Part 2 – Fundamental Rules

- Part 2 sets out principles applicable to determining inheritance rights, such as:
  - when a person is a spouse;
  - the effect of adoption;
  - the requirement to survive at least five days;
  - the implications of a posthumous birth; and
  - the rights of posthumously conceived children.
- Other fundamental rules are also addressed, including:
  - the requirements for a contrary intention in a will to be given effect;
  - the admissibility of external evidence to interpret a will;
  - what happens if two people who inherit from each other die simultaneously.
- Finally, the implications of Nisga'a and First Nations' Final Agreements on succession law and, in particular, their right to control the disposition of treaty lands and cultural property are addressed.

Division 1 – Meaning of Spouse, Effect of Adoption and Construction of Instruments

- Division 1 is composed of three sections. Two sections address inheritance rights (when a person is a spouse and the effect of adoption) and the third sets out rules governing the interpretation of wills and other testamentary documents.

SECTION 2

- Section 2 specifies when a person has the status of "spouse." The definition covers married and unmarried spouses - it is irrelevant whether they are of opposite or same sex.
- For unmarried persons to qualify as spouses, they must have lived with one another in a marriage-like relationship for at least two years before death.
- This section has been amended by section 465 of the new *Family Law Act* to update wording so the section is consistent with that Act.
- Married and unmarried spouses are treated equally under the Wills, Estates and Succession Act with respect to the termination of the relationship. In both cases a spouse will cease to be entitled to inherit as a spouse on the date of separation.
  - Paragraph (2) (b) specifies that people in a marriage-like relationship cease being spouses once the relationship is terminated;

- Paragraph 2 (2) (a) contemplates that two persons will cease being spouses if an event occurs that causes an interest in family assets to arise OR if two years have passed from the date of separation.
    - However, under section 81 of the new *Family Law Act* an interest in family assets now **automatically** arises on separation. As an interest in family assets arises on separation the requirements of paragraph 2 (2) (a) (ii) will **always** be met and there will never be a scenario where paragraph 2 (2) (a) (i) is needed.
        - Section 2 will be amended (and paragraph 2 (2) (a) (i) removed) at a later date, either as part of a package of amendments to the *Family Law Act* or *Wills, Estates and Succession Act*. While efforts will be made to make these changes before the *Wills, Estates and Succession Act* comes into force, this cannot be promised.

SECTION 3

- Section 3 complements section 37 of the *Adoption Act* by specifying the effect adoption has on succession in the *Wills, Estates and Succession Act.*
- Adoption completely severs a blood relationship for succession purposes (with an exception for step-parent adoptions). This means that neither a birth parent nor an adopted child can inherit from each other where there is no will.
- Of course, a birth parent can leave a gift to a child that has been adopted in their will. Likewise, an adopted child can prepare a will that makes a gift to a birth parent.
- Section 3 is amended by section 466 of the *Family Law Act* to replace the term "natural parent" with the prescribed term "pre-adoption parent."

SECTION 4

- Section 4 sets out the principles governing the admission of outside or external evidence of intent in the interpretation of wills.
- The distinction between 'patent' and 'latent' ambiguity in the test for admissibility of extrinsic evidence is eliminated. Section 4 allows evidence of surrounding circumstances to be admitted for the purpose of showing an ambiguity exists. Evidence of intent cannot be introduced to identify an ambiguity. However, intent may be used to interpret an identified ambiguity – by reading the will in light of the facts and information known to the will-maker when they made the will.
    - Paragraph 4 (2) (b) (i) refers to an ambiguity being apparent "on its face". This means that the ambiguity must be obvious when it is read, for example:
        - "I give to my sister's children the following, the "good ones" shall receive $1,000 each, the rest shall receive a book of their choosing from my library." This provision is ambiguous on its

face, because when you read the provision you don't know who is to receive $1,000 and who is to receive a book.
        - Previously, external evidence was not permitted to help interpret such statements. Now, if there is evidence that the deceased had favoured certain nieces and nephews who were studious and did well in school and had repeatedly identified certain nieces and nephews as "good ones," and had criticized other nieces and nephews, telling them that they "ought to read a book sometime," then that evidence can be admitted to interpret which nieces and nephews were to receive the money and which were to receive books.
    - Paragraph 4 (2) (b) (ii) refers to an ambiguity which only becomes apparent when the terms of the will are considered in light of surrounding circumstances, for example:
        - In the will the deceased makes a gift to "my nephew James Scott." On its face there would appear to be no ambiguity; it is clear that James is to receive the gift. An ambiguity becomes apparent in light of surrounding circumstances if the will-maker did not actually have a nephew named "James Scott," but had two nephews with the last name Scott who had "James" as a middle name.
        - Evidence showing that one nephew went by his middle name (James) and the other nephew used his first name has always been admitted to show to whom the will-maker was referring.
- The restriction on extrinsic evidence of intent being used to identify an ambiguity has been carried forward to prevent people from trying to vary otherwise clear statements in wills with trumped-up stories, arguing "He really meant me... he told me;" or "Here is a letter where he wrote just before he died and it says, 'I wish you could have the house;' It is clear he intended me to have it."

Division 2 – Survivorship Rules

- Division 2 carries forward some provisions from the *Survivorship and Presumption of Death Act* (to be renamed the *Presumption of Death Act*) and adds new survivorship rules.
- The general intent of Division 2 is to try to create rules of survivorship that are most likely to reflect the intention of a person making a will, if they put their mind to these issues. These provisions are most important for self-made wills.
- Many presumptions in this division can be displaced by a contrary intention being expressed in a will.

SECTION 5

- Section 5 deals with scenarios where people die at the same time or in circumstances where it is uncertain which of them survived the other; for example, a car crash.
- Subsection (1) creates a general presumption that each person has survived the other. This is a change as, currently, section 2 of the *Survivorship and Presumption of Death Act* presumes a younger person has survived an older person.
    - There are two advantages for presuming that each person has survived the other:
        1. First, it ensures that the estate will go either to the person's contingent beneficiaries (if there is a will) or to their family in accordance with the intestacy rules in Part 3 of this Act. Currently, the older person's estate may go to a stranger, as it will pass in accordance with the younger person's will or to the younger person's family on intestacy.
        2. Second, this presumption resembles the presumptions set out in sections 83 and 130 of the *Insurance Act*, which will lower the chances of insurance proceeds and the decedent's estate being treated inconsistently and should reduce disputes.
    - The presumption in subsection (1) may be displaced by contrary intentions expressed in a will or the specific rules that are set out in following sections in Division 2.
- Subsection (2) addresses joint tenants. In the event of the simultaneous death of two joint tenants, subsection (2) converts the joint tenancy into a tenancy-in-common. This is a change because the *Survivorship and Presumption of Death Act* would award the gift to the younger tenant's successors.
    - The objective of this new rule is to ensure that the estate of each deceased joint tenant will receive that deceased joint tenant's share in the property. This should result in greater fairness than arbitrarily providing that the successor of one tenant receive the entire share.

SECTION 6

- Section 6 carries forward section 2 (3) of the *Survivorship and Presumption of Death Act* and maintains the present law.
- If a will has provisions that provide for an alternative disposition if a person dies before another, and there are circumstances where it is uncertain which person survived the other, it is deemed that the person to whom the provision applies has died before the other and the alternative disposition provision applies.

SECTION 7

- Section 7 reproduces section 2 (4) of the *Survivorship and Presumption of Death Act* and maintains the present law.
- Similar to section 6, if a will has provisions that provide for a substitute personal representative if an executor named in the will dies before the will-maker, and there are circumstances where it is uncertain whether the executor survived the will-maker, it is deemed that the executor died before the will-maker and the substitute personal representative is appointed.

SECTION 8

- Section 8 generally carries forward the rule currently found in section 91 of the *Estate Administration Act* concerning successors who are conceived but not born at the time of the intestate's death.
    - Successors are treated as if they had been born at the intestate's death and therefore are entitled to inherit.
- This section departs from section 91 to reflect the policy expressed more generally in section 10, which is that a beneficiary should survive for at least a minimum period of time (5 days) before being entitled to inherit.

SECTION 8.1

- Section 8.1 is added by section 467 of the *Family Law Act*.
- Section 8.1 addresses the possibility of a person's child being conceived after their death (i.e., assisted reproduction using the person's genetic material).
- There is the potential for such a posthumous conception occurring years after the person's death. Therefore, section 8.1 sets out rules to balance the rights of a child conceived after death with the interests of living beneficiaries who wish to see an estate administered within a reasonable period of time.
    - Notice must be given of the intent to conceive a child using the deceased's genetic material within 180 days of the grant of probate or administration being issued.
    - The child must be born within two years of the person's death (and survive for five days).

SECTION 9

- Section 9 addresses a unique situation involving gifts of a life estate in property, for example:
    - 'A', who is deceased, leaves a gift to 'B' and 'C' for life, and then to the survivor of them. B and C die in circumstances where it is uncertain who survived the other.
- Under section 9 the heirs of B and C share the gift equally.

- Section 9 is necessary because under the general rule of survivorship in section 5 the gift would fail, as both B and C are deemed to have survived the other.

- The general principle of survivorship expressed in section 2 of the *Survivorship and Presumption of Death Act* would award the gift to the younger person's successors.
  - The reason for changing the law is to better reflect the will-maker's wishes. Referring to the above example, since the will-maker did not distinguish between B and C, it is not desirable for the law to favour one over the other.

SECTION 10

- Section 10 is a new provision. It requires a person to survive for at least five days in order to take a gift under a will (and for all other purposes in interpreting a will).
  - Currently, if it can be shown that one person survived another, even for a moment, then that person is entitled to inherit under the first deceased's will (unless otherwise specified) or as their intestate successor.
    - However, because the intended beneficiary is deceased, a person unknown to the deceased could end up receiving a gift (through the will of the intended beneficiary or the applicable intestacy provisions). As this is likely not what a person would want, most professionally prepared wills require a beneficiary to survive the will-maker for a specified period (often 30 or 60 days) in order to inherit under the will.
  - Similarly, section 10 makes it more likely that a deceased's wishes will be honoured. As the provision ensures that an alternative beneficiary specified by the deceased (or the residual beneficiary) will receive the gift, as opposed to a person inheriting through the original beneficiary.
- Five days was chosen for three reasons:
  1. The British Columbia Law Institute and its predecessor, the Law Reform Commission, both proposed a five-day time period.
  2. The American *Uniform Probate Code* sets a period of survivorship at 120 hours, which is essentially five days.
  3. Although lawyers usually select a longer period when they draft a will (30 or 60 days), this longer period reflects a conscious choice by the will-maker. A shorter period is desirable as a default provision because it will not delay administering the deceased's estate.
- Subsection (1) permits the default period of five days to be displaced. But you may only substitute a period longer than five days.
- Subsection (3) makes it clear that this provision is not intended to apply to the appointment of personal representatives. This is because a personal representative's duties commence on the will-maker's death; therefore, a personal representative's authority should not be uncertain.

SECTION 11

- Section 11 clarifies that the proceeds of life insurance policies and accident and sickness insurance policies are dealt with in accordance with the rules set out in the *Insurance Act*.
    - This section is essentially a codification of common-law principles that are already a part of Canadian estate law.
- Together, section 11 and section 5 should minimize disputes about who is entitled to insurance proceeds and the estate of the deceased. In most cases it should be the same people; where it is not, there is a clear explanation of which rules apply.

Division 3 – Nisga'a Final Agreement and First Nations' Final Agreements

- Division 3 maintains the present law with respect to the treatment of First Nations' cultural property as required by court decisions and treaty obligations.
    - The Nisga'a are referred to separately in this Act, as this is the practice in other legislation.
    - As of March 28, 2013, there were six First Nations in Stage 6 of the Treaty process, meaning they have signed a final agreement and are considered a Treaty First Nation under the Act:
        - the Tsawwassen, who negotiated independently, and
        - the Maa-nulth, which was a negotiating collective composed of five nations: the Huu-ay-aht, Ka:'yu:'k't'h'/Che:k'tles7et'h', Toquaht, Uchucklesaht, and Yuulu?il?ath?.
- The heading for Division 3 has been amended by section 6 of the *Wills, Estates and Succession Amendment Act, 2011*.

SECTION 12

- Section 12 has been repealed by section 7 of the *Wills, Estates and Succession Amendment Act, 2011*.
- The definitions have been moved to section 1, the general definition section.
- The definitions that were located in section 12 are not just used in Division 3, and so it is appropriate to move them to section 1.

SECTION 13

- Section 13 gives the Nisga'a Lisims government standing to commence an action in respect of wills of Nisga'a citizens that provide for the devolution of cultural property.

- The Nisga'a Lisims government has standing in any proceeding in which the validity of a Nisga'a citizen's will is at issue or Nisga'a cultural property is at issue.
- It is explicitly recognized that, if the Nisga'a are participating in an action, then the court must consider evidence of Nisga'a laws or customs dealing with the devolution of cultural property. Historically, many First Nations had communal views on property ownership, for example:
    - A Nisga'a citizen may have a ceremonial object in their possession due to the position they occupy in the nation. However, who receives the ceremonial object after the death of that citizen may be controlled by the Nisga'a in a collective manner. Simply because the citizen is in possession of the ceremonial object does not necessarily give that citizen the right to make a gift of the object under their will, or for the object to be distributed in accordance with the rules of intestacy where there is no will.

SECTION 14

- Section 14 reproduces section 13, but applies to Treaty First Nations.
- This section gives a Treaty First Nation government standing to commence an action in respect of wills of Treaty First Nation citizens that provide for the devolution of cultural property.
- A Treaty First Nation government has standing in any proceeding in which the validity of a Treaty First Nation citizen's will is at issue or Treaty First Nation cultural property is at issue.
- It is explicitly recognized that if a Treaty First Nation is participating in an action, then the court must consider evidence of that Treaty First Nation's laws or customs dealing with the devolution of cultural property. Historically, many First Nations had communal views on property ownership, for example:
    - A Treaty First Nation citizen may have a ceremonial object in their possession due to the position they occupy in the nation. However, who receives the ceremonial object after the death of that citizen may be controlled by the Treaty First Nation in a collective manner. Simply because the citizen is in possession of the ceremonial object does not necessarily give that citizen the right to make a gift of the object under their will, or for the object to be distributed in accordance with the rules of intestacy where there is no will.

SECTION 15

- Subsections (1) and (2) of Section 15 relate to the Nisga'a and require notice to be provided to the Nisga'a Lisims Government if a person is applying for probate and administration in respect of a Nisga'a citizen.
    - Paragraph 117 in the Nisga'a Government Chapter of the Nisga'a Final Agreement confers a right of standing on the Nisga'a Lisims Government in any proceeding in which the validity of the will of a

Nisga'a citizen or the devolution of the citizen's cultural property is at issue. The requirement for notice enables the Nisga'a Lisims Government to be in a position to exercise its right of standing.

- Subsections (3) and (4) relate to Treaty First Nations and require notice to be provided to the a Treaty First Nation Government if a person is applying for probate and administration in respect of that Treaty First Nation's citizen. As with subsections (1) and (2), these subsections ensure that Treaty First Nations are in a position to exercise their right of standing.

SECTION 16

- Section 16 protects the rights of the Nisga'a and Treaty First Nation governments by prohibiting a wills variation action – that could impact the distribution of Nisga'a or Treaty First Nation cultural property – from being heard unless the party claiming benefit has served notice of the action on the Nisga'a Lisims or Treaty First Nation government.
    - The purpose of section 16 is to ensure that the Nisga'a and Treaty First Nations are in a position to exercise their right of standing.

SECTION 17

- This section is not being brought into force at this time.

SECTION 18

- This section is not being brought into force at this time.

SECTION 18.1

- Section 18.1 is added by section 11 of the *Wills, Estates and Succession Amendment Act, 2011*.
- Section 18.1 allows the Nisga'a Lisims Government to compel the disposal of land held by the estate of a deceased, where the beneficiary of the deceased's estate is not a Nisga'a citizen.
- This section addresses a potential mischief where beneficiaries that are not entitled to possess Nisga'a land are allowed to live on the land indefinitely as a result of a personal representative not actively seeking to dispose of the land after the deceased's death.
    - This could be a particular issue where the spouse of the deceased is not a member of the Nisga'a nation and is therefore not entitled to possess the land. If the spouse is the executor of the deceased's estate, they have no incentive to dispose of the land.

SECTION 18.2

- Section 18.2 is added by section 11 of the *Wills, Estates and Succession Amendment Act, 2011*.
- Section 18.2 allows a Treaty First Nation to compel the disposal of land held by the estate of a deceased, where the beneficiary of the deceased's estate is not a citizen of that First Nation.
- This section addresses a potential mischief where beneficiaries that are not entitled to possess Treaty First Nation land are allowed to live on the land indefinitely as a result of a personal representative not actively seeking to dispose of the land after the deceased's death.
    - This could be a particular issue where the spouse of the deceased is not a member of the Treaty First Nation and is therefore not entitled to possess the land. If the spouse is the executor of the deceased's estate, they have no incentive to dispose of the land.

SECTION 18.3

- Section 18.3 is added by section 11 of the *Wills, Estates and Succession Amendment Act, 2011*.
- Section 18.3 clarifies that the provisions in the *Wills, Estates and Succession Act* are subject to Nisga'a and Treaty First Nation laws regarding the ownership of land.
    - This means that if a person is not entitled to hold an interest in Nisga'a or Treaty First Nation land under the laws of the Nisga'a or Treaty First Nation, then no section in Part 3 – When a Person Dies Without a Will should be read as enabling a person to acquire an interest in that land.
        - In particular, section 18.3 prevents a person from mistakenly believing that Division 2 of Part 3 (Spousal Home) applies to give them a right in the spousal home despite Nisga'a or Treaty First Nation Laws to the contrary.
- It is important to appreciate that section 18.3 does not change the law; even without this section it is almost certain that a court would find Treaty legislation paramount over the *Wills, Estates and Succession Act*.
- Note: While this provision clarifies that First Nations laws are paramount, in many cases there will be no barrier to a non-member acquiring the spousal home. For example:
    - the Nisga'a are moving to a form of "fee simple" land holding, which would allow Nisga'a land to be held by non-Nisga'a; and
    - the Huu-ay-aht Nation uses 99-year leases when distributing land to members. Non-members can acquire these leases.