



Manitoba Law  
Reform Commission

# **REFORM OF *THE WILLS ACT*, *THE LAW OF PROPERTY ACT*, AND *THE BENEFICIARY DESIGNATION* *ACT*, REVISITED**

Final Report

March 2020



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AND *THE BENEFICIARY DESIGNATION ACT*, REVISITED**

Final Report #139

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**Library and Archives Canada Cataloguing in Publication**

Manitoba Law Reform Commission

Reform of *The Wills Act*, *The Law of Property Act* and *The Beneficiary Designation Act*  
Revisited

(Report ; 139)

Cover title.

Includes bibliographical references.

ISBN: 978-0-7711-1603-2

The Commission's Reports are available electronically at [www.manitobalawreform.ca](http://www.manitobalawreform.ca).

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The Manitoba Law Reform Commission is funded through grants from:



The Manitoba Law Foundation



Manitoba Justice, Government of Manitoba

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## ACKNOWLEDGMENTS

The Commission gratefully acknowledges the following individuals for providing valuable feedback on this project: John Fergusson, Office of the Public Guardian and Trustee; the lawyers of Tradition Law LLP, John Poyser, John Delaney, Cynthia Hiebert-Simkin, Ken Mandziuk, Ryan Gorlick and Krista Clendenning; the Wills and Estates practice group at D’Arcy & Deacon LLP and Steve Falkingham of D’Arcy and Deacon LLP in his personal capacity, Ian Hull, Suzana Popovic-Montag and Nick Esterbauer of Hull & Hull LLP; Anita Southall of Fillmore Riley LLP; Justice Geoff Lindsay of the Supreme Court of New South Wales, the staff of the Courts & Tribunals Regional Service Delivery of New Zealand; and L. Col. Anne Litowski and Col. A.W. Bolt of the Office of the Judge Advocate General, Canadian Armed Forces.

The Commission would also like to thank those practitioners who attended the Manitoba Bar Association’s Wills, Estates and Succession section’s roundtable discussion and provided useful feedback on issues raised in the Commission’s Consultation Paper.

The Commission gratefully acknowledges Professor Donn Short, Faculty of Law, University of Manitoba, for bringing to the attention of the Commission the issue respecting ss. 29 and 17.4 of *The Wills Act* and *The Law of Property Act*, respectively.

The views expressed in this report are those of the Manitoba Law Reform Commission and do not necessarily represent the views of those individuals who have so generously assisted the Commission in this project.

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## EXECUTIVE SUMMARY/RÉSUMÉ

In September 2019, the Manitoba Law Reform Commission (the “Commission”) released a Consultation Paper entitled *The Wills Act, Revisited*<sup>1</sup> to solicit feedback on possible areas of reform. The Commission received feedback from legal practitioners who provided their comments on the provisional recommendations and issues for discussion contained in the report. The feedback received related not only to the reform issues identified in the Consultation Paper, but also pointed to other possible deficiencies in the current law.

In this report, the Commission revisits the recommendations for reform of *The Wills Act* and related legislation first considered in its 2003 report, *Wills and Succession Legislation* (“Report 108”)<sup>2</sup>. Recommendations for substantial reform reiterated in this report include reducing the age by which a person can make a valid will from 18 to 16 years and introducing into the legislation a definition of an electronic will.

Other recommendations contained in Report 108 have been reversed either due to advancements in the case law in a given area, recent trends in legislative reform in other jurisdictions or based on feedback received during the consultations. For example, given the enhanced focus on predatory marriages and resulting reforms in other jurisdictions, the Commission is now recommending the abolishment of the automatic revocation of a will by a subsequent marriage.

Finally, this report contains a number of new recommendations not contained in Report 108, including amending the Court of Queen’s Bench Rules to enable the court to make, alter, or revoke a will for a person lacking testamentary mental capacity.

The Recommendations contained in this report seek to improve and modernize the legislation and to help Manitobans carry out their testamentary intentions.

## RÉSUMÉ

En septembre 2019, la Commission de réforme du droit du Manitoba (la « Commission ») a publié un document de consultation intitulé *The Wills Act, Revisited* afin de solliciter des commentaires sur les domaines de possibles réforme. La Commission a reçu des commentaires de juristes qui ont fait part de leurs observations sur les recommandations provisoires et les sujets à discuter contenus dans le rapport. Les commentaires reçus portaient non seulement sur les sujets de réforme

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<sup>1</sup> Manitoba Law Reform Commission, “The Wills Act, Revisited”, Consultation Paper (August 2019). The consultation paper is available online:

<[http://www.manitobalawreform.ca/pubs/pdf/additional/consultation\\_report\\_sept2019.pdf](http://www.manitobalawreform.ca/pubs/pdf/additional/consultation_report_sept2019.pdf)>.

<sup>2</sup> Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report 108, March 2003. Available at the Commission’s website: [www.manitobalawreform.ca](http://www.manitobalawreform.ca).

indiqués dans le document de consultation, mais ils ont également mis en évidence d'autres lacunes des dispositions législatives actuelles.

Dans le présent rapport, la Commission réexamine les recommandations de réforme de la Loi sur les testaments et de la législation connexe, examinées pour la première fois dans son rapport de 2003 intitulé *Wills and Succession Legislation* (Rapport n° 108). Parmi les recommandations de réforme importantes réaffirmées dans le présent rapport, citons la diminution de l'âge auquel une personne peut rédiger un testament valide de 18 à 16 ans et l'introduction dans la loi d'une définition du concept de testament électronique.

D'autres recommandations contenues dans le Rapport n° 108 ont été revues, soit en raison des progrès de la jurisprudence dans un domaine donné, des tendances récentes en matière de réforme législative dans d'autres collectivités publiques, soit en fonction des commentaires reçus lors des consultations. Par exemple, compte tenu de l'importance accrue accordée aux mariages de prédation et des réformes qui en résultent dans d'autres collectivités publiques, la Commission recommande désormais l'abolition de la révocation automatique d'un testament par un mariage ultérieur.

Enfin, le présent rapport contient un certain nombre de nouvelles recommandations qui ne figuraient pas dans le Rapport n° 108, notamment la modification des règles de la Cour du Banc de la Reine afin de permettre à cette dernière de rédiger, de modifier ou de révoquer un testament pour une personne qui n'a pas le discernement nécessaire à la préparation d'un testament.

Les recommandations contenues dans ce rapport visent à améliorer et à moderniser les dispositions législatives et à aider les Manitobains à concrétiser leurs intentions testamentaires.



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## CHAPTER 1: INTRODUCTION

In Manitoba, laws governing wills, estates and succession are contained in a number of statutes, including *The Wills Act*.<sup>3</sup>

In 2003, the Commission published Report 108 containing 77 recommendations to reform the wills statute and related legislation in Manitoba.<sup>4</sup> Despite the passage of 17 years, none of the recommendations has been implemented.

Since the release of Report 108, several law reform agencies have published reports on this area of the law and several legislative amendments have been enacted by other jurisdictions. These developments make timely an update of Report 108 and afford an opportunity to shine light on and reaffirm all of the recommendations contained in that earlier report with the exception of those that are amended or newly added in this report.

This report does not re-examine every issue contained in Report 108 and does not replace that report. Interested parties are encouraged to consider both the contents of that earlier report and this one together for a more complete understanding of the Commission's recommendations pertaining to wills and estates legislation in Manitoba.<sup>5</sup>

As in Report 108, this Report uses the gender neutral terms “testator”, “executor”, and “administrator” to include “testatrix”, “executrix”, and “administratrix”.

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<sup>3</sup> CCSM c W150.

<sup>4</sup> See Appendix A for a list of recommendations from Report 108.

<sup>5</sup> Other Commission reports recommending amendments to wills, estates and succession legislation published after Report 108 in 2003 include: “*The Beneficiary Designation Act (Retirement, Savings and Other Plans)*”, Report #138 & “Updating the Administration of Small Estates in Manitoba”, Report #135. Available at the Commission's website: [www.manitobalawreform.ca](http://www.manitobalawreform.ca).

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## CHAPTER 2- THE WILLS ACT

The Commission has considered the wills legislation in Manitoba and elsewhere in Canada. In the Commission's view, there are 17 areas where *The Wills Act* may not adequately address the current realities.

### A. Mental Capacity

Testamentary mental capacity is one of the requirements of a valid will, the others being testamentary intent in connection with a document not in the form of a conventional will, requisite age, knowledge and approval, due form, and due execution. *The Wills Act* includes the requirements respecting age, form, and execution, but not intention, mental capacity or knowledge and approval. Recommendation 1 of Report 108 suggests that the Act should provide a complete, consolidated list of the fundamental requirements of a valid will. This would require that the requisites of intention, mental capacity, and knowledge and approval be added to the Act. Report 108 does not further address mental capacity.

The law defining testamentary mental capacity is common law,<sup>6</sup> the root case being *Banks v. Goodfellow*:

It is essential ... that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.<sup>7</sup>

An extensive body of case law and journal commentary has developed since this principle was enunciated, easily accessible from several treatises.<sup>8</sup> In 2017, the United Kingdom's Law

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<sup>6</sup> The law is created in two ways: legislation and common law. Legislation is created by legislatures and government cabinets in the form of statutes or Acts, such as *The Wills Act*, and regulations. Common law is created by judges of trial courts and courts of appeal and by tribunals, in the written reasons given for their decisions or judgments. Common law is sometimes called case law and judge-made law.

<sup>7</sup> *Banks v Goodfellow* (1870), LR 5 QB 549, at 565.

<sup>8</sup> For example see: James MacKenzie, Ian M Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4<sup>th</sup> ed (Toronto: Butterworths, 2000); Albert Oosterhoff, Mitchell McInnes, C. David Freedman & Adam Parachin, *Oosterhoff on Wills*, 8<sup>th</sup> ed (Toronto: Carswell, 2016); John G Ross Martyn, *Theobald on Wills*, 17<sup>th</sup> ed (London: Sweet & Maxwell, 2016); Francis Barlow, *Williams on Wills*, 10<sup>th</sup> ed (London: Butterworths, 2014); Ian Hull & Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5<sup>th</sup> ed (Toronto: Carswell, 2016), and John E.S. Poyser, *Capacity and Undue Influence*, 2<sup>nd</sup> ed (Toronto: Carswell, 2019).

Commission (the “UK Commission”) published a Consultation Paper titled “*Making a Will*” (“UK Paper”)<sup>9</sup> in which the UK Commission raised several concerns:

2.33 Many stakeholders have told us that the *Banks v Goodfellow* test works well, and is well understood by those who apply it. The test succinctly and effectively addresses the fundamental requirements for capacity in the context of making a will, covering what someone without expertise in the law would intuitively think necessary to make a will. It is a specific test to assess capacity for a specific issue, making a will.

...

2.35 Other stakeholders have expressed concern with the test. The language of the case now appears archaic. It may be understood by lawyers who are well-versed in dealing with the test, but is unlikely to be readily appreciated by lay people or other professionals, such as social workers, called upon to make assessments of capacity. At the very least, recasting the test in a modern form would make it more readily understandable and therefore more easily applied...

...

2.41 More generally, it has been questioned whether the test in *Banks v Goodfellow* is appropriate given that it was created before many developments in modern medicine. Its focus on disorders of the mind and delusions does not reflect the wide range of factors that are now understood to have the potential to affect a person’s capacity. In particular, the test does not reflect the significance of dementia in the context of assessments of capacity. The test dates back to a time when rarely did people outlive their minds. In the context of an ageing population where dementia has become increasingly prevalent, it might be argued that there is clearly scope here for a new test for testamentary capacity which would consign *Banks v Goodfellow* to history... .

...

2.59 The longevity of the *Banks v Goodfellow* test may suggest that it performs its task well and is understood by courts, solicitors and testators alike. We have concluded, however, that the problems with the current law mean that reform is required ...

The UK Commission proposed for consideration the statutory adoption of the definition of mental capacity in the *Mental Capacity Act*.<sup>10</sup>

In 2013, the British Columbia Law Institute (“BCLI”) published a report on common law tests of capacity,<sup>11</sup> which rejected replacing the common law of testamentary mental capacity with a statutory test, noting that codifying the test “would rob the law of some of its flexibility.”<sup>12</sup>

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<sup>9</sup> United Kingdom Law Commission, “Making a Will”, Consultation Paper No 231 (2017).

<sup>10</sup> 2005, c 9. The Act provides in ss 2 and 3 (see Appendix B) a definition of mental incapacity to be used in several situations, apparently not including the making of a will, the UK Paper paras 2.7 – 2.9.

<sup>11</sup> British Columbia Law Institute, *Report on Common-Law Tests of Capacity*, Report 73 (2013) [BCLI 2013 Report].

<sup>12</sup> *Ibid* at 43.

In our Consultation Paper, the Commission posed for consideration whether testamentary mental capacity should continue to be a matter entirely of common law or should a statutory definition be added to *The Wills Act* similar to ss. 2 and 3 of the UK *Mental Capacity Act*,<sup>13</sup> on which the common law would develop.

Most of the feedback received by the Commission supported preserving the law of testamentary mental capacity as it is, a matter entirely of common law. Those in favour of continuing the law as it is argued that:

- currently, the vast majority of capacity determinations are made by lawyers (and judges) without the assistance of a medically trained assessor, employing simple, straightforward questions, which naturally flow from the articulation of the *Banks v. Goodfellow* test,
- the component in s 2(1) of the UK *Mental Capacity Act* definition,<sup>14</sup> “an impairment of, or disturbance in the functioning of, the mind or brain” is a determination that very few, if any, lawyers are equipped to make,<sup>15</sup>
- the determination of testamentary mental capacity is a legal determination, not a medical one, and
- a statutory articulation would be very difficult, having to accommodate the test(s) to be used for the various different components of an estate plan often executed at the same time, such as the differing tests applicable to a will and a codicil.<sup>16</sup>

In addition to paragraph 235 of the UK Paper, quoted earlier, the Commission also considered an article published in the Canadian Bar Review,<sup>17</sup> proposing “a modest update to the legal test ... adopting a medico-legal approach that incorporates advances in both science and social contexts and modernizes the language used”. The approach advocated in this article comprises a list of five criteria to be included in a statutory definition of testamentary mental capacity or to inform judicial decision making.<sup>18</sup>

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<sup>13</sup> See Appendix B.

<sup>14</sup> *Ibid.*

<sup>15</sup> At the 2019 Pitblado Lectures, an annual two day event held in Winnipeg, it was advised that the vast majority of doctors have no training in mental capacity assessment.

<sup>16</sup> A codicil is a document by which a testator makes changes to a Will, including revocation of an existing will or codicil.

<sup>17</sup> K.I. Shulman, S.G. Himel, I.M. Hull, C. Peisah, S. Amodeo, and C. Barnes, “Banks v Goodfellow (1870): Time to Update the Test for Testamentary Capacity” (2017) 95 Canadian Bar Review 251.

<sup>18</sup> *Ibid* at 266. The five criteria advocated for in the article are that the testator must be: (1) capable of understanding the act of making a will and its effects; (2) capable of understanding the nature and extent of their property relevant to the disposition; (3) capable of evaluating the claims of those who might be expected to benefit from his estate, and able to demonstrate an appreciation of the nature of any significant conflict and or complexity in the context of the testator’s life situation; (4) capable of communicating a clear, consistent rationale for the distribution of their property, especially if there has been a significant departure from previously expressed wishes or prior wills; and (5) free of a mental disorder, including delusions, that influences the distribution of the estate.

Beyond confirming Recommendation 1 of Report 108, that the Act should “provide a complete, consolidated listing of the fundamental requirements for a valid will”, the Commission is not recommending any statutory codification of the law of testamentary mental capacity.

Issue two in our Consultation Paper asked whether the common law presumption of testamentary mental capacity should be replaced with a statutory iteration of the presumption and the shifting burden of proof.

Generally, there are two burdens of proof: the legal burden and the evidentiary burden. The legal burden is on the party suing, seeking, or asserting and it follows that the person with the legal burden initially shoulders the evidentiary burden of proof. With testamentary mental capacity, the legal burden is on the propounder of a will, i.e. the person applying for Letters Probate, that the testator had testamentary capacity to make the will. The propounder’s initial evidentiary burden is usually satisfied by an affidavit of execution respecting the will and any codicils, and by the presumption of mental capacity. Together the presumption and existence of an affidavit of execution shift the evidentiary burden to those persons opposing probate of a will and, incidentally, the presumption of mental capacity, being a presumption, is by definition rebuttable by anyone opposing probate on the basis that the testator lacked testamentary mental capacity. The evidence of anyone opposing probate may shift the evidentiary burden back to the propounder. The legal burden never shifts; the evidentiary burden shifts.

On the question of whether the common law presumption of testamentary mental capacity should be replaced with a statutory presumption and the shifting burden of proof, feedback was sparse and mixed, leading the Commission to the decision to “let sleeping dogs lie”.

## **B. Judicial Wills**

Judicial or court-made wills are created or enabled by judges empowered by statutory legislation to do so.<sup>19</sup> Judicial will-making involves providing a will for a person who has never had the testamentary capacity to make a will, and providing a will or a codicil, or for the revocation of a will or a codicil, for a person who had testamentary mental capacity but has lost it. Without the judicial will or codicil, an unjust or inappropriate distribution of the person’s estate will occur, which is not addressed by *The Intestate Succession Act*<sup>20</sup> or *The Dependents Relief Act*.<sup>21</sup>

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<sup>19</sup> Judicial wills are often referred to as statutory wills. The term “statutory will” can conjure up intestate succession legislation and is used in the United States in regard to fill-in-the-blanks, statutorily mandated will forms, which in Canada are commercially provided, but not statutorily mandated, and commonly called Stationer’s Will Forms.

<sup>20</sup> SM 1989-90, c 43.

<sup>21</sup> SM 1989-90, c 42.

*The Wills Act* of Manitoba does not provide for judicial will-making. By common law, neither judges nor substitute decision-makers, such as a committee appointed pursuant to *The Mental Health Act*<sup>22</sup> or an attorney pursuant to a power of attorney, can make or alter a will.

Express statutory enablement is required for judicial wills. Such legislation exists in England and Wales, New Zealand, all of the states of Australia except the Capital Territory,<sup>23</sup> and New Brunswick.<sup>24</sup> Additionally, the *Uniform Wills Act* of the Uniform Law Conference of Canada (“ULCC”) contains such a provision.<sup>25</sup>

The legislation of the aforementioned jurisdictions, including the arguments for and against it, has been thoroughly considered by the Alberta Law Reform Institute (“ALRI”) in its *Creation of Wills Report*<sup>26</sup> (“ALRI Report”), which “does not recommend law reform in this area.”<sup>27</sup> This issue is also raised in a report and memo of the Scottish Law Commission,<sup>28</sup> an article by Hassan Chaudhary,<sup>29</sup> and a project proposal submitted to the Commission by a member of the public.

One scenario whereby the statutory authorization of a court to make or enable the making of a will would be beneficial was brought to the Commission’s attention by a member of the public. A child, X, was born with significant mental disabilities, including an inability to communicate. X’s mother, with the assistance of her second husband and his two sons provide day to day care; likely the two step-brothers will continue their care after X’s mother and their father die. The child’s biological father provides no care whatsoever, having abandoned the mother and X. To ensure the financial well-being of X, a Henson Trust<sup>30</sup> and a Registered Disability Savings Plan (“RDSP”) were established. Additionally, X received an inheritance from his maternal grandparents. When X dies, the money in the RDSP is paid to X’s estate, which, together with the remainder of the inheritance in whatever form it exists, will comprise X’s estate. As X lacks the capacity to make

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<sup>22</sup> SM 1998, c 36.

<sup>23</sup> Examples of the Australian legislation, the New South Wales *Succession Act* 2006 No 80, ss 18-26 and the Western Australian *Wills Act* 1970 No 12, ss 39-48 are in Appendix C.

<sup>24</sup> Infirm Persons Act, RSNB 1973, c I-8, s 3(4).

<sup>25</sup> Uniform Law Conference of Canada, *Uniform Wills Act*, (2015) ULCC 0025 [ULCC Act].

<sup>26</sup> Alberta Law Reform Institute, *Creation of Wills*, Report 96 (2009) [ALRI Report].

<sup>27</sup> *Ibid* para 107; see Appendix C.

<sup>28</sup> Scottish Law Commission, Discussion Memo 70, Part IV, and Scottish Law Commission *Report on Succession*, Report No 124 (1990) which recommends against “the introduction of a [judicial] power to make a will for an incapax”. In Report 215, also titled *Report on Succession* (2009), the Scottish Law Commission did not re-examine the issue but noted that “since 1990 there have been legislative changes in this area, notably with the passage of the *Adults with Incapacity (Scotland) Act* 2000. Part 6 of this Act provides for “intervention orders”, which allow a court to make an order relating to an incapable person’s property, financial affairs or personal welfare. These have, on occasion, been made for succession purposes”.

<sup>29</sup> *Statutory Wills: A Case for Granting Ontario Courts the Authority to Pass Statutory Wills on Behalf of Persons Lacking Testamentary Capacity*, (2013) 4:1 Osgoode Hall Review of Law and Policy 65.

<sup>30</sup> A Henson Trust is a type of trust often used in estate planning where there is a disabled beneficiary who is entitled to receive government disability support payments. The essential elements of a Henson Trust are: (i) that the trustee must have absolute discretion, (ii) that the assets of the trust do not vest in the beneficiary, and (iii) that there is a gift-over following the death of the beneficiary.

a will, pursuant to *The Intestate Succession Act*, X's estate will devolve to X's surviving mother and/or biological father, and, if neither is alive, to any surviving paternal or maternal grandparents, and, if none, to other blood relatives. Should X's biological father and/or paternal or maternal grandparents be alive upon X's death, the estate will not devolve to his care-giving step-father, or step-brothers, if either or both of them survive X's death. If *The Wills Act* were amended to enable the making of judicial wills, a Court of Queen's Bench judge might be persuaded to create a will for X giving his estate to his step-father, if he survives X's mother and continues to be his care-giver, or to his two half brothers, if they survive him and continue to care personally for X.<sup>31</sup>

Our Consultation Paper asked whether provision be added to *The Wills Act* to enable the Court of Queen's Bench to make, alter, or revoke a will for a person lacking testamentary (mental) capacity. Although this is not a novel idea as such legislation exists elsewhere, the feedback was unanimously and vociferously negative for a variety of reasons including:

- it is not the purview of the courts to make or alter testamentary documents;
- the right of one to distribute his or her own assets is an important part of testamentary autonomy;
- it introduces uncertainty;
- any benefit it would have in some cases would be largely outweighed by the troubles it would create;
- it would be necessary for the court to engage in tax (estate) planning;
- there may not be a gap that needs to be filled;
- there would be difficulties in challenging a will when it was made by a judge; and
- it would not minimize litigation but would simply create litigation up front.

The Commission sought information from the jurisdictions in which such legislation exists. The Probate and Protective List Judge of the Supreme Court of New South Wales in Australia advised that there has been an increasing number of applications for statutory wills in recent years in that jurisdiction. He advised that, in his experience, statutory wills are very beneficial where there is a consensus within a family as to a form of order for the benefit of an incapable person.

New Zealand's *Protection of Personal and Property Rights Act*<sup>32</sup> entitles a court to appoint one or more persons to act as manager<sup>33</sup> of another person's property and to authorize the manager to make testamentary dispositions for a person subject to the order, a "section 55 order". The Act also entitles a court to direct that a person subject to a property order may still make a testamentary

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<sup>31</sup> Other circumstances for which a judicial will is appropriate are described in the ALRI Report, paras 61-62; see Appendix C.

<sup>32</sup> 1988, No 4.

<sup>33</sup> "Manager" is defined in New Zealand's *Protection of Personal Property Rights Act*, 1988 to mean "a person appointed by the court pursuant to the Act as manager of another person's property". The equivalent in Manitoba would be a committee for property.

disposition, a “section 54 order”. The New Zealand Courts Division provided the Commission with the following statistics:

- In 2018-19 (July-June), the Court received 11 applications for leave for a person subject to a property order to make a testamentary disposition. Nine orders were granted, one was dismissed and one was withdrawn or discontinued. In the same year, the Court received 57 applications for an order that a property manager could make a testamentary disposition for a person subject to a property order. 47 orders were granted, two were dismissed and eight were withdrawn or discontinued.
- The statistics over the last 10 years show a combined total of between 47 & 75 applications for orders made under ss. 54 and 55 of the Act. The majority of the applications were granted.

The Ministry of Justice of the United Kingdom and the Court of Protection advised that they do not track the number of statutory will applications received or orders granted.<sup>34</sup> No data was received from the Court of Queen’s Bench of New Brunswick.

Notwithstanding the ALRI decision not to recommend the enactment of such legislation and the negative feedback the Commission received, the Commission is persuaded, by the circumstances which prompted the project proposal it received from a member of the public, by paragraphs 61-62 of the ALRI Report,<sup>35</sup> and by the existence and use of the empowering legislation in England, Australia, New Zealand, and New Brunswick, that there is a gap in our law, which can be reasonably filled.

There are several matters with which enabling legislation will have to address, including whether the person for whom the court can make, alter, or revoke a will is a person lacking “testamentary mental capacity” or lacking “testamentary capacity”.<sup>36</sup> A second matter is whether the judicial process should be a one-step application or a two-step process, the first step being an application for leave to apply.<sup>37</sup> The Commission is persuaded by the Victorian Law Reform Commission<sup>38</sup> and in the interest of access to justice that a one-step application process is preferable. Other matters with which the enabling legislation will have to address include who can apply, who must receive notice of an application, what criteria the Court must employ, the form and execution of the will, and whether there is a right of appeal. The Commission considers it to be unnecessary at this juncture to deal with these matters and, if the government decides to enable the making of judicial wills, the Commission, if requested, and legislative counsel can conduct further research and advise on existing legislation as well as treatise and journal commentary.

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<sup>34</sup> But see the ALRI Report, para 69, Appendix C.

<sup>35</sup> See Appendix C.

<sup>36</sup> See the ALRI Report, para 77, Appendix C.

<sup>37</sup> *Ibid* at paras 71-73.

<sup>38</sup> Victorian Law Reform Commission, *Succession Laws Report*, 2013, 29; available online at: [https://lawreform.vic.gov.au/sites/default/files/Succession\\_Laws\\_final\\_report.pdf](https://lawreform.vic.gov.au/sites/default/files/Succession_Laws_final_report.pdf).



### **Recommendation 1**

*The Wills Act* should be amended to enable the Court of Queen's Bench to make, alter or revoke a will for a person lacking testamentary (mental) capacity.

## **C. The Beneficiary Designation Act (Retirement, Savings, and Other Plans)**

In 2019, the Commission published Report 138, "*The Beneficiary Designation Act (Retirement, Savings, and Other Plans)*". In that report, the Commission considered:

... whether various substitute decision makers should be empowered to make, change, or revoke a beneficiary designation with court approval ... Uniquely ... the *Power of Attorney Act* and the *Wills, Estates and Succession Act* of British Columbia provides an attorney with [such power] ... where the court authorizes the change and the designation is not made in a will ... . The feedback received by the Commission on this issue is supportive of statutorily empowering various substitute decision makers to make, change, or revoke a beneficiary designation with court approval, if a similar empowerment is made to *The Wills Act* and *The Insurance Act*. The Commission is currently studying possible reforms to *The Wills Act*, and the upcoming report will deal with empowering the Court of Queen's Bench to make, alter, or revoke a will. Thus, it is premature to make a recommendation respecting *The Beneficiary Designation Act*.<sup>39</sup>

Given that the Commission is recommending that *The Wills Act* be amended to enable the Court of Queen's Bench to make, alter or revoke a will for a person lacking testamentary (mental) capacity in Recommendation 1, it is necessary to make related changes in statutes regulating substitute decision makers.

### **Recommendation 2**

*The Mental Health Act*, *The Vulnerable Persons Living with a Mental Disability Act*, and *The Powers of Attorney Act* should be amended to provide expressly for a substitute decision maker for property, a committee, or an attorney, pursuant to an enduring power of attorney or a springing power of attorney triggered by the donor becoming mentally incompetent, with the approval of the Court of Queen's Bench, to make, change, or revoke a beneficiary designation in plan as defined by and to which *The Beneficiary Designation Act* applies.

<sup>39</sup> Manitoba Law Reform Commission, *The Beneficiary Designation Act (Retirement, Savings and Other Plans)*, 2019 at 7.

## D. Privileged Wills

*The Wills Act* provides:

### **Military forces and mariners**

5(1) A member of the Canadian Forces while on active service pursuant to the *National Defence Act* (Canada), or a member of any other naval, land, or air force while on active service, or a mariner or a seaman when at sea or in the course of a voyage, may make a will by a writing signed at its end by the testator or by some other person in the presence and by the direction of the testator without any further formality or any requirement of the presence of, or attestation or signature by, a witness.

In Report 108, the Commission considered privileged wills<sup>40</sup> and recommended the repeal of section 5:

Recommendation 6: Privileged wills should no longer be valid but provision should be made that those in existence at the time of the coming into force of the new legislation remain valid.

The Law Reform Commission of Nova Scotia's *Reform of the Nova Scotia Wills Act*, Final Report ("NS Report")<sup>41</sup>, recommends retention of the provision for privileged wills, as does the ALRI Report.<sup>42</sup> The BCLI in its report on *Wills, Estates and Succession: A Modern Legal Framework* ("BCLI 2006 Report")<sup>43</sup> recommends abolition of privileged wills.<sup>44</sup>

In response to the Consultation Paper, the Commission received a submission from the Office of the Judge Advocate General ("OJAG") advocating the retention of section 5. Similar correspondence was submitted to the ALRI prior to the release of its report, which ultimately persuaded the ALRI to recommend retention of a similar provision on privileged wills in Alberta's legislation.<sup>45</sup>

In its correspondence, the OJAG submitted that section 5 should be retained due to:

- *Frequent Relocation* – Canadian Armed Forces ("CAF") members are relocated throughout the country regularly and it is possible that a will drafted in one jurisdiction will not meet the formal legislative requirements for a will in the member's new jurisdiction;
- *Rapid Deployment* – certain units of the CAF are expected to deploy for extended periods with little or no notice and, therefore, even where a member has prepared a valid will, there would be insufficient time to make necessary adjustments; and

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<sup>40</sup> See Appendix D.

<sup>41</sup> 2003 at 14-17. See Appendix E.

<sup>42</sup> Supra note 26, paras 162-185. See Appendix F.

<sup>43</sup> Report No 45 (2006) [BCLI Report].

<sup>44</sup> See Appendix G.

<sup>45</sup> See Appendix F.

- *Communication Restrictions* – while members are rarely isolated during deployment, personal communications are subject to operational restrictions for security reasons.

The Commission appreciates the circumstances of CAF members detailed by the OJAG. As outlined below, OJAG has taken positive steps to advise CAF members to make wills. OJAG's positive steps are appropriate for the unique circumstances faced by CAF members. This and changes in the law since section 5 was created render s. 5(1) out of date.

As noted in the OJAG's correspondence, the CAF actively encourages members to make a will and takes great measures to assist them in doing so. The CAF provides members with a non-mandatory standard-form will at various stages, including on enlistment, along with instructions for preparing, reviewing and administering a will.<sup>46</sup> While the standard-form will is not appropriate for members with extensive personal property or with complex personal situations, directives applicable to all officers and non-commissioned members advise members to consult with civilian legal counsel or a notary where the standard form is not appropriate, specifically where they may wish to obtain instructions for guardianship of a minor child, establish trusts for minor children, engage in tax planning, establish survivorship requirements, or identify the jurisdiction that will apply to the distribution of a member's estate.<sup>47</sup> This same directive also strongly encourages members to "review and update their will upon birth or adoption of a child and make a new will "...upon marriage unless the existing will was made in contemplation of marriage and there is a declaration to that effect in the will..."<sup>48</sup> The Commission believes that the extensive information and instruction provided to members by the CAF on the making and revision of wills substantially diminishes the necessity of section 5.

As noted by the ALRI, succession laws have evolved significantly since the exemption in section 5 was established. For example, the holograph will provisions contained in section 6 of *The Wills Act* enable a testator to make a valid will without the requisite formalities and without witnesses where it is written wholly in the person's own hand and signed at the end.

Additionally, *The Wills Act* contains a judicial dispensation power, which allows a court, upon application, to order that a will that does not comply with the formal requirements of the Act be effective regardless of the noncompliance where it is satisfied that the document contains the testamentary intentions of a deceased person.<sup>49</sup>

The Commission agrees with the OJAG that privileged wills served a purpose prior to the modernization of succession legislation and that there must be some means by which members of the CAF on active service can have their testamentary wishes given effect without strict compliance with the formal requirements for a valid will. As noted above, these statutory exemptions already exist and are available to all wills submitted for probate through sections 6 and 23 of the Act. Additionally, the Commission fails to see why a statutory exemption should remain in place for

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<sup>46</sup> Government of Canada, Department of National Defence, "Preparation and Administration of Wills", Defence Administrative Orders and Directives (DAOD 7012-1) (Ottawa: DND, 3 September 2004 (modified 21 November 2007)).

<sup>47</sup> *Ibid* at 2.6.

<sup>48</sup> *Ibid* at 2.1.

<sup>49</sup> *Supra* note 3, s 23; this section can be found on pages 15-16 of this report.

members of the CAF and not be available to others whose occupations put them in harm's way such as firefighters, police officers, members of rescue teams, and fishers, among others.

As a final thought, the Commission believes that the objective should always be for Manitobans to obtain the necessary professional advice and to execute a will that complies with the formalities in *The Wills Act*. While exceptions are necessary, increasing the proportion of wills that satisfy the formal requirements is preferable to broadening exceptions.

### **Recommendation 3**

The Commission confirms Recommendation 6 in Report 108 that section 5, which provides for the making of a privileged will, should be repealed.

## **E. Minors**

*The Wills Act* provides:

**8(1)** A will made by a person who is under the age of 18 years is not valid unless, at the time of making the will, the person

(a) is or has been married; or

(b) is a member of a component of the Canadian Forces that is referred to in the *National Defence Act* (Canada) as a regular force; or

(c) is a person described in section 5.

In Report 108, the Commission recommends that the age at which a person can make a valid will should be lowered from 18 to 16 years.

There are four matters, not considered in Report 108, worthy of consideration. First, while section 8(1)(a) enables a minor to make a will if the minor “is or has been married”, it does not so enable a minor who is or was in a common law relationship to make a will, as does, for example, *The Wills and Succession Act* of Alberta.<sup>50</sup>

A second matter, considered by the ALRI Report,<sup>51</sup> is whether a provision should be added to *The Wills Act*, creating a process by which a person whose situation does not come within section 8(1) can apply to the Court of Queen's Bench for validation of a will or can apply to the Court for a declaration of testamentary capacity in order to make a will. Most Australian states and New Zealand have the former type of legislation and some states of the United States have the latter type. The difference between the types of legislation is that with the former, the minor must obtain judicial approval of the will and any alteration or revocation of the will, while the latter simply

<sup>50</sup> *Wills and Succession Act*, 2010, c W-12.2, s 13(2)(a).

<sup>51</sup> *Supra* note 26 at 12-19.

confers on the minor the testamentary capacity of an adult, without any further supervision of the exercise of that capacity.

In 1981, the British Columbia Law Reform Commission (predecessor to the BCLI) recommended legislation of the latter type<sup>52</sup>; the BCLI 2006 Report does not renew the recommendation. The NS Report recommends legislation of the latter type. The ALRI Report recommends legislation of the former type, given the then wording of the section in the *Alberta Wills Act* comparable to s. 8(1) of *The Wills Act*, which provides for when a will made by a minor is valid.

The NS Report recommendation has not been implemented, but the ALRI Report recommendation has. Sections 13(2)(c) and 36 of the *Wills and Succession Act*<sup>53</sup> provide:

### **Who can make a will**

13 (2) An individual who is under 18 years of age may make, alter or revoke a will if the individual has the mental capacity to do so and if the individual...

(c) is authorized by an order of the Court under section 36.

### **Court may authorize minor to make a will**

**36(1)** The Court may, on application by or on behalf of an individual who is under 18 years of age but is not an individual described in section 13(2)(a) or (b), make an order authorizing the individual

- (a) to make or alter a will in specific terms approved by the Court, or
- (b) to revoke the whole or any part of a will made by the individual.

(2) Before making an order under this section, the Court must be satisfied that

- (a) the individual understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it,
- (b) the proposed will, alteration or revocation accurately reflects the individual's intentions, and
- (c) it is reasonable in all the circumstances that the order should be made.

(3) An order under this section may be granted on any conditions that the Court considers appropriate.

(4) A will, or a writing altering or revoking the whole or any part of a will, made pursuant to an order under this section

- (a) must be made in accordance with section 15 or as the Court may direct, and
- (b) is invalid if it does not conform to the order authorizing the will to be made.

A third matter pertains to section 8(3) of *The Wills Act*, which allows for the revocation, but not the alteration of a will:

### **Revocation by infants**

**8(3)** A person who has made a will under subsection (1) may, while under the age of 18 years, revoke the will.

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<sup>52</sup> British Columbia Law Reform Commission, *Report on the Making and Revocation of Wills*, Report 52 (1981).

<sup>53</sup> SA 2010, c W-12.2. Sections 13(2)(a) and (b) are comparable to ss 8(1)(a) and (b) of *The Wills Act* and s 15 is comparable to s 4 of *The Wills Act*. Section 36 appears to provide for the Court to empower a minor to make a will, not for the validation of the will.

A fourth matter is, if Recommendation 3 of this Report is implemented, sections 8(1)(b) and (c) and (2) should be repealed.

Regarding the first matter, not surprisingly the feedback unanimously supports the addition to s. 8(1)(a) of a minor who is or was in a common law relationship. Regarding the second matter, the feedback unanimously supports a Queen's Bench application process, but is divided on whether the process should be to validate a will or for a testamentary capacity. The feedback is unanimous that alteration should be added to s. 8(3).

#### **Recommendation 4**

- (a) Section 8(1) of *The Wills Act* should be amended to state that a person who is under the age of 18 years (or 16 years if the requisite testamentary age is changed to 16 years) and is or was married or in a common law relationship or is a person described in current s. 8(1)(b) and (c) (unless Recommendation 3 in Report 108 is implemented and privileged wills are no longer valid) has testamentary capacity.
- (b) *The Wills Act* should be amended to add to section 8 a judicial process by which a person whose situation does not come within s. 8(1) can apply for a declaration of testamentary capacity.
- (c) Section 8(3) of *The Wills Act* should be amended to add the words “alter or” before the word “revoke”.
- (d) If Recommendation 3 from Report 108 is implemented, section 8(1)(b) and (c) and (2) should be repealed.

## **F. Electronic Wills**

There is no universally accepted definition of an electronic will. Report 108, perhaps simplistically, defined such a will as “a will that exists solely in a computer (or on a computer diskette) and exists solely in the form of electronic impulses, albeit of which a printout can be made”.<sup>54</sup> Of course a will can be composed on various types of media, i.e. computers, tablets, and smartphones, and stored on the internal storage of those devices and on external storage devices, such as external hard drives, memory cards or sticks, discs, and in a cloud. The Law Reform Commission of Saskatchewan's report on *Electronic Wills* (“SK Report”)<sup>55</sup> described an electronic will as a will “created on a computer, authenticated with a digital identifier and stored on electronic media.”<sup>56</sup>

<sup>54</sup> Report 108, at 13.

<sup>55</sup> Saskatchewan Law Reform Commission, *Report on Electronic Wills* (2004). Available online at: <https://lawreformcommission.sk.ca/electwills2.pdf>.

<sup>56</sup> *Supra* note at 3. See also ULCC Act *supra* note 25, s 12; the ALRI Report, at 43, Nevada's electronic wills legislation, NRS 133.085; a proposed amendment to the Texas Estates Code, J Banks, *Turning a Won't into a Will*:

The UK Paper distinguishes between wills that are created electronically (which are now the majority of wills), wills that are created and executed electronically, (none currently), and wills that are created, executed, stored, and submitted for probate electronically (none currently).<sup>57</sup>

In Report 108, not only does the Commission not consider the creation of a discrete regime for the making of an electronic will or recommend the use of the dispensation power established by s. 23 of *The Wills Act*, but recommends that the Act should be amended to expressly prohibit the admission to probate of “wills that exist only in electronic form.”<sup>58</sup> Since the publication of Report 108, there has been a deluge of law reform commission reports dealing with, and journal articles about, electronic wills.<sup>59</sup>

The only electronic wills legislation creating a discrete regime is the Nevada Revised Statute,<sup>60</sup> which has its critics and has never been used due to one of its requirements.<sup>61</sup>

In several jurisdictions, electronic wills have been admitted to probate via dispensation legislation like s. 23 of *The Wills Act* of Manitoba:

### **Dispensation power**

**23** Where, upon application, if the court is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;

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*Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas*, (2015) 8 Est Plan & Cmty Prop LJ, 291, 310 [Banks]; and the electronic Will Bills tabled in various US states and the *Draft Electronic Wills Act* of the National Conference of Commissioners of Uniform State Laws, all of which can be found at <[uniformlaws.org/committee.aspx?title=Electronic%20Wills](http://uniformlaws.org/committee.aspx?title=Electronic%20Wills)>.

<sup>57</sup> *Supra* note 9, at 105.

<sup>58</sup> Appendix A, recommendation 9.

<sup>59</sup> Law Reform Commission reports: SK Report, BCLI 2006 Report at 29-33; ALRI Report at 43-54; the UK Paper 231, 2017, Chp 6. Selected articles: W Hurlburt, “Electronic Wills and Powers of Attorney: Has Their Day Come?”, the Uniform Law Conference of Canada, Proceedings of 83<sup>rd</sup> Annual Meeting, 2001, at 175, Appendix E; GW Beyer and CG Hargrove, “Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?”, (2007) 33 Ohio Northern UR 865; JK Grant, Shattering and Moving, “Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will”, (2008) 42 Univ of Mich J of LR 105; SC Boddery, “Electronic Wills: Drawing a Line in the Sand against their Validity”, (2012) 47 Real Prop. T &E LJ 197; K Melnychuk, “One Click Away: The Prospect of Electronic Wills in Saskatchewan”, (2014) 77 Sask LR 27 [Melnichuk]; J Banks, “Turning a Won’t into a Will: Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas”, (2015) 8 Est. Plan & Cmty Prop LJ 291; D DeNicuolo, “The Future of Electronic Wills”, available online at: <[americanbar.org/publications/bifocal/vol\\_38/issue-\\_\\_\\_June2017\\_/the\\_future\\_of\\_electronic\\_wills.html](http://americanbar.org/publications/bifocal/vol_38/issue-___June2017_/the_future_of_electronic_wills.html)>; Willing, “The Current Role of Technology in the Law of Succession, 2017”, <[Willing.com/blog/Modernizing\\_the\\_law\\_to\\_enable\\_electronic\\_wills.html](http://Willing.com/blog/Modernizing_the_law_to_enable_electronic_wills.html)>; “What is an “Electronic Will”?” (2018) 131 Harv. LR 1790.

<sup>60</sup> *Supra* note 52.

<sup>61</sup> See Banks *supra* note 52 at 301; Melnychuk *supra* note at 59; Beyer and Hargrove *supra* note 59 at 887; Grant *supra* note 59 at 124; and Oosterhoff *supra* note 8 at 321.

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

This has occurred in the United States, New Zealand, Australia, South Africa, the United Kingdom, and Quebec.<sup>62</sup>

In 2003 the ULCC, which, in 2000 began consideration of electronic wills, adopted a new dispensation power for its *Uniform Wills Act*, including the validation of a will “in electronic form”.<sup>63</sup> The SK Report,<sup>64</sup> the BCLI 2006 Report,<sup>65</sup> and the ALRI Report<sup>66</sup> followed suit in 2004, 2006, and 2009 respectively; each report expressly recommends against the creation of a discrete regime for the making of an electronic will, considering such a development to be premature. The UK Paper provisionally proposes the enactment of a power by regulation to create a regime that provides for the recognition of electronic wills and, as well, the inclusion in the UK *Wills Act* of a dispensation power that includes the validation of electronic wills. Recently, the United States’ National Conference of Commissioners of Uniform State Laws (“US NCCUSL”) published for discussion a draft *Electronic Wills Act*.<sup>67</sup>

Although there are pros and cons to, and technological considerations with, the legalization of electronic wills,<sup>68</sup> legalization is most definitely in the offing; in the meantime the status quo is not appropriate.

The Commission agrees with the recommendations contained in the BCLI 2006 Report, the SK Report, the ALRI Report, and the UK Paper that providing for the validation of electronic wills comprises a two pronged initiative, expressly providing for validation within the dispensation power, s. 23, of *The Wills Act*, and creating a discrete regime for electronic wills. While the Commission lacks the resources to do the latter and it makes sense to await what the US NCCUSL

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<sup>62</sup> See, *inter alia*, S Snail and N Hall, “Electronic Wills in South Africa”, (2010) “7 Digital Evidence and Electronic Signature”, L Rev 67, S Papodopolous, “Electronic Wills in an Aura of Authenticity”, (2012) 24 S Afr Mercantile LJ 93, S Herwin, (2014) 33 ET & PJ 281, at 307, G.Y. Gurer, “No Paper, No Problem: Ushering in Electronic Wills through California’s Harmless Error Provision” (2016) 49 UCDL Rev 1955, J Gregory, “Electronic Wills Down Under and Closer to Home”, <<http://www.slaw.ca/2018/01/18/electronic-wills-down-under-and-closer-to-home/>>, and Oosterhoff *supra* note 8.

<sup>63</sup> Proceedings of the 85<sup>th</sup> Annual Meeting, 2003, at 70-71, creating s 19.1 in its Uniform Wills Act, which in its current 2015 Act comprise sections 10-12.

<sup>64</sup> SK Report *supra* note 51 at 26-32.

<sup>65</sup> BCLI 2006 Report *supra* note 43 at 31-33, which has been implemented.

<sup>66</sup> ALRI Report *supra* note 26 at 49-54.

<sup>67</sup> National Conference of Commissioners of Uniform State Laws, *Draft Electronic Wills Act* (22 Jan 2019), available online:

<<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=506a61da-e7cc-9b69-0fe1-8df8df6bf431&forceDialog=0>>.

<sup>68</sup> *Supra* note 55.



produces, the Commission proposes that s. 23 be amended to expressly include electronic wills, using the definition of an electronic will in s. 12 of the 2015 ULCC *Uniform Wills Act*:

**Electronic form of documents**

**12** For the purposes of section 10 and 11, a document, writing or other marking or an obliteration is in an electronic form if it

- a) is recorded or stored on any medium in or by a computer system,
- b) can be read by an individual, and
- c) is capable of reproduction in a visible form.

As one respondent to our Consultation Paper, observed, “... it would be ... regrettable if a modern day version of Cecil George Harris typed his will on his iPhone instead of [scratching it on]... the fender of his tractor and ... not have his final wishes given full effect...”.<sup>69</sup>

**Recommendation 5**

Section 23 of *The Wills Act* should be amended to:

- (a) make the current section sub-section (1),
- (b) add to the new subsection (1) immediately after the words “...imposed by this Act...”, the words “or is in an electronic form”,
- (c) and add as subsection (2):
  - (2) for the purposes of subsection (1) a document or any writing on a document is in an electronic form if it
    - (a) is recorded or stored on any medium in or by a computer system,
    - (b) can be read by an individual, and
    - (c) is capable of reproduction in a visible form.

The Commission intends to await the publication by the US NCCUSL of a final version of its recommended legislation respecting electronic wills, following which the Commission may issue another consultation paper and consider the matter further.

Incidentally, unlike e-commerce legislation that exists in most other Canadian jurisdictions, Manitoba’s *Electronic Commerce and Information Act*<sup>70</sup> is silent on its application to wills and codicils and, therefore, may arguably allow for a will complying with the legislation to be declared valid. The SK Report, however, doubts the applicability of such legislation to wills, because of the fundamentally different natures of wills and contracts.<sup>71</sup>

<sup>69</sup> The observer was referencing an unreported decision, (1948) SK Surr. Ct; for case comment, see *WM Elliott* (1948) 26 CBR 1242.

<sup>70</sup> CCSM, c E55.

<sup>71</sup> *Supra* note 51 at 21.

## G. Video Tape and Cinematographic Wills

In Report 108, the Commission considered video tape and cinematographic wills and decided not to recommend recognition of such wills for probate, consistent with the situation in all jurisdictions.<sup>72</sup> However, in a contested will case, film of the making of a will may be admissible as evidence of a testator's intention, mental capacity, knowledge and approval and due execution. At least two US states, Indiana and Louisiana, have statutorily mandated the admissibility of such wills as evidence.<sup>73</sup>

### Recommendation 6

*The Wills Act* should be amended to expressly state that film of the making of a will is admissible in a contested will action as evidence of testamentary intention and capacity, knowledge and approval, and due form and execution.

## H. Gifts to Translators

Sections 12 and 13 of *The Wills Act* address gifts to a witness and a proxy signor respectively and to the spouse or common law partner of a witness and a proxy signor.

### Definition of "common-law partner"

**12(1)** For the purpose of this section and sections 13 and 14,

"common-law partner" of a person means

(a) another person who, with the person, registers a common-law relationship under section 13.1 of *The Vital Statistics Act*, and who is cohabiting with the person, or

(b) another person who, not being married to the person is cohabiting with him or her in a conjugal relationship of some permanence.

### Gift to attesting witness

**12(1.1)** Where a will is attested by a person to whom or to whose then spouse or common-law partner, a beneficial devise, bequest, or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest, or other disposition or appointment is void so far only as it concerns the person so attesting, or the spouse or common-law partner or a person claiming under any of them; but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

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<sup>72</sup> *Supra* note 2 at 12-13.

<sup>73</sup> Beyer and Hargrove, *supra* note 55 at 884-85 and Appendix H.

### **Attestation by two other witnesses**

**12(2)** Where a will is attested by at least two persons who are not within subsection (1) or where no attestation is necessary, the devise, bequest, or other disposition or appointment is not void under that subsection.

### **Validation of gifts to witnesses**

**12(3)** Where a person to whom or to whose spouse or common-law partner, a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property is given or made by a will, attests the will, the court, on application, if satisfied that neither the person nor the spouse or common-law partner of the person exercised any improper or undue influence upon the testator, may order that, notwithstanding subsection (1), the devise, bequest or other disposition or appointment is valid, and thereupon, the devise, bequest or other disposition or the appointment, as the case may be, is valid and fully effective as though the will had been properly attested by other persons.

### **Gift to persons signing for testator**

**13(1)** Where a will is signed for the testator by another person to whom or to whose then spouse or common-law partner, a beneficial devise, bequest, or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest, or other disposition or appointment is void so far only as it concerns the person so signing or the spouse or common-law partner or a person claiming under any of them; but the will is not invalid for that reason.

### **Validation of gifts to signor of will**

**13(2)** Where a person to whom or to whose spouse or common-law partner a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property is given or made by a will, signs the will for the testator, the court, on application, if satisfied that neither the person nor the spouse or common-law partner of the person exercised any improper or undue influence upon the testator may order that notwithstanding subsection (1), the devise, bequest or other disposition or appointment is valid, and thereupon the devise, bequest or other disposition or appointment, as the case may be, is valid and fully effective as though the will had been properly signed by the testator.

With reference to s. 12 of the *Succession Act* of Queensland, the ALRI Report recommends adding a similar section respecting gifts to a person who translates a will to the testator at the time when the testator signs the will, but not gifts given to the spouse of a translator and not including a charge or direction in the will for payment of the translation service;<sup>74</sup> Why a gift to a translator's spouse or common law partner is not included is not clear. The ULCC *Uniform Wills Act* contains such a section, which also voids a gift to a translator's spouse.<sup>75</sup> It should be noted that no jurisdiction other than Queensland has such legislation, including Alberta.

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<sup>74</sup> *Supra* note 26 at 151-153.

<sup>75</sup> ULCC Act *supra* note 25, s 13(1).

The Consultation Paper asked whether *The Wills Act* should be so amended; feedback was favourable.

The wills legislation of the Australian States of a New South Wales, Northern Territory, Queensland, Tasmania, and New Zealand comparable to ss. 12 and 13 of *The Wills Act* include a sub-section that provides for validation of gifts to a witness or proxy signor by the consent of the only beneficiary or the beneficiaries, who would otherwise benefit. As the ALRI Report points out,

[393] However, this provision is merely declaratory of the common law ... and not really needed to enable such an agreement to be made ... [While it does remind the parties of an alternative to a judicial validation proceeding, the] ...

[394] ALRI sees no need to have an explicit statutory exception concerning consent. In estate practice, beneficiaries agree all the time to alter bequests and other details, without the ... [*The Wills Act*] having to authorize such consent. If this kind of provision is enacted only with regard to a witness [proxy signor, and translator] beneficiary's void gift, it may lead to court challenges about its absence in other areas of the Act. It is better to simply rely on the common law concerning the role of consent, rather than spelling it out in the statute. This is the Canadian practice.

We agree.

#### **Recommendation 7**

*The Wills Act* should be amended to add a section similar to ss. 12(1.1) and (3) and 13(1) and (2) respecting a translator and the spouse or common law partner of a translator or a person claiming under any of them, including a sub-section that exempts a charge or direction in a will for the payment of remuneration for a translator.

### **I. Sections 12 and 13: Notice and Validation Limitation**

Neither s. 12 nor s. 13 requires a personal representative<sup>76</sup> to give notice to a witness or proxy signor beneficiary or a witness spouse or common law partner beneficiary or a person claiming under them of the consequence of those provisions, that a gift to them would be invalidated by the role they played in the execution of the will.

Additionally, neither section prescribes a limitation period respecting the application for the judicial validation provided in ss. 12(3) and 13(2). No Canadian legislation requires a personal representative to give notice and only the *Saskatchewan Wills Act*<sup>77</sup> provides a limitation period, six months from the grant of probate or letters of administration with will annexed.

<sup>76</sup> Personal representative is the generic term for an executor or an administrator with will annexed.

<sup>77</sup> SS 1996, c W-14.1, s 13(6); also the ULCC Act *supra* note 25, s 13(3).

### **Recommendation 8**

*The Wills Act* should be amended to

- (a) add to ss. 12 and 13, and to a similar section respecting translators, requiring a personal representative upon filing an application for probate or administration with will annexed to give notice to a witness, a person signing for a testator, or a translator, or the spouse or common law partner of a gift, of the gift's void status, and the availability and the limitation period for judicial validation of the gift.
- (b) add to ss. 12 and 13 and a similar section respecting translators a limitation period respecting an application for judicial validation of six months from the grant of probate or administration or such extended period as approved by the court.

## **J. Personal Representative Remuneration**

A personal representative is entitled to fair and reasonable remuneration for the service rendered. This can be set out in a will or by court order. If it is provided for in a will and the personal representative acts as a witness or proxy signor (or translator, if Recommendation 7 is implemented) to the signing of the will, s. 12(1.1) and s. 13(1) may void it.

### **Recommendation 9**

Sections 12 and 13 of *The Wills Act* (and the section respecting translators, if Recommendation 7 is implemented) should be amended to expressly provide that a charge or direction in a will respecting personal representative remuneration is not void by the personal representative acting as a witness to, or proxy signor (or translator) of the will.

## **K. Revocation by Marriage and Common-law Relationship**

The Wills legislation of all but two Canadian provinces and territories contains a section similar to ss. 16(a) and 17 of *The Wills Act*:

**16** A will or part of a will is not revoked except as provided in subsection 18(2) or (4) or (a) subject to section 17, by the marriage of the testator; or ...

**17** A will is revoked by the marriage of the testator except where (a) there is a declaration in the will that it is made in contemplation of the marriage; or

(a.1) there is a declaration in the will that it is made in contemplation of the testator's common-law relationship with the person the testator subsequently marries; or

(b) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate; or

(c) the will fulfills obligations of the testator to a former spouse or common-law partner under a separation agreement or court order.

The Commission considered s. 17 in Report 108, including whether the section should be repealed. The Commission concluded that s. 17 should be retained with two changes:

Recommendation 14. The Act should provide that a will is not revoked by the marriage of the testator where it appears from the will, or from extrinsic evidence, that the will was made in contemplation of the marriage.

Recommendation 15. The Act should provide that a will is not revoked by the marriage of the testator where either the will or a part of the will was made in contemplation of the marriage.

Since Report 108 was published, the repeal of such legislation has been considered by four law reform agencies and documented in the NS Report,<sup>78</sup> The Law Reform Commission of Saskatchewan's report on *Revocation of Wills* ("SK 2006 Report")<sup>79</sup>, the BCLI 2006 Report,<sup>80</sup> and the UK Paper.<sup>81</sup>

The NS Report recommends retention, with two changes, that the section should include revocation upon the "registration of a domestic partnership" and, because the Commission was informed that "not many Nova Scotians are aware of the provision", notice of the section should be given upon application for a marriage licence and registration of a "domestic partnership".<sup>82</sup>

The SK 2006 Report considers at greater length the pro and con arguments for repeal, before ultimately concluding that the provision should be retained. Incidentally, the SK 2006 Report echoes the NS Report that the consultation process revealed that "few lay people" are aware of the section;<sup>83</sup> presumably, the situation in Manitoba is the same.

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<sup>78</sup> *Supra* note 41 at 28-30.

<sup>79</sup> Saskatchewan Law Reform Commission, *Revocation of Wills* (2006) at 4-14.

<sup>80</sup> *Supra* note 43 at 33-34.

<sup>81</sup> *Supra* note 9 at 209-13.

<sup>82</sup> *Supra* note 41 at 29.

<sup>83</sup> *Supra* note 79 at 12.

The UK Paper ultimately does not take a position on the issue, commenting, *inter alia*, that “[r]evocation by marriage is a delicate policy area, because, whatever the rule, there will be difficult cases”.<sup>84</sup>

The BCLI 2006 Report highlights such a case, leading to its recommendation for the repeal of s. 15 of the BC *Wills Act*,<sup>85</sup> as it then was:

Practitioners note that it is not widely known or understood by the public that a will is revoked by later marriage. As a result unintended intestacies occur and careful testamentary planning may be inadvertently overturned. For example, a testator [makes]...a will containing a trust [for]...a disabled child...and later marries a person who is independently wealthy.<sup>86</sup>

Although not unanimous, overwhelmingly the feedback supports the repeal of ss. 16(a) and 17 for three reasons. First, there is the lack of public awareness of the repealing effect of a subsequent marriage, which, if never appreciated or at least not appreciated in time to right the ship, can wreak havoc on an estate plan.

A second reason is the apparently growing phenomenon of the predatory marriage, i.e. vulnerable, single seniors being targeted to marry by much younger care-givers or “new best friends”, resulting in an intestacy, benefitting the predator.<sup>87</sup> A vulnerable senior may have the lower mental capacity to marry compared to the higher testamentary mental capacity necessary to restore a pre-existing will.

Thirdly, a subsequent spouse, predator or legitimate, has the relatively recent benefit of *The Family Property Act* and *The Dependants Relief Act*, which addresses concerns for the welfare of a new spouse. For those reasons and the recent repeal of the comparable sections in the wills legislation of British Columbia and Alberta,<sup>88</sup> the Commission is persuaded that Manitoba should follow suit.

### **Recommendation 10**

*The Wills Act* should be amended to repeal ss. 16(a) and 17.

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<sup>84</sup> *Supra* note 9 at 212.

<sup>85</sup> This recommendation was implemented in the enactment of the *Wills, Estates and Succession Act*, SBC 2009, c 13. Similarly, the *Wills and Succession Act* of Alberta, SA 2010, c W-12.2, s 23 (2) repeals former s 17.

<sup>86</sup> *Supra* note 43 at 33.

<sup>87</sup> Kimberly Whaley, “Capacity Assessment and Predatory Marriages, A Cross-Canada Perspective” (Paper delivered at the Pitblado Lectures, 8 November 2019) [unpublished].

<sup>88</sup> The wills legislation of Quebec has never provided for such revocation.

In the Consultation Paper, the Commission posed three related questions:

1. If ss. 16(a) and 17 are retained, should the section apply equally to marriage and the commencement of a common law relationship registered pursuant to *The Vital Statistics Act*?
2. Should the opening words of s. 17 and the wording of s. 17(a) be similarly changed and s. 17(a.1) repealed?
3. If ss. 16(a) and 17 should be retained, should it be required that a notice be given of the effect of those provisions with the issuance of a marriage licence and the registration of a common law relationship pursuant to *The Vital Statistics Act*?

There was only sparse feedback provided, probably because a yes answer is so obvious to each of the questions. The Commission appreciates that few common law relationships are registered pursuant to *The Vital Statistics Act*; but, amending s. 16(a) and the opening working of s. 17 by adding only “or the commencement of a common law relationship” is too vague and would spawn litigation.

### **Recommendation 11**

If ss. 16(a) and 17 of *The Wills Act* are retained,

- (a) there should be added to s.16(a) after the words “marriage” words, such as “...or the commencement of a common law relationship registered pursuant to *The Vital Statistics Act*”,
- (b) the opening words of s.17 and the wording of s.17(a) should be similarly changed and s.17(a.1) repealed, and
- (c) if ss.16(a) and 17 are retained, there should be a sub-section added to s.17 providing for a notice to be given of ss.16(a) and 17 with the issue of a marriage licence and the registration of a common law relationship pursuant to *The Vital Statistics Act*.

## **L. Revocation by Divorce**

*The Wills Act* provides:

### **Effect of divorce**

#### **18(2) Where in a will**

- (a) a devise or bequest of a beneficial interest in property is made to the spouse of the testator; or



(b) the spouse of the testator is appointed executor or trustee; or

(c) a general or special power of appointment is conferred upon a spouse of the testator;

and after the making of the will and before the death of the testator, the testator's marriage to that spouse is terminated by a decree absolute of divorce or is found to be void or declared a nullity by a court in a proceeding to which the testator is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.

### **Definition of "spouse"**

**18(3)** In subsection (2) "**spouse**" includes the person purported or thought by the testator to be the spouse of the testator.

### **Effect of termination of common-law relationship**

#### **18(4) Where in a will**

(a) a devise or bequest of a beneficial interest in property is made to the common-law partner of the testator;

(b) the common-law partner of the testator is appointed executor or trustee; or

(c) a general or special power of appointment is conferred on a common-law partner of the testator;

and after making the will and before the death of the testator, the testator's common-law relationship with his or her common-law partner is terminated

(d) where the common-law relationship was registered under section 13.1 of *The Vital Statistics Act*, by registration of the dissolution of the common-law relationship under section 13.2 of *The Vital Statistics Act*; or

(e) where the common-law relationship was not registered under section 13.1 of *The Vital Statistics Act*, by virtue of having lived separate and apart for a period of at least three years;

then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the common-law partner predeceased the testator.

In Report 108, the Commission makes several recommendations<sup>89</sup> on the effect of divorce on a will, all of which the Commission confirms, while accounting for the addition of s. 18(4) on common law relationships since the publication of the Commission's earlier report. Additionally, there are two matters upon which the Commission sought advice in the Consultation Paper.

First, the Commission considered whether a sub-section should be added to s. 18 providing for a written notice to be given of s. 18 with the issuance of a divorce judgment and with the registration pursuant to *The Vital Statistics Act* of the termination of a common law relationship. The feedback was unanimously in favour.

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<sup>89</sup> See Appendix A, Recommendations 19-23.

## Recommendation 12

*The Wills Act* should be amended to add a sub-section to s.18 providing for the registrar of the Court of Queen's Bench to accompany a decree absolute of divorce with, and for the Director of Vital Statistics upon the registration of the termination of a common law relations to give, a notice of s. 18.

In its Report 72, *Effect of Divorce on Wills*<sup>90</sup>, the ALRI addresses a further matter worth consideration, not treated in Report 108:

Two people can enter into a binding contract under which one of them agrees to make a will that leaves certain property to the other. If the party who has agreed to make the will fails to do so (or does so and later replaces the complying will with a non-complying will) the other party would have a claim for damages or specific performance against the estate based on the testator's breach of contract. As pointed out by one of our commentators, spouses could enter into a separation agreement that requires one of them to leave certain property to the other, intending the agreement to remain in effect after the divorce. Suppose that a husband (H) has agreed as part of a divorce settlement to leave certain property to his wife (W) in his will. H makes a will to that effect prior to the divorce, but there is nothing in the will itself that indicates that the spousal gift is intended to survive the divorce. In the absence of such an indication in the will ... [s. 18(2)(a) of *The Wills Act*] would require the provision containing the spousal gift to be applied as if W had predeceased H, which is obviously not consistent with the terms of the agreement. Since the disposition brought about by ... [s. 18(2)(a)] is inconsistent with the terms of the settlement agreement, W should have a contractual remedy against H's estate for damages or specific performance of the agreement.

We think this result would follow even ... [though] ... [*The Wills Act* ... [is] silent on the point. However, out of an abundance of caution we suggest that the ... [*The Wills Act*] should expressly state that ... [s. 18(2)(a)] does not prevent the former spouse from relying upon or enforcing the terms of any agreement to which the testator is a party. This would negate any possible argument that ... [s. 18(2)(a)] is intended to override the provisions of such an agreement.<sup>91</sup> [footnotes omitted]

<sup>90</sup> Alberta Law Reform Commission, *Effect of Divorce on Wills*, Report 72, (1994) available online at: <https://commentary.canlii.org/w/canlii/1994CanLIIDocs101#!fragment/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBplTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA>

<sup>91</sup> *Ibid* at 26.

### **Recommendation 13**

*The Wills Act* should be amended to expressly state that s. 18(2)(a) and 18(4)(a) do not prevent a former spouse or common law partner from relying upon or enforcing the terms of any agreement to which the testator is a party.

## **M. Undue Influence**

One of the six requirements for a valid will, listed at the beginning of Chapter 2, is knowledge and approval, to which undue influence relates. A testator must know and approve of the contents of a will. Undue influence occurs where there is imposition or coercion that causes a testator to make a will or include in a will a provision that does not reflect the true wishes of the testator or, in other words, a will or a provision in a will of which the testator truly does not approve. Like the law of testamentary mental capacity, the law of knowledge and approval, including the law of undue influence, is entirely common law, and it is as well described in wills treatises<sup>92</sup> as the law of mental capacity. The onus of proving undue influence is on the person alleging it. The law of undue influence relating to inter vivos gifts and contracts differs from the law of testamentary undue influence. With inter vivos gifts and contracts, there is a presumption of undue influence in connection with relationships of influence where, for example, a gift is made by a child to a parent, a follower to a spiritual adviser, a patient to a medical adviser, and a client to a lawyer; there is no such presumption in the law of testamentary undue influence.

The BCLI 2006 Report considers “whether the principles and presumption respecting inter vivos dispositions of property should be applied in cases of alleged undue influence in relation to wills.”<sup>93</sup> Ultimately, it concluded against recommending “to change the testamentary doctrine of undue influence.”<sup>94</sup> Nonetheless, the *Wills, Estates and Succession Act*<sup>95</sup> contains s. 52:

### **Undue influence**

**52** In a proceeding, if a person claims that a will or any provision of it resulted from another person

(a) being in a position where the potential for dependence or domination of the will-maker was present, and

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<sup>92</sup> *Supra* note 8.

<sup>93</sup> *Supra* note 43 at 53.

<sup>94</sup> *Ibid* at 54.

<sup>95</sup> SBC 2009, c 13.

(b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

The UK Paper considers at considerable length the law of knowledge and approval, including undue influence, and seeks comment on a proposal of the creation of a statutory “doctrine” of testamentary undue influence.<sup>96</sup>

In the Consultation Paper the Commission asks whether the law of knowledge and approval, including undue influence, is in need of statutory definition or change. The feedback, though mixed, was, like the feedback respecting testamentary mental capacity, in the majority view to leave this area entirely to the common law. Beyond confirming recommendation 1 of Report 108, the Commission has concluded against any further statutory codification of the law of knowledge and approval including the law of undue influence.

## **N. Presumptions and Election**

The common law presumptions of concern are:

- (1) When a testator makes a will, giving a legacy to the testator’s child, or a child for whom the testator stands in place of a parent, followed by a substantial *inter vivos* gift intended to advance the child in life, the *inter vivos* gift is presumed to be an advance(ment of a portion) of the legacy, thus reducing the legacy in part or entirely.
- (2) Similarly, when a parent makes a binding agreement to advance a portion (portion debt) followed by a will giving a legacy to a child, including a child for whom the testator stands in place of a parent, and the testator dies before the agreement is fulfilled, it is presumed that the legacy satisfies the portion debt in part or entirely as the amount of the legacy compares to the unfulfilled portion debt.
- (3) When a testator makes a will giving to a creditor a legacy equal to or greater than the debt, the gift is presumed to be in satisfaction of the debt.

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<sup>96</sup> *Supra* note 9 at Chapter 7.

- (4) When a testator makes a will giving a legacy and subsequently makes an inter vivos gift to the legatee of the same amount as the legacy, the inter vivos gift is presumed to revoke the legacy.

The BCLI 2006 Report notes that some of the presumptions are “rooted in English social conventions of past centuries” which are no longer relevant, and recommends their abrogation for the reason that they create “uncertainty in the administration of estates.”<sup>97</sup> The BCLI 2006 Report also recommends that the abrogation of these presumptions should be subject to a contrary intention appearing in the will or otherwise proved by extrinsic evidence. These recommendations have been implemented by s. 53 of the *Wills, Estates and Succession Act* of British Columbia:

**53(1)** The presumption of law that a gift by a will-maker made during his or her lifetime to a child of the will-maker or to a person to whom the will-maker stands in place of a parent is an advancement of a portion that is intended to revoke a gift in the will-maker's will in favour of the child or person is abrogated and the gift in the will takes effect according to its terms.

**(2)** The presumption of law that a legacy is revoked by a gift in the same amount as the legacy made by the will-maker during the will-maker's lifetime is abrogated and the legacy takes effect according to its terms.

**(3)** The presumption of law that a debt owed by a will-maker is satisfied by a legacy to the creditor equal to or greater than the debt is abrogated and the debt continues to be a claim against the will-maker's estate.

**(4)** The presumption of law that a binding promise by a person to make a gift to advance a child in life is satisfied to the extent of the benefit promised by a gift in the person's will to the child is abrogated and the promise remains binding on the person and the person's estate.

**(5)** The abrogation of a presumption set out in any of subsections (1) to (4) is subject to a contrary intention appearing in the will or otherwise and extrinsic evidence is admissible to prove the contrary intention.

The *Wills and Succession Act* of Alberta contains a similar abrogation section,<sup>98</sup> which also abrogates presumption (1), above, in the situation of the parent dying intestate<sup>99</sup> and it provides for a court application respecting abrogated presumption (1) above.<sup>100</sup>

The doctrine of election is explained in *Williams on Wills*:<sup>101</sup>

... a testator cannot, except in the proper exercise of a power of appointment, dispose of property not vested in him at the time of his death or for any greater interest than is so vested

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<sup>97</sup> *Supra* note 43 at 42-45.

<sup>98</sup> SA 2010 c W 12.2, s 110.

<sup>99</sup> *Ibid* at s 110(2).

<sup>100</sup> *Ibid* at s 109.

<sup>101</sup> C. H. Sherrin; R. F. Barlow; R. A. Wallington, *Williams on Wills*, 10<sup>th</sup> ed (London: Lexis Publishing, 2014) at 513. Footnotes omitted.

in him. Normally, therefore, a gift by the testator to a ... [beneficiary] of property in which he has no interest fails altogether, but in the special case where the [beneficiary] true owner of the property so given also receives a benefit under the same will, ... [the beneficiary] is put to ... [an] election whether he will give up such benefit or will give effect to the disposition by the testator which has failed. Thus, if the testator gives to A property which in fact belongs to B and by the same will makes a gift to B, then B will not be allowed to take such gift unless he undertakes to give effect to the gift to A... . [footnotes omitted]

As treated by *Williams on Wills*<sup>102</sup> the common law of election is complex. The BCLI 2006 Report asserts:

The doctrine of election is an equitable one, intended to bring about a just result by preventing someone from taking the benefit of a gift with an implied condition without doing equity by complying with the condition. While it may occasionally produce a fair result, it is a confusing and anomalous feature of succession law that is applied in very rare circumstances.

The notion that testators may dispose of property they do not own goes against very fundamental principles of property law, as well as common sense. The Law Reform Commission recommended abrogation of the doctrine of election in [Report 102, 1989, *Wills and Changed Circumstances*] ... and in this Project the Testate Succession Subcommittee concurred.

Section 53 of the proposed Act abolishes the doctrine of election by stating that unless an intention appears in a will that a gift is conditional on the beneficiary disposing of property the beneficiary owns, a gift in a will of property that the testator does not own is void. No obligation arises on the beneficiary from a purported disposition under the will of the beneficiary's property.

“Section 53 of the proposed Act”, referenced above, has been implemented as s. 51 of the *Wills, Estates and Succession Act*:

- 51(1)** Subject to subsection (2),
- (a) a gift of property that the will-maker does not own is void, and
  - (b) the rights of a beneficiary are not affected by the purported gift by the will-maker of property owned by the beneficiary.
- (2)** A will-maker may make a gift of property that is conditional on the disposition by the beneficiary of property owned by the beneficiary.

The Alberta *Wills and Succession Act* contains a virtually identical section:

- 111 (1)** Where a testator purports, by will, to dispose of property that the testator does not own,

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<sup>102</sup> *Ibid* at Chp 42, 513-522. See also *Oosterhoff on Wills*, *supra* note 8 at 572-576.

- (a) the disposition is void, and
- (b) any rights that the owner of the property has as a beneficiary under the will are not affected by the testator's purported disposition.

(2) Nothing in subsection (1) affects the right of a testator to make a disposition of property that is conditional on a disposition by the beneficiary of property that is owned by the beneficiary.

#### **Recommendation 14**

- (a) Regarding the presumptions, *The Wills Act* should be amended to add a section like s. 53 of the *Wills, Estates, and Succession Act* of British Columbia and s. 109 of the *Wills and Succession Act* of Alberta.
- (b) Regarding the doctrine of election, *The Wills Act* should be amended to add a section like s. 111 of the *Wills and Succession Act* of Alberta.

## **O. Mortgaged Land**

Section 36 of *The Wills Act* provides:

### **Primary liability of mortgaged land**

**36(1)** Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in freehold or leasehold property which, at the time of the death of the person, is subject to a mortgage, and the deceased has not, by will, deed, or other document, signified a contrary or other intention, the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

### **Signifying contrary intention**

**36(2)** A testator does not signify a contrary or other intention within subsection (1) by

(a) a general direction for the payment of debts or of all debts of the testator out of his personal estate or his residuary real or personal estate; or

(b) a charge of debts upon that estate;

unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

## **Saving**

**36(3)** Nothing in this section affects a right of a person entitled to the mortgage debt to obtain payment or satisfaction either out of the other assets of the deceased or otherwise.

## **"Mortgage" defined**

**36(4)** In this section "mortgage" includes an equitable mortgage, and any charge whatsoever, whether legal, equitable, statutory or of other nature, including a lien or claim upon freehold or leasehold property for unpaid purchase money, and "mortgage debt" has a meaning similarly extended.

Report 108 makes two Recommendations regarding s.36 of the Act and mortgages:<sup>103</sup>

Recommendation 34: Section 36 of the Act ... should apply to both real and personal property.

Recommendation 35: The definition of "mortgage" in the Act should include only mortgages and charges related to the acquisition, use, or improvement of the particular land or chattel.

These recommendations are based upon recommendations of the British Columbia Law Reform Commission Report, *Wills and Changed Circumstances*, Report 102, 1989, relating to s. 30 of the then *Wills Act* of British Columbia, which was identical to s. 36 of the Manitoba *Wills Act*. The BCLI 2006 Report reconsiders these matters:

In keeping with the objective of eliminating archaic and unwarranted differences between the treatment of real and personal property, the former Law Reform Commission recommended that the principle of section 30 [s. 36 of *The Wills Act*] be extended to both categories of property, and to any mortgages or charges that were reasonably related to the acquisition, improvement, or preservation of the property. It would be fair to let debts secured by charges not specifically relating to the particular property, such as a general security over the testator's assets, to be borne as debts of the estate with all interests contributing to their payment, however.

In this Project, the extension of section 30 to personal property was debated at length. It was noted that while the extension had a theoretical appeal from the standpoint of fairness among beneficiaries, it would require the personal representative to inquire into the origins of all debts and security on estate assets to determine how it affects various beneficial interests. This imposes a fairly onerous burden on personal representatives and those advising them. In addition, some forms of security on intangibles such as shares may be difficult to categorize.

Ultimately, a majority consensus emerged that a new provision based on the principle underlying section 30 [36] of *The Wills Act* should extend only to *registered* charges on real and *tangible* personal property to the extent of the indebtedness relating to the acquisition, preservation or improvement of the asset.<sup>104</sup>

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<sup>103</sup> *Supra* note 2 at 42-43.

<sup>104</sup> *Supra* note 43 at 47.



This has been implemented by s. 47 of British Columbia's *Wills, Estates and Succession Act*.

**47** (1) In this section, "purchase money security interest" means a security interest taken in land or in tangible personal property that

(a) secures credit, including interest charges, provided to the will-maker to acquire, improve or preserve the land or tangible personal property, and

(b) is registered under the *Land Title Act* or the *Personal Property Security Act*.

(2) The interest of a beneficiary in a gift of property encumbered by a purchase money security interest is, as between the different persons claiming through the will-maker, primarily liable to pay the debt secured by the purchase money security interest to the extent that the debt is attributable to the acquisition, improvement or preservation of the property.

(3) If a purchase money security interest applies to more than one gift of property in a will, each property is liable for payment of the purchase money security interest proportionally, to the extent that the debt is attributable to the acquisition, improvement or preservation of each property. [emphasis added]

The Consultation Paper requested comment on the BCLI 2006 Report and s. 47 of the *Wills and Succession Act* of British Columbia. Some of the feedback went further than the feedback the Commission requested, submitting that s. 36 should be repealed, because it is, similar to the repealing of effect of subsequent marriage in s. 16(a), not well known by the general public, "contrary to the general understanding of lawyers", and counter intuitive, i.e. that mortgage debt is treated differently than any other debt.

The feedback which spoke to the commentary requested was all in support of the approach recommended in the BCLI 2006 Report. While the effect of s. 36 may not be well known, the Commission considers this provision, amended to apply to personal property, as intuitive, reflecting what lay people expect is the law. The Commission is persuaded by the BCLI 2006 Report that the Commission's Report 108, Recommendations 34 and 35, should be refined, as provided by s. 47(1) of the *Wills and Succession Act* of British Columbia.

### **Recommendation 15**

*The Wills Act* should be amended to repeal s. 36 and replace it with a section like s. 47 of the *Wills and Succession Act* of British Columbia, extending the application of the section to tangible and registered personal property while restricting it to registered mortgages.

## P. Section 29

Section 29 of *The Wills Act* provides:

### Gifts to heirs

**29** Except when a contrary intention appears by the will, where property is devised or bequeathed to the "heir" of the testator or of another person,

(a) the word "heir" means the person to whom the beneficial interest in the property would go under the law of the province if the testator or the other person died intestate; and

(b) where used in that law, the words "child", "issue" or "descendant" include for the purposes of this section, a person related by or through adoption to the testator or other person. [emphasis added]

Section 17.4 of *The Law of Property Act*<sup>105</sup> provides:

### Meaning of "heirs and assigns"

**17.4** In the case of a person dying on or after July 1, 1885, in the interpretation of any Act of the Legislature, or in the construction of any instrument to which the deceased was a party or was interested, the expression "heirs" or "heirs and assigns" or "heirs, executors, administrators or assigns", or any expression of similar import, shall be construed to mean the person's personal representative, unless a contrary intention clearly appears. [emphasis added]

Bearing in mind that presumably "any instrument" in s. 17.4 of *The Law of Property Act* includes a will, is there a different construction to be made of a gift in a will of a parcel of land "to the heir of A" and the gift of another parcel of land "to heirs of B"?

The original version of current s. 29 was included in *The Wills Act*<sup>106</sup> of 1936 as s. 25:

### Devise to "Heir."

**25.** Where real property is devised to the heir or heirs of the testator or of any other person and no contrary or other intention is signified by the will, the words "heir" and "heirs" shall be construed to mean the person or persons to whom the beneficial interests in the real property would go under the law of the Province in the case of intestacy. [emphasis added]

*The Wills Act* of 1936 was an adoption of the 1929 *Uniform Wills Act* of the Conference of Commissioners of Legislation in Canada (the Conference). In 1951 the Conference began the process of updating its *Uniform Wills Act*. A Special Committee reported to the annual meeting of the Conference in 1954 with a draft revised *Uniform Wills Act*, which continued s. 25 of the 1929

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<sup>105</sup> CCSM c L90. Added by SM 1989-90, c 43, s 14.

<sup>106</sup> SM 1936, c 52.

*Uniform Wills Act*. At the 1956 annual meeting of the Conference, the Special Committee reported with a revised draft of the *Uniform Wills Act*, with a revised s. 25 as section 27:

27. Except when a contrary intention appears by the will, where property is devised or bequeathed to the “heir” of the testator or of another person,

(a) the word “heir” means the person to whom the beneficial interest in the property would go under the law of the Province if the testator or the other person died intestate; and

(b) where used in that law the word “child” includes for the purpose of this section a person related by or through adoption to the testator or the other person.

No explanation was recorded for the removal of the words “or heirs”. The revised draft *Uniform Wills Act* was adopted at the 1957 annual meeting.

In the 1964 re-enactment of *The Wills Act*,<sup>107</sup> s. 28 adopted, so to speak, the wording of s. 27 of the *Uniform Wills Act*, which since has been re-numbered as the current s. 29. There is no explanation in the legislative record for the change in wording from s. 25 of *The Wills Act* of 1936 to s. 28 of *The Wills Act* of 1964 and dropping of the words “or heirs”.

The comparable legislation of the other Canadian provinces and territories varies.<sup>108</sup>

#### **Recommendation 16**

*The Wills Act* should be amended to add, immediately following the word “heir”, the words “or heirs” to the opening wording of s. 29 and to the wording of s. 29(a).

## **Q. Consolidation**

Consolidation of a jurisdiction’s succession legislation was considered in the BCLI 2006 Report:<sup>109</sup>

### **A. Why Consolidate?**

In jurisdictions where consolidation of succession-related statutes has been undertaken, the reasons given for doing so have been very simple. One is that succession to property rights on death is a distinct, though multi-faceted, branch of the law. Another is that accessibility to the

<sup>107</sup> SM 1964, c 57.

<sup>108</sup> British Columbia and Alberta define heir, heirs, next of kin and kin; Saskatchewan defines heirs; Ontario, North West Territories, and Nunavut define heir or heirs; New Brunswick, like Manitoba, defines heir; the Acts of Nova Scotia, Prince Edward Island, and Newfoundland, and Yukon contain no such section.

<sup>109</sup> *Supra* note 43 at 93 [footnotes omitted].

law and ease of use is enhanced by gathering conceptually related enactments in a single statute. A third reason for consolidation, not advanced overtly like the above two but equally arguable, is that the process of consolidation facilitates comprehensive and harmonious reform as opposed to quick fixes through piecemeal amendment. A fourth, and typically unstated, policy ground is that of legislative economy: an assumption that it is simply a good thing to reduce the number of separate Acts wherever possible.

These policy reasons for consolidation appear quite axiomatic. As with much else that appears axiomatic on the surface, the devil is in the details.

The argument for some degree of consolidation is nevertheless compelling. There are few other branches of the statutory law of British Columbia in which legislation with closely related subject-matter is as badly fragmented. It may make sense to look for the law relating to wills in the Wills Act, and the law relating to the procedures for administration of estates in the Estate Administration Act. Surely very little justification can be offered, however, for maintaining two separate Acts for provisions dealing with domestic grants of probate (Estate Administration Act) and those concerning resealing of foreign ones (Probate Recognition Act). The substantive rules governing inheritance on intestacy are buried deep within the Estate Administration Act, surrounded by extensive procedural provisions.

It is clear that the statutory portion of succession law is not as accessible or as logically organized as it could be. The issue is not whether any consolidation is needed. Rationalization of British Columbia's statutes in this area requires it. The issues are the appropriate extent of consolidation.

The current *Wills, Estates, and Succession Act* of British Columbia consolidates, in terms of Manitoba statutes, *The Wills Act*, *The Intestate Succession Act*,<sup>110</sup> *The Dependants Relief Act*,<sup>111</sup> *The Survivorship Act*,<sup>112</sup> *The Homesteads Act*,<sup>113</sup> *The Beneficiary Designation (Retirement, Savings, and Other Plans) Act*,<sup>114</sup> and *The Court of Queen's Bench Surrogate Practice Act*.<sup>115</sup> The Alberta *Wills and Succession Act*<sup>116</sup> and the *Succession Law Reform Act*<sup>117</sup> of Ontario also consolidate many of the same Acts, but not so many as British Columbia.

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<sup>110</sup> SM 1989-90, c 43.

<sup>111</sup> SM 1989-90, c 42.

<sup>112</sup> RSM 1987, c S250.

<sup>113</sup> SM 1992, c 46.

<sup>114</sup> SM 1992, c 31.

<sup>115</sup> RSM 1987, c C290.

<sup>116</sup> SA 2010, c W-12.2.

<sup>117</sup> RSO 1990, c .26.

**Recommendation 17**

*The Wills Act, The Intestate Succession Act, and The Dependants Relief Act* should be consolidated into one Act with the title *The Wills, Intestate Succession, and Dependants Relief Act*, with a reference at the beginning or end of the Act to other Acts dealing with succession and estate administration.

## CHAPTER 3- MISCELLANEOUS

This chapter considers two issues related to succession legislation contained in other statutes.

### A. Abatement

In Report 108, the Commission observes:

A testator can designate assets of his or her estate to be used to pay debts, funeral expenses, and the costs of administering the estate. When a will does not contain such a provision, or to the extent that the assets designated are insufficient, the common law of abatement applies. Manitoba is one of many jurisdictions that have superseded the common law of abatement by subsections 17.3(4) and (5) of *The Law of Property Act*.<sup>118</sup>

Report 108 provides several Recommendations, 49-53,<sup>119</sup> respecting the replacement of these subsections. All the respondents to the Consultation Paper agreed with Recommendations 49-53 of Report 108 and with the Commission's suggestion that s. 17.3(4) and (5) should be repealed and replaced with a section added to *The Court of Queen's Bench Surrogate Practice Act*, not *The Law of Property Act*.

#### **Recommendation 18**

Sections 17.3(4) and (5) of *The Law of Property Act* should be repealed and replaced with a section added to *The Court of Queen's Bench Surrogate Practices Act* implementing Recommendations 49-53 of Report 108.

### B. The Court of Queen's Bench Surrogate Practice Act

Should *The Court of Queen's Bench Surrogate Practice Act* be given a plain English title to assist Manitobans in understanding the matters with which the Act deals? The Commission is aware that plain language statutes promote access to justice and that, on a very basic level, the titles of Acts should provide the reader with knowledge of the subject matter of the Act. Feedback received unanimously supported the re-naming of the statute dealing with estate administration.

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<sup>118</sup> *Supra* note 2 at 61.

<sup>119</sup> See Appendix A.

**Recommendation 19**

The Title of *The Court of Queen's Bench Surrogate Practices Act* should be changed to *The Administration of Estates Act*.

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## CHAPTER 4 - LIST OF RECOMMENDATIONS

### Recommendation 1:

*The Wills Act* should be amended to enable the Court of Queen's Bench to make, alter or revoke a will for a person lacking testamentary (mental) capacity. (p. 9)

### Recommendation 2:

*The Mental Health Act, The Vulnerable Persons Living with a Mental Disability Act, and The Powers of Attorney Act* should be amended to provide expressly for a substitute decision maker for property, a committee, or an attorney, pursuant to an enduring power of attorney or a springing power of attorney triggered by the donor becoming mentally incompetent, with the approval of the Court of Queen's Bench, to make, change, or revoke a beneficiary designation in plan as defined by and to which *The Beneficiary Designation Act* applies. (p. 9)

### Recommendation 3:

The Commission confirms Recommendation 6 in Report 108 that section 5, which provides for the making of a privileged will, should be repealed. (p. 12)

### Recommendation 4:

- (a) Section 8(1) of *The Wills Act* should be amended to state that a person who is under the age of 18 years (or 16 years if the requisite testamentary age is changed to 16 years) and is or was married or in a common law relationship or is a person described in current s. 8(1)(b) and (c) (unless Recommendation 3 in Report 108 is implemented and privileged wills are no longer valid) has testamentary capacity.
- (b) *The Wills Act* should be amended to add to section 8 a judicial process by which a person whose situation does not come within s. 8(1) can apply for a declaration of testamentary capacity.
- (c) Section 8(3) of *The Wills Act* should be amended to add the words "alter or" before the word "revoke".
- (d) If Recommendation 3 from Report 108 is implemented, section 8(1)(b) and (c) and (2) should be repealed. (p. 14)

### Recommendation 5:

Section 23 of *The Wills Act* should be amended to:

- (a) make the current section sub-section (1),
- (b) add to the new subsection (1) immediately after the words "...imposed by this Act...", the words "or is in an electronic form",



(c) and add as subsection (2):

(2) for the purposes of subsection (1) a document or any writing on a document is in an electronic form if it

(a) is recorded or stored on any medium in or by a computer system,

(b) can be read by an individual, and

(c) is capable of reproduction in a visible form. (p. 17)

#### **Recommendation 6:**

*The Wills Act* should be amended to expressly state that film of the making of a will is admissible in a contested will action as evidence of testamentary intention and capacity, knowledge and approval, and due form and execution. (p. 18)

#### **Recommendation 7:**

*The Wills Act* should be amended to add a section similar to ss. 12(1.1) and (3) and 13(1) and (2) respecting a translator and the spouse or common law partner of a translator or a person claiming under any of them, including a sub-section that exempts a charge or direction in a will for the payment of remuneration for a translator. (p. 20)

#### **Recommendation 8:**

*The Wills Act* should be amended to

(a) add to ss. 12 and 13, and to a similar section respecting translators, requiring a personal representative upon filing an application for probate or administration with will annexed to give notice to a witness, a person signing for a testator, or a translator, or the spouse or common law partner of a gift, of the gift's void status, and the availability and the limitation period for judicial validation of the gift.

(b) add to ss. 12 and 13 and a similar section respecting translators a limitation period respecting an application for judicial validation of six months from the grant of probate or administration or such extended period as approved by the court. (p. 21)

#### **Recommendation 9:**

Sections 12 and 13 of *The Wills Act* (and the section respecting translators, if Recommendation 7 is implemented) should be amended to expressly provide that a charge or direction in a will respecting personal representative remuneration is not void by the personal representative acting as a witness to, or proxy signor (or translator) of the will. (p. 21).

**Recommendation 10:**

*The Wills Act* should be amended to repeal ss. 16(a) and 17. (p. 23)

**Recommendation 11:**

If ss. 16(a) and 17 of *The Wills Act* are retained,

- (a) there should be added to s.16(a) after the words “marriage” words, such as “...or the commencement of a common law relationship registered pursuant to *The Vital Statistics Act*”,
- (b) the opening words of s.17 and the wording of s.17(a) should be similarly changed and s.17(a.1) repealed, and
- (c) if ss.16(a) and 17 are retained, there should be a sub-section added to s.17 providing for a notice to be given of ss.16(a) and 17 with the issue of a marriage licence and the registration of a common law relationship pursuant to *The Vital Statistics Act*. (p. 24)

**Recommendation 12:**

*The Wills Act* should be amended to add a sub-section to s.18 providing for the registrar of the Court of Queen’s Bench to accompany a decree absolute of divorce with, and for the Director of Vital Statistics upon the registration of the termination of a common law relations to give, a notice of s. 18. (p. 26)

**Recommendation 13:**

*The Wills Act* should be amended to expressly state that s. 18(2)(a) and 18(4)(a) do not prevent a former spouse or common law partner from relying upon or enforcing the terms of any agreement to which the testator is a party. (p.27)

**Recommendation 14:**

- (a) Regarding the presumptions, *The Wills Act* should be amended to add a section like s. 53 of the *Wills, Estates, and Succession Act* of British Columbia and s. 109 of the *Wills and Succession Act* of Alberta.
- (b) Regarding the doctrine of election, *The Wills Act* should be amended to add a section like s. 111 of the *Wills and Succession Act* of Alberta. (p. 31)

**Recommendation 15:**

*The Wills Act* should be amended to repeal s. 36 and replace it with a section like s. 47 of the *Wills and Succession Act* of British Columbia, extending the application of the section to tangible and registered personal property while restricting it to registered mortgages. (p. 33)

**Recommendation 16:**

*The Wills Act* should be amended to add, immediately following the word “heir”, the words “or heirs” to the opening wording of s. 29 and to the wording of s. 29(a). (p. 35)

**Recommendation 17:**

*The Wills Act, The Intestate Succession Act, and The Dependants Relief Act* should be consolidated into one Act with the title *The Wills, Intestate Succession, and Dependants Relief Act*, with a reference at the beginning or end of the Act to other Acts dealing with succession and estate administration. (p. 37)

**Recommendation 18:**

Sections 17.3(4) and (5) of *The Law of Property Act* should be repealed and replaced with a section added to *The Court of Queen’s Bench Surrogate Practices Act* implementing Recommendations 49-53 of Report 108. (p. 38)

**Recommendation 19:**

The Title of *The Court of Queen’s Bench Surrogate Practices Act* should be changed to *The Administration of Estates Act*. (p. 39)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M.  
c. L95, signed this 11<sup>th</sup> day of March, 2020.

**“Original Signed by”**  
Cameron Harvey, President

**“Original Signed by”**  
Myrna Phillips, Commissioner

**“Original Signed by”**  
Michelle Gallant, Commissioner

**“Original Signed by”**  
Jacqueline Collins, Commissioner

**“Original Signed by”**  
Sacha Paul, Commissioner

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## APPENDIX A

### List of Recommendations from Report 108

1. *The Wills Act* should provide a complete, consolidated listing of the fundamental requirements for a valid will. (p. 5)
2. The Act should provide that a will is valid if it appears that the testator intended by his signature to give effect to the will. (p. 6)
3. The Act should provide that a person signing a will on behalf of a testator may sign the testator's name, his or her own name, or both names. (p. 7)
4. The Act should provide that a will is validly executed even if any or all of the witnesses did not know that it was a will. (p. 8)
5. The Act should provide that, if the first witness signs the will in the presence of the testator only, he or she need only acknowledge his or her signature to the second witness in the presence of the testator. (p. 8)
6. Privileged wills should no longer be valid but provision should be made that those in existence at the time of the coming into force of the new legislation remain valid. (p. 10)
7. The age at which a person can make a valid will should be set at 16 years. (p. 11)
8. "Handwriting" should be defined in the Act to include mouthwriting, footwriting, and similar kinds of writing. (p. 11)
9. The Act should prohibit the admission to probate of wills that exist only in electronic form. (p. 15)
10. The Act should provide that a handwritten postscript on a holograph will apparently written at the same time as the will is not invalidated if it appears the testator intended the writing to be part of the will. (p. 15)
11. The Act should provide that, subject to the requirements of The Queen's Bench Rules and *The Court of Queen's Bench Surrogate Practice Act*, a will need not be dated and need not include either a testimonium clause or an attestation clause. (p. 16)
12. The Act should provide that a will is invalid if a person who attested it was incompetent as a witness at the time of attestation, but not if the person became incompetent only after attesting it. (p. 17)
13. The Act should provide that any person competent to make a will, other than a person unable to see sufficiently to attest the testator's signature and a person who signs a will on behalf of the testator, can act as a witness to a will. (p. 17)
14. The Act should provide that a will is not revoked by the marriage of the testator where it appears from the will, or from extrinsic evidence, that the will was made in contemplation of the marriage. (p. 22)

**15.** The Act should provide that a will is not revoked by the marriage of the testator where either the will or a part of the will was made in contemplation of the marriage. (p. 22)

**16.** The Act should provide that no obliteration, interlineation, cancellation by the writing of words of cancellation or by drawing lines across a will, or any part of a will, made after execution of a will, is valid or has any effect except to the extent that the words or effect of the will before the alteration are not apparent unless the alteration is executed in accordance with this Act. (p. 26)

**17.** The Act should provide that the alteration is properly executed if the signature of the testator and the subscription of the witnesses are made:

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

(b) at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or in some other part of the will. (p.26)

**18.** The Act should provide that a will may be obliterated, interlineated, or cancelled by the writing of words of cancellation or by drawing lines across a will or any part of a will by a testator without any requirement as to the presence of or attestation or signature by a witness or any further formality if the alteration is wholly in the handwriting of, and signed by, the testator. (p. 26)

**19.** The Act should provide that, after the making of a will by a testator and before his or her death, the marriage of the testator is terminated by a divorce judgment or the marriage is found to be void or declared a nullity by a court in a proceeding to which he or she is a party, then, unless a contrary intention appears in the will, the will shall be construed as if the spouse had predeceased the testator. (p. 28)

**20.** The Act should stipulate that a life estate pur autre vie with a spouse as a cestui que vie will not survive the termination of a marriage, unless a contrary intention appears in the will. (p. 29)

**21.** The Act should treat beneficiary designations in favour of a spouse, whether designations of insurance proceeds or pension proceeds, in the same manner as other devises or bequests. (p. 29)

**22.** The provisions of the Act dealing with revocation of a will upon marriage should not apply in the event of a subsequent marriage to the former spouse. (p. 30)

**23.** References to “a decree absolute of divorce” should be replaced with a reference to “a divorce judgment”. (p. 30)

**24.** The Act should explicitly permit the revival of wills that have been revoked by destruction if copies or adequate evidence is available to the court to reconstruct the will. (p. 31)

**25.** The Act should provide that, except when a contrary intention appears by the will, where a testator (or his or her estate) before, at the time of, or after his or her death

(a) made an agreement to dispose of specifically gifted property but the agreement was not fully implemented at the time of death;

(b) sold specifically gifted property and has taken back a mortgage, charge or other security;

(c) has a right to receive insurance proceeds covering loss of or damage to specifically gifted property;

(d) has a right to receive compensation for the expropriation of specifically gifted property;

the devisee or donee of that property is entitled to the proceeds of disposition, mortgage, charge or security interest, insurance proceeds or compensation. (p. 34)

**26.** The Act should provide that, except where a contrary intention appears by the will, where the testator has bequeathed proceeds of sale of property and the proceeds are received by the testator before his or her death, the bequest is not adeemed by commingling the proceeds where those proceeds can be traced. (p. 36)

**27.** The provision of the Act dealing with property disposed of by committee or substitute decision maker should include an attorney acting pursuant to an enduring power of attorney under The Powers of Attorney Act. (p. 36)

**28.** The Act should provide that, where a gift fails and the testator has designated an alternative beneficiary, the gift should be distributed to that alternative beneficiary, notwithstanding that it fails for a reason other than that contemplated by the testator. (p.37)

**29.** Section 25 of the Act [new draft s. 23] should be renumbered subsection (1) and a new subsection (2) should be added, reading substantially as follows: Exception 25(2) [new draft s. 23(2)] Subsection (1) does not apply to a residuary devise or bequest that fails or becomes void. (p. 38)

**30.** The Act should provide that the relevant date for identifying beneficiaries is the date of the testator's death. (p. 40)

**31.** Section 25.2 of the Act [new draft s. 25] should apply in any case where a gift to a child, other issue, or sibling of the testator fails, regardless of the reason. (p. 40)

**32.** Section 25.2 of the Act [new draft s. 25] should be applicable only when the person dies after the testator makes the will. (p. 41)

**33.** The Act should provide that, unless a contrary intention appears in the will, if a beneficiary fails to survive the testator by 30 days, any gifts to that beneficiary should be distributed as if the beneficiary had predeceased the testator. (p. 42)

**34.** Section 36 of the Act [new draft s. 37] should apply to both real and personal property. (p.43)

**35.** The definition of "mortgage" in the Act should include only mortgages and charges related to the acquisition, use, or improvement of the particular land or chattel. (p. 43)

**36.** The Act should impose a single set of conflict of laws rules for both movables and immovables, modeled on Articles 3, 5-7 and 17 of the Hague Convention [as set out in Appendix B], and guided by the principle behind subsection 42(2) of the current Act. (pp. 44-45)

**37.** If the Hague Convention is not adopted, the conflict of laws provisions in The Wills Act and The Dependents Relief Act should refer to an “interest in immovables” rather than an “interest in land”. (p. 45)

**38.** The conflict of laws provisions of the Act should refer to “formal and intrinsic validity” rather than “the manner and formalities of making a will”. (p. 45)

**39.** The conflict of laws rules provisions should include the testator’s capacity. (p. 46)

**40.** A provision similar to clause 42(2)(b) of the current Act should include any writing made in accordance with the Act declaring an intention to revoke an existing will. The clause should also expressly provide that the testator’s capacity to make the later will must also conform to the relevant law. (p. 46)

**41.** The Act ought to include a single set of conflict of laws rules relating to the revocatory effect of the destruction of a will. (p. 46)

**42.** The Act should include a set of conflict of laws rules relating to the revocatory effect of a subsequent marriage, divorce and annulment, for both movables and immovables, with domicile and habitual residence (as defined in The Domicile and Habitual Residence Act) at the time of the marriage, divorce and annulment being the relevant connecting factor. (p. 47)

**43.** The Act should codify, in their entirety, the common law choice of law rules regarding construction of wills, substituting “domicile and habitual residence” (as defined in The Domicile and Habitual Residence Act) for “domicile” as the connecting factor. (p. 47)

**44.** The Act should provide that an inter vivos gift to a child by a parent is presumed not to be an advancement. (p. 48)

**45.** The Act should provide that, if a court is satisfied that a will is so expressed that it fails to carry out the testator’s intentions, in consequence of

- (a) an error arising from an accidental slip or omission;
- (b) a misunderstanding of the testator’s instructions;
- (c) a failure to carry out the testator’s instructions; or
- (d) a failure by the testator to appreciate the effect of the words used;

it may order that the will be rectified. (p. 55)

**46.** The Act should provide that, where any part of a will is meaningless or ambiguous either on its face or in the light of evidence (other than evidence of the testator’s intention), extrinsic evidence, including statements made by the testator or other evidence of his intent, may be admitted to assist in its interpretation, which interpretation shall be preferred to one resulting from the application of a rule of construction. The legislation should also include a provision stating that the new rule should not render inadmissible extrinsic evidence that is otherwise admissible by law. (p. 57)



**47.** Where it is deemed appropriate to do so, provisions which contain the words “subject to a contrary intention appearing by the will” should also include the words “or from other relevant evidence”. (p. 57)

**48.** The Act should provide that where a testator devises or bequeaths property in terms which in themselves would give an absolute interest to one person but by the same instrument purports to give another person an interest in the same property, the gift to the first person is absolute notwithstanding the purported gift to the second person. (p. 60)

**49.** *The Law of Property Act* should provide that, for the payment of unsecured debts, funeral expenses, and the costs of administering the estate, the order in which assets are used shall be:

- (a) assets specifically charged with the payment of debts or left on trust for the payment of debts;
- (b) assets passing by way of intestacy and residue;
- (c) assets comprising general gifts;
- (d) assets comprising specific and demonstrative gifts;
- (e) assets over which the deceased had a general power of appointment that has been expressly exercised by will. (p. 62)

**50.** *The Law of Property Act* should provide that each class should include both personal property and real property, and no distinction should be made between the two types of property within a given class. (p. 63)

**51.** *The Law of Property Act* should provide that each asset within a given class should contribute rateably to payment of debts. (p. 63)

**52.** *The Law of Property Act* should provide that, to charge property with payment of debts or to create a trust for payment of debts, a testator must do something more than:

- (a) give a general direction that debts be paid;
- (b) give a general direction that the executor pay the testator’s debts; or
- (c) impose a trust that the testator’s debts be paid. (p. 63)

**53.** *The Law of Property Act* should provide that the statutory order of application of assets may be varied by the will of the testator. (p. 63)

**54.** *The Wills Act* should provide that residuary personalty and realty are equally available for the fulfilment of general bequests, including legacies and demonstrative legacies. (p. 64)

**55.** *The Wills Act* should provide that real property charged with the payment of debts or pecuniary gifts is primarily liable for that purpose, notwithstanding a failure by the testator to exempt his or her personal property. (p. 64)

- 56.** Subsection 41(2) of *The Family Property Act* and subsection 12(1) of *The Dependants Relief Act* should be repealed and replaced with provisions imposing the same abatement regime that governs the payment of debts, funeral expenses, and costs of administering the estate, subject to a contrary testamentary direction. (p. 65)
- 57.** *The Intestate Succession Act* should expressly stipulate that the only ascendant and collateral blood relatives who are entitled to succeed shall be those up to and including great grandparents and their issue. (p. 66)
- 58.** Section 8 of *The Intestate Succession Act* ought to apply equally to cases of whole and partial intestacies. (p. 67)
- 59.** Section 8 of *The Intestate Succession Act* should treat as an advancement a gift declared by the testator to be an advancement, regardless of when the declaration is made. (p. 67)
- 60.** *The Intestate Succession Act* should provide for a single choice of law rule substantially identical to Article 3 of the Hague Convention [as set out in Appendix B]. (p. 70)
- 61.** *The Intestate Succession Act* should provide that a successor must survive the deceased by 30 days. (p. 71)
- 62.** Subsection 27(3) of *The Marital Property Act* should be amended by deleting the requirement that the spousal agreement refer specifically to Part IV of the Act before a waiver of rights takes effect. (p. 73)
- 63.** Section 38 of *The Marital Property Act* should be amended to clarify the order of calculation of entitlement under that Act and *The Intestate Succession Act*. (p. 73)
- 64.** *The Dependants Relief Act* should be amended to provide that the right to apply or to continue an application for an order of relief under the Act survives the death of a dependant. (p. 75)
- 65.** *The Dependants Relief Act* should permit the court to suspend the administration or distribution of an estate, in whole or in part, on application by persons who, apart from not being substantially dependent on the deceased at the time of death, fit the definition of “dependant” in order to make provision for their possible future needs. (p. 76)
- 66.** *The Dependants Relief Act* should authorize the court to permit a late application whenever it is satisfied that it is just to do so. (p. 77)
- 67.** *The Dependants Relief Act* should explicitly state that distribution of an estate is stayed for six months to permit beneficiaries to make an application under the Act. (p. 77)
- 68.** Section 8 of *The Dependants Relief Act* should require the court to consider the financial responsibility a dependant has for dependants in calculating the maintenance and support required by the dependant. (p. 78)

**69.** Subsection 13(2) of *The Dependants Relief Act* should be repealed and replaced with a provision adopting a single choice of law rule substantially identical to Article 3 of the Hague Convention [as set out in Appendix B]. (p. 79)

**70.** *The Dependants Relief Act* should provide that an applicant need not establish either residence or domicile within Manitoba. (p. 80)

**71.** *The Dependants Relief Act* should provide that an agreement or waiver to the contrary will not disqualify an application under the Act, but will be a factor considered by the court in determining the application. (p. 81)

**72.** Subject to Recommendation 73, where a person has entered into an enforceable contract to devise property by will, the court may order that the rights of the promisee to the contract, whether or not the person complied with the agreement, be subject to an order under the Act provided the court is satisfied that:

(a) the value of the property exceeds the value of the consideration received by the person in money or money's worth;

(b) the person entered into the contract with the intention of removing property from his/her estate in order to reduce or defeat a claim under the Act;

(c) the promisee to the contract had actual or constructive notice of this intent; and

(d) there would be insufficient assets in the estate to make reasonable provision for the maintenance and support for a dependant after the transfer of the property which the deceased agreed to leave by will. (p. 82)

**73.** In exercising its power in relation to a contract to leave property by will, the court ensure that any order will not deprive the promisee of the right to receive property or to recover damages for the breach of the contract in an amount which is at least equal to the value of the consideration received by the deceased in money or money's worth. (pp. 82-83)

**74.** In determining whether the value of the property exceeds the value of the consideration received by the deceased and in what manner to exercise its powers, the court should have regard to:

(a) the value of the property and the value of the consideration at the date of the contract;

(b) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract;

(c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and

(d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise. (p. 83)

**75.** That *The Dependants' Relief Act* include anti-avoidance provisions similar to those contained in section 72 of the Succession Law Reform Act of Ontario. (p. 84)

**76.** The Trustee Act should be amended to provide that where the last surviving named or appointed executor of an estate dies, his or her executor automatically steps into his or her shoes as executor, but only until

(a) an administrator with will annexed is appointed; or

(b) six months have elapsed, whichever occurs first.(p. 86)

**77.** Rule 74.02(10) of the Queen's Bench Rules should be amended by deleting the references to specific examples of suspicious circumstances. (p. 87)

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## APPENDIX B

### *The Mental Capacity Act, 2005, c. 9, section 2, 3, 4, 16 and 18.*

#### **2. People who lack capacity**

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
  - (a) a person's age or appearance, or
  - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person (“D”) may exercise under this Act—
  - (a) in relation to a person who lacks capacity, or
  - (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

#### **3. Inability to make decisions**

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
  - (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or
  - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
  - (a) deciding one way or another, or
  - (b) failing to make the decision.

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## APPENDIX C

### The Alberta Law Reform Institute Final Report no. 96, 2009, The Creation of Wills.

#### CHAPTER 3. STATUTORY WILLS FOR PERSONS WITHOUT TESTAMENTARY CAPACITY

##### A. Introduction

[57] After reaching the age of majority, adults may possess and then lose testamentary capacity, either temporarily or permanently, due to any number of conditions resulting in mental disability or mental incompetence, including mental illness, brain injury from physical trauma, senile dementia, etc. Some people may never have testamentary capacity in their lifetime due to developmental delay or impairment. However, the legal assessment of an adult's testamentary capacity is never just presumed from the presence of a mental condition; it is always assessed on an individual basis. The law is clear that a mentally challenged person whose affairs require management by a substitute decision-maker may still have the testamentary capacity to create a will.<sup>58</sup>

[58] The law in Canada also seems clear that a substitute decision-maker cannot exercise the testamentary power of a person under their care by making, altering or revoking that person's will. A testator's power to make a will cannot be transferred or delegated at common law. Like getting married or serving a prison sentence, will-making is classified as a personal act that can only be performed by the principal, not by an agent. In addition, the fiduciary nature of the relationship between a principal and their agent, attorney or trustee restricts a substitute decision-maker from disposing of the principal's property without clear and specific authority to do so; therefore, this principle similarly restricts substituted will-making.<sup>59</sup> Although many Canadian statutes confer on substitute decision makers very broadly-stated general powers to deal with the property and affairs of the persons under their care, it is extremely doubtful that the power to make a will would thereby be included.<sup>60</sup> Five provinces leave no doubt about the matter by

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<sup>58</sup> Feeney at § 2.7.

<sup>59</sup> Dawn D. Oosterhoff, "Alice's Wonderland: Authority of an Attorney for Property to Amend a Beneficiary Designation" (2002), 22 E.T.P.J. 16 at 18-19.

<sup>60</sup> Gerald B. Robertson, *Mental Disability and the Law in Canada*, 2d ed. (Toronto: Carswell, 1994) at 97-98 [Robertson].

expressly providing that a substitute decision-maker cannot make, change or revoke a will.<sup>61</sup>

[59] Courts have no greater authority in this area than other substitute decision makers. In the absence of express statutory authority, a court cannot make, change or revoke the will of a person without testamentary capacity.<sup>62</sup>

[60] In England, Australia and New Zealand, courts are granted such express statutory authority to make “statutory wills” for persons without testamentary capacity. In Canada, however, courts typically do not have such statutory authority. The one exception is New Brunswick, which extended such jurisdiction to its courts about a decade ago.

## **B. Circumstances Addressed by Statutory Wills**

[61] Before considering the relevant legislation and reform issues in this area, it is useful to canvass the types of fact scenarios which are typically advanced as reasons to make a statutory will.<sup>63</sup> These scenarios are a cause for concern only if they result in an unjust or inappropriate distribution on the incompetent person’s death that, for whatever reason, cannot be adequately addressed by the law of intestacy or dependants relief legislation. If the safety net of intestacy and dependants relief statutes produces an acceptable result for a particular incompetent person and their family, then the justification for a statutory will is reduced. The usual fact scenarios discussed in the context of this issue include the following:

- The person made no will before becoming incompetent and intestacy will produce an undesirable result or a result the person would not have wanted.

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<sup>61</sup> Northwest Territories, Nunavut, Ontario, Saskatchewan <sup>61</sup> and Quebec: *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 36(3); *Substitute Decisions Act*, S.O. 1992, c. 30, s. 31(1); *Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 43; Quebec Civil Code, art. 711.

<sup>62</sup> Robertson, note 60, at 98.

<sup>63</sup> See, for example, Martin Terrell, “Wills for persons without capacity” (2004), 154 New L.J. 968 at 970 [Terrell].



- A pre-existing will was revoked by marriage or divorce, the person is now incompetent to make a new one and intestacy will produce an undesirable result or a result the person would not have wanted.
- The person did make a will before becoming incompetent but it has become seriously outdated during the period of incompetence for reasons such as:
  - a major asset in the will has been disposed of by the property trustee;
  - the will does not provide for a child who arrived after the period of incompetence commenced;
  - the executor or chief beneficiary has predeceased the testator;
  - there has been a major change in the relationship between the testator and the beneficiaries under an existing will or on intestacy.
- A statutory will is needed to prevent money inherited from one side of the family from going to the other side on intestacy.
- It is just and desirable to make testamentary provision for a dedicated non-family caretaker (a friend, employee or charitable organization) who of course will have no claim on intestacy or under dependants relief legislation. This scenario is most compelling where the blood relatives are non-existent, remote or neglectful.
- A statutory will can prevent litigation over the estate which would otherwise occur.
- In jurisdictions where inheritance or estate taxes exist (unlike Alberta), a statutory will can result in significant tax savings, for example, by substituting a beneficiary's child for the beneficiary in the will so the estate property passes between the three generations only once, not twice.

[62] A statutory will case in England that had very unusual circumstances is *Re Davey*.<sup>64</sup> A young male nurse in a nursing home secretly married an elderly dying woman with mental deterioration. The marriage revoked her will (made while

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<sup>64</sup> *Re Davey*, [1981] 1 W.L.R. 164 (Ct. of Protection).

mentally competent) which had left her property to her family. On her death she would therefore die intestate and her estate would pass to her secret husband of a few days. In the course of an already ongoing application to appoint a trustee, the Court of Protection learned of the secret marriage and quickly appointed the Official Solicitor as trustee to deal with the matter. Without time to challenge the validity of the marriage in court, the Official Solicitor applied for and obtained a statutory will in the same terms as the revoked will, without notice to the husband or family. The woman died just a few days later. The court observed that the disinherited husband's remedy would be to apply for a share of the estate under the dependants relief legislation.

[63] It is also important to remember when considering fact scenarios for statutory wills that a court need not be asked to make a statutory will to deal with absolutely all of a person's estate. If an existing will or the intestacy laws will distribute a person's estate in an appropriate way except for one small aspect which needs intervention, the court can be asked to simply make that one adjustment. For example, the court could make a codicil to an existing will to add a bequest to a caregiver. As stated by the Law Reform Committee of Victoria:

... it should be made clear that the Court is not bound to make an entire will for an incapable person. The applicant may be satisfied with a specific bequest or devise, for example a life interest in a house in which the applicant may be living with the incapable person whom he or she is caring for on a gratuitous basis. The rest of the estate can be distributed according to an existing will or the intestacy rules, or be left to a family provision claim. The jurisdiction should be capable of being exercised only to meet the need at hand. If every time the court were to consider that it must authorise an entire will that could be an occasion for expensive enquiries and hearings.<sup>65</sup>

### C. Statutory Wills in England

[64] The English Court of Protection has been empowered since 1970 to make statutory wills for mentally incompetent persons.<sup>66</sup> On application, the court may

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<sup>65</sup> Law Reform Committee (Victoria), *Reforming the Law of Wills*, Final Report (1994) at para. S.5A.23 [Victoria Report].

<sup>66</sup> Roger Kerridge, *Parry & Clark: The Law of Succession*, 11<sup>th</sup> ed. (London: Sweet & Maxwell, 2002) at 66 [Parry & Clark]. This authority is currently found in the *Mental Capacity Act 2005* (U.K.), 2005, c 9, s 18(i) and Schedule 2, ss 1-4 [Mental Capacity Act]. The *Mental Capacity Act* was enacted following a review of substitute decision-making by The Law Commission (England) in its  
(continued...)

authorize the execution of a will<sup>67</sup> for a person (“P”) who “lacks capacity in relation to a matter or matters concerning . . . P’s property and affairs.”<sup>68</sup> A person lacks capacity “in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.”<sup>69</sup> The court cannot make a statutory will for a minor.<sup>70</sup>

[65] Under the Court of Protection Rules, an application for a statutory will may be brought without prior permission of the court by a wide assortment of people, including the Official Solicitor, the Public Guardian, a person who has made application for the appointment of a deputy (trustee or guardian) for P, a beneficiary under an existing will or on intestacy, an attorney under an enduring power of attorney and any person for whom P might be expected to provide if P had capacity to do so. Anyone else must have the prior permission of the court to apply for the making of a statutory will.<sup>71</sup>

[66] A statutory will “may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it.”<sup>72</sup> Accordingly, “[t]he Court will, broadly speaking, attempt to make for the patient the will it supposes he would, had he been capable,

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<sup>66</sup> (...continued)

report *Mental Incapacity*, Report No. 231 (1995). This report contains virtually no discussion of the law and practice of statutory wills, apparently treating it as self-evident that statutory wills are a useful and valid mechanism that should continue as before. And indeed, the *Mental Capacity Act* made no substantive changes to this area which was previously governed by the *Mental Health Act 1983* (U.K.), 1983, c 20, Part VII.

<sup>67</sup> *Mental Capacity Act*, ss 16(2)(a) and 18(1)(i). The power to make a statutory will can only be exercised by the court, not by P’s deputy: *Mental Capacity Act*, s 20(3)(b).

<sup>68</sup> *Mental Capacity Act*, s 16(1)(b).

<sup>69</sup> *Mental Capacity Act*, s 2(1).

<sup>70</sup> *Mental Capacity Act*, s 18(2).

<sup>71</sup> *The Court of Protection Rules 2007*, S.I. 2007/1744, rr. 50, 51(1), 51(2)(a) and 52(4)(a)-(e).

<sup>72</sup> *Mental Capacity Act*, Schedule 2, s 2. This continues the subjective approach long taken by British courts under predecessor legislation such as the *Mental Health Act 1983* (U.K.), 1983, c 20, s 96(1)(e), for example.

have made for himself.”<sup>73</sup> The court is to proceed in a subjective manner to determine what this particular person would want done with their estate, rather than just doing what the court perceives as being objectively best. The leading case of *Re D.(J.)*<sup>74</sup> listed five principles or factors for a court to follow when devising a statutory will:

- (1) the patient should be assumed to have a brief lucid interval at the time the will was made;
- (2) during that lucid interval it should be assumed that the patient has full knowledge of the past and realises that as soon as the will is executed he will lapse back into his pre-existing mental state;
- (3) the actual patient must be considered, with all his antipathies and affections that he had while in full capacity, and not a hypothetical patient;
- (4) the patient must be assumed to be acting reasonably and to have been advised by a competent solicitor; and
- (5) in normal cases, he is to be envisaged as taking a broad brush to the claims on his bounty rather than an accountant’s pen.<sup>75</sup>

[67] Subjectively considering the actual, not hypothetical, person can pose difficulties in some circumstances. In *Re C*, the patient was profoundly mentally handicapped from birth and lived in an institution for her entire life. She inherited a great deal of money from her parents.<sup>76</sup> Her relatives appeared to be largely unaware of her existence. Apart from the staff and other patients at the hospital, her only friend was a volunteer from a charitable organization concerned with mental patients. The court was unable to do a subjective assessment of Miss C because

[i]n all relevant respects, the record of her individual preferences and personality is a blank on which nothing has been written. Accordingly, there is no material on which to construct a subjective assessment of what the patient would have wanted to do.... [I]n those circumstances the court must assume that she would have been a normal decent person, acting in

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<sup>73</sup> Parry & Clark at 67.

<sup>74</sup> *Re D.(J.)*, [1982] 1 Ch. 237.

<sup>75</sup> Lord Mackay of Clashfern, ed., *Halsbury’s Laws of England*, 4<sup>th</sup> ed. reissue, vol. 30(2) (London: LexisNexis Butterworths, 2005) at para. 695, summarizing *Re D.(J.)*, [1982] 1 Ch. 237 at 243-244 [Halsbury’s].

<sup>76</sup> *Re C*, [1991] 3 All E.R. 866 (Ch.).

accordance with contemporary standards of morality. In the absence of actual evidence to the contrary, no less should be assumed of any person....<sup>77</sup>

So “the judge was obliged to partially resurrect the patient on the Clapham omnibus” and objectively assess what Miss C might have wanted to do with her estate.<sup>78</sup> The court felt that she would be influenced by two considerations – first, that she had lived her entire life in community care and second, that her wealth had come from her family. Accordingly, the court decided that she would have felt a moral obligation to recognize both the community and her relatives in her will. The statutory will therefore split the estate between local mental health charities and the relatives. The effect of the statutory will was to significantly benefit the charities, who would have received nothing if the estate had passed by intestacy.

[68] Once the court has approved the terms of a statutory will, it will authorize someone (usually the property trustee) to sign the will for the person who lacks capacity. The authorized person must sign the will with their own name and the name of the patient, in the presence of two or more witnesses present at the same time. The witnesses must then sign the will in the presence of the authorized person. Finally, the will must be sealed with the court seal. Apart from these special formalities, the will is governed by the standard wills legislation.<sup>79</sup>

[69] Statutory will applications are fairly rare in England – only around 250 applications per year.<sup>80</sup> Applications are detailed, time-consuming to prepare and therefore costly to bring. The effort and cost must be assessed against the size of the estate and the consequences of not having a statutory will.<sup>81</sup> As one writer notes:

An application needs to show the patient’s family and interests, character and history of generosity, the patient’s testamentary history and the relationship to his proposed beneficiaries, the size of the estate and the likely size of the estate at the date of death. The application must then apply all these factors to the present situation and show why the present dispositions

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<sup>77</sup> *Re C*, [1991] 3 All E.R. 866 (Ch.) at 870.

<sup>78</sup> I.M. Hardcastle, “Statutory wills and the blank canvas” (1991), 135 So. J. 780-781 at 781.

<sup>79</sup> Mental Capacity Act, Schedule 2, s. 3; Parry & Clark at 66.

<sup>80</sup> Terrell, note 63, at 968.

<sup>81</sup> Terrell, note 63, at 970.

under an existing will or intestacy are inappropriate, and why the patient would wish to change those present dispositions. The burden of proof is on the applicant to justify the change to the current dispositions.<sup>82</sup>

#### **D. Statutory Wills in Australia**

[70] Most Australian jurisdictions (New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia) authorize the making of statutory wills for mentally incompetent persons.<sup>83</sup> Only the Australian Capital Territory does not allow the making of statutory wills for adults lacking testamentary capacity. The uniform model statute proposed by the Australian National Committee for Uniform Succession Laws recommends that all Australian jurisdictions adopt a standard procedure allowing statutory wills.<sup>84</sup>

[71] There are several differences between the English model of statutory wills and the typical Australian model. A major difference is that, in England, most people apply to court to make a statutory will in a one-step process. The typical Australian model creates a two-step process whereby every applicant must first seek leave of the court to bring a subsequent application for a statutory will.<sup>85</sup>

[72] The Australian two-step process is designed to screen applications so that only well-founded applications will be heard by the court. It reflects a fear that frivolous or vexatious applications may be brought. In Australia, anyone can apply to have a statutory will made for an incompetent person. This permissive model

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<sup>82</sup> Terrell, note 63, at 968, 970.

<sup>83</sup> *Succession Act 2006* (N.S.W.), ss. 18-26 [New South Wales Act]; *Wills Act* (N.T.), ss. 19-26 [Northern Territory Act]; *Succession Act 1981* (Qld.), ss. 21-28 [Queensland Act]; *Wills Act 1936* (S.A.), s. 7 [South Australia Act]; Tasmania Act, ss. 21-41; *Wills Act 1997* (Vic.), ss. 21-30 [Victoria Act]; *Wills Act 1970* (W.A.), ss. 39-48 [Western Australia Act].

<sup>84</sup> Australia Uniform Report at 44-58.

<sup>85</sup> The two-step process of requiring leave to be sought before the application hearing is found in Victoria, South Australia, Queensland, New South Wales, Northern Territory and Tasmania. It is also recommended by the uniform model statute. Western Australia uses a single application procedure. Tasmania allows statutory wills to be made by the Guardianship and Administration Board as well as by a court. The Board is a special tribunal established under the *Guardianship and Administration Act 1995*. It handles all guardianship appointments and other issues concerning mentally incompetent persons. Whether a statutory will is sought from a court or the Board, the procedure is essentially the same.

recognizes that a wide assortment of people who interact with an incapacitated person may have good reason to be concerned about that person's affairs (such as solicitors, social workers and health care workers).<sup>86</sup> But the downside of allowing anyone to apply is that "frivolous or vexatious applications may be lodged, or relatives may make applications for the purpose of ascertaining what provision, if any, the person who is the subject of an application has made for them in a will."<sup>87</sup>

[73] The disadvantage of a two-step process is that an applicant must appear twice – first to seek leave and then later to make the substantive case for a statutory will. In a small estate, the cost of two applications might be prohibitive. Also, in a clear case that is uncontested, two hearings seem excessive. Therefore, the court is usually given the power to allow the leave hearing to immediately proceed as the substantive hearing, using the same evidence and documents which have been filed. In other words, a leave application can (in appropriate cases) "be utilised as a 'fast track' procedure."<sup>88</sup>

[74] The application for leave must be supported by extensive evidence and documentation about the person's lack of testamentary capacity both now and in the future, the need to make a statutory will, the size and nature of the estate, the person's wishes or history concerning family and charitable giving, whether there is an existing will, the potential objects of testamentary provision, the beneficiaries on intestacy and, of course, a draft of the proposed testamentary direction.<sup>89</sup> An application for leave must essentially present the substantive case for making a statutory will.

[75] By contrast, the English one-step model screens potentially frivolous or vexatious applications by putting some restrictions on who may apply for a statutory will in the first place. As already noted, English regulations allow many types of people to apply for a statutory will without the prior permission of the

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<sup>86</sup> New South Wales Law Reform Commission, *Wills for Persons Lacking Will-making Capacity*, Report No. 68 (1992) at 12-13 [New South Wales Statutory Wills Report].

<sup>87</sup> New South Wales Statutory Wills Report at 14.

<sup>88</sup> Victoria Report at para. S.5A.21.

<sup>89</sup> See, for example, Queensland Act, s. 23.

court, including the Official Solicitor, the Public Guardian, a person who has made application for the appointment of a deputy (trustee or guardian) for P, a beneficiary under an existing will or on intestacy, an attorney under an enduring power of attorney and any person for whom P might be expected to provide if P had capacity to do so. But any other person who does not fit one of those categories must have the court's permission to apply for a statutory will. In other words, England uses a one-step model for the most common applicants, but not for a narrow category of other applicants – the kind who have the most remote relationship to the patient and presumably might be the most likely to bring an unfounded application. These applicants must use a two-step procedure and obtain leave before bringing an application for a statutory will.

[76] The Australian model also provides explicitly that the court is not bound by the rules of evidence. This makes it much easier to receive and assess information about the incapacitated person's wishes, habits and character.

[77] Before making a statutory will, Australian courts must be satisfied that the person lacks testamentary capacity and is incapable of making a valid will. But unlike the English legislation, Australian statutes do not explicitly tie testamentary incapacity to concepts of impairment or disturbance in the functioning of the mind or brain. In practical terms, the effect of both models is probably the same, but the Australian model appears to be more objective and less stigmatizing as a result. As stated by the Law Reform Committee of Victoria:

... it would be better not to attempt to enumerate the possible causes of incapacity in the person on whose behalf a statutory will may be made, by references to disease, senility, injury, mental infirmity, etc. That would involve an applicant having to show which kind of incapacity the person on whose behalf a statutory will was being sought was suffering from. Some of these terms relating to mental incapacity are not clear of meaning and are demeaning to the sufferer.<sup>90</sup>

[78] Also in contrast to the English model, most Australian jurisdictions allow a statutory will to be made for a minor who lacks testamentary capacity.<sup>91</sup> This

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<sup>90</sup> Victoria Report at para. S.5A.26.

<sup>91</sup> In Western Australia, statutory wills may be made only for adults without testamentary capacity: Western Australia Act, s. 40(2).



power is distinct from the power which most Australian courts also have to authorize a minor to make a will despite their minority. In that situation, the minor lacks testamentary capacity only by temporary reason of youth, with no other underlying cause of long-term incapacity, and the minor is personally requesting the ability to make a will. By contrast, the statutory will provisions are used where someone other than the minor is applying to have a statutory will made for a minor who is not going to acquire testamentary capacity on reaching majority or during their adult life due to some underlying cause of long-term incapacity.

[79] Like the English model, the typical Australian model requires the court to subjectively consider the actual person who lacks testamentary capacity, not a hypothetical person. In the language of the uniform model statute, the court must be satisfied that “the proposed will, alteration or revocation *is or might be one that would have been made* by the proposed testator if he or she had testamentary capacity.”<sup>92</sup> This flexible formulation allows the court to examine the issue according to a wide range of factors, as in England. South Australia uses a much narrower formulation (the court must be satisfied that “the proposed will, alteration or revocation *would accurately reflect the likely intentions* of the person if he or she had testamentary capacity”)<sup>93</sup> which, when previously used in the Victoria Act (now changed) was interpreted as limiting the court to examining only the proposed will rather than examining the wide range of factors delineated in the English case law.<sup>94</sup> To avoid this limiting effect, most Australian jurisdictions (New South Wales, Northern Territory, Queensland, Tasmania, Victoria and Western Australia) use variations of the more flexible wording also used in the uniform model statute.

[80] The typical Australian model provides that a court can make a statutory will only if the person who lacks testamentary capacity is alive at the date on which the

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<sup>92</sup> Australia Uniform Report <sup>92</sup> at 57, s. 21(b) of the uniform model statute [emphasis added].

<sup>93</sup> South Australia Act, s. 7(3)(b) [emphasis added].

<sup>94</sup> *Boulton v. Sanders* (2004) 9 V.R. 495 (C.A.) discussed in John Hockley, “Statutory wills in Australia: Wills for persons lacking capacity” (2006), 80 Austl. L.J. 68 at 71-72.

order is made.<sup>95</sup> If the incapacitated person dies at any point in the application process before the order is given, the possibility of making a statutory will ends and the person's estate will pass subject to the usual law of wills, intestacy and dependants relief. The Law Reform Committee of Victoria had recommended a more radical proposal – that an application for a statutory will should be able to be brought within six months of the incapacitated person's death (or such further extended period as the court may allow), on the basis that the extent of the estate and the relative claims of potential beneficiaries would be clearest at that point.<sup>96</sup> However, this recommendation was never implemented in Victoria or followed by any other Australian jurisdiction. The National Committee for Uniform Succession Laws stated that:

[t]he advantage of excluding applications made after the death of a person is that all applications to adjust how the person's estate will otherwise be distributed (whether by will or by the relevant intestacy rules) will be subject to a single legislative regime, namely, family provision legislation. This avoids the possible conflict that might arise if two different types of applications could be made after the death of a person.<sup>97</sup>

[81] A final departure from the English model concerns the method of executing a statutory will. In the typical Australian model, the court does not authorize a person (such as the property trustee) to sign the will on behalf of the incompetent person with their name and the incompetent person's name. The statutory will is instead signed by the Registrar of the court, sealed with the court seal and deposited in the court's will registry. It is a much more direct recognition that a statutory will is essentially a court order.

## **E. Statutory Wills in New Zealand**

[82] The Family Court of New Zealand is empowered to make a statutory will for a person who is subject to a property order. Although the person has already been found incompetent to manage their own affairs and a manager has been appointed to administer their property, the statute provides that the person is not,

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<sup>95</sup> See, e.g., Northern Territory Act, s. 19(3).

<sup>96</sup> Victoria Report at paras. S.5A.7, S.5A.17(3).

<sup>97</sup> Australia Uniform Report at 50-51.

by reason only of that order, incapable of making a will. The court will assess testamentary capacity before it acts.<sup>98</sup>

[83] The court has a few mechanisms at its disposal. It can direct that a person subject to a property order may make a will only with the leave of the court.<sup>99</sup> If there is an existing will, the court can ascertain the testator's "present desire and intention"<sup>100</sup> to see if the existing will still expresses it. If the will does not, the court can make a statutory will "in accordance with that present desire and intention."<sup>101</sup>

[84] If the court has directed that a will can be made only with the court's leave or if there is no existing will, the court can make a statutory will by first settling "the proposed terms of the testamentary disposition provisionally"<sup>102</sup> and then authorizing the manager to execute a will in those terms for and on behalf of the person. There is no real test stated in the legislation to indicate whether the terms of a statutory will should be determined objectively or subjectively. However, case law has determined that English precedent should be followed, despite its

... somewhat different statutory framework ... , but in the absence of any guidelines the test suggested by Sir Robert Megarry VC [in *Re D.(J.)*] seems eminently practical, particularly as the Vice Chancellor did not suggest that the factors or principles enumerated by him were intended to be exhaustive.<sup>103</sup>

Therefore, a subjective assessment of the incapacitated person will occur, to the greatest extent possible

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<sup>98</sup> *Protection of Personal and Property Rights Act 1988* (N 98.Z.), 1988 No. 4, ss. 2, 54, 55 [Rights Protection Act].

<sup>99</sup> Rights Protection Act, note 98, s. 54(2).

<sup>100</sup> Rights Protection Act, note 98, s. 54(6).

<sup>101</sup> Rights Protection Act, note 98, s. 54(6).

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<sup>102</sup> Rights Protection Act, note 98, s. 55(2).

<sup>103</sup> *Re Manzoni (A Protected Person): Kirwan v. Public Trustee*, [1995] 2 N.Z.L.R. 498 at 505 (H.C.).

[85] The signing requirements also follow the English model. The manager signs before two witnesses present at the same time and the witnesses then subscribe in the presence of the manager. Finally, the will is sealed with the court seal.<sup>104</sup>

## **F. Statutory Wills in Canada (New Brunswick)**

[86] As already mentioned, the only Canadian jurisdiction which allows a court to make a statutory will for a person without testamentary capacity is New Brunswick. In 1994, New Brunswick amended the *Infirm Persons Act* so that the Court of Queen's Bench would have "the power to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person."<sup>105</sup> A mentally incompetent person is one who requires care, supervision and control due to "a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury" or "who is suffering from such a disorder of the mind."<sup>106</sup> In addition to persons declared to be mentally incompetent by a court, these provisions also apply to anyone found by a court to be incapable of handling their affairs "through mental or physical infirmity arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs."<sup>107</sup>

[87] While the court must find the person to be mentally incompetent or incapable of managing their affairs, there is no explicit statutory requirement that the person must be found to lack testamentary capacity. Such a requirement is present in the English, Australian and New Zealand models. A New Brunswick court has commented that, if the person still has testamentary capacity, they should sign the will along with the committee (property trustee), but if the person does not have testamentary capacity, then there is no need for the person to sign it.<sup>108</sup> Even if this is a correct interpretation of the statute, it seems inappropriate for a court to

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<sup>104</sup> Rights Protection Act, note 98, s. 55(4).

<sup>105</sup> *Infirm Persons Act*, R.S.N.B. 1973, c. I-8, s. 3(4) [*Infirm Persons Act*].

<sup>106</sup> *Infirm Persons Act*, note 105, s. 1.

<sup>107</sup> *Infirm Persons Act*, note 105, s. 39(1).

<sup>108</sup> *Re M. (Committee of)* (1998), 27 E.T.R. (2d) 68 at 79 (N.B. Q.B.).

be acting when a person has testamentary capacity and can legally make their own will.

[88] The Act states a subjective test for the exercise of the court's discretion and provides that a court may make, amend or revoke a will:

... where the court believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent and making a will at the time the court exercises its power, would not have wanted.<sup>109</sup>

Only New Brunswick states the test as a negative proposition – the avoidance of a result which the mentally incompetent person would *not* want. One critic has inquired, “Would comments like ‘I want A to get something’ contrasted with ‘I would not want A to get anything’ furnish different results?”<sup>110</sup> Stating the test as a negative also caused some to question whether the English case law could be used when interpreting the law.<sup>111</sup> Despite this concern, New Brunswick courts have since adopted the English case law concerning the factors and principles which should guide a court in subjectively making a statutory will.<sup>112</sup>

[89] If the court believes a statutory will is warranted, it may authorize or direct the committee of the estate to do any action in relation to the incompetent person's estate that the person could do if competent.<sup>113</sup> Only a committee can be authorized to so act by the court. An attorney under an enduring power of attorney cannot apply for authorization to make, amend or revoke a will.<sup>114</sup>

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<sup>109</sup> Infirm Persons Act, note 105, s. 11.1(1).

<sup>110</sup> Eric L. Teed, Q.C. and Nicole Cohoon, “New Wills for Incompetents” (1996), 16 E.T.J. 1 at 2 [Teed & Cohoon].

<sup>111</sup> Franklin O. Leger, Q.C., “Court-approved Wills” (1998), 14:3 So. J. 7 at 8 [Leger].

<sup>112</sup> *Re M. (Committee of)* (1998), 27 E.T.R. (2d) 68 at 77 (N.B. Q.B.).

<sup>113</sup> Infirm Persons Act, note 105, s. 15.

<sup>114</sup> *Re MacDavid* (2003), 4 E.T.R. (3d) 50 at 53 (N.B. Q.B.).

[90] The making of any will, amendment or revocation by the committee must be approved by the court in order to be valid.<sup>115</sup> This seems to create an odd procedure. The court approves the terms of the will after the committee has executed the will rather than authorizing them in advance.<sup>116</sup>

[91] No other Canadian jurisdiction has followed New Brunswick's lead to authorize the making of statutory wills. Nor does there appear to be any great reform movement to advocate this development in Canada. However, one academic – Professor Gerald B. Robertson of the University of Alberta – has called for this reform to be made:

If the present position is indeed that Canadian courts cannot authorize a property guardian to make or revoke a will, this is an unfortunate omission in our law. Although such a power is one which should rarely be exercised, there are situations in which its absence can cause grave injustice, injustice which cannot necessarily be cured by the law of intestate succession or by dependants' relief legislation. Those responsible for reforming the law in this area should give serious consideration to following the lead taken by the English legislation.<sup>117</sup>

## **G. Is There a Need for Reform in Alberta?**

[92] Should an Alberta court have the power to make a statutory will for an adult who lacks testamentary capacity?

[93] Arguments in favour of court jurisdiction to make statutory wills usually focus on the perceived practical need, in some individual cases, to avoid an unjust or inappropriate distribution of an incapacitated person's estate on death. Sometimes the problematic distribution is not resolvable by reliance on intestacy or dependants relief laws and sometimes the problematic distribution may be the result of those laws.

[94] However, there are some major philosophical hurdles militating against allowing a court to simply come in and rearrange a person's testamentary affairs when the subject is personally incapable of doing it. Canadian legislation largely

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<sup>115</sup> Infirm Persons Act, note 105, s. 15.1.

<sup>116</sup> Infirm Persons Act, note 105, ss.11.1, 15.1; Leger, note 111, at 9.

<sup>117</sup> Robertson, note 60, at 98.

respects the view that will-making is a sacrosanct personal act that should not ever

be delegated to another. To allow even a court to engage in substitute will-making for the most vulnerable of testators can attract condemnation. As two legal commentators in New Brunswick stated:

Is this not another example of the “Big Brother” syndrome where the state can interfere with the discretion of an individual without the individual’s knowledge. To what extent should the state continue to interfere with the individual? What next? In the writers’ opinion, this is a bureaucratic enactment of control without justification and, as such, subject to dangerous development by the courts.<sup>118</sup>

[95] There is also the view that the statutory laws of intestacy and dependants relief already represent society’s considered legal response to situations where a person does not have a will (for whatever reason) or where the will or intestacy laws do not adequately provide for a dependent relative. This view argues that the integrity of these statutory safety nets should be preserved without special treatment for a certain class of persons (those without testamentary capacity) whose estates are then handled by alternative means. As stated by the Scottish Law Commission when it refused to recommend any system of statutory wills, “[w]hat such a power would really be would be a power to change the ordinary rules of succession, testate or intestate, which would otherwise apply on the death of the *incapax*.”<sup>119</sup>

[96] However, if a person who has testamentary capacity does not want their estate to be distributed according to intestacy or dependants relief laws, the person can avoid that result by exercising their testamentary capacity in an appropriate manner. Persons who lack testamentary capacity simply do not have that choice. It is arguable that the availability of a statutory will restores that choice to them (albeit via a substitute decision-maker) and provides equal opportunity to avoid an unwanted or undesirable result. Even though the choice would have to be exercised by substitute decision-making, it would at least occur in the context of an objective process with the most safeguards possible.

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<sup>118</sup>Teed & Cohoon, note 110, at 3.

<sup>119</sup>Scottish Law Commission, *Report on Succession*, Report No. 124 (1990) at 61 [Scotland Report]. The Commission’s public consultation on the issue of statutory wills found that “the results of consultation were overwhelmingly against the introduction of any such power”: Scotland Report at 62.

[97] In our Report for Discussion, the ALRI Board expressed our serious reservations about allowing statutory wills to be made in Alberta. A major concern was whether it is appropriate or advisable to allow such substitute decision-making for persons lacking testamentary capacity. From the perspective of potential beneficiaries, it may be arguable that a need for this reform exists, but the issue must be assessed from the point of view of the incompetent testator. Society has already provided a default safety net of intestacy and dependants relief legislation to cover situations where a will is absent or inadequate for whatever reason.

[98] The Board was also concerned that allowing statutory wills would encourage estate-sponsored litigation and act as a drain on estates. It was concerned about the existence and nature of evidence in contested cases.

[99] The lack of any significant local or national reform movement in Canada advocating this major legal change was also a consideration. Presumably this indicates that there is no pressing need for such a reform.

[100] For similar reasons, the Project Advisory Committee advised the ALRI Board that it did not support this reform. The Committee was also concerned that the legal availability of a statutory will could place a positive duty on a dependent adult's trustee or guardian to inquire into the propriety or adequacy of the dependent adult's will (or lack of same) and to assess whether a statutory will should be sought.

[101] While ALRI questioned whether there is a need to allow statutory wills to be made for persons without testamentary capacity, we wanted to assess public views and opinions on this issue by consulting as widely as possible. For that purpose, therefore, we made a formal Request for Comment in our Report for Discussion and waited to see what kind of response would emerge on this issue.

[102] Two responses were received in support of statutory wills from organizations advocating on behalf of seniors. These organizations argued that an aging parent's loss of testamentary capacity in the final stages of life can pose real issues for their families if intestacy or dependants relief laws do not adequately address the situation. Such issues will likely increase once today's large population of "baby boomers" reach their senior years, when dementia and Alzheimer's disease are more common.

[103] The rest of the consultation feedback on the issue of statutory wills was



largely negative. All the responses received from lawyers or organizations representing the mentally disabled were opposed to the making of statutory wills.

[104] The lawyers were mainly concerned about the subjective nature of creating a will for another person. They were also more likely to say that the existing legal safety net was sufficient to handle problems arising from loss of testamentary capacity.

[105] The opposition of organizations representing the mentally disabled was based on a profound distrust of lawyers, the courts and the legal system. While a statutory will might occasionally be beneficial to avoid unintended or unfair results on probate, they said that any possible benefit would be far outweighed by the perceived detriments of dealing with the legal system. The advocates for the mentally disabled said that both they and their clients distrust the motives of lawyers. They do not believe that the courts are capable of objectively assessing either a person's capacity or that person's testamentary wishes. They believe the judge will simply impose the judge's own views. Participating in the court system is time consuming, expensive and it always alienates the disabled individual.

[106] In ALRI's opinion, implementation of any proposal concerning statutory wills must be able to allay this kind of fear and distrust in a major population group affected by that law. Reform in a sensitive area like statutory wills cannot be accomplished without public support. Addressing this kind of fear and distrust would require a long-term government commitment to communication and reassurance. Extensive public education would also be required to show people how statutory wills work to people's benefit in other jurisdictions. The acceptance and use of statutory wills in other countries are facts which are completely unknown to people here.

[107] In addition to the other arguments against statutory wills which were canvassed in this chapter, the negative consultation input received on the issue of statutory wills confirmed ALRI's own initial reluctance to recommend legislation. Accordingly, ALRI does not recommend law reform in this area.

#### **RECOMMENDATION No. 6**

**The Alberta Law Reform Institute does not recommend that Alberta courts be given the power to make a statutory will for an adult who lacks testamentary capacity.**

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## APPENDIX D

### Wills and Succession Legislation, Report 108, 2003, pp. 8-10, Manitoba Law Reform Commission.

Privileged wills were first developed by the Romans and were carried over into the common law of England. They were codified in the first English *Wills Act* in 1540, continued in the *Statute of Frauds*, 1677 and then in the *Wills Act*, 1837. The rationale behind privileged wills was well summarized by the New South Wales Law Reform Commission in its 1986 Report:<sup>16</sup>

- the relatively low level of education of privileged testators;
- the unavailability of consultation and professional advice to military personnel, especially when they are on campaign or in combat (they were said to be *inops consilii*, ie without advice);
- the high risk of death faced by testators when in combat or at sea in comparison with the community generally;
- the privilege is conferred as a reward and incentive to engage in a socially beneficial occupation;
- soldiers and others facing battle need the comfort of knowing that, should they not return, arrangements have been made for their affairs;
- the need to ensure that minors who were called upon to serve in a military capacity and thereby risk early death had the “adult” privilege of making and revoking wills.

It is our understanding that the current practice of the Canadian Forces is to encourage its personnel to complete a will upon joining and then to update their will at regular and logical intervals (new posting, deployment overseas, change in marital status and upon the birth of children). As the Law Reform Commission of British Columbia commented in its 1981 report:

Forces personnel are probably more conscious of the necessity to maintain an accurate will than other members of the general public.<sup>17</sup>

Given modern communications technology and military practice, soldiers and sailors are no longer completely isolated when in combat or at sea. As well, many civilian occupations (firefighters, police officers, forestry workers) carry considerable risk; however, the privilege has not been extended to these individuals.

Although England retains the privilege, it should be noted that the English law does not permit holograph wills signed *solely* by the testator. On the other hand, New South Wales has abolished privileged wills as have 16 states of the United States which have adopted the *Uniform Probate Code*.

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<sup>16</sup> New South Wales Law Reform Commission, *Wills – Execution and Revocation* (Report #47, 1986) 145-146 [NSWLRC].

<sup>17</sup> BCLRC, *supra* n. 9, at 26, citing a telephone call from Lieutenant-Colonel Macdonald, Judge-Advocate General’s Office, Ottawa, on July 16, 1980.

We believe that the section has become obsolete and that the need for privileged wills no longer exists. In addition, current Manitoba legislation permits holograph wills made wholly in the person's own handwriting and signed at its end by the person (section 6) and gives the court the power to dispense with formal requirements of execution (section 23). The intestate succession and dependants relief legislation also provides for the orderly distribution of estates and the support of dependants when someone dies without a will. Accordingly, in our view, repeal of this provision would have very little adverse effect as, according to the Registrar of Probate of the Court of Queen's Bench, privileged wills are rarely submitted for probate and those which have been submitted were typically executed during the Second World War. We therefore recommend that the provision be repealed but that, in order to preserve the validity of any privileged wills which may be in existence at the time of repeal, repeal should not be made retroactive.

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## APPENDIX E

### **Reform of the Nova Scotia Wills Act, Final Report, 2003, pp. 14-17, Nova Scotia Law Reform Commission**

#### **2. Privileged wills**

The law has long recognized that it could be difficult for people in dangerous or inconvenient circumstances to satisfy the ordinary criteria for creation of a valid will. For instance, a soldier at the front may not have access to pen and paper. Even if writing materials are available, a will may be destroyed during battle, or a witness to a will may be killed or captured. As a result, soldiers in special circumstances have long been able to transfer their personal property by way of “privileged” wills, which do not have to satisfy ordinary requirements. Similarly, for many years mariners while at sea have been able to make wills without having to satisfy the regular criteria. In Nova Scotia, as long as a witness is able to testify as to the intentions of certain soldier or mariner testators, expressed at some time before death, these wishes may be upheld even though not strictly in conformity with the ordinary requirements of wills legislation.<sup>51</sup> A privileged will under Nova Scotia law can even be an oral one. Privileged wills can transfer both personal and real property.<sup>52</sup>

If a person entitled to create a privileged will does so under the required special circumstances, but survives and is no longer subject to those conditions, the will remains valid indefinitely, like any other validly created will.<sup>53</sup> As a result, for example, a mariner who created a holograph will at sea would not have to re-write the will upon returning safely to land....

The Discussion Paper did not take a position on privileged wills. Rather, it asked readers whether privileged wills were still necessary, and if so, whether any changes should be made to their availability, nature, or duration.

Comments on the retention of privileged wills tended to be mixed. Having taken all comments into account, the Commission is of the view there is still a need for privileged wills in Nova Scotia. Many military personnel reside here. From time to time, some are posted overseas. The Commission understands that the Canadian military encourages its members to have up-to-date wills, either through the services of a private lawyer or the completion of a standard Canadian Forces will form. Having a will is not, however, compulsory for Canadian Forces members. As a result, it is possible that a member of the military, and more particularly a Nova Scotian resident, could well find himself or herself in a situation where making a privileged will becomes necessary. Although this type of situation may not arise often, if the availability of a privileged will might prevent an intestacy and therefore put into effect a testator’s wishes, retention of the privileged will provision would have proved worthwhile. As a result, the Commission agrees that the privileged wills section in the *Wills Act* should be retained....

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<sup>51</sup>For example, though the *Wills Act* does not expressly allow holograph wills, they may be permitted if

prepared by soldiers or mariners in the appropriate circumstances. Also, a soldier or mariner does not have to be at least 19 years of age in order to create a valid privileged will.

<sup>s2</sup> *Wills Act*, note 2, above, s. 9.

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## APPENDIX F

### **The Creation of Wills, Final Report No. 96, pp. 61-71, Alberta Law Reform Institute**

#### **D. Should Exempt Wills Be Abolished?**

##### **1. Introduction**

[162] Over the past twenty-five years, there has emerged a small but growing movement advocating the abolition of exempt wills. It is argued that exempt wills are no longer needed because the historical conditions which once made them a good idea are now obsolete or changed. Law reform agencies in British Columbia, Manitoba, New South Wales, Victoria and Queensland have all called for the abolition of exempt wills.<sup>158</sup> In addition, the uniform model statute proposed for Australia contains no provision for exempt wills.<sup>159</sup> So far this reform movement has resulted in the abolition of exempt wills in five Australian jurisdictions (New South Wales, Northern Territory, Victoria, Queensland and Western Australia).

[163] On the other hand, exempt wills also continue to find support and advocates. Law reform agencies in England, New Zealand and Nova Scotia have all recommended retention of such provisions.<sup>160</sup>

##### **2. Members of Canadian Forces on active service**

[164] The main reason which is traditionally cited in support of exempt wills is that military personnel are often deployed on short notice for combat or lengthy campaigns abroad, where they have less access to consultation and professional advice about making or changing a will. This was certainly true in past centuries but may be questionable today. It is the current policy of the Canadian Forces to strongly encourage all members to make and update their wills regularly. The Canadian Forces provides each member with support, advice and opportunity, especially at enrolment, to make a will and place it in safekeeping with the Canadian Forces or record its location if held elsewhere.<sup>161</sup> Such modern military practices mean that “members of the armed forces are more, rather than

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<sup>158</sup> British Columbia 1981 Report at 22, 26-29, 159-162. Continuing support for this recommendation was recently affirmed by the Commission's successor agency: British Columbia 2006 Report 25-26; Manitoba Report at 8-10; New South Wales Wills Report at 141-152, 159-160; Victoria Report at para. S.7.12; Queensland Law Reform Commission, *The Law of Wills* (Report No. 52, 1997) at 34-36.

<sup>159</sup> Australia Uniform Report.

<sup>160</sup> England Report at 9; New Zealand Report at 4-5; Nova Scotia Report at 14-17.

<sup>161</sup> Canadian Forces Finance and Corporate Services, *Preparation and Administration of Wills*, DAOD Form 7012-1 (2004-09-03).

less, likely than average members of the public to be able to obtain legal advice and so be able to make valid formal wills.”<sup>162</sup>

[165] On the other hand, this reasoning did not persuade the Law Reform Commission of Nova Scotia to recommend abolition of the exemption:

Having a will is not, however, compulsory for Canadian Forces members. As a result, it is possible that a member of the military ... could well find himself or herself in a situation where making a privileged will becomes necessary. Although this type of situation may not arise often, if the availability of a privileged will might prevent an intestacy and therefore put into effect a testator's wishes, retention of the privileged will provision would have proved worthwhile.<sup>163</sup>

One such potential situation is where a member of the armed forces is given short notice of dangerous active service while learning at the same time of a change in a relationship with an intended beneficiary (such as the receipt of a “Dear John” letter before battle). This may necessitate an urgent need to make, amend or revoke a will in circumstances where it could be difficult to observe the usual formalities. It was this example which led to the New Zealand Law Commission's recommendation to retain exempt wills.<sup>164</sup>

[166] Another reason which originally supported the creation of this exemption is that, historically, soldiers tended to have relatively low levels of education and literacy.<sup>165</sup> Clearly this factor has changed in our modern society and is no longer a justification.

[167] It has been said that the ability to make an exempt will acts as a reward and incentive for military personnel to engage in a dangerous occupation that is beneficial to society.<sup>166</sup> 209 It has also been said that military personnel need this exemption because they face a high risk of death in the performance of their duties. But some critics have questioned why a similar exemption should not be accorded to accident victims<sup>167</sup> 210 or workers in other high-risk, socially valuable occupations.<sup>168</sup> 211

[168] Historically, the exemption arose in Rome and England when will-making requirements were complex and strictly enforced. Wills could fail for small technicalities. Intestacy was not a desirable alternative: “[t]he original reason for implementation of the privilege in Roman times seems to have been to avoid Rome's intestacy laws at any cost.”<sup>169</sup> But the law of succession has greatly evolved since those days and currently

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<sup>162</sup> Parry & Clark at 55.

<sup>163</sup> Nova Scotia Report at 16.

<sup>164</sup> New Zealand Report at 5.

<sup>165</sup> New South Wales Wills Report at 142, 145.

<sup>166</sup> New South Wales Wills Report at 146.

<sup>167</sup> Parry & Clark at 56.

<sup>168</sup> Manitoba Report at 9.

<sup>169</sup> British Columbia 1981 Report at 29.

offers much more flexible options. It is now possible for any testator to make a holograph will, eliminating the need for witnesses and greatly reducing the formalities of will-making.<sup>170</sup> Many jurisdictions have also legislated a substantial compliance provision or a dispensing power to save wills that would otherwise fail for some technical imperfection.<sup>171</sup> In addition, modern intestacy laws and dependants relief legislation operate reliably to ensure that “the proper moral and social obligations of deceased persons” are met.<sup>172</sup>

[169] Apart from these assertions that the historical reasons for the exemption are now largely obsolete, it also appears that the exemption is rarely used in Canada. Twenty-five years ago, the Law Reform Commission of British Columbia conducted an informal survey of Probate Registrars across Canada. From these officials’ anecdotal impressions and recollections, the Commission learned that exempt wills were rarely probated. In provinces where holograph wills are allowed, the exemption was used even less.<sup>173</sup> The Commission concluded that “[t]here is little evidence of modern use of this provision.”<sup>174</sup> A similar conclusion was recently drawn by the Manitoba Law Reform Commission, which found that “... according to the Registrar of Probate of the Court of Queen’s Bench, privileged wills are rarely submitted for probate and those which have been submitted were typically executed during the Second World War.”<sup>175</sup>

...

## **5. Recommendations for reform**

[179] When preparing our Report for Discussion, the ALRI Board debated at length whether there is an ongoing need for exempt wills. Both the Board and the Project Advisory Committee ultimately came to the conclusion that, for all the reasons discussed in this Part, legal and social conditions have changed and improved to the point where a special exemption for such wills is no longer the necessity it once was. The Project Advisory Committee qualified its support for abolition, however, by stating that any decision in this area should be subject to consultation with the Canadian Forces and deference given to its opinion.

[180]ALRI’s preliminary recommendation was to abolish exempt wills. Military personnel are encouraged and given every assistance to make a valid will prior to deployment. If a person in the armed forces or a mariner at sea is nevertheless forced by

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<sup>170</sup> Alberta Act, s. 7.

<sup>171</sup> As already discussed, ALRI has recommended enactment of a dispensing power in Alberta. See Chapter 1, Part E of this Report, summarizing the original recommendation made in Alberta Report.

<sup>172</sup> New South Wales Wills Report at 146.

<sup>173</sup> British Columbia 2006 Report at 27.

<sup>174</sup> British Columbia 2006 Report at 26.

<sup>175</sup> Manitoba Report at 9.



circumstances to make an informal will, the availability of modern legal devices such as holograph wills and a court dispensing power is more than adequate to deal with any resulting written will that does not conform to standard formalities.

[181] During consultation, we received input from several lawyers in private practice who all agreed with ALRI and our reasons for suggesting abolition. They agreed that there no longer seems to be a pressing legal need to retain exempt wills. However, a note of caution was sounded that recommending abolition could attract political resistance.

[182] An extensive brief in support of retaining exempt wills was received from the Office of the Judge Advocate General, Canadian National Defence Headquarters.<sup>196</sup> The position of the Canadian Forces (CF) on key issues which it identified may be summarized as follows:

- **Canadian Forces will forms:** Although the CF provides standardized forms for creating a will, these are only helpful to CF personnel who have small, simple estates. Furthermore, the CF does not provide legal counsel to its personnel on estate matters. “Although military personnel are encouraged to make a will and are given some, limited, assistance in such an endeavour, these circumstances do not, alone, provide the desired measure of certainty for CF members when they are performing their duties.”<sup>197</sup>
- **Mobility:** CF personnel are still required to deploy to distant locations with little notice, and often for extended periods of time. “While operational lines of communication and related amenities have substantially improved over time, service personnel have no practical means or facility in such circumstances to consult legal counsel or access resources that would permit the execution of a will under legal supervision.”<sup>198</sup> An exempt will may be the only option.
- **Nature of military operations:** “One of our principal concerns involves members of the CF who are deployed on dangerous operations.”<sup>199</sup> They may be faced with situations where they cannot execute a “civilian will” even in a holograph form (for example, where the CF personnel is injured in combat).
- **Reliance on exempt wills:** “[A]lthough there may be little evidence to support the reliance upon privileged wills in previous years, the CF is presently involved in operations of a nature and tempo not seen since the end of its involvement in the Korean War.”<sup>200</sup> Furthermore, the use of exempt wills is difficult to quantify since many are not probated, but “within the CF we consistently rely upon the identification of personal representatives in testamentary instruments that might otherwise be invalid in provincial jurisdiction.”<sup>201</sup> The CF relies on personal representatives to administer the “service estate” of the member

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<sup>196</sup> Letter to Peter J.M. Lown, Q.C., Alberta Law Reform Institute from Col. P.K. Gleeson, Deputy Judge Advocate General/Military Justice & Administrative Law, Office of the Judge Advocate General, National Defence (December 10, 2007) [OJAG brief].

<sup>197</sup> OJAG brief, note 239, at 2.

<sup>198</sup> OJAG brief, note 239, at 2.

<sup>199</sup> OJAG brief, note 239, at 2.

<sup>200</sup> OJAG brief, note 239, at 4.

<sup>201</sup> OJAG brief, note 239, at 4.

which includes outstanding pay, personal equipment, personal property found on the body of the deceased, etc.

- **Certainty of law:** To maximize uniformity of the law in Canada, the CF recommends that Alberta legislation regarding exempt wills should be consistent with the law in other Canadian jurisdictions. An exempt wills provision also promotes another kind of certainty. Although “many jurisdictions have legislated compliance provisions or dispensing powers, I would suggest that these provisions do not necessarily provide the same degree of certainty.”<sup>202</sup> In other words, an exempt will can be accepted as valid without the need for a court application, unlike the validation of an imperfect will under a dispensing provision.

[183] In light of these concerns, ALRI has reconsidered our recommendations concerning exempt wills. We still believe that a legitimate legal case can be made either way concerning this area. While the Office of the Judge Advocate General raises some valid points, the modern availability of holograph wills and a dispensing power really do dramatically undercut the continuing need for exempt wills. But it is also true that, as the Office of the Judge Advocate General points out, a dispensing power does not provide the same guaranteed result as an exempt will provision. Given that the Canadian Forces are at the moment actively involved in a war zone, it may not be an appropriate time to remove the historical availability of exempt wills.

[184] This may also be a reform area better suited to the Uniform Law Conference of Canada, which can examine the matter on a Canada-wide basis. If the time arrives to abolish exempt wills, it would be better to propose such a measure for all jurisdictions at the same time.

[185] The Alberta Law Reform Institute therefore recommends retaining this exemption for the meanwhile as provided in section 6 of the Alberta Act...

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<sup>202</sup> OJAG brief, note 239, at 3.

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## APPENDIX G

### **Wills, Estates and Succession: A Modern Legal Framework, Report No. 45, 2006, pp. 26-27, British Columbia Law Reform Institute**

#### **C. Abolition of Privileged Wills**

##### **1. ARMED FORCES PERSONNEL AND MARINER**

Armed forces personnel on active service of Canada, a Commonwealth country, or an ally of Canada enjoy the privilege to execute a valid will by signature alone, without attestation by witnesses<sup>104</sup> ...

The Canadian Forces inform their members about the standard procedure for executing valid wills and the vast majority of wills of Forces personnel are executed in standard form. Reliance on the privilege to make an informal will is discouraged.<sup>107</sup> Inquiries directed to probate registry staff in Vancouver and Victoria indicate that not more than one or two unattested military wills are probated each year, and the latest one that current staff can remember dealing with was from the Korean War. No privileged wills by mariners have come to the attention of probate registry staff with long experience.

The former Law Reform Commission urged in 1981 that the privilege of informal will making by military personnel and mariners be abolished on the ground that it is in disuse and would also be unnecessary if a dispensing power were enacted to validate wills that do not meet formal requirements, but are demonstrated to be authentic.<sup>108</sup> An additional ground for abolishing the privilege is that there are many other dangerous occupations besides serving in the armed forces and seafaring. As a dispensing power is among the recommendations of this Project, the recommendation by the former Commission for abolition of privileged military and marine wills was endorsed by the Testate Succession Subcommittee and Project Committee.

The proposed *Wills, Estates and Succession Act* therefore contains no provision for informal wills by military personnel and mariners. Privileged wills made validly before the effective date of the proposed Act would remain fully valid, however.<sup>109</sup>

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<sup>104</sup> *Wills Act*, *supra*, note 1, ss 5(1), (2). Attestation by a witness is required if the will is signed by someone other than the testator in the presence and at the direction of the testator: s. 5(3).

<sup>107</sup> Inquiries directed to the Judge Advocate-General's Office confirmed that the elaborate educational and facilitative programs concerning will-making by Forces personnel that are described in the Law Reform Commission of British Columbia *Report on the Making and Revocation of Wills*, *supra*, note 12 at 26-

27 continue in effect with only minor variations.

<sup>108</sup> *Report on the Making and Revocation of Wills, supra*, note 12 at 28.

<sup>109</sup> See s. 187(3) of the proposed *Wills, Estates and Succession Act* in Part Two of this Report.

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## **APPENDIX H**

### **Provisions on Video-taped and Cinematic Wills in Indiana and Louisiana**

#### **INDIANA**

##### IN Code § 29-1-5-3.2 (2017)

##### IC 29-1-5-3.2 Videotape

Sec. 3.2. Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:

- (1) The proper execution of a will.
- (2) The intentions of a testator.
- (3) The mental state or capacity of a testator.
- (4) The authenticity of a will.
- (5) Matters that are determined by a court to be relevant to the probate of a will.

#### **LOUISIANA**

##### LA Code Civ Pro 2904

##### Art. 2904. Admissibility of videotape of execution of testament

A. In a contradictory trial to probate a testament under Article 2901 or an action to annul a probated testament under Article 2931, and provided the testator is sworn by a person authorized to take oaths and the oath is recorded on the videotape, the videotape of the execution and reading of the testament by the testator may be admissible as evidence of any of the following:

- (1) The proper execution of the testament.
- (2) The intentions of the testator.
- (3) The mental state or capacity of the testator.
- (4) The authenticity of the testament.
- (5) Matters that are determined by a court to be relevant to the probate of the testament.

B. For purposes of this Article, "videotape" means the visual recording on a magnetic tape, film, videotape, compact disc, digital versatile disc, digital video disc, or by other electronic means together with the associated oral record.