efforts break down, the attorneys will withdraw and not participate in actual court proceedings.


Collaborative law consists of two clients and two attorneys, working together toward the sole goal of reaching an efficient, fair, comprehensive settlement of all issues. Each party selects independent collaborative counsel. Each lawyer’s retainer agreement specifies that the lawyer is retained solely to assist the client in reaching a fair agreement and that under no circumstances will the lawyer represent the client if the matter goes to court. If the process fails to reach agreement and either party then wishes to have matters resolved in court, both collaborative attorneys are disqualified from further representation. They assist in the orderly transfer of the case to adversarial counsel. Experts are brought into the collaborative process as needed, but only as neutrals, jointly retained by both parties. They, too, are disqualified from continuing work and cannot assist either party if the matter goes to court. The process involves binding commitments to disclose voluntarily all relevant information, to proceed respectfully and in good faith, and to refrain from any threat of litigation during the collaborative process.

The process moves forward via carefully managed four-way settlement meetings, preceded by considerable groundwork between lawyer and client, and between lawyer and lawyer.

Although the concept of collaborative law was developed in the context of family law, it can easily be adapted to estate law. The number of parties is usually more than the two involved in family matters, creating different logistics but, for the purposes of estate issues, the fundamental principles remain the same.

The concept is that collaborative law (Porter, Collaborative Law Level I):

... is an empowering process premised on the firm belief that, given the appropriate opportunity for understanding, full information, a range of choices and assistance in evaluating those choices for the consequences which flow from each, people are capable of making decisions for themselves.

The process is similar to mediation in that it is a form of interest-based negotiations. However, the role you play as a lawyer is quite different and also pivotal to the success of the process. In mediation, an independent and impartial third person manages the process. In collaborative law, the lawyers handle the process and advise their respective clients. A large part of your role is to educate and train your client in collaborative law skills. You will also
clarify the choices open to your client and the consequences that flow from each, making sure that your client is fully informed.

The collaborative process builds:

- from the initial lawyer-client meeting,
- to an initial lawyer-lawyer meeting,
- to client preparation for the session with all parties and lawyers,
- to the first and any subsequent full sessions,
- to final agreement.

Alberta is one of the first jurisdictions to use the collaborative law approach in estate disputes. The Collaborative Estate and Trust Lawyers of Alberta [CETL] is the first organization in North America to be formed by collaborative lawyers in the wills and estates field.

Collaborative law requires that protocols be in place. CETL has developed protocols for common training and standards, the form of agreement committing the lawyers and clients to the process, the role of the Public Trustee (which is unique to estate situations), and membership in the society.

2.4 Summary

While some different forms of ADR have been briefly described, in actuality, the dispute resolution processes are myriad. The interventions lying between the extremes of mediation and arbitration can vary greatly, as can the mixing and mingling of the methods. Any attempt at classification of the different methods of outside intervention for dispute resolution is fraught with difficulty because of substantial overlapping, as many of the methods share common characteristics.

3 WHICH ALTERNATIVE DISPUTE RESOLUTION PROCESS TO CHOOSE AND WHY?

Numerous factors affect the choice of an ADR method, several of which are also listed in ALRI, Promoting Early Resolution at para 118. These factors include:

- matching a dispute with a process,
- the strength of the “interpersonal” dimension of the dispute,
the nature of the dispute,
- the amount at stake,
- alternative methods,
- the speed of resolution,
- the costs involved,
- the relative power of the disputants,
- the relative knowledge of the disputants,
- the relative financial resources of the disputants,
- the mechanisms for steering disputants and intermediaries to the right choice,
- the relationship between dispute resolution methods (e.g., linear, hierarchical model, or integrated),
- the incentives for use of alternative methods, and
- the attitudes of lawyers and judges.

As noted in ALRI, *Promoting Early Resolution* at para 119, litigants may be attracted to ADR for a number of reasons, including:

- ADR is not restricted to legal issues and remedies; other interests at stake in a dispute can be accommodated by taking an “interest-based” (as opposed to “rights-based”) approach to problem-solving,
- the parties choose their own ADR proceeding, and choose the people who will assist (i.e., mediate) or ‘judge’ (i.e., deliver a binding or non-binding opinion about the likely outcome of the case at trial),
- the parties determine their own outcome,
- the parties choose when they will use ADR,
- ADR processes are typically private, thereby preserving the confidentiality of the proceedings and resolution,
- ADR may be more affordable than court adjudication, and
- Income tax considerations can be accommodated.
Consider the needs and aims of your client when choosing an ADR method. For instance, conciliation is a form of mediation in which efforts are made to repair a relationship between parties in order to help them find a peaceable and amicable resolution of differences. Therapeutic intervention is a form of mediation in which a relationship is repaired and personal skills for coping and dealing with problems are improved. An extension of therapeutic intervention would include individual therapy.

4 ALTERNATIVE DISPUTE RESOLUTION PROCESSES IN THE CIVIL JUSTICE SYSTEM

4.1 Traditional approach

Traditionally, the civil justice system was used to resolve disputes for parties unable to do so among themselves. Accessing that system was the only means to resolution. Unfortunately, the more litigants in a society, the greater the burden on the courts becomes. Extensive access to the courts has contributed to criticisms relating to costs, delays, and inefficiencies in the operation of the civil justice system.

The hallmarks of court adjudication are (ALRI, Promoting Early Resolution at paras 19-20):

- a judge hears the evidence presented by the parties, typically through their legal counsel (although these days, there are more and more self-represented litigants, which brings its own set of difficulties and challenges) and makes the decision,
- the issues are framed in the language of legal specialists, which does not always accord with the understanding (and lived reality) of the parties to the dispute,
- the parties are often distanced from the process, which instead is dominated by lawyers and judges,
- the process is very adversarial, structured by the rules of civil procedure,
- generally, the judge remains out of the arena of the dispute and lets the parties, with the advice of their legal counsel, decide when and how to proceed, and
- many disputes in litigation are settled, but the settlements tend to occur later in the litigation process and therefore do not result in significant savings of time or money for the participants.
Of course, the earlier that settlement occurs, the greater the potential for reducing delay and cost. This is best done before a case has been committed to extensive pre-trial discovery and other forms of trial preparation, including the retention of experts.

Settlement can occur before litigation begins or while it is under way, and may be the result of (ALRI, Promoting Early Resolution at para 16):

- independent initiative undertaken by the parties, including making use of dispute resolution processes available outside the civil justice system, in the private sector,
- advice given by counsel, who may negotiate a settlement with counsel for the other party or parties to the dispute, or propose the use of a settlement process as an alternative to litigation,
- the discussion of settlement possibilities, including the possibility of using a settlement process other than litigation, at a meeting with a judge (judicial pre-trial conference or case management meeting), or
- the facilitation of settlement by a judge, stepping out of the authoritative role associated with adjudication and using non-binding methods ordinarily offered in the private sector to assist the parties to come to an agreement.

4.2 Current experience

Historically, many persons resolved their disputes without litigating (which is still the case today). Beginning in the 1970’s, and spurred on by growing dissatisfaction with the high cost, slow pace, and adversarial nature of litigation, an era of experimentation with creative new methods of dispute resolution was occurring in the private sector.

For a fuller account of the ADR movement, see ALRI, Dispute Resolution Directory at 7–9. Significant in the move toward more consensual dispute resolution processes was the publication of Roger Fisher and William Ury’s now classic book on negotiations, the latest revised edition being Getting to Yes: Negotiating Agreement Without Giving In (New York: Penguin Books, 2011).

The CBA Task Force Report encapsulated the state of civil justice systems in the various jurisdictions of Canada in August 1996. At that point, Canada’s civil justice systems were in a state of flux and the traditional ways of doing court business were changing. In 2006, the BC
Justice Review Task Force made recommendations that called for “sweeping changes to the civil justice systems of all Canadian jurisdictions, in order to address critical problems of delay, cost and complexity” (BC Justice Review Task Force, Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force (British Columbia: BC Justice Review Task Force, 2006) at 81). Now, 10 years since its publication, these recommendations have been reflected in changes throughout the country, including in Alberta.

Although traditional trials continue to be used in the CBA Task Force’s “multi-option” vision of the civil justice system, they have become the “last-resort mechanisms of dispute resolution” (CBA Task Force Report at 31). In addition to trials, various dispute resolution techniques are integrated into the court system. The focus throughout is on early settlement.

Clearly, an important characteristic of the emerging emphasis on early dispute resolution is the promotion of settlement using processes that are alternative to court adjudication. The settlement measures being introduced in the court system are inspired by processes initiated in the private sector, but are adapted to fit the contours of litigation. These changes both reflect and spearhead a change in the mind-set of litigants, lawyers, judges, and court staff.

Such change has become ubiquitous in the legal landscape of Alberta. For example, Part 1 of the Rules of Court sets out certain foundational rules that outline their underlying purposes. Among these purposes is to encourage parties to resolve claims by themselves, by agreement, and with or without assistance (Rules of Court, r 1.2(2)(c)). Further, r 4.16 of the Rules of Court mandates that parties to litigation must, in good faith, engage in one or more ADR processes. Indeed, rules 8.4 and 8.5 prevent parties from setting a matter down for trial until they have fulfilled this obligation. (Note, however, that in February 2013, citing a lack of resources, the court advised that rules 8.4 and 8.5 of the Alberta Rules of Court will not be enforced until further notice. This suspension spoke directly to the popularity of JDRs, which will be discussed further, and the strain their popularity was putting on court resources.)

It is clear that we are no longer in a legal landscape dominated by litigation as a primary method of dispute resolution. Rather, ADR, in its various forms, has been encouraged by the bench as well as the bar.

The following chart illustrates the contrast between the litigation and non-litigation processes.
<table>
<thead>
<tr>
<th>Litigation Process</th>
<th>Non-litigation Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Process is adversarial (win-lose)</td>
<td>Process is non-adversarial, cooperative, and collaborative (win-win)</td>
</tr>
<tr>
<td>Process is court-controlled</td>
<td>Process is party-controlled</td>
</tr>
<tr>
<td>System is publicly provided</td>
<td>Assistance is privately engaged</td>
</tr>
<tr>
<td>Process is fairly structured (although flexible within institutionally-fixed limits)</td>
<td>Wide-open choice of process from limitless possibilities; able to accommodate wishes of parties</td>
</tr>
<tr>
<td>One party sues, the other must respond or stand in default</td>
<td>Voluntarily undertaken by both parties</td>
</tr>
<tr>
<td>Time limits imposed</td>
<td>Pace and timing up to the parties</td>
</tr>
<tr>
<td>Result often uncertain, not readily predictable</td>
<td>Result (usually) rests with parties</td>
</tr>
<tr>
<td>Progresses on a more or less lock-step continuum</td>
<td>More an integration than a continuum; allows for seamless movement among ADR processes on a single occasion, or simultaneous application of various ADR processes with respect to particular elements of the dispute</td>
</tr>
<tr>
<td>Issues are framed in legal terms, using legal concepts, and the discussion is “rights-based”</td>
<td>Issues reflect the interests of the parties, and the discussion is “interest-based”</td>
</tr>
<tr>
<td>Remedies are limited to legal remedies</td>
<td>Remedies respond creatively to party interests</td>
</tr>
<tr>
<td>The record and proceedings (generally) are open to members of the public</td>
<td>Proceedings (generally) are conducted in private; shared information is confidential</td>
</tr>
<tr>
<td>Adjudicative decision by an official external to</td>
<td>Agreement of the parties on resolution of the</td>
</tr>
<tr>
<td>Litigation Process</td>
<td>Non-litigation Process</td>
</tr>
<tr>
<td>-------------------------------------------------------------</td>
<td>-------------------------------------------------------------</td>
</tr>
<tr>
<td>the dispute (i.e., a judge or master)</td>
<td>dispute</td>
</tr>
<tr>
<td>Adjudicative decisions subject to appeal</td>
<td>If agreement is reached, no appeal process contemplated</td>
</tr>
</tbody>
</table>

5 COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION PROCESSES

Data from nearly all common law jurisdictions throughout the world show that fewer than 5% of all court cases actually reach trial. Yet, all cases are structured on the traditional litigation model as if they were going to trial.

Increasingly, courts are supplementing the traditional litigation system with dispute resolution programs and services known as “court-annexed ADR.” These programs and services, based on private sector ADR, are designed to encourage parties to settle their dispute before trial using non-binding processes. (Note that some of the court-annexed ADR programs introduced in Alberta do not use judges. However, they are not discussed here because they are not relevant to estate disputes).

It is not unusual for judges to play a role in relation to settlement. Formerly, judges who felt a dispute ought to be settled would call counsel into their private chambers to discuss the case on an informal basis. Today, the judicial role in promoting settlement is expanding. Judges now encourage settlement as a component of pre-trial and case management conferences. In addition, they sometimes step out of the authoritative role associated with adjudication in order to facilitate settlement using ADR techniques in specially-scheduled JDR sessions.

More recently, the JDR process has been formalized through rules 4.17 and 4.18 of the Rules of Court, with certain resources being devoted to the JDR process. Unfortunately, as of the fall of 2014, the number of members of the bench hearing JDRs was cut from 3 to 2 per week in both Edmonton and Calgary. Again, this was due to a lack of resources in the face of high demand (Court of Queen’s Bench of Alberta, “Notice to the Profession: Reduction in Judicial Dispute Resolution Bookings,” 2014-106 (20 May 2014)).

Further, the enactment of Part 4 of the Rules of Court, in conjunction with the foundational rules contained in the Rules of Court, have generally provided access to the courts by parties seeking assistance in resolving their dispute without a full trial.
5.1 Authority for judicial dispute resolution

One of the changes made in Alberta civil practice through the implementation of the amended Rules of Court in 2010 was the inclusion of Part 4, Division 3, titled “Dispute Resolution by Agreement.” Division 3 contains Subdivision 1 (Dispute Resolution Process) and Subdivision 2 (Judicial Dispute Resolution). Prior to the inclusion of ADR and JDR processes in the Rules of Court, authority for JDR came from the Practice Notes issued by the Court of Queen’s Bench of Alberta. At that time, the term “pre-trial conference” was used in the Practice Notes, and was seen as the root source of the expansion of judicial involvement into facilitating settlements. Today, the Rules of Court do not mention pre-trial conferences. Instead, the generic term “conference” is used (see r 4.10). However, pre-trial conferences are still contemplated in the Provincial Court Act, RSA 2000, c P-31.

The subdivision governing JDR in the Rules of Court provides its purpose, the process, guidance on documents required and confidentiality, and the role of a judge at different stages of JDR.

Additional authority for the expansion of the judicial role comes from:

- inherent jurisdiction, which includes the role of a superior court to control proceedings before it,
- statute (for instance, in Alberta, the Judicature Act, RSA 2000, c J-2, and in particular s 8, which deals with control over procedure and avoidance of multiplicity of actions), and
- Part 4 of the Rules of Court (on managing litigation).

Under the Rules of Court, the parties to a dispute now have access to Part 4, Division 2 (Court Assistance in Managing Litigation). Included in this part is r 4.10, which allows the parties to apply to the court for a conference, where dispute resolution possibilities can be considered. Following such a conference, the court may make a procedural order to assist the parties in managing the dispute, which theoretically could involve the attendance at mediation (r 4.10).

5.2 History of judicial dispute resolution

Where requested by the parties, judges use ADR techniques to actively facilitate settlement discussions between the parties in individually scheduled conferences known as JDRs.
The Court of Queen’s Bench of Alberta first offered JDR to litigants in Alberta around 1990. Initially, the process took the form of a judicial mini-trial. The Alberta judicial mini-trial was modelled on a process first introduced in r 35 of the now repealed *Supreme Court Rules*, BC Reg 221/90. That British Columbia rule was developed from a dispute resolution process that had proven effective to resolve commercial disputes in the private sector.

In Alberta, the early mini-trial consisted of a structured process, involving the presentation of the agreed facts and argument by counsel with parties present, and concluded with the delivery by the judge of a non-binding opinion on the likely outcome were the case to proceed to trial. ALRI described the mini-trial “as a discrete technique that may be used to produce a settlement, and observed that although a pre-trial conference may lead to a mini-trial, the mini-trial is not a continuation of the pre-trial conference, but is a separate event” (ALRI, *Promoting Early Resolution* at para 165). In 1996, the CBA Task Force identified two key features of the Alberta mini-trial: “voluntary participation” and “flexible design of procedure tailored to the dispute” (CBA Task Force Report at 34).

Once judges became involved in facilitating settlement in judicial mini-trials, they began to employ other processes in their settlement efforts with counsel and parties. Today, judges performing JDR frequently use mediation, caucusing (although less frequently), early neutral evaluation, and other techniques associated with ADR. The use by judges of a myriad of ADR techniques led to wide variations in the processes employed. These wide variations occur even though JDRs are a specialized function and the conference judge is usually selected from a defined roster of judges who are willing to undertake a JDR.

Factors that contribute to these variations were identified in ALRI, *Promoting Early Resolution* at para 166:

- the JDR Guidelines, which provide guidance on how to conduct a JDR session, can be difficult to access and hard copies issued by court clerks may differ from one judicial district to another. (A copy of the Alberta Court of Appeal’s JDR Guidelines is available online: https://albertacourts.ca/court-of-appeal/judicial-dispute-resolution-guidelines.),
- the process for selecting a judge to facilitate settlement appears to differ in Calgary and Edmonton (although both districts give the parties a say in the selection),
• the process is highly flexible (as a result, judges tend to develop individual “styles” of settlement facilitation, some being more inclined toward the original mini-trial, while others make more liberal use of ADR techniques), and

• some judges conduct a “binding JDR,” a practice that invites conceptually difficult questions about the judicial role being performed and about the relationship between adjudication, JDR, and settlement by the parties.

5.3 Current judicial dispute resolution practice in Alberta

The JDR process in Alberta is now entrenched in the Rules of Court and in the practices of the courts, and is much more simplified. The procedure is unified within the courts administration and is easily accessible, barring certain resource issues that have arisen.

Rule 4.17 of the Rules of Court sets out the purpose of a JDR; that purpose is to “provide a party-initiated framework for a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement.” Similarly, r 4.18 describes the JDR process. One of the essential components of r 4.18 is that the parties must agree to the procedure. Again, mutual agreement plays a large role in any ADR process. This is further evident in r 4.19, which states that the only documents that may result from a JDR are an agreement prepared by the parties or a consent order of the court; both of which require the consent and agreement of the participating parties. Arguably, r 4.19 appears to have eliminated the prospect of having a “binding” JDR.

While each justice may manage his or her JDR differently, the goal remains the same, which is the same goal set out in the foundational rules and in Part 4 generally: to facilitate a resolution of the litigation as efficiently and effectively as possible.

In 2009, Rooke ACJ published an evaluation report titled “Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen’s Bench of Alberta” (Edmonton: Court of Queen’s Bench of Alberta, 2009). This report released an assessment of Alberta’s JDR program based on a survey of the lawyers and clients who participated in JDRs in 2008. This report, along with Rooke ACJ’s master thesis, “The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of the Queen’s Bench” (2010) University of Alberta Faculty of Law Master Thesis, supports using JDRs as an integral and institutional part of dispute resolution at the Court of Queen’s Bench of Alberta.
Trevor CW Farrow, *Civil Justice, Privatization, and Democracy*, 1st ed (Toronto: University of Toronto Press, 2014) [Farrow, *Civil Justice*] at 98-101 speaks positively about the impact the JDR process has had across Canada and, in particular, Alberta. Quoting Belzil J of the Court of Queen’s Bench, he states that the “JDR has become hugely popular in the Province of Alberta... Lawyers and clients report a high degree of satisfaction with the system, with ever increasing request for JDR” (Farrow, *Civil Justice* at 99).

Ultimately, the *Rules of Court* now place a greater emphasis on settlement through non-litigation mechanisms. The JDR process has proved to be a very popular ADR mechanism, so much so that there are not enough court resources to keep up with demand. Hopefully, such resources will become available to allow the JDR process to continue and further develop.
ADULT INTERDEPENDENT RELATIONSHIP ACT CHECKLIST

Alberta Wills and Estates Practice Manual
**ADULT INTERDEPENDENT RELATIONSHIP ACT CHECKLIST**

The following checklist provides a summary of the matters to be examined when dealing with a situation involving an adult interdependent relationship. It has been reproduced from the LESA publication, *Bill 30-2: Adult Interdependent Relationships Act* (Edmonton: LESA, 2003).

<table>
<thead>
<tr>
<th>Applicable Section of Act</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Adult Interdependent Partner (AIP) if:</strong></td>
<td></td>
</tr>
<tr>
<td>(a) lived with another person in a relationship of interdependence</td>
<td></td>
</tr>
<tr>
<td>(i) for 3 continuous years, or</td>
<td>3(1)(a)(i)</td>
</tr>
<tr>
<td>(ii) have a child (birth or adoption), or</td>
<td>3(1)(a)(ii)</td>
</tr>
<tr>
<td>(b) entered into an Agreement</td>
<td>3(1)(b)</td>
</tr>
<tr>
<td><strong>2. Relationship of Interdependence if 2 persons:</strong></td>
<td>1(1)(f)</td>
</tr>
<tr>
<td>(a) share lives,</td>
<td>1(1)(f)(i)</td>
</tr>
<tr>
<td>(b) emotionally committed, and</td>
<td>1(1)(f)(ii)</td>
</tr>
<tr>
<td>(c) economic and domestic unit</td>
<td>1(1)(f)(iii)</td>
</tr>
<tr>
<td><strong>3. Economic &amp; Domestic Unit Factors (not an exhaustive list):</strong></td>
<td>1(2)</td>
</tr>
<tr>
<td>(a) conjugal relationship,</td>
<td>1(2)(a)</td>
</tr>
<tr>
<td>(b) exclusivity of relationship,</td>
<td>1(2)(b)</td>
</tr>
<tr>
<td>(c) conduct and habits,</td>
<td>1(2)(c)</td>
</tr>
<tr>
<td>(d) hold selves out as economic &amp; domestic unit,</td>
<td>1(2)(d)</td>
</tr>
<tr>
<td>(e) formalized obligations,</td>
<td>1(2)(e)</td>
</tr>
<tr>
<td>(f) direct or indirect contributions,</td>
<td>1(2)(f)</td>
</tr>
<tr>
<td>(g) financial (inter)dependence,</td>
<td>1(2)(g)</td>
</tr>
<tr>
<td>(h) care and support of children, and</td>
<td>1(2)(h)</td>
</tr>
<tr>
<td>(i) property</td>
<td>1(2)(i)</td>
</tr>
</tbody>
</table>
4. Applies to Retroactive AIP’s

5. Not an AIP if:
   (a) under 16 with signed AIP Agreement
   (b) age 16 or over without written consent of guardian(s)
   (c) related minor (blood or adoption)
   (d) related persons (blood or adoption) without AIP Agreement
   (e) provides service (domestic support and personal care) for:
       (i) fee,
       (ii) other consideration, or
       (iii) on behalf of other person or organization,
       (including government)
   (f) have another AIP
   (g) married and living with spouse

6. AIP Agreement if:
   (a) living together or intending to,
   (b) in Regulation form,
   (c) the following prohibitions don’t apply:
       (i) existing AIP Agreement,
       (ii) married,
       (iii) under 16, and
       (iv) 16 or older without guardians written consent,
Applicable Section of Act

(d) valid:

(i) no fraud, duress, or undue influence, 8(1)(a)
(ii) mental capacity, 8(1)(b)
(iii) living together or intending to, and 8(1)(c)
(iv) not prohibited (6(c) above) 8(1)(d)

(e) no requirement for independent legal advice

7. If AIP Agreement is invalid due to prohibitions (6(c) above)
or due to fraud, duress, or undue influence (6(d)(i) above) then
liable to other AIP party for pecuniary and non-pecuniary damages
and costs 8(2)

8. If an invalid AIP Agreement is used to claim as AIP,
then liable for pecuniary damages and costs to third parties 8(3)

9. If AIP is alleged, knowing it doesn’t exist, then liable for
damages and costs to person who relied on existence of AIP 9

10. AIP ceases if:
(a) legislation changes, 10(1)
(b) written agreement confirming separation
and no intent to reconcile, 10(1)(a)
(c) more than 1 year separate and apart, even if:
(i) mental incapacity, or 10(2)(a)
(ii) reconcile once for less than 90 days, 10(2)(b)
(d) marry (each other or 3rd party),  
(e) a deemed AIP (see 1(a) above) signs AIP agreement with 3rd party

11. Factors to consider when determining if AIPs are living separate and apart (not exhaustive list):
   (i) intention (one not both),
   (ii) physical separation (can be within same dwelling),
   (iii) sexual relations,
   (iv) domestic chores/services,
   (v) meals,
   (vi) social or recreational activities,
   (vii) level of communication, and
   (viii) financial arrangements

12. Party alleging an AIP has onus of proving
AFFIDAVIT OF ATTESTATION OF AN ENDURING POWER OF ATTORNEY (SAMPLE)

*Alberta Wills and Estates Practice Manual*
SAMPLE

AFFIDAVIT OF ATTESTATION OF AN ENDURING POWER OF ATTORNEY

(Powers of Attorney Act)

I, [name of witness], of [city], Alberta, make oath and say:

1. I was personally present and saw [name of donor] sign the Power of Attorney dated [date], which is attached to this affidavit.

2. I know [name of donor] to be the donor named in this Power of Attorney.

3. I signed the Power of Attorney as one of the witnesses at Edmonton, Alberta in the presence of the donor.

4. I believe the donor, the attorneys and the witnesses are all at least 18 years of age.

5. I am not an ineligible person, within the meaning of s 2(4)* of the Powers of Attorney Act, to sign the Power of Attorney as a witness.

SWORN before a Commissioner for Oaths for Alberta at [CITY], ALBERTA ON [DATE].

Deponent: ________________________________  Commissioner’s name: ________________________________

Appointment expiry date: ________________________________

* Section 2(4) Powers of Attorney Act, RSA 2000, c P-20

The following persons may not witness the signing of an enduring power of attorney:

(a) a person designated in the enduring power of attorney as the attorney;

(b) the spouse or adult interdependent partner of a person designated in the enduring power of attorney as the attorney;

(c) the spouse or adult interdependent partner of the donor;

(d) a person who signs the enduring power of attorney on behalf of the donor;

(e) the spouse or adult interdependent partner of a person who signs the enduring power of attorney on behalf of the donor.

---

1 This sample Affidavit of Attestation is for the registration of an enduring power of attorney at the Land Titles Office and as an affidavit of witness to the signature of a donor.
AFFIDAVIT OF ATTESTATION OF A PERSONAL DIRECTIVE (SAMPLE)

Alberta Wills and Estates Practice Manual
AFFIDAVIT OF ATTESTATION OF A PERSONAL DIRECTIVE

(Personal Directives Act)

I, [name of witness], of [city], Alberta, make oath and say:

1. I was personally present and saw [name of maker] sign the Personal Directive dated [date], which is attached to this affidavit.

2. I know [name of maker] to be the maker named in this Personal Directive.

3. I signed the Personal Directive as one of the witnesses at [city], Alberta in the presence of the maker.

4. I believe the maker, the agents, and the witnesses are all at least 18 years of age.

5. I am not an ineligible person within the meaning of s 5(3)* of the Personal Directives Act to sign the Personal Directive as a witness.

SWORN before a Commissioner for oaths for Alberta at [CITY], ALBERTA ON [DATE].

Deponent

Commissioner's Name:

Appointment Expiry Date:

* Section 5(3) of the Personal Directives Act, RSA 2000, c P-6
The following persons may not witness the signing of a personal directive:

(a) a person designated in the Personal Directives as the agent;
(b) the spouse or adult interdependent partner of a person designated in the Personal Directives as the agent;
(c) the spouse or adult interdependent partner of the maker;
(d) a person who signs the Personal Directives on behalf of the maker;
(e) the spouse or adult interdependent partner of a person who signs the directive on behalf of the maker.
DECLARATION OF ENDURING POWER OF ATTORNEY
(SAMPLE)

Alberta Wills and Estates Practice Manual
SAMPLE

DECLARATION OF ENDURING POWER OF ATTORNEY

IN THE MATTER OF THE POWERS OF ATTORNEY ACT
RSA 2000, c P-20, as amended

AND IN THE MATTER OF AN ENDURING POWER OF ATTORNEY
SIGNED BY [NAME OF DONOR] ON [DATE]

DECLARATION

TO WHOM IT MAY CONCERN

AND

TO THE REGISTRAR OF THE LAND TITLES OFFICE

I/We am/are named as the person(s) in the Enduring Power of Attorney of [Name of donor] whose written declaration will conclusively determine that the contingency or future event specified in the Enduring Power of Attorney has happened. When the specified contingency happens, or at a specified future time, the Enduring Power of Attorney comes into effect.

or

I/We are both medical practitioners and are authorized to make this declaration under the Powers of Attorney Act because the person(s) named in the Enduring Power of Attorney of [Name of donor] as the person(s), whose written declaration will conclusively determine that the contingency or future time specified in the Enduring Power of Attorney has happened, has died or is otherwise unavailable to make this declaration. When the specified contingency happens, or at the specified future time, the Enduring Power of Attorney comes into effect.

In my/our opinion, the donor has become mentally incapacitated.

I/we now declare that the specified contingency or future time has occurred. This enduring power of attorney is now in effect.

____________________________  ______________________________
Signature                         Signature

____________________________  ______________________________
Name:                           Name:
DUTIES OF AN ATTORNEY UNDER AN ENDURING POWER OF ATTORNEY (SAMPLE)

Alberta Wills and Estates Practice Manual
SAMPLE
DUTIES OF AN ATTORNEY UNDER AN ENDURING POWER OF ATTORNEY

You are appointed as an attorney under an enduring power of attorney [EPA]. This position brings great responsibilities. An attorney named in an EPA is not a lawyer; “attorney” refers to the person that is appointed in a power of attorney.

You have a *fiduciary* duty to the person who appointed you in his or her EPA, called the donor. That is, you are like a trustee and you hold the donor's property in trust for him or her. You must:

- act in the donor’s best interests,
- keep the donor's property safe,
- only use the donor's property for his or her benefit unless the donor has given you the specific authority to use his or her property for someone else's benefit as well,
- not take any benefit from the donor's property for yourself.

Usually, an attorney’s authority in an EPA is unlimited. But sometimes the donor puts limits in the EPA and restricts what you, the attorney, may or may not do with the donor’s property.

You must read the EPA very carefully to ensure that you understand what authority the donor gives to you and what authority is withheld from you.

As an attorney, you are entitled to be paid a reasonable fee (which is taxable income in your hands) for acting in this capacity. There is no set fee (sometimes called a tariff), but the fee is often comparable to fees awarded to trustees who act in the estate of a deceased person.

What follows is a list of some of your duties. This list is not exhaustive. The nature of a donor's property may require you to do more than what is indicated in this list. Some things in the list may not apply in your situation.

**Initial duties**

1. Review the EPA’s provisions.
2. Note whether or not the donor specifies that funds can be used to benefit others, such as a spouse, dependent children, or charitable groups.
3. Note what must be done to bring the EPA into effect.
4. Some EPAs are effective on the date they are signed. However, most come into effect only when the donor loses mental capacity. In that case, a letter is required, indicating that the triggering event (the donor's incapacity) has occurred. The donor may have specified who is to make this decision. If that is not the case, two medical practitioners must make it.

5. Advise all financial institutions with whom the donor deals that the EPA is in effect and that you are the appointed attorney. Provide a notarized copy of the EPA to the banks or other financial institutions. Transfer the donor's bank accounts into your name as attorney for the donor.

6. Register the EPA against the donor's title to any real property (land). The Land Titles Office requires an original EPA (which they keep). If the EPA is not effective immediately on signing (i.e., if it is a “springing EPA”), you need a notarized copy of the letter that indicates the EPA is now in effect. (See paragraph 3.)

7. List all of the donor's property with current market values.

8. Ensure that real property (land and houses, commercial and farm buildings, etc.) are adequately insured. Notify the insurance company that you are acting as attorney.

9. Ensure that other property (cars, boats, farm machinery, etc.) is adequately insured. Notify the insurance company that you are acting as attorney.

10. Determine all of the donor's debts and arrange for payment.

11. Arrange for the payment of recurring debts, such as nursing home fees, utilities, phone, etc.

12. Determine the monthly payment to the donor required for his or her living expenses.

13. Arrange to receive the donor's mail.

14. Arrange to list the contents of any safety deposit box.

15. Obtain a copy of the donor's will. Note the donor's intentions about his or her property in his or her will and ensure that his or her wishes are carried out as far as possible.
Investment duties

1. Invest the donor's funds in accordance with the prudent investor rule or any other instructions given to you by the donor in the EPA.

2. Consider what kind of investments are the best according to the donor's needs (e.g., need for income or invest for capital growth).

3. Engage an investment counsellor if necessary.

4. Review the investment portfolio on a regular basis.

5. Consider whether to sell or rent any real property.

6. Consider whether to sell or continue to operate any on-going businesses.

Accounting duties

1. Keep a record of all financial transactions you make on the donor's behalf.

2. When you start to act as attorney:
   - prepare an inventory of the donor's property and debts at that date at current market values,
   - keep a record of all income and other payments you receive for the donor—including the amount and date of receipt,
   - keep a record of all payments you make to the donor and other parties—including the amount and date of payment,
   - keep a record of all investments made by you for the donor.

3. Provide an accounting to any people to whom you are required to account to according to the EPA (if any). You may consider accounting to the donor's beneficiaries in any case, whether or not you are required to do so. It is very difficult for beneficiaries to later cause difficulties about the period of your attorneyship if you keep them advised throughout.

4. File annual tax returns with CRA and pay any assessed taxes.

5. Engage an accountant if necessary.

On the donor's death

1. Account to the donor's executor, named in his or her will.
SAMPLE

ENDURING POWER OF ATTORNEY

**This sample enduring power of attorney provides sample notes to be read by the attorney prior to execution and a certificate of independent legal advice.**

ENDURING POWER OF ATTORNEY OF [NAME OF DONOR]

Cancel previous enduring powers of attorney

1. I cancel any enduring power of attorney that I have already given.

Appointment of attorney

2. I appoint those named below as my attorney(s).

3. If those I appoint as my attorney(s) are unwilling or unable to act or to continue to act, I appoint those named below as alternative attorney(s) for me.

(a) Attorney(s) name [attorney's address]

(b) Alternative attorney(s) name [alternate attorney's address]

4. However, if, after I make this enduring power of attorney, my marriage to/relationship with [name of former spouse/partner] ends by a [final divorce judgment or by our separating permanently], any provision of this enduring power of attorney that gives a benefit to [name of former spouse/partner] or that appoints [name of former spouse/partner] as my attorney, is cancelled.

Effective date of this enduring power of attorney

5. The powers given to my attorney by this enduring power of attorney come into effect upon one of the following events occurring:

(a) Upon written direction from me that this enduring power of attorney shall come into effect and that my attorney shall be entitled to manage my affairs,
(b) Upon my becoming mentally incapable of making reasonable judgments in respect of matters relating to all or any part of my estate, or

(c) Upon my being physically unable and incapable of communicating decisions and judgments.

OR

5. The powers given to my attorney by this enduring power of attorney come into effect on the date of this document and continue despite my mental incapacity after this date.

6. Once I become mentally incapacitated, this enduring power of attorney is irrevocable during the period of my mental incapacity.

Who may make the written declaration?

7. I designate those named below as the person(s) who may determine whether I lack capacity to make any decisions affecting my financial matters.

8. If those I designated are unwilling or unable to make this determination, I designate the alternates named below to make this determination.

9. A written declaration from those designated is conclusive proof that I have become mentally incapacitated:

<table>
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<tr>
<th></th>
<th>Person(s)</th>
<th>[person’s address]</th>
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<table>
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<tr>
<th></th>
<th>Alternative Person(s)</th>
<th>[alternate person’s address]</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

10. I acknowledge that, if those I designate to make this determination are not available or cannot be contacted after reasonable efforts are made, the Powers of Attorney Act, RSA 2000, c P-20 provides that two medical doctors authorized to practise in the jurisdiction in which I reside are so designated.
Powers of my attorney

11. My attorney has authority to do anything on my behalf in connection with all my real and personal property that I may lawfully delegate to an attorney, including having access to any safety deposit box of mine and having custody of my will.

12. In addition to this general power to use my property for my benefit, my attorney also has the power to use my property to:

   (a) maintain, educate, benefit, and advance my spouse/partner and dependent children,
   (b) make gifts to my spouse/partner, children, and grandchildren on special occasions such as birthdays and Christmas in amounts that my attorney decides are suitable,
   (c) continue to make gifts to the charities I supported in amounts similar to those I made when I could manage my property, if appropriate in my then current circumstances.

13. My attorney has authority to delegate any of the powers given by this enduring power of attorney.

14. When making a payment to or on behalf of a person authorized by this enduring power of attorney to receive it, my attorney may pay the person, the guardian of the person, or any other appropriate person my attorney decides. A receipt from the person to whom the payment is made fulfills my attorney's responsibility. My attorney does not have to make sure that the payment is applied properly.

15. When I no longer have a need for them, my attorney may distribute items of household or personal use, according to any directions in my will or codicil.

16. My attorney may sell or retain any of my property, including land, as my attorney decides is best for me.

17. Subject to the previous clause, my attorney is bound by the prudent investor rule when investing or retaining any part of my property.

18. My attorney has the power to sign all instruments on my behalf concerning real property that can be registered under the Land Titles Act, Real Property Act or Registry Act (or equivalent legislation) of all the provinces of Canada and any foreign jurisdiction.

19. My attorney must file all required tax returns with the Canada Revenue Agency and this is my authorization to the Canada Revenue Agency to deal with my attorney with regard to any tax matter concerning me or any companies which I control.
20. My attorney may retain and act on the advice of any lawyer, financial advisor, accountant, broker, or other expert as my attorney deems necessary. The reasonable fees and charges for such experts must be paid from my estate.

21. In consultation with any agent I may appoint under a personal directive, my attorney may employ companions or other persons, including nurses, for my care at such compensation and for such length as my attorney and agent consider advisable.

22. My attorney may make whatever modifications are necessary to allow me to remain independent in my own home until it is no longer possible for me to do so without putting my health and well-being in jeopardy. I wish to remain independent in my own home for as long as possible. Such modifications must be paid for from my estate.

23. My attorney has the power to change any beneficiary designations I made and which benefit my spouse/partner in the circumstances only where my marriage to/relationship with [name of former spouse/partner] has since ended by a [final divorce judgment or by our separating permanently]. The beneficiary designation must be changed to "my estate."

Restrictions on powers

24. This enduring power of attorney has no restrictions.

OR

24. This enduring power of attorney is subject to the following restrictions:
(a) [delete paragraph or insert restrictions if applicable]

25. However, I wish my attorney to have in mind the provisions of my will. As far as possible, I want my attorney to make decisions under this enduring power of attorney that are consistent with allowing the gifts I made in my will to be effective.

26. My attorney may wish to sell property that is the subject of a specific gift in my will in order to provide for my present and future needs. In such a case, I direct my attorney to place the proceeds of the sale into an identifiable trust account so that the gift will not fail under the doctrine of ademption. These funds are to be administered for my benefit.

27. Any funds remaining in this identifiable trust account at my death must be given to the beneficiary of the property under my will.
Access to information

28. I authorize all my financial information to be made available to my attorney. This includes information from the Canada Revenue Agency and Pension Plan, financial institutions, employers and benefits providers, and all financial records, despite any contrary provisions of any federal or provincial privacy statutes.

Accounting

29. If my attorney is not my spouse/partner, my attorney (including any child of mine who is my attorney) must provide an annual accounting to all my children and provide any of them with information about my estate at their request. This accounting must be done according to the accounting requirements for trustees.

Dispute resolution

30. If any dispute arises concerning the operation of this enduring power of attorney or the interaction of this enduring power of attorney and any personal directive of mine, I direct that the issue(s) must be settled first through mediation; if that is not possible, then through arbitration under the Arbitration Act, RSA 2000 c A-43. I do not wish disputes to be decided by a court under the court's powers in the Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2.

Attorney compensation

31. My attorney must be paid for the work done as my attorney according to Alberta surrogate practice.

Acknowledgments by the donor

32. I read or had read to me, and understand the nature and effect of, this enduring power of attorney.

33. I am over 18 years of age.

34. I am voluntarily giving the attached enduring power of attorney.

35. I read the notes attached as a schedule to this enduring power of attorney.

I have signed this enduring power of attorney at [city], Alberta on [date].
Witnesses:

[NAME OF DONOR]

[name of lawyer]
Lawyer

[name of assistant]
Legal Assistant
Notes on the enduring power of attorney to be read before signing this document.

1. The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your property and financial affairs.

2. Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.

3. This document is an "enduring" power of attorney, which means that it will not come to an end if you become mentally incapable of managing your own affairs. At that point, your attorney will have a duty to manage your affairs and will not be able to resign without first obtaining permission from the court. This power of attorney comes to an end if your attorney dies.

4. You may cancel this power of attorney at any time, as long as you are mentally capable of understanding what you are doing.

5. You should ensure that your attorney knows about this document and agrees to being appointed as attorney.
CERTIFICATE OF INDEPENDENT LEGAL ADVICE

[name of lawyer], Barrister & Solicitor, has given legal advice concerning the enduring power of attorney signed by [name of donor], on [date].

[name of lawyer] states

1. I am not the attorney or the alternate attorney or the spouse or the adult interdependent partner of the attorney or the alternate attorney named in the enduring power of attorney.

2. The donor attended before me alone.

3. I gave the donor legal advice concerning the enduring power of attorney.

4. The donor appeared to me to understand the nature and effect of the document.

5. The donor signed the document before me.

6. The donor acknowledged to me that the donor gave the enduring power of attorney voluntarily.

Signed at [city], Alberta on [date].

_____________________________
[name of lawyer]  
Barrister & Solicitor
ENDURING POWER OF ATTORNEY QUESTIONNAIRE (SAMPLE)

Alberta Wills and Estates Practice Manual
SAMPLE

ENDURING POWER OF ATTORNEY QUESTIONNAIRE

Date: 

Your name: ____________________________________________

Address & postal code: __________________________________

Phone: ___________   Fax: ___________   E-mail: ___________

Attorney (the person or persons that will make financial decisions for you; this does not mean lawyer).

Name of attorney: _______________________________________

Address & postal code: __________________________________

Phone: ___________   Fax: ___________   E-mail: ___________

Relationship: ___________________________________________   Age: ________________

If you want more than one attorney to act together (joint attorneys), name the other attorney or attorneys here:

Name of attorney: _______________________________________

Address & postal code: __________________________________

Phone: ___________   Fax: ___________   E-mail: ___________

Relationship: ___________________________________________   Age: ________________

If you are naming more than two attorneys, do they make decisions on a majority basis or do they all have to agree?

☐ on a majority basis       ☐ they all have to agree (unanimous)

If you are not naming joint attorneys and your first-named attorney cannot or will not act, name your second choice (your alternate attorney) here:

Name of alternate attorney: __________________________________

Address & postal code: ______________________________________

Phone: ___________   Fax: ___________   E-mail: ___________

Relationship: ___________________________________________   Age: ________________
If your alternate attorney cannot or will not act, name your third choice here:

Name of attorney: ________________________________________________________________

Address & postal code: ____________________________________________________________

Phone: __________________ Fax: ___________________ E-mail: _________________________

Relationship: __________________________________ Age: ____________________________

Indicate whether you want this power of attorney to come into effect immediately when you sign it, or only once you are incapacitated (called a “springing” enduring power of attorney because it “springs” into effect only when and if you lose capacity to make reasonable judgments relating to all or any part of your estate). Remember, this relates to your finances and property only; this is not for personal or medical decisions:

☐ Effective immediately when signed ("Immediate Enduring Power of Attorney")

☐ Effective only when incapacitated ("Springing Enduring Power of Attorney"); springing into effect when you lose capacity to make financial and property decisions for yourself

   Note: If this is a springing power of attorney; you may name the person who decides whether or not you still have capacity to make reasonable judgments relating to all or some part of your estate:

   ☐ your attorney ☐ your attending physician

   ☐ other – Name: ______________________________________________________________

If you want to expand your attorney’s powers beyond what happens automatically by law, indicate which of the following you want your attorney to be able to do with your assets:

☐ give gifts to family members on special occasions, including gifts of cash

☐ give to charities

☐ help my children with post-secondary education expenses even if they are over the age of 18

☐ other ________________________________________________________________
Name any particular thing(s) you do not wish your attorney to do (such as sell certain real property that you own – you may want to consider items you have named in your will for giving, or items that have sentimental or particular value to you or others and should be kept, if at all possible):

Indicate below how you want your attorney to be paid for the time and effort acting on your behalf:

- [ ] no fees; my attorney should only be reimbursed for out-of-pocket expenses
- [ ] monthly fees of $__________ (plus reimbursement of out-of-pocket expenses)
- [ ] fees based on Alberta surrogate practice (plus reimbursement of out-of-pocket expenses)
- [ ] if my attorney is a trust company, fees paid according to its compensation schedule in existence when the power of attorney comes into effect.

Do you own:

- [ ] real property (house, cottage, etc.)
- [ ] business / farm

How do you want your attorney to invest money on your behalf:

- [ ] capital guaranteed investment such as GIC's and Term Deposits
- [ ] whatever he/she wants to invest in including mutual funds
- [ ] some combination of these two.
  - e.g., 50% capital guaranteed/50% whatever they decide
  - or 75% capital guaranteed/25% whatever they decide
  - or 25% capital guaranteed/75% whatever they decide
- [ ] other
ESTATE ADMINISTRATION INFORMATION GATHERING FORM (SAMPLE)

Alberta Wills and Estates Practice Manual
SAMPLE

ESTATE ADMINISTRATION INFORMATION-GATHERING FORM

Documents

Bring the following documents to your estate solicitor:

1. The deceased’s original will and any codicil or other document that appears to direct the distribution of property on death.

2. A copy of all relevant agreements and court documents, including matrimonial property agreements, orders, minutes of settlement, maintenance orders and custody orders, adult interdependent partner agreements, pre-nuptial agreements, cohabitation agreements, divorce judgments, enduring powers of attorney, and dependent adult orders.

3. A copy of all titles to land owned or partially owned by the deceased and a copy of any leases or tenancy agreements related thereto. Alternatively, provide the municipal description of such land.

4. A copy of all powers of attorney given by the deceased.

5. A copy of any trust agreements to which the deceased was a party or beneficiary.

6. A copy of the vehicle registration for any vehicles owned by the deceased.

7. A copy of the deceased’s life insurance policy and/or a summary of the full particulars of policies on the deceased’s life, including particulars of designated beneficiaries.

8. A copy of the deceased’s life insurance policy and/or a summary of the full particulars of policies owned by the deceased on the lives of others.

9. A copy of any shareholder agreement, partnership agreement, employment agreement, etc. to which the deceased was a party.

10. Full particulars of all foreign assets. It may be necessary to seek advice in the foreign jurisdiction relating to asset transfer. In general, immovables (corresponding roughly to real estate and leaseholds), transfer (or devolve) according to the law of the jurisdiction where they are situated. Movables (all other property) generally transfer under the law of the deceased’s home jurisdiction.
DECEASED’S PERSONAL INFORMATION

General

1. Deceased’s full name: ________________________________

2. Any other name by which the deceased was known: ________________________

3. Address of last residence in full (including postal code): ________________________

4. Habitual province/state of residence: ________________________

5. (a) Date of death: ________________________

   (b) Place of death: ________________________

   (c) Date of birth: ________________________

   (d) Place of birth: ________________________

   (e) Citizenship(s): ________________________

   (f) Did the deceased have a United States of America green card? 
       Yes ____ No ____

   (g) Did the deceased spend extended periods of time in the U.S.? 
       Yes ____ No ____

Marriages or relationships

6. Marital status: ________________________

   Did the deceased marry after the date of the will? ________________________

7. Name of any surviving spouse: ________________________

   Address (with postal code): ________________________

   Phone no. (bus): ____________________ (res/cell): ____________________
Date of marriage: ___________________________ Place: ___________________________

8. Name(s) of previous spouses: ___________________________

Date(s) of previous marriage(s): ___________________________

Reason for termination (divorce, death): ___________________________

9. Name of any adult interdependent partner: ___________________________

Address (with postal code): ___________________________

Phone no. (bus): ___________________________ (res/cell): ___________________________

(a) The adult interdependent partner lived with the deceased in a relationship of interdependence;

   (i) For a continuous period of not less than 3 years beginning
       ___________ (insert date) and ending ___________ (insert date)

   (ii) Of some permanence of which there is a child:

       Born ___________ (date of birth)

       Adopted ___________ (date of adoption)

(b) The adult interdependent partner entered into an adult interdependent partner agreement with the deceased dated ___________ (insert date).

The adult interdependent partner ___________ is/is not related to the deceased by blood or adoption.
Immediate family

10. Surviving children (including all of those born in and out of a marriage):

<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Address</th>
<th>Birthdate</th>
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<tbody>
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<tr>
<td>(d)</td>
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</table>

11. Are the spouse and/or the children physically or mentally handicapped?

Yes _________ No _________

12. If so, who, and in what way: __________________________________________

________________________________________________________________________

13. Predeceased children:

Yes _________ No _________

14. If yes, list name, date of death, birth date, and former address of such deceased child or children:

<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Date of death</th>
<th>Date of birth</th>
<th>Former address</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
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<tr>
<td>(c)</td>
<td></td>
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</tr>
</tbody>
</table>

Did the predeceased children have any children of their own?

Yes _________ No _________
If yes, list name, birth date, and address of such child or children:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Birthdate</th>
</tr>
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<tbody>
<tr>
<td>(a)</td>
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<td>(c)</td>
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</tbody>
</table>

Will/codicil

16. The deceased died leaving:
   Will: __________ Codicil: _________________ Without a will: _________________

17. Location of the will/codicil(s) since its/their execution: ________________________________

18. Date of the will: _________________ Date of any codicil: _________________

Witnesses to the will

<table>
<thead>
<tr>
<th>Name</th>
<th>Address and phone number</th>
<th>Occupation</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td></td>
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</tr>
<tr>
<td>(b)</td>
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</tbody>
</table>

Witness to any codicil

<table>
<thead>
<tr>
<th>Name</th>
<th>Address and phone number</th>
<th>Occupation</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b)</td>
<td></td>
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</tr>
</tbody>
</table>

19. Are either or both of the witnesses to the will (or codicil) a beneficiary or spouse or an adult interdependent partner of a beneficiary under the will (or codicil)?
   Yes _________________ No _________________
If yes, please name witness and advise if witness is a beneficiary or the spouse or an adult interdependent partner of a beneficiary. If the witness is the spouse or adult interdependent partner of a beneficiary, please name the beneficiary.

_________________________________________________________________________
_________________________________________________________________________
_________________________________________________________________________

Executors, administrators, trustees

20.  (a) Name of primary executor  Address (including postal code)  Occupation

_________________________  ___________________________  ___________
_________________________  ___________________________  ___________

(b) Phone no. (bus) ___________________________  (res/cell) ___________________________

(c) Relationship to the deceased: ___________________________

(d) Wishes to renounce? Yes _______  No _______

21.  (a) Name of alternate executor  Address (including postal code)  Occupation
(if an alternate is named)

_________________________  ___________________________  ___________
_________________________  ___________________________  ___________

(b) Phone No. (bus) ___________________________  (res/cell) ___________________________

(c) Relationship to the deceased: ___________________________

(d) Wishes to renounce? Yes _______  No _______
22. If renunciations are required, list the names, addresses, phone numbers and the relationship to the deceased of all of those persons ranked higher than or equal to the applicant in the hierarchy:

<table>
<thead>
<tr>
<th>Name</th>
<th>Complete address (including postal code) and telephone number</th>
<th>Relationship to the deceased</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td></td>
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<tr>
<td>(b)</td>
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<tr>
<td>(c)</td>
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<tr>
<td>(d)</td>
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</tbody>
</table>

Beneficiaries named in the will (complete the following information for each beneficiary – add additional sections if necessary):

23. (a) Name Complete address (including postal code) Date of birth

__________________________________ ____________________________ __________

__________________________________ ____________________________ __________

(b) Phone No. (bus) __________________________ (res/cell) __________________________

d) Relationship to the deceased: __________________________

d) Gift in the will: __________________________
Intestate Successors: Beneficiaries where there is no will

24. If the deceased died without a will, list the names, addresses, telephone numbers, and birth dates of the following persons:

(a) Spouse, adult interdependent partner, and children; if a child of the deceased has died before the deceased, list the children of that deceased child (the deceased's grandchildren). (If more room is needed, use the back of this form):

<table>
<thead>
<tr>
<th>Name</th>
<th>Complete address and telephone number</th>
<th>Relationship to the deceased and birthdate</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

(b) If there are no surviving spouse or adult interdependent partner, children, or grandchildren, then list the names, addresses, telephone numbers and birth dates of the deceased’s parents:

<table>
<thead>
<tr>
<th>Name</th>
<th>Complete address and telephone number</th>
<th>Relationship to the deceased and birthdate</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>
(c) If there are no surviving parents, then list the names, addresses, telephone numbers and birth dates of the deceased's brothers and sisters and their respective children. (If more room is needed, use the back of this form):

<table>
<thead>
<tr>
<th>Name</th>
<th>Complete address and telephone number</th>
<th>Relationship to the deceased and birthdate</th>
</tr>
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<tbody>
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</tbody>
</table>

(d) If necessary, the estate lawyer will advise you as to the beneficiaries who take after the brothers and sisters of the deceased and/or their children.

**Details of property and debts**

All property and debts must be valued at the deceased's date of death.

25. (a) Is there a safety deposit box? Yes _____  No _____

    Location: ___________________________________________________________

    Has an inventory been taken? Yes _____  No _____

    If yes, attach a copy.

(b) Perishable assets:

    Suggestions as to their maintenance or disposition: _______________________

    ________________________________________________________________

    ________________________________________________________________
(c) Do any assets require insurance or supervision? ________________________________

(d) Real Estate, including leasehold interests:

<table>
<thead>
<tr>
<th>Legal description and municipal address</th>
<th>Registered owner(s)</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

(e) Mortgages

<table>
<thead>
<tr>
<th>Mortgages on real estate</th>
<th>Mortgagee (bank, mortgage broker)</th>
<th>Value of any mortgage at the date of death</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

(f) Mines and minerals, and, if producing, amount of royalties in the past 12 months:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
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<tbody>
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</tbody>
</table>

(g) Cash (including traveller’s cheques, Canadian and foreign currency): __________________________
h) Bank accounts:

<table>
<thead>
<tr>
<th>Bank and address</th>
<th>Account no. &amp; type</th>
<th>Principal as at the date of death</th>
<th>Interest to the date of death</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

(i) Uncashed cheques: ____________________________________________________________
_____________________________________________________________________________

(j) Life insurance:

<table>
<thead>
<tr>
<th>Name &amp; address of company</th>
<th>Type</th>
<th>Policy no.</th>
<th>Face value</th>
<th>Beneficiary</th>
</tr>
</thead>
<tbody>
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</table>

(k) Debts due to the deceased: __________________________________________________
_____________________________________________________________________________

(l) Annuities:

Company name: _________________________________________________________________

Amount:_________________ Date of last payment: _________________________________

Beneficiary: _________________________________________________________________

(m) If the deceased carried a portfolio with a broker, name the broker, and provide a statement of value of portfolio as at the date of death: ________________________________
(n) Shares

<table>
<thead>
<tr>
<th>Name of company</th>
<th>Number and type of shares</th>
<th>Value</th>
<th>Certificate number</th>
<th>Transfer agent</th>
</tr>
</thead>
<tbody>
<tr>
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</table>

(o) Bonds & deposits

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
<th>Serial number</th>
<th>Date of purchase</th>
<th>Interest rate</th>
<th>Maturity date</th>
<th>Interest to the date of death</th>
</tr>
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</tbody>
</table>

(p) Pension(s)

Company name: __________________________________________

Amount: ___________________________ Date of last payment: ________________________

Beneficiary: ____________________________________________

(q) Canada Pension Plan

Contribution during the deceased's life:

Yes ___________ If yes, number of years ___________

No ___________

Date of last cheque: ________________ Amount ____________________
Survivors benefit: Who is eligible? ________________________________

Who will make the application for Death and Survivors benefits?

Lawyer _______ Other _______ If other, name: _______________________

Has the Canada Pension Plan been advised of the death?

Yes _______ No _______

(r) Old Age Security

Amount: __________________ Date of last payment: __________________

(s) Social Insurance Number: ________________________________

(t) RRSPs or RRIFs

Name of company: __________________ Value: __________________

Beneficiary: ________________________________

(u) Personal effects: List all of the deceased’s household goods, personal effects, jewellery, automobiles (year, make, serial number), any valuable paintings, antiques, collections, or art objects. Attach a separate list if necessary.

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

(v) Business or farming interest(s)
(w) Any other assets

________________________________________________________________________

________________________________________________________________________

Liabilities and Debts

(x) Funeral home name, address, telephone number, and amount of account:

________________________________________________________________________

________________________________________________________________________

(y) Any other liabilities: (credit card debts, utilities, guarantees, promissory notes)

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

(z) Accountant (if any): ____________________________________________________

Miscellaneous

(aa) Was the deceased a trustee or an executor for any other trusts or estates?

Yes ____________ No ____________ If yes, provide particulars of trust or estate.

________________________________________________________________________

________________________________________________________________________

(bb) Did the deceased grant a power of attorney to anyone?

Yes ____________ No ____________

If yes, name attorney and provide copy of power of attorney if available:

________________________________________________________________________
(cc) Describe the particulars of any litigation in which the deceased was involved.
FORMS CHECKLIST – APPLICATION FOR GRANT

Alberta Wills and Estates Practice Manual
### FORMS CHECKLIST

#### APPLICATION FOR GRANT

<table>
<thead>
<tr>
<th>Form NC</th>
<th>Description</th>
<th>Requirement/Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>NC 1</td>
<td>Application</td>
<td>Required</td>
</tr>
<tr>
<td>NC 2</td>
<td>Affidavit</td>
<td>Required</td>
</tr>
<tr>
<td>NC 3</td>
<td>Schedule 1: Deceased</td>
<td>Required if there is a will. Need a separate NC 4 for will and each codicil or other testamentary document.</td>
</tr>
<tr>
<td>NC 4</td>
<td>Schedule 2: Will</td>
<td>Required</td>
</tr>
<tr>
<td>NC 5</td>
<td>Schedule 3: Personal Representative(s)</td>
<td>Required</td>
</tr>
<tr>
<td>NC 6</td>
<td>Schedule 4: Beneficiaries</td>
<td>Required</td>
</tr>
<tr>
<td>NC 7</td>
<td>Schedule 5: Inventory of property and debts</td>
<td>Required</td>
</tr>
<tr>
<td>NC 8</td>
<td>Affidavit of witness to a will</td>
<td>Required if witnesses are available</td>
</tr>
<tr>
<td>NC 9</td>
<td>Affidavit of handwriting of deceased</td>
<td>Used if can’t complete NC 8</td>
</tr>
<tr>
<td>NC 11</td>
<td>Affidavit of witness to signature</td>
<td>Required on several other NC forms</td>
</tr>
<tr>
<td>NC 12</td>
<td>Renunciation of Probate</td>
<td>Used to clear persons with higher or equal priority where renunciator is a personal representative named in the will</td>
</tr>
<tr>
<td>NC 13</td>
<td>Reservation of right to apply for a grant of probate</td>
<td>Used where personal representative named in the will wishes to reserve the right to apply for a grant at a later date</td>
</tr>
<tr>
<td>NC 14</td>
<td>Renunciation of administration with will annexed</td>
<td>Used to clear persons with higher or equal priority where renunciator has priority to apply but is not a personal representative named in the will</td>
</tr>
<tr>
<td>NC 15</td>
<td>Renunciation of administration</td>
<td>Used to clear persons with higher or equal priority to administer an intestacy</td>
</tr>
<tr>
<td>NC 16</td>
<td>Nomination and consent to appointment of personal representative</td>
<td>Used where person with priority to a grant of administration with will annexed or administration wishes to nominate another person to administer the estate – not available to executor named in the will</td>
</tr>
<tr>
<td>NC 17</td>
<td>Affidavit to dispense with bond, approve other security or reduce amount of security</td>
<td>Used where no applicant is an Alberta resident</td>
</tr>
<tr>
<td>NC 18</td>
<td>Consent to waive bond or other security</td>
<td>Used with Form NC 17</td>
</tr>
<tr>
<td>NC 19</td>
<td>Notice to beneficiaries (residuary)</td>
<td>Required if there is a residuary gift</td>
</tr>
<tr>
<td>Appendix</td>
<td>Description</td>
<td>Notes</td>
</tr>
<tr>
<td>----------</td>
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</tr>
<tr>
<td>NC 20</td>
<td>Notice to beneficiaries (non-residuary)</td>
<td>Required if there are specific or general gifts in the will</td>
</tr>
<tr>
<td>NC 20.1</td>
<td>Notice of void gift</td>
<td>Required if there is a void gift</td>
</tr>
<tr>
<td>NC 21</td>
<td>Notice to beneficiaries (intestacy)</td>
<td>Required in an intestacy or partial intestacy</td>
</tr>
<tr>
<td>NC 22</td>
<td>Notice to spouse of deceased (MPA)</td>
<td>Required if spouse does not receive entire estate but may be dispensed with</td>
</tr>
<tr>
<td>NC 23</td>
<td>Notice to spouse/adult interdependent partner of deceased (Family Maintenance and Support)</td>
<td>Required if spouse or adult interdependent partner does not receive entire estate</td>
</tr>
<tr>
<td>NC 24</td>
<td>Notice to dependent child or minor grandchild or great-grandchild of deceased (Family Maintenance and Support)</td>
<td>Required if a dependent child or minor grandchild or great-grandchild of deceased for whom deceased stood in the place of a parent does not receive entire estate</td>
</tr>
<tr>
<td>NC 24.1</td>
<td>Notice to the Public Trustee</td>
<td>Required when notice to the Public Trustee is required</td>
</tr>
<tr>
<td>NC 25</td>
<td>Affidavit regarding missing or unknown beneficiaries</td>
<td>Used to request waiver of service of notice</td>
</tr>
<tr>
<td>NC 27</td>
<td>Affidavit of service</td>
<td>Required</td>
</tr>
</tbody>
</table>
INTESTACY FLOWCHART

Alberta Wills and Estates Practice Manual

1 Section references contained within this appendix are from the Wills and Succession Act.
If an individual dies leaving a surviving spouse or adult interdependent partner but no descendants, the entirety of the intestate estate goes to the surviving spouse or adult interdependent partner.
Subject to section 63, if an individual dies leaving a surviving spouse and one or more descendants, or leaving a surviving adult interdependent partner and one or more descendants, the entirety of the intestate estate goes to the surviving spouse or adult interdependent partner, if all the intestate’s descendants are also descendants of the surviving spouse or adult interdependent partner.
Subject to section 63, if an individual dies leaving a surviving spouse and one or more descendants, or leaving a surviving adult interdependent partner and one or more descendants, if any of the intestate’s descendants are not descendants of the surviving spouse or adult interdependent partner, the surviving spouse or adult interdependent partner is entitled to the greater of the prescribed amount or 50% of the net value of the intestate estate and the residue of the intestate’s estate shall be distributed among the intestate’s descendants in accordance with this Part.

Inheritance to descendants under s.66 is not limited to the 4th degree. There is full representation.

*The prescribed amount is $150,000.*
Subject to section 63, if an individual dies intestate leaving both a surviving spouse and a surviving adult interdependent partner, 1/2 of the share provided by section 61(1)(b)(i) goes to the surviving spouse and the other 1/2 of the share goes to the surviving adult interdependent partner, if the intestate left one or more descendants. Inheritance to descendants under s.62(a) is not limited to the 4th degree. There is full representation.
Subject to section 63, if an individual dies intestate leaving both a surviving spouse and a surviving adult interdependent partner, 1/2 of the intestate estate goes to the surviving spouse and the other 1/2 of the intestate goes to the surviving adult interdependent partner, if the intestate left no descendants.

This situation is very rare. For this to happen, the intestate would have to have a child with the AIP under the age of 2 years that has predeceased the intestate or dies in a common accident with the intestate.
When a distribution is to be made under this Part to the descendants of any individual, 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 survive the estate, and (b) deceased children of that individual who left descendants surviving the intestate.

If the deceased person is a direct descendant of the intestate there is representation with no limits.

If the individual is not a direct descendant of the intestate, per stirpes distribution ends at the 4th degree of relation to the intestate. At the 4th degree of relation, the residue of the estate is distributed pro-rated.
If an individual dies leaving no surviving spouse, adult interdependent partner or descendants, the intestate estate goes to the parents of the intestate in equal shares if both survive the intestate, or to the survivor if one of them has predeceased the intestate.
DISTRIBUTION OF INTESTATE ESTATES
s. 67 (1) (b)

If an individual dies leaving no surviving spouse, adult interdependent partner or descendants, if there are no surviving parents, the intestate estate goes to the descendants of the parents or of either of them.
If an individual dies leaving no surviving spouse, adult interdependent partner or descendants, if there is no surviving parent, or descendants of a parent but the intestate is survived by one or more grandparents or descendants of grandparents: (i) \( \frac{1}{2} \) of the intestate estate goes to the surviving grandparents on one parent’s side, in equal shares, or if there is no surviving grandparent on that side, to the descendants of those grandparents; (ii) \( \frac{1}{2} \) of the intestate estate goes to the surviving grandparents on the other parent’s side, or to their descendants in the same manner as provided in subclause (i).

If everyone on this side of the diagram were deceased/nonexistent, then the entire estate would go to the other side.
If an individual dies leaving no surviving spouse, adult interdependent partner or descendants, if there is no surviving parent, or descendants of a parent, grandparent or descendants of grandparents, but the intestate is survived by one or more great-grandparent or descendants of great grandparents: (i) 1/2 of the intestate estate goes to the surviving great-grandparents on one parent’s side, in equal shares, or if there is no surviving great-grandparent on that side, to the descendants of those great grandparents; (ii) 1/2 of the intestate estate goes to the surviving great grand-parents on the other parent’s side or to their descendants in the same manner as provided in subclause (i).
LETTER TO PHYSICIAN REQUESTING CAPACITY ASSESSMENT (SAMPLE)

Alberta Wills and Estates Practice Manual
SAMPLE

LETTER TO PHYSICIAN REQUESTING CAPACITY ASSESSMENT

I was contacted by [client's name] to help with his/her estate planning. I understand that [client's name] has been in your care, and therefore you may be able to give me your opinion regarding his/her mental capabilities. I have attached a release, signed by [client’s name] authorizing you to provide me with that opinion.

Please bill [client's name] directly for providing this opinion.

Specifically, I am requesting your medical opinion on whether [client's name] has the capacity to sign certain estate planning documents.

For your background understanding, legal capacity is both task specific and time sensitive. From a legal perspective, a client may have legal capacity even though medically, the individual may be viewed differently. In this request, I am looking for your opinion related to the legal tests, and not related to the medical tests.

Incapacity in one area does not necessarily mean incapacity in another. Thus, although an individual may not have capacity to make a will (called “testamentary capacity”), he or she might have capacity to sign an enduring power of attorney (related to finances while he or she is alive) or a personal directive (related to personal care and medical decisions while he or she is alive).

Capacity must be assessed at particular points in time. In this case, that is when [client's name] gives me instructions or confirms the contents of the documents, and when he or she signs the estate planning documents. I expect [client's name] to sign his/her estate planning documents with me [in the next few weeks].

ENDURING POWER OF ATTORNEY (“EPA”)

The person who signs an EPA (called the "donor") must understand the nature and effect of both the EPA and these explanatory notes. In an EPA, an attorney does not refer to a lawyer, but refers to the person that the donor, [client's name], names to look after his/her financial affairs in case he/she becomes incapacitated.
When you consider [client's name]'s capacity to sign an EPA, consider the elements listed below (summarized by *In re K*, [1988] 1 All ER 358 (CHD)) that a donor should understand when signing an unrestricted EPA:

1. The attorney will be able to assume complete authority over the donor's affairs,
2. The attorney will, in general, be able to do anything with the donor's property which he himself could have done,
3. The authority will continue if the donor should be or become mentally incapable, and
4. The power is irrevocable if the donor becomes mentally incapable.

I have attached a form of medical opinion regarding legal mental capacity. Should you agree to provide us with your opinion on your patient’s capacity to execute an EPA, please complete that form to the best of your ability.

If you are not able to provide an opinion regarding [client's name]'s capacity, or do not feel you will be able to provide one before [date], please contact my office.
SAMPLE

MEDICAL OPINION REGARDING LEGAL MENTAL CAPACITY

<table>
<thead>
<tr>
<th>Patient's name:</th>
<th></th>
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<tbody>
<tr>
<td>Patient's address:</td>
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<tr>
<td>Date of birth:</td>
<td>Day</td>
</tr>
</tbody>
</table>

An opinion is required concerning [patient's name] and whether he/she has the capacity to sign certain estate planning documents.

I understand that legal capacity is both task specific and time sensitive. Incapacity to sign one document does not necessarily mean incapacity to sign another. Capacity must be assessed with reference to a particular document or action and point in time.

**Legal mental capacity to sign an Enduring Power of Attorney (EPA)**

[patient's name], the donor, must be sufficiently clear in his/her understanding and comprehension to know on his/her own and, in a general way, the nature and effect of the EPA.

I understand that in this context, the “donor” is [patient name], my patient, and the person who will name an attorney to make financial and property decisions if the donor becomes incapacitated in the future. I also understand that “attorney” means the person being appointed in the EPA by the donor to make financial and property decisions for him or her and does not mean a lawyer.

I understand that the elements a donor should understand when signing an unrestricted EPA are:

1. The attorney will be able to assume complete authority over the donor's affairs,
2. The attorney will, in general, be able to do anything with the donor's property which he himself could have done, and
3. The authority will continue if the donor should be or become mentally incapable.

I also understand that a donor does not have to understand the nature and effect of the acts that the attorney will perform.
BASED ON THIS UNDERSTANDING OF THE TEST FOR MENTAL CAPACITY FOR AN EPA AND ON MY QUESTIONING AND TESTING OF THIS PATIENT, I AM OF THE OPINION THAT [patient's name] [choose one only of the following]

- has the necessary capacity to sign an EPA
- does not have the necessary capacity to sign an EPA

I confirm that [patient's name]

<table>
<thead>
<tr>
<th>Analysis of abilities and inabilities</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>understands the nature of an EPA and its effects</td>
<td></td>
<td></td>
</tr>
<tr>
<td>understands the attorney will have complete authority over his/her property</td>
<td></td>
<td></td>
</tr>
<tr>
<td>understand the authority will continue irrevocably, if he/she becomes mentally incapable</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Signed: ___________________________ Date: ___________________________ (yy/mm/dd)

Physician's name, address, and contact information: (please print clearly)

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Phone, fax, email, web, and other contact info:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
NOTES ON THE PERSONAL DIRECTIVE (SAMPLE)

Alberta Wills and Estates Practice Manual
Notes on the Personal Directive

These notes are to be read by the maker before signing this document

1. This document authorizes the person or persons you name as your agent(s) to make personal and health care decisions for you. Your agent cannot make decisions concerning property and financial affairs on your behalf.

2. Your agent(s) and service providers must continually determine whether or not you have the mental capacity to make decisions, recognizing that you may have capacity to make some personal decisions and not others.

3. Before making a personal decision under this personal directive, the agent(s) must consult with you regarding the decision.

4. Your agent(s) must:
   - act honestly and in good faith,
   - as far as possible, try to help you become independent,
   - choose the least restrictive, least intrusive course of action that is available and appropriate,
   - encourage you to participate in your personal care decisions,
   - try to establish regular personal contact between you and those family members and friends who support you,
   - consult from time to time with supportive family and friends, and with whomever is providing your personal care,
   - follow the instructions and wishes you made when you were capable, unless it's impossible to do so,
   - make the decision that they believe you would have made in the circumstances, given their knowledge of your wishes, beliefs, and values, and
   - where they do not know what decision you would have made, to make the decision they believe in the circumstances is in your best interests.
5. Your personal directive ceases to have effect in the following circumstances:
   - during any period in which you regain and have capacity,
   - on your death,
   - on the death or mental incapacity of your agent (unless you have named an alternate agent),
   - when you cancel or revoke it (provided you are mentally capable of understanding what you are doing), or
   - by order of the court.

6. Within a reasonable time after this personal directive takes effect, the agent must make every reasonable effort to notify your nearest relative and your legal representative (your attorney in an Enduring Power of Attorney or your guardian or trustee under an adult guardianship and trusteeship order).

7. Your agent must keep a record of all personal decisions made under this personal directive and keep that record during the period you lack capacity, and for at least 2 years after the agent's authority ceases. When requested, the agent must provide a copy of those decisions to you, to your lawyer, and to anyone else entitled to receive a copy of that record, as directed in this Personal Directive or by the Personal Directives Act, RSA 2000, c P-6.

These notes are not intended to be legal advice to the agent. The agent should review the Personal Directives Act, consult with the Public Guardian's Office, and obtain independent legal advice.
PERSONAL DIRECTIVE (SAMPLE)

Alberta Wills and Estates Practice Manual
**This sample personal directive includes a certificate of independent legal advice.**

**PERSONAL DIRECTIVE OF [NAME OF MAKER]**

This personal directive is for the benefit and guidance of my family, my physician and other care-givers, my lawyer, and all others whom it may concern.

If the time comes when I can no longer take part in medical and personal care decisions for my own future, I direct all people concerned to follow this directive. I have made this statement so that you may know my views and to mitigate any feelings of guilt that you might feel if you have to make these decisions for me.

**Cancel previous personal directives**

1. I cancel all personal directives, advance health care directives, or living wills that I have already given.

**Appointment of agent**

2. I appoint those named below as my agent(s).

3. If those I appointed as my agent(s) are unwilling or unable to act or to continue to act, I appoint those named below as alternative agent(s) for me.

<table>
<thead>
<tr>
<th>(a)</th>
<th>Agent(s)</th>
<th>[agent's address]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(b)</th>
<th>Alternative agent(s)</th>
<th>[alternate agent's address]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

4. These appointments continue despite my mental incapacity after this date.

5. However, if after making this personal directive, my marriage to/partnership with [name of spouse/partner] ends by a final divorce judgment or by our separating permanently, the appointment of [name of spouse/partner] as my agent, is cancelled.
6. If I have more than one agent authorized to act and my agents are unable to agree on a decision, the decision of the majority of my agents is the decision. If there is no majority, the decision of the agent I first appointed governs.

7. The following person(s) are not authorized to make decisions for me and I direct that the views of these person(s) have no part to play in the actions taken under this personal directive:

(a) Person(s) not authorized [person’s address]

Coming into effect

8. This personal directive has effect only when I lack the capacity to make a decision for myself about a personal matter. I will lack the capacity when I no longer have the ability to understand the information that is relevant to making that decision or the ability to appreciate the reasonably foreseeable consequences of that decision.

9. There will be a continuing need for my agent and service providers to determine whether or not I have capacity to make the required decisions, recognizing that I may have capacity to make some personal decisions and not others. This personal directive may, therefore, be invoked for certain concerns but not for others, to suit the circumstances existing at the time.

Who may determine my lack of capacity

10. I designate those named below as the person(s) who may determine, after consulting with a physician or psychologist, whether I lack capacity to make any decisions affecting my personal matters.

11. If those I designate are unwilling or unable to make this determination, I designate those named below as alternative person(s) to make this determination.

12. A written declaration from those designated is conclusive proof that I have become mentally incapacitated:

(a) Person(s) [person’s address]

(b) Alternative person(s) [alternate person’s address]
13. I acknowledge that if those I designate to make this determination are not available or cannot be contacted after reasonable efforts are made, that the *Personal Directives Act* provides that two service providers, at least one of whom is a physician or psychologist, are so designated.

14. If a declaration of incapacity is signed, the person(s) so declaring must notify my agent(s) (if this is not the same person) and the following:

(a) Person(s) to be advised [person's address]

| Person(s) to be advised | [person's address] |

(b) to advise that

(a) I have been declared incapacitated,

(b) this personal directive is then in effect, and

(c) this determination of incapacity and my agents' decisions may be reviewed by a court.

15. I direct that my agent must have access to all confidential information concerning my personal (but not financial) matters. This includes complete access to all my medical, dental and pharmacological records.

**Revocation**

16. This personal directive ceases to have effect during any period in which I regain capacity but is continuously in effect during any period in which I have lost capacity.

**Authority of agent**

17. My agent has authority to make the following decisions on my behalf if I become incapable of making such decisions myself:

(a) my health care,

(b) where I am to live,

(c) with whom I am to live and associate,

(d) my participation in social, educational, and employment activities, and

(e) all other personal matters.

These decisions must be made according to the instructions and information given in this personal directive.
18. When making decisions, my agent can authorize anything that I could have lawfully authorized and must consult with me as far as is reasonable according to my circumstances.

19. I direct my agent to exercise authority in the least restrictive manner possible, encouraging me to become capable of caring for myself and of making reasonable judgments for matters relating to my person.

20. My agent may determine that I need companions or other persons, including nurses, for my care. Such people may be employed for as long as my agent, in consultation with any attorney I may have appointed in an Enduring Power of Attorney, considers advisable. Such people must be compensated from my estate.

21. I wish to remain independent in my own home for as long as possible. I direct any attorney I may have appointed to pay from my estate for whatever modifications are necessary to allow me to remain independent in my own home until it is no longer possible for me to do so without putting my health and well-being in jeopardy.

22. My agent has full authority to make all health care decisions on my behalf in consultation with my attending physician, and to instruct my health and personal care service providers. My agent knows me and my wishes, beliefs, and values. I therefore do not wish to impose any specific restrictions on my agent’s powers to make decisions on my behalf, as I trust my agent to make decisions according to my agent’s understanding of my wishes, beliefs, and values.

Instructions and information to my agent

23. I wish to benefit from life-support procedures only when they are required to sustain me while I recover from a transient illness or trauma with the expectation that I will resume a reasonably independent lifestyle with the ability to recognize family and friends and communicate effectively my wants and needs.

24. However, these are my directions if I am in a coma or a persistent vegetative state and my physician and other medical consultants have advised that, no matter what is done, I have no reasonable hope of regaining awareness of my surroundings or high mental functions. Indications of this may include my inability to recognize family and friends and to communicate effectively my wants and needs.

   (a) I wish to be kept comfortable and free from pain. This means that I may be given pain medication, including sufficient analgesics to control pain, moaning, and restlessness, even though it may dull consciousness and indirectly shorten my life.
(b) I instruct my health care service providers to refrain from any medical or surgical treatments and procedures, such as

- electrical or mechanical resuscitation of my heart when it has stopped beating,
- antibiotic therapy,
- tube feeding,
- surgery,
- mechanical respiration when I am no longer able to sustain my own breathing, and
- and similar treatments and procedures.

25. My main concern is that I be allowed to die with maximum dignity and with the least pain. I do not fear death itself as much as the indignities of deterioration, dependence and endless pain.

26. This statement is made after careful consideration and is in accordance with my strong convictions and beliefs. I want my wishes and directions expressed here carried out in the same way that they would be followed if I had the necessary capacity and could speak for myself. I hope that those to whom these personal directives are addressed will regard themselves as morally and legally bound by these provisions.

27. If my instructions in this personal directive are ambiguous or insufficient, I direct my agent:

(a) To make the decisions that my agent believes I would make in the circumstances, given my agent's knowledge of my wishes, beliefs, and values.

(b) If my agent does not know what decision I would make, to make the decision my agent believes is in my best interest in the circumstances.

(c) My agent cannot override my clear instructions in this personal directive. My agent's role is to interpret and, wherever possible, to implement my instructions as stated in this personal directive.

28. I release all who follow these instructions from any legal liability.
Authorization to consent to use of body organs

29. If medically suitable, I authorize my agent(s) to donate the following body organs for the use shown. This is my consent under the Human Tissue and Organ Donation Act of Alberta.

<table>
<thead>
<tr>
<th>Organs available</th>
<th>Use of organs</th>
</tr>
</thead>
<tbody>
<tr>
<td>[delete as appropriate]</td>
<td>[delete as appropriate]</td>
</tr>
<tr>
<td>all organs</td>
<td>transplant purposes</td>
</tr>
<tr>
<td>eyes, liver and kidneys,</td>
<td>medical education</td>
</tr>
<tr>
<td>heart and lungs, skin</td>
<td>scientific research</td>
</tr>
</tbody>
</table>

OR

Refusal to consent to use of body organs

29. I do not consent to the removal of any organs or tissue for transplant purposes, medical educational or scientific research. This is my refusal to consent under the Human Tissue Act of Alberta.

Authority to spend money

30. I may have authorized an attorney, who is not also my agent, to act for me with regard to my financial affairs under an Enduring Power of Attorney. If a decision taken by my agent requires the spending of money, such as for health care or for my living arrangements, I direct my attorney to authorize the expenditure.

Access to information

31. I authorize all my personal information to be made available to my agent. This includes information from caregivers and service providers, and all medical, dental, and pharmacological records, despite the provisions of any federal or provincial privacy statutes to the contrary.

32. The following persons may review the record of personal decisions which my agent is required to keep:

(a) My spouse/partner and children, and

(b) Any person, if my agent considers it to be in my interests that the person should be aware of the personal decisions, and such persons as my doctor, psychologists and any other treatment provider determine.
33. The following persons may NOT have any information about me or my health care or access to the record of personal decisions which my agent is required to keep:

| (a) Person(s) without access to information | [person’s address] |

Payment to agent

34. In accordance with s 18 of the Personal Directives Act, I direct that my agent may be compensated for acting as my agent. In addition, my agent is to be reimbursed for any expenses incurred by my agent in carrying out the duties of agent under this personal directive.

OR

34. In accordance with s 18 of the Personal Directives Act, I confirm that my agent is not to be paid for acting as my agent. However, my agent is to be reimbursed for any expenses incurred by my agent in carrying out the duties of agent under this personal directive.

Dispute resolution

35. I direct that although I may have only appointed some of my children as my agents, my other children should be consulted (as far as this is practical) in any decisions which my agents must make. I wish to maintain close relationships with all my children and to participate in their lives and families as much as I can. I direct that I be able to visit with my children (including overnight visits) as long as my medical advisors have no objection.

36. Should any dispute arise concerning the operation of this personal directive or the interaction of the directions under this personal directive and any enduring power of attorney of mine, I direct that the issue must be settled first through mediation; if that is not possible, then through arbitration under the Alberta Arbitration Act. I do not wish disputes to be decided by a court under the court’s powers in the Adult Guardianship and Trusteeship Act.

I have signed this personal directive at [city], Alberta on [date] 20___.

[NAME OF MAKER]

Witnesses:

[(name of lawyer)]
Lawyer

[(name of assistant)]
Legal assistant
CERTIFICATE OF INDEPENDENT LEGAL ADVICE

[name of lawyer], Barrister and Solicitor, gave legal advice concerning the personal directive signed by [name of testator] dated [date].

[name of lawyer], states

1. I am not the agent or the alternate agent or the spouse of the agent or the alternate agent named in the personal directive.

2. The maker attended before me alone.

3. I gave the maker legal advice concerning the personal directive.

4. The maker appeared to me to understand the nature and effect of the document.

5. The maker signed the document before me.

6. The maker acknowledged to me that the personal directive was given voluntarily.

Signed at [city], Alberta on [date] 20___.

_____________________________
[name of lawyer]
Barrister & Solicitor

NOTE:

The Personal Directives Act does not require independent legal advice. The maker is "presumed" to understand the nature and effect of the Directive if he or she is over the age of 18 years (but may not make one if he or she already has a guardian).
PERSONAL DIRECTIVE QUESTIONNAIRE (SAMPLE)

Alberta Wills and Estates Practice Manual
## Sample Personal Directive Questionnaire

**Date:** ________________

Your name: ____________________________________________

Address & Postal Code: ____________________________________________

Phone: ___________ Fax: ___________ E-mail: ___________

1. **Name an agent** (This is the person(s) that will make personal decisions for you if you lose the capacity to make them for yourself).

Name of agent: ____________________________________________

Address & Postal Code: ____________________________________________

Phone: ___________ Fax: ___________ E-mail: ___________

Relationship: ___________________________ Age: __________

2. **If you want more than one agent to act together** (joint agents), name the other agent or agents here:

Name of agent: ____________________________________________

Address & Postal Code: ____________________________________________

Phone: ___________ Fax: ___________ E-mail: ___________

Relationship: ___________________________ Age: __________

Name of agent: ____________________________________________

Address & Postal Code: ____________________________________________

Phone: ___________ Fax: ___________ E-mail: ___________

Relationship: ___________________________ Age: __________

3. **If you are naming more than two agents, do they make decisions on a majority basis or do they all have to agree?**

   _______ on a majority basis _________ they all have to agree
4. If you are not naming joint agents and your first-named agent cannot or will not act, name your second choice here:

Name of agent: 
Address & Postal Code: 
Phone:     Fax:     E-mail: 
Relationship:     Age:  

5. If your second-named agent cannot or will not act, name your third choice here:

Name of agent: 
Address & Postal Code: 
Phone:     Fax:     E-mail: 
Relationship:     Age:  

6. Indicate who should decide whether or not you have lost the capacity to make decisions about any personal matter:

   ______ your attorney ______ your attending physician
   ______ other – name: ____________________________

7. Do you want to donate your organs and tissue for transplantation purposes if at the time of your death you have any that would be useful for this purpose?

   ______ donate all organs or _______ heart / liver / kidneys / skin / eyes
   ______ transplant _______ medical education _______ scientific research
   ______ do not consent

8. What are your views about being kept alive artificially if you have no known hope of recovery?

   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
SUGGESTED FEE GUIDELINES

Alberta Wills and Estates Practice Manual
SUGGESTED FEES GUIDELINES
FOR LAWYERS AND PERSONAL REPRESENTATIVES

In the
Administration of the Estates of Deceased Persons
Administration of the Estates of Minors

1. These guidelines are prepared for the guidance of lawyers, personal representatives, and beneficiaries and heirs. They have no official sanction but are consistent with the charging principles set out in the Surrogate Rules. The parties are free to negotiate fees as they see fit.

LAWYERS' FEES

2. Lawyers' fees and disbursements are a matter of contract between the lawyer and the personal representatives. However, personal representatives may have them "taxed" and the beneficiaries of the estate may call the personal representative to account for the amount of legal fees and disbursements the representative has paid.

3. Fees should be set according to the criteria set out in Schedule 1 of the Surrogate Rules.

4. All fees and disbursements are subject to taxation by the taxing officer and the court who have the discretion to increase or decrease fees or decrease disbursements.

Fee for Core Legal Services

5. The fee consists of two components:

5.1 a base fee, and

5.2 an estate value fee.

These may be reduced if the lawyer performs less than the normal core legal services, or by other arrangement.

In 1995, the Surrogate Rules Committee issued Suggested Fee Guidelines for Lawyers and Personal Representatives. These guidelines were published for guidance only and not as a tariff.
6. The base fee component:
   6.1 is constant regardless of the value of the estate;
   6.2 reflects the normal core legal services that are required to administer any estate.

7. The estate value fee component:
   7.1 is a further allowance based on a percentage of the gross value of the estate;
   7.2 increases at a point where the size of the estate is likely to introduce more complexity in the administration.

8. When calculating the gross value of the estate, values of the following property are not included:
   8.1 All property held in joint tenancy by the deceased and another person.
   8.2 All property passing directly to a named beneficiary outside the will.
   8.3 Canada Pension Plan payments to a spouse or child of the deceased.
   8.4 Personal property outside Alberta if the deceased's usual residence was outside Alberta on the date of death.
   8.5 Land outside Alberta.
   8.6 All other property which does not pass through the hands of the personal representatives.

SUGGESTED FEE GUIDELINES - LAWYERS

Core Legal Services

9. Gross Value of Estate

<table>
<thead>
<tr>
<th>Gross Value of Estate</th>
<th>Base Fee</th>
<th>Estate Value Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>On estates with a gross value up to $150,000</td>
<td>$2,250</td>
<td>¼ x 1%</td>
</tr>
<tr>
<td>On estates with a gross value over $150,000</td>
<td>$2,250</td>
<td>1%</td>
</tr>
</tbody>
</table>

Non-Core Legal Services

10. The fee for non-core legal services is on a quantum meruit basis.
PERSONAL REPRESENTATIVES’ FEES

11. The affected beneficiaries or heirs of the estate must approve the fees and expenses for personal representatives’ work, or the court must order them.

12. Fees should be set within the suggested ranges according to the criteria set out in Schedule 1 of the Surrogate Rules.

13. The fees and expenses are subject to review by the court which has the discretion to increase or decrease fees or decrease expenses.

14. There are three categories of personal representatives’ fees:

14.1 fees charged on the gross capital value of the estate;
14.2 fees charged on revenue received by the estate during administration;
14.3 care and management fees charged in trust estates.

15. All fees may be varied up or down by agreement among the affected beneficiaries or heirs, or by the court.

Capital account

16. Fees are charged against capital receipts. No fees are charged on capital disbursements.

17. Fees should not exceed 5% of the gross capital value of the estate, unless circumstances warrant a higher fee.

Revenue account

18. Fees are charged against revenue receipts. No fees are charged on revenue disbursements.

19. Fees should not exceed 6% of the revenue receipts, unless unusual circumstances warrant a higher fee.
 Fees for care and management apply only to property being administered in trust estates where there is no current distribution of the estate property at date of death. This may be varied by agreement among the affected beneficiaries or heirs, or by the court.

Fees are charged against capital.

Fees should not exceed 5/10 of 1% per annum on the average market value of the estate property, unless circumstances warrant a higher fee.

SUGGESTED FEE GUIDELINES - PERSONAL REPRESENTATIVES

Capital
- On the first $250,000 of capital: 3% - 5%
- On the next $250,000 of capital: 2% - 4%
- On the balance: 1/2 of 1% - 3%

Revenue
- On revenue receipts: 4% - 6%

Care and management
- On the first $250,000 of capital: 3/10 - 6/10 of 1%
- On the next $250,000 of capital: 2/10 - 5/10 of 1%
- On the balance: 1/10 - 4/10 of 1%
SURROGATE CHECKLIST

Alberta Wills and Estates Practice Manual
SURROGATE CHECKLIST - APPLICATION RETURNED FOR THE FOLLOWING CORRECTIONS

Date ________________ Clerk ________________ Estate of ________________ File # ________________ Returned Via ________________

Some forms may appear to be a duplication of information. To ensure your application is completed properly, you should make sure all forms have the required information.

☐ Not our Judicial Centre (Rule 6) - File in ____________________________.
☐ 15/30 day survivorship clause specified in will - affidavit on application should be sworn after such period.
☐ Please indicate on Form NC 1 or by covering letter the number of certified copies of the grant required.
☐ Before/after date of death/ will - proclamation of Wills and Succession Act.

NC 1 Application For Grant (also Forms NC 28; NC 30; NC 32)
☐ Form missing/incorrect form; should use form NC ____________.
☐ Information incorrect/incomplete
☐ Application not dated/signed/address for service missing by Applicant _____ Solicitor.
☐ NC1 continued on 2nd page, Estate name must appear on 2nd page; order should be Justice of the Court of Queen's Bench of Alberta.

NC 2 Affidavit on Application (Forms missing/incorrect form; should use NC ; not sworn/affirmed) new form June 1st, 2015
☐ Para 1 - status/right of P.R. to apply incorrect/incomplete; must clear off all other executors, or other persons having prior or equal right to apply (predeceased, renounced, nominated, residuary beneficiary, etc.). On or after February 1, 2012 former Spouse revoked as executor apply Section 25 WSA; on or after June 1, 2015 former AIP priority revoked apply Section 13 EAA and Section 63 WSA
☐ Paragraph 3 incoherent (Acknowledgment of Trustee, Codicils, Renunciations, Affidavit to Dispense with Bond/other Security, Consents, etc.).
☐ Notices to be served in paragraph 4 missing _______.

NC 3 Schedule 1 - Deceased (Form missing/complete all sections)
☐ Date/place of deceased's birth/death missing.
☐ Name of deceased/family member differs from will/codicil - use "aka".
☐ Require particulars (including name & complete address) of spouse, former spouses, adult interdependent partner, and each child of the deceased (children of which relationship) Where spouse, former spouses or adult interdependent partner is deceased or divorced include date of death/divorce/relationship terminated. No gift to former Spouse/AIP on or after February 1, 2012 apply Section 25 or 63 WSA
☐ Require name & address of trustees/attorney for any mentally incompetent spouse or adult child. If no trustee/attorney appointed, give particulars.
☐ Where Section 34/35 of Wills Act or Section 3(3) of Intestate Succession Act or Section 32, 33 or 66 of the Wills and Succession Act apply, give names of all predeceased children & confirm if they left surviving spouse/children (must identify surviving children in NC9).
☐ Information specific to each child, minor grandchild or minor great-grandchild (section 72/73 of the Wills and Succession Act is missing).

NC 4 Schedule 2 - Will/Codicil (Form missing/complete all sections)
☐ Date of will/codicil should be ________________.
☐ Explain here (or in NC9) why the witnesses cannot be located and what attempts have been made to locate.
☐ Clear off and or provide any memorandum or other documents referred to in clause # ___________ of will/codicil (Rule 22).
☐ Interlineations, alterations, erasures or obliterations in will/codicil not addressed.
☐ Name of witness ________________ incorrect or not addressed.
☐ Section not completed on entering into marriage or adult interdependent partner agreement after the date of the will.

NC 5 Schedule 3 - Personal Representative(s) (Form missing/complete all sections)
☐ Status is incorrect / incomplete (named in the will or person with priority to apply).
☐ Name of P.R ________________ differs from Will/Codicil - use "aka" or "in will referred to as".
☐ Indicate names of persons with priority or equal right to apply/give names of persons having renounced.

NC 6 Schedule 4 - Beneficiaries (Form missing/complete all sections)
☐ Age of beneficiaries missing/specify life estate/in trust for beneficiary ________________
☐ Name of beneficiary ________________ differs from will: use "aka".
☐ Gift missing for beneficiary, (or void beneficiary) ________________ (if deemed, abated or lapsed, please give full particulars).
☐ Nature of gift incorrect/incomplete for beneficiary ________________.
☐ Paragraph # of Will or Section # of the Intestate Succession Act/Wills and Succession Act incorrect for beneficiary.
☐ Name all predeceased siblings, identify their surviving spouse/children and set out the share of gift each child receives where Section 34/35 of the Wills Act or Section 6 of the Intestate Succession Act or Section 25/32/33 or 63/67 of the Wills and Succession Act.
☐ Incorrect distribution pursuant to the Will/Intestate Succession Act /WSA. No gift to former Spouse/AIP on or after February 1, 2012 apply Section 25 or 63 WSA
☐ Require affidavit regarding missing or unknown beneficiaries (Form NC 25). SR 27
☐ State amount of property passing as a percentage or fraction unless specific bequest in will.
☐ Information regarding void / revoked gifts missing / incomplete.
☐ Missing clause “Except as otherwise provided, all beneficiaries are mentally capable”.

PLEASE LEAVE SHEET ATTACHED WHEN RE-SUBMITTING APPLICATION

SEE OVER
NC 6.1 Acknowledgment of Trustee (Form missing/complete all sections)
☐ Acknowledgment of trustee not required - remove all reference (paragraph 5 on NC2).
☐ Require Acknowledgment of Trustee (name/age/address/paragraph # of will missing).
☐ Require NC11 Affidavit of Execution - incomplete/not prescribed form.

NC 7 Schedule 5 - Inventory of Property and Debts (Alberta assets including movable assets such as Canadian bank accounts/debts only/at date of death)
☐ Form missing/complete all sections.
☐ State where property is located - legal or municipal address to determine jurisdiction. (Rule 6)
☐ Net value on top summary does not match net value on bottom/second page.
☐ Require undertaking to file a revised inventory if values are unknown/to be determined. (User Notes 2.8 NC7)

NC 8/NC 9 Affidavit of Witness/Handwriting of deceased (Form missing/not sworn) **Reminder only new form NC 8 June 1st, 2015
☐ Must explain here (or in Form NC 4) why there is no Form NC 8 from either attesting witness to will/codicil.
☐ Paragraph #2 - Will/codicil date left blank/incorrect.
☐ Paragraphs #5 - Address interlineations, alterations, erasures or obliterations in will/codicil.
☐ Add a paragraph 6, if the deceased was blind, marked the will/codicil; did not fully understand the language or requested another person to sign on the deceased's behalf.
☐ If will/codicil where witnesses are deceased or unable to give an affidavit then provide an affidavit in Form NC9 as per Rule 19 or if will/codicil is holograph form then provide an affidavit in Form NC9 as per Rule 16(4).

Back of Will/Codicil - Rule 16(1), (2) and (8) (all markings to be on the last (signature) page of the Will/Codicil)
☐ Exhibit "A" to Affidavit of Witness/Handwriting not marked/incorrectly sworn/sworn wrong date - s/b ________________
☐ P.R.'s/Commissioner/Notary signature missing/differs from NC2.
☐ Line for Justice of Court queen's Bench of Alberta to sign is missing.

Renunciation/Nominations (Form NC 12; NC 14; NC 15; NC 16) (Form incorrect, should use Form NC __ )
☐ Renunciation(s)/nomination(s) from ________________ missing.
☐ NC 11 Affidavit of Execution from ________________ missing/incomplete/not prescribed form.
☐ Reference to the wrong Act s/b Estate Administration Act.

Bond/Security Requirement (Rule 28 & 29 and 31(1)) (Required only where none of the P.R.'s is a resident of Alberta)
☐ Bond/Other Security not required - remove all reference.
☐ Bond/Other Security required - PR may apply to dispense with/reduce amount of bond (NC17)
☐ Consents (NC18) may be required by the Court.
☐ NC11 is missing/incorrect for the Consent to Waive Bond/Other Security of ________________

Notice to Beneficiaries (Form NC 19; NC 20; NC 21; NC 20.1) Section 12 Estate Administration Act (EAA)
☐ Incorrect/June 1st new form of notice sent to beneficiary/void beneficiary ________________, use NC __
☐ Description of gift/void gift: incorrect/incomplete for beneficiary ________________.

Notice to Dependents (Form NC 22; NC 23; NC 24; NC 24.1) Section 11 Estate Administration Act (EAA) SR 26
☐ Notice to spouse of right to claim Matrimonial Property (NC 22) (required when spouse does not get all of the estate and when parties were married at time of death or, if divorced, divorce was within two years of death); original acknowledgements are required (required if spouse does not get all of the estate). Service can be by recorded mail or on solicitor acknowledging for spouse.
☐ Notice to spouse or adult interdependent partner of right to claim Family Maintenance (NC 23) missing; original acknowledgements are required (required if spouse or AIP does not get all of the estate). Service can be by recorded mail/solicitor acknowledging for AIP/Spouse.
☐ Notice to a child/dependent child or minor grandchild or minor great-grandchild under the Wills and Succession Act (NC 24) required (Note: Must serve trustee or attorney if appointed, guardian/parent of a minor child).
☐ Notice to the Public Trustee under the Estate Administration Act (NC 24.1) missing for ______ Section 11 EAA

NC 27 Affidavit of Service (Form missing/incomplete)
☐ Beneficiary(ies)/Trustee/Attorney/Guardian of Minor child not served
☐ For each beneficiary served, name & address of service, date & mode of service and name of notice served, must be clearly stated in the Affidavit.
☐ Attach "Notice to Beneficiaries" and mark same as exhibit(s) to the affidavit (you are not required to attach the application or postal receipts).
☐ Form not served on Trustee/Attorney/Guardian of minor (______________) pursuant to Section 11 EAA.
☐ Other (see attached)

PLEASE ENSURE AFFIDAVIT (NC 2) IS PROPERLY RE-SWORN IF CHANGES HAVE BEEN MADE TO ANY ATTACHMENTS, IF NOT RE-SWORN APPLICATION WILL BE AUTOMATICALLY RETURNED

PLEASE LEAVE SHEET ATTACHED WHEN RE-SUBMITTING APPLICATION

August 2015

LESA Library
This is my last will.

Part 1 – Distribution of my estate

Revocation

1. I cancel all my earlier wills and codicils.

Appointment of personal representatives

2. In this will, my executor is both the executor of my will and the trustee of my estate, unless another is appointed as trustee.

3. I appoint my wife, Jane Seymour (“Jane”), of Edmonton, Alberta, to be my executor.

4. If Jane:
   - dies before me,
   - is unable or unwilling to act as executor,
   - is unable or unwilling to continue to act as executor, or
   - dies before the trusts in this will are completed,
   then I appoint my cousin, Thomas Cromwell, of St. Albert, Alberta, to be my executor.

5. My executor must be a Canadian resident to ensure that any trust remains a Canadian trust for income tax purposes. If not, the appointment is or becomes invalid.

6. My executor is not required to post a bond, regardless of whether my executor is an Alberta resident or not. I direct my executor to apply to the court to dispense with the requirement for a bond and I request the court to grant this application.

Transmitting property to my executor

7. I give all my property, wherever located, to my executor in trust to carry out the terms of my will.

Payment of debts

8. My executor must pay my debts and estate administration expenses as described in this will in Part 2 - Administration of my Estate.
Distribution of property— if Jane survives me

Residue

9. If Jane survives me, I give the rest of my property to her.

Distribution of property— if Jane does not survive me but children or grandchildren do

10. If Jane does not survive me, I make the following gifts.

Bequests

11. I give my suit of armour to my son, Edward Tudor, of Edmonton, Alberta.
12. I give my 21" 14k gold chain to my daughter, Elizabeth Tudor, of Edmonton, Alberta.
13. I give my gold ring with ruby stone to my daughter, Mary Tudor, of Vancouver, British Columbia.
14. I give other articles of household goods and personal effects as I may prepare in a separate list after my will is signed as a codicil to it.
15. The beneficiary of any household goods and personal effects must pay the delivery and storage costs for the items once my executor is in a position to make the delivery.
16. If I have not specified a beneficiary of any household goods or personal effects those items are to be divided by agreement among my residuary beneficiaries.
17. However, if the beneficiaries do not agree on the division of household goods and personal effects, my executor must decide on a division method, including by lottery, sealed bids, rotation of choice, and selling the items, or any other method chosen by my executor whose decision is binding on the beneficiaries.

Legacies

18. I give $10,000 to Holy Trinity Anglican Church, Old Strathcona, Edmonton, Alberta, to be used in its vestry's discretion.

Residue

19. I give the rest of my property to my children, in trust.

Trusts of the rest of my property for children and grandchildren

20. My executor must initially hold the rest of my property in one trust for the benefit of my children.
21. When my youngest child then alive reaches the age of 18 years, my executor must divide the rest of my property equally among my children, in separate trusts. The term “children” includes those who survive me and those who die before me but whose children are then living.

Terms and conditions of the children’s trusts

22. The terms and conditions of the children's trusts operate both before and after my executor divides the remaining property in the one trust into separate trusts for each child. All payments of income and capital from the trusts can only be made for the benefit of my children.

23. My executor must invest the property in the trusts to generate income.

24. While my executor holds the rest of my property in one trust for my children, my executor may pay out income and capital unequally to my children depending on each child’s need.

25. My executor may make a payment to my children directly or to a third party for my children’s benefit. Examples of a third party include a parent or an educational institute. This power to pay out capital extends as far as collapsing the entire trust.

26. My executor must add any income earned, but not paid out in any year, to the capital of the trust and invest it.

27. After my executor divides the trust property into separate trusts, my executor may pay out income and capital only to the child who benefits from the trust.

28. If any of my children
   - dies before me, or
   - dies before he or she receives all of the funds held in trust for him or her,
   and if that child has living children, those children take their parent’s place and share their parent’s portion equally.

29. If any of my children
   - dies before me, or
   - dies before he or she receives all of the funds held in trust for him or her,
   and if that child has no living children, my children (that is, those living and those who died before this time but whose children are living) take my deceased child’s share equally.

30. The directions in my will about investment of capital and payment of income and capital in the children’s trusts apply to any shares held in trust for grandchildren.


Distribution to children

31. My executor must pay each child his or her remaining share as follows:
   (a) 33% of the share, when the child is 21 years of age;
   (b) 50% of the remaining share, when the child is 25 years of age;
   (c) the balance of the share, when the child is 30 years of age.

32. If any grandchild receives a share of my estate, my executor must pay each grandchild his or her remaining share when the grandchild is 25 years of age.

Distribution of property—If Jane, children, and grandchildren do not survive me

33. If none of Jane, my children, or my grandchildren survive me, or they survive me but die before they receive all the property given to them, I give my property as follows.

   Residue

34. My executor must divide the rest of my property into two equal shares and distribute them as follows:
   • one share equally between my parents, Margaret and Henry Tudor, of Edmonton, Alberta, or to the survivor of them;
   • one share equally between Jane's brothers and sisters, all of Winnipeg, Manitoba, or to the survivor(s) of them.

Qualification of beneficiaries

35. Any beneficiary must live for 30 days after my death in order to receive any benefit from my estate.

36. Despite the previous provision, my executor may use the income or capital of any beneficiary's share for his or her benefit during this 30 day period even if he or she does not survive me for 30 days.
Part 2 – Administration of my estate

Payment of debts and expenses

37. My executor must pay my debts and estate administration expenses in the following order:

(a) my funeral expenses, including the cost of a suitable marker;
(b) the costs of administering my property and the trusts I create under my will, including legal fees and executor’s compensation;
(c) all taxes and duties levied against my property, and
(d) my legally enforceable debts.

38. However, any beneficiary who must pay succession duties on his or her share of my estate must pay them from his or her share.

Power to sell or retain

39. My executor has the authority to sell my property but also to keep my property and investments, including real property, in the same form as they are in when I die. The power to keep my property in its original form continues for as long as my executor administers my estate. This is so even if there is a debt against any of the property or it does not produce income.

Power to invest

40. My executor must adhere to the prudent investor standard when investing my property. However, my executor may depart from the prudent investor standard by holding real property and items of household goods and personal effects if my executor decides it is reasonable to do. To make such a decision, my executor must consider my circumstances and family situation at my death.

Power to distribute land or personal property

41. My executor may divide and distribute any part of my property without first converting it into cash.

42. The property received by each beneficiary does not need to be identical. However, the division must be as close as possible to their shares.

43. My executor’s decisions about the values of this division are binding on the beneficiaries.
Power to deal with land and buildings

44. My executor has full discretion to manage any land and building forming part of my property, including:
   (a) repairing, renovating, removing, or adding buildings
   (b) selling, mortgaging, leasing, or otherwise disposing of the property
   (c) employing a person or company to manage the property.

Power to carry on business operations

45. My executor may carry on any business in which I was involved and I appoint my executor as a director of any corporations of which I was a director and shareholder. This appointment takes effect immediately on my death.

Power to employ professional advisors

46. My executor may employ professional advisors to help administer my property and then must pay them from my estate for their services.

Taxes

47. My executor may make any elections or other decisions allowed by the *Income Tax Act*, Canada and other tax legislation. To do so, my executor may rely on advice from specialists in this area and is not liable for any adverse consequences to my estate or the beneficiaries in so doing.

Payments for minors

48. My executor may pay any amounts for minors to the parent or guardian of that minor or to a third party for the minor's benefit. My executor is no longer responsible for these payments once the parent, guardian, or third party receives them.

Executor's compensation

49. For acting as my executor and trustee, my executor is entitled to compensation as described in the fee guidelines for surrogate matters. This is in addition to any gift that I give my executor as a beneficiary in my will.

50. My executor is entitled to receive pre-payment of compensation on the first anniversary of my death and annually after that until my executor completes administering my estate.

51. My executor should immediately pay himself or herself from my estate for any reasonable expenses my executor incurs in administering it.
Gifts made during my lifetime

52. When calculating the division of my estate, my executor must not take into account any gifts my beneficiaries received from me during my lifetime by any means.

Not mutual will

53. The provisions in this will mirror similar provisions in my spouse’s will made on the same day. However, my spouse and I do not have any agreement that our wills are irrevocable to invoke the mutual wills doctrine. This is not a mutual will.

Declaration of general charitable intention

54. I declare my general charitable intention regarding any gift to any charitable institution designated as a beneficiary in my will (the “original charitable beneficiary”) that does not exist at the time of my death.

55. Property I designate to a charity that no longer exists will be distributed as follows:

(a) to the charitable institution which appears to be the successor institution to the original charitable beneficiary, or, if there is no such successor institution, then

(b) to other charitable institution(s) with substantially the same or similar purposes to those of the original charitable beneficiary, as determined by my executor.
Part 3 – Guardians for my children

Appointment of guardians

56. If Jane dies before me and any of my children is a minor when I die, I appoint my mother, Margaret Tudor (“Margaret”), of Leduc, Alberta, as their guardian.

57. If Margaret dies before me, or is unable or unwilling to act as guardian when I die or at a later time, I appoint my brother, Arthur Tudor, of Fort Saskatchewan, Alberta, as their guardian instead.

Guardianship directions

58. I do not wish any financial burden placed on my guardians as a result of caring for my children. I direct that my property be made available to my guardians to pay the cost of medical expenses, clothing, feeding, educating, and providing a home for my children. It is more important that my children have a secure, happy, and comfortable home life while they are growing up than that their inheritance be preserved for them later.

59. If my children are over 14 years of age, my guardians must consider my children's wishes about where they want to live.

Interpretation

60. This will must be read with all changes of gender or number required by the context. I have signed my will and initialled the previous 7 pages on [date].

HENRY TUDOR

Henry Tudor signed this will in our presence and we then signed this will in his presence and in the presence of each other.

Witnesses

[name of witness] [name of witness]
Lawyer Legal Secretary
[address] [address]
WILLS AND ESTATES QUESTIONNAIRE (SAMPLE)

Alberta Wills and Estates Practice Manual
# WILLS AND ESTATES QUESTIONNAIRE

## SECTION 1 – FAMILY INFORMATION

### PERSONAL INFORMATION

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<th>Spouse’s name:</th>
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List any other names you are known by:

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Citizenship other than Canada? YES/NO

If yes, where?

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<th>If yes, where:</th>
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Do you have a US green card? YES/NO

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Do you holiday in the US for extended periods of time each year? YES/NO

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MARRIAGE INFORMATION

Marital status: _____________________________________________________________

Date and place of marriage: ___________________________________________________________________________

Previous marriage? YES/NO

If yes, name of previous spouse and date of death / divorce / separation:

Date and place of marriage: ___________________________________________________________________________

If yes, please provide details:

Obligations relating to previous marriages (e.g., spousal & child maintenance)? YES/NO

If yes, please provide details:

If you are single, separated, or divorced:

(a) Do you plan to marry in the near future? Give details: ____________________________________________________________________________

(b) Do you cohabit (live “common law”) with anyone now? Give details: ____________________________________________________________________________

(c) If so, when did you start living together? ____________________________________________________________________________

(d) Do you plan to separate or divorce in the near future? Give details: ____________________________________________________________________________
CHILDREN

Number of children: ________________________

Are all the following children from your present marriage / relationship? YES/NO

If no, indicate with the appropriate letter beside each child:

P - from previous marriage (not adopted by each other unless indicated) (husband/wife)
A - legally adopted
O - born outside of present marriage /relationship

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<tr>
<th>Letter</th>
<th>Full name</th>
<th>Address</th>
<th>Date of birth</th>
<th>Marital status</th>
<th>Names and ages of their children</th>
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Are there any stepchildren, adopted children or children from another relationship of either spouse? YES/NO

Are any of your grandchildren adopted or step grandchildren? YES/NO

If yes to any of the above questions, give details. (For example, if adopted, is the adoption legally finalized? For stepchildren/step grandchildren, do you intend them (or some of them) to be treated equally with biological grandchildren or not? If so, name them.):

________________________________________________________________________________________________________________________________________________________

Have you stored genetic material? (For example, frozen sperm/eggs/embryo). YES/NO

Are any of the children or grandchildren mentally or physically incapacitated? YES/NO

If yes, please describe:

________________________________________________________________________________________________________________________________________________________

________________________________________________________________________________________________________________________________________________________

Have any of your children predeceased you? YES/NO

If yes, give the name and date of death of the deceased child and the names of their children, if any.

________________________________________________________________________________________________________________________________________________________

________________________________________________________________________________________________________________________________________________________
SECTION 2 - INSTRUCTIONS FOR WILL

PERSONAL REPRESENTATIVE(S):

Another name for a personal representative used to be “executor.”

If you want your spouse to be the sole beneficiary of your estate, you may also want to name him/her as the primary personal representative (PR). You should also name alternates, in case your first choice is unable to act at the time. Your PR must be an adult (18 years or older). For tax reasons, your PR should be a resident of Canada, and for practical and cost reasons, it is easiest for the PR to be resident in Alberta. If you have more than one PR, we recommend at least one of them is a resident of Alberta. This can be discussed further with your lawyer.

1. Full name: ____________________________  Relationship: ____________________________  Age: ____________  Address: ____________________________

ALTERNATES:

2. Full name: ____________________________  Relationship: ____________________________  Age: ____________  Address: ____________________________

3. Full name: ____________________________  Relationship: ____________________________  Age: ____________  Address: ____________________________

GUARDIAN(S) FOR MINOR CHILDREN:

1. Full name: ____________________________  Relationship: ____________________________  Age: ____________  Address: ____________________________

ALTERNATE GUARDIAN(S):

2. Full name: ____________________________  Relationship: ____________________________  Age: ____________  Address: ____________________________
BENEFICIARIES:

The following choices for distributing your estate are for your convenience only. It is intended to get you thinking about the issues to be discussed at the meeting with your lawyer.

1. All to spouse: YES/NO Other: _______________________________________

2. If spouse predeceases me: ___________________________________________
   Equally to all children? YES/NO
   All to children but different percentages to particular children?
   ________________________________________________________________

3. At what age are your children to receive their share of your estate?
   ______ all at 18? or another age _____________
   ______% at _____ years _______% at _____ years
   ______% at _____ years
   ______ other ___________________________________________________

   The age of majority is 18 in Alberta. Unless specified otherwise, the will is drafted so that your PR holds each child's share in trust until the specified age with power to use income and capital from the trust for that child's education, maintenance and support.

4. If one child dies before you do, or before reaching the age at which he or she is entitled to the share, who shall receive that share or the amount remaining?
   ______ the children of the deceased child (my grandchildren)
   ______ my surviving children only
   ______ other ___________________________________________________

5. Family demise:

   How is your Estate to be divided if you and your spouse and all your children and grandchildren are killed in a common accident, or if any of your children or grandchildren survive you but die before becoming entitled to receive their entire portion of your estate?
   ______ 1/2 to my parents and 1/2 to my spouse's parents
_______ 1/2 to my brothers and sisters and 1/2 to my spouse’s brothers and sisters who are then alive in equal shares

_______ charities

_______ other ____________________________________________________________

6. Specified gifts or legacies - list items or amounts and who is to receive it:

_____________________________________________________________________

_____________________________________________________________________

_____________________________________________________________________

_____________________________________________________________________

(Caution: Do not list any items unless they are definitely valuable or of great sentimental value or unless you are prepared to pay your lawyer to draft the will and change it when an item is sold or replaced).

7. Money for guardians:

If it becomes necessary for the guardians that you name to look after and raise your minor children, will they require:

_______ A lump sum of money to be paid to them to buy a larger house, to renovate their current house, to buy a larger vehicle etc. in order to accommodate your children?

_______ If so, then how much would you like to give to them for this purpose?

_______ A monthly amount to be paid to them to assist with the additional monthly expenses that they will incur as a result of raising your children?

_______ If so, then how much per month per child would they require?

8. PR compensation:

Personal representatives are entitled to be paid for the time, effort and expertise they spend administering your estate. This can be a lump sum amount or a percentage of your estate. If you wish your PR to receive compensation for acting on your behalf, you may specify that they be compensated according to the usual rules, or you may specify the dollar amount or percentage of your estate they are to receive. They will also be entitled to reimbursement for any out-of-pocket expenses they incur in administering your estate.
In Alberta a rough guideline of the compensation that a PR is entitled to is 1% to 5% of the value of your estate. If you wish to specify in your will the compensation that is to be received by your PR will it be:

_____ according to the usual rules?

_____ a percentage of your estate, and if so, what will that percentage be?

_____ a set amount, and if so, how much will that amount be?

If you name more than one PR to act on your behalf, is compensation shared or are they each to receive the amount or percentage specified?

_________________________________________________________________________

_________________________________________________________________________

_________________________________________________________________________
SECTION 3 - FINANCIAL INFORMATION

The purpose of this section is to provide us with sufficient information to assist you in planning your Estate and to ensure we include appropriate powers in your will. It will also inform your PR(s) of all of your assets to make sure they do not miss any. If there is insufficient space to answer any of the following sections, please list on a separate paper.

In the left margin please indicate ownership of assets:

J - owned jointly by husband and wife (or indicate joint owners)
H - owned by husband
W - owned by wife
O - owned by husband and/or wife with some other person (please describe)

REAL ESTATE:

Principal Residence: (note - you can only have one principal residence for tax purposes)

Municipal address: 
Legal description: 
Name(s) on Title: 
Ownership: Joint tenancy or Tenancy in common
Other Land: 
Interest in mines and minerals:
## Bank Accounts:

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## Guaranteed Investment Certificates and Term Deposits:

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## Life Insurance Policies: Indicate Type: Term ("T"), Permanent ("P"), Universal ("U")

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<th>Company</th>
<th>Policy no.</th>
<th>Value</th>
<th>Beneficiary</th>
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## Segregated Funds:

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</tbody>
</table>

## Pension Plans:

<table>
<thead>
<tr>
<th>Company</th>
<th>Beneficiary</th>
</tr>
</thead>
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</tbody>
</table>

## Registered Retirement Savings Plans and Registered Retirement Income Funds:

<table>
<thead>
<tr>
<th>Financial institution</th>
<th>Location</th>
<th>Named beneficiary</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>
DEBTS OWED TO YOU (By children or anyone else)

Does anyone owe you money (e.g., personal loans, promissory notes, mortgages)?
YES/NO

If yes - provide details:

____________________________________________________

____________________________________________________

____________________________________________________

BUSINESS INTERESTS (e.g., private company, partnership, sole proprietorship, etc.)? - Please describe:

____________________________________________________

____________________________________________________

____________________________________________________

SHARES IN PUBLIC CORPORATIONS, MUTUAL FUNDS, BONDS, AND DEBENTURES:

(Do not list all shares if portfolio changes regularly)

____________________________________________________

____________________________________________________

____________________________________________________

VALUABLE PERSONAL PROPERTY: (e.g. automobiles, mobile homes, boats, heirlooms, etc.)

<table>
<thead>
<tr>
<th>Description</th>
<th>Location of property</th>
</tr>
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<tbody>
<tr>
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</tbody>
</table>

ANY OTHER ASSETS NOT LISTED ABOVE: (Disability savings plans, tax-free savings accounts, registered education savings, etc.)

____________________________________________________

____________________________________________________

____________________________________________________
1. Do you have an interest in any assets outside Alberta? YES/NO

2. Do you have an interest in any assets outside Canada? YES/NO

3. Do you have any wills for assets outside Canada? YES? NO

4. Have you made any loans or advances to family members or others that are to be repaid? YES/NO

5. Have you made any loans or advances to family members or others that are to be forgiven? YES/NO

If you have answered yes to any of the above questions please provide further details.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
SECTION 4 – LIABILITIES & MISCELLANEOUS

CREDITOR AMOUNT

________________________________________
________________________________________
________________________________________

Are any of your debts life-insured? YES/NO

________________________________________

SAFETY DEPOSIT BOX:

<table>
<thead>
<tr>
<th>Location</th>
<th>Box Number</th>
<th>Registered Name(s)</th>
<th>Location of Keys</th>
</tr>
</thead>
<tbody>
<tr>
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</table>

FUNERAL ARRANGEMENTS:

On your death do you want your body to be buried: YES/NO

If you have answered yes, do you have a preference as to where it should be buried?

________________________________________

Would you prefer that your body be cremated? YES/NO

If you have answered yes, do you have any instructions as to what is to be done with your ashes?

________________________________________

Have you already pre-arranged these matters? If so, with which company:

________________________________________
ALBERTA WILLS AND ESTATES PRACTICE MANUAL

It is important that you communicate these arrangements with your family members. Having these in your will is not optimum because the will is generally not consulted until after funeral and memorial arrangements are completed.

OTHER ESTATE PLANNING:

Do you have a previous will? YES/NO

If Yes, please bring a copy in to the meeting with your lawyer.

Do you have an Enduring power of attorney?

Do you have a Personal Directive?