The New Wills and Succession Act

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The New Alberta *Wills and Succession Act*—What's In It?...and What's Out

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A. Introduction

A new *Wills and Succession Act*[2] has been passed by the Alberta Legislature. Once in force, it will have significant impact on wills and succession practice in Alberta. To allow for preparation and education, the Act will come into force on a date set by proclamation. Proclamation is expected in early 2012.[3]

This paper is intended for lawyers and those who work with estates and related legislation and explains the provisions the *Wills and Succession Act*, SA 2010 cW-12.2, as amended by the *Wills and Succession Amendment Act* (Appendix B to this paper, and which may be viewed at http://qp.alberta.ca/Laws_Online.cfm). There is also a short discussion of relevant changes to the *Family Law Act*. It is a companion to papers prepared by Lois MacLean, Jodie Hierlmeier, Janice Henderson-Lypkie, Barbara Krahn, and Dennis Pelkie Q.C., for the April 30, 2011 Legal Education Society[4] of Alberta seminar "The *New Wills and Succession Act* - What's in it and What You Need to Do Now". [5]

The paper follows the *WSA* by Part and section, highlighting substantive changes and continuation of the law. If a section is not mentioned it is because there was either no change or it is self-explanatory.

Transitional provisions are highlighted.

Transitional rules covering the transition from old law to new are highlighted in each part of the paper. In the Act itself, a general transitional rule is found near the beginning or end of each

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[2] *Wills and Succession Act,* SA 2010, cW-12.2.
[3] A further phase of succession law reform is in process and will deal with the administration of deceased's property.
[4] http://www.lesa.org/. See Appendix A for a listing of the companion papers.
[5] This paper is the "What's in it". The excellent work of the others explains the devilish details and "What you need to do now".

Part. Exceptions to the general rule may be found in specific sections, for example, the general transitional rule for wills is in section 8, and an exception is found in section 25(3).

Two caveats: It is not uncommon for housekeeping changes to be made to legislation before it comes into force. The reader is reminded to refer to the latest version of the statute. The version discussed here is as of March 25, 2012, including one amendment that is currently before the legislature.[6] There may be further tweaks.

The coming into force of the *WSA* will occur by the passage of an Order in Council which will be published. Generally, such a "Coming into Force" order proclaims all parts of a statute in force, but there may be exceptions.

B. *Wills and Succession Act*— An Overview

The *Wills and Succession Act* repeals and replaces the *Wills Act*, the *Intestate Succession Act*, the *Dependants Relief Act*, the *Survivorship Act*, and section 47 of the *Trustee Act*.[7] It also makes a major amendment to the *Matrimonial Property Act*[8] to allow for matrimonial property claims on the death of a spouse.

Prior to its passage, the Act was the subject of considerable study by Alberta Justice and other government departments, and the Alberta Law Reform Institute. There was extensive consultation with the public, lawyers and other experts. The principles guiding the new law are[9]

- *Testamentary Freedom - A person can do what he or she wants with her or his property. There must be justification for interfering with testamentary freedom.*
- *Testamentary freedom is subject to the discharge of the deceased's legal obligations.*

[6] At time of writing the Bill 14 Wills and Succession Amendment Act 2011 is at second reading. It amends s. 8.
[7] *Wills Act,* RSA 2000, c. W-12. *Intestate Succession Act,* RSA 2000, c I-10. *Dependants Relief Act,* RSA 2000, c D-10.5. *Survivorship Act,* RSA 2000, c S-28. *Trustee Act,* RSA 2000, c T-8, s 47. Unless otherwise stated, all references in this paper to these statutes are to these citations.
[8] *Matrimonial Property Act,* RSA 2000, c M-8.
[9] The principles received very strong support in public consultation. See posting of consultation results a http://justice.alberta.ca/Pages/home.aspx

- *Where there is intestacy, a deceased will be presumed to intend her or his family to be his or her beneficiaries.*

- *Vulnerable or dependent individuals should be supported: at minimum family members who are dependent on the deceased should be entitled to adequate support.*
- *Laws should be internally consistent, harmonize with other law and legislation and be accessible –effective in resolving issues, and as easy as possible to locate and understand and apply.*

Major changes to the law will include:

- Matrimonial Property
    - Married people are entitled to their share of the matrimonial property when their spouse dies.
- Family Support (formerly Dependants Relief)
    - In addition to a spouse, partner[10], minor and disabled adult children, adult children under 22 who are going to school can apply for support from a parent's estate, if the deceased was supporting the child at the time of death.
    - A minor grandchild or great-grandchild can apply for support from the grandparent's estate if the deceased grandparent was standing in the place of the grandchild's parent when the grandparent died.
    - A surviving spouse or adult interdependent partner has a temporary right to possession of the family home for 3 months after the death, if the home is not already owned by him or her.
- Intestacy
    - The entire estate will go to the spouse or partner, if the children are all children of that relationship.
- Wills
    - A gift in a will to an ex-spouse or ex-adult interdependent partner is void unless the will says otherwise.
    - Repeal of the rule that a person's will is revoked when they marry.
    - Extrinsic evidence of intention is admissible to interpret a will
    - Court may validate a will that would otherwise be void for failure to comply with formalities, if there is evidence that clearly shows the intent of the deceased.

[10] In this paper, "partner" or "AIP" refers to an Adult Interdependent Partner under the *Adult Interdependent Relationships Act,* RSA 2000 c A- 4.5

- Court may allow a minor to make a will.
- Court may restore a void gift to a witness.

- Survivorship
  - The presumption is no longer that the youngest dies last where two or more people die in circumstances where order of death cannot be determined.

A full summary of the changes to the law may be found on the Alberta Justice website at http://justice.alberta.ca/. Search for "succession".

Further background can be found in the relevant Hansard speeches on Bill 21 from the Fall 2010 sitting of the Alberta Legislature, via http://www.assembly.ab.ca.

There are consequential amendments to the *Administration of Estate Act* and the *Unclaimed Personal Property and Vested Property Act*. (Part 7 deals with all consequential amendments.)

Coincidentally, and relevant to succession law, Alberta's *Family Law Act* has been amended to abolish illegitimacy, to allow for variation of certain support orders *post mortem*, and in relation to parentage of children born using assisted human reproduction. At the time of writing, this legislation was assented to but not in force, though it is expected to come into force in the Summer of 2011. This is discussed at below. For the current status of this legislation, see the Alberta Queen's Printer website at http://www.qp.alberta.ca/.

C. General Interpretation and Application — Sections 1 to 4

Many of the definitions in the *Wills and Succession Act* have remained from previous legislation. Note there are definitions provisions both at the start of the Act and within the various Parts. Discussed below are the general definitions of particular interest.

Section 1(1)(a) The definition of adult interdependent partner (AIP)[11] is that found in section 3 of the *Adult Interdependent Relationships Act*:

> 3(1) Subject to subsection (2), 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
> >
> > > (i) For a continuous period of not less than 3 years, or
> >
> > > (ii) Of some permanence, if there is a child of the relationship by birth or adoption,
> >
> > > Or
> >
> > (b) The person has entered into an adult interdependence partner agreement with the other person under section 7.
>
> (2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.

Note that there are places in the *Wills and Succession Act* where the Act will apply differently for AIPs who are related by blood (as described in section 3(2) above). For example, see section 25(2) where blood-related AIPs are excluded from the application of section 25.

Section 1(1)(b) The definition of "beneficiary" applies to the whole Act, except Part 4 which deals with beneficiary designations. In this definition the term "beneficial disposition" appears. This term simply means a gift given via will or intestacy. The term "gift" was considered for use in the Act, instead of "beneficial disposition". The problem was that the term creates confusion in parts of the statute that refer to *inter vivos* and other forms of gifts. Generally, the *WSA* refers to "dispositions" under or made by will, which distinguishes it from other legal forms of transfer of property that may occur before or around the time of death. See section 7(1)(a) for a definition of "disposition."

[11] In this paper, "partner" or "AIP" refers to an Adult Interdependent Partner under the *Adult Interdependent Relationships Act*, RSA 2000 c A- 4.5.

Section 1(1)(e) The term "descendent(s)" replaces the word "issue" as it appears in the *Intestate Succession Act* and other succession legislation. Simply, descendants are a person's offspring: children, grandchildren, great-grandchildren and so on.

Section 1(1)(i) The definition of "property" is substantively similar to the ones found in the *Adult Guardianship and Trusteeship Act* and the *Civil Enforcement Act*. (A noteworthy difference is that causes of action are NOT included.) The intent is to cover all forms of property that are transmittable on death. There are no distinctions between real and personal property under the *WSA.*

"Estate" is not defined in the *WSA.* The Act is premised on the basis that the "estate" is property that passes via will or intestacy. [12]

Section 1(2) This section does not change the law, but there is a shift in the perspective. The *Intestate Succession Act* speaks of disposition of the "intestate's estate". The *WSA* speaks of disposition of an "intestate estate", which is "an estate or any part of an estate that is not disposed of by the will."

Section 1(3) The intention is to make it clear that a "child" is a child of both its parents, as defined in Part 1 of the *Family Law Act*.[13] Under the *Family Law Act ("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 (in which case there are specific provisions for parentage in the *FLA*)

[12] During development of the *WSA* there were discussions and suggestions that "estate" be formally defined in the WSA, in particular to specifically deal with the issue of property passing by beneficiary designation, (i.e., under Part 4 WSA) not being part of the estate or being creditor protected. Some other jurisdictions have done so. See for example *Succession Law Reform Act* RSO 1990 c s.26 s. 72. For further, see the discussion relating to WSA Part 4.

[13] *Family Law Act,* SA 2003 c F-4.5, both before and after the amendments made by Bill 22 (2010 *Family Law Statutes Amendment Act 2010 SA 2010 c 16*).

Section 2 If there is a question about a spouse's right to property under a will or intestacy, the spouse's rights under the *Dower Act*[14] prevail. This is not new law.

Section 3(3) This reiterates the application of section 11 of the *Alberta Evidence Act.* This is of increased importance given the new provisions for extrinsic evidence (s.26), rectification (s. 39), alleged advances (Part 6), and dispensation of formalities (s. 37, 38). There is no change to the law here. The *Alberta Evidence Act* Section 11 states

> 11 In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

Section 4 This is the same as section 5(1) of the *Family Law Act*. It reinforces the policy that law favours appropriate settlement: a lawyer has a duty to look at alternative methods of resolving contentious issues and to ensure the client is aware of alternative methods of settlement.[15]

D. Part 1 Survivorship - Sections 5 and 6

The *Survivorship Act* is repealed and replaced. There is a new rule for succession of property when people die in circumstances where order of death cannot be established.

Section 5(1) This replaces section 1 of the *Survivorship Act*. Previously, the "seniority" rule was in place: if two or more people died at the same time or if it was uncertain who died first, for property distribution purposes, the presumption was that the older person died first. Now, when order of death cannot be ascertained, the presumption for property distribution purposes will be that each individual predeceased the other.

The Alberta *Insurance Act*[16] contains the same rule, at sections 599 and 690.

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[14] *Dower Act,* RSA 2000, c D-15.
[15] See also Chapter 1 of the Alberta Law Society Code of Conduct.
[16] *Insurance Act,* RSA 2000, c I-3, ss. 599, 690.

Section 5(2) This is a corollary to the new rule, applicable where all the deceased own property jointly with each other: where 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, and New Brunswick. British Columbia also made the change in 2009, Bill 4, the *Wills, Estates and Succession Act,* which is passed but is not in force at time of writing.[17] This approach also follows the recommendations in the Uniform Law Conference of Canada Model Act (1971).

Transitional for Survivorship

Section 6 The new section 5 applies only to deaths occurring after section 5 comes into force, which will most likely be the date the *WSA* comes into force. The *Survivorship Act* applies to deaths occurring before section 5 comes into force.[18]

E. Part 2 Wills - Sections 7 to 57

Consistent with the principles guiding reform, the changes to wills law are aimed at giving primacy to testamentary intent, and to modernization of some ancient concepts.

As before, wills can be made in one of three forms: formal, holograph or military. The formalities for making, varying and revoking each are set out in Part 2. All forms of will are interpreted by the same rules. There are new rules for interpretation and for validation of wills.

E.1 Application of Part 2 – sections 7 and 8

[17] To check on the status of this bill, see http://leg.bc.ca/legislation/index.htm

[18] For those readers wondering what happened to other sections of the *Survivorship Act*: section 2 is not continued and section 3 (relating to survivorship of personal representatives) is moved to the *Administration of Estates Act*.

Section 7(1)(a) This section defines "disposition." Note 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*. Note also, this definition includes the "conferral or exercise of a power of appointment". [19] This inclusion is not a change in the law.

Also, see comments above on section 1(1)(b). Generally, the *WSA* refers to "dispositions" under or made by will. This is basically a gift 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) The rules regarding will signing have changed somewhat, and this is explained below. This section is an interpretation device, and continues 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.

Transitional for Wills Sections 9 – 22, 24, 27, 29- 36, Divisions 3 and 4

Section 8 is an important general transitional rule: the old *Wills Acts* will apply to wills made before the coming into force of the *WSA.* There are exceptions, in section 8(2) and elsewhere in the *WSA*.

Section 8(2) is a major exception to section 8(1). Under *WSA*, the Court has expanded powers respecting interpretation, correction and validation of wills. The provisions allowing use of extrinsic evidence (section 26) and rectification, and dispensation of formalities (sections 37 through 40), apply to ALL wills or alterations of wills made *before or after* the *WSA* comes into effect, if the testator's death occurs after the *WSA* comes into force.[20] This promotes the principle of respect for testator intent, and for this reason the provisions apply retroactively.

[19] For a general description of the law of power of appointment, see A.H. Oosterhoff, *Oosterhoff on Trusts, Text Commentary and Materials,* 6th ed (Toronto: Carswell, 2008) at 131.
[20] *Wills and Succession Amendment Act 2011,* Bill 14, as of March 25, 2011 at second reading.

E.2 Legal Effect of Wills - Sections 9 - 12

Section 9 This section conflates and replaces sections 21, 24, 25, 26, 29 and 31 from the *Wills Act* RSA 2000, c W-12. The law is not changed: a person can, by will, dispose of all property that he or she legally has the ability to dispose of. Unless the will is interpreted otherwise, the disposition conveys 100% of the testator's interest in the property.

Much of the ink in the old sections was devoted to restating this same rule for different categories of disposition and different types of property, such as devises of land, general dispositions and gifts of real property, cash legacies, and so on.

Section 10 This section is a modernization of *Wills Act* section 21, dealing with ademption by conversion. There is no change to the law: if estate property is converted from one form to another between the time of the will and the time of the death, the beneficiary is entitled to any identifiable interest in the property that remains. No tracing is permitted. If no identifiable interest remains the gift is no longer in existence: it adeems. Note: there is an exception to the ademption rule in the *Adult Guardianship and Trusteeship Act* section 67.[21]

Section 11 This section is not a change in the law, but modernizes *Wills Act* section 25: dispositions of property listed in the section, include property over which the testator had a general power of appointment.

Section 12 continues section 10 to the *Wills Act*. While this section 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.

[21] In addition, the Alberta Law Reform Commission has recommended this exception be extended to the *Powers of Attorney Act*, Alberta Law Reform Institute, *Wills and the Legal Effects of Changes Circumstances Report No. 98* (Edmonton: ALRI, 2010) at 167. Stay tuned.

E.3 "Making" a Will— Sections 13 – 21

These sections deal with the legal requirements for making a will, including capacity, requirements as to writing, signature and other formalities. The terms "making the will" and "will is made" refer to compliance with these requirements.

E 3.1 Who can make a will.

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

> **Section 13(1)** is a statement of the current law: adults with mental capacity (according to the current common law test[22], which is not changed) can make a will.
>
> **Subsection 13(2), Minors Wills** This replaces section 9 from the *Wills Act* which invalidated wills made by minors, with certain exceptions. Most of these exceptions are maintained. There is a key change: any minor can make a valid will, provided there is Court oversight in accordance with the new *WSA* section 36. There is another change relating to minor's wills. The *Wills Act* section 9(3)(c) is not continued. That subsection allowed unmarried and un-partnered minors with children to make wills. Unless there is a will under s. 36, the estates of such minors will go by intestacy, likely to their children.

E 3.2 Formalities for making a will

There is no major change in required formalities, but there is now a clear division between categories of formalities: ones that cannot be dispensed with and ones that can. Section 37 *WSA* allows the Court to dispense with certain (but not all) requirements for making a will.

There are two elements that must be present in order to make a valid will: the will must be in writing and it must be signed. While section 37 WSA now allows the Court to dispense with certain requirements for making a will, writing and signature cannot be dispensed with. There is one very small exception for signatures, discussed below in relation to section 39.

[22] Banks v. Goodfellow (1870) 5 LR QB 549 lives! See Oosterhoff *supra* at 179 - 222

Section 14 This provides that a will must be in writing and signed. In addition, unless a Court says otherwise, it must also follow the other requirements for one of: a formal will (section 15), a holograph will (section 16), or a military will (section 17).

Section 14(a) The definition of "writing" in the *Interpretation Act* [23] is relevant here. The *Interpretation Act* states in section 28(1)(j) that "written" or any similar term includes *words represented or reproduced by any mode of representing or reproducing words in visible form*. This definition would not preclude a formal or military will from being created electronically, provided there are visible words. However, it does NOT allow for wills to be created in video or audio formats.

Section 14(b) This sets out basic requirements for a valid testator signature. It must appear on the face of the will that the testator intended, by signing, to give effect to the will. This is a restatement of section 8(1) of the *Wills Act*. Note the phrase "on the face of the will": proof of intent relating to signature is distinct from proof of intent in relation to interpretation of the will under section 26.

See below in relation to section 19 for further on interpretation of signatures.

Section 15, Formal Wills This sets out the additional requirements for a formal will, which are no different than before: the written document must be signed by the testator (remember sections 7(2) and 19(1)—this includes a person who signs on behalf of a testator), and the signature is acknowledged by the testator in front of two witnesses in the presence of each other, and each witness signs in the presence of the testator. Note that the witness is a witness to the signature, not necessarily the will. [24]

The key change is that section 37 will apply to allow the witness requirements to be dispensed with.

[23] *Interpretation Act,* RSA 2000, c I-8, s 28(1)(j).

[24] This point is often confused (at least by the author) because in practice, witnesses to signatures are often called on to attest to other aspects of the making of a will. Witnesses don't even need to know the document is a will. See s. 20(4) *WSA*, below.

Section 16, Holograph Wills This section contains the holograph will requirements. Again, there is no legal change. In addition to being written and signed, to be valid the will must be entirely in the testator's own handwriting.

The key change is that section 37 allows a Court to dispense with the requirement for the document to be entirely in the testator's own *hand*writing. This will impact the interpretation of stationers' form wills.

Sections 17 and 18, Military Wills Modern Canadian Forces practice is to encourage members to have a valid will before engaging in active service. Therefore, this form of will is extremely rare. This law was retained, however, to cover all possible situations where a military member may need a will.[25]

Section 19 This modernizes the rules for determining the validity of testator signatures. It should be read with sections 7(2) and 14(b) in mind:

> **Section 19(1)** continues the law allowing the will to be signed by another person in substitution for the testator's signature.
>
> **Sections 19(2) and (3)** are based on wording recommended by the Uniform Law Conference of Canada [26] and replace s. 8(2) of the *Wills Act.* The essence of the new rules is:
>
> - Generally, a signature is effective to "make the will" it if appears the testator intended to give effect to the whole document by the signature.
> - Generally, the signature would 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.

[25] Note, however, that references to mariners and seamen have been removed, this having lost relevance in Alberta sometime after the Cretaceous Seaway dried up.
[26] *Uniform Wills Act,* ULCC 1953.

- Any writing added after the will is fully made (i.e., all formalities, including signature, are completed), is never validated by the signature.

The process for proving a valid signature need not change. As mentioned in the commentary on section 14, for evidentiary purposes, as with the current law, it must be apparent *on the face of the document* that the testator intended the signature to give effect to the writing.

Section 20 provides detailed rules for witnesses. There are some changes to the law here, and some modernization:[27]

Section 20(1) This adds a new requirement for witness to be mentally competent. Note there is no age limit. While a mental competence test is not specified, there is not much for the witness to attest to: the witness must simply be capable of stating that he saw the testator sign the document or acknowledge her signature.

Section 20(2) is a new provision. It prohibits a person who has signed the will on behalf of the testator[28] to also sign the will as a witness. Its purpose is to reduce the risk of fraud or undue influence.

Sections 20(3) and (4) confirm the capacity of certain witnesses. This is a continuation of Wills Act sections 11[29], 12 and parts of 13.

With respect to creditors as eligible witnesses - section 14 of the *Wills Act*, confirming creditors are competent witnesses, is repealed and not replaced. This is not intended as a change and under the *Interpretation Act* does not revive old common law[30]. The repeal simply eliminates an unnecessary rule. In addition, *WSA* section 110(3) repeals the common law presumption that a money disposition to a creditor is a repayment of a debt. See discussion below on section 110.

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[27] Background for many of the changes to sections 20 and 21 can be found in the good work of the Alberta Law Reform Institute, *Wills and the Legal Effects of Changes Circumstances Report No. 98* (Edmonton: ALRI, 2010).
[28] That is, the person described in section 19(1) *WSA*.
[29] Section 11 *Wills Act* is the mysterious *A will made in accordance with this Act is valid without other publication*. It is replaced by *WSA* section 20(4)(a): a witness to a testator's signature doesn't need to know the document a will.
[30] *Interpretation Act,* supra, s. 35(1)(a)

Section 21(1) This expands the law that a gift or the conferral of a power of appointment to a witness or her spouse or adult interdependent partner is void.

Sections 21(b) and (c) add interpreters and individuals who sign the will on behalf of the testator to the list of "suspect" beneficiaries who are disqualified from taking a benefit under the will. Their spouses and partners and descendents, or others claiming by representation through these individuals, are also disqualified. The intent, again, is to reduce the risk of fraud or undue influence.

Section 21(2)(c) "points" to section 40, a new and major exception to section 21(1). Notably, section 40 provides an opportunity for the person whose gift has been rendered void under section 21(1) to apply to the Court for relief. If the applicant can prove nothing nefarious occurred, the Court can allow the gift.

E.4 Alteration, Revocation and Revival of Wills – Sections 22 – 25

Again, changes here are intended to achieve testamentary intent while at the same time balancing the law to protect against fraud or undue influence.

Section 22 This codifies rules for alterations made to a will.

Section 22(1) "Alterations" include "writings" as well as "markings or obliterations" inserted after a will is made. That is, alterations include holes, scribbles, white out, and the like.

If the will is a holographic will, then the alterations need to be made in the holographic style, and if the will is formal, valid alterations have to follow the same formalities. This is not new law.

Section 22(1)(b)(iii) There is a key change here: there may be relief for alterations which do not strictly conform to the *WSA*. This section "points" to the new section 38 validation remedy, which allows an application for relief.

Section 22(2) contains a change relating to unattested obliterations. 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 unattested or unsigned obliterations. In addition to the new section 38 remedy, the Court can now use "any means appropriate" to decipher the original words. Only when the Court is unsuccessful in discovering the words will an unattested obliteration stand.[31]

Section 23 Marriage or AIP by agreement no longer revokes a will. This section contains a major change relating to revocation. The section replaces sections 16, 17, 17.1 and 18 of the *Wills Act*. Marriage or creation of an adult interdependent partnership will no longer revoke a will.

Transitional for section 23(2)

The intent of s. 23(2)(a) and (b) in combination with section 8(1) ("unless otherwise expressly provided in this Part…"), is that no existing will, regardless of when it is made, is revoked by marriage.

Transitional for section 23(2) continued…

For wills made *before* the *WSA* comes into force, marriage and the creation of an adult interdependent partnership by agreement will not *revoke* the will.

For those interested, the ancient common law was that a major change in life circumstances revoked a will. Recall[32] those were the days that personalty and realty were transmitted on death separately by testaments or wills, respectively. Over time, statutes removed the general change of circumstance rule (continued in WSA section 23(2)(c)), continuing only the rule that

[31] See Alberta Law Reform Institute *Wills and the Legal Effects of Changes Circumstances Report No. 98* (Edmonton: ALRI, 2010).
[32] From what you learned in law school, not personal experience!

marriage revoked a will. The marriage rule is now gone as well.[33] But hark! There is a new rule relating to divorce or ending an adult interdependent relationship—see section 25 below.

Section 24 This section restates, but does not change, the rules for revival of a will, previously in section 20 in the *Wills Act*.

Section 25 Divorce or the termination of an Adult Interdependent Partnership after a will is made revokes the gift to the spouse or AIP, as the case may be.

This is new law. If a will gives a beneficial interest, exercises a power of appointment or appoints as a guardian or personal representative in favour of a person who, after the will was made, became the former spouse or a former AIP of the testator, then that disposition is revoked. [34]

This is achieved by deeming the former spouse/AIP as having predeceased for the purpose of the disposition. The disposition would then be distributed according to the lapse provisions in the will, or, failing that, those under the *WSA*. Note, the former spouse or partner is not deemed deceased for other purposes.
The rule is subject to a contrary intention of the testator.

One becomes an ex-spouse upon divorce. One becomes an ex-AIP when one of the circumstances in section 10 of the *Adult Interdependent Relationships Act* arises.

Section 25 only applies to wills made *before* a marriage or AIP relationship ends. If the will is made subsequent to a divorce or termination of an AIP relationship, this section will not apply. This makes sense, if one considers that a testator who makes a will in favour of an ex-spouse or ex-AIP is doing so intentionally.

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[33] Like all the policy changes reflected in the *WSA*, this received strong support in consultation. The Alberta Law Reform Institute also recommended the change. See Alberta Law Reform Institute *Wills and the Legal Effects of Changes Circumstances Report No. 98* (Edmonton: ALRI, 2010). One interesting and compelling reason for change was pointed out by a number of practitioners: the legal test for capacity to marry is lower than that for capacity to make a will. Think about that in a time of aging population where late life marriages are rising and dementia will affect one in seven of us . . .

[34] This change was supported in public and technical consultation and by the Alberta Law Reform Institute, *Wills and the Legal Effects of Changes Circumstances Report No. 98* (Edmonton: ALRI, 2010) and Alberta Law Reform Institute, *The Effect of Divorce on Wills Report No. 72* (Edmonton: ALRI, 1994)

Section 25(2) The revocation rule does not apply if the former AIP is related by blood: in that case, the AIP will be eligible to receive the disposition rather than have it lapse.[35]

Transitional for Section 25

Section 25(3) Section 25 will apply to revoke a gift to an ex-spouse or ex-AIP if the divorce or termination occurs *after* the *WSA* comes into force. The new rule applies to wills which are made before the *WSA* comes into force.

E.5 Interpretation of a Will - Sections 26 – 35

These are the general and specific rules for interpretation of a will. Again, the overall intent is to fairly ascertain testamentary intent. The general provision, section 26, sets out the principles guiding interpretation. Specific rules, sections 27 – 35, fill in gaps where testamentary intention is unknowable.

Throughout the *WSA*, readers will see the phrase "unless the Court, in interpreting the will, finds that the testator had a contrary intention."[36] This phrase replaces the *Wills Act* reference "unless a contrary intention appears in the will." This latter phrase reflected the prohibition on the use of extrinsic evidence, under which the Court was limited to look only within the will itself, with the exception of "armchair evidence" to interpret the will. There was considerable confusion as to whether or when latent or patent ambiguity had to appear in order for a Court to venture outside the corners of the document, and if so, how far. The *WSA* refocuses the interpretation process on the underlying goal: determination of testamentary intent. The new phrase is part of that change.

Central to this refocusing, however, is Section 26 of the *WSA*.

[35] Section 25(2) is one of the exceptions noted in the definition of Adult Interdependent Partner (section 1(1)(a)).
[36] Contrast to *WSA* s. 14(b) " apparent on the face of the document "

Section 26 This requires that a will be interpreted so as to give effect to the intent of the testator. This is the central to the process of interpreting a will.

> **Section 26(a) and (b)** codify the common law rules which require the Court to look at the special or general meaning of the words in the will and allow limited external evidence under the "armchair" rule.[37]
>
> **Section 26(c)** goes a step further to allow the use of extrinsic evidence of intent in interpreting the will.

The admission of extrinsic evidence has been adopted with success in the United Kingdom and is supported by a number of law reform agencies.[38]

As before, the validity of the will must be established (i.e. the will must be proven to be validly made) before interpretation rules are applied. The Court is not empowered to create a will where there was none.

The reader is also directed to *WSA* section 3(3), and reminded that section 11 of the *Alberta Evidence Act* requires 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.

Transitional for section 26

[37] A.H.Oosterhoff, *Oosterhoff on Wills and Succession,* 6th ed (Toronto: Carswell, 2008) at 474 – 596

[38] Alberta Law Reform Institute, *Wills and the Legal Effects of Changes Circumstances Report No. 98* (Edmonton: ALRI, 2010); Law Reform Commission of New South Wales, Report 85 (1998) *Uniform Succession Laws: the Law of Wills* (NSW: LRCNSW at Chapter 6; British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework Report No. 45* (Vancouver: BCLI, 2006) at 39.

Section 26 has retroactive effect, and applies to all Alberta wills, whenever made, provided the death occurs after the coming into force of the Act. See *WSA* section 8(2), and the *Wills and Succession Amendment Act, 2011.*

Section 27 This restates current law that a will speaks from the time of death, and continues section 22 of the *Wills Act*.

Section 28 This is new statute law. The status of illegitimacy is to be entirely removed from Alberta law. Therefore, section 36 of the *Wills Act* had to go. The rule is that unless contrary intent is shown, a reference in a will to person's child, descendant or issue will refer to *all* that person's children. This clearly repeals what is left of the common law that an illegitimate child could not inherit. [39]

Further, this includes children in the womb at the time of the *testator's* death. Thus a reference to child in a will, unless contrary intent is shown, does not apply to posthumously conceived[40] children, that is, embryos or other reproductive material implanted after the testator[41] dies. A testator may provide for a posthumously conceived child in a will.[42]

[39] *Family Law Statutes Amendment Act* 2010, SA 2010 c 16 s. 1(7) (unproclaimed at time of writing, but expected to be in force in 2011. In the meantime, *Wills Act* s. 36 is on the books, but is generally interpreted as including the father as well as the mother. See **Hegedus Estate v. Paul (Guardian of)** [1999] 5 W.W.R. 696, ABSurCt, and **Re Bowlen Estate,** infra at note 39**.**

[40] I am here using the *Family Law Act* definition of "conceived", which means implantation has occurred. By this definition, a viable embryo in a storage facility is not conceived.

[41] In a living person, not the testator!

[42] The Manitoba Law Reform Commission produced an interesting paper on this topic. See Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief* (Winnipeg: MLRC, 2008). Also, the Uniform Law Conference of Canada has recommended a *Uniform Child Status Act*, which would define parents as including the biological parent of posthumously conceived children, for certain purposes. *Uniform Child Status Act,* ULCC 2010. Alberta family law covers parents of children born as a result of assisted reproduction, but the definition of parent is limited to children who are conceived and in the womb at time of death.

Transitional for section 28[43]

WSA section 28 may effectively be in force for wills made after July 2011. Why? There is new family law that abolishes the status of illegitimacy. It is planned to come into force in summer 2011.[44] That legislation repeals *Wills Act* section 36, which provides wills are to be interpreted such that an illegitimate child is treated as the legitimate child of the mother. Effective in July 2011 (assuming the things go as planned), s. 36 of the current *Wills Act* will read:

References to children, descendents or issue [in a will]

36(1) Unless a court, in interpreting a will, finds that the testator had a contrary intention, references in the will to the children, descendents or issue of any individual, including the testator, must be interpreted as including any child for whom that individual is a parent within the meaning of Part 1 of the Family Law Act, and any child who is in the womb at the time of the testator's death and is later born alive.
***(2)** This section applies only in respect of wills made after the coming into force of this subsection*.

Section 28 is *WSA* and *Wills Act* section 36 are identical.

Section 29 This section, which concerns interpretation of phrases concerning "issue" and "descendants", modernizes section 28(1) of the *Wills Act*.[45]

Section 30 This section is substantially the same as *Wills Act* section 27. It can be noted that the definition of "kin" in this section includes the spouse and adult interdependent partner. This is not the case in the general definition of "kin" for the rest of the Act.[46]

Both sections 29 and 30 "default" to the rules for intestacy.

[43] You only need to know this info if you happen to be involved with a will made after July 2011 and before January 2012 involving a inheritance of child who was born out of wedlock and someone has the nerve to argue that despite the case law, the child can't inherit. Otherwise, skip this box..
[44] *Family Law Statutes Amendment Act, 2011,SA 2011 c 16 s. 1(53)*
[45] Section 28(2) of the *Wills Act* has been removed entirely. The old section 28 largely existed to avoid estate tails, which were abolished in 1906 by the *Law of Property Act,* RSA 2000, c L-7. Yes, 1906.
[46] "Kin" under section 1(1)(g) *WSA* does not include relatives by marriage.

Sections 32 and 33 – Rules for Lapse and other failed gifts These sections apply to situations where the gift cannot take effect, and the will does not provide for an alternative. The two sections are similar. The circumstances covered in sections 32 and 33 are quite different, but the principles are generally the same: they provide a best legislative guess about unknown and unknowable testamentary intent.[47] Again, the sections "default" to the rules for intestacy.

Section 32 This replaces sections 23 and 35 of the *Wills Act*. It covers lapse caused by the beneficiary dying before the testator and provides a hierarchy of alternate recipients of the gift. The section removes the old distinction in treatment between specific gifts and gifts of residue:

- Gift goes first to the alternate beneficiary of the gift,
- Then, if the dead beneficiary is a descendent, to beneficiary's descendents (not to the spouse/partner of the dead beneficiary)
- then to residual beneficiaries, and
- lastly, as if the testator dies intestate.

Some features of note include:

- *WSA* section 32(1)(a) refers to the alternate recipient of the disposition in question, not an alternate recipient of a different disposition.
- Section 32(1)(b) is similar to section 35 of the *Wills Act*. The difference is that under the *Wills Act*, the spouse or partner of the dead descendant's beneficiary would inherit. This is not possible under the new law. Under section 32(1)(b), if the dead beneficiary is a descendant of the testator, the gift goes to the dead beneficiary's descendents and not her spouse or children.
- Section 32(2) is an exception and is applicable when dealing with an adult interdependent partner related by blood or adoption. When a person is both an AIP and a descendent of a dead beneficiary, he or she can inherit under section 32(1)(b) as a descendent.

[47] These provisions are based on recommendations by the Alberta Law Reform Institute. Also see the British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework Report No. 45* (Vancouver, BCLI, 2006).

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

Section 33 This fills in gaps where there is no testamentary direction to cover situations where a beneficiary disclaims or a gift is forfeit. The best-known example of forfeiture is the "murderous beneficiary"—who cannot inherit because he murdered the testator.[48] The alternate beneficiaries are the same as in section 32.

Specific features include:

- Section 33(1)(b) allows for the innocent[49] descendant of the murderous beneficiary to inherit, if the scoundrel was a descendant.[50]
- As with section 32(1)(b), the spouse or partner of surviving descendents do not inherit under the new law.
- The intended beneficiary is deemed to have predeceased the testator for the purpose of the gift in question only. For all other purposes of the will, the beneficiary remains alive.
- Section 33(2) has the same effect as section 32(3), see above.

Sections 34 and 35, concerning the disposition of any estate not disposed of by will, and charitable gifts, restate the *Wills Act*, sections 38 and 32, respectively.

The former section 37 of the Wills Act has been repealed and is not replaced. Section 39 of the *Administration of the Estates Act* covers this field.

Transitional for Sections 27, 29 – 35

Sections 27, 29 – 35 of the *WSA* will apply to wills made after the *WSA* comes into force. See s. 8 *WSA*.

[48] This also applies on intestacy.
[49] Of course, if the child is an accomplice, the gift would be forfeit to that child. Dysfunctional family. . .
[50] For an interesting fact situation and discussion, see *Re Bowlen Estate* (2001), 98 Alta. L.R. (3d) 381, 304 A.R. 100.

E.6 Wills - Court Orders, Validation of Wills — Sections 36 through 49

These sections are all new law. All of these provide means to achieve testator intent through various validation processes. Court oversight provides protection against fraud or undue influence. Procedure for these is to be included in the Surrogate Rules.

Section 36 Minor's Wills This is a companion to section 13. The Court may authorize the making of a will by a minor. Section 36(2) outlines what a Court will consider: the minor must understand the nature and effect of the will; it must reflect their intentions, and must be reasonable. These conditions also apply to alterations and revocations of a minor's will.

This is new law in Canada. There are no Canadian cases. There are policy similarities to the law relating to mature minors and health care decisions, and to the ability of minors to make contracts. Two of many practical considerations is the need for the minor to have independent legal advice and the role his or her parents may play. For further discussion, see the Alberta Law Reform Institute, Report 96: *The Creation of Wills* and the New South Wales Law Reform Commission Report 85 (1998): Uniform Succession Laws: the Law of Wills[51].

Transitional for section 36

Section 36 will apply only after the *WSA* comes into force. See Section 8(1).

[51] Both cited, supra.

Section 37 Validation of Non-compliant Wills This section is new.[52] The section allows validation of a document which purports to be a will, but which has not complied with the formalities in sections 15, 16 or 17. (Recall that writing and signing are required by section 14 and cannot be dispensed with.) The standard of proof is balance of probabilities, on "clear and convincing evidence" of the testator's intentions. This standard is not higher than a balance of probability test, as the extra words import a particular significance for the Court.[53] Similar provisions found in Saskatchewan[54], Manitoba[55] and in British Columbia's not-yet-proclaimed *Wills, Estates and Succession Act*. Cases from Saskatchewan will be helpful to guide the application of this provision.

This section applies to documents that purport to be, or to revoke, wills.

Section 38 Validation of Non-compliant Alterations This section compliments section 37 by allowing the Court to validate a non-compliant alteration including unattested writing, marking or obliteration appearing on a will.

Section 39 Rectification and reading in signatures This section continues and codifies the common law that allows a Court to remove characters or words in a will if they were included by in error, or by the misstep of a person preparing the will. New to the law is that, on proof of intention, the Court is able to ADD characters or words to correct errors.[56]

Section 39(2) This is also new. The Court may be able to cure the omission of the testator's signature on a document that is in all other respects a will. The test is more strict than that in section 39(1). In order for the Court to change the signature, there must be proof of pure

[52] Recommendations were made by Alberta Law Reform Institute, *Wills: Noncompliance with Formalities Report No. 84*(Edmonton: ALRI, 2000).
[53] There are a number of estate cases referring to this phrase. There is debate by some that it creates a higher standard of proof than balance of probabilities, but the cases do not seem to suggest that there is one: for example, Re Green Estate 2001 ABQB 835, [2002] 2 W.W.R. 561 Cewe Estate v. Mide-Wilson [2009] B.C.J. No. 1445
2009 BCSC 975 See also Alberta Law Reform Institute, *Wills: Non-Compliance with Formalities Report No. 84* (Edmonton: ALRI, 2000) at 28 – 31
[54] *Wills Act*, SS 1996, c. W-14.1
[55] *Wills Act,* CCSM c W150 , also Quebec and PEI
[56] Alberta Law Reform Institute, *Wills and the Legal Effects of Changes Circumstances Report No. 98* (Edmonton: ALRI, 2010)

mistake or inadvertence. This section is not expected to see much action, but does cover extreme situations such as where spouses mistakenly sign each other's wills.

Procedurally, applications under section 39 may be made before a grant, but not after six months after the grant. Practically speaking, the application under section 39(2) would have to be made before a grant, as part of proof of the will.

Section 40 This section compliments section 21. It allows the Court to save a void disposition to an interpreter, witness or surrogate signatory (or their spouse or AIP). The disqualified beneficiary must prove no undue or improper influence. Procedurally, under section 40(2), this application can be made only within six months after the date of grant of probate.

Transitional for sections 37, 38, 39, 40

Sections 37, 38, 39 and 40 apply to all Alberta wills, unattested alterations, and documents alleged to wills, if the testator dies after coming into force of s. 8(2) of the *WSA*. It does not matter when the document, will or alteration was created. See s. 8(2).

E.7 PART 2 DIVISION 2 Sections 41 to 45 —Conflict of Laws (Wills)

No changes were made to this division: it is virtually the same as Part 2 of the *Wills Act*.

However, practitioners are encouraged to consider the effect of changes in the *Wills and Succession Act*—to Alberta wills dealing with property outside the province, and foreign wills affecting Alberta property.[57]

[57] A useful reference: Karen Platten, "Conflicts of Laws in Estates" (2007) Legal Education Society of Alberta.

E.8 PART 2 DIVISION 3 Sections 46 to 57 —International Wills

Section 54 Only one small change in this section was made. This is the addition of section 54(3). This section has simply been moved from regulation and into the Act itself for clarity. The substance remains the same.

F. PART 3—Distribution of Intestate Estates – Sections 58 – 70

Much of the *Intestate Succession Act* is carried forward into this part. The long-held principle is maintained, that a person who dies without a will is assumed to want his estate to go to his family.[58] The scheme of distribution is generally the same as the *Intestate Succession Act*, that is, closest relatives take first, starting with the spouse or partner of the deceased. There are a few key changes, however.

Section 58 The title of this Part and section 58(1)(a), "distribution of intestate estates", reflects the shift discussed above, in relation to section 1(2): intestacy is spoken of from the perspective of dealing with the *intestate estate*, rather than dealing with the *intestate's estate*. This shift makes no legal difference, but accommodates both full and partial intestacy.

Section 58(1)(b) This section contains a small change to the definition of net value: in particular, with the introduction of the matrimonial property claim on death, the net value of the estate will be reduced by the value of a matrimonial property claim. This, along with other debts and administration expenses, will be deducted to determine the net value of the intestate estate.

[58] The continuation of this legal principle was strongly supported in public consultation, conducted in 2009.

Section 58(2) This section accommodates the reality of new reproductive technology, by which a deceased person's reproductive material may be used to conceive children. This section limits inheritance of the intestate estate to children who are in the womb at the relevant time.[59] Posthumously conceived children do not inherit through intestacy.

Section 61 This section is a change from section 3 of the *Intestate Succession Act*. Previously, the spouse or AIP was entitled to a preferential share of the first $40,000 of the estate and then shared the rest with the deceased's children. Now, under section 61(1)(a), if all the descendents are descendents of both the testator and of the surviving spouse or AIP, then the spouse or AIP gets the whole estate. This "all to the spouse rule" reflects the prevailing view that the surviving spouse or partner will look after the surviving family, in accordance with the values of that family.

"All to the spouse" would not work, obviously, if there are children of other relationships. If the intestate leaves descendents who are not descendents of the surviving spouse or AIP, section 61(1)(b)(1) applies to give the spouse or AIP a preferred portion of the estate, with the remainder to the deceased's descendents. The preferred share will be the greatest of 50% or an amount to be set by regulation. The regulation should be in place before the *WSA* comes into force. It is a ministerial regulation, which allows for relatively easy amendment. Based on Statistics Canada and other data, it is estimated that the share will be around $150,000.

Section 62 This section replaces section 3.1 from the *Intestate Succession Act*. Previously, if the testator had both a spouse and an AIP, the estate would go to the person with whom the testator was last residing. This has changed so that the estate is split 50/50 by the spouse and the AIP (section 62(b)). More likely, where there are both spouse and AIP, there will be descendents, in which case, the preferred share under section 61(1)(b)(i) is split 50/50 and the remainder goes to children and other descendents[60] (section 62(a)).

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[59] As mentioned earlier, under the *WSA* the parent-child relationship is defined in accordance with the *Family Law Act,* which in turn defines parentage based on the parent-child connection .

[60] Because of the changes, this scenario will be less common than before. This is because section 63 now disinherits separated spouses who have been living apart from the deceased for more than two years, or in respect of whom there is a final agreement or order dealing with marital affairs. Given this, for there to be both an inheriting spouse and an adult interdependent partner, the deceased must have both a legal spouse and have been cohabiting in a relationship of some

Section 63 This is a new section replacing the *Intestate Succession Act* section 13, which disinherited adulterous and deserting spouses. The modern rule will disinherit the surviving spouse of an intestate deceased if the couple had been living separate and apart for more than two years prior to the death (section 63(1)(a)), if they are parties to a declaration of irreconcilability (section 63(1)(b)), or if they are parties to an agreement dealing with property while separate and apart (section 63(1)(c)). The spouse is deemed predeceased in these circumstances. Note that there is no specified reconciliation period.

This approach was supported in consultations and was recommended by the Uniform Law Conference of Canada *Uniform Wills Act*.[61] It is a better legislative guess at what the intent of an intestate might be.

There is no mention of former AIPs in this section, as section 10 of the *Adult Interdependent Relationships Act* sets out when a person becomes a former adult interdependent partner. Former AIPs cannot, of course, inherit an intestate estate.

Sections 64 and 65(a) These sections carry forward current law.

Section 66 This section is a codification of the *per stirpes* rule. It does not change Alberta law, but simply explains and clarifies.[62] For a *per stirpes* distribution, the estate is divided into as many shares as there are children of the relevant deceased individual, except there is no share for a deceased child who died leaving no surviving descendents. The shares are divided the same way at each generation. Note that *per stirpes* is the default distribution for wills under Part 2. See sections 30 and 31.

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permanence with the new partner with whom he had a child. See *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 section 3(1)(a).

[61] *Uniform Wills Act,* ULCC 1953.

[62] Interestingly, some American jurisdictions define *per stirpes* differently. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act Report No. 78* (Edmonton, ALRI, 2000) at 140-141.

Section 67 This section outlines what will happen to the estate if the deceased dies leaving no spouse, AIP or descendents. As in the past, the estate goes to either or both of the parents of the intestate (section 67(1)(a)).[63, 64]

At this point, new provisions apply affecting distribution.

- This general rule applies: where distribution is to any line except direct descendents of the testator, section 67(2) allows inheritance to relatives only to the fourth degree of relationship to the intestate. That is, distribution through any line of relatives (other than direct descendents of the intestate) cannot go past the 4th degree of relationship.

- If there are no surviving parents, then, under section 67(1)(b), the estate goes to the descendents of the parents, that is, to the intestate's siblings and *their descendents*. The resulting line of relatives allows inheritance by representation down to grand nieces and grand nephews. The *Intestate Succession Act* limit was nieces and nephews.

- If there are no siblings, and no nieces, nephews, grand nieces or grand nephews, the estate is distributed according to a parentelic system. This replaces the consanguinity-based system. The basic idea is to split the estate between the maternal and paternal[65] sides of the testator's family, with 50% going to each side. The advantages of this system are that it limits the search for distant relatives, and it likely equates better to testamentary intent to split the estate between the two sides of the family.

The new parentelic distribution, under section 67(1)(d) is as follows:

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[63] Who are the parents? Adopted children are, of course, treated as children of their adoptive parents; Alberta family law is premised on there being one or two legal parents. See sections 6 and 7 of the *Family Law Act*, SA 2003 c F-45. This is codified in section 7 of the *Family Law Act*, as amended by *Family Law Statues Amendment Act*, SA 2010 c-16. This amendment is not in force at the time of writing. Interesting to consider what happens if there are three parents.

[64] Interesting to consider what happens if there are more than two legal parents, which has occurred in Ontario. *A.A. v. B.B.* (2007), 83 OR (3d) 561, 278 DLR (4th) 519.

[65] The act is written in gender-neutral terms, and does not actually refer to "maternal" and "paternal" grandparents or great-grandparents. This takes into account the possibility of same-sex parents. For ease of discussion, this paper refers to "maternal" and "paternal."

- Take the estate and split it in two. One half goes to the maternal grandparents or either of them. If the maternal grandparents are both dead, then to their descendants *per stirpes*. Recall that, except for lineal descendents of the testator, only relatives to the fourth degree of relation to the intestate can inherit.[66]

- Do the same for the paternal side.

- If there are only relatives on one of the maternal or paternal grandparent's side, then 100% of the estate goes to that side.

- If no relatives are found through the "grandparent and descendents" line, then the same exercise is repeated for maternal great-grandparents and paternal great-grandparents. Again, there is a share for each living grandparent, or any of them, on one side. If the great grandparents on that side are all dead, then *per stirpes* to their descendents. Again, the 4th degree rule applies.[67] Same for the other side.

Now, it may seem silly to stop the search for heirs at great-grand-uncles and great-grand-aunts, but, after this point, the intestate estate falls under the *Unclaimed Personal Property and Vested Property Act* (UPVPA)[68] (*Wills and Succession Act*, section 69). Relatives of the fifth or greater degree can apply under that Act for a share of the estate. To determine priority under that Act, the parentelic system applies.[69]

[66] Four degrees from the testator is: 1st degree–the parent; 2nd degree–the grandparent; 3rd degree–the grandparent's child (great-uncle or great-aunt); and 4th degree–great-uncle or great-aunt's children (first cousin once removed).
[67] Four degrees from the testator is: 1st degree–the parent; 2nd degree–the grandparent; 3rd degree–the great-grandparent; and 4th degree–the great-grandparents' children (great-grand-uncles and great-grand-aunts).
[68] *Unclaimed Personal Property and Vested Property Act RSA 200 c U-15*
[69] There are a number of possible variations on the parentelic distributions. British Columbia has a slightly different one, see Bill 4, *Wills, Estate and Succession Act,* 1 Sess, 39th Leg, British Columbia,2009, cl. 23. For further on the parentelic principle, see Alberta Law Reform Institute, *Reform of the Intestate Succession Act Report No. 78* (Edmonton: ALRI, 2000).

As before, where personal representatives have been unable to find an heir two years after the grant of administration, they may deposit the remaining intestate estate with the Minister under the *Unclaimed Personal Property and Vested Property Act*.[70]

Section 68(b) This section continues section 9(2) of the *Intestate Succession Act*: the term "half kin" replaces "half blood." For example, half-brothers or half-sisters inherit in the same way as so-called "full bloods"; siblings need only have one parent in common. 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.

Advancement, that is, what happens if the deceased intended an *inter vivos* transfer be an advance of a beneficiary's share of the estate, is now dealt with under *WSA* section 106, which is discussed below. Section 11 of the *Intestate Succession Act* is no more.

Transitional for Part 3

Section 70 is the transitional provision: Part 3, Distribution of Intestate Estates, applies to deaths occurring after the Part comes into force.[71]

[70] *Unclaimed Personal Property and Vested Property Act*, *supra*, **as amended by *WSA***

Application and interpretation

32(1) In this Part, "intestate estate" has the same meaning as in Part 3 of the Wills and Succession Act

(2) This Part applies to the **intestate of an individual**

(a) who dies after this Act comes into force, or

(b) who died before this Act came into force, to the extent that the administration of the **intestate's estate** has not been completed before this Act comes into force.

Transfer and vesting of estate

33(1) A personal representative of an intestate in respect of all or any portion of the intestate's estate who has not within two years after the grant of administration learned of any person entitled by law to the estate, or a portion of it, must, subject to section 22(3), pay, transfer or deliver the estate or the portion, as the case may be, and any information or records relating to it to the Minister, and on doing so the personal representative is discharged from liability in respect of the property paid, transferred or delivered.

(2) Property paid, transferred or delivered to the Minister by a personal representative in accordance with subsection (1) vests in the Crown as of the date on which it is paid, transferred or delivered.

(3) A person who claims to be entitled to an estate or a portion of an estate that has been paid, transferred or delivered to the Minister under this section may assert a claim in accordance with section 48.

[71] Section 70(2) and (3) takes into account changes made to the *Intestate Succession Act* in 2003 dealing with AIPs.

G. Part 4—Designation of Beneficiaries under Plans – Section 71

There is no substantial change to the law. Section 47 of the *Trustee Act* has been moved to the *WSA*. There is a minor change in the inclusion of Tax Free Savings Accounts (TFSA) in the definition of "plan" in section 71(1)(d)(iv). This was previously in a regulation under the *Trustee Act*.

The new wills provision whereby a gift in a will is revoked on divorce or termination of an adult interdependent partnership is NOT extended to property transferred by beneficiary designations.

The Alberta Law Reform Institute, as well as some senior practitioners, have proposed various ways that property passing by beneficiary designation may be protected from creditors in the hands of certain beneficiaries or in the hands of the estate.[72] Some practitioners have advocated attachment of assets "outside the estate" for family maintenance and support and matrimonial property claims on death.[73] Others have vehemently argued against same. Such initiatives raise interesting considerations for pension, insurance, tax, civil enforcement, savings plans, property law, and family maintenance policy. No change has occurred in this regard.

Those interested in this issue may be aware that were was a relevant amendment to the *Civil Enforcement Act*[74] in 2009 which created creditor protection for certain classes of RRSPs, DPSPs and similar plans, and which may provide some protection when these plans transfer on death. The protection is similar, but not identical to creditor protection for insurance products under the Alberta *Insurance Act*.

H. Part 5—Family Maintenance and Support – Sections 72 – 108

The law allowing family members to claim support from the estate of the deceased is largely carried forward, but there are significant additions.

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[72] For one perspective, see Alberta Law Reform Institute, *Exemptions of Future Income Plans on Death Report No. 92* (Edmonton: ALRI, 2004)
[73] See further under the discussion on FMS, especially at Note 88
[74] *Civil Enforcement Act,* RSA 2000, c-15, ss 81.1,921.

Part 5 repeals and replaces the *Dependants Relief Act* (DRA). Division 1, which creates a temporary right of possession to the family home, is entirely new. Division 2 contains most of the old DRA. Division 2 contains a number of changes to current law, but the general principles and framework of the DRA is not changed.

The reader should note this part of the paper does not follow the exact chronology of Part 5.

H.1 Part 5 Division 1—Temporary Possession of Family Home - sections 74 – 86

Section 75 This section is new.

In the past, a spouse or AIP who had no legal interest in the family home may not have had a right to remain in the home after the death of the testator. Section 75 allows for a period of at least 90 days in which a surviving spouse or AIP can remain in the family home. There is no equivalent in Canadian statutes at this time, except in the Northwest Territories.[75,76]

"Family home" is broadly defined, similar to the definition of "matrimonial home" found in Part 2 of the *Matrimonial Property Act.*[77] Houses, condominiums, mobile homes and apartments are included. The home must have been ordinarily occupied by the spouses or AIPs as their home. The difference from *MPA* is that the qualifying home under *WSA* has been owned (wholly or in part) or leased by the deceased's spouse but not by the surviving spouse or AIP.

The right to possession arises where the spouse or AIP is not on the title or on a lease. It does not arise and is not necessary where a spouse has a life interest under the *Dower Act*.[78]

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[75] *Family Law Act,* SNWT 1997, c 18, s 57.
[76] The public consultation on this topic supported a longer period of possession: up to a year. The Alberta Law Reform Institute proposed a number of options, including a life estate in these circumstances. The new British Columbia legislation provides for a life estate in the home where there is intestacy. See Bill 4, *Wills, Estate and Succession Act,* 1 Sess, 39th Leg, British Columbia,2009, cl 23, ss 26-35.
[77] *Matrimonial Property Act,* RSA 2000, c M-8.
[78] *Dower Act,* RSA 2000, c D-15.

The right to possession is good as against joint owners, landlords, the personal representative and beneficiaries. The right to possession is trumped, however, if there is an adult child with a disability who has a right to live in the home.

This provision gives the spouse or AIP breathing room during an emotional time, and prevents the locks from being peremptorily changed, without notice to a grieving individual.

Section 76 This allows for temporary possession of necessary household goods along with possession of the home. Section 72(c) defines the term. Note that, unlike the *Matrimonial Property Act*, "household goods" does not include articles used for aesthetic purposes. This will allow the retrieval of art or similar valuables during the period of possession.

Section 77 This section clarifies that the right to possession does not give greater rights to the home than the deceased had. Both the residence and the household goods remain subject to taxes, mortgage payments and so forth. It must be noted, however, that the rights of joint owners, who take by survivorship on the death of the spouse, will be deferred by the surviving spouse or partner's right to possession.

Section 78 A spouse or AIP may contract out of the home possession provisions in sections 75-77 by a written agreement. This is an exception to section 103, under which parties cannot contract out of a right to family maintenance and support.[79]

Section 79 While the right to possession is being exercised, the estate will be responsible for paying the expenses for the home, outlined in section 79. Costs such as rent, mortgage payments, taxes and insurance will be 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).

Section 79(3) provides that, If the estate pays for these costs, they will be deducted from the spouse or partner's share of the estate, unless a will provides otherwise, or

[79] WSA Section 103, which codifies the current common law on this point.

there is an order under the *WSA*. This could include an order under the Family Maintenance and Support provisions in Part 5, Division 2.

Section 80 Under this section the surviving spouse or partner has an obligation to reasonably maintain and repair the house. The "reasonableness" standard takes into account the state of repair at the time of death.

Section 81 This creates an obligation on the spouse to allow entry to the personal representative, an owner and a co-owner. For the personal representative, the spouse or partner's obligation is triggered on provision of 24 hours notice. No notice is required to trigger the obligation to allow the owner to enter. This provision does not preclude entry by consent of the occupier. It is not necessary for the personal representative, or any person, to provide notice if the occupier consents.

Section 82 In this section, the Court may make orders cancelling or extending the possession period. The possession period can be extended indefinitely and the possession period may be rolled into the general remedy for Family Maintenance and Support. There is an exception for property that was owned jointly with the dead spouse or partner, in which case the possession limit is six months (section 82(3)).

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
- regarding household goods

Sections 83, 84, 85 This allows possession orders to be registered at the land titles office and personal property registry (for mobile homes and household goods). Registrations may be cancelled pursuant to section 85.

Transitional for Part 5 Division 1

Section 86 Part 5, Division 1, the right to possession of the family home, will apply to deaths occurring after the *WSA* comes into force.

H.2 Part 5 Division 2—Family Maintenance and Support (FMS) – Sections 87 to 108

While this Division replaces the *Dependants Relief Act*, there is little change to the "core" principles or operation of the law. The Court must still review whether a deceased "made adequate provision for the proper maintenance and support" of family members. Where that threshold is not reached, the Court must determine an "adequate provision in the circumstances." [80] Section 93 provides a list of considerations to be taken into account in determining the application: some of these are from the current legislation, some are new, and others are codification of common law. There is no intent to change the rule as set out in *Tataryn* (SCC)[81] and *Stang* (ABQB),[82] cases that set out the application of the "legal-moral" test.[83] Under that test, the Court will look at the legal obligations (or equivalents) that may have existed during life, and then at the "moral": the community standards and values which could be reasonably expected to measure adequacy and propriety in the circumstances of the deceased and his family.

Section 88 This section, which covers orders for maintenance and support of family members, is a reorganization of section 3 of the *Dependants Relief Act* but no substantial changes have been made.

Section 93 This sets out the factors the Court must consider to determine the application. Note, these considerations would apply to both aspects: whether the original maintenance and support is "adequate for proper maintenance and support" and what provision would be

[80] This is identical to the *Dependants Relief Act*, supra, s. 3
[81] *Tataryn v. Tataryn Estate,* [1994] 2 S.C.R. 807.
[82] *Stang v. Stang Estate,* [1998] 7 W.W.R 551, 58 Alta L.R. (3d) 201. There was very strong support on consultation for these, and for the *Tatryn* test.
[83] March 15, 2011 *Alberta Hansard* 27th Legislature 365

"adequate . . . for proper maintenance and support" in the circumstances. Most of these are found in the DRA,[84] a few were developed based case law and public consultation.[85] Note that because spouses will now be entitled to make a claim for matrimonial property on death, the fact and amount of the claim will be taken into account when determining the FMS application. The DRA (section 3(5)) allowed the character of a person to be considered when making an FMS decision: this concept has been subsumed into section 93(a) and (e).

Legislation in other jurisdictions employs other tests and frameworks. Manitoba, for example, uses a financial needs test.[86] British Columbia legislation does not have a "dependency" aspect: under it, independent healthy adult children may apply for variation.[87]

There is no change to the rule that FMS is paid out of the estate of the deceased.[88] The determination of adequacy may, however, take into account assets outside the estate, including property transferred by beneficiary designation, survivorship or otherwise than by will or intestacy, or any benefits (such as insurance) paid as a result of death.

There are several changes, however.

H.2.1 Who may qualify for FMS? - Section 72

Section 72 The term "dependant" is replaced with "family members," consistent with government policy for terminology in social legislation (section 72). "Relief" is replaced by "maintenance and support." The latter phrase appears in the DRA, signalling the intent to maintain the current principles, and also to distinguish "post death" family support from child and spouse "support" as provided under the *Divorce Act (Canada)* and the *Family Law Act*. Different principles are used to determine family support during the life of the parties.

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[84] Such as consideration of dower, in DRA s. 4, and consideration of reasons of the testator Section 3(4) *Dependants Relief Act,* RSA 2000, c D-10.5, ss 3,4.
[85] E.g. *Kiernan* v. *Stach Estate* 2009 CarswellAlta 324 ABQB (character), *Skworoda v. Skworoda Estate* 2008 CarswellAlta 496 ABQB (needs), *Re Kinsella Estate* 2004 Carswell Alta 1196 (disabled adult children).
[86] *Dependants Relief Act,* CCSM 1990, c D37, s 2(1).
[87] A good general source in this area is Harvey and Vincent, *The Law of Dependents Relief Canada* (Toronto: Carswell, 2006)
[88] Ontario, *Succession Law Reform Act*, RSO 1990, c S.26. section 72 allows access to such assets. Prince Edward Island and Yukon legislation also permits this. *Dependants of a Deceased Person Relief Act,* RSPEI 1988 c D-7, s 19. *Dependants Relief Act,* RSY 2002, c. 56, s 20.

Two significant categories of applicants have been added. In addition to spouse, adult interdependent partner, minor child and adult disabled child, the following may apply for FMS:

- **Section 72(b)(v)** An adult child under the age of 22, who is in school full time, can apply for support from a dead parent's estate. This mirrors the child support provisions found in the *Family Law Act*. The *Alberta Child Support Guidelines*, regulations under the *Family Law Act,* define "in school full time."[89] Basically, "full time" is whatever the child's educational institute says defines as full time study.

- **Sections 72(b(vi) and 73** A minor grandchild or great-grandchild, who depends on a deceased grandparent or great-grandparent, can also apply for continued support. The child must have been living with, and financially dependent on, the grandparent, and the grandparent must have "stood in the place of the parent." This status is further defined in section 73(2), which sets out factors to determine the status. These are similar, but not identical to, family law determination of a child "*in loco parentis*." See, for example, *Chartier* v. *Chartier* on *in loco parentis* and *Family Law Act* section 47.[90]

The additions of these "minor grandchild" provisions will require personal representatives to report the possibility of dependent minor grandchildren to the Public Trustee.[91] Amendments are made to the *Administration of Estates Act* that changes the requirements for service.

Section 73(d) In this section, a smaller change is the removal of the "presumed dead" provisions in section 2 DRA. This is replaced by the provision that "spouse" includes a party to a void or voidable marriage. There is, therefore, a possibility of more than one spouse applying for relief under Part 5. This could occur in cases of polygamy. Of course, since at least 2004,

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[89] *Alberta Child Support Guidelines*, Alta Reg 147/2005 s 3(3)
[90] *Chartier v. Chartier* [1999] 1 S.C.R. 242.
[91] From a policy perspective, the inclusion of this section coincides with public consultation results and also with the documented increase in grandparents acting as parents to their children's children. See ***Grandparents Raising Grandchildren in Canada: A Profile of Skipped Generation Families Esme Fuller-Thomson SEDAP Research Paper No. 132 Oct 2005*** ***http://socserv2.mcmaster.ca/sedap/p/sedap132.pdf***

there has been a possibility that both a spouse and an adult interdependent partner may apply under the *DRA*. Former AIPs and former spouses remain ineligible.

H.2.2 Process for Applying for FMS - Sections 88 – 92

Section 88 of the *WSA*, already referred to, sets out the Court's jurisdiction in relation to the FMS. Section 88(3) is new law which links the family home possession provisions with the FMS provisions.

Section 89 This is the limitation period for bringing the FMS application. six months from grant of probate or administration. It is unchanged, as is the Court's power to entertain a later application if there is undistributed estate (formerly section 15 DRA).

Section 90 There are modernized rules for who may make an application, to accommodate the new Rules of Court, and the evolution of adult guardianship and trusteeship legislation. This replaces section 13(2) DRA. It should also be noted that the Surrogate Rules will be updated before the *WSA* comes into force to provide for procedural changes required by *WSA*.

Section 91 This updates section 12(3) DRA. While it continues the rules for who must be served with notice of the FMS application, there are some changes to the rules for how family members with limited capacity are to be served.

- If an application is made for FMS and is to be served on a minor child, the parent or guardian of the minor child is to be served, unless the child is subject to a permanent guardianship order, in which case, the Public Trustee is served. Previously, parents received notice through the Public Trustee (section 91(2)(a)).
- A represented adult within the meaning of the *Adult Guardianship and Trusteeship Act* is served by serving his or her trustee (section 91(2)(b)). This is not new.

- Incapacitated people, within the meaning of the *Public Trustee Act*, are served via the Public Trustee (section 91(2)(c)) AND the application may not proceed until the Public Trustee has indicated to the Court whether she will make representations on the application (section 91(3)). This is new.

Section 92 This section continues the law that the application is a representative action and covers all family members who have notice of it, which continues section 16 DRA.

H.3 Provisions Relating to the Application and Court Powers - Sections 96 – 100

Section 93 These are the factors the Court may use to determine adequate maintenance and support. This provision is discussed above in relation to section 88 and opening paragraphs describing this Division of the *WSA*.

Section 94 This is authority for the Court to make interim orders. There is no new law here.

Section 95 This section has new disclosure requirements which allow a family member and a personal representative to request financial information from each other. These are similar to the family law rules in that no Court order is required.[92] These rules will go some way to easing discovery of assets both inside and outside the estate, for the purpose of determining adequacy of, and appropriateness of, family maintenance and support. Section 95(3) reminds us that there are methods beyond this Act that can be used to get the financial information required for making a maintenance and support order.

Sections 96-100 These sections are simply a reordering and modernization of DRA sections 5, 6, 7, 8, 9 and 11. There is no substantive change. These sections deal with the terms, conditions and effects of FMS orders.

H.4 Miscellaneous FMS Provisions

[92] *Family Law Act*, SA 2003 c F-45. *Divorce Act,* RSC 1985, c 3.

Section 101 This is a modern version of section 10 DRA, which is what might be called a "vulture clause." It offers some protection for vulnerable recipients who may be persuaded to use their entitlement unwisely. Note that it only applies up to the time the order is entered.

Section 102 This section, also discussed above in the opening paragraphs on Part 5 Division 2, and under section 88 continues section 12 DRA.

Section 103 Contracting out prohibited Family members cannot contract out of a right to FMS. This is a codification of common law. Recall that section 78 *WSA* makes an exception, allowing contracting out of the right to possession of the family home. As well, spouses can contract out of a right to matrimonial property. The policy difference is that FMS is a support right; matrimonial property is a property right.

Section 104 This is a modernization of the Public Trustee's obligations in regard to FMS applications. Where the Public Trustee is trustee and is satisfied there is adequate support, there is no duty to apply for FMS. The Public Trustee may make an application for a minor family member as defined in the Act. This replaces section 14 of the *DRA*.

Section 105 This protects those, including the Public Trustee, who make good faith decisions in regard to FMS, especially the decision to make or not make an application for FMS. This is new.

Section 106 This maintains ability for a personal representative to make reasonable advances for the maintenance of family members (as defined in section 73) who are beneficiaries. The personal representative remains personally liable for any other distribution made before the expiry of the six months from the grant, and without the consent of the family members or the Court.

Section 107 This maintains the offense and personal liability provisions in respect to personal representatives who distribute the estate after receiving notice of a FMS application and without

the permission of the Court. The fines are increased to bring them into line with current fines policy. They have been increased by a multiple of five.

Transitional for Part 5 Division 2
Section 108 provides that Part 5 Division 2 will apply to deaths occurring after the *WSA* comes into force.

I. Part 6—Wills General, Advances, Abolition of Common Law Rules, Regulations Sections 109 - 112

I.1 Advances[93] and abolition of the presumption and doctrine of advancement – sections 109 and 110(1),(2)

The old evidentiary presumption of advancement (which applies to wills) and the doctrine of advancement (which applies to intestacy), are abolished by *WSA* section 110(1) and (2). The possibility remains, however, that a deceased has, during her life, transferred property to a child, spouse or partner, with the intention that the value of the transfer is an advance of the recipient's share of her estate. To provide for this, section 109 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.

Section 109 and the abolitions in section 110 are not intended to interfere with *Pecore* (SCC) or *Madsen* (SCC)[94] dealing with modern versions of presumption of a resulting trust and the presumption of advancement.

[93] Advancement, advances by portion and advances was one of the definitional headaches encountered when developing the *WSA*. The common law uses the term several ways, which can be boiled down to "an *inter vivos* transfer for the purpose of advancement of the child in life, is an advancement of the child's share of the estate." In other words "an advancement is an advance". Yikes. In s. 109, it means an advance of the share of the estate. See s. 109(4)

[94] *Pecore v. Pecore,* [2007] 1 S.C.R. 795. ; *Madsen Estate v .Saylor*, [2007] 1 S.C.R. 838.

Section 109 A Court application can be made to determine whether an advance against the estate has occurred, and if so, how, and whether and how it is to be accounted for.

The 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 descendent (e.g., children, grandchildren, great-grandchildren, etc.). The application may be made in respect to both testate and intestate estates. The potential applicants are the personal representative or any person interested as a beneficiary of the estate.

Section 109(3) As section 109 allows for an exploration of the nature of the *inter vivos* transfer, the application is not limited to a wills interpretation exercise, and therefore there are different evidentiary considerations. In this section, the 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, to determine the nature of the transfer. The review may include:

- Interpretation of the will, if there is one. This would include application of section 26, which sets out the admissible evidence, including extrinsic evidence, for interpretation.
- Review of the deceased's oral statements at the time of the transfer, or his or her written statements made at any time.
- Reviewing the recipient's oral or written statements. Implicitly, this includes statements made at any time.

Again, evidentiary rules relating to the admissibility and weight of self-serving evidence will be of import in these applications, in particular, Section 11 of the *Evidence Act* will apply to these applications, to require corroboration of the evidence of an interested party.[95]

Section 109(6) This applies only to an intestate estate: where the *inter vivos* transfer is a repayable advance, and the prospective beneficiary died before the intestate, there is a presumption that the intestate did not intend the beneficiary's descendents to account for the

[95] *Wills and Succession Act,* SA 2010, c W-12.2, s 3(3). and *Alberta Evidence Act*, RSA 2000, c A-18, s 11. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

advance. In such a situation, the descendent is not accountable for the advance, and receives the full share of the intestate estate, unless it can be shown on a balance of probabilities that the intestate intended otherwise.

Section 109(8) In this section, there is a limitation period. The application must be made within six months from issue of grant of probate or administration.

Transitional for section 109

The Section will operate prospectively, from the date the *WSA* comes into force and will apply to inter vivos transactions made before or after the Act comes into force.

I.2 Abolition of Presumptions and Doctrines

Sections 110 and 111 These abolish a number of ancient evidentiary and doctrinal rules. These sections are directed at the abolition of specific rules. As mentioned in relation to section 109, these changes are not intended to interfere with modern common law evolving in this area, such as the rulings in *Pecore* or *Madsen*.[96] Any perceived disadvantage from the repeal of these provisions may be compensated, at least in regard to testate estates, by the new law allowing extrinsic evidence.

The abolitions include:

> **Section 110(1)** abolishes the old presumption against double portions for testate estates. This is also known as the "presumption or rule against double portions."[97] That is, the evidentiary presumption is abolished that a payment made to a child after the making of the will, but before death, is an advance on the inheritance, and is to be deducted from the child's share of the estate. Those who allege such an advance was made have (subject to other rules which may apply) the onus, and are required to prove it on a balance of probabilities.

[96] *Pecore v. Pecore,* [2007] 1 S.C.R. 795. ; *Madsen Estate v .Saylor*, [2007] 1 S.C.R. 838.
[97] ". . . and is a subset of the doctrine of satisfaction." A.H. Oosterhoff, *Oosterhoff on Wills and Succession,* 6th ed (Toronto: Carswell, 2008) at 580.

Section 110(1) abolishes the doctrine of advancement,[98] in relation to intestacy. Under that doctrine, payments made to the child for the betterment of the child (also, confusingly, referred to as "advancement") were deductible from the child's share of the estate. *Intestate Succession Act* section 11 is repealed as a result.

Section 110(3) abolishes the presumption of "satisfaction of debt," also known as the "presumption of satisfaction" and reference is also made in some places to "doctrine of satisfaction."[99] Under this presumption, if facts showed a testator had incurred a debt and then made a will including a cash gift to the creditor, in an amount equal to or greater than the debt,[100] then the gift was in satisfaction of the debt. With the abolition of the presumption, those alleging a testamentary disposition satisfied a debt in these circumstance, will need to prove the intent surrounding the transaction and the disposition. *WSA*

Section 110(4) abolishes the presumption of satisfaction of legacy. This presumption stated that if a testator makes a will leaving a *legacy* (cash gift) to any person and then makes an *inter vivos* gift to that person in the same amount, there is an evidentiary presumption that the *inter vivos* gift revokes the legacy in the will.

Transitional for section 110

[98] The difference between "doctrine" and "presumption" is somewhat arcane. Practically speaking, there is not much difference, as the presumptions and onus surrounding these two rules seemed to end up at the same place: proof that an inter vivos transfer was made and of the intention of the donor and donee. Under common law, there is substantial confusion over whether, for the rule to apply, the donor must have intended the transfer to be for the "advancement" (e.g., education or business advancement) of the child in order for the child to account for it, or whether the advancement refers to the donor's pure intent that the funds be repaid. Regardless, there was strong support in public and technical consultation to do away with these rules. See Alberta Justice, Succession Law Stakeholder Consultation Summary of Input (Edmonton: Government of Alberta, 2009) at .http://justice.alberta.ca/initiatives/Documents/alberta_succession_law_reform_public.pdf

[99] See A.H. Oosterhoff, *Oosterhoff on Wills and Succession,* 6th ed (Toronto: Carswell, 2008) at 578-579.

[100] A.H. Oosterhoff, *Oosterhoff on Wills and Succession,* 6th ed (Toronto: Carswell, 2008) at

Subsections 110(1),(3),(4) are evidentiary presumptions that will disappear when the *WSA* comes into force. After that time, facts existing prior to the Act comes into force will have to be proven without the use of the presumptions.

Subsection 110(2), combined with the repeal of section 11 of the Intestate Succession Act makes the section applicable to *inter vivos* transfers made before or after the *WSA*. [101], [102]

Section 111 does away with the doctrine of election. This is a fairly rare and limited rule. The British Columbia Law Reform Commission defines[103] the doctrine/rule of election as:

> A gift in a will contains a gift that is conditional on performance by the beneficiary on 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.

Or Oosterhoff[104]

> . . . 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 section 111 is, in these circumstances, to eliminate the election, and to make the disposition of the non-owned property void. Note, however, section 111(2) is a saving

[101] One might argue differently, but at the same time there is not much substantive difference between the old and new law in respect to the valuation and assessment of what was called an "advancement by portion" under s. 11. The differences are primarily procedural.
[102] Wow, one hundred footnotes...
[103] British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework Report No 45* (Vancouver, BCLI, 2006) at 46.
[104] A.H.Oosterhoff, *Oosterhoff on Wills and Succession,* 6th ed (Toronto: Carswell, 2008) at 570.

provision in that the right to make a disposition, conditional on the disposition of property owned by the beneficiary, is not affected.

I.3 Regulations

Section 112 The Lieutenant-Governor in Council (i.e. Cabinet) may make regulations. Regulations relating to international wills (section 56)[105] and plans under Part 4,[106] will likely be under a single Wills and Succession Act Regulation. The spouse's share on intestacy (section 61) is a Ministerial Regulation. Procedural rules will be housed in the *Surrogate Rules*. These are in process at time of writing.

J. Part 7—Related and Consequential Amendments - Sections 113- 126

While various pieces of legislation will be affected by the *WSA*, many of these are relatively minor.[107] The three main pieces of legislation that are affected are the *Matrimonial Property Act*, the *Administration of Estates Act*, and the *Unclaimed Personal Property and Vested Property Act*.

J.1 *Matrimonial Property Act* Amendments—Death as a Trigger for a Matrimonial Property Claim - Section 117

[105] The existing regulation, International Wills Registration System Regulation (35/1997), will likely be continued. See *International Wills Registered System Regulation,* AB Reg 35/1997.
[106] Tax Free Savings Accounts were the only plans listed in the Trustee Act Regulation. TFSAs are now listed in the *WSA* itself. See *Trustee Act Regulation,* AB Reg 228/2008.
[107] See *WSA* sections 113 *to 126* of Bill 21, *Wills and Succession Act.* The practice is to remove the consequential amendments from the published statutes once they are incorporated into the statutes they amend. Therefore, future publications of the *WSA* statute will not contain the amendments.

The key change is that death will be a trigger to a matrimonial property claim. A surviving spouse may claim the value of their share of matrimonial property from the estate of the spouse, on the death of their spouse. They do not have to be divorced or separated in order to make this claim (sections 5(1)(f) and 6(5) of the *MPA*).

The details of this change are somewhat complex.[108] A very simple description of the process follows. The claim for matrimonial property on death will operate in a way similar to a matrimonial property claim on a divorce.

- While they are alive, married spouses build their matrimonial property. They can own it jointly or individually. Individual spouses can buy and sell the matrimonial property that belongs to them without being accountable to the other.
- When the marriage ends due to death, all the matrimonial property owned by either or both of them is given a value on Valuation Day (which will usually be the date of trial).
- A decision is then made as to how much each spouse's share is, depending on the length of the marriage and other factors. The starting point for most property is 50/50 division, but a spouse may claim more or less if there are good reasons, like a very short marriage or extraordinary contributions.
- The surviving spouse is entitled to the value of his or her share of the matrimonial property.
- If the surviving spouse already owns matrimonial property equal or greater than the value of the share (usually because she already owned it or it became hers as a result of the death), then the matrimonial property claim is dismissed.
- Couples can make an agreement that the law does not apply to them.

Further:

- The valuation of the matrimonial property claim will take into account life insurance and non-estate property of both spouses (sections 7 and 7.1 of the *MPA*).
- The matrimonial property claim is paid from estate assets only (section 9(4) of the *MPA*).

[108] See the companion paper prepared by J. Henderson-Lypkie and Jodie Hierlmeier for further. (listed in the Appendix) Also, it is a brain burner to try to read the *MPA* amendments out of the context of the *MPA*. Don't try, see their paper for a mock up of the final version.

- Only living spouses may commence a claim for matrimonial property (section 5.1 of the *MPA*).
- As for matrimonial property claims on divorce, the right is only available to spouses, not adult interdependent partners.
- The matrimonial property claim will not directly affect the surviving spouse's right to inheritance from their deceased spouse.
- The new right to claim will apply where the death of the deceased spouse occurs after the coming into force of the new sections (section 5.1(3) of the *MPA*).

J.2 *Administration of Estates Act* Amendments

The *Administration of Estates Act* is currently undergoing a separate review; however, the *AEA* is amended to provide for changes made under the *WSA*.[109]

- *AEA* section 1(k) is amended so that the definition of "will" is the same in both pieces of legislation.
- AEA section 7 is amended re: service for FMS applications and matrimonial property applications.
- A "new" section 20.1 is added to the *AEA*. This is not new law. This provision deals with survivorship of an executor, and was formerly section 3 of the *Survivorship Act*.
- A "new" section 54.1 is also added. Again, this is not new law. This is the former section 30 of the *Wills Act* and deals with personal representatives' power relating to options for real estate. This subject matter is more closely related to estate administration.
- Lastly, section 37 of the *Wills Act* is repealed by the *WSA.* Section 39 of the *Administration of Estates Act* covers the same ground. The *AEA* provision deals with liability for payment of mortgages and security on inherited property. The *Wills Act* section only refers to realty.

J.3 *Unclaimed Personal Property and Vested Property Act* Amendments

[109] see *Wills and Succession Act,* SA 2010, c W-12.2, s 113.

The *Wills and Succession Act* makes amendments made to the *Unclaimed Personal Property and Vested Property Act*. Amendments link with Part 3, Intestate Estates, section 69.

The key amendments are **bolded** below.

Ownership claims

48(1) subject to subsection (8), if under this Act or another enactment, unclaimed personal property or vested property has been paid, transferred or delivered to the Minister, or an amount has been paid to the Minister as equivalent value for unclaimed personal property or vested property, a person, governmental organization or other entity who asserts a claim to that unclaimed personal property or vested property or amount may claim that unclaimed personal property or vested property or amount by filing with the Minister a claim in the form required by the Minister that includes

(a) the full name and address of the claimant,

(b) the basis on which the claim is made, and

(c) any other information required by the Minister in support of the claim.

(2) The Minister must, within 120 days after a claim is filed under subsection (1), consider the claim and

(a) must allow the claim if the Minister is satisfied that the claimant is the owner of the property or amount,

(b) may allow the claim,

(i) if the Minister is satisfied that the claimant has a valid entitlement to the property or amount but is prevented from asserting full rights as owner to that property or amount because of a procedural impediment to the claimant assuming those ownership rights, including, without limitation, in the case of an entitlement arising under an estate, the fact that probate or administration has not yet been granted in respect of the estate, or

(ii) subject to the regulations, if the Minister is satisfied that the claimant is an individual of the 5th or greater degree of relationship to an individual who died intestate and is prevented by section 67(2) of the *Wills and Succession Act* from sharing in the intestate estate,[110]

(c) may deny the claim if the Minister is not satisfied under clause (a) or (b).

[110] *Unclaimed Personal Property and Vested Property Act,* SA 2007, c U-1, s 48.

(3) Notwithstanding subsection (2), . . .

K. Related *Family Law* Act Amendments

Bill 22, the *Family Law Statues Amendment Act*,[111] was also passed by the Legislature in the Fall Session 2010. It contains amendments to the *Family Law Act* relevant to succession law: these can be expected to come into force in mid-2011.

K.1 No more bastards

The first of these changes is the abolition of the status of illegitimacy. The *Family Law Act* section 7 abolishes the status of illegitimacy for all purposes. Action 36 of the *Wills Act* is repealed and replaced.[112] There will likely be a change to the current *Wills Act* some time in 2011, prior to the coming into force of the *WSA*. For further explanations of this change, see above under *WSA* section 28 . There is not much other impact on succession law as both the *Intestate Succession Act* and the *Dependants Relief Act* included children "born . . . outside marriage."[113]

K.2 Testamentary Guardians

Secondly, the *Family Law Act,* section 22 is "tweaked" in respect to testamentary guardians of children. The section read:

> Testamentary appointment of guardian
>
> 22(1) A guardian who is a parent of a child may appoint a person to be a guardian of the child after the death of that guardian by deed or will

The problem identified is that not a lot of people know what formalities amount to a "deed." Section 22 **is revised as follows**:

> Testamentary appointment of guardian

[111] *Family Law Statues Amendment Act*, SA 2010, c 16.
[112] But see footnote 39
[113] *Intestate Succession Act,* RSA 2000, c I-10, s 1(b). and *Dependants Relief Act,* RSA 2000, c D-10, s1(b)(ii).

22(1) A guardian who is a parent of a child may appoint a person to be a guardian of the child after the death of that guardian by

(a) a will, or

(b) a **written document that is signed and dated by the guardian and an attesting witness.**

It is worth noting in passing that, under the new section 25 of the *WSA*, an appointment of a testamentary guardian by will may be revoked if a couple divorces or ends their adult interdependent partnership.[114]

K.3 Variation of support orders after death

Finally, there is new law allowing for the variation of *Family Law Act* support orders or agreements after death. *Family Law Act* section 80 provides that family support orders or agreements bind the estate after death of the payor, unless the order or agreement says otherwise. The new provision, *FLA* section 80.1[115] allows for variation of these orders or agreements. Variation of family support orders during life requires a change in circumstances; the quantum of child and spouse/partner support is based on guidelines that presume two living adults. Section 80.1 sets different considerations for variation when the family support payor has died: the needs of dependants who do not have the benefit of the order or agreement; the need to wind up the estate; and the benefits received as a result of the death. [116]

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[114] See commentary on section 25 *WSA*
[115] *Family Law Act,* SA 2003, c F-4.5.
[116] Unfortunately, this does not extend to *Divorce Act* (Canada) support orders. Darn separation of powers.